Fordham Law Review

Volume 49 | Issue 1 Article 11

1980

Public Figure Defamation: Preserving Summary Judgment to Protect Free Expression

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PUBLIC FIGURE DEFAMATION: PRESERVING SUMMARY JUDGMENT TO PROTECT FREE EXPRESSION

INTRODUCTION

The Supreme Court, in *Hutchinson v. Proxmire*,[1] recently announced its disapproval of the widespread use of summary judgment in public figure defamation suits[2] in response to lower court assertions that the summary procedure "may well be the 'rule' rather than the 'exception' " in such actions.[3] In footnote nine, the Court stated that

> we are constrained to express some doubt about the so-called "rule." The proof of "actual malice" calls a defendant's state of mind into question, and does not readily lend itself to summary disposition. In the present posture of the case, however, the propriety of dealing with such complex issues by summary judgment is not before us.[4]

Although the fate of summary judgment in public figure defamation cases was expressly left unresolved, the pronouncement has signifi-

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1. 443 U.S. 111 (1979).

2. Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979). Defamation is the non-privileged publication, either written or verbal, of a false statement to a third party which injures the reputation of the plaintiff. 1 A. Hanson, Libel and Related Torts § 14 (1969). Defamation is the invasion of a person's interest in his reputation and good name. W. Prosser, Handbook of the Law of Torts § 111 (4th ed. 1971).

3. Oliver v. Village Voice, Inc., 417 F. Supp. 235, 237 (S.D.N.Y. 1976); *accord*, Yiamouyiannis v. Consumers Union of the United States, Inc., 5 Media L. Rep. (BNA) 1174, 1175 (S.D.N.Y. 1979), *aff'd*, 619 F.2d 932 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3247 (U.S Oct. 7, 1980) (No. 79-1987); Hutchinson v. Proxmire, 431 F. Supp. 1311, 1330 (W.D. Wis. 1977), *aff'd*, 579 F.2d 1027 (7th Cir. 1978), *rev'd*, 443 U.S. 111 (1979); Rosanova v. Playboy Enterprises, Inc., 411 F. Supp. 440, 449 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978); Guitar v. Westinghouse Elec. Corp., 396 F. Supp. 1042, 1053 (S.D.N.Y. 1975), *aff'd mem.*, 538 F.2d 309 (2d Cir. 1976); *see* Comment, *The Expanding Constitutional Protection for the News Media from Liability for Defamation: Predictability and the New Synthesis*, 70 Mich. L. Rev. 1547, 1565 & n.116 (1972). Summary judgment was originally available only to plaintiffs, McLauchlan, *An Empirical Study of the Federal Summary Judgment Rule*, 6 J. Legal Stud. 427, 441 (1977), but modern law allows either party to move for it. *E.g.*, Fed. R. Civ. P. 56(a)-(b). This Note is limited to a discussion of summary judgment for defendants in public figure defamation actions.

4. 443 U.S. at 120 n.9 (citations omitted). The Court reversed a grant of summary judgment for defendant on the ground that the plaintiff was not a public figure and thus, did not have to show actual malice, *id.* at 136, the standard required of public figures. Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967); *see* notes 27-28 *infra* and accompanying text. In Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979), decided the same day as *Hutchinson*, the Court reversed a grant of summary judgment in a public figure defamation case on identical grounds, *id.* at 169, and cited the *Hutchinson* footnote. *Id.* at 161 n.3.

cantly confused many lower courts[5] and, in some instances, has caused denial of summary judgment where granting it was warranted.[6]

This Note challenges the Supreme Court's observation that summary judgment may be inappropriate in most public figure defamation actions and further contends that its use in this area is especially appropriate in promoting free expression.

I. THE CONTEXT OF FOOTNOTE NINE

Standing alone, footnote nine could be interpreted as an innocuous statement, intended only to advise lower courts to carefully scrutinize summary judgment motions in public figure defamation cases. The footnote, however, is the latest step in a trend whereby the Supreme Court has continuously narrowed the protection its earlier decisions afforded public figure defamation defendants.[7] Only in light of this trend may the true significance, and potential impact, of footnote nine be fully understood.[8]

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5. *See* Yiamouyiannis v. Consumers Union of the United States, Inc., 619 F.2d 932 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3247 (U.S. Oct. 7, 1980) (No. 79-1957); Hart v. Playboy Enterprises, Inc., 5 Media L. Rep. (BNA) 1811 (D. Kan. 1979); Church of Scientology v. Siegelman, 475 F. Supp. 950 (S.D.N.Y. 1979); Nader v. de Toledano, 408 A.2d 31 (D.C. 1979), *cert. denied*, 444 U.S. 1078 (1980). Other courts have taken cognizance of the footnote and attempted to reconcile their decisions with it. National Nutritional Foods Ass'n v. Whelan, 492 F. Supp. 374 (S.D.N.Y. 1980); Loeb v. New Times Communications Corp., 6 Media L. Rep. (BNA) 1438 (S.D.N.Y. 1980); Mount v. Sadik, No. 78 Civ. 2279 (S.D.N.Y. Apr. 7, 1980); Rinsley v. Brandt, 6 Media L. Rep. (BNA) 1222 (D. Kan. 1980); Berkey v. Delia, 287 Md. 302, 413 A.2d 170 (1980); National Ass'n of Governmental Employees v. Central Broadcasting Corp., 79 Mass. Adv. Sh. 2485, 396 N.E.2d 996 (1979), *cert. denied*, 100 S. Ct. 2152 (1980). *See also* Hall v. Piedmont Publishing Co., 6 Media L. Rep. (BNA) 1333 (N.C. Ct. App. 1980). A few courts have noted the Supreme Court dicta but have not relied on it. Steaks Unltd., Inc. v. Deaner, 623 F.2d 264 (3d Cir. 1980); Cianci v. New Times Publishing Co., 486 F. Supp. 368 (S.D.N.Y. 1979), *rev'd on other grounds*, 6 Media L. Rep. (BNA) 1625 (2d Cir. 1980).

6. Hart v. Playboy Enterprises, Inc., 5 Media L. Rep. (BNA) 1811 (D. Kan. 1979); Church of Scientology v. Siegelman, 475 F. Supp. 950 (S.D.N.Y. 1979).

7. *Compare* Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (plurality opinion) *and* Time, Inc. v. Pape, 401 U.S. 279 (1971) *and* Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6 (1970) *and* St. Amant v. Thompson, 390 U.S. 727 (1968) *and* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) *and* Rosenblatt v. Baer, 383 U.S. 75 (1966) *and* Garrison v. Louisiana, 379 U.S. 64 (1964) *with* Hutchinson v. Proxmire, 443 U.S. 111 (1979) *and* Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979) *and* Time, Inc. v. Firestone, 424 U.S. 448 (1976) *and* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

8. *See* Hentoff, Nader v. de Toledano, *The Anatomy of a Malignant Libel Suit*, Village Voice, Apr. 7, 1980, at 20, col. 1; Tybor, *The Libel War Escalates*, Nat'l L.J., Apr. 21, 1980, at 1, col. 1. A noted first amendment lawyer has suggested that footnote nine may preclude summary judgment in the future. [1980] Media L. Rep. (BNA) News Notes (June 17, 1980) (on file with the *Fordham Law Review*) [hereinafter cited as News Notes] ("The footnote 'may be rhetoric, but I doubt it'. . . ." (quoting Floyd Abrams, Esq.)).

Until the landmark Supreme Court decision, *New York Times Co. v. Sullivan*,[9] no special protection was afforded those who mistakenly defamed persons of public prominence.[10] The *Sullivan* Court, however, recognized that a primary purpose of the first amendment[11] was to encourage self-government by permitting comment and criticism of those charged with its leadership.[12] To ensure "freedom of expression upon public questions"[13] and to enhance the "profound national commitment to . . . uninhibited, robust, and wide-open" debate on public issues,[14] the *Sullivan* Court held that public official plaintiffs must prove with "convincing clarity"[15] that the defendant

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9. 376 U.S. 254 (1964).

10. Prior to *Sullivan*, defamation was not considered an issue of constitutional dimension. Before 1964, "the consistent view of the Court was that libelous words constitute a class of speech wholly unprotected by the First Amendment." Gertz v. Robert Welch, Inc., 418 U.S. 323, 370 (1974) (White, J., dissenting); *see* Beauharnais v. Illinois, 343 U.S. 250, 292 (1952) (Jackson, J., dissenting); L. Eldredge, The Law of Defamation § 50 (1978). The body of law that developed following *Sullivan*, however, was not wholly unprecedented, but had a solid foundation in common law. Freedom of speech had been called "a prized American privilege." Bridges v. California, 314 U.S. 252, 270 (1941). Public discussion was considered a political duty and, thus, "a fundamental principle of the American government." Whitney v. California, 274 U.S. 357, 375 (1927) (footnote omitted), *overruled on other grounds per curiam*, Brandenburg v. Ohio, 395 U.S. 444 (1969); *see* J. Townshend, A Treatise on the Wrongs Called Slander and Libel 445 n.3 (4th ed. 1890). As early as 1890 the importance of a free press, as expressed in the first amendment, was recognized in defamation suits, as was a newspaper's duty to discuss questions of public interest and criticize the actions of those in power. *Id. See generally* Noel, *Defamation of Public Officers and Candidates*, 49 Colum. L. Rev. 875 (1949). As the *Sullivan* Court noted, "[t]he general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions." 376 U.S. at 269.

