Northern Illinois University Law Review

Volume 16 | Issue 1 Article 1

11-1-1995

Awareness of Meaning in Libel Law: An Interdisciplinary Communication & Law Critique

Clay Calvert

Awareness of Meaning in Libel Law: An Interdisciplinary Communication & Law Critique

CLAY CALVERT*

INTRODUCTION

More than three decades after the United States Supreme Court constitutionalized libel law with its seminal decision in *New York Times Co. v. Sullivan*[1] and adopted the actual malice standard,[2] a growing movement has begun among legal scholars,[3] libel defense attorneys,[4] and a number of

---

* A.B., Stanford University; J.D., University of the Pacific; Ph.D. Candidate, Stanford University; Instructor, Stanford University.

1. 376 U.S. 254 (1964). The United States Supreme Court in *Sullivan* "constitutionalized" libel law by holding for the first time that "libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." *Id.* at 269.

2. *Id.* at 279-80 (stating that actual malice exists when a defamatory falsehood is published with knowledge of its falsity or with reckless disregard for whether it was true or false). *See also* Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 692 (1989) (providing that while a mere failure to investigate the veracity of a statement will not alone support a finding of actual malice, "the purposeful avoidance of the truth is in a different category"); St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (holding that a reckless disregard for the truth exists when a defendant entertains serious doubts as to the truth of his or her publication); Garrison v. Louisiana, 379 U.S. 64, 74 (1964) (holding that a reckless disregard for the truth requires a "high degree of awareness of their probable falsity").

Actual malice is a legal term of art that must be distinguished from the common law meaning of malice as ill will, spite, or hatred. Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 510-11 (1991). As the United States Supreme Court stated in *Masson*, "the term can confuse as well as enlighten. In this respect, the phrase may be an unfortunate one." *Id.* at 511.

3. *See, e.g.*, Marc A. Franklin & Daniel J. Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825 (1984).

4. *See, e.g.*, C. Thomas Dienes & Lee Levine, *Implied Libel, Defamatory Meaning, and State of Mind: The Promise of* New York Times Co. v. Sullivan, 78 IOWA L. REV. 237 (1993).

federal courts[5] to again alter the constitutional landscape of libel[6] law. In particular, these individuals and courts want to add further protection--protection beyond the actual malice standard and procedural requirements--to the constitutional shield that now guards defendants in civil libel actions.[7] They call for a new, constitutionally mandated fault element. This element requires public official[8] and public figure[9] plaintiffs to prove that defen-

---

5. *See, e.g.*, Newton v. National Broadcasting Co., 930 F.2d 662 (9th Cir. 1990); Saenz v. Playboy Enters., Inc., 841 F.2d 1309 (7th Cir. 1988); Woods v. Evansville Press Co., 791 F.2d 480 (7th Cir. 1986); Masson v. New Yorker Magazine, Inc., 832 F. Supp. 1350 (N.D. Cal. 1993).

6. Libel is generally the written, pictorial, or broadcast form of defamation. Robert D. Sack, *Common Law Libel and the Press: A Primer*, *in* 2 COMMUNICATIONS LAW 35, 41 (PLI Pat., Copyrights, Trademarks, and Literary Property Course Handbook Series No. G-372, 1993). As distinguished from slander, "[l]ibel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words." RESTATEMENT (SECOND) OF TORTS § 568 (1977). *See also* RESTATEMENT (SECOND) OF TORTS § 568A (providing that "[b]roadcasting of defamatory matter by means of radio or television is libel, whether or not it is read from a manuscript"). *But see* CAL. CIV. CODE § 46 (West 1982) (stating that slander includes defamation by "radio or any mechanical or other means").

7. The United States Supreme Court has adopted a number of constitutional safeguards in addition to the actual malice standard. For instance, the Supreme Court has ruled that trial court decisions in libel actions are subject to independent review on appeal. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984); Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989). In addition, the Court has held that plaintiffs must prove falsity in libel actions involving media defendants when the speech is a matter of public concern. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

8. *See* Rosenblatt v. Baer, 383 U.S. 75, 86 (1966) (defining public officials, for purposes of the actual malice standard, as those government employees who are so important that the public is independently interested in their qualifications and performance, beyond the general public interest in the qualifications and performance of all government employees). *See also* RESTATEMENT (SECOND) OF TORTS § 580A cmt. b (1977) (describing who constitutes a public official); James v. San Jose Mercury News, Inc., 20 Cal. Rptr.2d 890, 895 (Cal. Ct. App. 1993) (providing a list of four factors that courts in California consider when determining whether a government employee is a public official for purposes of applying the actual malice standard in defamation actions). The Court's definition of a public official is someone employed by the government who:

> (1) has, or appears to the public to have, substantial responsibility for or control over the conduct of governmental affairs; (2) usually enjoys significantly greater access to the mass media and therefore a more realistic opportunity to contradict false statements than the private individual; (3) holds a position in government which has such apparent importance that the public has an independent interest in the person's qualifications and performance beyond the general public interest in the qualifications and performance of all governmental employees; and (4) holds a position which

dants who publish allegedly libelous statements were aware of the defamatory meaning[10] at the time of publication.[11]

C. Thomas Dienes and Lee Levine, prominent media defense attorneys and two of the leading proponents of the proposed element, argue that "only the publisher who was aware of the defamatory meaning at the time of publication should be subject to legal responsibility in public figure cases."[12] This sentiment was voiced originally by Stanford University Law School Professor Marc A. Franklin and UCLA Law School Professor Daniel J. Bussel, who called for courts to focus on "whether the speaker is aware of the defamatory meaning at the time he disseminates the statement."[13] Citing the work of Franklin and Bussel, one federal district court judge held in 1993 that "awareness of defamatory meaning is an element of constitutional law."[14]

This new standard contrasts dramatically with the traditional, common law rule under which "[t]he defendant's subjective state of mind regarding the meaning of his publication was simply not relevant."[15] As Dienes and Levine state, at common law "[c]ourts did not even ask whether the publisher could reasonably have known of the defamatory meaning. Only the readers' understanding matter[s]."[16] In brief, the common law imposed strict liability (or liability without fault) on defendants for unintended meanings.

The rationale for changing the common law rule and imposing the awareness of meaning fault standard is to protect defendants in so-called "surprise" defamation cases.[17] These cases involve the libel by impression

---

> invites public scrutiny and discussion of the person holding it entirely apart from the scrutiny and discussion occasioned by the particular controversy.

Id. at 895.

9. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974) (defining three classes of public figures, including all-purpose public figures, involuntary public figures, and voluntary limited-purpose public figures). *See also* RESTATEMENT (SECOND) OF TORTS § 580A cmt. c (1977) (describing the origin of the public figure classification and criteria for determining if a person is a public figure for purposes of a defamation action).

10. A meaning is defamatory "if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." RESTATEMENT (SECOND) OF TORTS § 559 (1977).

11. *See supra* notes 3-6 and accompanying text.

12. Dienes & Levine, *supra* note 4, at 244.

13. Franklin & Bussel, *supra* note 3, at 887.

14. Masson v. New Yorker Magazine, Inc., 832 F. Supp. 1350, 1361-62 (N.D. Cal. 1993).

15. Dienes & Levine, *supra* note 4, at 247.

16. *Id.* n.53.

17. *See* Franklin & Bussel, *supra* note 3, at 832.

(or libel by implication)[18] and extraneous facts scenarios,[19] as well as the more general problem of multiple meanings created when the language used is ambiguous and a defendant could be held "liable for something he did not mean to convey."[20] In brief, advocates of the standard ask the legal community to ponder the question: Why should defendants be held strictly liable for communicating a message when they never knew about nor intended to imply the fact or meaning that the plaintiff argues the message conveys?

