Libel as Malpractice: News Media Ethics and the Standard of Care

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INTRODUCTION

Doctors, lawyers, and journalists share a strong common bond: They live in fear of being haled into court where the trier of fact will pass judgment on how they have performed their duties. When the doctor or lawyer is sued by a patient or client, it is a malpractice case. The standard by which liability is determined is whether the doctor or lawyer acted with the knowledge, skill and care ordinarily possessed and employed by members of the profession in good standing. Accordingly, if


Some courts read the standard as requiring a doctor or lawyer to possess the skill of the “average” member of the profession. Prosser and Keeton, supra note 1, § 32, at 187; see, e.g., Green v. United States, 530 F. Supp. 633, 642 (E.D. Wis. 1982), aff'd, 709 F.2d 1158 (7th Cir. 1982); Spike v. Sellett, 102 Ill. App. 3d 270, 273, 430 N.E.2d 597, 600 (1981); Coleman v. McCarthy, 53 R.I. 267, 269, 165 A. 900, 901 (1933). Many commentators and courts, however, argue that this reading of the standard is misleading because the malpractice standard only considers those in good professional standing and looks only to their minimum common skill. Prosser and Keeton, supra note 1, § 32, at 187; see Shevak v. United States, 528 F. Supp. 427, 432 (N.D. Tex. 1981). A doctor, such as a “specialist,” who represents himself as having greater skill is held to that higher standard of care. Prosser and Keeton, supra note 1, § 32, at 187; see Salis v. United States, 522 F. Supp. 989, 994 (M.D. Pa. 1981); Coyne v. Cirilli, 45 Or. App. 177, 182, 607 P.2d 1383, 1386 (1980). The malpractice standard has been applied most often in actions against doctors. Prosser and Keeton, supra note 1, § 32, at 186.

The traditional standard held the doctor to the same standard of care as other doctors in the same community. See Prosser and Keeton, supra note 1, § 32, at 187-89. The country doctor who did not possess the same equipment and facilities or have the same opportunities for learning as did doctors in large cities was held to a lower standard of care. Id. Today, as courts begin to recognize that doctors share similar training, doctors are being held to similar standards throughout the country. Id. at 188. The “locality” or “community” rule is becoming a thing of the past as a general national standard is being applied in medical malpractice cases. See, e.g., Sullivan v. Henry, 160 Ga. App. 791, 800,
the doctor or lawyer acted as other lawyers or doctors would have under similar circumstances, he is generally deemed not to have been negligent, as a matter of law.3

In libel cases, if the plaintiff is a public figure or public official, he must prove that the journalist acted with actual malice in order to establish liability.4 If the plaintiff is a private figure, he must prove that the journalist was at least negligent.5 Thus in either case the plaintiff must prove that the journalist was at fault. Unlike actions against doctors or lawyers, however, a libel suit against a journalist is treated as a general tort action.6 Accordingly, in libel cases involving private plaintiffs, most courts instruct the jury that its task is simply to determine whether the defendant acted reasonably.7 The second half of the question—"in light of prevailing standards"—is often not addressed.8 Consequently, a journalist’s actions are judged against those deemed reasonable by other members of the public.9 What a jury has in mind when applying this ordinary negligence standard unaided by evidence of journalistic practices is anyone’s guess.10 Similarly, in applying the actual malice stan-

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7. See infra notes 38-40 and accompanying text.

8. See infra notes 38-40 and accompanying text.

9. See infra notes 38-40 and accompanying text.

10. See infra notes 38-40, 52 and accompanying text.
standard for public figure plaintiffs, liability may ensue only if there has been an extreme departure from the standards of the reasonable journalist.\textsuperscript{11} The jury, however, is given little guidance as to what those practices are.\textsuperscript{12}

In both instances, general background information on news reporting and news writing methods are seldom permitted to be introduced into evidence.\textsuperscript{13} The jury is usually called upon to inquire closely into what a given reporter did on the story in question, not into what reporters as a professional group would tend to do when preparing a similar story.\textsuperscript{14} Thus, the meaning of the term "reasonable person" or "reasonable journalist" is unclear because judges and juries are not receiving the background information on news practices that would give substance to these terms.\textsuperscript{15} Although the fault requirement in libel cases was expected to benefit news media defendants by immunizing them from liability when normal newsgathering activity led to factual errors,\textsuperscript{16} the reasonable person standard is vague and often leads to jury verdicts against media defendants on the basis of passion rather than proof.\textsuperscript{17} Juries are therefore permitted to impose strict liability on media defendants for making mistakes.\textsuperscript{18} These jury verdicts are usually reversed on appeal,\textsuperscript{19} but only at great expense to the defendant.\textsuperscript{20}

Much of the scholarship on libel has been written from a press perspective.\textsuperscript{21} The authors have concentrated on a perceived need for protection in the form of legislative changes\textsuperscript{22} and first amendment privileges and doctrines, ignoring the workings of tort law itself.\textsuperscript{23} It may be premature, however, in light of increased suits and unfavorable verdicts, to

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\item See infra notes 41, 65 and accompanying text.
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\item See generally Franklin, supra note 21 (criticizing current libel law and proposing substantial legislative changes that would recognize that remedies other than damages may meet the needs of many plaintiffs).
\item See generally Lewis, supra note 21 (proposing that damages awarded without an effective limit should be held to violate first amendment); Smolla, supra note 21 (proposing a number of constitutional changes in libel law). There is evidence that the media's behavior over the past ten years has actually alienated the public, creating a climate more hostile to media and more hospitable to libel actions. See J. Barron, \textit{Public Rights and}
say that yet another radical extension of the media’s first amendment protections is needed. The news media have developed a habit of seeking constitutional protection while ignoring other defensive methods available. The paucity of appellate cases analyzing the standards of liability must be assumed to be, in part, a result of news media defendants’ failure to challenge those standards forcefully. The media should seek to win libel cases on the nonconstitutional grounds that current libel law provides.24 One of these grounds is the development of libel as malpractice.

This Article proposes that libel be treated as a malpractice action rather than as a general tort action. As is the case with doctors and lawyers, the issue of a journalist’s fault is not within the competence of the lay jury unaided by evidence of journalistic practices.25 Rather than permitting a jury to substitute its own view of what constitutes reasonable journalistic behavior, the courts should allow journalists to avoid

the Private Press 83-87 (1981) (criticizing the media’s failure to recognize the first amendment rights of the public it serves).

Although commentators have recently shown interest in the nonconstitutional standards that should be applied in libel cases in order to prevent plaintiffs from prevailing solely by reason of jury sympathy, see generally, Anderson, Reputation Compensation and Proof, 25 Wm. & Mary L. Rev. 745 (1984) (advocates that rather than presuming harm to reputation, damages in libel should be limited to those deriving from actual harm to reputation only and that there should be a strict requirement of proof of reputation harm); LeBel, Defamation and the First Amendment: The End of the Affair, 25 Wm. & Mary L. Rev. 799 (1984) (proposing that if remedy of repair were used whereby defendant devotes same amount of resources to countering false statements, presumption would be that any unidentifiable injury to reputation had been remedied), few articles address the question of using a malpractice standard, as advocated here, that would require evidence of journalism practices. But cf. Anderson I, supra note 21, at 454-56 (although not considering use of journalism codes, states that if libel is measured against a professional standard in which customs and practices of the profession are relevant, it would skew analysis to favor the orthodox media and discriminate against media whose methods differ from those of the mainstream and of those rarely involved in investigative reporting); id. at 466 (journalism malpractice standard “invites imposition of a uniform standard for all types of publishers and broadcasters” and fails to recognize “the enormous diversity within the profession in terms of journalistic philosophy, resources, power, and technology”). One recent article noted development in some jurisdictions of a professional standards approach to fault but saw the issue as unnecessary to fault analysis. See Franklin, What Does “Negligence” Mean in Defamation Cases?, 6 Comm/ent 259, 261-66 (1984) (asserting that fault assessment should be made in light of how error was committed and listing four major groups of fact patterns in which errors typically result). Franklin’s four groups focus on the processes of reporting and editing rather than on falsity, which is salutary. An area of law already subdivided into types, however, could become unworkably complex if too many “types” are established; before long, libel could become a “code” action.

24. Under the doctrine of constitutional avoidance, courts refrain from reaching the federal or constitutional issue if the case can be disposed of on an adequate nonconstitutional ground. See, e.g., People v. Pettingill, 21 Cal. 3d 231, 248, 578 P.2d 108, 118, 145 Cal. Rptr. 861, 871 (1978) (en banc); Sterling v. Cupp, 290 Or. 611, 614, 625 P.2d 123, 126 (1981) (en banc); Abrahamson, Reincarnation of State Courts, 36 Sw. L.J. 951, 962-67 (1982). The approach urged here is simply that journalists spend less energy in arguing how the law immunizes their mistakes and channel some of that energy into explaining how journalism works.

25. See infra notes 45-52 and accompanying text.
liability by showing that their actions are consistent with generally accepted journalistic practices. This would give meaning to the Supreme Court’s declaration that the plaintiff must prove fault in order to prevail. Use of a journalism malpractice standard can help media defendants win frivolous libel suits, thus eliminating such suits in the future and protecting expression in the same way that a grant of summary judgment does. Winning cases is as important as setting precedents, because many media defendants cannot afford the expense of extended appeals.

Part I of this Article discusses the reasonable person standard most courts have employed in media libel cases and demonstrates the inadequacies of this standard. Part I further shows how the Supreme Court has paved the way for the reasonable journalist inquiry and how some courts have utilized this standard. Part II illustrates that the development of journalism codes has helped lead to a uniformity of journalistic practices. These uniform practices can provide the trier of fact with national, objective guidelines in determining whether the journalist exercised due care. Part III demonstrates that the proposed journalism malpractice standard is consistent with the first amendment.

A malpractice standard is relevant and necessary in libel actions regardless of whether journalism is considered a profession in the usual sense. The application of the malpractice standard to doctors and lawyers is not compelled merely because they are deemed professionals. Rather, because the reasonableness of their conduct is usually beyond the competence of a jury unaided by evidence regarding medical or legal practices, the inquiry focuses on whether the doctor or lawyer acted consistently with generally accepted medical or legal standards.

26. Whether journalism should be considered a profession is beyond the scope of this Article. This question has been widely and hotly debated among journalists and journalism educators. See, e.g., J. Merrill, The Imperative of Freedom, A Philosophy of Journalistic Autonomy 134-38 (1974) (concluding that it would be undesirable to have journalism take on the uniformity of a "profession"); Singletary, Commentary: Are Journalists "Professionals"?, 3 Newspaper Res. J. 75, 85 (1982) (examining journalism under the criteria of professions and concluding that journalism is not yet a profession). Characteristics of professions most often cited by scholars and the courts are licensing, internal regulation, specialized education and entrance examinations. See Frye v. Commissioner of Finance, 95 A.D.2d 274, 277, 466 N.Y.S.2d 3, 6 (1983), aff'd, 62 N.Y.2d 841, 466 N.E.2d 151, 477 N.Y.S.2d 611 (1984); E. Schein, Professional Education 9 (1972); Singletary, supra, at 75. Licensing and entry certification have been considered by one court to be so critical to the status of professions that a journalist cannot be deemed a "professional." See Frye, 95 A.D.2d at 277, 466 N.Y.S.2d at 6 (freelance syndicated columnist who had not majored in journalism denied state tax exemption benefiting professionals because he did not have a government license, specialized education, and was not subject to regulation).

