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DEFAMATION AS A CONSTITUTIONAL TORT: WITH ACTUAL MALICE FOR ALL

Ray Yasser*

If the laws of each age were formulated systematically, no part of the legal system would be more instructive than the law relating to defamation. Since the law of defamation professes to protect personal character and public institutions from destructive attacks, without sacrificing freedom of thought and the benefit of public discussion, the estimate formed of the relative importance of these objects, and the degree of success attained in reconciling them, would be an admirable measure of the culture, liberality, and practical ability of each age. Unfortunately, the English law of defamation is not the deliberate product of any period. It is a mass which has grown by aggregation, with very little intervention from legislation, and special peculiar circumstances have from time to time shaped its varying course. The result is that perhaps no other branch of the law is as open to criticism for its doubts and difficulties, its meaningless and grotesque anomalies. It is, as a whole, absurd in theory and very often mischievous in its practical operation.[1]

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1. Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903) [hereinafter cited as Veeder].

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INTRODUCTION

Of those who have studied defamation, few can disagree with Veeder's turn-of-the-century observation. The English common law of defamation was indeed "a forest of complexities . . . inconsistencies and perverse rigidities with circuitous paths and dead ends for seriously wronged plaintiffs."[2] Unfortunately, many of the pitfalls remain with us today.

The maze of common law defamation was transported from England to the United States in the eighteenth century. Although federal and state judges bravely attempted to render the law intelligible, the more realistic among them found a "fog of fictions, inferences and presumptions."[3] Those who insisted that the maze was understandable found clear cases of "slander which is libelous per se . . . ."[4] Few emerged with all faculties intact. The result was that although our judges struggled to find their way through the common law labyrinth, they succeeded only in hammering out false or partial passageways which only added to the confusion.

In 1964, the United States Supreme Court boldly entered America's legal equivalent of the Gardens at Versailles. The Court has been thrashing about ever since, albeit with an air of confidence. For the fruits of its labor, the Court can honestly lay claim to having created some of the most perplexing of the labyrinth's putative passageways.[5]

There is a twofold purpose for writing this article. First, the author hopes to offer as clear a picture of the defamation maze as possible. To avoid becoming lost in its corridors, the approach taken by this article is somewhat detached. Value judgments are avoided wherever possible—*res ipsa loquitur.*[6] In order to present a clear and accurate picture, it is of course important to distinguish new additions to the maze from those which have been around for some time. Therefore, the common law of defamation is described at the outset. From this vantage point, the impact of the Supreme Court cases is discussed. From there, the magnificent structure in its entirety is briefly surveyed.

2. Eaton, *The American Law of Defamation Through Gertz v. Robert Welch Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975) [hereinafter cited as Eaton].

3. Coleman v. MacLennan, 78 Kan. 711, 740, 98 P. 281, 291 (1908).

4. Douglas v. Janis, 43 Cal. App. 3rd 931, 941, 118 Cal. Rptr. 280, 286 (1974).

5. *See* notes 46-98 *infra* and accompanying text.

6. Many authorities have been critical of this area of the law. *See, e.g.*, W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 111 (4th ed. 1971); Courtney, *Absurdities of the Law of Slander and Libel*, 36 AM. L. REV. 552 (1902); Veeder, *History and Theory of the Law of Defamation*, 4 COLUM. L. REV. 33 (1904).

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The second and primary purpose of the article is to voice a plea for a more rational approach to the tort of defamation; for guidance in finding a way out of the maze. Judges, torts professors, lawyers and litigants in defamation cases are, after all, not Minotaurs. A fair balancing of one's right to be free from injury to reputation with another's right to speak freely can be better accomplished outside the maze. Only there can a degree of success be achieved in reconciling these important competing interests commensurate with the "culture, liberality and practical ability"[7] of the technological age that is peculiarly our own.

Profile of the Tort of Defamation at Common Law

The Plaintiff's Prima Facie Case—A Strict Liability Tort

The tort of defamation, as it existed at common law, can be defined as the unconsented to and unprivileged intentional communication to a third person of a false statement about the plaintiff which tends to harm the reputation of the plaintiff in the eyes of the community.[8] Consent and privilege are affirmative defenses that must be pleaded and proved by the defendant.[9] Once defamatory meaning is apparent, injury to reputation is generally presumed as a matter of law.[10] Moreover, the plaintiff is given the benefit of a rebuttable presumption that the statement is false, thus making truth a defense to be pleaded and proved by the defendant.[11] Therefore, the plaintiff's prima facie case consists of a simple allegation that the defendant intentionally communicated to a third person a statement about the plaintiff which tended to expose the plaintiff to "public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace."[12]

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7. Veeder, *supra* note 1, at 546.
8. *See, e.g.*, W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 113, 766-72 (4th ed. 1971) [hereinafter cited as PROSSER]. Although no such definition is offered by Prosser, a fair reading of the cases and authorities indicates that this definition is essentially accurate and complete, though admittedly awkward.
9. *Id.* § 114, at 784.
10. *Id.* § 112, at 754.
11. *Id.* § 116, at 796.
12. Kimmerle v. New York Evening Journal, Inc., 262 N.Y. 99, 102, 186 N.E. 217, 218 (1933); *see also* RESTATEMENT OF TORTS, § 559 (1938) [hereinafter cited as RESTATEMENT].

It should be noted that the tort of defamation is in substance one of strict liability.[13] That is to say, the only intent that is required is the intent to communicate something to a third person.[14] In the vast majority of cases, of course, the defendant clearly intends to communicate something to a third person even though she may not intend to defame or harm the plaintiff. In fact, it appears that the only type of case where the courts are willing to concede that the requisite intent to communicate is lacking involves situations analogous to that where the defendant is alone with the plaintiff, defaming her to her face, and an unanticipated intruder overhears the defamatory utterance.[15]

As to all other matters which conceivably could be either intended or negligently performed, the defendant is strictly accountable.[16] It thus makes absolutely no difference that the defendant *does not intend* to lie, defame or harm the plaintiff. Likewise, it is immaterial that the defendant *does not negligently* lie, defame, or harm the plaintiff. The defamer, in short, is strictly liable for whatever she intentionally communicates to a third person about the plaintiff if it turns out that what she said is false, injures the plaintiff's reputation in the eyes of the community, and is neither consented to by the plaintiff nor privileged. At common law, one communicates virtually at her peril. The printed and written word is, in a legal sense, indistinguishable from nitro-glycerin and dangerous animals—if someone is hurt by use of it, liability attaches.[17]

The Libel/Slander Per Se/Per Quod Distinctions

Common law defamation consists of the two torts of libel and slander. Libel is written or printed defamation—defamation em-

13. *See, e.g.*, Coleman v. McClennan, 78 Kan. 711, 98 P. 281 (1908); Cassidy v. Daily Mirror Newspapers Lmtd. [1929] 2 K.B. 331; E. Hulton & Co. v. Jones, [1909] 2 K.B. 444 (C.A.), *aff'd.* [1910] A.C. 20; Bromage v. Prosser, 4 B.C. 247 (1825).

