Teachers as Plaintiffs in Defamations: Determination of Their Status as Public Officials or Public Figures

Monica Smyth

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation
Monica Smyth, Comment, Teachers as Plaintiffs in Defamations: Determination of Their Status as Public Officials or Public Figures, 24 Santa Clara L. Rev. 431 (1984).
Available at: http://digitalcommons.law.scu.edu/lawreview/vol24/iss2/5

This Comment is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.
TEACHERS AS PLAINTIFFS IN DEFAMATIONS:
DETERMINATION OF THEIR STATUS AS PUBLIC
OFFICIALS OR PUBLIC FIGURES

I. INTRODUCTION

Confidence in the public schools has been eroding.1 This decline in confidence manifests itself in different ways. One popular way to show displeasure with the schools is to criticize those perhaps most associated with education: teachers.2 The criticism usually takes the form of a condemnation of teachers in general.3 Occasionally, this public scrutiny has turned from a general attack upon all teachers to an accusation against a single teacher. These attacks have included accusations that a teacher is blatantly incompetent,4 that a teacher exercised unsound professional discretion in the selection of a textbook,5 that a teacher hit a student unnecessarily,6 and that a teacher engaged in illicit sexual activity with a student.7 Such potentially defamatory accusations, if false, cast an unjustified shadow upon the
teacher's professional reputation and may significantly hamper her ability to perform effectively in the classroom.

The traditional remedy available to teachers and other private individuals to rectify an unwarranted attack upon their reputations is to initiate a slander or libel action against the defamer. To succeed in a slander action, a teacher would generally have to show that the defamation discredited her character or professional reputation. A teacher could recover both general and special damages from a slanderous statement upon her professional reputation even without first proving special damages. If the slanderous statement did not impinge on the teacher's professional reputation, however, special damages would have to be proven before any recovery would be allowed.

In the case of libel, general damages are presumed even without a showing that the defamation tarnished the teacher's professional reputation and without having to prove special damages. Some state courts, however, have placed a constitutional barrier on libel actions filed by teachers, making it more difficult for them to recover. These states require that in libel actions, teachers must not

---

8. When referring to teachers in general, the feminine personal pronoun is used throughout for consistency only.
10. W. Prosser, supra note 9, at 758.
11. General damages are non-pecuniary losses like harm to reputation, hurt feelings, and resulting emotional distress. Id. at 762.
12. Special damages generally refer to out of pocket losses, such as lost salary. Restatement (Second) of Torts § 575 comment b (1977).
13. See Wertz v. Laurence, 66 Colo. 55, 179 P. 813 (1919) (allegation that teacher was insane was actionable without proof of special damages); Thompson v. Bridges, 209 Ky. 710, 273 S.W. 529 (1925) (accusation that a teacher-principal was immoral was actionable without proof of special damages); Cavarnos v. Kokkinak, 338 Mass. 355, 155 N.E.2d 185 (1959) (charge that teacher introduced communist literature into the classroom was actionable per se); Bray v. Callihan, 155 Mo. 43, 55 S.W. 865 (1900) (statement that teacher was a villainous reptile and unfit to be with a decent girl was actionable per se).
14. W. Prosser, supra note 9, at 760.
15. See Siemiankowski v. Paniewiez, 277 A.D. 830, 98 N.Y.S.2d 277 (1950) (libelous allegation not touching teacher's professional duties was actionable).
17. See Sewell v. Brookbank, 119 Ariz. 422, 581 P.2d 267 (1978) (high school teacher was a public figure); Gallman v. Carnes, 254 Ark. 987, 497 S.W.2d 47 (1973) (law-school professor and dean were public officials); Basarich v. Rodeghero, 244 Ill. App. 3d 889, 321 N.E.2d 739 (1975) (teacher ruled to be either public official or public figure); Johnson v. Board of Junior College, 31 Ill. App. 3d 270, 334 N.E.2d 442 (1975) (teacher held a public figure); Johnston v. Corinthian Television Corp., 583 P.2d 1101 (Okla. 1978) (teacher was a
only meet the common law defamation requirements imposed upon all private plaintiffs, but must also meet the constitutional burden imposed by the Supreme Court upon public officials in *New York Times Co. v. Sullivan* and upon public figures for all purposes and limited public figures in *Gertz v. Robert Welch, Inc.*

To encourage discussion about important public issues, the Supreme Court ruled that leading public officials and influential public figures must prove in defamation actions that the defendant acted with actual malice, thus making it more difficult for them to recover than private plaintiffs. Whether or not a plaintiff should be designated as a public official or a public figure is a question of law. While not specifying the precise criteria to be employed when classi-
fying plaintiffs as public officials, public figures for all purposes, or limited public figures, the Supreme Court has nevertheless drawn some general guidelines in *New York Times* and its progeny. The Supreme Court has not yet had the opportunity to apply these standards to determine how teachers should be classified.  

The state courts examining the status of teachers as plaintiffs in defamation actions, for the most part, have not articulated the guidelines employed in their analyses. Furthermore, state courts are divided in their conclusion as to whether teachers should be classified as public officials, public figures, or simply private persons.

This comment proposes specific guidelines suggested by *New York Times* and its progeny to determine whether a plaintiff should be classified as a public official, public figure for all purposes, or limited public figure in defamation actions. These standards are then applied to teachers to determine their status. Based on this analysis, this comment proposes that teachers should not be classified as either public officials or public figures for all purposes. Teachers may, however, fall under the limited public figure category in certain situations.

II. THE DEVELOPMENT AND RATIONALE OF THE PUBLIC OFFICIAL AND PUBLIC FIGURE CATEGORIES

The Supreme Court in *New York Times* recognized that the first amendment does not protect defamatory statements. On the other hand, the Court also stated that “[d]ebate on public issues should be uninhibited, robust, and wide-open.” The Court was thus faced with the dilemma of how to balance the need to protect an individual’s reputation with the desire to encourage the robust dis-

23. The Supreme Court had the opportunity to determine if a school principal should be classified as a public official or public figure, but declined to hear the case. Kapiloff v. Dunn, 27 Md. App. 514, 343 A.2d 251 (1975), cert. denied,426 U.S. 907 (1976). In Kapiloff, the Maryland Supreme Court ruled that a principal was a “public figure/public official,” but did not delineate the rationale for this classification. Id. at 519, 343 A.2d at 258. Contra McCutcheon v. Moran, 99 Ill. App. 3d 421, 424, 425 N.E.2d 1130, 1133 (1981) (teacher-principal is neither a public official nor a public figure).


25. See supra note 17.


cussion of public issues.\textsuperscript{28}

In its first attempt to balance these interests, the New York Times Court adopted a standard that made it more difficult for a public official to recover damages for defamatory falsehoods.\textsuperscript{29} The Court imposed upon the public official the burden of proving that the defamation was made with "actual malice," rather than mere falsity as provided by common law.\textsuperscript{30} Additionally, the Court attempted to strike an effective balance between the competing interests by imposing a high standard of proof for showing actual malice.\textsuperscript{31}

In Curtis Publishing Co. v. Butts,\textsuperscript{32} the Supreme Court ruled that the actual malice standard applies in defamation actions brought by public figures.\textsuperscript{33} The Court reasoned that similar standards should apply to public figures because, like public officials, they are often thrust into the vortex of public controversies and can make use of self-help remedies in the form of media access to counter false charges.\textsuperscript{34} The Court subsequently modified the public official and public figure doctrine by focusing on the character of the controversy rather than concentrating on the nature of the plaintiff. In Rosenbloom v. Metromedia,\textsuperscript{35} the Court extended constitutional protection to all discussions and communications involving matters of public or general concern without regard to whether plaintiffs were private or

\begin{flushleft}
\textsuperscript{28} Note, Public Figures, Private Figures and Public Interest, 30 STAN. L. REV. 157, 158 (1977). The author suggested the Court has tipped the scales in favor of protecting an individual's reputation to the detriment of the discussion of public issues. \textit{Id.} at 166.

\textsuperscript{29} New York Times, 376 U.S. at 256.

\textsuperscript{30} \textit{Id.} The Court has defined "actual malice" as a publication that was made with "knowledge that it was false or with reckless disregard of whether it was false or not." \textit{Id.} at 279-280. The Court noted the mere fact that a newspaper reporter did not check her sources is not enough to show actual malice. \textit{Id.} at 287.

\textsuperscript{31} \textit{Id.} at 286-87. To meet this constitutional standard, the plaintiff must show actual malice with "convincing clarity." \textit{Id.}

\textsuperscript{32} 388 U.S. 130, \textit{reh'g denied,} 389 U.S. 889 (1967).

\textsuperscript{33} \textit{Id.} at 155. In Curtis, two separate libel actions were consolidated. In the first case, the plaintiff, a well-known football coach, was accused of fixing a game. He brought a libel action, and was awarded $60,000 compensatory damages and $400,000 punitives. \textit{Id.} at 138.

In the second action, Associated Press v. Walker, the plaintiff was accused of controlling a violent crowd at a civil rights demonstration, and leading a charge against federal marshalls. A verdict of $500,000 compensatory and $300,000 punitive damages was returned in favor of the plaintiff. \textit{Id.} at 141.

