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HOW DO READERS READ? SOCIAL SCIENCE AND THE LAW OF LIBEL*

David McCraw**

Was L.B. Sullivan defamed?

In the twenty-eight years since the Supreme Court's decision in *New York Times Co. v. Sullivan*,¹ that question has been treated as little more than a curiosity by commentators and courts. Justice Brennan's ground-breaking opinion constitutionalizing the law of defamation shifted the focus of the law from the issue of harm to the plaintiff and other traditional elements of the tort to defendant fault.² This latter issue, not surprisingly, now dominates legal commentary on libel.³

*New York Times* arose after a political advertisement decrying racial violence in Montgomery, Alabama, was placed by civil rights activists in *The New York Times* in 1960. The case stands as a poignant example of just how far the legal determination of harm to reputation under traditional principles of defamation law can diverge from reality. Both Justice Black, concurring in the Court's decision,⁴ and subsequent commentators⁵ have questioned not only the propriety of the $500,000 in damages won by Sullivan in the Alabama state court, but the very claim that a white southern politician's reputation was in any way harmed by the verbal attack of civil rights activists in

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¹. 376 U.S. 254 (1964).

². *See id.* at 279; *see also* RESTATEMENT OF TORTS § 558 (1938) (listing elements of the tort of defamation); ROBERT D. SACK, LIBEL, SLANDER AND RELATED PROBLEMS 39 (1980) (describing the evolution of elements of the cause of action for defamation).


⁵. E.g., David A. Anderson, *Presumed Harm: An Item for the Unfinished Agenda of Times v. Sullivan*, 62 JOURNALISM Q. 24, 27-28 (1985) [hereinafter Anderson, *Presumed Harm*] (discussing the defense's strategy of not attacking Sullivan's lack of evidence of reputational harm); Diane L. Zimmerman, *Curbing the High Price of Loose Talk*, 18 U.C. DAVIS L. REV. 359, 369 (1985) ("Most of the mistakes identified in the advertisement . . . in no event could have been construed as harming his or anyone's reputation.").
an advertisement published in that newspaper. Given the New York Times Court’s analytic emphasis on whether the newspaper acted with actual malice, decisions in its aftermath have said comparatively little about what would seem to be the fundamental issue in this type of tort action: Was there reputational harm, and how is it proven?

In the wake of growing dissatisfaction with defamation law’s focus on fault, assessment of reputational harm has become fertile new ground for both constitutional analysis and social science research. A few articles reporting research on such questions as how well readers distinguish between fact and opinion and how potential jurors judge the susceptibility of members of their community to libel have recently been published. Some scholars have urged the courts to make increased use of social science research in adjudicating First Amendment cases. Others have suggested use of social science data on the empirical questions raised by defamation, obscenity, and related legal issues. At the same time, in at least one high-profile libel case, Wayne Newton’s suit against the National Broadcasting Company, a public opinion survey was introduced to document reputational harm.


7. See generally Jeremy Cohen et al., Experimental Test of Some Notions of the Fact/Opinion Distinction in Libel, 66 JOURNALISM Q. 11 (1989) [hereinafter Cohen, Experimental Test] (reporting, among other things, that readers do pay attention to a newspaper’s contextual cues as to what is commentary and what is news); Jeremy Cohen et al., Perceived Impact of Defamation, 52 PUB. OPINION Q. 161, 171 (1988) [hereinafter Cohen, Perceived Impact] (reporting that jurors are likely to see others in the community as less skeptical than themselves in reading potentially libelous material).

8. See, e.g., Cohen, Perceived Impact, supra note 7, at 172 (arguing that empirical studies on perception “raise significant questions about the assumptions found in law pertaining to reputation”); Jeremy Cohen & Albert C. Gunther, Libel as Communication Phenomena, 9 COMM. & L. 9, 30 (1987) [hereinafter Cohen, Communication Phenomena] (“[R]esearch in communication brings us to a point at which we may begin to operate with more precision to identify what we mean by damage to reputation, and to identify the circumstances under which a communication may be reliably held to account for damage to reputation.”).

9. See generally Cohen, Communication Phenomena, supra note 8 (advocating more behavioral research on how and under what circumstances libelous media stories change readers’ opinions about persons mentioned in the stories); Timothy W. Gleason, The Fact/Opinion Distinction in Libel, 10 HASTINGS COMM. & ENT. L.J. 763 (1988) (stating that communication theory from social science can help courts understand the way readers decode contextual cues in coming to conclusions about what is opinion and what is alleged fact); William A. Haskins et al., Freedom of Speech: A Review Based Upon Analytical Communication Models, 8 COMM. & L. 37 (1986) (arguing that the courts have failed to square their view of the communication process with the findings of modern social science research).

Social science research can offer data on two important subjects common to defamation actions. The first involves “effect questions,” which explore how media messages influence viewers’ or readers’ beliefs and ultimately their opinion of a person’s reputation. Social science research can also examine the conditions under which reputational change occurs and the causal connection between defamation and reputational change. In addition to effect questions, social science research can assess how readers read. That is, it can analyze “processing questions” such as how readers arrive at meaning, how they decode contextual cues, and how pre-existing attitudes shape interpretation of meaning. These questions are important in libel law because a publication reasonably read as hyperbole, parody, or opinion is immune from liability as defamation.11

This Article reviews how the law has dealt with both the effect questions and the processing questions implicit in contemporary defamation law. It describes the communication paradigm that emerges from Supreme Court defamation decisions and compares that judicial model with what social science research shows about how the communication process actually works. The Article then discusses the policy implications of introducing social science models and research into areas that significantly implicate First Amendment values and goals. It concludes that liability for defamation, when speech implicates First Amendment interests, cannot be based solely upon an empirical finding of reputational harm. Instead, it suggests that social science research may be most useful in broadening and increasing the sophistication of models of human behavior that underlie judicial determinations.

I. REPUTATIONAL HARM: ANALYZING THE EFFECT OF MEDIA MESSAGES

A. Legal Approaches to the Effect Question

In typical tort actions for physical injury or economic loss the question of whether an injury has occurred is often uncontested. Rather, the principal issues being litigated are usually causation or damages. The evidentiary questions concerning the existence of actual injury are raised when tort...
claims are asserted for intangible injuries like emotional distress. Defamation, on the other hand, raises questions regarding proof of injury which are even more difficult than those involved in other intangible injury actions. "The logic of defamation creates a tangled web because it necessarily involves at least three parties—the plaintiff, the defendant, and a third party—who interact in a wide array of circumstances." 12 Those third parties—the readers, listeners, or viewers of the alleged defamation—are the crucial link in proof of injury. The crux of a suit for defamation in most jurisdictions is not that the plaintiff suffered direct emotional harm from exposure to the libelous publication, but that its publication changed the way others felt about him and acted toward him. 13

Some writers have attempted to dismiss the problem of defining defamation as a matter of common sense. 14 A closer look at the nature of the tort, however, suggests a different view. Logically, if defamation requires a detrimental change in readers' opinions towards an individual, and not merely the distress suffered by the individual when he or she sees the publication or knows that others see it, then the determination of whether the tort has occurred hinges on numerous variables. These variables include the readers' pre-publication attitude toward the plaintiff, the readers' pre-publication attitude toward the media defendant, and the persuasive potency of the statement—all interchanging within the dynamic social setting of the community. These diverse and intangible variables produce difficult questions. For example, if a plaintiff is of such impeccable esteem in his community that no one would believe negative statements about him, is he barred from winning a defamation action no matter how vicious the report? Conversely, if a plaintiff is of such low esteem that nothing can further damage his reputation, is a publication immune in its attacks on him? In either case, what percentage or stratum of a community must change its opinion toward the plaintiff before the law can permit the conclusion that "reputation" was

12. Epstein, supra note 6, at 785.
13. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 773 (5th ed. 1984) ("Defamation is . . . that which tends to injure 'reputation' in the popular sense; to diminish the esteem, respect, good will or confidence in which the plaintiff is held . . . . It necessarily . . . involves the idea of disgrace . . . .") (footnotes omitted) (collecting cases). By contrast, a false communication "that does not injure reputation but does injure feelings may be actionable as an invasion of privacy." See SACK, supra note 2, at 45 n.22.
14. E.g., KEETON ET AL., supra note 13, § 111, at 773 ("the general idea of defamation is sufficiently well understood"); Epstein, supra note 6, at 808 ("generally, it is not too difficult to find out whether [a certain statement] is defamatory"). The Restatement defines a defamatory communication as one that "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); see also SACK, supra note 2, at 46 n.26 (collecting cases defining "defamation").
injured? Finally, is a publication of low repute and no credibility effectively libel-proof because no reasonable reader should believe it?

These questions demonstrate the conceptual difficulties distinguishing defamation from other torts. The plaintiff is a stranger to the crucial causal inquiry: the effect, if any, of the defendant’s communication on a third-party. Moreover, the nexus between media and audience is the creation of meaning, a process that modern linguistic and literary theory has shown is fraught with ambiguity, subjectivity, and complexity. In short, as Professor Zimmerman succinctly stated, “no one—neither the courts nor the scholars—can explain exactly what constitutes defamation.”

Despite the conceptual, analytical, and evidentiary complexities posed in defamation jurisprudence, the question of what constitutes defamation was disposed of at common law, in large part, with the doctrine of “presumed harm.” Under this doctrine, actual harm does not need to be shown; the mere presence of words judged defamatory entitled the plaintiff to a presumption of actual injury. In fact, the presumption was irrebuttable in some jurisdictions.

The presumed harm doctrine has produced verdicts that can best be described as bizarre. New York Times Co. v. Sullivan provides a dramatic case in point. Sullivan, Commissioner of Police for Montgomery, Alabama, sued The New York Times after it published an advertisement signed by sixty-four civil rights leaders describing racial turmoil in Montgomery. He alleged that negative references to the police made in the advertisement necessarily reflected detrimentally on him. Specifically, he complained that the publication contained significant factual errors harming his reputation.