Specialized education and internal regulation do, however, exist in the media. See infra notes 111-14, 158-65 and accompanying text. This, coupled with the professional sense of detachment that journalists are trained to develop, see infra notes 139-41 and accompanying text, makes journalism similar to other professions. Licensing of journalists is likely prohibited by the first amendment, see infra note 166 and accompanying text, and lack of entrance examinations should not prevent the journalist from being deemed a "professional." See infra note 167 and accompanying text.

27. Deans Prosser and Keeton believe that the most compelling reason for treating
analysis should apply to libel suits against journalists.

I. STANDARDS OF CARE FOR MEDIA DEFENDANTS IN LIBEL CASES

A. The Reasonable Person Standard as an Unreasonable Standard: The Need for a Journalism Malpractice Approach

In *Gertz v. Robert Welch, Inc.*, the Supreme Court held that in cases involving private figure plaintiffs, the states are free to establish their own standards of liability "so long as they do not impose liability without fault." Most states require the private figure plaintiff to prove negligence, but this is only half of the fault equation. The courts must also

suits against doctors as malpractice cases, and thereby allowing the medical profession to establish its own standards, is

the healthy respect which the courts have had for the learning of a fellow profession, and their reluctance to overburden it with liability based on uneducated judgment. It seems clear, in any case, that the result is closely tied in with the layman's ignorance of medical matters and the necessity of expert testimony, since, when the jury are considered competent to do so, they are permitted to find that a practice generally followed by the medical profession is negligent. Prosser and Keeton, *supra* note 1, § 32, at 189. Many cases indicate that classification as a profession is not critical in order for a court to inquire into what members of the particular skilled industry do in determining whether the defendant acted negligently. See, e.g., Adams v. Greer, 114 F. Supp. 770, 775 (W.D. Ark. 1953) (abstractor of title is held to "the care which an ordinary, reasonable and prudent abstractor exercises or is accustomed to exercise under the same or similar circumstances"); Josephs v. Fuller, 186 N.J. Super. 47, 51, 451 A.2d 203, 205 (1982) (in determining travel agent's liability, court looks to what "any reasonable travel agent would have known"); Heath v. Swift Wings, Inc., 40 N.C. App. 158, 163, 252 S.E.2d 526, 529 (1979) (pilot entitled to instruction holding pilot "to the objective minimum standard of care applicable to all pilots"). Other cases classify members of some nontraditional professions as professionals in applying a malpractice standard. See, e.g., Cutlip v. Lucky Stores, Inc., 22 Md. App. 673, 693-94, 325 A.2d 432, 443 (1974) (architects); City of Eveleth v. Ruble, 302 Minn. 249, 253-56, 225 N.W.2d 521, 524-25 (1974) (engineers); Fantini v. Alexander, 172 N.J. Super. 105, 108-09, 410 A.2d 1190, 1192-93 (App. Div. 1980) (karate instructor); Fireman's Mut. Ins. Co. v. High Point Sprinkler Co., 266 N.C. 134, 142-43, 146 S.E.2d 53, 61-62 (1966) (fire sprinkler contractor). These courts, however, do not state that the reason for such application is determination of professional status. Rather, the common denominator of all these cases is that these industries possess special skill and engage in activities that laymen do not. Similarly, journalists, although not "specialists," do engage in conduct that laymen do not. See *infra* notes 48-50 and accompanying text.

There are also historical and technical reasons for treating traditional professions differently. Doctors and lawyers are assumed to "practice," and the action against them is therefore an action for bad practice. The assumption is so strong that most dictionaries use the fields of law and medicine as the primary examples of professional "practice." See Webster's Third Int'l Dictionary 1780 (2d ed. 1976). This semantic difference is clearly not a valid reason for treating journalism cases differently from cases involving the traditional professions.

29. *Id.* at 347.
decide whether to apply an ordinary negligence standard or a journalism malpractice standard. For the plaintiff to prevail under the ordinary negligence standard, it must be proved that the journalist did not act as a reasonable person would have acted under similar circumstances. Conversely, use of the journalism malpractice standard allows the journalist to prove lack of negligence by showing actions in accordance with generally accepted journalism practices.

Most courts that have recognized the distinction between the ordinary negligence standard and the journalism malpractice approach have chosen to employ the ordinary negligence standard. In rejecting suggestions that the determination of a journalist's liability be made in light of established journalism practices, the courts reason that the application of such a standard would leave the propriety of actions up to the discretion of the journalism industry, thereby permitting the journalist to be judged by a standard below that of ordinary care. One court reasoned:

The problem with such an approach is that it would make the prevailing newspaper practices in a community controlling. In a community having only a single newspaper, the approach suggested would permit that paper to establish its own standards. And in any community it might tend . . . toward a progressive depreciation of the standard of care.

Even assuming a national rather than community standard, some courts

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31. See infra notes 38-40 and accompanying text.
32. See infra notes 88-90 and accompanying text.
35. Troman v. Wood, 62 Ill. 2d 184, 198, 340 N.E.2d 292, 298-99 (1975). The Troman court clearly misunderstood the context of the libel case it was deciding. The defendant was Field Enterprises, Inc., publishers of The Chicago Sun-Times, id. at 187, 340 N.E.2d at 293, a major newspaper with broad circulation, and influence far beyond its community. Chicago is an extremely competitive journalism center. See E. Emery & M. Emery, The Press and America 335 (5th ed. 1984). The assumption that the commu-
reason that "[n]egligence throughout a trade should not excuse its members from liability." Implicit in the courts' reasoning is the assumption that the determination of due care in media libel cases is not a technical matter beyond the competence of a jury unaided by experts.

These courts assert that the ultimate question under this ordinary negligence standard is whether the reporter had "reasonable ground to believe" a story was true, or failed to make a "reasonable investigation."
They do not, however, indicate how a jury is to make this determination without evidence regarding journalistic practices. Rather, these courts instruct the jury to rely on its "own experience and instincts to determine whether an ordinarily prudent person would have behaved as the defendant did." Similarly, in actual malice cases, although the media defendant should not be liable unless the public figure plaintiff proves an extreme departure from the standards of a reasonable journalist, juries are typically given no guidance as to what these journalistic practices are.

Other courts appear to employ a reasonable journalist standard, but do so in form only. Although these courts use malpractice language, they fail to inform the jury how the standards of the reasonably prudent journalist are to be established, thus allowing counsel and juries to substitute other factors for the reasonable journalist standard.

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41. See Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967) (four justice plurality opinion written by Harlan, J.). Because "reckless disregard... cannot be fully encompassed in one infallible definition," St. Amant v. Thompson, 390 U.S. 727, 730 (1968), the Court later held that a publisher is also reckless if he "entertained serious doubts as to the truth of his publication," id. at 731.

42. See Kuhn v. Tribune-Republican Publishing Co., 637 P.2d 315, 319 (Colo. 1981) (court, applying Butts standard, see supra note 41, finds actual malice burden met in an opinion featuring court's own assessment of reportorial behavior); Downing v. Monitor Publishing Co., 120 N.H. 383, 386, 415 A.2d 683, 685 (1980) (court, applying St. Amant standard, see supra note 41, does not consider that journalists often do not identify sources, and finds that failure to reveal source raises a presumption that no source existed; court therefore grants directed verdict on actual malice issue).

43. In Gobin v. Globe Publishing Co., 216 Kan. 223, 531 P.2d 76 (1975), the court held that liability would ensue when the assertion of the falsehood is the result of the publisher's or broadcaster's negligence and when the substance of the assertion makes substantial danger to reputation apparent; the standard to be applied in determining such negligence is the conduct of the reasonably careful publisher or broadcaster in the community or in similar communities under the existing circumstances. Id. at 233, 531 P.2d at 84. Divided into two parts, this test has many benefits. By limiting private figure actions to those instances where the defamatory nature of the assertions should have been noticed, the Kansas court eliminates the entirely fortuitous libel claim, such as can be caused by a clerical or typing error. The court does not say, however, whether the journalist's judgment is weighed in deciding if danger to reputation was apparent. This uncertainty could open the door for juries to substitute their judgment about a story's potential impact for that of the journalist.

The "reasonably careful publisher or broadcaster" half of the test is a formal adoption of malpractice language. Gobin did not, however, state how the standards of the reason-
tute their own judgments. One court recently rejected the journalism malpractice approach but acknowledged that comparison of the journalist's conduct to that of other journalists is a factor to be considered in determining whether the journalist acted with due care.  

The courts' application of the reasonable person standard to libel litigation is unsound. In tort law theory, the reasonable person inquiry is an objective standard by which to assess both duty and behavior. The reasonable person test, however, is an objective standard only so long as the public is familiar with or understands the issues involved in the case. It works well when people are injured in automobile accidents, for example, because it takes little expertise to understand that a driver is negligent when looking at something other than the road.

In libel cases, however, the reasonable person is unfit to assess either duty or behavior, except when the behavior is obviously beyond the pale. Although gathering information is not a technical matter, at least

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45. Prosser and Keeton, supra note 1, § 32, at 173-74; see Fancher v. Southwest Mo. Truck Center, Inc., 618 S.W.2d 271, 274 (Mo. Ct. App. 1981) (“The standard of care exacted by the law is an external and objective one and the law does not permit the defendant to make the determination. . . .”).

46. Cf. Prosser and Keeton, supra note 1, § 32, at 189 (“[w]here the matter is regarded as within the common knowledge of laymen, as where the surgeon saws off the wrong leg, or there is injury to a part of the body not within the operative field,” the issue is within the competence of the jury and no experts are needed).

47. Cf. Goldwater v. Ginzburg, 414 F.2d 324, 342-43 & n.9 (2d Cir. 1969) (jurors confused as to circumstances under which punitive damages could be awarded in libel cases), cert. denied, 396 U.S. 1049 (1970); Anderson, supra note 21, at 461 (“The question of negligence in the publication of a defamatory falsehood involves far more complex issues than the question of negligence in causing a traffic accident.”).
as compared to law or medicine,\textsuperscript{48} newsgathering is neither an activity in which average jurors engage nor one of which they are likely to have knowledge. No one would contend that journalists have specialized knowledge of the scope of law or medicine. It is actually an essential feature of journalism that journalists have less specialized material to learn. They are trained to become professional generalists, persons who can tackle any number of subjects and treat them well.\textsuperscript{49} It is their professional lot to know much about everything and everything about nothing in particular.\textsuperscript{50} The specialized knowledge of the journalist enables him to obtain and use information; the subject of information itself is of less concern. Whereas the attorney and doctor are trained to have expertise in a narrow range of subject matter, the journalist is trained to know and use only a limited range of methods to discover a wide variety of information. Although anyone can work as a journalist, journalism as a discipline has its own distinct methodology. It is hard to imagine what would happen if a jury were charged with deciding how an ordinarily prudent person would perform an appendectomy or conduct a legal appeal. Similarly, it is hard to imagine that prudent person preparing an investigative story.

