A CRITICISM OF THE GERTZ PUBLIC FIGURE/ PRIVATE FIGURE TEST IN THE CONTEXT OF THE CORPORATE DEFAMATION PLAINTIFF

In New York Times v. Sullivan *the Supreme Court created a first amendment defamation privilege. The Court then struggled to find the appropriate test to determine when the privilege applies. In* Gertz v. Robert Welch, Inc., *the Court's concern for the private individual's reputation resulted in the creation of the public figure/private figure test. Two problems inherent in the* Gertz *test became apparent when the public figure/private figure formula was applied to corporate defamation plaintiffs. This Comment analyzes these problems in light of the goals of the defamation privilege and proposes solutions to the problems.*

INTRODUCTION

The law of defamation involves two important competing interests: society's right and need for widespread dissemination of information versus the individual's right to his own good name. In today's age of mass electronic and print media these interests conflict more violently than ever before. As the ability for wider information dissemination increases, the risk of harm to the individual's reputation becomes greater. Defamation in today's television, radio and high circulation print media means greater injury to one's reputation.

Because defamation law prior to 1964 was inadequate to deal with this rising conflict, the United States Supreme Court entered the area with *New York Times Co. v. Sullivan*.[1] *New York Times* attempted to reconcile this conflict by finding a qualified privilege in the first amendment.[2] The boundaries and nature of this privilege have been the center of controversy for the last seventeen

1. 376 U.S. 254 (1964).
2. *Id.* at 283.

years. Yet, this area of the law remains unsettled.[3]

First amendment protection was first extended to statements concerning public officials.[4] It was then expanded to include public figures,[5] and later to anybody acting in an area of public interest,[6] then limited again to public figures.[7] As the law stands today with respect to the first amendment defamation privilege, the controlling case is *Gertz v. Robert Welch, Inc.*[8] as modified by subsequent cases.[9] The *Gertz* public figure/private figure test determines whether the first amendment privilege exists. This test can be criticized in two respects. First, application of the test leads to the confusion of the terms "public controversy" and "public interest."[10] Second, the test raises problems with respect to its application to corporate defamation plaintiffs.[11] More specifically, in light of the nature of a corporation's reputational interest, is the public figure/private figure test the most appropriate test to use to determine if the privilege exists in corporate defamation cases?

This Comment will analyze the development of the *Gertz* formula, examine the cases attempting to apply it to corporate defamation plaintiffs, and present resolutions to the two criticisms stated above.

FAIR COMMENT DOCTRINE

Prior to 1964, there was no constitutional privilege for libelous speech,[12] and the scales were tipped heavily in favor of the private individual's reputation. The United States Supreme Court summed up the situation well in *Chaplinsky v. New Hampshire*,[13] stating that "there are certain well-defined and narrowly limited classes of speech, the prevention of which have never been thought to raise any constitutional problem. These include the

3. *See* text accompanying notes 12-61 *infra*.
4. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
5. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).
6. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).
7. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).
8. *Id.*
9. *See* text accompanying notes 54-61 *infra*.
10. Reliance Insurance Co. v. Barron's, 442 F. Supp. 1341 (S.D.N.Y. 1977); Trans World Accounts, Inc. v. Associated Press, 425 F. Supp. 814 (N.D. Cal. 1977); Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947 (D.D.C. 1976); Vegod Corp. v. American Broadcasting Cos., 25 Cal. 3d 763, 603 P.2d 14, 160 Cal. Rptr. 97 (1979).
11. *See* note 10 *supra*.
12. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 819 (4th ed. 1971) [hereinafter cited as PROSSER].
13. 315 U.S. 568 (1942).

lewd, and obscene, the profane and the libelous."[14] There did exist, however, a qualified privilege resembling the subsequently created constitutional privilege. The "fair comment" doctrine allowed a privilege for commentary on matters of public interest.[15] The doctrine allowed expressions of opinion, but not erroneous statements of fact; if the expression of opinion was based on untrue facts, it was not protected by the "fair comment" doctrine.[16]

NEW YORK TIMES AND ITS PROGENY

In 1964 the United States Supreme Court extended and modified the fair comment privilege in *New York Times v. Sullivan*.[17] This case opened up an area of first amendment law that has been consistently changed and modified ever since the decision was handed down. The area is still in a state of flux and will probably continue to change as new problems are presented to the court.

The Court in *New York Times* after noting the "national commitment to the principle that debate on public issues should be uninhibited, robust and wide open,"[18] found in the first amendment a qualified privilege in the area of defamation. The Court held that the first amendment guarantees of freedom of speech and press require a qualified privilege for critics of public conduct of public officials.[19] The privilege protects those who defame a public official without actual malice.[20] Unlike the common law fair comment privilege, the constitutional privilege set out in *New*

14. *Id.* at 571-72.
15. PROSSER, *supra* note 12, at 792, 820.
16. *Id.* at 819.
17. 376 U.S. 254 (1964). This case arose out of an advertisement paid for by the Committee to Defend Martin Luther King and the Struggle for Freedom in the South. The ad spoke of mistreatment of civil rights workers by the Alabama police. Some of the incidents described in the ad were inaccurate or never occurred. William B. Sullivan, a city commissioner for Montgomery in charge of the police department, brought a defamation action contending that the ad referred to him. The fair comment privilege in Alabama was limited to commentary and opinions based on true statements. The jury awarded Sullivan $500,000 and the Alabama Supreme Court affirmed.
18. *Id.* at 270.
19. *Id.* at 282-83.
20. *Id.* at 280. The Court defined actual malice as "knowledge that" the statement "was false or with reckless disregard of whether it was false or not." The Court later defined reckless disregard of the truth as publication with actual and serious doubts concerning the story's accuracy. *See* St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