11. The first amendment to the Constitution provides, in part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I.

12. 376 U.S. at 275. The Court noted that public discussion of public officials was a "fundamental principle of the American form of government." *Id.* (footnote omitted).

13. 376 U.S. at 269. "[T]he stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies." St. Amant v. Thompson, 390 U.S. 727, 731-32 (1968); *see* L. Eldredge, *supra* note 10, at 254; Frakt, *The Evolving Law of Defamation: New York Times Co. v. Sullivan to Gertz v. Robert Welch, Inc. and Beyond*, 6 Rut.-Cam. L.J. 471, 474 (1975) [hereinafter cited as Frakt I]; Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 Tex. L. Rev. 199, 201 (1976).

14. 376 U.S. at 270.

15. 376 U.S. at 285-86. A showing with convincing clarity is considered "clear and convincing proof." Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 30 (1971) (plurality opinion). This standard may lie between the civil standard of preponderance of the evidence and the beyond a reasonable doubt standard used in criminal

published the allegedly defamatory material with "actual malice," a term defined as knowing or reckless disregard for the truth.[16] Liability based on any lesser degree of proof thwarts the central meaning of the first amendment[17] by denying publishers the " 'breathing space' " needed to survive,[18] thus, infringing society's opportunity to take part in government.[19] The *Sullivan* decision, therefore, established pub-

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law. Nader v. de Toledano, 408 A.2d 31, 49 (D.C. 1979), *cert. denied*, 444 U.S. 1078 (1980). It appears to be closer to the reasonable doubt standard, however, as it requires "proof that is clear, precise and indubitable or unmistakable and free from serious and substantial doubt." MacGuire v. Harriscope Broadcasting Co., 612 P.2d 830, 839 (Wyo. 1980).

16. 376 U.S. at 279-80. "Actual malice" is a term of art that differs considerably from common law malice which means ill-will, spite, or hostility. Herbert v. Lando, 441 U.S. 153, 199 (1979) (Stewart, J., dissenting); Pierce v. Capital Cities Communications, Inc., 576 F.2d 495, 506 (3d Cir.), *cert. denied*, 439 U.S. 861 (1978); Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341, 1349-50 (S.D.N.Y. 1977). Hill, *Defamation and Privacy Under the First Amendment*, 76 Colum. L. Rev. 1205, 1249 n.199 (1976). The term "actual malice" has caused some confusion, leading the Supreme Court to remand several cases that were decided on jury instructions that allowed liability based on ill-will or hostility. *E.g.*, Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6 (1970); Henry v. Collins, 380 U.S. 356 (1965) (per curiam). The Court has suggested that courts avoid the use of the phrase in jury instructions. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 n.18 (1971) (plurality opinion). It has been proposed that "actual malice" be replaced with the more descriptive and less confusing "scienter." MacGuire v. Harriscope Broadcasting, 612 P.2d 830, 841 n.3 (Wyo. 1980); W. Prosser, *supra* note 2, at 821.

17. 376 U.S. at 273. The "central meaning" of the first amendment is "a core of protection of speech without which democracy cannot function, without which . . . 'the censorial power' would be in the Government over the people and not 'in the people over the Government.' " Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191, 208. The main thrust of *Sullivan* was to allow free criticism of government. 376 U.S. at 279-80. A degree of liability lower than reckless disregard would deter criticism of official conduct. *Id.* at 279. A lower standard would compel critics to "guarantee the truth of all [their] factual assertions" resulting in self-censorship. *Id.* Cases which relied on *Sullivan* and developed the law of public figure defamation expressed the same policy concerns. *E.g.*, Curtis Publishing Co. v. Butts, 388 U.S. 130, 149 (1967) ("The dissemination of the individual's opinions on matters of public interest is . . ., in the historic words of the Declaration of Independence, an 'unalienable right' that 'governments are instituted among men to secure.' "); Garrison v. Louisiana, 379 U.S. 64, 73 (1964) ("[T]he great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood.").

18. 376 U.S. at 271-72. The Court recognized that "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.' " *Id.* at 271-72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

19. 376 U.S. at 274-75. " 'The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.' " *Id.* at 269 (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)). The *Sullivan*

lic figure defamation as distinct from the common law torts of libel[20] and slander[21] by raising and constitutionalizing the standard of proof.[22]

The parameters of the public official class were left undefined in *Sullivan*.[23] Later Supreme Court decisions openly accepted the policy underlying *Sullivan*, requiring even those on the periphery of government to meet the actual malice standard.[24] The sphere of protection was most profoundly expanded by the Court in *Curtis Publishing Co. v. Butts*.[25] *Sullivan*, on its facts, held that public official status attached when the defamatory remarks involved conduct relating to a person's official duties.[26] The language of *Sullivan*, however,

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Court noted Judge Learned Hand's observation that the first amendment " 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.' " 376 U.S. at 270 (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945)). The Court subsequently reaffirmed this view, noting that the guarantees of freedom of expression are "not for the benefit of the press so much as for the benefit of all of us;" they are necessary for "the maintenance of our political system and an open society." Time, Inc. v. Hill, 385 U.S. 374, 389 (1967). It is as much the duty of the citizen to criticize official conduct as it is the duty of the official to administer. New York Times Co. v. Sullivan, 376 U.S. 254, 282 (1964).

20. Libel is defamation in writing or by some other permanent form of communication. 1 A. Hanson, *supra* note 2, § 38, at 39; W. Prosser, *supra* note 2, § 111, at 737.

21. Slander is oral defamation. 1 A. Hanson, *supra* note 2, § 45; W. Prosser, *supra* note 2, § 111, at 737.

22. 376 U.S. at 279-80 ("The constitutional guarantees require, we think, 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'. . . ."). The *Sullivan* decision "added to the tort law of the individual States a constitutional zone of protection for errors of fact caused by negligence." Time, Inc. v. Pape, 401 U.S. 279, 291 (1971).

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

24. St. Amant v. Thompson, 390 U.S. 727, 730-32 (1968) (deputy sheriff held public official); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82-83 (1967) (elected court clerk held public official); Rosenblatt v. Baer, 383 U.S. 75, 85 (1966) (remanded to state court due to substantial argument that former supervisor of county recreation area was public official); Henry v. Collins, 380 U.S. 356, 357-58 (1965) (county attorney and Chief of Police held public officials); *accord*, Adey v. United Action for Animals, Inc., 361 F. Supp. 457, 461-62 (S.D.N.Y. 1973) (consultant to the National Aeronautics and Space Administration held public official), *aff'd mem.*, 493 F.2d 1397 (2d Cir.), *cert. denied*, 419 U.S. 842 (1974). That the defamatory statement is made after the official has left his post is irrelevant to a determination of his status for purposes of a libel suit. 1 A. Hanson, *supra* note 2, § 141, at 108.

25. 388 U.S. 130 (1967).

26. New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964). The Court noted that it was unnecessary to determine, at that time, "the boundaries of the 'official conduct' concept." *Id.* at 283 n.23.

was sufficiently broad, and the first amendment concerns sufficiently compelling, to lead the Court, in *Curtis*, to conclude that the actual malice standard was equally applicable to any person who gains recognition from participation in public events.[27] Thus, the term "public figure" was born.[28]

A retreat from the liberal construction of the term "public figure," however, can be detected over the past several years.[29] In *Gertz v. Robert Welch, Inc.*,[30] the Supreme Court held that private individuals involved in issues of public concern are not necessarily public figures.[31] Although retaining the notion that public figure status can

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27. Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967). In *Curtis*, the plaintiff, a university athletic director involved in a bribery scandal, was considered a public figure because "public interest in education in general, and in the conduct of the athletic affairs of educational institutions in particular, justifies constitutional protection of discussion of persons involved in it." *Id.* at 146. In a companion case, a retired Army General, active in a dispute concerning federally enforced school integration, was deemed a public figure due to "the important public interest in being informed about the events and personalities involved in the . . . riot" in which he participated. *Id.* Focusing on the issue with which a person is associated to determine public figure status was reaffirmed in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (plurality opinion), where the Court held that private individuals involved in issues of public concern are subject to the actual malice standard. *Id.* at 43-44. Noting that the " 'profound national committment to . . . debate' " stressed in *Sullivan* referred to public issues, *id.* at 43 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)), the Court stated that "[d]rawing a distinction between 'public' and 'private' figures makes no sense in terms of the First Amendment guarantees." *Id.* at 45-46 (footnote omitted). A subject is equally worthy of public attention and comment whether a participant is "famous or anonymous." *Id.* at 44 (footnote omitted).