In applying a reasonable person standard, the courts are blind to the results of their decisions. A given jury may decide that a reporter's duty is always to report accurately, or that news media defendants have a duty to conduct fruitless inquiries to search for truth.\textsuperscript{51} It might even consider it a journalist's duty to explain the journalistic process to persons who are likely to be affected by a story. The reasonable person approach thus allows juries to define duty as they please and to set journalistic standards that are quite likely to vary from those of journalists. It leaves the door open for the imposition of strict liability by jurors who think the

\textsuperscript{48} See supra note 37 and accompanying text.

\textsuperscript{49} See Accrediting Council on Education in Journalism and Mass Communications, Accredited Journalism and Mass Communications Education, Accrediting Standards 6-7 (1983-84) (journalism accreditation currently calls for students in undergraduate programs to take no more than 25\% of courses in journalism). The journalism accreditation standards have recently been the subject of hot debate. See Dorfman, \textit{A New Deal for Journalism Education?}, Quill, Feb. 1984, at 17-18; Stone, \textit{Survey Reflects Disagreement on 25 Percent Accrediting Rule}, 38 Journalism Educ., Winter 1984, at 13.

\textsuperscript{50} Even in journalism, however, some specialization has developed. Masters degree programs are growing, see Ryan, \textit{Journalism Education at the Master's Level}, Journalism Monographs No. 66, at 1, 10-11 (1980), perhaps indicating a further professionalization of journalism. Specialization may result in a higher standard of care in certain libel cases. \textit{Cf.} Prosser and Keeton, supra note 1, § 32, at 187 (doctors who are "specialists" are held to higher standard of care).

\textsuperscript{51} Juries, for example, may not recognize that sources have no obligation to talk to journalists. It is possible under current standards that a jury could find that a reporter failed in a duty to conduct an inquiry from which no answers would come. \textit{See} P. Williams, \textit{Investigative Reporting and Editing} 170-85 (1978) (reasonable to assume that investigative story making persons look bad may make it difficult to obtain information from them).
press should never make mistakes. Libel law should have a chilling

52. A classic example of a jury imposing strict liability in a media libel case is Pring v. Penthouse Int'l, Ltd., 695 F.2d 438 (10th Cir. 1982), cert. denied, 103 S. Ct. 3112 (1983). In Pring, defendant wrote an article about "Charlene," a Miss Wyoming at a Miss America contest. See id. at 439. The story stated that Charlene performed oral sex on her coach at a Miss America pageant on national television, causing her coach to levitate. Id. at 441. Plaintiff was a former Miss Wyoming. Id. at 439. At trial, the jury awarded compensatory damages of $1.5 million and punitive damages of $25 million. See Pring v. Penthouse Int'l, Ltd., No. 79-351 (D. Wyo. May 23, 1979) (available on LEXIS, States library, Wyo. file), rev'd, 695 F.2d 438 (10th Cir. 1982), cert. denied, 103 S. Ct. 3112 (1983). The trial judge reduced the punitive damage award in half. See id. The Tenth Circuit set the award aside, reasoning that the magazine article could not possibly have been about the plaintiff because it contained physically impossible events in an impossible setting, and therefore it was a complete fantasy that could not be taken literally or reasonably understood as describing facts about the plaintiff. Pring, 695 F.2d at 443.

Many cases besides Pring indicate that once a libel case gets to a jury, awards are often excessively high. See, e.g., Tavoulareas v. Washington Post Co., 567 F. Supp. 651, 652, 661 (D.D.C. 1983) (jury awarded $250,000 in compensatory damages and $1.8 million in punitive damages to the president of Mobil Oil Corporation, William Tavoulareas, for a Washington Post story stating that he had "set up and maintain[ed] his son" in a shipping management firm that did business with Mobil; trial court later granted defendant judgment notwithstanding the verdict); Burnett v. National Enquirer, Inc., 144 Cal. App. 3d 991, 997, 1018, 193 Cal. Rptr. 206, 208, 223 (1983) (jury awarded $300,000 compensatory damages and $1.3 million punitive damages; trial judge reduced compensatory damages to $50,000 and punitive damages to $750,000; court of appeals reduced punitive damages to $150,000, appeal dismissed, 104 S. Ct. 1260 (1984); Miskovsky v. Oklahoma Publishing Co., 654 P.2d 587, 596 (Okla.) (court reversed jury verdict because trial court erred in submitting matter to jury), cert. denied, 459 U.S. 923 (1982); cf. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) ("The largely uncontrolled discretion of juries to award damages when there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms."). See generally Anderson I, supra note 21, at 435-36 (discussing high jury verdicts in libel cases); Lewis, supra note 21, at 608 (same); Smolla, supra note 21, at 1-7 (same). These high awards could be due to the public's general animosity towards the press and the fact that a common sense determination will inevitably embrace equitable principles. See Franklin I, supra note 21, at 8-11. The equities will certainly appear to average jurors to be on the side of plaintiffs rather than large media companies. Id.

Of the libel cases that go to trial, jurors rule against media defendants approximately 85% of the time. Franklin, Suing Media For Libel: A Litigation Study, 1981 Am. B. Found. Res. J. 795, 804 [hereinafter cited as Franklin II]. The trial judge grants a judgment notwithstanding the verdict 20% of the time. Franklin I, supra note 21, at 4. When the defendant appeals, the plaintiff loses his judgment approximately two-thirds of the time. Id. In all, the plaintiffs who sue media defendants ultimately get and keep five percent of their judgments. Id. at 4-5 & n.23; see Franklin I, supra note 21, at 8-11.

Despite the success of media defendants, libel cases exact a heavy financial burden on these publishers and reporters. See, e.g., Anderson, supra note 21, at 435-36 (cost of defending libel suits begins at approximately $20,000; successful defense in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), cost approximately $100,000); Franklin I, supra note 21, at 13-22 (noting the high costs of defamation litigation); Lewis, supra note 21, at 610-12 (noting that due to extensive discovery, CBS spent between $3 and $4 million for legal fees in Herbert v. Lando, 441 U.S. 153 (1979)); A General Surrenders, N.Y. Times, Feb. 19, 1985, at A22, col. 1 (in recent Westmoreland v. CBS case, combined costs exceeded $10 million prior to settlement); Margolick, Sharon Case and the Law, N.Y. Times, Jan. 25, 1985, at B4, col. 1 (in recent Sharon v. Time, Inc. case, combined legal fees exceeded $3 million).

There has been much literature on how the fault requirement is not impressed upon...
effect when the actual malice or negligence standards are met, but this formless standard offers far too much latitude to juries. Such indeterminacy and latitude vitiates the fault requirement imposed by the first amendment.

In addition to allowing juries too much latitude, the reasonable person standard unreasonably inhibits the journalist's exercise of professional discretion by giving that discretion no weight at all. Instructing juries to assess behavior by comparing reporters' actions to those of ordinary persons invites jurors to substitute their judgment for that of the newspaper. This is the functional equivalent of empowering a jury to assess liability because it thinks an attorney should have proceeded on one legal theory rather than another or because it believes that a doctor should have used a different medical procedure.

B. Considerations of Journalistic Practices by the Supreme Court

The Supreme Court has frequently indicated that consideration of industry and professional practices of newsgathering and dissemination is appropriate in libel cases. In 1964, in *New York Times Co. v. Sullivan*, the Supreme Court recognized the special status of the press when it established that in order to prevail in a libel suit, a plaintiff classified as a public official must prove actual malice on the part of the defendant. The plaintiff could prove actual malice by showing that the defendant printed the statement "with knowledge that it was false or with reckless disregard of whether it was false or not." The *Sullivan* Court recognized that a state's interest in protecting individual reputation is attenuated when the plaintiff is a public figure. The case set in motion a debate over whether the first amendment imparts a special status to the press. Regardless of whether the press enjoys such a status, *Sullivan*...
accepts the notion that the press has a special role in a democratic society and should be given relatively free reign on certain subjects.\textsuperscript{59}

Three years later, the Court decided \textit{Curtis Publishing Co. v. Butts},\textsuperscript{60} in which the Saturday Evening Post had published an "expose" on the fixing of a college football game between the Universities of Alabama and Georgia.\textsuperscript{61} The magazine had relied upon information provided by a single correspondent who was not a journalist and who had somehow overheard a telephone conversation between plaintiff Butts and Alabama coach Paul "Bear" Bryant.\textsuperscript{62} The magazine staff never conducted an independent inquiry into the charges, although its deadlines allowed plenty of time to do so.\textsuperscript{63} All nine justices agreed that the actual malice standard applies to public figures as well as public officials,\textsuperscript{64} and a plurality held that under this standard, a publisher is reckless if there was "an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."\textsuperscript{65} The phrase "responsible

not be afforded greater protection than nonmedia communications); Stewart, "Or of the Press", 26 Hastings L.J. 631 (1975) (suggesting that an independent meaning be given to the first amendment press language); Note, Mediocacy and Mistrust: Extending New York Times Defamation Protection to Nonmedia Defendants, 95 Harv. L. Rev. 1876, 1882 (1982) (interpreting Supreme Court cases as establishing that the nature of the material reported is the single important factor).

The Court has never decided the question whether its media rules apply equally to cases involving nonmedia defendants. See Hutchinson v. Proxmire, 443 U.S. 111, 133 n.16 (1979); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 798 & n.3 (1978) (Burger, C.J., concurring). The clearest expression of the Court's emphasis on media as a primary factor in its first amendment libel approach is in \textit{Gertz v. Robert Welch, Inc.}, 418 U.S. 323 (1974), in which the Court said that the fault standard "shields the press and broadcast media from the rigors of strict liability for defamation." \textit{Id.} at 348 (emphasis added). The issue whether the first amendment imparts a special status to the press in libel cases is before the court this term in \textit{Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.}, 104 S. Ct. 389 (1983) (grant of certiorari).

59. See 376 U.S. at 269-70. This recognition of the unique role of the media was not without precedent. In the late 1800's, Thomas Cooley had urged courts to reconsider the strictness of common law libel in light of the increased professionalism of the press. See Rosenberg, \textit{Thomas M. Cooley, Liberal Jurisprudence, and the Law of Libel, 1868-1884}, 4 U. Puget Sound L. Rev. 49, 59 (1980). Cooley also recognized that mass-produced newspapers were becoming the major source of information about government and public affairs, and suggested that a "good faith" privilege be accorded the media in libel cases where a story concerned public officials or public affairs. \textit{Id.} at 81. Cooley also urged that the interstate nature of newspapers be considered. Cooley's treatise and the Kansas case that relied on Cooley were used by Justice Brennan in fashioning \textit{Sullivan}'s actual malice test. See \textit{New York Times Co. v. Sullivan}, 376 U.S. 254, 280 n.20 (1964).

60. 388 U.S. 130 (1967).

61. \textit{Id.} at 135.

62. \textit{Id.} at 136.

63. \textit{Id.} at 157.

64. \textit{See id.} at 155 (four justice plurality opinion written by Harlan, J.); \textit{id.} at 164 (Warren, C.J., concurring); \textit{id.} at 170 (Black, J., and Douglas, J. concurring in part and dissenting in part); \textit{id.} at 172 (Brennan, J., and White, J., concurring in part and dissenting in part); \textit{Gertz v. Robert Welch, Inc.}, 418 U.S. 323, 336-37 & n.7, 344-45 (1974). In an enlargement of \textit{Sullivan}, the coaches were treated as "public figures" and their claims were subject to the actual malice test. \textit{Butts}, 388 U.S. at 155.

