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The Press and the Law: Some Issues in Defamation Litigation Involving Media Coverage of Legal Affairs and Proceedings

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THE PRESS AND THE LAW: SOME ISSUES IN DEFAMATION LITIGATION INVOLVING MEDIA COVERAGE OF LEGAL AFFAIRS AND PROCEEDINGS

by

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A significant number of reported defamation cases litigated against the press[1] involve efforts to report on legal affairs and proceedings.[2] The plaintiffs in these cases are often the participants in the legal matters in issue and include attorneys,[3] judges,[4] plaintiffs,[5] defendants,[6]

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1. This Article does not attempt to analyze defamation cases pertaining to lawsuits filed against nonmedia defendants although the reports also contain quite a few of these suits. Many involve statements made during trial testimony or in pleadings or judicial records. Most of these are fairly easily resolved under the fair-report privilege. Sometimes, the issues raised in the nonmedia defamation cases are the same as or very similar to those raised in the media cases. Often, however, significant differences as, for example, to proof of fault, arise.

2. Since 1970 courts have decided at least 300 such cases. *See infra* notes 3-328. This Article concentrates exclusively on cases decided after 1964 when the Supreme Court first began constitutionalizing elements of the law of defamation in New York Times v. Sullivan, 376 U.S. 254 (1964). For the most part this Article analyzes cases following the Supreme Court's decision in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). *Gertz* modified much of the legal analysis previously employed by the courts.

3. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Law Firm of Daniel P. Foster, 844 F.2d 955 (2d Cir. 1988); Tate v. Bradley, 837 F.2d 206 (5th Cir. 1988); Trotter v. Anderson, 818 F.2d 431 (5th Cir. 1987); Janklow v. Newsweek, Inc., 788 F.2d 1300 (8th Cir.) (en banc), *cert. denied*, 479 U.S. 883 (1986); Quilici v. Second Amendment Found., 769 F.2d 414 (7th Cir. 1985), *cert. denied*, 475 U.S. 1013 (1986); Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985); Lewis v. Time, Inc., 710 F.2d 549 (9th Cir. 1983); Bufalino v. Associated Press, 692 F.2d 266 (2d Cir. 1982); Curtis v. Southwestern Newspapers, 8 Media L. Rep. (BNA) 1651 (5th Cir. 1982); Littlefield v. Fort Dodge Messenger, 614 F.2d 581 (8th Cir.), *cert. denied*, 455 U.S. 945 (1980); Orr v. Argus-Press Co., 586 F.2d 1108 (6th Cir.), *cert. denied*, 440 U.S. 960 (1978); Ryder v. Time, Inc., 557 F.2d 824 (D.C. Cir. 1976); Casano v. WDSU-TV, Inc., 464 F.2d 3 (5th Cir. 1972); Wasserman v. Time, Inc., 424 F.2d 920 (D.C. Cir.), *cert. denied*, 398 U.S. 940 (1970); Harkaway v. Boston Herald Traveler Corp., 418 F.2d 56 (1st Cir. 1969); Zerman v. Sullivan & Cromwell, 677 F. Supp. 1316 (S.D.N.Y. 1988); Catalfo v. Jensen, 657 F. Supp. 463 (D.N.H. 1987); Murray v. Bailey, 613 F. Supp. 1276 (N.D. Cal. 1985); Joseph v. Xerox Corp., 594 F. Supp. 330 (D.D.C. 1984); Lane v. New York Times, 8 Media L. Rep. (BNA) 1623 (W.D. Tenn. 1982); Goodrick v. Gannett Co., 500 F. Supp. 125 (D. Del. 1980); Ratner v. Young, 465 F. Supp. 386 (D.V.I. 1979); Handelman v. Hustler Magazine, Inc., 469 F. Supp. 1048 (S.D.N.Y. 1978);

Cowles Communications, Inc., 430 F. Supp. 1363 (N.D. Cal. 1977); Carey v. Hume, 390 F. Supp. 1026 (D.D.C. 1975); Pemberton v. Birmingham News Co., 482 So. 2d 257 (Ala. 1985); Phoenix Newspapers, Inc. v. Church, 24 Ariz. App. 287, 537 P.2d 1345, *cert. denied*, 425 U.S. 908 (1975); Little Rock Newspapers, Inc. v. Dodrill, 281 Ark. 25, 660 S.W.2d 933 (1983); Dodrill v. Arkansas Democrat Co., 590 S.W.2d 840 (Ark. 1979), *cert. denied*, 444 U.S. 1076 (1980); McCoy v. Hearst Corp., 174 Cal. App. 3d 83, 231 Cal. Rptr. 518, 727 P.2d 711 (1986); Belli v. Berryhill, 11 Media L. Rep. (BNA) 1221 (Cal. Ct. App. 1984); Weingarten v. Block, 102 Cal. App. 3d 129, 162 Cal. Rptr. 701 (1980); Della-Donna v. Gore Newspapers Co., 489 So. 2d 72 (Fla. Dist. Ct. App. 1986), *cert. denied*, 479 U.S. 1088 (1987); Huszar v. Gross, 468 So. 2d 512 (Fla. Dist. Ct. App. 1985); Western Broadcasting v. Wright, 182 Ga. App. 359, 356 S.E.2d 53 (1987); Bandelin v. Pietsch, 98 Idaho 337, 563 P.2d 395, *cert. denied*, 434 U.S. 891 (1977); Wanless v. Rothballer, 115 Ill. 2d 158, 503 N.E.2d 316 (1986), *cert. denied*, 487 U.S. 929 (1987); Owen v. Carr, 134 Ill. App. 3d 855, 478 N.E.2d 658 (1985); Matchett v. Chicago Bar Ass'n, 1225 Ill. App. 3d 1004, 467 N.E.2d 271 (1984); Fried v. Jacobson, 99 Ill. 2d 24, 457 N.E.2d 392 (1983); Chapski v. Copley Press, 92 Ill. 2d 344, 442 N.E.2d 195 (1982); Wexler v. Chicago Tribune Co.,69 Ill. App. 3d 610, 387 N.E.2d 892 (1979); Bontkowski v. Chicago Sun-Times, 115 Ill. App. 2d 229, 252 N.E.2d 689 (1969); Savelas v. Law Bulletin Pub. Co., 115 Ill. App. 2d 205, 253 N.E.2d 168 (1969); McCall v. Courier-Journal & Louisville Times Co., 623 S.W.2d 882 (Ky. 1981); E.W. Scripps Co. v. Ball, 14 Media L. Rep. (BNA) 1693 (Ky. Ct. App. 1987); Drury v. Feeney, 505 So. 2d 111 (La. Ct. App. 1987), *writ denied*, 506 So. 2d 1225 (La. 1987); McHale v. Lake Charles American Press, 390 So.2d 556 (La. Ct. App. 1980), *cert. denied*, 452 U.S. 951 (1981); Hamilton v. Lake Charles American Press, Inc., 372 So. 2d 239 (La. Ct. App. 1979); Prince v. Curtis, 1 Mass. App. 810, 294 N.E.2d 499 (1973); Dineen v. Star Press, Inc., 391 A.2d 834 (Me. 1978); Fisher v. Detroit Free Press, 158 Mich. App. 409, 404 N.W.2d 765 (1987); Kurtz v. Evening News Ass'n, 11 Media L. Rep. (BNA) 2340 (Mich. Ct. App. 1985); Hayes v. Booth Newspapers, Inc., 97 Mich. App. 758, 295 N.W.2d 858 (1980); Peisner v. Detroit Free Press, Inc., 82 Mich. App. 153, 266 N.W.2d 693 (1978); Anton v. St. Louis Suburban Newspapers, Inc., 598 S.W.2d 493 (Mo. Ct. App. 1980); Cox v. Lee Enters. Inc., 723 P.2d 238 (Mont. 1986); Marchiando v. Brown, 98 N.M. 394, 649 P.2d 462 (1982); Silsdorf v. Levine, 59 N.Y.2d 8, 449 N.E.2d 716, 462 N.Y.S.2d 822, *cert. denied*, 464 U.S. 831 (1983); Gurda v. Orange County Publications, 56 N.Y.2d 705, 436 N.E.2d 1326, 451 N.Y.S.2d 724 (1982); Sills v. New York Times Co., 8 Media L. Rep. (BNA) 1460 (N.Y. 1982); Cohn V. National Broadcasting Co., 50 N.Y.2d 885, 408 N.E.2d 672, 430 N.Y.S.2d 265 (1980); November v. Time, Inc., 13 N.Y.2d 175, 194 N.E.2d 126, 244 N.Y.S.2d 309 (1963); Dibble v. WROC-TV Channel 8, 142 A.D.2d 966, 530 N.Y.S.2d 388 (1988); Golub v. Esquire Publishing, Inc., 124 A.D.2d 528,508 N.Y.S.2d 188 (1986); Roche v. Hearst Corp., 72 A.D.2d 245, 424 N.Y.S.2d 930 (1980), *aff'd*, 53 N.Y.2d 707, 421 N.E.2d 844, 439 N.Y.S.2d 352 (1981); Hahn v. Andrello, 44 A.D.2d 501, 355 N.Y.S.2d 850 (1974); Gilberg v. Goffi, 21 A.D.2d 517, 251 N.Y.S.2d 823 (1964), *aff'd*, 15 N.Y.2d 1023, 207 N.E.2d 620, 260 N.Y.S.2d 24 (1965); Hentell v. Knopf, 8 Media L. Rep. (BNA) 1980 (N.Y. Sup. Ct. 1982); Brower v. The New Republic, 7 Media L. Rep. (BNA) 1605 (N.Y. Sup. Ct. 1981); Cohn v. Am-Law, 5 Media L. Rep. (BNA) 2367 (N.Y. Sup. Ct. 1980); Polakoff v. Harcourt Brace, 3 Media L. Rep. (BNA) 2516 (N.Y. Sup. Ct. 1978); Plough v. Schneider, 8 Media L. Rep. (BNA) 1621 (Ohio Ct. App. 1982); Sellers v. Oklahoma Publishing Co., 687 P.2d 116 (Okla. 1987); Fitzpatrick v. Philadelphia Newspaper, Inc., 17 Media L. Rep. (BNA) 1210 (Pa. Super. 1989); Curran v. Philadelphia Newspapers, 376 Pa. Super. 508, 546 A.2d 639 (1988); Frisk v. News Co., 361 Pa. Super. 536, 523 A.2d 347 (1986); Sprague v. Walter, 357 Pa. Super. 570, 516 A.2d 706 (1986); DeCarralhoe v. DaSilva, 414 A.2d 806 (R.I. 1980); Padgett v. Sun News, 278 S.C. 26, 292 S.E.2d 30 (1982); Windsor v. Tennessean, 654 S.W.2d 680 (Tenn. Ct. App. 1983); El Paso Times, Inc. v. Kerr, 706 S.W.2d 797 (Tex. App.—El Paso 1986, writ ref'd n.r.e.); Crites v. Mullins, 697 S.W.2d 715 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.); Herron v. KING Broadcasting Co., 109 Wash. 2d 514, 746 P.2d 295 (1987); Herron v. Tribune Publishing Co., 108 Wash. 2d 162, 736 P.2d 249 (1987); Miller v. Charleston Gazette, 9 Media L. Rep. (BNA) 2540 (W. Va. 1983); D'Amato v. Freeman Printing Co., 38 Wis. 589, 157 N.W.2d 686 (1968).

4. Harte-Hanks Communications, Inc. v. Connaughton, 109 S.Ct. 2678, 105 L. Ed. 2d 562 (1989); Jenkins v. KYQ, 829 F.2d 403 (3rd Cir. 1987); Simonson v. United Press Int'l, 654 F.2d 478 (7th Cir. 1981); Dostert v. Washington Post, 531 F. Supp. 165 (N.D. W. Va. 1982); Times Publishing Co. v. Huffstetler, 409 So. 2d 112 (Fla. Dist. Ct. App.), *review denied*, 417 So. 2d 329 (Fla. 1982); Berkos v. National Broadcasting Co., 161 Ill. App. 3d 476, 515 N.E.2d 668 (1987), *appeal denied*, 119 Ill. 2d 553, 522 N.E.2d 1241 (1988); Young v. Meyer, 527 So. 2d 391 (La. Ct. App. 1988); Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 366

witnesses,[7] and subjects of investigations[8] and persons whom the press has

N.E.2d 1299, 397 N.Y.S.2d 943, *cert.denied*, 434 U.S. 969 (1977); DiLorenzo v. New York News, Inc., 81 A.D.2d 844, 432 N.Y.S.2d 483 (1981); Rinaldi v. Village Voice, Inc., 47 A.D.2d 180, 365 N.Y.S.2d 199, *cert.denied*, 423 U.S. 883 (1975); Marks v. New York News, 4 Media L. Rep. (BNA) 2280 (N.Y. Sup. Ct. 1979); Celebrezze v. Dayton Newspapers, Inc., 41 Ohio App. 3d 343, 535 N.E.2d 755 (1988); Harris v. Plain Dealer Publishing Co., 40 Ohio App. 3d 127, 532 N.E.2d 192 (1988); DiSalle V.P.G. Publishing Co., 375 Pa. Super. 510, 544 A.2d 1345, *appeal denied*, 521 Pa. 620, 557 A.2d 724 (1988), *cert. denied*, 109 S. Ct. 3216, 106 L. Ed. 2d 566 (1989); Braig v. Field Communications, 310 Pa. Super. 569, 456 A.2d 1366 (1983); Fink v. Packard Press Corp., 17 Media L. Rep. (BNA) 1193 (Pa. C. 1989); Guinn v. Texas Newspapers, Inc., 738 S.W.2d 303 (Tex. App.—Houston [14th Dist.] 1987, no writ), *cert. denied*, 109 S. Ct. 864, 102 L. Ed. 2d 988 (1988) (Justice of the Peace); *see also* Ross v. News-Journal Co., 228 A.2d 531 (Del. 1967) (unauthorized alderman); Standke v. B.E. Darby & Sons, Inc., 291 Minn. 468, 193 N.W.2d 139 (1971) (members of grand jury), *cert. dismissed*, 406 U.S. 902 (1972).