28. In Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), the Court defined "public figure" as one who has "attained that status by position alone" or by "purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy." *Id.* at 155. The Court relied on the common law definition of public figure as it related to the tort of invasion of privacy. *Id.* at 154. At common law, a person who, by his accomplishments or profession, gave the public a legitimate interest in his activities, was a public figure, even if he had sought no attention. Restatement of Torts § 867, Comment c (1939); Hunsaker, *Adequate Breathing Space in a Poisonous Atmosphere: Balancing Freedom and Responsibility in the Open Society*, 16 Duq. L. Rev. 9, 20 (1977).

29. K. Devol, Mass Media and the Supreme Court 232 (2d ed. 1976); L. Eldredge, *supra* note 10, § 52, at 282; Anderson, *Libel and Press Self-Censorship*, 53 Tex. L. Rev. 422, 451-52 (1975); Frakt, *Defamation Since* Gertz v. Robert Welch, Inc.: *The Emerging Common Law*, 10 Rut.-Cam. L.J. 519, 528 (1979) [hereinafter cited as Frakt II]; Kovner, *Disturbing Trends in the Law of Defamation: A Publishing Attorney's Opinion*, 3 Hastings Const. L.Q. 363, 365-67 (1976); Tybor, *supra* note 8, at 26, col. 1; News Notes, *supra* note 8.

30. 418 U.S. 323 (1974).

31. *Id.* at 347. The Court allowed "the States [to] define for themselves the appropriate standard" to be met by private individuals. *Id.* Only strict liability was precluded. *Id.* Several states have settled on a negligence standard. *E.g.*, Cahill v.

arise from participation in public issues, the Court emphasized the voluntariness of that participation.[32] A plaintiff must, through his own actions, "invite attention and comment" to become a public figure.[33] Therefore, the central focus for determining which plaintiffs must meet the high constitutional standard shifted from the issue in-

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Hawaiian Paradise Park Corp., 56 Hawaii 522, 543 P.2d 1356 (1975); Troman v. Wood, 62 Ill. 2d 184, 340 N.E.2d 292 (1975); Gobin v. Globe Publishing Co., 216 Kan. 223, 531 P.2d 76 (1975); Jacron Sales Co. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976); Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 330 N.E.2d 161 (1975); Thomas H. Maloney & Sons, Inc. v. E. W. Scripps Co., 43 Ohio App. 2d 105, 334 N.E.2d 494 (1974), *cert. denied*, 423 U.S. 883 (1975); Martin v. Griffin Television, Inc., 549 P.2d 85 (Okla. 1976); Taskett v. King Broadcasting Co., 86 Wash. 2d 439, 546 P.2d 81 (1976). Other states have opted for a test requiring private figures involved in public issues to show actual malice. *E.g.*, Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 538 P.2d 450, *cert. denied*, 423 U.S. 1025 (1975); Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc., 162 Ind. App. 671, 321 N.E.2d 580 (1974), *cert. denied*, 424 U.S. 913 (1976); LeBeouf v. Times Picayune Publishing Corp., 327 So. 2d 430 (La. Ct. App. 1976). At least one state has adopted an intermediate standard, requiring a showing of "gross irresponsibility" when private individuals are involved in issues of public concern. Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 200, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 65 (1975); Grobe v. Three Village Herald, 69 A.D.2d 175, 176, 420 N.Y.S.2d 3, 4 (2d Dep't 1979) (per curiam), *aff'd mem.*, 49 N.Y.2d 932, 406 N.E.2d 491, 428 N.Y.S.2d 676 (1980).

32. 418 U.S. at 345 ("Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare."); Robertson, *supra* note 13, at 222-23 ("The *Gertz* decision clearly implies that unless plaintiff is a household name, he will not incur public figure status without voluntary publicity-seeking on his part." (footnote omitted)). The common law definition employed in Curtis Publishing Co. v. Butts, 388 U.S. 130, 154-55 (1967), included those who sought no attention. *See* note 28 *supra*. Thus, the Court in *Gertz* narrowed the category acknowledged at common law. The standards by which public figure status is determined according to *Curtis* and according to *Gertz* are similar. Robertson, *supra* note 13, at 224. The *Curtis* Court noted that public status may be achieved "by position alone" or through "purposeful activity amounting to a thrusting of [one's] personality into the 'vortex' of an important public controversy." Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967). Similarly, *Gertz* referred to public figures as those who "have assumed roles of especial prominence in the affairs of society" and are deemed public for all purposes and those who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974). The emphasis, however, is significantly different. Robertson, *supra* note 13, at 224-25. Voluntary participation is stressed in *Gertz*. As Justice Blackmun noted, under the *Gertz* test, only a person who "literally or figuratively 'mounts a rostrum' to advocate a particular view" becomes a public figure. Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 169 (1979) (Blackmun, J., concurring).

33. Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974). The motivation for participation must be a desire to resolve the relevant issues. *Id.*; Time, Inc. v. Firestone, 424 U.S. 448, 453 (1976).

volved to the nature of the individual's involvement,[34] inevitably decreasing the number in that category.[35]

The type of activity in which one must voluntarily participate to acquire public figure status was not addressed in *Gertz*. In *Time, Inc. v. Firestone*,[36] however, the Court, confronted with this question, adopted a narrow construction of "public issue." It "reject[ed] the notion [implicit in earlier decisions] that a controversy is 'public' because it excites popular interest."[37]

Finally, it is noteworthy that prior to *Gertz*, the Supreme Court repeatedly held plaintiffs to be public figures.[38] Since *Gertz*, it has unanimously found plaintiffs to be private individuals.[39] The result is an increase in the number of plaintiffs who may recover on evidence falling short of actual malice and a consequent decrease in the protection previously afforded publishers.[40]

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34. Hill, *supra* note 16, at 1213 (The "new formula" of *Gertz* required "a focus on persons rather than issues."). The Court abandoned the "public or general concern" test employed in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44 (1971) (plurality opinion). Eaton, *The American Law Of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349, 1402-03 (1975); Frakt I, *supra* note 13, at 486; Frakt II, *supra* note 29, at 524-25; Hill, *supra* note 16, at 1212; *see* Time, Inc. v. Firestone, 424 U.S. 448, 489 (1976) (Marshall, J., dissenting).

35. Robertson, *supra* note 13, at 222 (The *Gertz* formulation signals a narrowing of the public figure category.). Justice Brennan noted that *Gertz* was indeed a cutback on the scope of the *Sullivan* decision, as it had developed. Time, Inc. v. Firestone, 424 U.S. 448, 474 (1976) (Brennan, J., dissenting).

36. 424 U.S. 448 (1976).

37. Hill, *supra* note 16, at 1214 (footnote omitted). In Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (plurality opinion), the Court had mentioned that "constitutional protection was not intended to be limited to matters bearing broadly on issues of responsible government." *Id.* at 42. In *Firestone*, as in *Gertz*, the Court failed to define specifically what makes a controversy public. Hill, *supra* note 16, at 1214.

38. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (plurality opinion) (distributor of obscene magazines held public figure); Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6 (1970) (prominent local real estate developer held public figure); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (university athletic director and retired Army General held public figures).

39. Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979) (individual failing to respond to Grand Jury subpoena regarding investigation of Soviet espionage held private individual); Hutchinson v. Proxmire, 443 U.S. 111 (1979) (government-subsidized scientist held private individual); Time, Inc. v. Firestone, 424 U.S. 448 (1976) (member of wealthy, well-known family held private individual); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (prominent attorney representing family of young man allegedly killed by Chicago policeman held private individual). It has been noted that the *Firestone* Court narrowed the definition of public figure by "presumably excluding socialites, entertainers and similar persons." K. Devol, *supra* note 29, at 232.

40. *See* K. Devol, *supra* note 29, at 232; L. Eldredge, *supra* note 10, § 52, at 282. *See generally* Tybor, *supra* note 8, at 1, col. 1. Those who do not have to show actual malice are more likely to sue. *See* K. Devol, *supra* note 29, at 232. As a

In this context, footnote nine is particularly ominous. Viewed in accord with the trend, footnote nine has received much attention and courts have already struggled to reconcile their decisions with it.[41] The result is a distortion of a sound procedural remedy.

