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The Issue Doctrine an Examination of the Impact of Rosenbloom Versus Metromedia on Constitutional Libel Litigation

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THE ISSUE DOCTRINE AN EXAMINATION OF THE IMPACT OF

ROSENBLOOM VERSUS METROMEDIA

ON CONSTITUTIONAL LIBEL LITIGATION

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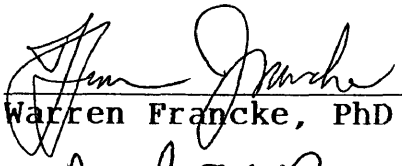

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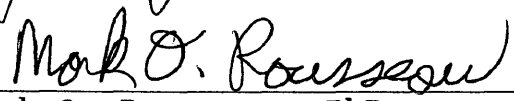

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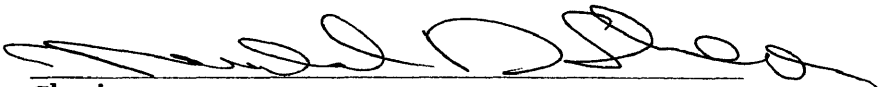

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Abstract

This thesis examines the *Rosenbloom v. Metromedia, Inc.*[1] Supreme Court decision as the source of the public issue doctrine (the application of the actual malice doctrine to private individuals who were involved in controversies over matters of public or general concern). The study uses an historical-legal viewpoint beginning with the Court of Star Chambers in early seventeenth century England. Within the framework of the law of defamation, the evolution of the concepts of public officials, public figures, private individuals and the public issue doctrine are examined in detail.

The historical progression of libel litigation is briefly traced through the American Colonies and into the early years of the United States' legal development. A detailed examination is made of the court rulings that make up the common law of defamation beginning with the Supreme Court's *New York Times v. Sullivan*[2] landmark decision in 1964.

The concept of actual malice is examined, relative to the public issue doctrine, from its inception in the *New York Times* decision to its application to public figures who are not public employees.[3] The next evolutionary step

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[1]403 U.S. 29 (1971).

[2]376 U.S. 254 (1964).

[3]Curtis Publishing Co. v. Butts (No. 37) and Associated Press v. Walker (No. 150), 388 U.S. 130 (1967).

studied was the application of the actual malice doctrine to private individuals via the public issue doctrine. This was accomplished by the 1971 *Rosenbloom* decision.[4]

For three years, all plaintiffs in libel litigation were required to prove actual malice if the defamation involved an issue of public or general concern. The state courts and lower level federal courts adopted this standard and held it until the 1974 *Gertz v. Robert Welch, Inc.* decision[5] repudiated the *Rosenbloom* issue doctrine.

Several states retained the public issue standard even after it was repudiated by the *Gertz* decision. The states of Michigan, Indiana, Alaska and Colorado made a conscious choice, but Pennsylvania retained the issue doctrine by failing to readdress it in subsequent decisions for more than 20 years.

The lasting effects that came from the *Rosenbloom* issue doctrine were the clear and convincing standard of proof required for actual malice and the increased difficulty experienced by libel defendants seeking summary judgments. In the aftermath of the issue doctrine, the courts have returned to refining the law of defamation.

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[4]403 U.S. 29 (1971).

[5]418 U.S. 323 (1974).

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Chapter I

Introduction

> If people cannot communicate their thoughts to one another without running the risk of prosecution, no other liberty can be secure, because freedom of speech and of the press are essential to any meaning of liberty.[1]

One of the most cherished freedoms in America is the free speech guaranteed by the First Amendment to the United States Constitution. "Congress shall make no law . . . abridging the freedom of speech, or of the press, . . . "[2] This simple statement has become one of the cornerstones of our democratic process of government.

The freedom to speak out on issues of public concern is crucial to the process of effective government. Citizens must be allowed to communicate their ideas to the public officials who represent them and to each other. Suppressing information "or the clash of opinion prevents one from reaching the most rational judgment, blocks the generation of new ideas, and tends to perpetuate error."[3]

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[1]James Morton Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* (Ithaca, NY: Cornell University Press, 1956), 418.

[2]U.S. Const. amend. I. "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."

[3]Thomas Irwin Emerson, *Toward a General Theory of the First Amendment*, (New York: Random House, 1963), 7.

The robust clash of ideas and opinions can lead to the libelous destruction of a person's reputation, a most valuable possession. As William Shakespeare said, "He that filches from me my good name robs me of that which not enriches him and makes me poor indeed."[4] The clash of ideas allows a free and robust dialogue for issues of public concern. The best test of an idea is to get itself accepted in the competition of the marketplace of ideas.[5]

Although the First Amendment protects all persons subjected to defamatory falsehoods, there is a difference in the degree of protection offered to private versus public persons. Private persons who are defamed receive more protection for their reputations because they are less able to defend themselves publicly.[6] Public persons are better able to defend their reputations because they enjoy a greater access to news media.

The Problem

Every journalist faces the possibility of publishing a statement that is a personal affront to someone. This possibility becomes a real problem when the

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[4]Othello 3.3, 159-165. In *William Shakespeare: The Complete Works*, ed. Peter Alexander, (New York: Random House, 1952), 1133.

[5]Abrams v. United States, 250 U.S. 616,630 (1919). Justice Holmes' dissenting opinion addressed the way men judged truth: ". . . the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their [men's] wishes safely can be carried out."

[6]Kent R. Middleton and Bill F. Chamberlin, *The Law of Public Communication*, 2d ed. (White Plains, NY: Longman Publishing, 1991), 119.

offended person is convinced his reputation is being attacked.

What must a journalist know to protect himself from libel litigation? One thing he should know is whether his subject is a public or a private person.

Public Officials:

The *New York Times v. Sullivan* Supreme Court decision of 1964 established a new era in libel litigation. Prior to this decision, common law and state and local statutes governed libel. This decision made two major changes in the law: the libel-litigation process was constitutionalized under the First Amendment and the "actual malice" doctrine, recognizing the difference between private citizens and public officials, was formulated.[7]

A greater burden of proof was levied upon public officials because they have greater access to the news media. Public officials must prove "actual malice." Actual malice has little to do with the ill will or malevolence found in common law; it is publishing defamatory information knowing that it was false or with reckless disregard for its falsity.[8]

The requirement to establish actual malice increases a public person's

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[7]New York Times Company v. Sullivan, 376 U.S. 254 (1964) [hereinafter *New York Times*].

[8]*Id.* at 279-280: "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for 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. . . ."

burden of proof and provides additional protection to the person and the medium that communicated the defamatory comments. After the *New York Times* decision, the concept of "public persons" was broadened to include those individuals who were not public officials, but who were equally capable of defending their reputations in the mass media. These were the "public figures."[9]

Public Figures:

A prominent football coach and a retired Army general figured prominently in the next private-public figure question placed before the Supreme Court. Did the *New York Times* actual malice rule apply to "libel actions instituted by persons who are not public officials, but who are 'public figures' and involved in issues in which the public has a justified and important interest?"[10]

Position:

Wallace Butts, the athletic director at the University of Georgia, was accused of fixing a game by providing his school's football secrets to a rival coach. Butts, who was responsible for the administration of the athletic programs, was employed by the Georgia Athletic Association, a private

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[9]Curtis Publishing Co. v. Butts (No. 37), 388 U.S. 130 (1967) [hereinafter *Butts*].

[10]*Id.* at 134.

corporation.[11] The trial judge instructed the jury that actual malice encompassed the notion of "ill will, spite, hatred and an intent to injure," and that malice also denoted a "wanton or reckless indifference or culpable negligence with regard to the rights of others."[12] He did not consider Butts a "public official," but he did instruct the jury adequately to cover the *New York Times* public official requirement.

The court of appeals upheld the jury's findings in favor of Butts stating it was in "complete accord" with the trial court. Butts was not a state employee, but he occupied a position of high responsibility. The public interest in both education and athletics justified the protection of discussion about Butts "equivalent to the protection afforded discussion of public officials."[13] By virtue of his position, Butts was a public figure.

Vortex:

Retired Army general Edwin A. Walker was defamed in an Associated Press (AP) article. The article accused him of taking command of a violent crowd and personally leading a charge against federal marshals. The marshals sought to assist the enrollment of a black student, James Meredith, at the University of Mississippi. Walker was a private citizen at the times of the riot

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[11]*Id.* at 135.

[12]*Id.* at 138 n.3.

[13]*Id.* at 146.

and defamation, but he could fairly be labeled a man of political prominence.[14]

There was no evidence of personal prejudice or incompetence on the part of the AP journalist, nor was there any hint of conscious indifference to Walker's rights or welfare. The jury found for Walker, but the trial judge dismissed the punitive damages because he found no evidence to support a finding of actual malice. At worst, the AP's article would be negligent. The appeals court affirmed the trial court's ruling and stated that the *New York Times* actual malice ruling was not applicable.[15]

The Supreme Court recognized that Walker commanded a substantial amount of public interest, and he had access to the means to expose falsity. He was a public figure because his voluntary actions thrust him into the "vortex" of an important public controversy. In its reversal, the Court said Walker must establish highly unreasonable conduct and extreme departure from investigating and reporting standards.[16] In brief, Walker must prove actual malice to be entitled to damages.

These two cases made the public figure concept dynamic. It appeared that one could become a public figure because of a position of prominence in

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[14]Associated Press v. Walker (No. 150), 388 U.S. 130, 140 (1968) [hereinafter *Walker*].

[15]*Id.* at 141.

[16]*Id.* at 154-155.

the public's view or by voluntarily injecting oneself into a public controversy with the intent of affecting the outcome.

The body of law governing public figure determination grew and broadened. Public persons were originally public officials who occupied high, decision making positions. This status percolated to lower ranking local government employees. Finally, non-government employees who were highly visible to the public could become public figures.

Along with the broadening, the determining factors for public figure status became blurred. Does a private citizen become a public figure because of his position (*Butts*) or because of his actions (*Walker*)? What part does the "controversial public issue" play in determining public figure status? How deeply "involved" with the issue must one be to become a public figure? Is the bystander, dragged kicking and screaming into the fray, a public person equally with the controversy's perpetrator who voluntarily chose to espouse the cause? The next step along the public figure path clouded the scene with a mixed Supreme Court decision[17] that stood only for a short time.

Issue:

George A. Rosenbloom, a distributor of nudist magazines, was acquitted

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[17]Rosenbloom v. Metromedia, Inc., 91 S.Ct. 1811, 1812 (1971): As a plurality opinion, the public issue doctrine did not set a precedent, but it did provide guidance. The absence of a clear majority (a five to four vote) makes this persuasive rather than mandatory authority.

of obscenity charges, but he was defamed in a series of radio broadcasts covering the controversy.[18] The trial court found that the actual malice standard did not apply. The appeals court, however, found in its reversal that the *New York Times* doctrine did apply. The Supreme Court affirmed the appeals court and tried to answer the question of whether or not the actual malice standard applied to Rosenbloom, a private-person plaintiff.[19] The Court determined that the public's primary interest was in the event and the participants' conduct, not the participants' earlier notoriety or anonymity. Whether the plaintiff is famous or private "has no relevance in ascertaining whether the public has an interest in the issue." The Court extended constitutional protection to the communication on such issues without regard to the private or public status of the participants. The *New York Times* actual malice doctrine was firmly focused on the issue, not the individual.[20]

The *Rosenbloom* plurality stood firmly on the private-public figure determination issue. The public issue, not the plaintiff's notoriety, determined

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[18]Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) [hereinafter *Rosenbloom*].

[19]*Id.* at 31.

[20]*Id.* at 44-45. "In that circumstance we think the time has come forthrightly to announce that the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern, albeit leaving the delineation of the reach of that term to future cases."

whether or not the actual malice standard applied, and a private figure plaintiff must prove actual malice to prevail against a media defendant.[21]

Under this final rule, a private citizen plaintiff has no recourse for injury to his reputation unless he proves actual malice.[22] In his dissenting opinion, Justice Stewart raises the specter of private individuals "being thrust into the public eye by the distorting light of defamation" simply because all human events can be viewed as a general or public concern.[23]

Individual:

After only three years, the "issue" doctrine met its first major test. Attorney Elmer Gertz, was inaccurately labeled in a magazine article as a "communist-fronter," he was accused of having a criminal record, and he was called the architect of a murder frame up.[24] At trial, the defendant claimed that Gertz was either a public official under *New York Times* or a public figure under *Butts*. The court ruled Gertz was neither a public official nor a public figure. The jury found for Gertz, but the judge concluded the *New York Times* standard should govern. He accepted the defendant's motion that constitutional privilege protected discussion of any public issue regardless of the plaintiff's

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[21]*Id.* at 52.

[22]*Id.* at 43-44.

[23]*Id.* at 79.

[24]Gertz v. Robert Welsh, Inc., 418 U.S. 323 (1974) [hereinafter *Gertz*].

public or private status. Judgment not withstanding the verdict (n.o.v.) was entered for the defendant, and the jury's verdict was nullified.[25]

The Court of Appeals applied the *Rosenbloom* issue standard and affirmed the trial court's judgment that Gertz did not prove the defendant acted with actual malice. The Supreme Court boiled the controversy down to one question. Can the publisher of defamatory falsehoods claim a constitutional privilege when the injured person is not a public figure?[26]

The Supreme Court verified the correctness of its earlier *New York Times* and *Butts* decisions regarding public officials and public figures, but it demanded a "different rule" for private individuals. Private individuals are more vulnerable to injury than public officials and public figures and, therefore, are more deserving of protection. The *Rosenbloom* issue doctrine unacceptably abridged a legitimate-state interest and forced judges to determine which issues are of general or public interest.[27]

Gertz was clearly not a public official, and, for two reasons, he was not a public figure. He did not possess the "pervasive fame or notoriety" required of an all purpose public figure, and he did not inject himself into a particular public controversy to become a limited public figure. His professional

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[25]*Id.* at 328-329.

[26]*Id.* at 330-332.

[27]*Id.* at 343-346.

standing, service with local civic groups and his publication of legal articles and books was not sufficient to make him a public figure. As a private individual, the court ruled, the actual malice standard did not apply to Gertz.[28]

A clear majority of five justices voted for the *Gertz* judgment and the Supreme Court's repudiation of the *Rosenbloom* public issue doctrine. The new Gertz doctrine focused on the plaintiff's actions and his status within the community.

Purpose

The *New York Times* decision provided journalists with an increased measure of protection against defamation litigation by requiring public officials to prove actual malice.[29] The protection increased significantly when proof of actual malice was extended to public figure plaintiffs.[30] The First Amendment protection reached its zenith when all defamation plaintiffs, who were involved with matters of public or general concern, were required to prove actual malice to prevail.[31] Logic tells us that any plaintiff, whose burden of proof has increased, is less likely to prevail. This reduces the restricting or chilling effect that libel litigation might have on the free and the open debate of public issues.

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[28]*Id.* at 351-352.

[29]*New York Times* at 279-280.

[30]*Butts* at 146; *Walker* at 154-155.

[31]*Rosenbloom* at 44-45.

Conversely, a wronged private citizen could find that protecting his reputation from libel is nearly impossible.

Each Supreme Court decision allowed journalists greater publishing freedom. With the *Rosenbloom* decision, the court reached a bit too far and tipped the scales of justice toward absolute freedom of the press. The *Gertz* decision repudiated the *Rosenbloom* public issue doctrine and returned the balance toward protecting private individuals from reputational harm.[32] These changes in First Amendment doctrine can cause uncertainty in the journalistic community and produce mass media self-censorship which weakens the free debate on public issues.

By studying the application of the *Rosenbloom* issue doctrine in libel litigation, we can develop a better understanding of its impact on libel litigation. There are numerous citations to this case, some as recent as 1993. This is of particular interest because the 1974 *Gertz* decision overruled the issue doctrine. This thesis will be a search for the impact of the *Rosenbloom* decision upon contemporary libel litigation.

Scope

This thesis will be grounded in the *Rosenbloom v. Metromedia* decision which was focused on the issue of a public controversy rather than on the

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[32]*Gertz* at 351-352.

individual who voluntarily injects himself into a public controversy. The goal of this research will be to determine *Rosenbloom's* impact on contemporary libel litigation in the federal courts.

It is important to limit the scope of this thesis to factors that bear upon libel litigation. Though many other interesting facets may open, this study will focus on a primary research question: How has the *Rosenbloom v. Metromedia* Supreme Court decision impacted contemporary libel litigation?

Chapter II

Review of Literature

Historical Overview

The American legal issue over the determination of whether one is a private or a public person predates the Pilgrims' arrival in the New World. A British court in 1606 included the private-public person distinction and ruled that libel against a public person was a greater offense than against a private person.[1]

The earliest libel law in America, English common law, had a one-way view of libel. Any criticism of government officials was seditious libel which was always proclaimed false, scandalous, and malicious.[2] Seditious libel, by contemporary standards the most repressive type of defamation, was fraught with an inherent vagueness that prohibited defaming or ridiculing the government or its officers. This concept clearly recognized a difference between public and private persons and that private libel was the less serious

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[1]John D. Stevens, *Shaping the First Amendment: The Development of Free Expression*, (Beverly Hills, CA: Sage Publications, 1982), 120 [hereinafter Stevens, J.D.]. "If it be against a private man it deserves mere punishment,... if it be against a magistrate, or other public person, it is a greater offence; for it concerns not only the breach of the peace, but also the scandal of Government."

[2]Leonard W. Levy, *Emergence of a Free Press*, (New York: Oxford University Press, 1985), 9 [hereinafter Levy].

offense.[3]

The right to criticize the performance of American public officials was addressed at the trial of William Bradford of Pennsylvania in 1692. Bradford and several others were accused of printing statements to the effect that Deputy Governor Thomas Lloyd's name "would stink," and stating that ministers, who were accused of monopolizing ministerial power, should not be magistrates. Bradford served as his own attorney in a jury trial separated from the other accused men. The judge instructed the jury simply to find whether or not Bradford had printed the material, but Bradford, in his closing argument, contested the instructions with: "That is wrong; for the Jury are Judges of Law, as well as in matters of Fact." Bradford's jury became hopelessly deadlocked (9-3), a mistrial occurred and a second trial never took place. Despite the absence of a direct and immediate impact on private-public person determination, Bradford's idea carried over to the trial of John Peter Zenger in

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[3]Sergeant William Hawkins, *A Treatise of the Pleas of the Crown*, (London, 1716); quoted in Leonard W. Levy, *Emergence of a Free Press*, (New York: Oxford University Press, 1985), 8. ". . . a writing which defames a private person only is as much a libel as that which defames persons entrusted in a public capacity . . . it is a very high aggravation of a libel that it tends to scandalize the government, by reflecting on those who are entrusted with the administration of public affairs . . ."

1735.[4]

The Zenger trial was the first prosecution in the American colonies for libeling a governor, William Cosby of New York. Zenger, printer of the New York Weekly Journal, attacked Cosby's performance and was indicted for "false" libel. Since common-law libel did not permit the defense of truth, the jury was instructed to determine whether or not Zenger printed the defamatory material. In a spectacular move, Zenger's attorney, Andrew Hamilton of Pennsylvania, confessed Zenger's responsibility for the printing and claimed his right to publish truthfully. To be libelous, the statements must be "false" as stipulated in the indictment. Central to Hamilton's argument was the question of whether or not the jury was to believe that "truth is a greater sin than falsehood."[5]

Hamilton's appeals prevailed. Zenger was acquitted and the jury's right to determine both questions of fact and questions of law was tenuously reestablished. Though it did not establish a legal precedent, history sees *Zenger* as a watershed case because the jury's verdict was in touch with popular opinion. The verdict supported freedom, truth, liberty, citizens (vice "subjects"

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[4]Levy, 20-25.

[5]Ibid., 39-42.

of the Crown), and it allowed a citizen to truthfully criticize the government.[6] It was not until the Bill of Rights, containing the First Amendment to the Constitution, became law that freedom of speech and of the press were guaranteed to the citizens.[7]

A major change in libel law, the Sedition Act of 1798, was designed to protect the government exactly as the English common law of seditious libel did.[8] By 1812, common-law seditious libel was effectively eliminated because the jurisdiction of crimes against the state was not among the American court's powers.[9] Non-seditious libel was not affected by the Court's action.

Under common law it was libelous *per se* to publish defamatory statements, and the burden of proof rested upon the defendant. Each state was free to handle defamation in its own way and develop its own libel laws. Some states allowed truth as a complete defense while others required proof of truth,

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[6]Ibid., 37.

[7]U.S. Const. amend. I.

[8]James Morton Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties*, (Ithaca, NY: Cornell University Press, 1956): 139.

[9]United States v. Hudson & Goodwin, 7 Cranch 32, 34 (1812) [hereinafter *Hudson & Goodwin*].

good motive and a justifiable end.[10]

Public officials are protected by a constitutional privilege[11] "to publish defamatory matter in communications arising from their legislative activities."[12] Only the most compelling interests of society can justify this broad license to destroy reputations. Absolute immunity is almost exclusively reserved for preserving the independence of those conducting the public's business.[13]

At the heart of the First Amendment is a Constitutional mandate to design rules that facilitate "the free flow of ideas and opinions on matters of public interest and concern."[14] Suppressing information, discussion or even the clash of ideas precludes reaching the most rational judgment, blocks new ideas and retains old errors.[15] Some restraint on absolute liberty is necessary,

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[10]Albert B. Saye, *American Constitutional Law*, 2d ed., (St. Paul, MN: West Publishing Co. 1979), 323.

