A Higher Protection for Scholars Faced with Defamation Suits

by AMEET KAUR NAGRA*

I didn't want to stand up for muzzling.
–Dr. Jan Moor-Jankowski[1]

Introduction

On December 28, 2012, Zachary A. Kramer, Associate Dean for Intellectual Life and law professor at the Sandra Day O'Connor College of Law, was sued in the United States District Court in New Jersey by bank executive Robert Catalanello for defamation.[2] The other named defendants in the action were Washington University School of Law, the publisher of Kramer's article, and Western New England School of Law, a sponsor of one of Kramer's lectures.[3] Catalanello alleged that Professor Kramer's article, "Of Meat and Manhood," contained false and defamatory statements about Catalanello's sexual discrimination towards a former employee, Ryan Pacifico, for being a vegetarian.[4] Professor Kramer discussed the details of Catalanello's discriminatory acts in his article, citing the

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1. Dr. Jan Moor-Jankowski was a scientist and defendant in a seven-year defamation battle. The suit cost him and the other defendants $2 million in total. *See* Douglas Martin, *Jan Moor-Jankowski Is Dead at 81; Used Chimps, Kindly, in Science*, N.Y. TIMES (Sept. 3, 2005), http://www.nytimes.com/2005/09/03/nyregion/03MOOR JANKOWSKI.html. *See infra* Part II.C.

2. Complaint at ¶1, Catalenello v. Kramer, No. 2:12CV07904 (D.N.J. 2012), 2012 WL 6783638.

3. *Id*.

4. *Id* at ¶14.

complaint Pacifico filed against Catalanello in New York state court.[5] Professor Kramer spent about a quarter of his article discussing Catalanello and Pacifico's interactions to describe the relationship between food and perceived sexuality while arguing the limitations of sex discrimination law under Title VII.[6]

The lawsuit against Professor Kramer is one of several recent examples where scholars are being sued or threatened with being sued for their academic work.[7] Other scholars in the United States, such as Joseph Massad, have had their work placed out of circulation when faced with the possibility of a libel suit.[8] Gannit Ankori, the author of *Palestinian Art*, threatened to sue Professor Massad, who teaches Arab politics at Columbia University, for libel.[9] Professor Massad wrote a review of Ankori's book that was published by the College Art Association. In 2008, the Association paid Ankori $75,000, issued an apology, sent a letter to its subscribers stating that the book review "contained factual errors and certain unfounded assertions" and requested relevant portions be withdrawn from circulation.[10] Another example is Kinder USA, a children's charity, who sued Michael Levitt, author of *Hamas: Politics, Charity and Terrorism in the Service of Jihad*, for libel because of the statements Levitt made in his book.[11] Levitt asserted that he conducted three years of research and his work was subject to academic peer review.[12] Kinder USA dismissed the suit in 2007 citing mounting costs, but—

5. Zachary A. Kramer, *Of Meat and Manhood*, 89 WASH. U. L. REV. 287, n.3 (2011).

6. *Id*. at 305–13 ("If Pacifico were to pursue a remedy under Title VII, he would surely fall victim to the bootstrapping logic. His chances of convincing a court that he faced actionable sex discrimination, and not vegetarian or sexual orientation discrimination, are slim at best.").

7. *See generally* Kate Sutherland, *Book Reviews, The Common Law Tort of Defamation, and the Suppression of Scholarly Debate*, 11 GERMAN L.J. 656, 665 (2010) (discussing "libel chill in the academy" in the United States, United Kingdom and Canada.)

8. Jennifer Howard, *Art Association Paid $75,000 to Avoid Libel Lawsuit*, THE CHRON. OF HIGHER EDUC. (June 22, 2008), http://chronicle.com/article/Art-Association-Paid-75000/41195.

9. *Id*.

10. *Id*.

11. Josh Gerstein, *Charity Drops Suit Against Terrorism Analyst*, N.Y. SUN (Aug. 16, 2007), http://www.nysun.com/national/charity-drops-suit-against-terrorism-analyst/60635.

12. *Id*.

more likely—California anti-SLAPP protections prompted the dismissal.[13]

Defamation suits against scholars have rarely been successful in the United States because of First Amendment protections,[14] but the prospect of spending a hefty sum to defend a defamation suit has a chilling effect on what scholars research or write. Professor Frank Sulloway's threat to sue *Politics and Life Sciences*, a journal published by the Association of Politics and Life Sciences, is illustrative.[15] The journal was planning on publishing a critique of Sulloway's book, *Born to Rebel*, and then invited Sulloway to write a response to the criticism.[16] Instead, Sulloway threatened to bring a defamation action accusing the journal's editor, Gary Johnson, of misconduct, and to complain to the university where Johnson taught as a professor.[17] Although no legal action was initiated, the journal's publishing contract was terminated and the September 2000 issue, which was to feature the critique, was not published until 2004.[18] Johnson noted that such publication delays "threatened" the overall "health of the journal and the association."[19] Consequently, Johnson advocated for a "multidisciplinary legal defense fund" for "small organizations and individuals" that face daunting legal costs because of what they publish.[20] Compared to profitable media companies, scholars are particularly vulnerable to defamation suits because of financial concerns. As Judge Easterbrook stated in *Underwager v. Salter*:

> Newspapers, magazines, and broadcast stations reap considerable profits from their endeavors, and the obligation to pay damages to those they injure is unlikely to put them out of business or even substantially temper their reports. (Consider that the British press, which lacks the *New York Times* shield, is today at least as likely as the American press to

13. *Id*.

14. *See infra* Part II.

15. Gary R. Johnson, *Science, Sulloway, and Birth Order: An Ordeal and an Assessment*, 19 POLITICS AND THE LIFE SCIENCES 211, 211 (Sept. 2000). *See* AMY GAJDA, THE TRIALS OF ACADEME 157–161 (Harvard Univ. Press ed., 2009) (discussing these events).

16. Johnson, *supra* note 15, at 212.

17. *Id*. at 219–21.

18. *Id*. at 211–12.

19. *Id*. at 241.

20. *Id*.

> publish adverse information about public figures.) Psychologists compiling monographs with the aid of research grants, and prosecutors seeking to augment one side's arsenal for trial, do not receive comparable rewards. Exposing such persons to large awards of damages is more apt to lead to silence than are comparable awards against media defendants.[21]

To avoid the silence cautioned by Judge Easterbrook, this Note calls for heightened protection for scholar defendants who face defamation suits.[22] The first section of this Note will review key Supreme Court defamation cases and demonstrate the lack of a specific, categorical protection for scholars. The second section will study defamation cases in the United States that involved scholarly speech and will argue that more definite protections are needed. As used in this Note, "scholarly speech" means a dissemination of the ideas of those who engage in serious study or research. The third and final section will argue that a common interest privilege similar to California's is a more definite protection of scholarly speech.[23]

I. Lack of Protection for Scholars in the Supreme Court's Defamation Jurisprudence

A. *New York Times v. Sullivan*: The Beginning of a First Amendment Shield Against Defamation Suits

Defamation is defined as a communication "which tends to hold the plaintiff up to hatred, contempt or ridicule or to cause him to be shunned or avoided."[24] It is "an invasion of the interest in reputation and good name."[25] Defamation consists of the torts libel and slander.[26] Libel refers to written communication, while slander refers to spoken communication.[27] The Supreme Court's jurisprudence related to this common law tort illustrates a tension between its

21. Underwager v. Salter, 22 F.3d 730, 735 (7th Cir. 1994).

22. *Id.*

23. Harkonen v. Fleming, 880 F .Supp. 2d 1071, 1079 (N.D. Cal. 2012). *See also* CAL. CIV. CODE § 47(c)(1) (2005).

24. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 739 (West Publ'ng Co. et al. eds., 4th ed. 1971).

