

PRIVATE OR PUBLIC? ELIMINATING THE *GERTZ* DEFAMATION TEST

Jeff Kosseff†

TABLE OF CONTENTS

I. Introduction.....	250
II. The Private Figure.....	251
A. <i>Sullivan</i> Brings Defamation under the First Amendment	251
B. <i>Gertz</i> Provides Greater Protection for Private Figures.....	254
III. Applying the Murky Distinction of <i>Gertz</i>	256
A. Impact on the Community.....	258
B. Judges as Editors: Determining Newsworthiness	260
C. What is Voluntary?	260
IV. Why <i>Gertz</i> is Outdated.....	262
A. Shrinking and Evolving Newsrooms	263
B. <i>Gertz</i> Reasoning no Longer Applies	266
1. Self-help for the Masses	266
2. What is voluntary?.....	270
V. Other Proposals to Modify <i>Gertz</i>	272
A. Eliminating the Actual Malice Requirement Altogether.....	273
B. Requiring Actual Malice for only Matters of Public concern	274
VI. Implications of Requiring Actual Malice in All Cases	275
VII. Conclusion	279

Abstract

More than thirty years ago, the Supreme Court adopted a two-part constitutional framework for defamation claims. Although public figures and officials are required to demonstrate actual malice, private figures are not. In the years since, the media has evolved tremendously. Monopoly information sources such as newspapers and television stations have shrunk, and smaller, independent Internet sites have flourished. Moreover, the rapid growth of the Internet has blurred the distinction between public and private figures.

These technological changes have rendered the public/private distinction

† Law Clerk to the Honorable Milan D. Smith, Jr., United States Court of Appeals for the Ninth Circuit. Georgetown University Law Center, J.D., 2010, University of Michigan, M.P.P., 2001, B.A., 2000. This article originated as a paper written for a seminar taught by Adjunct Professor Kenneth Jost, who provided valuable feedback throughout the writing and editing process. Thanks also to Professor Jeffrey Shulman for helpful comments. The views expressed in this article are only those of the author.

unworkable and unfair. This Article proposes that courts require a demonstration of actual malice for all defamation claims, eliminating the public/private dichotomy. A requirement of actual malice in all cases still provides sufficient safeguards for the plaintiff in the types of cases that defamation law has long been intended to address.

I. INTRODUCTION

Americans increasingly receive news from blogs, citizen journalists, philanthropic endeavors, and other emerging media. The media that have dominated for decades—corporate-owned broadcasters and newspapers—are shrinking and playing a less important role in informing the public about current events.¹ The Internet has caused massive structural changes in the news media.² But the standards governing newsgatherers' largest point of legal vulnerability—defamation—have not evolved similarly. Defamation standards were set in a patchwork of Supreme Court opinions in the sixties and seventies that were designed for that era's media landscape.³ The decisions pit defamed plaintiffs against massive media corporations, and the bias often has been in favor of defending David against big-media Goliath.

Media has evolved tremendously since the Supreme Court set forth the doctrinal tests, but the law has remained largely unchanged. Newspapers and television stations have consolidated as their revenues and profits have fallen. And in recent years, new competitors have emerged which lack the resources of traditional media companies but are gaining prominence and market share.⁴ The Internet makes it possible to have a loud voice without being a multi-billion-dollar corporation. This is a stark contrast with the facts of the cases that underlie the Supreme Court's defamation law doctrine.

In 1964, *New York Times v. Sullivan* held that to sue for libel, public officials are required to demonstrate actual malice.⁵ But ten years later, the Court in *Gertz v. Robert Welch, Inc.* created a weaker standard for other plaintiffs. Private figures, the Court held in *Gertz*, do not have to demonstrate actual malice to recover compensatory damages in libel lawsuits.⁶ Since then, state and federal courts have engaged in the arduous task of analyzing every defamation claim to determine whether the plaintiff is a private figure. That preliminary determination often can be dispositive. Without the burden of demonstrating that a false and damaging statement was made with actual malice, the plaintiff is far more likely to succeed.

Massive technological and economic changes in the media over the past

1. Patricia Sullivan, *As the Internet Grows Up, the News Industry Is Forever Changed*, WASH. POST, June 19, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/13/AR2006061300929.html>.

2. *Id.*

3. *See infra* Part II.A–B.

4. *See infra* Part IV.A.

5. "Actual malice" means that the defendant made the allegedly defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

6. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

three decades have rendered the *Gertz* public/private distinction unworkable and unfair. Although there has never been a clear line between public and private figures, that distinction is more blurry than ever in the Internet era. This Article proposes that courts require a demonstration of actual malice for all defamation claims, eliminating the public/private dichotomy. A requirement of actual malice in all cases still provides sufficient safeguards for the plaintiff in the types of cases that defamation law has long been intended to address.

Part II reviews libel law that led up to *Gertz* and then examines the *Gertz* background and holding.

Part III examines how *Gertz* has been applied in defamation cases in the three decades since then. Courts have not consistently ruled whether a plaintiff is a private figure, often reaching different results with very similar facts. The older media do not have the resources they once did to ensure that every fact cannot be challenged, and the new upstarts also lack such resources.

Part IV explains why the *Gertz* distinction is outdated. New Web-based and nonprofit news operations are assuming the watchdog role once reserved for large media. Part IV also addresses the two reasons the Supreme Court gave in *Gertz* for not requiring private figures to demonstrate actual malice: the relative inability of “self help” for them to correct damaging information, and the fact that private plaintiffs did not voluntarily expose themselves to the public, as public officials and figures have done.⁷ Both justifications are outdated in the new media landscape.

Part V examines other proposals to reform the *Gertz* regime and explains why they are inconsistent with First Amendment values.

Part VI explains the implications of my proposal: a revision of constitutional libel rules to require actual malice for all defamation claims. Actual malice is not an insurmountable barrier and strikes the proper balance between First Amendment rights and the compensation of those harmed by defamation.

II. THE PRIVATE FIGURE

This Part traces the history of defamation law that led to the binary public/private analysis of *Gertz*. This Part then examines how the distinction has been applied in the past thirty-four years and argues that *Gertz* provides an unclear standard, particularly in the Internet age.

A. *Sullivan Brings Defamation under the First Amendment*

Before 1964, there was no First Amendment protection for defendants accused of defamation.⁸ Instead, false speech was governed by common law tort doctrine.⁹ The court only needed to determine whether the defendant

7. *Id.*

8. See Stephen A. Siegel, *Injunction for Defamation, Juries, and the Clarifying Light of 1868*, 56 BUFF. L. REV. 655, 656 (2008) (“Speech that was simply mistaken could be the predicate for civil liability.”).

9. Some states applied the negligence standard to defamation claims, while a few applied the more

uttered or published an untrue statement that damaged the plaintiff, although state statutory and common law may have set additional requirements for recovery of damages.¹⁰ But a constitutional dimension was added in 1964, when the Supreme Court decided *New York Times Co. v. Sullivan*. *Sullivan*'s history demonstrates the First Amendment value in setting limits on defamation claims.

In dispute was a full-page newspaper advertisement alleging that college students engaged in civil rights protests in Alabama were “expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus,” and that an unidentified “they” bombed Dr. Martin Luther King Jr.’s home, “almost killing his wife and child.”¹¹ The advertisement also claimed that the dining hall was padlocked, “in an attempt to starve . . . [the protesting students] into submission.”¹² The plaintiff, a city commissioner who oversaw the police, alleged that “they” referred to the police.¹³ The lower court found, and defendants did not contest upon appeal, that the details of some of the statements were untrue.¹⁴ The state trial court judge instructed the jury that the untrue statements were “libelous *per se*” and not constitutionally protected, so therefore both actual and punitive damages were available.¹⁵ The Supreme Court of Alabama affirmed the judgment, holding that published words are libelous *per se* when they “tend to injure a person libeled by them in his reputation, profession, trade or business, or charge him with an indictable offense, or tend[] to bring the individual into public contempt”¹⁶ The trial court’s opinion and the state supreme court’s affirmation reflected the general view of defamation law at the time: false statements do not deserve protection under the First Amendment.¹⁷

But the Supreme Court’s reversal of the decision forever changed the landscape of defamation law. The Court determined that erroneous statements are inevitable in free-flowing public debate¹⁸ and held that the First Amendment “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

rigid strict liability standard. See Rodney A. Smolla, Dun & Bradstreet, Hepps and Liberty Lobby: A New Analytic Primer on the Future Course of Defamation, 75 GEO. L. J. 1519, 1550 (1987) (“In an analytic structure dominated by negligence, the strict liability standard for defamation stuck out like a sore thumb, existing purely because of the inertia of history. It was an island of strict liability in a sea of negligence, out of harmony with the rest of the landscape.”).

10. See *id.* (discussing the strict liability standard for liability arising from defamation).

11. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 257–58 (1964).

12. *Id.* at 258.

13. *Id.*

14. *Id.* at 258–59. Most of these false statements did not change the general premise of the accusations. The incorrect statements included: stating that protesting students sang the national anthem when in fact they sang “My Country ‘Tis of Thee”; stating that nine students were expelled for demonstrating at the Capitol when in fact they were expelled for demanding service at a county courthouse lunch counter; and stating that the entire student body protested when in fact only some of the students protested. *Id.* The most serious untrue allegation was that the dining hall had been padlocked. *Id.*

15. *Id.* at 262 (italics added).

16. *N.Y. Times Co. v. Sullivan*, 144 So. 2d 25, 37 (Ala. 1962).

17. *Id.* at 40.

18. *Sullivan*, 376 U.S. at 271.

false or with reckless disregard of whether it was false or not.”¹⁹ The opinion is grounded in the assumption that examining the public conduct of public officials is necessary for democracy to function and is embedded in the values of the First Amendment.²⁰

The *Sullivan* opinion limited its heightened actual malice standard to the public conduct of public officials. Justice Goldberg explicitly stated that the Court was not suggesting the First Amendment protected “defamatory statements directed against the private conduct of a public official or private citizen,” and that “[p]urely private defamation has little to do with the political ends of a self-governing society.”²¹ The Court in *Sullivan* did not set a black-letter definition of “public official”; instead, the Court stated that it was “enough for the present case that respondent’s position as an elected city commissioner clearly made him a public official”²² But it stated that it had “no occasion here to determine how far down into the lower ranks of government employees the ‘public official’ designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included.”²³

Over the next decade, the Court expanded *Sullivan*’s protection of speech to a broader category of defendants. In *Rosenblatt v. Baer*, the Court held that the actual malice standard also applies to claims by a person, even if unelected, who holds “a position in government [that] has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it”²⁴ The coverage was most dramatically expanded in 1967, when the Court ruled that *Sullivan* applies 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.”²⁵

The Court appeared to continue expanding the *Sullivan* doctrine. In *Rosenbloom v. Metromedia, Inc.*, a three-justice plurality held that a demonstration of actual malice was required for “all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.”²⁶ In *Rosenbloom*, the plaintiff sued a radio station that broadcast news of his arrest for distributing nudist magazines.²⁷ Although the plaintiff was a private figure, the plurality determined that the enforcement of obscenity laws was a matter of public interest, so reporting about it deserved constitutional protection.²⁸ The

19. *Id.* at 279–80.