14. *Id.*

15. Joel Eaton observes that "historically, the law of defamation has been characterized by a strict liability as severe as anything found in the law." Eaton, *supra* note 2, at 1352. *See also* RESTATEMENT, *supra* note 12, at § 577, Comment n; W. PROSSER, TORTS 604 (2d ed. 1955); Note, *Developments in the Law-Defamation*, 69 HARV. L. REV. 875, 902-03 (1956). Many commentators have concluded that negligent communication to a third person, or negligent publication, is enough.

16. PROSSER, *supra* note 8, at 771; RESTATEMENT, *supra* note 12, at §§ 579-580.

17. *See, e.g.*, Switzer v. Anthony, 71 Colo. 291, 206 P. 391 (1922) (defendant did not even know of plaintiff's existence); Martin v. The Picayune, 115 La. 979, 40 So. 376 (1906) (intended to praise plaintiff rather than defame him); Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 126 N.E. 260 (1920) (use of name believed to be fictitious); E. Hulton & Co. v. Jones, [1909] 2 K.B. 444 (C.A.), *aff'd.* [1910] A.C. 20.

bodied in some tangible or permanent form and therefore generally subject to wide dissemination.[18] Slander is oral defamation—fleeting and ephemeral and therefore generally not subject to wide dissemination.[19] Any libel which is clearly defamatory, with no need to resort to extrinsic facts[20] to show the defamatory meaning, is said to be actionable per se.[21] The phrase "actionable per se" means that general damage to reputation will be presumed. Slander is actionable per se only if the slanderer says that the plaintiff: (1) committed a crime of moral turpitude; or (2) has venereal disease or something equally loathsome and communicable; or (3) is somehow unfit or not to be trusted in her occupation; or (4) is not chaste.[22]

A libel not actionable per se is actionable per quod.[23] The phrase "actionable per quod" means that there is no presumption of general damage to reputation and that the plaintiff must plead and prove "special damages," usually of a pecuniary nature.[24] Libel per quod exists when the defamatory statement is innocent on its face but takes on a defamatory meaning when illuminated by proof of extrinsic facts.[25]

18. PROSSER, *supra* note 8, § 111, at 737.

19. Most states treat defamation by the electronic media as libel since it is subject to wide dissemination. Annot., 50 A.L.R.3d 1311 (1973). Georgia has created a third category for electronically broadcast defamation called "defamacast." American Broadcasting-Paramount Theatres, Inc. v. Simpson, 106 Ga. App. 230, —, 126 S.E.2d 873, 879 (1972). Prosser criticizes the concept of "defamacast" as "a barbarous new word." PROSSER, *supra* note 8, § 112, at 753.

20. *See* footnote 25 *infra*.

21. PROSSER, *supra* note 8, § 112 at 762.

22. *Id.* at 754-60. The fourth category is relevant only in regard to statements made of or concerning females. Some commentators suggest the existence of a fifth, peculiarly American, category of imputations of communist affiliation.

23. *Id.* at 763.

24. *Id.* at 760.

25. The English common law provided that all libel was actionable without proof of special damages. If a statement was not defamatory on its face, it was labelled libel per quod and extrinsic facts had to be pleaded to make out the defamatory meaning. The extrinsic facts had to be pleaded by way of "inducement," "innuendo" or "colloquium."

If the defamatory meaning could be established only by reference to facts not apparent upon the face of the publication, the plaintiff had to show such facts by way of "inducement." The purpose of the requirement called "innuendo" was to explain the meaning of the words in light of the facts. So, for example, a false statement that the plaintiff had given birth to twins was not defamatory on its face since there was nothing there that would hold the plaintiff up to scorn or ridicule; but when it was pleaded by way of inducement that she was married one week at the time of the birth and by way of innuendo (for the slow to catch on) that she must have had premarital intercourse, a defamatory statement was made out. See Morrison v. Ritchie and Co., [1901-1902] Sess. Cas. 645 (Scot. 2d Div.), 39 Scot. L. Rptr. 432 (1902).

If the publication on its face made no reference to the plaintiff, the plaintiff had to sustain the burden of pleading and proof by way of "colloquium" that the defamatory statement was of and concerning her. So, for example, if the defamatory statement was

Libel per quod, however, can be magically transformed to libel per se if it turns out that the defamatory statement as illuminated by extrinsic facts falls within one of the four classes of slander actionable per se.[26] Slander which does not fall into one of the four categories is only actionable per quod.[27]

The requirement that the plaintiff plead and prove special pecuniary damages in cases which are only actionable per quod often proves to be a difficult obstacle to overcome.[28] If, however, the plaintiff is successful in showing special pecuniary damage, general damages are then appropriate for presumed reputational injury along with non-pecuniary special damages, such as emotional distress or physical illness.

Available Defenses

Assuming that the plaintiff has made out a prima facie case, the defendant may escape liability by establishing that what was communicated was true or that what was communicated was either absolutely or conditionally privileged.[29] Truth is a complete defense if the defendant can show that the imputation is substantially true.[30] Generally, the defendant need not show literal truth but must establish that what was communicated was basically true as to the "sting" of the libel.[31] Truth is generally a total defense regardless of the motives.[32] Belief as to truth, however honest though it may be, is no justification for defamation.[33]

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that "the person in the 'A' frame house next to John Smith's house is an adulterer," the plaintiff would have to plead and prove extrinsic facts, by way of colloquium, that the defamatory statement was about her.

The addition of a special damage requirement to the libel per quod category apparently began because of confusion with the "per se" terminology already in the law of slander. *See, e.g.*, Eaton, *supra* note 2, at 1355. In any event, it now seems to be well established in the United States that special damages must be pleaded and proven in some cases of libel per quod. The authorities are in disagreement however as to what extrinsic facts may serve to illuminate the statement so that it is termed actionable only upon proof of special damages.

26. *See, e.g.*, Broking v. Phoenix Newspapers, 76 Ariz. 334, 264 P.2d 413 (1953); Thompson v. Upton, 218 Md. 453, 146 A.2d 880 (1958); note 25 *supra*.