25. *Id* at 737.

26. *Id.*

27. *Id.*

purpose of protecting "the individual's right to protection of his good name" and society's interest in "'uninhibited, robust and wide-open debate on public issues."[28]

In 1964, for the first time, the Supreme Court decided in *New York Times v. Sullivan* that the First Amendment limits state anti-defamation laws.[29] In this case, an elected commissioner of Montgomery, Alabama sued the *New York Times* for libel over an advertisement that accused the police, and thus the commissioner, of inappropriate police action.[30] The Court noted that the First Amendment illustrated "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open."[31] The Court ruled that neither false nor defamatory statements will "remove the constitutional shield from criticism of official conduct."[32] The Court refused to place the burden of proving truth or risking a libel judgment on the defendant because the possible inability to prove truth in court would act as a deterrent towards truthful speech and ultimately result in "self-censorship."[33] The Court held that in order to recover from defamation, a public official has to prove that a statement related to his "official conduct" was made with "actual malice," meaning "knowledge that it was false or with reckless disregard of whether it was false or not."[34]

B. Taking Context Into Account to Determine Meaning: A Limited Protection for Scholarly Ideas

In *Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler*, a local real estate developer sued a small weekly newspaper for libel because the newspaper published articles stating that some people attending the public meetings of a controversial project characterized the developer's negotiating position as blackmail.[35] The Supreme Court held that the alleged defamatory statement accusing the plaintiff of "blackmail" was a "rhetorical hyperbole" and not defamation when

28. Gertz v. Robert Welch, Inc. 418 U.S. 323, 340–41 (1974) (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964)).

29. *New York Times*, 376 U.S. at 264–65.

30. *Id.* at 257–58.

31. *Id*. at 256, 270.

32. *Id*. at 273.

33. *Id*. at 279.

34. *Id*. at 279–80.

35. Greenbelt Coop. Publ'n Ass'n, Inc. v. Bresler, 398 U.S. 6, 7–8 (1970).

made in the circumstances of heated community debates.[36] The Court stated that readers of the article describing statements made at a debate would not have understood "blackmail" to mean that the plaintiff had committed a crime, but as a characterization of his "negotiating position."[37]

Four years later, the Supreme Court reached a similar decision in *Letters Carriers v. Austin*. In *Letters Carriers*, nonunion letter carriers sued a union for including a list in their publications labeling the nonunion letter carriers as "scabs."[38] The Court concluded that such a label was not a "reckless or knowing falsehood," but was "literally and factually true" since a definition of a "scab" includes those who refuse to join a union.[39] The Court also ruled that the publication of an insulting definition of "scab" was protected because "such words were obviously used here in a loose, figurative sense to demonstrate the union's strong disagreement with the views of those workers who oppose unionization."[40] Referring to *Bresler*, the Court concluded that readers of the letter would not have believed that the plaintiffs committed treason and that publishing the insulting definition of "scab" was protected as a "rhetorical hyperbole, a lusty imaginative expression."[41]

In both cases, the Court looked to the context in which the statement was made to determine the meaning of an alleged defamatory statement. While this is far from affording additional, specific protection to scholarly speech, the Court's analyses in *Bresler* and *Letter Carriers* afford scholars an additional shield by allowing courts to take into account the context in which the statements were made. By taking context into account to determine the meaning of the words at issue, the Court concluded in both cases that the statements were not an attack on the plaintiffs, but a disagreement with their ideas. In *Bresler*, the context involved a disagreement with how the developer was bargaining;[42] in *Letter Carriers*, the context involved nonunion employees' refusal to join the union.[43] This is

36. *Bresler*, 398 U.S. at 13–14.

37. *Id*. at 14.

38. Old Dominion Branch No. 496, Nat. Ass'n of Letter Carriers, AFL-CIO v. Austin 418 U.S. 264, 267–69 (1974).

39. *Id*. at 283.

40. *Id.* at 284.

41. *Id*. at 285–86.

42. *Bresler*, 398 U.S. at 7.

43. *Letter Carriers*, 418 U.S. at 284.

significant for scholarly speech because what is usually being discussed is not personal character, but ideas.

C. *Rosenbloom* and *Gertz*: A Shift From "Public Concern" to the Character of the Parties

In *Rosenbloom v. Metromedia Inc.*, a private plaintiff sued news media for defamation because the media reported on the plaintiff's lawsuit against local officials who had seized his magazines for obscenity.[44] The Supreme Court was split. The plurality extended the protection afforded by the *New York Times* malice standard "to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."[45] The Court stated that "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."[46]

The Court focused on the subject matter of the alleged defamation instead of the character of the plaintiff or the fault of the defendant.[47] The Court stated that a public issue cannot "suddenly [become less a subject of public interest] merely because a private individual is involved."[48] The Court did not inquire into how well known the plaintiff was or if he had sought notoriety, but instead focused on the public issue involved in the case: correct enforcement of criminal laws—especially obscenity laws—because they implicated constitutional concerns of free expression.[49] Although the plaintiff was a private figure, the Court applied the *New York Times* malice standard because a public issue was involved.[50] Justice Harlan dissented, stating that although the most "utilitarian approach" would be to carefully examine every libel judgment to ensure "First Amendment values" would be protected, *New York Times* was a rule of "general application."[51]

The Court's extension of *New York Times* in *Rosenbloom* was short-lived. In *Gertz v. Robert Welch, Inc.*, a lawyer sued a

44. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 32–33 (1971).
45. *Id.* at 43–44.
46. *Id*. at 43.
47. *Id.* at 32–33.
48. *Id*. at 43.
49. *Id*.
50. *Id.* at 49.
51. *Id*. at 63.

publication because it was inaccurately published that the lawyer had a criminal record and was a communist.[52] The Supreme Court decided that "the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them," and *Rosenbloom* would lead to "unpredictable results and uncertain expectations" because of the inability to manage lower courts.[53] The Court stated, "[b]ecause an ad hoc resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application."[54]

Because of the necessity for efficient judicial review and the Court's belief that it can more easily distinguish between defamation plaintiffs and public/private concern in such actions, a recognition of scholarly activity as an interest deserving the protection of the *New York Times* malice standard will likely be unsuccessful under *Gertz*. Recognizing a narrow interest such as scholarly activity would not comport with the Court's desire to implement rules of "general application" or focus on the character of the plaintiff. *Gertz* did, however, include dicta that appeared to be protective of defendants such as scholars: "[w]e begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[55] Any possible protection from these statements would later dissipate with the Supreme Court's decision in *Milkovich v. Lorain Journal Co.*[56]

While establishing a "public" versus "private" figure distinction among plaintiffs for defamation claims, the *Gertz* Court observed: "public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater."[57]

52. Gertz v. Robert Welch, Inc., 418 U.S. 323, 326 (1974).

53. *Id.* at 339.

54. *Id*.

55. *Id*. at 339–40.

56. *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 18 (1990). *See also infra* p. 13.