5. Time, Inc. v. Firestone, 424 U.S. 448 (1976); Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287 (D.C. Cir.), *cert. denied*, 109 S. Ct. 715, 103 L. Ed. 2d. 18 (1988); Lal v. CBS, Inc., 726 F.2d 97 (3d Cir. 1984); Street v. National Broadcasting Co., 645 F.2d 1227 (6th Cir.), *cert. dismissed*, 454 U.S. 1095 (1981); Tomson v. Stephan, 699 F. Supp. 860 (D. Kan. 1988); DiLeo v. Koltnow, 200 Colo. 119, 613 P.2d 318 (1980); Read v. News Journal Co., 474 A.2d 119 (Del. 1984); DeLuca v. Newsday, 12 Media L. Rep. (BNA) 1525 (N.Y. Sup. Ct. 1985); Shifflet v. Thomson Newspapers, Inc., 69 Ohio St. 2d 179, 431 N.E.2d 1014 (1982); Camer v. Seattle Post-Intelligence, 45 Wash. App. 29, 723 P.2d 1195 (1986), *cert. denied*, 482 U.S. 916 (1987).

6. Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979); Brueggemeyer v. Associated Press, 609 F.2d 825 (5th Cir. 1980); Anderson v. Stanco Sports Library, 542 F.2d 638 (4th Cir. 1976); Lambert v. Providence Journal Co., 508 F.2d 656 (1st Cir.), *cert. denied*, 423 U.S. 828 (1975); Chang v. Michiana Telecasting Corp., 14 Media L. Rep. (BNA) 1889 (N.D. Ind. 1987); Karp v. Hill & Knowlton, Inc., 631 F. Supp. 360 (S.D.N.Y 1986); Bryant v. Associated Press, 595 F. Supp. 814 (D.V.I 1984); Ricci v. Venture Magazine, Inc., 574 F. Supp. 1563 (D. Mass. 1983); Casper v. Washington Post Co., 549 F. Supp. 376 (E.D. Pa. 1982); Tawfik v. Loyd, 5 Media L. Rep. (BNA) 2067 (N.D. Tex. 1979); Hurley v. Northwest Publications, Inc., 273 F. Supp. 967 (D. Minn. 1967), *aff'd*, 398 F.2d 346 (8th Cir. 1968); Pritchard v. Times S. W. Broadcasting, Inc., 277 Ark. 458, 642 S.W.2d 877 (1982); Jennings v. Telegram-Tribune Co., 164 Cal. App. 3d 119, 210 Cal. Rptr. 485 (1985); Donaldson v. Washington Post, 3 Media L. Rep. (BNA) 1436 (D.C. Super. Ct. 1977); Newell v. Field Enters., Inc., 91 Ill. App. 3d 735, 415 N.E.2d 434 (1980); Nagib v. News-Sun, Div. Keystone Printing Serv., Inc., 64 Ill. App. 3d 752, 381 N.E.2d 1014 (1978); Bannach v. Field Enters., 5 Ill. App. 3d 692, 284 N.E.2d 31 (1972); Ruebke v. Globe Communications Corp., 241 Kan. 595, 738 P.2d 1246 (1987); Hopkins v. Keith, 348 So. 2d 999 (La. Ct. App. 1977); Schaefer v. Hearst Corp., 5 Media L. Rep. (BNA) 1734 (Md. Baltimore City Super. Ct. 1979); Jackson v. Longcope, 394 Mass. 577, 476 N.E.2d 617 (1985); Grobe v. Three Village Herald, 69 A.D.2d 175, 420 N.Y.S.2d 3 (1979), *aff'd*, 49 N.Y.2d 932, 406 N.E.2d 491, 428 N.Y.S.2d 676 (1980); Suriano v. New York News, 11 Media L. Rep. (BNA) 1309 (N.Y. Sup. Ct. 1984); Jones v. Sun Publishing Co., 278 S.C. 12, 292 S.E.2d 23, *cert. denied*, 459 U.S. 944 (1982); Mark v. Seattle Times, 96 Wash. 2d 473, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124 (1982); O'Brien v. Tribune Publishing Co., 7 Wash. App. 107, 499 P.2d 24 (1972), *cert. denied*, 411 U.S. 906 (1973).

7. Rushford v. New Yorker Magazine, Inc., 846 F.2d 249 (4th Cir. 1988); Nelson v. Associated Press, Inc., 667 F. Supp. 1468 (S.D. Fla. 1987); Lemmer v. Arkansas Gazette Co., 620 F. Supp. 1332 (E.D. Ark. 1985); Dresbach v. Doubleday Co., 518 F. Supp. 1285 (D.D.C. 1981); McIver v. Talahassee Democrat, Inc., 489 So. 2d 793 (Fla. Dist. Ct. App.), *review denied*, 500 So. 2d 544 (Fla. 1986); Friedgood v. Peters Publishing Co., 13 Media L. Rep. (BNA) 1479 (Fla. Cir. Ct. 1986), *aff'd*, 521 So. 2d 236 (Fla. Dist. Ct. App.), *review denied*, 531 So. 2d 1353 (Fla. 1988), *cert. denied*, 109 S. Ct. 867, 102 L.Ed.2d. 991 (1989); Hoag v. Charlotte Republican-Tribune, 5 Media L. Rep. (BNA) 1535 (Mich. Cir. Ct. 1979); Wilhoit v. WCSC, Inc., 293 S.C. 34, 358 S.E.2d 397 (Ct. App. 1987); Burgess v. Reformer Publishing Co., 508 A.2d 1359 (Vt. 1986).

8. Porter v. Guam Publications, Inc., 643 F.2d 615 (9th Cir.), *cert. denied*, 454 U.S. 90 (1981) (person arrested on false charges); Schuster v. U.S. News & World Report, Inc., 602 F.2d 850 (8th Cir. 1979) (person indicted by grand jury); Zurita v. Virgin Islands Daily News,

mistakenly identified as participants in legal proceedings or investigations.[9] Several factors explain why press reporting of legal affairs results in defamation suits. Legal matters and proceedings often involve serious charges bearing great potential for defamatory harm if false.[10] Moreover, the risk of error is frequently significant since reporters must often decipher technical legal terminology and restate complex results of legal proceedings under the pressure of a deadline.[11] Another possibility is that many of the plaintiffs in these defamation suits are not hesitant to go into court to assert their rights,

578 F. Supp. 306 (D.V.I. 1984) (subject of investigations); Williams v. WCAU-TV, 555 F. Supp. 198 (E.D. Pa. 1983) (person arrested as bank robbery suspect); Gay v. Williams, 486 F. Supp. 12 (D. Alaska 1979) (suspect in organized crime investigation); Karp v. Miami Herald Publishing Co., 359 So. 2d 580 (Fla. Dist. Ct. App. 1978) (person under investigation by INS); Minton v. Thomson Newspapers, Inc., 175 Ga. App. 525, 333 S.E.2d 913 (1985) (plaintiff charged with driving under influence of alcohol); Mattson v. Chronicle Publishing Co., 156 Ill. App. 3d 613, 509 N.E.2d 150 (person suspected of stealing food), *appeal denied*, 116 Ill. 2d 561, 515 N.E.2d 111 (1987); Melon v. Capital City Press, 407 So. 2d 85 (La. Ct. App. 1981) (person arrested on drug charges), *writ denied*, 409 So. 2d (La. 1982); Rosen v. Capital City Press, 314 So. 2d 511 (La. Ct. App. 1975) (indicted physician); Jones v. Taibbi, 400 Mass. 786, 512 N.E.2d 260 (1987) (suspect in murder investigation); Sibley v. Holyoke Transcript-Telegram Publishing Co., 391 Mass. 468, 461 N.E.2d 823 (1982) (subject of police investigation); Rouch v. Enquirer & News, 427 Mich. 157, 398 N.W.2d 245 (1986) (person arrested for rape but not charged); Penn v. Detroit Free Press, 12 Media L. Rep. (BNA) 2129 (Mich. Cir. Ct. 1986) (public official investigated for fraud); Molnar v. Star-Ledger, 193 N.J. Super. 12, 471 A.2d 1209 (Super Ct. App. Div. 1984) (suspect of maintenance code violation); Robart v. Post-Standard, 52 N.Y.2d 843, 418 N.E.2d 664, 437 N.Y.S.2d 71 (1981) (person ticketed for failing to carry insurance identification card); Brown v. Johnson Newspapers Corp., 84 A.D.2d 636, 444 N.Y.S.2d 493 (App. Div. 1981) (person arrested for assault); Post v. Oregonian Publishing Co., 268 Or. 214, 519 P.2d 1258 (1974) (suspect identified in police all-points bulletin); Burgess v. Reformer Publishing Corp., 146 Vt. 612, 508 A.2d 1359 (1986) (witness before grand jury); Prahl v. Brosamle, 98 Wis. 2d 130, 295 N.W.2d 768 (Ct. App. 1980) (subject of police search).

9. Ryder v. Time, Inc., 557 F.2d 824 (D.C. Cir. 1976) (lawyer with same name as lawyer subject to professional discipline); Bell v. Associated Press, 584 F. Supp. 128 (D.D.C. 1984) (professional football player misidentified as person arrested for public lewdness); Nesbitt v. Multimedia, 9 Media L. Rep. (BNA) 1473 (W.D.N.C. 1982) (father of person charged with larceny); Slocum v. Webb, 375 So. 2d 125 (La. Ct. App. 1979) (father misidentified as son who was suspect in investigation); Gazette, Inc. v. Harris, 229 Va. 1, 325 S.E.2d 713 (1985) (complainant in child abuse case misidentified as suspect), *cert. denied*, 472 U.S. 1032 (1986).

10. *See, e.g.*, Gobin v. Globe Publishing Co., 215 Kan. 233, 531 P.2d 76, 83 (1975) ("damage done by negligent reporting of such court proceedings can be just as devastating to the individual as that resulting from false reporting done maliciously"); McCall v. Courier-Journal & Louisville Times Co., 623 S.W.2d 882, 844-885 (Ky. 1981) (charge that attorney trying to fix case is defamatory as matter of law), *cert. denied*, 456 U.S. 975 (1982); Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943 (charges that judge is probably corrupt are defamatory), *cert denied*, 434 U.S. 969 (1977); DiLorenzo v. New York News, Inc., 78 A.D.2d 669, 672, 432 N.Y.S.2d 483, 486-87 (1981) (charge that court convicted judge of perjury may be defamatory); *see also infra* notes 173-178, 198-240 and accompanying text.

11. *See, e.g.*, Time, Inc. v. Firestone, 424 U.S. 448, 451-52 (1976) (composing story without adequate verification under deadline pressure may have been negligent); Buchanon v. Associated Press, 398 F. Supp. 1196, 1204 (D.D.C. 1975) (legal distinction in court proceedings between campaign contributions and expenditures understandably confused reporters operating under deadline pressure); LaMon v. Butler, 110 Wash. 2d. 216, 222-23, 751 P.2d 842, 845 (1988) (reporter not negligent in misunderstanding ambiguous court order after conferring with city attorney); *see also* Bloom, *Proof of Fault in Media Defamation Litigation*, 38 VAND. L. REV. 247, 267-70, 359-60 (1985); *infra* notes 200-331 and accompanying text. *But see* Gobin v. Globe Publishing Co., 216 Kan. 223, 531 P.2d 76, 81 (1975) (explaining law does not provide absolute privilege for defamatory statements contained in reporting of judicial proceedings because "judicial proceedings are peculiarly susceptible to exact reporting; an account

since many are already deeply involved in litigation and others, such as lawyers and judges, are quite accustomed to it.[12] Finally, it is likely that as with much other defamation litigation, many plaintiffs in these cases have motives for filing suit beyond the prospect of recovery of damages to reputation. Such motives may include promoting political ends, striking back at the press, or trying to influence the underlying legal proceeding.[13]

These cases cut across all of the legal issues raised in media defamation litigation in general. Often the treatment of a particular legal issue raised in a media defamation case is not peculiar. Frequently, however, unique twists to or common themes connecting these cases arise. One may study and analyze these cases by focusing on several different themes or issues that are presented. This Article will focus on two specific themes that may bear a relationship to each other.

The first theme is the treatment, as a matter of constitutional law, of the participants in legal matters and proceedings as public figures or officials and the treatment of such matters and proceedings as public controversies or matters of public concern. The resolution of these issues is generally of great significance in the individual case since it will determine whether the strict actual malice standard of fault or some lower standard such as negligence[14] is applicable. The way that courts tend to decide these issues in this type of case is of more general interest in that it involves an important first amendment issue—the degree to which the law favors uninhibited reporting of legal matters and proceedings.

The second theme focuses on the degree of accuracy that the press is legally expected to achieve in covering legal matters and proceedings. This is a theme that cuts across several specific legal issues raised in defamation litigation, including whether the statements are defamatory, whether they are true or false, whether they are fact or protected opinion, whether they are a privileged fair and accurate report of an official or judicial proceeding, and whether the reporter is at fault if the statements are false and defamatory. As with the public figure issue, the degree of accuracy to which the law holds the press will often prove to be determinative of the outcome of a particular case. The general manner in which the courts deal with the accuracy of media usage of legal terminology and descriptions of legal matters,

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of that which transpired at trial is not contingent upon fallible or futile modes of investigation; court records are available . . . .").

12. Well-known attorney Melvin Belli for instance has brought defamation suits on several occasions. *See* Belli v. Orlando Daily Newspapers, Inc., 389 F.2d 579, *cert. denied*, 393 U.S. 579 (1967); Belli v. Berryhill, 11 Media L. Rep. (BNA) 1221 (Cal. Ct. App. 1984); Belli v. Curtis Publishing Co., 25 Cal. App. 3d 384, 102 Cal. Rptr. 122 (1972); *cf.* McBride v. Merrill Dow, 717 F.2d 1460, 1464 (D.C. Cir. 1983) (statement that he testified for client of "flamboyant" attorney Melvin Belli did not defame expert witness).

13. *See* Bezanson, *The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get*, 74 CALIF. L. REV. 789 (1986); Bezanson, *Libel Law and the Realities of Libel Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226 (1985); Soloski, *The Study and the Libel Plaintiff: Who Sues for Libel?*, 71 IOWA L. REV. 217 (1985). For a discussion of the dynamics of modern defamation litigation, see also Smolla, *Let the Libel Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1 (1983).

14. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

proceedings, and participants will also have a major effect on press coverage of the legal world as well as a participant's right to sue successfully for harm caused to reputation by defamatory falsehood.

On both issues one can discern a dominant trend accompanied by a somewhat weaker countertrend. The courts generally tend to find that legal matters and proceedings are not public controversies[15] and participants in them are not public figures.[16] Some cases, however, seem to lean in the opposite direction, and perhaps more importantly, a fair amount of contemporary first amendment jurisprudence is arguably in tension with these cases. With respect to the degree of accuracy to which the press is held in covering legal matters and proceedings, the dominant trend is to give reporters a fair margin of error regardless of the specific legal context in which the issue arises. The principle is not without limits however. No conscious relationship between the manner in which the courts deal with these issues appears to exist. To the extent that the courts tend to favor the plaintiff on the constitutional public figure issue, they tend to favor the defendant under both the common law and the constitution when the focus is on the accuracy either of the media's use of legal terminology or of its description of legal affairs.

