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## The Supreme Court's Limiting of First Amendment Protection for Defendants in Defamation Cases

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## COMMENT

# THE SUPREME COURT'S LIMITING OF FIRST AMENDMENT PROTECTION FOR DEFENDANTS IN DEFAMATION CASES

## INTRODUCTION

CBS broadcast a ninety-minute documentary on January 23, 1982, that charged General William C. Westmoreland, the American commander during the Vietnam War, and others with "a conspiracy, at the highest levels of American military intelligence, to suppress and alter critical intelligence on the enemy."<sup>1</sup> The program, entitled "The Uncounted Enemy: A Vietnam Deception," had interviews with several former military officers and intelligence analysts who said the command in Vietnam had deliberately understated the number of North Vietnamese infiltrating into South Vietnam. General Westmoreland felt the program had defamed him, and on September 13, 1982, he sued CBS for libel, seeking \$120 million in damages.<sup>2</sup> The suit was settled out of court just before it went to the jury.<sup>3</sup>

Traditionally, people who have been defamed have cherished both their good name and their right to free speech.<sup>4</sup> The Supreme Court has tried to balance these conflicting interests in libel cases involving the first amendment's<sup>5</sup> protection of freedom of the press. In 1964, the Court held that the first amendment "prohibits a public official from recovering

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1. Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 COLUM. L. REV. 603, 609 (1983).

2. *Id.* This action is but one in a growing number of libel suits with huge judgments and enormous costs. See *Tavoulareas v. Piro*, 759 F.2d 90 (D.C. Cir. 1985) (jury awarded the president of Mobil Oil over \$2 million for story by the *Washington Post* stating that he "set up his son" in a shipping management firm; defendant's motion for judgment n.o.v. granted; jury verdict reinstated); *Janklow v. Newsweek, Inc.*, 759 F.2d 644 (8th Cir. 1985) (\$10 million libel suit by South Dakota governor reinstated); *Pring v. Penthouse Int'l Inc.*, 695 F.2d 438 (10th Cir.), *cert. denied*, 462 U.S. 1132 (1982) (judgment in favor of Miss Wyoming reversed on appeal); *Burnett v. National Enquirer, Inc.*, 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983), *appeal dismissed*, 465 U.S. 1014 (1984).

3. *Atler, The General's Retreat*, NEWSWEEK, March 4, 1985, at 59.

4. Note, *Constitutional Law — First Amendment — Libel, United States Supreme Court Reaffirms Its Decision in Gertz v. Robert Welch, Inc. to Emphasize the Individual Injured in a Libel Action Rather Than the Event Reported*, 10 CREIGHTON L. REV. 351, 351 (1976).

5. The first amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

damages for a defamatory falsehood relating to his official conduct in office 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."<sup>6</sup> The Court extended the actual malice standard to include public figures three years later in *Curtis Publishing Co. v. Butts*<sup>7</sup> and *Associated Press v. Walker*.<sup>8</sup> In 1971, the Court extended the use of the actual malice standard to include all matters of general or public interest in *Rosenbloom v. Metromedia, Inc.*<sup>9</sup> The Court began limiting the protections afforded defendants in defamation actions three years later in *Gertz v. Robert Welch, Inc.*<sup>10</sup>

Part I of this comment surveys libel law prior to the *New York Times Co. v. Sullivan*<sup>11</sup> decision in 1964. Part II reviews the *New York Times* case. Part III examines the extension of the actual malice standard to public figures. Part IV looks at the actual malice standard. Part V analyzes the limitations the Supreme Court has placed on defendants in defamation actions.

## I. HISTORY

### A. Defamation at Common Law

The common law tort of defamation has been defined as "the unconsented to and unprivileged intentional communication to a third person of a false statement about the plaintiff which tends to harm his reputation in the eyes of the community."<sup>12</sup> The plaintiff's prima facie case consists of proof that "the defendant intentionally communicated to a third person a statement about the plaintiff which tended to expose the plaintiff of 'public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace.'"<sup>13</sup> Defamation is a strict liability tort. Therefore, the only intent that is required is that the defendant intended to communicate something to a third person; it does not matter if the defendant did not intend to defame or harm the plaintiff.<sup>14</sup>

Common law defamation is made up of the twin torts of libel and slan-

6. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

7. 388 U.S. 130 (1967).

8. *Id.*

9. 403 U.S. 29 (1971).

10. 418 U.S. 323 (1974).

11. 376 U.S. 254 (1964).

12. Yasser, *Defamation as a Constitutional Tort: With Actual Malice for All*, 12 TULSA L.J. 601, 603 (1977). Cf. W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 779 (5th ed. 1984) [hereinafter cited as PROSSER & KEETON] ("A defamatory communication usually has been defined as one which tends to hold the plaintiff up to hatred, contempt or ridicule, or to cause him to be shunned or avoided.").

13. Yasser, *supra* note 12, at 603 (quoting *Kimmerle v. New York Evening Journal, Inc.*, 262 N.Y. 99, 102, 186 N.E. 217, 218 (1933)).

14. *Id.* at 604.

der.<sup>15</sup> Generally, libel is written or printed defamation which is subject to wide distribution while slander is oral defamation which is not subject to wide distribution.<sup>16</sup> Libel is actionable per se if it is clearly defamatory, with no need to resort to extrinsic facts to show the defamatory meaning.<sup>17</sup> Slander is actionable per se only if it says the plaintiff (1) committed a crime which involves moral turpitude, (2) has venereal or some equally loathsome disease, (3) is unfit or is not to be trusted in his profession, or (4) is not chaste.<sup>18</sup> A libel is actionable per quod if the defamatory statement is innocent on its face, but takes on a defamatory meaning when illuminated by proof of extrinsic facts.<sup>19</sup>

## B. *Defenses*

Once the plaintiff has made out a prima facie case, the defendant may escape liability by establishing that the communication was either absolutely or conditionally privileged.<sup>20</sup> It is a well-settled common law rule that truth is a defense. It is immaterial that the defendant published the facts for no good reason or the worst possible motive, or that he did not even believe they were true at the time of publication.<sup>21</sup> However, the defendant has the burden of proving that the statement was completely true. Belief as to truth, however honest it may be, is no justification for defamation. Nor may the defendant avoid liability by proving that the statement was partially true, or, if the charge is one of persistent misconduct, by showing that it was true in a single instance.<sup>22</sup>

Privilege is also a complete defense if established by the defendant.<sup>23</sup> "Conduct which may otherwise impose liability is excusable in cases where the defendant is acting in furtherance of some" important social interest because it is more desirable in some situations to protect the defendant and allow the plaintiff to go unprotected.<sup>24</sup> The defendant is to-

15. PROSSER & KEETON, *supra* note 12, § 111, at 771.

16. Yasser, *supra* note 12, at 604-05. One court has created a third category for electronically broadcast defamations called "defamacast." Prosser criticized this categorization, calling it "a barbarous new word." *Id.* at 605 n.19; PROSSER & KEETON, *supra* note 12, § 112 at 787 (citing American Broadcasting-Paramount Theatres, Inc. v. Simpson, 106 Ga. App. 230, 126 S.E.2d 873 (1962)).

17. Yasser, *supra* note 12, at 605. If a libel is "actionable per se," general damage to reputation is presumed. *Id.*

18. *Id.* at 605; PROSSER & KEETON, *supra* note 12, § 112, at 788-93. Yasser supports the existence of a fifth, peculiarly American, category of imputations of communist affiliation. However, he cites no authority for this proposition. Yasser, *supra* note 12, at 605 n.22.

19. Yasser, *supra* note 12, at 605; see also PROSSER & KEETON, *supra* note 12, § 112 at 795. "Actionable per quod" means that there is no presumption of general damage to reputation. The plaintiff must plead and prove special damages.

20. Yasser, *supra* note 12, at 606; PROSSER & KEETON, *supra* note 12, §§ 114-116.

21. PROSSER & KEETON, *supra* note 12, § 116.

22. *Id.*

23. Yasser, *supra* note 12, at 607.

24. *Id.*

tally immune from liability if an absolute privilege exists.<sup>25</sup> This privilege is confined to the few situations where there is an obvious policy in favor of permitting freedom of expression without regard to the defendant's motives.<sup>26</sup> Statements entitled to absolute immunity are (1) those made in the course of legislative proceedings, (2) executive communications made in the discharge of official duties, (3) those made in the course of judicial proceedings, and (4) those uttered by political candidates who have been granted equal time under the Federal Communications Act.<sup>27</sup>

The more common situation involves the claim of a qualified privilege. There was a general recognition in the common law in defamation actions of a qualified privilege called "fair comment" upon the conduct of public officers and public employees.<sup>28</sup> This privilege extended to publication of matters that were of general concern to the public.<sup>29</sup> Such items which have been held to be matters of a legitimate concern to the public include "the management of public institutions, the conduct of private enterprise affecting the general community, and the performance of those who submit their talents to the public for approval."<sup>30</sup>

Although the existence of this privilege was undisputed, there was disagreement whether the privilege was restricted to statements expressing only "comment" or opinion, or whether it included misstatements of fact.<sup>31</sup> The majority view, adhered to by approximately three-fourths of the states, was that the privilege of public discussion was limited to opinion, comment, or criticism, and did not extend to any factual misstatement.<sup>32</sup> The reason generally given in support of the majority view is that

the danger that honorable and worthy men may be driven from politics and public service by allowing too great latitude in attacks upon their characters outweighs any benefit that might occasionally accrue to the public from charges of corruption that are true in fact, but are incapable of legal proof.<sup>33</sup>

A substantial minority of jurisdictions supported the view that even false statements of fact are privileged, if they were made for the public benefit

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25. *Id.* This interest is so important that the court is willing to immunize the defendant from liability for false statements without regard to purpose, motive, or reasonableness.

26. PROSSER & KEETON, *supra* note 12, § 114, at 816; Yasser, *supra* note 12, at 607.

27. PROSSER & KEETON, *supra* note 12, § 114; *see also* Yasser, *supra* note 12, at 607 and cases cited therein.

28. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 118, at 819 (4th ed. 1971); *see also* Note, *Fair Comment*, 62 HARV. L. REV. 1207 (1949).

29. W. PROSSER, *supra* note 28, § 118, at 819.

30. Note, *The Scope of First Amendment Protection for Good-Faith Defamatory Error*, 75 YALE L.J. 642, 645 (1966).

31. W. PROSSER, *supra* note 28, § 118, at 819.

32. *Id.* *See also* Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875, 896 n.102 (1949) (citing cases from twenty-six jurisdictions that adhere to this view).

33. *Post Publishing Co. v. Hallam*, 59 F. 530, 541 (6th Cir. 1893).

with an honest belief in their truth.<sup>34</sup> In supporting this view, the Kansas Supreme Court said "that here at least men of unimpeachable character from all political parties continually present themselves as candidates in sufficient numbers to fill the public offices and manage the public institutions."<sup>35</sup> Under either the majority or minority position, it was agreed that the privilege extended only to matters bearing upon the official conduct or fitness of an officer or candidate, and not to the purely private life of the person.<sup>36</sup>

Prior to 1964, freedom of speech and of the press in defamation cases were occasionally mentioned as an argument in support of a decision at common law that the particular conduct of the defendant was privileged.<sup>37</sup> However, the Supreme Court had consistently refused to give first amendment protection to any libelous material.<sup>38</sup> Then in 1964, the Supreme Court determined "for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct."<sup>39</sup>

## II. THE NEW YORK TIMES CASE

The Supreme Court said that it reached its decision in *New York Times Co. v. Sullivan* "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."<sup>40</sup> Among those attacks on public officials taking place at this time were those by the supporters of the civil rights movement in the South, where they encountered the greatest opposition to the civil rights movement. "Nowhere, with the possible exception of Mississippi, has that opposition been more fierce and tenacious than in Alabama."<sup>41</sup>

The publication in *New York Times Co. v. Sullivan* was a full-page advertisement that appeared in the *New York Times* on March 29, 1960. The advertisement, entitled "Heed Their Rising Voices,"<sup>42</sup> was placed by supporters of the civil rights movement calling themselves the "Commit-

34. W. PROSSER, *supra* note 28, § 118, at 820. The leading case on this point is *Coleman v. MacLennan*, 78 Kan. 711, 728-29, 98 P. 281, 287 (1908).

