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Accomodation of Reputational Interests and Free Press: A Call for a Strict Interpretation of Gertz

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ACCOMMODATION OF REPUTATIONAL INTERESTS AND FREE PRESS: A CALL FOR A STRICT INTERPRETATION OF *GERTZ*

I. Introduction

Defamation law[1] clearly limits the freedom of the press.[2] Nevertheless, courts traditionally refused to extend first amendment[3] protec-

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1. To successfully bring a defamation action, a plaintiff must establish four elements: (1) defamatory language (2) about the plaintiff (3) which is published and (4) which causes injury to the plaintiff's reputation. Columbia Sussex Corp. v. Hay, 627 S.W.2d 270, 273 (Ky. Ct. App. 1981) (an assertion that either a hotel manager or employees were engaged in a robbery constituted slander); *see* Hearst Radio, Inc. v. FCC, 167 F.2d 225, 226 (D.C. Cir. 1948) (plaintiff defamed by a misleading description of the way he operated a radio station); Albert Miller & Co. v. Corte, 107 F.2d 432, 435 (5th Cir. 1939) (plaintiff libeled by an article accusing him of contributing to the deplorable condition of the early Irish potato market), *cert. denied*, 309 U.S. 688 (1940).

"Defamation, made up of the twin torts of libel and slander, is an invasion of the right of personal security in a reputation and good name." General Motors Corp. v. Piskor, 27 Md. App. 95, 113, 340 A.2d 767, 780 (Ct. Spec. App. 1975) (citing W. PROSSER, THE LAW OF TORTS § 111, at 737 (4th ed. 1971)) (finding a slanderous imputation from the conduct of an employer's security staff in detaining an employee as he was leaving the employer's plant), *aff'd in part, rev'd in part*, 277 Md. 165, 352 A.2d 810 (1976), *appeal after remand*, 281 Md. 627, 381 A.2d 16 (1977).

Libel is printed or written defamation of a person. Williams v. Anti-Defamation League of B'nai Brith, 185 F.2d 1005, 1007 (D.C. Cir. 1950) (stating the general principle but, on the facts, finding that the plaintiff was not libeled); Caldwell v. Crowell-Collier Publishing Co., 161 F.2d 333, 335 (5th Cir. 1947) (plaintiff libeled by an article alleging he stated that a mob which lynched a suspected rapist had saved the court trouble); Kelley v. Hoffman, 137 N.J.L. 695, 697-701, 61 A.2d 143, 145-46 (1948) (discussing without deciding whether a radio broadcast is libel or slander); *see also* RESTATEMENT (SECOND) OF TORTS § 568(1) (1977) ("Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words.").

Slander consists of oral or spoken defamation. Simpson v. Oil Transfer Corp., 75 F. Supp. 819, 822 (N.D.N.Y. 1948) (telephone conversation relating to plaintiff's professional conduct may constitute slander); Chambers v. National Battery Co., 34 F. Supp. 834, 836 (W.D. Mo. 1940) (statements to a stenographer were slanderous); Butler v. Freyman, 216 Mo. App. 636, 640, 260 S.W. 523, 525 (Ct. App. 1924) (statement by store clerk that plaintiff helped another person steal a hat was slanderous); *see also* RESTATEMENT (SECOND) OF TORTS § 568(2) (1977) ("Slander consists of the publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than those" which constitute libel.).

Defamatory language includes "words which tend to expose one to public hatred, shame, obloquy . . . degradation or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society." Kimmerle v. New York Evening Journal, Inc., 262 N.Y. 99, 102, 186 N.E. 217, 218 (1933) (newspaper article which stated that a woman who ran a rooming house was courted by a murderer was not libelous); *see* Christopher v. American News Co., 171 F.2d 275, 278 (7th Cir. 1948) (a charge that one is a Nazi or is pro-Nazi is defamatory); Laun v. Union Elec. Co. of Missouri, 350

Mo. 572, 577, 166 S.W.2d 1065, 1067-68 (1942) (allegation that plaintiff stole money by padding bills for services and for insurance constituted defamation); *see also* RESTATEMENT (SECOND) OF TORTS §§ 565-566 (1977) (defamatory communication may consist of (a) a statement of fact or (b) an opinion which implies undisclosed defamatory facts as the basis for the opinion).

The defamatory character of the words is measured by their everyday meaning under the circumstances. Flowers v. Zayre Corp., 286 F. Supp. 119, 121 (D.S.C. 1968) (statement that plaintiff was trying to bribe a security guard is slanderous); McRae v. Afro-America Co., 172 F. Supp. 184, 187 (E.D. Pa. 1959) (statement implying that plaintiff was at least partly responsible for her daughter's suicide was reasonably capable of a defamatory meaning), *aff'd*, 274 F.2d 287 (3d Cir. 1960); Loveless v. Graddick, 295 Ala. 142, 148, 325 So. 2d 137, 142 (1975) (whether statement that a candidate for district attorney faced fraud charges was defamatory presented a jury question); *see also* RESTATEMENT (SECOND) OF TORTS § 563 (1977) ("The meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express.").

The defamatory language must refer to the plaintiff. Durski v. Chaneles, 175 N.J. Super. 418, 419-20, 419 A.2d 1134, 1135 (App. Div. 1980) (where article made no express or implied reference to the wives of the plaintiffs, the wives could not recover for defamation); Dijkstra v. Westerlink, 168 N.J. Super. 128, 133, 401 A.2d 1118, 1120 (App. Div. 1979) (jury question presented where defendant made a statement to police accusing, without naming, the plaintiff of shooting at him); Arnold v. Sharpe, 296 N.C. 533, 539, 251 S.E.2d 452, 456 (1979) (court must consider the alleged defamation in the context of the entire communication); *see also* RESTATEMENT (SECOND) OF TORTS § 564 (1977) (defamatory communication refers to the person to whom its recipient reasonably understands that it was intended to refer).

The defendant must publish or communicate the defamatory statement to a person other than the plaintiff. Carson v. Southern Ry. Co., 494 F. Supp. 1104, 1113 (D.S.C. 1979) (failure to prove publication of the allegedly slanderous statement is fatal to plaintiff's cause of action); Willis v. Demopolis Nursing Home, Inc., 336 So. 2d 1117, 1120 (Ala. 1976) (stating the general rule that where there is no publication, there is no defamation); McGuire v. Adkins, 284 Ala. 602, 603, 226 So. 2d 659, 661 (1969) (failure of complaint to state when, where, and to whom slander was published was a fatal omission); *see also* RESTATEMENT (SECOND) OF TORTS § 577(1) (1977) (publication may be intentional or negligent).

Intent to defame is not a necessary element in an action for defamation. Gariepy v. Pearson, 207 F.2d 15, 16 (D.C. Cir.) (irrelevant that defendant did not intend to defame the plaintiff), *cert. denied*, 346 U.S. 909 (1953); Kilian v. Stackpole Sons, Inc., 98 F. Supp. 500, 503 (M.D. Pa. 1951) ("Everyone who requests, procures, or commands another to publish a libel is prima facie answerable"); Weller v. Home News Publishing Co., 112 N.J. Super. 502, 508, 271 A.2d 738 (Law Div. 1970) (plaintiff falsely identified as charity patient need show only intent to publish, not intent to defame). At common law, the plaintiff was required to show only that the defendant intentionally published the article; no liability was imposed for a publication which the defendant did not intend to publish or could not reasonably anticipate that anyone but the defamed would overhear. Mathis v. Philadelphia Newspapers, Inc., 455 F. Supp. 406, 410 n.1 (E.D. Pa. 1978) (liability imposed where plaintiff's picture was improperly identified by the media as being that of a suspect in a bank robbery); Willis v. Demopolis Nursing Home, Inc., 336 So. 2d 1117, 1118-20 (Ala. 1976) (recognizing general rule that there is no defamation without a publication, but reserving the question whether a letter from the employer's attorney to the employee's attorney constituted publication).

Unless the publication is libelous or slanderous per se, the plaintiff must prove special, or particular, damages. *See* RESTATEMENT (SECOND) OF TORTS § 569 (1977)

(libel per se does not require showing of special harm). "Per se" means words which on their face and without the aid of extrinsic proof are recognized as injurious. Sauerhoff v. Hearst Corp., 538 F.2d 588, 591-92 (4th Cir. 1976) (implication of an extra-marital affair was intrinsically defamatory and no proof of injury is required); Thompson v. Upton, 218 Md. 433, 437-39, 146 A.2d 880, 883-84 (1959) (statements which impute to a police officer qualities rendering him unfit to serve are actionable without proof of damage); Arnold v. Sharpe, 296 N.C. 533, 538, 251 S.E.2d 452, 456 (1979) (whether alleged defamation constitutes libel per se depends on its context within the entire communication); Redding v. Carlton, 223 Pa. Super. 136, 138 n.1, 296 A.2d 880, 881 n.1 (Super. Ct. 1972) (statement concerning township supervisor's potential self-dealing is not libelous per se). A publication which implied that the plaintiff committed a crime or which has the tendency to injure him in his office, profession, or calling is actionable per se. Brown v. Newman, 224 Tenn. 297, 300, 454 S.W.2d 120, 121-22 (1970) (statement which court interpreted to mean that political influence had been exerted was not libelous per se but court noted that if the statement said that "the palms are greased at the city council," it would be libelous per se).

Words which charge a woman with unchastity are also actionable without proof of particular damage. Sauerhoff v. Hearst Corp., 538 F.2d 588, 591 (4th Cir. 1976); Renew v. Serby, 237 S.C. 116, 119, 115 S.E.2d 664, 666-67 (1960) (statement implying that female employee should not have sexual relations with her husband because she had to work the next day carried no suggestion of unchastity). Similarly, the implication that the plaintiff committed an indictable offense or an offense involving moral turpitude is libelous per se. *Cf.* Brown v. WRMA Broadcasting Co., 286 Ala. 186, 188, 238 So. 2d 540, 541 (1970) (implication that one has been fired is not actionable per se). A false charge of some moral defect is also libelous per se. Smith v. Phoenix Furniture Co., 339 F. Supp. 969, 971 (D.S.C. 1972) (calling the plaintiff a "bastard" and a "son of a bitch" is not slander per se); *cf.* Ceravolo v. Brown, 364 So. 2d 1155, 1156-57 (Ala. 1978) (berating someone in public with threats and ethnic slurs is not slander per se).