I. PUBLIC FIGURES AND CONTROVERSIES

A. The Public Figure and Legal Matters

The outcome of defamation litigation is frequently determined by whether the plaintiff is characterized as a public figure.[17] If the plaintiff is a public figure, then as a matter of constitutional law he must prove by clear and convincing evidence that the defendant published the defamatory falsehood with actual malice, that is, with knowledge that the statements were false or with reckless disregard for whether or not they were true.[18] Reckless disregard for the truth in turn has a subjective focus and requires proof that the defendant published the statements in question with a "high degree of awareness of [their] probable falsity".[19] This is an extremely difficult standard to meet. In the vast majority of cases in which the issue of fault is litigated, public figure plaintiffs lose either at trial or on appeal.[20]

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15. *See infra* notes 137-155 and accompanying text.

16. *See infra* notes 17-136 and accompanying text.

17. *See, e.g.*, Della-Donna v. Gore Newspapers Co., 489 So. 2d 72 (Fla. Dist. Ct. App. 1986), *cert. denied*, 479 U.S. 1088 (1987) (absolutely no proof of actual malice after court determined plaintiff attorney was public figure); Steere v. Cupp, 226 Kan. 566, 602 P.2d 1267, 1274 (1979) (no proof of actual malice required once court determined plaintiff was a public figure). *See* Ashdown, *Of Public Figures and Public Interest - The Libel Law Conundrum*, 25 WM. & MARY L. REV. 937 (1984); Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905 (1984).

18. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342-43 (1974). The Court in New York Times v. Sullivan, 346 U.S. 254, 279-80 (1964), initially devised and applied the actual malice standard to public officials; the Court in Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), first extended the heightened degree of protection to public figures.

19. St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (quoting Garrison v. Louisiana, 379 U.S. 64, 74 (1964)).

20. *See* Bloom, *supra* note 11, at 330-35; Franklin, *Winners and Losers and Why; A Study of Defamation Litigation*, 1980 AM. B. FOUND. RES. J. 455, 491 (1980).

With respect to private figure plaintiffs, however, the states may permit recovery if the plaintiff can establish the defendant's fault by a less exacting standard than actual malice.[21] Almost all state courts have adopted a negligence standard as the appropriate standard of fault when the plaintiff is a private figure.[22] This is a significantly easier standard for the plaintiff to satisfy than actual malice.[23] Consequently, virtually all defamation plaintiffs will attempt to argue, if at all possible, that they are private rather than public figures.

Three of the Supreme Court's most significant cases addressing the public figure determination involve media reporting of legal matters. These three cases, *Gertz v. Robert Welch, Inc.*,[24] *Time, Inc. v. Firestone*,[25] and *Wolston v. Reader's Digest*,[26] provide the basic framework for determining whether a court should consider any defamation plaintiff, and more specifically a trial participant, to be a public figure.

In *Gertz* a prominent Chicago attorney sued a right wing opinion journal for defaming him in an article it published concerning his representation of the family of a boy who had been shot and killed by a police officer.[27] The Supreme Court used the *Gertz* case as a vehicle for developing the public figure/private figure analysis in some detail. It noted that a plaintiff could be a public figure for all purposes[28] or an involuntary public figure.[29] It emphasized, however, that far and away the most typical public figure will be the limited purpose public figure, that is, a person who "thrust[s] [himself] to the forefront of [a] particular public controvers[y] in order to influence the resolution of the issues involved."[30] The Court explained that public figures are entitled to lesser degree of legal protection of their reputations than private figures, because they have assumed the risk of media attention by attempting to influence a public controversy; they are also less in need of protection because they are generally capable of responding to any charges through the media itself.[31] As will be discussed in greater detail below,[32] the Court found that the plaintiff in *Gertz* was neither an all purpose or limited purpose public figure.[33] Consequently, he was not required to meet the difficult ac-

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

22. *See* Brown v. Kelly Broadcasting Co., 48 Cal. 3d 711, 771 P.2d 406, 424 n.26, 257 Cal. Rptr. 406 (1989) (listing thirty three state court decisions opting for the negligence standard). For a discussion of other standards of fault adopted by state courts, see Bloom, *supra* note 11, at 251 n.14.

23. *See* Bloom, *supra* note 11, at 386-93.

24. 418 U.S. 323 (1974).

25. 424 U.S. 448 (1976).

26. 443 U.S. 157 (1979).

27. 418 U.S. at 325-27.

28. *Id.* at 345.

29. *Id.* The Court noted that "[h]ypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare."

30. *Id.*

31. *Id.* at 344.

32. *See infra* notes 47-56 and accompanying text.

33. 418 U.S. at 351-52.

tual malice standard of fault in order to recover.[34] In the course of its opinion, the Court also rejected the contention developed by the plurality opinion in the earlier case of *Rosenbloom v. Metromedia, Inc.*,[35] that the actual malice standard should apply to all matters of public interest even if the plaintiff in the defamation suit did not happen to be a public figure.[36]

In *Time, Inc. v. Firestone*[37] the Court held that the plaintiff, a prominent socialite and petitioner in a highly publicized divorce proceeding, was not a public figure.[38] Perhaps even more importantly, the Court determined that a titillating celebrity divorce trial was not what the Court had in mind as a public controversy in *Gertz*.[39] The Court also explicitly rejected the claim that the actual malice standard should apply to all reports of judicial proceedings.[40]

Finally in *Wolston v. Reader's Digest Association*,[41] the Court held that a person who had pleaded guilty to contempt for failing to appear before a grand jury investigating Soviet espionage fifteen years prior to the publication of the article was not a public figure at the time of the incident.[42] Justice Blackmun concurred on the grounds that even if the plaintiff had been a public figure at the time of the contempt charge, he would no longer remain a public figure due to the passage of time.[43]

B. Attorneys as Public Figures

Several relatively recent cases have addressed the issue of whether a court should consider an attorney, frequently an attorney involved in controversial litigation, to be a public figure. In many cases in which the attorney is a prosecutor the attorney must satisfy the actual malice standard because he is a public official rather than a public figure.[44] The same is true when the

34. *Id. at 352.*
35. 403 U.S. 29 (1971).
36. 418 U.S. at 346-47.
37. 424 U.S. 448 (1976).
38. *Id.* at 453-54.
39. *Id.*
40. *Id.*
41. 443 U.S. 157 (1979).
42. *Id.* at 165-68.
43. *Id.* at 169, 171.
44. *See, e.g.*, Janklow v. Newsweek, Inc., 788 F.2d 1300 (8th Cir.) (former attorney general), *cert. denied*, 479 U.S. 883 (1986); Curtis v. Southwestern Newspapers, 8 Media L. Rep. (BNA) 1651 (5th Cir. 1982); Murray v. Bailey, 613 F. Supp. 1276 (N.D. Cal. 1985) (assistant district attorney); Goodrick v. Gannett Co., 500 F. Supp. 125, 126 (D. Del. 1980) (assistant district attorney); Phoenix Newspapers, Inc. v. Church, 24 Ariz. App. 287, 537 P.2d 1345 (1976) (attorney general); McCoy v. Hearst Corp., 174 Cal. App. 3d 83, 231 Cal. Rptr. 518, 727 P.2d 711 (1986) (former prosecutor); Weingarten v. Block, 102 Cal. App. 3d 129, 162 Cal. Rptr. 701 (1980) (city attorney); Wanless v. Rothballer, 115 Ill. 2d 158, 503 N.E.2d 316 (village solicitor), *cert. denied*, 482 U.S. 929 (1986); E.W. Scripps Co. v. Ball, 14 Media L. Rep. (BNA) 1693 (Ky. Ct. App. 1987) (county prosector); McHale v. Lake Charles American Press, 390 So. 2d 557 (La. Ct. App. 1980) (city attorney), *cert. denied*, 452 U.S. 951 (1981); Dineen v. Star Press, Inc., 391 A.2d 834 (Me. 1978) (prosecutor); Roche v. Hearst Corp., 53 N.Y.2d 767, 421 N.E.2d 844, 439 N.Y.S.2d 352 (1981) (city attorney); Sills v. New York Times, 8 Media L. Rep. (BNA) 1460 (N.Y. Sup. Ct. 1982) (former state attorney general); Hentell v. Knopf, 8 Media L. Rep. (BNA) 1908 (N.Y. Sup. Ct. 1982) (former district attor-

plaintiff is a judge.[45] In addition, the Minnesota Supreme Court has held reluctantly that members of a grand jury are public officials or public figures.[46]

Gertz is the leading case not simply on public figures in general but specifically on lawyers as public figures.[47] Initially, the Court rejected the argument that Gertz was a public official either because he had served on a government housing commission briefly in the past or because as an attorney attending a coroner's inquest he was an officer of the court.[48] The Court correctly recognized that the latter theory was nothing more than a play on words that would automatically subject all litigating attorneys to the actual malice standard.[49] Next, the Court rejected the contention that Gertz was a public figure for all purposes simply because he was active in civic and professional associations and had published many books and articles on legal subjects.[50] The Court pointed out that he had not attained general fame or notoriety in the community and that none of the prospective jurors in the defamation trial had heard of him.[51]

Finally, the Court turned to the question of whether Gertz was a limited

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ney); Curran v. Philadelphia Newspapers, 376 Pa. Super. 508, 546 A.2d 639 (1988) (former U.S. attorney); Frisk v. News Co., 361 Pa. Super. 536, 523 A.2d 347 (1986) (public solicitor); Sprague v. Walter, 357 Pa. Super. 570, 516 A.2d 706 (1986) (district attorney); Windsor v. Tennessean, 654 S.W.2d 680 (Tenn. Ct. App. 1983) (former assistant U.S. attorney); El Paso Times, Inc. v. Kerr, 706 S.W.2d 797 (Tex. App.—El Paso 1986, writ ref'd n.r.e.), *cert. denied*, 480 U.S. 932 (1987) (assistant U.S. attorney); Herron v. KING Broadcasting Co., 109 Wash. 2d 514, 746 P.2d 295 (1987) (prosecuting attorney); Miller v. Charleston Gazette, 9 Media L. Rep. (BNA) 2540, 2542-43 (W. Va. Cir. Ct. 1983) (nominee for U. S. attorney). *But see* Bufalino v. Associated Press, 692 F.2d 266, 273 (2d Cir. 1982) (borough solicitor is not a public official when the article does not identify him by his position but only as an attorney).

45. Harte-Hankes Communications, Inc. v. Connaughton, 109 S. Ct. 2678, 2684-85, 105 L. Ed. 2d 562, 569 (1989) (acting judge and candidate for judicial office); Jenkins v. KYW, 829 F.2d 403, 407 (3rd Cir. 1987); Ross v. News-Journal Co., 228 A.2d 531, 532 (Del. 1967); Berkos v. NBC, Inc., 161 Ill. App. 3d 476, 515 N.E.2d 668, 675 (1987); Rinaldi v. Holt, Rhinehart & Winston, Inc., 42 N.Y.2d 369, 379, 366 N.E.2d 1299, 1305, N.Y.S.2d 943, 949, *cert. denied*, 434 U.S. 969 (1977); DiLorenzo v. New York News, Inc., 78 A.D.2d 669, 432 N.Y.S.2d 483, 484 (1981); Rinaldi v. Village Voice, Inc., 47 A.D.2d 180, 365 N.Y.S.2d 199, 201, *cert. denied*, 423 U.S. 883 (1975); Deluca v. Newsday, 12 Media L. Rep. (BNA) 1525, 1526 (N.Y. Sup. Ct. 1985); Celebrezze v. Dayton Newspapers, Inc., 41 Ohio App. 3d 343, 345, 535 N.E.2d 755, 757-58 (1988); Harris v. Plain Dealer Publishing Co., 40 Ohio App. 3d 127, 128, 532 N.E.2d 192, 194 (1988); Braig v. Field Communications, 500 Pa. 430, 456 A.2d 1366, 1371-72 (1983), *cert. denied*, 466 U.S. 970 (1984); DiSalle v. P.G. Publishing Co., 375 Pa. Super. 510, 544 A.2d 1345, 1348-49 (1988), *cert. denied*, 109 S. Ct. 3216, 106 L. Ed. 2d 566 (1989). *But see* Guinn v. Texas Newspapers, Inc., 738 S.W.2d 303, 305 (Tex. App.—Houston [14th Dist.] 1987, no writ history), *cert. denied*, 109 S. Ct. 864, 102 L. Ed. 2d 988 (question of fact as to whether Justice of the Peace not identified as such is a public official).

46. Standke v. B.E. Darby & Sons, Inc., 291 Minn. 468, 480-82, 193 N.W.2d 139, 142-43 (1971), *cert. denied*, 406 U.S. 902 (1972). The court relied on the grand jury's authority to exercise governmental power and noted its reluctance due to its practical and perhaps legal inability to defend itself in the press. *Id.*; *see also* Cassady v. Marcum, 11 Media L. Rep. (BNA) 2046, 2047 (Ky. Cir. Ct. 1984) (foreman of grand jury investigating public corruption is public figure). *But cf.*, Houston Chronicle Publishing Co. v. Stewart, 668 S.W.2d 727, 729 (Tex. App. —Houston [1st Dist.] 1983, writ dism'd) (court reporter is not a public figure).

47. 418 U.S. at 351-52.

48. *Id.* at 351.

49. *Id.*

50. *Id.* at 351-52.

51. *Id.* The Court is clearly hesitant to find all purpose public figures and would seem to

purpose public figure and concluded that he was not.[52] It emphasized that he played only a limited role in the coroner's investigation in his representation of a private client, took no part in the criminal prosecution of the police officer and discussed neither the criminal nor civil litigation with the press.[53] Consequently, he "did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome."[54]

The Court apparently conceded that in fact a public controversy surrounding the shooting of the boy by the police officer did exist but that Gertz, a private attorney, could become a public figure only by attempting to influence its outcome in the press rather than through the legal process.[55] Perhaps the Court believed that it should not hold an attorney to have assumed the risk of potentially defamatory press coverage simply by doing his job as an attorney in a controversial case as opposed to trying his case in the media. Although potentially defamatory coverage will not necessarily be less likely to follow the former than the latter, the Court seemed to say that as a matter of fairness the attorney who has not sought out press coverage should not have to assume such a risk. In his concurring opinion, Justice Burger warned that the Court would be making a mistake by applying the public figure doctrine in such a manner as to undermine the important public policy of encouraging lawyers to undertake the representation of clients in unpopular and controversial cases.[56] He is certainly correct that this is an important public policy that courts should not discourage, but one may question whether simply increasing the burden that the attorney would have to bear in a potential defamation case would have any significant deterrent effect on lawyers contemplating taking on such cases, at least as compared to the impact of loss of income or adverse but nondefamatory publicity.