15. See, e.g., David L. Eason, The New Journalism and the Image-World: Two Modes of Organizing Experience, in 1 Critical Studies in Mass Communications 51 (1984) (“By the end of the 1960s the doctrine of representation had crumpled in linguistics, philosophy, and even literary criticism. The center which separated image and reality was not holding . . . .”).


18. Anderson, Presumed Harm, supra note 5, at 24; see also Keeton et al., supra note 13, at 795 (collecting cases).


21. Id. at 257; see also Heed Their Rising Voices, N.Y. Times, Mar. 29, 1960, at L25.


23. The errors cited included claims that Martin Luther King, Jr., had been arrested seven times (in fact, it was four), that police had surrounded a school campus (they had actu-
Commentators have pointed out, however, that these errors could not have harmed Sullivan’s reputation. First, as Professor Epstein points out, Sullivan was not even in office at the time many of the events described in the advertisement occurred. Second, as Justice Black argued in his concurring opinion, the presumption of injury was applied in spite of the likelihood that Sullivan’s reputation was enhanced, not harmed. In other words, could a white southern office holder in 1960 really be heard to complain that his standing in his community was harmed by unflattering comments from civil rights activists? Finally, at the time of publication, the newspaper’s total daily circulation in Alabama was twenty-five copies. Nevertheless, at trial, Sullivan was awarded $500,000 for damage to his reputation thanks in part to the doctrine of presumed harm.

The doctrine of presumed harm traces its legal roots to the now largely abandoned idea that tort law should punish wrongdoers as much as compensate victims. Its survival in the face of attacks by some courts and scholars

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24. See Zimmerman, supra note 5, at 369 (“Most of the mistakes identified in the advertisement could in no way have been said, even by inference, to implicate Mr. Sullivan — and in no event could have been construed as harming his or anyone’s reputation.”).

25. Epstein, supra note 6, at 787.

26. New York Times, 376 U.S. at 294 (“Viewed realistically, this record lends support to an inference that instead of being damaged Commissioner Sullivan’s political, social, and financial prestige has been enhanced by the Times’ publication.”).

27. Anderson, Presumed Harm, supra note 5, at 28.

28. New York Times, 376 U.S. at 256. Some commentators erroneously equated presumed harm with either presumed damages or intangible injury. E.g., Sheldon W. Halpern, Values and Value: An Essay on Libel Reform, 47 WASH. & LEE L. REV. 227, 245 (1990). Presumed harm goes to the question of whether injury has occurred at all, while presumed damages comes into play after the harm or injury has been established and the courts are then required to determine the plaintiff’s compensation. See Paul A. LeBel, Defamation and the First Amendment: The End of the Affair, 25 WM. & MARY L. REV. 779, 785 (1984) (“A presumption of harm to reputation supplies the injury element of the tort action of defamation . . . . A presumption of damages, on the other hand, entitles the tort plaintiff to compensation even in the absence of any proof of actual loss.”). By analogy, presumed harm in defamation is equivalent to the physical intrusion element in a trespass action. What compensation the plaintiff in the trespass action should receive and how those damages should be proved are distinct from the question of whether the harm—the trespass—has occurred. The same distinctions apply in libel, although some courts allow juries to place a value on the presumed harm, even absent the showing of any resultant injuries. Id. in such cases, the doctrine of presumed harm becomes a doctrine of presumed damages as well. Finally, there is intangible injury, such as emotional distress, which is routinely allowed in torts including libel and is part of the damages arising from the harm. Id. at 785-86.

29. Anderson succinctly explains this evolution of tort law:

The genius of modern tort law is its emphasis on injury. Early tort law was an adjunct of criminal law and focused not on injury, but on wrong. If a court awarded damages, the damages were only incidental to the criminal prosecution of the perpe-
is largely due to the belief that proof of reputational harm is unduly burdensome. Moreover, the doctrine of presumed harm and the idea of libel per se were natural outgrowths of an earlier, less sophisticated view of how readers process information. In short, that view was that the locus of meaning is in the word itself, not in the interpretation of the word by the reader. Under this view, meaning is deemed uniform regardless of context or audience.

The contemporary status of presumed harm and libel per se is unclear. Although the Court addressed these issues only tangentially in *New York Times*, it directly dealt with them ten years later in *Gertz v. Robert Welch, Inc.* The *Gertz* Court acknowledged that the law of many states allows plaintiffs to win “substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred.” It held, however, that “actual injury” must be shown only in cases where a media defendant lacks knowledge of the publication’s falsity or has not acted with reckless disregard for the truth.

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30. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760 (1985); see also LeBel, supra note 28, at 787 (arguing that it is unrealistic to require plaintiffs to show actual harm in cases governed by the *New York Times* fault standard).

31. For a discussion of the earlier view of information-processing, see Haskins et al., supra note 9, at 38.

32. Indeed, as one commentator suggests, the notion of libel per se may actually have been appropriate based on the more homogeneous social order existing at that time. See Zimmerman, supra note 5, at 381. Zimmerman quotes the work of David Riesman describing early English libel verdicts in an era when the law was less preoccupied with proof of actual harm:

> Courts and juries were on relatively sure ground in the moderately homogeneous social order in which the law of defamation developed... [A]n English court, in late Elizabethan or Jacobean days, did not need much investigation to determine that it was, and ought to be, defamatory to call a man a “Papist.”

*Id.* (quoting David Riesman, *Democracy and Defamation: Fair Game and Fair Comment II*, 42 COLUM. L. REV. 1282, 1300-01 (1942) (first alteration in original)).


34. *Id.* at 349.

35. *Id.* Confusion surrounding the rules laid down by the Court may be attributable, in part, to the Court's tendency to interweave discussion of presumed harm and presumed damages. See supra note 28 and accompanying text. Logic and tort theory dictate that the two should be addressed individually despite the fact that they will often exist coextensively.
Many commentators, as well as the Restatement (Second) of Torts, read Gertz as significantly discrediting libel per se despite its continued presence in some state statutes. As Professor Anderson correctly points out, however, the language of Gertz does not support such a broad characterization. Gertz explicitly limits its bar on presumed harm to cases in which the defendant lacks "knowledge of falsity or reckless disregard for the truth."

The Gertz limitation on presumed harm will not be applied in most of the "public" cases of greatest First Amendment concern because proof of actual malice is required. In Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., the Court narrowed Gertz's limitation on the use of presumed harm to negligence cases involving "matters of public concern." Thus, in cases involving private figures and non-public matters, and in cases involving any public figure, presumed harm continues to be allowed. In short, the language of Gertz leaves open the possibility that public-figure plaintiffs who prove actual malice may receive damages after showing no more actual injury than Sullivan did.

Complicating matters further is the Court's 1976 decision in Time, Inc. v. Firestone. There, the plaintiff, a private individual, was awarded damages for emotional injury despite waiver of any claim for reputational harm. The Court held that Florida was free to allow recovery for injuries "without regard to measuring the effect the falsehood may have had upon a plaintiff's reputation." Justice Brennan, dissenting, took issue with the majority's reading of Gertz and argued that emotional injury is properly compensable only after reputational damage is proven. The majority approach, indeed, seemingly transforms defamation into a tort for infliction of emotional injury by publication. The creation of such a tort raises new First Amendment questions, given that the balance to be struck between the media's liberty interest and the individual's reputational interest is likely to differ from the balance to be struck between the media's liberty interest and the individual's

38. Anderson, Presumed Harm, supra note 5, at 29.
41. This latter issue awaits resolution by the Court. See Anderson, Presumed Harm, supra note 5, at 30. Anderson further argues that the language of Gertz allows presumed damages in any libel case once actual harm is shown. See Anderson, Reputation, supra note 17, at 756.
42. 424 U.S. 448 (1976).
43. Id. at 460-61.
44. Id. at 460.
45. Id. at 475 n.3 (Brennan, J., dissenting).
interest in freedom from emotional distress. Nevertheless, the trend among states is to follow the view espoused by Justice Brennan and foreclose awards for emotional damage unless reputational harm is established.

The doctrine of presumed harm actually subsumes two complex factual questions: Was reputation injured and did the publication cause that injury? Underlying the doctrine are questionable assumptions about the effect of communication and the way readers process information. The first assumption is that meaning exists in words themselves—that is, it is possible to understand how readers interpret words by looking solely at the words themselves. The meaning of words is deemed more or less universal across the community of readers. The second assumption underlying the doctrine is that when people read defamatory words, their opinions about the subject of these words change to the subject’s detriment; that is, there is a direct stimulus-response causal connection between the message and the readers’ mental state. Social science research on the process and effects of communication suggests that this static model is seriously flawed.

B. Social Science Approaches to the Effect Question

The study of mass communication underwent a fundamental shift in methodology in the mid-twentieth century. In the years immediately following World War I, questions of mass media’s effects were largely left to rhetorical analysis and to the social critique of political scientists such as Harold Lasswell. The dominant paradigm of the effect of mass communication in the pre-World War II era has frequently been characterized as the “hypo-dermic needle model.” This model proposed that the “mass media had direct, immediate, and powerful effects on a mass audience.” A study of the

46. Sanford, supra note 37, at 368. The Court has, in fact, barred as unconstitutional a public figure’s claim of emotional injury arising from mere publication in Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988). That ruling, however, did not address libel. In Hustler, conservative clergyman Jerry Falwell had claimed that a Hustler Magazine ad parody about his sexual past, even if making no statements that could reasonably be construed as assertion of facts, a necessary element for a libel action, had caused him emotional distress. The Supreme Court reversed the trial court’s award of damages, saying that to compensate public figures or officials under such circumstances would not give adequate breathing space to the freedoms protected by the First Amendment. Id. at 56.