2. Swede v. Passaic Daily News, 30 N.J. 320, 331, 153 A.2d 36, 42 (1959) (defamation law conflicts with the counter-policy recognizing that in certain situations, there is a privilege from liability for defamation); Rainier's Dairies v. Raritan Valley Farms, Inc., 19 N.J. 552, 557-58, 117 A.2d 889, 891 (1955) (policy embodied in defamation occasionally conflicts with the counter-policy favoring free expression and free press). The restriction may take the form of either prior restraint by injunction or subsequent punishment in the form of money damages. In Near v. Minnesota, 283 U.S. 697 (1931), the Supreme Court, reversing a conviction under a Minnesota statute which permanently enjoined a newspaper from publishing because it had published a defamatory article, held that prior restraints on the press were unconstitutional. *Id.* at 715. The Court suggested that subsequent punishment is the appropriate remedy and is consistent with the constitutional privilege of the press. *Id.* It was recognized that "public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment. . . ." *Id.* at 718-19. *See* Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) (suppression of free speech justified by reasonable ground to believe that serious evil or danger will result if free speech is practiced); Schenck v. United States, 249 U.S. 47, 52 (1919) ("The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent"); *cf.* Bond v. Floyd, 385 U.S. 116, 132-34 (1966) (state legislature could not constitutionally refuse to seat a duly elected legislator who said he supported individuals who burned their draft cards but did not incite people to violate the draft registration

tion to defamatory statements.[4] Holding a defendant answerable for defamatory publications was considered necessary to protect the individual's reputation.[5]

In *New York Times Co. v. Sullivan*,[6] the Supreme Court recognized and addressed the need for an accommodation of the competing interests of preserving reputation and fostering free expression[7] by the press. This accommodation takes the form of a "federal rule" which limits a state's power to award damages in defamation actions.[8]

New York Times provides that states may award damages in defamation actions brought by public officials[9] against media critics of

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law); Dennis v. United States, 341 U.S. 494, 503-11 (1951) (the government satisfied its burden by showing a substantial interest in limiting the speech of petitioners who created a "clear and present danger" by conspiring to organize the Communist party and violently overthrow the government). *See generally* Sweeney v. Patterson, 128 F.2d 457, 458 (D.C. Cir.) ("[w]hatever is added to the field of libel is taken from the field of free debate"), *cert. denied*, 317 U.S. 678 (1942).

3. U.S. CONST. amend. I.

4. Roth v. United States, 354 U.S. 476, 483 (1957) (obscenity, like libel, is not within the area of constitutionally protected speech); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (upholding the constitutionality of a state criminal statute prohibiting libel of blacks as a class); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (upholding the conviction of a Jehovah's Witness who called a city marshal a "damned Fascist"). In *Chaplinsky*, the Court noted that prohibiting certain well-defined, narrowly limited classes of speech has never been thought to raise any constitutional problems. "These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 571-72.

5. Swede v. Passaic Daily News, 30 N.J. 320, 331, 153 A.2d 36, 42 (1959); Rainier's Dairies v. Raritan Valley Farms, Inc., 19 N.J. 552, 557-58, 117 A.2d 889, 891 (1955). "An action for defamation is based on a violation of the fundamental right of an individual to enjoy a reputation unimpaired by false and defamatory attacks. The gist of such an action is injury to the plaintiff's reputation." Berg v. Consolidated Freightways, Inc., 280 Pa. Super. 495, 500, 421 A.2d 831, 833 (Super. Ct. 1980).

6. 376 U.S. 254 (1964).

7. *Id.* at 267-69. The interests protected by the free press clause include: preserving free discussions of the problems of society, Pennekamp v. Florida, 328 U.S. 331, 346-47 (1946); ensuring the "widest possible dissemination of information from diverse and antagonistic sources," Associated Press v. United States, 326 U.S. 1, 20 (1945); and protecting the vitality of our institutions by encouraging criticism, Terminiello v. Chicago, 337 U.S. 1, 4 (1949). To achieve these ends, the Court has noted, the first amendment "must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." Bridges v. California, 314 U.S. 252, 263 (1941).

8. *New York Times*, 376 U.S. at 279-80.

9. "Public officials" include "at the very least . . . those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." Rosenblatt v. Baer, 383 U.S. 75, 85 (1966). Whether plaintiff is a public official is a question for the trial judge to determine. *Id.* at 88.

their official conduct only if the plaintiff proves that the defendant acted with "actual malice."[10] Subsequently, the Court extended the *New York Times*[11] rule to public figures[12] and promulgated general standards for identifying public figures.[13] The Court declared unconstitutional the common law standard of strict liability[14] in actions

10. "Actual malice" differs from common law malice which involves ill will or evil intent. Cantrell v. Forest City Publishing Co., 419 U.S. 245, 251-52 (1974) (holding that reporter portrayed the plaintiff in a false light with actual malice); *cf.* Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6, 10 (1970) (where the plaintiff was a public figure, jury findings of falsehood and general hostility are insufficient to support liability). The plaintiff must show that the defendant knowingly or recklessly disregarded the truth of the statement which he published. "Reckless disregard" is determined ad hoc on the basis of the publisher's subjective awareness of the statement's probable falsity. St. Amant v. Thompson, 390 U.S. 727, 730-31 (1968) (holding that where the defendant failed to verify his information and did not consider the possible defamatory effect of the statement on the plaintiff but there was no finding of bad faith, the record was insufficient to support a finding of actual malice). "There must be sufficient evidence to permit the conclusion that defendant in fact entertained serious doubts as to the truth of his publication." *Id.* at 731. This subjective awareness standard assumes "an opportunity on the part of the publisher to evaluate the matter to be published and form some conclusion as to falsity or doubts as to truth." Adams v. Frontier Broadcasting Co., 555 P.2d 556, 564 (Wyo. 1976) (former candidate for public office was a public figure); *see* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974) (public figures and public officials "may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth"); Nader v. de Toledano, 408 A.2d 31, 40-41 (D.C. 1979) (even if syndicator knew nothing of journalist's reliability, this alone is insufficient to show actual malice). *See* 3 J. DOOLEY, MODERN TORT LAW § 36.05, at 20 (noting that "actual malice has become a term of art to provide a convenient shorthand for the New York Times standard of liability. . . . Whereas the common law standard focuses on the defendant's attitude toward the plaintiff, actual malice concentrates on the defendant's attitude toward the truth or falsity of the material published") (citing Cantrell v. Forest City Publishing Co., 419 U.S. 245, 251-52 (1974)). Commentators have suggested that the term "actual malice" as it is used in the *New York Times* rule actually refers to "scienter." *Id.;* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 782 (1978); W. PROSSER, THE LAW OF TORTS § 118, at 821 (4th ed. 1971).

11. 376 U.S. 254 (1964). *See* notes 9-10 *supra* and accompanying text.

12. Time, Inc. v. Firestone, 424 U.S. 448 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). "'Public figures' are those persons who, though not public officials, are 'involved in issues in which the public has a justified and important interest'" and such figures "include artists, athletes, business people, dilettantes, [and] anyone who is famous or infamous because of who he is or what he has done." Cepeda v. Cowles Magazine and Broadcasting, Inc., 392 F.2d 417, 419 (9th Cir.)(famous baseball player was a public figure), *cert. denied,* 393 U.S. 840 (1968); *see also* A.S. Abell v. Barnes, 258 Md. 56, 68, 265 A.2d 207, 214 (1970) (public figure status depends on the facts and circumstances of the particular case).

13. *Gertz,* 418 U.S. at 342-43. See notes 48-54 *infra* and accompanying text for a discussion of the standards of general application.

14. Gertz, 418 U.S. at 342-43. As a general rule, strict liability provided that the defendant was responsible for the consequences of a statement which he intentionally

brought by private individuals.[15] Establishing negligence as a constitutional minimum,[16] the Court delegated to the states the responsibility for formulating the proper standard of fault in actions brought by private individuals.[17]

This Note examines state court decisions applying the public figure guidelines and establishing standards of fault for private actions. Further, this Note discusses decisions extending the *New York Times* rule to non-media defendants and restricting the plaintiff's opportunity to prove a cause of action by favoring the use of summary judgment. This Note argues that current defamation law accords excessive deference to the press, accepts too quickly the purported "chilling effect" of libel judgments on the press, and ascribes insufficient significance to individual and state interests in compensation for injury inflicted by libelous press. Finally, this Note suggests an approach by which courts might properly balance the respective interests involved.

II. Development of Constitutional Limitations

Historically, the right of a private individual to recover for injuries inflicted by a defamatory publication was provided exclusively by state courts and legislatures.[18] The Supreme Court consistently held that the first amendment did not extend to libelous words.[19]

In *New York Times Co. v. Sullivan*,[20] the Supreme Court determined for the first time the extent of the first amendment limitation on a state's power to award damages in a libel action. The Court formulated a federal rule prohibiting a public official[21] from recover-

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published. *See* cases collected in note 1 *supra*, specifically Gariepy v. Pearson, 207 F.2d 15, 16 (D.C. Cir.), *cert. denied*, 346 U.S. 909 (1953); Kilian v. Stackpole Sons, Inc., 98 F. Supp. 500, 503 (M.D. Pa. 1951); Weller v. Home News Publishing Co., 112 N.J. Super. 502, 508, 271 A.2d 738, 741 (Law Div. 1970). Thus, if the plaintiff established a cause of action, he could recover even if the defendant was not negligent in defaming the plaintiff or did not intend to injure the plaintiff. W. PROSSER, *supra* note 10, § 113, at 771. But the plaintiff could not recover punitive damages unless he showed some degree of culpability on the part of the defendant. *Gertz*, 418 U.S. at 347-48; 3 J. DOOLEY, *supra* note 10, § 36.05, at 20.