Some significant lower court cases have applied the *Gertz* analytical framework to attorney-plaintiffs in defamation litigation. In *Peisner v. Detroit Free Press Inc.*, the Michigan Court of Appeals held that a prominent attorney appointed to appeal the murder conviction of an indigent defendant was not a public figure.[57] In *Steere v. Cupp*[58] the Kansas Supreme Court reached the unusual conclusion that the plaintiff, an attorney who a court

require that a plaintiff must have reached celebrity status at least in the community in which the publication was circulated. *Id.*

52. *Id.* at 352.

53. *Id.*

54. *Id.* Justice Brennan in dissent conceded that Gertz was not a public figure but argued that the actual malice standard should apply because the shooting and the ensuing litigation constituted a matter of public interest under *Rosenbloom*. *Id.* at 361-69.

55. *Id.* at 352.

56. *Id.* at 355.

57. 82 Mich. App. 153, 266 N.W.2d 693, 696 (1978) (appointed counsel in murder trial is private figure); *See* McCall v. Courier-Journal & Louisville Times Co., 623 S.W.2d 882, 886 (Ky. 1981) (apparently assuming criminal defense attorney in narcotics prosecution is private figure); Polakoff v. Harcourt Brace, 3 Media L. Rep. (BNA) 2516, 2517 (N.Y. Sup. Ct. 1978) (attorney who represented major organized crime figure forty years earlier was not public figure).

58. 226 Kan. 566, 602 P.2d 1267 (1979).

censured for conduct that occurred in his defense of a murder suspect, was not a limited purpose public figure for purposes of the trial but was in fact an all purpose public figure in the small Kansas community.[59] As to the public controversy surrounding the murder trial, the Court felt bound by *Gertz* and its analysis even though it noted that by responding to press questioning, he was probably more visible than the plaintiff in *Gertz*.[60] The Court's analysis does seem consistent with *Gertz* on this point in that Steere apparently made no attempt to try his case in the press. Relying on Steere's long history of public service and social prominence in the Kansas county, the court concluded that he was a public figure for all purposes even while acknowledging that it understood *Gertz* to counsel that such a characterization should be applied sparingly.[61] This analysis seems to be based on the conclusion that Steere was evidently a big fish in a small pond. It is doubtful that the same degree of civic and social prominence would lead to the conclusion that a similar attorney was an all purpose public figure in Chicago or New York. Even so, it seems likely that on these facts the Supreme Court might well have agreed with any of the three dissenting opinions that vigorously disputed the majority's conclusion that Steere was an all purpose public figure.[62] As Justice Miller put it "[u]nder this rationale, hundreds, if not thousands of Kansans are public figures for all purposes."[63]

While *Gertz* indicates that courts will generally not consider attorneys engaged in litigation to be public figures, one certainly should not read the case to suggest that attorneys can never be public figures. In the pre-*Gertz* case of *Belli v. Curtis Publishing Co.*,[64] the court readily accepted the stipulation by well-known attorney Melvin Belli that he was a public figure in the context of his defense of Jack Ruby, in one of the more celebrated criminal cases of

59. 602 P.2d at 1273.

60. *Id.* at 1273-74.

61. *Id.* A number of courts have held that an attorney is a public figure as a result of activities only tangentially related to the practice of law. *See* Joseph v. Xerox Corp., 594 F. Supp. 330, 332-34 (D.D.C. 1984) (attorney who wrote book on self-representation is public figure for purposes of controversy on that subject); Della-Donna v. Gore Newspapers Co., 489 So. 2d 72, 77 (Fla. Dist. Ct. App.), *cert. denied.*, 479 U.S. 1088 (1986) (attorney was limited purpose public figure due to his role as trustee in dispute over gift to university); DeCarvaho v. daSilva, 414 A.2d 807, 813 (R.I. 1980) (attorney is "giant" in Portuguese community apparently because of civic and political activities as well as due to law practice); Lane v. New York Times, 8 Media L. Rep. (BNA) 1623, 1625 (W.D. Tenn. 1982) (attorney who published several controversial books is public figure); *see also* Bufalino v. Detroit Magazine, 14 Media L. Rep. Media L. Rep. (BNA) 1597, 1598 (Mich. Ct. App. 1987) (plaintiff who alleged he had reputation as labor leader, fighter for equality, poet, lecturer and lawyer basically conceded he was public figure).

62. 602 P.2d at 1274 (Holmes, J., concurring in part, dissenting in part); *id.* at 1275 (Miller, J., dissenting); *id.* (Schroeder, C.J., dissenting).

63. *Id.* at 1275.

64. 25 Cal. App. 3d 384, 102 Cal. Rptr. 122 (1972). In the more recent case of Belli v. Berryhill, 11 Media L. Rep. (BNA) 22 (Cal. Ct. App. 1984) the court took notice of this finding and held that Belli was also a public figure for the purposes of that case based on his assertion in his pleadings that he was "an attorney, public figure, and the most prolific legal writer of his time" as well as on the fact that after filing a lawsuit against 200 financial institutions, he called a press conference to announce that it was "the largest such suit ever filed." *Id.* at 24.

the century.[65] Belli would probably qualify as a limited or all purpose public figure under *Gertz* analysis as well.

In the more recent case of *Ratner v. Young*,[66] which involved defamatory statements pertaining to a criminal trial arising out of a racially motivated mass murder on a golf course, the federal district court for the Virgin Islands applied the *Gertz* analysis and held that criminal defense attorney William Kunstler was an all purpose public figure.[67] With respect to Kunstler, the court noted that he had been one of the leading lawyers for radical causes in the country over the past two decades and had commanded great publicity through his cases and trial tactics.[68] The court readily found Ratner to be a limited purpose public figure with respect to the trial[69] in that along with Kunstler, she showed up at the trial uninvited and "took over the defense of one of the defendants, . . . attempted to try the issues in the news media as well as the courtroom" and pursued "scorched earth [tactics] all the way" including outbursts of shouting in the courtroom by the lawyers.[70] The court's analysis seems wholly consistent with *Gertz*; indeed on the limited public figure issue this case would appear to be a textbook example of how a trial lawyer could move beyond the more traditional role of courtroom advocate and attempt to influence the outcome of a public controversy surrounding a trial through the news media.

Cases involving attorneys engaged in areas of practice other than litigation have also reached divergent results. Apparently, an attorney does not become a public figure simply by incurring professional disciplinary sanctions. In *Dodrill v. Arkansas Democrat Co.*[71] the Supreme Court of Arkansas held that an attorney who was suspended from practice for a year and required to take the bar examination to obtain reinstatement was not a public figure.[72] Relying on *Gertz* and *Firestone*, the court noted that the plaintiff had made no attempt to influence any public controversy.[73] In *Littlefield v. Fort Dodge*

65. 23 Cal. App. at 387, 102 Cal. Rptr. at 124-25.

66. 465 F. Supp. 386 (D.C.V.I. 1979).

67. *Id.* at 399.

68. *Id.*

69. *Id.* at 397, 399; *see also* Hayes v. Booth, Inc., 97 Mich. App. 758, 295 N.W.2d 858, 865-66 (1980) (plaintiff defense attorney in murder case conceded he was public figure; however, the court noted that it would have found him to be limited purpose public figure for purposes of the public controversy surrounding the trial in view of his frequent outbursts at the judge as well as his affirmative steps to attract media attention); *cf.* Marcone v. Penthouse Int'l, 754 F.2d 1072, 1084-87 (2d Cir.), *cert. denied*, 474 U.S. 864 (1985) (plaintiff probably would not have been public figure based on his reputation and expertise as drug trafficking defense attorney alone but became public figure as result of his own indictment for drug trafficking as well as his association with motorcycle gang involved in drug trafficking); Gilberg v. Goffi, 21 A.D.2d 517, 251 N.Y.S.2d 23, 31 (1964) (mayor's law firm accused of engaging in conflict of interest is public figure).

70. 465 F. Supp. at 390-91.

71. 265 Ark. 628, 590 S.W.2d 840 (1979); *see also* Marchiondo v. Tribune Co., 98 N.M. 282, 648 P.2d 321 (1982) (prominent practicing attorney with political connections is not public figure).

72. 590 S.W.2d at 844.

73. *Id.* Ryder v. Time, Inc., 557 F.2d 824 (D.D.C. 1976), another defamation case involving a question of attorney discipline, presented but did not clearly resolve the interesting issue of who may be a public figure when the press defamatorily misidentifies the plaintiff as some-

Messenger[74] the court of appeals for the Eighth Circuit reached the same result on fairly similar facts.[75] *Wolston* supports these results since it holds that conviction for a criminal offense alone does not convert a person into a public figure.[76]

In *Bandelin v. Pietsch*,[77] however, the Idaho Supreme Court found that an attorney charged with contempt with regard to his actions as guardian of an estate was a public figure.[78] Although the court placed some reliance on his former notoriety as a state legislator, it essentially concluded that he was a limited purpose public figure with respect to the guardianship proceeding as a result of the judge's criticism of him despite the fact that he did not voluntarily pursue public acclaim.[79] While perhaps someone like Bandelin should be considered a public figure as a matter of policy, the court's holding and analysis seems to be inconsistent with the *Gertz* Court's emphasis on a voluntary attempt to influence a public controversy through the media, especially in a legal context.

C. *Litigants as Public Figures*

Just as *Gertz* addressed the question of whether a court should consider an attorney involved in litigation to be a public figure, *Time, Inc. v. Firestone*[80] considered whether a court should characterize a litigant, in this case the plaintiff in a highly publicized divorce trial, as a public figure.[81] *Firestone* involved the divorce trial of a socially prominent and extremely wealthy Palm Beach couple. Apparently, some of the testimony was quite titillating. The Court found that Mary Alice Firestone, the plaintiff in both the divorce and the defamation proceedings, was not a public figure.[82] Relying on *Gertz*, it first observed that she had "not assume[d] any role of especial prominence

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one else. In *Ryder* the bar had disciplined an attorney named Richard R. Ryder. Defendant Time magazine published an essay discussing the case identifying the lawyer without a middle initial. Another Virginia attorney named Richard J. Ryder sued claiming that the article defamed him. *Id.* at 824-25. The court found the plaintiff to be a private figure. *Id.* at 826. This approach would seem to be correct under *Gertz*, which emphasizes the degree to which a particular plaintiff needs and deserves protection. Of course the *Gertz* Court was not focusing on the misidentification problem. The press would surely argue that in a case like *Ryder*, it was not even aware that the actual plaintiff existed. In determining whether the press is writing about a private figure and probably subject to a stricter standard of care, the court can only focus on the subject of the article.

74. 614 F.2d 581 (8th Cir.), *cert.denied*, 445 U.S. 945 (1980).

75. *Id.* at 584. The court relied heavily on Time, Inc. v. Firestone, 424 U.S. 448 (1976), and noted that the attorney plaintiff's voluntary practice of law in violation of his probation did not transform him into a public figure since he did not appear to be attempting to influence a public controversy. *Id.*

76. 443 U.S. 157, 168 (1979); *See infra* notes 111-129 and accompanying text.

77. 98 Idaho 337, 563 P.2d 395, *cert. denied*, 434 U.S. 891 (1977).

78. 563 P.2d at 398.

79. *Id*; *see also* Della-Donna v. Gore Newspapers Co., 489 So. 2d 72, 77 (Fla. Dist. Ct. App.), *cert. denied*, 479 U.S. 1088 (1986) (attorney who was criticized as trustee of large bequest to private university, and who filed suit on behalf of estate of donor to revoke the gift was limited purpose public figure).

80. 424 U.S. 448 (1976).

81. *Id.* at 452-57.

82. *Id.* at 453-55.

in the affairs of society, other than perhaps Palm Beach society. . . ."[83] In other words, she was not a public figure for all purposes. The Court then concluded that she was not a limited purpose public figure either because the "[d]issolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public."[84] The Court went on to note that in any event, she would not qualify as a limited purpose public figure since she had not voluntarily chosen "to publicize issues as to the propriety of her married life [because] [s]he was compelled to go to court by the State in order to obtain legal release from the bonds of matrimony."[85] The fact that she had held a few press conferences did not transform her into a limited purpose public figure since a court should not assume that they did or were intended to have any impact on the resolution of the judicial proceedings.[86] This conclusion may well follow on the record before the Court. One could surely imagine a case, however, in which a litigant was in fact attempting to influence the outcome of the litigation itself or at least a public controversy involved in the litigation through press conferences or other communication with the media. Such an attempt would probably be a decisive factor leading to a conclusion that the plaintiff was a public figure.

Like *Gertz*, *Firestone* clearly embraces the policy that even though they may have initiated legal proceedings, people should not forfeit the protection of their reputation simply because they have become involved in those legal proceedings.[87] The Court obviously does not want to adopt a rule that might discourage people from asserting their legal rights through the judicial process, although it is certainly open to question whether any person would take account of this consideration in deciding whether to file a lawsuit.

It is not entirely clear how broadly one should read *Firestone* with respect to the voluntary nature of the plaintiff's conduct in initiating litigation. In concluding that Ms. Firestone had little meaningful choice other than to go to court in order to obtain a divorce, the Court quoted from *Boddie v. Connecticut*[88] where it had reached the same conclusion in a case invalidating the filing fees for indigents in divorce cases.[89] In subsequent filing fee cases the Court has distinguished *Boddie*, emphasizing that it turned on the constitutional significance of the marital relationship and the state's monopoly over its legal dissolution.[90] The Court could distinguish *Firestone* on the same grounds in a subsequent case, although it is quite likely that it would

83. *Id.* at 453.

84. *Id.* at 454. This is an important point, and it is considered in more detail below. *See infra* notes 137-155 and accompanying text.

85. 424 U.S. at 454.

86. *Id.* at 454 n.3.

87. *Id.* at 454.

88. 401 U.S. 371, 376-77 (1971).

89. *Id.*

90. *See* Ortwein v. Schwab, 410 U.S. 656 (1973) (distinguishing judicial review of administrative denials of welfare benefits); United States v. Kras, 409 U.S. 434, 443-46 (1973) (distinguishing bankruptcy proceeding).

not because it seems intent on construing the public figure doctrine narrowly.