27. PROSSER, *supra* note 8, § 112, at 754-62.

28. *See generally* Murnaghan, *From Figment to Fiction to Philosophy—The Requirement of Proof of Damages in Libel Actions*, 22 CATH. L. REV. 1 (1972).

29. PROSSER, *supra* note 8, §§ 114-116.

30. Florida Pub. Co. v. Lee, 76 Fla. 405, 80 So. 245 (1918); *but see* White v. White, 129 Va. 621, 106 S.E. 350 (1921).

31. *See, e.g.*, Bell Pub. Co. v. Garrett Eng. Co., 154 S.W.2d 885 (Tex. Civ. App. 1941).

32. C. GREGORY & H. KALVEN, TORTS 1025 n.8 (2d ed. 1969) [hereinafter cited as KALVEN].

33. *See, e.g.*, Fountain v. West, 23 Iowa 9 (1867) *discussed in* KALVEN, *supra* note 32, at 1022 n.3.

Privilege, like truth, is a complete defense if established by the defendant.[34] The rationale for the existence of privilege as a defense is that conduct which may otherwise impose liability is excusable in cases where the defendant is acting in furtherance of some socially useful interest.[35] That is to say, it is more desirable, from a social standpoint, to protect the defendant and allow the plaintiff to go uncompensated. If an absolute privilege is found to exist, the defendant is totally immune from liability. Absolute privilege arises when the defendant is acting in furtherance of some very important social interest; an interest so important that the court is willing to immunize the defendant from liability for false statements without regard to purpose, motive or reasonableness. Absolute privilege is confined to the few situations where there are obvious strong policy reasons in favor of permitting unbridled speech.[36] Thus, statements made in the course of judicial proceedings are absolutely privileged.[37] Similarly, statements made in the course of legislative proceedings are absolutely privileged.[38] Executive communications, arguably made in the discharge of official duties, are likewise absolutely privileged.[39] The media is absolutely privileged for defamation uttered by political candidates who have been granted equal time under the Federal Communications Act.[40]

The more common situation involves a claim of qualified privilege. Qualified privilege arises in situations where the defendant is arguably justified in talking. It is somewhat difficult to define qualified privilege with any degree of precision; the cases reveal repeated reliance on Baron Parke's formulation that a statement is privileged when it is "fairly made by a person in the discharge of some public and private

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34. *See* note 29 *supra*.

35. For a complete discussion of this policy, *see* Harper, *Privileged Defamation,* 22 VA. L. REV. 642 (1936); Veeder, *Freedom of Public Discussion,* 23 HARV. L. REV. 413 (1910).

36. For a general discussion of absolute privilege, *see* PROSSER, *supra* note 8, § 114.

37. This absolute immunity extends to all statements made in the course of the proceedings if arguably relevant to the subject matter of the proceedings: Irwin v. Murphy, 129 Cal. App. 713, 19 P.2d 292 (1933) (the jurors); McDavitt v. Boyer, 169 Ill. 475, 48 N.E. 317 (1897) (counsel); Ginger v. Bowles, 369 Mich. 680, 120 N.W.2d 842 (1963) (the judge); Laun v. Union Elec. Co., 350 Mo. 572, 166 S.W.2d 1065 (1943) (parties to the litigation); Nadeau v. Texas Co., 104 Mont. 558, 69 P.2d 586 (1937) (the published judicial opinions); Massey v. Jones, 182 Va. 200, 28 S.E.2d 623 (1944) (witnesses).

38. The legislative privilege extends to all statements made by the legislators and to printed records of the proceedings. Methodist Federation for Social Action v. Eastland, 141 F. Supp. 729 (D.D.C. 1956); Dillon v. Balfour, 20 L.R. Ir. 600 (1887).

39. Barr v. Matteo, 360 U.S. 564 (1959).

40. Farmer's Educ. & Coop. Union v. WDAY, Inc., 360 U.S. 525 (1959).

duty, whether legal or moral, or in the conduct of one's own affairs in matters where his interest is concerned."[41] The immunity conferred on the defendant is conditioned on her good behavior; the defendant must act properly or else the privilege is defeated. In general, a qualified privilege is defeated by the existence of facts inconsistent with the purpose of the privilege.[42] The common law qualified privilege includes the privilege to fairly comment on matters of public concern by offering opinion, but not false statement of fact,[43] and to fairly and accurately report public proceedings.[44]

This is the oversimplified, yet mind-boggling, common law maze that the Supreme Court ventured into in 1964 to determine the extent to which the first amendment limits a state's power to award damages in a libel action.[45]

THE MATRIX OF RELEVANT SUPREME COURT CASES

New York Times Co. v. Sullivan[46]

In March of 1960, L.B. Sullivan was one of three elected Commissioners to the City of Montgomery, Alabama. As such, he supervised the Montgomery Police Department, Fire Department, Department of Cemetery and Department of Scales. On March 29, 1960, the New York Times ran a full page advertisement entitled "Heed Their Rising Voices." The advertisement stated that thousands of Southern blacks, engaged in a non-violent effort to secure constitution-

41. *See, e.g.*, Watt v. Longsdon, [1930] 1 K.B. 130.

42. The privilege is defeated if the defendant steps outside the scope of the privilege or abuses the occasion by making statements that are malicious or by making statements with knowledge of falsity or with no reasonable belief that they are true. *See, e.g.*, Cook v. Pulitzer Pub. Co., 241 Mo. 326, 357, 145 S.W. 480, 490 (1912). "Malicious" in this regard is defined as "ill will" or acting with bad motives. Brewer v. Second Baptist Church, 32 Cal. 2d 791, 197 P.2d 713 (1948); Joseph v. Baars, 142 Wisc. 390, 125 N.W. 913 (1910). The privilege is also abused if defendant "over-publishes" the statement instead of using some less public alternative. Moyle v. Franz, 293 N.Y. 842, 59 N.E.2d 437 (1944) (use of newspaper); Logan v. Hodges, 146 N.C. 38, 59 S.E. 349 (1907) (defamatory message on post card); Montgomery Ward & Co. v. Nance, 165 Va. 363, 182 S.E. 264 (1935) (speaking so that he would be overheard).

43. Because a false statement of fact is not privileged as an "opinion" or "fair comment," the authorities are in disagreement as to whether it is a true privilege. *See* Eaton, *supra* note 2, at 1363 n.52. Dean Prosser calls the privilege "fair comment" and cites the majority position as protecting only opinion and the minority position as extending to false statements of fact as well as opinions. PROSSER, *supra* note 8, § 115, at 785-92 and § 118, at 819.