47. Sanford, supra note 37, at 368.
51. Rogers, supra note 49, at 292.
1940 presidential election by Columbia University's Paul Lazarsfeld and others, however, heralded the arrival of social science research on the effects of mass communication and the development of a new behavior-based paradigm of communication. Lazarsfeld and subsequent researchers posited that audiences are not a malleable, passive mass, but instead are composed of active, diverse individuals whose reactions to messages are neither uniform nor predictable from casual observation. Professor Bauer of Harvard University, who first wrote of the "obstinate audience," explains that "[t]he modern history of communication research and communication theory can be written to a great extent in terms of the enlarged role of the audience as a factor mediating the effects, if any, of communication." Social science research demonstrated that Bauer's obstinate audience uses selective attention, perception, retention, and recall to "stop, deflect, or modify the intent of the communicator." Other commentators, expanding on Bauer's research, view the modern paradigm of communication effects as having three important contexts: individual differences (i.e., individual selectivity serves as a mediating filter between the message and its effect), social categories (i.e., audience reactions, while diverse, can be categorized by social indices such as wealth, educational background, race, and so forth), and social relations (i.e., interpersonal communication mediates the effect of a mass communication message on a given individual).

While some researchers question how "obstinate" audiences truly are and how well social science measures the effects of communication on audiences, the idea that there is a simple and direct causal relationship between the mass-communicated message and its cognitive, attitudinal, and behavioral effects on an audience no longer prevails in communications research.

In sum, contemporary social scientists question the static model of communication effects, upon which the presumed harm doctrine is premised. In any given case of alleged reputational harm, modern communication theory would suggest that a researcher explore the interaction of at least four

52. See PAUL F. LAZARSFELD ET AL., THE PEOPLE'S CHOICE (1948).
53. See Rogers, supra note 49, at 293.
55. Id.
56. Id. at 143.
57. See, e.g., DEFLEUR & BALL-ROKEACH, supra note 50, at 185-94.
58. See, e.g., Elisabeth Noelle-Neumann, Return to the Concept of Powerful Media, 9 STUD. OF BROADCASTING 67 (1973).
60. Cohen, Communication Phenomena, supra note 8, at 9-10 ("Communication theory has come to reject the paradigm of powerful, uniform effects generated by mass media.").
primary variables: (1) the pre-publication attitude of the audience toward the plaintiff (positive or negative, long-held or recently developed); (2) the credibility ascribed by the audience to the publication (trusted or distrusted, partisan or neutral); (3) the saliency of the subject matter (its importance to the reader); and (4) the interpersonal interaction following exposure to the communication (either reinforcing or counteracting the communication).

Perhaps more fundamental, the legal construct "reputation" remains amorphous for social scientists. They question, for example, to what degree reputation is a set of factual beliefs held by a reader and to what degree it is an evaluation of those beliefs by the reader. They also question how widespread and uniform judgments or beliefs about an individual must be within a community to constitute "reputation." Independent of whether such questions have legal significance, they are necessarily part of social science's effort to study defamation empirically.

Contemporary work studying political "attack ads" illustrates social science's multiple-variable approach to analysis of the effect of communication on audiences. This research suggests that the predicted effect, reduced public esteem for the attacked candidate, cannot be taken for granted. In fact, one researcher found evidence of a backlash effect in which the attacker, not the subject, was harmed. On the other hand, additional research found that although the attack advertisements were effective, the impact of such advertisements varies depending on whether its sponsor was viewed as independent or partisan. Overall, the researchers found several factors relevant in discovering whether the subject's reputation was harmed, including the nature of the medium carrying the advertisement, the political affiliation of the audience, the timing of the advertisements, and the preconceived attitudes of the respondents toward the political candidates.

Social science research focusing on issues directly related to defamation is a more recent phenomenon. The leading advocate among communication researchers for behavioral studies on defamation, Professor Cohen of Stanford University, has published two articles reporting on defamation stud-
Cohen investigated what he terms the "Third Person Effect" in one of these studies. This theory suggests that individuals believe messages have a greater influence on others than on themselves. Cohen argues that the Third Person Effect is likely to lead jurors to conclude that their peers are influenced by a defamatory story even when they themselves are not.

The research, despite some methodological concerns (it did not attempt to simulate jury conditions and was based on a limited sample of subjects—Stanford undergraduates), raises interesting empirical questions about how juries may react to evidence of reputational harm. It suggests that readers act paternalistically, believing that their peers will be more influenced by the statement than themselves. Further, this research indicates that even though sources perceived as biased are not likely to be taken seriously by the individuals themselves, a belief persists among them that the source will influence others. Cohen speculates that this dynamic may be relevant in libel trials in which fault is heavily litigated because "[e]vidence about the intentions of the source, intended to bear on the fault element . . . , may contribute to the perception of harm." Thus, if the research is valid, jurors in a case like Gertz v. Robert Welch, Inc., where the publication was a clearly identifiable right-wing organ, are likely to conclude great harm was done to Gertz's reputation even though most readers probably would discount the source and, consequently, its story.

The Cohen research points to empirical questions that social scientists should address. The role such research can or should play in the law is a matter of policy considered below, but the advancement of knowledge about the impact of defamatory communication is valuable regardless of its ultimate role in law.

66. See supra note 7-8. The second of the two experiments is discussed in Part II.B of this article.
67. Cohen, Perceived Impact, supra note 7, at 171. For example, the researchers gave their subjects printed material and indicated the political leanings of the publication from which it purportedly came. They asked the subjects to evaluate whether certain articles had an impact on them personally and then to judge whether other readers would be influenced. When the source was perceived to be particularly biased, the subjects were more likely to discount the influence of the article on themselves but more likely to believe others would be influenced by it. Id. at 171-72.
68. Id.
69. Id. at 172.
70. Id. at 173.
71. Id.
73. See infra part III.
74. Cohen, supra note 61, at 20 ("There is a need to more clearly understand the assumptions about legal concepts such as reputation. . . . [W]e need to know whether [such] legal
II. DEFAMATORY MEANING: HOW DO READERS "PROCESS" THE MEANING OF WORDS

A. Legal Approaches to Determining Meaning (The Processing Question)

Closely connected to the question of a statement's effect on readers' attitudes and beliefs is the question of the statement's meaning. Before determining the effect of a communication, that is, whether it changed third parties' opinions about the subject, one must assess how readers processed the communication, that is, what meaning readers attached to the words. The two questions must be separated conceptually. One could conclude that a statement was defamatory (the meaning issue) and yet conclude that it did not change people's opinions of the subject (the effect issue). Opinions may not change despite a defamatory communication, for instance, because personal contact with the plaintiff or countering messages in other media led the readers to disbelieve the communication and maintain their existing opinions. Thus, analysis of how individuals process information turns on the psychology of comprehension, while analysis of the effect implicates the cognitive, attitudinal, and, ultimately, behavioral consequences that follow from the reader's processing of the words.

Just as New York Times Co. v. Sullivan75 demonstrates the capacity of the real world and the law to diverge on the effect question, an earlier, less known libel case, Commonwealth v. Canter,76 guided by the common law notion that words should be given their "ordinary, natural and reasonable meaning," has been used by Professor Schauer to show similar divergence on the question of meaning.77 Harry Canter was convicted in 1930 for criminal libel after he carried a sign calling the governor of Massachusetts a "murderer" for allowing Sacco and Vanzetti, the famed anarchists, to be executed.78 The ordinary, natural, and reasonable meaning of "murderer" is "one who commits the crime of murder," and thus, Canter's sign was libelous regardless of whether any reader would have understood it to mean anything more than political opposition to the governor's decision not to commute the Sacco and Vanzetti death sentences. In Schauer's words, Canter was "convicted more by the dictionary than by the law."79

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75. 376 U.S. 254 (1964).
76. 168 N.E. 790 (Mass. 1929).
78. Canter, 168 N.E. at 790.
79. Schauer, supra note 77, at 265.
There are three primary approaches to assessing the meaning of words. The first approach involves determination of what Schauer terms "core" meaning. The core meaning of a word is its "plain and natural" meaning. Because words have no intrinsic meaning, only the meaning given to them by readers, core meaning necessarily must refer to that meaning ascribed to the word by the linguistic majority—for example, the meaning as reflected in a dictionary. The second approach assesses contextual meaning. Schauer advocates that courts look at the circumstances in which the word is being used to understand the intent of the speaker. Meaning, then, is defined as the meaning the message-maker intended. The third approach, the empirical or positivist approach, assesses how readers actually interpret words. Instead of applying the plain and natural meaning or looking at the intent of the communicator, the third approach finds meaning based on how the word was actually construed by its audience.

The method by which the law determines meaning in the context of defamation is evolving. The common law relied on the plain and natural meaning of words. The Supreme Court, however, has moved the law of defamation toward more contextual and empirical approaches to assessing meaning. Because the Court requires appellate courts to examine the entire record in appeals of defamation suits, it has had several opportunities to address how meaning should be assessed. Over the past twenty-five years, the Court has clearly shifted away from the "core" meaning approach that lies at the heart of common law and the doctrine of presumed harm.

Contemporary analysis of meaning by the Court has generally arisen in two types of libel cases: those involving nonliteral use of language (e.g., hyperbole, parody, and figurative speech) and those in which courts seek to determine whether a communication is a statement of opinion or an allegation of fact. Analysis of meaning in these contexts is particularly important because only an erroneous allegation of fact is actionable. The problem, of
course, is that statements of opinion, as well as parody and hyperbole, may be read to imply the existence of facts. Under the law, the classification of fact and opinion is crucial; in the real world, however, the boundary between the two is commonly ambiguous. While the legal distinction has been widely criticized as artificial, even by the Supreme Court, the Court has nonetheless engaged in line-drawing for opinion and related linguistic constructs. The Court has concluded that statements reasonably read as metaphors are protected, as are hyperbole and parody. Statements of opinion, though not specifically singled out by the Court as immune from libel claims, are also protected.