York Times extends to erroneous statements of fact as well as opinion and comment.[21] The Court reasoned that "erroneous statement is inevitable in free debate and that it must be protected if the freedoms of expression are to have the 'breathing space' that 'they need to survive.' "[22] The Court feared that without this privilege the public debate would be limited and criticism discouraged.[23] Thus, to encourage public debate and criticism, public officials must show actual malice in defamation actions.[24]

In the companion cases of *Curtis Publishing Co. v. Butts*[25] and *Associated Press v. Walker*,[26] the Supreme Court extended the qualified first amendment privilege to public figures involved in issues of public interest.[27] Because of the similarities between the *New York Times* plaintiff and the plaintiffs involved in *Walker* and *Butts*, the Court held that the first amendment privilege should apply.[28] Nevertheless, the majority opinion applied a different standard than the actual malice standard of *New York Times*. The Court held that public figures must show "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[29] In a concurring opinion, Chief Justice Warren thought the actual malice standard should apply[30] and in subsequent decisions his view was followed.[31]

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21. New York Times Co. v. Sullivan, 376 U.S. 254, 278-79 (1964).
22. *Id.* at 271-72.
23. *Id.* at 279.
24. *Id.* at 283.
25. 388 U.S. 130 (1967). In this case the Saturday Evening Post published an article which accused Wally Butts, then Athletic Director of the University of Georgia, of conspiring to fix the 1962 Georgia-Alabama game. The basis of the charge was a questionable source who overheard a telephone call between Butts and Bear Bryant, the Alabama coach. Butts sued for libel and recovered 3 million dollars in damages which was reduced to $460,000 by the Court of Appeals. The Supreme Court affirmed.
26. *Id.* This case involved a news dispatch issued by Associated Press during the turbulent period when James Meredith, a black student, was forcibly enrolled in the University of Mississippi. The dispatch accused former general Edwin Walker of leading a violent crowd against the federal marshalls enrolling Meredith. Walker brought a libel suit and was awarded $500,000 in damages by the Texas state court. The Texas Court of Civil Appeals affirmed and the Texas Supreme Court declined to review. The United States Supreme Court reversed.
27. *Id.* at 154-55.
28. *Id.* at 155.

> [T]he public interest in the circulation of the materials here involved, is not less than that involved in *New York Times*. And both Butts and Walker commanded a substantial amount of independent public interest at the time of the publications; both, in our opinion, would have been labeled 'public figures' under ordinary tort rules.

Id. at 154.
29. *Id.*
30. *Id.* at 164 (Warren, C.J., concurring).
31. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

After the *Butts* and *Walker* decisions, the question remained whether the *New York Times* standard would be applied to private figures involved in issues of public interest. Basically, the issue was whether the status of the individual or the nature of the subject matter involved would be the important element in determining whether to apply the actual malice standard.

In *Rosenbloom v. Metromedia, Inc.*,[32] the Supreme Court's plurality decision temporarily answered the question in favor of the latter. "The public's primary interest is in the event; the public focus is on the conduct of the participant and content, effect and significance of the conduct, not the participant's prior anonymity or notoriety."[33] The plurality stressed the public interest nature of the issues involved in *New York Times* and *Butts*[34] and downplayed the status of the individuals involved. The *Rosenbloom* plurality reiterated the "profound national commitment to the principle that debate on *public issues* should be uninhibited, robust and wide open."[35] The opinion stated that the distinction between private and public figures "makes no sense in terms of the first amendment guarantees."[36] The *New York Times* actual malice test was applied to public officials and public figures not because they had less of an interest in protecting their reputations, but to encourage "ventilation of *public issues*."[37] The Court feared that the public figure/private figure test would leave the public figure's private life unprotected while inhibiting discussion of public issues merely because they involved private persons.[38] Thus, stressing the importance of the subject matter, the plurality in *Rosenbloom* created the public interest test which required that anybody involved in issues of public interest must prove ac-

32. 403 U.S. 29 (1971). This case involved a report by Philadelphia's radio station WIP concerning the arrest of George Rosenbloom for possession of obscene material. The report characterized the seized material as obscene instead of "allegedly" obscene material. A subsequent report on Rosenbloom's suit for injunction referred to the plaintiffs as "girlie book peddlers" and characterized their suit as an attempt to force police to "lay off the smut literature racket." Rosenbloom was acquitted and brought suit and recovered $750,000 which was reduced to $250,000 on remittitur. The Court of Appeals reversed and the Supreme Court affirmed.

33. *Id.* at 43.

34. *Id.* at 42.

35. *Id.* at 43 (emphasis added).

36. *Id.* at 46.

37. *Id.* (emphasis added).

38. *Id.* at 48.

tual malice to recover damages.[39]

Rosenbloom marked the height of protection given defamatory speech. Critics argued that *Rosenbloom* tipped the scales too far in favor of protecting defamation, because few topics had been found not to involve issues of public interest.[40] The critics feared that such application of the actual malice test to broad areas of public interest effectively barred successful protection of an individual's interest in his reputation.[41]

The Supreme Court responded to this fear three years later in *Gertz v. Robert Welch, Inc.*[42] The majority in *Gertz* criticized *Rosenbloom* as an inadequate balance between the first amendment values of free speech and press and the individual's interest in his reputation. The Court stated that the public interest test infringes too much on the legitimate state interest in protecting the individual's good name,[43] and would require the court to make ad hoc decisions as to what are and are not issues of public interest.[44] Thus, the Court held that the public figure/private figure distinction would better balance these competing interests.[45] The Court reasoned that individuals who seek public office or public notoriety thrust themselves into the vortex of public controversy and have more access to the media to rebut any defamation, and therefore, they are public figures and subject to the *New York Times* actual malice standard.[46]

Two types of public figures were identified in *Gertz*. The first is

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39. *Id.* at 54.

40. *See* Comment, *The Expanding Constitutional Protection for the News Media from Liability of Defamation: Predictability and the News Synthesis*, 70 MICH. L. REV. 1547, 1560-62 nn.94-96 (1972).