44. PROSSER, *supra* note 8, § 115, at 792.

45. N.Y. Times v. Sullivan, 376 U.S. 254 (1964).

46. *Id.*

ally protected rights, were being met by an "unprecedented wave of terror," perpetuated by "Southern Violators," designed to prevent them from enjoying their constitutional rights. The Montgomery police were implicated on a number of occasions as "Southern Violators."

It was uncontroverted that some statements in the advertisement were not accurate descriptions of events which occurred in Montgomery. The text of the advertisement concluded with an appeal for funds and appeared over the names of sixty-four persons, many widely known for accomplishments in religion, public affairs, trade unions and the performing arts. L.B. Sullivan sued the New York Times and four black Alabama clergymen who signed the advertisement. A Montgomery County jury found that Sullivan was defamed and awarded him one-half million dollars, the full amount claimed, against all the defendants. The Alabama Supreme Court affirmed[47] and the Supreme Court granted certiorari "because of the importance of the Constitutional issues involved."[48]

Although the Alabama law that was applied in *New York Times,* both at the trial level and appellate level, did not differ significantly from the profile of the tort of defamation at common law already described, the Supreme Court, with Justice Brennan writing the majority opinion, held

> that the rule of law applied by the Alabama Courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct.[49]

The Court went on to say that the evidence presented in the case was "constitutionally insufficient" to support the judgment for the respondent.[50] The common law then, according to the Supreme Court, was inherently constitutionally defective.

The Supreme Court considered the *New York Times* case *"against* the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials."[51] The

47. 273 Ala. 656, 144 So. 2d 25 (1962).
48. 376 U.S. at 264.
49. *Id.*
50. *Id.* at 264-65.
51. *Id.* at 270.

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Court quoted Judge Learned Hand to the effect that the first amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection" and that although "[t]o many this is . . . folly" we have nonetheless, as a society, "staked upon it our all."[52] In view of this national commitment to robust wide-open debate, Justice Brennan reasoned "that erroneous statement is inevitable in free debate and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive . . . .' "[53] Brennan cited Judge Edgerton for the simple truth that "whatever is added to the field of libel is taken from the field of free debate."[54]

The Court then constructed legal rules to ensure that our national commitment was not compromised. According to the Court, the Constitution requires

> a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[55]

Moreover, the aggrieved official must prove "actual malice" with "convincing clarity"—a standard of proof which is arguably more demanding than proof by a mere preponderance of evidence.[56]

Thus was born the constitutional privilege in defamation cases. The original and exclusive owner of the privilege, it should be noted, was the "citizen critic" of government.[57]

Curtis Publishing Co. v. Butts and Its Companion, Associated Press v. Walker[58]

Three years after the landmark *New York Times* decision, a majority of the Supreme Court agreed to extend the constitutional privilege to defamatory criticism of "public figures." Although Mr. Justice Harlan announced the result in both *Butts* and *Walker*, a majority of the Court agreed with Mr. Chief Justice Warren's conclusion in his con-

52. 376 U.S. at 270, *quoting* Learned Hand in United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).
53. 376 U.S. at 271.
54. *Id.* at 272.
55. *Id.* at 279-80.
56. *Id.* at 285-86.
57. *But see* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).
58. 388 U.S. 130 (1967).

curring opinion[59] that the *New York Times* test would apply to criticism of "public figures" in addition to "public officials."[60] The Court's extension of the constitutional privilege to defamatory criticism of "public figures" made the *New York Times* privilege available to those who defamed people "intimately involved in the resolution of important public questions" or who "by reason of their fame, shape events in areas of concern to society at large."[61]

The *Butts* case originated with an article in the Saturday Evening Post accusing Wally Butts of conspiring to "fix" a football game between the University of Georgia and the University of Alabama. At the time of the article, Butts was the athletic director of the University of Georgia. The article accused Butts of giving team secrets to the opposition. Butts brought a libel action in federal court against Curtis Publishing Co., the publisher of the Saturday Evening Post, seeking $5,000,000 compensatory and $5,000,000 punitive damages. At trial, the defendant relied on the defense of truth. The jury returned a verdict for $60,000 in general damages and $3,000,000 in punitive damages.[62] The court reduced the total award to $460,000 by remittitur. The Court of Appeals for the Fifth Circuit affirmed[63] and the Supreme Court granted certiorari and affirmed the decision.

The *Walker* case, the companion case to *Butts*, arose out of the distribution of a news story giving an eyewitness account of events on the campus of the University of Mississippi on the night of the now infamous riot which erupted as a consequence of federal efforts to enforce a judicial decree ordering the enrollment of James Meredith as the first black student at the university. The story stated that General Walker, a retired career soldier and staunch segregationist, personally led a charge against the federal marshalls' attempt to carry out the court order. Walker sued the Associated Press in the Texas state courts and asked for $2,000,000 in compensatory and punitive damages. Walker denied taking part in any "charge" against federal officials. Although the Associated Press defended on the basis of truth, a verdict of $500,000 compensatory damages and $300,000 punitive damages was returned. The trial judge, however, refused to enter the punitive award on the grounds that there was no evidence of "actual malice."

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59. *Id.* at 162.

60. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 336 n.7 (1974), which provides the scorecard without which one can't tell the players.

61. 388 U.S. 130, 164 (1967) (Warren, C.J., concurring).

62. Curtis Publ. Co. v. Butts, 225 F. Supp. 916 (N.D. Ga. 1964).

63. Curtis Publ. Co. v. Butts, 351 F.2d 702 (5th Cir. 1965).

Both sides appealed and the Texas Court of Civil Appeals affirmed. After the Supreme Court of Texas denied a writ of error, the Supreme Court of the United States granted certiroari and reversed.

The rationale used by the Chief Justice in his concurring opinion was that "differentiation between 'public figures' and 'public officials' . . . has no basis in law, logic or First Amendment policy."[64] The same test should apply both to the public figure plaintiff and public official plaintiff; each must show "actual malice" in order to recover. "[W]alker was a public man in whose public conduct society and the press had a legitimate and substantial interest."[65] Because he did not prove actual malice, Walker could not recover. Butts too was a public figure. Unlike Walker, however, Butts proved "actual malice," since the jury's punitive damage award was preceded by an instruction that such an award was appropriate only if "actual malice" was found. Butts, then, could recover. The result is that the privilege which once belonged only to the "citizen critic of government" is extended to the "citizen critic" of the public person.