II. The Impact of Footnote Nine

A. *Summary Judgment in Public Figure Defamation*

Determination of liability in public figure defamation requires a subjective inquiry;[42] proof of actual malice must be "brought home" to the defendant.[43] Although, as a general proposition, state of mind

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result, publishers may forego publication rather than risk liability. Kovner, *supra* note 29, at 369. The narrower definition of public figure will cause "names of some [persons involved in public issues to be] stricken from newsworthy stories, . . . tend[ing] to distort the news." *Id.* Additionally, it has been noted that one result of Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), is the increasing difficulty publishers will encounter in determining who is a public figure. Frakt I, *supra* note 13, at 487; *see Who's a Public Figure? You Figure It Out*, Nat'l L.J., Apr. 21, 1980, at 26, col. 1. This difficulty is evident in several decisions in which judges concur as to the proper standard to apply but sharply disagree as to the result on particular facts. *E.g.*, Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979); Dodrill v. Arkansas Democrat Co., 265 Ark. 628, 590 S.W.2d 840 (1979), *cert. denied*, 444 U.S. 1076 (1980). One federal court noted that even under the *Gertz* test, Gertz himself could have been deemed a public figure. Hotchner v. Castillo-Puche, 404 F. Supp. 1041, 1044 (S.D.N.Y. 1975) ("Perhaps if attorney Gertz was not a public figure, nobody is." (footnote omitted)), *rev'd on other grounds*, 551 F.2d 910 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977); *see* Anderson, *supra* note 29, at 448; Robertson, *supra* note 13, at 221-22.

41. *See* notes 5 & 8 *supra*.

42. St. Amant v. Thompson, 390 U.S. 727, 731 (1968); Curtis Publishing Co. v. Butts, 388 U.S. 130, 153 (1967); Garrison v. Louisiana, 379 U.S. 64, 74 (1964); Vandenburg v. Newsweek, Inc., 507 F.2d 1024, 1026 (5th Cir. 1975); Washington Post Co. v. Keogh, 365 F.2d 965, 967 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967); Yiamouyiannis v. Consumers Union of the United States, Inc., 5 Media L. Rep. (BNA) 1174, 1175 (S.D.N.Y. 1979), *aff'd*, 619 F.2d 932 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3247 (U.S. Oct. 7, 1980) (No. 79-1987); Schultz v. Reader's Digest Ass'n, 468 F. Supp. 551, 564 (E.D. Mich. 1979); Hoffman v. Washington Post Co., 433 F. Supp. 600, 605 (D.D.C. 1977), *aff'd mem.*, 578 F.2d 442 (D.C. Cir. 1978); Guitar v. Westinghouse Elec. Corp., 396 F. Supp. 1042, 1053 (S.D.N.Y. 1975), *aff'd mem.*, 538 F.2d 309 (2d Cir. 1976).

43. New York Times Co. v. Sullivan, 376 U.S. 254, 287 (1964) ("[T]he state of mind required for actual malice [has] to be brought home to the persons . . . having responsibility for the publication . . . ."); St. Amant v. Thompson, 390 U.S. 727, 731 (1968); Bezanson, Herbert v. Lando, *Editorial Judgment and Freedom of the Press: An Essay*, 1978 U. Ill. L.F. 605, 625, Hill, *supra* note 16, at 1211 n.19; Note, *Defamation and the First Amendment: Editorial Process Found Privileged in* Herbert v. Lando, 13 Tulsa L.J. 837, 844 (1978). One commentator noted that the Supreme Court has been "neither clear nor consistent" regarding whether it favors an objective or a subjective test of actual malice. *Id.* at 849. At least once the Court seemed to adopt an objective standard by defining reckless disregard as "an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967). This

offenses are inappropriate for summary disposition,[44] footnote nine should not signal automatic foreclosure of the possibility of summary judgment in public figure defamation.

Rule 56 of the Federal Rules of Civil Procedure permits summary disposition of actions when there are no material issues to be determined by a fact-finder.[45] The elements of a cause of action and the requisite degree of proof are incorporated into the consideration of a motion for summary judgment.[46] Failure to show sufficient evidence of an element is failure to establish the existence of a factual issue as to that element.[47] In public figure defamation, the requirement of

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case was not explicitly overruled, but the Court, soon after, in emphasizing the subjectivity of the standard, stated that "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing," St. Amant v. Thompson, 390 U.S. 727, 731 (1968), and that the defendant must have "entertained serious doubts" prior to publication. *Id.* The Court mentioned, however, that certain objective criteria could be used in determining the state of mind. *Id.* at 732. For example, if a story were based on an unverified anonymous telephone call, actual malice could be inferred. *Id.* Similarly, "allegations . . . so inherently improbable that only a reckless man would have put them in circulation" may create an inference of actual malice. *Id.* The same might be true if there were "obvious reasons" for the reporter to doubt the veracity of his source. *Id.* It appears that, although the standard is highly subjective, the Court has made some effort to create objective guidelines so that public figure defamation will not operate in a vacuum, and publishers will be forewarned as to what actions might create liability. As in other areas which require a measuring of professional conduct, "the customs and practices of the profession should provide the norm against which the reasonableness of the defendant's conduct is measured." Anderson, *supra* note 29, at 466 & n.203.

44. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam). Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 473 (1962); 10 C. Wright & A. Miller, Federal Practice and Procedure § 2730, at 583-84 (1973); 6 J. Moore, Federal Practice ¶ 56.17[41.-1], at 56-930 (2d ed. 1980). Relevant information may be within the exclusive knowledge of one of the litigants, making it difficult to show the absence, or the existence, of an issue. 10 C. Wright & A. Miller, *supra*, § 2730, at 583-84.

45. Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). *See generally* 10 C. Wright & A. Miller, *supra* note 44, § 2712. The summary judgment rule in most states is the same as the Federal Rule. D. Paston, Summary Judgment 23 (1963). For analytical purposes, this Note uses Rule 56 as the benchmark of summary judgment procedure.

46. 10 C. Wright & A. Miller, *supra* note 44, § 2727. To grant a motion for summary judgment, the court must be satisfied that the plaintiff can offer no competent evidence that could support a verdict in his favor. *Id.* at 531. "[T]he evidence offered must have the force needed to allow a jury to rely on it . . . ." *Id.* at 543. Evidence which is without force is insufficient to raise an issue of material fact. *Id.* at 542.

47. *Id.*; *see* Donnelly v. Guion, 467 F.2d 290, 294 (2d Cir. 1972). On a motion for summary judgment the court's sole duty is to determine whether an issue of fact remains. Heyman v. Commerce & Indus. Ins. Co., 524 F.2d 1317, 1318-20 (2d Cir.

proof of actual malice with convincing olarity creates a greater likelihood that summary judgment can be properly granted.[48]

The actual malice standard requires conduct of an egregious nature amounting to recklessness.[49] A defendant must have "in fact entertained serious doubts as to the truth of his publication."[50] Upon

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1975); 6 J. Moore, Federal Practice, *supra* note 44, ¶ 56.15[1], at 56-391. It may neither resolve the issue nor weigh conflicting evidence or inferences. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam); Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 628 (1944); Woods v. Hearst Corp., 2 Media L. Rep. (BNA) 1548, 1550 (D. Md. 1977).

48. Southard v. Forbes, Inc., 588 F.2d 140, 145-46 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979); Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858, 864 (5th Cir. 1970); Time, Inc. v. McLaney, 406 F.2d 565, 573 (5th Cir.), *cert. denied*, 395 U.S. 922 (1969); United Medical Labs., Inc. v. Columbia Broadcasting Sys., Inc., 404 F.2d 706, 712 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1969); Ethridge v. North Mississippi Communications, Inc., 460 F. Supp. 347, 351 (N.D. Miss. 1978); Jenoff v. Hearst Corp., 453 F. Supp. 541, 547 (D. Md. 1978). Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341, 1344 (S.D.N.Y. 1977); Trans World Accounts, Inc. v. Associated Press, 425 F. Supp. 814, 822 (N.D. Cal. 1977); Fadell v. Minneapolis Star and Tribune Co., 425 F. Supp. 1075, 1086 (N.D. Ind. 1976), *aff'd*, 557 F.2d 107 (7th Cir.), *cert. denied*, 434 U.S. 966 (1977); Cerrito v. Time, Inc., 302 F. Supp. 1071, 1075 (N.D. Cal. 1969), *aff'd per curiam*, 449 F.2d 306 (9th Cir. 1971); Anderson, *supra* note 29, at 456-58; Hill, *supra* note 16, at 1218 n.63.

49. New York Times Co. v. Sullivan, 376 U.S. 254, 287-88 (1964). Actual malice requires an "extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967); *e.g.*, Time, Inc. v. Johnston, 448 F.2d 378, 383-84 (4th Cir. 1971); Dacey v. Florida Bar, Inc., 427 F.2d 1292, 1295 (5th Cir. 1970); Oliver v. Village Voice, Inc., 417 F. Supp. 235, 238 (S.D.N.Y. 1976); Cerrito v. Time, Inc., 302 F. Supp. 1071, 1075 (N.D. Cal. 1969), *aff'd per curiam*, 449 F.2d 306 (9th Cir. 1971). The plaintiff must show that the defendant had a "high degree of awareness of . . . probable falsity." Garrison v. Louisiana, 379 U.S. 64, 74 (1964); *e.g.*, Arnheiter v. Random House, Inc., 578 F.2d 804, 806 (9th Cir. 1978), *cert. denied*, 444 U.S. 931 (1979); Grzelak v. Calumet Publishing Co., 543 F.2d 579, 582 (7th Cir. 1975). Time, Inc. v. Johnston, 448 F.2d 378, 385 (4th Cir. 1971); Washington Post Co. v. Keogh, 365 F.2d 965, 967 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967); Hoffman v. Washington Post Co., 433 F. Supp. 600, 605 (D.D.C. 1977), *aff'd mem.*, 578 F.2d 442 (D.C. Cir. 1978); Fadell v. Minneapolis Star and Tribune Co., 425 F. Supp. 1075, 1083 (N.D. Ind. 1976), *aff'd*, 557 F.2d 107 (7th Cir.), *cert. denied*, 434 U.S. 966 (1977).