65. 388 U.S. at 155 (four justice plurality opinion written by Harlan, J.). A publisher
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Publisher gave life to the notion that a news media defendant's actions should be judged by the standards of the profession rather than by general negligence concepts. Justice Harlan's opinion contained the detailed analysis of reportorial activity that would be expected under a malpractice standard: whether the defendants used methods and practices ordinarily used in preparing a news story, and whether those methods were normally adequate to assure reasonably accurate reporting. Butts is the Court's clearest statement that journalists' actions, rather than the nature of the allegedly defamatory statement, should be scrutinized in determining liability.

In Rosenbloom v. Metromedia, Inc., a 1971 case, the Court further emphasized the special role of the press. A plurality held that a purely private person who later sued for libel would be treated as a public figure if the story involved an issue of public importance. The plurality reasoned that issues, not identities, determine what the news media covers.

Finally, in 1974, in Gertz v. Robert Welch, Inc., the Court held that is also "reckless" if he "entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

67. Id. at 157-59. The plaintiff prevailed because of unusually shoddy reporting. See id. at 155.
68. In the companion case of Associated Press v. Walker, 388 U.S. 130 (1967), Walker, a retired general, actively led opposition to the the admission of James Gregory to the University of Mississippi. Id. at 140. An Associated Press (AP) report described the riot opposing integration and Walker's role in it. Id. The Court decided that Walker was a public figure because he voluntarily injected himself into a controversy. Id. at 154-55. It then held that AP could not be held liable; the riot was "hot news," requiring a different standard of reporting than is appropriate when time is not of the essence. Id. at 159.
69. 403 U.S. 29 (1971).
70. See id. at 52.
71. See id. at 43, 51-52. The plurality stated:
If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not "voluntarily" choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety.
Id. at 43 (footnote omitted).
private figures must establish fault on the part of the media defendant in order to prevail.73 The Court refused to apply the actual malice standard to private figures.74 It also redefined public and private figures, recognizing that participation in a public issue could make a person "public" for purposes of reporting on that issue.75 The Court rejected the *Rosenbloom* approach that made relation to a public issue determinative; now, a nominally private figure must affirmatively participate in a public issue in order for the case to be governed by the *Sullivan* standard.76

Traditional libel law served the primary function of providing redress

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73. See *id.* at 347 ("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.") (citation omitted). After *Gertz*, a state must apply the *Sullivan* standard in a suit by a public person; it is not required to do this in a suit by a private person but is entirely free to do so if it chooses. See *id.* A state must apply the *Sullivan* standard in all cases in determining whether presumed or punitive damages will be awarded. *Id.* at 349.


75. *Id.* at 345-50. The bulk of *Gertz* is devoted to considering the status of private figures. In reaffirming the public figure rules, the Court again noted that the public figure has sacrificed some privacy, and also recognized that because public figures can expect greater access to the news media when their reputations are threatened, they are able to engage in self-help to protect reputation. *Gertz*, 418 U.S. at 344. Private figures, by contrast, will have little or no access to the mass media. *Id.* As a result, broad dissemination of reputation-harming matter is more harmful to a private figure. *Id.* The Court did not specify any authority for its holding that private figures should be able to recover damages for actual injury upon a showing of fault, stating that different rules for private figures were compelled by "normative" considerations. *Id.* The distinction between public and private figures, however, is really a moral one.

American tort law generally reflects either society’s moral determinations or its assessment of risk. See Prosser and Keeton, supra note 1, § 1, at 5-6; *id.*, § 4, at 20-23. *Gertz* redesigned libel law to reflect both. See *Inger*, supra, at 823-25. The emphasis in *Gertz*, however, is on the behavior of the media rather than its ability to bear the risk of loss. 418 U.S. at 347-48. Private figures have a lighter burden because they deserve to be treated more carefully by the media: "[P]rivate individuals are not only more vulnerable to injury that public officials and public figures; they are also more deserving of recovery." *Id.* at 345. *Gertz* thus represents to some extent the Court’s attempt to balance interests on the basis of moral philosophy as well as legal precedent. The Court in *Sullivan* emphasized "that debate on public issues should be uninhibited, robust, and wide-open." 376 U.S. at 270. In *Gertz*, on the other hand, this interest in public affairs being reported took second place to the individual's interest in "dignity" and "protection of private personality." 418 U.S. at 341 (citing *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

76. See *Gertz*, 418 U.S. at 345-46, 352. In *Gertz*, the Supreme Court demonstrated two ways in which an individual can become a public figure:

For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such pervasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

LIBEL AS MALPRACTICE

for loss to reputation.77 Today's libel law retains this function,78 but the Gertz Court, by reasoning that private figures need more protection than public figures, demonstrated that libel also serves a regulatory function.79 By seeking to regulate the relationship of the media to both private and public figures, the Court used libel as a press check. In later cases the Court more explicitly recognized that libel may have a "chilling effect" on journalists' actions and expression.80 A second notable point about Gertz is that its adoption of the fault requirement was expected to benefit the news media by immunizing them from liability when normal news-gathering activity nevertheless led to factual errors.81

The regulatory and fault aspects of Gertz combine to make libel more like a malpractice action than an ordinary negligence action. The Court appears to be saying that news media defendants will not be judged solely on what they have printed (results), but also on how they have acted (due care). Besides requiring plaintiffs to prove fault, the previously discussed


78. Although libel today generally serves markedly different purposes than the traditional common law of libel, it does serve some of the purposes of the old action. The historical antecedents of American common law libel are found in the English ecclesiastical courts. Prosser and Keeton, supra note 1, at 772; see Van Veder, The History and Theory of the Law of Defamation (pts 1 & 2), 3 Colum. L. Rev. 546, 550 (1903); 4 Colum L. Rev. 33, 35-36 (1904) [hereinafter cited as Van Veder I and Van Veder II respectively]. At first the action was designed to protect the interests of the state and the state-run church, but the law of libel as we know it began as a means of protecting individual reputation. See Prosser and Keeton, supra note 1, at 772-73; Van Veder I, supra, at 558-59; Van Veder II, supra, at 46-47. The majority of American states adopted libel as it existed at common law at the time of statehood, with exceptions as mandated by state constitutional free expression provisions. Simon, Independent But Inadequate: State Constitutions and Protection of Freedom of Expression 16-17 (1984) (to be published in 33 Kan. L. Rev (1985)) (available in files of Fordham Law Review). The action was thought necessary in part to prevent violence between individuals when one was erroneously portrayed in print. See Van Veder II, supra, at 559. More importantly, it was meant to provide both redress for and vindication of reputation wrongly lost. See Eaton, supra note 71, at 1357-58.

79. Gertz was considered a retrenchment of press freedoms by many commentators. See, e.g., Anderson I, supra note 21, at 423-24; Ashdown, Gertz and Firestone: A Study in Constitutional Policy-Making, 61 Minn. L. Rev. 645, 657-90 (1977); Ingber, Defamation: A Conflict Between Reason And Decency, 65 Va. L. Rev. 785, 808-10 (1979). The argument is that although the Court reaffirmed the Sullivan Court's enhancement of press protection by holding that first amendment interests preclude states from imposing liability in public figure cases absent proof of actual malice, it severely constricted the press protection by not applying the Sullivan standard to persons who, although not public officials or public figures, are involved in matters of general or public concern. Anderson I, supra note 21, at 424-25; see Gertz v. Robert Welch, Inc., 418 U.S. 323, 342-50 (1974). Media disenchantment with Gertz can be attributed in part to the Court's adoption of a social responsibility theory of the press. See 418 U.S. at 341; F. Siebert, T. Peterson & W. Schramm, Four Theories of the Press 103 (1956). The press' special constitutional status under the first amendment gives rise to special responsibility, at least where private figures are concerned.


81. See Gertz, 418 U.S. at 348 (fault requirement "shields the press and broadcast media from the rigors of strict liability for defamation").
cases culminating in *Gertz* can be read as eliminating the common law assumption that the defendant was liable until proven otherwise, eliminating the presumption of damages, and restricting the right to recover punitive damages. Furthermore, these cases intimate that journalistic practices should be considered in libel suits.

C. Considerations of Journalistic Practices After *Gertz*

A minority of courts has followed the Supreme Court's intimations by considering journalism practices in libel cases. Most of these courts, however, have not explicitly adopted a journalism malpractice approach. In some of these cases, evidence concerning the practices of the journalists is given decisive weight. In others, the courts use malpractice-type language in upholding decisions for media defendants, but do not elaborate.  

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82. See *id.* at 323, 347 & n.10 (burden of proving falsity is on plaintiff). At common law, the burden was on the defendant to prove the truth of the statement, see *Perry v. Hearst Corp.*, 334 F.2d 800, 801 (1st Cir. 1964), and malice was presumed, see *Times Publishing Co. v. Carlisle*, 94 F. 762, 766-67 (8th Cir. 1899); *Bromage v. Prosser*, 107 Eng. Rep. 1051, 1055 (1825). The Supreme Court cases "abolished the common law principle that a public medium . . . publishes at its peril." *Keeton and Prosser, supra* note 1, § 113, at 805.

83. *418* U.S. at 349 ("It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury.").

84. *Gertz* required that actual injury be shown and punitive damages prohibited "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." *418* U.S. at 349.


86. See *Kohn v. West Hawaii Today, Inc.*, 65 Hawaii 584, 588-89, 656 P.2d 79, 82-83 (1982); *Henslee v. Monks*, 571 P.2d 440, 444 (Okla. 1977). In *Kohn*, after the plaintiff introduced evidence of the defendant magazine's standards, the court found that the magazine had deviated from its own "standard of care." 65 Hawaii at 588-89, 656 P.2d at 82-83. An analysis of *Kohn* demonstrates that a journalism malpractice approach can be disadvantageous to the media defendant because a given news organization's policies can become determinative on the question of negligence. Under the approach advocated, this decision is proper if the internal standards did not comport with those prevailing in journalism. The *Kohn* court's emphasis on professional practices arguably indicates sympathy with a libel-as-malpractice approach.

In *Henslee*, the Supreme Court of Oklahoma, in upholding a decision for the media defendant, relied upon testimony from a journalist concerning reporting standards. 571 P.2d at 443-44. A reporter who had prepared stories that were not completely accurate was held not liable because the reporter had nevertheless "exercised a high standard of professional journalism quality." *571* P.2d at 444.