Rosenbloom v. Metromedia, Inc.[66]

Approximately four years after *Butts* and *Walker*, the Supreme Court took the *New York Times* privilege one logical step further. Justice Brennan, writing for the plurality, concluded in *Rosenbloom* that the *New York Times* protection should extend to defamatory falsehoods relating to private persons if the statements concerned matters of general or public interest.

George Rosenbloom was a distributor of "nudist magazines" in the Philadelphia metropolitan area. During an obscenity crackdown, he was arrested for selling allegedly obscene material as he was making a delivery to a retail dealer. A few days after the arrest, the police obtained a search warrant to search Rosenbloom's home and warehouse and seized Rosenbloom's allegedly obscene inventory. Rosenbloom, who by this time was out on bail, was again arrested. Following the second arrest, a Metromedia Inc. radio broadcast included an item about Rosenbloom. The report broadcasted stated that obscene materials had been confiscated at Rosenbloom's home.

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64. 388 U.S. at 163 (Warren, C.J., concurring).
65. *Id.* at 165 (Warren, C.J., concurring).
66. 403 U.S. 29 (1971).

Rosenbloom then sued various city and police officials and several local news media alleging that the material seized was not obscene. Rosenbloom asked for injunctive relief prohibiting further police harrassment as well as further publicity of the arrests. Metromedia, in turn, reported that "girlie book peddlers" in the "smut literature racket" were seeking judicial relief. Rosenbloom, however, was not mentioned by name. Rosenbloom subsequently was acquitted of the criminal obscenity charged on the grounds that his magazines were not obscene. Following the acquittal, he filed a libel suit in federal district court, alleging that Metromedia's unqualified characterizations of his books as "obscene" and of him as a "girlie book peddler" in the "smut literature racket" were defamatory and constituted libel per se.

At trial, Metromedia's defenses were truth and privilege. After receiving instructions which did not apply the *New York Times* privilege, but clearly articulated common law rules, the jury returned a verdict for Rosenbloom and awarded him $25,000 in general damages and $725,000 in punitive damages.[67] The trial court then reduced the punitive damage award to $250,000 on remittitur. The Court of Appeals for the Third Circuit, reversed, holding that judgment be entered for Metromedia because Rosenbloom's evidence did not reasonably support the conclusion that Metromedia had acted with "actual malice" as constitutionally defined.[68] The Supreme Court granted certiorari and affirmed the judgment of the court of appeals.[69]

In affirming the lower appellate court, the Supreme Court in *Rosenbloom* extended the constitutional privilege to protect defamatory falsehoods concerning "private persons" if the statements concerned matters of "general or public interest." The Court focused on society's interest in learning about certain issues: "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved."[70] "Private individuals involved in an event of public interest"[71] are the legal equivalents of "public officials" and "public figures." All have to prove "actual malice" to recover in a defamation action.

67. Rosenbloom v. Metromedia, Inc., 289 F. Supp. 737 (E.D. Pa. 1968).
68. Rosenbloom v. Metromedia, Inc., 415 F.2d 892 (3d Cir. 1969).
69. 403 U.S. at 29.
70. *Id.* at 43.
71. *Id.* at 31.

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The Court went on to carefully analyze the role of the free press, the public's right to know, and the importance of the first amendment, concluding that the constitutional protection extended "to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."[72] The critical inquiry concerns the subject matter of the discussion.[73]

Gertz v. Robert Welch, Inc.[74]

By 1974, hundreds of post-*New York Times* defamation cases had been before the courts. The results of this avalanche of litigation was a continuing struggle to find the appropriate balance between the rights of free speech and press and the right to be free from character attacks. In *Gertz v. Robert Welch, Inc.*,[75] the Supreme Court reversed the trend by severely limiting, if not overruling, *Rosenbloom.*

In 1968 a Chicago policeman named Nuccio shot and killed a youth named Nelson. The policeman was subsequently found guilty of second degree murder by state prosecutors. The Nelson family retained Elmer Gertz to represent them in civil litigation against Nuccio.

Robert Welch published *American Opinion,* a monthly periodical of the John Birch Society. The magazine had long warned of a nationwide conspiracy to discredit local law enforcement agencies and create a national police force supporting a communist dictatorship. As a part of his effort to alert the public, Welch commissioned and published an article on the policeman's murder trial. In the article, Gertz was portrayed as a communist official with a criminal record. Statements made in the article contained serious factual inaccuracies.

Gertz filed an action for libel in the United States District Court for the Northern District of Illinois,[76] alleging injury to his reputation as a lawyer and citizen. Welch claimed that he was entitled to the constitutional privilege and asked for summary judgment on the grounds that Gertz would not be able to show "actual malice." The court denied the motion, concluding that Gertz might be able to prove "actual malice." After all the evidence was heard, the district court ruled that Gertz was not a public figure or public official and therefore did not

72. *Id.* at 44.
73. *Id.*
74. 418 U.S. 323 (1974).
75. *Id.*
76. Gertz v. Robert Welch, Inc., 306 F. Supp. 310 (ND. Ill. 1969).

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have to prove "actual malice" to recover. The case was submitted to the jury and the jury determined that the appropriate measure of damages was $50,000.

Following the jury verdict and on further reflection, the district court entered judgment for the defendant notwithstanding the verdict, anticipating the *Rosenbloom* decision.[77] The district court concluded that discussion of a public issue was constitutionally protected, that Welch's statements pertained to a public issue, and that Gertz had not met the *New York Times* "actual malice" standard.[78] The *Rosenbloom* decision intervened and the United States Court of Appeals for the Seventh Circuit then agreed with the district court and affirmed its judgment, citing *Rosenbloom*.[79] The United States Supreme Court granted certiorari to reconsider the extent of a publisher's constitutional privilege against liability for defamation of a private citizen and reversed.[80]

The Supreme Court in *Gertz* carefully reviewed the development of the law of defamation through *New York Times* and *Rosenbloom* in light of the competing interests of free speech and press and of protecting an individual's reputation. The Court recognized the critical importance of free speech and press to robust debate; the Court also recognized that "absolute protection for the communications media would require a total sacrifice of the competing value served by the law of defamation"[81] and that the "legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood."[82] Balancing the interests, the Court concluded that the protection afforded the media under *Rosenbloom* was too broad: "[T]he extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge this legitimate state interest to a degree that we find unacceptable."[83]

Thus the "public or general interest" test for determining the applicability of the *New York Times* standard was rejected as inadequately serving the competing values at stake. The Supreme Court concluded that the states should retain substantial latitude in their

77. See note 66 *supra* and accompanying text.
78. 322 F. Supp. 997 (N.D. Ill. 1970).
79. 471 F.2d 801 (7th Cir. 1972).
80. Gertz v. Robert Welch, 418 U.S. 323 (1974).
81. 418 U.S. 323, 341 (1974).
82. *Id.* at 341.
83. *Id.* at 346.