[11]U.S. Const. art. I, § 6.

[12]Rodney A. Smolla, *Law of Defamation*, (New York: Clark Boardman Co., 1986, 8-13 [hereinafter Smolla 1986-1].

[13]Harvey L. Zuckman and others, *Mass Communication Law: In a Nutshell* (St. Paul, MN: West Publishing Co., 1988), 66 [hereinafter Zuckman].

[14]Robert C. Post, "The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell," *Harvard Law Review* 103 (Jan. 1990): 667.

[15]Thomas Irwin Emerson, *Toward a General Theory of the First Amendment* (New York: Random House, 1963), 7.

otherwise you have jungle law where only the largest predator is free.[16]

Libel laws traditionally protect two separate interests; the individual's desire for privacy and his public good name and reputation.[17] Neither the press nor the individual public official plaintiff should be favored in a discussion of libel where rights are co-equal.[18]

The Supreme Court recognized that government officers have an absolute privilege to make defamatory statements within the bounds of their offices, and even an unworthy motive does not destroy the privilege.[19] The First and Fourteenth Amendments require a balance for citizen-critics to the immunity defense used by public officials.[20] The *New York Times* decision provided the balance by declaring the Sedition Act of 1798 unconstitutional and stating the government could not be libeled. The law would no longer protect the

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[16]Lloyd Davies, "The 'Public Figures' Defence--A Subversion of Democracy," *Law Institute Journal* 65 (Dec. 1991): 1195.

[17]Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 48 (1971) [hereinafter *Rosenbloom*].

[18]Murray I. Franck, "Book Review: Actual Malice Twenty-five Years After Times v. Sullivan," *Communication and the Law*, 14 (Mar. 1992), 84.

[19]Barr v. Matteo, 360 U.S. 564, 575 (1959) [hereinafter *Barr*].

[20]New York Times Co. v. Sullivan, 376 U.S. 254, 282-283 (1964) [hereinafter *New York Times*].

government and public officials from libel.[21]

Every citizen has an absolute right to criticize inefficient or corrupt government without fear of civil or criminal prosecution. Prosecutions for libel of government have no place in the American justice system,[22] and when public discussion is particularly strong, the Constitution limits the protection given to public officials.[23]

The principle purpose of a libel suit is restoring a falsely damaged reputation.[24] The *New York Times* decision shaped the course of modern libel by applying the actual malice standard to public officials and opening the door for public figures.[25]

Impact of Constitutionalizing Libel:

Prior to the 1964 *New York Times* ruling, there was an average of only

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[21]*New York Times*, 291; City of Chicago v. Tribune Co., 28 A.L.R. 1368 (1923) [hereinafter *City of Chicago*]; Rosenblatt v. Baer, 383 U.S. 75, 81 (1966) [hereinafter *Rosenblatt*]; Philadelphia v. Washington Post Co., 482 F.Supp. 897, 898 (E.D. Pa. 1979).

[22]*City of Chicago*, 1375, 1377.

[23]*Rosenblatt* at 85-86.

[24]Pierre N. Leval, "The No-Money, No-Fault Libel Suit: Keeping Sullivan in its Proper Place," in *The First Amendment Law Handbook*, ed. J.L. Swanson and C.L. Castle (New York: Clark Boardman Co., Ltd., 1990), 3.

[25]Stevens, J.D., 124.

five libel trials per year, and only four libel cases reached the Supreme Court. In 1964 the number of libel appeals jumped from 11 to 18 per year, and between 1964 and 1974 the Supreme Court heard 19 cases.[26] Between 1980 and 1984, the average increased to sixteen per year.[27] A substantial percentage of defamation cases against the media were brought by public official or public figure plaintiffs,[28] yet, only ten percent of them prevailed in cases seen through to judicial resolution between 1974 and 1984.[29] By 1985, 78 percent of Americans believed that the press was concerned with getting a good story and not concerned about hurting people.[30]

The libel litigation process is slow, costly, complex and juries are wildly unpredictable.[31] To ease the stress on the courts, summary judgment is often

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[26]F. Dennis Hale, "The Federalization of Libel by Two Supreme Courts," *Communication and the Law* 11 (Sept. 1989): 23.

[27]Richard A. Epstein, "Was *New York Times v. Sullivan* Wrong?" in *The First Amendment Law Handbook*, ed. J.L. Swanson and C.L. Castle (New York: Clark Boardman Co., Ltd., 1990), 48-49 n. 7.

[28]Ann L. Plamondon, "An Epistemological Analysis of the Concept of Actual Malice," *Communication and the Law* 11 (Mar. 1989): 19.

[29]John Soloski, "The Study and the Libel Plaintiff: Who Sues for Libel?" *Iowa Law Review*, 71 (Oct. 1985): 218.

[30]James P. Cain, "Is it Time to Change the Libel Doctrine for Public Figures? Protect Us From a Reckless Press," *American Bar Association Journal* 71 (July 1985): 41.

[31]Stevens, J.D., 126.

used.

Summary Judgment:

When both parties in a defamation suit agree on the material facts of the case, a summary judgment may be used. This procedure will conclude the case as a matter of law prior to trial and at considerable savings of time and money.[32] A defense motion for summary judgment must be granted if a public plaintiff does not provide clear and convincing evidence of actual malice.[33]

After the *New York Times* decision, trial courts responded favorably to defense motions for summary judgment 78 percent of the time. After the 1974 *Gertz* decision, summary judgment was granted only 51 percent of the time. This substantial reduction in summary judgments was caused by reversals at the appellate level and by fewer summary judgments in the federal courts.[34]

The increased complexity of the summary judgment procedures after *Gertz* could be a significant factor. Before issuing a summary judgment, the trial judge must determine if there is sufficient proof of actual malice[35] and

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[32]Kent R. Middleton and Bill F. Chamberlin, *The Law of Public Communication*, 2d ed. (White Plains, NY: Longman Publishing, 1991), 142 [hereinafter Middleton].

[33]Leval, 6.

[34]Robert M. Ogles and George E. Stevens, "Summary Judgment in Defamation Under Gertz," *Journalism Quarterly* 65 (Fall 1988): 745, 746.

[35]Hale, 34.

proof of public figure status.[36] The proof of actual malice calls the defendant's state of mind into question, and, because of the complexity of this issue, summary judgment is not easy.[37] The *Hutchinson* decision cautioned judges about using summary judgment without clearly assessing the defendant's state of mind.[38]

Two points are frequently glossed over when labeling someone a public figure: the press is usually favored by a summary judgment, and a jury generally has an anti-press bias.[39]

Public Officials

The Supreme Court's reversal of the *New York Times v. Sullivan* libel decision was a stunning victory for the American media. The Court provided legal support for a press that served the public's debate on public issues by keeping the discussion "uninhibited, robust, and wide open." The *New York*

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[36]Daniel P. Dalton, "Defining the Limited Purpose Public Figure," *University of Detroit Mercy Law Review* 70 (Fall 1992), 52 [hereinafter Dalton].

[37]Bruce W. Sanford, "No Quarter From This Court," *Columbia Journalism Quarterly* 18 (Sept. 1979): 62 [hereinafter Sanford]; *Hutchinson* at 120 n. 9.

[38]*Time*, "Private People," 114 (9 July 1979): 62 [hereinafter *Time*, "Private People"]; Hutchinson v. Proxmire, 443 U.S. 118, 119 n. 8 (1979) [hereinafter *Hutchinson*]: A summary judgment against Hutchinson was reversed by the Supreme Court. He was not a public figure despite his use of public funds for his animal behavior research.

[39]Sanford, 61.

Times decision reinforced the traditional "watchdog" role of the press[40] and helped to assure that open debate on public issues was supported, even if it produced sharp attacks on public officials.[41] "You can't have a free press unless you have an outspoken press."[42]

The term "public official" dominated the Supreme Court's *New York Times* decision. There was no clear determination of "who" in government service was bound by the actual malice rule,[43] and the public official category cannot contain all public employees.[44] The decision clearly shifted the emphasis of federal defamation law to the private or public status of the plaintiff.[45]

Substantial agreement among the courts accepted elected officials as public officials who must prove actual malice.[46] Those who seek the public

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[40]Richard L. Tobin, "The New York Times's Vital Victory," *Saturday Review* 47 (11 Apr. 1964): 69-70.

[41]*New York Times* at 270. ". . .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."

[42]Herbert Brucker, President of the American Society of Newspaper Editors (ASNE), quoted in Tobin, 70.

[43]Hale, 31-32.

[44]*Hutchinson* at 119 n. 8.

[45]Mark L. Rosen, "Media Lament--The Rise and Fall of Involuntary Public Figures," *Saint John's Law Review* 54 (1980): 488 [hereinafter Rosen].

[46]Hale, 31-32.

arena must accept the attendant risk of defamation because they voluntarily assume a role of public prominence.[47]

Non-elected public officials must be in positions where they exert significant influence on the resolution of public issues[48] and invite public scrutiny apart from the discussion that lead to the defamation.[49] The courts weigh the authority wielded by public employees and their access to news media. It is unlikely that a person will become a public official without control over public affairs. When policy-making authority is high the person is usually a public official[50] because he has substantial responsibility for, or control over, government affairs.[51]

"Public employee" and "public official" are not synonymous terms. Employees who are loosely associated with government and are extremely low

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[47]Rodney A. Smolla, *Suing the Press*, (New York: Oxford University Press, 1986), 59 [hereinafter Smolla, 1986-2].

[48]Hale, 31-32; Middleton, 116.

[49]*Rosenblatt* at 86 n. 13. The former operator of a county owned ski resort was a public official because he was responsible for the success or failure of the public resort.

[50]Smolla, 1986-1, 2-92, 2-93.

[51]Hale, 32; Harold L. Nelson and Dwight L. Teeter, *Law of Mass Communication: Freedom and Control of Print and Broadcast Media* 5th ed. (Mineola, NY: The Foundation Press, Inc., 1986), 111 [hereinafter Nelson].

in the organizational hierarchy.[52] Those who do not exercise discretionary authority and attorneys, as officers of the court, are not public officials.[53]

Public-official status is most often linked to the broad areas of forming public policy, supervising public funds or maintaining the public's health and welfare. The degree of public contact and the degree of authority are strong contributing factors.[54]

Law enforcement personnel, regardless of rank, are usually considered public officials because of the force of their authority.[55] A public official appears to have "substantial responsibility or control" over the conduct of government affairs relative to his position.[56] Public officials are more likely to administer self-help when defamed because they have a greater access to the news media and, therefore, more opportunity to correct errors.[57]

Even though the *Bradford* and later *Zenger* cases[58] established that juries determines matters of law as well as matters of fact, the concept seems to have

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[52]Smolla, 1986-1, 2-87, 2-88.

[53]Nelson, 112-113, 124.

[54]Middleton, 116.

[55]Ibid., 117.

[56]*Rosenblatt* at 85-87.

[57]Smolla, 1986-2, 58-59.

[58]Levy, 20-25, 37.

been discarded by modern courts in defamation litigation. Private or public status is determined as a matter of law, and the jury has no role in the determination.[59] The determination by the trial judge provides a clear record plus the findings required for review at the appellate level. It lessens the possibility that a jury would be able to use a general verdict to punish unpopular ideas or speakers.[60]

After the *New York Times* decision, First Amendment scholars found it difficult to even speculate on the precise course First Amendment law would take. The decision was imbedded in a rich profusion of rules that could affect nearly every facet of defamation law.[61]

The demise of seditious libel established that an impersonal attack on government operations did not libel the responsible public official.[62] To prove libel the evidence must clearly show that the attack was specifically directed toward the plaintiff[63] who must prove both falsity and actual malice.[64]

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[59]Smolla, 1986-1, 2-100.

[60]*Rosenblatt* at 88, 88-89 n. 15; Smolla, 1986-1, 2-89.

[61]Epstein, 19, 21.

[62]*New York Times* at 280, 292.

[63]*Rosenblatt* at 81.

[64]Rosen, 490.

Actual Malice:

Under common law, malice is defined as spite, ill-will or hatred,[65] and it deals with the defamer's attitude toward the person defamed. The Supreme Court's choice of words was unfortunately confusing because actual malice refers only "to the defamer's attitude toward the defamatory remark, connoting knowledge of or indifference to its falsity." The defendant must publish a known falsehood or have a reckless disregard for the falsity of his publication.[66]

Erroneous statements are inevitable in free debate; they must be protected if free expression is to survive and if we intend to preserve the robust character of open debate. Erroneous statements honestly made are protected by the actual malice doctrine.[67] A defendant, absent actual malice, has a qualified constitutional privilege[68] to speak defamatory truth or to make honest misstatements of fact about a public official's official conduct.[69] Whether or not a plaintiff was a public official now had legal ramifications.

Any portion of a public official's private life that impacts his

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[65]Ibid., 487 n. 2.

[66]Sheldon W. Halpern, "Of Libel, Language, and Law: *New York Times v. Sullivan* at Twenty-Five," *North Carolina Law Review* 68 (Jan. 1990): 274-275, 278.

[67]*New York Times* at 271-272, 278-280.

[68]*New York Times Co. v. Sullivan*, 95 A.L.R. 1450, 1453 (1964).

[69]Zuckman, 79-80.

performance in or fitness for office is open to public scrutiny, and it would appear that there is no facet of a public official's character or behavior that does not bear upon his fitness for public office.[70] The defamatory statements about a public employee, however, cannot be used as the evidence that makes him a public official;[71] his position must invite scrutiny apart from the public interest raised by the defamation.[72]

The fact that an official no longer holds his public office is not a serious consideration if the defamation is centered on his official conduct during his tenure as a public employee.[73] Six years after leaving office, two former law enforcement officers were considered to be public officials for purposes of their official conduct.[74] Public officials are not necessarily bound by actual malice for statements about their private lives.[75]

The public-official plaintiff must satisfy the actual malice requirements by proving that the defendant had serious doubts about the truth of his

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[70]Garrison v. Louisiana, 379 U.S. 64, 77 (1964) [hereinafter *Garrison*].

[71]Crane v. The Arizona Republic, 20 Media L. Rptr. 1649, 1659 (1992).

[72]*Rosenblatt* at 86 n. 13.

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

[74]Zerangue v. TPS Newspapers, Inc., 814 F.2d 1066, 1069 (5th Cir. 1987) [hereinafter *Zerangue*].

[75]Middleton, 117.

publication[76] to the convincing clarity standard.[77] Though public officials are absolutely protected from defamation arising from their official duties,[78] citizens are afforded similar protection with the actual malice doctrine.[79]

Public Figures

Public figures are generally defined as those who do not hold public office but are "intimately involved" in the resolution of important public questions, or whose fame enables them to shape events of public concern.[80]

"One who seeks the public arena must accept the heat of the fire as the price for entering the kitchen." Public figures are the people who voluntarily assume a role of special prominence in public affairs.[81] "Defining public figures is much like trying to nail a jellyfish to the wall."[82]

The debate about a public figure's conduct should always be robust,

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[76]Saint Amant v. Thompson, 396 U.S. 727, 731 (1968) [hereinafter *St. Amant*].

[77]Deckle McLean, "Move to Clear and Convincing Proof as Libel Standard Gain for Media," *Journalism Quarterly* 66 (Autumn 1989): 640-641 [hereinafter McLean, 1989]; Herbert v. Lando, 441 U.S. 153, 170 (1979) [hereinafter *Herbert*].

[78]U.S. Const. art. I, § 6.

[79]*New York Times* at 270.

[80]Dalton, 48.

[81]Smolla, 1986-2, 59.

[82]Rosanova v. Playboy Enterprises, Inc., 411 F.Supp. 440, 443, 444 (1976) [hereinafter *Rosanova*].

uninhibited, accommodate First Amendment rights and save personal reputations. Large libel settlements could threaten the press' ability to write vigorously about those in power, the very people who should be carefully scrutinized.[83] Public figures in libel cases are controlled by the actual malice standard,[84] a rule that was expanded to cover them as well as public officials.[85]

Whether a matter is of public or general concern is a question of law for the courts to determine. Whether or not the plaintiff is a public figure is a mixed bag of fact and law, but it is for the court, not the jury, to determine.[86] Public persons voluntarily expose themselves to the risk of defamation; private persons are more vulnerable to damage, therefore, they are more deserving of constitutional protection and have a more compelling call upon the courts for redress.[87]

Scholars generally recognize three types of public figures: those with

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[83]Floyd Abrams, "Is it Time to Change the Libel Doctrine for Public Figures?" *American Bar Association Journal* 71 (July 1985): 38, 41 [hereinafter Abrams, 1985].

[84]Paul D. Driscoll and Kyu Ho Youm, "Harte-Hanks Communications v. Connaughton: The U.S. Supreme Court's Application of the Actual Malice Rule," *Communication and the Law* 14 (Mar. 1992): 70 [hereinafter Driscoll].

[85]Jeremy Cohen and Albert C. Gunther, "Libel as Communication Phenomenon," *Communication and the Law* 9 (Oct. 1987): 14 [hereinafter Cohen].

[86]*Rosanova* at 444.

[87]Rosen, 498.

general fame or notoriety, those who voluntarily inject themselves into a public controversy and those who are involuntarily involved in a public controversy.[88] The truly involuntary and the all-purpose public figures are rare while limited-purpose public figures are more common.[89]

All-purpose public figure must have general fame or notoriety in the community and pervasive involvement in society's affairs.[90] Limited public figures voluntarily thrust themselves into the public arena, expose themselves to the risk of defamation and, like public officials, can obtain access to the news media to fight defamation.[91] Public-figure status should be determined by the notoriety of a person's achievements and the vigor with which he seeks public attention.[92]

The actual-malice rule should be applied to only two narrow categories of public figures, the all-purpose public figures and, more commonly, the

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[88]Deckle McLean, "Public Versus Private Figure Determination Under *Gertz*," *Communication and the Law* 14 (June 1992): 33 [hereinafter McLean, 1992].

[89]Rosen, 498-499.

[90]Saye, 324; George E. Stevens, "Local and Topical Pervasive Public Figures After *Gertz*," *Journalism Quarterly* 66 (Summer 1989, 463 [hereinafter Stevens, G., 1989].

[91]John J. Watkins, "The Demise of the Public Figure Doctrine," *Journal of Communication* 27 (Summer 1977): 49 [hereinafter Watkins].

[92]Halpern, 285 n. 64.

limited public figures.[93] Due to the burden of proof placed upon public figures, it is in the plaintiff's best interest to be judged a private person who is held to a lesser standard of fault established by each state.[94] Private figures can win by showing falsity, believability and negligence.[95]

A person may become a public figure in two ways, by assuming a role of "especial prominence in the affairs of society," or by thrusting himself into the vortex of a public controversy to influence its resolution.[96]

All-Purpose (Pervasive) Public Figures:

Generalizations about all-purpose public figures are risky because there are so few cases, and the courts hesitate requiring individual plaintiffs to prove actual malice for every libel suit they file.[97] There must be clear evidence of general fame or notoriety in the "community" and a pervasive involvement in the affairs of "society" to make a person an all-purpose public figure.[98] The courts did not define "community" as either local or national. The focus was

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[93]Hale, 39; Nelson, 121.

[94]Nelson, 122, 157.

[95]Robert E. Drechsel, "The Survival of 'End-Run' Theories of Tort Liability After *Hustler v. Falwell*," *Journalism Quarterly* 67 (Winter 1990): 1066 [hereinafter Drechsel, 1990-1].

[96]Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974) [hereinafter *Gertz*].

[97]Middleton, 122.

[98]Dalton, 51 n. 39.

on whether or not the plaintiff had fame or notoriety where the defamation occurred.[99]

Lower courts ruled consistently that national notoriety is not required, and someone could be a pervasive public figure within a state or even within a county. A prominent attorney, Steere, was an all-purpose public figure because of his activities in Franklin county Kansas.[100]

In other cases, communities of the "top 100 corporations"[101] and those with 600 population[102] were insufficient to determine pervasive public figure status because they were too small.[103]

An all-purpose public figure plaintiff's name should be "immediately recognized by a large percentage of the relevant population."[104] There was no clear evidence of one plaintiff's "general fame or notoriety in the community" because the jury never heard of him prior to the trial.[105] An all-purpose public

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[99]Stevens, G., 1989, 463-464.

[100]Steere v. Cupp, 5 Media L. Rep. 2046, 2050-2051 (Kan. S.C. 1979).

[101]Lawlor v. Gallagher President's Report, Inc., 394 F.Supp. 721, 731 (S.D.N.Y. 1975).

[102]Stevens, G., 1989, 465; Sewell v. Eubanks, 181 Ga. App. 545, 352 S.E. 2d 802 (1987).

[103]Stevens, G., 1989, 465.

[104]Harris v. Tomczak, 8 Media L. Rep. 2145, 2155 (E.D. Cal. 1982).

[105]Rosen, 499; *Gertz* at 352.

figure must be a "celebrity" or his name a "household word," and the public must recognize and follow his words and deeds.[106]

The "community" or the "society" are not necessarily geographical. A plaintiff can be ruled a pervasive public figure with regard to a certain topic.[107]

Topical Public Figures:

A prominent writer sued publishers of *Vanity Fair* magazine over her firing for alleged dishonesty and incompetence. She was an all-purpose public figure "with regard to her activities relating to literature, journalism and criticism" because the immense controversy she generated in these areas made her a pervasive, topical public figure within the literary and journalistic community.[108]

One plaintiff was not a limited public figure because there was no public controversy concerning his activities prior to the defamation. He was, however, an all-purpose public figure within the Portuguese community of Rhode Island for the defamation broadcast toward that community.[109]

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[106]Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1294 (D.C. Cir.), cert. denied, 449 U.S. 898 (1980) [hereinafter *Waldbaum*].