In *Greenbelt Cooperative Publishing Ass'n v. Bresler*, for example, the Court found that a citizen's characterization of a land developer as a "blackmailer" was a metaphor and could not be construed by a "reasonable

and onto the more germane inquiry of whether a fact has been asserted somewhere in the statement. As the Court notes, merely dressing a factual assertion up in the trappings of an opinion (by adding "in my opinion" or "I think") does not convert the factual assertion into an opinion immune from liability in a libel action. *Id.* at 2705-06. After *Milkovich*, then, no special rules apply to messages labeled opinion, but finding some principled way to distinguish between an opinion, which cannot be grounds for liability in a libel suit, and a factual assertion, which can be, remains an important concern.

85. See, e.g., Gleason, *supra* note 9, at 764 (writing that commentators have found the distinction between fact and opinion to be illusive, and perhaps nonexistent); SACK, *supra* note 2, at 155 & n.13 (describing the distinction between fact and opinion as the most elusive task encountered in defamation law and collecting authorities addressing the issue); Eileen Finan, Note, *The Fact-Opinion Determination in Defamation*, 88 COLUM. L. REV. 809 (1988) (arguing that the divergent outcomes demonstrate the difficulties courts face when attempting to draw the line between opinion and fact).

86. *See Milkovich*, 110 S. Ct. at 2706.


89. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56-57 (1988) (holding that a public figure could not recover damages for tort of intentional infliction of emotional distress for parody without also showing that publication contained false statements of fact made with actual malice).

90. The clearest enunciation of the Court's intent to afford opinion protection came in the dictum of *Gertz* in which the Court concluded that "as a matter of constitutional law an opinion can be neither true nor false and [that] the law of defamation permits recovery only for statements proved to be false." SACK, *supra* note 2, at 179 (construing *Gertz* and concluding that following the Court's reasoning, "a statement of opinion can never give rise to a successful action for libel or slander"). But see *Milkovich*, 110 S. Ct. at 2706-07 (holding that where statement of opinion reasonably implies false facts, public-figure plaintiffs must nonetheless also show that statement was made with knowledge of the falsity, or with reckless disregard for the truth, of implied facts).

reader” as an allegation of fact. While at common law the word “blackmailer” would be given its plain and natural meaning and would be libelous if untrue, the Court instead considered its meaning in the context of its use. In a later case, the Court found that the word “traitor,” used in a definition of “scab” to describe an individual in a labor union paper, was not actionable because it was merely hyperbole. The Court, in reaching this conclusion, also relied on the circumstances of its publication, in particular, that the paper’s point of view was clearly identifiable, leading readers to deduce the nonliteral meaning of the contested statement. In *Hustler Magazine, Inc. v. Falwell,* a magazine parody purported to discuss an incestuous sexual relationship involving Rev. Jerry Falwell. The Court noted that readers would have seen important cues cluing them into the periodical’s intent, including a label identifying the communication as humor.

One noteworthy judicial approach to determining meaning in defamation cases was spelled out by the Court of Appeals for the District of Columbia Circuit in *Olman v. Evans,* a case involving a challenge to a syndicated columnist’s derogatory comments in his column about a professor’s standing in academic circles. The court suggested four factors that should be applied to classify remarks as either fact or opinion: (1) the “common usage or meaning of the specific language of the challenged statement itself,” (2) whether “the statement [is] capable of being objectively characterized as true or false,” (3) the “context of the statement [in the entire communication],” and (4) the “broader context or setting in which the statement appears.”

92. *Id.* at 14.
93. *Id.*
95. *Id.* at 285-86.
97. *Id.* at 48. Because the plaintiff’s defamation claim was not before it, the Court did not explicitly discuss the relevance of these cues.
98. 750 F.2d 970 (D.C. Cir. 1984).
99. *Id.* at 979. The application of these factors can be seen by way of an example. A newspaper publishes an editorial column in which the writer says that a certain candidate for mayor was a “draft-dodging Deadhead in the 1960s.” The candidate sues, alleging that the paper has implied that he illegally evaded military service and used drugs. Using the four factors, the court would first explore the common understanding of the terms. They would consider whether people associate “Deadhead” with “drug user” and whether readers assume that draft-dodging implies illegality. More than that, the court would want to know whether a term like “Deadhead” has a specific enough definition that we could look at the candidate’s behavior during the 1960s and at the definition of “Deadhead” and come to a conclusion as to whether the term fit the person or not. But beyond such inquiries into the nature of the words’ meanings, the court would also take into account cues that provide the context of the words’ publication. That the words appeared in a clearly labeled column of personal opinion may lead the court to conclude that reasonable readers should have been on notice that hyperbole may be present and that literal meanings should not be applied. Further, in the broader con-
Courts following *Olman* adopted two approaches to determine whether a statement was fact or opinion. First, some courts ascertained whether the statement was "specific and verifiable," thereby facially factual, and then considered the context of the statement as a mitigating factor in judging whether the statement would be read as a factual allegation.\textsuperscript{100} The second and more common approach emphasized the use of context to determine whether the statement was specific and verifiable.\textsuperscript{101}

In *Milkovich v. Lorain Journal Co.*,\textsuperscript{102} the Supreme Court curtailed the attempts to create a distinct constitutional doctrine protecting opinion that evolved following *Gertz*.\textsuperscript{103} A newspaper columnist was sued by a high school wrestling coach after the columnist asserted in a column that the coach lied during a disciplinary hearing.\textsuperscript{104} The *Milkovich* majority and dissent unanimously concluded that opinion, rather than enjoying separate protection under the Constitution, is not actionable because statements of opinion by definition lack the "provably false factual connotation" that is an essential element in any libel action.\textsuperscript{105}

In an election campaign, readers might be held to be on notice that statements that could be read as assertions of fact in an investigative story at another time should instead be read as election-year venting at the present time.

It follows, of course, that statements read as factual assertions are subject to libel liability; statements read merely as opinion are not.

100. Finan, supra note 85, at 827. In *Presidio Enterprises, Inc. v. Warner Brothers Distributing Corp.*, 784 F.2d 674 (5th Cir. 1986), for example, the *Olman* approach was used to determine whether a movie company's claim that a film would be a "blockbuster" was opinion or a statement of fact actionable as a deceptive practice. The court employed a two-step methodology. First, it examined the term "blockbuster" to determine whether its definition was specific enough to allow verification of whether the film in question was, or was not, a blockbuster. Second, the court looked at the context of the publication to determine whether a term that was facially verifiable should nonetheless be considered opinion because of the circumstances in which it was presented. *Id.* at 679-80. The court found for the defendant on both prongs: "Blockbuster" was an ambiguous term, and, even if it were verifiable, the context of the publication made it clear that the statement was merely an opinion about future possibilities.

101. *Id.* In *Saenz v. Playboy Enterprises, Inc.*, 653 F. Supp. 552, 564 (N.D. Ill. 1987), for example, the court looked at the "totality of circumstances" to determine whether a magazine article was libelous. The plaintiff, a former government official, alleged that the article implied that he had engaged in torture. The court, in concluding that the story was reasonably read as opinion, considered such factors as the type of magazine involved and the author's use of opinionated language. To the extent that the words themselves were scrutinized, they were just one factor in the analysis of meaning. *Id.* at 564-66.


103. *Id.* at 2706.

104. *Id.* at 2698.

105. *Id.* at 2706. The Court, however, leaves open whether a different standard applies in cases not involving media defendants and matters of "public concern." *See id.* at 2706-07.
The Court, with Chief Justice Rehnquist writing for the majority, rejected lower courts’ attempts to develop rules for separating fact from opinion.\textsuperscript{106} The Court characterized as inappropriate attempts to create a separate opinion doctrine under the First Amendment. The Court’s criticism of approaches like \textit{Oilman} is in fact misplaced. In effect, lower courts were simply trying to establish a methodology for determining when there is “a provably false factual connotation”—an essential element in a defamation claim by the Court’s own reasoning in \textit{Milkovich}.

The majority opinion offered little guidance. The Court frames the dispositive issue as whether or not “a reasonable factfinder could conclude that the statements in the . . . column imply an assertion” of fact.\textsuperscript{107} The Court concluded that the column’s language was not “loose, figurative or hyperbolic” and therefore failed to negate the implication that the statements were “factual.”\textsuperscript{108} The Court further concluded that the overall tone of the column was consistent with a finding that the offending remarks were not merely statements of opinion.\textsuperscript{109} The Rehnquist opinion, at first blush, ironically can be read as accepting the \textit{Oilman} factors implicitly even as it rejects such approaches explicitly. The Chief Justice emphasized the specificity and verifiability of the challenged statements, coupled with an analysis of the context in which they appeared. Closer reading of the opinion, however, suggests a noteworthy difference between the respective approaches of \textit{Oilman} and \textit{Milkovich}. The Court implicitly limits consideration of the context to the tenor or tone of the article (“loose, figurative or hyperbolic” language). The Court disregarded arguably important contextual cues such as the format—the remarks were made in an opinion column rather than a news article—and the structure of the writer’s argument. As a result, the allegedly defamatory words themselves, as existed at common law, dominated the Court’s analysis.