The Court ruled that both plaintiffs were "public figures" and that the New York Times standard was applicable to them. The Court affirmed the first judgement, ruling the burden of proof had been met. However, the Court unanimously reversed the second judgement. \textit{Id.} at 155-57.

\textsuperscript{34} \textit{Id.} at 154-155.

\textsuperscript{35} 403 U.S. 29, 42-44 (1971) (plurality opinion).
\end{flushleft}
public persons.\textsuperscript{36}

This decision, however, was short-lived. In \textit{Gertz v. Robert Welch, Inc.},\textsuperscript{37} the Court rejected the nature of the issue as the controlling factor in defamation actions and focused once again on the status of the plaintiff.\textsuperscript{38} The \textit{Gertz} Court also divided the public figure doctrine into two categories: first, plaintiffs with pervasive power and influence are classified as public figures for all purposes; second, plaintiffs who voluntarily thrust themselves into a specific public controversy in an attempt to influence the outcome are classified as limited public figures.\textsuperscript{39} Both public figure categories are subject to the \textit{New York Times} standard of actual malice.\textsuperscript{40} In post-\textit{Gertz} decisions addressing the public figure doctrine, the Supreme Court has been reluctant to designate plaintiffs involved in public controversies as limited public figures.\textsuperscript{41}

III. GUIDELINES FOR DEFINING PUBLIC OFFICIAL, PUBLIC FIGURE FOR ALL PURPOSES, AND LIMITED PUBLIC FIGURE AS APPLIED TO TEACHERS

A. Public Official

When the \textit{New York Times} Court pronounced that defendants would be afforded a limited constitutional privilege to protect their statements concerning public officials, it also declared that it would not "determine how far into the lower ranks of government employ-

\begin{thebibliography}{99}
\bibitem{36} Id. at 43-44.
\bibitem{37} 418 U.S. 323 (1974).
\bibitem{38} The Court rejected \textit{Rosenbloom} because it would require that judges determine what is a public issue on an ad hoc basis. Furthermore, a private person would face the same burden to recover in a defamation action as a public official or public figure but without self-help remedies. Finally, a publisher could be held liable for a defamation of a public official or public figure concerning a non-public issue even if reasonable precautions were taken. \textit{Id.} at 346.
\bibitem{39} \textit{Id.} at 345. The \textit{Gertz} Court also postulated a third category, the \textit{involuntary} public figure, who has "become a public figure through no purposeful actions of his own." The Court, however, acknowledged that the "instances of truly involuntary public figures must be exceedingly rare." \textit{Id.}
\bibitem{40} Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 163-64 (1979).
\bibitem{41} See Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979) (failure to appear before grand jury was insufficient to bring plaintiff the status of limited public figure); Hutchinson v. Proxmire, 443 U.S. 111 (1979) (scientist was not a limited public figure); Time, Inc. v. Firestone, 424 U.S. 448 (1976) (wife was not a limited public figure because of her actions in a divorce proceeding).
\end{thebibliography}
ees the 'public official' designation would extend." The Court later defined public official in general terms in *Rosenblatt v. Baer*. The *Rosenblatt* Court stated that before it would apply the *New York Times* actual malice standard, it would have to find that the government official was in a position that invites public scrutiny beyond that of the average public official. Furthermore, the designation of "public official" would apply only to public employees who invited public attention apart from the particular controversy.

The Supreme Court in *Hutchinson v. Proxmire* recently declared that the "public official concept does not include all public employees." Under these general guidelines, no definite answer emerges as to whether a teacher should be classified as a public official. It is unclear whether a teacher occupies a position that invites public scrutiny beyond that of average public employees and apart from a particular controversy. The split in state jurisdictions as to whether a teacher should be classified as a public official is an indication of the ambiguity.

*New York Times* and its progeny, however, can be read in a manner that defines public official with precise guidelines. These guidelines can be used to determine if teachers should be classified as public officials. The first criterion that must be satisfied in determining that a plaintiff should be classified as a public official is that her salary must be paid by public funds. This guideline appears to be obvious, but it is worthy of special examination when applied to

43. 383 U.S. 75 (1966) (county supervisor of a public ski resort held to be a public official).
44. *Id.* The Court announced that "[w]here a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both elements . . . identified in *New York Times* are present and the *New York Times* malice standards apply." *Id.* at 86.
45. *Id.* at 86 n.13. The Court stated that to determine if the *New York Times* standard applies, the status of the plaintiff is dispositive rather than the nature of the controversy.
46. 443 U.S. at 111 (1979).
47. *Hutchinson*, 443 U.S. at 119 n.8. Since the court of appeals did not reach the public official issue, the Supreme Court did not directly address the issue as well. The Court instead focused on the public figure doctrine.
48. See Basarich v. Rodeghero, 244 Ill. App. 3d at 893, 321 N.E.2d at 742 (teacher held to be a public official); Johnston v. Corinthian Television Corp., 583 P.2d at 1103 (teacher ruled a public official). But see Franklin v. Benevolent and Protective Order of the Elks, 97 Ca. App. 3d at 922, 159 Cal. Rptr. at 132 (teacher held not a public official); McCutcheon v. Moran, 99 Ill. App. 3d at 424, 425 N.E.2d at 1133 (teacher-principal held not a public official). The status of teachers in defamation actions even differs within a state.
49. See *New York Times*, 376 U.S. at 283.
teachers. Although public school teachers meet this criterion because their salaries are paid by public funds, private school teachers do not. Consequently, if public school teachers are classified as public officials, an anomaly would result: public and private school teachers, although performing essentially the same job, would have to meet different burdens of proof as plaintiffs in defamation actions.

If the employee is paid by public funds, the next element in the analysis to determine public official status is whether the position is elected. The justification for this element is that elected officials normally invite public scrutiny beyond that of typical public employees. Although this is not a dispositive element, the mere fact that an official is elected may be sufficient to classify her as a public official under *New York Times*. Teachers would not meet this requirement because they are not elected, but typically are hired under the auspices of a local public school board.

A third criterion is whether the position requires an official oath of office. The rationale is that only high-ranking public officials are required to take oaths of office. Thus, if an official is required to take an oath before assuming the responsibilities of her office, this will cut in favor of designating her as a public official for

---

51. Private school teachers would merely have to meet the common law requirements. *See supra* note 18. In contrast, a public school teacher would be faced with the constitutional hurdle imposed in *New York Times*.

One way to remedy this inequity is to impose the *New York Times* standard on private teachers by classifying them as either public figures for all purposes or limited public figures. The better way to avoid the anomaly, as this comment proposes, is to not classify teachers as public officials in the first place. A teacher would then have to meet the common law defamation requirements imposed upon all private plaintiffs, unless she fell under one of the public figure categories.

52. Some public employees, although not elected, may still be classified as public officials by meeting other elements in the proposed analysis. For instance, the United States Secretary of State, despite not being elected, might be classified as public official for *New York Times* purposes simply based on his control of governmental policy. *See infra* notes 55-58 and accompanying text.

53. *See New York Times*, 376 U.S. at 283 n.23. In *New York Times*, the plaintiff was an elected commissioner whose duties included managing the police department. In determining if the plaintiff should be considered a public official, the Court noted that his "position as an elected city commissioner clearly made him a public official." *Id.* (emphasis added).


55. Rosenblatt v. Barr, 383 U.S. at 91 n.5 (Douglas, J., concurring). In his concurring opinion, Justice Douglas stated that it was unclear from the record whether the plaintiff was a public official for *New York Times* purposes. Furthermore, it was even unascertainable whether plaintiff was required to take an oath of office, a factor Justice Douglas would have apparently considered in determining whether plaintiff was a public official. *Id.*
New York Times purposes. Some states require that teachers take an oath of office before being granted a teaching certificate or license.66 Hence, teachers in these states satisfy this guideline for determining public official status.

The Court, in addition, has suggested other guidelines for classifying public officials which appear to be more critical to the determination than are the oath of office and elected position criteria. To be considered a public official, the plaintiff must have authority to act "in an executive, legislative, or judicial capacity."5

Teachers generally do not have authority to act in any of these capacities. Traditionally, executive power related to education is vested in a state's Department of Education.66 Teachers, however, neither set state educational policies nor determine local school regulations.69 Teachers also do not act in a legislative manner because they are not authorized to enact laws. Similarly, teachers plainly do not serve in a judicial capacity. This guideline is thus not likely to be met by the classroom teacher. A California court of appeal, in examining this policy-making criterion, concluded that the control of teachers over government is "at most remote and philosophical."60

The Court has also noted that the public official designation depends in part on the desire to prevent a defamation action brought by a public employee from being a form of seditious libel.61 The Sedition Act was designed to stop the publication of material disapproving of government policy.62 The Court has reasoned that allowing govern-

56. See, e.g., CAL. EDUC. CODE § 44334 (West 1978). This section states: "[No teaching] certification document shall be granted to any person unless he . . . has subscribed to the following oath or affirmation: 'I solemnly swear (or affirm) that I will support the Constitution of the United States of America, the Constitution of the State of California, and the laws of the United States and the State of California.'" Id.