[107]Stevens, G., 1989, 465.

[108]Adler v. Conde Nast, 643 F.Supp. 1558, 1559-1560, 1564 (S.D.N.Y. 1986).

[109]Stevens, G., 1989, 464; De Carvalho v. da Silva, 414 A.2d 806 (R.I. 1980).

A local all-purpose public figure retained that classification for the national media coverage of her activities. The court did not allow discussion in the local media while simultaneously preventing national coverage. "We do not believe that the constitutional freedoms of speech and press were ever intended to be geographically bound."[110]

It appears that a plaintiff, whose notoriety is coextensive with the scope of the publicity, could be bound by the actual malice rule.[111] The basic public-figure criterion is general fame or notoriety in the community where the defamation occurred. The number of all-purpose public figures may be extremely small, but this is not true of limited-purpose public figures.[112]

Limited-Purpose Public Figures:

A plaintiff becomes a limited-purpose public figure by voluntarily injecting himself into the "vortex" of a public controversy in order to influence its resolution. The limited public figure is a public figure only for the range of the subject controversy.[113]

Two Supreme Court decisions allowed the press to report about people in

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[110]Stevens, G., 1989, 464; Owens v. National Broadcasting Co., 508 So. 2d 949 (La. App. 1987).

[111]Stevens, G., 1989, 465.

[112]Rosen, 507.

[113]Nelson, 124-125.

public life without fear of libel because they extended actual malice protection to stories involving public figures as well as public officials.[114] The actual malice doctrine was extended because public figures are less vulnerable to defamation, they can resort to self-help, and they are less deserving of protection because they voluntarily expose themselves to an increased risk of defamation.[115] The plaintiff's conduct is the key to determining his public-figure status.[116]

The "public controversy" is a critical element in determining limited public-figure status, and private matters do not become public issues simply because they attract attention.[117] The public-figure plaintiff must have purposefully and extensively participated in the controversy,[118] he must have

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[114]*Newsweek*, "Limits of Libel," 69 (26 June 1967): 76-77; Curtis Publishing Co. v. Butts (No. 37), 388 U.S. 130 (1967) [hereinafter *Butts*]; Associated Press v. Walker (No. 150), 388 U.S. 130 (1967) [hereinafter *Walker*].

[115]Wolston v. Reader's Digest Assoc., 443 U.S. 157, 164 (1979) [hereinafter *Wolston*]. Wolston remained a private person despite a contempt of court conviction during hearings on Soviet espionage.

[116]Blue Ridge Bank v. Veribanc, 866 F.2d 681, 687 (4th Cir. 1989); McLean, 1992, 49.

[117]Dalton, 52.

[118]Rosen, 502.

been involved before the defamation was published,[119] and he must also be able to gain access to the media to rebut the defamation.[120] A private person does not automatically become a public figure simply by becoming involved with a matter that attracts public attention.[121]

Involuntary Public Figures:

The *Gertz* majority decision created a dichotomy between public figures and private persons. It split the public figure category into two subcategories, all-purpose public figures and limited-purpose public figures. The federal appeals court in Washington, D.C. gave us the concept of involuntary-limited public figures. These people are caught up in events that conspire to place them in the limelight.[122] An air traffic controller, who by sheer "bad luck" happened to be on duty at the time of a plane crash, became involved in the controversy over the accident's cause through no desire of his own.[123] The Court labeled him a public figure but acknowledged the limited scope of its

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[119]Stacey L. Hayden, "Limited Purpose Public Figures: *Spence v. Flynt* as an Illustration of the Need for a More Complete Test," *Brigham Young University Law Review* (1992): 833 n. 48; *Hutchinson* at 134-135; Hagel v. Vern Sims Ford, Inc., 12 Media L. Rep. 2248, 2250 (Wash. Ct. App. 1986).

[120]Watkins, 50.

[121]*Wolston* at 167.

[122]Zuckman, 92-93.

[123]Dameron v. Washington Magazine, 779 F.2d 736, 741-742 (D.C. Cir. 1985).

decision, and that the circumstances creating involuntary public figures should be rare.[124]

Justice Brennan gave us the idea that an involuntary public figure could exist with his majority opinion in *Time v. Hill*. Varying degrees of self exposure are a part of our American life style because we are a society that values free speech and press.[125]

When an individual's actions invite attention, even though he did not seek or desire the attention, he becomes a public figure.[126] If anyone, who is involuntarily caught up in a public controversy, assumes a prominent role in its outcome he becomes a public figure by inviting comment unless he exercises his volition and refuses a role in the debate. Generally speaking, plaintiffs who have not thrust themselves voluntarily into a public controversy are looked upon as private figures.[127] It is more meaningful to focus on the nature and extent of an individual's participation in the controversy[128] because a libel defendant must

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[124]McLean, 1992, 46-47.

[125]Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) [hereinafter *Hill*]. "Exposure of the self to others in varying degrees is a concomitant of life in a civilized country. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and press."

[126]McDowell v. Paiewonsky, 769 F.2d 942, 949 (3rd Cir. 1985); McLean, 1992, 48.

[127]McLean, 1992, 43, 45 n. 45.

[128]*Gertz* at 352.

show more than mere newsworthiness to justify applying the actual-malice standard.[129]

A person may associate with high-ranking officials without becoming a public figure, but this close association brings with it the risk that could place him at the heart of a public controversy. Proximity to the issue could cause the private person to be treated like a public person.[130] An unwilling person caught up in a controversy does not automatically become a public figure[131] particularly if he is dragged involuntarily into a public conflict.[132]

The *Firestone* decision[133] changed public figure determination by virtually eliminating the involuntary public figure concept and recognizing that access to the news media does not necessarily make one a public figure. The Court inferred that the concept of an involuntary public figure had no place in defamation law.[134]

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[129]Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976) [hereinafter *Firestone*].

[130]Clyburn v. New World Communications, 903 F.2d 29, 33 (D.C. Cir. 1990); McLean, 1992, 40-41.

[131]*Time*, "Private People," 62.

[132]Arlie Schardt, Diane Camper and Nancy Stadtman, "Public or Private Lives," *Newsweek* 94 (9 July 1979): 50.

[133]*Firestone* at 448.

[134]Watkins, 51.

A limited public figure "voluntarily injects himself or is drawn into a particular public controversy." The point often emphasized is "drawn into," and this is used to define the existence of involuntary public figures. The point that follows immediately is most often glossed over: "In either case such persons assume special prominence in the resolution of public questions."[135] The Court, it appears, did not intend to create a new type of public figure but only to describe methods used for entry or injection into public controversies.

Tests:

Efforts to instill uniformity into public-figure determination led to the development of several tests that are applied by state and federal courts at all levels. The tests are usually named after the plaintiff in the case of origin.

The Waldbaum test is most widely used to identify people who voluntarily participate in a public controversy become public figures. This three-part test isolates the public controversy and assures that persons in the community are affected, establishes the plaintiff's role as not trivial or tangential, and determines that the plaintiff's role is germane to the defamation. Both plaintiff and defamation must be related to the public controversy.[136]

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[135]*Gertz* at 351. "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."

[136]Dalton, 55-56, 55 n. 66; *Waldbaum* at 1296-1298.

In reversing a trial court's private-figure ruling, an appeals court used a broad two part test to determine if Marcone, a well-known attorney, was a public figure. The court determined whether the matter was a public controversy and the nature and extent of the plaintiff's participation. Volition meant the plaintiff assumed the risk of being labeled a public figure.[137]

A case of mistaken identity named Lerman (a.k.a. author Jackie Collins) as the person who played a nude part in a movie scene. The jury found for plaintiff,[138] but the court of appeals reversed after using a four part test, the second most popular in use. The plaintiff must successfully invite public attention before the defamation, voluntarily inject herself into the controversy, assume a position of prominence in the controversy, and maintain regular and continuing media access. If all four conditions are met, the plaintiff is a limited-purpose public figure. Lerman became a limited public figure for the purposes of discussing sexual matters.[139]

Other tests[140] are used, but the three main tests, *Waldbaum*, *Marcone* and

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[137]Marcone v. Penthouse Int'l Magazine, 754 F.2d 1072, 1083 (3rd Cir. 1985) [hereinafter *Marcone*]; Dalton, 59.

[138]Lerman v. Flynt Distributing Co., 745 F.2d 123, 127 (2d Cir. 1984) [hereinafter *Lerman*].

[139]*Lerman* at 137-138; Dalton, 60-61.

[140]Fitzgerald v. Penthouse Int'l, Ltd., 691 F.2d 666, 668 (4th Cir. 1982) (five point test); Dalton, 62 n. 121; Warford v. Lexington Herald Leader Co., 789 S.W.2d 758, 766 (Ky. 1990) (three point test); Clark v. ABC, 684 F.2d

Lerman, hinge on three main concerns: there must be a public controversy, the plaintiff must act voluntarily, and the plaintiff must have a prominent role in the controversy. The plaintiff's volition is a factor in all tests.[141]

The End-Run Tactic:

It is wrong in libel law to assign someone a legal disadvantage based upon his position in the community. The actual-malice rule could harm the case of an innocent public figure under a carefully directed and virulent attack by a private person.[142] This is precisely what happens in an "end-run" situation.

In defamation law, there is no such thing as a false opinion. The law currently provides an absolute protection in this area.[143] Beginning with this premise, the end-run tactic tries to circumvent libel defenses. The problem exists because a plaintiff is unable to prove that an opinion is false, that outrageous parody is believable, or that a defendant is negligent because the defendant intentionally inflicted the emotional distress. In any one of these cases, the libel defendant makes an "end-run" around the libel laws. The end-

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1208, 1218 (6th Cir. 1982) (three point test).

[141]Dalton, 62.

[142]Davies, 1195.

[143]Floyd Abrams, "Hidden Absolutes of the First Amendment," in *First Amendment Law Handbook*, eds. J.L. Swanson and C.L. Castle (New York: Clark Boardman Co., Ltd., 1990): 469 [hereinafter Abrams, 1990].

run forces a plaintiff to creatively relabel his case to "intentional infliction of emotional distress" and vigorously seek private-figure status.[144]

Effect of Time:

A majority of the circuit courts held that once a plaintiff is a public figure for a particular issue, he remains a public figure thereafter for that issue.[145]

Six years between an incident and the publication of defamatory information did not return a plaintiff to private status.[146] Even 30 years was insufficient to return a plaintiff to private status.[147] The lower courts held that Wolston's public-figure status, gained 21 years earlier during contempt of court proceedings, still applied and the passage of time did not restore his private-figure status. The Supreme Court demurred a final decision by stating, "[w]e need not and do not decide whether or when an individual who was once a public figure may lose that status by the passage of time."[148]

Public-figure status does not diminish over time if the subject defamation

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[144]Drechsel, 1990-1, 1066-1067, 1069-1070.

[145]Dalton, 64 n. 138.

[146]*Zerangue* at 1069.

[147]Stripling v. Literary Guild, 5 Media L. Rep. 1958, 1960 (W.D. Tex. 1979); *Zerangue* at 1069.

[148]*Wolston* at 166 n. 7.

concerns the original issue that led to the public attention. Even 50 years did not dim the controversy caused by the accuser of the "Scottsboro Boys" in the 1931 "rape case of the twentieth century."[149] The original public controversy was the treatment of blacks in American courtrooms.[150] As time passes, a person's public-official status may diminish regarding conduct in office and the actual-malice standard may no longer be justified. That point has not yet been reached.[151]

Standard of Proof:

The familiar standard of proof, "beyond a reasonable doubt," comes from criminal law and requires 99 to 100 percent certainty. The most common civil standard, a "preponderance of evidence," requires only a 51 percent certainty. The most commonly accepted standard for constitutional libel is "clear and convincing proof." It may appear that this latter standard should fall about the 75 percent certainty level, but, in fact, the 90 to 95 percent certainty level is required.[152]

Clear and convincing proof has been the standard since the *New York*

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[149]Middleton, 127-128.

[150]Street v. National Broadcasting Co., 645 F.2d 1227, 1235 (6th Cir. 1981), cert. granted, 454 U.S. 815, cert. dismissed, 454 U.S. 1095 (1981).

[151]Smolla, 1986-1, 2-89.

[152]McLean, 1989, 640.

Times decision, but it has not become a part of the actual-malice test.[153] A plaintiff must prove actual malice with convincing clarity,[154] and private figures must prove negligence to recover damages.[155] The proof of actual malice must satisfy a reasonable man or a prudent publisher,[156] and the defendant must have had serious doubt about the truth of his publication.[157]

In lieu of extending the actual-malice standard to public figures, Justice Harlan recommended a fault standard of highly unreasonable conduct,[158] which is similar to gross negligence. A plurality, led by Chief Justice Warren, disagreed and applied the actual-malice standard to public figures. They believed the public saw that a public figure's actions were as powerful as those of a public official. These divergent opinions were later melded into a single hybrid approach.[159] Fault establishes the degree of culpability the defendant has

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[153]Lansdown v. Beacon Journal Publishing Co., 14 Media L. Rep. 1801, 1804 (Ohio S.C. 1987).

[154]Scott M. Matheson, Jr., "Procedures in Public Person Defamation Cases: The Impact of the First Amendment," *Texas Law Review* 66 (Dec. 1987): 240 [hereinafter Matheson]; *Zerangue*, 1071.

[155]Smolla, 1992, 119.

[156]*St. Amant* at 730-731.

[157]*Herbert* at 156, 170.

[158]*Butts* at 155. ". . . a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."

[159]Rosen, 492 n. 25.

within the framework of society's values.[160] Private figures involved in matters of public concern must prove both fault and falsity, while a public-person plaintiff must prove falsity.[161]

Applying the Public Figure Doctrine:

While struggling to reconcile libel law with the Constitution, the Supreme Court broadened freedom of the press and narrowed the grounds for libel action with the *Rosenbloom* decision.[162] The Court bridged a gap between public and private figures by applying the actual malice standard to the private individual plaintiff.[163]

Three years later, the Supreme Court reduced press protection with the *Gertz* decision and later reduced it further with the *Firestone* decision.[164] The *Wolston* and *Hutchinson* decisions continued the trend toward weakening the media's ability to gather and disseminate information by narrowing the public-

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[160]Cohen, 13.

[161]Matheson, 242; Philadelphia Newspapers v. Hepps, 475 U.S. 767, 768-769 (1986). When libel is "of public concern a private figure plaintiff cannot recover damages without also showing that the statements at issue are false."

[162]Waters, 66.

[163]Rosen, 495.

[164]Waters, 66.

figure definition thereby increasing the difficulty of defending against libel.[165] Each state can set its own standard of libel proof for private figures. Some states even retained the "issue" standard.[166]

Issue Standard

Is the public-figure standard a consequence of an individual's status or of his involvement in matters of public concern? Should constitutional protection come from the nature of the defamed person or from the context of the utterance?[167]

Justice Brennan wrote that a public issue does not become less important just because a private person is involved. The public focuses on the event, not the participants' prior notoriety. Therefore, protection must be given to the discussion "without regard to whether the persons involved are famous or anonymous."[168] A private controversy may not have any First Amendment protection, but, when it becomes a "public concern," a considerable amount of First Amendment protection is available.

The Supreme Court's *New York Times* decision devoted considerable

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[165]*Broadcasting*, "Public Figure Libel Defense is Reduced by Supreme Court," (2 July 1979): 74; Sanford, 62.

[166]Stevens, J.D., 124.

[167]Halpern, 283.

[168]*Rosenbloom* at 43-44; Rosen, 495-496.

attention to the public or private status of the plaintiff and less to the public concern or content of the speech. The *Rosenbloom* court refocused on the issue and whether the issue was of public concern. The *Gertz* court refocused attention on the plaintiff's status because it did not want judges to determine the general or public interest of the subject controversy.[169]

Birth of the Issue Doctrine:

The right to criticize an agent of the government for job performance should not depend on whether or not he is arbitrarily labeled a public official. Private figure critics should be free of the fear of libel judgment because the *New York Times* ruling provides an unconditional right to speak out about public affairs as a minimum guarantee of the First Amendment.[170] Because there is no way to draw a permanent line making some people "public" while allowing others to retain their private status,[171] "the question is whether a public issue, not a public official is involved."[172] While speech about a public official

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[169]Robert E. Drechsel, "Defining 'Public Concern' in Defamation Cases Since *Dun & Bradstreet v. Greenmoss Builders*," *Federal Communications Law Journal* 43 (Dec. 1990): 1-4 [hereinafter Drechsel, 1990-2].

[170]*Rosenblatt* at 95: Douglas and Black, JJ., concurring.

[171]Nelson, 113-114.

[172]*Rosenblatt* at 91: Douglas and Black, JJ., concurring.

is, by definition, of public concern,[173] the media may have a strong voice in determining "public interest" by the stories selected for publication.[174]

The Supreme Court's minority opinion in the *Rosenblatt* decision provided the initial impetus toward an issue standard. During the eight years (1967-1974) after the *Rosenblatt* decision and before the *Gertz* decision, the issue standard required even unwilling participants in public events to meet the actual malice standard to establish libel.[175] The public-issue doctrine made the public-figure category nearly superfluous.[176]

Establishing the Issue Standard:

Rosenbloom, a dealer in nudist magazines, was a private person caught up in the public controversy over pornography. A three-member plurality of the Supreme Court (Brennan, Burger and Blackman, JJ.) ruled that a private person like Rosenbloom must prove actual malice if the defamation stemmed from a public controversy.[177] The Court said that plaintiff Rosenbloom was, in effect, a public figure even if he did not want to be. The nature of the event,

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[173]Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188, 1196-1197 (9th Cir. 1989). "We doubt that it is possible to have speech about a public figure but not of public concern."

[174]Drechsel, 1990-2, 17.

[175]Nelson, 119.

[176]Watkins, 49.

[177]Hale, 35.

not his fame or notoriety, gave the media license to cover his actions. The actual malice standard applied.[178]

The *Rosenbloom* decision tried to create a standard based on the nature of the defamatory utterance rather than on the plaintiff's status.[179] The issue test became a standard that protected the media's right to cover public issues fearlessly, and volition was irrelevant because only the public issue was of concern. Even private persons must prove actual malice if they were caught-up in a controversy over a public issue.[180] With the extension of actual malice to matters of public concern, it was crucial that private matters did not become public controversy simply because they attracted attention.[181]

During the short lived *Rosenbloom* era, few libel suits were won by either public or private figure plaintiffs.[182] Three years later, the Supreme Court's *Gertz* decision examined the *Rosenbloom* issue doctrine and repudiated it to provide a balance between First Amendment protection and providing relief from defamation injury. The balancing point was the degree of fault a plaintiff must establish, and this was a function of the plaintiff's public or

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[178]Stevens, J.D., 124

[179]Halpern, 283.

[180]McLean, 1992, 35.

[181]Dalton, 48, 54 n. 64.

[182]Nelson, 120-121.

private status. Public persons must prove actual malice.[183] The Court determined that the issue standard was inappropriate for a private plaintiff involved in a public controversy.[184]

The Court abandoned the issue standard and reemphasized the plaintiff's status. Justice Blackman provided a clearly defined majority when he concurred in the *Gertz* decision to eliminate the unsureness caused by the Rosenbloom plurality decision.[185] Private persons involved in matters of public concern were, once again, bound by a fault standard less than actual malice. The *Gertz* ruling was mitigated by requiring private persons to prove actual malice to recover punitive damages. Subsequent Supreme Court decisions applied the negligence standard to private figures.[186]

Evolutionary Summary:

Historically, private and public persons have been treated differently in libel litigation. The demise of seditious libel made it impossible to libel the government,[187] and the courtroom advantage began to shift from the public person toward the private person and the news media. Proof of libel by a

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[183]Halpern, 284-285.

[184]Dalton, 50.

[185]Rosen, 496-497; 497 n. 45.

[186]Hale, 35-36.

[187]*Hudson & Goodwin* at 34.

public person became much more difficult when the actual-malice doctrine[188] was applied. It allowed the news media to protect itself from libel litigation.

When the actual-malice doctrine was expanded to apply to public figures,[189] freedom of the press was once again boosted. The greatest boost came from the issue doctrine[190] which was soon replaced by the *Gertz* person centered doctrine[191] and a return to private-public figure determination. The three year life of the issue doctrine is the focus of this research.

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[188]*New York Times* at 279-280.

[189]*Butts* at 130.

[190]*Rosenbloom* at 44-45.

[191]*Gertz* at 343-346.

Chapter III

Methodology

Public figure determination is divided into three major categories. The first deals with public officials and the First Amendment privilege extended to them while performing their official duties. The second deals with all-purpose or pervasive public figures who are not public employees. The third major category encompasses limited public figures. These latter two categories will be examined in detail as "public figures."

The two fundamental concepts governing public-figure determination are "person centered" and "issue centered." The person-centered concept involves a plaintiff who thrusts himself into the vortex of a public controversy with the intent of affecting its resolution.[1] This doctrine relies heavily upon volition, the voluntary nature of the individual's injection of self into the controversy. The person-centered approach provides a considerable advantage to the plaintiff and could have a chilling effect on the news media.[2]

The issue-centered philosophy focuses on the utterance or public issue. The plaintiff's volition is irrelevant, and only the involvement in a public controversy or event is considered. The issue-centered approach renders the

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[1]Associated Press v. Walker (No. 150), 388 U.S. 130, 154-155 (1967).