87. See *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 541-42, 416 N.E.2d 557, 561, 435 N.Y.S.2d 556, 560-61 (1980) (editor held not liable because there was not "the slightest suggestion that [his] own behavior was anything but responsible and in accord with accepted journalistic practices"); *Martin v. Griffin Television, Inc.*, 549 P.2d 85, 92 (Okla. 1976) (court analogizes case to medical malpractice case, stating that "[o]rderly
The post-Gertz Restatement of Torts emphatically advocates a malpractice-like approach to libel. It provides:

The defendant, if a professional disseminator of news, such as a newspaper, a magazine or a broadcasting station, or an employee, such as a reporter, is held to the skill and experience normally possessed by members of that profession. . . . Customs and practices within the profession are relevant in applying the negligence standard which is, to a substantial degree, set by the profession itself, though a custom is not controlling . . . . If the defendant is an ordinary citizen, customs of the community as a whole may be relevant . . . . In the absence of expert testimony . . . the court should be cautious in permitting the doctrine of res ipsa loquitur to take the case to the jury and permit the jury, on the basis of its own lay inferences, to decide that the defendant must have been negligent because it published a false and defamatory communication. This could produce a form of strict liability de facto and thus circumvent the constitutional requirement of fault.88

The only court explicitly to adopt a journalism malpractice approach89 found the Restatement persuasive, reasoning:

[I]t is important to make clear that negligence in this context means a departure from standards which exist or ought to exist as standards of professional conduct in the news media industry . . . . [T]he important interests to be protected, which are founded in the First Amendment, require that juries not be allowed to conclude that because a false, defamatory statement was published, negligence must therefore have occurred. Res ipsa loquitur must be employed with great care.90

Although most states have adopted negligence as the fault standard that applies in private figure cases,91 a few post-Gertz courts have recognized the need for journalists to act on professional judgment by requiring standards of fault higher than mere negligence.92 Most of these states, in employing some variation on the public issue test of Rosenbloom, have adopted an actual malice standard for all libel cases involving stories covering issues of public interest.93 One state applies a

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88. Restatement (Second) of Torts § 580B comment g (1977) (citations omitted).
90. Id. at 976.
91. See supra note 30 and accompanying text.
standard higher than negligence but lower than actual malice in private figure cases.\textsuperscript{94}

Furthermore, many courts already recognize defenses to libel actions that reflect journalism practices in their application. The privilege of neutral reportage\textsuperscript{95} and the qualified fair report privilege\textsuperscript{96} are two defenses of this type. These defenses show that courts already implicitly recognize standard journalism practices, and in applying a malpractice standard it is recommended that they be recognized explicitly.\textsuperscript{97}

The privilege of neutral reportage precludes liability when a news media defendant accurately publishes charges made by interested parties on an issue of public interest.\textsuperscript{98} The privilege, which originated in a Second


Illinois' innocent construction rule is an explicit adoption of the precept that no defamation may be presumed unless it is manifest. This common law rule is extremely protective of journalists' judgment and discretion, assuming in effect that newspaper take precautions against disseminating material that hurts reputation. See Malone & Smolla, The Future of Defamation in Illinois after Colson v. Stieg and Chapski v. Copley Press, Inc., 32 De Paul L. Rev. 219, 274-86 (1983). Innocent construction thus serves two purposes. It automatically eliminates most frivolous libel claims, and it also serves to recognize that journalists are the ultimate custodians of their own credibility. \textsuperscript{98} See Cianci v. New Times Publishing Co., 639 F.2d 54, 69 (2d Cir. 1980); Edwards
Circuit case in 1977, as has not won wide acceptance in the courts but has been favorably received by commentators. Those courts that recognize the privilege of neutral reportage implicitly accept the journalistic maxim that a reporter should get both sides of the story. A journalist who has complied with this maxim would ordinarily therefore escape liability.

The qualified fair report privilege recognizes that a news reporter generally has a right to report proceedings of official bodies and the contents of official documents. As a journalistic matter, the privilege makes


101. See Hart, supra note 98, at 234; Developing Privilege, supra note 98, at 854, 864. But see Glasser I, supra note 98, at 12-13 (arguing that privilege may discourage responsible journalism).


It is clear here, that Devlin reported Audubon's charges fairly and accurately. He did not in any way espouse the Society's accusations: indeed, Devlin published the maligned scientists' outraged reactions in the same article that contained the Society's attack. The Times article, in short, was the exemplar of fair and dispassionate reporting of an unfortunate but newsworthy contretemps.

Id. at 120.

sense. It tracks the reporting practice of relying upon entities that are usually reliable, especially when those entities are authoritative organizations. The traditional rationale for the privilege—that government materials are presumptively open and that the public has a right to know of government activities—has been extended to cases involving nongovernmental entities. Extension of the privilege to such material recognizes in part that established journalism practices, which here deal similarly with both government and authoritative nongovernmental bodies, should be the standard by which liability is determined.

Both defenses illustrate that the practices of news professionals have had an impact beyond the elements of the libel cause of action. They show that the nature of modern day news dissemination inevitably comes into play when media actions are at issue. Each is a useful addition to the developing libel-as-malpractice action. More consistent discussion of these defenses and rules in the context of a professional liability action is therefore desirable.

In sum, journalism standards and ethical principles have slipped into libel cases through the back door. Journalism practices are clearly relevant in analyzing fault. Courts, by using terms that refer to journalism practices, such as "reasonable reporter," recognize the value of attempting to look at issues in libel from a journalistic point of view. Unfortunately, because there is little in the cases to show that judges or juries are receiving background information on news practices, the meaning of these terms remains unclear. To give substance to these and other terms that call into mind what newspapers do, greater detail in explaining how journalists put together news stories should be offered and admitted into evidence at trial.

by ill-will or malice. Restatement (Second) of Torts § 611 (1977); Note, Constitutional Privilege to Republish Defamation, 77 Colum. L. Rev. 1266, 1269 (1977) [hereinafter cited as Constitutional Privilege].


108. The need to clarify the professional basis of the action was underscored recently by Justice Rovira of the Colorado Supreme Court in dissent in Kuhn v. Tribune-Republican Publishing Co., 637 P.2d 315, 324 (Colo. 1981) (en banc) (Rovira, J., dissenting). The court, in an opinion that featured the majority's own assessment of reportorial behavior, found that the actual malice burden had been met. Id. at 319. Justice Rovira believes that the assessment should be based on more objective evidence:
II. THE ESTABLISHMENT OF A UNIFORM PROFESSIONAL STANDARD OF DUE CARE

A. The Need for a National Standard in Evaluating Journalists' Conduct

As mentioned, courts fear that employment of a journalism malpractice standard will allow journalists to set artificially low standards in small communities. This problem is easily avoided by adopting a national rather than community standard, as is currently being done in medical and legal malpractice cases.

The use of a national standard is justified by the increasing national uniformity of journalism practices, which has been fostered by three developments. First, journalism, like law and medicine, has developed a standard educational experience for its members. Most newly-hired journalists arrive at work with a degree from a journalism school, college or department. To a significant extent, they have taken the same "core" courses just as all lawyers take similar "core" courses. Required courses in most journalism programs include news writing, reporting, editing, advanced reporting and communication law. Most programs also require the study of journalism ethics, although there is debate whether it should be taught in a separate course or within the communication law course. Second, national journalism organizations that are deeply involved in considering ethics issues have been formed. Third, these organizations have adopted voluntary ethics codes that apply to their broad memberships.
Furthermore, a development in medical malpractice cases suggests that a national standard may be more practical, in addition to being theoretically justifiable. Doctors' sharing of similar outlooks and values—a phenomenon that can be seen also among journalists—in addition to a healthy dose of self-preservation, apparently accounts for the existence of a "conspiracy of silence" in medical malpractice litigation.117 Ironically, this tendency of professionals not to testify against other professionals in the same community has led to the use of experts from outside the immediate community. This in turn has hastened the development of a national standard.118 The use of a national standard in journalism malpractice cases would preclude a similar "conspiracy of silence" among journalists, as well as avoid the possibility of a small community paper setting its own standards.

B. Journalism Ethics Codes as the Standard of Care: Objective Guidelines for the Trier of Fact

1. Journalism Codes

As demonstrated, under present standards verdicts have been rendered against media defendants on the basis of the jury's common sense determination, uninformed by evidence of journalism practices.119 Journalists, however, should not be subject to a jury's common sense. Instead, standards developed by journalists themselves should be the criteria by which their conduct is measured.

Due care can be demonstrated by showing that the journalist acted according to nationally accepted practices of journalism. Several sources can be consulted in defining journalism standards. Standards are developed through formal journalism education and on-the-job experience. A major source of standards of practice, though, can be the code of ethics adopted by a professional organization. Adherence to freely adopted standards should present an unusually strong libel defense.

Journalism codes of ethics are a twentieth-century development. The two most influential groups120 that have promulgated codes are the Soci-
121. The SPJ/SDX Code of Ethics SPJ/SDX provides in its entirety as follows:

The Society of Professional Journalists, Sigma Delta Chi, believes the duty of journalists is to serve the truth.

We believe the agencies of mass communication are carriers of public discussion and information, acting on their Constitutional mandate and freedom to learn and report the facts.

We believe in public enlightenment as the forerunner of justice, and in our Constitutional role to seek the truth as part of the public's right to know the truth.

We believe those responsibilities carry obligations that require journalists to perform with intelligence, objectivity, accuracy, and fairness.

To these ends, we declare acceptance of the standards of practice here set forth.

RESPONSIBILITY

The public's right to know of events of public importance and interest is the overriding mission of the mass media. The purpose of distributing news and enlightened opinion is to serve the general welfare. Journalists who use their professional status as representatives of the public for selfish or other unworthy motives violate a high trust.

FREEDOM OF THE PRESS

Freedom of the press is to be guarded as an inalienable right of people in a free society. It carries with it the freedom and the responsibility to discuss, question, and challenge actions and utterances of our government and of our public and private institutions. Journalists uphold the right to speak unpopular opinions and the privilege to agree with the majority.

ETHICS

Journalists must be free of obligation to any interest other than the public's right to know the truth.

1. Gifts, favors, free travel, special treatment, or privileges can compromise the integrity of journalists and their employers. Nothing of value should be accepted.

2. Secondary employment, political involvement, holding public office, and service in community organizations should be avoided if it compromises the integrity of journalists and their employers. Journalists and their employers should conduct their personal lives in a manner which protects them from conflict of interest, real or apparent. Their responsibilities to the public are paramount. That is the nature of their profession.

3. So-called news communications from private sources should not be published or broadcast without substantiation of their claims to news value.

4. Journalists will seek news that serves the public interest, despite the obstacles. They will make constant efforts to assure that the public's business is conducted in public and that public records are open to public inspection.

5. Journalists acknowledge the newsman's ethic of protecting confidential sources of information.

ACCURACY AND OBJECTIVITY

Good faith with the public is the foundation of all worthy journalism.

1. Truth is our ultimate goal.

2. Objectivity in reporting the news is another goal, which serves as the mark of an experienced professional. It is a standard of performance toward which we strive. We honor those who achieve it.

3. There is no excuse for inaccuracies or lack of thoroughness.

4. Newspaper headlines should be fully warranted by the contents of the
American Society of Newspaper Editors (ASNE). SPJ/SDX adopted

articles they accompany. Photographs and telecasts should give an accurate picture of an event and not highlight a minor incident out of context.

5. Sound practice makes clear distinction between news reports and expressions of opinion. News reports should be free of opinion or bias and represent all sides of an issue.

6. Partisanship in editorial comment which knowingly departs from the truth violates the spirit of American journalism.

7. Journalists recognize their responsibility for offering informed analysis, comment, and editorial opinion on public events and issues. They accept the obligation to present such material by individuals whose competence, experience, and judgment qualify them for it.