15. 418 U.S. 323, 347 (1974).

16. *Id.* at 347.

17. *Id.*

18. *Id.* at 369-70 (White, J., dissenting); Laun v. Union Elec. Co., 350 Mo. 572, 166 S.W.2d 1065 (1943); Swede v. Passaic Daily News, 30 N.J. 320, 153 A.2d 36 (1959); Rainier's Dairies v. Raritan Valley Farms, Inc., 19 N.J. 552, 117 A.2d 889 (1955).

19. *See* note 4 *supra*.

20. 376 U.S. 254 (1964).

21. See note 9 *supra* for a definition of public officials. Sullivan was an elected commissioner of Montgomery, Alabama who alleged that he was defamed by a full

ing damages for defamatory falsehoods relating to his official conduct unless he proves that the defendant acted with actual malice.[22]

In *Curtis Publishing Co. v. Butts*,[23] the Court extended the *New York Times* rule to public figures without defining this class of plaintiffs.[24] Emphasizing specific facts,[25] the Court concluded that both plaintiffs, Butts and Walker, commanded substantial independent[26] public interest by virtue of their voluntary acts[27] and had sufficient access to the means of counterargument to expose the falsity of the defamatory statements.[28] The majority concluded that extension of

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page advertisement which implied that he took part in the "maltreatment" of black students. *New York Times*, 376 U.S. at 256-57.

22. See note 10 *supra* for a definition of actual malice. Integral to the Court's reasoning were concerns that libel can claim no "talismanic immunity" from constitutional limitations, *New York Times*, 376 U.S. at 269, and that the first amendment freedoms could not survive in the "pall of fear and timidity" imposed by a succession of civil judgments against public critics. *Id.* at 278.

23. 388 U.S. 130 (1967). The Court considered the companion cases of *Butts* and *Associated Press v. Walker*. Noting that state and federal courts were uncertain as to the reach of the *New York Times* rule, the Court addressed the problem of interpreting that rule too narrowly or too broadly. Two considerations which pressed the Court were that the *New York Times* rule would give "constitutionally adequate protection only in a limited field" or that it would go "far to immunize the press from having to make just reparation for the infliction of needless injury . . . ." *Id.* at 135. Butts, the athletic director at the University of Georgia, claimed he was defamed by a published statement accusing him of fixing a football game in a conversation with Coach Bear Bryant of Alabama. *Id.* at 135-36. Walker, a retired army officer, claimed he was defamed by false reports of his action during a riot which erupted when federal marshals attempted to enforce a court decree ordering the University of Mississippi to admit a black student. *Id.* at 140-41.

24. *Id.* at 154-55. The Court referred to the ordinary tort definition of "public figure." *Id.* at 154 (citing Spahn v. Julian Messner, Inc., 18 N.Y.2d 324, 328, 221 N.E.2d 543, 545, 274 N.Y.S.2d 877, 879 (1966) (privacy interests of public figures are afforded very little protection), *remanded on other grounds*, 387 U.S. 239 (1967)).

25. Butts was not a public official because he was employed by a private corporation. He was a well known, highly respected coach and he was negotiating for a position with a professional team at the time the article appeared. *Id.* at 135-36. Walker was a private citizen "acutely interested in the issue of physical federal intervention" in school segregation matters who had his own following, the "Friends of Walker." *Id.* at 140.

26. *Id.* at 154. The Court distinguished between "the public interest in the circulation of the materials here involved" on the one hand, and the public's interest in the plaintiff which already existed when these publications appeared. *Id.*

27. A plaintiff may be a public figure by virtue of his status in the community or by "purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy." *Id.* at 155.

A public figure commands sufficient media access "'to expose through discussion the falsehoods and fallacies' of the defamatory statements." *Id.* (citing Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (incorrectly cited in *Butts* as a dissenting opinion)).

28. *Id.*

the *New York Times* rule to plaintiffs who were not public officials was justified because distinctions between the public and private sector, in terms of the functions they perform and the influence they exert, were blurred.[29]

In *Rosenbloom v. Metromedia, Inc.*,[30] a plurality[31] of the Court applied the *New York Times* rule to private individuals involved in matters of public concern.[32] Justice Brennan, announcing the judgment of the Court, noted that the distinctions between public and private sectors were artificial.[33] He discounted the significance of the individual's access to the media[34] and the voluntariness of his involvement[35] where the defamatory statement involves a matter of public concern. The Court decided that the determination of which matters were of public concern should be made ad hoc.[36]

The Court expressly rejected *Rosenbloom*[37] in *Gertz v. Robert Welch, Inc.*[38] In contrast to *Rosenbloom*, the Court in *Gertz*[39] noted that public figures generally have greater access[40] to the media than private individuals.[41] Emphasizing the voluntariness of the plaintiff's

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29. *Id.* at 163 (Warren, C.J., concurring). Justice Harlan wrote the opinion of the Court in which seven Justices agreed that both plaintiffs were public figures. Five Justices agreed that the *New York Times* rule was applicable to public figures as Chief Justice Warren stated in his concurring opinion. Four Justices substituted, as stated in Justice Harlan's opinion, a standard based on "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.* at 155.

30. 403 U.S. 29 (1971). In *Rosenbloom*, a distributor of nudist magazines acquitted of state obscenity charges claimed that he was defamed by broadcasts omitting the words "allegedly" in descriptions of his arrest. *Id.* at 36.

31. Justice Brennan announced the judgment of the Court. Justices Burger and Blackmun concurred in the judgment and joined in the opinion. Justices Black and White wrote separate concurring opinions. *Id.* at 29.

32. *See* 3 J. DOOLEY, *supra* note 10, § 36.06, at 21 n.2 (noting that the term "a matter of public or general interest" originates in Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214 (1890)).

33. *Rosenbloom*, 403 U.S. at 41.

34. *Id.* at 47.

35. *Id.* at 43.

36. *Id.* at 44-45.

37. 403 U.S. 29 (1971).

38. 418 U.S. 323 (1974). The Court found that the *Rosenbloom* extension of the *New York Times* rule unacceptably abridged the state's legitimate interest in compensating individuals injured by defamatory publications. *Id.* at 346.

39. Elmer Gertz, an attorney representing the family of a youth killed by a policeman in a civil action against the policeman, was the subject of a news article containing serious inaccuracies and labeling him a "Communist-fronter" and a "Leninist." *Id.* at 325-26.

40. *Id.* at 344.

41. *Id.* at 345. "Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare." *Id.*

role,[42] the Court noted that public figures usually assumed the risk of being defamed.[43]

The Court recognized that the common law of strict liability[44] induced self-censorship by the press[45] but acknowledged that the *New York Times* rule exacted a high price from the defamed.[46] Nevertheless, the Court rejected an ad hoc balancing of the interests.[47] Instead, the Court established broad rules of general application,[48] cognizant that these rules might group together factually dissimilar cases.[49]

The Court distinguished between all purpose public figures and limited issue public figures and described the general characteristics of each group. The all purpose public figure achieves substantial power and influence, or pervasive fame or notoriety, in the affairs of society.[50] The limited issue public figure voluntarily injects himself, or is

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42. *Id.* at 344.
43. *Id.* at 345.
44. *See* note 14 *supra.*
45. *Gertz,* 418 U.S. at 342.
46. *Id.*
47. The Court concluded that the ad hoc balancing approach to the determination of whether the defendant had a privilege to defame "would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable." *Id.* at 343.
48. *Id.* at 343-45. The Court focused its inquiry on the individual plaintiff's participation in "the particular controversy giving rise to the defamation." *Id.* at 352. This freed the Court from the burden of determining whether a matter was of public interest and provided a standard which recognized that a plaintiff may be a public figure with respect to one controversy and a private figure with respect to a second controversy. The dual standard accounted for the difference in protections required and deserved by a private individual and a public figure, respectively. Thus, the private individual could recover on a showing of negligence, whereas a public figure would have to show actual malice. *Id.*
49. *Id.* at 344. The Court implicitly recognized that the general characteristics of both types of public figures would manifest themselves in diverse factual patterns. "Such rules necessarily treat alike various cases involving differences as well as similarities." *Id.*
50. *Id.* at 345. *See, e.g.,* Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188 (8th Cir. 1966) (any significant leader who seeks to capitalize on his ability to guide public policy is a public figure), *cert. denied,* 388 U.S. 909 (1967); Rosanova v. Playboy Enters., 411 F. Supp. 440 (S.D. Ga. 1976) (plaintiff who had previously received extensive publicity concerning alleged underworld contacts and his relationship with a particular union was a public figure), *aff'd,* 580 F.2d 859 (5th Cir. 1978); Bandelin v. Pietsch, 98 Idaho 337, 563 P.2d 395 (former legislator who was politically and professionally well known was a public figure), *cert. denied,* 434 U.S. 891 (1977); Adams v. Frontier Broadcasting Co., 555 P.2d 556, 559-60 (Wyo. 1976) (plaintiff who was a businessman, an active local politician, a former state insurance commissioner, and a promoter of a nationally recognized drum and bugle corps, was a public figure).

drawn, into a specific controversy.[51] Both engage the public's attention to influence, or assume special prominence in, the resolution of public questions.[52]

Classification of a limited issue public figure depends on the "nature and extent" of the individual's participation in the controversy.[53] Significantly, the Court said that the communications industry is entitled to act on the assumption that public figures assumed the risk of injury from defamatory publications and is protected in this assumption by the application of the *New York Times* rule.[54]

Gertz provided that states were free to set their own standards of liability for actions brought by private individuals so long as the states did not impose strict liability.[55] The Court established negligence as a

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51. *Gertz*, 418 U.S. at 345. *See, e.g.*, Weaver v. Pryor Jeffersonian, 569 P.2d 967, 973 (Okla. 1977) (a candidate for public office assumes special prominence in the resolution of a public issue by filing a declaration of candidacy); Press, Inc. v. Verran, 569 S.W.2d 435, 443 (Tenn. 1978) (a junior social worker was a public figure for the purposes of an article concerning her role in a child abuse case and her discussions with the child's mother); Exner v. American Medical Ass'n, 12 Wash. App. 215, 224, 529 P.2d 863, 870 (Ct. App. 1974) (plaintiff became a public figure by his participation in a controversy concerning the flouridation of public water supplies); Beatty v. Republican Herald Publishing Co., 291 Minn. 34, 38, 189 N.W.2d 182, 185 (1971) (plaintiff was a public figure on the basis of activities in opposition to urban renewal). *But see* Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265 (3d Cir. 1979) (plaintiff, drawn into the public eye by a contract dispute, was a public figure with respect to his playing; therefore, an article discussing a false allegation by a team physician that plaintiff suffered from a terminal disease was privileged); American Benefit Life Ins. Co. v. McIntyre, 375 So. 2d 239 (Ala. 1979) (insurance company is a limited issue public figure). See Adams v. Frontier Broadcasting Co., 555 P.2d 556, 560 n.4 (Wyo. 1976) for an exhaustive survey of state court application of the public figure criteria.