20. *See id.* at 302 (“[O]ne main function of the First Amendment is to ensure ample opportunity for the people to determine and resolve public issues. Where public matters are involved, the doubts should be resolved in favor of freedom of expression rather than against it.” (quoting WILLIAM O. DOUGLAS, *THE RIGHT OF THE PEOPLE* 41 (Doubleday 1958))).

21. *Id.* at 301 (Goldberg, J., concurring in result).

22. *Id.* at 283 n.23.

23. *Id.*

24. *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966).

25. *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 134 (1967) (plurality opinion).

26. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44 (1971) (plurality opinion).

27. *Id.* at 31.

28. *Id.* at 40.

Rosenbloom plurality opinion focused on the importance of public interest in the event being reported, rather than on whether the plaintiff was a public figure.²⁹ Therefore, under *Rosenbloom*, it was possible to apply the *Sullivan* requirement of actual malice to private figure plaintiffs who were associated with a matter of public interest. But because only three justices signed on to the plurality opinion, it is not binding precedent.³⁰ And the Court, three years later in *Gertz*, built a solid wall between public and private figures, one that complicated the inquiry more than ever before.

B. *Gertz Provides Greater Protection for Private Figures*

Just as *Sullivan* recognized the First Amendment value in restricting defamation claims,³¹ *Gertz* recognized the need to place limits on those First Amendment rights by considering the impact on private figures fighting to clear their names.³²

In *Gertz*, the publisher of a John Birch Society newsletter published false statements about Elmer Gertz, the lawyer representing the family of a man who was shot and killed by a Chicago police officer.³³ The family was bringing a civil lawsuit against the officer.³⁴ The monthly publication, in an article about the shooting and litigation, wrote that Gertz was an “official of the ‘Marxist League for Industrial Democracy, originally known as the Intercollegiate Socialist Society, which has advocated the violent seizure of our government,’ and it branded Gertz a ‘Leninist’ and a ‘Communist-fronter.’”³⁵ The article also stated that Gertz had a large criminal record and that he had been an architect of the framing of the police officer.³⁶ But Gertz did not have a criminal record, and he had not been involved with the Communist groups listed in the article.³⁷ The Court wrote that although the publication’s managing editor “made no effort to verify or substantiate the charges” against Gertz, he included an editor’s note stating that the author had “conducted extensive research” into the case.³⁸

Gertz sued for libel in federal district court.³⁹ One large threshold issue was whether Gertz qualified as a public figure.⁴⁰ The John Birch Society argued that Gertz was a public figure, citing his published writings about

29. *See id.* at 43 (“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. The public’s primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant’s prior anonymity or notoriety.”) (footnote omitted).

30. *See id.* at 30 (announcing the judgment of the Court in an opinion joined only by Justices Burger, Brennan and Blackmun).

31. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 264 (1962).

32. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344–45 (1973).

33. *Id.* at 325.

34. *Id.* at 323.

35. *Id.* at 326.

36. *Id.*

37. *Id.*

38. *Id.* at 327.

39. *Id.* at 323.

40. *Id.* at 351.

public interest issues and participation in cases such as the lawsuit against the police officer.⁴¹ The judge instructed the jury that some of the statements were libel *per se* under Illinois law and that Gertz was not a public figure, leading to a jury award of \$50,000.⁴² The district court then reconsidered its instructions and reaffirmed its conclusion that Gertz was not a public figure, despite his prominence in the community.⁴³ But the judge ruled that the *Sullivan* standard should govern, so the judge entered a judgment for the defendant notwithstanding the jury's verdict.⁴⁴ In a meeting with the parties, the judge stated that after reconsidering the state of libel law, he believed that the *Sullivan* rule extended "to not only public officials, public figures, but also to matters of public interest."⁴⁵ On appeal, the Seventh Circuit affirmed and also suggested that Gertz is a public figure,⁴⁶ yet it did not ultimately disagree with the lower court's decision to classify him as a private figure.⁴⁷ Then, citing *Rosenbloom*, it determined that private figures must demonstrate actual malice if the statements were made regarding an issue of "significant public interest."⁴⁸ The court affirmed, finding there was no demonstration of actual malice.⁴⁹

The Supreme Court reversed the lower courts. It held that the *Sullivan* standard does not apply to private individuals.⁵⁰ As long as they do not impose liability without fault, the Court wrote, "the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."⁵¹ The Court identified two reasons for differentiating between public and private figures. First, it is more difficult for private figures to obtain self-help, which the Court defined as "using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation."⁵² The Court's second reason for the differentiation is that public figures voluntarily assumed the risk: public figures and public officials have chosen to be in the public spotlight, yet a private figure "has relinquished no part of his interest in the protection of his own good name"⁵³ The Court articulated two types of public figures: general purpose public figures who "may achieve such pervasive fame or

41. ELMER GERTZ, *GERTZ V. ROBERT WELCH, INC.: THE STORY OF A LANDMARK LIBEL CASE* 48–49 (Robert K. Burdette ed., 1992).

42. *Id.* at 66–68.

43. *Cf.* *Gertz v. Robert Welch, Inc.*, 322 F. Supp. 997, 998 (N.D. Ill. 1970) ("He has written books, articles and reviews which have enjoyed wide circulation. He has appeared frequently on radio and television, and has delivered numerous speeches. And he has long been involved in civic affairs.").

44. *Id.* at 1000.

45. *GERTZ*, *supra* note 41, at 71.

46. *Gertz v. Robert Welch, Inc.*, 471 F.2d 801, 805 (7th Cir. 1972) ("Plaintiff's considerable stature as a lawyer, author, lecturer, and participant in matters of public import undermine the validity of the assumption that he is not a 'public figure' as that term has been used by the progeny of *New York Times*.").

47. *Id.* ("Nevertheless, for purposes of decision we make that assumption and test the availability of the claim of privilege by the subject matter of the article.").

48. *Id.*

49. *Id.*

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

51. *Id.* at 347.

52. *Id.* at 344.

53. *Id.* at 345.

notoriety that he becomes a public figure for all purposes and in all contexts,” and the more common limited-purpose public figure who “voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.”⁵⁴ Scholars saw this as the Court distancing from the *Rosenbloom* plurality’s requirement of actual malice for defamation lawsuits brought by private figures in matters of public interest.⁵⁵

The Court did not completely abolish the actual malice requirement for private individuals: for a court to award punitive damages in all cases, the Court wrote, the plaintiff still must demonstrate knowledge of falsity or reckless disregard of the truth.⁵⁶

The Court has not made any major revisions to the *Gertz* standard. In 1976, the Court found that a plaintiff who had divorced from her wealthy husband was not a limited-purpose public figure.⁵⁷ In 1979, the Court found that a researcher who had received federal funding was not a public figure when he sued a senator who criticized his research as wasteful.⁵⁸ The researcher “did not thrust himself or his views into public controversy to influence others,”⁵⁹ and “did not have the regular and continuing access to the media that is one of the accouterments of having become a public figure.”⁶⁰ In these decisions, the Court reinforced the requirement that for a plaintiff to be a public figure in a libel suit, he must both have assumed the risk that comes with being a public figure and have access to “self help” to help mitigate damage to his reputation.⁶¹

III. APPLYING THE MURKY DISTINCTION OF *GERTZ*

Although defamation law varies by state and may offer additional protection to defendants, the constitutional starting point is a requirement of actual malice for public figures and public officials to recover damages. This Part explains the difficulty courts have had in distinguishing between public and private figures, and the uncertainty this causes for newsgatherers.

Federal and state courts have applied inconsistent methods of determining whether a plaintiff is a public or private figure. The *Gertz* distinction between public and private figures is broad. The doctrine becomes even more confusing by designating two types of public figures: general purpose and limited purpose.⁶² A great deal is at stake. If a media outlet is reporting a

54. *Id.* at 351.

55. James Corbelli, *Fame and Notoriety in Defamation Litigation*, 34 HASTINGS L.J. 809, 829 (1983) (“The majority in *Gertz* rejected *Rosenbloom* because *Rosenbloom* failed to give sufficient consideration to the state interests involved in defamation cases. In a case involving the plaintiff’s private life, the legitimate state interest in protection of privacy rights, as well as reputational interests, is involved.”).

56. *Gertz*, 418 U.S. at 349.

57. *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976) (“Dissolution of a marriage through judicial proceedings is not the sort of ‘public controversy’ referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public.”).

58. *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979).

59. *Id.*

60. *Id.* at 136.

61. *See, e.g., Time*, 424 U.S. at 485.

62. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974).

story about a public figure or official, it need only take the precautions that it is not acting with knowledge of falsity or reckless disregard for the truth.⁶³ But if that story is about a private figure, it must make sure that every word in that story is true.⁶⁴ If not, the private figure plaintiff could sue for actual damages.⁶⁵ Even if the suit has little merit or the plaintiff is unlikely to qualify as a private figure, the initial litigation before motions to dismiss or summary judgment could be quite costly.

A few years after the *Gertz* opinion, an article in the *Yale Law Journal* presciently pointed out a significant problem with the new doctrine for defamation: “[I]t requires both judicial inquiries beyond the competence of courts and subjective determinations based on the content of published information.”⁶⁶ The decision “interferes to an unnecessary extent with press exercise of the selection and packaging function.”⁶⁷ That commentary illustrates the difficulty that courts have in determining whether an individual is a public figure. Since that article, courts have reached inconsistent results. In particular, courts have struggled greatly with the limited-purpose public figure.

A review of post-*Gertz* state and federal case law finds that courts have found many categories of plaintiffs to be both public figures and private figures, despite similar facts, including government contractors,⁶⁸ criminal defendants,⁶⁹ companies that advertise,⁷⁰ college professors,⁷¹ entertainers,⁷² lawyers,⁷³ high school students,⁷⁴ business executives,⁷⁵ coaches,⁷⁶ owners of

63. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

64. *See supra* text accompanying notes 8–10 (discussing liability standards).

