

1987

In the End, Truth Will Out'...Or Will It?. 'Merchant of Venice,' Act II, Scene 2

Donald Magnetti

Fordham University School of Law

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“IN THE END, TRUTH WILL OUT” ... OR WILL IT?

“MERCHANT OF VENICE,” ACT II, SCENE 2

Donald L. Magnetti*

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I. INTRODUCTION

“We came here to prove that *Time Magazine* lied . . . [a]nd we managed to prove that *Time Magazine* did lie.”¹ General Ariel Sharon. “This libel suit is over, and *Time* has won it.”² Statement of Time, Inc.

* Associate Professor of Law, Fordham University School of Law.

1. *New York Times*, Jan. 25, 1985, at A1, col. 2.

2. *Id.* at B4, col. 1.

And so ended the lengthy litigation whereby Israeli Defense Minister Ariel Sharon sought to vindicate his reputation following a January 25, 1985, *Time* report on his alleged connection with the massacre of Palestinian civilians in Beirut by Phalangist forces.³

This Article will assess the problem confronting a media-defamed plaintiff in light of recent United States Supreme Court decisions involving an individual's reputational rights and the media's first amendment rights. The first amendment decisions have in effect erected insurmountable hurdles in the path of such plaintiffs. This Article proposes a middle ground between the common law strict liability standard in defamation actions and the Supreme Court's concerns with the media's constitutional "privilege," whereby the truth or falsity of a publication may be established without the "chilling effect" of excessive verdicts and the enormous legal expenses associated with a traditional action for money damages. Section II will briefly trace and analyze the development of the American common law of defamation until the landmark decision of *New York Times Co. v. Sullivan*.⁴ Section III will consider the preoccupation of *New York Times* and *St. Amant v. Thompson*⁵ with the legal status of plaintiffs and defendants and the protection of the privilege at the expense of the very essence of defamation law: the truth or falsity of the publication. Section IV will examine the Supreme Court's struggle in the ten years between *New York Times* and *Gertz v. Robert Welch, Inc.*⁶ to define the plaintiff's status in terms of the *New York Times* malice standard. Section V will analyze the post-*Gertz* first amendment decisions and the Supreme Court's lack of attention to the wants of the defamed plaintiff. Section VI will consider various means which have been used or proposed to aid restoration of reputation — all of which have been ineffective. Section VII will analyze a proposed alternative remedy, a judicial declaration of falsity, which should be made available to a media-defamed plaintiff. It would allow reputation to be vindicated without great expense while at the same time the media's first amendment protections would not be violated.

II. THE COMMON LAW OF DEFAMATION

The law of defamation, comprising the twin torts of libel and slander, has had a rather absurd history from its origins in the medieval English ecclesiastical courts. Slander was regarded as a sin against God to be punished

3. See *infra* notes 189-90, 233, 238, 318-31 and accompanying text.

4. 376 U.S. 254 (1964). For a comprehensive bibliography, see Houdek, *Constitutional Limitations on Libel Actions: A Bibliography of New York Times and Its Progeny*, 6 COMM/ENT. L.J. 447 (1984).

5. 390 U.S. 727 (1968).

6. 418 U.S. 323 (1974).

by penance, and political libel was viewed by the infamous seventeenth century Star Chamber as a crime of sedition against the Crown.⁷ In the centuries of development in England and the United States, the essence of the defamation action became clear, despite the illogical rules and distinctions that came to surround it. Basic to the action is the falsity of a statement made by the defendant about the plaintiff which results in harm to the plaintiff's reputation.⁸ No matter how detrimental to reputation, no matter how humiliated and embarrassed a person may be as a result of statements made about him, no matter what damage one suffers from the communication, the law of defamation will allow no recovery if the statement made is true.⁹ Falsity remains at the very heart of the defamation action. While in most areas of tort law the burden is on the plaintiff to prove some fault on the defendant's part, the common law of defamation imposed strict liability upon the defendant for the harm to the plaintiff's reputation caused by the false statement. Despite a brief period in the seventeenth century when plaintiffs were required to plead and prove both the defendants' intent to defame and "malice," in terms of spite, hatred, ill will or motivation to harm,¹⁰ strict liability remained the standard applicable to defamation actions. The necessity of proving common law malice was rendered a legal fiction by the 1825 case of *Bromage v. Prosser*,¹¹ which held that what was required was "malice in law," i.e., if a statement was false, defamatory, and intentional, "the law implies such malice as is necessary to maintain the action."¹² The cases that followed *Bromage* for almost a hundred years retained the strict liability standard in the ordinary defamation action.¹³

7. For the historical development of the law of defamation, see Carr, *The English Law of Defamation*, 18 L.Q. REV. 255 (1902); Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries*, 40 L.Q. REV. 302, 397 (1924), 41 L.Q. REV. 13 (1925); Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903), 4 COLUM. L. REV. 33 (1904).

8. W. KEETON, D. DOBBS, R. KEETON, D. OWEN, PROSSER AND KEETON ON TORTS § 116, at 839 (5th ed. 1984) [hereinafter PROSSER & KEETON].

9. *Id.* § 116 at 840-42; see also Harnett & Thorton, *The Truth Hurts: A Critique of a Defense to Defamation*, 35 VA. L. REV. 425 (1949); Ray, *Truth: A Defense to Libel*, 16 MINN. L. REV. 43 (1932). Of course, a plaintiff injured by a true communication about him may, under certain circumstances, recover damages by an action for invasion of privacy. See, e.g., *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975).

10. For a discussion of the development of the necessity to prove malice from the treatment of slander as an "intentional" sin and political libel as an "intentional" crime, see Veeder, *supra* note 7, at 35-36.

11. 107 Eng. Rep. 1051 (1825).

12. *Id.* at 1053.

13. See, e.g., *Oklahoma Publishing Co. v. Givens*, 67 F.2d 62 (10th Cir. 1933) (innocent publication of an Associated Press report); *Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58, 121 N.E. 260 (1920) (novel featured a fictitious character identifiable as a city magistrate); *Jones v. E. Hulton & Co.*, 2 K.B. 444 (1909), *aff'd*, A.C. 20 (H.L.) (1910) (defendant newspaper published a story about a fictitious person only to have someone with the same name come forward claiming harm to reputation).

Inevitably the first amendment guarantee of a free press and the strict liability standard applied by the courts would come into conflict. The tension intensified in the late nineteenth century when first amendment rights were applied to the states through the fourteenth amendment. How could the media freely discuss and comment on public issues and the conduct of public officials with the threat of lawsuits for publication of false statements through innocent mistake? At the same time, the individual, be he public official or private person, had reputational rights which demanded protection. Freedom of the press clearly did not imply freedom to ruin the reputation of the innocent.

There gradually emerged in the late nineteenth and early twentieth centuries two different ways of addressing the tension and attempting to resolve the issue. The majority of the states came to adopt the rationale of the 1893 case of *Post Publishing Co. v. Hallam*,¹⁴ involving a newspaper report of alleged corruption in the selection of a candidate for a congressional seat in Kentucky. Circuit Judge William Howard Taft wrote what would become the hallmark opinion of the majority position. The lower court had charged the jury that the article in question was "conditionally privileged." The public acts of public men could, in good faith, be commented upon and criticized, but false allegations of fact, i.e., that the candidate had committed "disgraceful acts," were not privileged.¹⁵ On appeal the defendant argued that "the privilege extends to statements of fact as well as comment,"¹⁶ but the Sixth Circuit rejected the theory that underlying untrue statements made in good faith are privileged. Instead they adopted the traditional English rule that statements of fact had to be proved true, leaving the privilege to be applied only to fair comment and criticism.¹⁷

The *Hallam* court reasoned that any privilege must fall where harm to the individual went beyond societal benefits:

The existence and extent of privilege in communications are determined by balancing the needs and goods of society against the right of an individual to enjoy a good reputation when he has done nothing which ought to injure it. The privilege should always cease where the sacrifice of the individual right becomes so great that the public good to be derived from it is outweighed.¹⁸

The decision centered on the *falsity* of the charges published and the essence of the defamation action, not the intent of the publisher. In balancing a

14. 59 F. 530 (6th Cir. 1893).

15. See *Hallam v. Post Publishing Co.*, 55 F. 456, 461 (S.D. Ohio 1893).

16. *Hallam*, 59 F. at 540.

17. *Id.* at 541 (relying on *Davis v. Shepstone*, 11 App. Cas. 187, and *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238 (1891)) (Justice Oliver Wendell Holmes adopted the *Davis* rule).

18. *Hallam*, 59 F. at 540.

public official's reputational rights against the freedom of the press, the ruling refused to recognize that the press would be hampered by liability for published false statements that were believed to be true,¹⁹ and recognized the dangers that "honorable and worthy men may be driven from politics and public service by allowing too great latitude in attacks upon their characters."²⁰ Nevertheless, *Hallam*, holding that the *qualified* or *conditional* privilege extended only to comment and criticism based on true facts and no further, came to be the rule of defamation law in a majority of the states.²¹

In contrast, a minority of the states concentrated on the issue of malice, or its absence, on the part of the media defendant and in so doing adopted the rule that the qualified privilege extended beyond comment and criticism based on actual facts to misstatements of fact if made without malice. Courts which adopted the more liberal view did not reject protection of a public official's reputational rights, but rather stressed the public's right to full discussion of ideas. The leading 1908 Kansas case, *Coleman v. MacLennan*,²² became the most frequently cited decision by state courts which expanded the privilege.²³ *The Topeka State Journal* published an article about Attorney

19. *Id.* at 541 ("The freedom of the press is not in danger from the enforcement of the rule we uphold.").

20. *Id.*

21. See *Parsons v. Age-Herald Publishing Co.*, 181 Ala. 439, 61 So. 345 (1913); *Murray v. Galbraith*, 95 Ark. 199, 128 S.W. 1047 (1910); *Metropolis Co. v. Croasdell*, 145 Fla. 455, 199 So. 568 (1941); *Ogren v. Rockford Star Printing Co.*, 288 Ill. 405, 123 N.E. 587 (1919); *Democrat Publishing Co. v. Harvey*, 181 Ky. 730, 205 S.W. 908 (1918); *Martin v. Markley*, 202 La. 291, 11 So. 2d 593 (1943); *Pattangall v. Mooers*, 113 Me. 412, 94 A. 561 (1915); *Bowie v. Evening News*, 148 Md. 569, 129 A. 797 (1925); *Commonwealth v. Pratt*, 208 Mass. 553, 95 N.E. 105 (1911); *Oakes v. State*, 98 Miss. 80, 54 So. 79 (1910); *Lindsey v. Evening Journal Ass'n*, 20 N.J. Misc. 1275, 163 A. 245 (1932); *Cohalan v. New York Tribune*, 172 Misc. 20, 15 N.Y.S.2d 58 (1939); *Langer v. Courier-News*, 46 N.D. 430, 179 N.W. 909 (1920); *Peck v. Coos Bay Times Publishing Co.*, 122 Ore. 408, 259 P. 307 (1927); *Jackson v. Record Publishing Co.*, 175 S.C. 211, 178 S.E. 833 (1935); *State v. Colby*, 98 Vt. 96, 126 A. 510 (1918); *Carpenter v. Meredith*, 122 Va. 446, 96 S.E. 635 (1917); *McKillip v. Grays Harbor Publishing Co.*, 100 Wash. 657, 171 P. 1026 (1918); *Lukaszewicz v. Dziadulewicz*, 198 Wis. 605, 225 N.W. 172 (1929).

Several states adopted a less rigid rule than *Hallam* and extended the privilege to false statements of fact about public officials, provided they were not false charges of crimes, gross immorality or dishonesty. See, e.g., *Sweeney v. Patterson*, 128 F.2d 457 (D.C. Cir. 1942); *Sweeney v. Caller-Times Publishing Co.*, 41 F. Supp. 163 (S.D. Tex. 1941); *Donahue v. Star Publishing Co.*, 58 A. 513 (Del. 1904); *Cummins v. State*, 89 Ind. App. 256, 166 N.E. 155 (1929); *Holway v. World Publishing Co.*, 171 Okla. 306, 44 P.2d 881 (1935); *Nicholson v. State*, 24 Wyo. 347, 157 P. 1013 (1913).

22. 78 Kan. 711, 98 P. 281 (1908).

23. While *Coleman* is perhaps the most noted decision espousing the liberal view, it is by no means the first decision to extend the privilege to misstatements of fact made in good faith. As early as 1868, in *Palmer v. City of Concord*, 97 Am. Dec. 605 (N.H. 1868), New Hampshire allowed a publisher who charged a Civil War Union army unit

General Coleman, a candidate for reelection, and his official conduct in connection with a school fund transaction. After a jury verdict for the defendant, Coleman appealed on the basis of the trial court's instruction to the jury:

[W]here an article is published and circulated among voters for the sole purpose of giving what the defendant believes to be truthful information concerning a candidate for public office and for the purpose of enabling such voters to cast their ballot more intelligently, and the whole thing is done in good faith and without malice, the article is privileged, although the principal matters contained in the article may be untrue in fact and derogatory to the character of the plaintiff; and in such a case the burden is on the plaintiff to show actual malice in the publication of the article.²⁴

The Kansas Supreme Court at the outset of its opinion affirming judgment for the defendant acknowledged that its attention was centered beyond the rights of the parties and the truth or falsity of the publication:

Beyond their importance to the immediate parties the questions raised are of the utmost concern to all the people of the state. What are the limitations for the right of a newspaper to discuss the official character and conduct of a public official who is a candidate for reelection?²⁵

with cowardice in battle, to avoid liability "if the facts he alleged were true, or if he had probable cause to believe, and did believe, that they were true." *Id.* at 607.

Prior to *Coleman*, some courts confused "comment" on false facts with the false facts themselves and thus extended the "privilege." *Gott v. Pulsifer*, 122 Mass. 235 (1877), concerned a newspaper's report and comments about a statue, supposedly Phoenician in origin, but excavated in New York. The plaintiff owner claimed a \$30,000 sale was not completed following the false report that it had recently been sold in New Orleans for eight dollars. The Massachusetts Supreme Court extended the privilege to comment based on false facts, if made in good faith, by confusing "comment" with the underlying "false facts" and identifying the "facts" with the "comments":

The editor of a newspaper has the right . . . of publishing . . . comments . . . upon anything which is made by its owner a subject of public exhibition . . . and such publication falls within the class of privileged communications for which no action can be maintained without proof of actual malice. . . . Malice in uttering false statements may consist either in a direct intention to injure another, or in a reckless disregard of his rights and of the consequences that may result to him.

Id. at 238-39. Thus, the privilege extended to the misrepresentation that the statue had been sold for eight dollars.

Myers v. Longstaff, 14 S.D. 98, 84 N.W. 233 (1900), involved statements made by a newspaper about a candidate running for mayor. The court held: "Under the pleadings the alleged libelous publications were presumptively privileged, and in such a case the burden of proving express malice on the part of the defendant is upon the plaintiff, and he could not recover without proof of such malice." *Id.* at 108, 84 N.W. at 236.

24. *Coleman*, 78 Kan. at 712, 98 P. at 281-82.

25. *Id.* at 715, 98 P. at 283.

Unlike the *Hallam* court, the primary concern of the *Coleman* court was not to resolve the dispute between plaintiff and defendant as equitably as possible, but rather to channel the private litigation before it into broad public objectives. The court evaluated the warring interests of individual reputation and free speech and determined to shift its attention from the essence of the allegedly defamatory publication, i.e., its falsity, and instead to concentrate on society's need for the free dissemination of information and comment so that the public good might be advanced. The premise that an individual should not suffer a loss of reputation for the public good was not viewed as a statement but rather as a question to be decided. By its deference to what it considered the "public good," the *Coleman* court dogmatically answered the question simply: "Where the public welfare is concerned the individual must frequently endure injury to his reputation without remedy."²⁶

In shifting its view away from the truth or falsity of the published statement, the *Coleman* court did a distinct disservice to the defamed plaintiff and clouded the distinction between falsity and fair comment: "Will the liberty of the press be endangered if the discussion of . . . matters [of public interest] must be confined to *statements of demonstrable truth*, and to what a jury may . . . say is 'fair' *criticism and comment*?"²⁷ The *Coleman* court misunderstood the rationale of *Hallam* as being solely based on the "prediction" that honorable men would not enter politics should they have to sacrifice their good names in the process.²⁸ Careful to defend its own rationale, the decision stated that its approach to resolving the tension between the individual and the media was totally consistent with many prior decisions in England and the United States²⁹ and was a natural development from dictum in an 1884 Kansas decision, *State v. Balch*.³⁰ *Balch* was a criminal

26. *Id.* at 722, 98 P. at 285.

27. *Id.* at 735, 98 P. at 289 (emphasis added).

28. *Id.* at 732, 98 P. at 288.

29. The law of libel was liberalized in England by the "Fox Libel Act." See 2 May's Const. Hist. of Eng. 122. The *Coleman* court reinforced its view of the importance to society's welfare of a liberalized defamation law by citing the English case, *Wason v. Walker*, 4 L.R.-Q.B. 73, 93 (1868):

Our view of libel has, in many respects, only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in recent times been recognized. Comments on government, on ministers, and officers of state, on members of both houses of parliament, on judges and other public functionaries are now made every day, which half a century ago would have been the subject of actions or *ex officio* informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that, though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties?

Cited at 78 Kan. at 734, 98 P. at 289.

30. 31 Kan. 465, 2 P. 609 (1884).

libel case involving circulation of a printed handbill implying that a candidate for county attorney had been involved in voting fraud in a prior election, in which the court said:

Generally, we think a person may in good faith publish whatever he may honestly believe to be true . . . without committing any public offense, although what he published may in fact not be true and may be injurious to the character of others.³¹

The *Coleman* court passed over the fact that *Balch* was a criminal case³² and had no regard for the plaintiff's difficult task to prove bad faith, i.e., malice, on the part of the defendant—a problem that would claim the attention of the United States Supreme Court for two decades after *New York Times v. Sullivan*—with the observation: "Good faith and bad faith are as easily proved in a libel case as in other branches of the law."³³

A minority of the states³⁴ adopted the *Coleman* rationale and afforded protection to false statements about public officials so long as they were published without malice and with probable cause to believe in the truth of the statements. In so doing, the very basis for liability in defamation law was questioned, for the public official plaintiff was now required to rebut a new and powerful affirmative defense in any defamation action against a media defendant. Previously, to establish a prima facie case of common law defamation, the plaintiff had to prove publication to a third party of a defamatory statement of or concerning him which altered his reputation and then was required to prove whatever damages necessary under the law then in effect. "Fault" was not at issue, so the plaintiff's task was a relatively easy one. Over the years very few affirmative defenses were available to the defendant: truth, the absolute privilege afforded to those engaged in judicial or certain official proceedings, the privilege to publish accurate reports about such proceedings, and the *Hallam* qualified or conditional privilege to criticize and comment on true statements of fact. With the acceptance by a

31. *Id.* at 472, 2 P. at 614.

32. *Coleman*, 78 Kan. at 728, 98 P. at 287 ("True, that was a criminal case, but the rule of privilege is the same in both civil and criminal actions.").

33. *Id.* at 742, 98 P. at 292.

34. See *Conner v. Timothy*, 43 Ariz. 517, 33 P.2d 293 (1934); *Snively v. Record Publishing Co.*, 185 Cal. 565, 198 P. 1 (1942); *Knapp v. Post Printing & Publishing Co.*, 111 Colo. 492, 144 P.2d 981 (1943); *Moynahan v. Waterbury Republican*, 92 Conn. 331, 102 A. 653 (1918); *Children v. Shinn*, 168 Iowa 531, 150 N.W. 864 (1915); *Poleski v. Polish American Publishing Co.*, 254 Mich. 15, 235 N.W. 841 (1931); *Friedell v. Blakely Printing Co.*, 163 Minn. 226, 203 N.W. 974 (1925); *Cooper v. Romney*, 49 Mont. 119, 141 P. 289 (1914); *Estelle v. Daily News Publishing Co.*, 99 Neb. 397, 156 N.W. 645 (1916); *Lafferty v. Houlihan*, 81 N.H. 67, 121 A. 92 (1923); *Lewis v. Carr*, 178 N.C. 578, 101 S.E. 97 (1919); *Jackson v. Pittsburgh Times*, 152 Pa. 406, 25 A. 613 (1893); *Egan v. Dotsun*, 36 S.D. 459, 155 N.W. 783 (1915); *Williams v. Standard-Examiners Publishing Co.*, 83 Utah 31, 27 P.2d 1 (1933); *Bailey v. Charleston Mail Ass'n*, 126 W. Va. 292, 27 S.E.2d 837 (1944).

significant number of states of the *Coleman* extension of protection, a new hurdle was raised in the way of the public official plaintiff in any defamation action against a media defendant: to surmount the *Coleman* privilege raised as an affirmative defense, the plaintiff had henceforth to prove the defendant's "fault" or "malice" as the underlying basis of liability. Over fifty years would pass before the United States Supreme Court decided to attempt to resolve the tension that continued to develop.