52. *Compare* Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188, 196 (8th Cir. 1966) (Nobel Prize winning chemistry professor "obviously deemed himself influential and . . . was undertaking to provide leadership among many academic and scientific people and to bring forces from many nations of differing political ideologies to bear upon the problem" of nuclear testing), *cert. denied*, 388 U.S. 909 (1967) (all purpose public figure) *with* Exner v. American Medical Ass'n, 12 Wash. App. 215, 224, 529 P.2d 863, 870 (Ct. App. 1974) (plaintiff became a public figure by his participation in a local controversy concerning the flouridation of public water supplies) (limited issue public figure).

53. A plaintiff should be found to be an all purpose public figure only where the evidence clearly demonstrates general fame and pervasive involvement in public matters. *Gertz*, 418 U.S. at 352. Limited issue public figure status is determined by "looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Id.*

54. *Id.* at 345.

55. *Id.* at 347. *See* note 1 *supra*.

constitutional minimum.[56] States could not, however, award presumed damages under any circumstances[57] and could award punitive damages only on a showing of actual malice.[58]

In his dissent, Justice White concluded that the majority view federalized major aspects of libel law and declared unconstitutional the defamation law of most states.[59] Justice White felt such radical changes in defamation law were neither "required by the first amendment" nor "necessitated by our present circumstances."[60]

Notwithstanding the logic of Justice White's dissent,[61] the Court construed the first amendment to require a constitutional privilege against liability for defamation of private individuals. The Court constructed a standard that classified plaintiffs into public men and private individuals and structured the constitutional privilege along these lines.[62] Consequently, when considering whether the constitutional privilege attaches, a court's focus should be whether the plaintiff was a private individual at the time of the controversy giving rise to the defamatory publication.[63]

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56. *Gertz*, 418 U.S. at 347.

57. "[A]ll awards must be supported by competent evidence concerning the injury. . . ." *Id.* at 350. Although the Court doesn't specifically state that presumed damages may not be recovered, in view of this language, it would seem likely that recovery for presumed damages is at least severely restricted. *See id.;* see also note 1 *supra* for a discussion of libel and slander per se.

58. *See Gertz*, 418 U.S. at 349-50. "The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss." *Id.* at 349. "In most jurisdictions, jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive." *Id.* at 350.

59. *Id.* at 369-70 (White, J., dissenting).

60. *Id.* at 376-77.

61. Justice White felt that there was no substantial threat of self-censorship by the press, *id.* at 390, and argued that the press would be adequately protected by the rule limiting presumed and punitive damages. *Id.*

62. The use of the term "public men" to refer to both public officials and public figures originates in Chief Justice Warren's concurring opinion in *Curtis*, 388 U.S. at 165. This classification includes limited issue public figures. *Id.* at 164. In *Gertz*, the Court established "broad rules of general application" to distinguish public figures from private individuals. 418 U.S. at 343-45. States determine the standards of liability in actions brought by private individuals. *Id.* at 347. This distinction permits, in actions by private individuals, "the states to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by *New York Times*." *Id.* at 348.

63. *Gertz*, 418 U.S. at 352. The court should determine in what way the plaintiff abdicated his status as a private individual and assumed special prominence in the resolution of public questions. *See* J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 10, at 785.

In *Time, Inc. v. Firestone*,[64] the Court considered what a "public controversy"[65] was within the meaning of *Gertz*. The Court emphasized that it was not resurrecting the *Rosenbloom*[66] approach which inquired whether the matter was of public concern[67] and that it would not, in these cases, look to the subject matter of the controversy to determine if a privilege existed. Rather, the Court indicated that the inquiry was whether it was a controversy in fact, and concluded that a divorce proceeding was not a "public controversy" within the meaning of *Gertz*. The Court noted that Mrs. Firestone did not voluntarily bring attention to herself because judicial dissolution was the only way to obtain release from the marriage.[68] Refining "public controversies," the Court expressly refused to equate "public controversies" with matters of public interest.[69]

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64. 424 U.S. 448 (1976). The *Time* magazine article reported that "[t]he 17-month intermittent trial produced enough testimony of extramarital adventures on both sides, said the judge, 'to make Dr. Freud's hair curl.' " *Id.* at 452. The Court found that Mrs. Firestone was not a public figure. *Id.* at 453.

65. *Id.* at 454.

66. 403 U.S. 29 (1971). *See* Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 167-68 (1974). "We repudiated [*Rosenbloom*] in *Gertz*, and in *Firestone* . . . and we reject it again today." *See generally* Comment, Time, Inc. v. Firestone: *Sowing the Seeds of* Gertz, 43 BROOKLYN L. REV. 123 (1977), which criticizes the approach which focuses on whether the plaintiff attempted to influence the resolution of the issues involved in the controversy. *Id.* at 134. The author argues that this places "an unduly heavy burden on the media" because "a publisher must now determine not only whether someone has voluntarily placed himself in the public eye, but also whether he has done so for the express purpose of influencing a particular controversy's resolution." *Id.* at 134-35. This arguably "obliterate[s] the line between media circumspection and censorship." *Id.* at 146.

Wolston laid to rest any doubt about the vitality of *Rosenbloom*. *See Wolston*, 443 U.S. at 167-68. In choosing to focus its inquiry on the individual's participation in "the particular controversy giving rise to the defamation," *Gertz*, 418 U.S. at 352, the Court enunciated three specific reasons: first, the *Rosenbloom* extension of the *New York Times* rule unacceptably abridged the state's legitimate interest in compensating individuals injured by defamatory publications, *id.* at 346; second, it concluded that this approach "would lead to unpredictable results and uncertain expectations," *id.* at 343; and third, the Court concluded that this approach "could render our duty to supervise the lower courts unmanageable." *Id.* Consequently, the Court's continued repudiation of *Rosenbloom* in favor of an approach which focuses on the individual's participation in the resolution of the controversy suggests that this approach affords the appropriate balance of the respective interests. *See also* Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1293 (D.C. Cir.) (discussing the needs of both the press and the public for clear guidelines), *cert. denied*, 449 U.S. 898 (1980).

67. *Rosenbloom*, 403 U.S. at 43-44.

68. *Firestone*, 424 U.S. at 454. This is so "even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public." *Id.*

69. *Id.* The Court remanded the case to the state court because the state court failed to specify the basis of liability. *Id.* at 464; *cf. Gertz*, 418 U.S. at 347. The

III. Subsequent Limitations

Increasingly, an individual's cause of action for defamation has been restricted by state and federal courts interpreting overbroadly first amendment limitations.[70] Since the *New York Times* rule is a rule of constitutional law, states cannot curtail the privilege against liability for defamation concerning a "public plaintiff";[71] states can, however, limit a private individual's cause of action.[72]

There are basically four ways by which a state limits an individual's cause of action. Some states broaden the limited issue public figure category and thereby decrease the class of private plaintiffs.[73] Some states require the private individual to prove actual malice when the defamatory statement involves a matter of public concern.[74] This

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Court noted that Mrs. Firestone's press conferences did not convert her into a public figure because these conferences were not intended to have an effect on the marital controversy, and she did not use them to thrust herself to the forefront of some unrelated controversy to influence its resolution. *Firestone*, 424 U.S. at 454 n.3.

70. Gleichenhaus v. Carlyle, 3 Kan. App. 2d 146, 152-53, 591 P.2d 635, 641 (Ct. App.) (plaintiff who made a substantial contribution to a person in charge of a government agency and then received a contract, without bidding, from that agency is a public figure for the limited purpose of matters related to the contract), *rev'd on other grounds*, 226 Kan. 167, 597 P.2d 611 (1979) (finding a genuine issue of material fact concerning actual malice). *Compare* Lawrence v. Moss, 639 F.2d 634, 637 (10th Cir.) (plaintiff, a worker on a national political campaign, was not a public figure as the court focused on plaintiff's status only in the state where the defamation occurred), *cert. denied*, 451 U.S. 1031 (1981) *with* Clawson v. Longview Publishing Co., 91 Wash. 2d 408, 417, 589 P.2d 1223, 1228 (1979) (extent of the public official's power and the degree of his discretion in performing his official duties determines the scope of the privilege).

71. Finkel v. Sun Tattler Co., 348 So. 2d 51, 52 (Fla. Dist. Ct. App. 1977) (court strictly applied the standards established by the Supreme Court); Reaves v. Foster, 200 So. 2d 453, 458 (Miss. 1967) (noting that the "federal courts have preempted the field of libel and slander . . ."); Anton v. St. Louis Suburban Newspapers, Inc., 598 S.W.2d 493, 498 (Mo. Ct. App. 1980) (noting that "the states still retain a legitimate interest in providing a vehicle for the vindication of injury to reputation provided that they adhere to recognized constitutional standards now prevailing in this area of the law").