50. St. Amant v. Thompson, 390 U.S. 727, 731 (1968); *e.g.*, Pierce v. Capital Cities Communications, Inc., 576 F.2d 495, 508 (3d Cir.), *cert. denied*, 439 U.S. 861 (1978); Time, Inc. v. McLaney, 406 F.2d 565, 572 (5th Cir.), *cert. denied*, 395 U.S. 922 (1969); Gray v. Udevitz, 5 Media L. Rep. (BNA) 1412, 1413 (D. Wyo. 1979); Yiamouyiannis v. Consumers Union of the United States, Inc., 5 Media L. Rep. (BNA) 1174, 1175 (S.D.N.Y. 1979), *aff'd*, 619 F.2d 932 (S.D.N.Y. 1980), *cert. denied*, 49 U.S.L.W. 3247 (U.S. Oct. 7, 1980) (No. 79-1987); Logan v. District of Columbia, 447 F. Supp. 1328, 1332 (D.D.C. 1978); Hoffman v. Washington Post Co., 433 F. Supp. 600, 605 (D.D.C. 1977), *aff'd mem.*, 578 F.2d 442 (D.C. Cir. 1978). Trans World Accounts, Inc. v. Associated Press, 425 F. Supp. 814, 822 (N.D. Cal. 1977); Samborsky v. Hearst Corp., 2 Media L. Rep. (BNA) 1638, 1639 (D. Md.

consideration of a summary judgment motion, the court must be satisfied that the plaintiff could reveal to the jury evidence of reckless disregard, and, moreover, that a reasonable jury could infer that state of mind with convincing clarity.[51] Accordingly, "where the actual malice standard of [*Sullivan*] is applicable, the granting of summary judgment is the rule, rather than the exception because of the difficulty encountered by a plaintiff in showing the existence of actual malice."[52]

Contrasting public figure defamation with defamation of private individuals further demonstrates the appropriateness of summary judgment in the public figure area. According to *Gertz v. Robert Welch, Inc.*,[53] a private individual need only show negligence by a preponderance of the evidence.[54] Therefore, "a determination that the

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1977); Fadell v. Minneapolis Star and Tribune Co., 425 F. Supp. 1075, 1083 (N.D. Ind. 1976), *aff'd*, 557 F.2d 107 (7th Cir.), *cert. denied*, 434 U.S. 966 (1977), Oliver v. Village Voice, Inc., 417 F. Supp. 235, 239 (S.D.N.Y. 1976); Buchanan v. Associated Press, 398 F. Supp. 1196, 1203 (D.D.C. 1975).

51. Curtis Publishing Co. v. Butts, 388 U.S. 130, 174 (1967) (Brennan, J., concurring); Mistrot v. True Detective Publishing Corp., 467 F.2d 122, 124 (5th Cir. 1972); Dacey v. Florida Bar, Inc., 427 F.2d 1292, 1295 (5th Cir. 1970); Wasserman v. Time, Inc., 424 F.2d 920, 922 (D.C. Cir.) (Wright, J., concurring), *cert. denied*, 398 U.S. 940 (1970); Goldwater v. Ginzburg, 414 F.2d 324, 336 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970); Logan v. District of Columbia, 447 F. Supp. 1328, 1332 (D.D.C. 1978); Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341, 1350 (S.D.N.Y. 1977); Hoffman v. Washington Post Co., 433 F. Supp. 600, 604-05 (D.D.C. 1977), *aff'd mem.*, 578 F.2d 442 (D.C. Cir. 1978). The court's pre-trial role is to "ascertain whether there is evidence by which a jury could reasonably find liability under the constitutionally required instructions." Curtis Publishing Co. v. Butts, 388 U.S. 130, 174 (1967) (Brennan, J., concurring); *see* 3 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 84.09, at 100 (3d ed. 1977). The elements of defamation which are to be determined by the jury are "[s]ubject to the control of the court." Restatement (Second) of Torts § 617 (1977). The constitutional aspect of public figure defamation adds another dimension to the "normal controls possessed by a court under the common law or under state procedural statutes or rules of civil procedure." *Id.*, Comment b. Close scrutiny of the constitutional issues is required of the courts at each level of the litigation and each "may decide that the evidence is constitutionally inadequate to sustain the jury determination." *Id.* The Court takes the "determination of reckless disregard [from] the unquestioned judgment of juries" to allow publishers flexibility in exercising their first amendment rights. Anderson, *supra* note 29, at 457. Thus, the sufficiency of the evidence with which the allegedly defamed person must come forth is "for judicial determination." Arnheiter v. Random House, Inc., 578 F.2d 804, 806 (9th Cir. 1978), *cert. denied*, 444 U.S. 931 (1979).

52. Jenoff v. Hearst Corp., 453 F. Supp. 541, 547 (D. Md. 1978).

53. 418 U.S. 323 (1974).

54. *Id.* at 366 (Brennan, J., dissenting). The Court refused to allow recovery to private individuals without some showing of fault, the requisite degree to be determined by the states. *Id.* at 347; *see* note 31 *supra*. The Court rejected extension of

applicable standard is that of *Sullivan* rather than *Gertz* substantially enhances the possibility of a summary disposition in favor of the defendant."[55] For instance, in *Jenoff v. Hearst Corp.*,[56] the plaintiff was adjudicated a private individual and, because evidence sufficient to create an issue of negligence had been offered, defendant's motion for summary judgment was denied.[57] Noting that the evidence did not indicate an issue of actual malice, however, the court acknowledged that had the plaintiff been a public figure, summary judgment would have been granted.[58]

The requirement of proof of actual malice with convincing clarity was adopted to prevent "dampen[ing] the vigor and limit[ing] the variety of public debate."[59] Footnote nine may have been motivated in part by a concern that frequent grants of summary judgment resulted from undue reliance on that policy. There is no indication, however, that courts have exceeded the bounds of Rule 56 to afford additional protection to defendants sued for public figure defamation.[60] It is true that in granting summary judgment courts often appear to rely on the first amendment consideration underlying *Sullivan*.[61] More accurately, however, the decisions are based on the

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the *Sullivan* standard to private individuals because it believed the states' interest in compensating injury to reputation was paramount to protection of defamatory material which was not of public concern. 418 U.S. at 343

55. Hill, *supra* note 16, at 1218 n.63; *accord*, Anderson, *supra* note 29, at 456-58.

56. 453 F. Supp. 541 (D. Md. 1978).

57. *Id.* at 548. It was undisputed that the defendant's reporters never spoke with the source of their article, relying primarily on a statement purportedly written by him, which they had obtained from a third party. *Id.* at 547. Furthermore, it was clear that the reporters were unaware that the source had a criminal record and that the person who delivered the statement had also engaged in extensive criminal activity. *Id.*

58. *Id.*

59. New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).

60. 47 Geo. Wash. L. Rev. 286, 315 n.163 (1978) ("[D]espite dicta indicating sympathy for summary judgment motions in libel actions, whether courts actually employ a different standard in reviewing those motions is questionable."). *See also* Comment, *The Use of Summary Judgment in Defamation Cases*, 14 U.S.F.L. Rev. 77, 82-83 (1979). One court cautioned that, although courts must keep the chilling effect of libel suits in mind, they should grant summary judgment only where, on close analysis, it is appropriate under the Federal Rules. Schuster v. U.S. News & World Report, Inc., 602 F.2d 850, 855 (8th Cir. 1979).