35. *Coleman*, 78 Kan. at 734, 98 P. at 289.

36. W. PROSSER, *supra* note 28, § 118, at 822.

37. *Id.* at 819.

38. See, e.g., *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

39. *New York Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964).

40. *Id.* at 270.

41. *Pierce, The Anatomy of an Historic Decision: New York Times Co. v. Sullivan*, 43 N.C.L. REV. 315, 317 (1965). For a discussion of the events leading up to the case, see *id.* at 316-18.

42. The title, "Heed Their Rising Voices," was taken from a *New York Times* editorial. Kalven,

tee to Defend Martin Luther King and the Struggle for Freedom in the South"<sup>43</sup> and it spoke to mistreatment of civil rights workers by the Alabama Police. Of the ten paragraphs of text in the advertisement, the third and a portion of the sixth were the basis for the suit. They read as follows:

In Montgomery, Alabama, after students sang "My Country, 'Tis of Thee" on the State Capitol steps, their leaders were expelled from the school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.

Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for "speeding," "loitering" and similar "offenses." And now they have charged him with "perjury"—a *felony* under which they could imprison him for *ten years*. . . .<sup>44</sup>

Plaintiff L.B. Sullivan, a city commissioner for Montgomery in charge of the police department, was not mentioned in the advertisement by name.<sup>45</sup> However, he contended that the word "police" in the third paragraph referred to him as the commissioner who supervised the police department, so that he was accused of "ringing" the campus with police. He also alleged that the padlocking of the dining hall in order to starve the students into submission<sup>46</sup> would be imputed to the police, and hence to him. In the sixth paragraph, he contended the statement, "They have arrested [Dr. King] seven times," would be read as referring to him since police ordinarily make arrests. He also contended that the "They" who did the arresting would be equated with the "They" who committed the other described acts and with the "Southern violators." Thus, he claimed that the paragraph would be read as accusing the Montgomery police, and hence him, of answering Dr. King's protest with "intimidation and violence," bombing his home, assaulting his person, and charging him with perjury.<sup>47</sup>

Although a demonstration had taken place on the steps of the state

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*The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 194.

43. The text of the advertisement concluded with an appeal for money for three purposes: support for the student movement, "the struggle for the right-to-vote," and the legal defense of Dr. Martin Luther King, Jr., the leader to the movement, who had recently been indicted for perjury. *New York Times*, 376 U.S. at 257.

44. *Id.* at 257-58; see also *id.* app.

45. *New York Times*, 376 U.S. at 258.

46. Sullivan did not contend the charge of expelling the students was applicable to him since that was the responsibility of the State Department of Education. *Id.* at 258 n.2.

47. *Id.* at 258.

capitol, some of the statements contained in the two paragraphs were not accurate descriptions of the events that occurred in Montgomery.<sup>48</sup>

The trial judge instructed the jury that the statements in the advertisement were "libelous per se" and were not privileged, so that the defendants would be liable if the jury found that they had published the advertisement and that the statements were made "of and concerning" the plaintiff.<sup>49</sup> The jury so found, and awarded Sullivan \$500,000,<sup>50</sup> the full amount claimed, and the Supreme Court of Alabama affirmed the decision.<sup>51</sup>

The United States Supreme Court granted certiorari<sup>52</sup> and reversed the judgment on the ground that "the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct."<sup>53</sup> The Court held that the Constitution guarantees

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.<sup>54</sup>

In *Garrison v. Louisiana*,<sup>55</sup> decided just eight months after *New York Times*, the Supreme Court held that the *New York Times* rule limits state power to impose criminal sanctions for criticism of the official conduct of public officials.<sup>56</sup> In that case, the Orleans parish district attorney attributed a large backlog of pending criminal cases to the "inefficiency, laziness, and excessive vacations" of eight judges of the Criminal District Court of the Parish.<sup>57</sup>

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48. (1) The students sang the National Anthem, not "My Country 'Tis of Thee." (2) Nine students were expelled. However, the expulsion was for demanding service at a lunch counter in the Montgomery County Courthouse, not for leading the demonstration. (3) Most, but not all, of the student body protested the expulsion. (4) They protested by boycotting classes on a single day, not by refusing to register. Virtually all of the students registered for the ensuing semester. (5) The dining hall was not padlocked, and the only students who may have been banned from eating there were those without the proper meal ticket. (6) The police did not ring the campus in connection with the demonstration. However, they were deployed near the campus on three occasions. (7) Dr. King had only been arrested four times. (8) The allegation that Dr. King had been assaulted was unsubstantiated. See *New York Times*, 376 U.S. at 258-59; Kalven, *supra* note 42, at 199.

49. *New York Times*, 376 U.S. at 262.

50. *Id.* at 256.

51. *New York Times Co. v. Sullivan*, 273 Ala. 656, 144 So. 2d 25 (1962).

52. *New York Times Co. v. Sullivan*, 371 U.S. 946 (1963).

53. *New York Times*, 376 U.S. at 264.

54. *Id.* at 279-80.

55. 379 U.S. 64 (1964).

56. *Id.* at 67.

57. *Id.* at 66.



A. *Public Official*

The offending publication must specifically refer to the plaintiff. However, it is not necessary that the plaintiff's name appear in the publication, so long as it can reasonably be read as referring to the plaintiff, either by name or by official position.<sup>58</sup> The two paragraphs in the *New York Times* advertisement contained no reference to Sullivan, either by name or position. Although Sullivan argued that the reference to him "is clear from the ad,"<sup>59</sup> a number of the statements he relied on for his claim did not concern the police.<sup>60</sup> The Court said the two statements which did concern the police<sup>61</sup> "did not on their face make even an oblique reference to respondent as an individual."<sup>62</sup> Therefore, the Court held that the Constitution will not support "an otherwise impersonal attack on governmental operations [as] a libel of an official responsible for those operations."<sup>63</sup>

Although the publication must refer to the plaintiff, it is neither necessary that every recipient of the publication recognize him,<sup>64</sup> nor that the work be one of truth. Fictionalized accounts may provide a basis for a claim that the statement is "of and concerning" the plaintiff.<sup>65</sup> However, the burden of proof is substantially greater where a work of fiction is at issue.<sup>66</sup> One court said that for a defamatory statement made about a fictional character to be actionable, "the description of the fictional character must be so closely akin to the real person claiming to be defamed that a reader of the book, knowing the real person, would have no difficulty linking the two."<sup>67</sup>

Although the holding of *New York Times* was limited to public officials, the Court specifically declined to determine "how far down into the lower ranks of government employees the 'public official' designation would extend. . . , or otherwise to specify categories of persons who would

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58. 1 A. HANSON, *LIBEL AND RELATED TORTS* ¶31 (1969).

59. *Id.*

60. *Id.* at 289.

61. Those statements were that "truckloads of police . . . ringed the Alabama State College Campus" and that Dr. King had been "arrested . . . seven times." *Id.* at 257-58, 289.

62. *Id.* at 289.

63. *Id.* at 292.

64. *Fetler v. Houghton Mifflin Co.*, 364 F.2d 650, 651 (2d Cir. 1966) (plaintiff was deprived of the opportunity to prove to the jury that the alleged libel was of and concerning him); see also *Mullenmeister v. Snap-On Tools Corp.*, 587 F. Supp. 868, 873 (S.D.N.Y. 1984).

65. *Fetler*, 364 F.2d 650 (2d Cir. 1966) (the plaintiff alleged that the libel appeared in the portrayal of the chief character in a novel); see also *Geisler v. Petrocelli*, 616 F.2d 636 (2d Cir. 1980) (plaintiff is entitled to present evidence to the jury to determine whether the character in a work of fiction is "of and concerning" him); *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29 (1979) (the fact that the book is labeled as fiction did not bar a claim of libel).

66. *Fetler*, 364 F.2d at 653 (plaintiff's burden "is not a light one"); see also *Geister*, 616 F.2d at 639 (quoting *Fetler*).

67. *Springer v. Viking Press*, 90 A.D.2d 315, 320, 457 N.Y.S.2d 246, 249 (1982).

or would not be included.”<sup>68</sup> Since that time, courts have been struggling to determine who is a “public official” for purposes of the *New York Times* rule.

In *Rosenblatt v. Baer*,<sup>69</sup> a former recreation area supervisor brought suit against a newspaper columnist whose article concerned fiscal management of the area, but did not mention the plaintiff by name. He argued the article, which asked “What happened to all the money last year? and every other year?” and which could be read to imply speculation, referred specifically to him as the “man in charge.” However, the Court said the article could also be read as praise for the present administration.<sup>70</sup>

In attempting to help clarify the *New York Times* rule, the Court said that the designation of public official “applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.”<sup>71</sup> The Court went on to stress the need for an independent interest in the qualifications and performance of the person, beyond the general interest in the qualifications and performance of all employees. “The employee’s position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.”<sup>72</sup>

However, the protection of public official status is not limited to present public officials. Because a person who is defamed is a former public official does not deprive him of the protection of the *New York Times* rule.<sup>73</sup> This is another issue that the Supreme Court has not addressed directly. In *Rosenblatt*, the Court did not address the issue because the plaintiff’s theory was that “his role in the management of the Area was so prominent and important that the public regarded him as the man responsible for its operation. . . .”<sup>74</sup> The Court found that the public was still interested in the management of the area, and that the article, if it referred to the plaintiff, referred to the performance of his duty as a county employee.<sup>75</sup> However, the Court went on to state that there may be occasions where “a person is so far removed from a former position of authority that comment on the manner in which he performed his re-

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68. *New York Times*, 376 U.S. at 283 n.23.

69. 383 U.S. 75 (1966).

70. *Id.* at 79. The trial in *Rosenblatt v. Baer* took place before *New York Times Co. v. Sullivan* was decided. Therefore, the Supreme Court remanded the case to the New Hampshire Supreme Court for a determination of whether the plaintiff was a public official. *Id.* at 88.

71. *Id.* at 85.

72. *Id.* at 87 n.13.

73. *Id.* at 87 n.14.

74. *Id.* at 87.

75. *Id.* at 87 n.14.

sponsibilities no longer has the interest necessary to justify the *New York Times* rule."<sup>76</sup>

Just how "far removed" has yet to be determined. How long ago the person was a public official is balanced with the type of alleged defamation. In *Hart v. Playboy Enterprises*,<sup>77</sup> the plaintiff, a former federal narcotics officer, was a public official for the purposes of a libel action against a magazine concerning his misconduct, even though six years had elapsed between the termination of his employment and the publication of the article. The plaintiff, relying on *Wolston v. Reader's Digest Association*,<sup>78</sup> argued he was no longer a public official. The court distinguished *Wolston* on the grounds that (1) the case involved a public figure, not a public official and (2) the sixteen year period which had elapsed in *Wolston* was significantly longer than the six years here.<sup>79</sup> Almost thirty years had passed between the plaintiff's employment with the House Committee on Un-American Activities and the publication of defendant's book in *Stripling v. Literary Guild*.<sup>80</sup> Stripling, who was Secretary and the Chief Investigator of the Committee, argued that the passage of time had removed him from public official status. The court, noting that the public controversy over the activities in which the plaintiff participated had continued for thirty years and showed no signs of ending, said that "[a]s long as the public interest in free and robust debate [of those times] remains strong, the constitutional protections . . . remain applicable."<sup>81</sup>

In *Hutchinson v. Proxmire*,<sup>82</sup> the Supreme Court said that although it had not defined the precise boundaries of when a person falls within the category of public official, "it cannot be thought to include all public employees, however."<sup>83</sup>

In determining if an individual is a public official, the Washington Supreme Court in *Clawson v. Longview Publishing Co.*,<sup>84</sup> said that one should look to the nature of the plaintiff's duties and functions and to the

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76. *Id.*

77. 5 MEDIA L. REP. (BNA) 1811 (D. Kan. 1979).