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efforts to fashion a remedy for defamatory falsehoods about private individuals[84] and that so long as liability was not imposed without fault, the states could define for themselves the appropriate standard of liability.[85]

To guard against the states using their new latitude to intrude upon the first amendment, the Court then stated the requirement that state proscribed remedies "reach no farther than is necessary to protect the legitimate interest involved" and concluded that "[i]t is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury."[86] Thus, presumed or punitive damages cannot be recovered by the private plaintiff who establishes liability under a less demanding standard than *New York Times.*

The Court then turned its attention to the continuing dilemma of the "public person" as plaintiff. The *Gertz* Court endorsed its prior decisions in *Butts* and *Walker* and sought to further define the status of a public figure. Under *Gertz,* a public figure designation may rest on either of two alternatives:

> In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.[87]

For the second category—public people for a limited range of issues —it "[i]s preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation."[88] Public people in general enjoy "significantly greater access to the 'channels' of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy."[89] They typically also "invite attention and comment."[90] In contrast, "private individuals are not only more

84. *Id.* at 345-46.
85. *Id.* at 347.
86. *Id.* at 349.
87. *Id.* at 351.
88. *Id.* at 352.
89. *Id.* at 344.
90. *Id.* at 345.

vulnerable to injury than public officials and public figures; they are also more deserving of recovery."[91]

The Court concluded that Gertz was a private person and that the *New York Times* standard was not applicable. Because the jury was allowed to impose liability without fault and was permitted to presume damages without proof of actual injury, a new trial was ordered by the Court.[92]

Time, Inc. v. Firestone[93]

Less than two years later, in 1976, the Supreme Court added yet another link to the chain of defamation cases that began 12 years earlier with *New York Times v. Sullivan.* This time the Court was called upon to refine its definition of "public figure."

In 1964, Mary Alice Firestone and Russell Firestone sought the dissolution of their marriage in Florida. Since Russell was heir to one of America's wealthiest industrial fortunes, the proceeding drew a great deal of attention in the Miami press.[94] After judgment in the divorce proceeding was rendered, *Time Magazine* printed an item under its "Milestones" section, which stated that Russell Firestone had been granted a divorce based on the grounds of extreme cruelty and adultery. The article characterized the marriage as having "enough extramarital adventures on both sides to make Dr. Freud's hair curl."[95]

Within a few weeks of publication, Mary Alice Firestone demanded a retraction from *Time.* When the magazine refused, a libel action was commenced against it in Florida circuit court. A jury ultimately awarded Ms. Firestone $100,000 in damages. The decision was reviewed by the Florida District Court of Appeals,[96] and ultimately affirmed by the Florida Supreme Court.[97] The United States Supreme Court granted certiorari in 1975.[98]

91. *Id.*

92. The *Gertz* decision, according to some commentators, applies only to media defendants. A leading proponent of this view is Joel Eaton. Since Justice Powell, writing for the majority in *Gertz,* refers to the defendant randomly as a publisher, a newspaper, a broadcaster, media, communications media, news media, broadcast media and the press, this view is not without merit. No express limitation upon the holding to media defendants is stated. Lower courts that have dealt with the problem have refused to recognize a distinction between media and non-media defendants. *See* Eaton, *supra* note 2, at 1416 n.271 for a reference to the appropriate lower court cases.

93. 424 U.S. 448 (1976).

94. *Id.* at 485.

95. *Id.* at 450.

96. 279 So. 2d 389 (Fla. Dist. Ct. App. 1973).

97. 305 So. 2d 172 (Fla. 1974).

98. 421 U.S. 909 (1975).

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Time, Inc. contended that as a publisher it was entitled to the *New York Times* conditional privilege and thus could not be found liable unless it was established that the article was published with "actual malice." In support of this contention, *Time* argued that Ms. Firestone was a "public figure" and that the proceeding was of "a class of subject matter which . . . deserves the protection of the 'actual malice' standard."[99] The Supreme Court rejected both propositions.

The Court applied the *Gertz* criteria for defining a public figure and found that Ms. Firestone did not attain this status; "[r]espondent did not assume any role of especial prominence in the affairs of society . . . and she did not thrust herself to the forefront of any particular public controversy . . . ."[100] The Court explained that Ms. Firestone did not voluntarily enter the public spotlight or freely choose to publicize issues concerning her married life. She had to use the courts to obtain a divorce. *Time's* attempt to "equate 'public controversy' with all controversies of interest to the public" failed.[101] The Court noted that "[w]ere we to accept this reasoning, we would reinstate the doctrine advanced in the plurality opinion in *Rosenbloom v. Metromedia, Inc.*"[102]

Despite the fact that the *Firestone* Court rejected the argument that the *New York Times* privilege should extend to the *Time* publisher, the Court nevertheless refused to affirm the Florida court and remanded the case for readjudication. The Court noted that the record did not indicate evidence of fault on the part of the defendant charged with publishing the defamatory material. Since "*Gertz* established . . . that not only must there be evidence to support an award of compensatory damages, there must also be evidence of some fault on the part of a defendant,"[103] the Court had no choice but to remand for further proceedings.

THE LABYRINTH AFTER FIRESTONE

Gertz fundamentally altered the labyrinth. As Justice White remarked, "[l]est there be any mistake about it, the changes wrought by the Court's decision cut very deeply."[104] No area of the common law maze is unaffected. The most important lines of delineation are

99. 424 U.S. 448, 453 (1976).
100. *Id.*
101. *Id.* at 454.
102. *Id.*
103. *Id.* at 461.
104. 418 U.S. 323, 371 (1974) (White, J., dissenting).

public plaintiffs and private plaintiffs. It may also be important to distinguish media from non-media defendants. A consideration of the possible litigant combinations reveals the rough outline of the new maze.

Gertz makes it clear that a public person suing a mass media defendant must show "actual malice" to recover. *Gertz* also makes it clear that a private person suing a mass media defendant must show fault and actual injury to recover. But because of the ambiguity in *Gertz*, a public plaintiff suing a non-media defendant doesn't know what she has to prove to recover. It is simply not clear whether *Gertz* is limited to cases involving media defendants or applies as well to non-media speakers.[105]

If *Gertz* is limited to the media, a public person, in particular kinds of suits against a non-media speaker, will be entitled to recover on a common law strict liability theory. For example, if a non-media defendant speaks privately about the private life of a public person, constitutional limitations on liability are inapposite. If *Gertz* applies to non-media speakers, a public person would presumably have to show "actual malice" to recover.

