TRIANGULATING THE LIMITS ON THE TORT OF INVASION OF PRIVACY: THE DEVELOPMENT OF THE REMEDY IN LIGHT OF THE EXPANSION OF CONSTITUTIONAL PRIVILEGE

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Introduction

The tort of invasion of privacy[1] operates in many circumstances as a constraint on freedom of expression. It is used as a policing device that regulates the exercise of the First Amendment right of freedom of expression in conformity with the mores of the local community.

The Supreme Court has deemed both privacy and freedom of expression to be fundamental constitutional rights. The Court has consistently stated that freedom of expression is crucial and deserves extensive protection from infringement; as the Court pointed out in *Thornhill v. Alabama*,[2] this right must embrace all issues about which the citizenry requires information in order to fulfill its function in a free society.[3] Justice Brennan relied upon similar expressions of principle in his opinion for the Court in *New York Times Co. v. Sullivan*,[4] which held

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* Member, second year class.

1. Four types of invasion of privacy are commonly recognized: intrusion (physical invasion of the plaintiff's solitude), appropriation (pecuniary exploitation of plaintiff's name, identity or likeness), false light in the public eye (presentation of plaintiff in a false, though not necessarily defamatory, light before the public), and public disclosure of private facts (giving publicity to intimate but true facts about the plaintiff). *See* RESTATEMENT (SECOND) OF TORTS §§ 652A-E (Tent. Draft No. 13, 1967); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117 (4th ed. 1971) [hereinafter cited as PROSSER]; Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389-407 (1960). *See also* Bloustein, *Privacy as An Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962, 964 n.10 (1964); Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093, 1095 n.13 (1962).

This note will focus only upon the latter two branches of the tort because any First Amendment privilege applies, if at all, exclusively to these two variants. *See* PROSSER, *supra*, § 118 at 827; Galella v. Onassis, 353 F. Supp. 196, 222 (S.D.N.Y. 1972), *aff'd and modified*, 487 F.2d 986 (2d Cir. 1973).

2. 310 U.S. 88 (1940).

3. *Id.* at 102.

4. 376 U.S. 254 (1964).

that a libelous statement about a public official, published without knowledge or reckless disregard of its falsity, was not actionable. The decision rested on the theory that the First Amendment evinces "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[5]

The Court has also recognized, however, that other interests may outweigh freedom of expression in proper circumstances.[6] As Justice Harlan noted in *Konigsberg v. State Bar of California*:[7]

> [We] reject the view that freedom of speech and association, as protected by the First and Fourteenth Amendments, are "absolutes". . . . Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection. . . . On the other hand, general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved.[8]

Despite these caveats, early libel and invasion of privacy cases concluded that freedom of expression should be accorded the utmost deference. In one such case, a district court noted: "Although

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5. *Id.* at 270.

6. *See, e.g.*, with respect to subversive advocacy: United States v. O'Brien, 391 U.S. 367, 376-77 (1968); Dennis v. United States, 341 U.S. 494, 503-05 (1951); Schenck v. United States, 249 U.S. 47, 52 (1919). *See, e.g.*, with respect to "fighting words": Cohen v. California, 403 U.S. 15, 19 (1971); Feiner v. New York, 340 U.S. 315, 320-21 (1951); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). *See, e.g.*, with respect to obscenity: United States v. Reidel, 402 U.S. 351. 355-56 (1971); Roth v. United States, 354 U.S. 476, 481-83 (1957). *See, e.g.*, with respect to libel in general: Bigelow v. Virginia, 421 U.S. 809, 819 (1975); Konigsberg v. State Bar of California, 366 U.S. 36, 49-50 (1961); Times Film Corp. v. City of Chicago, 365 U.S. 43, 48 (1961); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952); Pennekamp v. Florida, 328 U.S. 331, 348-49 (1946); Near v. Minnesota, 283 U.S. 697, 715 (1931); Robertson v. Baldwin, 165 U.S. 275, 281 (1897).

7. 366 U.S. 36 (1961).

8. *Id.* at 49-51 (footnotes and citations omitted). For articles with prescriptive suggestions for the resolution of the conflict between privacy and free expression, *see, e.g.*, T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 548-57 (1970); Beytagh, *Privacy and a Free Press: A Contemporary Conflict in Values*, 20 N.Y.L.F. 453, 498-504 (1975); Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 959-67 (1968) [hereinafter cited as Nimmer].

what is of public concern is not as yet a clearly defined field of the law, it has been held that even in borderline cases the benefit of doubt should be cast in favor of protecting the publication."[9]

The Supreme Court has also recognized a fundamental right of privacy.[10] As early as 1891, in *Union Pacific Railway Co. v. Botsford*,[11] the Court recognized that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[12] The Fourth Amendment provided the basis for a long line of Supreme Court decisions that posited the individual's right to be free from intrusions upon privacy.[13] Only during the past decade has the Court restricted the scope of tort actions for invasion of privacy in order to safeguard the interest of free speech. This note examines the series of cases beginning with *Time, Inc. v. Hill*,[14] and extending through *Cox Broadcasting Corp. v. Cohn*,[15] in which the Court has expanded the defense of privilege based on the First Amendment right of free expression in suits framed upon the theory of invasion of privacy.

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9. Cordell v. Detective Publications, Inc., 307 F. Supp. 1212, 1220 (E.D. Tenn. 1968), *aff'd*, 419 F.2d 989 (6th Cir. 1969). *Accord*, Cantrell v. Forest City Publishing Co., 484 F.2d 150, 156 (6th Cir. 1973); Liberty Lobby, Inc. v. Pearson, 390 F.2d 489, 491 (D.C. Cir. 1968).

10. "Right of privacy" is a difficult phrase to define. The most concise definition is simply "the right to be let alone." T. COOLEY, LAW OF TORTS 29 (2d ed. 1888). But this definition is too broad. Alternative formulations suffer the same defect. *See, e.g.*, A. WESTIN, PRIVACY AND FREEDOM 7 (1967); Fried, *Privacy*, 77 YALE L.J. 475, 482-83 (1968); Gross, *The Concept of Privacy*, 42 N.Y.U.L. REV. 34, 35-36 (1967); Konvitz, *Privacy and the Law: A Philosophical Prelude*, 31 L. & CONTEMP. PROB. 272, 279-80 (1966); Ruebhausen and Brim, *Privacy and Behavioral Research*, 65 COLUM. L. REV. 1184, 1189 (1965). *See also* Griswold v. Connecticut, 381 U.S. 479, 509 (1965) (Black, J., dissenting).

For the purposes of this note, the following definition of privacy is used: "[T]he legally recognized freedom or power of an individual (group, association, [or] class) to determine the extent to which another individual (group, class, association, or government) may (a) obtain or make use of his ideas, writings, name, likeness, or other indicia of identity, or (b) obtain or reveal information about him or those for whom he is personally responsible, or (c) intrude physically or in more subtle ways into his life space and his chosen activities." Beaney, *The Right to Privacy and American Law*, 31 L. & CONTEMP. PROB. 253, 254 (1966).

11. 141 U.S. 250 (1891).

12. *Id.* at 251.

13. Mapp v. Ohio, 367 U.S. 643, 655-57 (1961); Irvine v. California, 347 U.S. 128, 132 (1954); Wolf v. Colorado, 338 U.S. 25, 28 (1949); Weeks v. United States, 232 U.S. 383, 391-92 (1914); Boyd v. United States, 116 U.S. 616, 630 (1886); *Ex parte* Jackson, 96 U.S. 727, 732-33 (1877).

14. 385 U.S. 374 (1967).

15. 420 U.S. 469 (1975).

The first section of this note considers whether the right of free speech and the rights protected by the tort action for invasion of privacy are coequal in importance, especially in light of the Supreme Court's dictum in the recent case of *Paul v. Davis*.[16] In conjunction with this discussion, the author asks whether preference for one interest over the other, as occurred in *Time, Inc. v. Hill*, is improper.

The next three sections triangulate the limits currently placed on the tort of invasion of privacy by the constitutional privilege for libel created in *New York Times Co. v. Sullivan*.[17] This task is accomplished by plotting the perimeters within which such an action must be brought. These perimeters are created by three factors: the actual malice test, the public figure/private person distinction, and the issue of damages. Section five considers whether the constitutional privilege, which originated in the context of libel suits, should be extended to limit the right of recovery in privacy actions. The argument is made that of the three factors determining the libel privilege, the actual malice test, to the extent it involves the issue of falsity, may have no application to invasions of privacy through public disclosure of private facts.

The conclusion links the assumptions developed in section one with the considerations discussed in section five. The author suggests that, to the extent that the right of privacy is deemed to be a fundamental constitutional right, the automatic deference to the right of free speech implicit in the *New York Times* rule should have no place in invasion of privacy suits. This note does not arrive at hard and fast conclusions about the relationship of the *New York Times* privilege and invasion of privacy actions. It attempts rather to highlight the crucial questions left

16. 424 U.S. 693 (1976).

17. 376 U.S. 254 (1964). *New York Times* is a libel case. Throughout this note extensive reference is made for several reasons to libel cases decided by the federal courts. First, the paucity of decisions (especially Supreme Court decisions) in invasion of privacy actions necessitates consideration of the holdings in defamation cases where an analogy to the area of privacy is likely to be drawn. Second, dicta in defamation cases often directly refer to the area of invasion of privacy. Third, the courts often carry over concepts and doctrines from the area of libel to that of invasion of privacy and vice versa. For example, the test of actual malice, first applied in *New York Times Co. v. Sullivan* was transferred into the invasion of privacy area in *Time, Inc. v. Hill*. Similarly, the public figure distinction inherent in *Hill* was subsequently carried back into the field of libel by Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). While this carryover is, in the author's opinion, incorrect, it is necessary to discuss what the federal courts are doing as well as what they should be doing. Finally, libel and invasion of privacy overlap, most noticeably in the false light variant of the latter tort. *See* PROSSER, *supra* note 1, § 117 at 813; Note, *Privacy in the First Amendment*, 82 YALE L.J. 1462, 1472 (1973). *But see* Nimmer, *supra* note 8, at 958. *See also* Time, Inc. v. Hill, 385 U.S. 374, 385 n.9 (1967); Berry v. National Broadcasting Co., 480 F.2d 428, 431 (8th Cir. 1973); Meeropol v. Nizer, 381 F. Supp. 29, 37 (S.D.N.Y.), *aff'd*, 505 F.2d 232 (2d Cir. 1974).

unanswered in the Court's recent decisions and suggests possible solutions to the problems underlying those questions.

I. Constitutional Underpinnings for the Tort of Invasion of Privacy

The initial issue that must be confronted is whether, in light of the Supreme Court's decision in *Griswold v. Connecticut*,[18] the tort action for invasion of privacy protects a constitutional right as fundamental as that of free speech. Prior to *Griswold*, the major analysis of the constitutional basis for a right of privacy was in *York v. Story*,[19] decided by the United States Court of Appeals for the Ninth Circuit. In that case the plaintiff, who was present at a police station in order to file a charge for criminal assault, was directed to undress by the defendant, the police officer assigned to handle her complaint. She reluctantly complied and was photographed in the nude by Story, who distributed the photos among his colleagues. The plaintiff sued Story for invasion of privacy, alleging, *inter alia*, deprivation of federal rights under the Civil Rights Act.[20] The district court dismissed the complaint. On appeal, plaintiff broadened her contentions by also alleging an unreasonable search under the Fourth Amendment, violation of her right of privacy, guaranteed by the Fourth and Fourteenth Amendments, in the commission of the unreasonable search, and deprivation of liberty without due process of law under the Fourteenth Amendment. Citing *Wolf v. Colorado*,[21] the court of appeals decided that privacy against personal intrusion was "implicit in the concept of ordered liberty,"[22] and deemed the photographing of the nude body to be as substantial a deprivation of that right as the searching of a residence without a warrant. Finally, the court concluded that the provisions of the Civil Rights Act afforded plaintiff a remedy in federal courts, despite the fact that no portion of the Bill of Rights explicitly proscribed the conduct in question.[23] Earlier and subsequent decisions cast doubt upon the via-

18. 381 U.S. 479 (1965).

19. 324 F.2d 450 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964).

20. 42 U.S.C. § 1983 (1970): "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

21. 338 U.S. 25, 27 (1949).

22. 324 F.2d at 455.

23. 324 F.2d at 455-56. The court relied on several earlier cases decided by various circuits in support of this proposition: Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963); Brazier v. Cherry, 293 F.2d 401 (5th Cir. 1961); Hardwick v. Hurley, 289 F.2d 529 (7th Cir. 1961); Geach v. Moynahan, 207 F.2d 714 (7th Cir. 1953); Koehler v. United States, 189 F.2d 711 (5th Cir. 1951) (all dealing with assaults upon arrestees by

bility of that holding.[24] Six years after deciding *York* the same circuit court of appeals reached a contrary result in *Baker v. Howard*,[25] a case involving the same section of the Civil Rights Act. The court explicitly

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police officers); Hughes v. Noble, 295 F.2d 495 (5th Cir. 1961) (refusal of police officers to obtain medical attention for one in custody).

24. Rosenberg v. Martin, 478 F.2d 520, 524-25 (2d Cir. 1973) (no cause of action was stated under the Civil Rights Act in the case of a false light invasion of privacy suit); Mimms v. Philadelphia Newspapers, Inc., 352 F. Supp. 862, 865 (E.D. Pa. 1972) (complaint framed on a false light invasion of privacy theory presented no allegation of the deprivation of any federally-guaranteed right); Bradford v. Lefkowitz, 240 F. Supp. 969, 977 (S.D.N.Y. 1965) (held in a false light suit that the Civil Rights Act "was not intended to incorporate every violation of a state right nor to provide preemption of such rights in a federal remedy.").

In one respect at least, the unwillingness of the federal courts to admit that the Civil Rights Act encompasses false light invasion of privacy suits is entirely consistent. In many instances the tort complained of in such suits overlaps with the gravamen of the complaint alleged in libel or slander actions; and the federal courts *have* consistently held that a plaintiff may not sue for libel under 42 U.S.C. § 1983. *See* Azar v. Conley, 456 F.2d 1382, 1389 (6th Cir. 1972); Church v. Hamilton, 444 F.2d 105, 106 (3d Cir. 1971); Association for Preservation of Freedom of Choice, Inc. v. Simon, 299 F.2d 212, 214 (2d Cir. 1962); Slegeski v. Ilg, 395 F. Supp. 1253, 1257 (D. Conn. 1975); Schumate v. New York, 373 F. Supp. 1166, 1168 (S.D.N.Y. 1974); Keen v. Philadelphia Daily News, 325 F. Supp. 929, 930 (E.D. Pa. 1971); Temple v. Pergament, 235 F. Supp. 242, 244 (D.N.J. 1964). Thus to the extent that false light invasion of privacy is an analogue of libel, it may be logical to say that the Civil Rights Act does not permit a plaintiff to seek redress in the federal courts. The same cannot be said, however, for invasion of privacy through public disclosure of private facts.

It should also be noted that these limitations do not apply to non-statutory means of access to the federal courts. *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 395-97 (1971).

25. 419 F.2d 376, 377 (9th Cir. 1969) (the rationale of *York* is inapplicable in a false light invasion of privacy case unless plaintiff is able to allege "such a gross abuse of privacy as to amount to an abridgement of fundamental constitutional guarantees.") *Accord*, Rosenberg v. Martin, 478 F.2d 520, 525 (2d Cir. 1973); Kipps v. Ewell, 391 F. Supp. 1285, 1290 (W.D. Va. 1975); Mimms v. Philadelphia Newspapers, Inc., 352 F. Supp. 862, 865 (E.D. Pa. 1972); Travers v. Paton, 261 F. Supp. 110, 115 (D. Conn. 1966); Dixon v. Pennsylvania Crime Comm., 67 F.R.D. 425, 431-32 (M.D. Pa. 1975). *See also* Paul v. Davis, 424 U.S. 693 (1976). That case is especially interesting in this context. In *Paul*, the police commissioner of Louisville, Kentucky, authorized the dissemination of a circular alleging that the respondent was an "active shoplifter." Davis had been arraigned over a year earlier on a charge of shoplifting, but after he entered a plea of not guilty, the charge had been filed away "with leave to reinstate"; it was, in fact, dropped shortly after publication of the circular. As a result of such publication, Davis' reputation was substantially besmirched. He brought a class action in a federal district court for damages and injunctive relief, alleging both invasion of privacy and deprivation of rights under 42 U.S.C. § 1983.

The district court granted the petitioner's motion to dismiss the complaint. The United States Court of Appeals for the Sixth Circuit reversed solely on the ground that Davis had sufficiently alleged a denial of due process under the terms of the Civil Rights Act. Paul v. Davis, 505 F.2d 1180 (6th Cir. 1974). On certiorari, the Supreme Court overturned the opinion of the court of appeals. Justice Rehnquist, in his opinion for the

distinguished the result in *York* on the basis of the blatant nature of the abridgement of personal dignity involved in that case. Notwithstanding *Baker*, *York* remains persuasive authority for the position that the tortious conduct may be so egregious as to amount to an infringement of the constitutional right to be free from intrusion.

Two years after *York*, the Supreme Court decided *Griswold v. Connecticut*,[26] confirming that there is a constitutional right of privacy. But the Court has extended its holding in *Griswold* to only a narrow range of situations involving state interference with the familial, marital,

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majority, suggested that acceptance of Davis' contentions would be tantamount to saying that every legally cognizable injury inflicted by individuals acting under color of law would constitute a violation of the Fourteenth Amendment. *Id.* at 698-99. According to him, this case did not present an instance where a state was trying to remove due process safeguards necessary for the protection of a constitutional interest; he noted that there was "no specific constitutional guarantee safeguarding the interest [the respondent] asserts has been invaded." *Id.* at 700. Justice Rehnquist held that because the shielding of an individual's reputation from defamation is not a privilege, right, or immunity secured by the Constitution, the respondent's exclusive remedy would be to sue in a state court on the basis of state tort law. *Id.* at 712.

In *Paul*, the respondent's claim under the Civil Rights Act was essentially one of libel; his allegation of invasion of privacy was a separate contention with which the court of appeals never dealt. Therefore, *Paul* is readily distinguishable from *York v. Story* and perhaps from *Baker v. Howard*. Arguably, to the extent that libel and false light invasion of privacy overlap, the rationale of *Paul* may apply to the latter cause of action. But *Paul* did not explicitly overrule either *York* or *Baker* and its effect on the holding of these two cases is, at best, conjectural. Nevertheless, in light of *Paul*, the lower federal courts will probably be very reluctant to permit a plaintiff to sue for invasion of privacy under the Civil Rights Act. Whether the holding in *Paul* will also curtail the ability of a plaintiff to seek redress in federal courts on the basis of the non-statutory remedy developed in *Bivens* is less clear.

26. 381 U.S. 479 (1965). In this case, a Connecticut statute forbade the use of contraceptives. Under a general criminal law, the executive director and senior medical director of a local birth control clinic were convicted as accessories for prescribing contraceptives to married couples. On appeal, it was contended that the anti-contraceptive statute violated the due process clause of the Fourteenth Amendment. In his opinion for the Court, Justice Douglas argued that penumbral emanations from the First, Third, Fourth, Fifth, and Ninth Amendments create a "zone of privacy" upon which the states may not infringe. *Id.* at 484-85. He concluded that the sanctity of the marital relationship fell within this zone.