III. THE *New York Times* RULE: PUBLIC OFFICIALS AND THE MEDIA DEFENDANT

On March 9, 1964, the United States Supreme Court decided *New York Times v. Sullivan* and thereby rejected the majority rule that the protection afforded the press was restricted to comment and did not extend to misstatement of fact. In reversing the Alabama Supreme Court's affirmation of a \$500,000 jury verdict against the *New York Times* for printing an advertisement placed by a civil rights group supporting Dr. Martin Luther King which contained misstatements about the actions taken by Montgomery police, and implicitly by the supervising commissioner, L.B. Sullivan,³⁵ the Court not only held that the Alabama rule of libel law did not protect rights guaranteed by the first and fourteenth amendments³⁶ but formulated a new defamation law for the nation:

Constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.³⁷

35. *Sullivan v. New York Times Co.*, 273 Ala. 656 (1962), *rev'd*, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

36. *New York Times v. Sullivan* was the first case in which the United States Supreme Court granted certiorari to review a state judgment in a civil defamation action. The fourteenth amendment prohibits states from abridging the privileges or immunities of citizens without due process of law, and *New York Times* was not a state criminal prosecution. The *New York Times* court circumvented this problem, stating:

Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which . . . imposes invalid restrictions on constitutional freedoms of speech and press. It matters not that law has been applied in civil action and that it is common law only, though supplemented by statute. . . . The test is not the form in which state power has been applied but . . . whether such power has in fact been exercised.

376 U.S. at 265. Thus, *New York Times* in essence held that any state judge applying state law in a civil defamation action was exercising state power which could be used to abridge constitutional rights guaranteed by the fourteenth amendment, and henceforth any civil defamation action against a media defendant could be reviewed by the Supreme Court because of the constitutional dimension.

37. *Id.* at 279-80.

Furthermore, to prevail in a libel action, the public official must prove the actual malice with "convincing clarity,"³⁸ a term which was left undefined.

Writing for a unanimous Court, Justice Brennan relied strongly on, and quoted extensively from, the *Coleman* decision³⁹ and adopted its rationale by ignoring concentration on the truth or falsity of the publication and focusing on the status of the plaintiff and the constitutional protection given the media defendant. "If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate."⁴⁰ Thus, the issue of falsity was obfuscated by the requirement that the plaintiff first prove that the publisher knew the publication was false or that it proceeded with reckless disregard of truth or falsity. How could a public official surmount this hurdle? The *New York Times* Court was silent.

Preoccupied with its emphasis on the public's right to know at the expense of the plaintiff's good name, the decision rested on the necessity of avoiding "self-censorship . . . by would-be critics of official conduct [who] may be deterred from voicing this criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so,"⁴¹ and on "the background of profound national commitment to the principal that debate on public issues should be uninhibited, robust, and wide-open. . . ."⁴² Important as these considerations are, the question remained: how may an aggrieved public official proceed to vindicate his reputation? There were two concurring opinions by Justices Goldberg and Black, in both of which Justice Douglas joined: Justice Goldberg thought the majority opinion should have acknowledged "an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses";⁴³ Justice Black viewed the Court's definition of "malice" as "an elusive, abstract concept, hard to prove and hard to disprove,"⁴⁴ and favored "granting the press an *absolute immunity* for criticism of the way public officials do their public duty."⁴⁵ Commissioner Sullivan had resorted to legal action to restore

38. *Id.* at 285-86.

39. *Id.* at 280-82.

40. *Id.* at 273.

41. *Id.* at 279. Undoubtedly the Court considered the deterring effect on defendants of litigation expenses and the possibility of excessive verdicts. The Alabama Supreme Court had affirmed the \$500,000 judgment against the Times and another \$500,000 verdict had been awarded against the Times to another commissioner. *Id.* at 294.

42. *Id.* at 270.

43. *Id.* at 298 (Goldberg and Stevens, J.J., concurring).

44. *Id.* at 293 (Black and Douglas, J.J., concurring).

45. *Id.* at 295 (emphasis added). It should be noted that the majority opinion did not explicitly reject anything contained in the concurring opinions of Justices Goldberg and Black.

his reputation, yet the Supreme Court's decision did not address the essential element of his libel action, the falsity of the publication, and avoided it altogether by basing its holding squarely on the first amendment free speech and free press guarantees.

A few months after *New York Times*, the United States Supreme Court in *Garrison v. Louisiana*⁴⁶ clarified the phrase of the *New York Times* rule "with reckless disregard of whether it [the statement] was false or not"⁴⁷ by holding that the rule was satisfied if a public official plaintiff could prove that the publication was made with a "high degree of awareness of . . . probable falsity."⁴⁸ Decided solely on first amendment grounds, the Court seemed unconcerned that the private reputations of public officials may be adversely affected by a false statement: "[W]here the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth."⁴⁹ "The *New York Times* rule is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed."⁵⁰ The explanation of *what* may be proved to establish "reckless disregard" did not inform the public official plaintiff of *how* to prove it. Once again, the Court turned a blind eye to the heart of a defamation action.

In 1968, the Supreme Court raised the hurdle it had erected in the public official's path to an insurmountable height. After *St. Amant v. Thompson*,⁵¹ *New York Times* malice became more difficult to prove when the Court offered "meaningful guidance" to the defamed public official plaintiff who thereafter could recover if he could prove that "the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."⁵² The *St. Amant* Court was well aware that such a test might permit the issue to be determined solely by the defendant's testimony that the statement was published in good faith and that the reckless disregard

46. 379 U.S. 64 (1964). The decision reversed a criminal libel conviction of the New Orleans District Attorney who, in the course of a press conference, had accused eight criminal court judges of, among other things, inefficiency, laziness, and taking excessive vacations.

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

48. *Garrison*, 379 U.S. at 74.

49. *Id.* at 72-73.

50. *Id.* at 77.

51. 390 U.S. 727 (1968). A candidate for the United States Senate while on television read into the cameras an affidavit by a union official that the plaintiff deputy sheriff had taken bribes. The defendant candidate had not checked the facts and had not inquired into the reputation of the union official. The state court held that the lack of further investigation by the defendant candidate constituted "reckless disregard for the truth." 250 La. 405, 196 So. 2d 255 (1967), *rev'd*, 390 U.S. 727 (1968).

52. *St. Amant*, 390 U.S. at 731.

standard might permit recovery in fewer situations than might be the case if the standard to be applied was that of the prudent publisher or the reasonable person.⁵³ The Court's attempt to give "meaningful guidance" led the public official plaintiff straight into a barrier which would block his attempts to restore his reputation.

Many of the difficulties raised by the *New York Times* holding which would occupy the Court's attention up until the present time may well have been avoided if more attention had been given to Justice Black's absolutist interpretation of the first amendment guarantees, for in his concurring opinion he viewed the Court's adoption of the malice standard as a stop-gap measure and believed the Constitution granted the press an *absolute immunity* to criticize public officials.⁵⁴ If the constitutional protection offered the press had been considered an "immunity" rather than a "privilege," alternative remedies other than money damages may have become available to a defamed plaintiff.

As shall be proposed,⁵⁵ viewing the protection as an "immunity" rather than a "privilege" recasts a defamation action against a media defendant. An immunity differs from a privilege in that a privilege is an affirmative defense raised by the defendant as an excuse or justification for his otherwise tortious conduct and affects the very basis of liability.⁵⁶ A privileged action avoids all liability where it would otherwise follow,⁵⁷ so that the underlying act is non-tortious and no cause of action exists. The intentional torts are defined as unpermitted and *unprivileged* invasions of particular rights. Thus, a drowning swimmer who crawls onto another's land without the other's permission in order to save himself has acted under privilege. No tort has been committed; no cause of action and no basis of liability exists although procedurally the privilege is raised as a defense.⁵⁸ If after inquiry it is established that the defendant acted in good faith because his own interests required it or because the interests of society demanded it, protection is granted as a matter of law and the plaintiff's action must be dismissed.

An immunity, on the other hand, exists when the actor, because of his status or position, is protected from civil liability, i.e., money damages,

53. *Id.*

54. See *supra* note 45 and accompanying text.

55. See *infra* notes 279-88 and accompanying text.

56. Booth & Brother v. Burgess, 72 N.J. Eq. 181, 188, 65 A. 226, 229 (1906) ("There is no justification for a tort. The so-called justification is an exceptional fact which shows that no tort was committed.").

57. See PROSSER AND KEETON, *supra* note 8, at 108-09 (quoting RESTATEMENT (SECOND) OF TORTS § 10 (1965)).

58. If in the process of saving his life the swimmer damages the property, he is liable to make restitution for the damage caused — not as a damage resulting from a trespass but rather as the consequence of a privileged act. See, e.g., Vincent v. Lake Erie Transportation Co., 109 Minn. 456, 124 N.W. 221 (1910).

within the limits of the immunity. The actor's conduct remains tortious, but the resulting civil liability is avoided. Unlike a privileged act, alternate remedies may be available to a plaintiff damaged by the conduct of an actor claiming an immunity.⁵⁹ In the years following *New York Times* the Supreme Court had many opportunities to address this distinction yet refrained from doing so in its preoccupation with defining the plaintiff's status in terms of malice.

IV. THE PUBLIC FIGURE PLAINTIFF: *Gertz v. Robert Welch*

How far and in what ways the *New York Times* rule would be extended or clarified occupied the United States Supreme Court for a decade. With its attention riveted on the status of the plaintiff in defamation actions against media defendants, the Court struggled to define "status" in terms of *New York Times* malice and ignored the plaintiff's chief interest in each case, viz. the restoration and vindication of his reputation. In its decisions no effort was made to consider the availability of alternate procedures, other than a suit for money damages, by which the plaintiff's burden could be lessened.

The *New York Times* Court had not defined the classification "public official,"⁶⁰ and less than two years after its decision, the Court had an opportunity to draw precise lines but declined to do so. In *Rosenblatt v. Baer*⁶¹ the plaintiff supervisor of a public recreational area sued the defendant newspaper columnist who had written that the recreational center was in a better financial position a year after the plaintiff's dismissal, thus implying that the plaintiff was inefficient or dishonest. The Supreme Court reversed and remanded on the basis of erroneous jury instructions but also considered the question of whether the supervisor was a "public official" within the *New York Times* holding and thus held to the *New York Times* malice standard. The Court rejected the argument that the question of who was a "public official" should be answered by reference to state law standards⁶² and declined to establish a uniform standard,⁶³ but remarked that since *New York Times* was decided to assure uninhibited debate on public issues,

It is clear . . . that the public official designation applies at the very least to those among the hierarchy of government employees who have, or appear

59. See generally PROSSER & KEETON, *supra* note 8, at 1032-75.

60. *New York Times*, 376 U.S. at 283 n.23 ("We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included.").

61. 383 U.S. 75 (1966). After a jury award of \$31,500 for the plaintiff, but before affirmation by the New Hampshire Supreme Court, 106 N.H. 26, 203 A.2d 773 (1964), *New York Times* was decided. The New Hampshire court found the decision no bar to its affirmation of the award.

62. *Rosenblatt*, 383 U.S. at 84.

63. *Id.* at 85 ("No precise lines need be drawn for the purpose of this case.").

to the public to have, substantial responsibility for or control over the conduct of governmental affairs.⁶⁴

The following year, the Supreme Court decided two cases simultaneously, *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*.⁶⁵ In *Butts*, the plaintiff football coach on the University of Georgia staff, but whose salary was paid by a private alumni group, sued the *Saturday Evening Post* because of an article that accused him of divulging his team's game plans to the University of Alabama coach before the 1962 Alabama-Georgia game. In *Walker*, the plaintiff political activist, a former Army general, was said to have personally led an assault against federal marshals who were on the University of Mississippi campus in 1962 to enforce a desegregation order. The cases were decided together precisely so that the Supreme Court could once again concentrate on the status of the plaintiffs in order to decide whether the *New York Times* malice standard was applicable.⁶⁶ The underlying facts and the method of reporting were decidedly different. In *Butts*, there was no deadline to meet, yet no efforts were made to check the story, which was based on the hotly disputed content of an overheard phone conversation between the two coaches, and which misrepresented the game itself and the players' subsequent remarks about the game. In *Walker*, the Associated Press received the "hot news" story from a reliable correspondent on the scene and only some facts as to the actual role played by Walker in the course of the campus riot were disputed. Butts' judgment for \$460,000 was affirmed by a vote of 5 to 4, and Walker's judgment was unanimously reversed. What is quite notable is the effect of the split Court's holding on subsequent defamation law. Neither state court had applied the *New York Times* standard because Butts and Walker were not "public officials," but the Supreme Court wanted to decide what standard was to be applied to plaintiffs of the status of Butts and Walker. Both were considered "public figures; Butts by his position alone, Walker by "thrusting . . . his personality into the 'vortex' of an important public controversy."⁶⁷ The justices differed on the standard to be applied. Justice Harlan, writing the opinion of the Court in which Justices Clark, Stuart and Fortas joined, reached his decision upholding Butts' judgment based on a standard different from *New York Times* malice, viz., a public figure plaintiff may prevail in an action against a media defendant upon "a showing of highly unreasonable conduct

64. *Id.* It should be noted that the Court remarked that "it is for the trial judge in the first instance to determine whether the proofs show [the plaintiff] to be a 'public official.'" *Id.* at 88.

65. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

66. *Id.* at 134 ("We brought these two cases here to consider the impact of [*New York Times*] on libel actions instituted by persons who are not public officials, but who are 'public figures' and involved in issues in which the public has a justified and important interest.") (citations omitted).

67. *Id.* at 155.

constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.”⁶⁸ Chief Justice Warren concurred in affirming Butts’ judgment but thought the *New York Times* standard should apply to “public figures.”⁶⁹ In a dissenting opinion, Justices Brennan and White agreed with the Chief Justice, and Justices Black and Douglas, while advocating press and speech freedoms far wider than those granted by *New York Times*, nevertheless joined with the Chief Justice on the applicability of the *New York Times* standard that the Court might reach a decision. The result was that the concurring opinion of Chief Justice Warren became the law of the land and the *New York Times* standard was extended to public figure plaintiffs based on the reasoning that the “views and actions [of public figures] with respect to public issues and events are often of as much concern to the citizen as the attitudes and behavior of ‘public officials’ with respect to the same issue and events.”⁷⁰

In extending the *New York Times* standard the *Butts* Court gave scant attention to the defamed plaintiff’s exceedingly slim chance of success in an action where *New York Times* malice must be proved except in the most blatant cases of grossly irresponsible reporting like that in the *Butts* action.⁷¹ And, just as the Court failed to precisely define “public official” in *Rosenblatt*, so too the term “public figure” was inadequately dealt with.

The “seminal”⁷² decision in *New York Times* had not considered the standard to be applied in a defamation action against a media defendant by a “private person” involved in a matter of public concern. This next step in the extension of constitutional protection of the media was taken in *Rosenbloom v. Metromedia, Inc.*,⁷³ which involved allegedly defamatory broadcasts charging that a distributor of nudist magazines was a “smut distributor” and “girlie-book peddler.”⁷⁴ Before his involvement in the controversy, Rosenbloom was certainly not a public figure, but rather “just one of the millions of Americans who live their lives in obscurity.”⁷⁵ The Third Circuit reversed a jury verdict for the plaintiff on the grounds that the

68. *Id.*

69. *Id.* at 164.

70. *Id.* at 162.

71. It should be noted that *New York Times* protection was extended to newspapers accurately reporting charges against public officials, *Greenbelt Coop. Publishing Ass’n v. Bresler*, 398 U.S. 6 (1970), and the accurate reporting of an apparent meaning of a Civil Rights Commission report, although the word “alleged” was omitted, *Time, Inc. v. Pape*, 401 U.S. 279 (1971).

72. See Kalven, *The Reasonable Man and The First Amendment: Hill, Butts and Walker*, 1967 SUP. CT. REV. 267, 305.

73. 403 U.S. 29 (1971).

74. *Id.* at 36. Rosenbloom was acquitted of criminal obscenity charges under the trial judge’s instructions that the nudist magazines were not obscene as a matter of law. *Id.*

75. *Id.* at 78 (Marshall, J., dissenting).

broadcasts concerned matters of public interest and, despite the fact that the plaintiff was a private individual, "the first amendment standard of actual malice is applicable."⁷⁶ The United States Supreme Court affirmed in a plurality opinion, holding that constitutional free press guarantees should be extended to "all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."⁷⁷

Since there was no majority opinion in *Rosenbloom*, the holding had limited effect on subsequent defamation actions against media defendants, but it stood firmly in the progression of cases in which the Court's attention was myopically focussed on the rights of the media. Justice Brennan made only a passing acknowledgment of the plaintiff's plight in his efforts to restore his reputation:

If the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern.⁷⁸

Subsequent developments in defamation law have shown that possible alternative remedies implied by Justice Brennan, viz. retraction status, right-of-reply statutes, or guarantees of right of access to the media,⁷⁹ would all face constitutional difficulties.

In *Rosenbloom*, the seed of *New York Times* had grown into a veritable protective thicket surrounding the media. Although the phrase "matter of public interest" was left undefined, what purpose is there for the media to publish something that is of no interest to the public? Again, in *Rosenbloom*, Justice Black reiterated his belief that the media should be afforded complete constitutional protection, the absolute immunity he espoused in *New York Times*,⁸⁰ but did not offer any alternative remedy to the defamed plaintiff.

It was not until 1974, in *Gertz v. Robert Welch, Inc.*,⁸¹ that the expansion of the *New York Times* rule came to an unsteady halt. The plaintiff, an

76. *Rosenbloom v. Metromedia, Inc.*, 415 F.2d 892, 898 (3d Cir. 1969), *aff'd*, 403 U.S. 29 (1971).

77. *Rosenbloom*, 403 U.S. at 44. Justice Brennan wrote the plurality opinion in which Chief Justice Burger and Justice Blackmun joined. Justice Black concurred on the basis of his concurring opinion in *New York Times*. *Id.* at 57. Justice White concurred on a decidedly different ground, *i.e.*, "The First Amendment gives the press and the broadcast media a privilege to report and comment upon the official actions of public servants in full detail, with no requirement that the reputation or the privacy of an individual involved in or affected by the official action be spared from public view." *Id.* at 62.

78. *Id.* at 47.

79. *Id.* at 47 n.15.

80. *Id.* at 57 (Black, J., concurring).

81. 418 U.S. 323 (1974). Even though a majority of the *Rosenbloom* Court had

attorney who represented the family of the deceased in a civil action against a Chicago policeman convicted of murdering the young man, brought suit against the defendant publisher who had depicted the plaintiff as a "Leninist," "communist-fronter," a member of a number of various Communist organizations, and an architect of the "frame-up" of the convicted policeman. The Seventh Circuit⁸² on the basis of the *Rosenbloom* holding affirmed the District Court's judgment n.o.v. for the defendant.⁸³ The United States Supreme Court reversed, remanded, and set forth new constitutional limitations on defamation actions by "private persons" against media defendants, specifically rejecting the *Rosenbloom* plurality's rule in holding that a media defendant may not claim the protection of the *New York Times* rule when it publishes defamatory material about a private person, even though the publication concerned a matter of public interest.⁸⁴

In *Gertz*, the Supreme Court continued its ten year history of recasting defamation law in terms of the plaintiff's status in society but did attempt to bring some relief to the defamed private person by indicating that a standard different from the *New York Times* rule may be made available to him. In balancing the necessity for an uninhibited, free press against the legitimate state interest⁸⁵ in allowing the possibility of a less rigorous standard

not supported the application of the *New York Times* standard to all plaintiffs in defamation actions against media defendants when the published matter was "of public concern," many states and several circuits adopted the plurality opinion in *Rosenbloom*. See, e.g., *West v. Northern Publishing Co.*, 487 P.2d 1304 (Alaska 1971); *Gallman v. Caines*, 254 Ark. 987, 497 S.W.2d 47 (1973); *Belli v. Curtis Publishing Co.*, 25 Cal. App. 3d 384, 102 Cal. Rptr. 122 (1972); *Moriarty v. Lippe*, 162 Conn. 371, 294 A.2d 326 (1972); *Firestone v. Time, Inc.*, 271 So. 2d 745 (Fla. 1972); *State v. Snyder*, 277 So. 2d 660 (La. 1972); *Priestley v. Hastings & Sons Publishing Co.*, 360 Mass. 118, 271 N.E.2d 628 (1971); *Harnish v. Herald-Mail Co.*, 264 Md. 326, 286 A.2d 146 (1972); *Standke v. B.E. Darby & Sons, Inc.*, 291 Minn. 468, 193 N.W.2d 139 (1971); *Whitmore v. Kansas City Star Co.*, 499 S.W.2d 45 (Mo. Ct. App. 1973); *Trails West, Inc. v. Wolff*, 32 N.Y.2d 207, 298 N.E.2d 52, 344 N.Y.S.2d 863 (1973); *Washington v. World Publishing Co.*, 506 P.2d 913 (Okla. 1972); *Sanders v. Harris*, 213 Va. 369, 192 S.E.2d 754 (1972); *Chase v. Daily Record, Inc.*, 83 Wash. 2d 37, 515 P.2d 154 (1973); *Polzin v. Helmbrecht*, 54 Wis. 2d 578, 196 N.W.2d 685 (1972); see also *Davis v. National Broadcasting Co.*, 447 F.2d 981 (5th Cir. 1971); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972); *Porter v. Guam Publications, Inc.*, 475 F.2d 744 (9th Cir. 1973). The Third Circuit, however, noted its "discomfort in accepting the *Rosenbloom* plurality opinion as a definitive statement of the appropriate law. . . ." *Gordon v. Random House, Inc.*, 486 F.2d 1356, 1359 (3d Cir. 1973).

82. *Gertz v. Robert Welch, Inc.*, 471 F.2d 801 (7th Cir. 1973).

83. *Id.* at 808.

84. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 346-47.