41. *See id.*

42. 418 U.S. 323 (1974). This case involved an article carried in AMERICAN OPINION, a monthly publication of the John Birch Society. Petitioner, Elmer Gertz, was a lawyer representing the Nelson family in civil litigation against a policeman named Nucio who had been found guilty of second degree murder for killing the Nelson youth. The article falsely stated that Gertz had framed Nucio in the criminal prosecution, had a criminal record, had taken part in the 1968 Chicago demonstrations and had been a member of the Marxist League for Industrial Democracy and the Intercollegiate Socialist Society. Gertz was denied recovery in his libel suit in the lower court, but the Supreme Court reversed.

43. *Id.* at 348.

> The Court stated that the individual's interest in his private reputation:
> [R]eflects no more than our basic concept of essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual states under the ninth and tenth amendments. But this does not mean that the right is entitled to any less recognition by this court as a basis of our constitutional system.

Id. at 341.

44. *Id.* at 346.

45. *Id.* at 343.

46. *Id.* at 344-45, 348.

the individual who achieves "such pervasive fame and notoriety that he becomes a public figure for all purposes and in all contexts."[47] The more common type of public figure is the individual who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues."[48]

By using the term "public controversy," the Court created two problems for subsequent courts attempting to apply the *Gertz* public figure/private figure test. The first is a definitional problem. Does "public controversy" as used in *Gertz* mean the same as "public interest" as used in *Rosenbloom*?[49] Subsequent cases applying the *Gertz* formula have often confused the two terms and used them interchangeably.[50] The second problem created by the use of the term "public controversy" is that the Court does not completely abandon a test based on the nature of the subject matter in favor of a test based solely on the status of the individual. The nature of the subject matter is still an element to determine whether the privilege exists. After *Gertz*, courts are required to find a public controversy before they find that the defamed individual was a limited public figure.[51] To label the defamed individual a limited voluntary public figure,[52] *Gertz* requires a finding that the individual voluntarily injected himself into, and that there did exist, a public controversy. Here the focus is on both the voluntary status of the individual and the nature of the subject matter. To label the defamed individual a limited involuntary public figure,[53] *Gertz* requires only that the individual

47. *Id.* at 351.

48. *Id.*

49. The term "public controversy" is a slippery one. Time, Inc. v. Firestone, 424 U.S. 448 (1976), attempted to distinguish between "public interest and public controversy." *Id.* at 454. Yet the distinction remains unclear. *See* text accompanying notes 62-121 *infra*.

50. *See, e.g.*, Trans World Accounts, Inc. v. Associated Press, 425 F. Supp. 814 (N.D. Cal. 1977).

51. As used in this Comment, the term "limited public figure" refers to those individuals who become public figures for a limited range of issues. The term includes both voluntary and involuntary limited public figures. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974).

52. As used in this Comment, the term "limited voluntary public figure" refers to those individuals who "voluntarily inject themselves . . . into a particular public controversy." *See id.*

53. As used in this Comment, the term "limited involuntary public figure" refers to those individuals who are "drawn into a particular public controversy and thereby become public figures for a limited range of issues." *See id.*

was involved in a public controversy. The focus here is only on the nature of the subject matter, which makes the limited involuntary public figure formula look much like the *Rosenbloom* public interest test.

Perhaps this similarity is the reason the Court has ignored the limited involuntary public figure category in three subsequent cases: *Time, Inc. v. Firestone*,[54] *Hutchinson v. Proxmire*[55] and *Wolston v. Reader's Digest Ass'n, Inc.*[56] All three cases cited and quoted the *Gertz* rule without any reference to the involuntary public figure category.[57] They each avoided that aspect of their respective situations which indicated the existence of a limited involuntary public figure.[58] In fact, in *Wolston*, the Court even ad-

54. 424 U.S. 448 (1976). This case involved an article in Time Magazine which reported that Russell Firestone, an heir to the Firestone rubber fortune, was granted a divorce from Mary Alice Firestone on the grounds of extreme cruelty and adultery. The correct grounds were extreme cruelty and lack of domestication. Mrs. Firestone filed a libel action and recovered $100,000 in the Florida circuit court. The decision was ultimately affirmed by the Florida and United States Supreme Courts. The United States Supreme Court held Mary Alice Firestone not to be a public figure despite the widespread media attention the divorce action received. The Court stated that just because Mary Alice Firestone had to go to court to deal with her divorce and the press covers it does not make it a public controversy.

55. 443 U.S. 111 (1979). This case involved statements, press releases, newsletters, and phone calls to federal agencies made by Senator Proxmire. Senator Proxmire made Hutchinson's research on monkeys, the subject of his Golden Fleece of the Month Award which is given to publicize wasteful government spending. Hutchinson brought a libel suit in which the district court granted summary judgment for Proxmire holding that Hutchinson was a public figure. The court of appeals affirmed, but the United States Supreme Court reversed holding that Hutchinson was not a public figure because he did not thrust himself into a public controversy.

56. 443 U.S. 157 (1979). This case involved an article published in Reader's Digest which falsely stated that Wolston was indicted as, and actually was, a Soviet spy. In 1957 and 1958 a federal grand jury was investigating Soviet spying in the United States. Wolston's aunt and uncle were arrested as spies. Wolston failed to respond to a subpoena to testify before the grand jury. A district court issued an order to show cause why petitioner should not be held in criminal contempt. On the date of this order Wolston offered to testify but was refused. He pleaded guilty to the contempt charge when his wife became hysterical when asked to testify. These events were reported in the Washington and New York newspapers. Wolston brought a libel suit and the district court found him to be a public figure and the court of appeals affirmed. The Supreme Court reversed, holding Wolston not to be a public figure.

57. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such pervasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.

See Time, Inc. v. Firestone, 424 U.S. 448, 453 (1976); Hutchinson v. Proxmire, 443 U.S. 111, 134 (1979); Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 164 (1979).