61. Pierce v. Capital Cities Communications, Inc., 576 F.2d 495, 510 (3d Cir.), *cert. denied*, 439 U.S. 861 (1978); Guam Fed'n of Teachers Local 1581 v. Ysrael, 492 F.2d 438, 441 (9th Cir.), *cert. denied*, 419 U.S. 872 (1974); Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858, 864-65 (5th Cir. 1970); Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967); Ethridge v. North Mississippi Communications, Inc., 460 F. Supp. 347, 351 (N.D. Miss. 1978); Jenoff v. Hearst Corp., 453 F. Supp. 541, 543 (D. Md. 1978); Fadell v. Minneapolis

lack of evidence of the requisite degree and recognition that unnecessary trials hinder free expression.[62]

One court, for instance, noted that the importance of guaranteeing first amendment freedoms places public figure defamation cases in a "somewhat different category," but continued by acknowledging its duty to grant summary judgment because a trial on the evidence presented was "not really warranted."[63] Similarly, another court observed that "to facilitate free debate . . . courts have more and more taken the position that the First Amendment issues . . . should be disposed of on summary judgment."[64] This court, however, also correctly granted summary judgment due to plaintiff's failure to present some evidence of actual malice.[65]

The statement that "because of the importance of free speech, summary judgment is the 'rule,' and not the exception, in [public figure] defamation cases,"[66] fails to make explicit an essential step in the court's reasoning. The shorthand means that the importance of free speech dictates the high standard required to prove liability, and the standard, in turn, makes summary judgment the rule.[67] Prior to *Hutchinson v. Proxmire*,[68] summary judgment had been properly applied in public figure defamation.[69] Although footnote nine does

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Star and Tribune Co., 425 F. Supp. 1075, 1085-86 (N.D. Ind. 1976), *aff'd*, 557 F.2d 107 (7th Cir.), *cert. denied*, 434 U.S. 966 (1977); Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947, 955 (D.D.C. 1976); Rosanova v. Playboy Enterprises, Inc., 411 F. Supp. 440, 448-49 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978); Buchanan v. Associated Press, 398 F. Supp. 1196, 1205 (D.D.C. 1975). Guitar v. Westinghouse Elec. Corp., 396 F. Supp. 1042, 1053 (S.D.N.Y. 1975), *aff'd mem.*, 538 F.2d 309 (2d Cir. 1976).

62. *See* notes 15-19 *supra* and accompanying text.

63. Time, Inc. v. McLaney, 406 F.2d 565, 566 (5th Cir.), *cert. denied*, 395 U.S. 922 (1969).

64. Fadell v. Minneapolis Star and Tribune Co., 425 F. Supp. 1075, 1085 (N.D. Ind. 1976), *aff'd*, 557 F.2d 107 (7th Cir.), *cert. denied*, 434 U.S. 966 (1977).

65. *Id.* at 1088.

66. Guitar v. Westinghouse Elec. Corp., 396 F. Supp. 1042, 1053 (S.D.N.Y. 1975) (footnote and emphasis omitted), *aff'd mem.*, 538 F.2d 309 (2d Cir. 1976).

67. Jenoff v. Hearst Corp., 453 F. Supp. 541, 547 (D. Md. 1978); *see* note 48 *supra* and accompanying text.

68. 443 U.S. 111 (1979).

69. *E.g.*, Southard v. Forbes, Inc., 588 F.2d 140, 146 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979); Grzelak v. Calumet Publishing Co., 543 F.2d 579, 583 (7th Cir. 1975); Dacey v. Florida Bar, Inc., 427 F.2d 1292, 1296 (5th Cir. 1970); Time, Inc. v. McLaney, 406 F.2d 565, 573 (5th Cir.), *cert. denied*, 395 U.S. 922 (1969); Gray v. Udevitz, 5 Media L. Rep. (BNA) 1412, 1413 (D. Wyo. 1979); Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341, 1352 (S.D.N.Y. 1977); Trans World Accounts, Inc. v. Associated Press, 425 F. Supp. 814, 823 (N.D. Cal. 1977); Woods v. Hearst Corp., 2 Media L. Rep. (BNA) 1548, 1550-51 (D. Md. 1977); Fadell v. Minneapolis Star and Tribune Co., 425 F. Supp. 1075, 1087-88 (N.D. Ind. 1976), *aff'd*, 557 F.2d 107 (7th Cir.), *cert. denied*, 434 U.S. 966 (1977); Martin Marietta Corp. v. Evening Star

not flatly preclude summary judgment, it clearly suggests that the summary procedure should be severely curtailed.[70] Consequently, lower courts have become decidedly confused in their analyses of motions for summary judgment in public figure defamation.[71]

One federal court, in reliance on footnote nine, denied defendants' summary judgment motion.[72] Even though it recognized that the evidence adduced by the plaintiff seemed to create an "insurmountable barrier" to his case,[73] the court stated that the actual malice stan-

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Newspaper Co., 417 F. Supp. 947, 961 (D.D.C. 1976); Buchanan v. Associated Press, 398 F. Supp. 1196, 1204-05 (D.D.C. 1975); Guitar v. Westinghouse Elec. Corp., 396 F. Supp. 1042, 1053 (S.D.N.Y. 1975), *aff'd mem.*, 538 F.2d 309 (2d Cir. 1976); Cerrito v. Time, Inc., 302 F. Supp. 1071, 1075-76 (N.D. Cal. 1969), *aff'd per curiam*, 449 F.2d 306 (9th Cir. 1971).

70. News Notes, *supra* note 8. One federal court which attempted to interpret the Supreme Court's intention in footnote nine concluded that the dicta "not only states 'doubt' [that summary judgment is the rule rather than the exception in public figure defamation actions], but takes almost the opposite position." Yiamouyiannis v. Consumers Union of the United States, Inc., 619 F.2d 932, 939 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3247 (U.S. Oct. 7, 1980) (No. 79-1987).

71. Several courts have refused to incorporate the burden of proof into the consideration of a motion for summary judgment. Hart v. Playboy Enterprises, Inc., 5 Media L. Rep. (BNA) 1811 (D. Kan. 1979); Church of Scientology v. Siegelman, 475 F. Supp. 950 (S.D.N.Y. 1979). One court, in an attempt to construe and adhere to footnote nine went to great lengths to delineate the "conflicting views on the precise procedure to be used by the trial court at the summary judgment stage." Nader v. de Toledano, 408 A.2d 31, 45 (D.C. 1979), *cert. denied*, 444 U.S. 1078 (1980). The court found two views—the first employed the normal Rule 56 procedure as expressed in Guam Fed'n of Teachers Local 1581 v. Ysrael, 492 F.2d 438 (9th Cir.), *cert. denied*, 419 U.S. 872 (1974), and a second, encompassed by Judge Wright's concurrence in Wasserman v. Time, Inc., 424 F.2d 920 (D.C. Cir.), *cert. denied*, 398 U.S. 940 (1970), which the court considered a departure from normal summary judgment law. 408 A.2d at 46. In *Wasserman*, Judge Wright had propounded that "[*Sullivan*] makes actual malice a constitutional issue to be decided in the first instance by the trial judge applying the [*Sullivan*] test. . . . Unless the court finds, on the basis of pretrial affidavits, depositions or other documentary evidence, that the plaintiff can prove actual malice in the [*Sullivan*] sense, it should grant summary judgment for the defendant." 424 F.2d at 922 (Wright, J., concurring) (footnote and citation omitted). Judge Wright's proposal is, in fact, no different from the test used in *Guam*; the *Nader* court "create[d] a non-existent debate." Nader v. de Toledano, 408 A.2d 31, 60 (D.C. 1979) (Harris, J., concurring in part, dissenting in part), *cert. denied*, 444 U.S. 1078 (1980).

72. Hart v. Playboy Enterprises, Inc., 5 Media L. Rep. (BNA) 1811, 1814 (D. Kan. 1979).

73. *Id.* The allegedly defamatory material charged plaintiff, an agent with the United States Bureau of Narcotics, with various unethical practices relating to his job. *Id.* at 1811. Plaintiff alleged, *inter alia*, that the inherent bias of the article, defendants' failure to investigate, and the reliance on only one oral source were sufficient evidence of reckless disregard to defeat a motion for summary judgment. *Id.* at 1814. The court recognized, however, that many of plaintiff's arguments were not relevant to the issue of actual malice. *Id.*; *see* Time, Inc. v. Pape, 401 U.S. 279, 290 (1971) (liability resulting from editorial judgment does not constitute actual malice); St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (failure to make a prior investiga-

dard may not be prejudged.[74] Similarly, another federal court denied summary judgment to a defendant although noting that plaintiff's evidence was "far from convincing."[75] These courts clearly failed to find a genuine issue as to defendant's actual malice. In denying summary judgment, they failed to correctly apply Rule 56.[76]

Several courts have expounded a "neutral approach" in an attempt to comply with the Supreme Court dicta.[77] In *Yiamouyiannis v. Consumers Union of the United States, Inc.*,[78] the court held that for procedural purposes public figure defamation is to be treated the same as other civil actions.[79] "[A]ny 'chilling effect' caused by the defense of a lawsuit itself, is simply to be disregarded, to have no force and effect."[80] Seeking the existence of a genuine issue of fact for trial, the court held that "no reasonable jury could find with convincing clarity on the facts . . . that [defendants] acted with actual malice."[81] The court affirmed the trial court's finding that the plain-

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tion does not constitute actual malice); Time, Inc. v. McLaney, 406 F.2d 565, 570-71 (5th Cir.), *cert. denied*, 395 U.S. 922 (1969) (publisher's justifiable reliance on a source does not constitute actual malice).