85. *Id.* at 349 ("[H]ere we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment."); see also Brosnahan, *From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and the First Amendment*, 26 HASTINGS L.J. 777 (1975) (tracing the development of defamation from *New York Times*, noting that the *Gertz* decision signifies a shift

to be applied in suits by private persons damaged by defamatory statements, the Court reasoned that the private person does not have easy access to the media to rebut defamatory statements, has not sought involvement in public affairs, has not thrust himself into the forefront of public controversies in order to influence the resolution of issues, and thus left to the states the right to adopt for themselves different tests of liability for media defamation of private individuals.⁸⁶ However, liability without fault could not be imposed, punitive or presumed damages could not be awarded unless *New York Times* malice was proven, and in the absence of a showing of *New York Times* malice, private person plaintiffs could only recover "actual damages."⁸⁷ "Actual damages" were not restricted to the traditional dollar and cent loss capable of proof, but included "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."⁸⁸

Gertz did not abrogate *New York Times* protection to "public figures" but reclassified such persons into "all-purpose public figures" and "limited-purpose public figures" who are related to particular public controversies.⁸⁹

away from concern with the first amendment and towards concern with state interest in defamation).

86. *Gertz*, 418 U.S. at 345-46.

87. *Id.* at 347-49.

88. *Id.* at 350.

89. *Id.* at 345:

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

Id. *Gertz*, in effect, complicated matters by this language.

Several post-*Gertz* decisions, *Time v. Firestone*, 424 U.S. 448 (1976), *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), and *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979), should be viewed as clarifications of the public figure/private person distinction. In *Firestone*, writing for a Court split 5 to 3, Justice Rehnquist stated that involvement in a sensational divorce case does not render a private person a public figure for purposes of defamation actions. *Firestone*, 424 U.S. at 454. Voluntary use of the courts to obtain legal dissolution of a marriage does not equal seeking publicity or influencing the outcome of a private controversy. *Id.* at 453.

As the decade of clarification of the *New York Times* rule closed, *Gertz* emerged as what seemed at the time a definitive halt in the expansion of constitutional protection. In *Hutchinson v. Proxmire*, the Court considered whether a research scientist receiving federal grants for animal research studies was a "limited" public figure because of his involvement in a "controversy" after Senator Proxmire had conferred his "Golden Fleece Award" on the scientist. In the course of his senate speech which was repeated in an

The Court in fact continued to analyze the means available to plaintiffs to restore their reputations in terms of their status, viz. self-help by access to the media to deny the defamatory publication, but ignored the fact that a denial in and of itself does not vindicate reputation, may entail the expenditure of large sums of money, and actually results in a republication of the defamatory language.⁹⁰

In a thirty-five page dissent, Justice White alone among the *Gertz* Court addressed the real problems faced by the private person plaintiff:

[W]ith the additional burden on the plaintiff of proving negligence or other fault, it will be exceedingly difficult, perhaps impossible, for him to vindicate his reputation by securing a judgment for nominal damages, the practical

interview and a newsletter, Senator Proxmire referred to the plaintiff as one who was wasting government funds. Actually, Dr. Hutchinson's experiments contributed valuable information to the space program. The Court rejected the district court's determination, 431 F. Supp. 1311 (W.D. Wis. 1977), *aff'd*, 579 F.2d 1027 (7th Cir. 1978), that Dr. Hutchinson was a public figure for the limited purpose of comment on his use of the federal grants after having been brought into the controversy by the Senator's allegations. *Hutchinson*, 443 U.S. at 134-35.

Hutchinson did not thrust himself or his views into public controversy to influence others. . . . Moreover, Hutchinson at no time assumed any role of public prominence in the broad question of concern about expenditures. Neither his applications for federal grants nor his publications in professional journals can be said to have invited that degree of public attention and comment on his receipt of federal grants essential to meet the public figure level.

Id. at 135.

In *Wolston*, the defendant published the plaintiff's name on a list of "Soviet agents" identified in the United States. *Wolston* was a nephew of convicted Soviet spies, who had in fact failed to appear before a grand jury investigating Soviet agents in the United States. The lower courts held he was a public figure and granted summary judgment because as a matter of law he could not prove *New York Times* malice. The United States Supreme Court reversed. Justice Rehnquist, writing for the majority, found that *Wolston* had not "voluntarily thrust" or injected himself into a public controversy, but rather he had been "dragged unwillingly" into the investigation. 443 U.S. at 166. The Court also noted that a public controversy must be a true "controversy," and "there was no public controversy or debate in 1958 about the desirability of permitting Soviet espionage in the United States; all responsible United States citizens understandably were and are opposed to it." *Id.* at 166 n.8; *see also* *Rancho La Costa, Inc. v. Superior Court*, 106 Cal. App. 3d 646, 658, 165 Cal. Rptr. 347, ___ (1980), *cert. denied sub nom. Penthouse Int'l Ltd. v. Rancho La Costa*, 450 U.S. 902 (1980).

90. *Gertz*, 418 U.S. at 344:

The first remedy of any victim of defamation is self-help — using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

Id. (footnote omitted).

effect of such a judgment being a *judicial declaration that the publication was indeed false*. Under the new rule the plaintiff can lose, not because the statement is true, but because it was not negligently made.⁹¹

The majority opinion and the concurring and other dissenting opinions gave no attention to Justice White's assessment of the monumental task the Supreme Court imposed upon a media-defamed plaintiff and ignored his plea for an alternative remedy: "I have said before, but it bears repeating, that even if the plaintiff should recover no monetary damages, he should be able to prevail and have a judgment that the publication is false."⁹²

V. DEVELOPMENTS AFTER *Gertz*

In *Gertz* the states were left "to define for themselves the appropriate standard of liability"⁹³ and were allowed "to impose liability on the publishers . . . of defamatory falsehood on a less demanding showing than that required by *New York Times*"⁹⁴ in defamation actions by private persons against media defendants. Initially, *Gertz* appears to have halted the extension of the application of the *New York Times* rule, but it actually extended a modified *New York Times* rule in that the private person plaintiff was henceforth required to prove *New York Times* malice to recover punitive damages and, in the absence of *New York Times* malice, could recover only "actual" and not general damages. *Gertz* left open more questions than it answered,⁹⁵ and in the years that have followed, few if any of those questions have been answered by the Supreme Court.

A. *Forum-Shopping*

The states have not uniformly adopted the negligence standard allowed by *Gertz* in cases involving private person plaintiffs,⁹⁶ and, as a result of

91. *Id.* at 376 (White, J., dissenting) (emphasis added).

92. *Id.* at 393 (White, J., dissenting).

93. *Id.* at 347.

94. *Id.* at 348.

95. Numerous articles have attempted to answer some of the issues left open by *Gertz*. See, e.g., Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422 (1975) (self-censorship still remains a problem after *Gertz*, with more protection needed). This contrasts with the view expressed in Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199 (1976) (*Gertz* lauded as bringing a measure of clarity and stability to defamation, particularly on the state level where negligence provides an easier standard to handle than a constitutional privilege). See also Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205 (1976) (taking issue with the Court's focus on public character when the Court should actually be considering the person and the subject matter in its analysis); McCarthy, *How State Courts Have Responded to Gertz in Setting Standards of Fault*, 1979 JOUR. Q. 531.

96. Most states chose and continue to follow a negligence standard in such cases.

Erie Railroad v. Tompkins,⁹⁷ this has led to the possibility of state-to-state forum shopping by plaintiffs in defamation actions.⁹⁸ In *Keeton v. Hustler*

See, e.g., *Mead Corp. v. R.D. Hicks*, 448 So. 2d 308 (Ala. 1979); *Antwerp Diamond Exch. of Am. v. Better Business Bureau of Maricopa County*, 130 Ariz. 523, 637 P.2d 733 (1981); *KARK-TV v. Simon*, 280 Ark. 228, 656 S.W.2d 702 (1983); *Gannett Co. v. Re*, 496 A.2d 553 (Del. 1985); *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78 (D.C. 1980), *cert. denied*, 451 U.S. 989 (1981); *Mid-Florida Television Corp. v. Boyles*, 467 So. 2d 282 (Fla. 1985); *Triangle Publications, Inc. v. Chumley*, 253 Ga. 179, 317 S.E.2d 534 (1984); *Kohn v. West Hawaii Today*, 65 Haw. 584, 656 P.2d 79 (1982); *Troman v. Wood*, 62 Ill. 2d 184, 340 N.E.2d 292 (1976); *Gobin v. Globe Publishing Co.*, 232 Kan. 1, 649 P.2d 1239 (1982); *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882 (Ky. 1981), *cert. denied*, 456 U.S. 975 (1982); *Wattigny v. Lambert*, 408 So. 2d 1126 (La. Ct. App. 1981), *cert. denied*, 457 U.S. 1132 (1982); *Metromedia, Inc. v. Hillman*, 285 Md. 161, 400 A.2d 1117 (1979); *New England Tractor-Trailer Training of Connecticut v. Globe Newspaper Co.*, 395 Mass. 471, 480 N.E.2d 1005 (1985); *Peisner v. Detroit Free Press, Inc.*, 421 Mich. 125, 364 N.W.2d 600 (1984); *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476 (Minn. 1985); *Whitten v. Commercial Dispatch Publishing Co.*, 487 So. 2d 843 (Miss. 1986); *Madison v. Yunker*, 180 Mont. 54, 589 P.2d 126 (1978); *Duchesnaye v. Munro Enters., Inc.*, 125 N.H. 244, 480 A.2d 123 (1984); *Marchiondo v. Brown*, 98 N.M. 394, 649 P.2d 462 (1982); *Embers Supper Club, Inc. v. Scripps-Howard Broadcasting*, 9 Ohio St. 3d 22, 457 N.E.2d 1164 (1984), *cert. denied*, 467 U.S. 1226 (1984); *Martin v. Griffin Television, Inc.*, 549 P.2d 85 (Okla. 1976); *Bank of Oregon v. Independent News, Inc.*, 298 Or. 434, 693 P.2d 35, *cert. denied*, 106 S. Ct. 84 (1985); *Philadelphia Newspapers v. Hepps*, 506 Pa. 304, 485 A.2d 374 (1984), *rev'd*, 106 S. Ct. 1558 (1986); *Deloach v. Beaufort Gazette*, 281 S.C. 474, 316 S.E.2d 139, *cert. denied*, 469 U.S. 981 (1984); *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412 (Tenn. 1978); *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809 (Tex. 1976), *cert. denied*, 429 U.S. 1123 (1977); *Seegmiller v. KSL, Inc.*, 626 P.2d 968 (Utah 1981); *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 143 Vt. 66, 461 A.2d 414 (1983), *aff'd on other grounds*, 472 U.S. 749 (1985); *Great Coastal Express, Inc. v. Ellington*, 230 Va. 142, 334 S.E.2d 846 (1985); *Dunlap v. Wayne*, 105 Wash. 2d 529, 716 P.2d 842 (1986); *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70 (W. Va. 1983); *Denny v. Mertz*, 106 Wis. 2d 636, 318 N.W.2d 141 (1982), *cert. denied*, 459 U.S. 883 (1982); *Adams v. Frontier Broadcasting Co.*, 555 P.2d 556 (Wyo. 1976).

Some states require more than the negligence standard in cases involving a private plaintiff and a media defendant. *See, e.g.*, *Gay v. Williams*, 484 F. Supp. 12 (D. Alaska 1979) (*New York Times* malice based on pre-*Gertz* Alaska state court decisions); *Diversified Management, Inc. v. Denver Post, Inc.*, 653 P.2d 1103 (Colo. 1982) (reckless disregard); *Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 321 N.E.2d 580 (1974), *cert. denied*, 424 U.S. 913 (1976) (*New York Times* malice); *Peisner v. Detroit Free Press, Inc.*, 421 Mich. 125, 364 N.W.2d 600 (1984) (*New York Times* malice); *Sisler v. Gannett Co.*, 104 N.J. 256, 516 A.2d 1083 (1986) (private person with sufficient experience and knowledge entering in a personal transaction or conducting his personal affairs in a manner that one in his position would reasonably expect implicates a legitimate public interest held to *New York Times* malice standard); *Gaeta v. New York News*, 62 N.Y.2d 340, 465 N.E.2d 802 (1984) (gross irresponsibility).

97. 304 U.S. 64 (1938).

98. *See Vairo, Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role for Federal Common Law?*, 54 FORDHAM L. REV. 167 (1985). "[A]s notions of personal jurisdiction expand, it is often a state-to-state choice with the plaintiff seeking

Magazine, Inc.,⁹⁹ the non-resident plaintiff brought a libel action against the defendant publisher in New Hampshire, where it sold between 10,000 and 15,000 magazines monthly, in order to take advantage of New Hampshire's six-year statute of limitations in defamation actions.¹⁰⁰ In reversing and remanding the First Circuit's affirmation of the district court's dismissal, the Supreme Court rejected the contention that it would be "unfair" for a federal court in New Hampshire to assert jurisdiction over the non-resident defendant publisher when a substantial number of copies of its national publication are regularly sold and distributed.¹⁰¹ New Hampshire had adopted the negligence standard to be applied in defamation actions by private persons.¹⁰² It would seem that, according to the *Keeton* rationale and the lack of uniformity encouraged by *Gertz*, private person plaintiffs are free to search the fifty states and to choose the law which is of most benefit. At first blush, this may seem to give some relief to the plaintiff, but at what expense? How many private individuals have the resources to pursue a suit, sometimes for years, in what may be a jurisdiction far removed from their residence? And, since the states remain free to change a standard once adopted, may not a plaintiff who institutes suit at a time when a negligence standard is being applied, find himself faced on appeal with a higher standard, e.g., *New York Times* or *Rosenbloom*, if the state had adopted a different standard in the interim?

B. *Post-Gertz Decisions Add to the Confusion*

In several post-*Gertz* decisions the United States Supreme Court and various circuits sought to resolve some of the problems left open by *New York Times* and its progeny. For the most part, due to the Court's continued preoccupation with the standard to be applied according to the status of the plaintiff, little if any help has been afforded to the plaintiff in his attempt to surmount the hurdles erected by *New York Times* and *St. Amant*. When faced with problems on the procedural level, the Court consistently avoided the falsity of the defamatory publication and offered no real help to the plaintiff in his attempts to vindicate his reputation.

To prove knowledge of falsity or reckless disregard of the truth, insofar as the media defendant entertained serious doubts as to the truth of his

to choose the most favorable procedural or substantive law or choice of law rules from among the several different states that can exercise personal jurisdiction over defendants." *Id.* at 179.

99. 465 U.S. 770 (1984).

100. The statute of limitations had run on the plaintiff's cause of action in every other state. See *Keeton v. Hustler Magazine, Inc.*, 682 F.2d 33, 35 (1st Cir. 1982), *rev'd*, 465 U.S. 770 (1984); see also Capra, *Book Review: Conceptual Limitations on Long-Arm Jurisdiction*, 52 *FORDHAM L. REV.* 1034, 1044-51 (1984).

101. 465 U.S. at 781.

102. See *McCusker v. Valley News*, 121 N.H. 258, 428 A.2d 493, *cert. denied*, 454 U.S. 1017 (1981).

publication,¹⁰³ the plaintiff must be able to have access in pre-trial discovery to the publisher's state of mind at the time of publication. After all, the media defendant may testify in pre-trial affidavits or at trial as to his lack of fault in the preparation of the allegedly defamatory material. In 1979, the Supreme Court addressed the problem in *Herbert v. Lando*,¹⁰⁴ in which a 6 to 3 majority held that an allegedly defamed public figure plaintiff may in pre-trial discovery inquire into the thought processes and editorial decisions of a media defendant, for in order to prove *New York Times* malice such a plaintiff must be able to "focus on the conduct and state of mind of the defendant."¹⁰⁵ In 1971, Colonel Anthony Herbert charged his superior officers with covering up war crimes in South Vietnam and further maintained he had been relieved of his command because of those charges.¹⁰⁶ CBS "60 Minutes" producer Barry Lando interviewed Herbert and researched his story, and in a segment of the program, correspondent Mike Wallace narrated the results of the investigation. In the discovery process, pursuant to the Federal Rules of Civil Procedure¹⁰⁷ which allow discovery of any unprivileged information relevant to the subject matter of the action, Lando was deposed on twenty-six occasions for over a year,¹⁰⁸ but he balked at answering questions concerning his state of mind during the program's preparation.¹⁰⁹ The district court¹¹⁰ granted an order compelling Lando to reply to the interrogations; the Second Circuit reversed holding that the editorial process and a reporter's state of mind were protected by the first amendment. The Supreme Court reversed, refusing to recognize "a constitutional privilege foreclosing direct inquiry into the editorial process, [for o]nly complete immunity from liability for defamation would effect this result, and the Court has regularly found this to be an untenable construction of the first amendment."¹¹¹

The 1979 *Herbert* decision affected both plaintiff and media defendant, but did nothing to lessen the time consumed by the litigation process¹¹² and

103. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

104. 441 U.S. 153 (1979).

105. *Id.* at 160. Note that in *New York Times*, Justice Goldberg thought that the real issue was whether freedom of speech could be constitutionally protected by allowing a "jury's evaluation of the speaker's state of mind." *New York Times*, 376 U.S. at 300. In *St. Amant*, Justice White commented that by equating the defendant's truth with "reckless disregard," the issue might be determined "by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity." 390 U.S. at 731.

106. See *Herbert v. Lando*, 568 F.2d 974, 980 (2d Cir. 1977), *rev'd*, 441 U.S. 153 (1979).

107. FED. R. CIV. P. 26(b)(1).

108. *Herbert*, 568 F.2d at 981-82.

109. *Id.* at 982-83.

110. 73 F.R.D. 387 (S.D.N.Y. 1977).

111. *Herbert*, 441 U.S. at 176.

112. Justice Marshall noted his concern that the majority opinion would allow liberal discovery procedures to become tools for harassment and delay, presumably at

the financial burdens imposed by drawn out procedures.¹¹³ The decision's effect on state "shield laws" which statutorily protect the secrecy of a reporter's informants is also uncertain.¹¹⁴

In 1984 the United States Supreme Court added yet another obstacle in the path of a public figure plaintiff who has prevailed at trial level over a media defendant: the possibility that the judgment will be reversed at the appellate level following a "de novo" review of the evidence submitted. In *Bose Corp. v. Consumers Union of United States, Inc.*,¹¹⁵ *Consumer Reports* published in 1970 a seven-page article evaluating the performance of medium-priced loudspeakers, one of which was a Bose product. Bose objected to numerous statements in the report on its product, especially that "individual instruments . . . tended to wander about the room."¹¹⁶ Prior to a bench trial,

the hands of plaintiffs who would try to force a settlement. *Id.* at 204. This view does not take into account what the public figure plaintiff wants, *i.e.*, a restored reputation, not money damages.

A number of authors agree with the view of Justice Marshall that *Herbert v. Lando* may have a chilling effect on the media and weakens the *New York Times* protection. See Note, *Constitutional Law — Self-Censorship After Herbert v. Lando: The Need for Special Pre-Trial Procedure in Defamation Actions*, 58 N.C.L. REV. 1025 (1980); Note, *Constitutional Law — First Amendment — Freedom of the Press — Erosion of New York Times Co. v. Sullivan*, 13 AKRON L. REV. 373 (1979); Frakt, *Defamation Since Gertz v. Robert Welch, Inc.: The Emerging Common Law*, 10 RUTGERS L.J. 519 (1979); see also Franklin, *Reflections on Herbert v. Lando*, 31 STAN. L. REV. 1035 (1979).

113. The Court noted that pre-trial discovery procedures may produce "mushrooming litigation costs" but recognized that this phenomenon was not peculiar to defamation suits. See *Herbert*, 441 U.S. at 176.

114. Half of the states have enacted "shield laws," and in states without such statutes, reporters have unsuccessfully attempted to claim a common law privilege. See *Garland v. Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958) (reporter must testify as to identity of "source" when information sought goes to the "heart" of plaintiff's claim); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (reporter must reveal sources to a grand jury); *In re Farber*, 78 N.J. 259, 394 A.2d 330 (1978), *cert. denied sub nom. New York Times Co. v. New Jersey*, 439 U.S. 997 (1978) (reporter held in civil and criminal contempt for refusing to obey order to deliver certain documents to judge for inspection *in camera*).

In defamation actions against media defendants, *Herbert's* effect is unclear, for in *Herbert* the journalist's communications and thoughts were involved, not his sources of information. "It is highly unlikely that any court will allow a person to sue a newspaper for libel and then immediately learn all the confidential sources that were involved in the creation of the story." T. CARTER, M. FRANKLIN & J. WRIGHT, *THE FIRST AMENDMENT AND THE FOURTH ESTATE* 405 (3d ed. 1985); see also CARTER, FRANKLIN & WRIGHT, *supra* at 377-411; *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, *reh'g denied*, 628 F.2d 932 (5th Cir. 1980) (*New York Times*, *Branzburg* and *Herbert* viewed as creating a first amendment privilege, but when identity of informant is central to the plaintiff's case and when plaintiff has already presented substantial evidence that the publication complained of was factually untrue and defamatory, defendant must reveal source).

115. 466 U.S. 485 (1984).

116. *Id.* at 488.

the district court denied the defendant's motion for summary judgment¹¹⁷ and ruled that Bose was a public figure which had to prove *New York Times* malice in order to recover damages. After a 19-day trial, in the course of which the judge carefully considered the testimony and the demeanor at trial of the engineer who supervised the testing of the Bose sound system, the court held that the engineer knew that the words he used, "about the room," did not mean "along the wall" which would have accurately reflected the facts,¹¹⁸ and that the plaintiff had sustained its burden of proving *New York Times* malice on the part of the defendant.¹¹⁹

117. *Id.* at 489.

118. *Id.* at 490.

119. *Id.* at 491. The problem of differentiating fact from opinion will not be addressed. At common law, the "fair comment doctrine" gave a qualified privilege to those who published opinions about public interest subjects. The following elements had to be proved to raise it as a defense: (1) the criticism was of legitimate public interest, (2) it was based on facts that were stated or known to the reader, (3) the criticism was an actual opinion and (4) the criticism was not made solely to injure the subject criticized. See, e.g., Carman, *Hutchinson v. Proxmire and the Neglected Fair Comment Defense: An Alternative to "Actual Malice,"* 30 DE PAUL L. REV. 1, 13 (1980).