Since *Firestone* few cases have raised the question of whether the plaintiff in a legal proceeding is a public figure.[91] In *Tomson v. Stephan*[92] a federal district court quite correctly concluded that a woman who had filed and subsequently settled a sexual harassment suit against the State Attorney General, who was then a candidate for governor, was not a public figure.[93] In the leading case of *Street v. National Broadcasting Co.*,[94] the Court of Appeals for the Sixth Circuit held that one of the prosecuting victims of an alleged rape in the famous Scottsboro case of the 1930s was and still remained a public figure some thirty years later.[95] Given that the Scottsboro cases created a nationwide debate on the fairness of criminal procedure in the South to black defendants and given that they ultimately resulted in the landmark constitutional decision on the right to counsel,[96] the court correctly concluded that the Scottsboro trial involved a public controversy.[97] It pointed out both that the plaintiff played a particularly prominent role in the controversy as one of the two victims and the major witness and that she had had effective access to the channels of communication.[98] Still, the court recognized that the question of whether she had voluntarily thrust herself into the controversy under the holdings of *Gertz* and *Firestone* was troublesome.[99] Citing *Firestone*, the court acknowledged that "[i]t cannot be said that a rape victim 'voluntarily' injects herself into a criminal prosecution for rape".[100] The court went on to conclude that this would only be the case if

91. At least three cases have held that a person does not become a public figure simply by being a witness in a lawsuit. *See* Nelson v. Associated Press, Inc., 667 F. Supp. 1468, 1472-73 (S.D. Fla. 1987) (witness who testified under subpoena in highly publicized divorce trial is not public figure); Dresbach v. Doubleday, 518 F. Supp. 1285, 1294 (D.D.C. 1981) (boy did not become public figure by testifying in a trial where his brother was charged with murdering their parents); Wilhoit v. WCSC, Inc., 293 S.C. 34, 358 S.E.2d 397, 401 (Ct. App. 1987) (plaintiff did not become character witness in embezzlement trial). These cases would seem to be clearly controlled by *Firestone*, if not by *Wolston*. In Lemmer v. Arkansas Gazette, 620 F. Supp. 1332, 1334-35 (E.D. Ark. 1985), the court found that a person who testified at the trial of members of Vietnam Veterans against the War was a public figure with respect to the public controversy surrounding that organization. The court relied on the plaintiff's antiwar activities and F.B.I. informant status. In Friedgood v. Peters Publishing, 13 Media L. Rep. (BNA) 1479, 1480 (Fla. Cir. Ct. 1986), the court found that the plaintiff was a public figure with respect to the public controversy concerning the murder of her mother and conviction of her father where she talked with the police, talked with attorneys, concealed evidence, and ultimately testified in court against her father. *Id.* at 1489. Although the court relied on several factors beyond her trial testimony, none of them seem qualitatively different from the type of behavior that was insufficient in *Gertz* and *Firestone*. Accordingly, the case seems inconsistent with Supreme Court precedent.

92. 699 F. Supp. 860 (D. Kan. 1988).

93. *Id.* at 867. The plaintiff's participation in a press conference at the defendant's request and for the defendant's benefit did not transform her into a public figure.

94. 645 F.2d 1227 (6th Cir.), *cert. dismissed*, 454 U.S. 1095 (1981).

95. *Id.* at 1233-36.

96. Powell v. Alabama, 287 U.S. 45 (1942).

97. 645 F.2d at 1234.

98. *Id.*

99. *Id.*

100. *Id.*; *see* Charlottesville Newspapers, Inc. v. Matthews, 229 Va. 1, 325 S.E.2d 713, 734-

she had in fact been a rape victim.[101] If she had fabricated the charges as the defense and others had argued, then in fact she would have voluntarily injected herself into a public controversy.[102] Since the court believed that the issues of public figure status and truth were so closely linked and since it believed that the press was entitled to guidance on the public figure issue prior to the resolution of the issue of truth in the defamation proceeding, it simply concluded that one must disregard the voluntary injection element in such a case.[103]

Considering that this conundrum might not be so unusual in defamation cases involving the reporting of legal proceedings, it is hardly clear that the Supreme Court would agree with this analysis. The Sixth Circuit was not required to stand fully behind this theory, however, since it went on to find that the plaintiff had voluntarily thrust herself into the controversy beyond her role in the trial itself by giving press interviews and "aggressively promot[ing] her version of the case outside of her actual courtroom testimony."[104] This may be enough to reconcile the decision with *Firestone*. In *Street*, unlike *Firestone*, the outcome of the trial itself rested on a larger public controversy, that is, whether justice was done or even whether justice could possibly be done in the 1930s South in a case like Scottsboro.[105] Presumably the plaintiff tried to influence this larger controversy through her public comments. It might have been even easier for the court to reconcile its decision with *Gertz* and *Firestone* by concluding that, even assuming she had been raped, the case was in fact one of those rare instances of the involuntary public figure. Giving her every benefit of the doubt, perhaps through no fault of her own, she was simply caught up in one of the cases of the century. That being so, the public interest in information would simply limit the degree of protection of reputation to which she might otherwise have been entitled.

The court also concluded that she remained a public figure some thirty years later, because historians are also in need of first amendment protection against defamation, and the public controversy over the Scottsboro trial remained alive.[106] Neither the principle nor its application seems particularly troublesome in view of the notoriety and continuing interest in the Scottsboro case and the evolution of southern racial justice. At some point, however, its application to a case of lesser magnitude could present problems.

In *Camer v. Seattle Post-Intelligencer*[107] the Washington Court of Ap-

35 (1985) (court assumed without discussion that rape victim was private figure with respect to article reporting rape trial).

101. 645 F.2d at 1234.

102. *Id.*

103. *Id.*

104. *Id.* at 1235.

105. *Id.* at 1235-36.

106. *Id.* at 1236.

107. 45 Wash. App. 29, 723 P.2d 1195, 1203 (1986), *cert. denied*, 482 U.S. 916 (1987); *see also* Dileo v. Koltnow, 613 P.2d 318, 322 (Colo. 1980) (discharged police officer who filed several lawsuits to regain his job became a public figure by calling the attention of the media to his lawsuit).

peals held that two women, each of whom had filed approximately ten public interest lawsuits and had tried to influence the public on the issues involved through letters to the editor, press releases, and participation at public meetings, were limited purpose public figures with respect to a discussion of overcrowded court dockets and nuisance suits.[108] The court noted that it could draw no clear line between the subject matter of the plaintiffs lawsuits and the abuse of the litigation process.[109] The case seems easily consistent with *Gertz* and *Firestone*. Indeed, the plaintiffs in *Camer* would appear to be textbook examples of *Gertz* conception of the limited purpose public figure using all means available to attempt to influence the outcome of public controversies.

In *Wolston v. Reader's Digest Association*, as pointed out above,[110] the Court held that a man who had failed to appear before a Grand Jury investigating Soviet espionage and who subsequently pleaded guilty to a charge of criminal contempt and received a suspended one year sentence was not a public figure.[111] At the outset, the Court noted that no contention that the plaintiff was an all purpose public figure arose.[112] Assuming that a public controversy regarding the propriety of law enforcement methods for dealing with Soviet espionage existed, the Court concluded that rather than voluntarily injecting himself into it, "petitioner was dragged unwillingly into the controversy."[113] Given that the plaintiff did not discuss the matter with the press and only took such actions as were necessary to defend himself, the mere fact that a court cited him for criminal contempt did not transform him into a public figure.[114] The Court emphasized that this was not a case in which an individual voluntarily incurred a citation of contempt in order to make a political statement.[115] Rather, the plaintiff simply failed to answer the subpoena due to poor health.[116] Finally, the Court decisively rejected the contention "that any person who engages in criminal conduct automatically becomes a public figure for purposes of comment on a limited range of issues relating to his conviction."[117]

Wolston contains many potentially limiting facts that could cause it to be read quite narrowly. Arguably, a person who has committed or been charged with a crime, or who has become involved in circumstances that the public has the right to know about in great detail has voluntarily taken action that should result in a reduction of his protection of reputation. Most courts have followed, with little detailed analysis, the broad implications of *Wolston*, however, and concluded that a criminal defendant or a person who

108. 723 P.2d at 1195-96.
109. *Id.*
110. *See supra* notes 41-43 and accompanying text.
111. 443 U.S. 157, 168 (1979).
112. *Id.* at 165.
113. *Id.* at 166.
114. *Id.* at 167.
115. *Id.* at 168.
116. *Id.*
117. *Id.*

has been indicted or arrested is not a public figure.[118]

Exceptions, however, exist. In *Ruebke v. Globe Communications* the Kansas Supreme Court held that an individual being tried (and subsequently convicted) for the brutal murder of two small children and their babysitter was a limited purpose public figure under the *Wolston* analysis with respect to the controversy surrounding the crime.[119] The Kansas court read *Wolston* to stand for the proposition that a criminal defendant does not automatically become a public figure but certainly can become one if he otherwise satisfies the requirements of *Gertz*.[120] This analysis is doubtlessly correct. In applying the *Gertz* criteria to the facts, the court emphasized the especially heinous nature of the crime, noting that it was a matter of great public concern.[121] It concluded that the combination of the intense media coverage that ultimately focused on the plaintiff, the plaintiff's voluntary act of turning himself in, and his arrest and indictment for the murders combined to render him a public figure.[122] Given the nature of the crimes and the degree of publicity, the court was probably correct in concluding that the plaintiff was an involuntary public figure for purposes of the controversy,[123] although the case could be limited to is facts. Similarly, in *Scottsdale Publishing v.*

118. Law Firm of Daniel Foster v. Turner Broadcasting Sys., 844 F.2d 955, 959 (2d Cir. 1988) (law firm located at address where F.B.I. conducted search for terrorist activity was private figure involved in matter of public concern under New York law); Mills v. Kingsport Times-News, 475 F. Supp. 1005, 1009 (D. W. Va. 1979) (defendant in murder trial was not public figure); Dalitz v. Penthouse, 168 Cal. App. 3d 468, 214 Cal. Rptr. 254 (1985) (plaintiff was not public figure on basis of fifteen-year old securities law conviction); Jennings v. Telegram-Tribune, 164 Cal. App. 3d 119, 210 Cal. Rptr. 485 (1985) (person who pleaded guilty to tax charge was not public figure); Western Broadcasting v. Wright, 182 Ga. App. 359, 356 S.E.2d 53 (1987) (attorney who was indicted and acquitted on charge of aiding client's tax evasion was not public figure); Newell v. Field Enters., 91 Ill. App. 2d 735, 415 N.E.2d 434, 449 (1980) (defendant in civil wrongful death action was not public figure); Jones v. Taibbi, 400 Mass. 786, 512 N.E.2d 260 (1987) (suspect in highly publicized serial murder investigation was private figure); Rouch v. Enquirer, 407 Mich. 157, 398 N.W.2d 245 (1986) (assuming man arrested for rape of babysitter was private figure); Jacobsen v. Rochester Communications, 410 N.W.2d 830, 835 (Minn. 1987) (defendant in arson case who gave interview to press on day appellate court reversed his conviction was private figure); Grobe v. Three Herald Village, 69 A.D.2d 175, 420 N.Y.S.2d 3 (1979) (man who filed plea similar to guilty plea to charge of criminal harassment was not public figure; however, disposition of the charges was matter of public concern); Burgess v. Reformer Publications, 146 Vt. 612, 508 A.2d 1359 (1986) (plaintiff subpoenaed before grand jury with respect to embezzlement investigation was private figure); LaMon v. Butler, 44 Wash. App. 654, 722 P.2d 1373 (1986), *aff'd*, 110 Wash. 2d 216, 751 P.2d 842 (1988) (person convicted of assault was not public figure). In Orr v. Argus-Press Co., 586 F.2d 1108, 1116 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979), the court held that an attorney indicted for fraud was a public figure. The court, however, relied primarily on his attempts to publicly promote his failed shopping center rather than on his indictment. This decision seems quite consistent with *Gertz* and *Firestone*. Likewise, in Logan v. District of Columbia, 447 F. Supp. 1328 (D.D.C. 1978), the court held that a criminal defendant was a public figure because he had gotten caught in a police sting operation after claiming to be a murderer and volunteering to be a hitman. *Id.* at 1331.

119. 241 Kan. 595, 738 P.2d 1246, 1252 (1987).

120. 738 P.2d at 1252.

121. *Id.*

122. *Id.*

123. *Id.*; *see also* Donaldson v. Washington Post Co., 3 Media L. Rep. (BNA) 1436, 1440 (D.C. Super. Ct. 1977) (criminal defendant charged with exhorting other defendant to kill youth who was helping bus driver collect fares in highly publicized "Good Samaritan" murder trial is public figure); *cf.* Yancey v. Hamilton, 17 Media L. Rep. (BNA) 1012, 1016 (Ky. 1989)

Superior Court,[124] the Arizona Court of Appeals held that a notorious criminal who testified about a celebrated murder under a grant of immunity was a public figure.[125] In distinguishing *Wolston*[126] the court pointed out that the plaintiff was not a minor figure dragged before the grand jury but rather was a major organized crime figure who chose to testify in detail about a matter of the greatest public concern.[127] Finally, the court noted that the plaintiff was not simply an ordinary criminal but a man who admitted to having committed over one hundred serious crimes.[128] As with *Ruebke*, the court's conclusion seems clearly and correctly distinguishable from *Wolston*.

If a person does not become a public figure simply because a court has convicted or tried him, or police have charged or arrested him, then it should follow that one does not assume public figure status simply by being the focus of a criminal investigation.[129] In *Trans World Accounts v. Associated Press*,[130] however, a federal district court held that a company that was the subject of a Federal Trade Commission investigation and press release announcing the intention to file a complaint alleging unfair trade practices against the plaintiff was a public figure.[131] The court conceded that the company was not an all purpose public figure, nor had it voluntarily injected itself into a public controversy.[132] Rather, the court concluded that the proceedings had drawn the company into a public controversy and hence the company became a public figure by engaging in the underlying business practices that the Federal Trade Commission had decided to investigate.[133] In other words, the court seemed to hold that the plaintiff had become an involuntary public figure. The court emphasized the fact that Federal Trade Commission deliberately attempted to use adverse publicity to coerce businesses into settling.[134] The court's conclusions seem quite inconsistent with both the letter and spirit of *Gertz* and *Firestone* despite its attempts to read these cases narrowly.[135] The decision seems even more inconsistent with

(question of fact as to whether plaintiff became limited purpose public figure by confessing to murder).

124. 159 Ariz. 72, 764 P.2d 1131 (Ct. App. 1988).

125. 764 P.2d at 1138-40.