65. Smolla, *supra* note 9, at 1525 n.30 (citing *Gertz*, 418 U.S. at 347–48).

66. *The Editorial Function and the Gertz Public Figure Standard*, 87 *YALE L.J.* 1723, 1738 (1978).

67. *Id.*

68. *Compare Mathis v. Cannon*, 573 S.E.2d 376, 382 (Ga. 2002) (stating an owner of municipal solid waste contractor is a public figure because of “his more public efforts in helping develop the quasigovernmental project”), *with Mahoney v. State*, 236 A.D.2d 37, 40 (N.Y. App. Div. 1997) (stating a government contractor is not a public figure because “[n]either the receipt of public funds . . . nor involvement in a controversial industry, alone, confers public figure status on an individual”).

69. *Compare Orr v. Argus-Press Co.*, 586 F.2d 1108, 1116 (6th Cir. 1978) (finding a criminal defendant was a public figure because “his conduct has made him the target of a criminal proceeding about which the public has a need for information and interpretation”), *with Thomas v. Tel. Publ’g Co.*, 929 A.2d 993, 1018 (N.H. 2007) (finding a criminal defendant accused of bank robbery was not a public figure because his alleged crimes “[were] not matters of public controversy”).

70. *Compare Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 274 (3d Cir. 1980) (holding that a company is a public figure because “through its advertising blitz, [it] invited public attention, comment, and criticism”), *with Imperial Apparel, Ltd. v. Cosmo’s Designer Direct, Inc.*, 853 N.E.2d 770, 777 (Ill. App. Ct. 2006) (“[T]he mere fact that [plaintiff] advertised its merchandise does not, without more, establish it as a limited purpose public figure.”).

71. *Compare Blum v. State*, 255 A.D.2d 878, 880 (N.Y. App. Div. 1998) (finding a professor involved in a tenure dispute to be a public figure because he “thrust” himself into the public forefront), *with Sewell v. Trib Publ’ns, Inc.*, 622 S.E.2d 919, 923 (Ga. Ct. App. 2005) (finding a professor to be a private figure in a libel lawsuit regarding classroom comments he made about the Iraq war because he “in no way thrust himself to the forefront of the controversy in any public forum”).

72. *Compare Rodriguez v. Nishiki*, 653 P.2d 1145, 1149 (Haw. 1982) (finding plaintiff musicians to be public figures in a lawsuit against a newspaper), *with Riddle v. Golden Isles Broad. LLC.*, 621 S.E.2d 822, 826 (Ga. Ct. App. 2005) (finding plaintiff musician was a private figure “[b]ecause there was no public controversy”).

73. *Compare Marcone v. Penthouse Int’l Magazine for Men*, 754 F.2d 1072, 1083 (3d Cir. 1985) (finding that a lawyer representing a well-known motorcycle gang was a public figure because “it is clear that

bars and restaurants,⁷⁷ physicians,⁷⁸ and police officers.⁷⁹ Although many of these cases are in different states, and each state may have its own common law and statutory defamation rules, the public figure determination is based on the First Amendment. Therefore, a newsgatherer should expect consistency in determinations of public figure status.

Granted, within general categories of plaintiffs, the facts of each situation may differ greatly. For example, an attorney representing a member of Congress in a bribery scandal is more likely to be seen as a public figure than an attorney who works in the public defender's office. But even similar factual situations can lead to different public figure determinations.

The rest of this section will examine such inexplicable results in more detail. To reach the private figure decision, courts have used subjective value judgments about factors such as the plaintiff's impact on the community, the newsworthiness of the dispute, and whether the plaintiff chose to be in the public eye. Although these factors are valid, they have not been applied in a consistent manner.

A. *Impact on the Community*

Courts often consider the role of the plaintiff in the community when determining whether the plaintiff is a public figure.⁸⁰ This is a logical step, yet courts have been unable to set a uniform standard as to what level of impact a plaintiff must have to be a public figure. This particularly raises questions for journalists covering business executives, who are not elected by the public but

the present case involves a public controversy"), *with* *Gilbert v. WNIR 100 FM*, 756 N.E.2d 1263, 1272 (Ohio Ct. App. 2001) (finding that a prominent community attorney was not a public figure in a libel suit over news reporting about a murder investigation).

74. *Compare* *Henderson v. Van Buren Pub. Sch. Superintendent*, 644 F.2d 885, 6 Med. L. Rptr. 2409, 2410 (6th Cir. 1981) (finding that a high school government president was a public figure when he "intentionally thrust himself into the controversy as between the School Board and the students at the high school . . ."), *with* *Wilson v. Daily Gazette Co.*, 588 S.E.2d 197, 209 (W. Va. 2003) (finding that a prominent high school athlete was not a public figure because "[n]othing in the record remotely suggests that [plaintiff] was a 'central' figure in any purported public controversy involving sportsmanship that existed prior to the Gazette's publications").

75. *Compare* *Blankenship v. Manchin*, 471 F.3d 523, 531 (4th Cir. 2006) (finding that a well-known businessman was a public figure in his defamation suit), *with* *Bank of Or. v. Indep. News, Inc.*, 670 P.2d 616, 621 (Or. Ct. App. 1983) (finding bank executive was not a public figure).

76. *Compare* *Price v. Time, Inc.*, 416 F.3d 1327, 1346 (11th Cir. 2005) (stating plaintiff, University of Alabama's football coach, was "undisputedly a public figure"), *with* *Moss v. Stockard*, 580 A.2d 1011, 1033 (D.C. 1990) (finding that a college coach was not a public figure).

77. *Compare* *Pegasus v. Reno Newspapers, Inc.*, 57 P.3d 82, 92 (Nev. 2002) (finding that a restaurant owner was a limited public figure for defamation lawsuit over negative restaurant review), *with* *Lee v. City of Rochester*, 174 Misc. 2d 763, 771 (N.Y. Sup. Ct. 1997) (finding that bar owner plaintiff was not a public figure).

78. *Compare* *Swate v. Schiffers*, 975 S.W.2d 70, 76 (Tex. Ct. App. 1998) (finding because plaintiff doctor "has certainly been drawn into controversy," he was a public figure), *with* *WJLA-TV v. Levin*, 564 S.E.2d 383, 391 n.3 (Va. 2002) (indicating that plaintiff doctor was not a private figure).

79. *Compare* *Drews v. Michelson*, 327 N.W.2d 723 (Wis. Ct. App. 1982) (unpublished disposition) (finding plaintiff police officer who had filed a discrimination complaint was a public figure), *with* *Kiseau v. Bantz*, 686 N.W.2d 164, 178 (Iowa 2004) (finding plaintiff police officer was not a public figure, even though she is a high-ranking officer).

80. *Girod v. El Dia, Inc.*, 668 F. Supp. 82, 85 (D.P.R. 1987).

may have a larger impact on local communities than the mayor or state legislators. For example, in *Girod v. El Dia, Inc.*, the U.S. District Court for Puerto Rico found that Alberic Girod, the president of a banking, mortgage, and trust company, was a public figure in a defamation lawsuit he brought against a newspaper that reported on his company's financial trouble.⁸¹ The court reasoned that "[t]he financial health of the trust company was a public issue, since the fate of Girod Trust Company as a commercial banking institution in a small island community, involved and affected the property of many persons other than Alberic Girod."⁸² But the Oregon Court of Appeals reached the opposite conclusion given similar facts in *Bank of Oregon v. Independent News*.⁸³ A bank and its president sued a weekly newspaper and its reporters for publishing an article that accused the bank president of improper management of a customer's money.⁸⁴ The defendant argued that the bank president is a public figure because the bank was a "'large publically held banking corporation' that is subject to extensive federal and state regulation."⁸⁵ The court rejected that argument, holding that the bank president was not a private figure because the bank "is a 'paradigm middle echelon, successful' business and is not a public figure by reason of engaging in that business, being subject to the routine or usual regulation of that business or being incorporated."⁸⁶

It is unclear why the executive in *Bank of Oregon* deserves more protection from defamation than the executive in *Girod*. In both cases, newspapers were reporting on prominent financial institutions in which local residents had placed their money and trust. One apparent distinction between the two cases is that the *Girod* court held that the plaintiff had become a public figure because of his business's aggressive tactics.⁸⁷ Aggressive tactics are commonplace in business, and it would be unfair for a business executive to expect less protection under libel law simply for the fact that he is playing the game well. Additionally, if the *Bank of Oregon* executive had participated in the allegedly fraudulent dealings with consumers, that should make him more likely to be a public figure. Because companies play such a vital role in communities, some have argued that businesses and their executives all should be treated as public figures for a constitutional defamation test.⁸⁸ But that has not yet occurred.⁸⁹

81. *Id.*

82. *Id.*

83. *Bank of Or. v. Indep. News, Inc.*, 670 P.2d 616, 620 (Or. Ct. App. 1983).

84. *Id.* at 618.

85. *Id.* at 621.

86. *Id.* (quoting *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 592 (1st Cir. 1980)).

87. *Girod v. El Dia, Inc.*, 668 F. Supp. 82, 85 (D.P.R. 1987).

88. Patricia Nassif Fetzer, *The Corporate Defamation Plaintiff as First Amendment "Public Figure": Nailing the Jellyfish*, 68 IOWA L. REV. 35, 83 (1982) (discussing a theory that proposes a blanket imposition of public figure status).

89. *See id.* at 84 ("The question whether a corporation is a public figure should be determined on a case-by-case basis within the current framework of constitutional privilege.").

B. *Judges as Editors: Determining Newsworthiness*

Courts also have used subjective value judgments about newsworthiness to answer the public figure question. This leads to further unpredictability, because a judge's view on newsworthiness likely is different than a newspaper editor's view. In *Barry v. Time, Inc.*, the men's head basketball coach at the University of San Francisco (USF) sued Time, Inc. for articles alleging improper payments to a star player on his team.⁹⁰ The plaintiff argued that he was not a public figure because he "occupied no position of persuasive power or influence and . . . never thrust himself to the forefront of any particular public controversy in order to influence the resolution of the issues involved."⁹¹ But the federal district court disagreed, finding that the plaintiff was a limited-purpose public figure because his "decision to accept the position of head basketball coach at USF inevitably thrust him into the forefront of an already existing public controversy regarding alleged recruiting violations at USF."⁹²

Compare that ruling with *Moss v. Stockard*, in which the head coach of the University of the District of Columbia's women's basketball team sued the university and its athletic director for slander after the athletic director had publicly implied the coach had been fired for stealing.⁹³ The court held that she was not a limited-purpose public figure, noting that "[m]erely by achieving some success as a basketball coach, she did not expose herself to a greater risk of being falsely accused of financial defalcation in her duties than any other person."⁹⁴ The court noted that although she is prominent "within women's basketball circles," that does not qualify for a broader public figure status.⁹⁵ The court interestingly suggests that it is possible to be a public figure within a particular segment of society but not be considered a public figure for a *Gertz* analysis.⁹⁶

Perhaps judges assume that coaches of men's collegiate basketball teams should expect more public scrutiny than coaches of women's teams. But that should not be the role of judges to decide. Coaches should expect the same level of public scrutiny, and it is unfair to provide easier access to damages for only a certain group of coaches based on a judge's determination of their teams' relative newsworthiness.