\textsuperscript{106} \textit{Id.} at 2706. The Chief Justice flatly rebuffed the respondents’ suggestion that a number of factors developed by the lower courts (in what we hold was a mistaken reliance on the \textit{Gertz} dictum) be considered in deciding [what is fact or opinion]. But we think the “breathing space” which “freedoms of expression require in order to survive” is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between “opinion” and fact. \textit{Id.} (citations omitted).
\textsuperscript{107} \textit{Id.} at 2707. The dissent parts company with the majority on this point after having concurred in finding that no special opinion doctrine exists in libel law. \textit{Id.} at 2709 (Brennan, J., dissenting).
\textsuperscript{108} \textit{Id.} at 2707.
\textsuperscript{109} \textit{Id.}
Justice Brennan’s dissenting opinion is devoted largely to arguing for a much broader consideration of context.\textsuperscript{110} He believed that Courts should consider the format of the writing and the overall selection of facts presented to the reader.\textsuperscript{111} For example, the dissent noted that the columnist made clear that the hearing was closed and did not imply that he had any sources for his accusation that the coach lied during the hearing. Thus, in the dissent’s view, no reasonable reader could conclude that the columnist was offering anything other than conjecture.\textsuperscript{112} The dissent’s analysis of context goes well beyond considerations of tone. It approvingly quotes Justice Holmes: “A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used.”\textsuperscript{113}

Therefore, according to Justice Brennan, both the majority and the dissent agree that a literal reading of challenged language, without more, is an insufficient basis upon which to find libel. Instead, courts must focus on “what a reasonable reader would have understood the author to have said.”\textsuperscript{114} The disagreement between the majority and the dissent, then, is the characterization of “reasonable reader” envisioned by each. This hypothetical reader, in the majority’s view, is someone who recognizes parody, hyperbole, and figurative language but otherwise tends to be a fairly literal reader. The dissent’s hypothetical reader, on the other hand, is someone who has the sophistication to understand the nature of various writing genres, to separate conjecture from factual assertion, and to pick up on contextual cues that signal statements meant to be read merely as speculation by the writer.

\textit{Milkovich}, as with other cases involving nonliteral language, demonstrates that the paradigm of information processing applied by the Court is an amalgam of the three approaches to meaning discussed above.\textsuperscript{115} Given the amorphous nature of the “reasonable reader,” the Court has recognized that meanings are constructed in the minds of readers. Thus, the Court’s approach incorporates the contextual or positivist approach. Yet, the notion of the “reasonable reader” necessarily means that the meaning chosen by the

\textsuperscript{110} Id. at 2709-11. Justice Brennan criticizes the majority for not giving sufficient weight to the need for First Amendment privileges. Id. at 2713. In addition, he finds that readers are as capable of discerning between speculative statements and opinions as they are of understanding the nonfactual nature of figurative language. Id. at 2714-15. He concluded that attributing a broader contextual understanding to readers is necessary in defamation cases so as to not infringe upon constitutionally protected free speech. Id. at 2715.

\textsuperscript{111} Id. at 2711.

\textsuperscript{112} Id. at 2710.

\textsuperscript{113} Id. at 2709 (quoting Towne v. Eisner, 245 U.S. 418, 425 (1918)).

\textsuperscript{114} Id. at 2708.

\textsuperscript{115} See supra notes 80-83 and accompanying text.
Court will be one that should or could have been arrived at by readers, not necessarily the meaning intended by the writer or actually received by readers. As a practical matter, then, reasonable reader-based analysis is similar to the common law plain and natural meaning approach to determining meaning. The analysis is more sophisticated and the universe of meanings considered is more expansive, but judges and juries must still choose a meaning that conforms to their perception of how members of their community read. Thus, there is a risk that a majoritarian reading will emerge to define meaning if "reasonableness" is defined as what a majority of the community would see in the words. This is precisely the risk that Schauer perceived with respect to common law's plain and natural approach to ascertaining meaning.

Although interested in readers' response and not just the words themselves, the reasonable reader approach is not synonymous with the pure positivist approach, an approach that focuses on the meaning actually given to the words by those who read them, no matter how unreasonable, and allows for multiple meanings across the community of readers. Elements of the contextual approach are also present in the Supreme Court's analysis. This approach, which emphasizes the writer's intent in determining meaning, is apparent in *Hustler Magazine, Inc. v. Falwell*,116 *Old Dominion Branch No. 496 v. Austin*,117 and *Bresler*.118 The Court found in these cases that reasonable readers should understand the non-defamatory purposes of the writer. In other words, the Court's model has readers giving meaning to the words, but also construing the intent of the writer. Unlike a positivist, contextualists and the Court would not hold writers who intend parody legally responsible for unreasonable misreading of their work by the public.

The Court's view of the process of reading raises several empirical questions: Do most readers recognize parody and hyperbole? Can they separate fact from opinion? Are they aware of contextual "cues" to content, such as designations of particular writings in newspaper as columns and editorials? Can they accurately discern the writer's intent from the passage? In short, do readers in fact read the way the Supreme Court thinks they do?

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118. 398 U.S. 6, 13-15 (1970). The contextualist might go further than the Court, however, and not hold a defendant liable where there is a discernable intent by the author even if a reasonable reader might nevertheless misunderstand the author.
B. The Social Science Approach to Meaning

Social science research on language in mass media has been limited. Nevertheless, it is possible to discern a social science paradigm for the empirical questions raised by the Supreme Court's decisions in cases like *Milkovich v. Lorain Journal Co.* Research has examined two relevant topics: the construction of meaning and reading comprehension. The first primarily addresses how readers decode words in given contexts. The second addresses how successful readers are at discerning what has been termed "communal meaning," the meaning generally shared across a linguistic community.

Modern approaches to meaning examine the interaction of a word or symbol with two kinds of information stored in the reader's memory: perceptual information and conceptual information. Perceptual information consists of, among other things, the reader's memories of prior experience with the objects and events associated with the words now encountered. Conceptual information includes a reader's syntactical and semantic decoding mechanisms, for example, information that assists the reader in understanding the word in the context of its use. Research at Yale University, which has relied extensively on computer modeling and studies of artificial intelligence, has employed the concept of "knowledge structures," mental devices activated and deactivated to guide the reader in arriving at the meaning for words and symbols. Research on knowledge structures is premised on the assumption that these structures are employed early in the processing of prose and direct interpretation. The knowledge structure is therefore considered more than a storage unit for information. Rather, it is a filtering device actively functioning to eliminate some possible meanings and accept others.

Regardless of the particular theory invoked, the underlying point of modern psycholinguistic research is the subjectivity of meaning. The word or symbol itself, once thought to be a vessel filled with meaning, is now consid-

120. 110 S. Ct. 2695 (1990).
122. Id. at 30-31. A thorough discussion of psycholinguistic theory, however, is beyond the scope of this Article.
123. Id.
125. Id. at 57.
126. Id. at 61.
ered little more than a stimulus. Meaning is found not in the symbol but in the stored memory of the reader.\textsuperscript{127} The intent of the writer—the meaning he attaches to the word—is not part of the reader’s meaning, except to the extent that context is communicated and decoded by the reader. For example, if a writer uses the word “liberal” in the conservative \textit{National Review}, the meaning intended by its use may not be fully conveyed unless a second symbol, the magazine itself, triggers stored information within the reader’s memory. It follows that a reader’s ability to understand text is a product of the reader’s knowledge structure. Moreover, if the reader’s knowledge structure differs materially from that of the writer, then communication between the two necessarily will be incomplete or inaccurate.\textsuperscript{128}

The second relevant area of linguistic social science research addresses reading comprehension. Though meaning is inherently individual, language is a social artifact. Language’s vitality and usefulness are dependent on its association with meanings that are widely accepted in the community. Reading comprehension is often discussed as the proficiency with which a reader is able to discern intended meaning of written communication, but a more logical understanding of the term is to view it as the ability to understand socially agreed-upon meaning.\textsuperscript{129} Measurements of reading comprehension allow researchers to generalize about what percentage of a given population will be able to decode prose of varying complexity in a manner consistent with other readers.

A recent study specifically examined reading behavior and libel.\textsuperscript{130} The purpose of the study was to test whether readers perceived and understood cues in a newspaper, such as the placement of an article on the op-ed page, to signal an opinion.\textsuperscript{131} The researchers concluded that page placement and existing assumptions about op-ed pages “play[ed] a significant role in influencing reader perceptions of whether statements are fact or opinion.”\textsuperscript{132} The research was based on a limited sample population, Stanford undergraduates in a mass communication class, but nonetheless suggests that further research in this area is warranted. Real-world measurements of reader behavior will necessarily aid informed policy choices essential to the reasoned evolution of libel law.

\textsuperscript{127} See, e.g., \textit{id.} at 80.

\textsuperscript{128} \textit{Id.} (“People engage in extensive inferencing when they read a text . . . . People with certain beliefs may lack the knowledge needed to arrive at a cohesive representation for a text . . . . [P]eople with different beliefs may end up with different information in the representation.”).

\textsuperscript{129} \textsc{Eleanor J. Gibson \\& Harry Levin}, \textsc{The Psychology of Reading} 401 (1975).

\textsuperscript{130} See Cohen et al., \textit{Experimental Test, supra} note 7.

\textsuperscript{131} \textit{Id.} at 13.

\textsuperscript{132} \textit{Id.} at 17.
Modern notions of language and reading are reflected to a limited extent in the Court's recent libel decisions. Clearly, the Supreme Court has recognized that the common law's plain and natural meaning approach to meaning is inconsistent with the contemporary understanding of language. The Court, however, has stopped short of embracing the logical conclusion of psycholinguistic theory, namely, that meaning is a purely empirical question.

The empiricist, rather than asking what a reasonable reader would say these words meant, would conduct research to show what readers actually believed they meant—specifically for defamation, did readers perceive the words to be factual assertions that lowered the standing of the plaintiff in their eyes? A comparable social science revolution took place in trademark law, where survey research is now a standard part of the plaintiffs' claim that a competitor has created confusion by use of a similar label or slogan. While the research problem in libel is more complicated—for example, getting timely research is difficult because publication of a libel is usually a one-time occurrence—the possibility of generating data of some probative value as to how the defendant's message was read certainly exists. Psycholinguists have been called as expert witnesses in some recent libel actions.