[2]Mark L. Rosen, "Media Lament--The Rise and Fall of Involuntary Public Figures," *Saint John's Law Review* 54 (1980): 498.

press nearly immune to libel litigation.[3]

For a brief three-year period, defamation law ignored the public or private status of the plaintiff and focused solely upon the controversy surrounding the defamation to determine whether or not the plaintiff must prove actual malice. This period began with the *Rosenbloom*[4] decision and continued until the issue doctrine was repudiated by the *Gertz*[5] decision. The goal of this research is to determine the impact of the *Rosenbloom* issue doctrine on contemporary libel litigation in the federal courts.

Information sources will be sought through computer subject matter searches for books, journals and handbooks relating to the issue doctrine and public-figure determination. Pertinent primary source material, referenced in secondary sources, will be examined. The concepts espoused in these sources will provide a deeper, clearer understanding of the information gathered from the primary sources (court reporters).

The primary information source research will include an examination of *Shepard's Citations* to determine which of the *Rosenbloom* progeny may have a

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[3]Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43-44 (1971) [hereinafter *Rosenbloom*].

[4]*Id.* at 29.

[5]Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

bearing on contemporary libel litigation. It is anticipated that more than 800 citations will be found.

Shepardizing, using *Shepard's Citations*, is one of the most widely used methods of updating the law. It involves tracing citing authorities (progeny of a case) or a point of law through legal citations made to the parent case (cited authority).[6] The Supreme Court's *Rosenbloom* decision will be Shepardized to determine the impact of the issue doctrine on subsequent decisions in the federal courts system. Parallel citations, citations to the same case in another reporter, to each cited authority will be examined to assure accuracy and total coverage.[7]

Shepard's analysis codes depict the status of the citing authority. They will be used in conjunction with Shepard's superscript numbers, which flag individual points of law by their headnote numbers, to limit the pool of cases to be examined. The headnote numbers are taken from the cited authority's court reporter. For example, 694FS[1]1549 refers to Volume **694** of the **F**ederal **S**upplement, headnote number **1**, a reference that can be found on page **1549** of the citing authority.[8] These two devices will be the tools used to cull the

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[6]Christopher G. Wren and Jill Robinson Wren, *The Legal Research Manual* 2d ed., (Madison, WI: Adams & Ambrose Publishing, 1986), 95-96.

[7]Ibid., 104.

[8]Ibid., 107.

anticipated massive citation list to a more manageable number. The citing authorities from this reduced list will become the research data pool for this thesis. It is recognized that *Shepard's Citations* can only provide a list of materials; the sources must be read and analyzed. The following Shepard's analysis codes are extracted for illustration:

History of Case

a (affirmed)	Same case affirmed on appeal.
D (dismissed)	Appeal from same case dismissed.
m (modified)	Same case modified on appeal.
r (reversed)	Same case reversed on appeal.
s (same case)	Same case as cited case.
S (superseded)	Substitution for former opinion.
v (vacated)	Same case vacated.
U S cert den	Certiorari denied by Supreme Court.

Treatment of Case

c (criticized)	Soundness of decision or reasoning in cited case criticized for reasons given.
h (harmonized	Apparent inconsistency explained and shown not to exist.
j (dissent)	Citation in dissenting opinion.
o (overruled)	Ruling in cited case overruled.
q (questioned)	Soundness of decision .[9]

The research will locate citations to the specific points of law found in the *Rosenbloom* case headnotes. Only those headnotes concerned with the issue doctrine's impact on determining public figure status will be examined. The

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[9]Ibid., 106.

following extracted headnotes are pertinent to the issue doctrine and public figure determination, and they are the primary target for this research.[10]

> Headnote 1: The First Amendment protection "extends to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."[11]
>
> Headnote 2: A private person involved in an event of public concern must establish falsity of a defamatory statement by clear and convincing proof.[12]

The *Shepard's Citations* source references will be examined beginning with the most recent and proceeding toward the parent case. This will provide an insight into the latest thinking on the issue standard and public-figure determination. Research will be expanded to the Creighton University and Douglas County Law Libraries as necessary.

The information gathered will be analyzed as text pertinent to the issue doctrine and public-figure determination. The text will provide the reader a systematic view of the history and evolution of the issue doctrine and answer

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[10]Rosenbloom v. Metromedia, Inc., 91 S.Ct. 1811, 1812 (1971).

[11]*Id.* at 1812; Separate opinion of Brennan, Burger, Blackman and Black, JJ. A plurality opinion does not set a precedent, but it does provide guidance.

[12]*Id.* at 1812; Separate opinion of Brennan, Burger and Blackman, JJ.; Contra Harlan, Marshall and Stewart, JJ. The absence of a clear majority makes this persuasive rather than mandatory authority.

the research question. How has the *Rosenbloom v. Metromedia* Supreme Court decision impacted contemporary libel litigation?

Chapter IV

Findings

Public Concern

The purpose of the First Amendment is to allow people the freedom to speak what they think on vital matters of public concern without prior restraint or fear of subsequent punishment.[1]

To achieve this purpose, our laws should be designed to protect private people from unwanted publicity and to protect all people by keeping their private affairs private. This right to privacy does not prohibit publication of material that is of "public or general interest." Private matters to private people may become items of public interest to others, who in varying degrees, have renounced their right to private lives.[2]

The concepts of fair comment, falsehoods and public interest, which fall under public concern, require a little more discussion.

Fair Comment:

Prior to the *New York Times* decision,[3] the law of defamation recognized

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[1]Thornhill v. Alabama, 310 U.S. 88, 95, 101-102 (1940); Notes. "The Scope of First Amendment Protection for Good-Faith Error," *Yale Law Journal* 75 (Mar. 1966): 644 [hereinafter Notes-Yale].

[2]Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4 (Dec. 1890): 214-215 [hereinafter Warren]. The phrase "public or general interest" was originated by Warren and Brandeis.

the defense of fair comment when the utterance was related to a matter of public interest or concern.[4] As a common-law defense, fair comment recognizes "public men" as legitimate subjects for community discussion even when they are not public officials.[5] When fair comment is invoked, the media opinion must be about a matter of public interest, it must be the journalist's own opinion, and it must be fair and printed without ill will. This protection applies to anyone who provides goods or services to the public.[6]

Falsehoods:

The law of defamation recognizes that rapid news dissemination will cause some erroneous expression of fact and opinion which must be tolerated.[7] Erroneous statements are inevitable in a free debate, and they must be protected

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[3]New York Times Co. v. Sullivan, 376 U.S. 254 (1964) [hereinafter *New York Times*].

[4]Ragano v. Time, Inc., 302 F.Supp. 1005, 1007 n. 5 (M.D. Fla. 1969) [hereinafter *Ragano*].

[5]Jacobellis v. Ohio, 378 U.S. 184, 190 (1964); Roth v. United States, 354 U.S. 476, 484, 487 (1957) [hereinafter *Roth*].

[6]Kent R. Middleton and Bill F. Chamberlin, *The Law of Public Communication* 2d ed. (White Plains, NY: Longman Publishing, 1991), 167 [hereinafter Middleton].

[7]*Ragano* at 1008.

to provide ideas the breathing space they need to survive.[8] The permit to communicate erroneous facts is raised to a constitutional privilege when communicating about the conduct of public officials and their official duties.[9] Historically, articles published and circulated to provide true information to voters about a candidate are privileged.

> The public benefit from publicity is so great and the chance of injury to private character so small that such discussion must be privileged.[10]

"Good-faith defamatory error" about a public official's conduct in office, whether fact or opinion, is protected by the First Amendment. Without this immunity, an inadvertent error could silence would-be critics of a public official's conduct.[11] The First Amendment protects this type of public information as political speech.[12] False statements of fact, however, were not

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[8]NAACP v. Button, 371 U.S. 415, 433 (1963) [hereinafter *NAACP*].

[9]Harvey L. Zuckman and others, *Mass Communication Law: In a Nutshell* (St. Paul, MN: West Publishing Co., 1988), 79 [hereinafter Zuckman].

[10]Coleman v. MacLennan, 98 P. 281, 286 (1908).

[11]W. Wat Hopkins, *Actual Malice: Twenty-five Years After Times v. Sullivan* (New York: Praeger, 1989), 172 [hereinafter Hopkins]; Notes-Yale, 643.

[12]Eric L. Collins, Jay B. Wright, and Charles W. Peterson, "Problems in Libel Litigation," *Communications and the Law* 7 (Oct. 1985): 42.

protected by the First Amendment prior to the *New York Times* decision,[13] and deliberate falsehoods were never protected because malicious libel enjoys no constitutional protection.[14]

Public Interest:

The definition of "public interest" is difficult to pin down because of the many definitions used[15] and the fluidity of these definitions.[16] However it is described, the public has a right to have an interest and to be informed on public issues.[17]

Being in the "limelight may be a factor in public interest occurring, it can hardly be held to constitute a condition for the right of public interest to

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[13]Notes. "The *New York Times* Rule: An Analysis of Its Implication," *Minnesota Law Review* 55 (Dec. 1970): 300 [hereinafter Notes-Minn.].

[14]Time, Inc. v. Hill, 385 U.S. 374, 388-391 (1967) [hereinafter *Hill*]; Linn v. United Plant Workers of America, 383 U.S. 53, 63 (1966).

[15]Bennett Ramberg, "The Supreme Court and Public Interest in Broadcasting," *Communications and the Law* 8 (Dec. 1986): 13.

[16]Author's note: Whether the term describing an event is: public interest, public issue, public controversy or public concern, the end result will be the same. The term will describe significant events causing participants, who seek to direct the outcomes, to be labeled "public figures."

[17]Cerrito v. Time, Inc., 302 F.Supp. 1071, 1073-1074 (N.D. Cal. 1969) [hereinafter *Cerrito*].

exist."[18] "Speech about public affairs is the essence of self-government,[19] and free speech and press are not reserved solely for political speech.

> All ideas having even the slightest redeeming social importance--unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion--have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interest.[20]

A family, held captive by three escaped prisoners and later released unharmed, became the subject of a front-page news story. A novel, a play and a *Life* magazine article cast the family in a false heroic light. The Supreme Court determined the publication was "a matter of public interest" and, in the absence of actual malice, it was protected by the First Amendment.[21] This 1967 decision displayed a subtle Supreme Court shift of emphasis from public official status and toward public interest.[22]

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[18]United Medical Laboratories v. Columbia Broadcasting System, Inc., 404 F.2d 706, 712 (9th Cir. 1968), cert. denied, 394 U.S. 921 (1968) [hereinafter *United Medical Laboratories*].

[19]Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) [hereinafter *Garrison*].

[20]*Roth* at 484.

[21]*Hill* at 387-388.

[22]Notes-Minn., 305.

Defamation over the accuracy of "mail-order" medical lab reports[23] resulted from a "legitimate public interest" in conditions capable of having a wide-spread effect on public health.[24] The defendant, Columbia Broadcasting System, was granted a summary judgment that was affirmed on appeal because there was no basis for actual malice.[25]

Whether a matter is of public or general concern is a question of law for the courts to determine.[26] Numerous lower courts, after *Butts*[27], extended the *New York Times* protection to publications possessing a valid public interest absent actual malice.[28]

Public officials are government employees who exert significant influence on the resolution of public issues[29] and they invite public scrutiny.[30]

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[23]*United Medical Laboratories* at 708.

[24]*Id.* at 711.

[25]*Id.* at 712-714.

[26]Hotchner v. Castillo-Puche, 404 F.Supp. 1041, 1045 (S.D. N.Y. 1975); Rosanova v. Playboy Enterprises, Inc., 411 F.Supp. 440, 444 (1976).

[27]Curtis Publishing Co. v. Butts (No. 37), 388 U.S. 130 (1967) [hereinafter *Butts*].

[28]Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858, 861, 861 n. 4 (5th Cir. 1970) [hereinafter *Bon Air Hotel*].

[29]F. Dennis Hale, "The Federalization of Libel by Two Supreme Courts," *Communications and the Law* 11 (Sept. 1989): 31-32; Middleton, 116.

Public figures are not public officials, but they are intimately involved in the resolution of important questions or their fame enables them to shape events of public concern.[31] Public figures assume roles of special prominence in public affairs,[32] and all of them share a single, common denominator. They are involved in "matters of public interest." The question of whether a child prodigy fulfilled his early promise was "a matter of public concern," even 30 years after he dropped from public view.[33]

"When interests in public discussion are particularly strong . . . the Constitution limits the protection afforded by the law of defamation." The courts must balance between the public need-to-know and the public interest in preventing and redressing attacks on reputation.[34]

The *Waldbaum* test[35], used to determine public figure status, sheds more

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[30]Rosenblatt v. Baer, 383 U.S. 75, 86 n. 13 (1966) [hereinafter *Rosenblatt*].

[31]Daniel P. Dalton, "Defining the Limited Purpose Public Figure," *University of Detroit Mercy Law Review* 70 (Fall 1992): 48.

[32]Rodney A. Smolla, *Suing the Press*, (New York: Oxford University Press, 1986), 59.

[33]Sidis v. F-R Publication Corp., 113 F.2d 806, 809-810 (2d Cir. 1940).

[34]*Rosenblatt* at 85-86.

[35]Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287 (D.C. Cir. 1980) [hereinafter *Waldbaum*].

light on public issues and demonstrates that the public figure and public issue doctrines are absolutely intertwined. One component of the test focuses upon the plaintiff, the degree to which he assumes risk to his reputation, his access to the mass media, and his fame or notoriety in the community.[36] The second component studies the controversy to assess the degree to which the dispute is real.[37] The *Waldbaum* test requires:

- The public controversy must be isolated.
- It must affect non-participants in the community.
- The plaintiff's role must not be trivial or tangential.
- The plaintiff's conduct must be germane to his participation in the controversy.
- Both the plaintiff and the defamation must be related to the controversy.[38]

Precursors (Antecedents) of the Rosenbloom Issue Doctrine:

The Constitution, Justice Douglas said, prohibits the Congress from passing any libel law, therefore, "the question is whether a public issue, not a

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[36]*Id.* at 1295.

[37]*Id.* at 1296.

[38]*Id.* at 1296-1298.

public official, is involved."[39] Both Justices Douglas and Black took an absolutist position:

> An unconditional right to say what one pleases about public affairs is what [we] consider to be the minimum guarantee of the First Amendment.[40]

Issues of public or general concern should not protect matters that are simply "public curiosity," such as the: names of rape victims, accounts of the private lives of people involved in public events, family relationship problems or falsehoods about businesses.[41]

An article and a luncheon photograph of an attorney, Ragano, misidentified him as a "Cosa Nostra bigwig," even though the magazine's staff knew his identity. The photo was not even taken at the luncheon which was the topic of the article. The magazine viewed Ragano as a "Cosa Nostra hoodlum" because he represented mob clients.[42] The trial court concluded that the matter was of "public significance."[43] The First Amendment does not "allow unlimited

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[39]*Rosenblatt* at 90-91.

[40]*Id.* at 95.

[41]Linda J. Peltier, "Recent Decisions: *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29," *The George Washington Law Review* 40 (Oct. 1971): 159 [hereinafter Peltier].

[42]*Ragano* at 1008.

[43]*Id.* at 1006.

substitution of views or conclusions," even those formed in good faith, unless the readers know of the substitution. Knowingly omitting Ragano's status amounted to "reckless disregard" for the truth.[44] Publication under there conditions demonstrated actual malice.[45]

Wasserman, another attorney in the same photo with Ragano, was accused of being a Cosa Nostra member. The District of Columbia trial court awarded summary judgment for the defendant.[46] The Court of Appeals found that the *New York Times* rule applied because Wasserman was engaged in a "matter of public interest and concern." Wasserman was able to prove actual malice, and the trial court's summary judgment was reversed.[47]

Two separate courts, ruling on the same event, arrived at the same conclusion: involvement in events that are in the public interest demand that even private plaintiffs prove actuaL malice.[48]

As the pre-*Rosenbloom* era came to a close, scholars began to speculate

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[44]*Id.* at 1009-1010.

[45]*Id.* at 1006 n. 1.

[46]Wasserman v. Time, Inc., 424 F.2d 920, 920 (D.C. 1970) [hereinafter *Wasserman*].

[47]*Id.* at 922.

[48]*Ragano*, 1010; *Wasserman*, 922.

about the future of the law of defamation. One prophetic scholar noted that libel laws had been emasculated in favor of the press and against public persons. Yet, there was no assurance of an open, robust debate on public issues.[49] Private individuals will be less willing to engage in public debate if it will allow the press to defame them with relative impunity. The logical "next step" will be a Supreme Court shift from a public person doctrine to a "public issue" standard.[50]

The *Rosenbloom* Issue Doctrine

Constitutional protection is not limited to speech bearing on issues of responsible government. It extends to a myriad of matters of public interest which include science, morality and the arts.[51] It applies to state libel action if the alleged defamation concerns an issue of public or general concern[52] rather

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[49]Jerome A. Barron, "Access to the Press--A New First Amendment Right," *Harvard Law Review* 80 (June 1967): 1657 [hereinafter Barron].

[50]Ibid., 1657 n. 39.

[51]Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 42 (1971) [hereinafter *Rosenbloom*].

[52]Robert E. Drechsel, "Defining 'Public Concern' in Defamation Cases Since *Dun & Bradstreet v. Greenmoss Builders*," *Federal Communications Law Journal* 43 (Dec. 1990): 4, 4 n. 25. In *Rosenbloom* and later cases, the Supreme Court used the terms "public concern" and "public interest" interchangeably. The particular choice of terms appears to have no significance.

than the plaintiff's status.[53] Defamatory statements about a public plaintiff's private characteristics must relate to his public role. The public official rule protects the paramount public interest in a free flow of information about public officials. Anything that might touch a public official's fitness for office is relevant.[54]

Private persons involved with public issues retain their privacy about materials not associated with the public issue, and they do not "offer up" their personal character and integrity.[55] Allowing personally defamatory remarks about private persons would discourage their speaking out and therefore subvert the First Amendment.[56]

The *National Review* defamed a Yale Law Professor in an article criticizing his signing of a petition against the Vietnam War. The article alleged that he may be a Communist who gave "aid and comfort" to the enemy, North Vietnam. The defendant urged dismissal because the First Amendment

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[53]Joel D. Eaton, "The American Law of Defamation Through *Gertz v. Robert Welch, Inc.* and Beyond: An Analytical Primer," *Virginia Law Review* 61 (Nov. 1975): 1390 n. 171 [hereinafter Eaton].

[54]*Garrison* at 77.

[55]Notes-Yale, 648-649.

[56]Ibid., 648-649.

privilege given to a public official's critics should include "debates on public issues." The court disagreed because debate on public issues does not give a privilege to falsely defame private parties.[57]

Time magazine labeled McLaney as a gambler who was associated with gambling and tax evasion, and who had injected himself into a Bahamian election campaign over the issue of gambling.[58] The Court concluded that the First Amendment privilege extends to public officials and to individuals who "are involved in matters of important public concern." McLaney was deeply involved in a public controversy, and his private-public status was not an issue.[59] The Supreme Court denied certiorari.[60]

Applying the Public Issue Rule:

Statements made by public officials on matters of public concern are First Amendment protected even if they are directed toward their superiors. Without knowingly false or reckless statements, a public employee has a First

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[57]Harper v. National Review, 33 U.S.L. Week 2341 (N.Y. Supreme Court, Dec. 22, 1964, Quoted in Notes-Yale, 650.

[58]Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir. 1969) [hereinafter *McLaney*].

[59]*Id.* at 573.

[60]McLaney v. Time, Inc., 395 U.S. 922 (1969).

Amendment right to speak out without fear of dismissal.[61] The Supreme Court balanced the employee's right to comment on public issues against the state's interest in promoting efficient public service;[62] the Supreme Court's decision was unanimous for the employee.[63]

The Masters' golf tournament and guest accommodations were a topic of legitimate public interest, even though such interest is usually applied to more weighty events.[64]

The *Albany Times Union* publisher[65] accused a garbage man of having Mafia connections. The trial court found a public controversy because the plaintiff's business provided "essential services for the welfare and health of inhabitants." The garbage man was subject to the actual malice rule.[66]

A white news vendor canceled a black-oriented newspaper because he feared that the headlines were spreading racial hatred and distrust and stirring

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[61]Pickering v. Board of Education, 391 U.S. 563, 574 (1968) [hereinafter *Pickering*].

[62]*Id.* at 568-569.

[63]*Id.* at 575.

[64]*Bon Air Hotel* at 862.

[65]Arizona Biochemical Co. v. Hearst Corp., 302 F.Supp. (S.D. N.Y. 1969).

[66]Notes-Minn., 307.

up ill feelings between black and white people in the community.[67] The publisher retaliated with a defamatory article. At trial, the publisher's fair-comment claim was found not in the public interest as required for immunized publication. A person's private prejudices were not important to the whole community.[68] The trial court found for the vendor, and the Court of Appeals affirmed.[69]

These precursors set the stage for the *Rosenbloom* decision to shift the focus of defamation law from the plaintiff to the event. *Rosenbloom* extended the *New York Times* rule to all communication involving matters of general or public concern without regard to the fame or anonymity of the people involved. This was an exceptionally large broadening of the actual malice rule.[70]

Rosenbloom: The Trial Court:

George Rosenbloom, a distributor of nudist magazines, was arrested on an obscenity charge. A local radio station (WIP) aired two series of news

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[67]Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 655 n. 13 (D.C. Cir. 1966) [hereinafter *Afro-American*].