58. In *Firestone*, the Court avoids the idea that Mary Alice was drawn into a public controversy by the amount of press she received. The Court correctly held

mitted that petitioner was dragged unwillingly into the controversy.[59]

Despite the Court's emphasis on the voluntary aspect of *Gertz*,[60] it still had to determine whether a public controversy existed. The defamed persons in each of the three cases were all involved in situations that could possibly have been public controversies.[61] Therefore, before it could label the persons private figures or limited public figures, the Court had to use a *Rosenbloom*'s public interest analysis to determine if the subject matter of each case constituted a public controversy. If it did and the persons voluntarily involved themselves in public controversies, they would be deemed public figures.

As the test stands today, if a person cannot be classified as the rare public figure for all issues, the court must look to the nature of the subject matter and the voluntariness of the individual's involvement in the subject matter to determine if the person is a limited public figure. The court must find both that the subject matter was a public controversy, and that the defamed individual voluntarily entered the controversy. No longer, it seems, can a person be "drawn into a particular public controversy." Thus, the test to determine whether the first amendment defamation privilege will apply is an unclear combination of the subject matter emphasis of *Rosenbloom* and the voluntary involvement emphasis of *Gertz*.

THE CORPORATE PLAINTIFF CASES

The four corporate plaintiff cases since *Gertz* point out two problems with the public figure/private figure test. First, the

that the controversy surrounding her divorce was not a public controversy, but whatever it was, there were aspects of her being drawn into it. In *Proxmire*, although government spending is a public controversy, the Court avoided the fact that Hutchinson was drawn into that public controversy by Proxmire's actions. In *Wolston*, Wolston was drawn into a public controversy by the subpoena.

59. Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 166 (1979).

60. Time, Inc. v. Firestone, 424 U.S. 448, 453-56 (1976); Hutchinson v. Proxmire, 443 U.S. 111, 135-36 (1979); Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 165-68 (1979).

61. In *Firestone*, the Court had to determine if the divorce and the press conferences were a public controversy. In *Hutchinson*, the Court had to determine whether Hutchinson's voluntary taking of money for his work from the government was a public controversy. In *Wolston*, Wolston was voluntarily absent from the grand jury proceedings. The Court had to determine whether the proceedings were a public controversy.

terms public controversy and public interest are used confusingly, indicating a need for a clear statement as to the distinction between them. The second problem concerns the appropriateness of the application of the public figure/private figure test to corporate plaintiffs. The public figure/private figure test focuses on the nature of the defamed individual's reputation. Is that reputation personal or public? Prior to *Gertz*, the emphasis was on the nature of the subject matter. The public interest test with its sole concern being the subject matter could be applied to all plaintiffs regardless of the nature of the individual's reputation. However, now that the courts must also look to the nature of the reputation involved, the question is raised whether *Gertz* with its concern for personal reputation is the appropriate test to apply in corporate plaintiff cases. While natural persons may sue for damage to their personal reputation,[62] a corporation does not have a personal reputation and can only sue for damage to its business reputation.[63] A corporation,

> is an artificial entity, created by law, existing separate and apart from the individuals who are its stockholders, directors, managers, employees and customers. . . . [I]t has no personality, no dignity that can be assailed, no feelings that can be touched [by defamation]. A man of good reputation possesses attributes of personal honor and dignity, but a corporation cannot be libeled in this regard.[64]

Thus, the distinction between public reputation and personal reputation in *Gertz* creates the dilemma of how to apply the *Gertz* formula to a corporation which does not have a personal reputation. Three federal district courts[65] and one state supreme court[66] have dealt with the issue.

The first case attempting to resolve the issue was *Martin Marietta Corp. v. Evening Star Newspaper Co.*[67] After analyzing the differences between a corporation and a natural person in terms of defamation law, the court held that the *Rosenbloom* public interest test should apply to corporate defamation plaintiffs.[68]

The case involved an article in the *Washington Star*. The article alleged that a weekend party for a soon to be married Air Force official was given at a hunting lodge leased by Martin Mari-

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62. *See* PROSSER, *supra* note 12, at 744-45.

63. *See* PROSSER, *supra* note 12, at 745-46; 50 AM. JUR. 2d *Libel and Slander* § 315 (1970).

64. R. PHELPS & E. HAMILTON, LIBEL 80-81 (rev. ed. 1978).

65. Reliance Insurance Co. v. Barron's, 442 F. Supp. 1341 (S.D.N.Y. 1977); Trans World Accounts, Inc. v. Associated Press, 425 F. Supp. 814 (N.D. Cal. 1977); Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947 (D.D.C. 1976).

66. Vegod Corp. v. American Broadcasting Cos., 25 Cal. 3d 763, 160 Cal. Rptr. 97, 603 P.2d 14 (1979).

67. 417 F. Supp. 947 (D.D.C. 1976).

68. *Id.* at 956.

etta, a defense contractor. The article stated that about one-third of the forty to fifty guests were defense department personnel. The article also stated that two prostitutes attended the party and that one was paid $3,000 by a Martin Marietta representative.

Martin Marietta brought suit for damages and an injunction demanding a retraction. Defendant moved for summary judgment claiming that actual malice had not been shown by the evidence. The court granted the motion holding that plaintiff was required to show actual malice and failed to do so.[69]

To reach its holding the court first analyzed the goals sought in the *Gertz* public figure/private figure formula. The court interpreted *Gertz* as primarily concerned with protecting the personal reputation of natural persons.[70] Citing *Gertz*, the court stated:

> It is quite clear from the court's opinion, however, that the values considered important enough to merit accommodation with interests protected by the first amendment are associated solely with natural persons, and that corporations, while legal persons for some purposes, possess none of the attributes the court sought to protect.[71]