Supporters of the standard argue that First Amendment[21] policy concerns of enhancing speech protection and preventing self-censorship militate in its favor. For instance, Franklin and Bussel assert that the standard "logically stems from the United States Supreme Court's decision in *New York Times Co. v. Sullivan.*"[22] They note that in creating the actual malice standard, the *Sullivan* Court "reasoned that, if strict liability [was] imposed, critics of the government might refrain from comment out of fear of liability for a completely innocuous error."[23] The actual malice

---

18. *See generally* ROBERT D. SACK & SANDRA S. BARON, LIBEL, SLANDER, AND RELATED PROBLEMS 188 (2d ed. 1994) (explaining that in cases of libel by implication or libel by impression "[s]tatements literally true may be actionable if they imply false and defamatory statements of fact. A literally true statement may imply facts that are not true. In such cases, the defamatory implications as well as the stated facts may form the basis for a cause of action").

19. Franklin and Bussel succinctly explain the extraneous fact scenario as follows:

> This situation arises when an otherwise innocent statement becomes defamatory because some or all of the audience know an extrinsic fact. The classic example of this type of situation involves the publication of an engagement notice about a man who is already married. Those who know this unstated fact may think either that the man is lying to his alleged fiancee, or that the woman they considered to be his wife is in fact not legally married to him. At common law, the speaker was held liable for such a statement, although he may not have known or had reason to have known the extrinsic fact giving rise to the statement's defamatory meaning.

Franklin & Bussel, *supra* note 3, at 834. *See generally* David M. Cohn, Comment, *The Problem of Indirect Defamation: Omission of Material Facts, Implication, and Innuendo*, 1993 U. CHI. LEGAL F. 233 (1993) (providing a comprehensive review of the libel by impression and extraneous fact scenarios).

20. Franklin & Bussel, *supra* note 3, at 833-34.

21. U.S. CONST., amend. I. *See also* Gitlow v. New York, 268 U.S. 652, 666 (1925) (providing that "freedom of speech and of the press--which are protected by the First Amendment from abridgment by Congress--are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States").

22. Franklin & Bussel, *supra* note 3, at 834.

23. *Id.* at 835.

standard, Franklin and Bussel argue, simply represents one fault standard (on the issue of truth/falsity) designed to protect the press--it was *not* intended to be the only constitutional fault requirement.[24] The awareness of meaning standard represents an additional fault standard.

The proposed standard treats a defendant's state of mind about meaning in much the same way that the actual malice rule treats a defendant's state of mind about truth or falsity. Both standards focus on the subjective state of mind of the defendant at the time of publication.[25] While the actual malice standard asks whether the defendant knew of or acted with reckless disregard for the *falsity* of a statement or message, the awareness of meaning standard asks whether the defendant knew of or acted with reckless disregard for the *meaning* of that statement or message.[26] The proposed standard is a second subjective state of mind hurdle that public official and public figure libel plaintiffs must clear on the road to recovery.[27]

While there is a bevy of communication research and theory on the subject of meaning,[28] the legal scholars and courts proposing the awareness of meaning standard--as well as communication researchers engaged in interdisciplinary research in communication and law--have yet to consider this literature or evaluate whether the proposed standard comports with the realities of daily communication and the processes of message meaning. More importantly, they have not considered whether the concept of meaning may be sufficiently different from that of truth/falsity in libel law such that it may make little sense to apply similar subjective state of mind standards to both the libel elements[29] of defamatory meaning and truth/falsity.

---

24. *See id.* at 836.

25. The United States Supreme Court has stated that the actual malice standard is "a subjective one" that focuses on a defendant's state of mind about truth and falsity at the time of publication. Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688 (1989). It is distinguished from an objective standard of negligence, as the Supreme Court has stated that "[m]ere negligence does not suffice." Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 510 (1991).

26. Masson v. New Yorker Magazine, Inc., 832 F. Supp. 1350, 1354 (N.D. Cal. 1993).

27. This second hurdle represents a "significant supplement to the *New York Times* requirement that the plaintiff show that the defendant recklessly disregarded or had knowledge of the falsity of the defamatory statement." Cass R. Sunstein, *Hard Defamation Cases*, 25 WM. & MARY L. REV. 891, 893 (1984).

28. *See generally* STANLEY E. FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980); JOHN FISKE, INTRODUCTION TO COMMUNICATION STUDIES (1990); GRAEME TURNER, BRITISH CULTURAL STUDIES: AN INTRODUCTION (1990).

29. The four basic elements of a cause of action for libel include: (1) "a false and defamatory statement concerning another;" (2) the unprivileged publication of that statement to at least one third party; (3) fault; and (4) "either actionability of the statement irrespective

Bridging research from the disciplines of communication and the law where relevant, this article critiques the merit of borrowing in wholesale fashion a constitutional state of mind standard that applies to the issue of truth/falsity--the actual malice standard--and applying it to the separate element of defamatory meaning. The article argues that the awareness of meaning standard conflicts with the realities of communication processes inherent in the determination of message meaning, including the active role that readers play in interpreting messages.[30] It posits that the standard privileges the private thoughts and intentions in the head of the defendant, ignoring the text and the reader's interaction with it.[31]

By ignoring the reader's interaction with the message, the standard also ignores the relational nature of defamation and the foundation of the libel tort.[32] In essence, it transforms libel from a three-party tort involving a plaintiff, defendant, and message audience into a two-party tort with the reader as the odd person out. Finally, the article argues that meaning and truth/falsity are readily distinct concepts, determined by radically different means that suggest that the element of meaning--unlike the element of truth/falsity--in libel law is ill suited for a subjective state of mind requirement like the proposed awareness of meaning standard.[33]

Part I of this article provides a brief introduction to the awareness of defamatory meaning standard.[34] Part II critiques the awareness of meaning standard from the perspective of both the law and communication theory and research on message meaning.[35] Part II argues that the awareness of meaning standard: (1) conflicts with the realities of communication processes inherent in determining message meaning; (2) conflicts with the relational nature of the defamation torts of libel and slander, stripping the audience of its active--and natural--role in defamation; and (3) represents a subjective state of mind requirement that may be inappropriate as applied to the element of meaning.

A brief statement about the benefits--and limitations--of interdisciplinary communication research on meaning and the law is in order. While communication and related research clearly cannot dictate legal standards or replace public policy judgments, and libel experts Randall P. Bezanson and

---

of special harm or the existence of special harm caused by the publication." RESTATEMENT (SECOND) OF TORTS § 558 (1977).

30. *See infra* notes 90-108 and accompanying text.
31. *See infra* notes 107-08 and accompanying text.
32. *See infra* notes 109-23 and accompanying text.
33. *See infra* notes 124-45 and accompanying text.
34. *See infra* notes 39-89 and accompanying text.
35. *See infra* notes 90-145 and accompanying text.

Kathryn Ingle emphasize that it cannot be ignored.[36] They stress that libel law cannot "turn its back on the fundamental insights these fields provide. This is especially so if libel law has employed approaches that respect the nature of the mass communication process, but has begun to veer away from them."[37]

Ultimately, this article suggests that the awareness of meaning standard begins to veer away from the reality of the communication processes related to meaning. It allows the private meaning in the head of a message source (the defendant in a libel action) to trump the common law standard of "what a reader could reasonably understand the publication to mean."[38] The conclusion that the standard conflicts with the realities of meaning and the dynamic processes of communication, as well as the relational nature of defamation law, is *not* offered as a substitute or replacement for the free speech policy considerations that scholars like Franklin and Bussel and Dienes and Levine offer in support of the standard--it is far too presumptuous to believe that communication research can dictate legal reasoning and public policy concerns. Rather, it is offered to *supplement* prior legal analysis and, ultimately, to help ground a proposed law about meaning in the realities of daily communication.

I. THE AWARENESS OF MEANING STANDARD

This part introduces the awareness of meaning standard. Initially, it defines the standard as originally advocated more than a decade ago by Stanford University Law School Professor Marc A. Franklin and law student Daniel J. Bussel,[39] and as more recently called for by C. Thomas Dienes and Lee Levine.[40] These scholars and practitioners are the chief proponents of the standard, having written extensive and thorough law journal arguments in its favor.