Justice Goldberg's concurrence arrived at a similar result by different means. *Id.* at 486-99. From the Ninth Amendment he extrapolated a right of marital privacy which he deemed to be cognate in importance with the other basic guarantees of freedom of speech, religion, and assembly. This right, he felt, emanates " 'from the totality of the constitutional scheme under which we live.' " *Id.* at 494, *citing* Poe v. Ullman, 367 U.S. 497, 521 (1961) (Douglas, J., dissenting). The two opinions share crucial defects. Neither justice takes into account the possibility of potential conflict between the right of privacy and the broadly-asserted First Amendment guarantee of free speech. More importantly, neither opinion defines the right of privacy said to be implicit in the Constitution.

and sexual activities of individuals.[27] It has not linked the *Griswold* right of privacy to the rights protected by the modern tort of invasion of

27. The Court relied on *Griswold* to overrule a conviction for possession of pornography. The evidence was obtained in defendant's dwelling by police officers who entered under the authority of a warrant issued for the purpose of acquiring other evidence unrelated to the offense for which he was convicted. Stanley v. Georgia, 394 U.S. 557, 564-65 (1969). *See also* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65-67 (1973); United States v. Reidel, 402 U.S. 351, 356 (1971).

Griswold was also the basis for the Court's decision to uphold a challenge to burdensome pregnancy regulations for public school teachers in Cleveland. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974). It was relied upon in the course of an opinion striking down a Massachusetts law imposing criminal sanctions on the use of contraceptives by married couples. Eisenstadt v. Baird, 405 U.S. 438, 443 (1972).

The major recent application of *Griswold* by the Supreme Court came in its opinion invalidating a Texas statute that proscribed abortions other than those necessary to save the life of the mother. Roe v. Wade, 410 U.S. 113, 152-54 (1973). *Accord*, Word v. Poelker, 495 F.2d 1349, 1350-51 (8th Cir. 1974); Hathaway v. Worcester City Hosp., 475 F.2d 701, 705-06 (1st Cir. 1973); Doe v. Turner, 361 F. Supp. 1288, 1290 (S.D. Iowa 1973); Doe v. Israel, 358 F. Supp. 1193, 1199-1200 (D.R.I. 1973).

In terms of the protection of the individual's sphere of decision over the sexual aspect of his life, the major decision is that of the United States Court of Appeals for the Seventh Circuit, which extended the protection of *Griswold* to consensual sodomy between a married couple in the privacy of their home. Cotner v. Henry, 394 F.2d 873, 875 (7th Cir. 1968). *Cf.* Lovisi v. Slayton, 363 F. Supp. 620, 624-25 (E.D. Va. 1973); Raphael v. Hogan, 305 F. Supp. 749, 755 n.18 (S.D.N.Y. 1969); Towler v. Peyton, 303 F. Supp. 581, 582-83 (W.D. Va. 1969).

But see Ravin v. State, 537 P.2d 494 (Alaska 1975); Roe v. Ingraham, 480 F.2d 102 (2d Cir. 1973). In *Ravin*, the Alaska Supreme Court held that the right of privacy enunciated in *Griswold* shielded the petitioner from a criminal prosecution for smoking marijuana in his own home. 537 P.2d at 498-99. But the basis for the decision may really be the Alaska Constitution, which recognizes a right of privacy. *Id.* at 500-01, 504. If so, the precedent set by *Ravin* may not provide sufficient impetus to extend *Griswold* any further than the United States Supreme Court has already done. In *Ingraham*, the petitioners were patients whose physicians had given them prescriptions for potentially harmful drugs. They objected to a New York statute requiring that this prescription information be filed in central data banks. The United States Court of Appeals for the Second Circuit held that the complaint should not have been dismissed because the individual's right to keep private the information contained in his medical prescriptions was near the continuum of privacy developed by *Griswold* and *Roe v. Wade*, 480 F.2d at 108-09. On remand, a three-judge district court invalidated the state statute on grounds of overbreadth. Roe v. Ingraham, 403 F. Supp. 931, 937 (S.D.N.Y. 1975).

The expansive effect of *Ingraham* may be questioned on several counts. First, both the court of appeals and the three-judge district court argued that the New York statute was defective because it failed to provide adequate safeguards for the confidentiality of the records in question. 480 F.2d at 109, 403 F. Supp. at 937. Second, the precedential value of these cases may be limited by the fact that they dealt with an aspect of privacy that Congress had previously attempted to shield by statute. Freedom of Information Act, 5 U.S.C. § 552(b)(6) (1970), *amending* 5 U.S.C. § 1002 (1964). Finally, at least one commentator has suggested that the right of "informational privacy" dealt with in *Ingraham* is both fundamentally different and clearly distinct from the concept of "indi-

privacy.[28]

In the face of such uncertainty, the lower federal courts have taken various positions. The conservative approach has best been expressed by Judge Johnson in his concurrence in *Drake v. Covington County Board of Education*,[29] a case decided by a three-judge federal court in Alabama:

> This constitutional right of privacy . . . is designed to create a zone of protected activities free from governmental intrusion. This constitutional right of privacy is very different from the right of privacy sounding in tort . . . . This tortious privacy right, often spoken of as the Warren-Brandeis right of privacy, is a creature of state law and is not constitutionally based. To the contrary, this right often comes in conflict with the First Amendment's guarantee of freedom of speech and of the press.[30]

Similarly, Judge Friendly in *Rosenberg v. Martin*[31] cautioned against equating the constitutional right of privacy with the statutory rights protected by the imposition of tort liability in New York.[32] Judge

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vidual autonomy" discussed in *Griswold*, so that the former decision cannot properly be said to be an extension of the latter. *See* Note, *Informational Privacy: Constitutional Challenges to the Collection and Dissemination of Personal Information by Government Agencies*, 3 HASTINGS CONST. L.Q. 229, 235-36, 245 (1976). Whatever one may think of this attempted distinction, it is worth noting that Chief Judge Friendly, in his opinion for the court of appeals in *Ingraham*, specifically relied on *Griswold* and *Roe v. Wade* to arrive at his conclusion. 480 F.2d at 107-108. For a recent discussion by the Supreme Court on this matter, see text accompanying notes 46-50 *infra*.

A few courts have also intimated that a constitutional right of privacy may protect homosexuals from governmental interference with their lives solely because of their sexual proclivities. *See* Norton v. Macy, 417 F.2d 1161, 1164 (D.C. Cir. 1969); Acanfora v. Bd. of Educ., 359 F. Supp. 843, 850-51 (D. Md. 1973); In re Labady, 326 F. Supp. 924, 929 n.4 (S.D.N.Y. 1971). These were civil suits. Quite recently, however, the United States Supreme Court concluded that no right of privacy shielded homosexuals from prosecution under a state criminal statute for acts of consensual sodomy. Doe v. Commonwealth's Atty. for City of Richmond, 96 S. Ct. 1489 (1976), *summarily aff'g*, 403 F. Supp. 1199 (E.D. Va. 1975). Because this decision was a summary affirmance of the decision of a three-judge district court, its value as precedent may be limited. Moreover, in light of the statements in *Cotner* and *Towler*, the Court's action raises troublesome equal protection problems which merit more extended consideration.

28. *But cf.* Time, Inc. v. Hill, 385 U.S. 374, 415 (1967) (Fortas, J., dissenting).

29. 371 F. Supp. 974 (M.D. Ala. 1974).

30. *Id.* at 980 (footnotes and citations omitted). *See* Note, *Roe and Paris: Does Privacy Have a Principle?*, 26 STAN. L. REV. 1161, 1163 (1974); Rehnquist, *Is An Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement? Or: Privacy, You've Come a Long Way, Baby*, 23 KAN. L. REV. 1, 3 (1974). *See also In re* Long, 55 Cal. App. 3d 788, 794-95, 127 Cal. Rptr. 732, 735-36 (App. Dep't Super. Ct. 1976). *Long* in particular noted the distinction between the tort and constitutional concepts of privacy, but indicated both concepts are similar in that they shield dignity.

31. 478 F.2d 520, 524 (2d Cir. 1973).

32. N.Y. CIVIL RIGHTS LAW §§ 50-51 (McKinney 1968).

Becker, in *Mimms v. Philadelphia Newspapers, Inc.*,[33] a case decided by the District Court for the Eastern District of Pennsylvania, also drew the distinction that "the wrongs plaintiff asserts, namely libel and invasion of privacy, are not normally considered federally guaranteed rights."[34] In a footnote, he added that the right to have one's intimate affairs shielded from publicity should always be distinguished from the constitutional right to be free from unwarranted government intrusion.[35] These cases evince a strong inclination not to apply *Griswold* to this area of tort law.

Two other federal courts, however, have adopted a more expansive approach. The initial case to do so was *Dietemann v. Time, Inc.*,[36] decided by a California district court five years after *York*. Two *Life* magazine reporters visited the plaintiff and managed to gain entry into his home on the pretext that they were acquaintances of a mutual friend. While there, they taped his conversation with a hidden recorder and photographed him with a concealed camera. By prior arrangement, the tapes and photos were turned over to the Los Angeles District Attorney's office. The plaintiff was subsequently arrested for practicing medicine without a license. Two weeks later, *Life* published an article that incorporated one of the photos surreptitiously taken and applauded the district attorney's "crackdown on quackery." Dietemann sued for invasion of privacy. The district court, relying on *Griswold*, held:

> At the outset defendant is met with the proposition that although freedom of speech and freedom of press are constitutional guaranties so is the right of privacy. . . . While the courts may be required under some circumstances to balance the rights and privileges when the constitutional guaranties of freedom of speech and press clash with the right of privacy, there would appear to be *no basis* to give greater weight or priority to any one of these constitutional guaranties.[37]

In addition to finding that the First Amendment right of freedom of expression did not bar plaintiff's invasion of privacy claim under California law,[38] the district court also concluded, on the basis of the discussion in *York* of the Civil Rights Act, that a judgment for the

33. 352 F. Supp. 862 (E.D. Pa. 1972).

34. *Id.* at 865.

35. *Id.* at n.5.

36. 284 F. Supp. 925 (C.D. Cal. 1968), *aff'd without considering the point*, 449 F.2d 245 (9th Cir. 1971).

37. *Id.* at 929. *Contra*, Cantrell v. Forest City Publishing Co., 484 F.2d 150, 156 (6th Cir. 1973), *rev'd without considering the point*, 419 U.S. 245 (1974): "If there are preferred positions among the rights guaranteed by the Bill of Rights, certainly such priority attaches to freedom of speech and the press rather than to the less explicit and less well defined right of privacy."

38. The court relied on the holding of the California Supreme Court in Gill v. Curtis Publishing Co., 38 Cal. 2d 273, 239 P.2d 630 (1952).

plaintiff could be predicated on federal law.[39] *Dietemann*, on reflection, is a revolutionary holding: it declared that privacy and freedom of expression are rights of comparable importance and should be treated as such by the courts.

Perhaps the most far-reaching decision on this issue was rendered by a federal court for the southern district of New York in *Galella v. Onassis*.[40] This action arose out of the harassing tactics employed by Ron Galella in photographing Jacqueline Kennedy Onassis. The district court, in enjoining Galella, cited *Griswold* and *Dietemann* for the proposition that the Constitution guarantees freedom from intrusive invasion of privacy.[41] The court further stated:

> The essence of the privacy interest includes a general "right to be left alone," and to define one's circle of intimacy; to shield intimate and personal characteristics and activities from public gaze; to have moments of freedom from the unremitted assault of the world and unfettered will of others in order to achieve some measure of tranquality [*sic*] for contemplation or other purposes, without which life loses its sweetness. The rationale extends to protect against unreasonably intrusive behavior which attempts or succeeds in . . . gathering, storing, sharing and disseminating of information by humans and machines.[42]

Finally, the court seconded the assertion of the New York Court of Appeals in *Nader v. General Motors Corp.*,[43] to the effect that privacy is cognate in importance with the guarantees of the First Amendment. *Galella*, then, goes beyond the statutory right of privacy embodied in New York law, and at least one New York district court has refused to apply its conclusions.[44]

Dietemann and *Galella* are formative efforts in applying *Griswold* to the tort of invasion of privacy, but one should recognize their limitations. Much of what was said was dicta; moreover, *Galella* and *Diete-*

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39. 284 F. Supp. at 932.

40. 353 F. Supp. 196 (S.D.N.Y. 1972), *aff'd and modified without considering the point*, 487 F.2d 986 (2d Cir. 1973).

41. *Id.* at 232. The court in *Galella* also relied on People v. Doorley, 338 F. Supp. 574 (D.R.I.), *rev'd on other grounds*, 468 F.2d 1143 (1st Cir. 1972). Dicta in *Doorley* suggested that the right of privacy was a complex conceptualization based on the First, Third, Fourth, Ninth, and Fourteenth Amendments and that the fact that the right was not located in one specific provision did not affect the state's interest in protecting it. *Id.* at 577.

42. 353 F. Supp. at 232 (footnotes and citations omitted). *Cf.* United States v. Laub Baking Co., 283 F. Supp. 217, 228 (N.D. Ohio 1968) (right of privacy deemed to encompass only those rights "traditionally regarded as private in nature").

43. 57 Misc. 2d 301, 292 N.Y.S.2d 514 (Super. Ct. 1968), *aff'd*, 31 App. Div. 2d 392, 298 N.Y.S.2d 137 (1969), *aff'd*, 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970).

44. Meeropol v. Nizer, 381 F. Supp. 29, 38 (S.D.N.Y.), *aff'd*, 505 F.2d 232 (2d Cir. 1974).

mann specifically involve tortious invasion of privacy based on the theory of intrusion, as did *York v. Story*. Arguably, however, the logic of these cases should apply to the false light and public disclosure of private facts branches of the tort of invasion of privacy.[45]

The validity of *Dietemann* and *Galella* may have been undercut by dictum in the recent decision of the Supreme Court in *Paul v. Davis*.[46] The decision in *Paul* dealt primarily with the respondent's libel claim under the Civil Rights Act, but Justice Rehnquist's majority opinion noted that Davis had, in his complaint, also alleged an invasion of his right of privacy under the First, Fourth, Fifth, and Ninth Amendments. Justice Rehnquist pointed out that the zones of privacy elaborated upon by the Court in *Griswold* and in *Roe v. Wade*[47] related to matters involving procreation, contraception, child-rearing, and education.[48] He went on to say:

> Respondent's claim is far afield from this line of decisions. . . . His claim is based not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be "private," but instead on a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.[49]

Apparently Davis simply sued for violation of privacy in general and not on the theory of false light invasion of privacy. If so, he was essentially attempting to recover for an abstract infringement of constitutional rights quite apart from any cause of action he might have had under modern tort law. Assuming this characterization of Davis' claim is accurate, Justice Rehnquist's statement can be interpreted very narrowly. Even assuming that Davis did originally allege false light invasion of privacy, however, there is no reason to construe Justice Rehnquist's remarks as relating to any rights other than those protected by that single branch of the tort of invasion of privacy. Certainly the dictum in *Paul* is silent about the nature of the interests protected by a cause of action for invasion of privacy through public disclosure of private facts. Yet a third difficulty with this passage is that Justice Rehnquist seems to be basing his conclusion on the theory that the offending public action dealt with a report on a matter of public record to which, by definition, no right of privacy can pertain.[50] If this inference is justi-

45. For definitions of these terms, see note 1 *supra*.

46. 424 U.S. 693 (1976), *rev'g* Davis v. Paul, 505 F.2d 1180 (6th Cir. 1974). For the facts of this case, see note 25 *supra*.

47. 410 U.S. 113 (1973).

48. 424 U.S. at 713.

49. *Id.*

50. See notes 253-55 and text accompanying *infra*. But even if one goes so far as saying that *Paul v. Davis* conclusively states that the right of privacy developed in

fied, then Justice Rehnquist's dictum would be applicable to only a very limited number of situations. Moreover, it is uncertain what effect this passage would have on the body of state tort law that permits recovery for privacy-invading but truthful reportage of matters of public record. At least it is arguable that the effect of this dictum should be limited solely to cases like *Paul*, which involve alleged invasions of privacy by government officers acting in their official capacity, and should not be extended to any other situations. The dictum in *Paul v. Davis* is therefore not very useful as a guideline for resolving future cases.

Two directions have been taken by lower federal courts trying to establish that the tort of invasion of privacy shields constitutional interests: either the courts have applied *Griswold*, as in *Dietemann* and *Galella*, or, under a different set of facts, they have invoked a constitutional sanction embodied in the Fourteenth Amendment and, as in *York v. Story*, have recognized a mode of redress in the Civil Rights Act. Yet a third alternative has been suggested, at least with respect to invasion of privacy through public disclosure of private facts.[51] The premise of this alternative is that freedom of expression does not end with the ability of one person to communicate his thoughts to another; the interest also embraces a right to control the use to which that other person puts the communicated information. In order to assure that each citizen is free to choose how to lead his own life, the state must guarantee him a minimum of privacy; it must allow a minimum of control over the dissemination of personal information by others.[52] The secret ballot is an obvious example and the need for confidentiality in testimony at certain types of legislative hearings is another. Strip away the cloaks of privacy in these situations and people will be reluctant to vote or to testify, and thus free expression will be diminished. Given this perspective, the First Amendment may require some protection of individual privacy; free speech is truly free only if the individual is allowed privacy

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Griswold does not include the rights protected by the tort of invasion of privacy, it is arguable that the court *should* expand *Griswold* in just such a way. If one admits that shielding the intimate facts of a person's life or penalizing the publication of facts that present a person in a false light in the public eye fall within the ambit of privacy, then why shouldn't these interests receive as much protection as the interest in protecting a person from state intrusion into the sexual, marital, or familial aspects of his life? Why acknowledge constitutional underpinnings for a cause of action for invasion of privacy through intrusion and not extend the same safeguards to the other branches of the tort? *Paul v. Davis* fails to address this problem; but even if Justice Rehnquist's comments are broadly construed, they need not result in any retreat from the cautious case-by-case balancing the Court has elsewhere sought to apply in invasion of privacy cases. See notes 258-59 *infra*.

51. *See* Note, *Privacy in the First Amendment*, 82 YALE L.J. 1462 (1973).

52. *Id.* at 1465-67.

in choosing what he wishes to express. Perhaps the major insight to be derived from this viewpoint is that freedom of expression and privacy are not competing interests but essentially complementary interests. As the advocate of this third alternative suggests, the courts have not recognized this fact.[53] Perhaps this is to be expected because the Supreme Court and most of the lower federal courts have been operating on the theory that these two interests conflict; that every extension of the right of privacy in a tort context becomes another encroachment on the preserve of free speech and free press.

The key point is that once one agrees that the former right is constitutional in nature and equivalent in importance to the latter, the application of any test limiting the ability of the plaintiff to recover damages for invasion of privacy would appear to be wrong. Rather, as Justice Harlan suggested in *Konigsberg v. State Bar of California*,[54] the body of local law protecting the right of privacy must be considered in light of the underlying state interest in affording such protection.

II. The Constitutional Privilege and its Ramifications: The Evolution of the Actual Malice Test

A. Origins

In order to determine what limits have been placed upon the plaintiff's ability to recover for tortious invasion of privacy, it is necessary to consider a number of libel cases where those limitations were initially created and defined.