C. *What is Voluntary?*

Courts have a particularly difficult time determining what a plaintiff must have done to have voluntarily thrust himself into the public spotlight. In *Pegasus v. Reno Newspapers, Inc.*, the owners of Salsa Dave's, a Mexican

90. *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1112 (N.D. Cal. 1984).

91. *Id.*

92. *Id.* at 1118.

93. *Moss v. Stockard*, 580 A.2d 1011, 1013, 1016 (D.C. App. 1990).

94. *Id.* at 1033.

95. *Id.* at 1032.

96. *Id.* at 1033.

restaurant, sued a newspaper for defamation because of a negative restaurant review.⁹⁷ Applying the *Gertz* standard, the Nevada Supreme Court determined that the restaurant was a limited-purpose public figure because it had “voluntarily entered the public spectrum by providing public accommodation and seeking public patrons.”⁹⁸ Although the court discussed the second prong of the *Gertz* analysis—whether the plaintiffs voluntarily thrust themselves into the spotlight—it did not mention the other *Gertz* prong, the ability of the plaintiffs to mitigate damage through self-help.⁹⁹ Just the mere fact that the owners had operated a restaurant open to the public provided the newspaper with additional protection from the owners’ defamation claim.¹⁰⁰

But another court had held that the former owner of a bar and dance club was not a limited-purpose public figure, despite the fact that a newsworthy event had occurred there.¹⁰¹ In *Lee v. City of Rochester*, the club’s former owner filed a defamation suit against a newspaper that published an account of a shooting at the club that injured nine people.¹⁰² Although the article did not mention the former owner by name, it described previous problems at the club, including the loss of its liquor license.¹⁰³ The newspaper argued that the former owner’s heavy promotion of the club, including buttons and radio advertisements, demonstrated that he had thrust himself into the public and made him a limited-purpose public figure.¹⁰⁴ In evaluating the defendant’s claims, the New York court used a four-part test to determine whether the former owner was a public figure.¹⁰⁵ The court examined whether the owner:

- (1) [S]uccessfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation;
- (2) voluntarily injected himself into a public controversy related to the subject of the litigation;
- (3) assumed a position of prominence in the public controversy; and
- (4) maintained regular and continuing access to the media.¹⁰⁶

Using this four-prong test, the court found that the former owner’s promotion was not sufficient to qualify him as a limited-purpose public figure.¹⁰⁷ The court determined that “[t]here is absolutely no evidence that plaintiff voluntarily involved himself in the two license suspensions in such a way as to grab the ‘limelight’ or achieve ‘special prominence’ in any debate concerning whether the licenses should not have been suspended.”¹⁰⁸

Supporters of the *Lee* decision may argue that because the plaintiff did not own the club at the time of the shooting, he is not a limited-purpose public

97. *Pegasus v. Reno Newspapers, Inc.*, 57 P.3d 82, 84 (Nev. 2002).

98. *Id.* at 92.

99. *See id.*

100. *Id.* at 85.

101. *Lee v. City of Rochester*, 174 Misc. 2d 763, 771 (N.Y. Sup. Ct. 1997).

102. *Id.* at 765.

103. *Id.* at 766.

104. *Id.* at 769.

105. *Id.* at 769–70.

106. *Id.* (quoting *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 136–37 (2d Cir. 1984)).

107. *Id.* at 771.

108. *Id.*

figure. But the reporting focused on alleged liquor license violations that occurred when he owned the club.¹⁰⁹ And unlike the plaintiffs in *Pegasus*, Lee made substantial efforts to promote his club at that time.¹¹⁰ Therefore, Lee should be more likely to qualify as a public figure than the owners of Salsa Dave's. But the differing results illustrate the wide range of approaches that courts use in applying the *Gertz* test. For example, the *Lee* court referred to the self-help question by asking whether the plaintiff "maintained regular and continuing access to the media,"¹¹¹ and the *Pegasus* opinion does not mention self-help. As to the other prong of *Gertz*, the opinions appear to set different requirements for demonstrating whether a plaintiff has thrust himself into the limelight. In *Pegasus*, the court held that just by operating a public establishment, the owners caused themselves to be public figures for any news report relating to that restaurant.¹¹² But in *Lee*, the court appears to require more than just operating a public establishment for a plaintiff to be considered a limited-purpose public figure. The court required a significant public event, such as the shooting, and it required the plaintiff to be directly connected to that event.¹¹³ This goes beyond the limits set in *Gertz*.

The comparisons in this section demonstrate the lack of clarity that courts confront in applying the standard set by the *Gertz* Court. Although state courts are free to develop their own common law, defendants should expect some uniformity in the application of a constitutional standard set by the United States Supreme Court more than thirty years ago. The wide range of approaches has created uncertainty that makes it difficult for the media to attempt to report news. As the Court acknowledged in *Sullivan*, some error is likely to occur in news reporting.¹¹⁴ If a newspaper is not fully confident that the subject of its reporting is a public figure, then it potentially could be forced to pay huge damages for such innocent and inevitable mistakes.

Because of the lack of clarity, a risk-averse news organization would be wise to assume that unless the subject of coverage is a member of Congress or holds another very prominent role in society, he is a private figure. That requires verifying the truth of every detail in the reporting. The next section will examine the rapidly changing characteristics of the media, and suggests that such precaution is increasingly difficult.

IV. WHY *GERTZ* IS OUTDATED

The previous Part demonstrated how the blurry line between public and

109. *Id.* at 766–67.

110. *See id.* at 769 (describing the measures the club owner took).

111. *Id.* at 770.

112. *Pegasus v. Reno Newspapers, Inc.*, 57 P.3d 82, 92 (Nev. 2002).

113. *Lee v. City of Rochester*, 174 Misc. 2d 773–74 (N.Y. Sup. Ct. 1997) ("Plaintiff closed his business nine years before the article on the shootings in the new establishment was published. He never reentered the business, and there is nothing in the record from which it may be concluded that he has not fully slipped into obscurity.").

114. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964) ("[E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" (citing *NAACP v. Button*, 371 U.S. 415, 432 (1963))).

private figures makes *Gertz* difficult to apply. This Part explains why it is unfair to expect modern-day newsgatherers to abide by the *Gertz* distinction. First, this Part examines the downfall of the large, profitable news organizations and the rise of smaller alternative sources of news. These new organizations—often civic journalists writing for blogs or small nonprofit upstarts—do not have the resources of their monopolistic predecessors. It is unfair to hold them to legal standards created for the more lucrative, large news corporations. This Part then explores the Court’s two reasons for refusing to require actual malice for public figures in *Gertz* and explains why they no longer apply in the Internet age.

A. *Shrinking and Evolving Newsrooms*

When reading libel opinions, it is easy to sympathize with the plaintiff as the powerless victim fighting the irresponsible, powerful media company. That may have been a better analogy in the sixties and seventies, but it is rapidly changing. As newspapers and broadcasters lose market share, civic journalism on the Internet by amateurs and bloggers becomes much more important to public discourse. Information is no longer being conveyed only by large monopolistic news organizations. These citizen journalists do not have the same resources and ability to check facts.

To illustrate the change, it is helpful to look at the decline of the newspaper and broadcast news industries. According to the Newspaper Association of America, a trade group, 72.3% of adults read the weekday edition of a daily newspaper in 1974, when *Gertz* was decided.¹¹⁵ In 2010, that number had dropped to 46.4%.¹¹⁶ Newspaper readership has declined precipitously in recent years, as has advertising revenue. Total U.S. newspaper advertising expenditures in 2009 were \$27.6 billion, down 27.2% from 2008.¹¹⁷ Television news has also fared poorly. In the past 25 years, the audience of the nightly network newscasts has dropped at an annual rate of about 1 million viewers per year, to about 23.1 million in 2007, and networks reduced their news staffs by about 10% between 2002 and 2006.¹¹⁸

Traditional media see some hope in the Internet: in 2009 newspaper revenues from online advertising were \$2.7 billion.¹¹⁹ Unfortunately for newspaper companies, they do not have a monopoly on this rapidly growing

115. *Daily National Readership Trends*, NEWSPAPER ASS’N OF AM., (Oct. 2004), http://www.naa.org/Trends-and-Numbers/Readership/~media/NAACorp/Public%20Files/TrendsAndNumber/Readership/Daily_National_Top50_64-97.ashx.

116. *National Readership & Audience by Age and Gender*, NEWSPAPER ASS’N OF AM., <http://www.naa.org/Trends-and-Numbers/Readership/Age-and-Gender.aspx> (last updated Aug. 26, 2011).

117. *Advertising Expenditures*, NEWSPAPER ASS’N OF AM., <http://www.naa.org/Trends-and-Numbers/Advertising-Expenditures/Annual-All-Categories.aspx> (last updated Mar. 1, 2011) (citing total of print and online newspaper revenues).

118. *Audience*, PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2008 <http://stateofthemediamedia.org/2008/network-tv-intro/audience> (last visited Sept. 4, 2011); *News Investment*, PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2008 <http://stateofthemediamedia.org/2008/network-tv-intro/news-investment> (last visited Sept. 4, 2011).