One way to read the difference between the majority and dissent in *Milkovich* is to see it as a disagreement over the extent to which psycholinguistic models of reading should be employed. Their views of the reasonable reader can be roughly segregated on the basis of the perceptual information/conceptual information distinction utilized in psycholinguistics. The majority implicitly accepts the view that reasonable readers draw on stored perceptual information: They use memories of prior experience that are associated with the words or symbols encountered. For example, a reader knows from experience that the word "blackmailer" can be attributed to persons in situations that do not involve the literal crime. Parody, hyperbole, and figurative speech are dependant on readers' recognition that words are being used in ways that cannot square with their normal understanding of these words. Syntactical and semantical cueing may aid this interpretative process; however, nonliteral meaning arises primarily from recognition of an incongruity between the word's routine meaning and its different use in the text. The *Milkovich* dissent, on the other hand, views the reasonable reader as capable of drawing on both perceptual and conceptual information.

to derive the meaning of written work. The ability to recognize conjecture and to understand cues relating to a newspaper's placement and treatment of a story are largely a matter of concept—that is, based on one's experience with the language and the medium, not with the objects and events referred to by the words.

Reading comprehension research is also germane to courts' attempts to arrive at an accurate model of the reasonable reader. By its nature, development of a satisfactory model requires the Court to make judgments about the ability of large numbers of readers to give words and symbols meaning. "Reasonable reader" need not be synonymous with "average readers;" however, the standard must nonetheless reflect social norms to some degree. For example, it is legally indefensible to hold a publisher accountable for the misreading of parody as fact by a small number of less-capable readers. Likewise, the state's interest in protecting reputations is ill-served if no remedy is available to a party harmed by a passage intended as parody but read as defamatory factual assertions by the overwhelming majority of readers. Reading comprehension research suggests that increasing numbers of readers are incapable of making the inferences necessary to decode nonliteral writing and understand that it does not contain factual allegations. Consequently, the likelihood of actual reputational harm is, as a practical matter, increasing. Nevertheless, the protection afforded by the First Amendment cannot contract with declining literacy rates. As in all areas of First Amendment adjudication, the policy considerations and empirical evidence underlying the law must guide its evolution.

III. PUBLIC POLICY AND "MEANING"

The preceding discussion has largely limited itself to how individuals associate meaning with words and symbols and to the Supreme Court's attempt to reflect that process in the context of the law of defamation. In the twenty-eight years since New York Times Co. v. Sullivan, the Court has distanced itself from the formalism inhering in the presumed harm and plain and natural meaning doctrines. It has, as a result, acknowledged that meaning is

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136. Id. at 2708 (Brennan, J., dissenting).
137. For example, the National Assessment of Educational Progress concluded in its most recent reading comprehension study that most children and young adults possess basic reading skills appropriate for their ages, but enjoy only a limited capacity to draw inferences, generalize, and synthesize material. See Diedre Carmody, Many Can Read But Few Can Reason, N.Y. Times, Mar. 15, 1987, at L22. The results of this study were based on a survey of more than 100,000 students in the fourth, eighth and eleventh grades and 3,700 persons described as "young adults." Id. Only 54% of these adults could "find, understand, summarize and explain" material written at the level of a high school textbook. Id.
neither static nor uniform in the real world and insisted, at least at times, that actual harm be shown. In short, as in other areas of the law, the Court has formulated a defamation jurisprudence informed, but not controlled, by empiricism. The logical direction of this evolution requires a determination of whether the law should now require empirical proof of reputational harm and actual meaning. Moreover, in cases involving opinion and nonliteral meaning, the law must address whether litigants should be required to prove how the passage was construed by readers. These questions raise important public issues and their resolution must be rooted in public policy.

A. The Probative Value of Social Science Research

A necessary first question is whether social science research is capable of generating data of use to courts adjudicating libel actions. Monahan and Walker have identified three categories of social science evidence: adjudicative facts (facts relevant only to the instant case), legislative facts (facts designed to inform decisions about what the rules of law should be), and social authority (the results of social science research applied to determine factual issues in specific cases). Research can also test how defamation occurs, and, as discussed above, some courts have recently allowed evidence in the form of public opinion surveys on the plaintiff’s reputation and testimony on meaning by psycholinguists.

Use of social science methodologies to create adjudicative facts is hampered, however, by the natural limits of field research, most particularly the absence of a controlled setting, the unavailability of pre-tests, and intervening variable problems. For example, research by a plaintiff may show that the public now holds him in low esteem but it may not be probative of whether a statement is defamatory if it fails to establish that the public previously held the plaintiff in higher esteem. Proof problems persist even if plaintiff has data on pre-existing reputational standing. The plaintiff must establish that the contested communication by the defendants was the cause of the alleged reputational decline. Thus, the plaintiff must prove that the demonstrated reputational change was not caused by alternate intervening causes, such as other media accounts, gossip, or the plaintiff’s own conduct. Moreover, public opinion data on the plaintiff’s current reputation, absent other data accounting for the effect of alternate intervening causes, may pose

139. See, e.g., Anderson, Reputation, supra note 17 (advocating elimination of doctrine of presumed harm).
140. MONAHAN & WALKER, supra note 10, at 280.
141. See supra notes 10 and 134.
142. For example, a reader’s exposure to other stories in other publications may intervene to alter the effect of the original story before opinion surveying can be done.
a significant risk of prejudice without providing sufficiently offsetting probative value. The alternative, requiring a plaintiff to prove that the publication was the proximate cause of a reputational change, presents a substantial, if not insurmountable burden because the causal chain of the tort involves three parties (defendant, plaintiff, and reader) and takes place in a flurry of possible intervening alternate causes over an undetermined span of time.

Similarly, fitting empirical evidence to questions of meaning in legal determinations is problematic. The use of expert testimony from psycholinguists raises important issues about what question the experts are speaking to: the majoritarian meaning of the challenged communication, the meaning that it would be given by a reasonable reader, or the actual meaning given to it by readers. Arguably, only on the last question is expert testimony likely to have greater validity and reliability than determination by the factfinder.143

Social science research is perhaps more plainly useful as a source of social authority and legislative facts than as a source of adjudicative facts.144 The research discussed above demonstrates that certain common sense notions of the mass media's influence and the process by which meaning is derived do not survive careful scrutiny. The research suggests to legislators and judges that the communication process is dynamic and that a host of variables can interact in that process yielding unexpected results. At a minimum, then, such research can be useful in broadening and increasing the sophistication, and hence the accuracy, of the models of human behavior that necessarily underlie judicial determinations that a particular communication has detrimentally affected the plaintiff's reputation.145

B. Presumed Harm and First Amendment Theory

Even if the methodological concerns with social science research can be resolved, policy questions stemming from elimination of a presumption of

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143. The legal significance of such empirical determinations of meaning through social science research, however, raises important policy questions. Interestingly, after Gertz there is disagreement among the courts as to whether classification of a statement as fact or opinion is properly resolved by the judge or the jury. See Sack, supra note 2, at 183-84 & nn.149-51 (comparing decisions from New York and California); see also Rodney A. Smolla, Law of Defamation § 4.08 (1992) (collecting cases addressing this issue).

144. See supra note 139 and accompanying text.

145. There may, of course, be limits to social science's contribution to the law in this area. Schauer's remarks regarding use of philosophy in the law are analogous:

[...]tempts to apply philosophical principles to legal problems too often lose sight of the particular goals that a legal system must serve and of the dynamics and limitations inherent in a system of laws administered to assist in the ordering of affairs of individuals. At times, being faithful to these goals may entail results which are not philosophically "correct."

Schauer, supra note 77, at 266 n.12.
harm remain. Requiring empirical proof in the place of presumptions and allowing broad judicial discretion as to whether a statement was libelous, at first blush, appears to favor defendants. Early articles on the use of social science data and paradigms in defamation cases concluded, however, that the introduction of social science research favored plaintiffs. David Reisman expressed concern in a 1942 essay that the common law afforded judges too much discretion to protect powerful defendants by arbitrarily deciding that a reputational smear was not libelous. Consequently, unpopular or minority plaintiffs found themselves, in Reisman’s view, at the whim of courts operating in “a morass of prejudice, happenstance, and guesswork.” The abstract nature of the tort, Reisman argued, invited judicial abuse and error. While Reisman doubted whether polling could provide evidence about the meaning of a challenged communication, he did believe that opinion polls could serve to inform courts of community sentiments that otherwise went unarticulated. Twenty years later, on the other side of the McCarthy era, Walter Probert argued that behavioral research could be used by plaintiffs to show reputational harm. In Probert’s view, the courts construed such harm too narrowly and analysis of “psychological and interpersonal disruption” would result in fairer compensation to plaintiffs.

The law and social sciences have changed since publication of the Reisman and Probert articles. The constitutionalization of defamation law through the First Amendment has broadened protection afforded to media defendants while simultaneously reducing the opportunity for the judicial abuse that concerned Reisman. The focus of litigation has shifted away from the content of the message and its meaning to media fault. This shift has limited the highly subjective review of language that often characterized cases at the time Reisman was writing. Probert’s belief in the promise of social science research at a time when such research was coming into its own in American universities was perhaps farsighted. Three decades later, however, social scientists would likely be more modest in assessing their potential for giving objective measure to reputational loss.

Unlike the earlier work by Reisman and Probert, Anderson’s articles imply that empiricism, at least on the issue of harm, operates to protect media

147. Id. at 1302.
148. Id. (citing the example of a political activist who is labeled a communist but cannot get a New York judge to find the term defamatory).
149. Id. at 1304.
151. Id. at 1191.
Indeed, Anderson's articles prompted concern that the elimination of presumed harm would deny plaintiffs compensation even after they had shown the media acted with actual malice. The Court in *Gertz v. Robert Welch, Inc.* appeared similarly concerned with the possibility that media "wrongdoers," those found to have acted with actual malice, would be able to avoid liability for defamation if the presumed harm rule was barred. Accordingly, the Court consented to continued application of the presumed harm doctrine in cases where actual malice is demonstrated.