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

The Court also further defined the meaning of "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 persuasive power and influence that they are deemed public figures for all purposes."[58] The Court distinguished an all-purpose public figure from a limited-purpose public figure, which is "an individual [who] voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions."[59]

The Court held, "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."[60] The *New York Times* malice standard, however, is still required to be met when imposing punitive damages, regardless if the plaintiff was a public or private individual.[61]

Determining whether plaintiffs are private or public figures in the context of scholarly speech may be difficult and may not afford sufficient protection to scholar defendants. More scholars are likely to be considered private individuals because of the Court's narrow interpretation of a "public figure."[62] The Court did not find Gertz, a lawyer involved in a public issue, to be a public figure because he never sought attention from the press and he played a limited role.[63] Scholars, however, whether public or private figures, have access to the "channels of effective communication,"[64] which was the main

58. *Id*. at 345.

59. *Id*. at 351.

60. *Id*. at 347.

61. *Id*. at 349.

62. *See* William T. Mawyer & G. Jane Hicks, *Academic Journals and the Management of Defamation and Plagiarism*, 18 SOUTHERN L.J 88, 90 (2008) ("However, editors and publishers should be aware that it might prove difficult to distinguish between private and public figures.").

63. *Gertz*, 418 U.S. at 325. A Chicago police officer shot and killed a youth; the police officer was convicted of homicide. The family of the victim retained Gertz to represent them in a civil suit against the officer.

64. This may not be true in cases such as *Catalenello v. Kramer* where the plaintiff is not a scholar, but rather a businessman. *See supra* p. 1. Non-scholar plaintiffs, however, still have access to new media. *See* Jeff Kosseff, *Private or Public? Eliminating the* Gertz *Defamation Test*, 2011 U. ILL. J.L. TECH. & POL'Y 249, 266 (2011) ("In the past three decades, the ability for self-help has spread to the masses, largely due to the Internet. Services such as Blogspot and Blogger offer free blogs, so anyone with an Internet connection can create a publicly accessible forum to correct false statements. The barriers of 1974 no longer exist.").

justification the *Gertz* Court used to make a public versus private figure distinction. There are hundreds of thousands of academic journals that scholars may use to counter claims and ideas they consider unfavorable.[65] Being classified as a private figure renders the protection of the *New York Times* malice standard inapplicable, increasing the likelihood that a defamation suit will be successful. After *Gertz*, most states required only private figure plaintiffs to prove simple negligence when bringing a defamation claim.[66]

For defamation suits involving scholarly speech, the *Rosenbloom* standard would have been just as difficult to apply as *Gertz*'s public versus private figure standard. For example, which scholarly subjects would enjoy the protectionary label of "public or general concern," if any?[67] By extending the *New York Times* malice standard to analyze subject matter, the Court could have established a foundation to recognize scholarly speech as "public or general concern," given the importance of full, frank discussion to the academic community. However, after *Gertz*, and later in *Time, Inc. v. Firestone*, the chances of recognized constitutional protection for scholarly speech have diminished.

D. *Firestone*, *Greenmoss Builders* and *Hepps*: The Changing Significance of Subject Matter

Applying *Gertz* in *Time, Inc. v. Firestone*, the Court did not find the head of a wealthy industrial family's wife to be a "public figure."[68] It refused to automatically extend the *New York Times* malice rule "to all reports of judicial proceedings."[69] The Court stated that there

65. Association of American University Presses (AAUP) states that 230,000 titles are in print at its member presses. *See AAUP Snapshot*, ASSOCIATION OF AMERICAN UNIVERSITY PRESSES (Apr. 2013), http://www.aaupnet.org/about-aaup/about-university-presses/aaup-snapshot. Judge Posner also observed, "[u]nlike the ordinary citizen, a scholar generally has ready access to the same media by which he is allegedly defamed." Dilworth v. Dudley, 75 F.3d 307, 310 (1996).

66. John J. Watkins & Charles W. Schwartz, Gertz *and the Common Law of Defamation: Of Fault, Nonmedia Defendants, and Conditional Privileges*, 15 TEX. TECH L. REV. 823, 829 (1984) ("After *Gertz* a public figure must satisfy the *New York Times* requirement of knowing falsity or reckless disregard for the truth, while a private plaintiff need only prove the degree of fault chosen by the particular state—usually simple negligence.").

67. Kosseff, *supra* note 64, at 275 ("Unfortunately, the *Rosenbloom* rule creates confusion similar to what has been caused by *Gertz*.") Kosseff notes that events such as city council meetings would easily qualify as events of "public concern," but disciplinary actions a school board takes against a single teacher may be more difficult to classify.

68. Time Inc. v. Firestone, 424 U.S. 448, 455 (1976).

69. *Id.* at 453–55.

was little reason why private plaintiffs "should substantially forfeit that degree of protection which the law of defamation would otherwise afford them simply by the virtue of their being drawn into a courtroom."[70] The Court stated that it would not use "subject matter classifications," such as reports of judicial proceedings, in deciding to what extent defamation should be constitutionally protected, citing the dismissal of the *Rosenbloom* test in favor of a plaintiff's character determination under *Gertz*.[71] Thus, *Firestone* reinforced a limitation on the application of the *New York Times* malice standard to public figure plaintiffs.

Focus on subject matter returned to the Supreme Court's defamation analyses in *Dun & Bradstreet, Inc. v. Greenmoss Builders*[72] and *Philadelphia Newspapers, Inc. v. Hepps*,[73] but only to determine awards of damages[74] and burdens of proof, respectively.[75] The subject matter of the speech was not used to determine defamation liability itself. In comparison, the character of the parties and the fault of the defendants played a more significant role. In *Dun & Bradstreet*, the Court found that the defamatory credit report the defendant issued to a private plaintiff did not involve public concern.[76] The Court held that punitive damages could be awarded without a showing of *New York Times* malice if the case does not involve such public concern.[77] In *Hepps,* the Court held that when there is a media defendant and a matter of public concern is involved, the Constitution requires that the burden of proving falsity falls on the plaintiff, contrary to the common law rule, which places the burden of proving the truth on the defendant.[78] The Court reserved judgment on cases involving non-media defendants.[79]

70. *Id*. at 453.
71. *Id*. at 456.
72. Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749 (1985).
73. Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).
74. *Dun & Bradstreet, Inc.*, 472 U.S. at 763.
75. *Hepps*, 475 U.S. at 776.
76. *Dun & Bradstreet, Inc*., 472 U.S. at 761–62.
77. *Id*. at 763.
78. *Hepps*, 475 U.S. at 776–77.
79. *Id*. at 779 n.4.

E. *Milkovich* and *Masson*: The Court's Rejection of Additional Protections

In *Milkovich v. Lorain Journal Company*, a former high school wrestling coach sued a newspaper and reporter for defamation after publishing a column accusing the coach of committing perjury.[80] The Court rejected a separate constitutional privilege for "opinion." It noted that already existing protections exist for opinions, including the *Hepps* requirement of proving falsity, the *New York Times* malice standard, and the *Bresler* and *Letter Carrier* protections for statements that are not meant to be taken literally.[81] The Court also dismissed any protections for opinions under the *Gertz* dicta.[82]

As part of its reasoning, the Court opined that the statement, "[i]n my opinion, Jones is a liar," is just as damaging as "Jones is a liar."[83] The Court asked "whether a reasonable fact finder could conclude that the statements in the Diadun column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding."[84] The Court answered the question in the affirmative, noting that "loose, figurative, hyperbolic" language was not used to cast doubt that the writer seriously believed that Milkovich committed perjury and the allegations in the column were factual enough to be proved true or false.[85] The Court focused on the statements at issue and did not analyze the overall nature of the article.