This part then explores how some lower courts already have adopted it. In particular, Federal District Court Judge Eugene F. Lynch's recent adoption of the awareness of meaning standard in both trials in the celebrated libel case of *Masson v. New Yorker Magazine, Inc.*[41] is discussed. Other cases in which courts have adopted the standard are also

---

36. Randall P. Bezanson & Kathryn L. Ingle, *Plato's Cave Revisited: The Epistemology of Perception in Contemporary Defamation Law*, 90 DICK. L. REV. 585 (1986).

37. *Id.* at 591.

38. Dienes & Levine, *supra* note 4, at 247.

39. *See* Franklin & Bussel, *supra* note 3.

40. *See* Dienes & Levine, *supra* note 4.

41. Masson v. New Yorker Magazine, Inc., 832 F. Supp. 1350 (N.D. Cal. 1993).

described.[42] The section then explains that while the United States Supreme Court has never held that the awareness of meaning element is compelled by the First Amendment, it has suggested, in dicta, that such an element may be mandated by First Amendment free speech and free press concerns.[43]

A. THE PROPOSED STANDARD

As noted in the Introduction, at common law a defendant's state of mind about the defamatory meaning of his or her publication was irrelevant.[44] The question of meaning focused only on "what a reader could reasonably understand the publication to mean."[45] Defamation, as Franklin and Bussel put it, has historically been "a recipient-centered concept."[46] A defendant could be held liable even though she did not mean to imply the fact or convey the meaning that a reasonable reader might understand the message to convey.

Today, there is a movement to require plaintiffs--in particular, public official and public figure plaintiffs--to establish some level of fault against defendants on the element of defamatory meaning.[47] A constitutional fault standard--actual malice--already exists on the issue of truth and falsity.[48] Now the effort has turned toward imposing a similar fault standard on the element of defamatory meaning. The standard would require plaintiffs to establish defendants' state of mind at the time of publication about the alleged meaning conveyed by the message that causes reputational harm.

For instance, Franklin and Bussel assert that both public and private plaintiffs should be required "to establish that the defendant was aware of the statement's defamatory meaning."[49] Specifically, after determining that a statement is reasonably capable of conveying a defamatory meaning,

---

42. Newton v. National Broadcasting Co., 930 F.2d 662 (9th Cir. 1990); Saenz v. Playboy Enterprises, Inc., 841 F.2d 1309 (7th Cir. 1988); Woods v. Evansville Press Co., 791 F.2d 480 (7th Cir. 1986).

43. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 348 (1974).

44. *See supra* notes 15-16 and accompanying text.

45. Dienes & Levine, *supra* note 4, at 247.

46. Franklin & Bussel, *supra* note 3, at 828.

47. An alternative proposal to the subjective state of mind requirement discussed in this article calls for imposition of an objective standard of reasonableness on the question of meaning. David Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422 (1975). Under such an objective standard, defendants would have a duty "to use reasonable care to avoid injury to reputation." *Id.* at 464.

48. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

49. Franklin & Bussel, *supra* note 3, at 845.

Franklin and Bussel argue that "courts must require the plaintiff to establish with convincing clarity that the defendant was aware of, or blinded himself to, the allegedly defamatory meaning of the statement that he was making."[50]

Similarly, Dienes and Levine "argue that, at a constitutional minimum, the defendant must in fact be *subjectively* aware at the time of publication of the implied defamatory meaning pleaded by the public figure plaintiff."[51] Both Franklin and Bussel and Dienes and Levine argue that the "convincing clarity"[52] standard of proof that applies to the issue of actual malice should also apply to proof of a defendant's state of mind about defamatory meaning.[53]

The Dienes and Levine proposal does, however, differ slightly from the Franklin and Bussel test. First, Dienes and Levine would apply their standard only to public official and public figure plaintiffs, while Franklin and Bussel advocate its adoption in all cases, regardless of a plaintiff's status. In addition, the Dienes and Levine proposal includes an escape hatch for defendants who were aware that a potential defamatory meaning existed *but* who also believed that an innocent, non-defamatory meaning for the same factual statement exists and who did not know about the falsity of the defamatory meaning at issue. A court applying the Dienes and Levine standard must thus follow this rule:

> [I]f a publication about a public official or public figure is reasonably capable of both defamatory and nonactionable constructions, we would hold that there can be no defamation liability if the publisher did not either deliberately set out to communicate the defamatory meaning with actual malice or, aware of the defamatory meaning, know it to be false at the time of publication.[54]

For Dienes and Levine, then defendants who are aware of a defamatory meaning *and* who deliberately intend to convey that meaning may be held liable. However, "if the publisher seeks to communicate a nonactionable meaning, but knows that the alleged defamatory meaning may also be communicated, the public figure plaintiff must prove that the defendant knew of the falsity of the defamatory meaning at issue."[55] This standard

50. *Id.* at 837.
51. Dienes & Levine, *supra* note 4, at 311.
52. *Sullivan*, 376 U.S. at 285-86.
53. Franklin & Bussel, *supra* note 3, at 837; Dienes & Levine, *supra* note 4, at 322.
54. Dienes & Levine, *supra* note 4, at 323.
55. *Id.* at 244.

gives slightly more protection to media defendants[56] than the Franklin and Bussel test, which does not provide a legal "out" for those defendants who were aware of a defamatory meaning but who intended to convey an innocent meaning.

Given the similarities, however, between the state of mind standards proposed by Franklin and Bussel and Dienes and Levine on the issue of defamatory meaning, and because each at minimum requires an awareness of defamatory meaning on the part of the defendant before liability may be imposed, the standards are referred to collectively in this article as the "awareness of meaning" standard.

B. JUDICIAL ADOPTION OF THE AWARENESS OF MEANING STANDARD

1. Lower Court Decisions

A number of lower courts have adopted the awareness of meaning standard or called for the imposition of a similar standard. For instance, in *Newton v. National Broadcasting Co.*,[57] the United States Court of Appeals for the Ninth Circuit addressed the relevance of imposing a state of mind requirement in the libel by impression scenario.

In that case, entertainer Wayne Newton filed an action for defamation alleging that three NBC news television stories "conveyed the false impression" that Newton had help from the Mafia and "mob sources" in purchasing the Aladdin Hotel in Las Vegas and that Newton, "while under oath, deceived Nevada state gaming authorities about his relationship with the Mafia."[58] At trial, the district court instructed the jury to consider whether NBC "should have foreseen" the impression alleged by Newton.[59] On appeal, the court of appeals concluded that this instruction is "an objective negligence test."[60] It stated that such an objective standard conflicts with the actual malice test created in *Sullivan* that "is deliberately

56. In their law journal article, Dienes and Levine address only the protection that media defendants should receive in libel cases. *Id.* at 240-41. They state that "[b]ecause the institutional press is regularly subject to defamation claims, this Article focuses on the relationship of the law of defamation to the news media." *Id.* at 240 n.19. They emphasize, however, that they are not arguing that the press should receive greater First Amendment protection "than nonmedia defendants." *Id.* at 241 n.19.

57. 930 F.2d 662 (9th Cir. 1990).

58. *Newton*, 930 F.2d at 667.

59. *Id.* at 680.

60. *Id.*

subjective."[61] The court of appeals stated that an objective standard "would permit liability to be imposed not only for what was not said but also for what was not intended to be said."[62] It concluded that an objective negligence standard like the one used by the district court "can never give rise to liability in a public figure defamation case."[63]

The court of appeals never articulated that specific test that the district court should have applied because it considered the issue of meaning as part of the actual malice analysis. However, it is clear that the court of appeals advocated a subjective standard focusing on what was intended to be said.[64] As the court of appeals stated, the trial court "erred because it substituted its own view as to the supposed impression left by the broadcast for that of the journalists who prepared the broadcast."[65] The appellate court thus suggests that if the journalists who prepared the messages in question were not aware of the impression, no liability should be imposed on them.