72. Rowe v. Metz, 39 Colo. App. 20, 22, 564 P.2d 425, 427 (Ct. App. 1977) (noting that *Gertz* applies equally to suits against non-media), *rev'd*, 195 Colo. 424-25, 579 P.2d 83, 84 (1978) (noting that media and non-media defendants may be treated differently with respect to proof of damages); Cahill v. Hawaiian Paradise Park Corp., 56 Hawaii 522, 536, 543 P.2d 1356, 1366 (1975) (court refrains from changing the negligence standard but reserves the question).

73. Lawrence v. Bauer Publishing & Printing Ltd., 89 N.J. 451, 469, 446 A.2d 469, 478 (1982), *cert. denied*, 51 U.S.L.W. 3353 (U.S. Nov. 9, 1982) (No. 82-130); Steere v. Cupp, 226 Kan. 566, 573-74, 602 P.2d 1267, 1273-74 (1979) (finding an attorney who was a well known local figure and who had achieved some influence in the community was an all purpose public figure but not a limited issue public figure for the purpose of the defense of a particular defendant in a well-publicized trial); *see* note 80 *infra*.

74. *See* note 97 *infra* and accompanying text.

resurrection of *Rosenbloom*[75] exceeds the constitutionally required showing of negligence.[76] Some states increase the plaintiff's procedural burden[77] by requiring the plaintiff to plead facts sufficient to constitute actual malice in order to avoid summary judgment.[78] Finally, some states extend the constitutional privilege against liability for defamation to non-media defendants.[79]

A. *Gertz* Standards Interpreted

When the courts determine that a plaintiff is a public figure by overgeneralizing the *Gertz* standards,[80] the courts consequently give insufficient consideration and protection to the private individual. The individual who is found to be a public figure in this way must now prove actual malice to recover even though the reasons justifying the creation of the public figure category are absent.[81] *Gertz* recog-

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75. 403 U.S. 29 (1971). See notes 30-36 *supra* and accompanying text for a discussion of *Rosenbloom*.

76. *See* note 56 *supra*.

77. For the purpose of this Note, this requirement of pleading summary judgment is treated as a procedural burden because it requires the plaintiff to plead in his complaint facts sufficient to constitute actual malice, quite apart from what he can prove at trial. This requirement does not add to his substantive burden, as he must prove actual malice if he is found to be a public figure, but places this burden at an earlier point in the proceedings. *See generally* Note, *Summary Judgment in Defamation Actions: A Threat to the Substantive Rights of Public Figure Plaintiffs*, 3 CARDOZO L. REV. 105, 112-13 (1981) (finding that summary judgment is inappropriate because the actual malice standard calls into question the defendant's mental state).

78. See note 110 *infra* and accompanying text for a discussion of summary judgment as a limitation on a private individual's cause of action.

79. *See* note 121 *infra* and accompanying text.

80. Lawrence v. Bauer Publishing & Printing Ltd., 89 N.J. 451, 446 A.2d 469 (1982) (president and secretary-treasurer of a taxpayer association who led a drive for a referendum election on a municipal appropriation were limited issue public figures), *cert. denied*, 51 U.S.L.W. 3360 (U.S. Nov. 9, 1982) (No. 82-130) (Rehnquist, J., dissenting) (the New Jersey Supreme Court erred in concluding that the court's conclusion was compelled by the first and fourteenth amendments); Steere v. Cupp, 226 Kan. 566, 573-74, 602 P. 2d 1267, 1273-74 (1979) (an attorney who practiced law in a community for thirty-two years, served as county attorney for eight years, participated as a business, social, and professional leader in community affairs, and served as counsel in a highly publicized murder trial was an all purpose public figure); American Benefit Life Ins. Co. v. McIntyre, 375 So. 2d 239, 242 (Ala. 1979) (a corporation whose dealings are subject to state regulations and which owes its existence as a corporate entity to the state is a public figure because it invites attention and comment from the media); NAACP v. Moody, 350 So. 2d 1365 (Miss. 1977) (highway patrol officer was a public figure); Wright v. Haas, 586 P.2d 1093 (Okla. 1978) (member of civic organization who wrote a letter to the editor concerning his organization was a public figure); DeCarvalho v. daSilva, 2 R.I. Adv. Sh. 67, 414 A.2d 806 (1980) (ethnic community leader).

81. *See* Herbert v. Lando, 441 U.S. 153, 159 (1979) (*New York Times* and its progeny "rested primarily on the conviction that the common law of libel gave

nized that a private individual neither abrogates his private status nor enjoys ready access to self-help in the same way or to the extent that a public figure does.[82] The distinction between these two categories of plaintiffs—public figures and private individuals—is essentially one of degree.[83] This distinction has received inconsistent judicial interpretation.[84]

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insufficient protection to the First Amendment guarantees of freedom of speech and freedom of press and that to avoid self-censorship it was essential that liability for damages be conditioned on the specified showing of culpable conduct by those who publish defamatory falsehood"). The Court in *Gertz* concluded that the states could specify the required showing of culpable conduct. *Gertz*, 418 U.S. at 347.

82. *See Gertz*, 418 U.S. at 345 ("private individuals are not only more vulnerable to injury than public officials and public figures: they are also more deserving of recovery"). *But see Rosenbloom*, 403 U.S. at 47 ("[i]f the States fear that private citizens will not be able to respond adequately . . . the solution lies in the direction of ensuring their ability to respond . . ."); Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc., 162 Ind. App. 671, 681-82, 321 N.E.2d 580, 587 (Ct. App. 1974) (the proper solution for any lack of access on the part of all citizens, whether 'public' or 'private' is not the expansion of the right to sue for defamation, but rather the passage of state laws creating a limited right to respond to defamatory falsehoods"), *cert. denied*, 424 U.S. 913 (1976).

83. The distinction among public officials, all purpose public figures and limited issue public figures is decisive in determining the scope of the privilege accorded the press. *See, e.g.*, (1) public officials: Monitor Patriot Co. v. Roy, 401 U.S. 265, 274 (1971) (political candidate's "office" "put[s] before the voters every conceivable aspect of his public and private life . . ."); Garrison v. Louisiana, 379 U.S. 64, 77 (1964) ("anything which might touch on [a state judge's] fitness for office" is privileged) (2) all purpose public figures: Brewer v. Memphis Publishing Co., 626 F.2d 1238 (5th Cir. 1980) (plaintiff husband and wife who once, as professionals, "sought" press coverage were public figures for the purpose of an article falsely alleging marital difficulties), *cert. denied*, 452 U.S. 962 (1981); Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977) (plaintiff children of Julius and Ethel Rosenberg, cast into the limelight by the publicity surrounding their parents' trial over 20 years prior to the defamation, were public figures for the purpose of the publication of their parents' private letters), *cert. denied*, 434 U.S. 1013 (1978); Fitzgerald v. Minnesota Chiropractic Ass'n, 294 N.W.2d 269 (Minn. 1980) (plaintiff, an Olympic medalist in skating was a public figure for the purpose of reports concerning him years after his skating career ended) (3) limited issue public figures: Jenoff v. Hearst Corp., 644 F.2d 1004 (4th Cir. 1981) (plaintiff, a police informant, was not a public figure for the limited purpose of articles charging he broke into an attorney's office and stole documents); Lawrence v. Moss, 639 F.2d 634 (10th Cir.) (plaintiff who previously worked in a high level federal government position at the time of the article and was an aide to Senator Hatch's campaign was not a public figure with respect to a statement that the plaintiff was a former "bagman" for Spiro Agnew), *cert. denied*, 451 U.S. 1031 (1981); Gleichenhaus v. Carlyle, 3 Kan. App. 2d 146, 591 P.2d 635 (Ct. App.) (plaintiff who made a substantial contribution to the head of a government agency and then received a contract, without bidding, from that agency is a public figure for the limited purpose of matters related to the contract), *rev'd on other grounds*, 226 Kan. 167, 597 P.2d 611 (1979) (finding a genuine issue of material fact concerning actual malice).

84. Two courts ruling on similar facts reached inconsistent conclusions. Thus, in Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 330 N.E.2d 161 (1975), a

When a court concludes hastily that a plaintiff assumed special prominence in the resolution of public questions, the public figure category becomes unjustifiably broad.[85] In *Lawrence v. Bauer Publishing & Printing Ltd.*,[86] the New Jersey Supreme Court found that the "obvious purpose" of one plaintiff's regular attendance at council meetings as president of a taxpayer's association, presentation of the association position, and initiation of a petition drive for a referendum vote was the resolution of the controversy.[87] Apparently the court equated choosing a side in the dispute with resolving the issue in one's favor. In so doing, the decision erroneously looks to the plaintiff's

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Massachusetts court found that a plaintiff who had participated actively in community affairs, belonged to various fraternal organizations, and performed official duties as a school employee and a member of the redevelopment agency was not a public figure because he did not engage the public's attention in an attempt to influence the outcome of public issues. In contrast, a Kansas court in Steere v. Cupp, 226 Kan. 566, 602 P.2d 1267 (1979), found that an attorney who practiced law in a community for thirty-two years, served as county attorney for eight years, participated widely in community affairs, and was involved in a highly publicized trial was an all purpose public figure. Inexplicably, the court then concluded that he was not a limited issue public figure for the limited purpose of a case in which he represented a client. *Id.* at 573-74, 602 P.2d at 1274.