The actual malice test was first enunciated in the landmark case of *New York Times Co. v. Sullivan*.[55] That case involved a suit by a city commissioner brought against *The New York Times*, which published an allegedly libelous (and partially false) advertisement castigating the way police in Montgomery, Alabama had dealt with a racial incident. The Supreme Court, reversing a judgment for the plaintiff, held that a public official could recover for libel only upon a showing that the defendant published defamatory statements with actual malice, that is, either with knowledge of their falsity or with reckless disregard of their possible falsity.[56] Under the common law of the states, there had

53. *Id.* at 1464. *Cf.* Branzburg v. Hayes, 408 U.S. 665, 714-15 (1972) (Douglas, J., dissenting).

54. See text accompanying note 8 *supra*.

55. 376 U.S. 254 (1964).

56. *Id.* at 279-80. Prosser dislikes the use of the term "malice" and would substitute for it the word "scienter." PROSSER, *supra* note 1, § 118 at 821. This is a valuable suggestion. The Supreme Court took pains to distinguish actual malice from ill-will or animosity. *See* Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82 (1967); Henry v. Collins, 380 U.S. 356, 357 (1965); Garrison v. Louisiana, 379 U.S. 64, 78-79 (1964). But a decade later courts are still confusing common-law malice with actual mal-

traditionally been a circumscribed privilege of fair comment about the activities of public servants,[57] but for over seventy years the federal courts had recognized the axiom that this privilege did not extend to the publication of falsehoods.[58] The Court in *New York Times* did not discredit this axiom; it merely exempted from tort liability innocent and negligent publishers of untruths.

The Court offered several justifications for its position. It advanced the theory that *ad hominem* criticism is a foreseeable risk that public servants must accept as a condition of their chosen careers.[59] The Court gave equal weight to the necessity for safeguarding the vitality of debate upon public issues and the concomitant need to give free expression breathing space. It expressed the fear that exorbitant awards of damages would have a chilling effect upon free speech. Moreover, it doubted whether First Amendment freedoms could survive under the pall of timidity imposed by the threat of lawsuits brought by libel victims.[60] The final justification offered by the majority in the *New York Times* case was that the difficulty and expense of verifying the truth of all assertions published would deter criticism and comment from being publicly aired. This argument was more fully elaborated by Judge J. Skelly Wright in *Washington Post Co. v. Keogh*,[61] where he noted:

> Verification . . . is a time-consuming process, a factor especially significant in the newspaper business where news quickly goes stale, commentary rapidly becomes irrelevant, and commercial opportunity . . . can easily be lost. In many instances considerations of time . . . make verification impossible . . . . Verification is also a costly process, and the newspaper business is one in which economic survival has become a major problem, made increasingly grave by the implications of this fact for free debate. We should be hesitant to impose responsibilities upon newspapers which can

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ice. *See, e.g.*, Cantrell v. Forest City Publishing Co., 419 U.S. 245, 251-52 (1974). *But cf.* Goldwater v. Ginzburg, 414 F.2d 324, 342 (2d Cir. 1969). This last opinion argued that evidence of ill-will "may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity."

The confusion is compounded when one remembers that the actual malice test is a *minimum* evidentiary burden on which the right of recovery is conditioned. Presumably *New York Times* would not preclude a state from requiring that, in order to receive punitive damages in a libel or invasion of privacy suit, the plaintiff must first prove actual malice *and* common-law malice.

57. *See* PROSSER, *supra* note 1, § 118 at 819-20.

58. Post Pub. Co. v. Hallam, 59 F. 530, 539-41 (6th Cir. 1893).

59. See note 86 *infra*.

60. New York Times Co. v. Sullivan, 376 U.S. 254, 278 (1964). *But see* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 263 (1974) (White, J., concurring).

61. 365 F.2d 965 (D.C. Cir. 1966).

be met only through costly procedures or through self-censorship designed to avoid the risks of publishing controversial material.[62]

B. Clarifications

The *New York Times* decision left many questions unanswered. Before subsequent courts could adequately apply the actual malice test, they first had to clarify exactly what the test entailed. The Court in *New York Times* spoke of the plaintiff's burden of making a "clear and convincing" showing of the defendant's knowledge or reckless disregard of falsity.[63] That part of the actual malice test conditioning liability on

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62. *Id.* at 972. The opinion also noted that the *New York Times* rule applies regardless of whether the publication complained of is a paid advertisement or an editorial. *Id.* at 970 n.6. *Cf.* Bigelow v. Virginia, 421 U.S. 809, 818 (1975); New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964); Perry v. Columbia Broadcasting Sys., Inc., 499 F.2d 797, 802 (7th Cir. 1974).

63. 376 U.S. at 285-86. Subsequent Supreme Court opinions repeat the "clear and convincing" requirement. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 (1971). Of course, as noted in Vandenburg v. Newsweek, Inc., 507 F.2d 1024, 1026 (5th Cir. 1975), this burden of proof is heavier than the usual "preponderance of the evidence" requirement in civil cases. *But cf.* Rosenbloom v. Metromedia, Inc., *supra* at 50.

At this juncture, it is useful to consider the procedural problems that arise when a defendant asserting constitutional privilege moves for a summary judgment or directed verdict. The consensus of the federal courts is that a bare allegation of actual malice by the plaintiff, supported only by a hope that cross-examination will impair the credibility of the defendant's witnesses, is insufficient to withstand a motion for summary judgment. Fram v. Yellow Cab Co., 380 F. Supp. 1314, 1335 (W.D. Pa. 1974); Goldman v. Time, Inc., 336 F. Supp. 133, 139 (N.D. Ca. 1971); Konigsberg v. Time, Inc., 312 F. Supp. 848, 853 (S.D.N.Y. 1970); Hurley v. Northwest Publications, Inc., 273 F. Supp. 967, 973-74 (D. Minn. 1967). What the courts do require is a showing by the plaintiff that he has "sufficient probative substance to be able litigably to give rise to an issue of fact on whether [actual] malice . . . existed or not." United Medical Laboratories, Inc. v. Columbia Broadcasting Sys., Inc., 404 F.2d 706, 712 (9th Cir. 1968). *Accord*, Time, Inc. v. Johnston, 448 F.2d 378, 383-84 (4th Cir. 1971); Time, Inc. v. McLaney, 406 F.2d 565, 571-72 (5th Cir. 1969); Thompson v. Evening Star Newspaper Co., 394 F.2d 774, 777 (D.C. Cir. 1968).

But a problem arises when one characterizes the issue of actual malice as a matter of constitutional fact. Because the very need to defend a lawsuit has a chilling effect on free speech, the First Amendment would seem to require the granting of a summary judgment or directed verdict whenever the plaintiff makes a doubtful showing. *See* Time, Inc. v. McLaney, *supra* at 566; Spern v. Time, Inc., 324 F. Supp. 1201, 1204 (W.D. Pa. 1971).

To meet this problem, Judge J. Skelly Wright has suggested a three-step procedure. First, use the usual method in deciding whether or not to grant a summary judgment. If the plaintiff withstands that challenge, let the trial court entertain a motion for a directed verdict after the plaintiff has fully presented his case, and if the trial proceeds, reserve the same motion for reconsideration after the defendant has introduced all his evidence. Should the plaintiff's case survive this challenge, let the issues go to the jury without informing them that the presiding judge has found actual malice. At each junc-

the knowing publication of a lie is self-explanatory; but the term "reckless disregard" both required and received further elaboration.

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ture, the trial judge makes an independent assessment of both the credibility of the plaintiff's witnesses or affidavits and the inferences that may be drawn from the evidence. *See* Wasserman v. Time, Inc., 424 F.2d 920, 922 (D.C. Cir. 1970) (Wright, J., concurring). Under this procedure, the plaintiff is compelled to meet his burden of clear and convincing proof at every stage of the trial; if at any point he fails to meet this burden, the proceeding is ended and the expense and inconvenience incurred by the defendant is thereby minimized. The obvious advantage of this procedure is that it provides the trial court with a sufficiently precise methodological approach to follow. Perhaps for this reason, Judge Wright's model has been explicitly adopted by the Fifth Circuit and by a few other district courts. *See* Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858, 864-65 (5th Cir. 1970); Buchanan v. Associated Press, 398 F. Supp. 1196, 1205 (D.D.C. 1975); Fram v. Yellow Cab Co., *supra* at 1335. In a recent case the Seventh Circuit has also given cautious approval to Judge Wright's technique, with certain reservations that arose from the limits of the factual situation with which it dealt. Carson v. Allied News Co., 529 F.2d 206, 210, 213 n.15 (7th Cir. 1976). It is impossible to say how many other jurisdictions have implicitly adopted this model.

But there are serious deficiencies in Judge Wright's approach. First, it may conflict with state laws requiring mixed questions of law and fact in invasion of privacy or libel cases to be submitted to the jury for determination. *See* Taggart v. Wadleigh-Maurice, Ltd., 489 F.2d 434, 438 (3d Cir. 1973). Another objection relates to one consequence of designating an issue to be a matter of constitutional fact. If such a designation is made then the appellate court is usually bound to make an independent de novo review of the record. Time, Inc. v. Pape, 401 U.S. 279, 284 (1971); New York Times Co. v. Sullivan, 376 U.S. 254, 284-86 (1964). When summary judgment is granted too quickly appellate courts have very little record to review. Unless the evidence is fully developed, appellate courts cannot fulfill their duty to assess independently issues of constitutional fact. For this reason, two cases in the Third Circuit reversed summary judgments with instructions to let the trial proceed so that the issues involved could be adequately aired, regardless of the chilling effect upon the defendant. *See* Taggart v. Wadleigh-Maurice, Ltd., *supra* at 438-39. *Accord*, Gordon v. Random House, Inc., 486 F.2d 1356, 1360-61 (3d Cir. 1973).

There is yet a third objection to Judge Wright's approach. His model would require the presiding trial judge, upon the defendant's motion for summary judgment or directed verdict, to make his own assessment of and draw his own inferences from the plaintiff's presentation of evidence. But the standard procedure in civil law suits in federal courts is to consider the evidence in the light most favorable to the party opposing the motion rather than to choose among the many inferences presented by the facts. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (both with respect to summary judgment); Galloway v. United States, 319 U.S. 372, 395 (1943) (with respect to directed verdicts). On this theory, two cases decided in the Ninth Circuit have repudiated Judge Wright's approach. *See* Teachers Local 1581 v. Ysrael, 492 F.2d 438, 441-43 (9th Cir. 1974). *Accord*, Alioto v. Cowles Communications, Inc., 519 F.2d 777, 780 (9th Cir. 1975). *See also* Hotchner v. Castillo-Puche, 404 F. Supp. 1041, 1050 (S.D.N.Y. 1975). The premise of these cases is that the presence of threatened First Amendment interests does not afford a basis for adopting procedures that inordinately discriminate against the plaintiff who seeks to submit his case to a jury; whether this premise is justified is a debatable proposition.

Two generalizations can be made. First, the granting of summary judgment in defamation and privacy cases is the rule, not the exception. Guitar v. Westinghouse Elec.

In *Garrison v. Louisiana*,[64] the phrase was defined as a "high degree of awareness of . . . probable falsity."[65] This case involved a statement by Garrison accusing members of the state judiciary of laziness and corruption. The Supreme Court reversed Garrison's conviction under Louisiana's criminal libel statute. It reiterated that mere negligence alone is an insufficient basis for imposing liability, thus implying that reckless disregard is allied to the concept of gross negligence. The connection between the two was drawn again three years later in the plurality opinion in *Curtis Publishing Co. v. Butts*,[66] in which Justice Harlan defined reckless disregard as being "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[67] Under this definition, the courts are to look at the degree of negligence exhibited by the publisher in the context of the standards of his profession and, if his lapse of due care is sufficiently egregious, then liability should be imposed.[68]

In 1968 the Court, in *St. Amant v. Thompson*,[69] gave full consideration to the subject of reckless disregard. In *St. Amant* the defend-

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Corp., 396 F. Supp. 1042, 1053 n.16 (S.D.N.Y. 1975). *Accord*, Treutler v. Meredith Corp., 455 F.2d 255, 257 n.1 (8th Cir. 1972); Alexander v. Lancaster, 330 F. Supp. 341, 350 (W.D. La. 1971). *But see* Time, Inc. v. Firestone, 424 U.S. 448, 475 n.3 (1976) (Brennan, J., dissenting). Second, the federal rules of procedure do not indicate how to determine whether an issue of fact exists. Therefore, while the trial judge should not decide issues of fact, he should scan the evidence supporting the plaintiff's allegations in order to determine whether or not that evidence establishes a cause of action. *Cf.* Ashwell & Co. v. Transamerica Ins. Co., 407 F.2d 762, 766 (7th Cir. 1969). *See also* (with respect to the duty of fact-finding in state court proceedings) Time, Inc. v. Firestone, *supra* at 969.

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

65. *Id.* at 74.

66. 388 U.S. 130 (1967).

67. *Id.* at 158. One district court has claimed that Justice Harlan's opinion expressed the view of a majority of the Court. Buckley v. Vidal, 50 F.R.D. 271, 273 n.1 (S.D.N.Y. 1970). This is erroneous. The opinions of the five concurring justices (Warren, C.J., and Black, Douglas, Brennan, and White, JJ.) suggest that they would apply the actual malice test to both public officials and public figures, without regard to any showing of "highly unreasonable conduct." 388 U.S. at 163 (Warren, C.J., concurring, joined by Brennan and White, JJ.); *id.* at 170 (Black and Douglas, JJ., concurring).

68. *But cf.* PROSSER, *supra* note 1, § 34 at 181-82, to the effect that the concept of "degrees" of negligence is a fallacy and that what the courts really mean to say is that differing circumstances require more or less due care. At least one federal court of appeals has implicitly accepted Prosser's approach in these First Amendment cases by stating that "hot news" items may require more stringent pre-publication investigative standards than other stories. Vandenburg v. Newsweek, Inc., 441 F.2d 378, 380 (5th Cir.), *cert. denied*, 404 U.S. 864 (1971); Vandenburg v. Newsweek, Inc., 507 F.2d 1024, 1026 (5th Cir. 1975).

69. 390 U.S. 727 (1968).

ant, in the course of a political broadcast, accused the plaintiff, a sheriff, of criminal conduct. The Supreme Court overturned the decision of the Louisiana Supreme Court, which had affirmed a judgment for the plaintiff. Recognizing that the term "reckless disregard" was not susceptible of one exact, unchanging definition, Justice White concluded that publication with serious doubts about the truth of the matter published is the key in determining whether reckless disregard under the actual malice test has been proven.[70] He went on to discuss the types of evidence sufficient to impeach a defendant's declaration that he published in good faith, and pointed out that professions of good faith would be unpersuasive where a story is based on: (a) fabrications concocted by the publisher, (b) an unverified, anonymous telephone call, (c) allegations so inherently improbable that no reasonable man would publicize them, or (d) statements elicited from an informant whose lack of veracity is obvious.[71] This summary is not entirely helpful. Fabricated stories fall under the rubric of knowing falsity and shed little light on reckless disregard. A story based solely on an anonymous telephone call is a rarity that most courts will never confront. "Inherently improbable allegations" is perhaps too vague a formulation to be helpful except in the most obvious cases. "Veracity of informants" is a useful criterion, but where the identity of the informants is confidential, the plaintiff may often be unable to convince a judge to require that the defendants disclose their names.[72] Moreover, even under these criteria, the courts will not impose liability in cases involving instances of rhetorical hyperbole.[73]

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70. *Id.* at 731.

71. *Id.* at 732.

72. *Compare* Carey v. Hume, 492 F.2d 631, 637-39 (D.C. Cir. 1974) *with* Cervantes v. Time, Inc., 464 F.2d 986, 991-93 (8th Cir. 1972). The gist of the two cases seems to be that a summary judgment for a defendant may not be granted unless plaintiff can cross-examine defendant's informants (confidential or otherwise), provided a plaintiff can show such cross-examination will have a direct bearing upon the issue of constitutional malice. The problem with this rationale is that often a plaintiff does not know in advance if the cross-examination of the informants will be relevant to the issue of malice. If the veracity of an informant is a crucial factor, the plaintiff cannot impeach the trustworthiness of the defendant's sources unless and until the defendant is made to disclose the identity of those sources. The determinative factor is apparently going to be whether the strength of the plaintiff's case in all other respects justifies the court's decision to break the bond of confidentiality.

73. Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler, 398 U.S. 6, 14 (1970) (report of accusation of "blackmail" against plaintiff in public debate although accuser merely meant plaintiff was applying high-pressure tactics against a municipal council). *Accord*, Lambert v. Providence Journal Co., 508 F.2d 656, 658-59 (1st Cir. 1975) (publication of article characterizing as a "murder victim" the person plaintiff was accused of killing); Time, Inc. v. Johnston, 448 F.2d 378, 384-85 (4th Cir. 1971) (statement that plaintiff was "destroyed" in a basketball game by the brilliant play of Bill Russell); Curtis Publishing Co. v. Birdsong, 360 F.2d 344, 348 (5th Cir. 1966) (statement that highway

C. Practical Application

It is interesting to consider the types of conduct by the defendant involved in those cases in which a plaintiff has succeeded in showing actual malice. As the following chronological procession of decisions suggests, the differences between knowledge and reckless disregard are perhaps clearcut in theory but nebulous in practice.

In *Curtis Publishing Co. v. Butts*,[74] the *Saturday Evening Post* published an article falsely accusing Butts of conspiring to fix a football game. This information was received from one Burnett who claimed to have overheard Butts conversing by telephone with the coach of the other team in question. Burnett was on probation for passing bad checks, so his trustworthiness was dubious. The reporters who wrote the article were not conversant with the game or they would have known that the information Butts allegedly divulged during the telephone conversation was valueless. No attempt was made to contact other witnesses or to review videotapes of the game in question; in fact, due to other demands, the article writer's research assistants did almost no subsidiary investigation. On these facts, the Supreme Court affirmed a verdict for the plaintiff.

In *Goldwater v. Ginzburg*,[75] the defendant published a magazine named *Fact*, one issue (published in 1964) of which was devoted to Barry Goldwater and his psychological unfitness for the presidency.

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patrolman was a "bastard"); Fram v. Yellow Cab Co., 380 F. Supp. 1314, 1327 (W.D. Pa. 1974) (statement that plaintiff's property was "adjacent to" a proposed construction site when it was actually a nearby, but not contiguous, plot). *See also* Buckley v. Littell, 394 F. Supp. 918, 944 (S.D.N.Y. 1975), *rev'd in part*, 539 F.2d 882, 893 (2d Cir. 1976). In this case the district court had held that hyperbole ("fascist," "fellow traveler") conveying a false representation may be actionable. The Second Circuit held that due to the inherent imprecision of such terms in the realm of political debate, the use of them cannot be deemed libelous.

Analogous to this problem is that encountered when the media report on official documents that may contain hyperbole or ambiguous rhetoric. *See* Time, Inc. v. Pape, 401 U.S. 279 (1971). In an article by the Civil Rights Commission that summarized a report on police brutality, *Time* quoted an illustrative episode mentioned in the report, saying that Pape and others had assaulted blacks. As a matter of fact, the Commission's report only printed an allegation that Pape had done so. Pape recovered for libel but the Supreme Court reversed, saying that the Commission's account of the incident was ambiguous and *Time* staffers could reasonably conclude that the authors of the report believed that the incident in question had actually occurred; in such circumstances, the Court found that *Time* was guilty only of an error of judgment. *Id.* at 292. The holding of this case may be limited to the specific facts involved; at least one subsequent decision by the Court seems to undercut drastically the value of *Pape* as a precedent. *See* Time, Inc. v. Firestone, 424 U.S. 448, 459 n.4 (1976). *But see id.* at 470 (Powell, J., concurring). Justice Powell repeats the rationale of *Pape* but fails to mention the earlier case specifically.