Gertz may have fundamentally changed the "fair comment doctrine" by conferring an absolute immunity from defamation actions for all opinions, for in dicta, the *Gertz* Court stated:

Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in uninhibited, robust, and wide-open debate on the public issues.

Gertz, 418 U.S. at 339-40 (quoting *New York Times*, 376 U.S. at 270).

The RESTATEMENT (SECOND) OF TORTS § 566 (1977), sought to clarify *Gertz*: "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." Thus, if undisclosed facts are known by publisher and recipient, no action will lie. If the publisher disclosed underlying facts and those facts are defamatory, an action will lie for the defamatory facts but not for the opinion based on those facts.

Most of the federal circuits have adopted the *Gertz* dicta. See *McBride v. Merrell Dow & Pharmaceuticals, Inc.*, 717 F.2d 1460, 1464 & n.7 (D.C. Cir. 1983); *Bose Corp. v. Consumers Union, Inc.*, 692 F.2d 189, 192-94 (1st Cir. 1982), *aff'd on other grounds*, 466 U.S. 495 (1984); *Hammerhead Enters., Inc. v. Brezenoff*, 707 F.2d 33, 40 (2d Cir. 1983), *cert. denied*, 464 U.S. 892 (1983); *Avin v. White*, 627 F.2d 637, 642 (3d Cir. 1980), *cert. denied*, 449 U.S. 982 (1980); *Church of Scientology v. Cazares*, 638 F.2d 1272, 1286 (5th Cir. 1981); *Orr v. Argus-Press Co.*, 586 F.2d 1108, 1114 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979); *Lewis v. Time, Inc.*, 710 F.2d 549, 552-53 (9th Cir. 1983); *Rinsley v. Brandt*, 700 F.2d 1304, 1307 (10th Cir. 1983).

The differentiation between opinion and fact remains a difficult one in many circumstances. See, e.g., *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985); *Hotchner v. Castillo-Puche*, 551 F.2d 910 (2d Cir. 1977), *cert. denied sub nom.* *Hotchner v. Doubleday & Co.*, 434 U.S. 834 (1977); *Information*

The First Circuit reversed,¹²⁰ after conducting a totally independent review of the evidence submitted at the trial, and determined that *New York Times* malice had not been proved as a matter of law. Rule 52(A) of the Federal Rules of Civil Procedure provides:

Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

The 6 to 3 majority of the United States Supreme Court held that when reviewing a determination of a case governed by the *New York Times* standard of actual malice, the "clearly erroneous" standard of Rule 52(A) does not prescribe the proper standard to be applied and that appellate courts must exercise their independent judgment to determine whether *New York Times* malice was proved with convincing clarity.¹²¹ The appellate judges may make a *de novo* determination about the media defendant's state of mind at the time of the alleged defamation from the record alone, without the benefit of observing the actual testimony of the defendant.¹²² The *Bose* decision contributed nothing to resolving the tension between the rights of a free press and a public figure's right to his reputation. By concentrating on the malice standard and the plaintiff's burden of proof at the appellate level, *Bose* only added to the confused state of post-*Gertz* defamation law.¹²³

Control Corp. v. Genesis One Computer Corp., 611 F.2d 781 (9th Cir. 1980).

Likewise, most circuits view the distinction as a matter of law. *See, e.g.*, Lewis v. Time, Inc., 710 F.2d 549 (9th Cir. 1983); Rinsley v. Brandt, 700 F.2d 1304 (10th Cir. 1983); Orr v. Argus-Press Co., 586 F.2d 1108 (5th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979).

120. *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 491-92 (1984).

121. *Id.* at 514.

122. *Id.* at 518-19 (Rehnquist, J., dissenting); *see also* Note, *The Future of Libel Law and Independent Appellate Review: Making Sense of Bose Corp. v. Consumers Union of United States, Inc.*, 71 CORNELL L. REV. 477 (1986); Note, *The Expanding Scope of Appellate Review in Libel Cases — The Supreme Court Abandons the Clearly Erroneous Standard of Review for Findings of Actual Malice*, 36 MERCER L. REV. 711 (1985); Note, *Constitutional Law — Independent Appellate Review Reaffirmed as Standard in Cases Requiring Determination of "Actual Malice,"* 19 SUFFOLK U. L. REV. 94 (1985); Note, *Can Civil Rule 52(a) Peacefully Co-Exist With Independent Review In Actual Malice Cases?*, 60 WASH. L. REV. 503 (1985).

123. The ramifications of the *Bose* holding undoubtedly affected the outcome of *Tavoulaareas v. Washington Post Co.*, 567 F. Supp. 651 (D.D.C. 1983). *See infra* notes 233, 238. After a jury verdict for the plaintiffs, the trial judge granted the defendants' motion for a judgment notwithstanding the verdict. A three-judge panel of the District of Columbia Circuit reversed the *j.n.o.v.* and reinstated the verdict against the *Post* defendants and one of the two private defendants, *Tavoulaareas v. Piro*, 759 F.2d 90 (D.C. Cir. 1985), and denied a motion for rehearing, 763 F.2d 1472 (D.C. Cir. 1985), but the District of Columbia Circuit, *en banc*, vacated the decision of the panel and agreed to rehear the case *en banc*. 763 F.2d at 1481. On rehearing, the court found the

The Supreme Court again concentrated on the "convincing clarity" standard in its 1986 decision in *Liberty Lobby, Inc. v. Anderson*,¹²⁴ in which the Court held that at the summary judgment stage the "convincing clarity" standard should be applied. The trial judge granted summary judgment for the media defendants because the plaintiffs could not prove *New York Times* malice as a matter of law.¹²⁵ The District of Columbia Circuit reversed,¹²⁶ preferring to follow a prior case¹²⁷ which set forth a two-step approach: on the summary judgment motion, the judge should determine if "the plaintiff can prove actual malice in the *Times* sense";¹²⁸ if the court determines in the affirmative, the judge at the end of the plaintiff's case at trial should determine as a matter of law whether the actual malice has been proven with "convincing clarity."¹²⁹ The District of Columbia Circuit reasoned that to impose this increased proof requirement at the summary judgment stage would in effect force the plaintiff "to try his entire case in pretrial affidavits and depositions,"¹³⁰ and found such an extension "simply incompatible with the preliminary nature of the summary judgment inquiry."¹³¹ The United States Supreme Court reversed, in a 6 to 3 decision, because the circuit court

evidence did not support a finding of constitutional malice with respect to any of the defendants, and affirmed entirely the opinion of the district court. *Tavoulaareas v. Piro*, Nos. 83-1604, 83-1605 (D.C. Cir. March 13, 1987) (en banc).

124. 106 S. Ct. 2505 (1986).

125. See *Liberty Lobby, Inc. v. Anderson*, 562 F. Supp. 201, 210 (D.D.C. 1983).

126. *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563 (D.C. Cir. 1984), *vacated and remanded*, 106 S. Ct. 2505 (1986).

127. See *Wasserman v. Time, Inc.*, 424 F.2d 920 (D.C. Cir.), *cert. denied*, 398 U.S. 940 (1970).

128. *Id.* at 922 (Wright, J., concurring).

129. *Id.* (Wright, J., concurring).

130. *Liberty Lobby*, 746 F.2d at 1570. This is decidedly against principles of procedure. See *Madison v. Deseret Livestock Co.*, 574 F.2d 1027, 1036 (10th Cir. 1978); *Jones v. Nelson*, 484 F.2d 1165, 1168 (10th Cir. 1973); *Walgren v. Howes*, 482 F.2d 95, 98 (1st Cir. 1973); *Perma Research and Dev. Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969).

131. *Liberty Lobby*, 746 F.2d at 1571. The court stated:

If it were to be applied at that early stage, summary judgment would be converted from a search for the minimum amount of evidence that could persuade a reasonable person into the final assessment of "actual malice" by the court itself — final, at least, if the court concludes actual malice has not been established. That would compel the plaintiff to present his full case prematurely, with the undesirable consequences described above. In addition, courts of appeal would be burdened with the unusual task of making the largely factual determination of actual malice in many cases where a judge or jury verdict against the plaintiff would render that unnecessary. . . . [W]e believe that the constitutional requirements of clear and convincing proof and independent judicial determination of the ultimate issue of actual malice are to be applied only after the plaintiff has had an opportunity to present his evidence.

Id.

had not applied the *New York Times* "clear and convincing" evidentiary standard to the lower court's grant of summary judgment:

[W]e conclude that the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. This is true at both the directed verdict and summary judgment stages. Consequently, where the *New York Times* clear and convincing evidence requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant. Thus, where the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.¹³²

Thus, the *Liberty Lobby* Court followed its prior decisions, concentrating solely on the procedural tasks that confront the defamed plaintiff and avoiding consideration of the basis of the defamation action: the falsity of the publication.

C. *The Dun & Bradstreet Decision*—A "Side Step"

Gertz did not address the question of whether the qualified protections afforded media defendants in defamation actions brought by private persons should be extended to actions against non-media defendants. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,¹³³ the plaintiff, a private construction company,¹³⁴ brought a defamation action against the defendant credit reporting agency, which had sent to five subscribers a false report, submitted by a high school student employed part time, that the business was bankrupt.¹³⁵ After a jury trial, *Greenmoss* was awarded both actual and punitive damages, but the trial court on reviewing its jury instructions concluded that they indicated an incorrect application of the *Gertz* standard¹³⁶ and granted the defendant's motion for a new trial. The Supreme Court of Vermont reversed, holding that the defendant, a non-media figure, was not entitled

132. 106 S. Ct. at 2514.

133. 105 S. Ct. 2939 (1985).

134. See *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 143 Vt. 66, 461 A.2d 414 (1983). The private figure status of *Greenmoss Builders, Inc.*, was not contested. "Neither the parties nor the courts below have suggested that . . . *Greenmoss Builders* should be required to show actual malice to obtain a judgment and actual compensatory damages." 105 S. Ct. at 2957 (Powell, J., dissenting).

135. 143 Vt. at 66, 461 A.2d at 415.

136. *Id.* at 69, 461 A.2d at 415.

to *Gertz* protection¹³⁷ and declined to adopt the *Gertz* rules as part of the common law of Vermont.

The *Dun & Bradstreet* Court did not consider whether *Dun & Bradstreet* was a media or non-media defendant and thus whether or not to apply the *Gertz* rule on that basis. It recognized the fact that there was disagreement among the lower courts as to when *Gertz* applied,¹³⁸ yet declined to extend application of *Gertz* as a matter of federal constitutional law. However, the Vermont Supreme Court's refusal to apply *Gertz* had rested on the very fact that the defendant was adjudged a non-media defendant.

The United States Supreme Court side-stepped the issue and affirmed on decidedly different grounds. Justice Powell, writing for a plurality of three, did not address the media/non-media distinction,¹³⁹ but rather relied on a rationale different from that of the Vermont Supreme Court. A determination of whether the *Gertz* rule applied was made on an examination of the type of speech involved. Thus, the original questions asked by both sides and by the amici curiae went unanswered. Do *Gertz* first amendment protections apply to the non-media defendant? Must the private figure plaintiff, like Greenmoss Builders, prove *New York Times* malice in order to obtain punitive damages? Justice Powell's thirteen page plurality opinion never discussed the non-media question, whereas his opinion in *Gertz* referred over twenty times to the media status of the defendant in the case.¹⁴⁰

The *Dun & Bradstreet* Court held that the *Gertz* rule as to presumed and punitive damages applies only to defamatory speech of public concern¹⁴¹ and determined that the credit report served only the interests of *Dun and Bradstreet* and the specific subscribers to whom the report had been sent.¹⁴²

137. *Id.* at 75, 461 A.2d at 418.

138. See 105 S. Ct. at 2942. See, e.g., *Denny v. Mertz*, 106 Wis. 2d 636, 318 N.W.2d 141, cert. denied, 459 U.S. 883 (1982) (*Gertz* inapplicable to chairman of the board of *Business Week* personally as he is a non-media defendant, but applicable to *Business Week* magazine); *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976) (*Gertz* applicable to all cases of libel and slander brought against non-media defendants).

139. The Court initially heard only arguments concerning the media/non-media distinction, but on reargument both plaintiff's and defendant's attorneys questioned whether the *Gertz* rule "should apply where the speech is of a commercial or economic nature." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 468 U.S. 1214 (1984) (ordering reargument). Nine months later when the case was decided, neither the media/non-media distinction nor the commercial speech distinction were discussed.

140. In fact, five of the Justices expressly rejected the media/non-media distinction, viz. Justice White, concurring, and Justice Brennan and three fellow Justices, dissenting. *Dun & Bradstreet*, 105 S. Ct. at 2944-46; see also Note, *Libel Law—Matters of Non-Public Concern*, 99 HARV. L. REV. 212 (1985); Note, *The Supreme Court Creates New Hurdle For Libel Defendants: Dun & Bradstreet, Inc. v. Greenmoss Builders*, 60 ST. JOHN'S L. REV. 144 (1985).

141. *Dun & Bradstreet*, 105 S. Ct. at 2944-46.

142. *Id.* at 2947.

The Court reasoned that the report did not serve any "strong interest in the free flow of commercial information,"¹⁴³ and that the type of credit reporting did not require special protection so that "debate on public issues [will] be uninhibited, robust, and wide-open."¹⁴⁴ Justice Powell, who in *Gertz* had balanced the individual states' interest in protecting private figures from defamation¹⁴⁵ against first amendment freedoms, applied the same balancing test. He reasoned that the same state interest was at stake¹⁴⁶ in so far that in both *Gertz* and *Dun & Bradstreet* the plaintiffs were private figures, but the first amendment interest at stake was even less, since *Dun & Bradstreet* did not involve a matter of public concern.¹⁴⁷ Is it to be inferred from such reasoning that the *Dun & Bradstreet* defendant is not a media defendant, for the media only publishes matters of public concern? If so, Justice Powell used a tautological way of answering the question raised by the Supreme Court of Vermont.

The *Dun & Bradstreet* Court in effect reinterpreted the *Gertz* holding. Despite the fact that Justice Powell asserted that "[i]n *Gertz* . . . we held that the First Amendment restricted the damages that a private individual could obtain from a publisher for a libel that involved a matter of public concern,"¹⁴⁸ the *Gertz* holding applied to all defamatory statements — not only those which involved a matter of public interest.¹⁴⁹ In fact, the *Gertz* Court specifically rejected the *Rosenbloom* distinction between public and private issues.¹⁵⁰ At first blush, the *Dun & Bradstreet* decision appears to make the private figure plaintiff's position less burdensome in defamation suits against both media and non-media defendants, but it actually has further complicated our libel law. The *Gertz* public/private figure distinction has been retained, but the *Rosenbloom* subject matter distinction has been resurrected.

Does the *Dun & Bradstreet* decision mean that to the already complicated categories of public official/public figure/private person plaintiffs and media/non-media defendants we now must add the *Rosenbloom* element of public concern/private matter? Do we now have twelve categories of defamation law?¹⁵¹

143. *Id.* (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumers Council*, 425 U.S. 748, 764 (1976)).

144. *Id.* (quoting *New York Times*, 376 U.S. at 270).

145. *Gertz*, 418 U.S. at 344-45, 352.

146. *Dun & Bradstreet*, 105 S. Ct. at 2944-45.

147. *Id.* at 2947.

148. *Id.* at 2941.

149. The *Gertz* holding read: "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Gertz*, 418 U.S. at 347.

150. See *supra* notes 73-80 and accompanying text.

151. For a tabular analysis, see Note, *The Supreme Court — Leading Cases*, 99 HARV. L. REV. 120, 219 (1985).

How does one define "speech of public concern?" As Justice Brennan observed in his dissent, the credit report could not be considered "as purely a matter of private discourse."¹⁵² *Dun & Bradstreet* has created a great gray area between what is clearly a matter of public concern and what is clearly private and has not made the private figure plaintiff's burden less onerous. And, it has added to, not dispersed, the "chilling effect" upon the media defendant who may now be required to analyze before every publication the public concern/private matter distinction which at a later date may be decided by a judge or jury.

D. Falsity — The Essence of a Defamation Action

The post-*New York Times* and post-*Gertz* cases have generally emphasized status or malice when on a case by case basis the plaintiff's real interest has invariably been publicizing the falsity of the alleged defamatory publication, resulting in suppression of the truth and denying the plaintiff a restored reputation. Even when addressing situations where attention to the matter of the truth or falsity of a publication could not be avoided, courts continue to restrict the plaintiff to the sole remedy of money damages and have allowed the introduction into defamation law of new doctrines which add to the already heavy burden imposed on the plaintiff.

The Neutral Reportage Privilege

In 1977, the United States Supreme Court, in denying *certiorari*, let stand a Second Circuit decision, *Edwards v. National Audubon Society, Inc.*¹⁵³ which set forth for the first time a new first amendment privilege, that of "neutral reportage," where a republisher who accurately and disinterestedly reports defamatory statements made against public officials or public figures is protected from liability, even though the reporter may be aware of the falsity of the allegedly defamatory statement.¹⁵⁴ Application of

152. *Dun & Bradstreet*, 105 S. Ct. at 2962 (Brennan, J., dissenting).

153. 556 F.2d 113 (2d Cir. 1977), *cert. denied sub nom.* *Edwards v. New York Times Co.*, 434 U.S. 1002 (1977).

154. The circuit court developed its theory on the basis of *Time, Inc. v. Pape*, 401 U.S. 279 (1971), and *Medina v. Time, Inc.*, 439 F.2d 1129 (1st Cir. 1971), but those cases must be distinguished and are not deemed to have given rise to a constitutional privilege of neutral reporting. See, e.g., Note, *The Developing Privilege of Neutral Reportage*, 69 VA. L. REV. 853, 862-63 & n.51 (1983); Sowle, *Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report*, 54 N.Y.U. L. REV. 469, 501-08 (1979). It should be noted that the Second Circuit held alternatively that the plaintiff, as a matter of law, could not prove that the media defendant had published the report with reckless disregard of the truth, so that in effect the "neutral reportage" privilege was unnecessary in reaching its conclusion. *Edwards*, 556 F.2d at 120-21.

The "neutral reportage" privilege as developed in *Edwards* must be distinguished from the common law reporter's privilege or "record libel," which protects republication of defamatory publications made in the course of official public proceedings. See, e.g., RESTATEMENT (SECOND) OF TORTS § 611 comment i (1971), and from privileges conveyed by state statutes.

this doctrine in effect protects the media republishers of defamatory statements and contradicts the common law refusal to distinguish between the liability of original publishers and republishers of defamatory matter.¹⁵⁵ In *Edwards*, a nature reporter for the *New York Times*, in an article concerning the crisis surrounding the use of the insecticide DDT, accurately reported an accusation by an official of the National Audubon Society that some scientists were "being paid to lie or [were] parroting something [they knew] little about."¹⁵⁶ The *New York Times* story quoted the Audubon official who mentioned the names of five prominent scientists and quoted the denials of three of the five scholars whom the reporter had reached. Both plaintiff and defendants admitted that the *New York Times* article accurately reported the substance of the Audubon official's accusation. The Second Circuit held that it was constitutionally impermissible to find the *New York Times* liable for defamation in this situation, for the totally neutral reportage of the newsworthy accusation was privileged, and said "if we are to enjoy the blessings of a robust and un intimidated press, we must provide immunity from defamation suits where the journalist believes, reasonably and in good faith, that his report accurately conveys the charges made."¹⁵⁷

Many courts have refused to adopt the Second Circuit's "constitutional privilege" of neutral reportage on the grounds that the "newsworthiness" element of the *Edwards* decision was in conflict with the *Gertz* Court's rejection of the "newsworthiness" test of *Rosenbloom*.¹⁵⁸ Other courts have adopted the privilege and have determined that the privilege does not chiefly

155. See PROSSER AND KEETON, *supra* note 8, § 113, at 810-11.

156. *Edwards v. National Audubon Soc'y, Inc.*, 556 F.2d 113, 118 (2d Cir 1977).

157. *Id.* at 120.

At stake in this case is a fundamental principle. Succinctly stated, when a responsible, prominent organization like the National Audubon Society makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity. What is newsworthy about such accusations is that they were made. We do not believe that the press may be required under the First Amendment to suppress newsworthy statements merely because it has serious doubts regarding their truth. Nor must the press take up cudgels against dubious charges in order to publish them without fear of liability for defamation. The public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them.

Id. (citations omitted).

158. Note, *The Developing Privilege of Neutral Reportage*, 69 VA. L. REV. 853, 863-65 (1983); see also *Dickey v. CBS, Inc.*, 583 F.2d 1221, 1226 n.5 (3d Cir. 1978) (*Edwards* also considered in conflict with *St. Amant*, since the reporter in *Edwards* may entertain serious doubts, 583 F.2d at 1225); *Postill v. Booth Newspapers, Inc.*, 118 Mich. App. 608, 325 N.W.2d 511 (1982) (press is already adequately protected by the *New York Times* malice standard; additional protection is unneeded).

depend on "newsworthiness."¹⁵⁹ The mere "neutrality" required by the doctrine when reporting serious charges against public officials or public figures clearly puts the plaintiff at a severe disadvantage. While accurate and neutral reporting is to be expected from a responsible press, republishing a statement known to be or believed to be false without indication of that fact should not be protected.¹⁶⁰

Prior Restraint Cases

In 1931 the United States Supreme Court curtailed the use of injunctions as a remedy in defamation actions in *Near v. Minnesota*,¹⁶¹ in which it struck down as unconstitutional a Minnesota public nuisance statute¹⁶² which permitted injunctions to be issued against newspapers which regularly published "malicious, scandalous and defamatory"¹⁶³ material. The denial of injunctions is firmly rooted in two traditional common law concepts: 1) if there is an available remedy at law, an equitable remedy will not be available,¹⁶⁴ and 2) the first amendment guarantee of freedom of speech — the prohibition of the prior restraint doctrine.¹⁶⁵ While prior restraint has been allowed in certain privacy cases,¹⁶⁶ "any system of prior restraints of expression comes to . . . [the United States Supreme] Court bearing a heavy presumption against its constitutional validity."¹⁶⁷

Strict adherence to this practice in all defamation actions leads to the suppression of truth and to the imposition of acute injustice on certain

159. See, e.g., *Barry v. Time, Inc.*, 584 F. Supp. 1110 (N.D. Cal. 1984) (*Sports Illustrated* published articles reporting accusations by a University of San Francisco basketball player that the team coach had been involved in illegal recruitment methods and illicit payments).