8. Special articles or presentations devoted to advocacy or the writer's own conclusions and interpretations should be labeled as such.

FAIR PLAY

Journalists at all times will show respect for the dignity, privacy, rights, and well-being of people encountered in the course of gathering and presenting the news.

1. The news media should not communicate unofficial charges affecting reputation or moral character without giving the accused a chance to reply.

2. The news media must guard against invading a person's right to privacy.

3. The media should not pander to morbid curiosity about details of vice and crime.

4. It is the duty of news media to make prompt and complete correction of their errors.

5. Journalists should be accountable to the public for their reports and the public should be encouraged to voice its grievances against the media. Open dialogue with our readers, viewers, and listeners should be fostered.

PLEDGE

Journalists should actively censure and try to prevent violations of these standards, and they should encourage their observance by all newspeople. Adherence to this code of ethics is intended to preserve the bond of mutual trust and respect between American journalists and the American people.


122. The Statement of Principles of ASNE provides in its entirety as follows:

PREAMBLE

The First Amendment, protecting freedom of expression from abridgement by any law, guarantees to the people through their press a constitutional right, and thereby places on newspaper people a particular responsibility.

Thus journalism demands of its practitioners not only industry and knowledge but also the pursuit of a standard of integrity proportionate to the journalist's singular obligation.

To this end the American Society of Newspaper Editors sets forth this Statement of Principles as a standard encouraging the highest ethical and professional performance.

ARTICLE I—Responsibility

The primary purpose of gathering and distributing news and opinion is to serve the general welfare by informing the people and enabling them to make judgments on the issues of the time. Newspapermen and women who abuse the power of their professional role for selfish motives or unworthy purposes are faithless to that public trust.

The American press was made free not just to inform or just to serve as a
a code of ethics only in 1973, but the code is well known due to a large membership. ASNE's 1923 code is the oldest national code of ethics. These codes are the focus here because these two organizations are primarily news oriented. Many other media organizations also have codes, but they are not as directly aimed at newsgathering.

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Forum for debate but also to bring an independent scrutiny to bear on the forces of power in the society, including the conduct of official power at all levels of government.

ARTICLE II—Freedom of the Press

Freedom of the press belongs to the people. It must be defended against encroachment or assault from any quarter, public or private.

Journalists must be constantly alert to see that the public's business is conducted in public. They must be vigilant against all who would exploit the press for selfish purposes.

ARTICLE III—Independence

Journalists must avoid impropriety and the appearance of impropriety as well as any conflict of interest or the appearance of conflict. They should neither accept anything nor pursue any activity that might compromise or seem to compromise their integrity.

ARTICLE IV—Truth and Accuracy

Good faith with the reader is the foundation of good journalism. Every effort must be made to assure that the news content is accurate, free from bias and in context, and that all sides are presented fairly. Editorials, analytical articles and commentary should be held to the same standards of accuracy with respect to facts as news reports.

Significant errors of fact, as well as errors of omission, should be corrected promptly and prominently.

ARTICLE V—Impartiality

To be impartial does not require the press to be unquestioning or to refrain from editorial expression. Sound practice, however, demands a clear distinction for the reader between news reports and opinion. Articles that contain opinion or personal interpretation should be clearly identified.

ARTICLE VI—Fair Play

Journalists should respect the rights of people involved in the news, observe the common standards of decency and stand accountable to the public for the fairness and accuracy of their news reports.

Persons publicly accused should be give the earliest opportunity to respond. Pledges of confidentiality to news sources must be honored at all costs, and therefore should not be given lightly. Unless there is clear and pressing need to maintain confidences, sources of information should be identified.

These principles are intended to preserve, protect and strengthen the bond of trust and respect between American journalists and the American people, a bond that is essential to sustain the grant of freedom entrusted to both by the nation's founders.


124. See Sheran & Isaacman, Do We Want a Responsible Press?: A Call for the Creation of Self-Regulatory Mechanisms, 8 Wm. Mitchell L. Rev. 1, 97 n.370 (1982).
125. See J. Jones, supra note 120, at 41-42; W. Rivers, W. Schramm & C. Christians, supra note 38, at 342-50 apps. E, F; Sheran & Isaacman, supra note 122, at 99-100.
The journalism codes, like other professional codes, largely are general statements of philosophy that provide little specific guidance on how a journalist should proceed in a given situation. In discussing newsgathering, however, both the ASNE and SPJ/SDX codes are specific. They advocate professional impartiality, both in the form of objective reporting and by calling for clear distinctions between news, opinion and analysis. In addition, both codes tell journalists to seek a response when reporting harmful information about a person. Furthermore, both codes call for rapid correction of errors of fact.

Significantly, both codes use the language of the social responsibility theorists. The social responsibility approach behind journalism codes is meant to ensure that journalists perform their services for readers with


127. See, e.g., Code of Ethics, at “Responsibility” (Society of Professional Journalists, Sigma Delta Chi 1973), reprinted in W. Rivers, W. Schramm & C. Christians, supra note 38, at 291 app. A (“The purpose of distributing news and enlightened opinion is to serve the general welfare.”). Many texts and studies analyze specific journalism situations. See, e.g., B. Swain, Reporters’ Ethics 3-110 (1978) (discussion of conflicts of interests, relationships with sources, special favors, etc.).


129. See J. Merrill & S. Odell, supra note 123, at 137; Rubin, supra note 127, at 47.


Neither the ASNE nor the SPJ/SDX code explicitly refers to journalists' social responsibility as one of due care, but that is the notion clearly conveyed by each: Journalists have a duty, and the code is a means toward the end of meeting that duty. This means is somewhat imprecise, but that is neither unusual nor harmful to the use of codes in libel and privacy litigation. The codes are useful in showing minimum professional standards of behavior; that these codes will not be the sole determinant of liability is not reason to ignore them.

Like medical and legal codes of ethics, the effect of journalism codes will be indirect. The principles adopted by the American Bar Association and American Medical Association are seldom explicitly mentioned in professional malpractice litigation. This is not surprising, because a principal function of codes is to establish professional conduct expectations, not to serve as evidence of negligence or its absence. The codes, from entry into professional school and beyond, are used to inculcate a certain frame of mind and manner of thinking about ethical issues. As such, they indirectly form the basis of the professional behavior addressed in malpractice cases. They are useful in showing minimum professional standards of behavior and critical in showing that journalism functions as a profession. If libel cases are decided on the basis of the standards and practices of journalism, the codes themselves will seldom be the basis of decision, but standards and policies derived from the codes will be crucial and sometimes determinative in malpractice decisions.

2. Use of Code Provisions in Formulating Standards of Care

An examination of a few particular journalism code provisions and other news media ethics concerns will be instructive regarding the indirect use of the codes in formulating national standards of care. Those code provisions requiring objective reporting are the most applicable in libel litigation. The ASNE code states that "[e]very effort must be made to assure that the news content is accurate, free from bias and in context, and that all sides are presented fairly." Additionally, it requires that a clear distinction be made for the reader between news reports and expressions of opinion. The SPJ/SDX code demands the same objective, un-
biased reporting.138

Moreover, just as in other professions, journalism students are trained to develop a sense of impartiality or professional detachment.139 Detachment is considered a prime characteristic of professions generally.140 Cultivating detachment in order to prevent self-interest from affecting professional work is considered by most journalists and journalism educators to be a prime objective.141 Evidence that a reporter sought to maintain a distance while developing a news story, considering possible alternative sources of information, tends to show that the reporter sought accuracy and achieved it as best he could. That would constitute due care. Conversely, failure to maintain a professional detachment could be accorded great weight in a determination of liability.

The codes also deal with conflicts of interests by journalists.142 Conflicts of interest would be most relevant on state of mind and intent issues, rather than on the question of newsgathering practices. Conflict of interest provisions concentrate on motivation, not newsgathering itself, and would be relevant in libel or privacy litigation in which evidence of motive may help a plaintiff to meet the burden of proof, as in actual malice cases,143 or whenever a journalist's personal stake affected story

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139. Among journalists, the term "objectivity" is often meant to connote the type of professional detachment suggested here. A better meaning of professional detachment in journalism, as in other professions, is lack of motivating self-interest. See, e.g., Glasser, Objectivity Precludes Responsibility, Quill, Feb. 1984, at 13; Rowley & Grimes, Three-Dimensional Objectivity, Quill, March 1984, at 18.


141. See J. Hulteng, Playing it Straight 43-48 (1981); W. Rivers, W. Schramm & C. Christians, supra note 38, at 178-83. Although a journalist has third-party readers as "clients" rather than the direct contact of doctors or lawyers, the journalist is expected to report without regard to personal or employer preferences. The recently completed Ariel Sharon libel case included assertions that a Time magazine correspondent violated the expectation of detachment by harboring a grudge against Sharon. Margolick, Sharon Case and the Law, N.Y. Times, Jan. 25, 1985, at 13, col. 1. Just as older, traditional professions have eventually turned to self-regulation, so too may journalism. See Sheran & Isaacman, supra note 124, at 2-30. The Society of Professional Journalists is currently looking into whether it wishes to establish internal regulation. See Letter from Casey Bukro, SPJ/SDX national ethics committee chairman, to local SPJ/SDX chapters (Dec. 1984) (available in files of Fordham Law Review).

142. The codes are concerned to a great extent with assuring independence from news sources. Provisions covering the concern deal mainly with gifts and favors. These portions of news codes would likely have little relevance in libel or privacy actions, and should not be expected to arise in that context. See Statement of Principles art. III—Independence (American Society of Newspaper Editors 1975), reprinted in W. Rivers, W. Schramm & C. Christians, supra note 38, at 290 app. A; Code of Ethics, at "Ethics" (Society of Professional Journalists, Sigma Delta Chi 1973), reprinted in W. Rivers, W. Schramm & C. Christians, supra note 38, at 292 app. A.

143. See supra notes 54-65 and accompanying text. An example would be a story or
development. In other words, violation of conflict of interest rules would tend to support a showing of actual malice, and maybe even negligence, but would not alone constitute proof thereof.

Both codes emphasize the importance of journalists' seeking a response when reporting harmful information about a person. The SPJ/SDX code states that "[t]he news media should not communicate unofficial charges affecting reputation or moral character without giving the accused a chance to reply." The ASNE Statement of Principles states that "[p]ersons publicly accused should be given the earliest opportunity to respond." This comports with the "apparent danger" doctrine, under which a journalist is deemed to have good reason to doubt the accuracy of a story whenever danger to reputation is apparent from its substance. Failure to take extra precautions before publishing a story the danger of which is apparent may result in a finding of actual malice—reckless disregard of the truth or falsity of a story—on the journalist's part.

By giving the accused an opportunity to respond to charges af-

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149. Allegations that at common law were considered to be defamatory per se would probably satisfy the "apparent danger" requirement. See Akins v. Altus Newspapers, Inc., 609 P.2d 1263, 1266-67 (Okla.), cert. denied, 449 U.S. 1010 (1980); L. Eldredge, supra note 103, § 5; B. Sanford, Synopsis of the Law of Libel and the Right of Privacy 15 (rev. ed. 1981).