74. 388 U.S. 130 (1967).

75. 414 F.2d 324 (2d Cir.), *cert. denied*, 396 U.S. 1049 (1969).

Judge Sterry R. Waterman, in his lengthy opinion for the United States Court of Appeals for the Second Circuit, found numerous instances of bias and bad faith on the part of Ginzburg. A claim that Goldwater had nervous breakdowns was based on the uncorroborated affidavit of only one informant. The defendant Ginzburg quoted the words of others, although the statements made in those quotations were patently improbable. Still other quotations were selectively edited in such a way as to distort their meaning. The central feature of the issue was a poll of psychiatrists purportedly showing that the medical community deemed Goldwater to be mentally unstable, and its validity was impeached not only by the expert testimony of Elmo Roper and the American Medical Association, but also by a demonstration that the responses of the psychiatrists solicited had been altered to produce misleading results. The court affirmed a verdict against Ginzburg on the theory that there was sufficient evidence to support the jury's finding of a preconceived plan to malign Goldwater's character.[76]

In *Airlie Foundation, Inc. v. Evening Star Newspaper Co.*,[77] another libel suit, the defendant published an accusation by one Higgs that the plaintiff, a non-profit organization involved in ecology and medicine, was secretly funded by the Central Intelligence Agency. Subsequently, the editor-in-chief checked with his friend Richard Helms, the C.I.A. director. Helms called the accusation a lie. The following day, the story was repeated with further details about the purported inconsistency between the Airlie Foundation's income and its expenditures; the article said that the C.I.A. had declined to comment on the accusation by Higgs but noted that other, unidentified government sources disputed the charge. Relying on *Goldwater* and *St. Amant*, the district court in the District of Columbia upheld a verdict for the plaintiff.

Finally, in *Davis v. Schuchat*,[78] an investigative reporter in the course of researching an article told one of Schuchat's colleagues that Schuchat had once been convicted of criminal fraud in an insurance case. He had in fact been indicted for such an offense, but was subsequently acquitted, and he brought suit alleging slander per se. Davis argued that in reading articles on the subject he had mistakenly assumed that Schuchat had been convicted because he had apparently confused him with another. The United States Court of Appeals for the District of Columbia held that in light of Davis' knowledge of the case in question, and his evasive answers during cross-examination at trial, he could be found to have harbored substantial doubts about the truth of his assertion.

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76. *Id.* at 337.

77. 337 F. Supp. 421 (D.D.C. 1972).

78. 510 F.2d 731 (D.C. Cir. 1975). *Compare Davis with* Buckley v. Littell, 394 F. Supp. 918, 940 (S.D.N.Y. 1975), *rev'd on other grounds*, 539 F.2d 882 (2d Cir.

In *Goldwater*, *Airlie*, and *Davis* the conduct of the defendants, while characterized as involving reckless disregard, really involved elements of publication with scienter. In *Butts*, this aspect was lacking but there the Court found no compliance with minimal standards of verification. This suggests that the courts are unlikely to impose liability for recklessness unless such recklessness is either (a) tied to a component of knowledge of falsity which is (or should be) the source of the "serious doubts" referred to in *St. Amant*, or (b) tied to total or nearly total failure to corroborate or verify, when such verification is neither inordinately difficult nor precluded by time constraints, as in the case of "hot news." Alleging reckless disregard would thus seem to be futile unless the plaintiff could prove that the defendant was guilty either of nonfeasance, where he had both a duty and an opportunity to act, or of misfeasance, where he discovered facts that should have put him on his guard as to the falsity of an assertion, but took affirmative action either to conceal those facts or to distort the meaning or the logical implications to be derived from them.

While the *New York Times* rule clearly constricted the capacity of the plaintiff to vindicate his personal interest by litigation, the Supreme Court changed its position in *Gertz v. Robert Welch, Inc.*[79] In *Gertz*, the plaintiff was a private attorney involved in a civil suit against a policeman convicted of killing a youth. The defendant's magazine, a publication of the John Birch Society, alleged that Gertz was part of a communist conspiracy to discredit the police. In the ensuing libel action, the trial court entered a judgment n.o.v. for the defendant and the court of appeals affirmed this ruling. The Supreme Court reversed. In doing so, it enunciated a dual standard. Plaintiffs who are public officials or public figures are still confronted with the burden of proving actual malice; private individuals, however, may benefit from any other appropriate standard of liability promulgated by the states, short of liability without fault. In other words, under *Gertz* the private-party plaintiff may sue for negligent publication of defamatory falsehoods.[80]

III. The Actual Malice Test: Against Whom Will It Apply?

A. Status Analysis and Interest Analysis with Respect to the Plaintiff

1. Early Developments: from New York Times to Rosenbloom.

A crucial problem of constitutional privilege concerns those who might be precluded from recovering damages if no malice is found to

1976) (held that evidence of the discrepancy between what an author privately believes and what he publicly writes is sufficient to establish actual malice).

79. 418 U.S. 323 (1974).

80. *Id.* at 347-50. *Accord*, Drotzmanns, Inc. v. McGraw-Hill, Inc., 500 F.2d 830, 833 (8th Cir. 1974).

exist. The federal courts have addressed this problem in two ways. One approach has focused on the status of the plaintiff. Under this theory, a public official or public figure would have to meet the burden of proving actual malice whereas a plaintiff deemed to be a private person would not. The second approach considers whether or not the plaintiff has become involved with a matter of public concern, thereby losing his anonymity, and, by implication, his privacy. Beginning with *Time, Inc. v. Hill*,[81] these two approaches merge, at least with respect to the plaintiff who claims he is a private person rather than a public figure. In such instances, the courts use the public interest analysis approach as a way of determining the plaintiff's status.

The majority opinion in *New York Times Co. v. Sullivan*[82] expressly limited the application of the actual malice test to instances of libel against public officials.[83] In a footnote, the Court indicated that it was not determining which classes of civil servants were public officials for the purpose of this test; nor was it willing to delineate the parameters of official conduct.[84] The Court justified its posture primarily on the theory that an award of damages for the innocent or negligent publication of defamatory falsehoods would have a detrimental effect upon the climate of robust debate protected by the First Amendment.[85] Additionally, it suggested that public officials, by reason of their status, must be able to weather harsh criticism, and "thrive in a hardy climate."[86] It is important to recognize that the *New York Times* decision is a narrow one and is plausible because of that very narrowness. Its status analysis approach placed the burden of proving actual malice only on those plaintiffs who were also public officials.

The next decision in this area came in 1966 in *Rosenblatt v. Baer*,[87] a libel suit brought by a former civil servant against the author of an article that accused him of embezzlement while he had held office

81. 385 U.S. 374 (1967).

82. 376 U.S. 254 (1964).

83. See text accompanying note 57 *supra.*

84. 376 U.S. at 283 n.23.

85. *Id.* at 270.

86. Craig v. Harney, 331 U.S. 367, 376 (1947), *cited in* New York Times Co. v. Sullivan, 376 U.S. at 273. The most compelling statement of this rationale is as follows: "Men in public life, whether they be judges, legislators, executives or scientists, must accept as an incident of their service harsh criticism, ofttimes unfair and unjustified—at times false and defamatory—and this is particularly so when their activities or performance may be the subject of differing attitudes and stir deep controversy. While it is not pleasant to be the target of false and defamatory charges, officials must be 'able to thrive in a hardy climate,' and their personal injury and hurt must yield to the higher purpose of assuring citizens freedom of expression. Dissent and the right to criticize those in public life are of the essence of the democratic process." Adey v. United Action for Animals, Inc., 361 F. Supp. 457, 465 (S.D.N.Y. 1973) (footnotes omitted).

87. 383 U.S. 75 (1966).

as director of a community recreation facility. In *Rosenblatt* the Supreme Court reversed a judgment for the plaintiff and Justice Brennan's majority opinion carefully filled in some of the gaps inherent in the status analysis approach taken in the *New York Times* decision. He defined public officials as "those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[88] Again, this decision dealt solely with the problem of public position; nevertheless, in talking about apparent importance or responsibility, the Supreme Court articulated a subjective and hence elastic test for determining who is a public official within the meaning of *New York Times*.

A year after *Rosenblatt*, the Court decided *Time, Inc. v. Hill*.[89] This case involved a *Life* magazine article about the dramatization of a novel inspired by the ordeal of the Hills, who had been held captive in their home by a trio of escaped convicts several years earlier. The article suggested that the play duplicated the Hills' actual experience, though in fact it did not. Hill sued in the New York courts under that state's statute protecting the individual's right of privacy.[90] A judgment for Hill and an award of compensatory damages was set aside by the Supreme Court. The Court noted the position taken in an earlier case by the Court of Appeals of New York to the effect that the *New York Times* rule did not apply to instances involving fictionalized, unauthorized biographies of celebrities who are not public officials.[91] The Court disagreed with the stance adopted by Judge Keating in that opinion, and held that the *New York Times* rule also applied to privacy actions brought to compensate for the harm caused by false reports of matters of public interest.[92] Because the public had an interest in learning about a new play opening on Broadway, Hill was denied an award of damages unless he could prove actual malice. The Court qualified its holding by pointing out that it did not decide whether the same standard should be applicable to persons both voluntarily and involuntarily thrust into the limelight, because that question was not before it.[93]

88. *Id.* at 85. *Compare Rosenblatt with* Clark v. Pearson, 248 F. Supp. 188, 193 (D.D.C. 1965) (held that the *New York Times* rule applies only to "high-ranking" public officials).

89. 385 U.S. 374 (1967).

90. Hill v. Hayes, 18 App. Div. 2d 485, 240 N.Y.S.2d 286 (1st Dep't 1963), *aff'd*, 15 N.Y.2d 986, 207 N.E.2d 604, 260 N.Y.S.2d 7, *amended*, 16 N.Y.2d 658, 209 N.E.2d 282, 261 N.Y.S.2d 289 (1965).

91. Spahn v. Julian Messner, Inc., 18 N.Y.2d 324, 221 N.E.2d 543, 274 N.Y.S.2d 877 (1966).

92. 385 U.S. at 388.

93. *Id.* at 391.

The use of the public interest analysis approach in *Time, Inc. v. Hill* offered an alternative to the status analysis approach the Court undertook in *New York Times.* But in many ways the matter of the public interest test is problematic. The public interest privilege as a defense to actions for invasion of privacy did not originate with the Court but was borrowed from the common law of the states.[94] Although *Time, Inc. v. Hill* does introduce a novel element to the privilege by shielding those who negligently or innocently publish misstatements of fact, the public interest analysis approach is still inadequate because of its vagueness and overbreadth. Conceivably, the privilege can cover any item likely to arouse public attention.[95] Consequently, the problem becomes not what is included within the test but rather what is not excluded. The term "matters of public interest" is so elusive that it permits the courts to extend the privilege to cover both matters of legitimate public concern and matters of interest to the public merely for their entertainment value.[96] Moreover, the rule of *Time, Inc. v. Hill* significantly erodes the concept of a private plaintiff. Hill was a private person who had once involuntarily become involved in an incident that caught the public's eye; he had, in effect, once been a public figure. Because of that one involvement, the Court believed he had forfeited his right of privacy; the experiences of Hill had been "matters of public concern" and accordingly were deemed fair game for subsequent publicization. Essentially, *Time, Inc. v. Hill* brings the public figure, the temporary celebrity, within the purview of the *New York Times* rule.[97]

The doctrine inherent in *Time, Inc. v. Hill* was carried back into the area of libel the same year by the Court's decision in *Curtis Publishing Co. v. Butts.*[98] *Butts* held that one who is a public figure, one who

94. *See, e.g.*, Jenkins v. Dell Publishing Co., 251 F.2d 447, 450 (3d Cir.), *cert. denied*, 357 U.S. 921 (1958); Rozhon v. Triangle Publications, Inc., 230 F.2d 359, 361 (7th Cir. 1956); Leverton v. Curtis Publishing Co., 192 F.2d 974, 976-77 (3d Cir. 1951); Sidis v. F-R Publishing Corp., 113 F.2d 806, 809 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940); Mahaffey v. Official Detective Stories, Inc., 210 F. Supp. 251, 253 (W.D. La. 1962); Hazlitt v. Fawcett Publications, Inc., 116 F. Supp. 538, 544-45 (D. Conn. 1953); Garner v. Triangle Publications, Inc., 97 F. Supp. 546, 549-50 (S.D.N.Y. 1951). *See also* PROSSER, *supra* note 1, § 118 at 824-26; Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193, 214 (1890).

95. Sweenek v. Pathe News, Inc., 16 F. Supp. 746, 747 (E.D.N.Y. 1936).

96. Jenkins v. Dell Publishing Co., 251 F.2d 447, 451 (3d Cir. 1958): "In brief, once the character of an item as news is established, it is neither feasible nor desirable for a court to make a distinction between news for information and news for entertainment in determining the extent to which publication is privileged." *Cf.* Time, Inc. v. Hill, 385 U.S. 374, 388 (1967).

97. *Accord*, Davis v. National Broadcasting Co., 320 F. Supp. 1070, 1073 (E.D. La. 1970), *aff'd*, 447 F.2d 981 (5th Cir. 1971).

98. 388 U.S. 130 (1967). This development was prefigured in Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188, 196 (8th Cir. 1966), *cert. denied*, 388 U.S. 909

both commands continuing public interest and has sufficient media access to counteract the effects of a defamatory publication, could recover damages for libel only upon proof of actual malice.[99]

The plurality opinion in *Butts* was, in some ways, an accurate forecast of things to come. It defined public figures as including those who thrust themselves into the midst of public questions or controversies, thus inviting widespread attention.[100] As a result, the public interest analysis involved in *Time, Inc. v. Hill* became a determinant of the status of the plaintiff for the purposes of applying the actual malice test.[101] At least one of the concurring opinions explicitly agreed with this step,[102] but the bewildering maze of different opinions in the case probably obscured widespread recognition of the innovative step the Court took.

The lower federal courts seized upon the interest analysis explicit in *Time, Inc. v. Hill* and implicit in *Butts*. The leading case in this regard was *United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc.*,[103] a suit brought by a mail order testing laboratory against CBS for general comments made during various radio and television broadcasts about the inaccurate clinical testing conducted by such laboratories. In affirming the trial court's entry of a summary judgment for the defendant, the Court of Appeals for the Ninth Circuit held:

(1967), which applied the *New York Times* rule to defamatory comments about "private citizens who seek to lead in the determination of national policy." *Accord*, Pauling v. News Syndicate Co., 335 F.2d 659, 671 (2d Cir. 1964).

99. Curtis Publishing Co. v. Butts, 388 U.S. at 155. For a discussion of the net effect the *Butts* decision had on the expansion of the scope of the actual malice test, see note 67 and text accompanying *supra*. Prosser defines "public figure" as "a person who, by his accomplishments, fame, or mode of living, or by adopting a profession or calling which gives the public a legitimate interest in his doings, his affairs, and his character, has become a 'public personage.'" PROSSER, *supra* note 1, § 118 at 823. Prosser's definition is too restrictive in at least one respect; not only persons but also institutions can become "public figures." University of the South v. Berkley Publishing Corp., 392 F. Supp. 32, 33 (S.D.N.Y. 1974). But even though an institution may be classified as a public or private figure for the purpose of determining liability in a libel suit, there is extensive authority to the effect that only natural persons, and not institutions, have a cause of action for tortious invasion of privacy. *See* United States v. Morton Salt Co., 338 U.S. 632, 652 (1950); Vassar College v. Loose-Wiles Biscuit Co., 197 F. 982, 985 (W.D. Mo. 1912); Copley v. Northwestern Mut. Life Ins. Co., 295 F. Supp. 93, 95 (S.D. W. Va. 1968); Oasis Nite Club, Inc. v. Diebold, Inc., 261 F. Supp. 173, 175 (D. Md. 1966).

100. Curtis Publishing Co. v. Butts, 388 U.S. at 155.

101. *But cf.* Time, Inc. v. Hill, 385 U.S. 374, 385 n.9 (1967), where Justice Brennan suggested that the decision in that case did not deal with the issues involved in libel per quod cases arising from publication of matters of public concern. This valuable suggestion unfortunately has been ignored.

102. Curtis Publishing Co. v. Butts, 388 U.S. at 164 (Warren, J., concurring).

103. 404 F.2d 706 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1969).

> If the publications here are within the field of First Amendment protection at all as against the consequences of state libel law, the area of public interest to which they relate—conditions allegedly capable of wide-spreadedly affecting public health—would seem to us to be one of such inherent public concern and stake that there could be no possible question as to the applicability of the *New York Times* standard for any defeasance.[104]

The court limited its ruling to matters of legitimate general interest.[105] In other words, the discussion centered on news as information, not news as entertainment. By stressing the legitimacy of the public's concern, the court retrenched slightly from the broad assertions proffered in *Time, Inc. v. Hill.*[106]

The public concern/general interest rationale either explicitly or implicitly underlies the holdings in a number of later decisions. Subsequent courts have directly or indirectly relied on the conclusions of *United Labs* in characterizing as items of legitimate public interest the activities of organized crime,[107] the gradual dilapidation of a hotel open only during the Masters Tournament,[108] sports and sports figures,[109] credit ratings,[110] and the activities of churches and ministers.[111] The import of *United Labs* and its progeny was that the lower federal courts would examine the nature of the publicity-causing occurrence and the

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104. *Id.* at 711.

105. *Id.*

106. This emphasis on the nature of the event rather than on the status of the plaintiff as being a key factor in libel suits prefigured the view adopted three years later by the plurality in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). See note 126 and text accompanying *infra.*

107. Casano v. WDSU-TV, Inc., 464 F.2d 3, 4 (5th Cir. 1972); Time, Inc. v. McLaney, 406 F.2d 565, 573 (5th Cir.), *cert. denied,* 395 U.S. 922 (1969); LaBruzzo v. Associated Press, 353 F. Supp. 979, 984 (W.D. Mo. 1973); Konigsberg v. Time, Inc., 312 F. Supp. 848, 851 (S.D.N.Y. 1970); Blanke v. Time, Inc., 308 F. Supp. 378, 379-80 (E.D. La. 1970); Holmes v. Curtis Publishing Co., 303 F. Supp. 522, 526 (D.S.C. 1969); Cerrito v. Time, Inc., 302 F. Supp. 1071, 1073 (N.D. Cal. 1969), *aff'd,* 449 F.2d 306 (9th Cir. 1971); Time, Inc. v. Ragano, 302 F. Supp. 1005, 1006-07 (M.D. Fla. 1969), *aff'd,* 427 F.2d 219 (5th Cir. 1970); Arizona Biochem. Co. v. Hearst Corp., 302 F. Supp. 412, 415 (S.D.N.Y. 1969). *But cf.* Harkaway v. Boston Herald Traveler Corp., 418 F.2d 56, 58-59 (1st Cir. 1969).