78. 443 U.S. 157 (1979) (plaintiff was no longer a public figure since there were 16 years between the events and publication).

79. *Hart*, 5 MEDIA L. REP. (BNA) at 1813 (Although the court reached the decision on the basis of the distinctions, it noted that Hart had continued to contest his discharge from employment by various appeals up until 13 months before the article was published.).

80. 5 MEDIA L. REP. (BNA) 1958, 1959 (W.D. Tex. 1979), *aff'd*, 636 F.2d 312 (5th Cir. 1981) (affirmed without a published opinion).

81. *Id.* at 1960.

82. 443 U.S. 111 (1976).

83. *Id.* at 119 n.8. The district court ruled that Hutchinson, who was involved in research for the federal government, was a public official. The court of appeals did not decide whether Hutchinson was a public official; therefore, the Supreme Court did not reach the public official issue. Instead, the case was decided on the issue of whether the plaintiff was a public figure.

84. 91 Wash. 2d 408, 589 P.2d 1223 (1979).

plaintiff's relationship to the public.<sup>85</sup> The court enunciated two variables to determine whether the plaintiff is a public official: "(1) the importance of the position held, and (2) the nexus between that position and the allegedly defamatory information—specifically, how closely the defamatory material bears upon fitness for office."<sup>86</sup> In *Clawson*, the administrator of a county motor pool brought a defamation action when the local newspaper reported that he had towed the automobile belonging to the sheriff's son to the county garage and had repaired it on county time. The court held the plaintiff was a public official. Although the position held was near the bottom of those who could be considered "public official" status in the sense of the "actual malice" standard, the nexus between the position and the alleged defamation could not have been closer since the allegations related directly to the plaintiff's job performance. The court held the nexus between the job and the alleged defamation bears heavily upon the "public official" determination.<sup>87</sup>

## B. Official Conduct

The Supreme Court also limited the *New York Times* rule to defamatory statements relating to the official conduct of the public official,<sup>88</sup> although the Court declined to determine the boundaries of official conduct.<sup>89</sup> Just eight months after the *New York Times* case, the Court said that official conduct included "anything which might touch on an official's fitness for office. . . ."<sup>90</sup>

In 1971, in *Monitor Patriot Co. v. Roy*<sup>91</sup>, the Court concluded that the *New York Times* rule also applied to anything which might touch on a candidate's fitness for office.<sup>92</sup>

85. *Id.* at 416, 589 P.2d at 1227.

86. *Id.* at 417, 589 P.2d at 1228.

87. *Id.* In another case in which this test was applied, the Clerk of the Washington State Senate was an auxiliary security officer in the senate. He was a "public official" when accused of placing electronic surveillance equipment on the defendant's telephone in the senate because of the nexus between his actions and the alleged statement. *Martonik v. Durkan*, 23 Wash. App. 47, 596 P.2d 1054 (1979).

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

89. *Id.* at 283 n.23.

90. *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964).

91. 401 U.S. 265 (1971).

92. *Id.* at 274. The Supreme Court has not spoken on the issue of official conduct since the *Monitor Patriot* case, but one state court held that a newspaper was entitled to invoke the actual malice standard in a libel action by a mayor for an article erroneously stating that the mayor had been arrested and charged with criminal trespass and cattle rustling when in fact the warrant had charged him with trespassing on private property and shooting at cattle. The news that the mayor had violated state law, albeit in the conduct of his private affairs, bore close connection to his fitness for public office. *Savannah News-Press v. Whetsell*, 149 Ga. App. 233, 235, 254 S.E.2d 151, 152 (1979).

## III. PUBLIC FIGURES

A. *The Extension to Public Figures*

Three years after the *New York Times* decision, the Supreme Court, in the companion cases of *Curtis Publishing Co. v. Butts*<sup>93</sup> and *Associated Press v. Walker*,<sup>94</sup> extended the actual malice standard to include people who are "public figures." Thus, people who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large"<sup>95</sup> are entitled to constitutional protection in libel actions.

The *Butts* case stemmed from an article published in the *Saturday Evening Post* which accused the athletic director at the University of Georgia, Wally Butts,<sup>96</sup> of conspiring to "fix" a football game between Georgia and the University of Alabama. The article, entitled "The Story of a College Football Fix," claimed Butts had given the head coach at Alabama "'Georgia's plays, defensive patterns, all the significant secrets Georgia football team possessed.'" <sup>97</sup> Butts brought a diversity action in federal court in Georgia against Curtis Publishing Company, the publisher of the *Saturday Evening Post*, seeking \$5,000,000 in compensatory damages and \$5,000,000 in punitive damages. The only defense that Curtis Publishing Company raised was that of substantial truth.<sup>98</sup> The jury returned a verdict in favor of Butts for \$60,000 in general damages and \$3,000,000 in punitive damages. The trial court reduced the entire award to \$460,000.<sup>99</sup> The Court of Appeals for the Fifth Circuit affirmed the decision<sup>100</sup> and the Supreme Court granted certiorari<sup>101</sup> and affirmed.

The *Walker* case, the companion case to *Butts*, arose out of the distribution of a news dispatch giving an eyewitness account of events on the campus of the University of Mississippi on the night of September 30,

93. 388 U.S. 130 (1967).

94. *Id.*

95. *Id.* at 164 (Warren, C.J., concurring).

96. Although Georgia is a state university, Butts was employed by the Georgia Athletic Association, a private corporation, rather than the state itself. *Id.* at 135. The athletic association had been described as a body carrying on "a business comparable in all essentials to those usually conducted by private owners." *Allen v. Regents of the Univ. Sys. of Ga.*, 304 U.S. 439, 451 (1937).

97. *Butts*, 388 U.S. at 136. The article alleged that an insurance salesman, George Burnett, had accidentally overheard a telephone conversation between Butts and Alabama coach Paul Bryant one month prior to the game. Burnett said that "'Butts outlined Georgia's offensive plays. . . and told. . . how Georgia planned to defend. . . Butts mentioned both players and plays by name.'" *Id.* (omissions in original).

98. *Id.* at 137. The trial in Butts' case was completed before the decision in *New York Times* was handed down. However, no constitutional defenses were raised although Curtis' counsel were aware of the progress of the *New York Times* case, and although general constitutional defenses had been raised in a libel action against Curtis instituted by the Alabama coach, who was a state employee. *Id.*

99. *Id.* at 138.

100. *Curtis Publishing Co. v. Butts*, 351 F.2d 702 (5th Cir. 1965).

101. *Curtis Publishing Co. v. Butts*, 385 U.S. 811 (1966).

1962.<sup>102</sup> The dispatch said that Walker, who admitted he was present on the campus at the time, had taken command of the violent crowd and had personally led a charge against the federal marshalls who were there.<sup>103</sup> Walker sued the Associated Press in Texas state court, seeking a total of \$2,000,000 in compensatory and punitive damages. The Associated Press raised both the defense of truth and constitutional defenses.<sup>104</sup> The jury returned a verdict in favor of Walker for \$500,000 in compensatory damages and \$300,000 in punitive damages. The trial court refused to enter the punitive damage award because there was no evidence of actual malice.<sup>105</sup> Both parties appealed, and the Texas Court of Civil Appeals affirmed both the award of compensatory damages and the striking of punitive damages.<sup>106</sup> After the Texas Supreme Court denied a writ of error,<sup>107</sup> the Supreme Court granted certiorari<sup>108</sup> and reversed.

Although Justice Harlan announced the result in the *Butts* and *Walker* cases, a majority of the members of the Court agreed with Chief Justice Warren's concurring opinion that the actual malice standard applies to "public figures" as well as "public officials."<sup>109</sup> The Court reversed the decision in the *Walker* case because he "was a public man in whose public conduct society and the press had a legitimate and substantial interest," and the trial judge had ruled there was no showing of actual malice.<sup>110</sup> However, the court affirmed the decision in the *Butts* case because the jury was instructed to determine whether the defendant had acted with "wanton and reckless indifference."<sup>111</sup>

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102. On that night, a massive riot erupted as a consequence of federal efforts to enforce a court decree ordering the enrollment of James Meredith, the first black student at the university. *Butts*, 388 U.S. at 140; see also Yasser, *supra* note 12, at 611.

103. *Butts*, 388 U.S. at 140. Walker, a retired career soldier with the United States Army, who had been in command of the federal troops during the school segregation confrontation at Little Rock, Arkansas, was acutely interested in the issue of physical federal intervention. He had made a number of statements against such action which had received widespread publicity. *Id.*

104. Although Walker admitted his presence on the campus and conceded that he had spoken to a group of students, he claimed he had counseled restraint and peaceful protest, and that he had exercised no control over the crowd. *Id.* at 140-41.

105. *Id.* at 141-42.

106. *Associated Press v. Walker*, 393 S.W.2d 671 (Tex. Civ. App. 1965).

107. *Butts*, 388 U.S. at 142.

108. *Associated Press v. Walker*, 385 U.S. 812 (1966).

109. *Butts*, 388 U.S. at 162 (Warren, C.J., concurring). Justices Harlan, Clark, Stewart, and Fortas, comprising the plurality and applying the "highly unreasonable conduct" test voted for recovery in *Butts*, but not in *Walker*. Chief Justice Warren, applying the actual malice standard also voted for recovery in *Butts*, but not in *Walker*. Justices White and Brennan, also applying the actual malice standard, thought the standard had not been met in *Walker*. In *Butts*, these Justices voted to remand on the ground of an improper instruction though they, like Warren, thought that actual malice had been shown. Justices Douglas and Black thought the judgments in both cases were void because the "First Amendment was intended to leave the press free from the harassment of libel judgments." *Id.* at 172.

110. *Id.* at 165 (Warren, C.J., concurring).

111. *Id.* at 156.

B. *Matters of General or Public Interest*

In 1971, a plurality of the Supreme Court suggested that the actual malice standard be extended to include all matters of general and public interest. Justice Brennan, writing for a plurality of the Court in *Rosenbloom v. Metromedia, Inc.*,<sup>112</sup> said "[i]f a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved."<sup>113</sup>

In the *Rosenbloom* case, George A. Rosenbloom, a distributor of nudist magazines in the Philadelphia area in 1961, was arrested while making a delivery of nudist magazines to a local newstand. Three days later, the police obtained a search warrant, searched Rosenbloom's home and warehouse, and seized the books and magazines found there. Rosenbloom, who was out on bail when the search and seizure took place, surrendered to police and was arrested a second time. After the second arrest, a Metromedia, Inc. radio broadcast reported that obscene materials had been confiscated from Rosenbloom's home.<sup>114</sup>

Rosenbloom then sued various city and police officials, and several local news media, alleging that the magazines were not obscene. He asked for injunctive relief to prevent the police from further interfering with his business. Although Rosenbloom was not mentioned by name in a second series of broadcasts, Metromedia reported that the "girlie-book peddlers" of the "smut literature racket" were seeking relief. After Rosenbloom was acquitted of the criminal obscenity charges, he filed a libel suit in federal district court. He alleged that Metromedia's unqualified characterizations of his books as "obscenè" and of him and his business as "smut distributors" and "girlie-book peddlers," and its characterization of his suit for injunctive relief as an attempt to force the defendants "to lay off the smut literature racket" were libelous.<sup>115</sup>

At trial, Metromedia relied on the defenses of truth and privilege.<sup>116</sup> After the jury was instructed as to common law libel,<sup>117</sup> it returned with a verdict for Rosenbloom for \$25,000 in general damages and \$725,000 in punitive damages. The trial court reduced the punitive damage award

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112. 403 U.S. 29 (1971).

113. *Id.* at 43.

114. *Id.* at 32-34.

115. *Id.* at 34-36.

116. *Id.* at 36.