In *Masson v. New York Magazine, Inc.*, the Court decided a libel claim involving an alleged fabricated quotation.[86] The Court stated that fabricated quotations could injure reputation either by attributing an "untrue factual assertion" to the speaker or by "manner of expression or even the fact that the statement was made indicates a negative personal trait or an attitude the speaker does not hold."[87] The Court rejected any "special test of falsity for quotations," instead holding:

> [A] deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for

80. *Milkovich*, 497 U.S. at 3.
81. *Id.* at 16–17.
82. *Id.* at 18.
83. *Id.* at 26–27.
84. *Id.* at 21.
85. *Id.* at 21–22.
86. Masson v. N.Y. Magazine, Inc., 501 U.S. 496, 499 (1991).
87. *Id.* at 511.

> purposes of [*New York Times* and *Gertz, Inc.*], unless the alteration results in a material change in the meaning conveyed by the statement. The use of quotations to attribute words not in fact spoken bears in a most important way on that inquiry, but it is not dispositive in every case.[88]

Milkovich and *Masson* demonstrated the Court's unwillingness to venture into new areas in its defamation jurisprudence. As with *Gertz* and *Firestone*, the Court was unwilling to create additional rules, instead preferring to stick to precedent while confronting new situations. As a result, the Court will likely not recognize a special protection for scholarly speech in the future.

II. Study of Defamation Cases Across the United States that Involve Scholarly Speech

A. From Psychology to Pharmacy in the Seventh Circuit: Keeping an Eye on Academic Context

Four notable defamation cases that involve scholarly speech in the Seventh Circuit were decided between 1994 and 2009. Two cases applied Wisconsin law, one applied Indiana law, and the other applied Illinois law. These cases were decided for the scholar defendants and came to the identical conclusion that academic controversies should not be settled in court. These cases took into account academic context, the scholar status of the defendants, whether the statements were capable of defamatory meaning, and whether actual malice was present. Before the cases considered actual malice, it was first determined whether the words were reasonably capable of defamatory meaning. These cases illustrate that the "defamatory meaning" inquiry is murky and extensive, and does not provide much guidance for scholar defendants.

In *Underwager v. Salter*, Ralph Underwager and Hollida Wakefield were psychologists and authors of two controversial books regarding memories of child sexual abuse. They sued psychologist Anna Salter and former prosecutor Patricia Toth for defamation.[89] During an episode of *60 Minutes: Australia*, Salter stated that Underwager "distorts facts" and that Underwager's testimony in a

88. *Id.* at 516–17.

89. Underwager v. Salter, 22 F.3d 730, 731–33 (7th Cir. 1994).

case "that 90% of all accusations of child molestation are wrong is 'gobbledygook' unsupported by any scientific evidence."[90] Prior to the *60 Minutes* interview, over the course of 18 months, Salter studied all the original works that plaintiffs had cited in their books.[91] Toth then played a tape of this episode at professional conferences.[92]

The court found that the plaintiffs were limited-purpose public figures under Wisconsin law because their "'role in the controversy' explored by defendant's speech is 'more than trivial or tangential.'"[93] The court stated that the plaintiffs were "well-known personages in the legal, medical, and scientific debates about children's ability to describe their sexual experiences."[94] The court's application of the limited-purpose public figure standard demonstrated a protective standard for scholars entangled in legal disputes with their peers. The "public controversy" was broadly defined as "child abuse," which provided the defendants the shield of actual malice.[95]

The court used the scholar status of the defendants in determining whether to create a distinction with media defendants.[96] The plaintiffs argued that they did not need to establish actual malice because the defendants were not reporters or publishers.[97] Although noting that the Supreme Court has not ruled whether *Gertz* applies to non-media defendants, the court decided that there was no distinction between media and non-media defendants under Wisconsin law.[98] The court reasoned, "[j]ust as the public has a strong interest in providing reporters with a qualified privilege to report on current events without fear of liability for accidental misstatements, so the public has a strong interest in protecting scholars and prosecutors."[99] By refusing to create a distinction between media and non-media defendants, the court created a strong protection for scholar defendants, who will almost never be considered media defendants, but will still have the protection of actual malice. In this case, the court did not find actual malice, noting that "[s]cientific truth is

90. *Id.*
91. *Id.* at 734.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 734–35.
97. *Id.* at 734.
98. *Id.*
99. *Id.* at 734–35.

elusive" and there was no evidence that Salter knew she was writing incorrect statements or that she did not bother checking what she was writing.[100]

In *Dilworth v. Dudley*, Underwood Dudley, a mathematics professor, called William Dilworth, an engineer, a "crank" in a mathematics book because of his mathematical ideas; Dilworth then sued Dudley for defamation.[101] The court found the plaintiff to be a limited-purpose figure despite the fact that he was an "obscure engineer."[102] Judge Posner stated, "anyone who publishes becomes a public figure in the world bounded by the readership of the literature to which he has contributed."[103] Similar to *Underwager*, the court applied the limited-purpose public figure standard broadly. It appears from the court's opinion that publication alone can make someone a public figure.

The court also decided that the word "crank" was not capable of defamatory meaning.[104] Citing *Bresler* and *Letter Carriers*, Judge Posner stated that the context must be taken into account to determine whether a word is used figuratively or literally.[105] In making this determination, he concluded that when used in a scholarly context the word "crank" was "just a colorful and insulting way of expressing disagreement with his master idea."[106] Judge Posner stated that if the term were used instead to describe the plaintiff's "character or sanity," it would have been a different case.[107] Judge Posner concluded, "judges are not well equipped to resolve academic controversies;" [source for quote] Dilworth should have published a rebuttal instead.[108]

Finding that a work was *not* academic has also led to a positive outcome for a scholar defendant. In *Lott v. Levitt*, John Lott, an academic and economist, sued Steven Levitt, an economist and author of the best-selling book, *Freakonomics*.[109] In a paragraph of his book, the defendant wrote that other scholars were not able to

100. *Id.* at 735.
101. Dilworth v. Dudley, 75 F.3d 307, 308 (7th Cir. 1996).
102. *Id.* at 309.
103. *Id.*
104. *Id.* at 310.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 311.
109. Lott v. Levitt, 556 F.3d 564, 566 (7th Cir. 2009).

"replicate" the plaintiff's results.[110] Under Illinois law, if a statement is "reasonably capable of an innocent construction [it] is not per se defamatory."[111] The plaintiff argued that the academic definition of "replicate" should be used, which meant that he falsified data or did not perform his analysis correctly.[112] Observing that *Freakonomics* was a "broadly appealing book," the court determined that a general definition of "replicate" outside the academic context was applicable.[113] The court found that in *Freakonomics* "replicate" meant that "scholars have disagreed with [the plaintiff's] findings."[114] The court said that if the plaintiff was complaining about an attack on his ideas instead of his character, he had no claim.

Dilworth and *Lott* demonstrate that when courts use a scholarly context to determine the meaning of alleged defamatory words, they have to first determine what qualifies as "scholarly." On the one hand, as in *Dilworth*, the court concluded that the article's context was scholarly because it discussed complex mathematical ideas.[115] On the other hand, as in *Lott*, works such as *Freakonomics* are harder to classify. Before labeling the work a "broadly appealing book," the court also noted that "econometrics is far from conventional wisdom."[116] The fact that *Freakonomics* was a *New York Times Bestseller*, which indicated its lay readership, appears to have played a significant role for the court in determining what meaning of "replicate" to use. Taking context into account to determine defamatory meaning is usually favorable to scholar defendants, but as *Lott* demonstrates, defining the context itself is both a difficult task and a subjective inquiry. Such a standard does not provide scholars with much guidance.[117] Even where context can be easily defined (as in *Dudley*), courts still have the task of determining the meaning of the words used.