[68]*Id.* at 656-657.

[69]*Id.* at 649.

[70]Rodney A. Smolla, *Law of Defamation* (New York: Clark Boardman Co., 1986), 56-57 [hereinafter Smolla, 1986-1].

broadcasts. The first series of eight broadcasts (on October 4-5, 1963) dealt with Rosenbloom's arrest. The first two broadcasts omitted the words "allegedly" or "reportedly" when describing obscene. The second series of 13 broadcasts (on October 21, 25 and November 1, 1963) repeatedly referred to "smut" dealers and "girlie book peddlers" but did not use Rosenbloom's name. They referred to pending court action which pointed directly to Rosenbloom.[71]

Rosenbloom attempted, without success, to inform WIP that the court found his magazines were not obscene. After the second series of broadcasts, Rosenbloom filed a defamation lawsuit against the radio station.[72]

The trial judge instructed the jury on the *New York Times* actual malice standard and the *Butts-Walker*[73] extensions of the public figures doctrine. He included instruction on Justice Harlan's use of "public figures or matters of public interest" in a footnote.[74] The use of the word "or" could mean that a

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[71]Rosenbloom v. Metromedia, Inc., 289 F.Supp. 737, 739-740 (E.D. Pa. 1968) [hereinafter *Rosenbloom-A*].

[72]*Id.* at 746.

[73]Curtis Publishing Co. v. Butts (No. 37) and Associated Press v. Walker (No. 150), 388 U.S. 130 (1967).

[74]*Butts* at 155 n. 19: "Nor does anything we have said touch, in any way, libel or other tort actions not involving public figures *or* matters of public interest." [*Emphasis added*].

private person in a public controversy could be required to satisfy *New York Times* actual malice. To this latter point, he said: "We think not." The court believed that applying the *New York Times* standard to a private person would be denying that person redress in the courts, and the Supreme Court's underlying philosophy precluded this drastic step.[75]

The jury awarded Rosenbloom $25,000 general damages and $725,000 punitive damages,[76] but he agreed to a remittitur of $250,000 in total damages. Defense motions for a judgment notwithstanding the verdict (n.o.v.) and a new trial were denied.[77]

Rosenbloom: The Court of Appeals:

The defendant, Metromedia, contended that the trial court erred in refusing to require *New York Times* actual malice, and, when the evidence was tested against *New York Times*, it was insufficient to be sent to a jury.[78] The Court of Appeals found that no recent Supreme Court decision was factually controlling, and some degree of free speech abuse was inescapable. If the press

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[75]*Rosenbloom-A* at 741-742.

[76]*Id.* at 739.

[77]*Id.* at 739, 746, 749.

[78]Rosenbloom v. Metromedia, Inc., 415 F.2d 899, 894 (3rd Cir. 1969) [hereinafter *Rosenbloom-B*].

was to properly discharge its function, these abuses must be tolerated to avoid self-censorship.[79]

Though the trial court and the appeals court used the same precedents, the appeals court arrived at a different conclusion and overruled the trial judge. In contrast to the trial court, the appeals court found both public interest and "hot news" which were seen as controlling.[80] The *New York Times* actual malice doctrine applied, but the plaintiff was unable to prove actual malice. The trial court's ruling was reversed over the public issue standard.[81] A petition to the United States Supreme Court for writ of certiorari was granted.[82]

Prior to 1971, the focus of constitutional libel had been the private-public status of the plaintiff. If this focus shifted to matters of public interest without

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[79]*Id.* at 894-895.

[80]*Id.* at 895-897; Each of these cases used the public issue concept to determine a First Amendment requirement to establish actual malice: Linn v. United Plant Workers of America, 383 U.S. 53 (1966); Pickering v. Board of Education, 391 U.S. 563 (1968); United Medical Laboratories v. Columbia Broadcasting System, Inc., 404 F.2d 706 (9th Cir. 1968), cert. denied, 394 U.S. 921 (1968); Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970); Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir. 1969), cert. denied, 395 U.S. 922 (1969).

[81]*Rosenbloom-B* at 898.

[82]Rosenbloom v. Metromedia, Inc., 397 U.S. 904 (1970) [hereinafter *Rosenbloom*].

regard for the plaintiff's status, private individuals' reputations could be jeopardized and the media would be able to create a "public interest" privilege in anything they considered newsworthy.

Rosenbloom: The Supreme Court:

The Supreme Court's opinion in *Rosenbloom* extended the *New York Times* actual malice rule to the defamation of any individual involved in a "matter of public or general interest."[83]

> We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, *without regard to whether the persons involved are famous or anonymous*.[84]

The *Rosenbloom* court expressly left open the standard of proof required for state libel laws, and it limited those laws to defamatory falsehood outside of "the area of public or general interest," further, the court did not extend constitutional protection to commercial speech "made in the course of business."[85]

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[83]*Id.* at 44: "The determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern." Smolla, 1986-1, 2-16, 2-17: The expansion of the actual malice doctrine reached its pinnacle with the public interest doctrine.

[84]*Rosenbloom* at 43-44 [emphasis added].

[85]*Id.* at 44 n. 1.

One critic claimed the *Rosenbloom* decision effectively destroyed the law of defamation, and that the line of cases, beginning with *New York Times*, has ended, because the courts have nowhere to go in defamation litigation.[86]

Justice White issued a separate concurring opinion that avoided the plurality opinion while supporting the outcome. He supposed that at least five court members would support the following rules: Public officials/public figures must prove falsehood and "either knowing or reckless disregard for the truth." Private plaintiffs must prove at least negligent falsehood, but in areas of public interest, they must prove deliberate or reckless falsehood.[87] Justice White's rules were neither a panacea nor a consolidation of the plurality opinion. To avoid actual malice, a private plaintiff must show negligence and that the defamatory statements were not of public interest.[88]

The *Rosenbloom* decision completed a trend that gradually reduced the emphasis on public status and increased the importance of the public issue. This doctrine subordinated private interests to the constitutional protection of matters vital to informed debate on public issues. The privilege did not apply

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[86]Eaton, 1394.

[87]*Rosenbloom* at 59.

[88]Eaton, 1397.

to the private segment of a private individual's life regardless of the degree of his participation in the public arena.[89]

Summary of Major Supreme Court Decisions:

The *New York Times* decision precluded a public official's recovery for defamation arising from his official conduct unless he could prove that the statements were made with actual malice.[90] The *Butts and Walker* decisions extended the *New York Times* privilege to public figures who are not public officials but are actively involved in matters of public concern. The *Rosenbloom* decision further broadened the *New York Times* privilege by extending it to private individuals who were involved in matters of public concern.[91] These cases were the precursors that lead up to the *Rosenbloom* decision.

We will study the impact of the *Rosenbloom* decision by examining the cases citing *Rosenbloom's* authority (the *Rosenbloom* progeny) as part of the law of defamation.

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[89]Peltier, 156-157.

[90]*New York Times* at 279-280.

[91]Eaton, 1412.

The Impact of *Rosenbloom*

The *Rosenbloom* court did not limit the breadth of the public or general concern concept.[92] Justice Marshall feared that the courts could find "all human events [were] arguably within the area of 'public or general concern.'" This was being realized in the state courts, and it allowed the media to operate within a self-drawn legal boundary because public interest could mean "newsworthy."[93]

The state libel laws that protected reputations became subordinate to the First Amendment goal of a free flow of information on issues of public concern. This eliminated inconsistencies resulting from diverse state libel laws, and it advanced the erosion of defamation as a tort. Since publications became matters of public concern, a private citizen faced with proving actual malice may have no legal recourse.[94] After the *Rosenbloom* decision, nearly all news reports were insulated by the public-issue doctrine.[95] With a modicum of effort, this procedure could allow railroading a plaintiff into proving actual

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[92]*Rosenbloom* at 44-45.

[93]Eaton, 1402.

[94]Peltier, 159.

[95]Eaton, 1399.

malice.

The progeny of *Rosenbloom* consisted of a list of 150 cases[96] citing either the decision's issue doctrine[97] or the clear and convincing standard of proof required for establishing actual malice.[98] Each case was read, extracted onto eight-inch by five-inch index cards, entered into a text data bank, and screened for applicability to this thesis' research question.[99]

Thirty-nine cases were culled from the data bank because they were not pertinent to the research question. The following types of cases were eliminated: state libel cases, cases from the Federal Rules Digest (focus is on federal procedural rules), *Rosenbloom v. Metromedia, Inc.* (the lower-court and Supreme Court cases), cases selected in error, and cases that did not involve libel.

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[96]The list was compiled by the Legal Information Service of Omaha, Nebraska using the West Publishing Company's computer data bank.

[97]Rosenbloom v. Metromedia, Inc., 91 S.Ct. 1811, 1812 (1971) [hereinafter *Rosenbloom-1*]; Separate opinion of Brennan, Burger, Blackman and Black, JJ. As a plurality opinion, the public issue doctrine did not set a precedent, but it did provide guidance.

[98]*Id.* at 1812; The separate opinion of Brennan, Burger and Blackman, JJ.; Contra Harlan, Marshall and Stewart, JJ. The absence of a clear majority makes this persuasive rather than mandatory authority.

[99]"How has the *Rosenbloom v. Metromedia, Inc.* Supreme Court decision impacted contemporary libel litigation?

The 111 libel cases selected for analysis were tried in Federal District Courts, Federal Courts of Appeal or the Supreme Court of the United States. Cases decided at both trial (district) court level and appellate court level were treated as separate entities. The cases were divided into two groups. Group "A" cases were decided during the three-year "*Rosenbloom* era" (June 1971 through July 1974). The Group "B" cases were decided after this time period or subsequent to the Supreme Court's *Gertz* decision.[100]

The Rosenbloom Era (June 1971 - July 1974):

A basic purpose of both public-figure doctrine and the *Rosenbloom* issue doctrine was determining whether or not a libel plaintiff must prove that the defamer (defendant) acted with actual malice.[101] The initial effect of the *Rosenbloom* issue doctrine was to simplify this process in a most dramatic manner. Defamation arising from an issue of general or public interest was protected under the *New York Times* actual-malice rule "without regard to whether the persons involved [were] famous or anonymous."[102]

During the three-year *Rosenbloom* era, 34 of 37 defamation cases (91.9

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[100]Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) [hereinafter *Gertz*].

[101]*New York Times* at 270.

[102]*Rosenbloom* at 43-44.

percent) in the federal court system cited the issue doctrine as having a major bearing on the court's decision, and they required proof of actual malice.

The libel decisions during the *Rosenbloom* era were strongly "pro-defendant," and the mass communication media were the most successful defendants. Of these 37 cases, 29 involved mass media defendants, and 23 of these (79.3 percent) prevailed in the litigation. Only four of the 29 mass media cases (13.8 percent) were not won by mass media defendants. Two of these were reversals of summary judgment[103] during the appeals process, and the two remaining cases involved decisions on points of law without either the defendant or the plaintiff winning.[104]

Most libel cases could now be settled by answering two questions. First, is actual malice required? Second, is there an issue of material fact that

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[103]Hood v. Dun & Bradstreet, Inc., 486 F.2d 25 (5th Cir. 1973) [hereinafter *Hood-B*]; Oberman v. Dun & Bradstreet, Inc., 460 F.2d 1381 (7th Cir. 1972) [hereinafter *Oberman*] (credit reports were not of public interest); McNair v. Hearst Corp., 494 F.2d 1309 (9th Cir. 1974) [hereinafter *McNair*] (actual malice was found); Gordon v. Random House, Inc., 486 F.2d 1356 (3rd Cir. 1973) [hereinafter *Gordon-B* (reversed and remanded to permit court to provide a more complete trial record).

[104]Firestone v. Time, Inc., 460 F.2d 712, 715 (5th Cir. 1972) (divorce trial was not an issue of public interest); Carey v. Hume, 492 F.2d 631, 631 (D.C. Cir. 1974) (court required journalist to reveal sources).

precludes a summary judgment?[105]

The first question focused upon the issue and whether it was of general or public interest. All matters of public interest, even erroneous statements of fact, were protected.[106] *Rosenbloom* reaffirmed the court's earlier opinions that actual malice must be proved with convincing clarity.[107] Newsworthiness alone does not change a controversy into a public issue,[108] and the defamation must be related to the topic or theme of the offending article to qualify for the constitutional privilege.[109] It was generally accepted that mass-media crime reporting and crime-related stories were of public or general interest[110] other

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[105]Credit Bureau of Dalton v. CBS News, 332 F.Supp. 1291, 1292 (N.D. Ga. 1971) [*Credit Bureau of Dalton*].

[106]*NAACP* at 433; Gertz v. Robert Welch, Inc., 471 F.2d 801, 805-806 (7th Cir. 1972).

[107]Lewis v. Reader's Digest Association, 366 F.Supp. 154, 156 (D. Mont. 1973) [hereinafter *Lewis*]; *United Medical Laboratories* at 711-712 (when an issue is of "inherent public concern." the plaintiff must establish actual malice with convincing clarity); *Cerrito* 1073-1074 (plaintiffs involved in areas of public interest must prove actual malice with convincing clarity).

[108]*United Medical Laboratories* at 712.

[109]*Lewis* at 711-712.

[110]LaBruzzo v. Associated Press, 353 F.Supp. 979, 979 (W.D. Mo. W.D. 1973) (links to organized crime); Alpine Construction Co. v. Demaris, 358 F.Supp. 422, 422 (N.D. Ill. E.D. 1973) (syndicate control of business); Cerrito v. Time, Inc., 449 F.2d 306, 306 (9th Cir. 1971) (accused head of a Cosa Nostra family); McFarland v. Hearst Corp., 332 F.Supp. 746, 746-747 (D.

types of articles falling under the First Amendment's protection varied over a wide range of subject matter.[111]

The second question focused directly on summary judgment, the most

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Md. 1971) (source of defamation was FBI flyer and bulletin); Casano v. WDSU-TV, Inc., 464 F.2d 3, 3-4 (5th Cir. 1972) (underworld connections); Mistrot v. True Detective Publishing Corp., 467 F.2d 122, 122 (5th Cir. 1972) (erroneous account of a double murder); Kent v. Pittsburgh Press Co., 349 F.Supp. 622, 622 (W.D. Pa. 1972) (release of a convicted murderer after 27 years); Miller v. News Syndicate Co., Inc., 445 F.2d 356, 356 (2nd Cir. 1971) (heroin smuggling); Bostic v. True Detective Magazine Co., 363 F.Supp. 919, 919 (S.D. N.Y. 1973) (erroneous list of accused murderers); Cardillo v. Doubleday and Co., Inc., 366 F.Supp. 92, 93 (S.D. N.Y. 1973) (convicted felon's name in a book about organized crime).

[111]Pace v. McGrath, 378 F. Supp. 140, 140 (D. Md. 1974) (illness resulting from eating tainted crabs in a restaurant); Hollander v. Pan American World Airways, 382 F.Supp. 96, 96 (D. Md. 1974) (poor hotel management); Time, Inc. v. Johnston, 448 F.2d 378, 378 (4th Cir. 1971) (termination of a professional basketball career); Adey v. United Action for Animals, 361 F.Supp. 457, 462 (S.D. N.Y. 1973) (cruelty to animals in space experiments); Hensley v. Life Magazine, Time, Inc., 336 F.Supp. 50, 50-51 (N.D. Calif. 1971) (exposure of an "Instant Minister Racket");
Treutler v. Meredith Corp., 455 F.2d 255, 255 (8th Cir. 1972) (alleged sales of obscene books by an Omaha mayoral candidate); Novel v. Garrison, 338 F.Supp. 977, 982 (N.D. Ill., E.D. 1971) (a "controversy of international significance," New Orleans District Attorney Jim Garrison's probe into the assassination of President Kennedy); Alexander v. Lancaster, 330 F.Supp. 341, 341-342 (W.D. La. 1971) (release of an auditor's report on a road paving construction contract); Otepka v. New York Times, Co., 379 F.Supp. 541, 541 (D. Md. 1973) (accusation of mishandling of government classified materials); Gordon v. Random House, Inc., 349 F.Supp. 919, 925 (E.D. Pa. 1972) and Gordon v. Random House, Inc., 486 F.2d 1356, 1358 (3rd Cir. 1973) (treatment of black customers by Jewish retailer); and Gospel Spreading Church v. Johnson Publishing Co., Inc., 454 F.2d 1050, 1051 (D.C. Cir. 1971) (the size of a church founder's personal estate).

frequent means of deciding a case. In 26 of 37 libel cases during the *Rosenbloom* era (70.3 percent), summary judgment was found in favor of the defendant. Twenty-two of these summary judgments (84.6 percent) were awarded to mass media defendants. At the appellate level, four summary judgment rulings were reversed, and two of these[112] involved mass media defendants. The other two cases were private libel that did not involve issues of public concern.[113]

The lead paragraph in a newspaper article implied that a divorce lawyer, McNair, acquired his home dishonestly as the result of his legal services to a former client. In reversing the trial court's summary judgment, the Court of Appeals held that the newspaper intended to make the impression of dishonesty, and, therefore, the record was not devoid of actual malice.[114]

Scarcely one week after the *Rosenbloom* decision was released, the courts acknowledged that it's extension of the First Amendment's protection to "matters of public concern." The public issue in question was rioting with

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[112]*McNair* at 1309; *Gordon-B* at 1356.

[113]*Oberman* at 1381; *Hood-B* at 25.

[114]*McNair* at 1310-1311.

blacks pitted against Jewish retailers.[115] With no major issue of fact and with the plaintiff unable to prove actual malice, summary judgment was found for the defendant.[116] The Court of Appeals disagreed. The question here was not publication of a known falsehood, but was the publisher guilty of reckless disregard by accepting the author's words at face value?[117] The summary judgment was reversed and the case remanded to provide a more complete trial record[118] that would provide enough evidence to conclude whether the defendant harbored serious doubts as to the truth of his publication,[119] if he was involved in the controversy prior to the defamation, and if the issue was of general or public concern. It must be noted that involvement prior to the controversy could make Gordon a limited public figure who must prove actual malice regardless of the applicability of the issue doctrine.[120]

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[115]Gordon v. Random House, Inc., 349 F.Supp. 919, 925 (E.D. Pa. 1972) [hereinafter *Gordon-A*].

[116]*Id.* at 919.

[117]*Gordon-B* at 1358.

[118]*Id.* at 1356.

[119]*Id.* at 1359; *St. Amant* at 731.

[120]Mark L. Rosen, "Media Lament--The Rise and Fall of Involuntary Public Figures," *Saint John's Law Review* 54 (1980): 502; Stacey L. Hayden, "Limited Purpose Public Figures: *Spence v. Flynt* as an Illustration of the Need for a More Complete Test," *Brigham Young University Law Review* (1992): 833

Communication Not Protected by *Rosenbloom*:

Cases that were not matters of general or public interest did not receive First Amendment protection under the *Rosenbloom* issue doctrine.

Credit reports issued by agencies such as Dun & Bradstreet are of limited distribution, but they can affect the business reputation of a firm, especially when the report is erroneous. A trial court ruled that such reports are not of public interest, however, and the First Amendment's qualified privilege does not apply.[121] The court of appeals affirmed that "reports of a commercial nature such as credit reports" were not of general or public interest.[122] Credit bureau reports fall under a conditional privilege, and the agency preparing these reports is privileged in the absence of actual malice.[123] The private nature of credit bureau libel precludes the issue doctrine from having a role in requiring proof of actual malice.[124]

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n. 48; John J. Watkins, "The Demise of the Public Figure Doctrine,' *Journal of Communication* 27 (Summer 1977): 50; Wolston v. Reader's Digest Assoc., 443 U.S. 157, 167 (1979) [hereinafter *Wolston*].

[121]Hood v. Dun & Bradstreet, Inc., 335 F.Supp. 170, 178 (N.D. Ga. 1971) [hereinafter *Hood-A*].

[122]*Hood-B* at 25, 29.

[123]*Oberman* at 1381-1382.

[124]*Id.* at 1386.

News reports about credit reporting agencies may be both defamatory and subject to First Amendment protection under the *Rosenbloom* issue doctrine. An out-of-context segment of a CBS news broadcast about credit bureaus inferred that the Credit Bureau of Dalton, Georgia violated industry standards.[125] Congressional legislative interest and national broadcast-news interest made the topic "an issue of great national concern" and placed it firmly under the *Rosenbloom* mantle. The plaintiff must show, by clear and convincing proof,[126] that the defendant acted with actual malice.[127]

An Omaha, Nebraska mayoral candidate, A.J. Treutler, was not afforded First Amendment assistance in his libel action against radio station WOW. The radio station aired an interview during which Treutler was accused of selling "obscene" books in his bookstore. The statements were ruled "not defamatory" because the radio station afforded him the opportunity: to discuss the type of books sold, read a complete advertisement for the books, or read representative

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[125]*Credit Bureau of Dalton* at 1292: The court's decision was held until after the *Rosenbloom* decision was released by the Supreme Court.

[126]Note: Without changing the legal ramifications, a subtle change in verbiage modified the "convincing clarity" standard to "clear and convincing proof." The terms are used interchangeably.