85. The correct approach is illustrated by Wheeler v. Green, 286 Or. 99, 593 P.2d 777 (1979) where the court concluded that there was evidence that the plaintiff horse trainer was well known and also that there was evidence of a controversy, but there was no evidence that the plaintiff had attempted in any way to influence the controversy or that he had taken any public part in the controversy whatsoever. *See also* Dodrill v. Arkansas Democrat Co., 265 Ark. 628, 636, 590 S.W.2d 840, 844 (1979) (a suspended attorney who was required to take a reinstatement examination was not a public figure because his activities were restricted to complying with a court mandate), *cert. denied sub nom.* Little Rock Newspapers, Inc. v. Dodrill, 444 U.S. 1076 (1980); Marchiondo v. Brown, 98 N.M. 282, ___, 649 P.2d 462, 467-68 (also reported at 21 N.M. St. B. Bull. 920, 924-25) (1982) (an attorney who is professionally and politically well known is not a public figure as his influence cannot be said to be pervasive and he did not inject himself into the controversy). *But see* Wright v. Haas, 586 P.2d 1093, 1096 (Okla. 1978) (plaintiff voluntarily injected himself into the vortex of the public controversy by writing a letter to the editor).

86. 89 N.J. 451, 446 A. 2d 469 (1982), *cert. denied*, 51 U.S.L.W. 3353 (U.S. Nov. 9, 1982) (No. 82-130). In *Lawrence*, the president and the secretary-treasurer of a taxpayer association brought a libel suit claiming they were defamed by a newspaper article which said that forgery charges "may loom" for the men in connection with their petition drive to seek a referendum vote on the firehouse appropriation. *Id.* at 456, 446 A.2d at 470. *See generally* Hirsch, *Survey of N.J. Libel Law*, 110 N.J.L.J. 421 (Oct. 14, 1982) (noting that the New Jersey Supreme Court expanded the public figure definition); Krasner, *Balancing Scales of Reputation Versus Press Freedom*, 110 N.J.L.J. 421 (Oct. 14, 1982) (noting that the New Jersey Supreme Court expanded the public figure classification to embrace "persons who might otherwise be considered private persons").

87. *Lawrence*, 89 N.J. at 463, 446 A.2d at 475.

status in the association rather than his role in resolving the controversy.[88]

A court may also overbroaden the public figure category in the way it defines a private individual and distinguishes public figures.[89] In *Lawrence*,[90] the court found that the co-plaintiff's activities "far exceeded the role of a private figure."[91] The court, however, never specified what aspects of his conduct[92] convinced the court he was a public figure.[93] This leaves a private individual considering participation in public affairs with insufficient guidelines for determining the effect which these actions will have on his legal remedies for defamation.[94] He requires more guidance than provided in *Gertz*—that a private individual loses his protection when he assumes "special prominence" in the resolution of a public controversy.[95] Rather, he requires

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88. *Id.* at 465, 446 A.2d at 476. The phrase "special prominence in the resolution of public questions" is ambiguous. It can refer either (1) to prominence in choosing the solution to a particular controversy or (2) to prominence in suggesting the method of arriving at that solution. In the case of *Lawrence*, this distinction is illustrated by the issue of whether the community should expend monies to build a firehouse. Prominence in choosing the solution here means an integral role in deciding whether or not to spend the money. Prominence in suggesting the method of arriving at the solution means being a central figure in the decision whether to have the question decided by the council or by popular vote. The plaintiffs in *Lawrence* were prominent in seeking popular vote but this type of prominence does not seem to be that which the Supreme Court considers necessary and sufficient to cost one protection under defamation law. *See Firestone*, 424 U.S. at 454 n.3 (construing "resolution" to mean "solution").

89. *Lawrence*, 89 N.J. at 465, 446 A.2d at 476. As the Wyoming court noted in Adams v. Frontier Broadcasting Co., 555 P.2d 556 (Wyo. 1976), one justification for treating a public figure under the *New York Times* rule is that the courts assume he has ready media access. The Supreme Court has recognized that a private individual does not become a public figure merely because he becomes involved in a matter which attracts public attention. Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 167 (1979)(person pleading guilty to contempt for failure to appear before a federal grand jury is not a public figure). Plaintiffs become public figures by virtue of the public interest in the plaintiff quite apart from that generated by any controversy. Basarich v. Rodeghero, 24 Ill. App. 3d 889, 321 N.E.2d 739 (App. Ct. 1974) (high school teachers and coaches become public figures because of their positions in the community).

90. 89 N.J. 451, 446 A.2d 469 (1982), *cert. denied*, 51 U.S.L.W. 3360 (U.S. Nov. 9, 1982) (No. 82-130).

91. *Id.* at 465, 446 A.2d at 476.

92. *Id.* The court, noting that Lawrence's and Simpson's activities differed only in degree, focused on Simpson's participation in the petition drive, the fact that his name appeared on the petition as an association committee member, his door-to-door collection of at least 250 signatures on the petitions, and the fact that he wrote at least one letter to the editor on the matter. *Id.*

93. *See* note 48 *supra* and accompanying text.

94. See notes 48-54 *supra* and accompanying text for a discussion of the general guidelines for determining public figure status which *Gertz* sets forth.

95. *See* note 54 *supra*.

a specific explanation as to what extent he can participate in public affairs without abrogating his rights; he requires a practical indication as to what acts cost him his protection under the law of defamation and transfer his rights to the press in the form of a privilege against liability for defamation.[96]

B. *Rosenbloom* Resurrected

Since *Gertz*, a minority of states have required a higher standard of culpability when an alleged defamation relates to a matter of public concern.[97] Illustrative of this approach is *Chapadeu v. Utica Observer*

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96. *See Lawrence*, 89 N.J. at 476, 446 A.2d at 481-82 (Schreiber, J., dissenting) (noting that after the article appeared, Simpson stopped attending and speaking at council meetings and Lawrence had second thoughts about attending the meetings). Justice Story recognized the potential chilling effect on citizen activity which would result if the press were not subject to the reasonable limitations of libel law. 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1880, at 610 (4th ed. 1873). He noted that the press "might become the scourge of the republic, first by denouncing the principles of liberty, and then, by rendering the most virtuous patriot odious through the terrors of the press, introducing despotism in its worst form." *Id.; see also Gertz*, 418 U.S. at 392 (White, J., dissenting)(recognizing that defamatory statements may frustrate the search for truth and injure individuals); Steere v. Cupp, 226 Kan. 566, 578, 602 P.2d 1267, 1276 (1979) (Miller, J., dissenting) (noting that broadly enlarging the public figure category deprives individuals "of the rights and protection which should be their due"); L. ELDREDGE, THE LAW OF DEFAMATION 283-85 (1978) (criticizes weighing individual reputational interests against the value of uninhibited free speech); Note, Gertz v. Robert Welch: *Reviving the Libel Action*, 48 TEMPLE L.Q. 450, 460 (1975) ("an individual may become reluctant to participate in the political process or other controversial and visible avocations, if that participation enables newspapers to spotlight his activities and to defame him with relative impunity"); *see* note 131 *infra* and accompanying text.

97. The following seven states, of the twenty-four states choosing a standard of liability for actions brought by private individuals, have chosen to resurrect *Rosenbloom*. Colorado: Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 538 P.2d 450 (1975) (article discussing antique store operator's efforts to return stolen goods was privileged as relating to a matter of public concern); Idaho: Bandelin v. Pietsch, 98 Idaho 337, 563 P.2d 395 (the *New York Times* privilege applies to reports concerning plaintiff's negligent management of an estate), *cert. denied*, 434 U.S. 891 (1977); Indiana: Aafco Heating & Air Conditioning Co. v. Northwest Publications Inc., 162 Ind. App. 671, 321 N.E.2d 580 (Ct. App. 1974) (reports alleging that the company which installed a furnace had no permit and that a fatal electrical fire may have been caused by the furnace were privileged), *cert. denied*, 424 U.S. 913 (1976); Lousiana: Mashburn v. Collin, 335 So. 2d 879 (La. 1977) (reports criticizing a restaurant which advertised and sought commercial patrons was privileged); Michigan: Peisner v. Detroit Free Press, Inc., 82 Mich. App. 153, 266 N.W.2d 693 (Ct. App. 1978) (report concerning plaintiff attorney's representation of an indigent defendant privileged by virtue of the public interest in matters of the administration of justice); New York: Chapadeu v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975) (arrest of public school teacher for drug offenses was a matter of public concern); Utah: Seegmiller v. K.S.L., Inc., 626 P.2d 968, 978 (Utah 1981)

Dispatch, Inc.[98] In *Chapadeu*,[99] a public school teacher arrested on narcotics charges claimed he was defamed by a publication errone-

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(reports concerning public health and safety where the question concerns the expenditure of public funds or the performance of official duties by government officials are privileged).