160. See generally Comment, *Edwards v. National Audubon Society, Inc.: A Constitutional Privilege to Republish Defamation Should be Rejected*, 33 HASTINGS L.J. 1203 (1982); Comment, "The Privilege of Neutral Reportage" — *Edwards v. National Audubon Society, Inc.*, 1978 UTAH L. REV. 347.

161. 283 U.S. 697 (1931).

162. 1925 Session Laws of Minnesota, ch. 285, §§ 10123(1)-(3) (Mason 1927).

163. *Id.* at § 10123(1).

164. See, e.g., *Alberti v. Cruise*, 383 F.2d 268 (4th Cir. 1967); *Greenberg v. DeSalvo*, 254 La. 1019, 229 So. 2d 83 (1969), *cert. denied sub nom.* *Greenberg v. Dunker*, 397 U.S. 1075 (1970); *Prucha v. Weiss*, 233 Md. 479, 197 A.2d 253 (1964), *cert. denied*, 377 U.S. 992 (1964).

165. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Carroll v. Princess Anne*, 393 U.S. 175 (1968); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Crosby v. Bradstreet*, 312 F.2d 483 (2d Cir.), *cert. denied*, 373 U.S. 911 (1963).

166. See, e.g., *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (privacy of an eleven-year-old boy arrested for a juvenile offense protected); *Capitol Cities Media, Inc. v. Toole*, 463 U.S. 1303 (1983) (names and addresses of jurors following a criminal conviction could not be printed).

167. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

plaintiffs. In *Mazzacone v. Willing*,¹⁶⁸ an insolvent woman, with the unreasonable belief that she had been defrauded of \$25 by a law firm, picketed the law firm's offices several hours daily with a large sign accusing the attorneys of theft and, to attract attention, rang bells and blew whistles. The Pennsylvania equity court enjoined the defendant from such activity, and on appeal the Superior Court modified the order to the extent that she was enjoined from "uttering or publishing statements to the effect that [the law firm] stole money from her."¹⁶⁹ The Pennsylvania Supreme Court reversed, holding that the equity court violated the woman's constitutional "right to freely speak her opinion — regardless of whether that opinion is based on fact or fantasy — regarding [the plaintiffs'] professional integrity,"¹⁷⁰ and that "[i]n deciding whether a remedy is adequate, it is the remedy itself, and not its possible lack of success that is the determining factor."¹⁷¹ The injustice worked on the plaintiffs in this case is most obvious. Precluded from all remedies but continued suits for money damages against a judgment-proof defendant, they must endure continuous defamatory publications which may have a severe effect on prospective clients.

The inequity of denying injunctions in all defamation actions has been severely criticized,¹⁷² but given the United States Supreme Court's consistent zealous protection of first amendment rights in recent decisions, it is difficult to imagine that the prior restraint doctrine will give way to the availability of injunctive relief as a feasible remedy to a plaintiff harmed by a continuous calculated campaign to destroy his reputation.

The "False Light" Cases

The right to protection against unreasonable interferences with an individual's right to privacy is generally recognized.¹⁷³ When false statements are made about an individual and a false impression is thereby created in the public eye, a plaintiff should be able to recover for the reputational harm suffered and have the opportunity to rectify the falsities ascribed to him.

168. 246 Pa. Super. 98, 369 A.2d 829 (1976), *rev'd*, 482 Pa. 377, 393 A.2d 1155 (1978).

169. 482 Pa. at 380, 393 A.2d at 1157.

170. 482 Pa. at 382, 393 A.2d at 1158.

171. 482 Pa. at 383, 393 A.2d at 1158.

172. See, e.g., Gold, *Does Equity Still Lack Jurisdiction to Enjoin a Libel or Slander?*, 48 BROOKLYN L. REV. 231 (1982); Note, *Corporate Defamation and Product Disparagement: Narrowing the Analogy to Personal Defamation*, 75 COLUM. L. REV. 963 (1975); Note, *Temporary Injunctions in Libel Cases*, 25 BAYLOR L. REV. 527 (1973).

173. The tort comprises the following four kinds of wrongs: 1.) appropriation of a person's name or picture for commercial advantage; 2.) public disclosure of private facts; 3.) intrusion upon a person's private affairs or seclusion; 4.) publication of facts which place a person in a false light. PROSSER AND KEETON, *supra* note 8, §§ 117-118, at 851.

Such inaccurate publications may not necessarily be defamatory, but as in a defamation action, the issue of the truth or falsity of the matter is the essence of any action for damages. In 1952, the Hill family was held hostage in their Pennsylvania house for nineteen hours by three escaped convicts but were treated courteously and were released unharmed. Involuntarily involved in a newsworthy event, the family sought to avoid publicity and moved to Connecticut. Six months later a novel was written about a family held captive in a suburban home by three fugitive prisoners who assaulted and tormented them, a story different from the account given by the Hills of what had transpired during their own detention. In 1954, a play based on the novel opened and *Life* magazine published an article about the play to the effect that the Hill family of Connecticut was in fact the family fictionally depicted in the theatrical production. After judgment for the Hills was affirmed in their invasion of privacy action against *Life* by the New York Court of Appeals,¹⁷⁴ the United States Supreme Court reversed and remanded, holding that first amendment protections for free expression precluded applying New York's pertinent privacy statute¹⁷⁵ to redress false reports of a newsworthy matter, in this instance the opening of a play, unless the publisher knew of the falsity of the report or had acted in reckless disregard of the truth and the jury was instructed accordingly.¹⁷⁶ In extending the *New York Times*

174. See *Hill v. Hayes*, 18 A.D.2d 485, 240 N.Y.S.2d 286 (1963), *aff'd*, 15 N.Y.2d 986, 260 N.Y.S.2d 7 (1965), *rev'd sub. nom. Time, Inc. v. Hill*, 385 U.S. 374 (1967).

175. In New York, the right of privacy is solely statutory, Civil Rights Law section 51 providing in part: "Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained . . . may maintain an equitable action . . . and may also sue and recover damages for any injuries sustained. . . ." N.Y. CIV. RIGHTS LAW 51 (McKinney 1976).

176. *Hill*, 385 U.S. at 394. It should be noted that in an opinion concurring in part and dissenting in part, Justice Harlan stated:

I must part company with [the Court's] sweeping extension of the principles of *New York Times Co. v. Sullivan*. It was established in *New York Times* that mere falsity will not suffice to remove constitutional protection from published matter relating to the conduct of a public official that is of public concern. But that decision and those in which the Court has developed its doctrine . . . have never found independent value in false publications nor any reason for their protection except to add to the protection of truthful communication. And the Court has been quick to note that where private actions are involved the social interest in individual protection from falsity may be substantial. Thus I believe that rigorous scrutiny of the principles underlying the rejection of the mere falsity criterion and the imposition of ancillary safeguards, as well as the interest which the State seeks to protect, is necessary to reach a proper resolution of this case.

Id. at 405-06 (Harlan, J., concurring in part & dissenting in part) (citations and footnotes omitted).

In a dissenting opinion, in which Chief Justice Warren and Justice Clarke joined, Justice Fortas opposed the extension of the *New York Times* standard, stating:

For this Court totally to immunize the press — whether forthrightly or by

malice standard to the "false light" cases, the Court was forced to address the issue of the falsity of the publication but did not focus on it, concentrating instead on the malice standard to be imposed on the private person plaintiff in his suit against a media defendant.¹⁷⁷ Whether or not a lesser standard of proof may be applicable in invasion of privacy actions following *Gertz's* defamation standards is uncertain.¹⁷⁸ In post-*Gertz* privacy decisions, the Supreme Court declined to take the opportunity to consider the question,¹⁷⁹ although in *Cox Broadcasting Corp. v. Cohn*,¹⁸⁰ a privacy case but not a "false light" case, Justice Powell in a concurring opinion noted that the *Gertz* decision's abandonment of the public interest *Rosenbloom* standard "calls into question the conceptual basis of *Time, Inc. v. Hill*."¹⁸¹

The "Fictionalization" Cases

A court's immediate concentration on the issue of the falsity of the publication and subsequent determination of the publisher's *New York Times*

subtle indirection — in areas far beyond the needs of news, comment on public persons and events, discussion of public issues and the like would be no service to freedom of the press, but an invitation to public hostility to that freedom. This Court cannot and should not refuse to permit under state law the private citizen who is aggrieved by the type of assault which we have here and which is not within the specially protected core of the First Amendment to recover compensatory damages for recklessly inflicted invasion of his rights.

Id. at 420 (Fortas, J., dissenting).

177. The Court stated:

Although the First Amendment principles pronounced in *New York Times* guide our conclusion, we reach that conclusion only by applying these principles in this discrete context. It therefore serves no purpose to distinguish the facts here from those in *New York Times*. Were this a libel action, the distinction which has been suggested between the relative opportunities of the public official and the private opportunities of the public official and the private individual to rebut defamatory charges might be germane. And the additional state interest in the protection of the individual against damage to his reputation would be involved.

Id. at 390-91.

178. For a continued application of the *New York Times* standard, see *Dodrell v. Arkansas Democrat Co.*, 265 Ark. 628, 590 S.W.2d 840 (1979), cert. denied, 444 U.S. 1076 (1980); see also Phillips, *Defamation, Invasion of Privacy and the Constitutional Standard of Care*, 16 SANTA CLARA L. REV. 77, 99 (1975). Some authors believe that the *Gertz* standard is now applicable. See, e.g., Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1274 (1976); Lehmann, *Triangulating the Limits on the Tort of Invasion of Privacy: The Development of the Remedy in Light of the Expansion of Constitutional Privilege*, 3 HASTINGS CONST. L.Q. 543, 593 (1976).

179. See *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974) (*New York Times* malice proved by knowingly false statements made in feature story about the widow and children of a man killed in a bridge collapse).

180. 420 U.S. 469 (1975).

181. *Id.* at 498 n.2.

malice has characterized what may be termed the "fictionalization cases," where if the plaintiff is able to identify himself and prove that others also identify him as the underlying real person portrayed in the supposedly fictional work, the plaintiff may use the very statements by which he has been identified and which ascribe to him words that were not his and actions he did not take as proof that the publisher lied about him.¹⁸² In 1969, author Gwen Davis Mitchell published a novel, *Touching*, based on "nude marathon" group therapy sessions in Southern California led by a fictitious physician, "Simon Herford, M.D.," who was portrayed as vulgar, sexually promiscuous and unprofessional. Prior to signing her book contract with Doubleday, Mitchell had attended a nude therapy session directed by Paul Bindrim, Ph.D., after having signed a consent form whereby she agreed not to write about the sessions or disclose the identify of any participant. Dr. Bindrim¹⁸³ specifically objected to several passages in which the fictitious Dr. Herford tried vulgarly and callously to persuade a minister to bring his wife to the next nude encounter and was depicted as having been responsible for the death in an automobile accident of a patient who drove away from a session in an emotionally charged state of mind. Tape recordings of the session attended by author Mitchell revealed the gentle manner in which Dr. Bindrim counselled the minister and the advice he gave to the participants about the necessity to avoid driving for some time after sessions. In focussing on the identification of the fictitious Dr. Herford with the real Dr. Bindrim, the jury had little difficulty in deciding the statements ascribed to the fictional Dr. Herford were defamatory of Dr. Bindrim.¹⁸⁴ In the "fictionalization"

182. In addition to identifying himself as the underlying person depicted in the fiction, some courts hold that the plaintiff must prove that the defamatory publication is not so bizarre that no one would believe it. *See, e.g., Falwell v. Flynt*, 797 F.2d 1270 (4th Cir. 1986), in which Reverend Jerry Falwell sued the publishers of *Hustler* magazine over his portrayal in an "ad parody" as having committed incest. The jury returned a verdict for the defendants "finding that no reasonable man would believe that the parody was describing actual facts about Falwell." *Id.* at 1273. The Fourth Circuit affirmed, however, a jury award to Falwell for intentional infliction of emotional distress.

183. *See Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29 (1979), *cert. denied*, 444 U.S. 984, *reh'g denied*, 444 U.S. 1040 (1980); *see also Silver, Libel, The "Higher Truths" of Art, and the First Amendment*, 126 U. PA. L. REV. 1065 (1978); Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1 (1983).

184. *Bindrim*, 92 Cal. App. 3d at 78, 155 Cal. Rptr. at 39 ("The test is whether a reasonable person, reading the book, would understand that the fictional character therein pictured was, in actual fact, the plaintiff acting as described."); *see also Pring v. Penthouse Int'l Ltd.*, 695 F.2d 438 (10th Cir. 1982), in which the plaintiff, a Miss Wyoming, sought to identify herself as a "Miss Wyoming" portrayed in a salacious parody.

The basic question which had to be resolved at the trial was in two parts — whether the publication was about the plaintiff, that is whether it was of and concerning her as a matter of identity; and secondly, whether the story must

cases *New York Times* malice seems to be proved or naturally flows from the fictionalization itself. Ironically, if the underlying fiction is not false enough, i.e., the actual person is identifiable, the fictitious statements attributable to the fictional character are viewed as knowingly false, i.e., malicious publications about the real person. Preoccupation with the plaintiff's legal status and proof of *New York Times* malice are sidestepped by avoiding them altogether.

The "Libel-Proof Plaintiff" and "Subsidiary Libel" Doctrines

In the post-*New York Times* and post-*Gertz* years, two new doctrines have been applied in defamation actions by some courts and, if they gain more widespread acceptance and are allowed to develop, many media-defamed plaintiffs will have less chance of prevailing in their efforts to vindicate reputations.

The libel-proof plaintiff doctrine was first proposed in *Cardillo v. Doubleday & Co., Inc.*¹⁸⁵ The plaintiff, an incarcerated organized crime figure, sued the publisher of *My Life in the Mafia* for allegedly libellous statements. The Second Circuit held "as a matter of law . . . [the plaintiff] is for purposes of this case, libel-proof, i.e., so unlikely by virtue of his life as a habitual criminal to be able to recover anything other than nominal damages as to warrant dismissal of the case, involving as it does First Amendment considerations."¹⁸⁶ A second libel-proof plaintiff theory, referred to as "the incremental harm branch of the libel-proof doctrine,"¹⁸⁷ was introduced in

reasonably be understood as describing actual facts or events about plaintiff or actual conduct of the plaintiff.

Id. at 439. For a case in which the plaintiff was unsuccessful in identifying herself as the real person portrayed as a fictional character, see *Springer v. Viking Press*, 90 A.D.2d 315, 457 N.Y.S.2d 246 (1982), *aff'd*, 60 N.Y.2d 916, 470 N.Y.S.2d 579 (1983).

185. 518 F.2d 638 (2d Cir. 1975). See generally Note, *The Libel-Proof Plaintiff Doctrine*, 98 HARV. L. REV. 1909 (1985).

186. *Cardillo*, 518 F.2d at 639. In a Second Circuit decision the following year, *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977), the court refused to apply the libel-proof plaintiff doctrine in a defamation action by William F. Buckley, Jr., who had been denominated a "fellow-traveller of fascists." *Id.* at 884. The court preferred to confine the theory to the facts of *Cardillo*. See also *Logan v. District of Columbia*, 447 F. Supp. 1328 (D.D.C. 1978) (previously convicted drug user); *Wynberg v. National Enquirer*, 564 F. Supp. 924, 928 (C.D. Cal. 1982) (several previous convictions of criminal offenses involving women had given plaintiff a "reputation for taking advantage of women generally.>").

187. See *Herbert v. Lando*, 781 F.2d 298, 310 (2d Cir. 1986), *cert. denied*, 106 S. Ct. 2916 (1986).

Simmons Ford, Inc. v. Consumers Union.¹⁸⁸ According to this theory, if the "incremental harm" arising from challenged statements adds very little to the harm inflicted by unchallenged statements in the same article or broadcast, that harm is so minimal that it is practically non-existent, and accordingly the challenged statements are determined to be non-actionable.

Second Circuit district courts have nevertheless been cautious before invoking the doctrine. In *Sharon v. Time, Inc.*,¹⁸⁹ Ariel Sharon, a former Israeli Defense Minister brought a defamation action against *Time Magazine* for an allegedly libellous statement in a report on the findings of the Kahan Commission, appointed by the Israeli government to investigate the massacre of Palestinians in Lebanon in September 1982. In denying the defendant's motion to dismiss, the district court accepted the defendant's claim that Sharon's reputation had been severely affected by unchallenged material in the article as a whole, but concluded that Sharon's "reputation cannot be said as a matter of law to have been so damaged by the reported events that he could recover only nominal damages. . . ." ¹⁹⁰ In *Herbert v. Lando*, after partial grant of summary judgments for the media defendants¹⁹¹ the district court judge denied defendants' motion to dismiss the complaint on the incremental harm theory and distinguished the case at bar from *Simmons Ford* in that the plaintiff in *Simmons Ford* challenged only one statement in a lengthy article and Herbert challenged many of the assertions made about him.¹⁹² Since damage to reputation is a *sine qua non* element of a defamation action,¹⁹³ proponents of the developing libel-proof plaintiff doctrine argue that if a plaintiff's reputation is very low in the eyes of the public, he can suffer no damage by further defamation, or that if he does not challenge statements that are very damaging to reputation in the same article or publication, a challenge to less damaging statements would not be meritorious.

Both theories played a significant role in the course of Liberty Lobby's defamation action against Jack Anderson, the reknowned reporter in his capacity as publisher of *The Investigator* magazine. Two articles published in the October 1981 issue of *The Investigator* portrayed Liberty Lobby and Willis A. Carto, its founder and chief lobbyist, as Neo-Nazi, fascist, anti-

188. 516 F. Supp. 742 (S.D.N.Y. 1981). In *Simmons Ford*, a media defendant criticized a new electric car and rated it "Not Acceptable." The article set forth numerous reasons for the rating, but only one paragraph was challenged by the plaintiff. Since the unchallenged portions were worse criticisms than the challenged paragraph, the court held only nominal damages might be possible and granted summary judgment for the defendant. *Id.* at 751.

189. 575 F. Supp. 1162 (S.D.N.Y. 1983).

190. *Id.* at 1169.

191. 781 F.2d 298 (2d Cir. 1986) (nine allegedly defamatory statements found to be non-actionable, but three were judged actionable).

192. *Id.* at 311.

193. See *Time, Inc. v. Hill*, 385 U.S. 374, 391 (1967); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348-49 (1974).

semitic and racist. In the ensuing defamation action, the media defendants moved for summary judgment on the grounds that the limited purpose public figure plaintiffs could not prove actual malice as a matter of law, and that the plaintiffs were "libel-proof" and thus could not recover any damages because their reputations were already so besmirched in the public eye that no injury to reputation could have occurred by the alleged defamatory publications.¹⁹⁴ The trial judge granted summary judgment for the media defendants because the plaintiffs could not prove actual malice as a matter of law,¹⁹⁵ but did not address the defendants' contention that the plaintiffs were "libel-proof".¹⁹⁶

On appeal, the District of Columbia Circuit Court considered the libel-proof plaintiff doctrine at length.¹⁹⁷ Judge Scalia, writing for a unanimous court, rejected the libel-proof plaintiff theory "because we think it a fundamentally bad idea, we are not prepared to assume that it is the law of the District of Columbia; nor is it part of federal constitutional law."¹⁹⁸ The court would not accept a "rule that a conscious, malicious libel is not actionable so long as it has been preceded by earlier assertions of the same untruths."¹⁹⁹ Alternately, the court rejected the "incremental harm branch" of the doctrine: "This apparently equitable theory loses much of its equity when one realizes that the *reason* the unchallenged portions are unchallenged may not be that they are true, but only that [the plaintiffs] were unable to assert that they were willfully false."²⁰⁰ In vacating the judgment, the United States Supreme Court never addressed the libel-proof plaintiff doctrine, so the rejection of that doctrine would seem to remain the law of the District of Columbia Circuit.²⁰¹

After a decade of litigation involving exhaustive discovery, all defendants in *Herbert v. Lando*²⁰² moved for summary judgment. The district court held that as a matter of law a jury could not find that nine of the eleven allegedly defamatory statements were false, defamatory and made with *New York*

194. *Liberty Lobby, Inc. v. Anderson*, 562 F. Supp. 201 (D.D.C. 1983).

195. *Id.* at 210.

196. *Id.* at 209 n.12.

197. *See Liberty Lobby v. Anderson*, 746 F.2d 1563, 1568-69 (D.D.C. 1984), vacated on other grounds, 106 S. Ct. 2505 (1986).

198. *Id.* at 1569.

199. *Id.* at 1568.

200. *Id.*

201. The defendants in *Liberty Lobby* requested the United States Supreme Court to review the circuit court's holding on the libel-proof plaintiff issue in their *certiorari* petition, but the Court declined to do so. The opportunity remained for the Court to discuss the doctrine in *dicta*, but it did not.

202. 596 F. Supp. 1178 (S.D.N.Y. 1984).