57. New York Times, 376 U.S. at 299 (Goldberg, J. concurring). Justice Goldberg stated:

In a democratic society, one who assumes to act for the citizens in an executive, legislative or judicial capacity must expect that his official acts will be commented upon and criticized. Such criticism cannot, in my opinion, be muzzled or deterred by the courts at the instance of public officials under the label of libel.

Id. (emphasis added).

58. See, e.g., CAL. EDUC. CODE § 33301 (West 1978). This section provides that "[t]he State Board of Education . . . shall be the governing and policy determining body." Id. These governing duties include determining the educational needs of states and to administer educational programs. CAL. EDUC. CODE § 33032 (West 1978).


ment officials to recover in a defamation action would, like the Sedition Act, chill public comment about the government.\textsuperscript{63} The Court stated that it disfavors any judgment which may be construed as a method to vindicate governmental policy.\textsuperscript{64} Applying this principle to teachers, the question is whether a judgment for a teacher-plaintiff in a libel action would be viewed as a victory for the government or as a means to quiet those critical of the government. The chances that a judgment in favor of a teacher would be seen in this manner appears to be remote considering the fact that teachers have at most a tenuous control of governmental policy.\textsuperscript{65}

Another element suggested by the Supreme Court to determine whether public employees should be subject to the \textit{New York Times} standard is whether they are granted an \textit{absolute} privilege to communicate defamatory statements related to their formal duties.\textsuperscript{66} There are two types of privileges: absolute and conditional. An absolute privilege affords its holder a complete defense to defamation.\textsuperscript{67} A conditional privilege, on the other hand, provides a defense contingent upon the absence of ill will and upon a reasonable belief of the privilege holder that the defamation is true.\textsuperscript{68} The rationale for these privileges is that certain public officials should be free to exercise their duties immune from defamation actions, which could inhibit their performance.\textsuperscript{69} An absolute privilege is normally granted to all federal officials.\textsuperscript{70} An absolute privilege, conversely, is only granted to the highest state officials, leaving lower officials with only a condi-
The classification of governmental employees for privilege purposes is related to their status as plaintiffs in defamation actions. Thus, if by virtue of her high public office a state employee is granted an absolute privilege to comment, then she is by analogy high enough in the governmental hierarchy to be classified as a public official for New York Times purposes. Although courts have granted school administrators absolute privileges to comment about teachers, courts are less inclined to grant absolute privileges to teachers. This reluctance cuts against designating teachers as public officials.

Although not specifically adopted by any court, the doctrine of governmental immunity may be of help in the determination of whether a plaintiff should be classified as a public official. Under this doctrine, certain public officials are immune from tort liability for negligent acts they commit when working within their scope of authority. Similar to the justification for granting public officials the privilege to comment, this doctrine allows public officials to discharge their duties without fear of personal liability. In some jurisdictions, the higher an official is in government, the more likely she will be afforded governmental immunity. By analogy, it can be argued that if a public employee is considered sufficiently high in the government hierarchy to be granted tort immunity, then she should be considered a public official for New York Times purposes.

If a court considers governmental immunity as a factor for classifying plaintiffs in defamation actions as public officials, teachers would have a strong argument that they should be considered private persons. In states addressing the issue, courts have ruled that teachers are not public officials for the purposes of governmental immu-

71. Restatement (Second) of Torts § 591 comment c (1977).
73. Christensen v. Marvin, 273 Or. 97, 539 P.2d 1082 (1975) (superintendent’s comments about a teacher are absolutely privileged); Barton v. Rogers, 21 Idaho 609, 123 P. 478 (1912) (school board is absolutely privileged to comment on teachers); McLaughlin v. Tilendis, 155 Ill. App. 2d 148, 253 N.E.2d 85 (1969) (allegations that teachers lacked ability were absolutely privileged); Williams v. School Dist., 447 S.W.2d 256 (Mo. 1969) (superintendent’s statement about teacher qualifications is absolutely privileged). See generally Annot., 40 A.L.R. 3d 490, 502-04, 506-08 (1971).
74. Dawkins v. Billingsley, 69 Okla. 259, 172 P. 69 (1918) (no privilege attaches to teacher’s entries into class record); Chapman v. Furlough, 334 So. 2d 293 (Fla. 1976) (privilege to comment about student involvement with drugs).
75. W. Prosser, supra note 9, at 987-88.
76. See id. at 987.
77. Id. at 987.
It follows by analogy that teachers should not be classified as public officials when bringing defamation actions.

B. Public Figure for All Purposes

The Court has stated that plaintiffs in defamation actions who "occupy positions of . . . persuasive power and influence . . . are deemed public figures for all purposes." On its face, the requirement of "persuasive power and influence" would appear difficult to meet. Indeed, thus far lower federal courts have limited the public figure for all purposes category to a very select group of influential plaintiffs. State courts, on the other hand, are more willing to classify plaintiffs as public figures for all purposes and have designated teachers as such. It is unclear, however, what persuasive power and influence teachers are presumed to have. Their primary duties include selecting teaching methods and materials, maintaining discipline, and evaluating students. It is doubtful that the performing of these basic responsibilities by teachers is what the Supreme Court meant by "persuasive power and influence."

An examination of the Court's justification for extending the New York Times standard to public figures will also prove helpful in determining whether classroom teachers should be classified as pub-


79. Gertz, 418 U.S. at 345.

80. See Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976) (television star is a public figure for all purposes); Buckley v. Littel, 539 F.2d 882 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977) (publisher, author, and television personality is a public figure for all purposes).

lic figures for all purposes. The Court stated that public figures for all purposes had to have voluntarily exposed themselves to increased media scrutiny and public attention.\textsuperscript{82} This voluntary exposure requirement has been likened to the tort doctrine of assumption of the risk.\textsuperscript{83} A public figure who placed herself in a position in which defamations are more likely to occur should be prevented from recovering unless she can prove actual malice.\textsuperscript{84}

Applying this principle, it must be determined whether teachers, by accepting their positions and teaching in the classrooms, voluntarily increase their chances of being defamed as a result of increased media attention. It appears that teachers do not voluntarily assume the risk of defamation because teaching is a common event, unlikely to invite increased media attention. Teachers all over the country fulfill their responsibilities without inviting any media attention whatsoever. As a consequence, teachers would probably fail to qualify as public figures for all purposes based on the requirement of voluntarily exposing themselves to enhanced media scrutiny.

The second rationale for applying the \textit{New York Times} standard to public figures is that, unlike most private persons, they usually have access to the media and other self-help remedies for rectifying any harm caused by the defamation.\textsuperscript{85} To be classified as a public figure for all purposes, such media access must be \textit{continuing}.\textsuperscript{86} Because few plaintiffs have continuing access to the press,\textsuperscript{87} this requirement is a formidable barrier. Few, if any, teachers are so newsworthy that they can command regular access to the media in order to rebut defamatory statements. As a general rule, their media access is probably no greater than that of the average private person has. Because they lack continuing media access, teachers would not qualify as public figures for all purposes based on the availability of self-help remedies.

\textsuperscript{82} \textit{Gertz}, 418 U.S. at 345.
\textsuperscript{84} \textit{See Gertz}, 418 U.S. at 349.
\textsuperscript{85} \textit{Id.} at 345. The Court noted, however, that self-help remedies "seldom suffice to undo [the] harm of defamatory falsehoods." \textit{Id.} at 344 n.9. A commentator has stated, furthermore, that self-help remedies may not be available, since the publisher has already displayed her prejudice in the matter, and thus may refuse to publish a rebuttal. In addition, the lack of competing newspapers within a community lessens the likelihood of a rebuttal. \textit{Stocker, An Analysis of the Distinction Between Public Figures and Private Defamation Plaintiffs Applied to Relatives of Public Persons}, 49 S. Cal. L. Rev. 1131, 1190-91 (1976).
\textsuperscript{87} \textit{Stocker, supra} note 85, at 1192-93.
C. Limited Public Figure

A limited public figure must meet the *New York Times* standard only for controversies in which she has thrust herself to the forefront "in order to influence the resolution of the issues involved."88 In all other defamation actions the plaintiff is designated a private person and thus must merely show the common law elements.88 Despite recent Supreme Court decisions to the contrary,89 state courts have readily designated plaintiffs as limited public figures.90 State courts have classified teachers as limited public figures while generally not specifying the factors they employed to reach their conclusion.91 This may be due, in part, to the fact that the limited public figure category is more difficult to define precisely than the public official and public figure for all purposes categories.92 Nevertheless, the Supreme Court has outlined a three-step analysis that defines limited public figure. In the Court’s analysis, all elements must be met before a plaintiff is classified as a limited public figure.