The following seventeen states chose a negligence standard. Arizona: Peagler v. Phoenix Newspapers, Inc., 114 Ariz. 309, 560 P.2d 1216 (1977) (negligence standard applicable where newspaper charged that plaintiff had the largest number of better business bureau complaints lodged against it); Arkansas: Dodrill v. Arkansas Democrat Co., 265 Ark. 628, 590 S.W.2d 840 (1979)(action by suspended attorney against newspaper which published report that the attorney failed an examination for reinstatement), *cert. denied sub. nom.* Little Rock Newspapers, Inc. v. Dodrill, 444 U.S. 1076 (1980); California: Vegod v. American Broadcasting Co., 25 Cal. 3d 763, 160 Cal. Rptr. 97, 603 P.2d 14 (1979) (merely doing business with parties to a public controversy does not elevate one to public figure status), *cert. denied*, 449 U.S. 886 (1980); Connecticut: Corbett v. Register Publishing Co., 33 Conn. Supp. 4, 356 A.2d 472 (Super. Ct. 1975) (report falsely stating that the plaintiff police officer's son had been arrested); Florida: From v. Tallahassee Democrat, Inc., 400 So. 2d 52 (Fla. Dist. Ct. App. 1981) (court noted that some cases in dicta adopted negligence standard, but refrained from adopting any standard); Hawaii: Cahill v. Hawaiian Paradise Park Corp., 56 Hawaii 522, 543 P.2d 1356 (1975) (statement that plaintiff is a communist); Illinois: Troman v. Wood, 62 Ill. 2d 184, 340 N.E.2d 292 (1975) (article suggesting that plaintiff's home served as headquarters for a youth gang); Kentucky: McCall v. Courier-Journal & Louisville Times Co., 623 S.W.2d 882 (Ky. 1981) (article repeating allegations that attorney would fix a criminal trial by bribing a judge), *cert. denied*, 50 U.S.L.W. 3916 (U.S. May 18, 1982) (No. 81-1741); Maryland: Emprey v. Holly, 48 Md. App. 571, 429 A.2d 251 (Ct. Spec. App. 1981) (statement that television personality hurt his knee while looting a store), *aff'd in part, rev'd in part*, 293 Md. 128, 442 A.2d 966 (1982)(only issue on appeal was punitive damages); New Hampshire: McCusker v. Valley News, 121 N.H. 258, 428 A.2d 493 (1981) (government employees who are not public officials need only prove negligence) (dictum), *cert. denied*, 454 U.S. 1017 (1982); New Mexico: Marchiondo v. Brown, 98 N.M. 282, 649 P.2d 462 (1982) (also reported in 21 N.M. St. B.Bull.920) (report concerning plaintiff attorney's alleged ties with organized crime); Tennessee: Memphis Publishing Co. v. Nichols, 569 S.W.2d 412 (Tenn. 1978) (implication that plaintiff wife was engaged in an extramarital affair); Texas: Poe v. San Antonio Express News Corp., 590 S.W.2d 537 (Tex. Civ. Ct. App. 1979) (article falsely accusing school teacher of fondling students); Utah: Seegmiller v. K.S.L., Inc., 626 P.2d 968 (Utah 1981) (negligence standard applied where article concerned mistreatment of horses but did not allege any official involvement or widespread occurrence); Washington: Taskett v. King Broadcasting Co., 86 Wash. 2d 439, 546 P.2d 81 (1976) (article implying that plaintiff in financial difficulties left town with money belonging to others); Wisconsin: Denny v. Mertz, 106 Wis. 2d 636, 318 N.W.2d 141 (1982) (statement that employee-stockholder was fired by his employer), *cert. denied*, 51 U.S.L.W. 3258 (U.S. Nov. 5, 1982) (No. 81-2376) (judgment below not final judgment); Washington, D.C.: Phillips v. Evening Star Newspaper Co., 424 A.2d 78 (D.C. 1980) (newspaper article stated that plaintiff had killed his wife during a quarrel when the shooting was accidental), *cert. denied*, 451 U.S. 989 (1981); *see also Gertz*, 418 U.S. at 377 (White, J., dissenting) (noting that in the three years between *Rosenbloom* and *Gertz*, seventeen states had adopted the *Rosenbloom* rationale).

98. 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975).

99. *Id.* at 197, 341 N.E.2d at 570, 379 N.Y.S.2d at 62.

ously linking his arrest with the arrest of two other men on misdemeanor drug charges. Relying on *Rosenbloom*,[100] the Appellate Division of the New York Supreme Court granted summary judgment, concluding that the statement was privileged absent a showing of actual malice.[101] Subsequently, *Gertz* was decided.[102] Affirming the decision below, the circuit courts recognized that *Gertz* permitted the states substantial latitude in setting standards for private actions. Within this latitude, the court, declining to follow *Gertz's* rejection of *Rosenbloom*, held that a plaintiff allegedly defamed by a publication discussing a matter "arguably" of legitimate public concern must show that the defendant acted in a grossly irresponsible manner.[103]

Matters of public concern are determined on an ad hoc basis.[104] This approach, some argue, is necessary to counter the "chilling effect" which a lesser standard of liability would have on the press.[105] Escalating the threshold standard of liability which a private plaintiff must satisfy ad hoc fails to accommodate the private individual's reputational interests.[106] Moreover, there seems to be no factual sup-

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100. 403 U.S. 29 (1971).

101. 45 A.D.2d 913, 914, 357 N.Y.S.2d 296, 298 (4th Dep't 1974).

102. 418 U.S. 323 (1974).

103. 38 N.Y.2d at 199, 341 N.E.2d at 571, 379 N.Y.S.2d at 64. The plaintiff "must establish, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." *Id.* at 199, 341 N.E.2d at 571, 379 N.Y.S.2d at 64.

104. *See* note 36 *supra*; Cottom v. Meredith Corp., 65 A.D.2d 165, 170, 411 N.Y.S.2d 53, 56 (4th Dep't 1978).

105. *See* note 97 *supra* and accompanying text. Cases taking this position construe the *New York Times* rule not as an accommodation of two competing interests, but only as a validation of the press privilege against liability for defamation. *See, e.g.*, Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 538 P.2d 450 (1975); Bandelin v. Pietsch, 98 Idaho 337, 563 P.2d 395, *cert. denied*, 434 U.S. 891 (1977); Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc., 162 Ind. App. 671, 321 N.E.2d 580 (Ct. App. 1974), *cert. denied*, 424 U.S. 913 (1976); *see also* Phillips v. Evening Star Newspaper Co., 424 A.2d 78, 93 (D.C. 1980) (Ferren, J., dissenting) ("[O]ur adoption of the negligence standard . . . will force the media toward a degree of self-censorship that our society can ill afford"), *cert. denied*, 451 U.S. 989 (1981).

106. Although *Rosenbloom* emphasized the potential chilling effect of defamation actions on the press and subordinated the individual's interest in compensation for injuries inflicted by a libelous press in order to avoid the potential chilling effect, *Gertz* and *Firestone* clearly recognize that one goal of the *New York Times* rule is to find the most appropriate accommodation of both competing interests. *See, e.g.*, McCusker v. Valley News, 121 N.H. 258, 428 A.2d 493, *cert. denied*, 454 U.S. 1017 (1981); Harley-Davidson Motorsports, Inc. v. Markley, 279 Or. 361, 568 P.2d 1359 (1977); Memphis Publishing Co. v. Nichols, 569 S.W.2d 412 (Tenn. 1978); *see also* *Gertz*, 418 U.S. at 390 (White, J., dissenting) ("The press today is vigorous and robust. To me, it is quite incredible to suggest that threats of libel suits from private citizens are causing the press to refrain from publishing the truth. I know of no hard facts to support that proposition and the Court furnishes none.").

port for the "chilling effect."[107] Nevertheless, some courts require private individuals to comply with *Rosenbloom*. This approach[108] extends the privilege beyond the constitutionally required minimum.[109] As a practical matter, it affords the press a privilege to defame a private individual regardless of whether he voluntarily assumed the risk that he would incur such injury or whether he can rebut the falsehood by means of counterargument.

C. Summary Judgment Favored

Some courts favor the use of summary judgment in these first amendment defamation cases.[110] Granting summary judgment where the constitutional privilege is asserted sharply limits the individual's judicial remedy.[111] In *Mashburn v. Collin*,[112] the Supreme Court of

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107. "We have not been referred to any instance in which a matter of general or public interest has not been adequately reported because of self-censorship on the part of the news media." Cahill v. Hawaiian Paradise Park Corp., 56 Hawaii 522, 536, 543 P.2d 1356, 1366 (1975). The Court formulated the accommodation for the press because it accepted the general principles supporting free press. *See New York Times*, 376 U.S. at 278.

108. *See* notes 48-54 *supra* and accompanying text. Essentially, this approach takes the position that "[i]f a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved." *Rosenbloom*, 403 U.S. at 43. *But see Gertz*, 418 U.S. at 346 ("The 'public or general interest' test for determining the applicability of the *New York Times* standard to private actions inadequately serves both of the competing values at stake.").

109. *See* notes 55-58 *supra*. The Court in *Gertz* rejected the *Rosenbloom* approach because it "would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable." *Gertz*, 418 U.S. at 343. Further, the Court noted that "[t]he 'public or general interest' test for determining the applicability of the *New York Times* standard to private defamation actions inadequately serves both of the competing values at stake." *Id.* at 346.

110. *See, e.g.*, Phillips v. Evening Star Newspaper Co., 424 A.2d 78, 81 n.1 (D.C. 1980) (motion for summary judgment, "early in the case is particularly appropriate . . . where 'chilling' of the freedom of the press and speech is threatened"), *cert. denied*, 451 U.S. 989 (1981); Bandelin v. Pietsch, 98 Idaho 337, 342, 563 P.2d 395, 399 (to avoid summary judgment, plaintiff must show facts sufficient to constitute actual malice), *cert. denied*, 434 U.S. 891 (1977); Aafco Heating & Air Conditioning, Inc. v. Northwest Publications, Inc., 162 Ind. App. 671, 688, 321 N.E.2d 580, 591 (Ct. App. 1974) (mere showing that a statement is factually incorrect does not create a genuine issue of fact concerning reckless disregard for the truth), *cert. denied*, 424 U.S. 913 (1976); Mashburn v. Collins, 355 So. 2d 879, 890 (La. 1977) (in cases affecting the exercise of first amendment liberties, proper summary judgment practice is essential).