The United States Court of Appeals for the Seventh Circuit adopted an awareness of meaning standard in *Saenz v. Playboy Enterprises, Inc.*[66] In that case the plaintiff alleged that a *Playboy* magazine article falsely accused him of "complicity in the torture of political dissidents while serving as an official for the United States Office of Public Safety ("OPS") in Uruguay and Panama during the sixties and seventies."[67] The court of appeals noted that "some basis, perhaps even a reasonable one, exists for Saenz's claim that the *Playboy* article implied his personal involvement in political torture while an official with OPS."[68] However, the article never expressly stated this fact.

The court of appeals held that in such cases of libel by impression, courts should employ a subjective state of mind requirement on the question of meaning. This standard focuses on whether the speaker intended or knew of the impression that he or she was creating.[69] As the court of appeals in *Saenz* stated:

> If a plaintiff must establish by clear and convincing evidence that the defendants acted with actual knowledge of or in reckless

---

61. *Id.*
62. *Id.* at 681.
63. *Id.* at 680.
64. *See id.* at 680-81.
65. *Id.* at 681.
66. 841 F.2d 1309 (7th Cir. 1988).
67. *Saenz*, 841 F.2d at 1311.
68. *Id.* at 1315.
69. *Id.* at 1318.

> disregard for the falsity of their accusations, it follows that where the plaintiff is claiming defamation by innuendo, he also must show with clear and convincing evidence that the defendants intended or knew of the implication that the plaintiff is attempting to draw from the allegedly defamatory material.[70]

The knowledge of implication requirement imposed by the court of appeals in *Saenz* echoes the awareness of meaning requirement proposed by Franklin and Bussel.

More recently, in the celebrated libel case of *Masson v. New Yorker Magazine, Inc.*,[71] Federal District Court Judge Eugene F. Lynch imposed different variations of the awareness of meaning standard in each of the case's two jury trials.[72] In that case, plaintiff Jeffrey Masson contended that defendant Janet Malcolm falsely portrayed him as egotistical and vain in a two-part article in the *New Yorker*.[73] Specifically, he alleged that she conveyed this impression by deliberately altering Masson's statements and then attributing the quotations directly to him.[74] After working its way up and down the federal court system over the course of a decade, the case eventually went to a jury trial in May, 1993. Presiding over the first trial, Judge Lynch gave the jurors, among other instructions, the following admonition: "The third element that Mr. Masson must prove by a preponderance of the evidence, is that the defendant was aware at the time of publication of the false, defamatory meaning reasonably communicated by one or more of the challenged quotations."[75]

In addition, when answering the questions on the Special Verdict Form used by the jury to render its decision, Judge Lynch instructed the jurors to answer the following question: "Did Mr. Masson prove by a preponderance of the evidence that Janet Malcolm was aware, at the time of publication, that the quotation(s) . . . defamed him?"[76]

---

70. *Id.*

71. 832 F. Supp. 1350 (N.D. Cal. 1993).

72. The first trial in *Masson* ended when the jurors deadlocked on the issue of the amount of damages to award the plaintiff. *Id.* In the second trial, the jury ruled in favor of Janet Malcolm, the only remaining defendant. *Id.* At the time of the drafting of this article, the case was on appeal to the Ninth Circuit Court of Appeals.

73. *See* Janet Malcolm, *Annals of Scholarship, Trouble in the Archives* (pts. 1 & 2), NEW YORKER, Dec. 5, 1983, at 59, Dec. 12, 1983, at 60.

74. 501 U.S. 496, 499 (1991).

75. Jury Instructions at 22, Masson v. New Yorker Magazine, Inc., 832 F. Supp. 1350 (N.D. Cal. 1993) (No. C-84-7548 EFL).

76. Special Verdict Form at 4, Masson v. New Yorker Magazine, Inc., 832 F. Supp. 1350 (N.D. Cal. 1993) (No. C-84-7548 EFL).

In supporting this jury instruction, Judge Lynch ultimately reasoned that "awareness of defamatory meaning is an element of constitutional law."[77] In reaching this conclusion, Judge Lynch cited to the work of Franklin and Bussel.[78] He also found such a requirement in the Ninth Circuit's holding in *Newton v. National Broadcasting Co.*,[79] as well as in the holdings of the Seventh Circuit in *Woods v. Evansville Press Co.*,[80] and *Saenz v. Playboy Enterprises, Inc.*[81] Citing to *Newton*, Judge Lynch concluded that the court of appeals' decision in that case stood for the proposition that the Ninth Circuit has "held that subjective awareness of defamatory meaning must be established in order to impose liability under the First Amendment."[82] Judge Lynch reasoned that the "purpose of the awareness element is to ensure that liability is not imposed upon a defendant who acted without fault."[83] He stated that application of this standard is *not* limited to the libel by impression or libel by implication scenarios, noting that the awareness element must be applied "regardless of whether the defendant's statement is directly or indirectly libelous."[84]

Upon retrial, Judge Lynch again instructed the jurors to consider the defendant's state of mind about defamatory meaning. However, he altered the earlier instruction that had asked jurors in the first trial to consider whether "the defendant was aware at the time of publication of the false, defamatory meaning reasonably communicated by one or more of the challenged quotations."[85] At the second trial, the jury received the following revised instruction:

> The fourth element that Mr. Masson must prove, this one by a preponderance of the evidence, is that the defendant was aware at the time of publication of the false, defamatory meaning reasonably communicated by one or more of the challenged quotations, or published with reckless disregard as to the false, defamatory meaning reasonably communicated by one or more of the challenged quotations.[86]

---

77. *Masson*, 832 F. Supp. at 1362.
78. *Id.* at 1361.
79. 930 F.2d 662 (9th Cir. 1990).
80. 791 F.2d 480 (7th Cir. 1986).
81. 841 F.2d 1309 (7th Cir. 1988).
82. *Masson*, 832 F. Supp. at 1363.
83. *Id.*
84. *Id.*
85. *Id.* at 1361.
86. Jury Instruction at 23, Masson v. New Yorker Magazine, Inc., 832 F. Supp. 1350 (N.D. Cal. 1994) (No. C-84-7548 EFL).

In addition, on the Special Verdict Form in the second trial, the jury was asked the following question: "[D]id Janet Malcolm either know that the quotation defamed Jeffrey Masson, or act with reckless disregard of whether the quotation defamed him?"[87]

The instructions and Special Verdict Form reveal that Judge Lynch added a "reckless disregard" prong to his prior instruction on defamatory meaning, apparently borrowing this language from the actual malice standard. It also should be noted that the Special Verdict Form in the second trial substitutes the word "know" for the word "aware." The use of the word "know" echoes the first prong of the actual malice standard that asks jurors to consider whether the defendant knew of a statement's truth or falsity.

In summary, a number of lower federal courts have begun to adopt variations of the awareness of meaning standard originally proposed by Franklin and Bussel, adding another layer of constitutional defense to defendants in libel actions. It is a state of mind requirement very similar to the actual malice standard, except that the proposed standard applies to the element of defamatory meaning, not truth or falsity.

2. Supreme Court Decisions

While a number of lower courts have advocated or employed an awareness or knowledge requirement on the question of a message's defamatory meaning, the Supreme Court has never expressly held that such a requirement is mandated by First Amendment interests of free speech and a free press. It has, however, suggested in dicta that some minimum standard of liability on the issue meaning may be required under the First Amendment when the defamatory meaning of a statement is not clear on its face.

In *Gertz v. Robert Welch, Inc.*,[88] the Supreme Court held that private individuals need not prove actual malice to recover damages for actual injuries caused by a defamatory statement.[89] The Court held that states could set their own standards for liability in such cases, provided they did not impose strict liability on defendants. The Court reasoned that allowing states to impose a standard of liability less than actual malice "recognizes the strength of the legitimate state interest in compensating private

87. Special Verdict Form at 6, Masson v. New Yorker Magazine, Inc., 832 F. Supp. 1350 (N.D. Cal. 1994) (No. C-84-7548 EFL).