110. *Id*. at 566–67.

111. *Id*. at 568–69.

112. *Id*. at 569.

113. *Id*.

114. *Id.* at 570.

115. Dilworth v. Dudley, 75 F.3d 307, 308–09 (7th Cir. 1996).

116. *Lott*, 556 F.3d at 569.

117. *See* AMY GAJDA, THE TRIALS OF ACADEME 169, *supra* note 15 (Discussing the court's approach in determining defamatory meaning in *Lott*, Gajda argued, "tying liability to the common understandings of a nonacademic audience, the court's approach suggests that scholars must anticipate possible meanings of their speech that scholars themselves would not attach to the words.").

In *Containment Technologies Group*, *Inc. v. American Society of Health Systems Pharmacists*, a manufacturer sued the publisher of the article at issue and three authors for libel in Indiana District Court.[118] The manufacturer played an important role in safely packaging prescriptions that would be directly injected into patients.[119] Two of the authors worked at a small business, Lab Safety Corporation, and the other was a pharmacist.[120] After testing five medical devices, the defendant authors recommended four of the devices, but did not recommend the plaintiff's device, which produced poor results.[121] One of the authors considered not publishing the article after a defamation suit was threatened.[122]

The court found that some of the statements were not defamatory because they did not refer to the defendant directly and others merely described the testing process.[123] However, the court decided that the defendants' conclusion that the plaintiff's device was inferior to the other devices tested was potentially defamatory. The court rejected the plaintiff's argument that it was a constitutionally protected opinion.[124] As a result, the court went on to consider whether the actual malice standard applied.[125]

Indiana law requires actual malice for all speech involving public concern.[126] The court found that the article "dealt with a serious health issue" and the safety of medical devices is one of "general and public concern."[127] The court did not find any malice on the part of the publisher since the article was peer-reviewed and received favorable feedback.[128] Despite possible "scientific problems" with the study, the court stated, "bad, but honest science is not actionable as defamation."[129]

The court noted that the only way that the plaintiff could have shown actual malice on the part of the authors would be if the authors

118. Containment Techs. Grp., Inc. v. Am. Soc'y of Health Sys. Pharmacists, No. 1:07–cv–0997–DFH–TAB, 2009 WL 838549, at *1 (S.D. Ind. Mar. 26, 2009).

119. *Id.*

120. *Id.* at *2–3.

121. *Id.* at *3.

122. *Id.* at *6.

123. *Id.* at *11.

124. *Id.* at *12.

125. *Id.*

126. *Id.*

127. *Id.* at *13.

128. *Id.* at *14–15.

129. *Id.* at *16.

had rigged the study.[130] The court also concluded that the battles should have taken place in the pages of the defendants' journal and other publications instead of in court.[131] If actual malice is required, it is difficult to imagine a successful case against scientific publishers and authors. Peer review and conducting an experiment in good faith will probably protect defendants in almost all cases. Scientists will likely never use their hard work for the sole purpose of attacking an individual or company.[132] As a result, courts applying the actual malice standard to scholar defendants will rarely find defamation liability.

B. Texas: Broad Protection for Medical Science Research

In *Ezrailson v. Rohrich*, a biochemist sued three medical science researchers at the University of Texas Southwestern Medical Center in Dallas for libel because of an article they published in a medical journal.[133] The article argued that the effectiveness of silicone antibody assays used to detect the leakage of silicone gel from breast implants into the body were "questionable," implying that the assay the plaintiff researched and developed was also "questionable."[134] The article named the plaintiff's then-employer as the developer of the assay, and credited the plaintiff as an author in a footnote.[135] After the plaintiff complained to the university, it concluded that the research was "sloppy," the article was publicly retracted and the defendants apologized.[136] The plaintiff filed suit, contending that the article's statement—that the assay used by the defendants in their research was similar to the one he developed—was false and defamatory.[137] The defendants conceded this statement was

130. *Id.*

131. *Id.* at *18.

132. *See* Christopher P. Guzelian, *Scientific Speech*, 93 IOWA L. REV. 881, 913 (2008) ("Nearly all scientific-opinion holders subjectively believe their opinions reflect the truth. Actual malice means that for liability to exist, an opinion-giver whose opinion causes allegedly injurious false perceptions subjectively has to have knowledge or a 'high degree of awareness of their probable falsity.' Scientific opinions, therefore, would nearly always be protected, no matter how misleading and injurious they might be.") (quoting Garrison v. Louisiana, 379 U.S. 64, 74 (1964)).

133. Ezrailson v. Rohrich, 65 S.W.3d 373, 374 (Tex. App. 2001).

134. *Id.* at 377.

135. *Id.*

136. *Id.*

137. *Id.* at 380.

erroneous.[138] Using the complex meaning of the word "similar," the court stated that "similar" meant that the assays were "sufficiently similar" so the defendants could have used the assay to effectively judge that of the plaintiff.[139] The court found that this was a hypothesis and a criticism of the plaintiff's ideas.[140]

The court next determined whether the defendants' statements were defamatory.[141] Texas law requires that, in making this finding, the court take into account the "surrounding circumstances."[142] The court emphasized the importance of testing scientific hypotheses, noting that although the defendants' hypothesis was incorrect, it was still an "advancement" in science.[143] The court held, "[i]n making the threshold determination of whether a medical science article is reasonably capable of defamatory meaning in light of surrounding circumstances, we believe a court should weigh the need to protect intellectual reputation against society's great need to permit an unfettered discussion of medical science hypotheses."[144] Because the article discussed a matter of "great concern to the medical science community and public at large," the court concluded that the statements were not defamatory.[145]

A comparison of *Ezrailson* with *Containment Technologies* further demonstrates how subjective a "defamatory meaning" inquiry can be. Both cases involved alleged defamatory conclusions as a result of scientific testing. In *Containment Technologies*, the defendants' conclusions were presumably valid, but they were reasonably capable of defamatory meaning so the court proceeded to consider actual malice.[146] In *Ezrailson*, the defendants conceded to making an erroneous statement, but the court held that their statement was not capable of defamatory meaning because it was a "scientific medical proposition."[147]

138. *Id.*

139. *Id.* at 381.

140. *Id.*

141. *Id.* at 381–82.

142. *Id.* at 381.

143. *Id.*

144. *Id.*

145. *Id.*

146. Containment Techs. Grp., Inc. v. Am. Soc'y of Health Sys. Pharmacists, No. 1:07–cv–0997–DFH–TAB, 2009 WL 838549, at *12 (S.D. Ind. Mar. 26, 2009).

147. *Ezrailson*, 65 S.W.3d at 381.