After establishing that *Gertz* focused on the natural person, the court pointed out the difference between corporations and natural persons "long reflected" in the law of libel.[72] The court noted that in the law of defamation a corporation has no personal reputation and may only sue for damage to its credit or business.[73] Thus, the court held that the *Gertz* public figure/private figure test did not apply to corporate plaintiffs.[74] The court compared corporate plaintiffs with natural persons who voluntarily become unlimited public figures[75] and thereby lose the protection given by *Gertz*.[76] Since the *Gertz* test is designed to determine whether a natural person has lost protection of his private reputation, it does not

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69. *Id.*
70. *Id.* at 955.
71. *Id.*
72. *Id.*
73. This traditional doctrine does no more than recognize the obvious fact that a libel action brought on behalf of a corporation does not involve 'the essential dignity and worth of every human being' and, thus, is not 'at the root of any decent system of ordered liberty.' Consequently, a corporate libel action is not 'a basic of our constitutional system,' and need not force the first amendment to yield as far as it would be in a private libel action. *Id.*
74. *Id.*
75. The term unlimited public figure, as used in this article, refers to public figures for all purposes. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974).
76. Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947, 955 (D.D.C. 1976).

make sense to apply *Gertz* to corporations which do not have private lives.[77]

After rejecting the *Gertz* test, the court had to determine the appropriate standard to apply. Recognizing that the state has some interest in protecting the business reputation of a corporation,[78] the court chose to apply the *Rosenbloom* public interest test.[79] Thus, when a corporate plaintiff is defamed, it must prove actual malice if the defamation involves something of public interest.

Martin Marietta was also based on an alternative holding in case "higher courts, which have yet to consider the problem, should find it necessary to fit corporate plaintiffs into [the] ill fitting mold" of the public figure/private figure test.[80] The court held that the Martin Marietta Corporation was at least a limited public figure[81] if not a public figure for all purposes.[82]

The case of *Trans World Accounts, Inc. v. Associated Press*,[83] involved an article carried on the AP and UPI wire services and published by Copley Press's San Diego newspapers. The article reported that the Federal Trade Commission (FTC) had issued complaints against eight companies, including Trans World Accounts Inc., charging them with four counts of unfair and deceptive practices. The article failed to distinguish which of the charges Trans World Accounts was charged with in the FTC complaint. Only two of the four charges were actually made against Trans World. Trans World brought a libel action in which the defendants AP, UPI and Copley Press moved for summary judgment.

The court held that the *Gertz* public figure/private figure test was the appropriate test to apply to corporate defamation plaintiffs.[84] *Martin Marietta*'s application of *Rosenbloom* was rejected for three reasons. "First, the Supreme Court in *Gertz* rejected *Rosenbloom* without qualification."[85] The court noted that *Gertz* rejected the public interest test because it would be too great an

77. *Id.*
78. *Id.* at 956.
79. *Id.*
This approach grants some deference to the values underlying corporate libel actions grounded in state law, while at the same time resulting in only a minor encroachment on the first amendment, which was designed primarily to defend the market place of ideas.
See id.
80. *Id.*
81. *Id.* at 957.
82. *Id.*
83. 425 F. Supp. 814 (N.D. Cal. 1977).
84. *Id.* at 819.
85. *Id.*

infringement on the state interest in protecting the private individual's reputation and would force the courts to make ad hoc determinations of what issues are of public interest.[86] This first reason is simply a restatement of the *Gertz* rationale as it applies to private individuals and ignores the distinction between human defamation plaintiffs and their corporate counterparts.

The *Martin Marietta* case was also rejected because under California law there is no difference between the protected interests of corporations and natural persons since they both can recover special, general, and punitive damages.[87] For this proposition the court cited *Di Giorgio Fruit Corp. v. American Federation of Labor and Congress of Industrial Organizations*,[88] which held that corporations can sue for damage to their business reputation. *Di Giorgio* recognized that while both corporations and natural persons have business reputations, only natural persons have any type of private or personal reputation.[89]

The final reason for rejecting *Martin Marietta* was that the true differences between corporations and natural persons are often unclear.

> [T]he line between the interests of natural persons and corporations is frequently fuzzy and ill-defined. Various legal considerations have long led to the incorporation of businesses that are in economic reality but individual proprietorships or partnerships. . . . For that additional reason, it seems that for purposes of applying the first amendment to defamation claims, the distinction between corporations and individuals is one without a difference.[90]

The court feared that if *Martin Marietta* were followed, small corporations that are run much like small non-incorporated businesses would be unfairly subject to a harsher standard as a corporate defamation plaintiff than would their non-incorporated counterparts. By merely incorporating, an individual would lose some protection of his reputation. The court refused to condone

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86. *Id.*

87. *Id.*

88. 215 Cal. App. 2d 560, 30 Cal. Rptr. 350 (1963).

89. *Id.* at 215 Cal. App. 2d 560, 570-71, 30 Cal. Rptr. at 356.

> While a corporation has no reputation in the personal sense to be defamed by words, such as those imputing unchastity, which would offset the purely personal reputation of an individual, it has a business reputation, and language which casts aspersions upon its business character is actionable.

Id. at 571, Cal. Rptr. at 356.

90. Trans World Accounts, Inc. v. Associated Press, 425 F. Supp. 814, 819 (N.D. Cal. 1977).

this bias and held that the same standard should apply to both corporations and natural persons.

The next question was whether Trans World Accounts was a public figure. The court concluded that Trans World Accounts was neither an unlimited public figure,[91] nor a limited voluntary public figure.[92] Instead, Trans World Accounts was labeled a limited involuntary public figure.[93] The court held that "Trans World may not have been a 'public figure' until the proposed complaint issued, but when it did, it was clearly drawn into a particular controversy."[94] Because the function of the FTC is to act in the public interest and publicize complaints, this "particular controversy" was a public controversy. Here, the court used the term public interest to find and define a public controversy enabling it to deem Trans World Accounts a limited involuntary public figure. The use of "public interest" to define "public controversy" shows confusion as to the meaning of the two terms and demonstrates the continued existence of the *Rosenbloom* public interest test in the public figure/private figure test. Thus, *Trans World* was not only decided on the basis of the abandoned limited involuntary public figure category, but also on the basis of a disguised *Rosenbloom* public interest test.