As the law currently stands, after *Gertz* and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the presumption of harm is allowed in cases involving public figures, private individuals if actual malice is shown, and private individuals when the subject matter is not of public concern, even if the degree of fault is merely negligence. The logic behind the Court's decisions to apply the doctrine to these three categories, and not fewer or more, is not self-evident and suggests confusion in the Court's First Amendment theory of defamation.

The *Gertz* decision, limiting application of the presumed harm doctrine to cases involving actual malice, was driven by the Court's belief that, as a matter of public policy and constitutional law, media fault must not be wholly immune under the guise of free expression. Imposition of liability under such circumstances was believed to be just and to serve as a deterrent to similar future misconduct. The *Gertz* Court's focus on fault solely as a vehicle for behavior modification, however, misreads the underlying policy of *New York Times*. *New York Times* was not about assigning the appropriate level of liability to the appropriate level of fault. The Court there correctly used the fault standard not as an end but as a means to provide "breathing space" for the press in its coverage of public officials. Thus, in so doing, the Court was seeking to protect the "core value" of the First Amend-

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153. See LeBel, supra note 28, at 783-84.
155. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). The Court only implicitly addresses deterrence in this context. For example, the Court notes that "[i]t is necessary to restrict defamation plaintiffs who do not prove [actual malice] to compensation for actual injury." *Id.* Given that the plaintiff-favoring presumption will apply only when the defendant has acted with actual malice, it is apparent that the Court views the presumption doctrine as a means to shape media behavior.
156. *Id.*
159. *Gertz*, 418 U.S. at 349. While the Court speaks only of presumed damages, the discussion appears to incorporate both presumed harm and presumed damages. See supra note 35.
ment: self-government. 160 Justice Brennan's majority opinion in *New York Times* demonstrates an intent to protect this value by granting the media broad protection when that core value is implicated. 161 The *New York Times* actual malice fault standard was designed to encourage socially beneficial conduct. However, unlike the *Gertz* Court's view that liability serves only a caution-inducing function, the heightened fault standard adopted in *New York Times* arguably is designed to encourage aggressive media behavior, thereby fostering the First Amendment's self-government core value. 162

This point is ignored by the *Gertz* majority, which realigned the *New York Times* actual malice standard with the traditional caution-inducing mechanism of tort law. 163 Indeed, a better reading of the underlying First Amendment theory of *New York Times* actually leads to a conclusion opposite of that reached in *Gertz*. The case for presumed harm is stronger, not weaker, when private individuals are the parties because the core value of self-government is less likely to be at risk. Thus, in cases not imbued with such core values, such as *Dun & Bradstreet*, libel law properly favors reputational interest. 164

The Court's decision in *Dun & Bradstreet* returned the law to a sound First Amendment theory of defamation even though the decision was seen


161. Harry Kalven, Jr., The New York Times Case: A Note on "The Central Meaning of the First Amendment," 1964 SUP. CT. REV. 191, 208-10. The Court's intent to protect First Amendment interests is further evidenced, as Anderson has noted, by the fact that it could have found for the newspaper on other, more obvious grounds than fault. See Anderson, Presumed Harm, supra note 5, at 28.

162. See New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964). Justice Brennan justified elimination of strict liability in favor of the more relaxed actual malice standard because "[u]nder such a rule [strict liability], would-be critics of official conduct may be deterred from voicing their criticism . . . . The rule thus dampens the vigor and limits the variety of public debate." Id. Application of the presumed harm doctrine in cases where First Amendment core values are at stake is perhaps unwise even when actual malice is shown. "The pernicious nature of substantial 'compensatory' damages in the absence of demonstrated harm is not ameliorated by the magnitude of the defendant's fault." Halpern, supra note 28, at 244. Presumed harm, especially when coupled with presumed damages, facilitates imposition of arbitrary punishment of an unpopular media defendant without proof of actual harm by judges and juries. The trial court decision in *New York Times* is, of course, a case in point. New York Times Co. v. Sullivan, 144 So. 2d 25 (Ala. 1962), rev'd, 376 U.S. 254 (1964). The First Amendment should operate to prevent the imposition of such a burden on the press.


164. See Sheldon W. Halpern, Values and Value: An Essay on Libel Reform, 47 WASH. & LEE L. REV. 227, 244 (1990) ("Even absent constitutional concerns, the existence of a purportedly compensatory scheme that operates independently of proof would be disturbing.").
by some as a blow to First Amendment protections. ¹⁶⁵ The Court ruled that harm would be presumed where the plaintiff, a private individual, shows negligence by the defendant. The Court imposed a less stringent standard of proof here because the subject matter of the communication, an erroneous credit rating sent privately to a handful of companies, was not one of public concern. While the rationale underlying application of the presumed harm doctrine remains dubious, the Court correctly concluded that the core value of self-government is not at issue in such cases. Accordingly, a different balance must be struck between the plaintiff's reputational interest and the defendant's First Amendment freedoms. ¹⁶⁶

The Court's decision in Philadelphia Newspapers, Inc. v. Hepps, ¹⁶⁷ requiring public figures to establish the falsity of the challenged communication in their pleading, may signal a shift in the focus of libel litigation away from fault, which has been the dispositive issue in most libel actions since New York Times. ¹⁶⁸ The focus on fault has often transformed defamation actions into inquisitions about media reporting techniques rather than forums for establishing the rights and liabilities of the parties. ¹⁶⁹ If Hepps truly signals a refocusing of libel litigation, the elimination of a presumption of harm in cases involving public figures should have a similar impact. It will discourage baseless suits, prompt more dismissals prior to burdensome discovery, and focus the litigation on a non-fault element of the defamation claim.

In cases where First Amendment interests are less at issue, cases involving private figures in matters of private concern, presumed harm still may be attacked as inconsistent with tort law principles, in particular that a tort action is to compensate an individual for actual damage. ¹⁷⁰ Elimination of presumed harm, however, is not synonymous with elimination of compensation for intangible injury, such as emotional harm. ¹⁷¹ If injury is established, then courts can award damages as in any tort case. The more difficult question is whether, absent a presumption of harm, the law realistically offers a


¹⁶⁶. In striking this balance in non-public concern cases, it seems appropriate to consider such variables as the plaintiff's ability to set the record straight, the level of care the defendant could reasonably be expected to exercise, and the plaintiff's ability to protect his or her reputation outside of legal action.


¹⁶⁸. See Bezanson, supra note 3, at 233 (discussing results of research by the Iowa Libel Project).

¹⁶⁹. See Bezanson, supra note 3, at 233.

¹⁷⁰. See, e.g., Anderson, Reputation, supra note 17, at 749 (explaining that "compensating individuals . . . is the only legitimate purpose of defamation law").

¹⁷¹. Halpern, supra note 164, at 245.
remedy. Private plaintiffs, often with limited means, may not be capable of demonstrating actual reputational injury. Moreover, removal of the presumption of harm compounds proof problems for such private plaintiffs because, as Anderson suggests, the "presumed harm rule is also a presumed causation rule." Anderson urges abolition of presumed harm in such cases. However, to mitigate the impact of this change he would retain the inference of causation if harm is ultimately established by the plaintiff. Absent an obvious economic loss, e.g., an employment termination or a decline in business to mark the onset of injury, many plaintiffs suffering actual harm resulting from reputational damage may go without remedy at law if harm cannot be presumed from publication. This seemingly harsh conclusion may be justified in two ways. First, tradition is on its side. Since Gertz, private individuals who establish merely negligence have had this burden. Second, as Anderson observes, the significance of reputation as a value in modern American society has diminished. Thus, the harm caused by its loss will be discounted regardless of proof.

C. The Construction of Meaning and First Amendment Theory

Empiricists argue that the actual meaning given to words by readers is the only relevant meaning in the adjudication of libel claims. If meaning is determined through presumption, or by examination of the text, rather than as a factually ascertainable matter, then plaintiffs may be compensated when no injury has occurred. Conversely, actual injury may go uncompensated because, although readers find the meaning libelous, a court may hold the statements to be harmless.

Despite this logic, a competing concern must be raised. If a positivist approach to meaning is to be adopted wholly, the media defendants will be less able to predict potential liability prior to publication and regulate their conduct accordingly. It is not hard to envision a writer producing a passage that he or she reasonably concludes will be read as hyperbole, publishing it, and then learning, too late, that substantial number of readers misconstrued it as fact. Should the law hold the writer liable? Does the failure to know his or her audience constitute some sort of fault? But why, assuming that reputation was hurt by the unfortunate combination of the published work

172. Anderson, Reputation, supra note 17, at 764.
173. Id. at 773. Such an approach is consistent with libel practice in many jurisdictions where plaintiffs offering proof of publication and actual harm are not required to prove causation. See Sanford, supra note 37, at 559.
175. See supra note 143 (discussing unsettled state of law regarding whether fact/opinion characterization is within the province of the judge or the jury).
and the public's misreading, should the innocent plaintiff be stuck with an uncompensated loss?