108. Bon Air Hotel, Inc. v. Time, Inc., 295 F. Supp. 704, 706-07 (S.D. Ga. 1969), *aff'd,* 426 F.2d 858 (5th Cir. 1970).

109. Time, Inc. v. Johnston, 448 F.2d 378, 382-83 (4th Cir. 1971); Sellers v. Time, Inc., 299 F. Supp. 582, 584-85 (E.D. Pa. 1969), *aff'd,* 423 F.2d 887 (3d Cir. 1970).

110. Oberman v. Dun & Bradstreet, Inc., 460 F.2d 1381, 1383-84 (7th Cir. 1972); Hood v. Dun & Bradstreet, Inc., 335 F. Supp. 170, 177-78 (N.D. Ga. 1971); Grove v. Dun & Bradstreet, Inc., 308 F. Supp. 1068, 1070-71 (W.D. Pa. 1970).

111. Gospel Spreading Church v. Johnson Publishing Co., 454 F.2d 1050, 1051 (D.C. Cir. 1971); Church of Scientology of California v. Dell Publishing Co., 362 F. Supp. 767, 769 (N.D. Cal. 1973); Spern v. Time, Inc., 324 F. Supp. 1201, 1203 (W.D. Pa. 1971).

right of the public to learn about it rather than the status of the plaintiff. But by defining the applicable criterion in terms of the public's "right to know," the courts assume that if the public has no legitimate concern in being informed about some subject, then perhaps the constitutional privilege may not be asserted by the potential defendant. The line might be drawn between news stories intended to inform and those intended merely to titillate or to amuse. The courts have not made this distinction, no doubt in deference to *Time, Inc. v. Hill*, and at least five decisions have applied the *United Labs* rationale to publications that were designed primarily to entertain.[112] Nevertheless, the refinement made by the *United Labs* case on *Time, Inc. v. Hill* did raise some issues that merit more discussion than they have yet received.

Several of the lower federal courts have, however, adopted a more pragmatic approach to the subject of newsworthiness and the public interest. In doing so, they have offered specific, concrete guidelines for determining when a publication is newsworthy. This effort is important because it provides an objective means of applying the public interest criterion. The first court to adopt this stance was a district court in California in *Goldman v. Time, Inc.*[113] This case involved a *Life* magazine article depicting plaintiff and others as part of a "restless generation" of American youth roaming abroad. The plaintiff initiated a suit for false light invasion of privacy, and the district court granted defendant's motion for a summary judgment. The court recognized the public interest to be an elusive and expansive concept,[114] and in determining how to reconcile the concept with the individual's interest in privacy the court relied on the tripartite criteria devised by the California Supreme Court.[115] Under this approach, newsworthiness is determined by weighing several factors, including (1) the social value of the facts published, (2) the depth of the article's intrusion into ostensibly private affairs, and (3) the extent to which the party voluntarily acced-

112. Taggart v. Wadleigh-Maurice, Ltd., 489 F.2d 434, 437 (3d Cir. 1973) (inclusion of unauthorized footage depicting plaintiff in a documentary film about a music festival); Firestone v. Time, Inc., 460 F.2d 712, 716-17 (5th Cir. 1972) (article detailing the tactics used by a party to gain evidence in a divorce suit); Neff v. Time, Inc., 406 F. Supp. 858, 861 (W.D. Pa. 1976) (publication of a photo depicting an exuberant football fan with an unzipped fly); Man v. Warner Bros. Inc., 317 F. Supp. 50, 52 (S.D.N.Y. 1970) (fact situation similar to that in *Taggart*); Sellers v. Time, Inc., 299 F. Supp. 582, 584-85 (E.D. Pa. 1969) (report about a law suit pending against a golfer who hit a golf ball backwards into his partner's eye). *But see* Time, Inc. v. Firestone, 424 U.S. 448, 453-54 (1976); Virgil v. Time, Inc., 527 F.2d 1122, 1128-29, 1131 (9th Cir. 1975).

113. 336 F. Supp. 133 (N.D. Cal. 1971).

114. *Id.* at 138.

115. *See* Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 541, 483 P.2d 34, 42-43, 93 Cal. Rptr. 866, 874-75 (1971). *Accord*, Kapellas v. Kofman, 1 Cal. 3d 20, 36, 459 P.2d 912, 922, 81 Cal. Rptr. 360, 370 (1969).

ed to a position of public notoriety.[116] The court declared that it was well aware of the power of the public media to bring virtually any person and even the most insignificant event into the ambit of news, but concluded that under this weighing-of-factors approach, the subject matter of the article was sufficiently newsworthy to require application of the *New York Times* rule.[117]

The balancing approach adopted in *Goldman* is a valuable device; it explicitly outlines those considerations which the courts should examine in determining what is an event of public interest. Unlike Justice Brennan's opinion in *Time, Inc. v. Hill*, the *Goldman* technique provides objective criteria for deciding cases on the basis of something other than the subjective responses of individual judges. Some courts had wrestled implicitly with similar determinants,[118] but *Goldman* was the first case to adopt the explicit guidelines the federal courts had been so desperately lacking. The analysis of *Goldman* has been adopted in at least two other jurisdictions,[119] but general acceptance has, at least to date, not been forthcoming.

During this period the Supreme Court was not concerned with refining the public interest analysis approach by enunciating more objective criteria. In 1971 the Court used straight status analysis to decide two cases that extended the *New York Times* rule. *Monitor Patriot Co. v. Roy*[120] involved an article printed in the *Concord Monitor* accusing a senatorial candidate of being a former petty bootlegger. In reversing a judgment for the plaintiff candidate, the Court held that the *New York Times* rule covered "every conceivable aspect of [the candidate's] public and private life that he thinks may lead the electorate to gain a good impression of him."[121] The Court admitted that this analysis went far beyond the rubric of official conduct. Moreover, the Court deemed irrelevant the fact that a considerable span of time had elapsed since the commission of the alleged criminal activities. This last aspect is especially interesting because it suggests that, at least in terms of the personal history of a public official or candidate for public office, a past event

116. 336 F. Supp. at 138.

117. *Id.*

118. *See, e.g.*, Miller v. News Syndicate Co., 445 F.2d 356, 358 (2d Cir. 1971); Cerrito v. Time, Inc., 302 F. Supp. 1071, 1073 (N.D. Cal. 1969); Arizona Biochem. Co. v. Hearst Corp., 302 F. Supp. 412, 415-16 (S.D.N.Y. 1969).

119. LaBruzzo v. Associated Press, 353 F. Supp. 979, 984 (W.D. Mo. 1973); Galella v. Onassis, 353 F. Supp. 196, 224-25 (S.D.N.Y. 1972), *modified, and aff'd without considering the point*, 487 F.2d 986 (2d Cir. 1973). *Cf.* Cantrell v. Forest City Publishing Co., 484 F.2d 150, 156 (6th Cir. 1973), *rev'd without considering the point*, 419 U.S. 245 (1974).

120. 401 U.S. 265 (1971).

121. *Id.* at 274.

will always be newsworthy if relevant to his public career.[122] *Ocala Star-Banner Co. v. Damron*[123] involved an accusation of perjury against a candidate for county tax assessor. In setting aside a judgment for the plaintiff the Court held that, for the purpose of applying the *New York Times* rule, a charge of criminal conduct against an official or candidate, no matter how remote in time or place, is always relevant to his fitness for office.[124] These holdings further blurred the distinction between public and private life.

2. *The Conjunction of Interest and Status Analysis in Rosenbloom*

The next step was taken in the plurality opinion in *Rosenbloom v. Metromedia, Inc.*[125] There the considerations implicit in *Butts* were made explicit: interest analysis became a determinant of status analysis. *Rosenbloom* involved a radio broadcast that accused the plaintiff, a private person, of being a "smut merchant" and "girlie book peddler." The Supreme Court affirmed the decision of the court of appeals, which had reversed a judgment for the plaintiff, concluding that:

> 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. . . . We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern,

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122. *Accord*, with respect to past newsworthy events in the lives of others than public officials and candidates, Time, Inc. v. Johnston, 448 F.2d 378, 381-82 (4th Cir. 1971); Werner v. Hearst Publishing Co., 297 F.2d 145, 147 (9th Cir. 1961); Jenkins v. Dell Publishing Co., 251 F.2d 447, 451 (3d Cir. 1958); Estill v. Hearst Publishing Co., 186 F.2d 1017, 1022 (7th Cir. 1951); Sidis v. F-R Publishing Corp., 113 F.2d 806, 809 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940). *Johnston* states that: "[n]o rule of repose exists to inhibit speech relating to the public career of a public figure so long as newsworthiness and public interest attach to events in such public career. This issue of remoteness . . . has often arisen in privacy cases. There are, it is true, distinctions between actions for an invasion of privacy and suits for defamation but the same considerations it would seem would be present in either case in determining whether mere passage of time will remove the protection afforded by the constitutional privilege created by *New York Times* for a publication relating to a past event in the career of a 'public figure.'" [Footnotes omitted.]

123. 401 U.S. 295 (1971).

124. *Id.* at 300.

125. 403 U.S. 29 (1971). The plurality opinion was authored by Justice Brennan and joined by Chief Justice Burger and by Justice Blackmun; Justices White and Black each concurred on separate grounds. Justices Harlan and Marshall dissented and Justice Douglas took no part in the decision.

without regard to whether the persons involved are famous or anonymous.[126]

The plurality buttressed this conclusion with the argument that a private figure has as much access to media for the purposes of rebuttal as a public figure has. The crucial point is not whether the plaintiff is famous enough to command equal time to refute any libelous charges, but rather whether the story is "hot" enough to make a victim's rebuttal newsworthy.[127] The plurality sidestepped the contention that a public figure assumes the risk of defamation, asserting simply that this contention is a "legal fiction," and that everyone is to some extent a public personage.[128] The plurality did, however, leave open the standard of proof necessary in suits concerning activities outside the public interest by stressing that its decision did not deal with unwarranted intrusions upon the private aspects of an individual's life.[129]

There are several problems inherent in Justice Brennan's plurality opinion. He speaks of public or general interest but nowhere does he indicate how general a general interest need be to merit application of the *New York Times* rule. As was the case with "public interest" in *Time, Inc. v. Hill*, the phrase "general interest" is too elastic to be truly helpful as a guideline. Justice Brennan also indicates that in *Rosenbloom* the public had a vital interest in the proper enforcement of criminal laws.[130] If the criterion is defined in terms of what the public needs to be informed about, then perhaps one can say there is no vital public interest in being informed about the factual origins of a new Broadway play, the details of a divorce case, or similar subjects. If this is a valid inference, then Justice Brennan's opinion in *Rosenbloom* seemingly retreats a step or two from his assertions in *Time, Inc. v. Hill*. The plurality opinion suggests that the public's focus is on the conduct of the participants in a newsworthy event, not on their prior anonymity or notoriety. If so, the problem then arising is whether the Court should adopt the public's focus as a starting point and provide no means of redress for the aggrieved individual. Arguably they should not adopt such a focus, but the plurality fails to address the problem. Justice Brennan also decries artificial distinctions between public and private individuals, but one result of his opinion is to preserve this distinction with regard to the personal aspects of an individual life. Such an

126. *Id.* at 43-44 (footnotes omitted). *Compare Rosenbloom with* United Medical Laboratories v. Columbia Broadcasting Sys. Inc., 404 F.2d 706, 711 (9th Cir. 1968). The language cited in Justice Brennan's plurality opinion appears to be borrowed directly from the earlier decision. In a footnote he seems to implicitly acknowledge the debt. 403 U.S. at 46 n.14. See notes 103-06 and text accompanying *supra*.

127. 403 U.S. at 46.

128. *Id.* at 48.

129. *Id.*

130. *Id.* at 43.

approach can result in an individual's entire past history becoming a subject of public interest merely because of his involvement in a newsworthy event. The plurality itself admits that "[t]he individual's interest in privacy . . . is not involved in this case, or even in the class of cases under consideration, since, by hypothesis, the individual is involved in matters of public or general concern."[131] In a sense, then, the *Rosenbloom* plurality opinion embellishes the theories expressed in *Time, Inc. v. Hill.* Conceivably, the only way an individual can retain his right of privacy is to completely avoid becoming embroiled in any event likely to attract public interest. This would seem to be prior restraint in its purest form.

Justice Brennan's opinion represented the consensus of three justices. Justice Black concurred in the result but advanced his familiar absolutist interpretation of the First Amendment,[132] and Justice White in his concurrence refused to venture beyond the boundaries laid down in the *New York Times* case.[133] Many lower courts accepted the plurality opinion of *Rosenbloo*m, however.[134] One court even went so far as to say that the decision unquestionably extended the scope of the constitutional privilege.[135]

3. Gertz and Beyond

It rapidly became apparent that *Rosenbloom* was a digression by three members of the Court. In *Gordon v. Random House, Inc.*[136] the United States Court of Appeals for the Third Circuit noted that the plurality opinion in *Rosenbloom* was not supported by a majority of the Court and suggested that its usefulness as a prophesy of the Court's eventual stance would depend upon the unarticulated First Amendment philosophies of Justices Powell and Rehnquist.[137] The court in *Gordon* concluded that before it can be determined if the *New York Times* rule

131. *Id.* at 48.
132. *Id.* at 57.
133. *Id.* at 57-62.
134. Mistrot v. True Detective Publishing Corp., 467 F.2d 122, 124 (5th Cir. 1972); Cervantes v. Time, Inc., 464 F.2d 986, 990-91 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); Oberman v. Dun & Bradstreet, Inc., 460 F.2d 1381, 1383 (7th Cir. 1972); Gospel Spreading Church v. Johnson Publishing Co., 454 F.2d 1050, 1051 (D.C. Cir. 1971); Cerrito v. Time, Inc., 449 F.2d 306, 307 (9th Cir. 1971); Time, Inc. v. Johnston, 448 F.2d 378, 381-82 (4th Cir. 1971); LaBruzzo v. Associated Press, 353 F. Supp. 979, 983 (W.D. Mo. 1973); Sierra Club v. Butz, 349 F. Supp. 934, 937 (N.D. Cal. 1972); Kent v. Pittsburgh Press Co., 349 F. Supp. 622, 625 (W.D. Pa. 1972); Airlie Foundation, Inc. v. Evening Star Newspaper Co., 337 F. Supp. 421, 423 (D.D.C. 1972); Novel v. Garrison, 338 F. Supp. 977, 982 (N.D. Ill. 1971); McFarland v. Hearst Corp., 332 F. Supp. 746, 748-49 (D. Md. 1971).
135. Goldman v. Time, Inc., 336 F. Supp. 133, 137 (N.D. Cal. 1971).
136. 486 F.2d 1356 (3d Cir. 1973), *rev'g* 349 F. Supp. 919 (E.D. Pa. 1972).
137. *Id.* at 1359-60.

is applicable in a libel case, the threshold question that must be resolved is whether the plaintiff had led an obscure private life or had taken part in a public controversy.[138] This conclusion was vindicated by the decision of the Supreme Court in *Gertz v. Robert Welch, Inc.*,[139] overruling *sub silentio* the plurality view expressed in *Rosenbloom*. The Court pointed out that the state interest in the context of libel suits brought by private persons appreciably differed from that present in actions instituted by public figures. The Court concluded that this difference required the formulation of new guidelines for libel suits involving private-party plaintiffs.[140] Justice Powell went on to demolish the arguments for extending the constitutional privilege advanced by Justice Brennan in *Rosenbloom*, and contended that public figures and officials are better able to counteract defamations than are private persons. He accepted the argument that the public plaintiff has assumed the risk of defamation by placing himself in the public eye and that the media may act on this assumption. In conclusion Justice Powell held that "[t]he 'public or general interest' test for determining the applicability of the *New York Times* standard to private defamation actions inadequately serves both of the competing values at stake."[141] Thus he would allow the states to define a lesser evidentiary burden for the private-party plaintiff in libel suits so long as they did not adopt any theory of strict liability.

In defining the term public figure, Justice Powell pointed out that it included both celebrities who command pervasive notoriety in all contexts of public discussion and individuals who voluntarily or involuntarily are drawn into public controversies and become public figures for a limited range of issues.[142] He admitted that in rare cases such a creature as an "involuntary public figure" could exist[143] but concluded this description did not fit Gertz.

Following the emphasis in *Gertz* on the status of the plaintiff, one district court recently suggested that the criterion suitable for distinguishing a "private person" from a "private person turned public figure" should be the same one announced in *Butts* and *Walker*: did the plaintiff intentionally seek to publicize his view; did he purposefully thrust himself into the "vortex" of a controversy?[144] Thus, at least in

138. *Id.* at 1361. *Cf.* Dietemann v. Time, Inc., 284 F. Supp. 925, 931 (C.D. Cal. 1968).

139. 418 U.S. 323 (1974). For the facts of this case see text accompanying notes 79-80 *supra.*

140. *Id.* at 343.

141. *Id.* at 346.

142. *Id.* at 351.

143. *Id.* at 345.

144. Fram v. Yellow Cab Co., 380 F. Supp. 1314, 1333-34 (W.D. Pa. 1974). *See also* Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967); Grove v. Dun & Brad-

libel cases, *Gertz* turned the clock back to 1967 by stressing the status of the plaintiff as the key to application of the *New York Times* rule. Like *Butts*, *Gertz* combines interest and status analysis, at least to a small extent. But the majority in *Gertz* was unwilling to carry the consequences of this approach as far as the plurality in *Rosenbloom* did.

Gertz has been characterized as an unworkable step backward from *Rosenbloom*.[145] The practical result seems to be that the problem of how to deal with the private-party plaintiff is dumped in the lap of the states, which are furnished minimal guidelines with which to work. Justice Powell and the four justices joining him effectively gutted the plurality holding in *Rosenbloom* and arguably did the same to *Time, Inc. v. Hill*. The language condemning the public interest test would seem to leave very little of the opinion in the latter case.[146] In a footnote however, Justice Powell distinguished *Time, Inc. v. Hill* as involving both "nondefamatory factual errors" and an "unusual state statute"[147] that provided a remedy for undesired publicity, so perhaps the discrete context involved in that case exempts it from the full force of his statements. Nevertheless, the majority opinion in *Gertz* may indeed deprive the holding in *Time, Inc. v. Hill* of its continuing vitality. As Justice Powell later noted in his concurrence in *Cox Broadcasting Corp. v. Cohn*,[148] *Gertz* seemingly "calls into question the conceptual basis of *Time, Inc. v. Hill*."[149] If he is incorrect, then a dual standard would operate; in libel cases courts would determine whether the plaintiff was a public or private figure, while in privacy cases the public interest test would be applied.[150]

The most recent explication of *Gertz* occurred in *Time, Inc. v. Firestone*.[151] Mary Alice Firestone was the third wife of Russell A.

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street, Inc., 438 F.2d 433, 435 (3d Cir. 1971); Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188, 195 (8th Cir. 1966); Buchanan v. Associated Press, 398 F. Supp. 1196, 1202 (D.D.C. 1975); Guitar v. Westinghouse Elec. Corp., 396 F. Supp. 1042, 1054 (S.D.N.Y. 1975).

145. El Meson Espanol v. N.Y.M. Corp., 389 F. Supp. 357, 359 (S.D.N.Y. 1974).

146. See text accompanying note 142 *supra*.

147. 418 U.S. at 335-36 n.6.

148. 420 U.S. 469 (1975).

149. *Id.* at 498. The majority opinion in *Cox* failed, however, to address this problem.