Times malice.²⁰³ The court did not apply the “libel-proof” plaintiff doctrine and would have allowed the case to proceed on the remaining two statements. The Second Circuit²⁰⁴ reversed as to the two remaining statements and implicitly endorsed the incremental harm theory of the libel-proof plaintiff doctrine,²⁰⁵ although granting summary judgment for the defendants on a “subsidiary libel” doctrine²⁰⁶ which in effect holds that a defamatory factual statement should be non-actionable if it is an “outgrowth of and subsidiary to”²⁰⁷ larger allegedly defamatory statements which may be incapable of disproof. This novel rule, in support of which the Second Circuit cited no cases, seems analogous to the libel-proof plaintiff doctrine²⁰⁸ — and the court recognized this as well as the fact that its decision may be viewed as granting the media defendant an absolute immunity to defame a public or private figure plaintiff, provided that the defamatory statements, even those made with *New York Times* malice, were subsidiary to the “larger” statements.²⁰⁹ The United States Supreme Court denied *certiorari* and thus let stand in the Second Circuit both the libel-proof plaintiff doctrine and the new “subsidiary” libel theory.²¹⁰

The Issue of Falsity

*Philadelphia Newspapers, Inc. v. Hepps*²¹¹ was a suit by a private person plaintiff against a media defendant in a jurisdiction where the negligence standard applied. A series of five “investigative” articles appearing in *The*

203. *Id.* at 1226.

204. 781 F.2d 298 (2d Cir. 1986).

205. *Id.* at 310-11.

206. *Id.* at 311-12; *see also* *Petition for Writ of Certiorari* (Herbert, Petitioner), at 9.

207. 781 F.2d at 312.

208. *Id.* at 311 n.10 (“Some may view our holding today as a variation of the ‘libel-proof’ plaintiff doctrine, but we need not so characterize it.”).

209. *Id.* at 312. The court explained:

We do not mean to imply by our holding that appellees could have published with impunity a vast collection of false statements so extensive as to portray Herbert as a liar in every respect. Such a portrayal may well be actionable. Rather, we hold that if the appellees’ published view that Herbert lied about reporting war crimes was not actionable, other statements — even those that might be found to have been published with actual malice — should not be actionable if they merely imply the same view, and are simply an outgrowth of and subsidiary to those claims upon which it has been held there can be no recovery. We do not intend by our holding to permit defamation defendants to freely embellish their stories with falsehoods while remaining free from liability.

Id. at 312.

210. *See* *Herbert v. Lando*, 106 S. Ct. 2916 (1986).

211. 106 S. Ct. 1558 (1986).

Philadelphia Inquirer between May 1975 and May 1976 purported to link Maurice S. Hepps, the principle shareholder of a corporation which granted franchises for beer and soda distributorships, with organized crime.²¹² In a suit in a Pennsylvania state court for defamation against the publisher and two reporters, Hepps, concededly a private person plaintiff, bore the burden of proving either negligence or malice on the part of the media defendants, but a Pennsylvania statute²¹³ had codified the decisional law and placed upon the defendants the burden of proving "the truth of the defamatory communication."²¹⁴

The trial court determined the statute unconstitutional because of the presumption of the falsity of the defamatory statement and instructed the jury that the burden of proof was on the plaintiff to prove the falsity of the defamation.²¹⁵ The jury returned a general verdict for the media defendants.²¹⁶ On appeal, the Pennsylvania Supreme Court reversed, holding that *Gertz* only required that the private person plaintiff prove the fault of the media defendant and that showing fault did not require proving falsity.²¹⁷ The court relied on the Pennsylvania law of libel as it had developed over the years²¹⁸ and reiterated the presumption that the principle that a person was innocent until proven guilty transcended the criminal law and applied to the law of defamation.²¹⁹ The majority opinion of the Pennsylvania Supreme Court stressed that "where the accusation is totally general and without the spe-

212. For example, one article asserted that federal agents had evidence of the direct financial involvement of a leader of organized crime in the corporation controlled by Hepps. As to this statement, the defamatory character of which was not in dispute, plaintiff Hepps merely denied knowledge that the crime figure was employed by a consultant firm which was in turn employed by some of Hepps' corporation's franchises. See Testimony of Maurice Hepps, Jr., Tr. 2185-86, 2200.

213. 42 PA. CONS. STAT. ANN. § 8343(b)(1) (1978).

214. *Id.*

215. *Hepps*, 106 S. Ct. at 1560. It should also be noted that at trial the media defendants invoked on many occasions Pennsylvania's "shield law." See 42 PA. CONS. STAT. ANN. § 5942(a) (1982) ("no person . . . employed by any newspaper . . . or any radio or television station, or any magazine . . . shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding. . ."). Plaintiff Hepps asked that the jury be instructed to draw a negative inference from the media defendants' invocation of the statute; the media defendants requested that no inferences be drawn. The trial judge gave neither instruction. *Hepps*, 106 S. Ct. at 1561.

216. *Id.* at 1560.

217. *Hepps*, 106 S. Ct. at 1561.

218. See generally Note, *Tort Law — Hepps v. Philadelphia Newspapers, Inc.: The Validity of the Common Law Presumption of Falsity in Light of New York Times and Its Progeny*, 61 NOTRE DAME L. REV. 125 (1986).

219. *Hepps*, 506 Pa. 304, 311, 485 A.2d 374, 378, *rev'd*, 106 S. Ct. 1558 (1986), *cert. denied*, 106 S. Ct. 1784 (1986); see also *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 448-49, 273 A.2d 899, 907-08 (1971); *Montgomery v. Dennison*, 363 Pa. 255, 263 n.2, 169 A.2d 520, 525 n.2 (1949).

cificity necessary for a response, the absence of such a presumption [of the falsity of the defamatory statement] would force the plaintiff into the unenviable position of proving the negative.’’²²⁰

In a 5 to 4 decision, the United States Supreme Court reversed, holding “where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false,”²²¹ and that “the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern.”²²² Thus, the private person plaintiff²²³ is now on the same footing as to the issue of falsity as the public official and public figure plaintiff, who, following *New York Times* and its progeny, have had the burden of proving falsity from the very fact that they had to prove *New York Times* malice — knowledge of the falsity or reckless disregard of the truth. Justice O’Connor, writing for the majority, noted that there will be cases where the plaintiff will not be able to prove falsity when in fact the publication is false, but that the Constitution requires that the scales be tipped in favor of the media defendant to protect free speech and to avoid the “chilling” effect on free speech resulting from the media’s fear of possible liability.²²⁴

In a vigorous dissent, Justice Stevens, writing for a united minority, assailed the majority opinion as giving “the character assassin a constitutional

220. *Hepps*, 506 Pa. at 312, 485 A.2d at 378; see Franklin & Bussel, *The Plaintiff’s Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 851-87 (1984). It should be noted that plaintiffs are often required to “prove a negative,” e.g., in misrepresentation actions where the falsity of the representation must be proved.

221. *Hepps*, 106 S. Ct. at 1559.

222. *Id.* at 1564.

223. Several post-*Gertz* decisions had already shifted the burden of proof on the issue of falsity to the plaintiff. See, e.g., *Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371 (6th Cir.) (according to the negligence standard applied by Tennessee, private person plaintiff must prove falsity of defendant newspaper’s charges that cattle were starving on plaintiff’s ranch); *Jacron Sales Co., Inc. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976) (former employee brought defamation action against former employer, a non-media defendant; Maryland Court of Appeals applied *Gertz* to both media and non-media defendants as to proof of falsity, and adopted standard set by RESTATEMENT (SECOND) OF TORTS § 580B (Tent. Draft No. 21, 1975), i.e., a negligence standard); *Jenoff v. Hearst Corp.*, 644 F.2d 1004 (4th Cir. 1981) (defamation action against media defendant in which the Fourth Circuit held that the *Jacron* decision correctly interpreted the Restatement Second standard and should apply); *Gazette, Inc. v. Harris*, 229 Va. 1, 325 S.E.2d 713, cert. denied sub nom. *Fleming v. Moore*, 105 S. Ct. 3513 (1985) (four consolidated defamation actions in which all plaintiffs were private persons and three of the four defendants were media members; the Virginia Supreme Court interpreted *Gertz* as mandating all plaintiffs to prove falsity).

224. *Hepps*, 106 S. Ct. at 1564.

license to defame,"²²⁵ for if a member of the media knew that it would be impossible for a private person plaintiff to prove the falsity of a defamation and published the defamation, not only with *New York Times* malice but with actual common law malice that could be proved by the plaintiff, the publication would nevertheless be constitutionally protected.²²⁶ The minority saw "little . . . basis for a concern that a significant amount of true speech will be deterred unless the private person victimized by a malicious libel can also carry the burden of proving falsity,"²²⁷ since the media defendant is already protected by the *Gertz* requirement that the plaintiff prove some fault.

At first blush, *Hepps* seems to extend significantly the trend of *New York Times* and its progeny. However, the holding is quite narrow and is confined only to the award of money damages, viz. "a private-figure plaintiff must bear the burden of [proving falsity] before recovering damages for defamation from a media defendant."²²⁸ Nothing indicates that the burden of proof shifts in a suit against a non-media defendant. Nothing was said of a shift in the burden should a private person seek an equitable remedy rather than money damages. The real significance of the decision is that the *Hepps* Court squarely addressed the essence of the defamation action — the falsity of the publication — and more importantly, provided that a remedy other than money damages may be available to the media-defamed plaintiff. "Nor need we consider what standards should apply . . . if a State were to provide a plaintiff with the opportunity to obtain a judgment that declared the speech at issue to be false but did not give rise to liability for damages."²²⁹ Echoing Justice White's vigorous dissent in *Gertz*,²³⁰ this may indicate that the United States Supreme Court may now be willing to afford to the plaintiff the opportunity to vindicate his reputation in a simple, direct and inexpensive way.

Summary

The more than two decades since *New York Times v. Sullivan* constitutionalized the common law of defamation have resulted in some clarification of the *New York Times* holding and its ramifications on plaintiffs and media defendants. But how far have we come? Are matters even more

225. *Id.* at 1568 (Stevens, J., dissenting).

226. *Id.*

227. *Id.* at 1571.

228. *Id.* at 1564. The *Hepps* Court was silent as to what quantity of proof, *i.e.*, preponderance of the evidence or the "clear and convincing evidence" standard, applies to the plaintiff on the issue of falsity.

229. *Hepps*, 106 S. Ct. at 1565 n.4.

230. *See supra* notes 91-92 and accompanying text.

confused and nebulous than in the early days after the *New York Times* decision?

There is no serious proposal to return to the full-blown, strict liability common law of defamation. The first amendment guarantees freedom of expression on public questions, and as a nation we are committed to "the principle that debate on public issues should be uninhibited, robust, and wide-open."²³¹ There is no place where debate is more vigorous than in the media. Debate and commentary, as well as reporting on news stories as they break, would be severely hampered if the media were constrained to ponder and consider the absolute, total veracity of every statement uttered or published. But, the individual's right to protect his reputation inevitably comes into conflict with the day-to-day operation of a totally protected media. The courts have carefully and properly balanced the individual's rights and the public good. Both must be protected, and in a free society some abuse must be tolerated.²³²

The "chilling effect" of the possibility of incurring substantial liability because of a good faith mistake or the simple negligence of an employee would stultify the media, and the enormous burden of legal fees incurred in the defense of defamation suits could be financially disastrous.²³³ The cost of discovery and the loss of time in the process can likewise be enormous.²³⁴ To a great extent, the necessity of proving *New York Times* malice has halted the onslaught of verdicts against media defendants. Despite the fact that between 1981 and 1984, news organizations lost 83 per cent of defamation cases tried before juries,²³⁵ the media defendants prevailed in 90 per cent of

231. *New York Times*, 376 U.S. at 270.

232. 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 571 (1876) ("Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press.").

233. See Abrams, *Why We Should Change Libel Law*, N.Y. Times, Sept. 29, 1985, § 6 (Sunday Magazine), at 90. It is estimated that CBS spent more than \$5 million to defend the defamation action brought by General Westmoreland. Legal fees paid by CBS and the other defendants in the twelve years of the *Herbert v. Lando* litigation may have exceeded \$3 million.

Plaintiffs are also affected by the costs of litigation. General Ariel Sharon reportedly spent in excess of \$1 million in his suit against *Time, Inc.* See N.Y. Times, Jan. 25, 1985, at B4, col. 1. William Tavoulaareas, president of Mobil Oil Corporation, expended almost \$3 million in his suit against *The Washington Post*. See advertisement by William P. Tavoulaareas in N.Y. Times, Sept. 25, 1983, at 25, col. 1; see also *supra* note 123 and *infra* note 238 and accompanying text.

234. In *Herbert v. Lando*, 441 U.S. 153, 205 n.3 (Marshall, J., dissenting), it is noted that almost 3000 pages of transcript were generated by the Lando deposition alone in the first year of discovery. The defendants had also produced in that year all of their notes with more than 120 people, as well as voluminous files, transcripts, videotapes and documents. See Brief of Respondents, in Opposition to Petition for Writ of Certiorari, at 2 n.1 (no. 85-1685).

235. Jury awards have been enormous, e.g., \$40 million in *Lerman v. Flynt*

those cases at appellate levels.²³⁶ However, the costs of discovery and the time-consuming process remain, although the *Liberty Lobby* Court's demand that the "clear and convincing" evidentiary standard be applied at the motion for summary judgment level may work to the benefit of media defendants before exhaustive discovery has taken place. The negligence standard of *Gertz*, which has been adopted by a majority of the states in suits by private persons against media defendants, precludes facile granting of summary judgment. The *Dun & Bradstreet* Court's dangerous resurrection of the *Rosenbloom* "public concern" standard may be a two-edged sword, allowing the court to consider it at the summary judgment stage and thus in some instances lessening the media defendant's burden, although at the same time adding to the "chill" imposed on a media figure debating whether it should or should not publish a story in light of the fact that some court may hold that the subject matter of the story was not of "public concern."

The plaintiff, on the other hand, has not fared so well as a result of Supreme Court and some circuit court decisions in recent years. First, we must consider the public official or public figure plaintiff in the wake of *New York Times*. He feels his reputation has been damaged, perhaps ruined, by a defamatory publication which may have had widespread circulation.²³⁷ At the time of commencing suit, he cannot prove special damages, for the long term effect of the defamatory statement upon his career in politics or business cannot be ascertained. The only remedy available to him is money damages, which will not be awarded unless *New York Times* malice can be proven with clear and convincing clarity, which may in fact be decided at the early stage of a motion for summary judgment before he has the opportunity for full discovery. In effect, the plaintiff is unable to restore his reputation. Of course, he may resort to his own resources and attempt to have his defenses to the alleged defamatory publication printed or aired, but any vindication by an independent third party is unavailable to him.²³⁸

Distrib. Co., 745 F.2d 123 (2d Cir. 1984); \$25.025 million in *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438 (10th Cir. 1982); \$19.2 million awarded to entertainer Wayne Newton against NBC, *N.Y. Times*, Dec. 18, 1986, at A26, col. 1.

236. See *Libel Defense Resource Center Bulletin*, No. 12 (Winter 1984); see also Franklin, *Suing The Media for Libel: A Litigation Study*, 1981 AM. B. FOUND. RES. J. 795 (results of a study of 291 defamation suits against media defendants).

237. The *New York Times* has a daily circulation in excess of 1,275,000. See *Statement of Ownership Management and Circulation*, *N.Y. Times*, Oct. 2, 1986. *Time* magazine's weekly circulation within the United States is over 4.6 million. Telephone interview with representative of *Time* magazine management.

238. Recent efforts by public figures to restore their reputations have received extensive press coverage. In two articles published on Nov. 30, and Dec. 1, 1979, *The Washington Post* charged that the president of Mobil Oil Corporation, William Tavoulaareas, "set up" his son in a lucrative shipping firm with which Mobil had ties, and indicated that he may have broken the law. In fact, the evidence was very slight that William Tavoulaareas had placed his son in the position, and the intimation

The growth of the libel-proof plaintiff doctrine is a further obstacle to the public figure plaintiff in a defamation action against a media defendant. From the very fact that celebrities are so frequently in the public eye and are regularly the subjects of media attention, many have reputations which have been adversely affected. As Judge Scalia succinctly remarked:

The law . . . proceeds upon the optimistic premise that there is a little bit of good in all of us—or perhaps upon the pessimistic assumption that no matter how bad someone is, he can always be worse. It is shameful that Benedict Arnold was a traitor; but he was not a shop-lifter to boot, and one should not have been able to make that charge while knowing its falsity with impunity.²³⁹

The United States Supreme Court has avoided addressing the doctrine with the result that, in the Second Circuit at least, it has been allowed to develop. In less than ten years, the original doctrine has spawned the incremental harm theory²⁴⁰ and most recently, the subsidiary libel theory.²⁴¹

VI. PROPOSED REMEDIES FOR THE DEFAMED PLAINTIFF

Before and after *New York Times* various means have been proposed to ease the burden of the media-defamed plaintiff and to assist him in obtaining what he really wants: a restored reputation. An analysis reveals that

of illegality was groundless or extremely tenuous. Father and son sued for libel and the case finally went to trial in July of 1983. See *Tavoulaareas v. Piro*, 759 F.2d 90, 98-103 (D.C. Cir. 1985). Almost four years later, the case ended with the District of Columbia Circuit affirming the trial court's grant of j.n.o.v. for the defendants. William Tavoulaareas estimated the suit cost him personally well in excess of \$2.5 million. See *supra* note 233.

On January 23, 1982, a CBS Reports documentary titled "The Uncounted Enemy: A Vietnam Deception" charged that General William Westmoreland had lied to President Johnson and the Joint Chiefs of Staff by understating the number of enemy troops in Vietnam. This alleged deception resulted in the total unpreparedness of the American forces for the Tet offensive of January 1968. See *N.Y. Times*, Feb. 2, 1985, at B2, col. 1. The suit was settled during trial in February 1985, after millions of dollars were spent. CBS did not disavow the 1982 documentary and did not pay any money to General Westmoreland.

On February 21, 1983, *Time* magazine published a cover story, "Verdict on the Massacre," in which it asserted that on the morning after the assassination of Bashir Gemayel in Beirut, Lebanon, Israeli Defense Minister Ariel Sharon had discussed with the Gemayel family "the need for the Phalangists to take revenge." *Sharon v. Time, Inc.*, 575 F. Supp. 1162, 1165 (S.D.N.Y. 1983). The massacre of Palestinian refugees at the Sabra and Shatila camps took place soon after on September 15, 1982. Both sides claimed victory when the jury held that Minister Sharon had in fact been defamed, but that no money damages could be awarded since he had not established *New York Times* malice on the part of *Time* magazine.

239. *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1568 (1984).

240. See *supra* notes 187-90 and accompanying text.

241. See *supra* notes 202-10 and accompanying text.

in fact the plaintiff has not been helped to any great degree and has no alternate choice to bringing an action for money damages.

A. Retraction Statutes

At common law a full retraction by a defendant which received "the same publicity and prominence as the defamation"²⁴² was available as a "partial" defense and served to mitigate damages. Thirty states have some form of retraction statute in force, which usually precludes the plaintiff from being awarded punitive damages.²⁴³ Basic to all the statutes is the requirement that the plaintiff notify the defendant of the alleged defamatory publication prior to initiating suit or within a certain time period, after which the defendant has a limited period of time in which to make a retraction in the same manner or with the same space and position as the original publication. If the defendant does not do so, the plaintiff may offer the failure to retract as a bar to mitigation of damages. The object of retraction statutes is obvious: the plaintiff is given the opportunity of vindicating his reputation in the same manner as he was originally defamed and the defendant is afforded the opportunity to have possible damages mitigated as a result of compliance with the statute. If no retraction is published, the plaintiff may recover special, general and punitive damages, subject of course to the *Gertz* limitations.

The constitutional difficulties raised by the United States Supreme Court in regard to right of reply statutes²⁴⁴ do not apply to retraction statutes since none convey the power to a court to order a retraction to be published by

242. See PROSSER AND KEETON, *supra* note 8, at 846.

243. See ALA. CODE § 6-5-185 (1975); ARIZ. REV. STAT. ANN. §§ 12-653.01-12-653.05 (1986); CAL. CIV. CODE § 48(a) (West 1987); CONN. GEN. STAT. ANN. § 52-237 (West 1986); FLA. STAT. ANN. § 770.01, .02 (West 1986); GA. CODE ANN. § 51-5-11 (1985); IDAHO CODE § 6-712 (1979); IND. CODE ANN. §§ 34-4-14-1, 2, and 34-4-15-1, 2 (Burns 1986); IOWA CODE ANN. § 659.2-.4 (West Supp. 1986); KY. REV. STAT. ANN. § 411.051 (Bobbs-Merrill 1986); ME. REV. STAT. ANN. tit. 14, § 153 (1986); MASS. ANN. LAWS ch. 231, § 93 (West 1986); MICH. COMP. LAWS ANN. § 600.2911 (West 1986); MINN. STAT. ANN. § 548.06 (West 1987); MISS. CODE ANN. § 95-1-5 (1986); MONT. CODE ANN. §§ 27-1-818, 819, 821 (1985); NEB. REV. STAT. § 25-840.01 (1985); NEV. REV. STAT. § 41.336 (1986); N.J. STAT. ANN. § 2A:43-2 (West 1952); N.C. GEN. STAT. § 99-2 (1985); N.D. CENT. CODE § 14-02-08 (1985); OHIO REV. CODE ANN. §§ 2739.03, .13, .14., .15 (Baldwin 1981); OKLA. REV. CODE ANN. tit 12, § 1446a (West 1987); OR. REV. STAT. §§ 30.160, .165, .170 (1985); S.D. CODIFIED LAWS ANN. § 20-11-7 (1986); TENN. CODE ANN. § 29-24-103 (1986); UTAH CODE ANN. § 45-2-1 (1986); VA. CODE ANN. § 8.01-48 (Michie 1986); W. VA. CODE § 57-2-4 (Michie 1986); WIS. STAT. ANN. § 895-.05 (West 1986).