117. The court charged the jury that four findings were necessary in order to return a verdict for Rosenbloom: (1) that one or more of the broadcasts were defamatory; (2) that a reasonable listener would conclude that the defamatory statement referred to Rosenbloom; (3) that the radio station had forfeited its privilege to report official proceedings fairly and accurately, either because it intended to injure the plaintiff personally or because it exercised the privilege unreasonably and without reasonable care; and (4) that the reporting was false. *Id.* at 39.

to \$250,000.<sup>118</sup> The Court of Appeals for the Third Circuit reversed, holding that Rosenbloom was required to establish that the alleged libelous remarks were made with "actual malice," notwithstanding that he was not a public figure, but that his evidence did not support the judgment.<sup>119</sup> The Supreme Court granted certiorari<sup>120</sup> and affirmed the decision of the court of appeals.

### C. *The Retreat*

By 1974, hundreds of post-*New York Times* defamation cases had worked their way through the courts.<sup>121</sup> "The results [sic] of this avalanche of litigation was a continuing struggle to find the appropriate balance between the rights of free speech and press and the right to be free from character attacks."<sup>122</sup> In *Gertz v. Robert Welch, Inc.*,<sup>123</sup> the Supreme Court retreated from its position in *Rosenbloom v. Metromedia, Inc.*,<sup>124</sup> which required private figures involved in events of public or general interest to show actual malice. In *Gertz*, a majority of the Court held that the *New York Times* standard was inapplicable in a case where the plaintiff was a private individual.<sup>125</sup>

In 1968, a Chicago policeman, Nuccio, shot and killed a youth named Nelson. The policeman was subsequently prosecuted and found guilty of second degree murder. The Nelson family retained Elmer Gertz to represent them in civil litigation against Nuccio.<sup>126</sup>

Robert Welch, Inc. published *American Opinion*, a monthly periodical expressing the views of the John Birch Society. The magazine had begun a campaign to warn the public of a nationwide conspiracy to discredit local law enforcement agencies and create a national police force supporting a communist dictatorship. As part of this effort to alert the public, *American Opinion* commissioned and published an article on the murder trial of Nuccio. The article, which contained serious factual inaccuracies, portrayed Gertz as a communist official with a criminal record.<sup>127</sup>

118. *Id.* at 40.

119. *Rosenbloom v. Metromedia, Inc.*, 415 F.2d 892, 892 (3d Cir. 1969).

120. *Rosenbloom v. Metromedia, Inc.*, 397 U.S. 904 (1970).

121. Yasser, *supra* note 12, at 614.

122. *Id.*

123. 418 U.S. 323 (1974).

124. 403 U.S. 29 (1971).

125. *Gertz*, 418 U.S. at 352.

126. *Id.* at 325.

127. *Id.* at 326. Gertz attended the coroner's inquest into the boy's death and initiated a civil suit for damages, but he neither discussed Nuccio with the press nor played any part in the criminal prosecution. However, the article portrayed him as an architect of the "frame-up."

The article stated that Gertz had been "an official of the 'Marxist League for Industrial Democracy, originally known as the Intercollegiate Socialist Society, which [had] advocated the violent seizure of our government.'" *Id.* at 326. It labeled him a "Leninist" and a "Communist-frontier." It



Gertz filed a diversity action for libel in the Northern District of Illinois.<sup>128</sup> The defendant filed a pretrial motion for summary judgment, claiming it was entitled to invoke the privilege of *New York Times*. The district court denied the motion, concluding that Gertz might be able to prove that the article was published with reckless disregard for the truth.<sup>129</sup> After all the evidence was heard, the district court ruled that Gertz was neither a public official nor a public figure. Because the court had ruled that some of the statements constituted libel *per se* under Illinois law, the court withdrew from the jury's consideration all issues except damages. The jury awarded Gertz \$50,000.<sup>130</sup>

Following the jury's verdict, the district court concluded that the defendant was entitled to the protection of *New York Times*, and it entered judgment for the defendant notwithstanding the verdict.<sup>131</sup> The court of appeals, citing the intervening decision in *Rosenbloom v. Metromedia, Inc.*,<sup>132</sup> concluded that the statement concerned an issue of significant public interest and affirmed the district court's decision.<sup>133</sup> The Supreme Court granted certiorari<sup>134</sup> and reversed the decision.

When the *Gertz* case reached the Supreme Court, the composition of the Court which had fractionated so badly in *Rosenbloom* had changed. Justices Powell and Rehnquist occupied the seats previously held by Justices Harlan and Black. The new Justices joined Justices Marshall and Stewart in adopting the substance of the views which they and Justice Harlan had offered in *Rosenbloom*.<sup>135</sup> Justices Marshall and Stewart also abandoned their view from *Rosenbloom* that punitive damages were con-

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also said that he had been an officer of the National Lawyers Guild, which was described as "a Communist organization that 'probably did more than any other outfit to plan the Communist attack on the Chicago police during the 1968 Democratic Convention.'" *Id.*

The article also stated the police file on Gertz "took 'a big, Irish cop to lift.'" *Id.*

The implication that Gertz had a criminal record was false. Although he had been a member and officer of the National Lawyers Guild some 15 years earlier, there was no evidence that he or the organization had taken any part in the demonstration at the Democratic convention in 1968. There was no basis for the charge that he was a "Leninist" or a "Communist-fronter." Finally, he had never been a member of the "Marxist League for Industrial Democracy" or the "Intercollegiate Socialist Society." *Id.*

128. *Id.* at 327.

129. *Id.* at 328.

130. *Id.* at 328-29.

131. *Gertz v. Robert Welch, Inc.*, 322 F. Supp. 997, 1000 (N.D. Ill. 1970). The trial court, anticipating the reasoning of *Rosenbloom v. Metromedia, Inc.*, concluded that even though Gertz was not a public official or a public figure, the discussion of a public issue was protected without regard to the status of the person defamed. *Gertz*, 418 U.S. at 329-30.

132. 403 U.S. 29 (1971).

133. *Gertz v. Robert Welch, Inc.*, 471 F.2d 801 (7th Cir. 1972).

134. *Gertz v. Robert Welch, Inc.*, 410 U.S. 925 (1973).

135. One commentator theorized that Justices Powell and Rehnquist voted the way they did because of their apparent sensitivity to the fact that the *Rosenbloom* plurality had nearly destroyed the common law of defamation. Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1409 (1975).

stitutionally proscribed. These four were joined by Justice Blackmun, who switched his vote.<sup>136</sup> This produced a clear majority for the first time in these type decisions since *New York Times Co. v. Sullivan*.<sup>137</sup>

In the opinion written by Justice Powell, the Court reaffirmed the positions taken in *New York Times Co. v. Sullivan* and *Curtis Publishing Co. v. Butts*,<sup>138</sup> rejected the extension proffered in the plurality decision in *Rosenbloom*, enunciated some guidelines for defining a "public figure," and delineated the limits when liability and damages may be imposed in defamation cases.

In affirming the use of the actual malice standard for public persons, whom the Court categorized as public figures<sup>139</sup> and public officials,<sup>140</sup> the Court held that the standard was an accommodation between the interests of the press and broadcast media in immunity from liability and "the limited state interest present in the context of libel actions brought by public persons."<sup>141</sup> The state has a greater interest in compensating injury to the reputation of private people because those individuals known as public persons "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."<sup>142</sup> However, a private individual who is defamed "has relinquished no part of his interest in the protection of his own good name,"<sup>143</sup> but is "more vulnerable to injury, and the state interest in protecting [him] is correspondingly greater."<sup>144</sup> Therefore, a private individual is in greater need of the courts to redress the injuries inflicted by defamatory statements.

As to matters of public or general concern, the Court was of the opinion that the extension of *Rosenbloom* would abridge the state interest in enforcing a legal remedy for defamatory falsehoods which injure a private individual. The Court also thought the extension of the privilege to

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136. *Id.* Justice Blackmun had concurred in the plurality opinion in *Rosenbloom*. In his concurring opinion in *Gertz*, he said he joined the *Rosenbloom* plurality because he felt it was the "logical and inevitable" extension of *New York Times* and its progeny. He confessed he sensed "some illogic" in the rejection of the *Rosenbloom* standard, and would adhere to his prior view, were his vote not needed for a majority. However, he joined the majority because the opinion removed "the specters of presumed and punitive damages" in the absence of *New York Times* malice and it was important for the Court "to come to rest in the defamation area and to have a clearly defined majority position." *Gertz*, 418 U.S. at 353-54 (Blackmun, J. concurring).

137. 376 U.S. 254 (1964).

138. 388 U.S. 130 (1967).

139. The Court defined public figures as "[t]hose who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention." *Gertz*, 418 U.S. at 342.

140. Public officials were defined as "those who hold governmental office." *Id.*

141. *Id.* at 343.

142. *Id.* at 344.

143. *Id.* at 345.

144. *Id.* at 344.

matters of public or general concern "would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not—to determine. . . 'what information is relevant to self-government.' "145

After rejecting the *Rosenbloom* standard, the Court addressed the issue of whether Gertz was a public figure. In seeking to further define who is a public figure, the Court held that public figure status may rest on either of two alternatives:

In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.<sup>146</sup>

In determining whether a person is a public figure, the Court held that "[i]t is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation."<sup>147</sup>

Although Gertz had a long history of involvement in community and professional affairs, having served as an officer of local civic groups and professional organizations, he had achieved no general fame or notoriety in the community. Therefore, he was not an all-purpose public figure. Also, although Gertz was at the coroner's inquest, his participation related solely to his representation of a private client in a civil action. Gertz took no part in the criminal prosecution of Nuccio, and he never discussed either the criminal or civil litigation with the press and was never quoted as having done so. Therefore, Gertz did not thrust himself into the vortex of the Nuccio trial so he was not even a public figure on the limited issue of Nuccio's trial. Thus, the Court concluded that Gertz was a private person and the *New York Times* standard was inapplicable.

In addition to finding that Gertz was not a public figure and remanding the case, the Court enunciated important guidelines for the determination of liability and damages. In the case of a private figure, the individual states were allowed to continue to define for themselves the appropriate standard of liability so long as they do not impose liability without fault.<sup>148</sup> The Court also imposed a significant restriction on recovery of damages by a private individual. In extending the *New York*

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145. *Id.* at 346.

146. *Id.* at 351.

147. *Id.* at 352.

148. *Id.* at 347, 348. This was equitable, because it recognizes the strength of the state's interest in compensating private individuals for wrongful injury to their reputation. However, it shields the press and broadcast media from strict liability. *Id.*

*Times* rule to punitive damages, the Court stated "States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth."<sup>149</sup>

#### D. *The Public Figure Standard*

Courts have had difficulty drawing the line between public figures and private individuals. One district court judge said the nebulous concept of defining a public figure "is much like trying to nail a jellyfish to the wall."<sup>150</sup> When that case reached the court of appeals, the Fifth Circuit commented that the public figure concept "has eluded a truly working definition" and "falls within that class of legal abstractions where 'I know it when I see it' in Justice Stewart's words."<sup>151</sup>

When it set forth the standard of the all purpose public figure, the Supreme Court cautioned the lower courts to use care in determining who is a pervasive public figure:

We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life.<sup>152</sup>

However, courts have found a wide variety of people and organizations to be pervasive public figures. Individuals who are pervasive public figures include television personalities and entertainment figures,<sup>153</sup> professional athletes,<sup>154</sup> a well-known political author and journalist,<sup>155</sup> an

149. *Id.* at 349. *But see* *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* 105 S. Ct. 2939 (1985). In *Greenmoss*, the Court distinguished the *Gertz* case by holding that the *New York Times* rule applied only to matters of public concern. *See also* notes 254-75 *infra* and accompanying text.

150. *Rosanova v. Playboy Enter. Inc.*, 411 F. Supp. 440, 443, (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978).

151. *Rosanova v. Playboy Enter. Inc.*, 580 F.2d 859, 861 (5th Cir. 1978) (footnote, quoting the jellyfish analogy, omitted) (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J. concurring)).

152. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974).