150. *Quaere*: What occurs in a suit alternatively charging libel and false light invasion of privacy? *See* RESTATEMENT (SECOND) OF TORTS § 652A (Tent. Draft No. 13, 1967); Berry v. National Broadcasting Co., 480 F.2d 428, 431 (8th Cir. 1973). Both indicate that a plaintiff cannot evade constitutional limitations placed on defamation by suing on another theory. Arguably the same could be said for invasion of privacy.

151. 424 U.S. 448 (1976). The opinion of the Court in this case was written by Justice Rehnquist and joined by Chief Justice Burger and by Justices Stewart, Blackmun, and Powell. Justice Powell, joined by Justice Stewart, wrote a concurring opinion in which he recommended reversal because none of the state courts had explicitly consid-

Firestone, heir to the tire fortune, and she was also a prominent member of the Palm Beach sporting set. In 1964, she filed a complaint for separate maintenance in a Florida circuit court. Her husband counterclaimed for a divorce, alleging extreme cruelty and adultery. The resulting trial lasted seventeen months, commanded national news coverage, and was publicized by forty-five articles in the *Palm Beach Post* and *Palm Beach Times*, and forty-three articles in the *Miami Herald*. Throughout the trial, the respondent held press conferences in which she commented on the proceedings. On December 15, 1967, a decree was entered, finding that "from the evidence of marital discord . . . neither of the parties has shown the least susceptibility to domestication."[152] The decree also awarded the respondent $3000 per month alimony. It was significant that under Florida law at that time no award of alimony could be given to a wife adjudged guilty of adultery.

The evening that the decree was handed down, the *Time* magazine staff received a wire dispatch saying Russell A. Firestone had been divorced from his third wife, whom he had accused of adultery and extreme cruelty. A *New York Daily News* article dated December 16 repeated the substance of the Associated Press dispatch. A report from the magazine's Palm Beach stringer quoted language from the decree about "extramarital escapades . . . of an amatory nature which would have made Dr. Freud's hair curl";[153] however, this language referred to evidence proffered by the husband, which the circuit court specifically discounted as unreliable.[154] Later that day, the *Time* staff received another report from the stringer saying that the technical grounds for the divorce were adultery and extreme cruelty. This account was

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ered whether or not the petitioner was in fact negligent. He also suggested that because of the ambiguity of the original divorce decree, *Time*'s interpretation of that order might be entirely reasonable. *Id.* at 469. Justice Brennan dissented on the theory that, under *Rosenbloom*, erroneous reportage of public proceedings is shielded by constitutional privilege. *Id.* at 474-81. Justice White also dissented, arguing that at the time of the alleged libel in 1967, the states could impose liability without fault because *Gertz* was not decided until seven years later. Justice White also felt that the Florida Supreme Court had, at any rate, made a conscious determination of negligence. *Id.* at 482-83. Justice Marshall was the final dissenter. He concluded that Mary Alice Firestone was a public figure under the rules laid down in *Gertz* and *Butts*. *Id.* at 484-90.

152. *Id.* at 451. One of the problems inherent in the language of this decree was that "lack of domestication" was not and is not a ground for divorce under the law of Florida. When the Florida Supreme Court reviewed the divorce decree, it noted this deficiency but nevertheless affirmed the order of the lower court on the theory that the trial record disclosed sufficient evidence to establish extreme cruelty, which is an adequate ground for dissolution of marriage in that state. Firestone v. Firestone, 263 So. 2d 223, 225 (Fla. 1972).

153. 424 U.S. at 452.

154. *Id.* at 449-52.

repeated in an article printed in the "Milestones" section of the issue for December 22. None of the senior members of the staff in New York City had actually read the decree.

Mary Alice Firestone sued *Time* for libel, and won an award of $100,000. After several years of appeals in the state courts, the Florida Supreme Court affirmed this judgment.[155] On appeal to the United States Supreme Court *Time* alleged that the respondent was a public figure under *Gertz*, and that therefore she should have been required to prove actual malice. Justice Rehnquist, in his opinion for the Court, flatly disagreed. He did indicate that the judgment should be reversed, however, basing his conclusion on the theory that none of the three state courts had "supportably ascertained petitioner was at fault."[156] Under *Gertz*, while the states could impose less stringent evidentiary prerequisites for recovery in defamation cases involving private persons,

155. This litigation produced a labyrinthine tangle of decisions by the Florida courts. Since many of these decisions are cited by the justices of the Supreme Court in their various opinions, it is necessary to sketch briefly the history of this lawsuit. Initially, when sued for libel, defendant was granted a summary judgment. Plaintiff challenged this ruling and it was reversed by the appellate court, which remanded the case for trial, concluding that disputed issues of material fact were present. Firestone v. Time, Inc., 231 So. 2d 862, 864 (Fla. App.), *cert. denied*, 237 So. 2d 754 (Fla. 1970). The second proceeding in the trial court resulted in a verdict for and award of damages to Mary Alice Firestone; *Time* appealed. The court of appeals made two major determinations. It held that the original divorce trial had been a matter of public concern under *Rosenbloom*. Time, Inc. v. Firestone, 254 So. 2d 386, 389 (Fla. App. 1971). It also concluded that the prerequisite of actual malice could not be proven because *Time* had offered one rational interpretation of an ambiguous document. *Id.* at 390. *See* note 73 *supra*.

The Florida Supreme Court granted certiorari and ruled that although a socialite's divorce may be newsworthy, in this instance no logical connection existed between the respondent's reported activities and the real concerns of the public. Firestone v. Time, Inc., 271 So. 2d 745, 751 (Fla. 1972). On remand, the court of appeals refused to deal in detail with the contentions raised by the state supreme court. It simply stipulated that (a) the respondent had no cause of action, (b) *Time*'s publication was fair and accurate, (c) the respondent had failed to overcome *Time*'s privilege to report on public proceedings, (d) *Time* had had a fair trial uninfluenced by passion or prejudice, and (e) the respondent had failed to introduce evidence entitling her to compensatory damages. Time, Inc. v. Firestone, 279 So. 2d 389, 394 (Fla. App. 1973).

On certiorari, the Florida Supreme Court held that the jury's award of damages was justified because the trial judge had specifically instructed the jury that Mary Alice Firestone could recover only for damages naturally and directly flowing from *Time*'s defamation. Firestone v. Time, Inc., 305 So. 2d 172, 176 (Fla. 1974). The court relied on dictum by a Florida court of appeals in an earlier case, to the effect that the test of the defendant's liability in libel cases involving summaries of public decrees is whether or not the public's reading of the news report would have a "different effect" from the public's reading of the decree. McCormick v. Miami Herald Publishing Co., 139 So. 2d 197, 200 (Fla. App. 1962), *quoted in* Firestone v. Time, Inc., *supra*, 305 So. 2d at 177. It was this last decision which *Time* appealed to the United States Supreme Court.

156. 424 U.S. at 461-62.

they were precluded from adopting a rule of liability without fault.[157] In Justice Rehnquist's opinion, the failure of the Florida courts to assign fault to *Time* was tantamount to the imposition of strict liability.[158]

Time argued that Mary Alice Firestone was a public figure. In light of her status as a socialite, the intense public interest in the divorce proceedings that she initiated, and her frequent press conferences during the trial, it would seem that Mrs. Firestone did inject herself into a "particular public controversy and thereby [became] a public figure for a limited range of issues."[159] Clearly the limited range of issues in this case could include the final disposition of the divorce proceedings. As Justice Marshall pointed out in his dissent, Mary Alice Firestone commanded sufficient media access to be able to rebut *Time*'s libel; moreover, by becoming voluntarily embroiled in this controversy, she seemingly courted attention from the media, thus implicitly accepting the attendant risk of injury to her reputation.[160]

Justice Rehnquist, however, characterized the respondent's position differently. He felt that she was compelled to resort to the judicial process to seek dissolution of her marriage; in his view, there was no indication that she held press conferences for the purposes of thrusting herself "to the forefront of some unrelated controversy in order to influence its resolution."[161] Justice Rehnquist rejected the notion that all

157. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).

158. 424 U.S. at 461-62. Justice Rehnquist's rationale is dubious. The Supreme Court of Florida had specifically held that, in view of the state statute denying alimony to a spouse found guilty of adultery, *Time* personnel should have realized that the stringer's report was inconsistent with the terms of the decree. The state court had concluded that this was journalistic negligence. Firestone v. Time, Inc., 305 So. 2d 172, 178 (Fla. 1974). Justice Rehnquist admitted the relevance of this passage but said in order to affirm he "would have to attribute to the Supreme Court of Florida from the quoted language not merely an intention to affirm the finding of the lower court, but an intention to find such a fact in the first instance." 424 U.S. at 463. In his view, this would not suffice as a "conscious determination" of fault.

But the finding of the Florida Supreme Court was just such a determination. *See id.* at 484 (White, J., dissenting). However, Justice Rehnquist's analysis would not be so troubling had he simply said that no recovery could be awarded in a libel suit unless the jury first found negligence on the part of the defendant. But he specifically found no prohibition against a finding of fault being made in the first instance by the appellate court rather than by the trial court. *Id.* at 461. Such a cart-before-the-horse approach seems unsound; nevertheless, even assuming that this is a valid approach, it is unclear why Justice Rehnquist should object to what the Florida courts did in this case.

159. Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974).

160. 424 U.S. at 487 (Marshall, J., dissenting).

161. *Id.* at 454-55 n.3. It is unclear what Justice Rehnquist means by an unrelated controversy. The press conferences in question dealt with the divorce trial then under way, and that was a distinctly *related* controversy. In the footnote, Justice Rehnquist cites *Gertz*, 418 U.S. at 345. But the language on that page refers to those who "thrust

controversies of interest to the public are public controversies.[162] This suggests that the latter category includes only matters of *legitimate* public interest, the test formulated earlier in the *United Labs* case and seconded by the plurality in *Rosenbloom*.[163] But Justice Rehnquist also states that *Gertz* repudiated *Rosenbloom* and substituted a status analysis test for the public interest analysis approach.[164] Although Justice Rehnquist's analysis of *Gertz* appears to be inherently inconsistent, his opinion was joined by four justices, including Justice Powell, who authored the main opinion in *Gertz*. *Firestone* thus raises more questions than it answers, and it can be regarded not as a logical progression from *Gertz*, but rather as an aberration.[165]

Arguably, the *Gertz* rationale is applicable to privacy cases and the courts should take the next logical step by discrediting *Time, Inc. v. Hill*. In privacy suits it is entirely sensible to condition the limitation of liability upon the status of the plaintiff. Public officials and voluntary celebrities might be said to have consented to intrusions upon their privacy, but perhaps this consent could be restricted to disclosure of facts bearing upon their public lives. For example, the press should not be privileged to disclose the homosexual status of a citizen who vocally supports a municipal reform program. This type of very private matter should arguably be protected from publicity, although disclosures of other classes of facts might not be similarly shielded.[166] The same analysis should also apply to involuntary public figures. Moreover, in both instances it is appropriate to recognize the effect of lapse of time, and admit that a former celebrity who retires from public view and seeks seclusion should have his right to privacy protected. As *Gertz* suggests, the standard applied to the private individual should be entirely different from that applied to the celebrity because the private person has not implicitly waived his right to have the intimate details of his life shielded from public exposure. Courts should look at the factors set forth in the balancing test adopted by *Goldman v. Time, Inc.*[167] to determine whether the particular case merits application of the *New York Times* rule. While it is true that the court in *Firestone* failed to do this, its

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themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." Arguably the respondent did just that.

162. 424 U.S. at 454.

163. See notes 103-06, 126 and text accompanying *supra*. *Accord*, 424 U.S. 488 (Marshall, J., dissenting).

164. *Id.* at 456. *But see id.* at 474-76 (Brennan, J., dissenting).

165. The current inconsistency in the Court's decisions has troubled Justice Brennan, who professes to find the Court's vacillating approach in defamation cases "strange." Paul v. Davis, 424 U.S. 693, 723 n.11 (Brennan, J., dissenting).

166. *Cf.* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 490-91 (1975); Time, Inc. v. Hill, 385 U.S. 374, 383 (1967); Garrison v. Louisiana, 379 U.S. 64, 72-73 (1964).

167. See text accompanying notes 113-17 *supra*.

omission does not negate the contention that the *Goldman* approach is the optimum means for determining the newsworthiness of a particular public controversy.

B. The Status of the Defendant as a Determinant of Liability

Surprisingly, the federal courts have devoted little attention to the status of the defendant as a criterion for determining whether the actual malice test should be applied in any given set of circumstances. A few decisions have analyzed the extent of the immunity a particular class of defendants may claim under the First Amendment.[168] But apart from a brief and noncommittal footnote included in the plurality opinion in *Rosenbloom v. Metromedia, Inc.*,[169] the Supreme Court has never addressed the issue of whether the constitutional privilege enunciated in *New York Times* should apply equally to media and private-party defendants. The Court has decided a few libel cases involving non-media defendants but has ignored the potential issue.[170]

Other courts have not been so reticent. One state court has explicitly stated that the actual malice test applies to private-party defendants in some libel cases;[171] and one federal court has expressly followed suit. In *Fram v. Yellow Cab Company of Pittsburgh*,[172] the defendant's lawyer allegedly defamed Fram in the course of a televised interview by impliedly describing him as paranoid and schizophrenic. Fram sued the Yellow Cab Company for libel but failed to join the television station as a defendant. Fram contended that the district court should not apply the *New York Times* actual malice test because, as a result of the procedural detail, no media defendant was involved in the lawsuit. The court disagreed, concluding that "[t]he application of the

168. *E.g.*, Doe v. McMillan, 412 U.S. 306, 315-16 (1973) (held the Speech and Debate Clause—U.S. CONST. Art. I, § 6—confers immunity upon Congressmen who author tortious statements, but does not protect private printers who publish those statements); Davis v. Schuchat, 510 F.2d 731, 734 (D.C. Cir. 1975); Carey v. Hume, 390 F. Supp. 1026, 1030 n.15 (D.D.C. 1975) (both holding that the "penumbras" of the First Amendment afford no special protection to investigative reporters). *See also* Firestone v. Time, Inc., 460 F.2d 712, 719 (5th Cir. 1972).

169. 403 U.S. 29, 30-31 n.1 (1971).

170. *E.g.*, St. Amant v. Thompson, 390 U.S. 727 (1968) (defendant a defeated senatorial candidate); Linn v. Plant Guard Workers, 383 U.S. 53 (1966) (defendant a labor union). *See also* Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) (party initially enjoined in an invasion of privacy suit was a racially integrated community organization). In each case the Court held that the allegedly defaming party should prevail because the plaintiff's allegations did not sufficiently state circumstances from which actual malice could be inferred.

171. Dalton v. Meister, 52 Wis. 2d 173, 183, 188 N.W.2d 494, 499 (1971), *cert. denied*, 405 U.S. 934 (1972).

172. 380 F. Supp. 1314 (W.D. Pa. 1974).

New York Times' constitutional prohibition does not turn on whether the defendant is the communications media."[173]

The issue is not so clear-cut. Many of the underlying justifications for the actual malice test are founded upon the compelling need for a free press and upon the "chilling effect" the threat of lawsuits and rigorous verification procedures would have on the media.[174] Perhaps the scope of the *New York Times* rule should be construed to protect only media defendants. Arguably, however, the broad generalizations in the *New York Times* decision about the necessity for robust debate and unimpeded public criticism imply that the rule of that case should extend to private party defendants who, if anything, are even less able to bear the potential twin burdens of costly litigation and difficult verification.

Fram was a libel case, but the applicability of the foregoing considerations to suits for invasion of privacy is also unsettled due to the inherent limitations of *Time, Inc. v. Hill*,[175] and to the effect of the *Gertz* holding on the "conceptual basis" of the earlier case.[176] This issue should be accorded more attention than the courts have given it, inasmuch as many of the privacy cases involve the tactics of non-media defendants that infringe individual rights. In one case, a defendant corporation erroneously assumed that the plaintiff was in arrears on his credit card account and its agents consequently stripped the tires from his car in full view of his co-workers.[177] Another suit arose from the conduct of a plaintiff's creditor, who telephoned his employer, accused the plaintiff of being a "cheat," and suggested that the employer fire him.[178] A third situation involved the issuance of insurance policies to a corporation. As part of its routine procedures, the insurer had an independent agency make a credit check, and the agency subsequently sold the information it obtained to the corporation's creditors.[179] A fourth instance involved a challenge to a New York statute authorizing

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173. *Id.* at 1334. *But cf.* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974). The language of this case seems to limit the applicability of the dual standard test to suits involving publishers and broadcasters. In fact, Justice Powell's opinion consistently refers to media, not private-party defendants. *See also* Brosnahan, *From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and the First Amendment*, 26 HASTINGS L.J. 777, 792-93 (1975).

174. See text accompanying notes 60-62 *supra.*

175. See text accompanying notes 228-30 *infra.*

176. See text accompanying notes 148-49 *supra.*

177. Santiesteban v. Goodyear Tire & Rubber Co., 306 F.2d 9 (5th Cir. 1962).

178. Harrison v. Humble Oil & Ref. Co., 264 F. Supp. 89 (D.S.C. 1967).

179. Copley v. Northwestern Mut. Life Ins. Co., 295 F. Supp. 93 (S.D. W. Va. 1968).

the sale of the information contained in driver registration forms to mail order houses and to other buyers.[180]

Only one of these privacy cases upheld the plaintiff's cause of action,[181] but the factual situations involved are illustrative. Arguably, constitutional privilege in any guise should not be extended to these types of defendants. The cases mentioned involved neither debate on public matters nor comment upon the actions of public figures or officials. The interests involved were not those of criticism and free speech, but rather were pecuniary in nature. The disclosures made by the defendants did not serve the public interest but instead were self-serving. To permit the defendant to invoke constitutional privilege as a defense where the underlying justifications are absent would impose an unnecessarily severe burden on the plaintiff. Consequently, it is reasonable to condition the application of the actual malice test on the status of the defendant as well as on that of the plaintiff. The broad generalization offered by Judge Scalera in *Fram* is, on reflection, self-defeating. The courts should be extremely wary of extending the doctrine of constitutional privilege to lawsuits in which it is inappropriate. Arguably, the techniques for determining whether the privilege is applicable should not be so broad that the courts are prevented from discriminating between the interests at stake for media and non-media defendants and, on the basis of those interests, restricting the scope of the protection afforded by the First Amendment. Again, the Supreme Court needs to delineate complete guidelines on this issue.

IV. The Damage Issue

A. The Theory of Damages in Libel and Invasion of Privacy Actions

Once it has been established that a plaintiff is required to prove actual malice, then only the question of measuring damages remains. This question can best be addressed by briefly sketching the theory of damages in libel actions. Under the common law of most states there are two varieties of libel: libel per se and libel per quod. Libel per se requires no pleading or proof of special damages; the very fact of publication creates a conclusive presumption of compensable injury. Libel per quod requires both pleading and proof of special damages,[182]

180. Lamont v. Commissioner of Motor Vehicles, 269 F. Supp. 880 (S.D.N.Y.), *aff'd*, 386 F.2d 449 (2d Cir. 1967), *cert. denied*, 391 U.S. 915 (1968).