[127]*Credit Bureau of Dalton* at 1296.

portions of one of the books to the radio audience.[128]

A public auditor's report on the mismanagement of a police-jury (local governing body) road-paving contract defamed the contractor, who was a police-juror elect. The contractor, Alexander, was paid $2,000 for "work completed" on an unfinished and unsatisfactory blacktopping job.[129] While the statements were libelous *per se*, both the contract and the actions of the police jury were of general or public concern, and there was no actual malice.[130] The audit report was immune as part of the auditor's official duties, and the news article was a fair report on government business.[131]

The *Playboy* magazine interview with New Orleans District Attorney, Jim Garrison, earned a libel lawsuit. The court ruled that proof of actual malice was required and cited the issue doctrine, but proof was not forthcoming. The magazine had simply quoted "an important elected official" who was engaged in a "controversy of international significance." The charges against both the magazine and Garrison were without support, and summary

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[128]Treutler v. Meredith Corp., 455 F.2d 255, 255 (8th Cir. 1972).

[129]Alexander v. Lancaster, 330 F.Supp. 341, 345 (W.D. La. 1971) [hereinafter *Alexander*].

[130]*Id.* at 348-349.

[131]*Id.* at 343-344.

judgment was awarded to the defendants.[132]

The courts recognized that the *Rosenbloom* decision applied the *New York Times* actual malice standard in all mass media libel cases. *Rosenbloom* did not restrict or limit the production of "hot news," and it applies even when the publication fulfills a desire to increase circulation and "amuse or astonish the audience."[133]

Time does not dull the right of the public to have an interest. Even 27 years after his conviction for murder,[134] a libel plaintiff's story was still germane to an article about prison conditions, and his notoriety or anonymity was not important. *Rosenbloom* does not "imply that no area of a person's activities fall outside the area of public or general interest,"[135] even though we all have a public aspect to our lives. The Supreme Court refused to imply that all areas of a person's activities are of public or general interest,[136] and extending First Amendment protection to all aspects of a person's life would be

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[132]Novel v. Garrison, 338 F.Supp. 977, 982-983 (N.D. Ill. E.D. 1971).

[133]Mistrot v. True Detective Publishing Corp., 467 F.2d 122, 124 (5th Cir. 1972).

[134]Kent v. Pittsburgh Press Co., 349 F.Supp. 622, 622 (W.D. Pa. 1972) [hereinafter *Kent*].

[135]*Id.* at 627.

[136]*Rosenbloom* at 44 n 12.

unfounded.[137]

Some apparently "private" matters, such as the size of a person's estate, can be of general or public interest when taken in context.[138] Because the church established by the deceased minister had a large congregation and played a significant role in "ordering society," it was considered a public institution in which the public had a vital interest in knowing about religious tax exemptions.[139]

An accused bank robber claimed defamation when a magazine erroneously included his name on a list of accused murderers. With no dispute over material facts, summary judgment was awarded to the defendant.[140] The First Amendment does not permit recovery from a mass media defendant even when statements broadcast in the public interest are known to be false. This ruling cited Justice Black's absolutist-concurring opinion in *Rosenbloom*, and the slight negligence did not approach actual malice.[141]

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[137]Buckley v. Esquire, Inc., 344 F.Supp. 1133, 1134 (S.D. N.Y. 1972).

[138]Gospel Spreading Church v. Johnson Publishing Co., Inc., 454 F.2d 1050, 1050 (D.C. Cir. 1971) [hereinafter *Gospel Spreading Church*].

[139]*Id.* at 1051.

[140]Bostic v. True Detective Magazine Co., 363 F.Supp. 919, 919 (S.D. N.Y. 1973) [hereinafter *Bostic*].

[141]*Id.* at 920-921; *Rosenbloom* at 57.

When the theme of a book, organized crime, was determined to be of public interest and the plaintiff was an incarcerated-convicted felon, the *Rosenbloom* issue doctrine required proof of actual malice.[142] The judge awarded summary judgment to the defendant and dismissed the lawsuit as frivolous and having a potentially chilling effect on the mass media.[143]

The Post-*Rosenbloom* Era (After July 1974):

The *Rosenbloom* era drew to a close on June 25, 1974 when the Supreme Court released the *Gertz* decision and repudiated the *Rosenbloom* issue doctrine. The *New York Times* doctrine was retracted and no longer required private persons to prove actual malice except to recover punitive damages from media defendants.[144] The Court's dissent with the *Rosenbloom* plurality was clear. A clear majority, five to four, held that the *New York Times* privilege applied only to defamation involving public official or public figure plaintiffs.[145]

During the 20 years following the *Rosenbloom* era, 29 of 74 defamation cases (39.2 percent) in the federal court system cited the issue doctrine as

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[142]Cardillo v. Doubleday and Co., Inc., 366 F.Supp. 92, 93-94 (S.D. N.Y. 1973) [hereinafter *Cardillo*].

[143]*Id.* at 95.

[144]Eaton, 1412.

[145]Zuckman, 86-87.

having a major bearing on the court's decision. The libel decisions remained strongly "pro-defendant," and, once again, the mass communication media were the most successful defendants.

Of these 74 federal libel cases, 52 involved mass-media defendants, and 42 of these (80.8 percent) prevailed in the litigation. Only ten of the 52 mass-media cases (19.2 percent) were lost by mass-media defendants. Four of these were reversals of summary judgment[146] during the appeals process. In three cases,[147] the plaintiff proved actual malice, and the remaining three cases[148] involved private plaintiffs who were not required to prove actual malice after the repudiation of the *Rosenbloom* issue doctrine.

In 31 libel cases (41.9 percent) decided after the *Rosenbloom* era, summary judgment was found in favor of the defendant. Twenty-five of these

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[146]Dixon v. Newsweek, Inc., 562 F.2d 626 (10th Cir. 1977) [hereinafter *Dixon*]; Cianci v. New Times Publishing Col, 639 F.2d 54 (2nd Cir. 1980) [hereinafter *Cianci*]; Wolston v. Reader's Digest Association, 429 F.Supp. 167 (D.C. 1977); Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) [hereinafter *Milkovich*].

[147]Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989); Bose Corp. v. Consumers Union of the United States, Inc., 508 F.Supp. 1249 (D. Ma. 1981); Jensen v. Times Mirror Co., 634 F.Supp. 304 (D. Conn. 1986).

[148]Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Dixon v. Newsweek, Inc., 562 F.2d 626 (10th Cir. 1977); Time, Inc. v. Firestone, 424 U.S. 448 (1976).

summary judgments (80.6 percent) were awarded to mass-media defendants. At the appellate level, six summary judgment rulings were reversed. Four of these[149] involved mass media defendants. The remaining two cases involved non-media defamation.[150] A direct comparison of the *Rosenbloom* Era (June 1971 through July 1974) and the Post-*Rosenbloom* Era (after July 1974) is shown in Table I.

Throughout the *Rosenbloom* era, most defendants won their libel cases, and this continued but decreased slightly after the *Rosenbloom* era ended. The success rate for mass-media defendants was essentially unchanged after the issue doctrine was repudiated. The incidents of summary judgment showed a marked decrease (28.4 percent reduction) during the Post-*Rosenbloom* era. Mass-media defendants won summary judgment 27.8 percent less often after the *Rosenbloom* era ended.

Reversals of summary judgment for all defendants decreased slightly after *Rosenbloom* was repudiated while they increased slightly for mass-media defendants. The actual number of summary judgment reversals was too small

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[149]*Dixon* at 626; *Cianci* at 54; *Wolston* at 167; and *Milkovich* at 1.

[150]Lawrence v. Moss, 639 F.2d 634, 635 (10th Cir. 1981) (candidate was accused of being a "bag man" for former Vice-President Spiro Agnew); Ollman v. Bell, 750 F.2d 631 (D.C. Cir. 1974) (statements were protected as opinion).

for meaningful generalizations.

Table I.--A Direct Comparison of Selected Aspects[151] of *Rosenbloom* Era Libel Litigation With Post-*Rosenbloom* Era Libel Litigation.

Condition/Comparison	Rosenbloom Era Count	Rosenbloom Era Percent	Post-Rosenbloom Era Count	Post-Rosenbloom Era Percent
ALL DEFENDANTS	n=37		n=74	
Defendants won[152]	29	78.4	55	74.3
Won by summary judgment	26	70.3	31	41.9
Summary judgment reversed	4	10.8	6	8.1
MASS-MEDIA DEFENDANTS	n=29		n=52	
Defendants won	23	79.3	42	80.8
Won by summary judgment	22	75.9	25	48.1
Summary judgment reversed	2	6.9	4	7.7

[151]The case list is not exhaustive. Only cases selected for analysis (federal libel cases citing the issue doctrine or the clear and convincing standard of proof) were compared in Table I.

[152]The case was "won" if the ruling court's final decision favored the defendant. Some litigation did not result in a "winner," but it decided a point of law and defererred final judgment to another tribunal.

Generally, summary judgments can be the gauge of difficulty a libel plaintiff experiences while trying to prove his case. When proof of actual malice was required of private-figure plaintiffs, summary judgment in favor of the defendant was frequent. After *Rosenbloom*, a marked decrease in the frequency of summary judgment occurred because proof of actual malice was no longer required of private-figure defendants. When the issue standard was law, proof of actual malice was required and libel defendants won their cases, most often, through summary judgment. It is interesting to note that the success rate for all defendants was only slightly decreased.

Exceptions to the *Gertz* Rule:

In the aftermath of the *Rosenbloom* era many exceptions to the new *Gertz* rule appeared. The federal courts in New York found the *Rosenbloom* issue doctrine did not allow sufficient latitude to provide a remedy for injury to private reputations,[153] and a considerable amount of confusion arose from the term "actual malice." The term "constitutional malice" was adopted as a neutral term with the same meaning.[154] Defamatory articles, published during

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[153]Med-Sales Associates v. Lebhar-Friedman, Inc., 663 F.Supp. 908, 908 (S.D. N.Y. 1984).

[154]Westmoreland v. Columbia Broadcasting System, Inc., 596 F.Supp. 1170, 1172 n. 1 (S.D. N.Y. 1984).

an election campaign, were not protected by either the First Amendment's "opinion" doctrine or the common law of fair reportage.[155] Ill will was not a part of the constitutional question,[156] and the plaintiff won a reversal of summary judgment.

A Michigan plaintiff sued the Reader's Digest over a defamatory article about the disappearance of a labor leader. Because the article was of public interest and the plaintiff was unable to prove actual malice, summary judgment was found for the defendant.[157]

In nearby Indiana, the *Rosenbloom* issue doctrine suited the state's needs and was made part of the state's constitution.[158] A race-car driver, accused of making illegal modifications to his car, was unable to meet the actual malice standard[159] because the law applied the *Rosenbloom* standard "to all publications concerning events or topics of general or public interest."[160]

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[155]*Cianci* at 54.

[156]*Id.* at 66; *Rosenbloom* at 52 n. 18.

[157]Schultz v. Reader's Digest Association, 468 F.Supp. 551, 551 (E.D. Mich. 1979).

[158]Ind. Const. art. I, § 9 quoted in Fazekas v. Crain Consumer Group Div., 583 F.Supp. 110, 113-114 (S.D. Ind. 1984) [hereinafter *Fazekas*].

[159]*Fazekas* at 110.

[160]*Id.* at 113.

The public-issue standard was adopted by the Indiana courts after the *Gertz* decision repudiated the issue doctrine. Thus private plaintiffs in libel litigation must prove defamatory falsehood with actual malice.[161] The Indiana rationale provided for an accommodation between free speech and press as it relates to a well-informed community and protecting private reputations of individuals.[162] When Indiana was given the choice of either a *Gertz* standard or a *Rosenbloom* standard, the latter was selected.[163] This choice placed Indiana judges in a position to determine what information was relevant to free expression.[164] This law realized justices Marshall and Stewart's fear that the courts would receive the power, to determine what is of interest to the public.[165]

The Colorado Supreme Court recognized the *Gertz* decision's repudiation of the issue doctrine and went on to include the recognition that states may define their own standards of liability. The court did not, however, require the

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[161]Woods v. Evansville Press Co., Inc., 791 F.2d 480, 483 (7th Cir. 1986).

[162]AAFCO Heating & Air Conditioning Co. v. Northwest Publications, Inc., 321 N.E.2d 580, 586 (Ind. 1974) [hereinafter *AAFCO*].

[163]*Id.* at 585.

[164]*Id.* at 590.

[165]*Rosenbloom* at 79.

St. Amant "serious doubts" standard.[166]

> Following *Gertz*, we adopted the plurality standard from *Rosenbloom*, with the limitation that reckless disregard for whether a statement is true does not mean that the person must have serious doubts as to its truth.[167]

Colorado adopted this particular course of action in preference to making public-figure status easier to prove.[168] It did retain the requirement that "liability must be supported with convincing clarity," or clear and convincing proof.[169]

In August of 1971, shortly after the issue doctrine became law, the Alaska Supreme Court ruled that newspaper articles, alleging that a taxicab company was involved in selling liquor to minors, were of public concern. Summary judgment was found for the defendant.[170] The issue doctrine clearly required even private plaintiffs to prove actual malice by clear and convincing

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[166]St. Amant v. Thompson, 390 U.S. 727, 731 (1960).

[167]Diversified Management, Inc. v. Denver Post, Inc., 653 P.2d 1103, 1106 (Colo. S.C. 1982) [hereinafter *Diversified Management*]; *Gertz* at 352.

[168]*Id.* at 1107-1108.

[169]*Id.* at 1109.

[170]West v. Northern Publishing Co., 487 P.2d 1304, 1304 (Alaska S.C. 1971) [hereinafter *West*].

proof.[171] After the *Gertz* decision repudiated the issue doctrine, Alaska retained this standard as state law when the defamation concerned an event of general or public concern.[172]

The drug-trafficking allegations, picked-up from a wire service, against the plaintiff were not made with actual malice.[173] The court held the public-issue privilege even extends to misstatements of fact against private persons in the absence of actual malice.[174] Alaska persists in this ruling even into 1987 when a national magazine defamed a private-figure veteran with accusations of posttraumatic stress disorder as a result of Vietnam service; the plaintiff never served in Vietnam.[175] The Alaskan courts followed the issue doctrine and required proof of actual malice despite its repudiation by *Gertz*.[176]

The Pennsylvania Confusion:

The state of Pennsylvania was drawn into the issue doctrine controversy

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[171]*Id.* at 1305-1306.

[172]Gay v. Williams, 486 F.Supp. 12, 15 (D. Alaska 1979) [hereinafter *Gay*].

[173]*Id.* at 12.

[174]*Id.* at 14, 15 n. 8.

[175]Sisemore v. U.S. News & World Report, Inc., 662 F.Supp. 1529, 1529 (D. Alaska 1987) [hereinafter *Sisemore*].

[176]*Id.* at 1533-1534.

by a radio talk-show host who used his show to accuse a snow-plow driver, Matus, of overcharging for his services.[177] The plaintiff was not involved in an event of public or general concern which would have required proof of actual malice at the clear and convincing level.[178] A jury award of $13,500 to the plaintiff was affirmed.[179]

> We, therefore, accept this modification of the law of defamation in Pennsylvania, and with it the corollary that in such cases the reasonable care standard must give way to the more stringent of knowing or reckless disregard of falsity. Specifically, we adopt as binding on us the holding of the plurality opinion in *Rosenbloom*.[180]

The United States Supreme Court supported the Pennsylvania Supreme Court and denied certiorari.[181] The *Matus* ruling was both followed and ignored during the next 20 years.

A former professional football player won a jury trial over the team physician's false statement that his contract was dropped because he had a "fatal disease." The actual-malice rule was applied because the plaintiff voluntarily

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[177]Matus v. Triangle Publications, Inc., 286 A.2d 357, 357 (Pa. S.C. 1971) [hereinafter *Matus*].

[178]*Id.* at 363; *Rosenbloom* at 52.

[179]*Matus* at 358.

[180]*Id.* at 363.

[181]Triangle Publications, Inc. v. Matus, 408 U.S. 930 (1972).

entered a field of high public interest thereby inviting attention; he was a public figure.[182]

Republication of a police report led to the erroneous identification of people in a photograph as bank robbers.[183] The trial court ruled that the Pennsylvania Supreme Court was now free (after *Gertz*) to abandon the issue standard. *Matus* was "no longer good law," and a private-figure defamation plaintiff may recover on a showing of negligence.[184]

An anonymous guest on a radio talk show alleged that the plaintiff was a Communist.[185] In citing both *Rosenbloom* and *Matus*, the court determined that even a private plaintiff must follow Pennsylvania's actual malice rule which follows *Rosenbloom* through *Matus*.[186]

The status of Pennsylvania's common-law privilege was uncertain after *Gertz*, and the *Rosenbloom* issue doctrine was criticized in the wake of *Gertz*

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[182]Chuy v. Philadelphia Eagles Football Club, 431 F.Supp. 254, 267 (E.D. Pa. 1977).

[183]Mathis v. Philadelphia Newspapers, Inc., 455 F.Supp. 406, 406-407 (E.D. Pa. 1978) [hereinafter *Mathis*].

[184]*Id.* at 412.

[185]Lorentz v. Westinghouse Electric Corp., 472 F.Supp. 946, 946 (W.D. Pa. 1979) [hereinafter *Lorentz*].

[186]*Id.* at 953 n. 6.

and *Firestone*. A plaintiff should be a public figure based on his own record.[187]

After the *Gertz* repudiation of the issue doctrine, the U.S. Supreme Court adopted a test based on the private or public status of the plaintiff. "The Pennsylvania Supreme Court has not reconsidered, in the light of *Gertz*, the wisdom of its decision to adopt the public concern test."[188]

An attorney, Marcone, was accused of drug-related criminal conduct in a magazine article.[189] Since the Pennsylvania Supreme Court had not yet reconsidered the *Matus* ruling, the court was bound to follow the issue standard. However, the court concluded that *Matus* was not "good law," and that the Pennsylvania Supreme Court, being free to choose a negligence standard, would do so in private figure cases.[190] On appeal, the court found that the plaintiff was a public figure who failed to prove actual malice, and the trial-court's judgment was reversed.[191] Despite an acknowledgment that

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[187]Hanish v. Westinghouse Broadcasting Co., 487 F.Supp. 397 (E.D. Pa. 1980).

[188]Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, 272 (3rd Cir. 1980) [hereinafter *Steaks Unlimited*].

[189]Marcone v. Penthouse, Int'l., Ltd., 533 F.Supp. 353, 353 (E.D. Pa. 1982) [hereinafter *Marcone-A*].

[190]*Id.* at 361.

[191]Marcone v. Penthouse Int'l. Magazine for Men, 754 F.2d 1072-1073 (3rd Cir. 1985).

Rosenbloom was overruled by *Gertz*, the Court of Appeals ruling that Marcone was a public figure effectively retained the state's issue doctrine. When a private plaintiff was defamed in a sexual-solicitation classified advertisement in a newspaper,[192] *Rosenbloom* was recognized as a source of the requirement for private plaintiffs to prove actual malice on issues of public or general concern.[193] The trial court held that the Pennsylvania Supreme Court would accept a negligence standard as appropriate for private-person libel, over a private subject, in the newspaper.[194]

The Supreme Court held that a private-figure plaintiff must prove mass-media defamation false when it is a matter of public or general concern. This did not include the additional actual-malice burden.[195]

> Where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false.[196]

Even as late at 1991, the Pennsylvania Supreme Court retained the

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[192]Fitzpatrick v. Milky Way Productions, Inc., 537 F.Supp. 165, 167, 167 n. 4 (E.D. Pa. 1982) [hereinafter *Fitzpatrick*].

[193]*Id.* at 167-168.

[194]*Id.* at 169.

[195]Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 767 (1986) [hereinafter *Hepps*].

[196]*Id.* at 768-769.

Rosenbloom issue doctrine as state law. "Pennsylvania law has not yet caught up with reality."[197] A hotel manager alleged defamation when a magazine article said he was not qualified for his position, and that he was hired through an act of nepotism. The trial court held the statements were capable of defamation, but the article was in the public interest and required proof of actual malice.[198]

The end of the *Rosenbloom* era was met with mixed reviews. Most states accepted the new *Gertz* ruling and took its precepts in stride. A much smaller number of states made the issue doctrine a part of the state's law of defamation. Pennsylvania, apparently by default, holds the issue doctrine as law simply because the state supreme court has not readdressed the issue during the past 20 years.

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[197]Buckley v. McGraw-Hill, Inc., 782 F.Supp. 1042, 1046 (W.D. Pa. 1991) [hereinafter *Buckley*].

[198]*Id.* at 1042.

Chapter V

Summary and Conclusions

Summary

Freedom of speech is essential to every meaning of liberty,[1] because the robust clash of ideas allows the best idea to get selected in the marketplace of ideas.[2] The ideas that are opened to debate are not always high minded, and they are frequently offensive. When offense is given, the law of defamation is called upon to settle the situation.

Early Freedom of Speech:

In Colonial America and after the birth of the new nation, defamation was focused on preventing damage to the government by citizens who sought to criticize public officials and their performance.[3] Libel against a public person was considered a greater offense than libel against a private person,[4] and the

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[1]James Morton Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* (Ithaca, NY: Cornell University Press, 1956), 418.

[2]Abrams v. United States, 250 U.S. 616, 630 (1919).

[3]Leonard W. Levy, *Emergence of a Free Press*, (New York: Oxford University Press, 1985), 9.

[4]John D. Stevens, *Shaping the First Amendment: The Development of Free Expression*, (Beverly Hills, CA: Sage Publications, 1982), 120 [hereinafter Stevens].

burden of proof rested upon the libel defendant.[5] Public officials in the United States were protected by a constitutional privilege.[6] Even after the Bill of Rights, freedom of speech was not a formidable power that was readily available to citizens or to the mass media until 1964.

New York Times (1964).