153. *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976) (well-known television personality); *Burnett v. National Enquirer, Inc.*, 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983), *appeal dismissed*, 465 U.S. 1014 (1984); *Montandon v. Triangle Publications, Inc.*, 45 Cal. App. 3d 938, 120 Cal. Rptr. 186, *cert. denied*, 423 U.S. 893 (1975) (author of book on how to give parties who had appeared on a number of television and radio shows to promote her book); *Cochran v. Indianapolis Newspapers, Inc.*, 175 Ind. App. 548, 372 N.E.2d 1211 (1978) ("Playmate" who had appeared in *Playboy* magazine).

154. *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265 (3d Cir. 1979) (former professional football player); *Cepeda v. Cowles Magazine & Broadcasting, Inc.*, 392 F.2d 417 (9th Cir.), *cert. denied*, 393 U.S. 840 (1968) (professional baseball player); *Pep v. Newsweek, Inc.*, 553 F. Supp. 1000 (S.D.N.Y. 1983) (former professional boxing champion); *Rood v. Finney*, 418 So. 2d 1 (La. App. 1982), *writ denied*, 420 So. 2d 979 (La. 1982), *cert. denied*, 460 U.S. 1013 (1983) (a professional golfer).

infamous assassin,<sup>156</sup> a consumer advocate and lawyer,<sup>157</sup> and a noted civil rights leader.<sup>158</sup> Organizations who are public figures include churches<sup>159</sup> and corporations.<sup>160</sup>

The second category of public figures as defined by *Gertz* are those individuals who are public figures for a limited range of issues. This category is divided into two subparts: (1) people who are involuntarily drawn into a particular public controversy<sup>161</sup> and (2) people who voluntarily thrust themselves into a particular public controversy in order to assume special prominence in the resolution of public questions.<sup>162</sup> Less than two years after *Gertz*, the Supreme Court narrowed the scope of who is a public figure in *Time, Inc. v. Firestone*.<sup>163</sup>

In 1964, Mary Alice Firestone and Russell Firestone, the heir to the tire fortune, sought the dissolution of their marriage in Florida.<sup>164</sup> The proceedings drew a great deal of press in the Palm Beach and Miami area, and became "a veritable *cause celebre* in social circles across the country."<sup>165</sup> After judgment in the divorce was entered, *Time* magazine printed an article in its "Milestones" section which stated that Russell Firestone had been granted a divorce "on grounds of extreme cruelty and adultery." The article characterized the trial as having "enough testimony of extramarital adventures on both sides. . . to make Dr.

155. *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977) (also the author of a syndicated newspaper column and a weekly television show).

156. *Ray v. Time, Inc.*, 452 F. Supp. 618 (W.D. Tenn. 1976), *aff'd*, 582 F.2d 1280 (6th Cir. 1978) (confessed murderer of civil rights leader).

157. *Nader v. de Toledano*, 408 A.2d 31 (D.C. 1979), *cert. denied*, 444 U.S. 1078 (1980) (critic of the safety of the Corvair automobile manufactured by General Motors).

158. *Williams v. Trust Co. of Ga.*, 140 Ga. App. 49, 230 S.E.2d 45 (1976) (had received widespread publicity for civil rights and labor activities, several arrests, participation in politics, and efforts to be elected to public office); *see also* *Loeb v. Globe Newspaper Co.*, 489 F. Supp. 481 (D. Mass. 1980) (publisher of newspaper with strong public stands on controversies; his paper received nationwide attention for its coverage of the New Hampshire Presidential Primary in 1972, when he engaged in a celebrated exchange with one of the candidates); *Mobile Press Register, Inc. v. Faulkner*, 372 So. 2d 1282 (Ala. 1979) (a "famed figure throughout Alabama" who had been a prominent businessman, politician, and community leader for over 40 years); *Guthrie v. Annabel*, 50 Ill. App. 3d 969, 365 N.E.2d 1367 (1977) (chairman of political party and a candidate for sheriff); *Steere v. Cupp*, 226 Kan. 566, 602 P.2d 1267 (1979) (attorney who practiced law in community for 32 years, eight as the county attorney, and was a prominent participant in numerous social activities).

159. *Church of Scientology of Cal. v. Siegelman*, 475 F. Supp. 950 (S.D.N.Y. 1979) (large world-wide religious movement with five million adherents); *Holy Spirit Ass'n for the Unification of World Christianity v. Sequoia Elsevier Publishing Co.*, 75 A.D.2d 523, 426 N.Y.S.2d 759 (N.Y. App. Div. 1980).

160. *Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1341 (S.D.N.Y. 1977) (large corporation with a billion dollars in assets; thrust itself into the public arena by offering to sell its stock to the public).

161. *Gertz*, 418 U.S. at 345.

162. *Id.* at 351.

163. 424 U.S. 448 (1975).

164. *Id.* at 450.

165. *Id.* at 485 (Marshall, J., dissenting) (quoting *Firestone v. Time, Inc.*, 271 So. 2d 745, 751 (Fla. 1972)).

Freud's hair curl.' ”<sup>166</sup>

Within a few weeks of publication, Mary Alice Firestone demanded a retraction from *Time*. When they declined, she filed a libel action in Florida Circuit Court. Based on a jury verdict for the plaintiff, the court entered a judgment against Time, Inc. for \$100,000.<sup>167</sup> This decision was reviewed and reversed by the Florida District Court of Appeal,<sup>168</sup> but was ultimately affirmed by the Florida Supreme Court.<sup>169</sup> The Supreme Court granted certiorari,<sup>170</sup> and remanded the cause for further findings.

When the Court in *Gertz* classified limited purpose public figures, it stated “[h]ypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare.”<sup>171</sup> The Court in *Firestone* appeared to narrow the classes of public figures to two classes: (1) all purpose public figures, and (2) those who inject themselves into a public controversy. The standard for all purpose public figures remained the same as enunciated in *Gertz*. However, the standard for limited purpose public figures was reduced in its dimensions.<sup>172</sup> Justice Rehnquist chose the standard from *Gertz* which described vortex public figures as those who “have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.”<sup>173</sup> By failing to select the language in *Gertz* which describes a public figure as one who “voluntarily injects himself or is drawn into a particular public controversy,”<sup>174</sup> the Court limited the class of public figures to those who thrust themselves into a controversy, and eliminated the class of involuntary public figures.

The Court in *Firestone* concluded that the plaintiff was not an all purpose public figure because she “did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society.”<sup>175</sup> The Court, in a footnote, stated that the plaintiff, who was far from shunning publicity by holding several press conferences during the course of the proceedings,<sup>176</sup> did not become a public figure “in an attempt to satisfy inquiring reporters.”<sup>177</sup> Nor did the Court find her to

166. *Id.* at 452 (quoting the item from “Milestones” in *Time*).

167. *Firestone*, 424 U.S. at 452.

168. *Time, Inc. v. Firestone*, 279 So. 2d 389 (Fla. Dist. Ct. App. 1973).

169. *Firestone v. Time, Inc.*, 305 So. 2d 172 (Fla. 1974).

170. *Time, Inc. v. Firestone*, 421 U.S. 909 (1975).

171. *Gertz*, 418 U.S. at 345.

172. Comment, *Developing Standards of Care After Time, Inc. v. Firestone: Experimentation is Needed*, 29 MERCER L. REV. 841, 849 (1978).

173. *Firestone*, 424 U.S. at 453 (quoting *Gertz*, 418 U.S. at 345).

174. *Gertz*, 418 U.S. at 351.

175. *Firestone*, 424 U.S. at 453.

176. *Id.* at 485 (Marshall, J., dissenting).

177. *Id.* at 454 n.3.

have "thrust herself to the forefront of some unrelated controversy."<sup>178</sup> As to this issue, the majority felt that she did not choose to publicize her divorce, but was forced to go to the courts of the state in order to obtain a divorce.<sup>179</sup>

#### IV. ACTUAL MALICE

The Supreme Court, in *New York Times Co. v. Sullivan*,<sup>180</sup> in effect, constitutionalized the minority view that the common law privilege of fair comment protects false assertions of fact if they are made for the public benefit with an honest belief in their truth.<sup>181</sup> The Court held that there was a constitutional rule which "prohibits a public official"<sup>182</sup> from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice.'<sup>183</sup> This has been described as "unquestionably the greatest victory won by the defendants in the modern history of the law of torts."<sup>184</sup>

The Court defined actual malice as publishing a defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not."<sup>185</sup> Although the definition of the term appears to be clear from reading the opinion, the Court has spent years reiterating that it did not mean common law malice. Common law malice, which is frequently expressed in terms of ill-will, spite, or a deliberate intention to harm the plaintiff, focuses mainly on the defendant's attitude toward the plaintiff's privacy, not toward the truth or falsity of the material published.<sup>186</sup> The common law standard of malice, which is generally required to support an award of punitive damages in the typical tort action, is quite different from the standard of *New York Times*, and is constitutionally insufficient to establish "actual malice."<sup>187</sup>

Actual malice is a term of art that was "created to provide a conve-

178. *Id.* at 454-55 n.3.

179. *Id.* at 454; see also *Boddie v. Connecticut*, 401 U.S. 371 (1971). The dissolution of a marriage is not the type of "public controversy" referred to by the Court in *Gertz*, even though some members of society will be interested in reading about the marital difficulties of the extremely wealthy. *Firestone*, 424 U.S. at 454.

180. 376 U.S. 254 (1964).

181. See *supra* notes 40-54 and accompanying text.

182. This was extended to public figures in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). See *supra* notes 93-111 and accompanying text.

183. *New York Times*, 376 U.S. at 279-80; see *supra* notes 40-54 and accompanying text.

184. W. PROSSER, *supra* note 28, § 118 at 819. Alexander Meiklejohn, a long time advocate of the view that "the first amendment is an absolute," Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245, proclaimed that the *New York Times* decision was "an occasion for dancing in the streets." Kalven, *supra* note 42, at 221 n.125.

185. *New York Times*, 376 U.S. at 280.

186. *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 252 (1974).

187. *Id.* For a discussion of the difference, also see *Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1341, 1349-50 (S.D.N.Y. 1977).

nient shorthand expression for the standard of liability that must be established before a State may constitutionally permit public officials to recover for libel in actions brought against publishers.”<sup>188</sup> The problem reached the point that one Justice later wrote:

I have come greatly to regret the use in [*New York Times Co. v. Sullivan*] of the phrase “actual malice.” . . . In common understanding, malice means ill will or hostility, and the most relevant question in determining whether a person’s action was motivated by actual malice is to ask “why.” As part of the constitutional standard enunciated in the *New York Times* case, however, “actual malice” has nothing to do with hostility or ill will, and the question “why” is totally irrelevant.<sup>189</sup>

The Court still uses the term “actual malice,” and has made an effort since the *New York Times* case to set forth what it means. However, it has also recognized that it “cannot be fully encompassed in one infallible definition,” and that “its outer limits will be marked out through case-by-case adjudication.”<sup>190</sup> But, as the Court noted in *St. Amant v. Thompson*,<sup>191</sup> the cases have furnished some guidance in what is meant by “actual malice.” The reckless conduct required by the standard is not measured by a failure to investigate, without more,<sup>192</sup> nor is it measured by whether a reasonably prudent person would have published, or would have investigated before he published.<sup>193</sup> Rather, “there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication,”<sup>194</sup> or that he acted with a “high degree of awareness of their probable falsity” in publishing the statements.<sup>195</sup>

Because direct evidence of “actual malice” is rare, the plaintiff must focus on both direct and circumstantial evidence. Therefore, factors of conduct and state of mind, which would not be sufficient standing alone to prove actual malice, are probative of actual malice.<sup>196</sup> Thus, while motive, intent, and ill will are not sufficient to support a finding of actual malice, they may be factors which indicate actual malice.<sup>197</sup> Other factors to be considered are the inherent improbability of the story,<sup>198</sup> the

188. *Cantrell*, 419 U.S. at 251.

189. *Herbert v. Lando*, 441 U.S. 153, 199 (1979) (Stewart, J., dissenting) (footnote omitted).

190. *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968).

191. *Id.* at 731.

192. *Gertz*, 418 U.S. at 332.