244. See *infra* notes 249-54 and accompanying text.

the defendant.²⁴⁵ Retraction statutes effectively encourage the media defendant to publish a full admission of falsity or, as is more likely the case, a "taking back" of the original publication. If the plaintiff will settle for such a "taking back," which is considerably less than an admission of falsity, such statutes may well serve to reduce the number of defamation actions. On the other hand, if the plaintiff wants more than a simple retraction which may not completely dispense doubts about the underlying truth or falsity of the publication, such statutes afford no relief to the defamed public official or public figure plaintiff from the burden of proving *New York Times* malice with clear and convincing clarity, and thus do little to afford the plaintiff vindication by an independent third party.

B. *Right of Reply Statutes*

A suggested method of vindicating a defamed plaintiff's reputation has been a statutorily mandated "right of reply," published by the media defendant in the same manner and with the same prominence as the original publication was made. The constitutional problems raised by such statutes were recognized at an early date.²⁴⁶ Patterned after European and South American statutes which require the media to print court-ordered replies or retractions,²⁴⁷ the only general right of reply statute in force for any considerable period of time in the United States was that of Nevada, which in any event was repealed in 1969.²⁴⁸

In 1974, the United States Supreme Court addressed the constitutionality of right of reply statutes in *Miami Herald Publishing Co. v. Tornillo*.²⁴⁹ Under the Florida limited right of reply statute then in force, a political

245. Such a type of retraction statute allowing a court-ordered publication has been proposed. See Note, *Vindication of the Reputation of a Public Official*, 80 HARV. L. REV. 1730, 1742 (1967). In *Miami Herald Publishing Co. v. Tornillo*, Justice Brennan, in a concurring opinion, understood the decision as addressing only "right of reply" statutes and not implying any "view upon the constitutionality of 'retraction'" statutes affording plaintiffs able to prove defamatory falsehoods a statutory action to require publication of a retraction. 418 U.S. 241, 258 (1974) (Brennan, J., concurring).

246. Statutes in Michigan and Kansas were held unconstitutional. See *Park v. Detroit Free Press*, 72 Mich. 560, 40 N.W. 731 (1888); *Hanson v. Krehbiel*, 68 Kan. 670, 75 P. 1041 (1904). Statutes in Minnesota and Florida were upheld. See *Allen v. Pioneer Press, Co.*, 40 Minn. 180, 40 N.W. 936 (1889); *Ross v. Gore*, 48 So. 2d 412 (Fla. 1950).

247. The first such law was enacted in France in 1822. See 1 BARBIER, *Code Explique de la Presse* (2d ed. 1911). For a discussion of the foreign statutes, see Donnelly, *The Right of Reply: An Alternative to an Action for Libel*, 34 VA. L. REV. 867, 884-91 (1948).

248. See NEV. REV. STAT. § 200.570 (1963) (repealed, 55th Sess. Laws, ch. 310, § 10 (1969)).

249. 418 U.S. 241 (1974).

candidate could request free space to reply to any attack upon his personal character.²⁵⁰ Tornillo, executive director of a teachers' union and a candidate for the Florida House of Representatives in 1972, was severely criticized by two editorials for previously leading an "illegal" teachers strike. Under section 104.38 he demanded to reply "in as conspicuous a place and in the same kind of type as the charges which prompted the reply."²⁵¹ A unanimous United States Supreme Court held that the statute violated the first amendment's guarantee of a free press:²⁵² "The Florida statute operates as a command in the same sense as a statute or regulation forbidding [a newspaper] to publish specified matter."²⁵³ The *Tornillo* Court further held that the Florida statute intruded into the function of editors in deciding what should be printed and how public issues and officials should be treated.²⁵⁴

The only right of reply statute now in force is a Mississippi law²⁵⁵ which provides that if a newspaper shall print an editorial or news story "reflecting upon the honesty and integrity or moral character"²⁵⁶ of a political candidate, the politician may demand that his reply to the charges be printed. Courts have so strictly interpreted and applied the statute that it has in effect been overturned.²⁵⁷ The constitutional problems associated with such statutes, as well as the reluctance of legislatures to enact legislation because of those

250. FLA. STAT. § 104.38 (repealed 1975) provided:

If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082, or § 775.083.

Id. For the legislative history of the statute, see Hoffer & Butterfield, *The Right to Reply: A Florida First Amendment Abbreviation*, 53 JOURN. Q. 2 (1976).

251. 418 U.S. at 244.

252. The statute had been previously held unconstitutional in the one reported case in which it had been invoked prior to *Tornillo*. See *State v. News-Journal Corp.*, 36 Fla. Supp. 164 (Volusia County Ct. 1972).

253. 418 U.S. at 256.

254. *Id.* at 258.

255. MISS. CODE ANN. § 23-3-35 (1986).

256. *Id.*

257. See *Gulf Publishing Company, Inc. v. Lee*, 434 So. 2d 687 (Miss. 1983) (public official charged with favoring other officials in selecting locations of paved roads denied the right to reply under § 23-3-35 which must be strictly construed); *Manasco v. Walley*, 216 Miss. 614, 63 So. 2d 91 (1953) (unjust criticism of state representative's conduct in office deemed not to impune honesty or integrity or moral character).

problems,²⁵⁸ prevent right of reply statutes from being a feasible remedy to a plaintiff defamed by a media defendant.

C. The "Schumer Bill"

Representative Charles E. Schumer²⁵⁹ has proposed H.R. 2846²⁶⁰ in the 99th Congress, which as drafted offers a codified remedy to public officials

258. See *Opinion of the Justices to the Senate*, 363 Mass. 909, 298 N.E.2d 829 (1973), in which the Massachusetts Supreme Judicial Court advised that a right of reply statute being considered by the Great and General Court would be held unconstitutional.

259. Democrat, New York.

260. H.R. 2846, 99th Cong., 1st Sess., 131 CONG. REC. 85 (1985), reads as follows:

SECTION 1. ACTION FOR DECLARATORY JUDGEMENT THAT STATEMENT IS FALSE AND DEFAMATORY.

(a) CAUSE OF ACTION.—

(1) A public official or public figure who is the subject of a publication or broadcast which is published or broadcast in the print or electronic media may bring an action in any court of competent jurisdiction for a declaratory judgment that such publication or broadcast was false and defamatory.

(2) Paragraph (1) shall not be construed to require proof of the state of mind of the defendant.

(3) No damages shall be awarded in such an action.

(b) BURDEN OF PROOF.—

The plaintiff seeking a declaratory judgment under subsection (a) shall bear the burden of proving by clear and convincing evidence each element of the cause of action described in subsection (a).

(c) BAR TO CERTAIN CLAIMS.—

A plaintiff who brings an action for a declaratory judgment under subsection (a) shall be forever barred from asserting any other claim or cause of action arising out of a publication or broadcast which is the subject of such action.

(d) ELECTION BY DEFENDANT.—

(1) A defendant in an action brought by a public official or public figure arising out of a publication or broadcast in the print or electronic media which is alleged to be false and defamatory shall have the right, at the time of filing its answer or within 90 days from the commencement of the action, whichever comes first, to designate the action as an action for a declaratory judgment pursuant to subsection (a).

(2) Any action designated as an action for a declaratory judgment pursuant to paragraph (1) shall be treated for all purposes as if it had been filed originally as an action for a declaratory judgment under subsection (a), and the plaintiff shall be forever barred from asserting or recovering for any other claim or cause of action arising out of a publication or broadcast which is the subject of such action.

SECTION 2. LIMITATION ON ACTION.

Any action arising out of a publication or broadcast which is alleged to be false and defamatory must be commenced not later than one year

and public figures defamed by a media defendant. The plaintiff may elect to receive a judicial declaratory judgment²⁶¹ which would preclude him from a future action for money damages,²⁶² provided the plaintiff proves with clear and convincing evidence that he is a public official or public figure defamed by a published statement concerning him which was false and defamatory.²⁶³ The bill would seem to afford the plaintiff the opportunity to vindicate his reputation without the expense and time spent on lengthy discovery and without the burden of proving *New York Times* malice. Closer study reveals a plethora of problems. The proposed bill also affords a *media defendant* the right to convert an action against it for money damages into an action for a judicial declaratory judgment,²⁶⁴ and if the defendant so chooses, the suit is handled as if the plaintiff had originally chosen the declaratory judgment remedy under the statute.²⁶⁵ Reasonable attorney's fees would be awarded to the prevailing party,²⁶⁶

As proposed, the Schumer Bill would not solve many problems of the media-defamed plaintiff. Notwithstanding the doubtful authority of Congress to enact such a bill,²⁶⁷ the option of the media defendant to convert a plaintiff's action for money damages into an action for a declaratory judgment

after the first date of such publication or broadcast.

SECTION 3. PUNITIVE DAMAGES PROHIBITED.

Punitive damages may not be awarded in any action arising out of a publication or broadcast which is alleged to be false and defamatory.

SECTION 4. ATTORNEY'S FEES.

In any action arising out of a publication or broadcast which is alleged to be false and defamatory, the court shall award the prevailing party reasonable attorney's fees, except that—

(1) the court may reduce or disallow the award of attorney's fees if it determines that there is an overriding reason to do so; and

(2) the court shall not award attorney's fees against a defendant which proves that it exercised reasonable efforts to ascertain that the publication or broadcast was not false and defamatory or that it published or broadcast a retraction not later than 10 days after the action was filed.

SECTION 5. EFFECTIVE DATE.

This Act shall apply to any cause of action which arises on or after the date of the enactment of this Act.

261. *Id.* § 1(a)(3).

262. *Id.* § 1(c).

263. *Id.* § 1(b). See generally Note, *The Defamed Reputation: Will Declaratory Judgment Bill provide Vindication?*, 13 J. LEGIS. 72 (1986). See also Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CAL. L. REV. 847 (1986).

264. H.R. 2846 § 1(d)(1).

265. *Id.* at §1(d)(2).

266. *Id.* at § 4.

267. The basic authority under which Congress could enact such a bill is unclear. Is the regulation of such publications permitted by the Commerce Clause, United States Constitution Article I, § 7, cl.3? Or, is the bill rooted in the fact that it protects first and fourteenth amendment rights?

flies in the face of the plaintiff's seventh amendment rights. As the bill is drafted, a plaintiff who has suffered financial loss and severe mental distress related to his loss of reputation could be precluded from money damages because the media defendant chooses to designate the action as one for a declaratory judgment of falsity.²⁶⁸ Even if the media defendant was inspired by common law malice, by converting the action into one of equity, it would be shielded from all financial liability, and what is even more surprising in the bill, punitive damages may never be awarded in any defamation action against a media defendant.²⁶⁹ It may be argued that awarding attorney's fees to the prevailing party would discourage "nuisance suits" and promote media responsibility. Conversely, such awards may have a chilling effect on both the defamed plaintiff and the media defendant. The plaintiff may well be reluctant to initiate a defamation action if there is the risk that he will be judged not to have proven the falsity of a publication with *clear and convincing* evidence, and consequently be burdened with having to pay the potentially large fees charged by both his own attorneys and those for the media defendant.²⁷⁰ Also, some media defendants of modest resources, e.g., small town newspapers, periodicals with very limited circulation or local radio stations, may hesitate to publish anything but the most meticulously researched and documented stories in fear that as a result of a good faith mistake they may be liable for large legal fees incurred in the course of an action for such a declaratory judgment.

H.R. 2846, as drafted, attempts by means of a codified national defamation law to provide the defamed public official or public figure with a simple, relatively inexpensive procedure whereby the current difficulties faced by such plaintiffs may be avoided. However, the many problems inherent in the proposed bill would not seem to render it a viable solution to be available in the foreseeable future.

D. *Use of Summary Judgment*

Resort to a motion for summary judgment at an early stage in a defamation action for money damages would seem to offer both plaintiff and media defendant an early opportunity for a final determination of the action.

268. H.R. 2846 § 1(d)(1). The United States Supreme Court has recognized the right for an action for money damages for libel and slander: "The Seventh Amendment . . . entitled the parties to a jury trial in actions for damages to a person or property, for libel and slander, for recovery of land, and for conversion of personal property." *Ross v. Bernhard*, 396 U.S. 531, 533 (1970).

269. H.R. 2846 § 3. If the only damages a media defendant might suffer would be a series of probably not highly publicized declaratory judgments, because the defendant would so elect in all suits against it, grossly careless reporting would be encouraged.

270. *See supra* note 233.

In practice the use of the summary judgment proceeding works almost exclusively to the benefit of the media defendant. Only in the most extraordinary circumstances can a plaintiff have in his possession evidence that could convince a judge to render a decision in his favor, e.g., a written admission or deposition testimony that the media defendant had spitefully set out to harm the plaintiff's reputation.²⁷¹

In its reversal in *Hutchinson v. Proxmire*, the Supreme Court observed in dictum: "The proof of 'actual malice' calls a defendant's state of mind to question . . . and does not readily lend itself to summary disposition,"²⁷² and noted that the district court had said that in determining whether *New York Times* malice could be proved, "summary judgment may well be the 'rule' rather than the 'exception.'"²⁷³ Despite the *Hutchinson* Court's obser-

271. An example of such a damaging admission, although not relied on in a summary judgment motion, is a section of Reverend Jerry Falwell's pre-trial deposition of *Hustler* publisher Larry Flynt:

Q. Do you recognize that in having published what you did in this ad, you were attempting to convey to the people who read it that Reverend Falwell was just as you characterized him, a liar?

A. He's a glutton.

Q. How about a liar?

A. Yeah. He's a liar, too.

Q. How about a hypocrite?

A. Yeah.

Q. That's what you wanted to convey?

A. Yeah.

Q. And didn't it occur to you that if it wasn't true, you were attacking a man in his profession?

A. Yes.

Q. Did you appreciate, at the time that you wrote 'okay' or approved this publication, that for Reverend Falwell to function in his livelihood, and in his commitment and career, he has to have an integrity that people believe in? Did you not appreciate that?

A. Yeah.

Q. And wasn't one of your objectives to destroy that integrity, or harm it, if you could?

A. To assassinate it.

Falwell v. Flynt, 797 F.2d 1270, 1273 (4th Cir. 1986). However, the jury, finding that no reasonable person would believe the parody, returned a verdict for the defendants on the libel claim. See *supra* note 182.

272. 443 U.S. 111, 120 n.9 (1979). See *supra* note 89; see also *Westmoreland v. CBS, Inc.*, 596 F. Supp. 1170 (S.D.N.Y. 1984); 10A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2730, at 240-41 (1983).

273. *Hutchinson v. Proxmire*, 431 F. Supp. 1311, 1330 (W.D. Wis. 1977), *aff'd*, 579 F.2d 1027 (7th Cir. 1978), *rev'd*, 443 U.S. 111 (1979). In *Wasserman v. Time, Inc.*, 424 F.2d 920, 922 (D.C. Cir. 1970), *cert. denied*, 398 U.S. 940 (1970), Judge Wright, in a concurring opinion, reflected the liberal rule:

New York Times Co. v. Sullivan makes actual malice a constitutional issue to be decided in the first instance by the trial judge in applying the *Times*

vation, subsequent studies have shown that the success of media defendants at the summary judgment stage has not been affected by the *Hutchinson* Court's dictum.²⁷⁴

Traditionally, summary judgment has been considered by courts to be an extraordinary remedy, not to be granted as a matter of course. According to Federal Rule of Civil Procedure 56(c), summary judgment shall be granted when there is "no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law,"²⁷⁵ but "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response . . . must set forth specific facts showing that there is a genuine issue for trial."²⁷⁶ Rule 56 does not state that a plaintiff must meet a certain burden of proof at the motion for summary judgment level. The public figure plaintiff's argument is that to require him to establish actual malice with convincing clarity by reference to depositions and other papers at this level precludes him from discovering the media defendant's state of mind at the time of publishing, a fact central to the very concept of *New York Times* malice, and something extremely difficult to establish without a trial.

In *Calder v. Jones*, the United States Supreme Court stated that "[w]e have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws."²⁷⁷ Nevertheless, the *Liberty Lobby* Court was "convinced that the inquiry involved in a ruling on a motion for summary judgment . . . necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits."²⁷⁸ By requiring the public figure plaintiff to establish actual malice on the part of the media defendant with clear and convincing evidence at the level of a motion for summary judgment, the value to the plaintiff of such a motion is almost completely diminished.

test of actual knowledge or reckless disregard of the truth. Unless the court finds, on the basis of pretrial affidavits, depositions or other documentary evidence that the plaintiff can prove actual malice in the *Times* sense, it should grant summary judgment for the defendant.

424 F.2d at 922.

274. See *Libel Defense Resource Center Bulletin* No. 12 (Winter 1984), analyzing 136 summary judgment motions from 1982 through 1984 following the *Hutchinson* decision. Media defendants' summary judgment motions were granted in 74% of all the cases; at trial level, the defendants prevailed in 80% of the cases; on appeal, the defendants' success rate was 66%. *Id.* at 1. When motions for summary judgment are made by media defendants against public figure plaintiffs, 80% of such motions were granted; in actions involving private persons, 65% were granted. *Id.* at 2.

275. FED. R. CIV. P. 56(c).

276. FED. R. CIV. P. 56(e).

277. 465 U.S. 783, 790-91 (1984).

278. 54 L.W. 4758 (1986) (adopting the rationale of the Second Circuit in *United States v. Taylor*, 464 F.2d 240 (2d Cir. 1972)); see *supra* notes 123-32 and accompanying text.

VII. THE JUDICIAL DECLARATION OF FALSITY

Faced with the insurmountable hurdles erected by *New York Times, St. Amant* and *Tornillo*, the plaintiff is further constrained by the current law of defamation to seek only one remedy: money damages. For the plaintiff, it is an "all or nothing" situation; for the media defendant, the time and cost of defending defamation actions and the threat of large verdicts remain.

Would it not be possible for courts to initiate procedural changes which would afford the plaintiff a remedy without jeopardizing the media defendant's first amendment rights? The added protection which *New York Times* and its progeny afford the media to ensure its constitutional rights and to guarantee "uninhibited, robust, and wide-open"²⁷⁹ public debate has been almost uniformly referred to as a "privilege," procedurally an affirmative defense raised by the defendant as an excuse or justification for conduct that otherwise would be tortious. "'Privilege' is the modern term applied to those considerations which avoid liability where it might otherwise follow."²⁸⁰ In other words, there is no cause of action, no basis for liability. The privilege is dependent upon the motives or purpose of the actor. If after inquiry it is established that the defendant acted in good faith or to further an interest of such societal import that protection is granted as a matter of law, the plaintiff's suit must be dismissed.²⁸¹

An immunity, on the other hand, exists when an actor is absolutely protected from civil liability, in the form of money damages, despite the actor's evil motive, recklessness or negligence. The common law concentrated on the status of the defendant and his relation to the plaintiff and, in certain situations, determined that the interests of society demanded that, even though the defendant had acted tortiously, his status required that he escape liability for his wrongful act.²⁸² The status may be such that the immunity is absolute and shields against all liability in all circumstances, as is the case with governmental or sovereign immunity, as the 1907 statement of Justice Holmes explains: "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."²⁸³ This immunity from suit is absolute, unless it is af-

279. *New York Times*, 376 U.S. at 270.

280. PROSSER AND KEETON, *supra* note 8, at 108-09 (citing RESTATEMENT (SECOND) OF TORTS § 10 (1965)).

281. *Booth & Brother v. Burgess*, 72 N.J. Eq. 181, 188 (1906) ("There is no justification for a tort. The so-called justification is an exceptional fact which shows that no tort was committed.").

282. See RESTATEMENT (SECOND) OF TORTS, Introductory Note to Chapter 45A (1979).

283. *Kawanakoa v. Polybank*, 205 U.S. 349, 353 (1907); see also *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 82 at 104-05 (1821).

firmatively waived, but when extended to government officials it attaches only when the tortious act is connected with official duties.²⁸⁴ In defamation actions, time and again executive officers of government have been held immune from suit.²⁸⁵ Yet surely the underlying wrongful act is tortious and the cause of action remains, although the defamer is shielded from liability for money damages.

Why have the courts not approached the status enjoyed by the media in the same way as they approach that of government officials? The *Gertz* Court essentially tried to arrive at a balance between the individual's right to reputation and the protection of a free press, but the post-*Gertz* decisions reveal how unsuccessful that attempt was. Rather than concentrating on the status of the plaintiff and the malice standard, courts should consider the status of the defendant, the essence of the defamation, viz., the falsity of the publication, and the relation of the defendant to the individual plaintiff. The interests of society demand that the media be protected from defamation actions for money damages only when it has not acted "with knowledge of falsity or reckless disregard of the truth." When so viewed the protection emerges as an "immunity,"²⁸⁶ not a "privilege." The underlying tortious act is not rendered non-tortious, but rather remains a defamation. One cannot maintain that a private citizen who happens to be a member of the media is "privileged" to defame individuals, but one can maintain that a member of the media who harms the reputation of an individual by a false publication should be shielded from liability for money damages because of the importance of his contributions to the growth of a free society. From this viewpoint, *New York Times* and its progeny may be viewed as holding that a media defendant is immune from suit by a public official or public figure plaintiff unless such plaintiff can prove with convincing clarity that the media defendant acted with *common law* malice, knowledge of falsity, or reckless disregard of the truth.²⁸⁷

284. *Barr v. Matteo*, 360 U.S. 564 (1959). *Barr* extended the absolute immunity to all federal officers. Some states follow the *Barr* rationale and have extended the immunity to minor state officials, e.g., *New York*. See *Sheridan v. Cresona*, 14 N.Y.2d 108, 198 N.E.2d 359, N.Y.S.2d 161 (1964).