When the *New York Times* decision[7] was released in 1964, the private citizens' avenue for redress was eased and the media gained a formidable defense tool against libel claims. Public-official plaintiffs were required to prove actual malice, publication of a known falsehood or reckless disregard for the truth, to recover damages resulting from defamation.[8]

Before the *New York Times* ruling, there was an average of only five libel trials per year. After the *New York Times* decision, libel appeals ranged between 11 and 18 per year.[9] Between 1980 and 1984, the average increased

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[5]Albert B. Saye, *American Constitutional Law*, (St. Paul, MN: West Publishing Co., 1979), 323.

[6]U.S. Const. art. I, § 6.

[7]New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[8]Stevens, 124.

[9]F. Dennis Hale, "The Federalization of Libel by Two Supreme Courts," *Communication and the Law*, 11 (Sept. 1989): 23 [hereinafter Hale].

to 16 per year.[10]

After the *New York Times* decision, trial courts responded favorably to defense motions for summary judgment 78 percent of the time. After the 1974 *Gertz* decision, summary judgment was granted only 51 percent of the time due to reversals at the appellate level and fewer summary judgments in the federal courts.[11] The *New York Times* decision opened the door for public figures.

Butts and Walker (1967):

A prominent football coach (Butts) and a retired Army general (Walker) were the first non-public official libel plaintiffs who were required to prove *New York Times* actual malice.[12] By virtue of his position, Butts was recognized as a public figure who wielded considerable influence in college football (the theme of his defamation). He was involved with an issue that generated an important and justified public interest.[13]

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[10]Richard A. Epstein, "Was *New York Times v. Sullivan* Wrong?" in *The First Amendment Law Handbook*, ed. J.L. Swanson and C.L. Castle (New York: Clark Boardman Co., Ltd., 1990) 48-49 n. 7.

[11]Daniel P. Dalton, "Defining the Limited Purpose Public Figure," *University of Detroit Mercy Law Review* 70 (Fall 1992), 52.

[12]Curtis Publishing Co. v. Butts (No. 37) and Associated Press v. Walker (No. 150), 388 U.S. 130 (1967) [hereinafter *Butts*; *Walker*].

[13]*Butts* at 134.

Walker thrust himself into the vortex of the vigorous controversy over the enrollment of a black student, James Meredith, at the University of Mississippi. He was fairly labeled as a man of political prominence,[14] who commanded a considerable amount of public interest. He was a public figure.[15]

The *New York Times* rule now covered private citizens who, by virtue of their positions or their actions, attracted public attention to themselves and their causes. These were the public figures who must prove actual malice.

Rosenbloom (1971):

How would the courts treat private citizens whose positions did not justify public-figure status and whose actions remain essentially private? If the private citizen was involved in an issue of public or general interest, he must prove actual malice along with public officials and public figures. The Supreme Court reasoned that the public was concerned with the issue, not the private or public status of the participants.[16] Private-citizen plaintiffs, involved in issues of public or general concern must prove *New York Times* actual malice to prevail in libel litigation.

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[14]*Walker* at 140.

[15]*Id.* at 154-155.

[16]Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44-45 (1971) [hereinafter *Rosenbloom*].

The *Rosenbloom* plurality decision had far reaching effects on libel litigation. These effects are the findings of this thesis.

The *Rosenbloom* Era (1971-1974)

Finding 1:

While the *Rosenbloom* issue doctrine was the law of the land, private individuals who were defamed (over their involvement with an issue of public or general concern) could not prevail in libel litigation unless they could prove that the defendant acted with actual malice.[17]

Libel decisions during this period were strongly pro-defendant, 74.8 percent of all defendants won their cases. Mass-media defendants won their cases 79.3 percent of the time. The *Rosenbloom* issue doctrine rendered the public-figure concept nearly superfluous.[18]

Finding 2:

Summary judgment rulings in favor of the defendant were the most common means of settling libel litigation. Most defendants, 70.3 percent, and 75.9 percent of mass-media defendants won their libel litigation by summary judgment. This swift and least costly method of resolving defamation litigation

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[17]*Id.* at 43-44.

[18]John J. Watkins, "The Demise of the Public Figure Doctrine," *Journal of Communication*, 27 (Summer 1977): 49.

is a boon to the mass media. Its widespread use is attributed to the difficulty a plaintiff had in proving the actual malice required by the *Rosenbloom* issue doctrine.

Finding 3:

Actual malice must be proved by clear and convincing evidence. This standard of proof is much more difficult to meet than the usual "preponderance of evidence" required by civil courts, yet it is much less difficult than the criminal court standard of "beyond a reasonable doubt."[19] Summary judgment must be granted if the plaintiff fails to provide clear and convincing evidence of actual malice.[20] The clear and convincing standard of proof provided an additional edge to the defendant.

The Post-*Rosenbloom* Era (1974-1994)

The post-*Rosenbloom* era encompasses all federal libel decisions after the Supreme Court ruled in *Gertz* that only public persons involved in issues of public or general concern must meet the actual-malice standard. The *Gertz* ruling recognized the right of private plaintiffs to recover damages resulting

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[19]Lansdown v. Beacon Journal Publishing Co., 14 Media L. Rep. 1801, 1804 (Ohio S.C. 1987).

[20]Pierre N. Leval, "The No-Money, No-Fault Libel Suit: Keeping Sullivan in its Proper Place," in *The First Amendment Law Handbook*, ed. J.L. Swanson and C.L. Castle (New York: Clark Boardman Co., Ltd., 1990), 6.

from defamation over a matter of public or general concern without proving actual malice. It was mitigated by requiring private persons to prove actual malice only when they sought to recover punitive damages from mass-media defendants.[21] In all other cases, proof of negligence was sufficient to recover actual damages.[22]

Finding 4:

Summary judgments in favor of the defendants became more difficult to obtain after the issue doctrine was repudiated. After *Gertz*, 41.9 percent of all defendants and 48.1 percent of mass media defendants won libel litigation via summary judgment. This was a reduction of 28.4 percent and 27.8 percent respectively. Without the clear-cut requirement to have all plaintiffs prove actual malice, judges were reluctant to award summary judgment to libel defendants.

Finding 5:

The clear and convincing standard of proof remained unchanged after the issue doctrine's repudiation. It became a lasting effect of the *Rosenbloom* issue

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[21]Joel D. Eaton, "The American Law of Defamation Through *Gertz v. Robert Welch, Inc.* and Beyond: An Analytical Primer," *Virginia Law Review* 61 (Nov. 1975): 1412 [hereinafter Eaton].

[22]Hale, 35-36.

doctrine.

Finding 6:

Five states adopted the issue standard during the *Rosenbloom* era and retained it after the *Gertz* decision was released. Michigan, Colorado and Alaska retained the requirements to prove actual malice when the defamation is about a matter of public or general interest.[23] Indiana initially adopted the standard judicially but made it a part of the state's Constitution.[24] The Pennsylvania Supreme Court adopted the issue doctrine, with its *Matus* decision,[25] immediately after the *Rosenbloom* decision was released. *Matus* has not yet been revisited, and that has been the source of much confusion. Some Pennsylvania courts have decided that the *Matus* decision is not good law[26]

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[23]Schultz v. Reader's Digest Association, 468 F.Supp. 551 (E.D. Mich. 1979); Diversified Management, Inc. v. Denver Post, Inc., 653 P.2d 1103 (Colo. S.C. 1982); West v. Northern Publishing Co., 487 P.2d 1304, 1304 (Alaska S.C. 1971); Gay v. Williams, 486 F.Supp. 12, 15 (D. Alaska 1979); Sisemore v. U.S. News & World Report, Inc., 662 F.Supp. 1529, 1529 (D. Alaska 1987).

[24]Ind. Const. art. I, § 9 quoted in Fazekas v. Crain Consumer Group Div., 583 F.Supp. 110, 113-114 (S.D. Ind. 1984); Woods v. Evansville Press Co., Inc., 791 F.2d 480, 483 (7th Cir. 1986); AAFCO Heating & Air Conditioning Co. v. Northwest Publications, Inc., 321 N.E.2d 580, 586 (Ind. 1974).

[25]Matus v. Triangle Publications, Inc., 286 A.2d 357 (Pa. S.C. 1971) [hereinafter *Matus*].

[26]Mathis v. Philadelphia Newspapers, Inc., 455 F.Supp. 406 (E.D. Pa. 1978); Hanish v. Westinghouse Broadcasting Co., 487 F.Supp. 397 (E.D. Pa.

while others stood firmly behind the mandated issue standard.[27] By default, caused by inaction, Pennsylvania retained the issue doctrine as state law.

Conclusions

The law of defamation has continually reached for a balance between complete or absolute freedom of speech and the just requirement to protect reputations from harm. The *Rosenbloom* decision had a transitory effect on libel litigation relative to the issue doctrine except in a few states where it was adopted and incorporated into the body of state law. For the majority of states, its effect vanished as soon as the *Gertz* decision was released. For one state, Pennsylvania, it remains an unsettled battle where free speech and reputation protection are holding in an uneasy cease fire.

When the standard of proof for actual malice is considered, the *Rosenbloom* decision had a lasting effect on libel litigation by mandating the "clear and convincing" standard. This standard increased the plaintiff's burden

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1980); Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264 (3rd Cir. 1980); Fitzpatrick v. Milky Way Productions, Inc., 537 F.Supp. 165 (E.D. Pa. 1982); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 767 (1986).

[27]Chuy v. Philadelphia Eagles Football Club, 431 F.Supp. 254 (E.D. Pa. 1977); Lorentz v. Westinghouse Electric Corp., 472 F.Supp. 946 (W.D. Pa. 1979); Marcone v. Penthouse, Int'l., Ltd., 533 F.Supp. 353 (E.D. Pa. 1982); Marcone v. Penthouse Int'l. Magazine for Men, 754 F.2d 1072 (3rd Cir. 1985); Buckley v. McGraw-Hill, Inc., 782 F.Supp. 1042 (W.D. Pa. 1991).

of proof as contrasted to the civil, preponderance of evidence, standard.

The substantial drop in summary judgments for the defendant during the post-*Rosenbloom* era shows that cases have substantive issues of fact that are not easily dismissed via summary judgment. This indicates serious evidence was presented by the plaintiffs, and it highlights the difficulty found in meeting the clear and convincing standard of proof.

The small changes in summary judgment reversals after the *Rosenbloom* era indicates no change in the very careful consideration by judges before ruling on summary judgment for the defendant.

The *Rosenbloom* issue doctrine was one more step toward absolute freedom of speech, but it went one step too far in denying private persons redress from public defamation. Many strong personalities participated in the *Rosenbloom* decision and in its demise. Equally strong are those who continue the effort in this conflict of ideas. The greatness of our open society will prevail, and the best course of action for freedom of speech will be found.

In closing this thesis, the most fitting words are those Justice Powell used to announce the *Gertz* decision:

> This Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment. With this decision,

we return to that effort.[28]

Epilogue

The cause of the demise of the *Rosenbloom* issue doctrine was the *Gertz* Supreme Court decision that repudiated it and remanded the *Gertz* case to the trial court for final resolution.[29] This trial was ironically humorous.

The new trial court entered a judgment on a jury verdict for Gertz. Robert Welch appealed based on lack of evidence to support actual malice; this would preclude punitive damages.[30]

The Supreme Court's decision is the law of the case, and, to reexamine the issue, the court must have clear and convincing reasons that the law was not properly applied.[31] Gertz did not prove actual malice at the first trial.[32] The latest trial court interpreted the Welch defense as a claim of qualified privilege which, under Illinois law, requires proof of actual malice. This is strangely ironic because the U.S. Supreme Court decided that Gertz, a private plaintiff,

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[28]*Gertz* at 325.

[29]*Id.* at 352.

[30]Gertz v. Robert Welch, Inc., 680 F.2d 527, 527-528 (7th Cir. 1982) [hereinafter *Gertz-E*].

[31]*Id.* at 532.

[32]*Id.* at 532 n. 5.

did not have to prove actual malice.[33]

The evidence showed that Welch had reason to doubt the truth of his publication, and there was more than enough evidence to show that the article was published with utter disregard for the truth or falsity. The evidence supported a finding of actual malice for the man who removed the requirement for other private people to prove actual malice.

After more than 14 years of litigation, Gertz prevailed, collected every penny of the settlement and took his wife on a world cruise at the John Birch Society's expense.[34]

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[33]*Id.* at 533-534.

[34]Elmer Gertz, "Gertz on Gertz: Reflections on the Landmark Libel Case," *Trial* 21 (Oct. 1985): 72.

Bibliography

Abrams, Floyd. "Is it Time to Change the Libel Doctrine for Public Figures? It's a Landmark for Freedom of Expression." American Bar Association Journal 71 (July 1985): 38-41.

Abrams, Floyd. "The Hidden Absolutes of the First Amendment." In First Amendment Law Handbook, eds. James L. Swanson and Christian L. Castle, 465-473. New York: Clark Boardman Co., Ltd., 1990.

Barron, Jerome A. "Access to the Press--A New First Amendment Right." Harvard Law Review 80 (June 1967): 1641-1678.

Boasberg, James E. "With Malice Toward None: A New Look at Defamatory Republication and Neutral Reportage." Hastings Comm/Ent Law Journal 13 (1991): 455-488.

Bowles, Dorothy A. "Neutral Reportage as a Defense Against Republishing Libel." Communications and the Law 11 (Mar. 1989): 3-18.

Broadcasting. "Public Figure Libel Defense is Reduced by Supreme Court." (2 July 1979): 74-75.

Burt, Dan M. and Anthony S. Murry. "The Public Figure Defamation Case: Westmoreland's Counsel Recount Their Strategy." Trial 21 (Oct. 1985): 56-58.

Cain, James P. "Is it Time to Change the Libel Doctrine for Public Figures? Protect Us From a Reckless Press." American Bar Association Journal 71 (July 1985): 38-41.

Cohen, Jeremy and Albert C. Gunther. "Libel as Communication Phenomenon." Communication and the Law 9 (Oct. 1987): 9-30.

Collins, Eric L., Jay B. Wright, and Charles W. Peterson. "Problems in Libel Litigation." Communications and the Law 7 (Oct. 1985): 41-57.

Coughlin, Ellen. "Justices Rule Proxmire May be Sued for Libel by Scientist." Chronicle of Higher Education 18 (2 July 1979): 1, 11.

Dalton, Daniel P. "Defining the Limited Purpose Public Figure." University of Detroit Mercy Law Review 70 (Fall 1992): 47-66.

Davies, Lloyd. "The 'Public Figures' Defence--A Subversion of Democracy." Law Institute Journal 65 (Dec. 1991): 1195-1197.

Drechsel, Robert E. "The Survival of 'End-Run" Theories of Tort Liability After Hustler v. Falwell." Journalism Quarterly 67 (Winter 1990): 1062-1070.

Drechsel, Robert E. "Defining 'Public Concern' in Defamation Cases Since Dun & Bradstreet v. Greenmoss Builders." Federal Communications Law Journal 43 (Dec. 1990):1-22.

Driscoll, Paul D. and Kyu Ho Youm. "Harte-Hanks Communications v. Connaughton: The U.S. Supreme Court's Application of the Actual Malice Rule." Communication and the Law 14 (Mar. 1992): 57-80.

Eaton, Joel D. "The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer." Virginia Law Review 61 (Nov. 1975): 1349-1451.

Editor and Publisher. "Court Narrows Libel Shield and Broadens Private Rights." 112 (30 June 1979): 11-12.

Emerson, Thomas Irwin. Toward a General Theory of the First Amendment. New York: Random House, 1963.

Epstein, Richard A. "Was New York Times v. Sullivan Wrong?" In First Amendment Law Handbook, eds. James L. Swanson and Christian L. Castle, 19-51. New York: Clark Boardman Co., Ltd., 1990.

Franck, Murray I. "Book Review: Actual Malice Twenty-five Years After Times v. Sullivan." Communication and the Law. 14 (Mar. 1992): 81-87.

Gertz, Elmer. "Gertz on Gertz: Reflections on the Landmark Libel Case." Trial 21 (Oct. 1985): 66-75.

Goodale, James C., chmn. Communication Law. Vol. 1, New York: Practicing Law Institute, 1985.

Gregory Williams. "A Taste of His Own Fleece." Aviation Week and Space Technology 112 (31 Mar. 1980): 13.

Gwynne, Peter. "Supreme Court's Golden Fleece Ruling Supports Researchers." Industrial Research/Development 21 (Aug. 1979): 46.

Hale, F. Dennis. "The Federalization of Libel by Two Supreme Courts." Communications and the Law 11 (Sept. 1989): 19-42.

Halpern, Sheldon W. "Of Libel, Language, and Law: New York Times v. Sullivan at Twenty-Five." North Carolina Law Review 68 (Jan. 1990): 273-326.

Hawkins, Sergeant William. A Treatise of the Pleas of the Crown. London, 1716. Quoted in Leonard W. Levy. Emergence of a Free Press, 8. New York: Oxford University Press, 1985.

Hayden, Stacey L. "Limited Purpose Public Figures: Spence v. Flynt as an Illustration of the Need for a More Complete Test." Brigham Young University Law Review (1992): 827-840.

Hixson, Richard. Mass Media and the Constitution: An Encyclopedia of Supreme Court Decisions. New York: Garland Publishing, Inc., 1989.

Hopkins, W. Wat. Actual Malice: Twenty-five Years After Times v. Sullivan. New York: Praeger, 1989.

Kalven, Harry, Jr. "Privacy in Tort Law: Were Warren and Brandeis Wrong?" Law and Contemporary Problems 35 (Spring 1966): 326-341.

Kiesler, Charles and Robert Lowman. "Hutchinson v. Proxmire." American Psychologist 35 (Aug. 1980): 689-690.

Leval, Pierre N. "The No-Money, No-Fault Libel Suit: Keeping Sullivan in its Proper Place." In First Amendment Law Handbook, eds. J.L. Swanson and C.L. Castle, 3-18. New York: Boardman Co., Ltd., 1990.

Levy, Leonard W. Emergence of a Free Press. New York: Oxford University Press, 1985.

Matheson, Scott M., Jr. "Procedures in Public Person Defamation Cases: The Impact of the First Amendment." Texas Law Review 66 (Dec. 1987): 215-303.

McLean, Deckle. "Press and Privacy Rights Could Be Compatible." Communications and the Law 8 (Apr. 1986): 13-26.

McLean, Deckle. "Move to Clear and Convincing Proof as Libel Standard Gain for Media." Journalism Quarterly 66 (Autumn 1989): 640-645.

McLean, Deckle. "Public Versus Private Figure Determination Under Gertz." Communications and the Law 14 (June 1992): 31-50.

Middleton, Kent R., and Bill F. Chamberlin. The Law of Public Communication 2d ed. White Plains, NY: Longman Publishing, 1991.

Nelson, Harold L. and Dwight L. Teeter, Jr. Law of Mass Communications: Freedom and Control of Print and Broadcast Media, 5th ed., Mineola, NY: Foundation Press, 1986.

Newsweek. "Limits of Libel." 69 (26 June 1967): 76-77.

Notes. "The New York Times Rule: An Analysis of Its Implication." Minnesota Law Review 55 (Dec. 1970): 299-319.

Note: "The Scope of First Amendment Protection for Good-Faith Error." Yale Law Journal 75 (Mar. 1966): 642-656.

Ogles, Robert M. and George E. Stevens. "Summary Judgment in Defamation Under Gertz." Journalism Quarterly 65 (Fall 1988): 745-747.

Peltier, Linda J. "Recent Decisions: Rosenbloom v. Metromedia, Inc., 403 U.S. 29." The George Washington Law Review 40 (Oct. 1971): 151-161.

Plamondon, Ann L. "An Epistemological Analysis of the Concept of Actual Malice." Communication and the Law 11 (Mar. 1989): 19-45.

Post, Robert C. "The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell." Harvard Law Review 103 (Jan. 1990): 603-686.

Proxmire, William. The Fleecing of America. Boston: Houghton Mifflin Co., 1980.

Ramberg, Bennett. "The Supreme Court and Public Interest in Broadcasting." Communications and the Law 8 (Dec. 1986): 11-29.

Rosen, Mark L. "Media Lament--The Rise and Fall of Involuntary Public Figures." Saint John's Law Review 54 (1980): 487-518.

Sanford, Bruce W. "No Quarter From This Court." Columbia Journalism Quarterly 18 (Sept. 1979): 59-63.

Saye, Albert B. American Constitutional Law. 2d ed. St. Paul, MN: West Publishing Co., 1979.

Schardt, Arlie, Diane Camper and Nancy Stadtman. "Public or Private Lives." Newsweek 94 (9 July 1979): 50.

Shakespeare, William. William Shakespeare: The Complete Works, ed. Peter Alexander. New York: Random House, 1952.

Smith, James Morton. Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties. Ithaca, NY: Cornell University Press, 1956.

Smolla, Rodney A. Law of Defamation. New York: Clark Boardman Co., 1986.

Smolla, Rodney A. Suing the Press. New York: Oxford University Press, 1986.

Smolla, Rodney A. Jerry Falwell v. Larry Flynt: The First Amendment on Trial. New York: St. Martin's Press, 1988.

Smolla, Rodney A. Free Speech in an Open Society. New York: Alfred A. Knopf, 1992.

Soloski, John. "The Study and the Libel Plaintiff: Who Sues for Libel?" Iowa Law Review 71 (Oct. 1985): 217-220.

Steffen, Brian J. "What Iowa Editors Know About Libel Law." Journalism Quarterly 65 (Winter 1988): 998-1000.