Legal scholars have offered varying solutions to these problems. For example, given the ambiguities of meaning, Zimmerman argues for an "innocent construction" rule in cases involving nonliteral language and determinations of whether a statement is fact or opinion.\textsuperscript{176} She proposes that "[a] statement may be deemed defamatory only when no reasonable nondefamatory reading of the communication exists."\textsuperscript{177} Other commentators have proposed a variety of alternate approaches. For example, one commentator proposes that all communication be characterized as either an "accusation," "opinion," or "report" depending on the author's intent.\textsuperscript{178} Under this scheme, only accusations in which the speaker or writer has intentionally attributed responsibility for blameworthy conduct are subject to liability for defamation.\textsuperscript{179}

Another commentator instead suggests that in certain "contextual conditions"\textsuperscript{180} (i.e., places where opinion is normally found ambiguous), statements should be classified as statements of opinion as a matter of law.\textsuperscript{181} Schauer takes a more theoretical approach. He argues that "the key to principled first amendment adjudication . . . lies not in all-encompassing doctrinal solutions or structures, but in the identification of certain general principles of first amendment theory."\textsuperscript{182} He notes further that "the choice of language may be as much a part of the freedom protected by the first amendment as is the choice of the underlying propositions which that language expresses."\textsuperscript{183}

Judge Bork's concurrence in \textit{Ollman} represents one of the more interesting attempts to establish a reasoned nexus between ascertaining meaning and

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\item \textsuperscript{176} Zimmerman, \textit{supra} note 5, at 438.
\item \textsuperscript{177} Zimmerman, \textit{supra} note 5, at 438. Earlier, some jurisdictions had adopted more liberal versions of this rule that allowed a finding for the defendant if \textit{any} nondefamatory reading was available, were adopted in some jurisdictions. Zimmerman, \textit{supra} note 5, at 437. The rule was widely criticized, and later struck down by the supreme court of a state that had adopted it for immunizing defendants even when the nondefamatory reading was the most unreasonable of all possible readings. Zimmerman, \textit{supra} note 5, at 437.
\item \textsuperscript{178} Id. at 348-49.
\item \textsuperscript{179} Id. at 268.
\item \textsuperscript{180} Peter M. Tiersma, \textit{The Language of Defamation}, 66 TEX. L. REV. 303, 349-50 (1987).
\item \textsuperscript{181} Gleason, \textit{supra} note 9, at 763 (defining "contextual conditions" as including "[a]ll ambiguous language presented in forums where audiences generally expect opinion statements, such as editorials, op-ed pages, opinion columns, editorial advertisements and cartoons, would be considered opinion").
\item \textsuperscript{182} Schauer, \textit{supra} note 77, at 301.
\item \textsuperscript{183} Id. at 268.
\end{itemize}
How Do Readers Read?

First Amendment theory. He argued that fact and opinion exist as part of a continuum of meaning. He proposed that statements made in “a political arena” be construed as opinion unless they address a verifiable physical act. Thus, the statement “Senator Smith is controlled by special interest groups” is properly read as opinion while “Senator Smith received illegal contributions from the Teamsters” is properly construed as fact.

Any attempt to resolve the differences among these approaches must begin by acknowledging the values, and limits, of empiricism. Research on the interrelationship between language and meaning has fostered recognition of the intellectual bankruptcy of the common law’s plain and natural meaning doctrine. It has demonstrated that meaning may be culturally specific and that minorities are defined to some degree by their ability to create meanings at odds with those of the social majority. Minority meaning, nevertheless, is equally deserving of protection under First Amendment principles. The limits of empiricism in ascertaining meaning therefore become plain when the writer’s liability is determined entirely by the perceptions of readers.


185. Ollman, 750 F.2d at 1009-10. Judge Bork’s approach speaks to policy concerns that are similar to those found in the common law doctrine of “fair comment” and in the Supreme Court’s attempt in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), to extend the holding of New York Times to matters of public interest. All three are efforts to encourage a vigorous public debate by limiting liability of those who communicate about public issues. Under fair comment, some jurisdictions have held that criticism of persons or entities who put their work before the public is privileged. Harold L. Nelson & Dwight L. Teeter Jr., Law of Mass Communications 167 (4th ed. 1982). Because fair comment traditionally provides protection only for opinion or for factual allegations made without malice, id. at 167-68, it appears to offer no greater protection than the Court’s First Amendment precedents and is therefore of limited vitality today. Rosenbloom, a plurality decision later rejected in Gertz, briefly extended the actual malice standard to defendants speaking on matters of public interest regardless of whether the plaintiff was a public figure or private individual. Rosenbloom, 403 U.S. at 52. Under Rosenbloom, any plaintiff in a case involving an issue of public interest had to show that the defendant acted with actual malice. That extension followed the Court’s earlier decision broadening the application of the actual malice test from cases involving public officials to cases involving either public figures or public officials. See Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). With Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the Court abandoned the public interest test and returned to the rule that the actual malice standard will apply only when the plaintiffs are public figures or officials, regardless of whether the subject of the communication is of public interest or not.

Bork’s public forum test in Ollman, while protecting the same values as Rosenbloom’s public interest test, has the decided advantage of being a more objective determination. Under Rosenbloom, courts would have to decide what topics are legitimately of public interest. Under the public forum approach, courts need not judge whether the content of the communication is of public interest, only whether it was made in a public forum. The latter decision seems less susceptible to inconsistent and arbitrary determinations than decisions about subject matter and the legitimate limits of public taste.

186. See supra note 77 and accompanying text.
Such a result would be at odds with both the purposes of tort law and First Amendment policy. The law must allow writers to reasonably predict the possibility of liability prior to publication and thereby provide them an opportunity to alter their conduct. At the same time, communicators must be protected when core values of the First Amendment are implicated.

At odds here are two values: one, the freedom of communicators, when working in the interest of self-government, to know with reasonable certainty prior to publication that their conduct is protected, and two, society’s interest in having effective remedies for those who are defamed. Because of the ambiguities in any standard invoking the concept of the reasonable reader, communicators will often not be able to predict their liability when there is a close call, for instance, between opinion and fact or between literal and nonliteral readings. Similarly, as discussed in Section II, the reasonable reader concept will often be a means for applying majoritarian meaning to minority communication. Yet, when core values of the First Amendment are at stake, society has an interest in having communicators who feel free to express themselves in the language and manner they believe most appropriate for creating an impact on the marketplace of ideas.

As an alternative to the reasonable reader method, the innocent construction rule, as modified by the Illinois courts and Zimmerman to encompass only reasonable constructions, would seem to both overprotect and underprotect. It overprotects statements that may in fact be read as libelous accusations but can nonetheless be reasonably construed to be opinion. On the other hand, the rule may underprotect minority speech important to self-government, to the extent that majoritarian meaning is likely to determine what is construed by courts as the meaning derived by the reasonable reader.

Given the ambiguity of meaning and the uncertainties of ad hoc determinations of the effect of that meaning on reasonable readers, the sensible approach is not to look for techniques for judicial determination of meaning, such as Olman, but to establish when ambiguous statements deserve a legal presumption that they are not in fact libelous. Bork’s “political arena” approach, which one commentator has observed is in accord with the views expressed by Meiklejohn, is consistent with sound First Amendment theory. This approach provides that in fora important to self-government, ambiguous speech is entitled to a presumption that it is opinion or nonliteral speech, regardless of what the reasonable reader would conclude. This approach is advantageous for several reasons. First, the likelihood of real reputational damage is decreased in such fora. The widely known norms of

187. See supra text following note 115.
188. See Finan, supra note 85, at 824.
the political forum are that charges are made, opinions are traded in haste, and emotions may shape such political speech. Expecting readers to understand those norms—and perhaps modify their reading and listening behavior accordingly by employing some skepticism—is reasonable. Second, as in other First Amendment areas, "breathing space" is essential. The Court's decisions in New York Times Co. v. Sullivan, 189 and Gertz v. Robert Welch, Inc. 190 recognize "that actionable defamation should be both substantial and recognizable." 191 The individual's reputational interest, when core First Amendment values are jeopardized, should not be protected when the ambiguities of language make questionable whether injury has occurred at all. Individuals communicating in political fora will understand that they enjoy broad protection if a presumption in their favor is implemented. Moreover, a presumption in favor of such defendants would protect minority language within such fora against ad hoc and restrictive application of the "reasonable reader" standard. 192

In those cases in which core self-government values are not plainly implicated, empirical approaches to meaning may be appropriate. Use of empiricism to ascertain meaning may, in rare cases, subject defendants to liability for unintended meanings. However, fault standards, presumptions of non-libelous meaning, and other legal devices can be employed to limit this possibility. More likely, the greater burden will be borne by plaintiffs if meaning becomes a question of fact rather than a question of law, and thus liberty interests in free expression will enjoy a reasonable degree of protection. Moreover, the use of empiricism to ascertain meaning in cases not implicating core First Amendment values will limit the possibility of abusive ad hoc judicial pronouncements of meaning and ensure that actual harm has occurred before compensation is awarded. On balance, social values, communicators' First Amendment liberty interests, and compensation of actual harm will all be served.

IV. CONCLUSION

One of the great revolutions of modern law is its break from legal formalism. Twentieth century social science has fostered this evolution of the law.

191. Zimmerman, supra note 5, at 434.
192. Difficulties remain, of course, because the boundaries of the "political arena," like the boundaries of Meiklejohn's First Amendment self-government core value, are ambiguous. For example, it is unclear whether Milkovich, a libel suit over a newspaper column discussing the appearance of a public high school coach before a state athletic board, should properly fall within the protected "political arena."
It has aided legislators and courts in adapting the law to the realities of contemporary social existence. Social science research has similar relevance to the continuing evolution of defamation law because it is capable of providing empirical evidence of the existence of defamation. Yet, application of such research data to the law cannot be an uncritical process. The policy-based underpinnings of the law and the concerns of social science are not coextensive. The law must continue to ask whether the defendant should be held legally responsible even if defamation has occurred. The answer to this most important question plainly turns on questions of First Amendment public policy, and, therefore, it must encompass more than an empirical finding that reputation was harmed.

Perhaps the greatest challenge to social science research in this area of the law rests not with its ability to analyze the dynamics of communication \textit{vis-à-vis} defamation, but to assess the effect defamation law has on First Amendment expression. Does the fault standard of \textit{New York Times} and its progeny truly encourage aggressive press behavior? Does the existence of privilege bring about more fruitful coverage of governmental proceedings? Do large libel awards engender greater care on the part of reporters, discourage investigative reporting, or have some other impact on the media? The answer to those and similar questions may represent the most important policy questions facing First Amendment litigators and adjudicators today.