The first prong of the analysis is whether the defamatory statement is related to a public controversy.94 If the controversy is not public in nature, the analysis ends and the plaintiff is classified as a private person. At issue, then, is the precise definition of public controversy. The Court has stated that mere public interest in an event is not enough to consider it a public controversy.95 The Court has further suggested that a public controversy may be an event in which media attention can be anticipated.96

In Franklin v. Benevolent and Protective Order of Elks,97 a California court of appeal carefully examined the issue of what is a

89. Stocker, *supra* note 85, at 1211. *See supra* note 18 and accompanying text.
90. *See Note, The Constitutional Law of Defamation—Recent Developments and Suggested State Court Responses, 33 MAINE L. REV. 371, 380-85 (1981); Note, Whither the Limited-Purpose Public Figure?, 8 HOFSTRA L. REV. 403, 423 (1980) (suggesting that the Court has narrowed the limited public figure category to such an extent that it “has been whittled down to the breaking point”).
91. *Note, Whither the Limited-Purpose Public Figure?, supra* note 90, at 404.
92. *See Fleming v. Moore, 221 Va. at 888, 275 S.E.2d at 637.*
93. *Comment, Gertz and the Public Figure Doctrine Revisited, 54 TUL. L. REV. 1053, 1080 (1980).*
94. *Gertz*, 418 U.S. at 345. The *Gertz* Court again decided to examine the public nature of the controversy as part of its analysis, although it also purported to reject *Rosenbloom.* *See supra* text accompanying note 35. *See also Note, The Editorial Function and the Gertz Public Figure Standard, 87 YALE L.J. 1723, 1738-39 (1978).*
96. *Id. See* Stocker, *supra* note 85, at 1214.
public controversy within the educational confines. In *Franklin*, the teacher-plaintiff selected for her American Government class excerpts from a book designed to illustrate different propaganda techniques. The court stated that textbook selections made by teachers for the purpose of discharging their professional responsibilities were *not* public controversies because media attention could not be anticipated before the books were chosen.

A second element of the limited public figure analysis is whether the plaintiff has *voluntarily* thrust herself into the vortex of a controversy. The key to determining whether the plaintiff acted voluntarily is to examine her actions *before* the defamation occurred. If a teacher is dragged unwillingly into a public controversy in an effort to defend herself, then she should not be classified as a limited public figure.

To illustrate this point, consider the conduct of the plaintiff in *Franklin* before she was defamed. After the use of the book was protested by a parent, the local school board held a public meeting to examine the merits of using this book. The mere fact that she participated in this meeting was not sufficient to consider her a limited public figure because she had not arranged the meeting and was only attempting to defend her selection.

The final requirement is that a plaintiff must attempt to influence the outcome of the controversy. To determine whether this element is met, the plaintiff's actions must be examined *during* the controversy. In particular, attempts by the plaintiff to influence public opinion by way of the media must be scrutinized. For instance, in *Franklin* the plaintiff made no effort to influence public opinion through the media during the controversy, but merely responded to

---

98. *Id.* at 919, 159 Cal. Rptr. at 133.
99. See *id.* at 931, 159 Cal. Rptr. at 140.
100. *Gertz*, 418 U.S. at 345.
102. See *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979). The Court reasoned that "those charged with defamation cannot, by their own conduct, create their own defense by making claimant a public figure." *Id.*

In *Hutchinson*, a behavioral scientist brought suit against Senator William Proxmire after the senator gave his "Golden Fleece Award" to the government agency funding the scientist's work. The fact that the scientist responded to media inquiries in an attempt to defend himself was insufficient to consider him a limited public figure. *Id.* at 136.

103. *Franklin*, 97 Cal. App. 3d at 919, 159 Cal. Rptr. at 133.
104. *Id.* at 931, 159 Cal. Rptr. at 140-41.
the charges leveled against her. The court ruled that she was not a limited public figure. On the other hand, if a plaintiff seeks to influence public opinion through the media, she would be classified as a limited public figure assuming the other elements are met.

IV. ACADEMIC FREEDOM: CONSIDERATION UNIQUE TO TEACHERS AS PLAINTIFFS IN DEFAMATION ACTIONS

A consideration unique to teachers arises when they are plaintiffs in defamation actions involving their choice of teaching methods and materials. If teachers are required to meet the *New York Times* standard in these cases, their academic freedom could be infringed. The doctrine of academic freedom includes the freedom of teachers to choose appropriate teaching methods and materials. Although courts have not given teachers a blanket guarantee of freedom to teach, courts have recognized teachers' right to select methods and materials that serve demonstrated educational purpose. The freedom to select methods and materials is founded on the principle that schools are intended to serve as "the market place of ideas" and on teachers' professional prerogative. This freedom, however, has also been recently extended to

107. *Franklin*, 97 Cal. App. 3d at 931, 159 Cal. Rptr. at 141. A commentator has suggested that a teacher should avoid attempts to influence public controversies until after it is resolved in order to avoid the limited public figure designation. *See Beezer, Criticism of Teachers and the Law of Defamation: How Extensive the Shield of Protection?* 62 PHI DELTA KAPPAN 577, 581 (1981).

108. *Franklin*, 97 Cal. App. 3d at 931, 159 Cal. Rptr. at 141.

109. *Kemerer & Hirsh, The Developing Law Involving the Teacher's Right to Teach*, 84 W. Va. L. Rev. 31, 46-47 (1981). Besides the freedom to choose methods and materials, authors Kemerer and Hirsh have included the freedom of association and expression outside the schools in the doctrine of academic freedom. *Id.*

110. *Id.* at 61-62. *See Beezer, How Extensive is the Teacher's Authority to Determine Methodology*, 63 PHI DELTA KAPPAN 615, 618 (1982).

111. *Kemerer & Hirsh, supra* note 108, at 51-53. Concerning academic freedom and the marketplace of ideas, Justice Brennan wrote:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas.


112. One reason for only granting academic freedom to college instructors is that colleges traditionally serve a different function than primary and secondary schools. Generally, colleges are places for students to discover new ideas, whereas primary and secondary schools transmit basic skills. The quality of education at primary and secondary schools may depend
teachers at other than college levels.\textsuperscript{113}

The \textit{Franklin} court implicitly recognized that classifying teachers as public officials or public figures could restrict their academic freedom.\textsuperscript{114} Teachers, fearing that they would have to meet the high \textit{New York Times} burden in a defamation action, might tend to avoid controversial methods and materials that could cause a public outcry.\textsuperscript{115} This fear could conceivably restrict a teacher's choice of methods and materials to the extent that her academic freedom is infringed and the educational interests of the students not served. A teacher similar to the plaintiff in \textit{Franklin}, for example, might avoid using a controversial book about propaganda in her social studies class, even though sound teaching theory would require that she do so. Consequently, the restriction of academic freedom is another factor that should be considered when determining the status of teachers in defamation actions.

V. CONCLUSION

Despite Supreme Court opinions defining, in general terms, the three classes of plaintiffs in defamation actions, lower courts have not been uniform in their classifications of such plaintiffs. These courts have extended public official status to plaintiffs with only remote influence in government, despite Supreme Court opinions to the contrary, and have failed to justify classifications of plaintiffs as public figures for all purposes and limited public figures. This lack of uniformity has been especially apparent in classifications of teacher-plaintiffs in defamation actions.

One explanation for the conflict is the absence of clear standards defining public official, public figure for all purposes, and limited public figure. This comment has discussed guidelines for each category to assist in the classification of teachers as plaintiffs in defama-
mation actions. It proposed that before a determination is made, all elements that make up a particular category be examined. This examination will determine the proper status of teacher-plaintiffs in defamation actions.

The guidelines for defining a public official strongly indicate that teachers should not be placed in this classification. Although teachers are paid with public funds and may take an oath of office, they are not elected. More importantly, teachers do not exercise legislative, executive, or judicial authority, and their victory in a defamation actions would not likely be construed as seditious libel. Furthermore, teachers, unlike high government officials, are not granted an absolute privilege to comment. Finally, the fact that teachers are seldom granted governmental immunity further suggests that they should not be considered public officials.

Teachers also should not be classified as public figures for all purposes. Teachers do not exercise the "persuasive power and influence" required of public figures for all purposes. Moreover, teachers neither assume the risk of defamation by accepting their positions and teaching nor have access to adequate self-help remedies.

A teacher might be classified as a limited public figure in a defamation action depending on the facts and circumstances of the individual case. To determine whether a teacher is a limited public figure, a three-step analysis is required. The first step examines whether the alleged defamation is related to a public controversy. If not, the analysis terminates and the teacher is classified as a private person. However, if the alleged defamation is related to a controversy, the examination turns to whether the teacher voluntarily took part in the controversy before the alleged defamation occurred. As before, if this step is not satisfied, the teacher would be simply classified as a private person. If this step is met, the analysis continues to determine whether the teacher attempted to generate public support for her actions. Only if this final step is satisfied would the teacher be classified as a limited public figure.

The court's determination of the status of teachers in defamation actions could infringe the teacher's academic freedom. If teachers are classified as public officials or public figures, and thus have to satisfy the New York Times standard, their control over teaching materials and methods may be restricted. This restriction may not be in their students' best interests. As a consequence, courts should be especially reluctant to extend public official or public figure status to teachers in situations implicating academic freedom.