119. *Advertising Expenditures*, *supra* note 117.

source of revenue.¹²⁰ Unlike print newspapers, which require massive investments in printing presses, delivery trucks, and other capital, anyone with an Internet connection, and some spare time could compete for readers—and ad dollars.¹²¹ Consider the story of Joshua Micah Marshall.¹²² His political blog, Talking Points Memo, was the first media outlet to comprehensively report the nationwide firings of U.S. attorneys, coverage that led to the 2007 resignation of Attorney General Alberto Gonzales.¹²³ In 2008, that reporting earned him a George Polk Award, a national journalism honor typically awarded to traditional media such as newspapers, television stations, and magazines.¹²⁴ His blog's readership has climbed to 750,000 readers a month—challenging that of many large metro newspapers.¹²⁵ But the advertising revenue has only enabled him to hire a very small editorial staff.¹²⁶ Unlike the traditional model of a monopolistic newspaper that can afford to have many layers of managers, line editors, and copy editors, even the most successful Web sites operate on a streamlined budget.¹²⁷ Another incredibly popular news and opinion Web site, The Huffington Post, had more viewers than the Web sites of traditional media such as ABC News in January 2008.¹²⁸ The Huffington Post has received \$10 million in investments, and in 2007, founder Arianna Huffington said she expects it to become profitable.¹²⁹ But it only pays its 43 full-time employees, not the 1,800 bloggers who create most of the content.¹³⁰

Another emerging form of newsgathering is the nonprofit journalism model. The concept received a great deal of attention in 2007 when philanthropist Herbert Sandler announced he would donate \$30 million to the creation of ProPublica, a nonprofit newsgathering operation headed by the former managing editor of the *Wall Street Journal* and staffed by about 24 well-known investigative journalists.¹³¹ The donation allows the nonprofit to report in-depth stories and provide them to media outlets for free, removing the constant pressure of declining circulation and advertising revenues faced by most for-profit newsrooms.¹³² The nonprofit is free to focus on a single mission: watchdog reporting. The philanthropy-funded nonprofit business model remains largely untested, but it could fill the gaps left by newspapers and other traditional media that were forced to cut as they lost their

120. Noam Cohen, *Blogger, Sans Pajamas, Rakes Muck and a Prize*, N.Y. TIMES, Feb. 25, 2008, at C1.

121. *See id.* (stating that the Internet enables anyone to report on pressing issues).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. Jefferson Graham, *Huffington's Vision Prospers on Blog*, USA TODAY, Sept. 25, 2007, http://www.usatoday.com/money/industries/technology/2007-09-25-huffington_N.htm.

128. Press Release, Comscore, *Bloggers are Heavy Consumers of Content at News and Entertainment Web Sites* (Mar. 10, 2008), available at <http://www.comscore.com/press/release.asp?press=2102>.

129. Graham, *supra* note 128.

130. *Id.*

131. Suzanne Perry, *Financier Backs Project to Beef Up Investigative Reporting*, CHRON. OF PHILANTHROPY, Nov. 1, 2007.

132. *Id.*

monopolies. In 2010, ProPublica won the Pulitzer Prize for Investigative Reporting for an in-depth story about how a New Orleans hospital responded to Hurricane Katrina.¹³³ In the past two years, ProPublica has won nearly every significant national journalism award.¹³⁴

These economic changes are continuing, and nobody is certain where the evolution will lead. But it is clear that as readership of online news sites such as Talking Points Memo and The Huffington Post increases, readership of the once lucrative traditional media decreases.¹³⁵ And philanthropic endeavors such as ProPublica have the potential of playing an important watchdog role once almost exclusively reserved for print and broadcast media. But these new media do not have the same resources for fact checking and legal vetting.¹³⁶ While most new media want to report the facts responsibly, they do not have the resources to err on the side of caution and assume that all of their subjects could be seen as private figures under the *Gertz* analysis. The much leaner mainstream media and the new community Internet media cannot afford the uncertainty of the *Gertz* rule. Large media companies typically carry libel insurance, so even a huge damages award would not bankrupt them.¹³⁷ But libel insurance is more difficult for bloggers and other online news organizations to purchase.¹³⁸ Unless the subject is someone who is clearly a public figure or official, there is a chance that a court would find the plaintiff to be a private figure. This distinction is especially important for media outlets that do not have deep reserves of money. Since 1980, the average post-trial award for plaintiffs in libel cases was \$556,000.¹³⁹ The damages that a private plaintiff could collect for any error of fact—with or without malice—are enough to financially ruin a well-meaning blogger, community website, or nonprofit organization.

But cost of compliance alone is not a sufficient reason to eliminate the *Gertz* standard. The argument is about more than just cost: the fundamental justifications for *Gertz* are not as relevant in 2011 as they were in 1974. The

133. *Awards and Honors*, PROPUBLICA, <http://www.propublica.org/awards> (last visited Sept. 4, 2011).

134. *Id.*

135. *See, e.g.*, NEWSPAPER DEATH WATCH, <http://newspaperdeathwatch.com> (last visited Sept. 4, 2011) (tracking the decline of newspaper staff and readership).

136. *Compare* N.Y. Times Co., Annual Report (Form 10-K), at 60 (Feb. 22, 2011) (stating total operating costs of \$2.1 billion for year ended December 26, 2010), *with* PRO PUBLICA, INC., ANNUAL REPORT 10 (2010), *available at* http://s3.amazonaws.com/propublica/assets/about/PP_2010_annualrep_forWEB.pdf (stating total expenses of \$9.2 million for year 2010).

137. But the economic problems and consolidation experienced by large media companies have affected their ability to advocate for First Amendment issues. Legal counsel, like all other areas of large media companies, has been scaled back. For example, shortly after its acquisition by Rupert Murdoch's News Corp., the *Wall Street Journal* fired its well-known in-house First Amendment attorney, Stuart Karle. *See* John Koblin, *Rupert Murdoch Cans Wall Street Journal First Amendment Lawyer*, N.Y. OBSERVER (Feb. 29, 2008 7:04 PM), <http://www.observer.com/2008/wall-street-journal-lawyer-fired>.

138. Michael Rothberg, *Online Publishing Risks Create Need for Libel Insurance*, ONLINE JOURNALISM REV. (Feb. 20, 2004), <http://www.ojr.org/ojr/law/1077150111.php> ("Many online publishers are small operations. They often lack the resources enjoyed by traditional media to protect against the publication of defamatory or otherwise actionable content.").

139. Press Release, Media Law Res. Ctr., Annual Study Sees Lowest Number of Media Verdicts Since 1980; of Five Verdicts, Only One for Plaintiffs, *available at* http://www.medialaw.org/Content/NavigationMenu/About_MLRC/News/2008_Bulletin_No_1_.htm (last visited Sept. 4, 2011).

rest of this Part will examine the two reasons *Gertz* provided for the public/private distinction and explain why they are no longer as necessary as they once were.

B. *Gertz Reasoning no Longer Applies*

The Court in *Gertz* provided two justifications for not requiring a demonstration of actual malice by private figure plaintiffs, as opposed to public figures: (1) the greater availability to public figures and officials of “self-help” to correct the damage from the defamation; and (2) the public figure’s voluntary entry into the spotlight.¹⁴⁰ In the context of the modern media, both justifications are outdated.

1. *Self-help for the Masses*

Self-help justifies the public/private distinction, the Court wrote in *Gertz*, because public officials and public figures “usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.”¹⁴¹ Therefore, the self-help justification hinges on the ability of public officials and figures to effectively respond to defamation.

In 1974, private figures had few options to independently correct the record. With most Americans receiving their information from a few television networks or from the local monopoly newspaper, it was difficult for a private figure to spread the message. Letters to the editor long have been an option, but newspapers have limited space, and if the newspaper had published the defamatory content, it may not be eager to publish an article that is critical of its reporting.

Public figures and officials, on the other hand, at least theoretically had a better chance of self-help, because they could call press conferences or use their connections with media to get their message out. If they were very powerful in the community, they could call the publisher of the local newspaper and complain about the reporter. Self-help likely was easier for some public officials and figures than for others. But it surely was difficult for private individuals to correct the record.

In the past three decades, the ability for self-help has spread to the masses, largely due to the Internet. Services such as Blogspot and Blogger offer free blogs, so anyone with an Internet connection can create a publicly accessible forum to correct false statements. The barriers of 1974 no longer exist.¹⁴² Granted, correcting the record on a blog typically does not have the

140. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).

141. *Id.*

142. *See Reno v. ACLU*, 521 U.S. 844, 853 n.9 (1997) (“Web publishing is simple enough that thousands of individual users and small community organizations are using the Web to publish their own personal ‘home pages,’ the equivalent of individualized newsletters about that person or organization, which are available to

same impact as a news conference that is covered by the *New York Times*. But the magnitude of the harm likely will be proportional to the magnitude of the self-help that is available. For example, if a plaintiff was defamed on a defendant's blog, the damage likely would be limited to the results of Google searches for the plaintiff's name. If the plaintiff were libeled in the *New York Times*, his blog response likely would attract greater attention and links from other sites. Additionally, many newspapers, including the *New York Times*, offer the ability for any reader to post comments on their websites about stories, viewable to the public, although some edit those comments.¹⁴³

Corrections of news stories also have become more effective mechanisms for self-help. Corrections in print editions do not effectively mitigate damage caused by defamatory statements because they appear on a separate day from the initial story, often buried at the bottom of the newspaper's second page. With the increasing transition of newspapers' readership from print editions to their websites, corrections now often are appended to the top of the story online. Some news organizations also will change the text of the story to eliminate the inaccuracy, although some purists argue that corrections are sufficient and the original online copy should not be altered.¹⁴⁴ Although such remedies do not fully mitigate the damage, because some people may have only viewed the initial, inaccurate story, they are far better than the corrections that were available only in a static, print-only world.

Critics may rightly argue that private individuals' access to self-help is limited. Individual blogs often have very few—if any—regular readers.¹⁴⁵ But the private sector has created solutions for private individuals who are the victims of defamation. The best-known provider of such a service is Reputation.com, which charges monthly fees for various “reputation management” services;¹⁴⁶ “MyReputation,” creates positive content about the subscriber that appears at the top of search engine results for the subscriber's name.¹⁴⁷ Reputation.com also requests that websites remove inaccurate information about subscribers.¹⁴⁸

The Supreme Court of Georgia expressly recognized the widespread availability of online self-help in *Mathis v. Cannon*.¹⁴⁹ In that case, the plaintiff was president and majority owner of a company that collected solid

everyone on the Web.”).

143. See Robert Niles, *Are You Killing Your Comments?*, ONLINE JOURNALISM REV. (Jan. 31, 2007), <http://www.ojr.org/ojr/stories/070131niles> (“Opening your stories and blog entries to comments represents just the first step in a long process of building an interactive relationship with your readers.”).

144. See Mark Thompson, *To Fix or Not to Fix: Online Corrections Policies Vary Widely*, ONLINE JOURNALISM REV. (July 28, 2004), <http://www.ojr.org/ojr/workplace/1091056600.php> (“Online publishing technology makes fixing errors a snap, and they have decided it's silly to continue refraining from taking advantage of that. But tinkering with the content of newspaper archives is surprisingly controversial.”).