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

194. *Id.*

195. *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

196. See *Herbert*, 441 U.S. at 160; *Goldwater v. Ginzburg*, 414 F.2d 324, 342 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970).

197. *Bose Corp. v. Consumers Union of United States, Inc.*, 692 F.2d 189 (1st Cir. 1982), aff’d, 466 U.S. 485 (1984); *Goldwater*, 414 F.2d at 342; *Sprouse v. Clay Communications, Inc.*, 211 S.E.2d 674, 688 (W. Va.), cert. denied, 423 U.S. 882 (1975).

198. *St. Amant*, 390 U.S. at 732.



defendant's negligence,<sup>199</sup> his lack of credibility,<sup>200</sup> his awareness of the seriousness of the harm to be caused,<sup>201</sup> his reliance on obviously unreliable or unverified sources,<sup>202</sup> the fabrication of the story by the defendant,<sup>203</sup> and post-publication acts, such as the failure to retract.<sup>204</sup>

Courts have also looked at the type of news being conveyed if the defendant is a news organization. The fact that the defendant had embarked on a "program of 'sophisticated muckraking,' designed to 'provoke people, make them mad' "<sup>205</sup> in *Curtis Publishing Co. v. Butts*<sup>206</sup> was some evidence probative of actual malice. The absence of a "hot news" deadline, allowing ample time for development of truth and resolution of doubtful material is also probative of the defendant's actual malice.<sup>207</sup> Finally, the Supreme Court has held that inquiring into the defendant's editorial process is not barred by the Constitution.<sup>208</sup>

## V. PROTECTIONS NARROWED

During its October 1978 term, the Court again narrowed the class of individuals to which the actual malice standard applies in two cases: *Hutchinson v. Proxmire*<sup>209</sup> and *Wolston v. Reader's Digest Association*.<sup>210</sup> That same term, in *Herbert v. Lando*,<sup>211</sup> the Court insured that plaintiffs who are classified as public figures will have a broad range of discovery tools to aid them in meeting their burden of proof. Finally, the Court limited the rule of *Gertz* which requires a showing of actual malice for the recovery of presumed or punitive damages to only those issues which involve matters of public concern.<sup>212</sup>

199. *Bose Corp.*, 692 F.2d at 196; *Goldwater*, 414 F.2d at 342; *Herbert v. Lando*, 73 F.R.D. 387, 405 n.5 (S.D.N.Y.), *rev'd*, 568 F.2d 974 (2d Cir. 1977), *rev'd*, 441 U.S. 153 (1979).

200. *Davis v. Schuchat*, 510 F.2d 731, 736 (D.C. Cir. 1975); *McManus v. Doubleday & Co.*, 513 F. Supp. 1383, 1389 (S.D.N.Y. 1981).

201. *Carson v. Allied News Co.*, 529 F.2d 206, 211 (7th Cir. 1976); *Mahnke v. Northwest Publications, Inc.*, 280 Minn. 328, 339-41, 160 N.W.2d 1, 8-10 (1968).

202. *St. Amant*, 390 U.S. at 732; *Burns v. McGraw-Hill Broadcasting Co.*, 659 P.2d 1351, 1361-62 (Colo. 1983) (source was bitter and frustrated); *Stevens v. Sun Publishing Co.*, 270 S.C. 65, 71, 240 S.E.2d 812, 815, *cert. denied*, 436 U.S. 945 (1978) (author recognized his principal source's "obvious bias").

203. *St. Amant*, 390 U.S. at 732; *Carson v. Allied News Co.*, 529 F.2d 206, 212-13 (7th Cir. 1976).

204. *Church of Scientology of Cal. v. Dell Publishing Co.*, 362 F. Supp. 767, 770 (N.D. Cal. 1973).

205. *Curtis Publishing Co.*, 388 U.S. at 169 (Warren, C.J., concurring).

206. 388 U.S. 130 (1967).

207. *Id.* at 157-58 (Butts article was not "hot news," while the dispatch concerning Walker required immediate dissemination); *see also Carson*, 529 F.2d at 211; *Burns*, 659 P.2d at 1362; *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 465, 273 A.2d 899, 916 (1971).

208. *Herbert*, 441 U.S. at 169; *see infra* notes 236-52 and accompanying text.

209. 443 U.S. 112 (1979).

210. 443 U.S. 158 (1979).

211. 441 U.S. 153 (1979).

212. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985).

**A. The 1979 Decisions Limiting the Public Figure Concept**

The *Hutchinson*<sup>213</sup> case involved Senator William Proxmire of Wisconsin and his "Golden Fleece of the Month" award. The award was designed to publicize what Proxmire perceived to be the most egregious examples of wasteful governmental spending. In April 1975, his second award went to the National Science Foundation, the National Aeronautics and Space Administration, and the Office of Naval Research, for spending almost half a million dollars during the preceeding seven years to fund a project of the plaintiff, Ronald Hutchinson, a behavioral research scientist.<sup>214</sup> The bulk of Hutchinson's research was devoted to the study of emotional behavior, with a particular concentration upon the behavior patterns of certain animals, such as the "clenching of jaws when they were exposed to various aggravating stressful stimuli."<sup>215</sup>

Senator Proxmire,<sup>216</sup> who described Hutchinson's research as "nonsense" and "transparent worthlessness," claimed that Hutchinson had "made a fortune from his monkeys and in the process made a monkey out of the American taxpayer."<sup>217</sup> In May, 1975, Proxmire repeated the essence of his speech in a press release sent to about 100,000 people.<sup>218</sup> Subsequently, Hutchinson brought a diversity suit in federal court against Proxmire.<sup>219</sup> The district court granted the defendant's motion for summary judgment,<sup>220</sup> and the decision was affirmed on appeal.<sup>221</sup> The Supreme Court granted certiorari<sup>222</sup> and reversed.

In reversing, the Supreme Court held *inter alia*<sup>223</sup> that Hutchinson

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213. 443 U.S. 111 (1979).

214. *Hutchinson*, 443 U.S. at 114.

215. *Id.* at 115.

216. Proxmire is not certain whether he delivered the speech on the Senate floor, or merely had it inserted into the Congressional Record. *Id.* at 116 n.3.

217. *Id.* at 116. In his speech describing the federal grants for Hutchinson's research project, Proxmire concluded with the following comment:

"The funding of this nonsense makes me almost angry enough to scream and kick or even clench my jaw. It seems to me it is outrageous.

"Dr. Hutchinson's studies should make the taxpayers as well as his monkeys grind their teeth. In fact, the good doctor has made a fortune from his monkeys and in the process made a monkey out of the American taxpayer.

"It is time for the Federal Government to get out of this 'monkey business.' In view of the transparent worthlessness of Hutchinson's study of jaw-grinding and biting by angry or hard-drinking monkeys, it is time we put a stop to the bite Hutchinson and the bureaucrats who fund him have been taking of the taxpayer."

*Id.* (quoting 121 CONG. REC. 10803 (daily ed. Apr. 18, 1975)) (statement of Senator Proxmire).

218. *Id.* at 117.

219. *Id.* at 118.

220. *Hutchinson v. Proxmire*, 431 F. Supp. 1311 (W.D. Wis. 1977), *aff'd*, 579 F.2d 1027 (7th Cir. 1978), *rev'd*, 443 U.S. 111 (1979).

221. *Hutchinson v. Proxmire*, 579 F.2d 1027 (7th Cir. 1978), *rev'd*, 443 U.S. 111 (1979).

222. *Hutchinson v. Proxmire*, 439 U.S. 1066 (1979).

223. Although it is beyond the scope of this comment, the principal defense raised by Proxmire was that his statements were protected by the speech and debate clause. U.S. CONST. art. I, § 6. The Court held that Proxmire was not protected by that clause. *See Hutchinson*, 443 U.S. at 123-33.

was not a public figure, even for the limited purpose of receiving federal funds for research because Hutchinson's published writings, which reach a relatively small category of professionals in his field, became a matter of public controversy only because of the Golden Fleece Award. To hold otherwise would be tantamount to allowing the defendant to "create their own defense by making the claimant a public figure."<sup>224</sup> The Court said that Hutchinson had neither thrust himself nor his views into the public controversy to influence others, nor had he assumed any role of public prominence in the broad question of the concern about public expenditures. The Court also noted that Hutchinson "did not have the regular and continuing access to the media that is one of the accouterments of having become a public figure."<sup>225</sup>

In *Wolston*,<sup>226</sup> the defendants had published a book entitled *KGB: The Secret Work of Soviet Agents* in 1974, which falsely identified plaintiff Ilya Wolston as a Soviet agent. Although he was never indicted for espionage, he pleaded guilty to a contempt charge in 1958 for failing to appear to testify before a grand jury investigating Soviet intelligence agents in the United States. During the six week period between his failure to appear before the grand jury and his sentencing, fifteen articles appeared in Washington and New York newspapers which discussed these events. Following his sentencing, the publicity subsided, and he largely succeeded in returning to a private life.<sup>227</sup>

Following the publication of the book, Wolston filed a libel suit in federal court, claiming the passages that stated he had been indicted for espionage and had been a Soviet agent were false and defamatory. The trial court granted the defendants' motion for summary judgment on the ground that Wolston was a limited purpose public figure, who could not prove actual malice,<sup>228</sup> and the decision was affirmed on appeal.<sup>229</sup> The Supreme Court granted certiorari<sup>230</sup> and reversed.

The Supreme Court acknowledged that plaintiff was not a public figure for all purposes because "[h]e achieved no general fame or notoriety and assumed no role of special prominence in the affairs of society as a result of his contempt citation or because of his involvement in the investiga-

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224. *Hutchinson*, 443 U.S. at 135.

225. *Id.* at 136. The suggestion that public figures have a "regular and continuing" access to the media appears to have been expressed for the first time in *Hutchinson*. Prior decisions had only assumed that public figures have greater access to the media than do private individuals. Comment, *Gertz and the Public Figure Doctrine Revisited*, 54 TULANE L. REV. 1053, 1072 n.128 (1980).

226. 443 U.S. 157 (1979).

227. *Id.* at 159-63.

228. *Wolston v. Reader's Digest Ass'n*, 429 F. Supp. 167 (D.D.C. 1977), *aff'd*, 578 F.2d 427 (D.C. Cir. 1978), *rev'd*, 443 U.S. 157 (1979).

229. *Wolston v. Reader's Digest Ass'n*, 578 F.2d 427 (D.C. Cir. 1978), *rev'd*, 443 U.S. 157 (1979).

230. *Wolston v. Reader's Digest Ass'n*, 439 U.S. 1066 (1979).

tion of Soviet espionage in 1958.”<sup>231</sup> However, the Court went on to hold that the plaintiff was not a limited purpose public figure because the facts did not warrant a finding that he had “‘voluntarily thrust’ or ‘injected’ himself into the forefront of the public controversy surrounding the investigation of Soviet espionage in the United States.”<sup>232</sup> The Court reaffirmed its rejection of *Rosenbloom*, by pointing out that “[a] private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention.”<sup>233</sup> Finally, the Court rejected the argument that a person who engages in criminal activity automatically becomes a public figure on the limited range of issues related to his conviction. The Court viewed *Wolston* much like it had viewed *Mrs. Firestone*, insofar as neither plaintiff had been a willing participant in litigation, and held that a person does not forfeit any protection which the law of defamation provides merely by being drawn into the courtroom.<sup>234</sup>

These two decisions confirm that there is no longer a category of involuntarily public figures—no longer can a private individual be transformed into a public figure merely because he unwittingly attracts media attention, or is forced to participate in public events.<sup>235</sup> The Court appears to have narrowed the limited purpose public figure to one who “literally or figuratively ‘mounts a rostrum’ to advocate a particular view.”<sup>236</sup>

## B. *Herbert v. Lando*<sup>237</sup>

In 1971, Colonel Anthony Herbert received widespread media attention when he formally charged his superior officers with covering up war crimes in Vietnam.<sup>238</sup> Herbert alleged that his superiors were not interested in investigating the charges. He claimed that when he persisted in

231. *Wolston*, 443 U.S. at 165.