74. Hart v. Playboy Enterprises, Inc., 5 Media L. Rep. (BNA) 1811, 1814 (D. Kan. 1979).

75. Church of Scientology v. Siegelman, 475 F. Supp. 950, 955 (S.D.N.Y. 1979). The court noted that it felt "constrained, in view of the [*Hutchinson*] footnote, to deny the motion." *Id.* at 956 n.16.

76. Although the court denied summary judgment in Church of Scientology v. Siegelman, 475 F. Supp. 950 (S.D.N.Y. 1979), it did so "without prejudice . . . to a subsequent motion upon completion of additional discovery." *Id.* at 958. Requiring further discovery for an unfounded claim, however, can inhibit free speech. Fadell v. Minneapolis Star and Tribune Co., 425 F. Supp. 1075, 1085 (N.D. Ind. 1976), *aff'd*, 557 F.2d 107 (7th Cir.), *cert. denied*, 434 U.S. 966 (1977). In granting summary judgment, the court in *Fadell* noted that the expense of the voluminous discovery, which had consumed nearly four years, tended to have a chilling effect on the exercise of first amendment rights. *Id.*; *see* Oakes, *Proof of Actual Malice in Defamation Actions: An Unsolved Dilemma*, 7 Hofstra L. Rev. 655, 712 (1979). Later developments in *Church of Scientology* suggest that the denial of summary judgment was erroneous. The case was dismissed due to the plaintiffs' refusal to make discovery. Church of Scientology v. Siegelman, No. 79 Civ. 1166, slip op. at 1 (S.D.N.Y. May 30, 1980). The defendants' attorney remarked that the defamation action was " 'clearly frivolous,' " Nat'l L.J., Aug. 4, 1980, at 6, col. 1 (quoting Mel Wulf, Esq.), and a $4 million lawsuit for malicious prosecution has been initiated. *Id.*

77. Yiamouyiannis v. Consumers Union of the United States, Inc., 619 F.2d 932, 940 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3247 (U.S. Oct. 7, 1980) (No. 79-1987); Loeb v. New Times Communications Corp., 6 Media L. Rep. (BNA) 1435, 1443 (S.D.N.Y. 1980); National Nutritional Foods Ass'n v. Whelan, 492 F. Supp. 374, 379 (S.D.N.Y. 1980); Mount v. Sadik, No. 78 Civ. 2279, slip op. at 12-13 (S.D.N.Y. Apr. 7, 1980); Nader v. de Toledano, 408 A.2d 31, 50 (D.C. 1979), *cert. denied*, 444 U.S. 1078 (1980).

78. 619 F.2d 932 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3247 (U.S. Oct 7, 1980) (No. 79-1987).

79. *Id.* at 940.

80. *Id.* (citations omitted).

81. *Id.*

tiff's evidence was "grossly inadequate to raise even an inference of actual malice, much less the clear and convincing proof necessary to survive a motion for summary judgment."[82] Although ultimately adopting the proper approach for summary judgment motions,[83] the *Yiamouyiannis* court expressed the erroneous belief that its holding significantly altered settled law.[84] In fact, the "neutral approach" is not novel, but has long been the basis for consideration of motions for summary judgment in public figure defamation.[85]

The approach to be applied to summary judgment motions neither favors plaintiffs or defendants, nor enhances or restricts the right of free expression.[86] It is a consideration of the evidence, in the light most favorable to the opposing party,[87] to determine if the evidence submitted is sufficient to allow a reasonable jury to find actual malice with convincing clarity.[88] By failing to recognize settled procedural principles, footnote nine has led to distortion of summary judgment. Additionally, adherence to it may result in abridgment of first amendment freedom, a direct consequence of improper denial of summary judgment.

B. *Summary Judgment and Protection of Free Speech*

The chilling effect of unnecessary defamation suits often can be alleviated by proper use of summary judgment.[89] It has been noted

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82. Yiamouyiannis v. Consumers Union of the United States, Inc., 5 Media L. Rep. (BNA) 1174, 1175 (S.D.N.Y. 1979), *aff'd*, 619 F.2d 932 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3247 (U.S. Oct. 7, 1980) (No. 79-1987).

83. *See* notes 45-52 *supra* and accompanying text.

84. Yiamouyiannis v. Consumers Union of the United States, Inc., 619 F.2d 932, 939-40 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3247 (U.S. Oct. 7, 1980) (No. 79-1987).

85. Nader v. de Toledano, 408 A.2d 31, 60 (D.C. 1979) (Harris, J., concurring in part, dissenting in part), *cert. denied*, 444 U.S. 1078 (1980) (The incorporation of the actual malice standard into the consideration of a motion for summary judgment has been "explicitly acknowledged" by "virtually every court dealing with the subject."); *see* note 69 *supra*.

86. *See* notes 45-47 *supra* and accompanying text.

87. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam); Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 473 (1962); Bailey v. Hartford Fire Ins. Co., 565 F.2d 826, 830 (2d Cir. 1977); 10 C. Wright & A. Miller, *supra* note 44, § 2716, at 430. The allegations of the opposing party will be taken as true, and he will receive the benefit of the doubt as to conflicting assertions. Time, Inc. v. McLaney, 406 F.2d 565, 571-72 (5th Cir.), *cert. denied*, 395 U.S. 922 (1969); Oliver v. Village Voice, Inc., 417 F. Supp. 235, 237 (S.D.N.Y. 1976); Buchanan v. Associated Press, 398 F. Supp. 1196, 1205 (D.D.C. 1975); 10 C. Wright & A. Miller, *supra* note 44, § 2716, at 430-32.

88. *See* note 51 *supra*.

89. Southard v. Forbes, Inc., 588 F.2d 140, 145 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979); Vandenburg v. Newsweek, Inc., 441 F.2d 378, 379 (5th Cir.), *cert. de-*

that summary judgment is the "best procedural protection" for first amendment rights.[90] Footnote nine, however, strikes a "potentially crippling legal blow" to those speaking out on public issues.[91] Treated as a directive by lower courts, the effect of the Supreme Court's doubt as to the appropriateness of summary judgment is to undermine first amendment policies inherent in public figure defamation.[92]

Public figure defamation involves a balancing of the right to reputation valued by the individual against the interest in free expression valued by both the media and the public.[93] In *Gertz v. Robert Welch, Inc.*,[94] the Supreme Court acknowledged the tension that "necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury."[95] Consideration of summary judgment adds another dimension to the already precarious balance.[96] In the area of public figure defamation,

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nied, 404 U.S. 864 (1971); Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967). Yiamouyiannis v. Consumers Union of the United States, Inc., 5 Media L. Rep. (BNA) 1174, 1175 (S.D.N.Y. 1979), *aff'd*, 619 F.2d 932 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3247 (U.S. Oct. 7, 1980) (No. 79-1987); Fadell v. Minneapolis Star and Tribune Co., 425 F. Supp. 1075, 1085 (N.D. Ind. 1976), *aff'd*, 557 F.2d 107 (7th Cir.), *cert. denied*, 434 U.S. 966 (1977); Buchanan v. Associated Press, 398 F. Supp. 1196, 1205 (D.D.C. 1975); Cerrito v. Time, Inc., 302 F. Supp. 1071, 1075-76 (N.D. Cal. 1969), *aff'd per curiam*, 449 F.2d 306 (9th Cir. 1971); Note, *The Role of Summary Judgment in Political Libel Cases*, 52 S. Cal. L. Rev. 1783, 1800-01 (1979).

90. MacGuire v. Harriscope Broadcasting Co., 612 P.2d 830, 831 (Wyo. 1980); *see* cases cited note 89 *supra*.

91. Tybor, *supra* note 8, at 1, col. 3. The footnote has been termed " 'the greatest portent of hard times' " in the area of public figure defamation. *Id.* at 27, col. 3 (quoting Robert Sack, Esq.).

92. *See* Hentoff, *supra* note 8, at 21, col. 3; Tybor, *supra* note 8, at 27, col 3.

93. Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974). The *Sullivan* Court acknowledged that "[w]hatever is added to the field of libel is taken from the field of free debate." New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964) (footnote omitted) (quoting Sweeney v. Patterson, 128 F.2d 457, 458 (D.C. Cir.), *cert. denied*, 317 U.S. 678 (1942)). The competing interests in public figure defamation were recognized early. "A good reputation . . . is not only one of the most satisfying sources of a man's own contentment, but . . . one of the most productive kinds of capital he can possess." Coleman v. MacLennan, 78 Kan. 711, 721, 98 P. 281, 285 (1908). The *Coleman* court noted that "[w]here the public welfare is concerned the individual must frequently endure injury to his reputation without remedy." *Id.* at 722, 98 P. at 285. Other courts have recognized the necessary balancing process. *E.g.*, Rosanova v. Playboy Enterprises, Inc., 580 F.2d 859, 862 (5th Cir. 1978); Pierce v. Capital Cities Communications, Inc., 576 F.2d 495, 496-97 (3d Cir.), *cert. denied*, 439 U.S. 861 (1978); Vandenburg v. Newsweek, Inc., 507 F.2d 1024, 1026 (5th Cir. 1975).