David August Sandino
DEFAMATION IN FICTION: THE NEED FOR A NEW TEST

I. INTRODUCTION

Imagine an author's dilemma in writing a piece of fiction. On the one hand, she may find it provocative to use a real life experience or character to create her fictional story. By describing or portraying a character that might bear resemblance to a real person, however, an author risks liability for defamation and exposes herself to the possibility of a multimillion dollar jury verdict. Such outrageous verdicts inhibit an author's freedom of expression. This harsh result occurs because the present laws of libel do not afford a fiction writer adequate protection when the jury determines a reasonable reader or audience might identify plaintiff as the character in the fiction. This comment proposes an additional standard for determining the common identity between a plaintiff and the character in a fiction. The test should be: did the author use due care in describing the fictional character so as not to confuse the fictional character with the plaintiff?

II. BACKGROUND OF New York Times and Gertz

In the past two decades there has been a revolution in the law of defamation and the first amendment. In New York Times Co. v. Sullivan, and Gertz v. Robert Welch Inc., the Supreme Court ap-
plied a strict balancing test of the individual's interest in reputation against first amendment rights of free speech and expression.

Prior to *New York Times* and its progeny, state defamation laws for the most part provided great protection to an individual's reputation. The common law placed great emphasis on protecting an individual's "decency" by imposing strict liability on the defendant in a defamation action. The speaker's intention was irrelevant; liability was established simply if the plaintiff could prove that the defendant was responsible for the defamatory statement.8

This aspect of defamation was bound to come into conflict with the first amendment. The strict liability standard was seen as an inhibition on free speech. There was a great dilemma whether the sanctity of the individual should be sacrificed to attain other socially valuable goals. Editors were unable to draw lines between those statements with defamatory potential and those without. The inevitable result was self-censorship and a stifling of "free and robust debate." Such results are inimical to the first amendment.

Thus, the Supreme Court developed new tests to overcome these dangers.7 In *New York Times*, for the first time, the Supreme Court subjected state defamation law to a constitutional minimum. Where a public figure claimed defamation, she would have to prove that the media defendant acted in reckless disregard for the truth or in knowing falsity8 in printing the alleged defamation. This became known as "constitutional malice."9 If the plaintiff was a private individual, this standard was lowered.10 A private individual need prove only negligence to establish liability for actual damages.11 To collect punitive damages, however, the higher "constitutional malice" test must be met.12

While these tests provide adequate protection for the media defendant, they do not give sufficient protection to the fiction writer.

---

7. "[L]ibel can claim no talismanic immunity from constitutional limitations." 376 U.S. at 269.
8. *Id.* at 279-80. Knowing falsity means the defendant must have known a statement was false, but printed it anyway.
9. The standard of proof for constitutional malice is "clear and convincing" evidence, a much higher standard than "a preponderance" of the evidence. *Id.* at 285-86.
10. "[A]n ordinary citizen should [not] himself carry the risk of damage and suffer the injury in order to vindicate first amendment values." Gertz, 418 U.S. at 392 (White, J., dissenting).
11. *Id.* at 347.
12. *Id.* at 349.
This is because *New York Times* and *Gertz* left untouched the traditional element of "of and concerning." Thus, the dangers that prevailed prior to *New York Times* and *Gertz* persist today for the fiction writer.\(^{13}\) The same policy concerns that led the Supreme Court to require that state libel laws adhere to a constitutional minimum must lead the Court today to provide a coherent and persuasive legal theory to protect the fiction writer. A new focus in the "of and concerning" test could help preserve fiction as a form of free expression in society.

**III. THE NEED FOR A NEW TEST**

The problem in analyzing defamation in fictional accounts is that the traditional elements of "identity" and "falsity" do not work when applied to works of fiction. Much of the case law in the area of defamation and fiction centers around establishing this crucial element of "identity." Plaintiffs can establish the "of and concerning" element in fictional accounts with very little difficulty.\(^{14}\) The test is an objective standard: whether the reader or audience reasonably believes that a character is intended to portray an actual person.\(^{15}\)

---

13. *See infra* notes 35-52 and accompanying text.
14. In Geisler v. Petrocelli, 616 F.2d 636 (2d Cir. 1980), even though the author painted the leading character in a way very different from the plaintiff, the fact that plaintiff was named in the book meant the jury could find that the description identified plaintiff.

In Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29 (1979), the court found the fictional character similar to the actual plaintiff since plaintiff was identified as the character in the novel by several witnesses and plaintiff's own tape recordings of several encounter therapy sessions showed that the novel was based substantially on plaintiff's particular therapy session. The jury found the requisite "of and concerning" element to exist.

In Smith v. Huntington, 410 F. Supp. 1270 (S.D. Ohio), *aff'd mem.*, 535 F.2d 1255 (3d Cir. 1975), the use of plaintiff's name was coincidental in the publication of a true story that expressly stated the names used were fictitious. Because the plaintiff and the fictional character were the same age and had mothers who were alike, a reasonable person could conclude the article referred to the plaintiff. (The characterization of the article as "fictitious" precluded, however, reasonable jurors from determining it identified plaintiff).

In Fetler v. Houghton Mifflin Co., 364 F.2d 650 (2d Cir. 1966), the court found sufficient similarities between the plaintiff and the character in the novel to establish identity. Both had large families who traveled throughout Europe in a bus during the 1930's while on a concert tour. Thus, the court held that it would not be unreasonable for a jury to find that the fictitious character could be understood to be a portrayal of plaintiff. 364 F.2d at 651.

*But see* Middlebrooks v. Curtis Publishing Co., 413 F.2d 141 (4th Cir. 1969) (facts suggesting that a reasonable person would not identify plaintiff are differences in age, type of employment and the fact there are no real parallels to plaintiff's life); Wheeler v. Dell Publishing Co., 300 F.2d 372 (7th Cir. 1962) (no one who knew the plaintiff could identify her with the unsavory character because a reasonable person would conclude the that author created the character in this ugly way so that no one could identify her).

15. Plaintiff bears a slight burden of showing that:

[the libel designates the plaintiff in such a way as to let those who knew [her]
This objective test is inadequate in fictional accounts for a number of reasons. First, as it has been applied in the cases, a paucity of evidence can nevertheless connect the plaintiff with the character in the fiction.10 *Bindrim v. Mitchell* exemplifies how little evidence is required to prove the plaintiff is the character in the novel. In *Bindrim* the plaintiff, a psychologist, sued the author and publisher of a novel, *Touching*, which he felt associated him with a particular therapy practice. The book portrayed a psychiatrist conducting a "Nude Marathon" in group therapy as a means of helping people shed their psychological inhibitions with the removal of their clothes. The only evidence supporting the "of and concerning" requirement consisted of plaintiff’s colleagues who testified plaintiff was the psychiatrist in the novel.18 There was also some similarity between a transcript of plaintiff’s therapy session and the session described in the novel.

In *Pring v. Penthouse International Ltd.*,19 the evidence that supported the similarity between plaintiff and the character was tenuous at best. "Miss Wyoming Saves the World," billed as a "humor" magazine article, depicted a failed entrant in the Miss America Pageant whose "talents" included the ability to levitate a man by performing a sex act on him. Plaintiff, Kimberly Pring, and the fictional Miss Wyoming both wore jumpsuits, whirled batons in the Miss America Pageant, and held the title of "Miss Wyoming." Beyond these characteristics, there were no other similarities between the plaintiff and the fictional Miss Wyoming; yet, the jury found that the plaintiff was the person "referred to" in the story.20

Not only can a minimum amount of evidence be used to establish the critical element of identity, but a plaintiff can usually find a friend, relative, or cooperative witness to identify her as the fictional character. The objective test is unacceptable in another respect because fiction writers often use real life experiences to create their stories.

Contemporaneous events, symbols and people are regularly used in fictional works. Fiction writers may be able to more persua-
sively or more accurately express themselves by weaving into the tale persons or events familiar to the reader. No author should be forced into creating mythological worlds or characters wholly divorced from reality.\textsuperscript{21}

Even though courts may understand this to be the norm for fiction, they still entertain defamation suits involving fictional accounts.

One anomaly that may result is that more than one plaintiff may identify with the fictional character. For example, other women throughout the history of the Miss America Pageant may have whirled batons and worn blue jumpsuits; there is nothing to prevent any of these women from asserting defamation if she can produce a witness to testify that she is identified by the character. Similarly, Paul Bindrim held no monopoly on the particular type of nude therapy practice described in the novel \textit{Touching}.\textsuperscript{22} In fact, there were no physical similarities between Bindrim and the fictional character.\textsuperscript{23} Nonetheless, the testimony of colleagues who recognized Paul Bindrim in the novel sounded the death knell to the author's and publisher's freedom of expression since the novel was found actionable as libelous.

The final problem with the application of the "of and concerning" test is that the fictional text can be manipulated to support both falsity and identity, sometimes simultaneously. Works of fiction inevitably mix fact and non-fact so that some of the text may identify plaintiff and some may defame her. This situation does not arise to such an acute degree in media accounts. An objective of news reporting is to promote fact-finding and truth. In a defamation involving a media story, it is usually clear who is the person identified.\textsuperscript{24} There is seldom the need to use the same text that identifies plaintiff to prove the falsity element too. The more critical determination in suits involving media accounts is proving that a defendant acted in reckless disregard of the truth or was negligent in publishing the material.