232. *Id.* at 166.

233. *Id.* at 167. “A libel defendant must show more than mere newsworthiness to justify application of the demanding burden of *New York Times*.” *Id.* at 167-68.

234. *Id.* at 168-69.

235. Comment, *supra* note 224, at 1074.

236. *Wolston*, 443 U.S. at 169 (Blackmun, J., concurring).

237. 441 U.S. 153 (1979).

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

Herbert's story fascinated an American public that was increasingly becoming disenchanted with the Vietnam War. In July 1971, he was interviewed by *Life Magazine*; that September, James Wooten of the *New York Times* wrote an article favorable to Herbert titled “How a Supersoldier Was Fired From His Command.” Interviews with the television personality Dick Cavett followed which, according to Cavett, elicited a level of view response unmatched by any other single program. In October 1971, Congress became embroiled in the “Herbert affair” when Rep. F. Edward Heber, Chairman of the Armed Services Committee, convinced the Army to remove Herbert's poor efficiency report from his military record.

*Id.* at 981.

pressing his charges, he was abruptly relieved of his command.<sup>239</sup> On February 4, 1973, CBS culminated the media attention given Herbert with a segment on its news documentary program, "60 Minutes," which "cast serious doubt upon Herbert's veracity and concluded that the American press had been deluded by Herbert's story."<sup>240</sup> Mike Wallace narrated the program, and Barry Lando produced and edited it.<sup>241</sup> Lando subsequently published an article in *Atlantic Monthly* based on the information he had gathered for the show.<sup>242</sup>

Herbert then sued Lando, Wallace, CBS, and *Atlantic Monthly* for defamation, alleging the article falsely and maliciously portrayed him as a liar.<sup>243</sup> Herbert conceded he was a public figure, and then engaged in extensive pre-trial discovery, including deposing Lando, in order to obtain the evidence he hoped would prove actual malice.<sup>244</sup>

Lando objected to certain questions relating to his beliefs, opinions, intent, and conclusions while working on the story on the ground that any response would be inconsistent with protection afforded the editorial process by the first amendment.<sup>245</sup> The district court denied his objection,<sup>246</sup> but the court of appeals vindicated the contentions of Lando and his fellow reporters,<sup>247</sup> holding that requiring answers to such questions

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239. Herbert's sudden fall from grace surprised many observers. His long career in the military had been exemplary, under strong leadership, the second battalion had exhibited extraordinary prowess in battle. His military acumen had earned Herbert one Silver and three Bronze stars, and he had recently been recommended to receive the Distinguished Service Cross.

*Id.* at 980-81.

"During this period of intense public interest, Herbert announced his retirement from the service." *Id.* at 981.

240. *Id.* at 982. The segment was entitled "The Selling of Colonel Herbert." *Id.*

241. *Herbert*, 441 U.S. at 156.

242. *Id.*

243. *Id.*

244. *Id.* at 156-57. "Lando's deposition alone continued intermittently for over a year and filled 26 volumes containing nearly 3,000 pages and 240 exhibits." *Id.* at 176 n.25.

245. *Herbert*, 568 F.2d at 982-83. The court of appeals grouped the objectionable questions into five categories.

1. Lando's conclusions during his research and investigations regarding people or leads to be pursued, or not to be pursued, in connection with the "60 Minutes" segment and the *Atlantic Monthly* article;
2. Lando's conclusions about facts imparted by interviewees and his state of mind with respect to the veracity of persons interviewed;
3. The basis for conclusions where Lando testified that he did not reach a conclusion concerning the veracity of persons, information or events;
4. Conversations between Lando and Wallace about matter to be included or excluded from the broadcast publication; and
5. Lando's intentions as manifested by his decision to include or exclude certain material.

*Id.* at 983.

246. The plaintiff sought an order to compel discovery. The district court ruled that because the defendant's thought processes were important to the issue of actual malice, the plaintiff was entitled to discovery. *Herbert v. Lando*, 73 F.R.D. 387 (S.D.N.Y.), *rev'd*, 568 F.2d 974 (2d Cir. 1977), *rev'd*, 441 U.S. 153 (1979).

247. *Amici curie* briefs were filed with the court of appeals on behalf of the American Society of Newspaper Editors, *Chicago Sun-Times*, The Miami Herald Publishing Co., National Broadcasting

on Lando's thoughts, opinions, and conclusions would chill the thought process of journalists and "consume the very values which the [*New York Times*] landmark decision sought to safeguard."<sup>248</sup> The Supreme Court granted certiorari,<sup>249</sup> and reversed the decision of the court of appeals.

The Supreme Court refused

to hold for the first time that when a member of the press is alleged to have circulated damaging falsehoods and is sued for injury to the plaintiff's reputation, the plaintiff is barred from inquiring into the editorial processes of those responsible for the publication, even though the inquiry would produce evidence material to the proof of a critical element of his cause of action.<sup>250</sup>

The Court felt the expanded protection urged by Lando would place too great a burden on public libel plaintiffs, a burden already heavy under *New York Times*.<sup>251</sup> Thus the Court ruled that in order to meet the burden of proof, a public libel plaintiff may inquire into the thoughts, opinions, and conclusions of the defendants responsible for publishing the defamatory material "where there is a specific claim of injury arising from a publication that is alleged to have been knowingly or recklessly false."<sup>252</sup> However, the Court did limit this right of inquiry—there is constitutional protection from inquiry which "subjects the editorial process to private or official examination merely to satisfy curiosity or to serve some general end such as the public interest."<sup>253</sup>

#### C. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*<sup>254</sup>

The Supreme Court recently decided to continue to limit the constitutional protections previously afforded defendants in libel suits. In that case, defendant *Dun & Bradstreet, Inc.*, a credit reporting agency, sent a report, which was false and grossly misrepresented the assets and liabilities of plaintiff *Greenmoss Builders, Inc.*, to five subscribers to its service indicating the plaintiff had filed a voluntary petition for bankruptcy. The plaintiff's president learned of the defamatory report while discussing future financing with a bank.<sup>255</sup> He immediately called the defendant's re-

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Company, Inc., *The New York Times Co.*, and the Radio Television News Directors Ass'n. *Herbert*, 568 F.2d at 975.

248. *Id.* at 984.

249. *Herbert v. Lando*, 435 U.S. 922 (1978).

250. *Herbert*, 441 U.S. at 155.

251. *Id.* at 170. "Libel plaintiffs are required to prove knowing or reckless falsehood with 'convincing clarity.'" *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964)).

252. *Herbert*, 441 U.S. at 174. For a detailed discussion of the case, see Note, *Self-Censorship After Herbert v. Lando: The Need for Special Pre-Trial Procedures in Defamation Action*, 58 N.C.L. REV. 1025 (1980).

253. *Herbert*, 441 U.S. at 174 (footnote omitted).

254. 105 S. Ct. 2939 (1985).

255. *Id.* at 2941. Plaintiff's president testified at trial that he was both shocked and confused over the report, because at the time of the report, the plaintiff's business was steadily expanding.

gional office to explain the error and ask for a correction. He also requested the names of the firms who had received the notice in order to assure them that their company was solvent, but the defendant refused to divulge the names of the recipients of the report.<sup>256</sup>

About a week after the initial report had been sent, when the defendant had determined that the report was false, it sent a correction notice.<sup>257</sup> The plaintiff told the defendant that it was dissatisfied with the notice, and again asked for the list of subscribers who had seen the initial report. The defendant once again refused to divulge the names.<sup>258</sup> Thereafter, the plaintiff refused to provide any financial data to the defendant and requested the defendant to inform anyone seeking such data that they were being withheld pending the outcome of the plaintiff's defamation action against the defendant.<sup>259</sup> Instead, the defendant issued a "blank rating" on the plaintiff, indicating that the plaintiff's circumstances were "difficult to classify." This information was given to creditors who requested information on the plaintiff's financial status.<sup>260</sup>

Greenmoss Builders then filed suit in Vermont state court, alleging that the false report had injured its reputation. It sought both compensatory and punitive damages. The jury returned with a verdict in favor of the plaintiff and awarded \$50,000 in compensatory or presumed damages and \$300,000 in punitive damages.<sup>261</sup> Dun & Bradstreet sought a new trial, arguing that *Gertz* precluded a recovery of presumed or punitive damages unless there was a showing of knowledge of falsity or reckless disregard for the truth. "The trial court indicated it doubted whether *Gertz* applied to 'non-media [cases],' but granted a new trial '[b]ecause. . . [it was] dissatisfied with the instructions given to the jury. . . .'"<sup>262</sup> The Vermont Supreme Court reversed, holding "that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions."<sup>263</sup> The Supreme Court granted cer-

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*Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 143 Vt. 66, 70-71, 461 A.2d 414, 416 (1983), *rev'd* 105 S. Ct. 2939 (1985).

256. *Dun & Bradstreet*, 105 S. Ct. at 2941.

257. *Id.* The notice stated that one of the plaintiff's former employees, not the plaintiff, had filed the bankruptcy petition, and that the plaintiff "continued in business." *Id.* at 2941-42. At trial, it was established that the error occurred when one of the defendant's employees, a seventeen year old high school student who reviewed Vermont bankruptcy pleadings, inadvertently attributed a bankruptcy report filed by one of the plaintiff's former employees. Dun & Bradstreet's representative testified that it was the routine practice to check the accuracy of the reports with the business themselves, but no attempt was made in this case to verify the information before reporting it. *Id.* at 2942.

258. *Id.* at 2947.

259. *Greenmoss Builders*, 143 Vt. at 72, 461 A.2d at 416.

260. *Id.* at 72, 461 A.2d at 416-17.

261. *Dun & Bradstreet*, 105 S. Ct. at 2942. As a consequence of the defendant's report, the plaintiff alleged "a damaged business reputation, loss of company profits, and loss of money expended to correct the error." *Greenmoss Builders*, 143 Vt. at 69, 461 A.2d at 415.

262. *Dun & Bradstreet*, 105 S. Ct. at 2942.

263. *Greenmoss Builders*, 143 Vt. at 75, 461 A.2d at 418.

tiorari<sup>264</sup> and affirmed the judgment of the Vermont Supreme Court, but for different reasons.

Justice Powell, who also wrote the opinion in *Gertz*, delivered the plurality opinion. He said that "permitting recovery of presumed and punitive damages in defamation cases absent a showing of 'actual malice' does not violate the First Amendment when the defamatory statements do not involve matters of public concern."<sup>265</sup>

Justice Powell employed the approach used in *Gertz* and balanced the strong and legitimate state "interest in compensating private individuals for injury to [their] reputation" against the first amendment interest in protecting this type of expression.<sup>266</sup> The importance of the state's interest was stressed because, "as Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being. . . .'"<sup>267</sup> But while *Gertz* says that no plaintiff can recover presumed or punitive damages without a showing of actual malice because of the first amendment interest, Justice Powell said "[t]he First Amendment interest [in *Dun & Bradstreet*] is less important than the one weighed in *Gertz*."<sup>268</sup> In reaching this conclusion, Justice Powell noted that "speech on 'matters of public concern' is 'at the heart of the First Amendment's protection,'"<sup>269</sup> while "speech on matters of purely private concern is of less First Amendment concern."<sup>270</sup>

This decision is both a reversal of at least part of the rule in *Gertz*, and an abandonment of the reasoning in *Gertz*.<sup>271</sup> In holding that a plaintiff cannot recover presumed or punitive damages without a showing of actual malice, the Court in *Gertz* abandoned the suggestion of *Rosenbloom v. Metromedia, Inc.*, which applied the actual malice standard to all things of general or public interest. The Court in *Gertz* stated that it did not want "judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not."<sup>272</sup> However, the plurality of *Dun & Bradstreet* returned to the "matter of public concern"

264. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 464 U.S. 959 (1983).

265. *Dun & Bradstreet*, 105 S. Ct. at 2948.

266. *Gertz*, 418 U.S. at 348-49.