150. Under the standard of St. Amant v. Thompson, 390 U.S. 727 (1968), actual malice can be shown if there was evidence that a journalist had "in fact entertained serious doubts as to the truth of his publication." Id. at 731. The Court in Herbert v. Lando, 441 U.S. 153 (1979), indicated that it would be enough that a journalist should have had doubts. Id. at 160-62. Whether St. Amant survives Herbert is unclear, see Bose Corp. v. Consumers Union, 104 S. Ct. 1949, 1965 n.30 (1984), but under either standard unofficial charges are likely to be treated as subject to doubt absent a response from the accused.
fecting moral character, journalists may prevent a finding of actual malice in such circumstances.

Journalism code provisions also emphasize the duty of journalists to rectify errors promptly as a way of ensuring credibility and, perhaps in part, of eliminating libel suits.151 Retraction statutes in existence in many states152 recognize the basic moral and ethical principle that one should admit one's errors. These statutes serve to mitigate damages, but not to preclude liability, for news media defendants who meet the terms of the statutes.153 Although a defendant's compliance with a retraction statute may assist in establishing that the defendant has acted as a prudent publisher, it is at the same time an admission of error, something potential defendants may be loath to do.154 Juries seem to be inclined to equate error with negligence. Proper application of the fault standards, however, could make a timely retraction a useful defensive device in that it shows conformity with professional and social standards. If the focus is where it should be—on the steps taken in reporting, not on the results of that reporting—a retraction may help.

3. Potential Problems with a Self-Imposed National Standard of Care

It is arguable that the self-imposed national standard of care resulting from a journalism malpractice standard will lead to artificially low national standards.155 This objection, however, is equally applicable to law

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154. Sheran & Isaacman, supra note 124, at 94-96.

155. Cf. Prosser and Keeton, supra note 1, § 33, at 194 ("an entire industry... cannot be permitted to set its own uncontrolled standard"). Courts have on occasion held industrywide practices to be unreasonable. See Texas & Pac. Ry. v. Behymer, 189 U.S. 468, 470 (1903) (sudden stop causing bumping of cars on freight train); Lambert v. Park,
and medicine, although this comparison is not drawn by the courts. Furthermore, although courts seldom determine that an entire practice is negligent, as with medicine and law, if a particular practice were below a reasonable standard of care, the court would still be able to so determine.

It is also arguable that because journalism, unlike medicine and law, has no internal regulation, state licensing, or entry examination, there is no protection against unethical practices before the legality of the practice is tested in the courtroom. Internal regulation does, however, exist in the media. Professional journalism organizations, as discussed, have promulgated codes of ethics. Many individual newspapers and television stations have "house" codes. Other newspapers have responded to perceived public disenchantment by appointing ombudsmen—persons who are empowered to investigate the newspaper's own practices and policies—to the staff. In addition, most news organizations have explicit policies concerning controversial or risky practices such as the use of anonymous sources. This kind of internal regulation is unlike that of other professional groups, in which a central internal regulator reigns. Remedies other than damages have been proposed for enforce-


156. See Prosser and Keeton, supra note 1, § 32, at 189.
158. These are three characteristics common to the traditional professions. See supra note 26.
159. See supra notes 120-32 and accompanying text.
160. See B. Swain, supra note 127, at 116-34 apps. D-I (reprinting various house codes).
163. Lawyers are disciplined and regulated through state and local bar associations, either voluntary or involuntary, but the states retain ultimate authority through the state courts. R. Aronson & D. Weckstein, Professional Responsibility 17-29 (1983). The American Bar Association has had considerable influence on professional conduct through its suggested codes and rules. Compare Model Code of Professional Responsibility (1980) with Disciplinary Rules (Nebraska State Bar Ass'n 1982) (taken verbatim
ing journalism standards, perhaps prompted by the lack of such an internal regulator. Any enforceable system, however, would probably violate the first amendment. Similarly, the first amendment probably prohibits licensing of journalism. Finally, although journalism, unlike medicine and law, has no entry examination, in those professions as in journalism the schools are the primary filters through which a would-be member must pass.

Mandatory instruction in journalism ethics programs, along with an apparent willingness to question its own, is evidence that the journalism profession takes its ethical responsibilities seriously. There is a large body of literature on journalism ethics, and journalists accord a great deal of thought and time in professional meetings to ethical matters.

from ABA Model Code) and California Rules of Professional Conduct (State Bar of California 1974) (substantially the same as ABA Model Code).

Doctors are more centrally regulated, with a national code, the Principles of Medical Ethics, sponsored by the American Medical Association. The Judicial Council of the American Medical Association has no formal enforcement authority but serves to clarify the standards of professional conduct. See Current Opinions of the Judicial Council of the American Medical Association 33-34 (1982). These professions, however, were subject to scattered regulation until this century, see L. Friedman, A History of American Law 564-66 (1973); J. Berlant, Profession and Monopoly: A Study of Medicine in the United States and Great Britain 192-252 (1975), while their conduct nevertheless was measured by a malpractice standard, see McCullough v. Sullivan, 102 N.J.L. 381, 132 A. 102 (Sup. Ct. 1926); Pike v. Honsinger, 155 N.Y. 201, 49 N.E. 760 (1898).

Licensing of journalists would constitute direct government regulation and would also pose the perhaps greater danger of government using licensing to choose those journalists it likes best. The first amendment clearly prohibits government from discriminating among journalists or journalism organizations. See Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue, 460 U.S. 575, 592-93 (1983) (state use tax on products used by newspaper publishers discriminated against the press, and was held void under first amendment); Sherrill v. Knight, 569 F.2d 124, 129-30 (D.C. Cir. 1977) (first amendment prohibits discrimination in issuance of White House press passes); Cable News Network v. ABC, 518 F. Supp. 1238, 1245 (N.D. Ga. 1981) (requiring nondiscriminatory access to White House among the media).

It is unlikely that journalists in this country will ever accept government licensing of any form. That alone distinguishes journalists from other groups that have specifically sought government licensing to enhance professional status and effectively to limit market entry of competitors. See Abel, The Rise of Professionalism, 6 Brit. J. of L. & Soc’y 82, 83-87 (1979).

A huge majority of bar applicants passed the examinations on the first attempt during the 1970’s. V. Countryman, T. Finman & T. Schneyer, The Lawyer in Modern Society 758 n.59 (1976). In medicine, the gatekeeper role of the schools is well known. See J. Berlant, supra note 163, at 180-81.

See C. Christians & C. Covert, supra note 112, at 11-14.


One of the clearest indications of the seriousness the media attach to ethical issues
The existence of that concern should be reflected in adjudicating libel actions.

C. Use of Professional Standards in Libel Litigation

This section will illustrate how codes of ethics and other discernible professional standards may be used by all parties in libel litigation. The application of professional journalism standards that will most alarm journalists will be by plaintiffs. It is reasonable to assume that plaintiffs will use codes to their advantage once the professional nature of the libel action is better developed. This application can take several forms. A plaintiff's best use, of course, would occur where it can be shown clearly that the defendant violated the standards of journalism. Such behavior would rather obviously evidence a lack of due care.\(^\text{172}\)

Rather than such a clear case of liability, however, a battle of experts is more likely to develop. If a national standard is employed, as recommended, both sides should have little trouble retaining experts. Of course a battle of experts always presents the danger that a jury will base its conclusion on the relative effectiveness of the experts' presentations rather than upon the actions of the news media defendant. It is the judge's responsibility, however, to explain the role of experts and attempt to limit their influence. There is little evidence that the use of experts has proved unworkable in other malpractice actions.

A third possibility is that plaintiffs, without producing direct evidence of a violation, will use codes, policies or standards to raise an inference that the defendant has failed to abide by them. This might be done by making comments that appeal to a jury's bias against the media, or perhaps by reference to a standard higher than that generally accepted among professional journalists in the United States. Proper jury instructions can help to avoid this problem.

The most likely use of codes is in traditional discovery before trial and cross-examination during trial. The plaintiff might seek an admission that a reporter was unfamiliar with codes or standards or was uncertain about the application of the standards in a given situation.\(^\text{173}\) If journalists can be shown to be unfamiliar with the practices and standards of their own profession, they will lose many libel cases. For this reason, if not out of a sense of social responsibility, journalists must ensure that they know and adhere to these standards.

Use of professional standards by journalist defendants has been amply
discussed. Reporters and editors who are called to testify should not speak only to what they did on a story; they should tell the judge and jury that their methods are accepted in the journalism profession. Rather than waiting until a libel suit is filed, however, a journalist should anticipate possible litigation. Many journalists routinely create full files and records for stories they have prepared. This material can be useful in many respects: It can demonstrate the types of sources interviewed, establish the time frame in which the story was developed, show any additional research a reporter may have done to get a better grip on a complex subject, and prove that responses to accusations were sought. A good record, therefore, is probably the most helpful item in demonstrating that a given story was prepared in accordance with accepted journalistic practices.

The hierarchy of a news organization may become important because editors’ notes and comments on stories will be relevant in an assessment based on professional standards. For example, an editor’s failure to require further investigation when the danger of a story to someone’s reputation is readily apparent could render a news organization ripe for a suit even if the reporter involved had no suspicion of the danger. Because editors are the primary means within a news organization of ensuring that a story meets the standards of journalism, and are empowered to exercise the greatest judgment and discretion in most news organizations, the role of the editor is a significant area of inquiry in libel actions.

Judges in journalism malpractice cases must be careful to frame their charges to juries in terms of the applicable professional standards. Especially in the early stages of this developing action, rigorous appellate review would be needed in order to guard against failure of the judge properly to charge the jury. The trial judge, however, is the first protection against jury verdicts that are manifestly opposed to the law.

The use of codes and practices may also have an effect on damages. For example, assuming negligence has been shown, the codes might be used as a yardstick to show that the defendant did not depart drastically

174. See supra notes 120-71 and accompanying text.
175. Supporting affidavits, leading textbooks and scholarly research, and any applicable policies of the news organizations will be helpful.
176. See Daniels, Pre-Complaint Phase: Avoiding Litigation—Preventing Counseling, in Practicing Law Institute, Handbook on Libel Litigation 1981, at 17, 33 (1981). Alteration or destruction of all or part of a record may eliminate evidence of negligence, but can lead to other harmful consequences. In the confidential source context, some courts have allowed juries to assume that refusal to reveal sources in a libel action allows a presumption that no source existed for the statement. See DeRoburt v. Gannett Co., Inc., 507 F. Supp. 880, 887 (D. Hawaii 1981); Downing v. Monitor Publishing Co., 120 N.H. 383, 387, 415 A.2d 683, 686 (1980). A similar presumption might allow a jury to infer negligence from the absence of a record showing that due care was taken.
from prevailing practices. In most states this would preclude a finding of actual malice and assessment of punitive damages. A showing that a negligent defendant nevertheless acted in good faith, perhaps by seeking reactions or retracting an erroneous statement, might prevent assessment of other damages, such as those for infliction of emotional distress.\textsuperscript{180} Of course, the mitigating effect of compliance with codes or standards after a showing of negligence depends on a showing that the defendant was unreasonable only in part.

Finally, there is the issue of the role of experts in libel litigation. First, as noted, the community approach should be explicitly abandoned.\textsuperscript{181} Journalism standards vary little,\textsuperscript{182} and exceptions such as the practice of small-town journalism seldom arise in reported cases. A national standard assures that regional peccadilloes do not come to dominate libel litigation, and should also ensure that experts are available when needed.