126. *Id.*

127. *Id.*

128. *Id.*

129. *See* KARK-TV v. Simon, 280 Ark. 228, 656 S.W.2d 702 (1983) (person detained by police for investigation of robbery is not public figure); Melon v. Capital City Press, 407 So. 2d 85 (La. Ct. App. 1982) (person arrested on drug charges is not public figure); Port Packett Corp. v. Lewis, 229 Va. 1, 325 S.E.2d 713, 735, 740 (1985) (assuming parents investigated for death of child due to abuse are private figures); Burgess v. Reformer Publishing Co., 146 Vt. 612, 508 A.2d 1359 (1986) (treasurer of organization involved in embezzlement investigation is not public figure simply because grand jury summoned him to testify).

130. 425 F. Supp. 814 (C.D. Cal. 1977).

131. *Id.* at 819-21.

132. *Id.* at 820.

133. *Id.* at 820-21.

134. *Id.* at 820.

135. To distinguish *Gertz* and *Firestone*, the court contrasted the private nature of the proceedings in those cases with the public nature of the proceedings and the government entity involved in the case before the court. This rationale seems more akin to public interest focus of *Rosenbloom v. Metromedia*, 403 U.S. 29 (1970), than to the plaintiff's voluntary conduct em-

Wolston, which the Supreme Court decided the following year. Consequently, *Trans World* is weak precedent.

D. *Legal Affairs as Matters of Public Controversy*

Prior to *Gertz*, in *Rosenbloom v. Metromedia*,[136] Justice Brennan's, plurality opinion took the position that the actual malice standard of fault should apply whenever the defamatory statements in question dealt with a matter of public interest, regardless of whether the plaintiff was a public figure.[137] In that case the plaintiff was a distributor of magazines who was caught up in a raid on a newsstand for obscene literature.[138] The plurality argued that under the First Amendment the public had an interest in knowing about issues of significance whether or not the participants qualified as public figures.[139] The matter of public interest approach of *Rosenbloom* never commanded a majority of the Court, but lower courts followed and applied it until *Gertz* was decided four years later.[140] *Gertz* decisively rejected this approach under the rationale that it would provide too little protection for reputation and that it would be too difficult for judges to decide on an ad hoc basis what is and is not a matter of public interest.[141] At the same time however, the Court in *Gertz* declared that a person becomes a limited purpose public figure by voluntarily injecting himself into a public controversy.[142] *Firestone* emphasized the significance of the public controversy concept when it concluded that the plaintiff's highly publicized divorce trial was not "the sort of 'public controversy' referred to in *Gertz*."[143] In his dissent, Justice Marshall charged that through the public controversy requirement the Court was reviving the type of *Rosenbloom* public interest analysis that it had purportedly rejected in *Gertz*.[144]

Justice Marshall is certainly correct in noting that both the public controversy and matter of public interest analyses focus on subject matter rather than participants, and that both will necessarily require judicial definition by way of inclusion and exclusion. But public controversy is clearly intended to be a far narrower concept than matter of public interest. Furthermore, public controversy plays a much more limited role in the analysis. Under the

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phasis of *Gertz* and *Firestone*. While *Gertz* did suggest that it would be theoretically possible to become a public figure involuntarily, it left no doubt that that would be a rarity. 418 U.S. at 325-28. Under the *Transworld* court's analysis, anyone charged with a public offense by a governmental agency presumably forfeits the protection of private figure status.

136. 403 U.S. 29 (1970).

137. *Id.* at 43-44.

138. *Id.* at 32-35.

139. *Id.* at 40-45.

140. *See* Gertz, 418 U.S. at 377 n.10 (providing an extensive list of cases applying the *Rosenbloom* public interest test).

141. *Id.* at 345-46. For the argument that the court should explicitly focus on content by requiring plaintiffs to meet the actual malice standard when the statements in issue relate to matters of self-government as well as when the plaintiff is a public figure or a public official, see Franklin, *Constitutional Libel Law: The Role of Content*, 34 UCLA L. REV. 1657 (1987).

142. 418 U.S. at 345.

143. Time, Inc. v. Firestone, 424 U.S. 448, 487 (1976).

144. *Id.* at 484, 487-88.

Rosenbloom plurality approach, matter of public interest is the determinative factor with respect to the standard of fault.[145] If the issue is a matter of public interest, the actual malice standard applies. Public controversy, however, is only a part of the method for determining whether a person is a limited purpose public figure. Finally, the courts seem intent on applying the concept of public controversy in a literal manner. Apparently there must be an actual controversy virtually in the form of a debate.[146] It is not enough that it is simply a subject of some interest. Moreover, it must be a debate in which the public, as opposed to the private parties in a lawsuit, is participating.[147]

The difference between the two concepts is clearly illustrated by cases involving legal proceedings. As noted above, *Firestone* held that the plaintiff's highly publicized divorce was not a public controversy.[148] Other cases have followed that lead. In *Levine v. CMP, Publications, Inc.*, for instance, the court of appeals for the fifth circuit held that a corporate unfair competition lawsuit did not present a public controversy.[149] *Firestone* does not suggest that litigation can never involve a public controversy. As the court in *Ratner v. Young* held, for instance, a mass murder trial with racial and political overtones that arose out of an incident that had a "devastating effect on the economy of the [Virgin] Islands" quite clearly involved a public controversy.[150] The public debate, however, must precede and transcend the litigation itself.

Since *Gertz*, a few jurisdictions have adopted a matter of public interest approach for determining either when to apply the actual malice standard[151]

145. 403 U.S. at 43-44.

146. *See* Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 166 n.8 (1978); Time, Inc. v. Firestone, 424 U.S. 448, 454-55 (1976).

147. *Id.*; Waldman v. Fairchild Publications, 627 F.2d 1287, 1296 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980). In a different context the Court held that a report by a credit agency concerning a private business was not a matter of public concern, and therefore, a jury could award presumed and punitive damages without a showing of actual malice. Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985). To what extent the decision turned on the means of communication and the limited nature of the intended audience as opposed to the nature of the subject matter itself is not entirely clear.

148. 424 U.S. at 454-55.

149. 738 F.2d 660, 672 (5th Cir. 1984); *see also* Davis v. Keystone Printing, 111 Ill. App. 3d 427, 444 N.E.2d 253 (1982) (charges of tax fraud and encouraging violations of federal law were not public controversies).

150. 465 F. Supp. 386, 400 (D.V.I. 1978). Likewise, in Street v. National Broadcasting Co., 645 F.2d 1229 (6th Cir.), *cert. dismissed*, 454 U.S. 1095 (1981), the court had no difficulty concluding that the Scottsboro trial, one of the most infamous cases in American legal history, was a public controversy considering that it gave rise to "a major public debate over the ability of our courts to render even-handed justice." *Id.* at 1234. *See also* Joseph v. Xerox Corp., 594 F. Supp. 330 (D.D.C. 1984) (dispute over whether members of the public can adequately represent themselves before courts and administrative agencies is public controversy); Della-Donna v. Gore Newspapers, 489 So. 2d 72 (Fla. Dist. Ct. App. 1986), *cert. denied*, 479 U.S. 1088 (1987) (dispute over a fifteen million dollar gift to college is public controversy); Bandelin v. Pietsch, 98 Idaho 337, 563 P.2d 395, 398, *cert. denied*, 434 U.S. 891 (1977) (dispute over guardianship is public controversy).

151. *See, e.g.*, Diversified Management v. Denver Post, 653 P.2d 1103 (Colo. 1982) (applying objective version of reckless disregard standard to matters of public interest); Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc., 162 Ind. App. 671, 321 N.E.2d 580, 585-86 (1974) (reckless disregard standard applies to matter of public concern); Sisler v.

or at least when to apply a standard such as New York's "gross irresponsibility" standard[152] that is more rigorous than negligence. Courts applying such a standard find consistently that legal proceedings, especially criminal charges and proceedings, are matters of public interest.[153] As a practical matter, the courts seem to take the position that virtually anything that is either interesting to the public or at least anything which should be of legitimate interest to the public is covered.[154] Since courts and investigative agencies are part of the government applying or enforcing the law, it is easy to conclude that the concerns of the courts and the police are necessarily the concerns of the public at large. Many such matters would hardly qualify as public controversies under *Gertz* and *Firestone* since no preexisting interest, much less debate on the issues at hand would exist. Under *Gertz* and *Firestone*, the Court construed the concept of the public controversy narrowly in cases involving press coverage of legal proceedings. While this may arguably

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Gannett Co., Inc., 104 N.J. 256, 516 A.2d 1083, 1095 (1986) (reckless disregard standard applied to private person engaged in conduct he could reasonably expect implicates legitimate public interest).

152. Chapadeau v. Utica Observer Dispatch, 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975) (applying "gross irresponsibility" standard to matters "arguably within the sphere of legitimate public concern").

153. *See, e.g.*, Orr v. Argus-Press Co., 586 F.2d 1108, 1113 (6th Cir. 1978) (indictment of attorney for fraud regarding collapse of shopping center is matter of public interest), *cert. denied*, 440 U.S. 960 (1979); Chang v. Michiana Telecasting Corp., 14 Media L. Rep. (BNA) 1889, 1904 (N.D. Ind. 1987) (civil suit involving charges of trade secret misappropriation is a matter of public interest); Dougherty v. Capitol Cities Communications, Inc., 631 F. Supp. 1566, 1570-72 (E.D. Mich. 1986) (criminal investigation of bankruptcy courts is matter of public interest under Michigan law); Gay v. Williams, 486 F. Supp. 12, 14 (D. Alaska 1979) (criminal investigation of drug smuggling and organized crime is matter of public interest under Alaska law); Diversified Management v. Denver Post, 653 P.2d 1103, 1106 (Colo. 1982) (federal investigation of companies financial dealings is matter of public concern); Hatjioannou v. Tribune Co., 3 Fla. Supp. 2d 143 (Cir. Ct. 1982) (law enforcement is matter of public concern for purposes of the privilege of neutral reportage); Rouch v. Enquirer, 427 Mich. 157, 203-04, 398 N.W.2d 245, 266 (1986) (report of arrest is matter of public interest); Kurtz v. Evening News Ass'n, 144 Mich. App. 205, 375 N.W.2d 391, 395 (1985) (filing of charges against attorney for attack on police officer is matter of public interest); Peisner v. Detroit Free Press, Inc., 82 Mich. App. 153, 266 N.W.2d 693, 697-98 (1978) (attorney's appeal of murder case is matter of public interest); Berryman v. Clark, 12 Media L. Rep. (BNA) 1310, 1311 (Mich. Cir. Ct. 1985) (subject of prisoner lawsuits and their effect on judicial system is matter of public concern); Merrill v. Monthly Detroit City Magazines, 9 Media L. Rep. (BNA) 1994 (Mich. Cir. Ct. 1983) (magazine article referring to indicted underworld figure is matter of public interest); Jacobsen v. Rochester Communications, 410 N.W.2d 830, 836 n.7 (Minn. 1987) (criminal trial is matter of public concern); Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975) (arrest of high school teacher on drug charge is matter of public concern); Pollnow v. Poughkeepsie Newspapers, 107 A.D.2d 10, 486 N.Y.S.2d 11 (1985) (criminal assault case against youth is a matter of public concern), *aff'd*, 67 N.Y.2d 778, 492 N.E.2d 125, 501 N.Y.S.2d 17 (1986); Brown v. Johnston Newspapers Corp., 84 A.D.2d 636, 444 N.Y.S.2d 493, 495 (1981) (arrest for assault is matter of public concern); Robart v. Post Standard, 74 A.D.2d 964, 425 N.Y.S.2d 891, 892 (1980) (issuance of ticket involved criminal justice system and as such is matter of public concern). *But see* Nabkey v. Booth Newspapers, 140 Mich. App. 507, 364 N.W.2d 363 (1985) (report about plaintiff being arrested for stealing court records and assaulting prosecutor with a pen is not matter of public interest but merely "interesting and amusing reading").

154. *See* Gaeta v. New York News, Inc., 62 N.Y.2d 340, 349, 465 N.E.2d 802, 805, 477 N.Y.S.2d 82, 85 (1984) ("the need for judgment and discretion to be exercised by journalists, subject only to review by the courts to protect against clear abuses; determining what editorial content is of legitimate public interest and concern is a function for editors . . . .").

cramp press coverage of the judicial process somewhat, it is consistent with and indeed essential to the Court's attempt to strike a more adequate accommodation between protection of reputation and the interest of the public and the press in uninhibited reporting.

E. A Judicial Proceedings Privilege?

In his dissent in *Firestone* Justice Brennan was prepared to extend the logic of *Rosenbloom* a step further by concluding that the Court should consider judicial proceedings to be matters of public interest to which the actual malice standard must apply as a matter of law.[155] Relying on *Cox Broadcasting Corp. v. Cohn*[156] and other Supreme Court precedents,[157] Justice Brennan argued that such a judicial proceedings privilege should exist given the public nature of judicial proceedings, the public need to obtain information about the courts as a significant organ of the government, and the important role of the media in reporting judicial proceedings to the public.[158] Courts are indeed an integral part of the government and the application of the law and administration of justice should be subjects of the highest importance to the public.[159] As Justice Brennan noted in his *Firestone* dissent, the Meiklejohn theory of freedom of expression,[160] which provides the primary philosophical and theoretical foundation for *New York Times v. Sullivan*,[161] and much of the Supreme Court's other free speech jurisprudence as well, places speech regarding governmental affairs at the very core of First Amendment protection.[162]

At the time the Court decided *Firestone* several Supreme Court cases emphasized the importance of public access to information concerning the judicial process.[163] This policy has assumed even greater constitutional significance following the landmark decision in *Richmond Newspapers, Inc. v. Virginia*.[164] There, the Court held that the public, including the press, had

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155. 424 U.S. 448, 471-81 (1976).

156. 420 U.S. 469 (1975).

157. Sheppard v. Maxwell, 384 U.S. 333 (1966); Craig v. Harney, 331 U.S. 367 (1947); Bridges v. California, 314 U.S. 252 (1941).

158. 424 U.S. at 474-81.

159. Justice Brennan stated:

> The Court has emphasized that the central meaning of the free expression guarantee is that the body politic of this Nation shall be entitled to the communications necessary for self-governance, and that to place restraints on the exercise of expression is to deny the instrumental means required in order that the citizenry exercise that ultimate sovereignty reposed in its collective judgement by the Constitution.

Id. at 441.

160. *See* Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 (1961). *See generally*, A. MEIKLEJOHN, POLITICAL FREEDOM (1948).

161. 376 U.S. 254, 270-81 (1964).

162. Shortly after New York Times v. Sullivan, Justice Brennan, the author of the opinion, delivered a speech discussing the influence of Meiklejohn's theory on Supreme Court precedent including *Sullivan*. *See* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); *see also* Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 245 (1964).