Stevens, George E. "Local and Topical Pervasive Public Figures After Gertz." Journalism Quarterly 66 (Summer 1989): 463-465.

Stevens, George E. "Criminal Libel After Garrison." Journalism Quarterly 68 (Fall 1991): 522-527.

Stevens, John D. Shaping the First Amendment: The Development of Free Expression. Beverly Hills, CA: Sage Publications, 1982.

Stevens, John Paul. "The Freedom of Speech." Yale Law Journal 102 (Apr. 1993): 1293-1313.

Talansky, Jerry. "Recent Decisions: First Amendment Extension of the New York Times Rule in Libel Action Arising From Matters of Public Interest." Journal of Public Law 20 (2, 1971): 601-614.

Time. "Private People." 114 (9 July 1979): 62.

Tobin, Richard L. "The New York Times's Vital Victory." Saturday Review 47 (11 Apr. 1964): 69-70.

Tomlinson, Don E. "Expert Testimony in Private Figure Libel Trials on the Issue of Negligence: A Developing Concept." Communication and the Law. 14 (June 1992): 69-87.

Trager, R. and Bill F. Chamberlin. "The Dangerous Exception to Protection of Opinion." Communication and the Law 11 (Dec. 1989): 51-64.

"Vindication of the Reputation of a Public Official." Harvard Law Review 80 (June 1967): 1730-1757.

Walsh, John. "The Proxmire Decision, A Caution to Congress." Science 205 (13 July 1979): 170-171.

Warren, Samuel D. and Louis D. Brandeis. "The Right to Privacy." Harvard Law Review 4 (Dec. 1890): 193-220.

Waters, Harry and Diane Camper. "Private Lives." Newsweek (15 Mar. 1976): 66.

Watkins, John J. "The Demise of the Public Figure Doctrine." Journal of Communication 27 (Summer 1977): 47-53.

U.S. News and World Report. "Workers, Mothers, Police in Court Rulings." (9 July 1979): 6.

U.S. News & World Report. "Yes, Washington Can Ban Laetril." (2 July 1979): 5.

Wren, Christopher G. and Jill Robinson Wren, The Legal Research Manual 2d ed. Madison, WI: Adams and Ambrose Publishing, 1986.

Youm, Kyu Ho. "Survivability of Defamation as a Tort." Journalism Quarterly 66 (Autumn 1989): 646-652.

Zuckman, Harvey L., Martin J. Gaynes, T. Barton Carter and Juliet Lushbough Dee. Mass Communication Law: In a Nutshell. St. Paul, MN: West Publishing Co., 1988.

Table of Cases

Bose Corp. v. Consumers Union of the United States, Inc., 508 F.Supp. 1249 (D. Ma. 1981).

Bose Corp. v. Consumers Union of the United States, Inc., 692 F.2d 189, 196 (1st Cir. 1982).

Bostic v. True Detective Magazine Co., 363 F.Supp. 919 (S.D. N.Y. 1973).

Braun v. Flynt, 726 F.2d 245 (5th Cir. 1984).

Brewer v. Memphis Publishing Co., 626 F.2d 1238 (5th Cir. 1980).

Brown v. Kelly Broadcasting Co., 16 Media L. Rep. 1625 (Calif. S. C. 1989).

Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980).

Buckley v. Esquire, Inc., 344 F.Supp. 1133 (S.D. N.Y. 1972).

Buckley v. McGraw-Hill, Inc., 782 F.Supp. 1042 (W.D. Pa. 1991).

Bufalino v. Detroit Magazine, Inc., 17 Media L. Rep. 1449 (Mich. S. C. 1989).

Cantrell v. Forest City Publishing Co., 484 F.2d 150 (6th Cir. 1973).

Cardillo v. Doubleday and Co., Inc., 366 F.Supp. 92 (S.D. N.Y. 1973).

Carey v. Hume, 492 F.2d 631 (D.C. Cir. 1974).

Casano v. WDSU-TV, Inc., 464 F.2d 3 (5th Cir. 1972).

Cerrito v. Time, Inc., 449 F.2d 306 (9th Cir. 1971).

Cerrito v. Time, Inc., 302 F.Supp. 1071 (N.D. Cal. 1969).

Chuy v. Philadelphia Eagles Football Club, 431 F.Supp. 254 (E.D. Pa. 1977).

Cianci v. New Times Publishing Co., 639 F.2d 54 (2nd Cir. 1980).

City of Chicago v. Tribune Co., 307 Ill. 595, 139 N.E. 86, 28 A.L.R. 1368 (1923).

Clark v. American Broadcasting Cos., Inc., 684 F.2d 1208 (6th Cir. 1982).

Clyburn v. New World Communications, Inc., 903 F.2d 29 (D.C. Cir. 1990).

Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908).

Connick v. Myers, 461 U.S. 138 (1983).

Continental Nut Co. v. Robert L. Berner Co., 393 F.2d 283 (7th Cir. 1968).

Cooper v. Mitchell Brothers, 454 U.S. 90, 102 S.Ct. 172, 70 L.Ed.2d 262 (1981), *reh. denied*, 456 U.S. 920 (1982).

Crane v. The Arizona Republic, 20 Media L. Rep. 1649 (9th Cir. 1992).

Credit Bureau of Dalton v. CBS News, 332 F.Supp. 1291 (N.D. Ga. 1971).

Curtis Publishing Co. v. Butts (No. 37), 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967).

Dameron v. Washington Magazine, Inc., 779 F.2d 736 (D.C. Cir. 1985).

Davis v. Nat'l Broadcasting Company, 447 F.2d 981 (5th Cir. 1971).

Davis v. Schuchat, 510 F.2d 731 (D.C. Cir. 1975).

De Carvalho v. da Silva, 414 A.2d 806 (R.I. 1980).

Dickey v. CBS, Inc., 583 F.2d 1221 (3rd Cir. 1978).

Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971).

Diversified Management, Inc. v. Denver Post, Inc., 653 P.2d 1103 (Colo. S.C. 1982).

Dixon v. Newsweek, Inc., 562 F.2d 626 (10th Cir. 1977).

Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985).

Durham v. Cannan Communications, Inc., 645 S.W.2d 845 (Tex. Civ. App. 1982).

Edwards v. Nat'l Audubon Society, Inc., 556 F.2d 113 (2nd Cir. 1977).

F. & J. Enterprises, Inc. v. Columbia Broadcasting Systems, Inc., 373 F.Supp. 292 (N.D. Ohio 1974).

Fadell v. Minneapolis Star and Tribune Co., Inc., 425 F.Supp. 1075 (N.D. Ind. 1976).

Fairyland Amusement Co. v. Metromedia, Inc., 413 F.Supp. 1290 (W.D. Mo. 1976).

Fazekas v. Crain Consumer Group Div., 583 F.Supp. 110 (S.D. In. 1984).

Firestone v. Time, Inc., 460 F.2d 712 (5th Cir. 1972).

First National Bank of Boston v. Bellotti, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978).

Fitzgerald v. Penthouse Int'l., Ltd., 525 F.Supp. 585 (D. Md. 1981).

Fitzgerald v. Penthouse Int'l, Ltd., 691 F.2d 666 (4th Cir. 1982).

Fitzpatrick v. Milky Way Productions, Inc., 537 F.Supp. 165 (E.D. Pa. 1982).

Fracaro v. Priddy, 514 F.Supp. 191 (M.D. N.C. 1981).

Fram v. Yellow Cab of Pittsburgh, 380 F.Supp. 1314 (W.D. Pa. 1974).

Galella v. Onassis, 353 F.Supp. 196 (S.D. N.Y. 1972).

Garrison v. Louisiana, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed. 2d 125 (1964).

Gaus v. County of Wells, Indiana, 620 F.Supp. 1462 (N.D. Ind. 1985).

Gay v. Williams, 486 F.Supp. 12 (D. Alaska 1979).

Gertz v. Robert Welch, Inc., 306 F.Supp. 310 (N.D. Ill. E.D., 1969).

Gertz v. Robert Welch, Inc., 322 F.Supp. 997 (N.D. Ill. E.D., 1970).

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

Gertz v. Robert Welch, Inc., 680 F.2d 527 (7th Cir. 1982).

Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

Gintert v. Howard Publications, Inc., 565 F.Supp. 829 (N.D. Ind. 1983).

Girl Scouts v. Personality Posters Mfg. Co., 304 F.Supp. 1228 (S.D.N.Y. 1969).

Goldman v. Time, Inc., 336 F.Supp. 133 (N.D. Calif. 1971).

Gordon v. Random House, Inc., 349 F.Supp. 919 (E.D. Pa. 1972).

Gordon v. Random House, Inc., 486 F.2d 1356 (3rd Cir. 1973).

Gospel Spreading Church v. Johnson Publishing Co., Inc., 454 F.2d 1050 (D.C. Cir. 1971).

Grass v. News Group Publications, Inc., 570 F.Supp. 178 (S.D. N.Y. 1983).

Gray v. Udevitz, 656 F.2d 588 (10th Cir. 1981).

Grove v. Dun & Bradstreet, Inc., 308 F.Supp. 1068 (W.D. Pa. 1970).

Guccione v. Flynt, 618 F.Supp. 164 (D.C. N.Y. 1985).

Hagel v. Vern Sims Ford, 12 Media L. Rep. 2248 (Wa. Ct. of A. 1986).

Hanish v. Westinghouse Broadcasting Co., 487 F.Supp. 397 (E.D. Pa. 1980).

Harris v. Tomczak, 8 Media L. Rep. 2145 (E.D. Cal. 1982).

Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989).

Hausworth v. Glisson, 485 F.Supp. 29 (N.D. Ga. 1978).

Hensley v. Life Magazine, Time, Inc., 336 F.Supp. 50 (N.D. Calif. 1971).

Herbert v. Lando, 568 F.2d 974 (2nd Cir. 1977).

Herbert v. Lando, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979).

Hollander v. Pan American World Airways, 382 F.Supp. 96 (D. Md. 1974).

Hood v. Dun & Bradstreet, Inc., 335 F.Supp. 170 (N.D. Ga. 1971).

Hood v. Dun & Bradstreet, Inc., 486 F.2d 25 (5th Cir. 1973).

Horn v. Kean, 796 F.2d 668 (3rd Cir. 1986).

Hotchner v. Castillo-Puche, 404 F.Supp. 1041, 1045 (S.D. N.Y. 1975).

Howard v. Lyons, 360 U.S. 593, 79 S.Ct. 1331, 3 L.Ed.2d 1454 (1959).

Hutchinson v. Proxmire, 431 F.Supp. 1311 (W.D. Wi. 1977).

Hutchinson v. Proxmire, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979).

In re Ballay, 482 F.2d 648 (D.C. Cir. 1973).

In re IBP Confidential Business Documents Litigation, 755 F.2d 1300 (8th Cir. 1985).

Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964).

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

Jensen v. Times Mirror Co., 634 F.Supp. 304 (D. Conn. 1986).

Jones v. American Broadcasting Cos., Inc., 694 F.Supp. 1542 (M.D. Fla. 1988).

Jones v. Palmer Communications Co., 16 Media L. Rep. 2137 (Iowa S. C. 1989).

Kent v. Pittsburgh Press Co., 349 F.Supp. 622 (W.D. Pa. 1972).

LaBruzzo v. Associated Press, 353 F.Supp. 979 (W.D. Mo. W.D. 1973).

Lansdowne v. Beacon Journal Publishing Co., 14 Media L. Rep. 1801 (Ohio S.C. 1987).

Lawlor v. Gallagher President's Report, Inc., 394 F.Supp. 721 (S.D.N.Y. 1975).

Lawrence v. Moss, 639 F.2d 634 (10th Cir. 1981).

Lerman v. Flynt Distributing Co., Inc., 745 F.2d 123 (2nd Cir. 1984).

Lewis v. Coursolle Broadcasting, 127 Wis.2d 105, 377 N.W.2d 166 (1985).

Lewis v. McGraw Hill Broadcasting Co., Inc., 20 Media L. Rep. 1240 (Colo. Ct. of A. 1992).

Lewis v. Reader's Digest Association, 366 F.Supp. 154 (D. Mont. 1973).

Linn v. United Plant Workers of America, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966).

Littlefield v. Fort Dodge Messenger, 481 F.Supp. 919 (N.D. Iowa 1978).

Littlefield v. Fort Dodge Messenger, 614 F.2d 581 (8th Cir. 1980).

Logan v. District of Columbia, 447 F.Supp. 1328 (D.C. 1978).

Lorentz v. Westinghouse Electric Corp., 472 F.Supp. 946 (W.D. Pa. 1979).

Maheu v. Hughes Tool Co., 384 F.Supp. 166 (C.D. Calif. 1974).

Marcone v. Penthouse Int'l., Ltd., 533 F.Supp. 353 (E.D. Pa. 1982).

Marcone v. Penthouse Int'l. Magazine for Men, 754 F.2d 1072 (3rd Cir. 1985).

Martin v. Wilson Publishing Co., 497 A.2d 322 (R.I. 1985).

Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F.Supp. 947 (D.C. 1976).

Mathis v. Philadelphia Newspapers, Inc., 455 F.Supp. 406 (E.D. Pa. 1978).

Matus v. Triangle Publications, Inc., 286 A.2d 357 (Pa. S.C. 1971).

Mau v. Rio Grande Oil, Inc., 28 F.Supp. 845 (N.D. Cal. 1939).

McDowell v. Paiewonsky, 769 F.2d 942 (3rd Cir. 1985).

McFarland v. Hearst Corp., 332 F.Supp. 746 (D. Md. 1971).

McKinney v. Alabama, 424 U.S. 669, 96 S.Ct. 1189, 47 L.Ed.2d 387 (1976).

McNair v. Hearst Corp., 494 F.2d 1309 (9th Cir. 1974).

McQuoid v. Springfield Newspapers, Inc., 502 F.Supp. 1050 (W.D. Mo. 1980).

Med-Sales Associates v. Lebhar-Friedman, Inc., 663 F. Supp. 908 (S.D. N.Y. 1987).

Meeropol v. Nizer, 381 F.Supp. 29 (S.D. N.Y. 1974).

Milkovich v. Lorain Journal Co., 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990).

Miller v. News Syndicate Co., Inc., 445 F.2d 356 (2nd Cir. 1971).

Mills v. Kingsport Times-News, 475 F.Supp. 1005 (W.D. Va. 1979).

Millstone v. O'Hanlon Reports, Inc., 383 F.Supp. 269 (E.D. Mo. 1974).

Mistrot v. True Detective Publishing Co., 467 F.2d 122 (5th Cir. 1972).

Monitor Patriot Co. v. Roy, 401 U.S. 265, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971).

NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).

NAACP v. Claiborne Hardware Co., 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982).

Nat'l Assoc. of Letter Carriers v. Austin, 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974).

Nat'l Life Insurance Co. v. Phillips Publishing, Inc., 20 Media L. Rep. 1393 (D. Md. 1992).

New Franklin Enterprises v. Sabo, 20 Media L. Rep. 1063 (Mich. Ct. of A. 1992).

New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, 95 A.L.R. 1450 (1964).

Norwood v. Soldier of Fortune Magazine, Inc., 651 F.Supp. 1397 (W.D. Ariz. 1987).

Novel v. Garrison, 338 F.Supp. 977 (N.D. Ill., E.D. 1971).

Oberman v. Dun & Bradstreet, Inc., 460 F.2d 1381 (7th Cir. 1972).

Ollman v. Bell, 750 F.2d 970 (D.C. Cir. 1984).

Otepka v. New York Times, Co., 379 F.Supp. 541 (D. Md. 1973).

Owens v. National Broadcasting Co., 508 So. 2d 949 (La. App. 1987).

Pace v. McGrath, 378 F.Supp. 140 (D. Md. 1974).

Patrick v. Field Research Corp., 414 U.S. 922, 94 S.Ct. 218, 38 L.Ed.2d 157 (1973).

Philadelphia v. Washington Post Co., 482 F.Supp. 897 (E.D. Pa. 1979).

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986).

Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

Pirre v. Printing Developments, Inc., 468 F.Supp. 1028 (S.D. N.Y. 1979).

Prager v. American Broadcasting Co., 569 F.Supp. 1229 (D. N.J. 1983).

Price v. Symsek, 988 F.2d 1187 (D.C. Cir. 1993).

Ragano v. Time, Inc., 302 F.Supp. 1005 (M.D. Fla. 1969).

Raible v. Newsweek, Inc., 341 F.Supp. 804 (W.D. Pa. 1972).

Reliance Insurance Co. v. Barron's, 442 F.Supp. 1341 (S.D. N.Y. 1977).

Rinsley v. Brandt, 446 F.Supp. 850 (D. Kan. 1977).

Rizzuto v. Nexxus Products Co., 641 F.Supp. 473 (S.D. N.Y. 1986).

Rosanova v. Playboy Enterprises, Inc., 411 F.Supp. 440 (1976).

Rosanova v. Playboy Enterprises, Inc., 580 F.2d 859 (5th Cir. 1978).

Rosenblatt v. Baer, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966).

Rosenbloom v. Metromedia, Inc., 289 F.Supp. 737 (E.D. Pa. 1968).

Rosenbloom v. Metromedia, Inc., 415 F.2d 8992 (3rd Cir. 1969).

Rosenbloom v. Metromedia, Inc., 397 U.S. 904, 90 S.Ct. 917, 25 L.Ed.2d 85 (1970).

Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971).

Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957).

Ryan v. Herald Association, Inc., 16 Media L. Rep. 2472 (Vt. Sup. Ct. 1989).

Ryder v. Time, Inc., 557 F.2d 824 (D.C. Cir. 1976).

Schultz v. Reader's Digest Association, 468 F.Supp. 551 (E.D. Mi. 1979).

Sidis v. F-R Publication Corp., 113 F.2d 806 (2d Cir. 1940).

Sierra Club v. Butts, 349 F.Supp. 934 (N.D. Calif. 1972).

Sisemore v. U.S. News & World Report, Inc., 662 F.Supp. 1529 (D. Alaska 1987).

St. Amant v. Thompson, 390 U.S. 727. 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968).

Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264 (3rd Cir. 1980).

Steere v. Cupp, 5 Media L. Rep. 2046 (Kan. S.C. 1979).

Street v. National Broadcasting Co., 645 F.2d 1227 (6th Cir. 1981).

Stripling v. Literary Guild, 5 Media L. Rep. 1958 (W.D. Tex. 1979).

Sunward Corporation v. Dun & Bradstreet, Inc., 811 F.2d 511 (10th Cir. 1987).

Sweeny v. Patterson, 128 F.2d 457 (D.C. Cir. 1942).

Tavoulares v. Piro, 817 F.2d 762 (D.C. Cir.) (1987).

Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940).

Time, Inc. v. Firestone, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976).

Time, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L. Ed. 2d 456 (1967).

Time, Inc. v. Johnston, 448 F.2d 378 (4th Cir. 1971).

Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir. 1969), *cert. denied*, 395 U.S. 922, 89 S.Ct. 1776, 23 L.Ed.2d 239 (1969).

Time, Inc. v. Pape, 401 U.S. 279, 91 S.Ct. 633, 28 L.Ed.2d 45 (1971).

Tollett v. United States, 485 F.2d 1087 (8th Cir. 1973).

Trans World Accounts, Inc. v. Associated Press, 425 F.Supp. 814 (N.D. Calif. 1977).

Treutler v. Meredith Corp., 455 F.2d 255 (8th Cir. 1972).

Triangle Publications, Inc. v. Matus, 408 U.S. 930, 92 S.Ct. 2494, 33 L.Ed.2d 343 (1972).

Tunnell v. Wiley, 369 F.Supp. 1260 (E.D. Pa. 1974).

United States v. Fatico, 458 F.Supp. 388 (E.D. N.Y. 1978).

United Medical Laboratories v. Columbia Broadcasting System, Inc., 404 F.2d 706 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1968).

United States v. Fall River Navigation Co., 285 F.Supp. 354 (S.D.N.Y. 1968).

United States v. Hudson & Goodwin, 7 Cranch 32 (1812).

Vanasco v. Schwartz, 401 F.Supp. 87 (E.D. N.Y. 1975).

Vazquez Rivera v. El Dia, Inc., 641 F.Supp. 668 (D. Puerto Rico 1968).

Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287 (D.C. Cir. 1980).

Wasserman v. Time, Inc., 424 F.2d 920 (C.A.D.C. 1970).

West v. Northern Publishing Co., 487 P.2d 1304 (Alaska S.C. 1971).

Westmoreland v. Columbia Broadcasting Systems, Inc., 596 F.Supp. 1170 (S.D. N.Y. 1984).

Williams v. Pasma, 202 Mont. 66, 656 P.2d 212 (1982), *cert. denied* 461 U.S. 945 (1983).

Wolston v. Reader's Digest Association, 429 F.Supp. 167 (D.C. 1977).

Wolston v. Reader's Digest Assoc., 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979).

Woods v. Evansville Press Co., Inc., 791 F.2d 480 (7th Cir. 1986).

Wortham v. Dun & Bradstreet, Inc., 399 F.Supp. 633 (S.D. Tx. 1975).

Wynberg v. Nat'l Inquirer, Inc., 564 F.Supp. 924 (C.D. Calif. 1982).

Yerkie v. Post-Newsweek Stations, Michigan, Inc., 470 F. Supp. 91 (D. Md. 1979).

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 592, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977).

Zerangue v. TPS Newspapers, Inc., 814 F.2d 1066 (5th Cir. 1987).