94. 418 U.S. 323 (1974).

95. *Id.* at 342.

96. Loeb v. Globe Newspaper Co., 489 F. Supp. 481, 487 (D. Mass. 1980) ("The use of summary judgment . . . must balance two competing interests: the obligation to avoid 'chilling' the exercise of treasured First Amendment rights, and caution to avoid foreclosing a genuine issue of fact.").

an improper denial of summary judgment may curtail first amendment freedoms.[97]

The purposes of summary judgment are perfectly harmonious with the policy on which the *Sullivan* rule is based. The harassment and expense sought to be avoided by proper application of summary judgment[98] characterize the chilling effect and consequent self-censorship unnecessary litigation would cause among publishers.[99] In the first amendment area, useless litigation is more than just a costly inconvenience; at stake is the free debate so coveted in our society.[100] The overwhelming expense of even a successfully defended defamation action[101] indicates that the threat of litigation itself causes

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97. Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858, 865 (5th Cir. 1970); Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967); Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947, 961 (D.D.C. 1976); Buchanan v. Associated Press, 398 F. Supp. 1196, 1205 (D.D.C. 1975).

98. Summary judgment is an ideal tool for ferreting out unfounded claims, the ultimate determination of which may come too late to prevent unnecessary expense for, and harassment of, the defendant. 10 C. Wright & A. Miller, *supra* note 44, § 2712, at 371-74. The purpose of summary judgment is to avoid unnecessary trials. *Id.* at 372. A trial is unnecessary if there is no genuine issue of material fact. *Id.* at 370. Summary judgment cannot be used, however, to deprive a litigant of a trial if a genuine issue exists, Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464 (1962); Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620 (1944); 10 C. Wright & A. Miller, *supra* note 44, § 2712, at 381-82, and courts are generally reluctant to deprive a litigant of the opportunity to present his case to a jury. Time, Inc. v. McLaney, 406 F.2d 565, 571 (5th Cir.), *cert. denied*, 395 U.S. 922 (1969). The constitutionality of the procedure has rarely been challenged, 10 C. Wright & A. Miller, *supra* note 44, § 2714, at 413, because the rule does not deprive a party of the right to trial, but is merely the means to frame the issue, if any, to see if trial is necessary. Fidelity & Deposit Co. v. United States, 187 U.S. 315, 320 (1902).

99. New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964) (Without the actual malice standard, "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true . . . , because of doubt whether it can be proved in court or *fear of the expense of having to do so.*" (emphasis added)); Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967) ("The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself . . . .").

100. Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967) (If harassment by useless litigation succeeds, the stake is free debate.); Anderson, *supra* note 29, at 434 ("A system of free expression is not secure if it must rely on the press to subordinate economic self-interest to the abstract principle of free speech.").

101. To mitigate the expense of litigation, publishers can purchase libel insurance policies. Recently, they are doing so "at an unprecedented rate." Tybor, *supra* note 8, at 26, col. 3. Publishers are, in addition, increasing the amounts of their coverage. *Id.* at 26, col. 4. Furthermore, the amount of the risk has increased dramatically. " 'A few years ago it was the unusual risk that warranted limits in excess of a million dollars, . . . [n]ow, it is the unusual risk that doesn't warrant limits of at least a million.' " *Id.* (quoting Rodger Rudnick).

potential defendants to " 'steer far wider of the unlawful zone' "[102] and act as self-censors.[103]

Economic disincentives to publish material which could result in libel litigation are potent. The initial cost of defending a libel suit was $20,000 as much as five years ago[104] and could easily cost much more. The successful defense of *Rosenbloom v. Metromedia, Inc.*[105] in 1971, for example, reportedly cost close to $100,000.[106] It is not surprising that publishers believe they " 'cannot afford the luxury of winning a libel action' " and consequently engage in self-censorship.[107]

One blatant example involves a journalism review which deleted parts of an article it would have otherwise printed so as to avoid possible legal action.[108] Although convinced it could succeed on the merits in such a suit,[109] the belief that "the cost of defending it might easily bankrupt the magazine" caused a decision that "the risk was not worth it."[110]

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102. New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964) (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).

103. New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964). In St. Amant v. Thompson, 390 U.S. 727 (1968), the Court adhered to the view that "to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones." *Id.* at 732. While "calculated falsehoods" and deliberate lies are not constitutionally protected, Garrison v. Louisiana, 379 U.S. 64, 75 (1964), the "strategy" of *Sullivan* is that "speech be overprotected in order to assure that it is not underprotected." Kalven, *supra* note 17, at 213. "The sole basis for protecting publishers who spread false information is that otherwise the truth would too often be suppressed." Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 301 (1971) (White, J., concurring).

104. Anderson, *supra* note 29, at 435-36.

105. 403 U.S. 29 (1971) (plurality opinion).

106. Anderson, *supra* note 29, at 436.

107. Note, *Protecting First Amendment Rights of Defendants by Limiting Plaintiffs' Access to the Courts: Procedural Approaches to* Noerr *and* Sullivan, 62 Minn. L. Rev. 681, 691 n.44 (1978) (quoting McWilliams, *Is muckraking coming back?*, Colum. Journalism Rev., Fall 1970, at 8, at 15).

108. [More], Aug. 1974, at 17, col. 2 (Editor's Note) [hereinafter cited as Editor's Note]. [More] reported that the New York Times had refused to print certain material obtained from an investigative reporter. Hume, *The Mayor, The Times, and The Lawyers*, [More], Aug. 1974, at 1, col. 1. [More] censored that same material in its account. Editor's Note, *supra*. *See generally* Anderson, *supra* note 29, at 430-32.

109. Editor's Note, *supra* note 108, at 17, col. 2. Attorneys for both [More] and the New York Times had advised the publishers that the material was not libelous, but that a lawsuit would probably be initiated. *Id.*; Hume, *supra* note 108, at 17, col. 1.

110. Editor's Note, *supra* note 108, at 17, col. 2. The expense of obtaining summary judgment in a defamation case has been cited as one reason for the bankruptcy of a major publication, *Look* magazine. Hume, *supra* note 108, at 1, cols. 1-2. The fear of litigation is particularly threatening to small publications which are less able to absorb the necessary costs. Kovner, *supra* note 29, at 368; Oakes, *supra* note 76, at

Libel litigation may create non-economic disincentives to publishers as well. Following the initiation of a lawsuit against him,[111] a freelance journalist was unable to circulate, through his syndicate, an article which, without comment, quoted the plaintiff of the pending action.[112] The syndicate's apparent fear of repercussions resulted in curtailment of the writer's first amendment rights and chilled the speech of both author and publisher.[113]

Additionally, it has been noted that "[t]he press has virtually no economic incentive to publish anything that might lead to a libel suit."[114] Daily newspapers, for example, may compete for circulation through the use of comics, color photographs, and contests rather than risk the defamation actions which could result from more aggressive and informative journalism.[115] These publishers clearly steer wide of the unlawful zone.

Fear of litigation results in self-censorship.[116] This fear is magnified when summary judgment, a device for prompt disposition of unfounded claims, is not readily available.[117] The high standard of proof imposed upon public figure defamation plaintiffs resulted from the national commitment to free debate in areas of public concern. Casting doubt on the use of summary judgment indicates serious discord with that commitment.

CONCLUSION

The subjective inquiry in public figure defamation was intended to shield publishers, allowing breathing space for free expression. It should not now be used as a sword against them, requiring defense of unwarranted lawsuits. The high standard of actual malice creates a likelihood that summary judgment often will be appropriate. To this extent, summary judgment has been, and should continue to be, the rule. Courts should not follow the suggestion of footnote nine; to do so would alter normal summary judgment procedure and ignore first amendment concerns.

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713. Among these, there is a greater incentive to forego publication of material which could result in a libel suit. Washington Post Co. v. Keogh, 365 F.2d 965, 972 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967).

111. Nader v. de Toledano, 408 A.2d 31 (D.C. 1979), *cert. denied*, 444 U.S. 1078 (1980).

112. *See* Hentoff, *supra* note 8, at 20, col. 2. Hentoff notes that the writer has had to bear the full expense as the publisher was granted summary judgment by the lower court. *Id.* at 21, col. 3; *see* Nader v. de Toledano, 408 A.2d 31 (D.C. 1979), *cert. denied*, 444 U.S. 1078 (1980).

113. *See* Hentoff, *supra* note 8, at 20, col. 2.

114. Anderson, *supra* note 29, at 433.

115. *Id.*

116. *See* notes 101-03 *supra* and accompanying text.

117. *See* Anderson, *supra* note 29, at 451-52.