A private person suing a non-media defendant faces a similar dilemma. If *Gertz* is limited to the media, the private person is entitled to rely on a common law strict liability theory in suits against non-media speakers. If *Gertz* applies to non-media speakers, then arguably the private plaintiff must show at least fault and actual injury.

If all of this sounds to you like so much hocus-pocus, take heart: you are not alone. The fact is that nobody, with the possible exception of the Supreme Court Justices, knows what *Gertz* means. A clear outline of the labyrinth will not be perceptible until the Court clarifies its approach to defamation problems. A suggested approach follows.

DEFAMATION AS A CONSTITUTIONAL TORT: WITH ACTUAL MALICE FOR ALL

In 1967 Harry Kalven made this observation concerning the potential of *New York Times* as a precedent: "If it is applied across the board in these cases, it retains its salience as a key precedent and it gives the Court a touchstone for the future; if the standard is nibbled away, a promising starting point for analysis of future problems

105. *See* note 92 *supra* and accompanying text.

is wasted."[106] The reference here to Kalven's observation is the starting point for a suggested analysis which does not discriminate between public-people-plaintiffs and private-people-plaintiffs and which does not discriminate between media defendants and non-media defendants. In this analysis, the first amendment protects the right to communicate about people. A communicator is only liable if she communicates a defamatory statement with "actual malice." Thus, in this analysis, every person has a constitutional privilege to communicate thoughts about people. The *New York Times* privilege is the touchstone, to be applied across the board, rather than nibbled away.

The Public Plaintiff/Private Plaintiff Distinction

The Court in *Gertz* makes it abundantly clear that one critical determination to be made in defamation cases is whether the plaintiff is a public person. The justifications for the distinction are that public people invite comment about themselves and have access to the media and are therefore less deserving of recovery and less vulnerable to injury than private people.

The rationale of the first justification is that the public person voluntarily assumes the risk, inherent in public life, that she may be burned by the public spotlight.[107] In a sense, then, the constitutional privilege is merely an assumption of risk defense in federal disguise."[108] But is it fair to say that a public person voluntarily assumes the known risk of character assassination? Justice Brennan, dissenting in *Gertz*, thought that:

> [T]he idea that certain 'public figures' have voluntarily exposed their entire lives to public inspection while private individuals have kept theirs carefully shrouded from public view is, at best, a legal fiction. In any event, such a distinction could easily produce the paradoxical result of dampening discussion of issues of public or general concern because they happen to involve private citizens while extending constitutional encouragement to discussion of aspects of lives of 'public figures' that are not in the area of public or general concern.[109]

Even though the Court emphasized the notion of voluntary exposure, it recognized that one could become a public person involun-

106. KALVEN, *supra* note 32, at 1269.
107. *See* Eaton, *supra* note 2, at 1420.
108. *Id.*
109. 418 U.S. at 364 (Brennan, J., dissenting).

tarily: "Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare."[110] The "exceedingly rare" case presumably would include the cases of one who is a relative of a famous person and one who is a victim or passive participant in an event of public interest. In any event, by acknowledging that there may be such a person as an involuntary public person, it appears that access to the media alone can be sufficient to classify one as a public person.

The second justification, that the public person has access to the media and therefore is less vulnerable to injury because of her opportunity to rebut the charges, fails to comport with reality in at least two fundamental ways. To begin with, it is not entirely accurate to say that the public person has superior access to the media. *Miami Herald Publishing Co. v. Tornillo*,[111] decided contemporaneously with *Gertz*, suggests the opposite. In that case, the Court held that a Florida statute that granted a political candidate a "right of reply" to answer newspaper attacks on his record was unconstitutional because it violated the first amendment guarantee of a free press. The clear implication of *Tornillo* is that a public person who is defamed by the media has no legal right to reply through the media. Secondly, it is entirely unclear whether access to the media is an effective self-help remedy to a defamatory statement. It is a well known truism that the truth rarely catches up with the lie. Moreover, one who proclaims innocence in the face of a false charge about her may well be thought to protest too much. Indeed, the Court recognized in *Tornillo* that access to the media is often not an effective remedy:

> Of course, an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie. But the fact that the self-help remedy of rebuttal, standing alone, is inadequate to its task does not mean that it is irrelevant to our inquiry.[112]

The Court did not go on in *Tornillo* to indicate how it is relevant to our inquiry. However, the Court in *Gertz* did go on to explain that:

> Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public person-

110. *Id.* at 345.
111. 418 U.S. 241 (1974).
112. 418 U.S. at 344 n.9.

> ality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.[113]

Just what this means is entirely unclear.

We do know that the public person designation may rest on either of two alternative bases. According to the Court, one may achieve such a degree of fame or notoriety that she becomes a public person for all purposes. In the vast majority of cases, however, the Court states that a person is a public person for a limited range of issues. If, as suggested, one must look to the particular controversy to make the public person determination in the vast majority of cases, then it appears that the *Rosenbloom* analysis has been retained.

This is so because the Court states that in evaluating the nature and extent of an individual's involvement in a controversy for the purpose of determining whether that person is a public person, the critical factor to be considered is whether the individual has "thrust himself into the vortex of this *public* issue . . . in an attempt to influence its outcome."[114] That is to say, although participation in a public issue is "not exactly a twin sister of *Rosenbloom's* 'involvement in a matter of public concern,' . . . the two concepts are close enough to be first cousins."[115] Somewhat ironically, the Court in *Gertz* said it was abandoning *Rosenbloom* because:

> The extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge . . . legitimate state interest[s] to a degree that we find unacceptable. And it would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of "general or public interest" and which do not—to determine, in the words of Mr. Justice Marshall, "what information is relevant to self government." We doubt the wisdom of committing this task to the conscience of judges.[116]

As Justice Marshall himself observed in *Firestone,* the Court was on the one hand rejecting the propriety of judicial inquiry into the legitimacy of interest in a particular subject while sanctifying it on the other with its public figure analysis.[117]

113. *Id.* at 352.
114. *Id.* (emphasis added).
115. Eaton, *supra* note 2, at 1423.
116. 418 U.S. at 346 (citation omitted).
117. *Id.* at 488 (Marshall, J., dissenting).