Reliance Insurance Co. v. Barron's,[95] involved an article published by *Barron's* criticizing plaintiff's preliminary prospectus, (a document that provided information to the public concerning a proposed sale of stock). The article accused plaintiff of employing "creative accounting" concepts and engaging in improper business practices. It also alleged that the proceeds of the proposed sale would move upstream to plaintiff's parent corporation to the detriment of plaintiff, its policyholder and its minority shareholders. Reliance Insurance brought a libel suit based on this publication.

The court was presented with the problem of which precedent to follow:[96] *Martin Marietta*'s application of *Rosenbloom* or *Trans World*'s application of *Gertz*. The court without analysis or dis-

91. *Id.*
92. *Id.*
93. *Id.* at 821.
94. *Id.*

The same result might not happen today after Hutchinson v. Proxmire, 443 U.S. 111 (1979) and Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979). In these two cases the United States Supreme Court refused to characterize plaintiffs as limited involuntary public figures when it would have been easy to do so. Instead, the Court chose to ignore the limited involuntary public figure status created by *Gertz*. See text accompanying notes 55-61 *supra*.

95. 442 F. Supp. 1341 (S.D.N.Y. 1977).
96. *Id.* at 1347.

cussion chose to follow *Trans World* and apply *Gertz*.[97]

Nevertheless, *Reliance Insurance*, like *Trans World*, slipped into using a public interest test to determine whether Reliance Insurance was a public figure.[98] The court first noted the large size of plaintiff corporation and that its shares were publicly traded on the New York Stock Exchange.[99] The court then stated that "[t]here has been *great public interest* in Insurance and its affiliated companies over the past several years, particularly with respect to the circumstances surrounding its acquisition."[100] Reliance had also thrust itself into the public arena by offering to sell its shares to the general public.[101] Based on these reasons, the court held Reliance Insurance to be both an unlimited public figure and a limited voluntary public figure.[102]

In arguing its status as a public figure, Reliance pointed out that one of the "theoretical underpinnings"[103] of the *Gertz* test was access to the media to rebut libelous speech. Reliance noted, however, that the federal securities laws prevented such media access. The court rejected this media access argument as no more than a "make weight."[104]

Reliance then argued that it did not voluntarily thrust itself into the media.[105] The court rejected this argument as well, holding that Reliance's offer to sell to the public satisfied the voluntary involvement in a public controversy requirement.[106] The court held that this offer to sell to the public could be reported on as a matter of public interest. "Investigative reporting is not limited to impeachment of presidents or the exposure of licentious congressmen. The *public interest* is served equally when reporters find a 'Deep Throat' in the executive suite. . . ."[107] Thus, the court was able to define Reliance as a public figure by using a

97. *Id.*
98. *See id.* at 1349.
99. *Id.* at 1348.
100. *Id.* (emphasis added).
101. *Id.*
102. *Id.*
103. Reliance Insurance Co. v. Barron's, 442 F. Supp. 1341, 1348 (S.D.N.Y. 1977).
104. *Id.* "There are many public figures who are so scorned and reviled by the media as to have little or no access for purposes of counteracting a libel. These remain yet public figures." *Id.*
105. *Id.* at 1349.
106. *Id.*
107. *Id.* (emphasis added).

public interest test.[108]

The most recent court to be presented with the issue of whether the public interest test or the public figure/private figure test should be applied to corporate defamation plaintiffs was the California Supreme Court in *Vegod Corporation v. American Broadcast Cos. Inc.*[109] Plaintiff corporations were in the business of closing out stores that were going out of business. The popular City of Paris department store in San Francisco was going out of business and plaintiffs were hired to conduct the closing. ABC's San Francisco television station aired a report which alleged that a Better Business Bureau spokesman told a reporter that "two outside companies, Vega [sic] Corporation and Western Institute of Retailers [sic] have been brought in to handle the closeout, a closeout the Better Business Bureau says has deceived the public. . . ."[110] Plaintiffs brought a libel action in which the lower court found them to be public figures under the *Gertz* test. The Supreme Court of California reversed holding that *Gertz* applied,[111] and that plaintiffs were not public figures.[112]

In arriving at its conclusion that *Gertz* should apply to corporate defamation plaintiffs, the court followed the reasoning of *Trans World*.[113] In applying the *Gertz* test the court for the first time found a corporate plaintiff not to be a public figure.[114] In order to find plaintiffs were non-public figures, the court had to determine whether plaintiffs were involved in a public controversy.

The defendant first argued that the demise of the store was a public controversy and since plaintiffs were involved with the store they must be public figures.[115] The court rejected this contention holding that even if the demise of the store was a public controversy, "merely doing business with parties to a public con-

108. In holding Reliance to be a public figure, the court stated: "When such reporting concerns the financial transactions of a large public corporation, the *public interest* in maintaining the free marketplace of ideas must outweigh plaintiff's claim to the sanctity of private status." *Id.* (emphasis added).

109. 25 Cal. 3d 763, 603 P.2d 14, 160 Cal. Rptr. 97 (1979).

110. *Id.* at 766, 603 P.2d at 15, 160 Cal. Rptr. at 99.

111. *Id.* at 770-71, 603 P.2d at 18-19, 160 Cal. Rptr. at 101-12.

112. *Id.*

113. Trans World Accounts, Inc. v. Associated Press, 425 F. Supp. 814 (N.D. Cal. 1977). The court in *Vegod* cited the unqualified rejection of the *Gertz* argument, the lack of difference between corporations and humans argument, and the fuzzy line argument.

114. Vegod Corp. v. American Broadcasting Cos., 25 Cal. 3d 763, 769-70, 603 P.2d 14, 17-18, 160 Cal. Rptr. 97, 101 (1979). In the previous three cases dealing with the application of *Gertz* to corporate defamation plaintiffs, the plaintiffs were all held to be public figures.