In fiction, however, the text is ambiguous as to the elements of falsity and identity. Few cases ever progress to the point where the plaintiff must establish "constitutional malice."\textsuperscript{25} Courts have develop-

\textsuperscript{22.} 92 Cal. App. 3d at 86, 155 Cal. Rptr. at 44.
\textsuperscript{23.} Id. at 75, 155 Cal. Rptr. at 37.
\textsuperscript{24.} See, e.g., \textit{Gertz}, 419 U.S. at 326. The defendant here named the plaintiff, Gertz, as a major "architect" of a plot to discredit local police in Chicago.
\textsuperscript{25.} The only case where a court has applied the clear and convincing standard of consti-
oped two approaches to overcome the possibility that part of a fictional text may identify a plaintiff and part may defame her. First, some courts conclude that it is incumbent on the jury to resolve the ambiguity. In *Geisler v. Petrocelli*, the court admitted a certain irony—the virtuous plaintiff cannot prove libel because the defamatory falsehood is so outrageous that it cannot possibly identify her. Yet, she is a more deserving plaintiff because the defamation more seriously injures her reputation. Thus, the court concluded that the jury should make the final determination since "adjudication . . . as a matter of law will seldom satisfy the expectation that legal holdings be consistent and logical."  

The lower court in *Pring* also let the jury resolve the ambiguity that arose out of the fantasy story. Although the story described something physically impossible in an impossible setting, the court instructed the jury on the identity element. The court stated that the plaintiff could recover if it was reasonably probable that members of the public reading the "humor" article understood that it referred to Kimberly Pring. The court noted that the character or plot can bear such a resemblance to an actual person so as to make a reasonable reader or audience understand a particular character is intended to portray that person.

Moreover, the trial court in *Pring* dispensed with the falsity element, treating the story as a statement of fact. Because the trial court did not instruct the jury on the falsity element, the jury was able to find liability solely on the objective "of and concerning" test. A grave risk is created when the jury is allowed to resolve the ambiguities surrounding the falsity and identity elements. The risk is that the jury may improperly determine that the fictional text refers to the plaintiff. This result may occur if the evidence that identifies plaintiff (and is thus implicitly true) is also manipulated to establish that the plaintiff was defamed (but by definition the evidence used to prove defamation must be a falsehood).

---

26. 616 F.2d 636 (2d Cir. 1980).
27. Id. at 639.
28. 695 F.2d at 442.
29. Id. at 442. It appears that on pre-trial motion to dismiss, the trial court had decided the story generally was not fiction.
30. The dissent in *Bindrim* pointed out that this is a resurrection of the spurious logic which Professor Kalven found in the position of the plaintiff in *New York Times v. Sullivan* which has the effect of endlessly manufacturing defamation. So, for example, those practices which are similar to plaintiff's technique are classified as identifying. Those which are unlike
A second approach courts employ is to use the falsity element as the final determination of a fictional text's defamatory potential. A court may determine as a matter of law\textsuperscript{31} that the fiction cannot refer to actual facts regarding the plaintiff.\textsuperscript{32} Thus the falsity element fails. However, this manipulation of the law and fact doctrines implicitly confuses the ostensibly separate elements of identity and falsity. If it is determined that the story cannot be reasonably understood as describing actual facts regarding the plaintiff, how can the story possibly identify the plaintiff? If falsity fails because the story does not describe actual facts regarding the plaintiff, identity must fail also.

This inconsistency may just be one of the peculiarities of the law and the anomalous results that certain legal tests produce. There is the danger, however, that the court is delineating which fictional accounts will be immune from liability for defamation based on the degree of fantasy. Consequently, the more non-facts in a story and the further from reality the characterization, the better the chance the court will rule for the defendant-author.

This results in more than an ad hoc determination. Rather, the court arbitrarily draws an elusive line based on the context of the fiction, creating a problem of inconsistent results. Because \textit{Pring v. Penthouse International} described an impossible fantasy in an outlandish setting, the court ruled as a matter of law that a reasonable person could not conclude that the story described actual facts regarding Kimberly Pring.\textsuperscript{33} On the other hand, \textit{Bindrim} produced the opposite result. The novel, \textit{Touching}, was much closer to reality and further removed from fantasy. Thus, the traditional elements of falsity and identity were established as well as "constitutional mal-

\textsuperscript{31} This element could also be a jury question. See \textit{Pring}, 695 F.2d at 442-43. When the decision is taken away from the jury, the problem of arbitrary jury determination diminishes.

\textsuperscript{32} \textit{Id.} at 439-43. After looking to the line of cases that suggested no factual representation could reasonably be inferred, the court concluded that where the words represent little more than "rhetorical hyperbole," no cause of action for libel will lie. See \textit{generally}, \textit{Old Dominion Branch No. 496, Nat'l Ass'n of Austin}, 418 U.S. 264 (1974); \textit{Greenbelt Pub. Ass'n v. Bresler}, 398 U.S. 6 (1970); \textit{Church of Scientology of Cal. v. Cazares}, 638 F.2d 1271 (5th Cir. 1981); \textit{Gregory v. McDonnell Douglas Corp.}, 17 Cal. 3d 596, 352 P.2d 425, 131 Cal. Rptr. 641 (1976).

\textsuperscript{33} The dissent, in pointing out the weakness in the majority's argument, suggests that the story does describe "facts" regarding plaintiff since fellatio is the fact attributed to plaintiff. 695 F.2d at 443-44 (Breitenstein, J., dissenting).
IV. DANGERS THAT EXIST FOR THE FICTION WRITER

The result in *Bindrim* reflects many of the dangers that persisted prior to *New York Times v. Sullivan*. By proposing the constitutional malice standard for public figures in *New York Times* and the negligence standard for private individuals in *Gertz*, the Court hoped to address four problem areas: run-away juries, self-censorship, suppression of free and robust debate, and notice to editors and authors of a statement's defamatory potential. These problem areas are prevalent in defamation actions arising out of fiction.

The danger in jury discretion is that juries assess damages, particularly punitive damages, in "wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Pring v. Penthouse International* illustrates how the jury may use its discretion selectively to punish expressions of unpopular or immoral views. That the Penthouse article that described the sexual exploits of a Miss America contestant no doubt shocked the conscience of the jury was reflected in the damage award of $26.5 million for plaintiff.

Another illustration of the plaintiff-oriented jury is the 1979 California appellate decision of *Bindrim v. Mitchell*. The court of appeals assessed $25,000 in damages against the defendant author and publisher, reducing the original jury verdict of $38,000 compensatory damages and $25,000 punitive damages. The dissent noted the danger of imposing liability on the author and publisher: "From a constitutional standpoint, the vice is the chilling effect upon the publisher (or author) of any novel critical of any occupational practice. [This] invites litigation on the theory, 'when you criticize my occupation, you libel me!'"

Another problem with jury discretion in defamation cases is the often arbitrary way in which juries apply the legal tests. To begin

34. *Bindrim*, 92 Cal. App. 3d at 72-74, 155 Cal. Rptr. at 36-38.
35. *Gertz*, 418 U.S. at 350. For example, in Hotchner v. Castillo-Puche, 551 F.2d 910 (2d Cir. 1977), *cert. denied*, 434 U.S. 834 (1978), the jury awarded plaintiff $125,000 in punitive damages after just one week of trial. The alleged defamation was an uncomplimentary depiction of a Spanish author in his association with Ernest Hemingway.
36. The initial award against the editor was $1.5 million in compensatory damages and $25 million in punitive damages. In addition, plaintiff obtained a $35,000 judgment against the author. The award was later reduced and still later reversed on appeal. 695 F.2d 438.
37. See Ingber, supra note 6, at 827-833 (discussion of the "jury problem" in defamation actions).
38. 92 Cal. App. 3d at 69, 155 Cal. Rptr. at 33.
39. *Id.* at 89, 155 Cal. Rptr. at 45.
with, the trier of fact may have difficulty evaluating "constitutional
malice," especially where the plaintiff appears as the innocent victim
of a callous publication as in Pring.\textsuperscript{40} A fiction writer implicitly acts
in reckless disregard for the truth, since fiction is the antithesis of
truth. Additionally, the jury may have difficulty evaluating the funda-
damental elements of falsity and identity.\textsuperscript{41} The portion of the text
that identifies the plaintiff may combine with the rest of the text to
defame her. "With any such amalgam of controversial elements
pressing upon the jury, a jury determination becomes . . . a virtual
role of the dice."\textsuperscript{42}

The possibility of unpredictable jury determinations and exces-
sive damage awards in turn increases the danger of self-censorship.
The \textit{New York Times} rule has not helped to remove the threat of
litigation,\textsuperscript{43} and unsuccessful defendants face sizable judgments.\textsuperscript{44}
Moreover, the exorbitant cost of defending a libel suit can by itself
inFLICT self-censorship, regardless of the likelihood of successful appel-
late courts review.\textsuperscript{45}

As a result of arbitrary analysis by the jury, inflated jury
awards and the resulting self-censorship, freedom of expression in
fictional work is stifled.\textsuperscript{46} Yet, fiction has been characterized as the
greatest mouthpiece for the expression of ideals.\textsuperscript{47} Moreover, providing
the fiction writer with first amendment protection would promote
"free and robust" debate. This "debate" is not necessarily the strict
political debate outlined in \textit{New York Times} and other news-report-
ing cases, but nonetheless it plays an important role in modern
society.