181. Santiesteban v. Goodyear Tire & Rubber Co., 306 F.2d 9 (5th Cir. 1962). In *Harrison*, the suit was dismissed for lack of sufficiently offensive conduct. In *Copley*, it was held that a corporation cannot sue for invasion of privacy. In *Lamont*, the challenge was rejected both because a public record was involved, and because the facts disclosed were neither vital nor intimate.

182. PROSSER, *supra* note 1, § 112, at 762-63; Murnaghan, *From Figment to Fiction to Philosophy—The Requirement of Proof of Damages in Libel Actions*, 22 CATHOLIC

unless the statement falls into one of four special categories.[183] Once the extrinsic facts causing special damages are proved, the plaintiff can recover both compensatory and punitive damages.[184] Under libel per se, once the plaintiff proves publication he is entitled to recover nominal damages at the very least,[185] and often juries will grant compensation for the presumed harm to the plaintiff's reputation. Dean Prosser concludes that the courts treat invasion of privacy actions like libel per se to the extent that they presume at least nominal damages.[186] Of course the plaintiff can recover punitive damages where he proves ill-will or common law malice.

In the majority opinion of *New York Times*, the Court specifically held that a plaintiff in a libel suit can recover no damages whatsoever without first proving actual malice.[187] The argument underlying this conclusion is a familiar one: awards of damages have a "chilling effect" upon freedom of expression.[188] Thus the Court recognized that the very measure of recovery available to the plaintiff may impede free speech.

Three years later, in *Curtis Publishing Co. v. Butts*,[189] a plurality

U.L. REV. 1, 4, 13 (1972). Professor Eldredge adopts the view prevalent in English common law that all libel is defamatory per se, while the American Law Institute's position is that proof and pleading of special damages is unnecessary if the defendant knew or should have known of the extrinsic facts that cause these damages. *See* RESTATEMENT (SECOND) OF TORTS § 569(c) (Tent. Draft No. 20, 1974).

183. Usually listed as imputation of: (1) a serious crime, (2) a loathsome disease, (3) injury to business, trade, profession, or office, and (4) unchastity in a woman. *See* PROSSER, *supra* note 1, § 112 at 754-60.

184. *Id.* at 761.

185. *Id.* at 762. *See generally* C. MCCORMICK, LAW OF DAMAGES § 116-17 (1935).

186. PROSSER, *supra* note 1, § 117 at 815. *But cf.* Time, Inc. v. Hill, 385 U.S. 374, 384-85 n.9 (1967), where Justice Brennan suggests right of privacy actions have affinities with libel per quod rather than with libel per se.

The entire issue may be moot since the *Gertz* case appears to erode the distinctions between libel per se and libel per quod by not allowing the jury to presume damages even if the defamation is on its face injurious to the plaintiff's reputation. Gertz v. Robert Welch, Inc., 418 U.S. 323, 348 (1974). However, one commentator has argued that *Gertz* abolishes presumed damages only for that type of defamation per se defined as being actionable without proof of damage, not for that type of defamation per se defined as involving a statement that is defamatory on its face. Note, *Defamation Law in the Wake of Gertz v. Robert Welch, Inc.: The Impact on State Law and the First Amendment*, 69 NW. U.L. REV. 960, 975-76 n.88 (1975). Both this author and apparently, Justice White disagree with that commentator's interpretation. *See* Gertz v. Robert Welch, Inc., *supra* at 392-93 (White, J., dissenting).

187. See text accompanying note 55 *supra*.

188. *But see* Gertz v. Robert Welch, Inc., 418 U.S. 323, 390-91 (1974) (White, J., dissenting). Justice White points out the dearth of hard data to support this rationale. *See also* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 519 (1970); C. MCCORMICK, LAW OF DAMAGES § 77 at 278 (1935).

189. 388 U.S. 130 (1967).

of the Court upheld an award of punitive damages in a libel case on the theory that any special exemption afforded a publisher was not required by the First Amendment and would provide him with an invidious advantage over other defendants. The plurality declared that where the defendant's conduct is severe enough to "strip from him the constitutional protection our decision acknowledges, we think it entirely proper for the State to act not only for the protection of the individual injured but to safeguard all those similarly situated against like abuse."[190] The problem with the opinion is that it deems the test for punitive damages to be common law malice rather than actual malice,[191] but under *New York Times*, the plaintiff would first have to prove knowledge or reckless disregard in order to recover even compensatory damages. The opinion in *Butts* failed to clarify whether or not it meant to indicate that the *New York Times* damage analysis did not apply to cases involving public figures.[192]

The problem received careful scrutiny in Judge Waterman's opinion in *Goldwater v. Ginzburg*.[193] Citing *Butts* as support, the United States Court of Appeals for the Second Circuit concluded that the federal law does not pre-empt state laws that permit plaintiffs in libel per se actions to receive awards without proof of special damages.[194] Again citing *Butts*, the court pointed out that punitive damages serve two legitimate state needs: they safeguard individual rights and they act as a deterrent.[195] But of course in *Goldwater* punitive damages were awarded after a showing of actual malice, so the result was entirely consistent with the *New York Times* decision.

The district court in *Airlie Foundation, Inc. v. Evening Star Newspaper Co.*,[196] faced a similar situation, but its stance was more cautious. It held that all damage awards in the area of free speech must be closely scrutinized for excessiveness in order to ward off any chilling effect.[197] It therefore refused to allow compensation to the plaintiff for all of the losses sustained because those losses might not have been the direct result of the defendant's false accusation. The court considered an award of nominal damages to be sufficient compensation for any injury to reputation and, in light of the defendant's subsequent retraction and apology, scaled down the jury's award of punitive damages.

190. *Id.* at 161.

191. See note 56 *supra*.

192. *Cf.* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 54 n.19 (1971).

193. 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970). For the facts of the case, see text accompanying notes 75-76 *supra*.

194. *Id.* at 340.

195. *Id.* at 341.

196. 337 F. Supp. 421 (D.D.C. 1972). For the facts of the case, see text accompanying note 77 *supra*.

197. *Id.* at 431.

The district court's caution was justified. In *Gertz*, the Supreme Court announced a strict damage standard: no punitive damages are allowable except upon proof of actual malice.[198] Thus after *Gertz* a private party could sue a publisher on a theory of negligence, but he could recoup only his actual losses, which might be minimal or very difficult to prove.[199] The Court based its conclusion on several factors: first, the unpredicability and irrationality inherent in the size of jury verdicts; second, the irrelevancy of punitive damages to the state interest in permitting a plaintiff to sue on the basis of negligence, because such damages represent a windfall rather than compensation for injury; and finally, the possibility that punitive damages would exacerbate the risk of self-censorship in the media.[200] These justifications advanced by the Court are really *ipse dixits*; *Gertz* does little more in the area of suits involving public figures than reiterate the rule of *New York Times* that no damages, compensatory or punitive, may be awarded without proof of actual malice.[201] The major modification announced by *Gertz* is that the private party plaintiff can be recompensed for his actual losses upon proof of mere negligence. In this respect, *Gertz* presents a relaxation of the consequences with respect to damage awards created by the strict rule advanced by the plurality in *Rosenbloom*.

The subsidiary issue is whether or not the damage discussion in *Gertz* applies to privacy cases. If, as Prosser suggests, the award of damages for invasion of privacy is procedurally similar to that for libel, the analogy might be valid. The damage aspect of *New York Times*, which was carried over into the privacy area in *Time, Inc. v. Hill*, remains controlling law, but *Cantrell v. Forest City Publishing Co.*[202] is bothersome in this respect. In *Cantrell*, the trial judge held in effect that the plaintiff could not recover punitive damages because he had not proved common law malice; however, the judge permitted the case to go to the jury, which found actual malice and awarded compensatory damages. The Supreme Court approved, saying that the trial judge, in denying punitive damages, had not drawn any conclusions about the defendant's actual malice or lack of it, but had merely found that the plaintiff failed to prove that the defendant harbored ill-will.

198. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974).

199. *Accord*, Shapo, *Media Injuries to Personality: An Essay on Legal Regulation of Public Communication*, 46 TEXAS L. REV. 650, 658-67 (1968); Kalven, *Privacy In Tort Law—Were Warren and Brandeis Wrong?*, 31 L. & CONTEMP. PROB. 326, 334 (1966). *But cf.* PROSSER, *supra* note 1, § 117 at 815 n.44.

200. 418 U.S. at 350.

201. *Accord*, Davis v. Schuchat, 510 F.2d 731, 737 (D.C. Cir. 1975); MacNeil v. Columbia Broadcasting Sys., Inc., 66 F.R.D. 22, 27 (D.D.C. 1975).

202. 419 U.S. 245 (1974). For the facts of the case, see text accompanying notes 238-39 *infra*.

This reasoning seems questionable. *Gertz* predicated an award of punitive damages upon proof of actual malice; since the jury found actual malice in *Cantrell* it could, under the logic of *Gertz*, grant both punitive and compensatory damages. Thus, according to *Gertz*, the trial judge should not have dismissed the punitive damage claim unless he was also willing to grant a summary judgment for the defendant.[203] The Court's position in *Cantrell* seems inconsistent with *Gertz* unless one concludes that the damage doctrine of the latter decision is not meant to apply to privacy cases. Further analysis by the Supreme Court is needed to clarify the issue of punitive damages in privacy actions.

B. Application of Gertz in Subsequent Libel Cases

The cases following *Gertz* have tread warily in the quagmire surrounding the issue of damages. In *Drotzmanns, Inc. v. McGraw-Hill, Inc.*,[204] plaintiff trucking corporation sued the publisher of a trade journal that ran an article falsely intimating that the plaintiff was bankrupt. The trial court awarded $245,000 in general damages, but the United States Court of Appeals for the Eighth Circuit held that the award was grossly excessive because the losses the plaintiff suffered were at least partially due to its impaired finances, which had been a problem before publication of the story.[205] Moreover, the trial judge had instructed the jury that they could award punitive damages because the case involved libel per se; he had not conditioned the award of punitive damages on proof of actual malice.[206] Consequently, the court of appeals reversed and remanded the case on the damage issue. *Drotzmanns* clearly shows that *Gertz* undercuts the libel per se/libel per quod distinction by permitting an award of punitive damages in either case only upon a showing of actual malice.

In *Davis v. Schuchat*,[207] a slander per se case, the United States Court of Appeals for the District of Columbia pointed out that *Gertz* denies punitive damages in all defamation cases tried on a theory of negligence. But in *Davis*, because the plaintiff proved actual malice, the state had an interest in allowing an award of punitive damages, even

203. It might be argued that because the trial in *Cantrell* occurred *before* the Supreme Court decided *Gertz*, the doctrine of the latter case is inapplicable in any event. But in other circumstances, the Supreme Court has been willing to apply *Gertz* retroactively. *See* Time, Inc. v. Firestone, 424 U.S. 448, 454-55, 460-62 (1976). *But cf. id.* at 484 (White, J., dissenting).

204. 500 F.2d 830 (8th Cir. 1974).

205. *Id.* at 835.

206. *Id.* at 836.

207. 510 F.2d 731 (D.C. Cir. 1975). For the facts of this case, see text accompanying note 78 *supra.*

to a public official. The court observed that punitive damages still serve a valid function: "[They] are allowed because the civil law has long recognized that in certain situations deterrence can better be achieved through modification of the civil awards than through a requirement of criminal sanctions."[208]

While *Davis* represents one approach to the problem, *Maheu v. Hughes Tool Co.*[209] represents the opposite position. This case arose out of a telephone interview allegedly made by Howard Hughes in which he characterized Maheu as a "son of a bitch" and an embezzler. Maheu sued on a theory of libel, requesting both compensatory and punitive damages. The District Court for the Central District of California stated that punitive damages are allowable only if they serve "substantial" state interests.[210] It outlined several possible state interests: protection of reputation, protection of privacy, and deterrence of "conduct that is motivated by ill-will or is accompanied by malice, fraud, or oppression."[211] The court held that protection of reputation is adequately assured by the threat of costly litigation and by the award of compensatory damages. Protection of privacy was not considered a compelling interest because public figures have consented to invasions of their right of privacy. Finally, the court considered the deterrence aspect[212] and acknowledged that punitive damages do have a deterrent effect. But a public figure like Maheu had access to the media for purposes of rebuttal and, by placing himself in the public eye, had voluntarily increased his risk of exposure to defamation. These factors, according to the court, undercut the deterrence argument. The opinion goes on to list the defects of the system of awarding punitive damages: the unpredictability of juries, the absence of any dollar limit, and the "chilling effect" on freedom of expression. The court concluded:

> Because it would be difficult to objectively supervise the exercise of the jury's discretion in this tender First Amendment area and because unlimited, discretionary awards of punitive damages do not narrowly and necessarily promote the special state interest to protect the reputation and privacy of public figures from special dangers flowing from highly malicious tortious defamation, *i.e.*, the greater probability that harm will be inflicted and that the magnitude of the harm will be larger, this court concludes that the First Amendment precludes plaintiff's recovery of punitive damages.[213]

208. *Id.* at 738.
209. 384 F. Supp. 166 (C.D. Cal. 1974).
210. *Id.* at 170.
211. *Id.* at 172.
212. *Id.* at 171.
213. *Id.* at 173-74. As a result, Judge Pregerson held CAL. CIV. CODE § 3294 was unconstitutional to the extent it allowed punitive damages in libel cases. *Id.* at 174. *Compare Maheu with* Sprouse v. Clay Communications, Inc., 211 S.E.2d 674 (W. Va.),

Maheu takes the logic of *Gertz* and pushes it to its furthest extent: only private persons who show actual malice may obtain punitive damages. The interesting point is that District Judge Harry Pregerson's arguments in this case are borrowed directly from Justice Powell's opinion in *Gertz*. If *Maheu* is affirmed, its holding may even extend to suits for invasion of privacy.[214] As suggested, *Maheu* goes about as far as any court has ever gone in this area; its effect would be to decrease drastically the number of lawsuits brought by public figures and officials because their actual pecuniary losses would be minimal or too speculative.[215] How the appellate courts respond to Judge Pregerson's opinion will go far in establishing whether a judicially recognized cause of action still exists as a legal device to deter invasions of privacy.

Punitive damages are not the sole problem in this area. The analysis of compensatory awards in *Gertz* has also engendered confusion. The Supreme Court, in deciding *Time, Inc. v. Firestone*,[216] did not have to consider the issue raised in *Maheu*. In *Firestone*, the respondent withdrew all claims for injury to reputation before the commencement of the libel trial; she sought damages solely for mental anguish and was awarded $100,000.[217] Justice Rehnquist said it was irrelevant that Mary Alice Firestone chose not to recover for an injury to reputation, because under Florida law she could recover for other injuries without regard to the impairment of her good name, as long as those injuries were proximately caused by the defamation.[218]

Justice Rehnquist's conclusion is questionable. Not only did the respondent waive recovery for injury to reputation, but a pretrial order prevented *Time* from offering evidence to show the absence of such

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cert. denied, 423 U.S. 882 (1975). In *Sprouse*, the West Virginia court held that "punitive damages may only be recovered in cases where the award of actual damages is insufficient to dissuade others in like circumstances from committing similar acts in the future." *Id.* at 692. *See also* Buckley v. Littell, 539 F.2d 882, 897 (2d Cir. 1976) (suggested the type of approach taken in *Maheu* may be the logical outcome of *Gertz* but declined to follow it until the Supreme Court speaks on the matter); Fopay v. Noveroske, 31 Ill. App. 3d 182, 198, 334 N.E.2d 79, 92 (1975) (called the rationale of *Maheu* persuasive but contrary to the position of the Supreme Court).

214. See note 150 *supra*.

215. It is apparent that a plaintiff's actual damages will include, "in addition to out-of-pocket injuries, [only] damages for impairment of reputation and standing in the community, for personal humiliation, and for pain and mental anguish. All [such] damages awarded must be solely compensatory and supported by competent evidence showing the harm, although evidence of its dollar value need not be introduced." Lawlor v. Gallagher Presidents' Report, Inc., 394 F. Supp. 721, 733 (S.D.N.Y. 1975). *Cf.* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

216. 424 U.S. 448 (1976). For the facts of this case, see text accompanying notes 151-55 *supra*.

217. *See* 424 U.S. at 475 n.3 (Brennan, J., dissenting).

218. *Id.* at 460.

injury.[219] Damages for mental anguish in defamation cases have historically been regarded as parasitic; they may be "tacked on" only after injury to reputation is proven.[220] By withdrawing her claim for injury to reputation, the respondent precluded herself from recovering any damages connected to that claim. The result reached by the Florida courts makes sense only if one assumes that they treated *Time*'s allegation of adultery as libel per se and thus actionable without proof of injury; but in fact, the Florida Supreme Court rightly pointed out that *Gertz* prohibited such a bald presumption of compensable harm.[221] *Gertz* does permit recovery for mental anguish[222] but not until *Firestone* did the Court suggest that such damages were anything but parasitic; as a result, the court has partially obfuscated the nature and scope of compensatory damages in defamation and privacy actions.

V. The Applicability of the Actual Malice Test to Suits for Invasion of Privacy

The preceding sections have analyzed the three components of the constitutional privilege created by *New York Times* and have triangulated the limits they place on the right of recovery for tortious invasion of privacy. In this section, the issue confronted is whether a test of privilege developed in a libel context should be applied in privacy suits and if so, which types of privacy suits.

The tort action for defamation protects one's reputation; the two branches of the tort action for invasion of privacy under discussion, by providing a device for penalizing unauthorized disclosure, enable the individual to determine for himself when and in what manner intimate facts about him are to be disclosed to the public. In most jurisdictions, truth is a defense to a charge of defamation in a civil case, so the falsity of an assertion is the key factor in determining whether liability can be imposed upon a defendant (absent some circumstance of privilege such as coverture, consent by the plaintiff, or a report based on a public record).[223] An invasion of privacy suit can be based, *inter alia*, on either a theory of public disclosure of private facts or a theory of false light. Under either theory, the test is whether publication of the matter would be offensive and objectionable to a reasonable man of ordinary

219. *Id.* at 475 n.3 (Brennan, J., dissenting).

220. *See* PROSSER, *supra* note 1, § 112 at 761.

221. Firestone v. Time, Inc., 305 So. 2d 172, 176-77 (Fla. 1974).

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

223. *See* PROSSER, *supra* note 1, § 116 at 796-99; RESTATEMENT (SECOND) OF TORTS § 582 (Tent. Draft. No. 20, 1974). *Compare* Perry v. Hearst Corp., 334 F.2d 800, 801 (1st Cir. 1964) *with* Farnsworth v. Tribune Co., 43 Ill. 2d 286, 290, 253 N.E.2d 408, 411 (1969).

sensibilities;[224] the critical factor in such cases is whether the unauthorized disclosure is a flagrant breach of the community's notions of morality and decency.[225] The tort of invasion of privacy through public disclosure of private facts recognizes a cause of action for publication of an embarrassing private fact that is, by definition, entirely true. On the other hand, when a plaintiff complains of being put in a false light in the public eye, the publication in question need not be defamatory. The best example of this latter type of case is *Time, Inc. v. Hill*, where the false assertions contained in the play and in the *Life* magazine article tended to cast the plaintiffs in a creditable light by emphasizing the personal courage of the Hills during their ordeal. Thus, it is necessary to make careful differentiations between the torts of defamation and invasion of privacy and between the interests they safeguard.[226]

Time, Inc. v. Hill applied the actual malice test to an invasion of privacy case. Prosser's interpretation of *Time, Inc. v. Hill* is that by this decision, the two branches of invasion of privacy that turn on publicity were brought within the ambit of the constitutional privilege.[227] But as a matter of fact, the Court held only that the *New York Times* rule "preclude[s] the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth."[228] The rule of *Time, Inc. v. Hill* therefore applies only to false light cases. The Court explicitly noted that it was not dealing with the constitutional questions that might arise if truth were not a defense.[229] In a footnote, the Court added that the problem of constitutional proscriptions of truthful publications would be left open for later cases to resolve.[230] The application of the actual malice test to false light cases is reasonable.[231] These cases do turn on whether a false assertion of fact was published, so the *New York Times* rule could legitimately be applied in this context. This is especially so

224. PROSSER, *supra* note 1, § 117 at 811, 813. *Accord*, Leverton v. Curtis Publishing Co., 192 F.2d 974, 976 (3d Cir. 1951); Samuel v. Curtis Publishing Co., 122 F. Supp. 327, 329 (N.D. Cal. 1954); RESTATEMENT (SECOND) OF TORTS § 652F, comment f at 130 (Tent. Draft No. 13, 1967).