Because the court concluded that the statements were not capable of defamatory meaning, it did not have to consider whether the requirement of actual malice applied, and whether it was met. The court in *Ezrailson* found the context—a medical science article—to be dispositive in finding that the statements were not capable of defamatory meaning.[148] Instead of using context to discern the meaning of the statement at issue, the court broadly stated that there should be defamation protection for "criticism of the creative research ideas of other medical scientists," even if the criticism "fails for lack of merit."[149] The approach in *Ezrailson* especially guards scientific scholars from defamation liability in jurisdictions such as Texas that only require actual malice if plaintiffs are public or limited purpose public figures—and not if a matter involves a public concern in jurisdictions such as Indiana.[150]

C. New York and Maryland: Protecting Scholar Defendants with the Opinion Privilege

In *Immuno AG. v. Moor-Jankowski*, Immuno AG—a multinational corporation and manufacturer of biologic products—sued Dr. Shirley McGreal and Dr. J. Moor-Jankowski for defamation. Dr. Moor-Jankowski—co-founder and editor of the *Journal of Medical Primatology*—published a "letter to the editor" by Dr. McGreal. In her letter, McGreal, a primate advocate, criticized Immuno AG's proposal to use chimpanzees in its hepatitis research in Africa.[151] Dr. McGreal also published an article with *New Scientist* magazine, which featured a quote from Moor-Jankowski accusing Immuno AG of "scientific imperialism."[152] Immuno AG sued Moor-Jankowski, McGreal, and publishers and distributors of the journal and magazine.[153] With the exception of Moor-Jankowski, all the defendants settled with the plaintiff.[154] The case appeared before the Court of Appeals of New York, after the U.S. Supreme Court vacated

148. *Id*. at 381–82.

149. *Id*. at 382.

150. *See* WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568, 571 (Tex. 1998) for an overview of Texas defamation law.

151. *Id.*

152. *Id.* at 1273.

153. *Id.*

154. *Id. See supra* note 1.

the previous judgment for the defendant and instructed the case be reconsidered in light of *Milkovich*.[155]

After applying the standard set in *Milkovich* and finding that the statement was not libelous, the court decided to review the case on state law grounds.[156] The court took into account the "broader social setting" of McGreal's letter to the editor, including the importance of letters to the editor.[157] The court went on to evaluate the "immediate context" of the letter, including the highly specialized readership and the public controversy involved.[158] The court stated that the organization to which McGreal belonged (and which broadcast her point of view) was identifiable to readers.[159] The court also found significant that the letter included a "prefatory Note."[160] These factors led the court to conclude that the statement was an opinion even though the language was "serious and restrained."[161] The court noted that isolating the alleged defamatory speech may lead to the finding of more factual assertions than there actually are, as opposed to considering the "full context."[162] The court affirmed the dismissal of the plaintiff's complaint, concluding that it was clear that McGreal was just expressing a "highly partisan point of view."[163]

In *Freyd v. Whitfield*, Peter and Pamela Freyd sued Dr. Whitfield, a trauma psychologist.[164] The Freyds' adult daughter, Jennifer, accused the Freyds of sexual abuse after recovering repressed memories of the incidents.[165] In response, the Freyds began a public campaign against the validity of repressed memories. The events at issue were Whitfield's discussion, at three professional conferences, of the "Freyd family controversy," as well as Dr. Whitfield's response to an inquiry about Jennifer's book.[166] The court found that the statements were not defamatory because they were constitutionally protected opinion that could not "either be

155. *Id*. *See supra* pp. 12–14.
156. *Id.* at 1275–77.
157. *Id.* at 1279–80.
158. *Id.* at 1280–81.
159. *Id.*
160. *Id*.
161. *Id*.
162. *Id.* at 1281–82.
163. *Id*.
164. Freyd v. Whitfield, 972 F. Supp. 940, 942–43 (D. Md. 1997).
165. *Id*. at 942.
166. *Id*. at 943.

objectively proven false or verified as true."[167] The court also reasoned that the statements represented the defendant's "personal views."[168] The court stated the subjectivity of the remarks was evidenced by the academic context in which they were expressed.

Both *Immuno AG* and *Freyd* found that the scholar defendants' opinions were protected, and thus there was no liability for libel. Both cases involved divisive controversies: the ethics of using chimpanzees in Africa as research subjects, and the validity of repressed memories.[169] Both statements at issue clearly took a position: McGreal was against Immuno AG's proposed research and Whitfield believed in the validity of repressed memories.[170] In both cases, the court took the nature of the controversy into account in determining that the statements were constitutionally protected opinion.[171] In *Freyd*, the court also noted that because the issue was "hotly contested," it was difficult to prove whether Whitfield's statements were true or false.[172] Not all scholars, however, are involved in intense controversies—and those that are might not take extreme positions. Applying the opinion privilege is difficult for scholars, such as Professor Kramer, who evaluate facts to demonstrate problems and propose solutions. Catalenello's discriminatory acts are not a current controversy and the complaint was dismissed several years ago.[173] The allegations may be verifiable, but doing so would be an arduous task. [174]

III. A More Definite and Effective Solution: A Common Interest Privilege that Protects Scholarly Speech

A conditional common interest privilege can be a defense to a defamation action. It generally applies when a person who has a common interest in a "particular subject matter" reasonably believes that "there is information that another sharing the common interest is

167. *Id*. at 945–46.

168. *Id*. at 946.

169. Immuno AG. v. Moor-Jankowski, 567 N.E.2d 1270, 1280–81 (N.Y. 1991); *Freyd*, 972 F.Supp. at 944.

170. *Id.*

171. *Immuno AG*, 567 N.E.2d at 1280–81; *Freyd*, 972 F. Supp. at 945.

172. *Freyd*, 972 F. Supp. at 945–46.

173. *See supra* p. 1.

174. *See* GAJDA, *supra* note 15, at 170 ("The unpredictable dividing line between 'opinion' and 'fact' necessarily leaves academics guessing about how they can go in criticism and debate."). Gajda also raises issues about how a jury is to verify such assertions. *See id*. at 172–73.

entitled to know."[175] A common interest privilege that recognizes scholarly activity, such as California's, helps courts avoid the difficult and unpredictable tasks of determining whether the statements at issue are capable of defamatory meaning.[176]

Why use a common interest privilege to protect scholarly speech? As demonstrated in the first part of this Note, it is unlikely that any constitutional protections will be established for scholarly speech.[177] However, courts can protect scholar defendants by refusing to create defamation liability in the first place. At least thirteen states and the District of Columbia already recognize a conditional common interest privilege.[178] When faced with a defamation claim where scholarly speech is challenged, courts in these states can extend protection by recognizing scholarly activity as an "interest."[179]

A common interest privilege is far from an absolute protection for scholarly speech because a court must still determine whether the privilege applies and if malice overcomes it. The privilege provides a simpler, more straightforward approach to dispose of defamation challenges to scholarly speech. *Taus v. Loftus*[180] and *Harkonen v.*

175. Restatement (Second) of Torts § 596 (1977).

176. *See* Harkonen v. Fleming, 880 F. Supp. 2d 1071, 1079 (N.D. Cal. 2012). *See supra* Part II.

177. *See supra* Part I.