88. 418 U.S. 323 (1974).

89. *Id.* at 347.

individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability."[90]

The Court, however, went on to suggest in dicta that a *different standard* might apply when the defamatory meaning of a statement is *not* readily apparent to its publisher. It stated:

> Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential. . . . Such a case is not now before us, and we intimate no view at to its proper resolution.[91]

University of Texas Law Professor David A. Anderson remarks that this caveat "leaves little doubt that a showing of fault with respect to veracity might not suffice where the statement is not defamatory on its face, but it is not clear what the Constitution does require."[92] The Court's own language--whether the content would "warn a reasonably prudent editor or broadcaster"--suggests the imposition of an objective negligence standard (rather than the subjective awareness of meaning standard) that focuses on whether the defendant used reasonable care in investigating potential defamatory implications that might be drawn from a message.

In summary, there is a growing movement among legal scholars and lower federal courts to add a second subjective state of mind fault element to the rubric of constitutional libel law. The Supreme Court has suggested in dicta that a fault standard on the element of meaning may be required in some cases, although it has never squarely addressed the issue.

II. AN INTERDISCIPLINARY PERSPECTIVE ON THE AWARENESS OF MEANING STANDARD

University of Chicago Law School Professor Richard A. Epstein states that the law of defamation "necessarily involves at least three parties--the plaintiff, the defendant, and a third party--who interact in a wide array of circumstances."[93] This relationship represents a "defamation triangle."[94] The roles played by the third party--the message audience--in the defamation

---

90. *Id.* at 348.

91. *Id.* (citations omitted).

92. David A. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 463 (1975).

93. Richard A. Epstein, *Was* New York Times v. Sullivan, *Wrong?*, 53 U. CHI. L. REV. 782, 785 (1986).

94. *Id.*

triangle are critical in three related areas. The third party plays a pivotal role in: (1) processing message meaning; (2) creating, maintaining, and transforming individual reputations; and (3) representing the location of the primary injury element in defamation--reputational harm.

This article argues that the awareness of meaning standard denigrates and emasculates the roles of the third party. It suggests that adoption of the standard, when coupled with use of the actual malice rule, transforms libel into a *two-party tort.* The third party--the party that traditionally plays an active role in meaning determination, in creating and transforming reputations, and that is the site of reputational harm--is the odd party out. Adoption of the standard conflicts with the common law's conception of defamation as a relational tort that serves plaintiffs as an avenue of redress for reputational injury.

Sections A and B reveal that the awareness of meaning standard conflicts with the active role that readers play in determining meaning and, in so doing, contradicts the nature of defamation as a relational tort and the concept of reputation. Section C argues that the process for determining truth and falsity in libel law is distinctly different from the process of determining meaning. This difference is important because it suggests that while truth and falsity may be suitable for the application of a subjective state of mind requirement like actual malice, the element of meaning is not tailored for a subjective state of mind standard like the awareness of meaning rule. In a nutshell, meaning, unlike the element of truth/falsity, is not suitable for a subjective state of mind requirement.

A. THE STANDARD IGNORES THE REALITIES OF THE MEANING PROCESS

Subsection 1 provides a brief background on communication research that acknowledges the active role that readers necessarily play in the process of determining meaning. Subsection 2 then notes that the common law standards for determining meaning are in accord with communication research that focuses on the active role that readers play in the meaning process. Subsection 3 demonstrates how the awareness of meaning standard conflicts with the realities of meaning determination and identifies the concomitant problems with such a standard that attempts isolate aspects of a dynamic communication process.

1. Readers Play Active Roles in Determining Meaning

Writing in a 1986 *Dickinson Law Review* article considering the links between communication research and defamation, libel scholars Randall P.

Bezanson and Kathryn Ingle emphasize the critical role that readers play in determining meaning.[95] They state that "audiences play active parts in message and meaning construction."[96] Citing to research and theory in semiotics and hermeneutics, they observe that the "notion of the active reader pervades communications-related scholarship."[97] For instance, communication scholar John Fiske argues that "meanings are not located in the text itself. Reading is not akin to using a can opener to reveal the meaning in the message. Meanings are produced in the interactions between text and audience. Meaning production is a dynamic act in which both elements contribute equally."[98]

Fiske's observations make clear that the meaning intended by the encoder or source of a message--a potential defendant in a libel action--does *not* necessarily dictate or control meaning. The reader plays an active and crucial role in the determination of message meaning. Furthermore, Fiske's description of a "dynamic" process of meaning suggests that it is futile to isolate one element of the meaning process--such as the source's intent, the text, or the audience--and believe that it controls meaning. In brief, meaning is a complex process involving negotiating between reader and text.[99]

Likewise, communication scholar Mary Anne Moffitt notes that "American interpretivism privileges the audience's active role in deriving personal, privileged meanings from a text."[100] Meaning is seen as "audience-centered" in the American tradition of interpretivism.[101]

The so-called "effects tradition"[102] of empirical American communication research also acknowledges the active role that audiences play in determining the impact of messages. For instance, communication researchers Jeremy Cohen and Albert Gunther identify a number of audience-centered variables relevant to libel law that may influence the impact of messages on a person's reputation.[103]

In brief, scholars of communication in both the cultural studies and effects camps do *not* view the audience or message recipient as passive.

---

95. *See* Bezanson & Ingle, *supra* note 36.

96. *Id.* at 587.

97. *Id.* at 588.

98. JOHN FISKE, INTRODUCTION TO COMMUNICATION STUDIES 164 (1990).

99. Bezanson & Ingle, *supra* note 36, at 607.

100. Mary Anne Moffitt, *Articulating Meaning: Reconceptions of the Meaning Process, Fantasy/Reality, and Identity in Leisure Activities*, COMM. THEORY, Aug. 1993, at 231, 236.

101. *Id.* at 231.

102. JAMES W. CAREY, COMMUNICATION AS CULTURE 89 (1988).

103. Jeremy Cohen & Albert C. Gunther, *Libel as Communication Phenomena*, COMM. & LAW, Oct. 1987, at 9, 28.

Audiences necessarily play an active role in interpreting message meaning. The determination of meaning occurs as part of a communication process that involves active participation by message recipients. Meaning is not something controlled or totally controllable by the message communicator. Any "search for meaning" necessarily involves how people other than the message source perceive and process the communication.

2. The Recognition and Accommodation of Active Reading in the Common Law

The common law's emphasis on the reader and message recipient on the question of defamatory meaning acknowledges the active role that readers play in the meaning process.[104] At common law, the issue of meaning focused solely on how the average reader, giving words their natural and ordinary effect, would understand a message.[105] As Dienes and Levine state, "[a]t common law, the focus in establishing defamatory meaning was on what a reader could *reasonably understand* the publication to mean."[106] This maxim recognizes the interaction between text and reader.

Bezanson and Ingle, drawing the link between communication scholarship on meaning and libel law, state:

> It is by now commonplace within media theory that audiences, whether readers or listeners, play active roles in even the least interactive media. The audience has also been an important element in common law defamation, because it is the audience, or interpretive community, which is the site of reputational harm.[107]

At first glance, the meaning process described in Subsection 1 above seems to suggest that all meaning is relative, a condition that could paralyze a legal system that depends on precedent and fixed guidelines. The common law of libel, however, recognizes this danger and imposes limitations on the process of meaning determination, reining in otherwise unbridled audience discretion and relativism.

At common law, words are to be given their plain and natural meaning, with jurors not allowed to give a strained or unreasonable construction.[108]

---

104. *See* Franklin & Bussel, *supra* note 3, at 828 (stating that defamation historically "has been a recipient-centered concept").

105. *See* MacLeod v. Tribune Publishing Co., 52 Cal.2d 536, 547 (1959).