Because fiction can be characterized as a "higher truth," first
amendment protection can be viewed as particularly important for
the fiction writer. "[T]he quest for 'higher truths' is a broad-based
one that unabashedly subjects the lives of characters—fictional and

\begin{itemize}
  \item \textsuperscript{40} See Inquiry, "Miss Wyoming Levitates the Law of Libel," May 11, 1981.
  \item \textsuperscript{41} See supra text and accompanying notes 24-30.
  \item \textsuperscript{42} Gertz, 418 U.S. at 360 (Douglas, J., dissenting).
  \item \textsuperscript{43} Inghber, supra note 6 at 833. "A major defect in the \textit{New York Times} rule is that it
  operates at the wrong end of the litigation. In most cases, the rule merely changes the instruc-
tion under which the case is submitted to the jury at trial." \textit{Id.}
  \item \textsuperscript{44} \textit{Id.} at 834. The author suggests that even where chances for recovery are remote,
  that plaintiffs may be lured into court by the prospect of windfall damages. \textit{Id.} at 834 n.216.
  \item \textsuperscript{45} \textit{Id.} at 833-34.
  \item \textsuperscript{46} There may be a greater chilling effect in fiction than in news-reporting. Kulzich &
  \item \textsuperscript{47} R. Burton, \textit{The Modern Need for Literature}, in FORCES IN FICTION 101 (1901).
\end{itemize}
real—to include, at times scathing analysis.” 48 Fiction writers use falsity to arrive at “truth” 49 although not the standard truth of factual reporting revered by the media. 50 While news-reporting tells the reader/audience what has happened, fiction suggests what might or could happen. Thus, fiction represents a different but significant kind of “free and robust debate.”

The final problem area the Supreme Court addressed in the recent defamation cases was that of notice. Gertz suggests that the standard for a private individual if the defamation does not appear on the statement’s face is higher than negligence. 51 On its face, fiction suggests mostly falsity, 52 or at a minimum, a mixture of fact and non-fact. The fiction writer manipulates real life experiences to communicate ideas in a “fictional” way to arrive at truths. By its nature, fiction does not warn a reasonably prudent editor of potential defamatory consequences. As Gertz dicta suggests, a different standard is necessary where the defamation is not libel per se. Thus, the courts must adopt a different standard for fiction.

Before proposing this standard, it is necessary to examine what degree of protection fiction should receive as a vehicle for promoting free expression in today’s society.

V. CONTRIBUTION OF FICTION TO FREE SPEECH AND EXPRESSION

To understand the importance of fiction to the market place of ideas, it is useful to evaluate other areas of the law besides defamation where individual rights and first amendment values have been in conflict in fictional accounts. In addition, some insight can be drawn from observing why courts refuse to draw lines and play literary critic when reviewing litigation involving fiction and the first

49. Id. at 1067.
50. Fiction might also be characterized as opinion. Gertz asserts there is no such thing as a false opinion. 418 U.S. at 339.
51. “Our inquiry would involve different considerations if a statement did not warn a reasonably prudent editor or broadcaster of its defamatory potential.” 418 U.S. at 348; accord Bindrim, 92 Cal. App. 3d at 73, 155 Cal. Rptr. at 36. A publisher has no duty to investigate content when the publication comes from a known reliable source and there is nothing in the circumstances to suggest inaccuracy. Id.
52. “Every fiction writer knows his creation is in some sense ‘false’. That is the nature of the art.” Guglielmi, 25 Cal. 3d at 871, 603 P.2d at 461, 160 Cal. Rptr. at 359.
amendment.

In the areas of right to privacy\(^{53}\) and right of publicity,\(^{54}\) courts must balance individual rights against first amendment values. Often, the individual's rights are outweighed by first amendment values. For example, in *Leopold v. Levin*,\(^{55}\) the court considered a fictionalized book and movie depicting a famous murder, the Leopold-Loeb case. The court concluded that a legally protected right of privacy may not prevail when balanced against the liberty of expression constitutionally assured in a matter of public interest.\(^{56}\)

Similarly, in *Hicks v. Casablanca Records, Inc.*,\(^{57}\) the court determined that the first amendment protection accorded novels and movies outweighed any publicity rights plaintiff might possess.\(^{58}\) The court recognized that a balancing process is necessary to reconcile two important but conflicting values. However, the court concluded that the right of publicity did not attach in a fictional account where it was evident to the audience that the event depicted was fictitious.\(^{59}\)

In another right of publicity case, a California court discussed the value of fiction when balanced against an individual's right to publicity.\(^{60}\) Although the court did not hold that the right of publicity outweighed the value of free expression,\(^{61}\) it did conclude that fiction occupies a valuable position in the realm of free expression because it is a "significant medium of the communication of ideas."\(^{62}\)

Courts have never limited first amendment protection to "hot

\[^{53}\text{The right to privacy represents the right of an individual "to be let alone". Cooley, Torts 29 (2d ed. 1888). The law of privacy is comprised of four distinct types of invasions of an individual's interests: intrusion, public disclosure of private facts, false light in the public eye, and appropriation. Prosser, Privacy, 48 Calif. L. Rev. 383, 385 (1960).}\]

\[^{54}\text{The right of publicity is the right of an individual to exploit his own name and likeness. Haelan Laboratories v. Topps Chewing Gum, 202 F.2d 866, 868 (2d Cir. 1953). The interest protected by the right of publicity is the same as that protected by the tort of misappropriation.}\]

\[^{55}\text{45 Ill. 2d 434, 259 N.E.2d 250 (1970).}\]

\[^{56}\text{Id. at 254. The fact that plaintiff had been and continued to be a public figure was also a factor that the court considered. Another court has stated that a fictional account of a public figure, if not actually damaging to plaintiff, should not be subject to a right of privacy action. Spahn v. Julian Messner, Inc., 21 N.Y.2d 124, 131, 233 N.E.2d 840, 845 (1967) (Bergan, J., dissenting).}\]

\[^{57}\text{464 F. Supp. 426 (1978). This case involved an attempt by the heirs and assignees of Agatha Christie to enjoin the distribution of a book and motion picture which described an incident during Agatha Christie's life.}\]

\[^{58}\text{Id. at 433.}\]

\[^{59}\text{Id.}\]

\[^{60}\text{Guglielmi, 25 Cal. 3d 860, 160 Cal. Rptr. 352, 603 P.2d 454.}\]

\[^{61}\text{25 Cal. 3d at 872, 160 Cal. Rptr. at 360, 603 P.2d at 461-62.}\]

\[^{62}\text{25 Cal. 3d at 865, 160 Cal. Rptr. at 355, 603 P.2d at 457.}\]
Instead, courts have emphasized two functions of the first amendment: (1) to maintain the integrity of the political process, and (2) to communicate and expand cultural experience. Cultural awareness may be heightened through the existence of various genres of fiction that entertain the public. Entertainment has been granted the same constitutional protection as the exposition of ideas because "the line between the informing and the entertaining is too elusive." What is fundamental is that entertainment is a mode of self-expression, notwithstanding its contribution to the market place of ideas.

Courts are unwilling to play literary critic in the courtroom because what seems of no value to some may have fleeting or enduring value for others. "It is fundamental that courts may not muffle expression by passing judgment on its skill or clumsiness, its sensitivity or coarseness; nor on whether it pains or pleases." Thus, even the humor article that appeared in Penthouse inspiring the Pring litigation is entitled to some first amendment protection. For whenever there is an attempt to suppress particular words, there is a danger in suppressing certain ideas in the process.

VI. No Absolute First Amendment Protection for Fiction

If courts recognize the unqualified value of protecting fictional works as a means of self-expression, and if outrageous results occur

64. Felcher & Rubin, Privacy, Publicity, and the Portrayal of Real People by the Media, 88 Yale L.J. 1577, 1597 (1979).
65. Novels and other fictional genres have been used to criticize and satirize political and social views throughout history. For example, Dostoyevsky's novels are critical of Tsarist Russia and the class system during the mid-19th century; but because the criticism was expressed through literature, it was less susceptible to government censorship.
70. "The First Amendment is not limited to ideas, statements, or positions which are accepted; which are not outrageous; which are decent and popular; which are constructive or have some redeeming element; or which do not deviate from community standards and norms . . . ." Pring, 695 F.2d at 443.
when fictional accounts are subjected to libel actions, then why not grant fiction absolute first amendment protection?