115. Vegod Corp. v. American Broadcasting Cos., 25 Cal. 3d 763, 769, 603 P.2d 14, 17, 160 Cal. Rptr. 97, 101.

troversy does not elevate one to public figure status."[116]

Defendant's second argument was that by advertising and selling goods to the public, plaintiffs became public figures.[117] The court answered this contention by stating that there is a distinction between public controversy and public interest (but it failed to tell us what that distinction is). The court then held "that a person in the business world advertising his wares does not necessarily become part of an existing public controversy."[118] Thus, here a court attempting to apply *Gertz* to corporations has again found itself defining a public figure based on the nature of the subject matter. The court in effect held that commercial conduct can never be a public controversy.[119] This statement seems to conflict with both *Trans World* and *Reliance Insurance* which both involved commercial conduct[120] and both used "public interest" language to define public figures.[121]

These four cases illustrate the need for a clear statement on the following. First, what if any, is the true distinction between public interest and public controversy? Second, what guidelines should be used by courts in determining whether defamation involves issues of public interest or public controversy? Finally, what standard, the *Rosenbloom* public interest standard or the *Gertz* public figure/private figure standard, should apply to corporate defamation plaintiffs?

CONCLUSION

What does public interest or public controversy mean and what guidelines should be used to determine if it exists? As is evident from the four corporate cases discussed above, courts often confuse and use interchangeably the terms public interest and public

116. *Id.*
117. *Id.* at 769, 603 P.2d at 18, 160 Cal. Rptr. at 101.
118. *Id.* at 770, 603 P.2d at 18, 160 Cal. Rptr. at 101.
119. *Id.*
120. Reliance Insurance Co. v. Barron's, 442 F. Supp. 1341 (S.D.N.Y. 1977) involved issuance of plaintiff's stock upon which defendant commented. Certainly this was criticism of commercial conduct that received protection. Trans World Accounts, Inc. v. Associated Press, 425 F. Supp. 814 (N.D. Cal. 1977) involved an FTC complaint issued against Trans World upon which defendant commented. This also was criticism of commercial conduct that received protection.
121. Reliance Insurance Co. v. Barron's, 442 F. Supp. 1341, 1349 (S.D.N.Y. 1977); Trans World Accounts, Inc. v. Associated Press, 425 F. Supp. 814, 820 (N.D. Cal. 1977).

controversy. In *Martin Marietta*, the court labeled the issues raised by the article as issues of "legitimate public interest."[122] Two sentences later, the court called the alleged activities a public controversy.[123] In *Trans World*, the court noted the function of the FTC as guarding the public interest.[124] It then held that since the FTC acted in the public interest, Trans World Accounts was drawn into a public controversy.[125] In *Reliance Insurance*, the court held that to be a public figure, Reliance must be involved in a public controversy;[126] but the court then went on to talk about how financial reporting is in the public interest.[127] In *Vegod*, the court distinguished between public interest and public controversy, but then held, contrary to *Trans World* and *Reliance Insurance*, that criticism of commercial conduct cannot benefit from the actual malice test.[128]

To find the meaning of these terms, a look at the goals of the first amendment privilege is necessary. In *New York Times*, the Supreme Court stated "the constitutional safeguard (first amendment) 'was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' "[129] The Court in *New York Times* created the first amendment defamation privilege against the background of a "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open."[130] These statements indicate that the essential value promoted by the first amendment is the widespread dissemination of information to enable the people to effectively govern themselves.[131] This

122. Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947, 956 (D.D.C. 1976).

123. *Id.*

124. Trans World Accounts, Inc. v. Associated Press, 425 F. Supp. 814, 820 (N.D. Cal. 1977).

125. *Id.*

126. Reliance Insurance Co. v. Barron's, 442 F. Supp. 134, 139 (S.D.N.Y. 1977).

127. *Id.*

128. Vegod Corp. v. American Broadcasting Cos. 25 Cal. 3d 763, 769-70, 603 P.2d 14, 18, 160 Cal. Rptr. 97, 101 (1979).

129. New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

130. *Id.* at 270.

131. *See also* Virginia Pharmacy Board v. Virginia Consumer Counsel, 425 U.S. 748 (1976), where the Supreme Court discusses the value of commercial advertising in terms of first amendment self government values.

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.

Id. at 765.

idea of effective self-government should be the essential objective of and the guideline to the public interest or public controversy test. Whether a subject matter is labeled public interest under the *Rosenbloom* test or public controversy under the *Gertz* test, the goal of effective self-governance is the same. Therefore, one term could be coined to connote the same idea contained in both the terms.

The term "legitimate public interest" is proposed. This term would replace the use of the term "public interest" which has been loosely applied to all subject matters. It would also replace the confusing use of the term "public controversy" in the *Gertz* public figure/private figure test. To find an issue of legitimate public interest, the guideline to use would be the idea of self-governance. If information on the topic is essential to the self-governance of people in their daily lives, then the subject is one of legitimate public interest. Thus, under the *Rosenbloom* public interest test, if one is somehow involved in an issue of legitimate public interest, then the plaintiff must prove actual malice. Under the *Gertz* public figure/private figure test, if one voluntarily becomes involved in an issue of legitimate public interest, then the plaintiff would have to prove actual malice.

What standard should apply in corporate defamation cases to determine the existence of a first amendment privilege? The public interest test of *Rosenbloom* and *Martin Marietta* and the public figure/private figure test of *Gertz* and *Trans World* represent the two opposing views on the issue. Because of the nature of the protected interests involved in corporate defamation cases, *Martin Marietta* thought *Rosenbloom* more appropriately balanced the competing reputational and first amendment interests.[132] *Trans World*, on the other hand, criticized this approach saying that *Gertz* unqualifiedly rejected *Rosenbloom*;[133] that under California law, corporations and humans are treated the same in defamation cases;[134] and that the line between corporations and sole proprietorships or partnerships is often "fuzzy."[135]

132. Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947, 956 (D.D.C. 1976).