145. See Amit Agrawal, *Average Number of Readers per Blog*, DIGITAL INSPIRATION (Apr. 6, 2007), <http://www.labnol.org/internet/favorites/average-number-of-readers-per-blog/245/> (stating that there are, on average, only seven readers for each blog on LiveJournal).

146. See generally REPUTATION.COM, <http://www.reputation.com> (last visited Aug. 21, 2011).

147. *Frequently Asked Questions*, REPUTATION.COM, <http://www.reputation.com/faq/> (last visited Aug. 20, 2011).

148. *Id.*

149. *Mathis v. Cannon*, 573 S.E.2d 376, 385 (Ga. 2002).

waste for a government-owned solid waste material recovery facility, which had been plagued with allegations of mismanagement.¹⁵⁰ The defendant, a member of a community activist group, posted negative comments about the plaintiff on a Yahoo! bulletin board.¹⁵¹ Among the comments, the defendant accused the plaintiff of having been fired from a previous job and accused him of being a crook.¹⁵² The plaintiff sued the defendant for libel.¹⁵³ Georgia, like many states, has a “retraction statute” that bars punitive damages unless the plaintiff first makes a written request for retraction of a “publication of an erroneous statement.”¹⁵⁴ The statute applies to a “newspaper or other publication,” but it does not explicitly mention the Internet.¹⁵⁵ The plaintiff argued that the court should construe the statute as inapplicable to Internet postings.¹⁵⁶ But the court adopted a broader construction that includes Internet postings.¹⁵⁷ Among its reasoning was *Gertz*’s emphasis on self-help:

It acknowledges that the legislature extended the retraction defense originally created for newspapers, magazines, and periodicals to include newspapers and “other publications.” It encourages defamation victims to seek self-help, their first remedy, by “using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation.” It eliminates the difficult task of determining what is a “written publication” and who is the “print media” at a time when any individual with a computer can become a publisher. It supports free speech by extending the same protection to the private individual who speaks on matters of public concern as newspapers and other members of the press now enjoy. In short, it strikes a balance in favor of “uninhibited, robust, and wide-open” debate in an age of communications when “anyone, anywhere in the world, with access to the Internet” can address a worldwide audience of readers in cyberspace.¹⁵⁸

Similarly, the Delaware Supreme Court recognized the availability of self-help in *Doe v. Cahill*, when it declined to enforce a plaintiff’s request for the identity of an anonymous blogger who had allegedly defamed him:

The Internet provides a means of communication where a person wronged by statements of an anonymous poster can respond instantly, can respond to the allegedly defamatory statements on the same site or blog, and thus, can, almost contemporaneously, respond to the same audience that initially read the allegedly defamatory statements. The plaintiff can thereby easily correct any misstatements or falsehoods, respond to character attacks, and generally set the record straight. This unique feature of internet communications allows a potential

150. *Id.* at 378–79.

151. *Id.* at 379.

152. *Id.*

153. *Id.* at 376.

154. GA. CODE ANN. § 51-5-11 (2010).

155. *Id.*

156. *Mathis*, 573 S.E.2d at 383.

157. *Id.* at 385.

158. *Id.* at 385–86 (citations omitted).

plaintiff ready access to mitigate the harm, if any, he has suffered to his reputation as a result of an anonymous defendant's allegedly defamatory statements made on an [I]nternet blog or in a chat room.¹⁵⁹

In both *Mathis* and *Doe*, the courts denied relief to plaintiffs at least partly because they recognized that the Internet provides defamation victims with an unprecedented level of self-help.¹⁶⁰

Congress also has recognized the widespread availability of self-help on the Internet.¹⁶¹ In 1996, Congress passed the Communications Decency Act (CDA).¹⁶² Section 230 of the statute confers tort immunity to Internet service providers (ISPs) and websites by preventing them from being treated as publishers of content created by third parties¹⁶³ and guarantees that the immunity is not abrogated by the website's efforts to screen out objectionable content.¹⁶⁴ In the conference report for Section 230, the committee wrote that it aimed to overrule earlier state court decisions that held websites and ISPs responsible for defamatory third-party content: "The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services."¹⁶⁵ Congress, therefore, recognized that judicial threats do not provide the proper incentives to block objectionable online content. As Allison E. Horton observed, "[T]he CDA's purpose is to promote self-help on the Internet and prevent the potential chilling effect that regulation may have on Internet speech."¹⁶⁶

Critics of my proposal may correctly argue that in many cases self-help never will completely mitigate the damage caused by defamation. But that is the case for both public and private figures. It is rare for self-help to completely reverse damage to an individual's reputation. Moreover, no remedy—whether self-help or court-awarded damages—will ever be able to undo the very real harm that defamation can cause. Particularly in the Internet era, once defamatory content is made public, it is very difficult to completely

159. *Doe v. Cahill*, 884 A.2d 451, 464 (Del. 2005).

160. *Id.*; *Mathis*, 573 S.E.2d at 385–86.

161. 47 U.S.C. § 230 (2006).

162. *Id.*

163. "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." *Id.* § 230(c)(1). Section 230 defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." § 230(f)(2). Courts have widely held that websites and Internet service providers are considered interactive computer services for the purposes of Section 230. *See, e.g.*, *Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669 (7th Cir. 2008).

164. According to the text of the statute: "No provider or user of an interactive computer service shall be held liable on account of—(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1)." 47 U.S.C. § 230(c)(2).

165. H.R. REP. NO. 104-458, at 174 (1996).

166. Allison E. Horton, *Beyond Control?: The Rise and Fall of Defamation Regulation on the Internet*, 43 VAL. U. L. REV. 1265, 1305 (2009).

remove it from the public record. In 1976, the Supreme Court recognized that it is unnecessary for the self-help remedy to be a perfect antidote to defamation: “*Gertz* set no absolute requirement that an individual be able fully to counter falsehoods through self-help in order to be a public figure.”¹⁶⁷ The Supreme Court required public figures and officials to demonstrate actual malice because they had access to self-help, even though the Court acknowledged that the self-help would not counteract all of the damage caused by defamation.¹⁶⁸ Similarly, the self-help that is now available to private figures is imperfect, but that imperfection should not cause us to ignore these new tools.

In sum, self-help is no longer available only to well-known public officials and wealthy public figures. Although self-help will never entirely restore a defamed individual’s reputation, it often can greatly reduce the damage. This increased availability of self-help significantly weakens the first reason *Gertz* provides for a public/private distinction.

2. *What is voluntary?*

As to the second justification, the *Gertz* Court wrote that public figures “have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies”¹⁶⁹ Using this reasoning, the Court argued that public figures deserve less protection than private figures because public figures chose to be the focus of attention.

Even before the emergence of the Internet, some courts questioned whether this public/private dichotomy was fair. In 1974, shortly after the *Gertz* decision, the Indiana Court of Appeals adopted the standard of the *Rosenbloom* plurality and required the plaintiff to show malice in defamation claims involving matters of public concern, regardless of whether the plaintiff is a public or private figure.¹⁷⁰ Central to the court’s reasoning was the artificiality of the distinction between public and private figures:

Public officials and public figures are as deserving of redress for injury to their reputation as private citizens. The argument that public officials and public figures assume the risk of defamation by voluntarily placing themselves in the public eye is a misconception of the role which every citizen is expected to play in a system of participatory self-government. Every citizen, as a necessary part of living in society, must assume the risk of media comment when he becomes involved, whether voluntarily or involuntarily, in a matter of general or public interest. It has long been recognized that “[e]xposure

167. *Time, Inc. v. Firestone*, 424 U.S. 448, 486 (1976).

168. *Id.*

169. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

170. *See AAFCO Heating & Air Conditioning Co. v. Nw. Publ’ns, Inc.*, 321 N.E.2d 580, 585 (Ind. Ct. App. 1974).

of the self to others in varying degrees is a concomitant of life in a civilized community.”¹⁷¹

The emergence of the Internet has magnified that false dichotomy. Indeed, the very concept of “private figures” can be considered a relic, because the Internet has greatly eroded the traditional concept of privacy. In 1999, Sun Microsystems co-founder Scott McNealy controversially, yet presciently, stated, ““You have zero privacy. Get over it.””¹⁷² The legal concept of privacy was first widely articulated by Samuel D. Warren and Louis D. Brandeis in their 1890 *Harvard Law Review* article *The Right to Privacy*.¹⁷³ Warren and Brandeis determined that “[t]he common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.”¹⁷⁴ The emergence of new technologies and, in particular, the Internet, has drastically shifted that framework. As Professor A. Michael Froomkin succinctly wrote in *The Death of Privacy?*, “[B]oth the state and the private sector now enjoy unprecedented abilities to collect personal data.”¹⁷⁵ Just as the notion of privacy has shifted radically in the past four decades, so too has the notion of a “private figure.”

In 1974, public figures were easy to define: they were the people who often appeared in newspapers and on television, such as politicians, entertainers, and athletes.¹⁷⁶ Largely, they were in the public spotlight because they chose to be there.¹⁷⁷ It was relatively easy to determine whether individuals chose not to seek the public spotlight: they were not frequently in the media and did not speak at public forums.¹⁷⁸

But that was before the era of YouTube, MySpace, and Facebook. On MySpace and Facebook, users receive free accounts that allow them to post information such as their names, hobbies, work and education background, and pictures.¹⁷⁹ They use these social networking sites to connect with other users.¹⁸⁰ MySpace reports more than 185 million registered users worldwide.¹⁸¹ More than 750 million people have accounts on Facebook.¹⁸² Although MySpace and Facebook tend to be popular among high school and college students, LinkedIn provides a similar service that adults use for professional networking.¹⁸³ More than 120 million people are registered with LinkedIn,

171. *Id.* at 588 (quoting *Time*, 385 U.S. at 388).

172. Deborah Radcliff, *A Cry for Privacy*, *COMPUTERWORLD*, May 17, 1999, at 46.

173. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 *HARV. L. REV.* 193 (1890).

174. *Id.* at 198.

175. A. Michael Froomkin, *The Death of Privacy?*, 52 *STAN. L. REV.* 1461, 1463 (2000).

176. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) (discussing the role of public figures).

177. *Id.*

178. *Id.*

179. FACEBOOK, <http://www.facebook.com/facebook?sk=info> (last visited Sept. 4, 2011); *About Us*, MYSPACE, <http://www.myspace.com/Help/AboutUs> (last visited Aug. 20, 2011).