267. *Id.* at 341 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

268. *Dun & Bradstreet*, 105 S. Ct. at 2945. Powell noted that the Court has recognized that not all speech is of equal first amendment importance. See *id.* at 2945 n.5.

269. *Id.* at 2945 (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)).

270. *Id.* at 2946 (citing *Connick v. Myers*, 461 U.S. 138, 146-47 (1983)).

271. One searches *Gertz* in vain for a single word to support the proposition that limits on presumed and punitive damages obtained only when speech involved matters of public concern. . . . Distrust of placing in the courts the power to decide what speech was of public concern was precisely the rationale *Gertz* offered for rejecting the *Rosenbloom* plurality approach.

*Id.* at 2959 n.11 (Brennan, J., dissenting).

272. *Gertz*, 418 U.S. at 346.



terminology of *Rosenbloom*, something a majority in *Gertz* wanted to avoid.

As Justice Brennan notes in the dissent, the plurality opinion fails to explain what is a matter of public concern. The only guidance is that it "must be determined by [the expression's] content, form, and context."<sup>273</sup> What the plurality does is "to serve up a smorgasbord of reasons why the speech at issue here is not . . . 'a matter of public concern.'"<sup>274</sup> The reasons include the following: (1) the "speech was solely in the individual interest of the speaker and its specific business audience," (2) "the report was made available to only five subscribers," (3) the speech was "unlikely to be deterred by state regulation," (4) the speech was "solely motivated by a desire for profit," and (5) "the reporting was also more objectively verifiable than speech deserving of greater protection."<sup>275</sup>

Justice Powell was joined by Justices Rehnquist and O'Connor. Justices Burger and White joined in the judgment, each arguing for the reversal of *Gertz* altogether. Justice Brennan delivered the dissent, joined by Justice Stevens, and by Justices Marshall and Blackmun, who were part of the majority in *Gertz*.

#### D. Philadelphia Newspapers, Inc. v. Hepps<sup>276</sup>

In 1986, the Supreme Court decided the first case helpful to defendants in defamation actions in over a decade. Although a public figure plaintiff must show the falsity of the statement at issue in order to prevail in a defamation action,<sup>277</sup> the Court had never addressed the issue of where the burden of proof as to truth or falsity should lie when the plaintiff is a private figure. In *Philadelphia Newspapers*, the Court held that a private figure plaintiff alleging defamation has the burden of proving the falsity of a media defendant's speech on matters of public concern. In that case, the *Philadelphia Inquirer*, a newspaper owned by defendant Philadelphia Newspapers, Inc., published a series of articles, written by defendants William Ecenbarger and William Lambert, between May 1975 and May 1976. The general theme of those articles was that the plaintiffs<sup>278</sup> had links to organized crime and had used those links to influence the state's

273. *Dunn & Bradstreet*, 105 S. Ct. at 2947 (quoting *Connick v. Myers*, 461 U.S. 138, 147-48 (1983)).

274. *Id.* at 2959 (Brennan, J., dissenting).

275. *Id.* at 2947.

276. 106 S. Ct. 1558 (1986).

277. See *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) ("a public official [is] allowed the civil remedy only if he establishes that the utterance was false"); see also *Herbert v. Lando*, 441 U.S. 153, 176 (1979) ("the plaintiff must focus on the editorial process and prove a false publication attended by some degree of culpability").

278. Plaintiff Michael S. Hepps is the principal stockholder of plaintiff General Programming, Inc. (GSI), a corporation that franchises a chain of stores selling beer, soft drinks, and snacks. GSI

governmental processes, both legislative and administrative.<sup>279</sup>

The plaintiffs then filed suit in Pennsylvania state court, alleging they had been defamed. As to falsity, Pennsylvania followed the common law presumption that a person's reputation is a good one and statements defaming a person are presumed false, although proof of the truth of the words by the defendant is an absolute defense to a defamation action.<sup>280</sup> Before trial, the parties raised the issue of who has the burden of proof as to falsity, but the trial court reserved its ruling on the matter. After all the evidence had been presented, the trial court concluded that the Pennsylvania statute<sup>281</sup> giving the defendant the burden of proving the truth of the statements violated the United States Constitution. The trial court then instructed the jury that the plaintiffs bore the burden of proving falsity. The jury ruled for the defendants.<sup>282</sup> The Pennsylvania Supreme Court viewed the *Gertz* case as requiring the plaintiff simply to show fault in actions for defamation. It concluded that a showing of fault did not require a showing of falsity, held that placing the burden of showing truth on the defendant did not violate the first amendment, and remanded the case for a new trial.<sup>283</sup> The Supreme Court noted probable jurisdiction<sup>284</sup> and reversed.

The Supreme Court, noting that in *Gertz* and *New York Times* a common law rule had been superseded by a constitutional rule, said "the common law's rule on falsity—that the defendant must bear the burden of proving truth—must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages."<sup>285</sup> The Court, in a majority opinion delivered by Justice O'Connor, stated that "[t]o ensure that true speech on matters of public concern is not deterred, . . . the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks

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owns the trademark "Thrifty Beverage." *Hepps*, 106 S. Ct. at 1560; *Hepps v. Philadelphia Newspapers, Inc.*, 506 Pa. 304, 309, 485 A.2d 374, 377 (1984).

279. The articles discussed a state legislator . . . whose actions displayed "a clear pattern of interference in state government by [the legislator] on behalf of Hepps and Thrifty." The stories reported that federal "investigators have found connections between Thrifty and underworld figures;" that "the Thrifty Beverage beer chain . . . had connections . . . with organized crime;" and that Thrifty had "won a series of competitive advantages through rulings by the State Liquor Control Board." A grand jury was said to be investigating the "alleged relationship between the Thrifty chain and known Mafia figures," and "[w]hether the chain received special treatment from the [state governor's] administration and the Liquor Control Board."

*Hepps*, 106 S. Ct. at 1560 (brackets and ellipses in original) (citations omitted).

280. *Id.*

281. "In an action for defamation, the defendant has the burden of proving, when the issue is properly raised: the truth of the defamatory communication." 42 PA. CONS. STAT. § 8343(b)(1) (1982).

282. *Hepps*, 106 S. Ct. at 1560-61.

283. *Hepps v. Philadelphia Newspapers, Inc.*, 506 Pa. 304, 485 A.2d 374 (1984).

284. 105 S. Ct. 3496 (1985).

285. *Hepps*, 106 S. Ct. at 1563.

damages against a media defendant for speech of public concern."<sup>286</sup>

In reaching its decision, the Court recognized there will always be cases where the truth or falsity of the statements cannot be conclusively resolved.<sup>287</sup> If the burden of proving falsity were on the plaintiff, there would be cases in which the plaintiff could not meet its burden despite the fact the speech was false. Thus, the plaintiff's suit would fail, even though it was meritorious. Similarly, if the burden of proving truth were on the defendant, there would be cases in which the defendant could not meet its burden despite the fact that the speech was true. Thus, the plaintiff's suit would succeed, even though it was not meritorious. The Court decided the plaintiff must bear the burden of proving falsity because the Constitution required it to rule in favor of protecting true speech when the evidence as to truth or falsity is ambiguous<sup>288</sup> and to "protect some falsehood in order to protect speech that matters."<sup>289</sup>

Although this case is helpful to some defamation defendants, the Court limited its holding in two respects: (1) to media defendants and (2) to matters of public concern. The first limitation—to media defendants—is important for purposes of this comment<sup>290</sup> because the holding does not apply to nonmedia defendants.<sup>291</sup> Thus, there is a group of potential defendants who may still bear the burden of proving truth in jurisdictions with laws such as the one in existence in Pennsylvania.<sup>292</sup> The im-

286. *Id.* at 1564. Although Justice Brennan joined Justice O'Connor's majority opinion, he filed a separate concurrence, joined by Justice Blackmun, noting he adhered to his view that a distinction between media and nonmedia defendants cannot be reconciled with the principle that "[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union, or individual." *Hepps*, 106 S. Ct. at 1565-66 (Brennan, J., concurring) (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2957 (1985) (Brennan, J., dissenting)).

287. The Court expressly recognized that placing the burden on the plaintiff would insulate from liability some speech that is false, but unprovably so. Nonetheless, the Court felt its previous decisions supported this result. *Hepps*, 106 S. Ct. at 1564-65.

288. *Id.* at 1564.

289. *Id.* at 1564-65 (quoting *Gertz*, 418 U.S. at 341).

290. Although the issue is beyond the scope of this comment, limiting the holding to media defendants may be of greater importance in another context. The first amendment explicitly protects the freedom "of the press," in addition to protecting the freedom "of speech." U.S. CONST. amend. I. Through most of our country's history, the two phrases have been used interchangeably. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 456 (1983). In no case has a majority of the Supreme Court ever recognized the press clause of the first amendment as having independent constitutional significance. It has refused to give the press any more protection than an individual enjoys under the speech clause. See generally *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (police search of newsroom); *Branzburg v. Hays*, 408 U.S. 665 (1972) (refusal of reporters to disclose confidential sources). However, Justice Stewart espoused the view that the press clause does have independent constitutional significance. See Stewart, "Or of the Press", 26 HASTINGS L.J. 631 (1975); see also *Zurcher*, 436 U.S. at 570-77 (Stewart, J., dissenting); *Branzburg*, 408 U.S. at 725-52 (Stewart, J., dissenting).

291. The Court said it need not "consider what standard would apply if the plaintiff sues a nonmedia defendant." *Hepps*, 106 S. Ct. at 1565 n.4.

292. See, e.g., *Denny v. Mertz*, 106 Wis.2d 636, 654-58, 318 N.W.2d 141, 150-51, cert. denied, 459 U.S. 883 (1982); *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412, 420 (Tenn. 1978).

portance of the second limitation to matters of public concern should be noted because this case is the first one in which a majority of the Court held that whether the speech at issue is of public concern is a factor in the outcome of a defamation case.<sup>293</sup>

## CONCLUSION

Although people have always cherished their good name, in 1964 the Supreme Court felt the first amendment interests, when balanced against that right to a good name, were more important if the person defamed was a public official. If a public official is defamed, he is required to prove actual malice. The Court extended the actual malice standard in 1967 to public figures, then in 1971, to all matters of general or public concern.

Since 1974, the Supreme Court has been attempting to narrow the protections offered to defendants in libel actions. That year, the Court in *Gertz* rejected the general or public interest approach offered by the *Rosenbloom* plurality. It felt that judges would be making *ad hoc* determinations as to what was a matter of general or public concern, and they limited the use of the actual malice standard to public officials and public figures. The Court did allow states to determine what standard of liability would be applied in cases involving private individuals, so long as strict liability was not used. Two years later, the Court restricted the public figure doctrine in *Time, Inc. v. Firestone* by eliminating the class of involuntary public figures.

In *Gertz*, the Court also held that states could not allow the recovery of presumed or punitive damages without a showing of actual malice. This limitation on presumed or punitive damages appears to be restricted by *Dun & Bradstreet v. Greenmoss*, where a plurality said that such damages could be recovered without a showing of actual damages if the defamatory material did not involve a matter of general or public concern. Since this was only a plurality opinion, with two members concurring in the judgment only—while arguing that *Gertz* should be overruled, we have returned to the days of *Rosenbloom*, where there is no clear majority view in the area of punitive damages as they apply to private individuals.

In *Hepps*, the Court held that private figure plaintiffs must prove falsity before they can recover damages from a media defendant. The Court expressly limited its holding to media defendants and to matters of public concern. By holding that the rule of *Hepps* only applies to matters of public concern, a majority of the Court used the language of *Rosenbloom* which was rejected by *Gertz*.

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293. A force "that may reshape the common-law landscape to conform to the First Amendment . . . is whether the speech at issue is of public concern." *Hepps*, 106 S. Ct. at 1563.

Although the law of defamation always has been complex, some commentators thought the constitutional change would make a difficult area of the law easier to understand.<sup>294</sup> However, the Supreme Court muddled this already complex area. The result is that the confusion is worse now than ever before.

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294. See Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 889 (1984).