133. Trans World Accounts, Inc. v. Associated Press, 425 F. Supp. 814, 819 (N.D. Cal. 1977).

134. *Id.*

135. *Id.*

The first two of these criticisms are not helpful in resolving the issue of which standard to apply to corporate defamation plaintiffs. The idea that *Gertz* unqualifiedly rejected the *Rosenbloom* public interest test is just an interpretation of *Gertz*. Another acceptable interpretation is that *Gertz* was speaking only of natural person defamation plaintiffs when it rejected the *Rosenbloom* test. As for the second criticism, *Di Giorgio*[136] demonstrated the difference in the nature of reputational interests between corporate plaintiffs and human plaintiffs.[137]

Perhaps the most potent and valid criticism *Trans World* makes of *Martin Marietta* is the "fuzzy" distinction criticism. If there is no difference, except the legal act of incorporation, between small corporations and most private businesses,[138] why should there be a different standard between the two to determine the existence of a privilege?

Prior to *Gertz* there was no need to distinguish between private businesses and corporations. The *Rosenbloom* public interest test with its emphasis on the nature of the subject matter applied to all plaintiffs. But, *Gertz* instructs us to focus on the status of the individual's reputation. If the reputation has remained personal to the individual then the person is a private figure and the privilege does not apply. Nevertheless, *Gertz* does not take into account corporations which do not have personal reputations. How then should *Gertz* be applied to corporations?

Three options come to mind. The first would be to do away with the *Gertz* public figure/private figure test altogether and revert back to the *Rosenbloom* public interest test for all plaintiffs. This option is unlikely to occur in light of the Supreme Court's deep concern for the personal reputation of the individual. The second option would be to hold that corporate plaintiffs are always public figures because they lack the personal reputation sought to be protected in *Gertz*. This option, however, ignores the state's valid interest in protecting the business reputation of corporations. The most appropriate option would be to apply the *Rosenbloom* public interest standard to both corporations and individuals suing for damage to their business reputation. This subject matter oriented test would adequately balance the state's interest in a corporation's and individual's business reputation with the first amendment interests.

The reputational interests of private businesses and corpora-

136. Di Giorgio Fruit Corp. v. American Fed'n of Labor and Congress of Indus. Organizations, 215 Cal. App. 2d 560, 570-71, 30 Cal. Rptr. 350, 356 (1979).

137. *See* text accompanying notes 87-89 *supra*.

138. "Private businesses" refers to all non-incorporated businesses.

tions are very similar. A corporation may sue for damage to its business reputation as distinguished from damage to any personal reputation which the corporation lacks.[139] When a person sues for damage to his business, trade, or occupation, the same distinction is made between interests in business reputation and interests in personal reputation.[140] Defamatory words which tend to "prejudice another in his business trade or profession" are actionable.[141] This type of action requires that the plaintiff be engaged in, and that the defamatory words relate to, the type of business, trade or profession which is the subject of the action.[142] The defamatory words must damage the plaintiff in his business, trade, or profession; "it is insufficient that they merely reflect on him as an individual."[143] Thus, when a natural person is suing, a distinction is made between a business reputation and a private reputation, while a corporation only has a business reputation.

It is the state's interest in the personal reputation of the natural person which *Gertz* thought unsatisfactorily protected by the *Rosenbloom* public interest test.[144] *Gertz* found that this interest in personal reputation "reflects no more than our basic concept of essential dignity and worth of every human being" and is a "basic of our constitutional system."[145] Private business and corporate defamation plaintiffs lack this personal reputation. Therefore, since there is no "basic of our constitutional system" to balance against the first amendment interests, the first amendment need not yield as far as it did in *Gertz*. Because personal reputation is not at stake when private businesses or corporations sue for damage to their business reputation, it is ridiculous to say that they could be private figures with private reputations under *Gertz*. Thus, in private business and corporate defamation cases a different standard than the *Gertz* public figure/private figure test is

139. "[A corporation] can maintain an action for a libel or a slander respecting its business or credit. . . . The courts are agreed, however, that since no question of such reputation can be involved, recovery may not be had for injury to a corporation's personal reputation." *Id.* 50 AM. JUR. 2d *Libel and Slander* § 315 (1970).

140. *Id.* at § 102.

141. *Id.*

142. *Id.* at § 104.

143. *Id.*

144. *See* Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947, 955 (D.D.C. 1976).

145. Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974), (*citing* Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (concurring opinion)).

needed when determining the applicability of the first amendment privilege.

The *Rosenbloom* public interest test would be the appropriate test to apply. Application of the public interest test would resolve the dilemma of how to apply the public figure/private figure test which seeks to protect personal reputations to defamation cases involving private businesses and corporations which do not involve personal reputations. The state does have an interest in protecting business reputations.[146] The public interest test would adequately balance the state's interests in business reputations and the first amendment values of free speech and press. The protection would come from the fact that with the strengthened term "legitimate public interest" not all issues would give rise to the qualified privilege. If a private business or corporation sues for defamation about a subject of legitimate public interest (information essential to self-government), then the first amendment defamation privilege would require them to prove actual malice.

The Supreme Court needs to reenter the area of the first amendment defamation privilege to clarify how the public figure/private figure test is to be applied. First, the Court needs to either define the distinction, if any, between the terms public controversy and public interest or combine the two into the stronger "legitimate public interest" term. Second, the applicability of *Gertz* in the context of the corporate plaintiff needs to be resolved. The *Gertz* public figure/private figure test should be limited to individual plaintiffs suing for harm to their personal reputation while the *Rosenbloom* public interest test should apply to private business and corporations. This scheme would be an appropriate method for determining when a case gives rise to the qualified first amendment defamation privilege.

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146. *See* Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947, 955 (D.D.C. 1976).