163. *See supra* note 158 and accompanying text.

164. 448 U.S. 555 (1980).

a First Amendment right to attend criminal trials.[165] It explained that public access to criminal trials serves several important functions, including the assurance of fairness,[166] the discouragement of perjury and misconduct,[167] provision for a catharsis for public outrage,[168] and education of the public about the operation of the judicial system in general and in a particular case.[169] With respect to the last policy, the Court noted that "it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted."[170] The Court has since extended the principle of *Richmond Newspapers* beyond criminal trial proper.[171] Thus, it is clear that the need for public access to information about legal proceedings and the justice system is a consideration of special significance under the First Amendment.

As Justice Brennan argued in his *Firestone* dissent, the case for a constitutional judicial proceedings privilege is bolstered not simply by the importance of the subject matter but by the arguably greater likelihood of error with respect to matters with significant defamatory potential.[172] In covering the courts the press will often report allegations of criminal conduct,[173] unethical behavior,[174] or misconduct such as the adultery charges in *Firestone*.[175] Moreover, reporters covering legal affairs and proceedings must often attempt to decipher and explain complex and technical legal language under deadline pressure which tends to increase the potential for defamatory error.[176] Even so, the case for a constitutional judicial proceedings privilege would be weak unless a reason exists to believe that the absence of a privilege would deter the press from covering judicial proceedings vigorously because of a perceived increased threat of liability or at least of litigation. Consequently, Justice Brennan argued that the application of the less protective negligence standard of fault would inevitably "chill" press coverage of legal proceedings.[177]

The majority in *Firestone* emphatically rejected Justice Brennan's plea for a constitutional judicial proceedings privilege.[178] It acknowledged that judicial proceedings often involve matters of great public significance.[179] It also concluded, however, that many judicial proceedings involve matters of

165. *Id.* at 569.
166. *Id.*
167. *Id.* at 571.
168. *Id.* at 572.
169. *Id.* at 575.
170. *Id.*
171. *See* Waller v. Georgia, 467 U.S. 39 (1984) (pretrial proceedings); Press-Enters. Co. v. Superior Court, 464 U.S. 501 (1984) (voir dire proceedings); Globe Newspapers Co. v. Superior Court, 448 U.S. 596 (1982) (testimony of minor victim in sex offense case).
172. *See supra* notes 10-11 and accompanying text.
173. *See supra* notes 111-136 and accompanying text.
174. *See supra* notes 71-73, 77-79 and accompanying text.
175. The facts of *Firestone* are an appropriate illustration. *See infra* notes 308-319 and accompanying text.
176. *See supra* note 11 and accompanying text.
177. 424 U.S. at 471, 474.
178. *Id.* at 455-57.
179. *Id.* at 454.

purely private concern to the parties.[180] To the extent that matters of public concern are involved, the Court believed that the privilege recognized in *Cox Broadcasting v. Cohn*,[181] which provides the press with complete protection against liability for the republication of "truthful information contained in official court records open to public inspection," is more than adequate to serve this interest.[182] By definition, Justice Brennan's privilege would protect false as opposed to truthful reports of judicial proceedings.[183] Arguably this would undermine rather than further the public's interest in learning about the business of the courts.[184] Furthermore, such a categorical subject matter oriented approach would constitute at least a limited return to the *Rosenbloom* matter of public interest analysis that the Court had previously rejected because it was insufficiently protective of the state interest in reputation.[185] A privilege for reports of judicial proceedings, even if limited to what actually happens in the courtroom, would seem quite inconsistent with the Court's participant-oriented public figure approach.[186] As the Court recognized, such a privilege might well require overturning *Gertz* itself.[187]

The Court rejected the *Rosenbloom* public interest approach in part because of its concern that a judicial determination of what constitutes the public interest would be too ad hoc and unpredictable.[188] A limited exception for judicial proceedings would not necessarily threaten the Court's general resistance to that approach since it would appear easily applicable. Nevertheless, the Court maintained that even such a limited exception would upset the proper balance between protection of vigorous press coverage and the individual's interest in reputation.[189]

Perhaps the Court's primary problem with a judicial proceedings privilege stemmed from its conclusion that it would insufficiently protect the reputational interests of private figure plaintiffs involved often somewhat involuntarily in legal proceedings.[190] To some extent, the Court seemed concerned that fear of not being able to protect their reputations against defamatory assaults by the press could deter people from enforcing their rights or honoring their obligations through the legal process.[191] This is of course a possibility in an individual case, but as a general rule it would seem that few

180. *Id.* at 455-57.
181. 420 U.S. 469 (1975); *see also* Florida Star v. B.J.F., 109 S.Ct. 2603, 105 L. Ed. 2d 443 (1989); Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977).
182. 424 U.S. at 455.
183. 424 U.S. at 473.
184. *Id.* at 457. Rightly or wrongly, New York Times v. Sullivan, as well as the rest of the Supreme Court's First Amendment case law in the defamation area, is based on the assumption that the press is in need of a certain degree of "strategic" protection for defamatory falsehood in order to prevent self-censorship of truthful information. For a recent critical analysis of the case, see Epstein, Was *New York Times v. Sullivan Wrong?* 53 U. CHI. L. REV. 782 (1986).
185. 424 U.S. at 456.
186. *Id.* at 456-57.
187. *Id.* at 457.
188. *Id.* at 456.
189. *Id.*
190. *Id.* at 457.
191. *Id.*

people would choose to forfeit the benefits or incur the harm that would often result from foregoing recourse to the legal process simply because of the rather remote possibility that the press might defame them. Rather, the Court really seemed to believe that it would simply be unfair to force people largely to relinquish protection of their reputation in order to engage in activity that they may be wholly unable to avoid and which often may be highly beneficial both to the individual and society.[192]

Ultimately the debate over the necessity for a judicial proceedings privilege focuses on the gap between the stringent actual malice and the more lenient negligence standard of fault. In a sense, the Court has painted itself into a corner by rendering the actual malice standard so difficult to meet that it is loath to extend it beyond its existing domain for fear that it would unfairly undermine the interest in protecting reputation. On the other hand, the press sees the negligence standard as too lenient and too unpredictable to provide sufficient protection for vigorous reporting.[193] I have argued elsewhere that at least over time the courts, in reliance on the standards of the journalism profession itself, will apply the negligence standard with sufficient clarity and consistency to overcome the problem of vagueness.[194] Even where some uncertainty as to the meaning of journalistic negligence in a particular area exists, one can reasonably assume that the press will generally proceed to cover the story on the assumption that they are acting in a journalistically reasonable and defensible manner. With respect to the coverage of legal proceedings in particular, public interest in the information combined with competitive pressures in the news business should often dictate that the press will report the stories to the best of its ability regardless of the prevailing standard of fault in the event of defamation litigation.

The Court probably will not reconsider its rejection of the judicial proceedings privilege in *Firestone*. Despite the theoretical appeal of Justice Brennan's argument, it is far from clear that the press needs such a privilege. To the extent that the competing interests warrant a better accommodation in this area, however, it might make more sense for the Court to proceed by fine tuning the existing standards. Given the general public interest in assuring full dissemination of information concerning judicial proceedings, perhaps the Court should construe the concept of public controversy more broadly and demand less in terms of voluntary action by the plaintiff to achieve public figure status, at least where the plaintiff is indeed involved in litigation of legitimate public concern.

The Court is surely correct that a person should not have to sacrifice significant protection of reputation when circumstances have involuntarily dragged him into or he has even initiated a legal proceeding to protect his own private rights. It need not necessarily follow, however, that an attorney

192. *Id.*

193. *See, e.g.*, Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422 (1975); Franklin, *What Does Negligence Mean in Defamation Cases?* 6 COM.ENT. 259 (1984); Kalven, *The Reasonable Man and the First Amendment: Hill, Butts and Walker*, 1967 SUP. CT. REV. 267 (1967).

194. *See* Bloom, *supra* note 11, 389-93.

or a litigant in a controversial case of public importance should be entitled to the protection of the lowest standard of fault, even if he did not voluntarily attempt to influence a public controversy through the media rather than the courtroom. Likewise, when a person has engaged in conduct that has resulted in the filing if not the litigation of criminal charges against him, it is not necessarily unfair to require him to satisfy a higher standard of fault even if he did not voluntarily thrust himself into the controversy in issue. The overwhelming majority of legal proceedings would still involve private disputes between private figures. At the same time, in order to fairly accommodate the plaintiff's interest in protection of reputation, the Court should consider loosening up the actual malice standard either by de-emphasizing its subjective focus[195] or by applying the clear and convincing evidence standard with somewhat reduced rigor so that the injured plaintiff will have at least a fighting chance of prevailing.[196] As with reconsideration of a judicial proceedings privilege, the Court would probably not be inclined to move in this direction. Both common law and constitutional treatment of other issues presented in these cases, such as the extent to which the press should be held liable for inaccurate descriptions of legal proceedings and the correct use of legal terminology, may significantly temper the apparent tension between the need of the press to inform the public fully about legal affairs and proceedings and the strict application of the public figure doctrine and hence the lower standard of fault in this area.

II. ACCURACY IN THE DESCRIPTION OF LEGAL PROCEEDINGS AND PARTICIPANTS AND THE USE OF LEGAL TERMINOLOGY

A theme that permeates so many of these cases is the extent of the media's obligation to report the details of legal affairs, proceedings, and participants accurately and to use legal terminology accurately. This theme arises in the context of many different legal issues, including whether a statement is defamatory, whether it is true, whether it is substantially fair and accurate under the fair report privilege, whether it is fact or opinion, and whether it was published with the requisite degree of fault. Often the resolution of any one of these issues will determine the outcome of the litigation. Despite the variety of different doctrines under which courts analyze this problem, courts treat this problem similarly from one context to the next. In many of these settings the courts usually give the press a large amount of leeway in describing legal affairs and in using legal terminology. Given the importance

195. *See* Kalur, *Explorations of the "Outer Limits": The Misdirected Evolution of Reckless Disregard*, 61 DEN. L.J. 43 (1983). I have previously defended the actual malice test but only if courts apply the test fairly, permitting the plaintiff to prove the defendant's state of mind through objective circumstantial evidence. *See* Bloom, *supra* note 11, at 330-35.

196. In Bose Corp. v. Consumer's Union of the United States Inc., 466 U.S. 485 (1984), the Court reaffirmed its faith in the stringent application of the clear and convincing evidence test by appellate courts and in the actual malice standard itself as it has evolved. Even more recently in Harte-Hanks Communications, Inc., v. Connaughton, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989), the Supreme Court affirmed a lower court finding of actual malice but professed its continued allegiance to the subjective oriented actual malice standard and the clear and convincing evidence rule.

of publishing truthful information, the potential for significant harm to reputation, and the frequent ease of achieving accuracy, a point nontheless arises under each of these doctrines when the press will be held responsible for defamatory misdescription of legal proceedings or misuse or legal terminology. A review of some of the significant decisions in each of these areas illustrates the basic approaches that the courts have taken.

A. Is It Defamatory?

Frequently, a key issue is whether the description of a participant in a legal proceeding or the use of a legal term with reference to such a person is defamatory. This issue generally requires the courts to confront both the common meaning and connotations of the language employed as well as the nature of the reputation of the person involved. Attorneys seem to sue the press for defamation with some frequency, and as a result the courts must often decide whether a particular statement or allegation would lower the reputation of the particular attorney or attorneys in general in the public eye. It is clear that allegations that would undermine an attorney's reputation for professional honesty[197] or competence[198] or a judge's reputation for fairness[199] are defamatory.

Sometimes, however, whether a statement is defamatory will require the court to examine closely the role and obligations of the plaintiff as an attor-

197. *See.* Carey v. Hume, 390 F. Supp. 1026, 1029 (D.D.C. 1975) (statement to the effect that attorney moved clients files and claimed that someone had stolen them is defamatory); McCall v. Courier-Journal & Louisville Times Co., 623 S.W.2d 882, 884-85 (Ky. 1981) (statements that criminal attorney would fix the case or bribe the judge are defamatory per se); Freeman v. Cooper, 414 So. 2d 355 (La. 1981) (statement that attorney was suborning perjury was defamatory); Silsdorf v. Levine, 59 N.Y.2d 8, 449 N.E.2d 716, 462 N.Y.S.2d 822, 449, *cert. denied*, 464 U.S. 831 (1983); November v. Time, Inc., 13 N.Y.2d 175, 194 N.E.2d 126, 244 N.Y.S.2d 309 (1963) (statements that attorney advised his client to ignore a subpoena and that implied that the attorney was trying to take advantage of his client could be defamatory); Herron v. KING Broadcasting Co., 109 Wash.2d 514, 746 P.2d 295 (1987) (charge that prosecuting attorney bargained away cases in exchange for campaign contributions is defamatory); D'Amato v. Freeman Printing Co., 38 Wis. 2d 126, 157 N.W.2d 686 (1968) (statement that district attorney ignored vice operations is defamatory).

198. Miami Herald v. Frank, 442 So. 2d 982, 983 (Fla. Dist. Ct. App. 1983) (statements indicating that attorney was incompetent in preventing client from reorganizing company is defamatory); McHale v. Lake Charles American Press, 309 So. 2d 556, 561 (La. Ct. App. 1980) (statement that " '[n]o bond buyer would buy a nickel's worth of securities on [the plaintiff's] opinion' " was defamatory in that it "portrayed him as a totally incompetent bond attorney"), *cert. denied*, 452 U.S. 951 (1981); Cohn v. Am-Law, 5 Media L. Rep. (BNA) 2367, 2368 (N.Y. Sup. Ct. 1979) (statement that attorney was totally unprepared for client's sentencing hearing is defamatory); *cf.* McBride v. Merrell Dow, 717 F.2d 1460, 1465 (D.C. Cir. 1983) (statement that plaintiff was paid much more to testify than other expert witnesses could be defamatory in that it might imply that his testimony was for sale).