111. *See, e.g.*, Browning v. Birmingham News, 348 So. 2d 455, 460 (Ala. 1977) (trial court should have presumed, for the purposes of the summary judgment motion, that because the complaint did not allege actual malice that plaintiff was a private individual not required to show actual malice); Gleichenhaus v. Carlyle, 3 Kan. App. 2d 146, 154, 591 P.2d 635, 642 (Ct. App.) (summary judgment should be

Louisiana considered an appeal from a grant of summary judgment for the defendant, a food critic who critiqued the plaintiff's restaurant.[113] The court concluded that where the defendant asserts a constitutional privilege, the court must determine whether the plaintiff's pleadings present a genuine issue of fact sufficient to support a finding of actual malice.[114] The court noted that summary judgment is "an effective screening device for avoiding the unnecessary harassment of defendants by unmeritorious actions" and is essential to the constitutional privilege.[115] *Gertz*[116] squarely supports the position which recognizes that a public plaintiff must prove, but need not plead, actual malice.[117] In *Gallagher v. Johnson*,[118] the Supreme Court of Montana considered the appeal of the director of an urban development agency where the trial court dismissed his action against an agency critic. Reversing and remanding, the court held that actual malice need not be specifically pleaded to preserve the first amendment protections.[119] Other decisions support this conclusion.[120]

D. The Constitutional Privilege Extended to Non-Media Defendants

Some courts extend the constitutional privilege against liability for defamation to non-media defendants.[121] Various arguments are ad-

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employed with caution in defamation cases), *rev'd on other grounds*, 226 Kan. 167, 597 P.2d 611 (1979); Gallagher v. Johnson, 37 Mont. 940, 611 P.2d 613 (1980) (public official not required to plead sufficient facts to show actual malice); McCusker v. Valley News, 121 N.H. 258, 428 A.2d 493 (1981), *cert. denied*, 454 U.S. 1017 (1981). The defendant's summary judgment burden, according to one court, is to establish (1) that plaintiff was a public official, (2) the truth of the statements contained in the publication, (3) the absence of malice, (4) that the publication was privileged, (5) the absence of any negligence, and (6) the absence of damages. Poe v. San Antonio Express News Corp., 590 S.W.2d 537, 542 (Tex. Civ. Ct. App. 1979).

112. 355 So. 2d 879 (La. 1977).

113. The court concluded that, since the restaurant was a matter of public concern, the statements were privileged absent a showing of actual malice. *Id.* at 889-90. The critique read "T'aint Creole, t'aint Cajun, t'aint French, t'aint Country American, t'aint good." *Id.* at 887.

114. *Id.* at 890.

115. *Id.* at 891. The court reinstated the trial court's decision which had granted summary judgment for the defendant. *Id.*

116. 418 U.S. 323 (1974).

117. *See* note 24 *supra* and accompanying text; *Gertz*, 418 U.S. at 345.

118. 37 Mont. 940, 611 P.2d 613 (1980).

119. *Id.* at 946-47, 611 P.2d at 618. Recently, the Supreme Court in Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979) (dictum), advised against the use of summary judgment in defamation actions. The Court noted that since the proof of actual malice concerns the defendant's state of mind, it does not readily lend itself to summary disposition. *Id.* In *Hutchinson*, the Supreme Court held that concern about public expenditures is insufficient to make plaintiff a public figure. *Id.* at 135.

120. *See* note 111 *supra*.

121. *See, e.g.*, Anderson v. Low Rent Housing Comm'n, 304 N.W.2d 239, 247 (Iowa 1981), *cert. denied*, 50 U.S.L.W. 3447 (U.S. Dec. 1, 1981) (No. 81-714);

vanced.[122] Nevertheless, the emphasis in *Gertz* on limiting its holding to the media is clear.[123] Moreover, the considerations supporting the *New York Times* rule do not support extension of this rule to non-media defendants. The Supreme Court has consistently held that defamation is a class of speech unprotected by the first amendment.[124] Extending the *New York Times* privilege to non-media defendants would do indirectly what the Supreme Court has refused to do directly—extend absolute first amendment protection to libelous publications.

IV. A Suggested Approach

The *New York Times* rule is a Supreme Court mandate that the states modify their defamation law to accommodate the competing interests of preserving individual reputation and fostering free expression.[125] When the states extend[126] the *New York Times* rule beyond that expressly required by the Court, they should specify what constitutional considerations justify this extension.

Certainly the state's interest[127] in compensating private individuals justifies the substantial latitude which the states retain in establishing

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Michaud v. Inhabitants of Town of Livermore Falls, 381 A.2d 1110, 1113 (Me. 1978); Sindorf v. Jacron Sales Co., 27 Md. App. 53, 94, 341 A.2d 856, 881 (Ct. Spec. App. 1975).

122. Sindorf v. Jacron Sales Co., 27 Md. App. 53, 94, 341 A.2d 856, 881 (Ct. Spec. App. 1975) (limiting the privilege to media defendants would defeat the underlying rationale for the privilege; it would also present problems of defining the media); Michaud v. Inhabitants of Town of Livermore Falls, 381 A.2d 1110, 1113 (Me. 1978) (private letter entitled to the same constitutional protections as a newspaper article).

123. Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 258 (Minn. 1980) (*New York Times* rule was "fashioned as an exception to the common law rule to permit the printed and electronic media to perform their function of informing the public about newsworthy people and events without undue fear of defamation liability. Thus, its focus on the defendant's attitude toward the truth of what he said rather than on his attitude toward the plaintiff is proper only when a media defendant is involved.").

124. *See* note 4 *supra*. *But see* Herbert v. Lando, 441 U.S. 153, 159 (1979) (primary purpose of the *New York Times* rule was to afford adequate protection for the press and avoid self-censorship by the press).

125. *See* note 7 *supra* and accompanying text.

126. *See* notes 23-29 *supra* and accompanying text. The states can establish their own standards of liability in actions brought by private individuals against media defendants so long as the court finds some degree of culpability. *Gertz*, 418 U.S. at 347; *see* Harley-Davidson Motorsports, Inc. v. Markay, 279 Or. 361, 366, 568 P.2d 1359, 1363 (1977) (noting that some states responded to the *New York Times* line of cases as an excuse to overhaul their laws of defamation).

127. *See* notes 55-58 *supra* and accompanying text; *see also* Rosenblatt v. Baer, 383 U.S. 75, 86 (1966) ("[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation"). A private individual seldom has any alternative to legal action for redressing grievances. *Gertz*, 418 U.S. at 344.

standards for actions brought by private individuals. States should scrupulously protect this interest. They can do this by preserving a class of private individual plaintiffs in defamation law.[128] States can protect this interest also by refusing to resurrect *Rosenbloom*,[129] and by strictly interpreting *Gertz*. Undue limitation[130] of the plaintiff's cause of action may dampen the willingness of capable citizens to take part in public affairs.[131]

The following approach would adequately protect the interests involved where a media defendant claims that the plaintiff is a limited issue public figure. The court should first isolate the controversy which is the subject matter of the publication and ensure that it is a dispute in fact.[132] Second, the court should measure the plaintiff's role

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128. Consider the criticism of the Texas court in Roegelein Provision Co. v. Mayen, 566 S.W.2d 1 (1978), which noted "[u]nfortunately, the terms private person or private plaintiff can be defined only negatively and, probably tautologically, in terms of a person who is neither a public official or a public figure." *Id.* at 10. The court must determine whether the plaintiff was a public figure prior to the defamation. Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1298 (D.C. Cir.) (holding that plaintiff who was president of the second largest cooperative in the nation and was a leading advocate of certain cooperative practices was a public figure for the purpose of an article concerning those practices), *cert. denied*, 449 U.S. 898 (1980); Arber v. Stahlin, 382 Mich. 300, 305 n.4, 170 N.W.2d 45, 47 n.4 (1969) (holding that political party workers were not public figures), *cert. denied*, 397 U.S. 924 (1970).

129. The *Rosenbloom* approach "would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not. . . . We doubt the wisdom of committing this task to the conscience of judges." *Gertz*, 418 U.S. at 346.

130. This results when a court concludes, by overgeneralizing *Gertz*, or drawing an improper perspective on the facts, with insufficient regard for the effect of its decision on the plaintiff, that the plaintiff is a public figure. *See* notes 80-96 *supra* and accompanying text.

131. Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1293 (D.C. Cir.) (noting that the individual may choose not to participate in public affairs when that activity may deprive him of his remedy for injury inflicted by defamatory statements), *cert. denied*, 449 U.S. 898 (1980). *See generally* Note, *An Analysis of the Distinction Between Public Figures and Private Defamation Plaintiffs Applied to Relatives of Public Persons*, 49 S. CAL. L. REV. 1131, 1199-1200 (1976) ("[r]ecognition by the Court of the danger of inhibiting citizen participation in public affairs, which is inherent in leaving participants without remedies for defamation, is long overdue"). But see note 105 *supra* for cases which emphasize the chilling effect of libel judgments on the press.

132. In this context, a controversy is not simply a matter which attracts attention or engages the public's interest. Time, Inc. v. Firestone, 424 U.S. 448, 454-55 (1976). "[A] public controversy is a dispute that in fact has public attention because its ramifications will be felt by persons who are not direct participants." *Waldbaum*, 627 F.2d at 1296. *See also* Wolston v. Reader's Digest Association, 443 U.S. 157, 167-68 (1979) ("[a] libel defendant must show more than mere newsworthiness to justify application of the demanding burden of *New York Times*"); Hutchinson v. Proxmire,

in the dispute to determine whether the plaintiff in fact enjoyed media access sufficient to rebut the falsehood and greater than that enjoyed by a private individual.[133] The court should also specifically determine the particular facts by which it finds that the plaintiff assumed the risk he might be defamed or by which it concludes that he engaged the public's attention to influence, or assumed special prominence, in the resolution of public questions. Finally, the court should state the facts which transferred plaintiff's right to recover for his injury to the defendant in the form of a privilege against liability for defamation. This emphasis on and articulation of the facts would both ensure careful consideration of the plaintiff's interests and facilitate appellate review.

V. Conclusion

The value of an individual's reputation has long been recognized. The *New York Times* rule, a comparatively recent development, seeks to accommodate the competing interests of preserving reputation and fostering free expression. Applying this rule, which is structured along a judicial classification of defamation plaintiffs, some courts have accorded excessive deference to the press by broadening the public figure category, requiring a private individual involved in matters of public concern to prove actual malice, favoring the use of summary judgment, and extending the conditional privilege to non-media defendants. These decisions ascribe insufficient significance to the value of an individual's reputation and may dampen the willingness of private citizens to participate in public affairs. To avoid these consequences, an approach which emphasizes the translative fact in the individual's metamorphosis from private citizen to public figure is necessary.

Tom Wall

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443 U.S. 111, 135 (1979) ("[c]learly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure").

133. "As a general rule, a person who meets this test has access to the media if defamed." *Waldbaum*, 627 F.2d at 1294. *See* Note, *supra* note 131, at 1210.