178. In addition to California, New York, and the District of Columbia (*see* Armenian Assembly of Am., Inc. v. Cafesjian, 597 F. Supp. 2d 128, 138 (D.D.C. 2009)), these states include: Florida (*see* Nodar v. Galbreath 462 So. 2d 803, 809 (Fla. 1984)), Illinois (*see* Morton Grove Pharm., Inc. v. Nat'l Pedicolosis Ass'n, Inc., 494 F. Supp. 2d 934, 942 (N.D. Ill. 2007)), Indiana (*see* Elliot v. Roach, 409 N.E.2d 661, 672 (Ind. Ct. App. 1980)), Kentucky (*see* Stringer v. Wal-Mart Stores, Inc., 151 S.W.3d 781, 796 (Ky. 2004)), Michigan (*see* Lawrence v. Fox, 97 N.W.2d 719, 721–23 (Mich. 1959)), Nevada (*see* Lubin v. Kunin, 17 P.3d 422 (Nev. 2001)), New Jersey (*see* Mick v. Am. Dental Ass'n, 139 A.2d 570, 577–78 (N.J. Super. Ct. App. Div. 1958)), Pennsylvania (*see* Doman v. Rosner, 371 A.2d 1002, 1006 (Pa. Super. Ct. 1977)), South Dakota (s*ee* Gateway Inc., v. Companion Prods., Inc., 320 F. Supp. 2d 912, 930–31 (D.S.D. 2002)), Texas (*see* Clark v. Jenkins, 248 S.W.3d 418, 432 (Tex. App. 2008)) and Wisconsin (*see* Zinda v. La. Pac. Corp., 440 N.W.2d 548, 552 (Wis. 1989)).

179. *See* GAJDA, *supra* note 15. Gajda argues that "academic actors" should receive immunity for their conduct "within the scope of employment." *Id*. Gajda elaborated, "[t]he principle would start with a presumption that academic judgments of college and university decision makers—including the assessment of which judgments truly qualify as academic—normally deserve deference." *Id.* Although this approach would protect university professors who publish their ideas, it would not protect those scholars who are not employed by academic institutions. Further, as Gajda recognizes, statutory immunity is not geared towards the academic realm. *Id*. On the other hand, as *Harkonen* demonstrates, a common interest privilege can be interpreted to include "scholarly activity" regardless of the scholar's employer.

180. Taus v. Loftus, 151 P.3d 1185 (Cal. 2007).

Fleming illustrate the application of California's statutory common interest privilege,[181] while *Chandok v. Klessig* demonstrates the application of New York's qualified privilege of common interest.[182] A common interest privilege that recognizes "scholarly activity" generally, as illustrated in *Harkonen,* is a more effective way to use the privilege to protect scholarly speech.[183]

In *Taus*, the unnamed subject of a case study that described the subject's alleged recovery of repressed memories of child abuse sued the authors and publishers of two articles.[184] The articles were published in the Skeptical Inquirer magazine by the Committee for the Scientific Investigation of Claims of the Paranormal.[185] Among the tort actions the plaintiff brought, she alleged that she was defamed by the articles. The articles at issue claimed that she behaved in "self-destructive ways" after recovering her memories, terminated her relationship with her mother, and questioned whether the abuse had ever taken place.[186] The plaintiff also claimed the defendant's statements at a professional conference where he mentioned her "self-destructive behavior" and her current service in the United States Navy was defamatory.[187] The California Court of Appeal found that the plaintiff's claims of defamation regarding the statements in the articles should have been dismissed, but the defamation claim related to the statement at the conference should have been permitted to go forward because it implied that the plaintiff is "unfit for military service."[188]

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181. *See* CAL. CIV. CODE § 47(c)(1) (2005) ("A privileged publication or broadcast is one made: (c) In a communication, without malice, to a person interested therein, (1) by one who is also interested."). *See also* 5 WITKIN, SUMMARY OF CALIFORNIA LAW § 529 (10th ed. 2005) (The defamation tort in California involves "(a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage.").

182. Chandok v. Klessig, 632 F.3d 803 (2011). *See* 14 LEE S. KREINDLER ET. AL., NEW YORK PRACTICE SERIES: NEW YORK LAW OF TORTS § 1:51 (2012) ("A qualified privilege attaches to a communication made by a person with a legitimate interest in making or a duty to make the communication, and the communication is sent to a person with a corresponding interest or duty, even though without the privilege the communication would be defamatory. This privilege, referred to as the 'common interest' privilege, is extended to communications made by one person to another in which both have an interest.")

183. *See* Harkonen v. Fleming, 880 F. Supp. 2d 1071,1079 (N.D. Cal. 2012).

184. *Taus*, 151 P.3d at 1188–89.

185. *Id*. at 1192, 1194.

186. *Id*. at 1201–02.

187. *Id*.

188. *Id*. at 1202–03.

The California Supreme Court reversed on the grounds that the common interest privilege applied, even though neither the court of appeal nor the parties raised the privilege.[189] The court discussed any potential defamatory meaning, and whether the statement could be a fact rather than an opinion.[190] Citing California Civil Code section 47, subdivision (c)(1), the Court observed:

> [I]t is clear that the alleged defamatory statement here in question—a statement made by Loftus, a psychology professor and author, at a professional conference attended by other mental health professionals and that was related to the subject of the conference—falls within the reach of this statutory common-interest privilege.[191]

The Court stated that under the statute, the defendant has the initial burden of demonstrating that the privilege applies.[192] If the privilege applies, the burden shifts to the plaintiff to establish a prima facie case demonstrating that the statement was made with "actual malice," which would defeat the privilege.[193] The plaintiff can demonstrate "actual malice" by "showing that the publication was motivated by hatred or ill will towards the plaintiff or by a showing that the defendant lacked reasonable ground for belief in the truth of the publication and thereafter acted in reckless disregard of the plaintiff's rights."[194]

In this case, the Court decided that malice was not established because the defendant neither revealed the plaintiff's identity nor provided details of her "self-destructive" behavior.[195] The Court stated that the defendant's strongly held views about the repressed memory issue—in addition to persistent investigation of the plaintiff

189. *Id*. at 1209.

190. *Id*.

191. *Id*.

192. *Id.* at 1210.

193. *Id*.

194. *Id.* (citing Sanborn v. Chronicle Publ'g Co., 556 P.2d 764 (1976)). *See also* CAL. CIV. CODE §48(a)(d) (2013) ("Actual malice" is that state of mind arising from hatred or ill will toward the plaintiff; provided, however, that such a state of mind occasioned by a good faith belief on the part of the defendant in the truth of the libelous publication or broadcast at the time it is published or broadcast shall not constitute actual malice.")

195. *Id*. at 722.

despite the plaintiff's objections and filing of an ethical complaint with the defendant's university—failed to establish malice.[196]

In *Harkonen v. Fleming*, a federal judge granted the defendant's motion to strike under the California Anti-SLAPP statute.[197] A medical doctor and former CEO of a biotechnology company sued a professor of biostatistics.[198] The plaintiff conducted a clinical trial of a prescription drug and the defendant served as a biostatistician for the clinical trial.[199] The defendant wrote a letter to the plaintiff expressing his concern about misrepresentations in a press release about the clinical trial. He then wrote an article about the press release in a peer-reviewed academic journal, *Annals of Internal Medicine*—a peer-reviewed academic journal published by the American College of Physicians—and discussed the issue in university lectures.[200] The plaintiff claimed that the article accused him of falsifying test data by concealing the deaths of two people. The court stated that both the defendant's publication in an academic medical journal and the speeches at universities were "scholarly activity considered to fit within the common interest privilege."[201] Citing *Taus*, the court stated that in regards to privileged speech, the plaintiff must show "actual malice" by a preponderance of the evidence.[202]

The court decided that the plaintiff could not prove "actual malice" by preponderance of the evidence because the defendant had sought input from other scientists, who both participated in the clinical trial, and decided that the article was accurate before publication.[203] The court also dismissed the plaintiff's argument that the defendant demonstrated a "hatred or ill will" towards the plaintiff because he ignored him and expressed anger towards him.[204]

Because of the existence of a statutory common interest privilege in both cases, the court did not have to undergo an analysis of whether the statements were capable of defamatory meaning or if they were constitutionally protected opinion instead of fact. Discerning defamatory meaning of the statements at issue in

196. *Id*.
197. Harkonen v. Fleming, 880 F. Supp. 2d 1071, 1082 (N.D. Cal. 2012).
198. *Id*. at 1075.
199. *Id*.
200. *Id*. at 1075–76.
201. *Id*. at 1079.
202. *Id*. at 1080.
203. *Id*. at 1082.
204. *Id*. at 1081.