106. Dienes & Levine, *supra* note 4, at 247 (emphasis added).

107. Bezanson & Ingle, *supra* note 36, at 600.

108. SACK & BARON, *supra* note 18, at 77.

An average or reasonable reader standard is commonly applied on the question of meaning.[109] For instance, in both trials in *Masson v. New Yorker Magazine, Inc.* jurors were instructed that the language in question "must be taken in its plain and ordinary sense" and that the meaning of words involves consideration of "their natural and probable effect on the mind of the average reader."[110] In addition, the language must be considered as a whole. As Robert D. Sack and Sandra S. Baron state in their treatise on libel law, "particular words must be read in the context of the entire communication as a whole."[111]

The common law of libel thus recognizes the dynamic interaction between reader and text on the element of meaning, but maintains guidelines and standards to keep meaning determination from becoming a linguistic free-for-all.

3. The Awareness of Meaning Standard and the Privatization of Meaning

In contrast to the common law, the awareness of meaning standard conflicts with communication research and theory on meaning. The standard attempts to isolate and segregate the speaker's intent from other crucial aspects of the communication process in which meaning is negotiated. By privileging the source's intentions, the standard ignores the roles that audience, text, and culture play in the dynamic processes of meaning determination.

According to Bezanson and Ingle, there is a grave danger in separating the elements of the communication process and focusing on the source's

---

109. *Id.* at 81. A crucial distinction must be recognized here between questions of meaning and questions of value. Franklin & Bussel, *supra* note 3, at 829-30 n.14. The question of meaning--which is the focus of the awareness of meaning standard--involves determination of "whether the words will bear the 'spin' that [the] plaintiff is seeking to put on them." MARC A. FRANKLIN & DAVID A. ANDERSON, CASES AND MATERIALS ON MASS MEDIA LAW 200 (5th ed. 1995). In contrast, the value question, which is necessarily considered *after* resolution of the meaning question, focuses on whether the particular meaning in question is the type that could harm a person's reputation. *Id.* at 201. It is only on the value question that disputes arise about in whose eyes reputational harm should be measured--so-called "right-thinking" people or, in the words of the RESTATEMENT (SECOND) OF TORTS § 559 (1977), a "substantial and respectable minority" of the community. A discussion of this issue and the value question is beyond the scope of this article, which focuses instead on a proposed standard that relates only to the meaning question.

110. Jury Instruction at 13, Masson v. New Yorker Magazine, Inc., 832 F. Supp. 1350 (N.D. Cal. 1993) (No. C-84-7548 EFL); Jury Instructions at 12, Masson v. New Yorker Magazine, Inc. (N.D. Cal. 1994) (No. C-84-7548 EFL).

111. SACK & BARON, *supra* note 18, at 76.

intent to the exclusion of the content of the message, the audience's interaction with that content, and public discussion and debate about that message and its potential meanings.[112] They emphasize that "any attempt to make sense of human communication which obscures the dynamic communication process in favor of precise analysis of isolated parts of that process will likely lead to distorted conclusions."[113]

The awareness of meaning standard indeed distorts the very notion of meaning. It privileges the *intent* in the head of the message source, not the *meaning* actually conveyed to reasonable readers. By pleading ignorance of a meaning that a jury finds a message is susceptible of conveying and that the plaintiff alleges is conveyed, a libel defendant gains a potential escape hatch from liability. If the jury believes a defendant's protestations of lack of awareness of meaning, he or she is cleared of liability. This defeats the common law purpose of defamation law--providing redress for reputational harm.

This standard--one that privatizes meaning in favor of defendants and ignores realities of communication processes--threatens to jeopardize the common law's goal of compensation for reputational harm. The focus is taken off the question of harm and injury and placed instead on considerations of fault and a message source's intentions. The actual malice standard already provides a fault standard to protect defendants that often becomes the focus on libel litigation. As Bezanson and Ingle state:

> If the defamation torts are to sustain their purpose in providing redress for reputational harm rather than for slipshod journalism or media irresponsibility, the analytical frameworks that are now applied in the interest of free expression must be carefully assessed. Privileges and standards of proof designed to allow for more precise determinations of fault and falsity tend to isolate some variables in the communication experience and to ignore others. When these isolated and specific issues are addressed and synthesized in the form of a libel judgment, they often fail to explain the communication taken as a whole.[114]

The awareness of meaning standard fits this description. It is a fault standard that isolates a single variable in the communication experience while it ignores others. In particular, it excludes the audience's role that is vital in determining a message's meaning. In addition, it excludes the role of the text (the message), privileging instead the thoughts and intentions in

112. Bezanson & Ingle, *supra* note 36, at 607-08.

113. *Id.* at 589.

114. *Id.* at 591.

a defendant's head. The problems with the standard, however, extend beyond its direct contradiction of the reality of the meaning process and its frustration of the common law purpose of defamation law.

B. THE STANDARD CONFLICTS WITH THE RELATIONAL NATURE OF DEFAMATION AND REPUTATIONAL HARM

As noted above, the law of defamation involves at least three parties--the defendant (the message source), the plaintiff (the individual referred to in the message), and the message audience (the third party to whom the defendant's message about the plaintiff is communicated and received).[115] The role of the third party is vital not only in receiving and interpreting messages, as described above in Section A, but also in shaping and transforming individual reputations *and* as the site of reputational harm, the central injury element in libel law.[116] This section argues that the proposed standard ignores the relational nature of the tort and substantially derogates the role of the third party.

1. Linking Meaning, Reputation, and the Role of the Third Party

Meaning and reputation are inextricably linked. A reputation is a relational interest, manifested in the attitudes, opinions, and overt actions and behaviors of others toward the plaintiff within a relevant community.[117] How people come to think, feel, and behave toward an individual is influenced *both* by how they process information that they receive--how they interpret and understand messages about the individual--and by their discussion with others about that information. As Bezanson and Ingle state, "reputation entails the evaluative interpretation of information concerning an individual or entity by a relevant discourse community."[118]

Simply put it is the audience's active interpretation of messages and processing of information that creates, maintains, and transforms an

---

115. *See* Epstein, *supra* note 93, at 795.

116. *See* Monitor Patriot Co. v. Roy, 401 U.S. 265, 275 (1971) (stating that "damage to reputation is . . . the essence of libel").

117. *See* RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 118 (1992) (defining reputation as a relational interest "existing outside the individual persona, an intangible 'asset' of social or professional life that may be inventoried like any other stock-in-trade"); Lee C. Bollinger, *The End of* New York Times v. Sullivan: *Reflections on* Masson v. New Yorker Magazine, 1991 SUP. CT. REV. 1, 28 (providing that reputation is often equated with one's "standing within a community").

118. Bezanson & Ingle, *supra* note 36, at 585-86.

individual's reputation. The speaker's intent behind a message does *not* control another individual's reputation. As Bezanson and Ingle state, "[r]eputations are established not because of a speaker's motive or the specific content of a media message, but because these and other elements of the communication process have been interpreted and assimilated by those for whom that motive or message has salience."[119] Reputations thus evolve as part of a dynamic communication process involving active interpretation of messages by readers and/or viewers.

The communication processes involved in shaping individual reputations also extend beyond the realm of individual processing of information and message meaning. These additional processes involve discourse and debate among individuals within a relevant community. Specifically, readers may discuss the meaning of information that they receive about an individual and reformulate their own conceptions about how the information impacts a person's reputation. It is in this public process of discussion that an individual's reputation is molded and transformed. These communication processes help to make the concept of individual reputation, in the words of University of California-Berkeley Boalt Hall School of Law Professor Robert C. Post, an inherently "social and public" phenomenon.[120]

2. The Links Between Reputational Harm and the Role of Third Parties

Reputational injury occurs when there is harm to one's relationships with others caused by a defamatory message. As First Amendment scholar Rodney Smolla states, "[d]efamation is defined in terms of injury to one's esteem or standing in the community--the very vocabulary with which we describe the tort conjures up notions of interference with business, family or social relationships."[121] Smolla's description makes clear the nature of the relational interest that is an individual's reputation.