180. FACEBOOK, *supra* note 180; MYSPACE, *supra* note 180.

181. ALEX BELL, BLACKWELL GLOBAL CONSULTING, MAKING SOCIAL MEDIA WORK: INSURANCE INDUSTRY PERSPECTIVE (2011), available at http://www.cgn.net/pdf/Blackwell%20Global%20Executive%20Briefing_Social%20Networking%20for%20the%20Insurance%20Industry_052611_NASBP.pdf.

182. *Statistics*, FACEBOOK, <http://www.facebook.com/press/info.php?statistics> (last visited Aug. 20, 2011).

183. Memorandum from the Pew Research Center’s Internet & Am. Life Project on Adults and Social

displaying information such as their work experience and education.¹⁸⁴ Most people are to some extent public figures because of information they post on the Internet. And it is not just information they posted. Many employers, such as universities, police departments, and public schools post information about their employees on the Internet. If the employees were aware that part of their job included this voluntary exposure, would that mean that they have thrust themselves into the public spotlight?

The ease at which people can disseminate personal information over the Internet calls into question whether there ever could be a black-letter definition of “voluntary” in the *Gertz* context. A college student with a MySpace account is not generally considered a public figure in the same way as a chief of police or candidate for public office. But both have taken voluntary actions to place themselves into the public eye. Granted, the candidate for public office likely took greater voluntary actions to attract public attention. But both have willfully drawn attention to themselves, which appears to be the reasoning set forth in *Gertz*.¹⁸⁵ If such voluntary action were enough to qualify someone to be a limited-purpose public figure, it could have an additional chilling effect on free speech: it would cause people who fear defamation to not take advantage of services such as Facebook.

Although tens of millions of people voluntarily place personal information about themselves on the Internet, it is true that there also are millions who have not done so. But the Internet still is undergoing rapid technological changes, and as the digital divide is bridged, an increasingly large portion of American society now is online.¹⁸⁶ Although there are many people without an online presence, that portion of society is likely to only decrease. There is no longer a clear line between those who choose to live public lives and those who want to remain private. This change reduces the relevance of the *Gertz* Court’s second justification for the public/private distinction.

V. OTHER PROPOSALS TO MODIFY *GERTZ*

Many other critics have recognized the inconsistency of the *Gertz* rule, and they have proposed various modifications. This Part considers two alternative proposals for reforming the existing *Gertz* regime and explains why they do not sufficiently address the problems with the current rule.

Network Websites (Jan. 14, 2009), available at http://www.pewinternet.org/~media/Files/Reports/2009/PIP_Adult_social_networking_data_memo_FINAL.pdf.

184. LINKEDIN, <http://www.linkedin.com/network> (last visited Aug. 18, 2011).

185. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351–52 (1974).

186. A 2008 Scarborough Research report found that 49% of U.S. households had high-speed Internet connections, up from 12% in 2002. See Press Release, Scarborough Research, The Need for Internet Speed: Broadband Penetration Increased More than 300% Since 2002 (Apr. 15, 2008), available at <http://www.scarborough.com>.

A. *Eliminating the Actual Malice Requirement Altogether*

Plaintiff advocates also recognize the inefficacy of the *Gertz* regime, as interpreted by state and federal courts. But their solution is entirely the opposite of my proposal. They propose returning to *Gertz*'s original roots and allowing the recovery of damages, regardless of actual malice, in all cases involving private figure plaintiffs.¹⁸⁷

This solution, however, would be disastrous for free speech. As demonstrated in Parts III and IV of this Article, the elimination of the actual malice requirement would place an additional burden on an already strained media at a time when increasing opportunities for plaintiffs to exercise self-help are available.

The Supreme Court articulated the actual malice requirement for libel claims from public officials and figures because it recognized the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open” even though that debate “may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”¹⁸⁸

Even before *Sullivan*, courts had struggled to balance regulation and free speech. And the Supreme Court has long recognized the danger of overregulating speech. In 1959, the Supreme Court heard *Smith v. California*, in which a bookstore owner was convicted under a city ordinance that made it illegal “for any person to have in his possession any obscene or indecent writing, [or] book . . . in any place of business where . . . books . . . are sold or kept for sale.”¹⁸⁹ The bookstore owner challenged the ordinance as a violation of his First Amendment rights.¹⁹⁰ The Supreme Court invalidated the city ordinance, finding that it was unconstitutional to hold the distributor of obscene material strictly liable if the distributor did not know the material was obscene.¹⁹¹ The Court held that “this ordinance’s strict liability feature would tend seriously to have that effect, by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold.”¹⁹² The Court was concerned that excessive regulation would cause the distributor to over-censor the material:

By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public’s access to constitutionally protected

187. See Nat Stern, *Private Concerns of Private Plaintiffs: Revisiting a Problematic Defamation Category*, 65 MO. L. REV. 597, 653–54 (2000) (“The apparently unqualified application of *Gertz*’s protections to all ‘private individuals’ represented a reasoned exercise in balancing free speech and reputational concerns. Through carefully calibrated requirements for damages, the *Gertz* Court sought to steer a middle ground between *Rosenbloom*’s overinclusive barrier to defamation suits and the draconian rigors of the common law.”).

188. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

189. *Smith v. California*, 361 U.S. 147, 148 (1959) (quoting LOS ANGELES, CA., MUNICIPAL CODE § 41.01.1).

190. See generally *id.* at 149 (discussing the constitutional objections to the ordinance).

191. *Id.* at 151–52.

192. *Id.* at 152.

matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature.¹⁹³

Similarly, eliminating the actual malice requirement would lead to tremendous over-censoring of speech. Just as the Court was concerned that the bookseller ordinance in *Smith* would lead to a reduction in the distribution of perfectly legal books, an elimination of the actual malice requirement would lead to a reduction in non-defamatory speech.

In sum, eliminating the actual malice requirement altogether would sharply curtail uninhibited and robust debate. Traditional and emerging media would be far less likely to publish information, even if that information appeared accurate and was supported by corroborating evidence. Without the actual malice requirement, the cost of publishing information would be far too high. Even an innocent mistake could become a multi-million dollar liability.

B. *Requiring Actual Malice for only Matters of Public concern*

Other commentators have proposed a more moderate change than the one advanced in this Article: instead of simply eliminating *Gertz*, they argue, courts should replace it with a standard similar to that of the *Rosenbloom* plurality: plaintiffs in defamation lawsuits must prove actual malice if the allegedly defamatory comment was made about a matter of general public concern.¹⁹⁴ Barry F. Smith first proposed such a change nearly a decade after *Gertz*, arguing that the *Gertz* distinction led to a dramatic increase in libel lawsuits.¹⁹⁵ Applying *Rosenbloom*, Smith wrote, “would discourage much of the litigation the media now face” and “reduce the exorbitant costs of libel litigation now paid by the media to more acceptable levels.”¹⁹⁶ This gets to the heart of the reasons the Court first protected defamatory statements in *Sullivan*. As the Court wrote in *Rosenbloom*, “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.”¹⁹⁷ If the Court replaced the *Gertz* standard with a determination of whether the matter is of public concern, many private plaintiffs still would be protected. For example, if two neighbors had a dispute over their property line and one neighbor posted defamatory falsehoods about the other on his blog, that likely would not be a matter of public concern and therefore the lawsuit would not require actual malice. Four states—Alaska,

193. *Id.* at 153.

194. *E.g.*, Barry F. Smith, *The Rising Tide of Libel Litigation: Implications of the Gertz Negligence Rule*, 44 MONT. L. REV. 71, 89 (1983).

195. *See id.* at 71 (“The trend toward high libel judgments is clear. It has reached the point where leading media lawyers are predicting that one of the next changes in the United States Supreme Court will make in libel law will be to set constitutionally required limits on the amount of damages libel plaintiffs may recover.”).

196. *Id.* at 90.

197. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 43 (1971).

Colorado, Indiana, and New Jersey—have adopted the *Rosenbloom* rule as an additional safeguard and require private figure plaintiffs to prove actual malice if the defamation involves a matter of public concern.¹⁹⁸

Unfortunately, the *Rosenbloom* rule creates confusion similar to what has been caused by *Gertz*. Although news organizations no longer would be forced to determine the public figure status of individuals, they now would be forced to make an equally difficult judgment: is the event of public concern? Some questions would be easy to answer: city council meetings, sporting events, and school shootings likely would easily qualify as matters of public concern. But consider more difficult judgment calls that news organizations likely would face: for example, disciplinary actions that a school board takes against an individual teacher. It could be argued that those actions are of public concern because the teacher is entrusted with the care of a group of students. But an equally compelling case could be made that the matter involves a few people and therefore is not of public concern. As with *Gertz*, this broad standard would result in difficult-to-apply and varying definitions that would cause news organizations to be overly prudent.

VI. IMPLICATIONS OF REQUIRING ACTUAL MALICE IN ALL CASES

This Part considers the repercussions of eliminating the *Gertz* rule and requiring a demonstration of actual malice in all defamation claims. The concerns that prompted the Court to constitutionalize defamation law in *Sullivan* are so widespread due to current conditions that it is necessary to place all defamation law under the First Amendment. Such a change still would protect victims of defamation while providing clear guidelines for media.

By eliminating *Gertz* and requiring the *Sullivan* standard of actual malice for all plaintiffs, the Court would adequately protect victims of defamation without substantially burdening newsgathering operations. It would create an easily applied, bright-line rule: if news organizations know that information is false or recklessly disregard whether the information is false, they could be liable for damages. But they would not have to scour every detail, fearing the subject of their coverage might qualify as a private figure.

One criticism of my proposal is that plaintiffs do not have clear guidance as to what constitutes actual malice. But *New York Times v. Sullivan* is nearly fifty years old, and litigants have guidance from hundreds of state and federal court opinions that have applied the actual malice standard. When the Indiana Court of Appeals adopted an actual malice requirement for defamation lawsuits brought by private figures regarding matters of public concern, it confronted criticism that the actual malice standard is too uncertain.¹⁹⁹ The court rejected that argument, finding that the Supreme Court's formulation of the actual malice test in *St. Amant v. Thompson* in 1968 “should provide trial

198. *Chang v. Michiana Telecasting Corp.*, 900 F.2d 1085, 1087 (7th Cir. 1990).