Harkonen would have been a particularly difficult task because the statements were about statistics and discussed endpoints, subgroups and interim values.[205] In deciding whether the privilege applied—instead of attempting to discern defamatory meaning—the courts in both cases considered the context in which the statements were made and the purpose and identity of the individuals that produced them.[206] Both courts decided that the privilege applied.[207] Deciding whether malice defeated the privilege was a more detailed inquiry, but it was straightforward in both cases.[208] The *Taus* and *Harkonen* defendants were scholars and were more concerned with their ideas rather than a personal attack on the other party. Despite evidence of less-than-amicable relations between the parties, both courts found that "actual malice" was not established because there was no showing of "hatred or ill will."[209] Also, the defendants conducted research before publishing their work and lecturing.[210] This thwarted any attempts of the plaintiffs to demonstrate that the defendants "lacked reasonable ground for the belief in the truth of the publication."[211]

Although not codified, New York's qualified privilege of common interest operates similar to California's statutory common interest privilege. The defendant has the burden of proving the privilege applies.[212] If proved, a "rebuttable presumption of good faith arises."[213] To defeat it, the plaintiff must demonstrate the statements were false and the defendant abused the privilege.[214] Abuse can be shown by (1) malice: either "hatred or ill will" towards the plaintiff, or (2) by demonstrating that the defendant acted "with a high degree of awareness that the statement was probably false."[215] Although no cases conclude that New York's privilege applies

205. *Id*. at 1077.
206. *Id.* at 1079; *Taus*, 40 Cal. 4th at 721.
207. *Harkonen*, 880 F. Supp. 2d at 1079; *Taus*, 40 Cal. 4th at 721.
208. *Harkonen*, 880 F. Supp. 2d at 1081–82; *Taus*, 40 Cal. 4th at 722.
209. *Harkonen*, 880 F. Supp. 2d at 1081–82; *Taus*, 40 Cal. 4th at 722.
210. *Harkonen*, 880 F. Supp. 2d at 1081–82; *Taus*, 40 Cal. 4th at 722.
211. *Harkonen*, 880 F. Supp. 2d at 1081–82; *Taus*, 40 Cal. 4th at 722.
212. Kreindler, *supra* note 182.
213. *Id*.
214. *Id*.
215. *Id*.

generally to "scholarly activity,"[216] the recent Second Circuit case *Chandok v. Klessig* did apply the privilege to a scholarly context.[217]

In *Chandok*, the plaintiff, a postdoctoral research associate, was hired to conduct plant disease research in the defendant's laboratory.[218] After the plaintiff made an important discovery, both she and the defendant applied for and received a research grant from the National Institutes of Health (NIH).[219] Because of personal differences, the plaintiff stopped working at the defendant's lab.[220] After unsuccessful attempts to convince the plaintiff to return, the defendant realized that the plaintiff's results could not be replicated.[221] Consequently, the defendant discussed the plaintiff's possible scientific misconduct with his colleagues, the NIH, National Science Foundation, and the coauthors of articles that discussed the research.[222] The defendant also submitted statements to retract articles.[223] The district court dismissed the complaint on the grounds that the plaintiff was a limited-issue public figure and "actual malice" was not established.[224]

The Second Circuit affirmed the complaint's dismissal on grounds that the New York qualified privilege of common interest applied.[225] The court stated that the defendant made the statements to individuals who "shared his interest in [nitric oxide synthase] research" and who had made contributions to his research.[226] The court did not find that the defendant "knew the statements were false or acted in reckless disregard for the truth" since he had tried to replicate the results and had asked for the plaintiff's help.[227] The court also did not find that the defendant acted solely with "ill will"

216. An exhaustive search yielded no cases that supported this proposition.

217. Chandok v. Klessig, 632 F.3d 803 (2011).

218. *Id*. 805–06.

219. *Id*. at 806.

220. *Id*.

221. *Id*. at 806–07.

222. *Id*. at 808.

223. *Id*.

224. *Id*. at 805.

225. *Id*.

226. *Id*. at 817. The court also found the privilege applied because the defendant had a legal or moral obligation to make the statements because the research was federally funded. *Id*. at 816–17.

227. *Id*. at 817.

towards the plaintiff given the importance to the scientific community of replicating the results.[228]

Like *Taus*, *Chandok* used the state law privilege to decide the defamation claim even though the lower court took a different approach.[229] On the one hand, *Chandok* specified an interest—nitric oxide synthase research—that triggered the application of the common interest privilege.[230] On the other hand, *Harkonen* did not specify an interest, but generally recognized "scholarly activity" as privileged.[231] It is not known how far this privilege extends for New York scholars. For scholars who conduct research and study in more generally known fields, it is uncertain whether courts will identify a broad "interest" for the privilege. Because of this uncertainty, the court's approach in *Harkonen* is more protective of scholar defendants. Although not a bright-line test, an approach that "scholarly activity" triggers application of a common interest privilege constitutes a stronger protection for scholarly speech.[232] This approach better ensures that more broadly appealing scholarly topics are considered privileged. Instead of concentrating on whether the audience shares an interest in the subject matter, this approach focuses on the nature of the activity.

Conclusion

Protecting scholarly speech is a pressing concern as scholars and publications continue to face the risk of having to defend a defamation action. Not only are defamation suits very costly, but they are also time consuming and can affect the health of a publication, as demonstrated by Frank Sulloway's legal threats. Compared to the publications of media giants, a defamation claim is more likely to inhibit scholarly ideas. A variety of scholars face these risks, including scientists, psychologists, economists, mathematicians, law professors, and book reviewers.

While it is fortunate that scholar defendants rarely lose defamation suits, many scholars cannot afford the journey to a favorable verdict. Seven years and $2 million later, Dr. Moor-Jankowski, albeit victorious, was the only defendant standing after his

228. *Id.* at 818.

229. *Taus*, 40 Cal. 4th at 720; *Chandok*, 632 F.3d at 805.

230. *Chandok*, 632 F.3d at 817.

231. Harkonen v. Fleming, 880 F. Supp. 2d 1071, 1079 (N.D. Cal. 2012).

232. *Id.*

defamation battle. The Supreme Court has refused to significantly alter its defamation framework promulgated almost half a century ago. As a result, specific constitutional protections for scholars will probably not be found in the near future. Lower courts have worked within this constitutional framework to protect scholars by concluding that plaintiffs who sue scholar defendants must prove "actual malice," statements are not reasonably capable of defamatory meaning, and statements are protected opinion. Although these efforts are admirable, this framework usually forces courts to engage in extensive analysis and can lead to unpredictable results.

A more protective approach stems from state statutes that recognize a common interest privilege. In those states that already recognize such a privilege, courts should extend it to include "scholarly activity." Having a definite protection such as the common interest privilege will likely help scholars avoid defamation suits to begin with.