The source of injury to reputation in libel law is a defamatory message. In determining whether a potentially injurious defamatory meaning is conveyed, it is necessary for at least one person other than the plaintiff and defendant to receive the message and understand it in a defamatory sense alleged by the plaintiff before proceeding in a libel action.[122] In resolving

---

119. *Id.* at 586.

120. Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 708 (1986).

121. *See* SMOLLA, *supra* note 117, at 118.

122. *See* RESTATEMENT (SECOND) OF TORTS § 563 cmt. c (1977) (providing that "[t]he question to be determined is whether the communication is reasonably understood in a defamatory sense by the recipient").

the issue of message meaning, "[l]anguage is to be given its natural, plain, ordinary, obvious meaning."[123] As noted above, a reasonable reader commonly is employed on the question of message meaning.[124]

The role of the reader/viewer of a message--the third party in libel law--thus lies at the heart of reputational harm. Only if the reader or viewer understands the defamatory meaning alleged by the plaintiff to cause harm may a plaintiff proceed with a libel action.[125] Furthermore, when readers' understanding of the defamatory message causes them to change their behavior or opinion of the plaintiff in the negative direction, actual injury to reputation occurs. The reader is thus not only vital for interpreting message meaning, but also represents the location of reputational harm. As Bezanson and Ingle state, "it is the audience, or interpretive community, which is the site of reputational harm."[126]

In summary, the third party plays a crucial role not only in interpreting meaning and shaping reputations, but also in the processes that lie at the heart of reputational harm. Unfortunately, as Subsection 3 below suggests, the awareness of meaning standard conflicts with these facts.

3. Awareness of Meaning Standard: Ignoring the Relational Nature of the Tort and Depreciating the Role of the Third Party

A major flaw with the awareness of meaning standard is that it ignores the relational nature of defamation. It emasculates the role of the third party as the interpreter of messages, the creator of reputations, and the location of reputational harm. It allows a defendant to escape liability *even though* a reasonable reader might understand that the message in question to convey the defamatory meaning alleged by the plaintiff. Furthermore, the standard allows the defendant to escape liability *even though* actual injury to reputation may have been caused by his or her message.

While message recipients play a vital role in shaping and molding individual reputations through processing of messages and debate and discourse, this role is largely stripped away by the awareness of meaning standard. The thoughts and intentions in the head of a defendant about meaning are allowed to trump the actual processes that occur in shaping,

---

123. SACK & BARON, *supra* note 18, at 77.

124. *See supra* notes 104-05 and accompanying text.

125. This, of course, is not to say that the plaintiff will win the libel action simply because at least one person other than himself and the defendant receives the message and understands its defamatory meaning. Other elements, such as fault on the question of truth and falsity, must be satisfied to win a libel action.

126. Bezanson & Ingle, *supra* note 36, at 600.

transforming--and harming--individual reputations. This radically changes the nature of defamation as conceived at common law, removing the role of the audience.

The standard comports with what Bezanson and Ingle characterize as libel law's "increasing disregard for the relational aspects of defamation."[127] The ramification of this, Bezanson and Ingle state is clear--"the concept of defamation as a tort which protects relational interests within relative interpretive communities loses force when those communities, or audiences, are not recognized as active interpreters."[128] The awareness of meaning standard does much more than give defendants another defense in libel actions--it changes the very nature of the defamation tort and the "delicate balance"[129] between defendant, plaintiff, and message recipient. The balance shifts distinctly in favor of the defendant, with the message recipient largely removed from the equation.

C. MEANING, UNLIKE TRUTH/FALSITY, IS NOT SUITED FOR A SUBJECTIVE STATE OF MIND REQUIREMENT

This Section argues that meaning and truth/falsity--two distinct elements in libel law--are determined in readily different fashions. The law's conception of truth/falsity as objective, verifiable fact makes it much better suited for a subjective state of mind standard, such as actual malice, than the element meaning. Concomitantly, this suggests that the awareness of meaning standard--as a subjective state of mind standard applied to the issue of meaning--may be inappropriate.

1. Truth/Falsity as Discoverable, Objective, Verifiable Reality

Unlike the process for determining message meaning described above in Section A, the method for determining truth and falsity in libel law does *not* require or entail an active role on the part of the message recipient (or Epstein's "third party"). Instead, the journalist or other message communicator may embark on a solitary search for determining truth or falsity and discover it independently of any communication process. The law engages in the fiction that truth, unlike meaning, exists independently of the reader or audience for a message.

---

127. Bezanson & Ingle, *supra* note 36, at 603.
128. *Id.* at 603-04.
129. *See* Epstein, *supra* note 93, at 786.

As Harvard professor Frederick Schauer states, the law of libel assumes "that certain objective factual truths exist, that some state of affairs does obtain."[130] Truth is thus a discoverable, objective reality that exists independently of the journalist or defendant. It can be investigated and discovered by a message source, independent of any effort by third parties. Indeed, the watch dog role of the press assumes that it will ferret out the truth about government conduct and operations and report it to the public.[131]

The message source thus has the ability, in most cases, to control the truth or falsity of his or her messages. In some cases, however, ascertaining the truth may be difficult. This difficulty in large part underlies the Supreme Court's adoption of the actual malice standard. As Justice Byron White stated in his concurring opinion in *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*:[132]

> The *New York Times* case was an effort to effectuate the policies of the First Amendment by recognizing the difficulties of ascertaining the truth of allegations about a public official whom the newspaper is investigating with an eye to publication. Absent protection for the nonreckless publication of "facts" that subsequently prove to be false, the danger is that legitimate news and communication will be suppressed.[133]

The difficulty in determining truth or falsity thus does not stem from the complex dynamics of human communication processes. Rather, its sources are the impediments that may block the investigatory process, such as faded memories of witnesses, shield laws, and lost or destroyed evidence. Indeed, there may be a dispute about what the truth really is in a particular case, with the jury left to decide what is true by weighing the evidence and its credibility. The actual malice standard provides a method of protection for defendants when such obstacles arise on the quest for true facts.

Because truth is conceptualized as objective and verifiable fact beyond the dynamic processes of human communication, it is much better suited for a subjective state of mind requirement like actual malice than the issue of meaning. Unlike meaning, there is a fixed benchmark or referent of truth against which a defendant's subjective state of mind may be compared.

---

130. Frederick F. Schauer, *Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter*, 64 VA. L. REV. 263, 267 (1978).

131. *See generally* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 297 (articulating a central role for the press as a watch dog over government abuses and corruption in First Amendment jurisprudence).

132. 398 U.S. 6 (1970).

133. *Id.* at 22-23 (White, J., concurring).

2. Message Truth/Falsity as a Question of Accuracy

The question whether a particular printed statement is true or false really amounts to a question of accuracy. Complete truth, as Sack and Baron note, is not necessary to establish the defense of truth, as "minor inaccuracies do not render an otherwise truthful article actionable."[134] All that is required for the common law defense of truth is that the statement sued upon be found to be substantially true. As the Supreme Court stated in *Masson v. New Yorker Magazine, Inc.*,[135] the law of libel "overlooks minor inaccuracies and concentrates upon substantial truth."[136] The concept of accuracy thus lies at the heart of the legal issue over whether an allegedly defamatory statement is true or false for purposes of libel law, with minor inaccuracies held not actionable.

Truth and falsity of a message then boils down to "a content-oriented question."[137] The question is whether the content published in an article or book is accurate--whether it matches or corresponds with a reality that exists independent of the writer or publisher. As attorney Martin F. Hansen states, the law assumes "that factual statements describe a reality existing apart from the individual observer."[138] Hansen adds that there is a "presumed stability between statements and the reality they purport to describe."[139] A correspondence theory of truth is thus employed in libel law in which the question is whether printed statement X corresponds with an independent reality Y.