199. *AAFCO Heating & Air Conditioning Co. v. Nw. Publ'ns, Inc.*, 321 N.E.2d 580, 584–85 (Ind. Ct. App. 1974).

courts with relatively clear guidance.”²⁰⁰

The *St. Amant* Court held that reckless conduct was not measured by whether a reasonably prudent man would have published or would have investigated before publishing; rather, the evidence must show that the defendant in fact entertained serious doubt as to the truth of the statement. . . . Thus, publisher knowledge of serious factual inconsistencies—facts which negate or materially contradict the impression conveyed by the published statements to some significant extent—would be highly probative evidence of awareness of probable falsity. The publisher’s failure to employ any reliable investigatory methods or lack of any effort to independently verify disputed or questionable factual assertions would also be relevant to the issue of reckless disregard for the falsity of published statements. . . . Further guidance as to the proper content of the *New York Times* privilege standard can be gained by examining the many federal and state cases that have focused on the question of constitutional “malice.”²⁰¹

Another criticism of this proposed standard is that it makes innocent, private parties more vulnerable to defamation and less able to defend themselves. But actual malice is not an insurmountable bar for plaintiffs. It strikes the proper balance and protects plaintiffs from negligent reporting that results in damaging statements.²⁰²

The Supreme Court has set reasonable parameters for actual malice. Shortly after its *Sullivan* ruling, the Court found actual malice in *Curtis Publishing Co. v. Butts*.²⁰³ In *Butts*, a magazine published an article accusing a coach and athletic director of fixing a football game based on an affidavit from an individual who said he overheard the coach and the athletic director on the telephone.²⁰⁴ The magazine had assigned an inexperienced reporter, who did little to verify the information in the affidavit and ignored the fact that the affiant had been on probation.²⁰⁵ The Court found that actual malice existed because the “evidence is ample to support a finding of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.”²⁰⁶ *Butts* demonstrates that the actual malice standard allows courts to penalize media for reckless damage and is not an absolute prohibition on defamation damages.

Twenty-four years later, the Supreme Court once again ruled there was enough evidence to support a finding of actual malice. In *Masson v. New*

200. *Id.* at 589.

201. *Id.* (internal citations omitted) (citing *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)).

202. Scholars have noted that “actual malice” is something of a misnomer. Actual malice “does not mean ill will, and ‘reckless disregard’ does not mean unreasonable inattention to potential consequences. . . . This appropriation and redefinition was an attempt to strike a balance between freedom of speech guaranteed by our state and federal constitutions and the right to recovery for harm enshrined in American common law.” Julie C. Sipe, “*Old Stinking, Old Nasty, Old Itchy Old Toad*”: *Defamation Law, Warts and All (A Call for Reform)*, 41 *IND. L. REV.* 137, 142 (2008).

203. *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 165–66 (1967).

204. *Id.* at 136.

205. *Id.* at 157–58.

206. *Id.* at 158.

Yorker Magazine, Janet Malcolm, a reporter for the *New Yorker*, wrote a two-part series about plaintiff Jeffrey Masson, who had served as projects director of the Sigmund Freud Archives until he became disillusioned with Freudian psychology.²⁰⁷ Malcolm interviewed Masson numerous times in person and by phone.²⁰⁸ After the *New Yorker* published the articles in December 2003, Masson challenged the accuracy of numerous quotations that were attributed to him and filed a libel action in federal district court.²⁰⁹ During discovery, the defendants produced tape recordings of the interviews, which revealed that Masson made statements that were similar but not identical to the quotations in the articles.²¹⁰ The defendants moved for summary judgment and both sides agreed that Masson was a public figure and therefore must present clear and convincing evidence of actual malice.²¹¹ The district court granted summary judgment for the defendants, finding a lack of actual malice.²¹² The Ninth Circuit affirmed, finding that even if Malcolm had deliberately altered the quotations, there was no evidence of actual malice.²¹³ The Supreme Court granted certiorari and reversed the Ninth Circuit.²¹⁴ The Supreme Court held that “a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for purposes of *New York Times Co. v. Sullivan* . . . and *Gertz v. Robert Welch, Inc.* . . . unless the alteration results in a material change in the meaning conveyed by the statement.”²¹⁵ As to the *New Yorker* article, the Court held that if the alterations of Masson’s quote gave a different meaning to the statements, then the publication may be actionable, and therefore remanded the case for a new determination of actual malice.²¹⁶

A review of recent defamation decisions from state and federal trial courts finds other instances in which the plaintiffs who were public officials or public figures demonstrated actual malice. In *Murphy v. Boston Herald, Inc.*, a judge sued the *Boston Herald* after its reporter falsely stated, both in newspaper articles and on a national cable news program, that the judge told a rape victim that she should “get over it.”²¹⁷ The Massachusetts Supreme Court found the reporter displayed actual malice by failing to verify the judge’s quote, which he considered outrageous when he had first heard it.²¹⁸ The court noted that the reporter was aware of other witnesses to the alleged statement, but he failed to attempt to interview them.²¹⁹ When a reporter substantially doubts information, the court held, “the purposeful failure to investigate known witnesses may be proof of actual malice.”²²⁰

207. *Masson v. New Yorker Magazine*, 501 U.S. 496, 500 (1991).

208. *Id.*

209. *Id.* at 501–02.

210. *Id.* at 501–08.

211. *Id.* at 508.

212. *Id.* at 508–09.

213. *Id.* at 509.

214. *Id.*

215. *Id.* at 517 (internal citations omitted).

216. *Id.* at 525.

217. *Murphy v. Bos. Herald, Inc.*, 865 N.E.2d 746, 750–51 (Mass. 2007).

218. *Id.* at 760.

219. *Id.* at 759–60.

220. *Id.* at 760.

Similarly, in *DiBella v. Hopkins*, plaintiff Lou DiBella sued the defendant, a former boxer, Bernard Hopkins, for libel.²²¹ In 2000, DiBella, a former Home Box Office executive, agreed to assist in publicizing and marketing Hopkins in exchange for a \$50,000 fee.²²² In 2001, Hopkins stated in media interviews that DiBella collected fees from Hopkins when DiBella was still an executive with Home Box Office, which televises boxing matches.²²³ Hopkins alleged a quid pro quo: that DiBella agreed to televise his boxing matches in exchange for a consulting fee.²²⁴ DiBella sued for libel in federal court. Discovery revealed that the payment was not made while DiBella was still employed by Home Box Office and had nothing to do with televising Hopkins's match.²²⁵ The record further revealed that Hopkins was aware of the true facts when he made the defamatory statements.²²⁶ The jury returned a verdict in DiBella's favor on one libel claim but rejected three other claims, and both parties appealed.²²⁷ Hopkins argued that DiBella failed to satisfy his burden of proving actual malice.²²⁸ The Second Circuit disagreed, and held that the evidence "clearly and convincingly shows that the statements Hopkins made about the nature of his \$50,000 payment to DiBella were false and that Hopkins knew or should have known they were false when he made them, or that he spoke with reckless disregard of the statements' truth or falsity."²²⁹ Courts in numerous other cases have similarly found that the defendant knew of the falsity and therefore actual malice was present.²³⁰

A finding of actual malice does not require any demonstration of bad faith or even knowledge of falsity.²³¹ Instead, a plaintiff may meet the actual malice requirement by showing a defendant's recklessness.²³² For example, in *Coastal Abstract Services, Inc. v. First American Title Insurance Co.*, the Ninth Circuit found actual malice when the executive at one company reported to a bank official that a company with which it did business was not "paying its bills."²³³ The appellate court agreed with the trial court that actual malice existed because the executive "admitted to failing to check the accuracy of the statement and to failing to correct it when confronted with conflicting evidence."²³⁴ This case, and others like it, demonstrates that actual malice does not necessarily require a showing of specific intent to harm the plaintiff; a

221. *DiBella v. Hopkins*, 403 F.3d 102, 106 (2d Cir. 2005).

222. *Id.* at 107.

223. *Id.* at 107–09.

224. *Id.* at 107.

225. *Id.* at 116–17.

226. *Id.* at 116.

227. *Id.* at 109.

228. *Id.* at 109–10.

229. *Id.* at 117.

230. *See, e.g.,* *Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 190 (2d Cir. 2000); *Eastwood v. Nat'l Enquirer*, 123 F.3d 1249, 1256 (9th Cir. 1997); *Connaughton v. Harte Hanks Commc'ns., Inc.*, 842 F.2d 825, 847 (6th Cir. 1988); *Blue Ridge Bank v. Veribanc, Inc.*, 675 F. Supp. 1007, 1012 (W.D. Va. 1987); *Bose Corp. v. Consumers Union of U.S., Inc.* 508 F. Supp. 1249, 1276 (D. Mass. 1981); *Carson v. Allied News Co.*, 482 F. Supp. 406, 408 (N.D. Ill. 1979); *Selby v. Savard*, 655 P.2d 342, 346 (Ariz. 1982).

231. *See* *Coastal Abstract Servs., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 736 (9th Cir. 1999).

232. *Id.*

233. *Id.* at 730, 736.

234. *Id.* at 736.

reckless defendant can be found to have acted with actual malice.²³⁵

These cases show that the requirement of actual malice requires newsgatherers to exercise a large quantum of care before publishing potentially damaging information. Courts frequently find that defamatory statements were made with actual malice. Eliminating the *Gertz* distinction would not cause a flood of irresponsible and damaging journalism. Bloggers, reporters, and others still would be required to exercise reasonable care to ensure that their reporting is accurate. But they would know that as long as they exercised that care and followed professional standards; they would not have to worry about paying huge damages if they make an honest mistake. This strikes the proper balance that the First Amendment requires.

VII. CONCLUSION

Legal scholars have long debated the relative merits of rules and standards.²³⁶ Standards provide judges with wider latitude and may ensure that the true intent of a statute or constitutional provision is met. But rules provide predictability and better ensure that judges do not exceed the boundaries of their legal authority. In the case of defamation claims, a black-letter rule is necessary. The *Gertz* standard has been applied so inconsistently in the past three decades that it offers little predictability for news organizations, potentially chilling the freedom of speech and press guaranteed in the First Amendment. A new constitutional rule requiring actual malice in all cases would provide the certainty that is necessary in an evolving media landscape while still providing plaintiffs with a strong mechanism to recover compensatory and punitive damages.

235. See also *Khawar v. Globe Int'l, Inc.*, 965 P.2d 696, 712 (Cal. 1998) (upholding jury determination of actual malice in defamation case arising from a report that a photojournalist assassinated a presidential candidate because newspaper made no effort to investigate evidence that another person was the assassin).

236. See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 621 (1992) (“[R]ules involve a wholesale approach to an information problem, that of determining the law’s appropriate content. Standards instead require adjudicators to undertake this effort, which may have to be done repeatedly . . .”).