To begin with, case law is clearly opposed to this result. Since *New York Times* and *Gertz*, cases have unequivocally established that fiction shall not be granted absolute first amendment protection. In *Miss America Pageant v. Penthouse International Ltd.*, the court expressly stated that first amendment protection is not absolute for works of parody and satire. Earlier, in *Bindrim*, the court asserted that the fictional aspect of the novel, *Touching*, would not insulate the defendant author from liability for libel if all the elements of libel were present. The court found that the label "fiction" is not decisive of what readers or an audience reasonably understand about the fictional characterization. This label is, however, one factor the jury considers in determining whether readers understand the fiction to be "of and concerning" the plaintiff.

Moreover, granting fiction absolute first amendment protection presents many dangers. Fiction could be manipulated as a vehicle for irresponsible defamatory writing. Authors and publishers would have carte blanche to defame at will. For example, had the story in the *Pring* litigation contained less "fantasy" or had it named the plaintiff, Kimberly Pring, rather than characterizing the character as Miss Wyoming, the plaintiff might have been a more deserving victor. The first amendment would not provide absolute protection when an individual's reputation is maligned.

Establishing absolute first amendment protection for fiction also suggests definitional problems. First, writers and publishers might label all their expressions "fiction" in hope of complete immunity. Perhaps this problem could be solved by rules circumscribing the medium of fiction. For example, courts could distinguish fiction which is factual with the goal of informing from fiction which is imagined with the goal of enlightening. However, such a delinea-
tion is unworkable. If courts decline to play literary critic, they can hardly be expected to draw lines between what informs and what entertains. The law already refuses to draw the "elusive line" when it comes to the first amendment. Any standard for determining what is more "fact" or more "fiction" would be too ambiguous for either judges or juries to determine.

The evolution of defamation from its strict liability standard indicates that there will never be any "absolute rules." While *New York Times* gave protection to media members who allegedly defame public officials and public figures, *Gertz* then circumscribed these broad protections. By requiring that private individuals need only show defendant's conduct was negligent rather than reckless, *Gertz* eased the burden of proof and shifted the pendulum back toward strict liability. The *New York Times* and *Gertz* dichotomy leads to case by case balancing. This may, in fact, be the best first amendment methodology; its flexibility adapts to the various rights and values in controversy during any one period of time.

Both the previous case precedent in defamation and the disposition of current members of the bench indicate that first amendment protection is not a realistic approach. Interpretations of *New York Times* and *Gertz* may be inherently political, representing free press rather than free speech policy interests. Fiction fails to fit conveniently into the political mold unless it is characterized as a "higher truth." While some have characterized fiction in this manner, judges faced with this issue today may not.

Moreover, although some characterize "fiction" as a "higher truth," the judges who sit on the bench may not. The litigation surrounding the *Penthouse* article may typify this dilemma. The majority admitted that "the gross nature of the article here concerned makes an objective analysis of the law difficult." Though the *Penthouse* article can hardly be called a "classic" in literary prose, its

---

78. Guglielmi, 25 Cal. 3d at 867, 603 P.2d at 459, 160 Cal. Rptr. at 357.
79. "The need to avoid self-censorship by the news media is, however, not the only societal value at issue." Gertz, 418 U.S. at 341.
80. Ingber, supra note 6, at 808. One of the concurring justices in *New York Times* argued that purely private defamation is not protected under the first amendment because it has little to do with the political ends of a self-governing society. "The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedoms protected by the first amendment." *New York Times*, 376 U.S. at 301-02 (Goldberg, J. concurring).
82. Pring, 695 F.2d at 443.
DEFAMATION IN FICTION

satirical value may be worth noting, as the article critiques both the Miss America Pageant and a “young girl’s American dream” to hold the coveted title of “Miss America.” Nevertheless, it is doubtful that courts will give *Penthouse* magazine absolute first amendment protection when a person’s reputation has been threatened in this manner.

VII. A PROPOSAL FOR A NEW TEST TO DETERMINE “OF AND CONCERNING” IN DEFAMATION ACTIONS

The traditional element of “identity” is ineffective in establishing that a fictional characterization is “of and concerning” a plaintiff. The focus on what a reasonable person would conclude provides only minimal protection to the fiction writer. It prevents the plaintiff who claims she sees herself in the fictional characterization and from establishing a libel cause of action on this basis alone.83

However, the focus on the reasonable reader does not go far enough. This standard completely ignores the nature of the author’s conduct in describing the fictional character. By refusing to address the author’s conduct, the court is holding an author strictly liable for whatever she writes, as long as a reasonable jury understands that the fictionalization identifies the plaintiff. A paucity of evidence often determines what the reasonable reader concludes; the evidence used to identify plaintiff may also be used to establish falsity. Thus, it is only equitable and fair to examine the author’s conduct when creating the fictional character. The question then becomes: to what standard of conduct should the author be held?

The standard of “intent” might be too difficult a burden for any plaintiff to prove.84 Convincing evidence may establish that an author actually “aimed or intended” her fiction to refer to the plaintiff. However, individual authors may escape this standard by simply denying that they intentionally identified the plaintiff as the character in the book or movie. Moreover, fiction often consists of an integrated mixture of fact and non-fact. By implication, this mixture suggests that the author did not “intend” to identify the plaintiff. Had an author “intended” to identify the plaintiff in her character she would not have come mingled fact and fantasy.

83. The mere fact that the plaintiff produced witnesses who testified as to their belief that the character portrayed in the fictional story was plaintiff was not enough to establish “of and concerning.” United States v. Miles, 34, 39 (Cir. 1979).

84. One court has expressly rejected this standard. In *Bindrim*, the court found it was not error to fail to charge the jury that there be clear and convincing evidence defendant intentionally identified plaintiff. 92 Cal. App. 3d at 79, 155 Cal. Rptr. at 39.
A better standard for establishing liability is negligence. The courts should ask: did the author use reasonable care in identifying the character in the fiction so as not to confuse the plaintiff with the character in the fiction? 85 A minimum mens rea of negligence will better serve the goals of New York Times: (1) to encourage free and robust debate; (2) to mitigate high jury awards; and (3) to eliminate self-censorship. By increasing the minimum standard from strict liability to negligence, it becomes more difficult for a plaintiff to bring a successful libel cause of action against a work of fiction. The number of plaintiff-victories in defamation actions will decrease and thus, large jury awards will be less prevalent.

The trier of fact will determine whether or not the author used reasonable care in identifying the character in her fictional work. 86 The risk of some arbitrary determinations still exists, but the likelihood of a plaintiff establishing that an author fell below the standard of care of other authors in a similar position will decrease. An author can escape liability by showing she utilized due care not to confuse plaintiff and the fictional character. An author can further show that she described the fictional character using different physical attributes, a different name, and avoided clear parallels between fictional and real events. 87 Or an author might successfully prove it is a legitimate literary technique to portray a character in an outrageous or ugly way so as not to confuse the character and the plaintiff. But it is really the fact that the plaintiff bears the burden of proving breach of a duty that will help shield the fiction writer from liability. 88 Thus, the threat of high jury awards and resulting self-censorship diminishes.

A negligence standard would be in accord with the Gertz holding, which requires that a private individual prove the media-defendant was negligent in publishing the defamatory falsehood. When

---

85. This test does not delineate between public and private figures as the other defamation tests do. The different status of a plaintiff may however influence the analysis of the author's negligence in describing the characters in the fiction.

86. Presumably, an author would have to at least know of the plaintiff in order for a court to examine an author's conduct regarding the description of the fictional character and the plaintiff.

87. In a right of privacy action, an author demonstrated a deliberate attempt to create the fictional character wholly divorced from plaintiff as a literary technique. But this did not shield defendant-author from liability. Spahn v. Julizu Messner, Ltd., 233 N.E.2d 840, 21 N.Y.2d 124 (1967). Compare Wheeler v. Dell Publishing Co., 300 F.2d 372 (Cir. 1962), where author created fictional character in an unsavory way so as not to identify plaintiff. In this defamation action, the court determined the fiction was not actionable as libelous.

88. This will be a more difficult burden than just gathering evidence and witnesses to prove a reasonable person would identify plaintiff with the fictional character.
balancing first amendment rights against reputation, the courts have been unequivocal in preferring negligence over strict liability as the proper standard to apply to defendants' conduct.

The negligence standard also satisfies the Court's concern that publishers and authors will be forced to exercise self-censorship without notice of a statement's defamatory potential. The problem of notice lessens when an author uses the requisite degree of care. Thus, if an author uses precautions in describing a fictional character, there can be no "surprises" to a reasonably prudent editor as to the defamatory nature of the statement. If the author's conduct is relevant to the identity element in a defamation cause of action, an editor need only monitor the steps the author took in order to meet her duty of due care.

VIII. CONCLUSION

The present laws of libel cannot be viewed in a vacuum. They are nothing more than conceptualizations that fit particular circumstances. The same factors that led the Court in *New York Times* to adopt a different standard for media-defendants, must lead the Court today to articulate a new test for the fiction writer-defendant. The failure of present legal analysis to consider the fiction writer's freedom of expression along with problems of self-censorship can only be remedied by altering the "of and concerning" test, focusing on the author's conduct. A negligence standard will help insure first amendment protection for those who create the "higher truths" in our society.

Monica Smyth