225. *See* Sidis v. F-R Publishing Corp., 34 F. Supp. 19, 25 (S.D.N.Y. 1938), *aff'd*, 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940).

226. *See* Time, Inc. v. Hill, 385 U.S. 374, 391 (1967), in which Justice Brennan makes such distinctions. Unfortunately, he apparently forgot his own good advice when he wrote the plurality opinion in *Rosenbloom*.

227. PROSSER, *supra* note 1, § 118, at 827. *Accord*, Galella v. Onassis, 353 F. Supp. 196, 222 (S.D.N.Y. 1972).

228. Time, Inc. v. Hill, 385 U.S. 374, 387-88 (1967).

229. *Id.* at 383-84.

230. *Id.* at 383 n.7.

231. See note 150 *supra*.

when a plaintiff sues alternatively on the theories of libel and invasion of privacy. If the ultimate issue (scienter with respect to falsity) is the same for each theory, no reason exists for the courts to place liability-limiting restrictions on libel and not on false light invasion of privacy. Thus this aspect of the decision in *Time, Inc. v. Hill* is internally consistent.[232]

For the same reason, the actual malice test developed in the *New York Times* case has no application to the tort of invasion of privacy through public disclosure of private facts because the issue at hand is not falsity but the publication of facts that are *concededly true.* This observation is borne out by a consideration of the application of *Time, Inc. v. Hill* by the lower federal courts. That decision has been followed in false light cases,[233] but has not even been mentioned in public disclosure of private facts cases.[234] Thus, despite Prosser's generalization, constitutional privilege as measured by the actual malice test has not been extended to cases involving public disclosure of private facts.

What tests do apply? As has been suggested, the decision of the Court in *Gertz v. Robert Welch, Inc.*[235] seems to undercut the holding of *Time, Inc. v. Hill,* at least according to Justice Powell.[236] Even if Justice Powell is incorrect, the holding in *Gertz* at least restricts the decision in *Time, Inc. v. Hill. Gertz* established that the right of recovery for a private-party plaintiff may be conditioned on a less demanding burden of proof than that necessary for a public figure. This dual standard was expressly limited to cases involving publication of defamatory falsehoods injurious to a private individual.[237] But although *Gertz* was a libel case, the language limiting its application apparently also embraces that class of false light cases in which the publication was defamatory. Further, one can argue that, in terms of logic and consistency, the dual standard of *Gertz* should apply to all false light cases because in those cases, as in libel, one of the crucial issues is scienter. Consequently, any change in the liability-limiting tests

232. *Accord,* Nimmer, *supra* note 8, at 963. Nimmer's central thesis is that a less stringent test should be imposed in the privacy area because, while a reputation injured by defamation may be rehabilitated by further speech, a disclosure that invades privacy is an irreparable *fait accompli. Id.* at 961-62.

233. *E.g.,* Berry v. National Broadcasting Co., 480 F.2d 428, 431 (8th Cir. 1973); Varnish v. Best Medium Publishing Co., 405 F.2d 608, 611 (2d Cir. 1968); Cordell v. Detective Publications, Inc., 307 F. Supp. 1212, 1219-20 (E.D. Tenn. 1968), *aff'd,* 419 F.2d 989 (6th Cir. 1969).

234. *See, e.g.,* Copley v. Northwestern Mut. Life Ins. Co., 295 F. Supp. 93 (S.D. W. Va. 1968); Lamont v. Commissioner of Motor Vehicles, 269 F. Supp. 880 (S.D.N.Y. 1967); Harrison v. Humble Oil & Ref. Co., 264 F. Supp. 89 (D.S.C. 1967).

235. 418 U.S. 323 (1974).

236. See notes 148-49 and text accompanying *supra.*

237. 418 U.S. at 347.

applicable to libel should be carried into the area of false light invasion of privacy. *Time, Inc. v. Hill* would require as much unless one argues that the conceptual basis of that case is no longer valid.

Two invasion of privacy cases have been decided by the Supreme Court since *Gertz*. *Cantrell v. Forest City Publishing Co.*[238] arose from the publication of an article in the *Cleveland Plain Dealer* inaccurately depicting the destitution and despair of a recently-widowed woman with several young children. The widow instituted a diversity action on the theory of false light invasion of privacy. The district court judge dismissed a claim for punitive damages because of lack of proof of common law malice but denied summary judgment for the defendants. Mrs. Cantrell won an award for compensatory damages, which the United States Court of Appeals for the Sixth Circuit reversed. The district court judge's finding of no common law malice for the purpose of awarding punitive damages was misconstrued by the appellate court to mean that there was no actual malice as defined by *New York Times*. The Supreme Court reversed, pointing out the error committed by the court of appeals. Justice Stewart's opinion cited *Time, Inc. v. Hill* and commented cryptically:

> No objection was made by any of the parties to this knowing-or-reckless-falsehood instruction [by the district judge]. Consequently, this case presents no occasion to consider whether a State may constitutionally apply a more relaxed standard of liability for a publisher or broadcaster of false statements injurious to a private individual under a false-light theory of invasion of privacy, or whether the constitutional standard announced in *Time, Inc. v. Hill* applies to all false-light cases. Cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323.[239]

It is unclear to which false light cases *Time, Inc. v. Hill* should not apply; its analysis would apparently control whether or not the false light engendered by the publication was also defamatory. But Justice Stewart's remark seems to bear out the observation that the dual standard of *Gertz* may apply in the privacy area. If so, then the federal courts would differentiate between those false light cases involving public figures and those that do not, and would apply *Time, Inc. v. Hill* only to the former.

The second privacy case to come before the Court after *Gertz* was *Cox Broadcasting Corp. v. Cohn.*[240] Under a Georgia statute, it was a misdemeanor to publish the names of rape victims. Cohn's daughter had been raped and murdered. Six youths were indicted for this crime and were brought to trial eight months later. A reporter for WXB-TV,

238. 419 U.S. 245 (1974).
239. *Id.* at 250-51.
240. 420 U.S. 469 (1975).

a Cox affiliate, attended the proceedings and learned the name of the victim by scrutinizing the indictments, which had been placed on public record. His broadcast disclosed the identity of the murdered girl. Cohn, relying on the state statute, sued for invasion of privacy based on public disclosure of private facts. The Georgia Supreme Court denied summary judgment for the defendants on the theory that the First Amendment protections did not extend to this type of disclosure by the media.[241] On appeal, the United States Supreme Court invalidated the ordinance on the narrow ground of the common law privilege to report upon matters contained in a public record. But in the course of his opinion, Justice White recognized the distinction between false light cases and public disclosure of private facts cases. He pointed out that *Time, Inc. v. Hill* applied the actual malice test only to the publication of "false or misleading information" on "matters of public interest."[242] The Court declined, however, to address the issue of what types of sanctions would be permitted against publication of truthful information. Nor did the Court say whether different standards should apply in the discrete area of purely private libels.[243] Justice Powell's concurrence argued that under *Gertz* truth was a defense applicable even in cases of defamations against private-party plaintiffs.[244]

In the false light privacy cases two options present themselves: either the holding of *Time, Inc. v. Hill* applies to all false light cases; or the dual standard of *Gertz* applies, and the courts will determine which test of liability will be employed by considering whether the plaintiff is a public official, public figure, or private person. Despite Justice Stewart's caveat in *Cantrell*, it seems reasonable to say that the validity of *Time, Inc. v. Hill* as a controlling precedent is undiminished by *Gertz*.

Time, Inc. v. Hill has no bearing on the public disclosure of private facts cases, however. In this field the Court also has several options, as *Cox* suggests. It could conclude that truth is always a defense to the imposition of liability, in which case this particular branch of the tort of invasion of privacy will not survive. This outcome is unlikely, given the Court's current composition. Alternatively, the Court could enunciate a dual standard that would make liability depend on the character of the fact disclosed. If the fact is a matter of legitimate general interest, then the plaintiff could be denied recovery; if the fact is so intimate that it bears no relationship to the appropriate concerns of the public, then the plaintiff would have a cause of action. This ad hoc technique is a

241. Cox Broadcasting Corp. v. Cohn, 231 Ga. 60, 68-69, 200 S.E.2d 127, 133-34 (1973).

242. 420 U.S. at 490.

243. *Id.* at 491.

244. *Id.* at 498-99.

possibility, but it retains the vagueness inherent in the concept of general interest.

A third approach has been taken by the Supreme Court of California. In *Kapellas v. Kofman*,[245] a housewife running for office was the subject of a newspaper editorial. The article alleged that she was not devoting enough time to her maternal duties and disclosed the fact that several of her six children had had difficulties with the police. Plaintiff sued on three theories: libel, false light invasion of privacy, and public disclosure of private facts. The court pointed out that false light cases, because they involve issues similar to those that appear in libel suits, should meet the same requirements of a libel claim in all aspects of the case, including that of malice.[246] The court then applied a balancing test involving several factors to determine whether the disclosure involved met the criterion of newsworthiness necessary in privacy cases generally.[247] It concluded that under this test the plaintiff's claim for libel and false light invasion of privacy could not stand. As to her claim for invasion of privacy through public disclosure of private facts, the court again consciously balanced the interests involved. It concluded that if the publication does not substantially overstep the bounds of "propriety and reason in disclosing facts about those closely related to an aspirant for public office, the compelling public interest in the unfettered dissemination of information will outweigh society's interest in preserving such individuals' rights to privacy."[248]

In *Briscoe v. Reader's Digest Association*,[249] the California Supreme Court went even further than it had in *Kapellas*. In *Briscoe*, an article in *Reader's Digest* disclosed that the plaintiff had been convicted of armed robbery eleven years earlier, although he had since rehabilitated himself. One result of this publication was that both the plaintiff's young daughter and his friends abandoned him. Briscoe sued on a theory of invasion of privacy through public disclosure of private facts. The California Supreme Court reversed the trial court's dismissal without leave to amend. The court admitted that truthful reports of recent crimes are protected by the First Amendment, and, in view of the public's interest in law enforcement, suggested that disclosure of information about past crimes might be similarly shielded.[250] But it drew the line by holding that disclosure of the names of the participants in past crimes serves only to satisfy the public's frivolous curiosity, and that the

245. 1 Cal. 3d 20, 459 P.2d 912, 81 Cal. Rptr. 360 (1969).

246. *Id.* at 35 n.16, 459 P.2d at 921, 81 Cal. Rptr. at 369.

247. *Id.* at 36, 459 P.2d at 922, 81 Cal. Rptr. at 370. See text accompanying note 137 *supra*.

248. 1 Cal. 3d at 37-38, 459 P.2d at 923, 81 Cal. Rptr. at 371.

249. 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971).

250. *Id.* at 537, 483 P.2d at 39, 93 Cal. Rptr. at 871-72.

First Amendment does not protect such exposures.[251] This is especially true when the person named has since rehabilitated himself and when a significant period of time has elapsed since his conviction. The court concluded that a plaintiff may be allowed to recover on a theory of public disclosure of private facts if he shows that a "publisher invaded his privacy with reckless disregard for the fact that reasonable men would find the invasion highly offensive."[252] This rather elegant test couples the *New York Times* consideration of reckless disregard (and the interpretations given to it by later decisions) with the traditional concept of extreme offensiveness recognized by the California courts as early as *Melvin v. Reid*.[253] It thus provides an objective criterion with which to work, couched in phraseology already explicated by previous courts. The *Kapellas-Briscoe* test is perhaps the optimal method of accommodating the rights of both free speech and privacy, but a caveat is necessary. In *Briscoe*, the court imposed sanctions on publication of an item in the public record. Faced with a similar problem, the Supreme Court in *Cox Broadcasting Corp. v. Cohn*[254] held that "the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection."[255] *Cox* thus casts grave doubt on the *Briscoe* decision, and indicates that the Supreme Court may be unlikely to adopt the same approach.

Conclusion

The privacy cases recently decided by the Supreme Court have raised more questions than they have answered. *Cantrell* was decided on purely procedural grounds, while the ultimate basis for the decision in *Cox* was a narrow but widely recognized privilege under the common law of the states.[256] The result of these decisions is to leave open many crucial issues. One needs to know whether *Time, Inc. v. Hill* is still conceptually valid, whether *Gertz* has any application to privacy actions, what the test of privilege is in public disclosure of private facts cases,

251. *Id.*, 483 P.2d at 40, 93 Cal. Rptr. at 872.

252. *Id.* at 543, 483 P.2d at 44, 93 Cal. Rptr. at 876.

253. 112 Cal. App. 285, 291-92, 297 P. 91, 93 (App. Dep't Super. Ct. 1931).

254. 420 U.S. 469 (1975).

255. *Id.* at 495. *Accord*, Nebraska Press Ass'n v. Stuart, 423 U.S. 1327, 1331 (1975). It should be noted that the Georgia Supreme Court in the *Cox* case specifically relied on *Briscoe* in reaching its conclusions, which the Supreme Court disapproved. *See also* Johnson v. Harcourt, Brace & Jovanovich, Inc., 43 Cal. App. 3d 880, 891, 118 Cal. Rptr. 370, 378 (App. Dep't Super. Ct. 1974). In this privacy case, the California Court of Appeals distinguished *Briscoe* on the theory that in that earlier case the plaintiff had sought anonymity in the hope that people would forget his former misdeeds, while in *Johnson*, plaintiff had once again placed himself in the public eye.

256. See note 5 *supra*.

what the status of punitive damages is in privacy cases, whether the holding in *Fram* represents the settled state of the law, and what actually is the scope of the constitutional right of privacy created by *Griswold*. *Cox* is a heartening decision for two reasons. First, it draws the distinctions between defamation and privacy, and between false light and public disclosure of private facts cases. Second, it recognizes the questions that need to be answered and suggests that a careful *ad hoc* approach, rather than reliance on the precise but indiscriminate technique of "definitional balancing," will be used to answer those questions.

New York Times Co. v. Sullivan stands for the proposition that in certain circumstances, when the interest of freedom of expression and the interest in protecting an individual's reputation conflict, then the former will automatically prevail unless the plaintiff can show specific egregious conduct on the part of the defendant. Within these narrow limits, the *New York Times* case is entirely logical since the interests protected by a cause of action for libel are not constitutional interests. While the Supreme Court has often indicated in abstract, generalized language that libel is not a form of protected speech,[257] it has never suggested that there is a constitutional right to have the integrity of one's reputation shielded from the deleterious effect of defamatory statements.

The problem arises in *Time, Inc. v. Hill*, which attempts to use the same conflict-resolving technique in the area of invasion of privacy. The thrust of the Court's decision in *Time, Inc. v. Hill* is that whenever the right of privacy and the right of free expression collide, the courts must defer to the latter unless the plaintiff can prove the defendant published calculated falsehoods. If one assumes, as some courts have, that the right of privacy is inherently inferior to the right of free expression, then the conceptual basis of *Time, Inc. v. Hill* is justified. If, however, one relies on *York v. Story* or *Griswold* and its progeny for the proposition that the right of privacy protected by the tort actions under discussion is as fundamental a right as that of free speech, then the preferential technique of *Time, Inc. v. Hill* is improper. If the right of privacy and the right of freedom of expression are deemed equally important, then any conflict between the two arguably should be resolved by resorting to the ad hoc case-by-case balancing technique Justice Harlan advocated

257. PROSSER, *supra* note 1, § 114 at 777-81; RESTATEMENT (SECOND) OF TORTS § 652 (Tent. Draft No. 13, 1967). *Accord*, Cordell v. Detective Publications, Inc., 307 F. Supp. 1212, 1218 (E.D. Tenn. 1968); Lamont v. Commissioner of Motor Vehicles, 269 F. Supp. 880, 883 (S.D.N.Y. 1967). *But see* Time, Inc. v. Firestone, 424 U.S. 448, 455-56 (1976); Buchanan v. Associated Press, 398 F. Supp. 1196, 1201 (D.D.C. 1975); RESTATEMENT (SECOND) OF TORTS § 611 (Tent. Draft No. 21, 1975); PROSSER, *supra* note 1, § 118 at 832-33. These authorities hold that the privilege to report on public proceedings is lost if the reportage is unfair or inaccurate.

in *Konigsberg*.[258] Such a technique would not follow hard and fast preferential rules but rather would consider each case in context, in light of such factors as the status of the plaintiff, the status of the defendant, the cause of actions involved and the interests protected by that cause of action, the interests at stake in terms of the public's need to be informed about the matters which the defendant disclosed, and the nature of the facts revealed.[259]

The Court in *Gertz* partially attempted to use this technique; *Gertz* reintroduces distinctions between suits brought by private persons and those brought by public figures. It requires the courts in each case to scrutinize fully the status of the plaintiff before allowing the defendant to invoke the *New York Times* privilege as a defense. *Gertz* may apply in privacy cases; as Justice Powell noted in his concurrence in *Cox*, *Gertz* "recognized the need to establish a broad rule of general applicability, acknowledging that such an approach necessarily requires treating alike cases that involve differences as well as similarities."[260] If Justice Powell is correct then the *Gertz* holding may indeed implicitly undermine the assumptions underlying *Time, Inc. v. Hill*. It may signal the Court's willingness to analyze both libel and invasion of privacy with a more flexible technique, taking into account the various factors weighed by the California Supreme Court in *Kapellas* and *Briscoe*.[261] If privacy is a fundamental right, as *Griswold* teaches, then *Gertz*, to the extent that it adopts such a flexible technique by making the defense of consitutional privilege depend upon the status of the plaintiff, is one small but necessary step in the right direction.

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258. See text accompanying note 8 *supra*.

259. *See* Time, Inc. v. Firestone, 96 S. Ct. 958, 966 (1976) (suggesting that *Cox* was part of a line of cases that eschew subject matter classifications in favor of balancing the competing interests involved in cases where constitutional privilege is an issue); Erznoznik v. City of Jacksonville, 422 U.S. 205, 208-09 (1975) (suggesting that whenever free speech and privacy collide, a resolution must ultimately depend on the facts of each individual case). *See also* National Broadcasting Co. v. FCC, 516 F.2d 1101, 1176 n.65 (D.C. Cir. 1974) (suggesting that while in limited instances privacy may outweigh journalistic license, *Cox* may require a different approach in the case of disclosures of already public information).

260. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 499-500 (1975) (Powell, J., concurring).

261. See text accompanying note 137 *supra*.