For instance, in *New York Times Co. v. Sullivan*, the United States Supreme Court held that some of the statements at issue were false because they "were not accurate descriptions of events which occurred in Montgomery."[140] The Court in *Sullivan* compared the printed statements in the advertisement in question against the "events which occurred in Montgomery" to determine falsity.[141]

This conception of falsity invokes the related concept of *verifiability*, with the determination of factual falsity at libel law turning on the ability of the parties to verify a statement's truth or falsity by reference to outside

134. SACK & BARON, *supra* note 18, at 185.

135. 501 U.S. 496 (1991).

136. *Id.* at 516.

137. *See* Bezanson & Ingle, *supra* note 36, at 586.

138. Martin F. Hansen, *Fact, Opinion, and Consensus: The Verifiability of Allegedly Defamatory Speech*, 62 GEO. WASH. L. REV. 43, 55 (1993).

139. *Id.* at 57.

140. New York Times Co. v. Sullivan, 376 U.S. 254, 258 (1964).

141. *Id.*

evidence.[142] As Sack and Baron suggest, the truth and falsity determination amounts to a "search for 'historical fact.'"[143]

This approach to truth and falsity is evident in the Supreme Court's decision in *Milkovich v. Lorain Journal Co.*[144] In that case, the Supreme Court articulated the standard for when statements are legally considered as either actionable fact or non-actionable opinion. In articulating the standard, the Court held that only statements that are objectively verifiable--statements that are, in the words of the Court, "provable as false"[145]--are actionable statements of fact.

The Court then illustrated that determinations of factual falsity are made by comparing whether a published statement, X, matches an objective fact, Y, that exists independently of the publisher of statement X. In *Milkovich*, a central issue was whether the plaintiff lied while testifying before the Ohio High School Athletic Association (OHSAA). If the plaintiff had not lied, then the statement in the column at issue that accused him of lying would be considered false. The Court stated that "a determination whether [plaintiff] lied in this instance can be made on a core of objective evidence by comparing, *inter alia*, [plaintiff's] testimony before the OHSAA board with his subsequent testimony before the trial court."[146] The Court emphasized that whether Milkovich had lied was "*an articulation of an objectively verifiable event.*"[147] Upon determining whether the plaintiff had lied, this fact then could be compared to what was printed in the column at issue in *Milkovich.*

This is a referential theory of truth. It is one in which the law checks for a one-to-one correspondence between what was printed or written in an article and what transpired in the real world (a referent). If the two match, or a least are not substantially different, then for purposes of libel law the publication is true.

The Supreme Court's recent decision in *Masson v. New Yorker Magazine, Inc.*[148] also illustrates the Court's one-to-one referential (or correspondence) theory of truth and falsity. In that case, the Supreme Court held, in the context of the deliberate alterations of quotations, that an alteration from what was actually said by a quotation's source does not

---

142. *See* Martin F. Hansen, *Fact, Opinion, Consensus: The Verifiability of Allegedly Defamatory Speech*, 62 GEO. WASH. L. REV. 43, 48 (1993).

143. SACK & BARON, *supra* note 18, at 193.

144. 497 U.S. 1 (1990).

145. *Id.* at 19.

146. *Id.* at 21.

147. *Id.* at 22 (emphasis added).

148. 501 U.S. 496 (1991).

make the published, altered-version of the quotation false unless there is "a material change in the meaning conveyed by the statement."[149] The Court then compared what plaintiff Jeffrey Masson said on a series of tape-recorded interviews with what writer-defendant Janet Malcolm attributed to him.[150] Essentially, the Court asked whether statement X published by Malcolm and attributed directly to the mouth of Masson matched statement Y made by Masson on tape-recorded interviews, employing the material change in meaning test as its barometer of accuracy.

In summary, truth--at least for purposes of libel law--exists independently of any human communication process. It is objective and discoverable. Truth is stable; it is not--unlike meaning--negotiated by the reader. The reader or audience of an article or other message plays no role in shaping or creating the truth because it exists a priori of the article or message in question.

D. THE ELEMENT OF TRUTH/FALSITY IS SUITED FOR A SUBJECTIVE STATE OF MIND STANDARD WHILE MEANING IS NOT

Because truth is assumed to be fixed, it is well suited for the application of a subjective state of mind requirement like actual malice. There is an objective reality against which a defendant's knowledge and state of mind about the veracity of a particular fact may be compared. In other words, a defendant's state of mind (X) may be compared with an objective, independent reality (Y).

In contrast, the meaning subscribed to an article or message necessarily depends upon information processing and active participation by readers, as well as discussion and discourse among members of a community about its contents. Meaning, unlike truth, "is not stable or unchanging, but varies with its context and an audience's understanding of the purpose for which the statement was made."[151] The ramification of this fact about meaning is that there is not an objective, independent reality against which to

149. *Id.* at 517.

150. It should be noted that Malcolm claimed that some of the quotations that appeared in her article about Masson but were not found on the tapes were contained on hand-written notes of her conversations with Masson. *Id.* at 508. In yet another twist in this seemingly never-ending case that is currently on appeal again, Malcolm claimed in August, 1995--more than a decade after the case began--to have discovered missing notes that she claims contain three of the quotations at issue in the case. Karyn Hunt, *Writer Finds Missing Notes to Libel Case,* S.F. EXAMINER, Aug. 26, 1995.

151. Martin F. Hansen, *Fact, Opinion, and Consensus: The Verifiability of Allegedly Defamatory Speech,* 62 GEO. WASH. L. REV. 43, 72 (1993).

compare a defendant's state of mind about meaning. There is no benchmark against which the defendant's alleged state of mind about meaning may be evaluated. The element of meaning, in contrast to the element of truth/falsity, is thus ill suited for the application of a subjective state of mind requirement.

CONCLUSION

This article suggests three reasons why judges, justices, and legislative bodies should proceed with caution before adopting the awareness of meaning standard. First, the standard conflicts with basic communication research and theory about message meaning. It fact, it corrupts the concept of meaning. It fails to acknowledge the crucial interaction between reader and text, and instead overemphasizes the thoughts in the mind of the message source. The intentions of the speaker, however, are *not* the same thing as the meaning of a message.

Second, by ignoring the role of the reader or third party in defamation law, the standard comports with what Bezanson and Ingle characterizes as libel law's "increasing disregard for the relational aspects of defamation."[152] It not only conflicts with the realities of communication, but also with the nature and purpose of the tort. As Bezanson and Ingle state, "the concept of defamation as a tort which protects relational interests within relative interpretive communities loses force when those communities, or audiences, are not recognized as active interpreters."[153] The natural role of the third party is removed from the balance in defamation. Defendants are allowed to escape liability for reputational harm even though reasonable readers may understand a message to convey a defamatory meaning.

Finally, the article reveals that the meaning and truth/falsity are distinct concepts, with the element of truth/falsity better suited for a subjective state of mind standard. Meaning, as the common law acknowledges, is negotiated and unstable, while truth is assumed to be objective, verifiable, and independent of any communication process. That libel law engages in the fiction that truth is objective makes it much better suited for a subjective state of mind requirement than meaning. The independent reality of truth conceptualized in libel law provides a firm benchmark against which a defendant's subjective state of mind may be compared. This standard for comparison is lacking on the issue of meaning.

---

152. Bezanson & Ingle, *supra* note 36, at 603.

153. *Id.* at 603-04.

As noted early in the article, this interdisciplinary analysis and its conclusions are *not* intended to replace or substitute for the First Amendment policy concerns of free speech and legal reasoning that militate in favor of its adoption. Rather, the analysis is intended to supplement the forceful policy-driven arguments offered by Franklin and Bussel, Dienes and Levine, and lower court judges, and to help ground the law of defamation in the realities of communication processes. A complete analysis of the awareness of meaning standard should be cognizant of *both* the legal arguments in favor of the standard as well as communication research which suggests that it may be a flawed approach to resolving the legal problems it is intended to address.

What is clear is that what appears at first to be the simple addition of one element to the calculus of constitutional libel law has consequences much greater than enhancing speech protection. It distorts the nature and purpose of defamation law in the name of free speech. Whether distortion of the tort in the name of protecting speech and a free press is sound ultimately must be put to debate in the legal community.