The point is that it is just not possible under *any* analysis to determine public person status without determining whether the relevant issue is a public issue. Public person status, quite simply, depends to a large degree on whether the issue the person is involved in is categorized as a public issue, public controversy, or matter of public concern. If in fact this is so, and it is not possible to determine public person status without determining whether an issue is a public issue, then the Court has done nothing more than indirectly commit to the conscience of judges a task that it believes cannot be appropriately performed by the judiciary. In a roundabout fashion, the Court is determining what information is relevant to self-government—an admittedly dangerous practice. The better approach would be to simply protect communications about people without endeavoring to give special protection to communications about "public people."

The Media/Non-Media Distinction

When the Supreme Court in *New York Times* determined "for the first time the extent to which the Constitutional protections for speech and press limit a state's power to award damages in a libel action brought by a public official,"[118] no mention was made of a distinction between the rights afforded the media defendant and the rights afforded the non-media defendant. The privilege belonged to the citizen-critic and not the media-critic. In fact, the suggestion that the protection of speech and press might be different is a fairly recent suggestion that, so far, is limited to the minds of only a few legal scholars.[119]

In any event, no Supreme Court defamation case after *New York Times* and before *Gertz* suggests that this is an important distinction.[120] The Court in *Gertz* suggests the distinction but offers no rationale whatsoever for it; the point is, there apparently is none.[121]

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118. 376 U.S. 254, 256 (1964).

119. *See* FRANKLIN, *Cases and Materials Mass Media Law* 66-67 (1st ed. 1977); Stewart, *Or of the Press*, 26 HAST. L.J. 631 (1975); Nimmer, *Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HAST. L.J. 639 (1975); Lange, *The Speech and Press Clauses*, 23 U.C.L.A. L. REV. 77 (1975); Nimmer, *Speech and Press: A Brief Reply*, 23 U.C.L.A. L. REV. 120 (1975).

120. It could be argued that the *Rosenbloom* plurality opinion speaks in terms of protection for the press rather than freedom of speech, but a thorough reading of the opinion reveals no clear suggestion that this is an important distinction.

121. Perhaps the best attempt to create a rational basis for such a distinction is Pro-

The "ultimate expansion of *Gertz* to provide equal standards for recovery against both media and non-media defendant seems predictable"[122] if, in fact, one can call it an "expansion" at all. The well-established theory of our Constitution appears to be that "every citizen may speak his mind and every newspaper express its view."[123] The case law clearly supports the view that the constitutional privilege is as available to the non-media defendant as to the media defendant.

The historical approach to the defamation problem suggests a profound unwillingness to afford special rights to "the press." The traditional approach is that the lonely pamphleteer, the academic researcher, the novelist, the political pollster and the soap-box orator possess the same first amendment rights as the established "press."[124] The traditional approach is especially viable today; any person with access to a Xerox copier machine has media power. As a practical matter, in this technological age, we are all communications media.

The lower courts that have dealt directly with the question have uniformly understood the *Times* doctrine to apply equally to media and non-media defendants.[125] Thus, a speaker at a public rally,[126] a neighborhood grocery store owner[127] and an individual complaining about police burtality[128] have all been afforded the constitutional privilege. The unmistakeable thrust of these and other cases is that the constitutional privilege is available to the non-media defendant.

In deciding to whom the constitutional privilege is available, it is entirely inappropriate to distinguish the media from the non-media defendant. The fact that mass media defendants are likely to disseminate their statements more widely than non-mass media defendants goes directly to the issue of damages and not at all to the issue of whether the privilege is available. Communications by people about people are constitutionally protected, not just communications by the media.

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fessor Dresser's article. Dresser, *First Amendment Protections Against Libel Actions: Distinguishing Between Media and Non-Media Defendants,* 47 S. CAL. L. REV. 902 (1974); *See also* Robertson, *Defamation and the First Amendments,* 54 TEX. L. REV. 199 (1976).

122. Eaton, *supra* note 2, at 1417.
123. 376 U.S. 254, 299 (1964) (Goldberg, J., concurring in result).
124. Branzburg v. Hayes, 408 U.S. 665, 704-05 (1972).
125. Eaton, *supra* note 2, at 1406.
126. Fox v. Kahn, 421 Pa. 563, 221 A.2d 181, cert. denied, 385 U.S. 935 (1966).
127. Jaworsky v. Padfield, 211 So.2d 122 (La. 1968).
128. Jackson v. Filliben, 281 A.2d 604 (Del. 1971).

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CONCLUSION

Compelling reasons support the notions that, for defamation purposes, public people ought not to be distinguished from private people and media defendants ought not to be distinguished from non-media defendants. The simple truth is that one's legal rights and obligations ought not to depend on one's status[129] as a "public" person or as a "media" person. No logical reasons exist to support the notion that legally relevant distinctions ought to be drawn among victims of defamation or among publishers of defamation.

In this analysis, the tort of defamation clearly takes on a constitutional dimension. A constitutional privilege belongs to each of us when we communicate thoughts about other people. In this analysis, a degree of success is achieved in reconciling the important competing interests which favorably reflects the "culture, liberality and practical ability"[130] of our technological age. A constitutional privilege[131] is applied across the board and is not nibbled away. The common law maze is avoided by offering constitutional protection for all communications made by people about people.

If, as a practical matter, these distinctions were not drawn, the tort of defamation would be stripped of many of the inconsistencies and perverse rigidities which made the common law of defamation absurd in theory and mischievous in practical application. A qualified privilege, grounded in the first amendment, would be available in every defamation case.

In essence, defamation would very much resemble an intentional tort. The injured plaintiff would have to prove with convincing clarity that the defendant made a defamatory statement with "actual malice" —that is, with knowledge that it was false or with reckless disregard of whether it was false or not. If the plaintiff could prove this, she

129. Perhaps the one other area of the law where a person's status determines her legal rights involves the rights of those who enter upon the land of another and are injured by a condition on the land. The common law approach was to afford varying degrees of protection to trespassers, licensees and invitees. For a thorough and convincing critique of this approach to tort liability, *see* the famous case of Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

130. Veeder, *supra* note 1, at 546.

131. The author leaves for a subsequent article a discussion of the relative advantages and disadvantages of the particular privilege, based on the "actual malice" standard, that the Supreme Court has left with us.

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could recover nominal, compensatory and punitive damages. The "per se/per quod" distinction would be discarded; the libel/slander distinction would be unnecessary. Along with them, the whole panoply of damages-related problems would be obviated. The tort would have a constitutional dimension, with proof of "actual malice" required for all who complain of injury to their reputation.