A second question concerns when those experts are needed. Unlike other professional liability actions, it is not assumed that expert testimony will always be necessary.\textsuperscript{183} In the academic world, much journalism research is quantitative. Professional literature on newsgathering standards and practices is plentiful, and libel litigation is particularly amenable to the use of statistical and social science research in establishing prevailing practices.\textsuperscript{184} A body of literature already exists that may be helpful in establishing standards.\textsuperscript{185} The expert may not be needed in


\textsuperscript{181} See supra notes 109-18 and accompanying text.

\textsuperscript{182} See supra notes 111-16 and accompanying text. \textit{But see} Anderson I, supra note 21, at 466 (arguing that there is "enormous diversity within the [journalism] profession").

\textsuperscript{183} See Robertson, \textit{Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.}, 54 Tex. L. Rev. 199, 259 (1976). The Restatement (Second) of Torts assumes that expert testimony would be routine: "Evidence of custom within the profession of news dissemination would normally come from an expert who has been shown to be qualified on the subject." Restatement (Second) of Torts §580B comment h (1977). At least one court has adopted this position. See Seegmiller v. KSL, Inc. 626 P.2d 968, 976 (Utah 1981).

That expert testimony is not always needed was demonstrated in Kohn v. West Hawaii Today, Inc., 656 P.2d 79 (Hawaii 1982), where a magazine relied on the Restatement (Second) of Torts in defending a libel suit. The court held that expert witnesses were neither required nor barred in libel actions, \textit{id.} at 83, but that use of experts would be appropriate when the issues were such that laypersons were not able to assess them. \textit{Id.} In \textit{Kohn}, however, the plaintiff had introduced the defendant's own standards, which had not been followed. Testimony concerning the prevailing practices in the industry thus was not needed, because the defendant had substituted its own standards. \textit{Id.} at 82. Violation of one's own standards should constitute malpractice only if those standards comport with those prevailing in journalism.

\textsuperscript{184} The behavior of newspeople has been studied extensively for many years in such publications as Journalism Quarterly. Use of quantitative research in defining what most journalists would do in certain situations during libel litigation is but a slight extension of the present academic use of such material.

cases in which the standard is easily ascertained and the parties can agree that that standard represents the current practice of the profession. Thus, use of experts would be appropriate in close or tough cases, in which the issues are such that laypersons are not able to address them adequately. For example, it would not be surprising if experts were routinely required in libel suits arising out of extensive investigative reporting.

The third expert witness question is: Who shall act as an expert? Must that person be a working journalist, a reporter or editor? Or is a journalism professor who specializes in ethics or reporting techniques the best expert? There has been little use of expert witnesses in libel suits during the past three years, partly because of the difficulty of answering these questions.

Because the qualification of an expert is a prerequisite to admission of an expert's testimony in malpractice litigation, the issue is committed to the discretion of the courts. There is no evidence that either practicing journalists or academics make better expert witnesses. Counsel on either side might be wise to consider using both, remembering that academics publish their analysis. Journalists and academics presently seem reluctant to act as expert witnesses, but this reluctance may dissipate as the professional basis of the action becomes clearer. It is not surprising that people within the profession are reluctant to testify in lawsuits that they accurately perceive are conducted with such amorphous standards that their testimony could harm as well as aid the profession.

It should be apparent that the role of experts in journalism malpractice cases would parallel that of experts in legal and medical malpractice actions. Professional ethical or conduct standards currently enter mal-

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186. See Robertson, supra note 183, at 259.
189. McCormick on Evidence, supra note 188, § 13, at 34.
190. When a plaintiff complains that a doctor has failed to perform a medical procedure properly, expert testimony is normally required to establish the prevailing practice. Prosser and Keeton, supra note 1, at 188. The expert witness is expected to be a doctor or lawyer with a particular knowledge of the procedure or legal practice in question. Id. The courts apply the doctrine of res ipsa loquitur, typically in medical cases, when the facts and circumstances suggest the inevitability of a finding of negligence. Id. at 252-53. Res ipsa is rare in legal malpractice cases, probably due to the fact that doctors operate on people, upon whom damage is apparent, while lawyers operate with words, which wound less visibly. See Comment, Professional Negligence, 121 U. Pa. L. Rev. 627, 642 (1973). Res ipsa is a first cousin to strict liability: The shift of the burden to defendant in either res ipsa or strict liability is inappropriate in legal malpractice simply because lawyering requires interpretation of facts and choice of methods. Legal negligence is not apparent on its face: A plaintiff needs to show failure to act or inappropriate action to establish negligence. A forceps in the abdomen, on the other hand, speaks for itself. As with legal malpractice, journalism malpractice is likely to involve intangible factors
practice litigation at the expert testimony stage: By defining the prevailing practices, which are inculcated through the codes, and by discussing whether or not those practices have been followed in a given case, the expert is both telling the court and jury what the current ethical expectations involve, and informing them about specific procedures and developments.

Making libel a malpractice action will benefit both plaintiffs and defendants. A violation of professional standards should be easier for the plaintiff to prove if the standards are on the table for all to see. The slight advantage that the use of standards may give plaintiffs is more than offset, however, by the fact that the same standards, applied properly, can eliminate many of the marginal claims and vexatious suits brought today. If plaintiffs' lawyers could refer to clear standards, both in professional journalism literature and as explicated in cases, fewer suits would be brought on speculation.

One of the greatest advantages of consistent application of a malpractice rather than an ordinary negligence standard is that it promises to get lawyers out of the newsroom. The practice of relying on either in-house or outside counsel to read stories and advise about their possible libelous nature has grown with the number of libel cases in recent years. Reporters and editors often find that counsel is very cautious about what should be printed. This is not surprising when counsel is trying to assess an article on the basis of today's fragmented libel law. A consistent application and interpretation of professional standards would benefit journalists immensely. They would know that they could rely on their own standards and judgments.

III. FIRST AMENDMENT CONCERNS

Although there are many advantages to the form of libel actions proposed in this Article, journalists may be concerned that there are first amendment violations inherent in adoption of a malpractice standard.

unnamenable to a res ipsa treatment. The Restatement (Second) of Torts cautions against the use of res ipsa loquitur in journalism cases:

In the absence of expert testimony . . . the court should be cautious in permitting the doctrine of res ipsa loquitur to take the case to the jury and permit the jury, on the basis of its own lay inferences, to decide that the defendant must have been negligent because it published a false and defamatory communication. This could produce a form of strict liability de facto and thus circumvent the constitutional requirement of fault.

Restatement (Second) of Torts § 580B comment h (1977).

191. See supra note 190.


Their greatest concern may be that making libel a professional action is tantamount to government licensing or its equivalent.

There is no reason to assume, however, that recognition of professionalism for libel purposes must necessarily lead to professionalism in the regulatory and licensing sense. It is a basic tenet of first amendment law that government may not discriminate against certain members of the media because it thinks they are less responsible or professional.\footnote{See supra note 166.} Accreditation of journalists has not, however, been considered to be a prerequisite to application of the professional standard in those states that have worked on developing the malpractice concept.\footnote{See Karaduman v. Newsday, Inc., 51 N.Y.2d 531, 541-42, 416 N.E.2d 556, 561, 435 N.Y.S.2d 556, 560-61 (1980); Seegmiller v. KSL, Inc., 626 P.2d 968, 976 (Utah 1981).} What matters is that a defendant is working as a professional journalist, not that a defendant has graduated from an accredited journalism school or has been licensed by the government. Application of a malpractice standard might encourage public support for licensing, but that is a matter for future media vigilence.

Another assertion is that application of a malpractice standard discriminates among disseminators of information, but it is meant to discriminate: It recognizes that journalists have standards that the average citizen does not. If a person aspires to the status of a journalist, that person may seek to have the malpractice standard applied. The average citizen who seeks to disseminate information is amply protected by the ordinary negligence standard, which is malleable and can adapt according to the knowledge and ability of the defendant involved. The full range of other protections, including perhaps the actual malice standard, would be available to those who are not journalists.\footnote{Whether the actual malice standard would apply to nonmedia defendants is an open question. See supra note 58.} Moreover, few ordinary citizens are sued for libel as a result of disseminating information in the course of publishing a newspaper or of broadcasting a news story. The typical libel action involving ordinary citizens as defendants arise out of personal and employment relationships, not third party relationships as is the case with the mass media.

It can be argued that a malpractice approach would discriminate unconstitutionally against unpopular or nontraditional publishers and broadcasters—those who do not follow generally accepted journalism practices and would therefore not be protected by application of a malpractice standard.\footnote{See Anderson I, supra note 21, at 466-67; Robertson, supra note 186, at 257 n.367.} The current batch of standards discriminates in operation if not facially because it so easily allows juries to find against unpopular defendants.\footnote{See Robertson, supra note 186, at 238. The National Enquirer and Penthouse magazine, for example, seem to get sued for libel often, and also seem to suffer the wrath}
cepts the need for a standard of care. The nontraditional publisher will still be better served if professional rather than ad hoc considerations are applied to libel suits. The hard truth is that nontraditional publishers court trouble by operating on the very edge of the law, which in itself constitutes a recognition by these publishers of the existence of professional standards.

Another concern is that making libel a malpractice action grants the media rights that are greater than the first amendment allows. It is axiomatic that the states are free to grant greater free expression rights than the Supreme Court requires. Moreover, the development of libel-as-malpractice should be considered to be protected under the press clause of the first amendment. The Supreme Court has not expressly declared that the clause has independent significance, but the language of the Court's opinions makes it clear that the press enjoys some kind of special status. It would help if the Court would make explicit what it has been doing implicitly for the last twenty years. The Court's statements about the unique nature of the press, coupled with its express advice that states have a great deal of leeway, makes it clear that either the state courts or legislatures have the power to establish libel as a malpractice action.


200. See supra note 58.

201. See supra notes 53-84 and accompanying text.

202. The legislature is preferable because the action can be given the clarity that has escaped a majority of the courts.


204. Id. at 997 (Meskill, J., dissenting).
CONCLUSION

Few areas of law are so uncertain and imprecise as libel. Few other areas have prompted as many urgent calls for alteration. Use of a malpractice approach in libel cases would eliminate much of the uncertainty that has been produced by the ad hoc tendencies of some juries and judges to render large verdicts against media defendants who were not at fault. The courts should recognize that, as with law and medicine, the issue of whether a journalist was at fault is usually beyond the competence of a lay jury unaided by evidence of journalistic practices. Journalism codes have helped lead to a uniformity of practices that compare in consistency to the practices of law and medicine. These uniform practices can form the basis of a national standard of care, thereby providing juries and judges with objective guidelines in determining whether the journalist exercised due care.

Bits and pieces of a journalism malpractice action exist. Only a handful of courts have directly addressed questions that arise in treating libel as a malpractice action. The various formulae and tests developed by the courts have not been pieced into a coherent whole. As a result, the ability of media defendants to use journalism practices in establishing a standard of care for libel has been severely impaired. Consequently, although the first amendment requires the plaintiff in libel actions to prove that the journalist was at fault, this requirement is not clearly impressed upon juries, thereby resulting in jury verdicts against journalists and necessitating costly, even if successful, appeals.