285. See, e.g., *Mellon v. Brewer*, 18 F.2d 168 (D.C. Cir.), cert. denied, 275 U.S. 530 (1927) (Secretary of Treasury not liable for libel of government employee); *Blair v. Walker*, 64 Ill. 2d, 349 N.E.2d 385 (1976) (governor not liable for defamatory press release).

286. The use of "immunity" as the more accurate term rather than "privilege" was suggested over fifty years ago. See *Green, Relational Interests*, 30 ILL. L. REV. 314, 318-19 (1935); see also *Evans, Legal Immunity for Defamation*, 24 MINN. L. REV. 607, 613 (1940). The courts, however, have not adopted it.

287. Such a view falls short of the "absolute immunity" favored by Justice Black in *New York Times* (see *supra* note 45 and accompanying text), for the immunity would not apply to all defamations under all circumstances.

While precluding money damages as a remedy, *New York Times* and subsequent decisions are silent concerning the availability of other remedies,²⁸⁸ yet courts have not had difficulty in affording an alternate remedy to a plaintiff in suits against judges who are *immune* from suits for money damages for acts performed in their judicial capacity. For almost 400 years the doctrine of judicial immunity has been part of the common law.²⁸⁹ American judges have always been protected by immunity, provided that their acts are judicial "and within the very general scope of their jurisdiction."²⁹⁰ The immunity attaches even though the official act complained of was done in bad faith, maliciously or corruptly.²⁹¹ The cause of action against the judge existed, but he was immune from suit for money damages. Nevertheless, in the seventeenth and eighteenth centuries in England, the King's Bench issued prerogative writs to impose collateral control on judges of rival courts,²⁹² and the United States Federal Circuits have held that judicial immunity does not bar injunctive relief against a judge for a judicial act within his jurisdiction.²⁹³

In *Pulliam v. Allen*,²⁹⁴ the United States Supreme Court directly addressed the doctrine of judicial immunity under 42 U.S.C. section 1983 of the Civil Rights Act of 1871.²⁹⁵ A Virginia magistrate imposed bail on persons

288. Occasional references have been made, e.g., by Justice White in *Gertz* and Justice O'Connor in *Hepps*. See *supra* notes 91-92, 229 and accompanying text.

289. See 5 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 159-60 (3d ed. 1945).

290. PROSSER AND KEATON, *supra* note 8, at 1057; see, e.g., *Stump v. Sparkman*, 435 U.S. 349 (1978), *reh'g denied*, 436 U.S. 951 (1978) (judge who refused to give a hearing to a 15 year-old girl before ordering her sterilized held to be absolutely immune from suit for money damages pursuant to 42 U.S.C. § 1983, because his order was a "judicial act"). But see *Zarcone v. Perry*, 572 F.2d 52 (2d Cir. 1978) (judge who brought coffee vendor before him in handcuffs because coffee tasted bad, found liable for compensatory and punitive damages because his act was totally non-judicial). See generally Black, *Stump v. Sparkman and the History of Judicial Immunity*, 1980 DUKE L.J. 879.

291. See *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1872); *Scott v. Stansfield*, L.R. 3 Ex. 220, 223 (1868).

292. See 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 226-31 (7th ed. 1956).

293. See *In re Justices of Puerto Rico*, 695 F.2d 17, 25-26 (1st Cir. 1982); *Heimbach v. Lyons*, 597 F.2d 344, 347 (2d Cir. 1979); *Timmerman v. Brown*, 528 F.2d 811, 812 (4th Cir. 1975); *WXYZ, Inc. v. Hand*, 658 F.2d 420, 423 (6th Cir. 1981); *Harris v. Harvey*, 605 F.2d 330 (7th Cir. 1979), *cert. denied*, 445 U.S. 938 (1980); *Koen v. Long*, 428 F.2d 876, 877 (8th Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); *Richardson v. Koshiba*, 693 F.2d 911 (9th Cir. 1982).

294. 466 U.S. 522 (1984).

295. Section 1983 of the Civil Rights Act states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at

arrested for non-jailable misdemeanors and incarcerated them if the bail was not met. The district court enjoined the practice and awarded attorney's fees against the magistrate under 42 U.S.C. section 1988.²⁹⁶ The Fourth Circuit affirmed.²⁹⁷ In a 5 to 4 decision, the United States Supreme Court affirmed and noted that there has never been a rule of absolute judicial immunity from all prospective relief and the absence of such absolute immunity has not had a "chilling effect on judicial independence."²⁹⁸ Noting that no United States Court of Appeals has ever barred injunctive relief,²⁹⁹ the Court reiterated the requirements of equitable relief, "a showing of an inadequate remedy at law and of a serious risk of irreparable harm,"³⁰⁰ and noted that there is only minimal risk that judges will be harassed and constrained from acting independently as a result of the possibility of injunctive relief.³⁰¹ Holding that "judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in [his or] her jurisdiction,"³⁰² the Court rejected the magistrate's contention that the awarding of attorney's fees functionally was the same as awarding money damages³⁰³ and affirmed the award of legal fees. Justice Powell, in a vigorous dissent, in which Chief Justice Burger and Justices Rehnquist and O'Connor joined, decried the effect of the threat of burdensome litigation upon a judge's independence, "particularly in cases where the decision is likely to be unpopular,"³⁰⁴ and noted that the threat increases when the prevailing plaintiff may be entitled to attorney's fees.³⁰⁵ If attorney's fees awarded under section 1988 continue to escalate, the "chilling effect" upon judicial independence may indeed become a reality.

Just as injunctive relief has been awarded against judges enjoying immunity, so too equitable relief should be made available to individuals defamed by a media defendant enjoying the *immunity* afforded by *New York Times*. Any plaintiff, regardless of his classification as a public official,

law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1871).

296. 42 U.S.C. § 1988 reads in part as follows: "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

297. *Allen v. Burke*, 690 F.2d 376 (4th Cir. 1982), *aff'd*, 466 U.S. 522 (1984).

298. *Pulliam*; 466 U.S. at 537.

299. *Id.*

300. *Id.* (citing *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959)).

301. *Pulliam*, 466 U.S. at 537.

302. *Id.* at 541-42.

303. *Id.* at 543.

304. *Id.* at 554 (Powell, J., dissenting).

305. *Id.* at 555-57. Note also that hourly rates of \$95 to \$105 (total fee, \$79,312) for second and third year associates under § 1988 have been upheld. *See Blum v. Stenson*, 465 U.S. 886 (1984). State judges have been found liable for substantial attorney's fees. *See Morrison v. Ayoob*, No. 78-267 (W.D. Pa. 1983), *aff'd*, 727 F.2d 1100 (3d Cir.), *cert. denied*, 466 U.S. 973 (1984).

public figure or private individual, should be able to elect a judicial declaratory judgment of the falsity of the publication in lieu of money damages. At the trial level, let the burden of proof remain upon the plaintiff as to defamatory character and falsity of some material fact which he would have to prove with clear and convincing evidence. In the interests of encouraging full public debate, the media defendant would still be provided with a slight advantage. There is no reason to return to the strict liability standard of the common law of defamation which actually was a contradiction to the traditional tort rules as to burden of proof.³⁰⁶ In light of the strong dissent in *Pulliam*, attorney's fees should be borne by each party since a sizeable award for legal fees may be construed as the equivalent of an award for money damages.³⁰⁷ All of the media defendant's constitutional rights would be preserved in any action for money damages, but such rights would in fact be irrelevant in an action for a judicial declaration of falsity.

The judicial declaratory judgment, favored by the Schumer Bill as a remedy to be elected in defamation actions, has been a recognized action for many years.³⁰⁸ While there has been controversy over making this remedy available concurrently with money damages in the same action, there is a strong tradition allowing the plaintiff to choose the time and place of his action, and since the choice of the declaratory judgment remedy would result in a final judgment as to the truth or falsity of the publication, there would be no reason for a plaintiff to elect the remedy should he feel he has at hand the "clear and convincing" evidence necessary to prove *New York Times* malice unless he wishes to avoid the time and expense of a long litigation. Rule 57 of the Federal Rules of Civil Procedure provides, in pertinent part: "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."³⁰⁹ The authorities in general argue that the availability of money damages is no bar to an action for a declaratory judgment.³¹⁰ Even though a court may, in its discretion,³¹¹

306. See *supra* notes 10-13 and accompanying text.

307. The "Schumer Bill" would allow attorney's fees to be awarded to the prevailing party. See *supra* note 260. Other proponents of the availability of the judicial declaration of falsity would also award legal fees. See, e.g., Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. REV. 1, 36 (1983). An award of fees has also been proposed as an element of a possible remedy to be afforded an individual defamed by one possessing "executive privilege." See Becht, *The Absolute Privilege of the Executive in Defamation*, 15 VAND. L. REV. 1127, 1170 (1962).

Legal fees incurred in an action for a declaration of falsity would generally be very significantly lower than in an action for money damages. However, it is conceivable that expenses incurred in acquiring evidence on the issue of falsity may, in some instances, be quite high.

308. See, e.g., F. JAMES & G. HAZARD, *CIVIL PROCEDURE* 28-32 (2d ed. 1977).

309. FED. R. CIV. P. 57.

310. See, e.g., C. WRIGHT, A. MILLER & M. KANE, *supra* note 272, § 2758, at

refuse to allow an action for a declaratory judgment, especially when a better or more effective remedy is available,³¹² in a defamation action against a media defendant, money damages involving expensive and exhaustive litigation requiring the frequently impossible burden of proving *New York Times* malice with clear and convincing evidence cannot usually be deemed a "better or more effective" remedy than the relatively simple, inexpensive declaration of falsity which goes to the very essence of the cause of action — the publication of a falsity about the plaintiff which harmed his reputation.

Despite the occasional suggestion that a judicial declaratory judgment of falsity should be available as a vindication remedy,³¹³ a declaratory judgment has not been an available remedy for plaintiffs in defamation actions, although oddly enough, in the late nineteenth and early twentieth centuries a similar type of relief was available as a common form of action in the Justice of the Peace Courts in certain Arkansas counties.³¹⁴ A person who claimed to be defamed would file a "lie bill" against the alleged defamer. There would follow a trial³¹⁵ on the issues of falsity and defamation, and if

621 ("Existence of another adequate remedy does not bar a declaratory judgment."); see also F. JAMES & G. HAZARD, *supra* note 308, at 31 ("[W]here the issues tendered for declaratory judgment will be settled in that suit, there seems to be little if any justification in the ordinary case for letting the putative wrongdoer deprive the injured party of his traditional tactical advantage by bringing an independent action for declaratory judgment."); see also Powell v. McCormack, 395 U.S. 486 (1969); United Public Workers of America v. Mitchell, 330 U.S. 75 (1947); Hanes Corp. v. Millard, 531 F.2d 585 (D.C. Cir. 1976).

311. See *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 494, *reh'g denied*, 317 U.S. 704 (1942).

312. See C. WRIGHT, A. MILLER & M. KANE, *supra* note 272, § 2758, at 623; see also *City of Highland Park v. Train*, 519 F.2d 681 (7th Cir. 1975), *cert. denied*, 424 U.S. 927 (1976).

313. See, e.g., Note, *An Alternative to the General-Damage Award for Defamation*, 20 STAN. L. REV. 504 (1968); Hulme, *Vindicating Reputation: An Alternative to Damages as a Remedy for Defamation*, 30 AM. U.L. REV. 375 (1981); Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. REV. 1 (1983).

314. See Leflar, *Legal Remedies for Defamation*, 6 ARK. L. REV. 423, 423-25 (1952).

315. There is an issue as to whether a declaratory judgment is legal or equitable, *i.e.*, whether a jury trial is a matter of right under the seventh amendment. In 1791, declaratory judgments were unknown so resort to history cannot resolve the issue.

[T]he solution that has been worked out to this problem is to look to the kind of action in which the issue involved would have been decided if there were no declaratory judgment procedure and to see whether the issue would have been triable of right to a jury in that action. If there would have been a right to jury trial on the issue if it had arisen in an action other than for a declaratory judgment, it must be tried to a jury on demand in the declaratory action. There is no right to jury trial if, absent the declaratory procedure, the issue would have arisen in a proceeding in equity or in admiralty.

C. WRIGHT, A. MILLER & M. KANE, *supra* note 272, § 2769, at 758-60.

the plaintiff prevailed, the judgment would be rendered in the nature of a declaratory judgment, in accordance with which the defendant would be directed to sign a statement that he had lied about the plaintiff. The origins of the lie bill and how widely it was used are obscure.³¹⁶ The procedure was uncomplicated, the time and expense of prolonged discovery and litigation was avoided, and the plaintiff's reputation was restored in the eyes of the community.

Some courts have already afforded the allegedly defamed plaintiff the opportunity of having a judicial determination of the defamatory nature and falsity of the objectionable publication by instructing the jury to answer questions seriatim as part of the deliberation process, but this opportunity was given the plaintiff only at the very end of the lengthy litigation process. In Israeli Minister Ariel Sharon's suit against *Time Magazine*,³¹⁷ the district court judge in a 65-page charge to the jury provided the jury with a verdict sheet containing questions to be answered. The jury was first to determine whether the plaintiff had proved by a preponderance of the evidence whether the disputed paragraph³¹⁸ when read in context defamed him.³¹⁹ Secondary questions concerned whether Sharon "consciously intended" or "actively encouraged" the Phalangists to murder non-combatants.³²⁰ The jury decided that *Time* had defamed Sharon and that the paragraph meant that he had "consciously intended" the acts of revenge.³²¹ The Sharon jury then considered whether "any actionable defamatory statement contained in the challenged paragraph was false in some material respect."³²² Specifically, the question to be answered was "whether the plaintiff has proved by clear and convincing evidence the falsity of the facts in the paragraph,"³²³ "that he did not engage in any discussion with the Phalangists prior to the massacre

316. See Leflar, *supra* note 314, at 423-25.

317. See generally Sharon v. Time, Inc., 575 F. Supp. 1162 (S.D.N.Y. 1983).

318. The paragraph read:

One section of the report, known as Appendix B (the 'Kahan report,' the result of the Israeli government's investigation into the massacres in the Palestinian camps), was not published at all, mainly for security reasons. That section contains the names of several intelligence agents referred to elsewhere in the report. Time has learned that it also contains further details about Sharon's visit to the Gemayel family on the day after Bashir Gemayel's assassination. Sharon reportedly told the Gemayels that the Israeli army would be moving into West Beirut and that he expected the Christian forces to go into the Palestinian refugee camps. Sharon also reportedly discussed with the Gemayels the need for the Phalangists to take revenge for the assassination of Bashir, but the details of the conversation are not known.

N.Y. Times, Jan. 25, 1985, at B4, col. 3.

319. See Charge to Jury by Judge Abraham D. Sofaer, Tr., at 4087-88.

320. *Id.* at 4088.

321. N.Y. Times, Jan. 17, 1985, at B7, col. 1.

322. Charge to Jury, *supra* note 319, Tr., at 4031.

323. *Id.* at 4088.

of the need to take revenge for the death of Bashir Gemayel.³²⁴ The jury answered the question in the affirmative.³²⁵ Only after determination as to defamatory meaning and falsity was the jury to consider actual malice³²⁶ and damages. The jury found that *Time* did not publish the false and defamatory paragraph with "serious doubts as to its truth,"³²⁷ i.e., with *New York Times* malice. *Time* magazine issued a statement that "*Time* has won it."³²⁸ Minister Sharon declared, "We came here to prove that *Time* Magazine lied . . . (a)nd we managed to prove that *Time* Magazine did lie."³²⁹

The trial judge effectively provided Minister Sharon with a declaratory judgment of falsity, but while providing the defamed plaintiff with procedural help to vindicate his reputation, such an approach, however, falls far short of providing a simple effective remedy as an alternative to money damages. Plaintiff Sharon still had initially to sue for money damages, had to entail the great expense of discovery and litigation, and remained open to an adverse summary judgment prior to trial because of an inability, as a matter of law, to establish a *prima facie* case on all the elements necessary to be proven at trial.³³⁰

What most defamed plaintiffs really want is an opportunity to restore their reputations in the eyes of the community. After a media defendant has refused to retract or to apologize in a manner acceptable to the plaintiff, our current law of defamation leaves the individual no choice but to follow the same arduous path as Minister Sharon. The only purpose of the judicial declaration of falsity would be to obtain public acknowledgment that a false statement has been made about the plaintiff by the defendant. The granting of the declaratory judgment as a possible remedy is in accord with the very policy behind the use of such a procedure, as Professor Borchard, a draftsman of the Uniform Declaratory Judgments Act, long ago observed:

The two principal criteria guiding the policy in favor of rendering declaratory judgments are (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.³³¹

Federal courts, with the Federal Declaratory Judgment Act,³³² and all the states, with either the Uniform Declaratory Judgments Act³³³ or similar state

324. *Id.*

325. N.Y. Times, Jan. 19, 1985, at A1, col. 4.

326. Charge to Jury, *supra* note 319, Tr., at 4088-89.

327. N.Y. Times, Jan. 25, 1985, at A1, col. 2.

328. *Id.* at B4, col. 1.

329. *Id.* at A1, col. 2.

330. See *Wasserman v. Time, Inc.*, 424 F.2d 920, 921-22 (D.C. Cir.), *cert. denied*, 398 U.S. 940 (1970).

331. E. BORCHARD, *DECLARATORY JUDGMENTS* 299 (2d ed. 1941).

332. 28 U.S.C. § 2201 (1982 & Supp. 1986); *Id.* at § 2201 (1982).

333. See 12 U.L.A. 85 (Supp. 1986). The Uniform Act has been adopted by forty states, the United States Virgin Islands and Puerto Rico.

statutes,³³⁴ have existing declaratory judgment legislation. Making the remedy available to a media-defamed plaintiff would effectively eliminate the relevance of the plaintiff's status as a public official, public figure, or private person as well as the defendant's status as a member of the media whose first amendment rights could be infringed upon. Let the courts of the nation provide the plaintiff with what he desires most—a restored reputation, something an action for money damages with its almost insurmountable hurdles does not provide.

VIII. CONCLUSION

In this Article, the effect of the United States Supreme Court decisions concerning media-defamed plaintiffs have been examined in light of the essence of defamation law — publication of falsity. In balancing the reputational interests of the individual against the constitutional guarantees of free speech and a free press, *New York Times Co. v. Sullivan* ignored the issue of falsity and, in its attempts to preserve wide-open debate on public issues, concentrated exclusively on the status of the plaintiff and the malice standard to be applied in any defamation action. In *St. Amant v. Thompson*, the barrier in the path of the defamed public official and, after *Curtis Publishing Co. v. Butts*, in the way of the public figure as well, was raised to an almost insurmountable height—leaving the plaintiff with no practical remedy by means of which his reputation could be effectively vindicated. *Gertz v. Robert Welch, Inc.* only added more confusion to the state of defamation law, as the Supreme Court in attempting to bring some relief to the media-defamed private person plaintiff, left open more new questions than it answered old ones.

Post-*Gertz* decisions tried to resolve some of the problems left open by *New York Times* and its progeny, but due to the Supreme Court's continued preoccupation with determining the applicable standard according to the plaintiff's status, little if any help was afforded the plaintiff, with the exception of *Herbert v. Lando* where it was held that in the pre-trial discovery process the plaintiff may inquire into the thought processes and editorial decisions of a media defendant. Even in those instances where the Supreme Court and circuit courts have addressed the aspect of the falsity of the publication, the public official and public figure received no relief since they

334. The remaining ten states have adopted statutes which are similar. See ALASKA STAT. § 22.05.010 (1982); CAL. CIV. PROC. CODE § 1060 (West 1982); CONN. GEN. STAT. ANN. § 52-29 (West 1960); HAW. REV. STAT. § 632-1 (1976); KAN. CIV. PROC. CODE ANN. § 60-1701 (Vernon 1983); KY. REV. STAT. ANN. §§ 418.040-.090 (Bobbs-Merrill 1972); MICH. COMP. LAWS ANN. § 24.264 (West 1981); MISS. R. CIV. P. 57 (1972); N.H. REV. STAT. ANN. § 491:22 (1983); N.Y. CIV. PRAC. L. & R. § 3001 (McKinney 1974).

continued to be restricted to only one remedy: money damages. The post-*Gertz* years also saw the development of and acceptance in some circuits of potentially threatening doctrines in defamation law, e.g., the libel-proof plaintiff doctrine, the incremental harm theory and the subsidiary libel doctrine. Only in *Philadelphia Newspapers, Inc. v. Hepps* did the United States Supreme Court squarely address the essence of the defamation action and provided a hint that a single, more effective remedy may be available to the media-defamed plaintiff.

The various means proposed in past years to ease the burden of the media defamed plaintiff and to assist him in obtaining what he most wants, a restored reputation, have not offered any alternative remedy. But, if the special constitutional protection enjoyed by the media is viewed as an "immunity," rather than as a "privilege," the underlying cause of action remains and the immunity only precludes an award of money damages. An alternative remedy is available: a declaratory judgment of falsity, by means of which any media-defamed plaintiff, who either cannot prove *New York Times* malice with clear and convincing evidence or who does not want to pursue such a course of action, may gain his end purpose in a defamation action: the restoration of the good name that was altered or besmirched. As Iago opined:

Good name in man and woman. . .
Is the immediate jewel of their souls:
Who steals my purse steals trash; . . .
But he that filches from me my good name
Robs me of that which not enriches him,
And makes me poor indeed.

"Othello," Act III, Scene 3.