199. Dostert v. Washington Post, 531 F. Supp. 165 (N.D.W.Va. 1982) (statement that judge "barged into" someone's house can be read to imply he behaved unethically or criminally); Berkos v. NBC, 161 Ill. App. 3d 475, 515 N.E.2d 668 (1987) (implication that judge accepted bribe to dispose of criminal case favorably is defamatory); Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943 (charges that the judge is probably corrupt and sentences were suspiciously lenient is defamatory), *cert. denied*, 434 U.S. 969 (1977); Braig v. Field Communications, 500 Pa. Super. 430, 456 A.2d 1366 (1983) (charge that judge would "blow out" case against police suggests he is biased and is defamatory), *cert. denied*, 466 U.S. 970 (1984).

ney as well as the connotations of the language in issue in order to determine whether the statement is defamatory. An excellent case in point is *Rudin v. Dow Jones & Co.*[200] There, a financial magazine, *Barron's*, published an article commenting on the fact that a group of investors, including Frank Sinatra and his attorney Milton Rudin, had purchased a large block of stock in a dredging company and questioning why Sinatra would invest in such a business rather than a gambling casino.[201] Two weeks later, *Barron's* published a letter submitted by Rudin under the caption "Sinatra's Mouthpiece."[202] Rudin objected to the tone and implications of the initial article.[203] Rudin then informed *Barron's* that he considered the caption "Sinatra's Mouthpiece" to be defamatory and demanded a retraction.[204] The magazine published a reply stating that it "meant to cast no aspersion on Mr. Rudin; [o]ur dictionary defines 'mouthpiece' as 'spokesman'."[205] Rudin filed suit and *Barron's* moved to dismiss the complaint on the ground that the statement was not defamatory.[206] The federal district court engaged in an extended analysis of the term mouthpiece as applied to an attorney.[207] While it recognized that mouthpiece could be understood to refer simply to a spokesman, as *Barron's* asserted, dictionaries and thesaurae also defined the term as "(an unscrupulous criminal lawyer or a lawyer in sympathy with the underworld)" and "puppet,. . . tool,. . . [or] henchman."[208] The court then noted in reliance on caselaw and ABA Standards that the later connotation is defamatory in that it suggests a lack of independent judgement on the part of an attorney as well as a willingness to sacrifice one client's interest for another.[209] The court also pointed out that the connection of the term mouthpiece with Sinatra who was "popularly rumored to be associated with organized crime" emphasized the possible defamatory connotation.[210] Because the meaning could be defamatory as well as nondefamatory, the court denied the motion to dismiss.[211]

Two years later following a full trial[212] the same judge dismissed the com-

200. 510 F. Supp. 210 (S.D.N.Y. 1981).
201. *Id.* at 211-12.
202. *Id.* at 212.
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.* at 213.
207. *Id.* at 214-15.
208. *Id.* at 213-14. Courts have held that linking an attorney with organized crime is defamatory. Bufalino v. Associated Press, 692 F.2d 266, 269 (2d Cir. 1982); Harkaway v. Boston Herald Traveler Corp., 418 F.2d 56, 58 (1st Cir. 1969); Alioto v. Cowles Communications, Inc., 430 F. Supp. 1363, 1371-72 (C.D. Cal. 1977).
209. 510 F. Supp. at 215-16.
210. *Id.* at 216.
211. *Id.* at 217; *see also* Anton v. St. Louis Suburban Newspapers, 598 S.W.2d 493, 497 (Mo. Ct. App. 1980) (statement that attorney was responsible for "sleazy slight-of-hand" and "sleazy dealings" referring to alleged threats, acts of vandalism and an "administrative coup" is defamatory in that it imputes unethical conduct to lawyer); Handelman v. Hustler Magazine, Inc., 469 F. Supp. 1048, 1051 (S.D.N.Y. 1978) (statement that attorney "ate up" $800,000 of estate in will contest could be defamatory in that it could imply that the attorney charged an exorbitant fee or acted unethically by allowing the estate to be wasted).
212. Rudin v. Dow Jones & Co., 557 F. Supp. 535, 546 (S.D.N.Y. 1983).

plaint on the ground that the plaintiff had failed to prove that the caption "Sinatra's mouthpiece" was defamatory as used in the circumstances of the case. Both parties produced expert testimony in an attempt to establish the proper connotation of the term.[213] The plaintiff produced a former judge, a former United States attorney, and a Wall Street lawyer, all of whom testified that the term mouthpiece as applied to an attorney indicated a lack of integrity and independence.[214] The plaintiff also produced a professor of psychology who testified as to a study he had done which showed that a statistically significant number of people surveyed regarded "John Doe's Mouthpiece" as more negative than "John Doe's Spokesman."[215] Finally, Rudin testified on his own behalf as to his background and good reputation and noted that he felt that the caption was "an attempt 'to paint me in the [motion] pictures that I remembered as a kid with the mouthpiece as a fast talking guy with a derby who will do anything, he has got a bail bondsman in his pocket, a couple of judges in his other pocket and will do as his client pleases.' "[216] *Barron's* produced its own professor of psychology who criticized the methodology and results of the plaintiff's psychologist and produced his own study which indicated that people surveyed did regard mouthpiece as somewhat more negative than spokesman but that the difference narrowed when the survey used the phrase "Sinatra's Mouthpiece."[217] The defendant also produced two prominent journalists who testified that the use of the caption "Sinatra's Mouthpiece" was consistent with accepted journalistic practices.[218]

Reviewing all the evidence, the court held that Rudin had failed to establish that the defendant's readers understood the term in the defamatory sense.[219] The court did not place much weight on the conflicting testimony of the psychologists.[220] It observed that plaintiff's attorney witnesses emphasized the pejorative connotations of the term mouthpiece when linked with an attorney but noted that the article did not identify the plaintiff as an attorney in the letter to the editor to which *Barron's* attached "Sinatra's Mouthpiece" as a caption but rather identified the plaintiff only in the initial article published two months earlier.[221] Considering the remainder of the

213. *Id.* at 538.

214. Among other things, Judge Kauffman, a former justice of the Pennsylvania Supreme Court testified that " 'mouthpiece,' when used with respect to an attorney, 'clearly communicates one who is more concerned with fulfilling the directions and instructions of a client, usually a criminal client, and even more specifically an underworld client, and has little or no concern with the code of professional responsibility, the rules of court and the applicable law.' " *Id.* Peter Fleming, the Wall Street lawyer, testified that "the term [mouthpiece] implies an absence of independence which is 'offensive to my concept of a lawyer's function' ". *Id.* Paul Curran, the former United States attorney, testified that "an attorney who is a mouthpiece is 'someone who is more of a tool for his client ... than he should be....It is most commonly used in the context of organized crime situations." *Id.*

215. *Id.* at 538-39.

216. *Id.* at 541.

217. *Id.* at 542.

218. *Id.* at 542-43.

219. *Id.* at 543.

220. *Id.* at 543-44.

221. *Id.* at 544-45.

evidence including dictionary definitions and newspaper clippings using the term "mouthpiece," the court concluded that it is often understood in an irreverent though not necessarily a defamatory manner when applied to an attorney.[222] Given that *Barron's* was not aimed at a legal audience, the court could not conclude that it was understood in the defamatory sense.[223]

Rudin is worth reviewing at this length because it is probably the most careful and detailed examination that a court has given to defamatory content in the legal context. It involves the meaning of common slang rather than strict legal terminology. Nevertheless, it requires the court to come to grips with the proper role and obligations of an attorney as well as the nature of an attorney's reputation in the legal community. As the court may have realized, the extensive expert testimony by psychologists on the meaning of the term mouthpiece may have been a bit of overkill. It does illustrate how complex a seemingly straight forward question of defamatory content can readily become. On the record before it, which seemed to contain more than ample evidence of the common defamatory understanding of the term, the court seemed to bend over backwards in its second opinion to reach the conclusion that the plaintiff failed to carry his burden. It is not unusual in these types of cases for the courts to construe potentially defamatory statements against the plaintiffs.[224]

Ratner v. Young[225] is another case in which a court found it necessary to look closely at the proper role and professional obligations of an attorney in

222. *Id.* at 545. Editors for the defendant testified that they had intended to use the term in an "irreverent," "witty," and "colorful" sense, rather than in a defamatory sense. *Id.* at 543 n.6.

223. *Id.*; *see also* Quilici v. Second Amendment Found., 769 F.2d 414, 418-19 (7th Cir. 1985), *cert. denied*, 475 U.S. 1013 (1986) (statement that attorney used too much of his side's time in oral argument is not defamatory); Brower v. New Republic, 7 Media L. Rep. (BNA) 1605, 1610 (N.Y. Sup. Ct. 1981) (no reason to believe attorney's statement of what certain individual had said to her would be understood to imply that she had unethically breached client confidence).

224. *See, e.g.*, Lane v. New York Times, 8 Media L. Rep. (BNA) 1623, 1626 (W.D. Tenn. 1982) (statement that attorney travelled to Switzerland to remove funds from controversial client's bank account is not defamatory in that it does not suggest that attorney did anything improper); Matchett v. Chicago Bar Ass'n, 125 Ill. App. 3d 1004, 467 N.E.2d 271, 276 (1984) (statement that Bar Association rated plaintiff "unqualified" to be judge when it had actually termed him "not recommended" is not defamatory where newspaper also printed that his age was determinative factor), *cert. denied*, 471 U.S. 1054 (1985), *reh'g denied*, 472 U.S. 1022 (1985); Wexler v. Chicago Tribune Co., 69 Ill. App. 3d 610, 387 N.E.2d 892, 895 (1979) (charges that client's funds dwindled significantly after being turned over to attorney is not defamatory in that it does not suggest that attorney mismanaged them); *cf.* Mitchell v. St. Louis Business Journal, 689 S.W.2d 389, 390 (Mo. Ct. App. 1985) (not libel per se to report that a court convicted plaintiff of carrying unregistered handgun when no such offense existed); Fulton v. Mississippi, 498 So. 2d 1215 (Miss. 1986) (not defamatory to state that plaintiffs signed quitclaim deed with respect to property that they did not own); Hampton v. Dispatch Printing Co., 15 Media L. Rep. (BNA) 2093-2094 (Ohio Ct. App. 1988) (although court had acquitted plaintiff on murder charge on grounds of self defense, statement that plaintiff had committed murder was not defamatory in that it may have been used in nonlegal innocent sense, presumably meaning that the killing had occurred, but with legal justification); Windsor v. Tennessean, 654 S.W.2d 680, 685-86 (Tenn. Ct. App. 1983) (statement that witness attorney "refreshed his recollection" on witness stand is not defamatory in that it does not imply that he committed perjury), *cert. denied*, 465 U.S. 1030 (1984).

225. 465 F. Supp. 386 (D.V.I. 1979).

order to determine whether the statements in issue were defamatory.[226] There, a judge accused attorneys William Kunstler and Margaret Ratner in a letter to the editor of trying to turn a controversial murder trial into a political trial and of trying to provoke the court into committing prejudicial error.[227] The district court concluded that these allegations were not defamatory observing in the process that:

> many famous political trials in American and English history have been considered to reflect credit upon the defense attorney who was advocating an unpopular cause. John Adams was defense counsel in the so-called Boston Massacre cases, ... Kunstler himself evidently considered that there was nothing unprofessional about being associated with the defense of a political trial . . . . Whether trial tactics attempting to provoke the court and to obtain a mistrial would be considered unethical or unprofessional conduct would depend on the circumstances. All competent defense lawyers in criminal cases try to get reversible error in the record. It is generally accepted that there is nothing wrong in such efforts as long as they are not corrupt.[228]

The statements in *Ratner* were such that a layman might well have considered them to be defamatory because they likely were inconsistent with the common understanding of the role of a lawyer. Yet a closer look at the true professional obligations of an attorney revealed that this was not the case.[229] This is consistent with the tendency of the courts to construe the common law rules strictly in this area.

Sometimes these cases turn on whether an arguably improper use of a legal term is defamatory. In *Sprecher v. Dow Jones & Co.*,[230] for instance, a securities lawyer sued the publisher of the *Wall Street Journal* on the theory that an article stating that the SEC and the plaintiff settled an SEC complaint against the plaintiff by a consent decree was defamatory because it failed to state that the SEC dismissed the complaint with prejudice.[231] The court disagreed and held that the statement as published was both nonde-

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226. *Id.* at 393-97.

227. *Id.* at 392.

228. *Id.* at 395.

229. *See* Stevens v. Morris Communications, 170 Ga. App. 612, 317 S.E.2d 652, 654 (1984) (not defamatory to report that plaintiff was attorney for nursing home experiencing legal difficulties); Fisher v. Detroit Free Press, 158 Mich. App. 409, 404 N.W.2d 765, 767 (1987) (newspaper's repetition of judge's statement that attorney filed action seeking $15,000 for lost companionship of a tree was not defamatory); Marchiondo v. New Mexico State Tribune Co., 98 N.M. 282, 648 P.2d 321, 332 (Ct. App. 1982) (not defamatory to say that attorney who contributed money to governor's campaign is his crony and that attorney might be appointed to public office); Golub v. Esquire Publishing Co., 124 A.D.2d 528, 508 N.Y.S.2d 188 (1986) (statement that plaintiff was "loose tongued lawyer" who revealed his "innermost secrets" is not defamatory since it does not suggest that he divulges client confidences); Sellers v. Oklahoma Publishing Co., 687 P.2d 116, 121 (Okla. 1987) (statement that attorney accused judge of manipulating jury to aid former law partner did not defame the attorney in that it did not imply that he had done anything wrong); Herron v. Tribune Publishing Co., 108 Wash. 2d 162, 736 P.2d 249, 257 (1987) (statement that opposing counsel asked for disqualification of plaintiff prosecutor does not impute criminal conduct, and hence is not defamatory).

230. 88 A.D.2d 550, 450 N.Y.S.2d 330 (1982), *aff'd*, 58 N.Y.2d 862, 447 N.E.2d 75 (1983).

231. 88 A.D.2d at 552, 450 N.Y.S.2d at 332.

famatory and true.[232] It pointed out that "the term 'with prejudice' is a legal one which has little, if any, meaning to the average reader."[233] As a matter of policy,

> [t]o hold that a possible omission of this nature by a reporter may be deemed defamatory would place upon the press the onerous and unreasonable burden of having to ascertain, whenever a news story is published, if something might conceivably have been left out which could be subject to misconception.[234]

On the other hand, a court might well consider a statement about an attorney nondefamatory simply because the more sophisticated audience of a legally oriented periodical would understand that it was not to be interpreted in an overly literal manner. In *Owen v. Carr*,[235] for instance, an Illinois Court of Appeals concluded that the readers of The National Law Journal would understand that statements to the effect that an attorney was trying to establish in litigation that another attorney had used the disciplinary process for purposes of intimidation did not amount to an allegation of fact but merely an "advocate's view of his client's cause of action."[236] On occasion however, the press will use legal terminology in a manner that gives rise to a defamatory implication. In *Levine v. CMP Publications, Inc.*,[237] for instance, the Court of Appeals for the Fifth Circuit held that a jury could properly have found that the statement that the plaintiff was "convicted of stealing tapes" in reference to a civil fraud verdict was defamatory in that it implied that a court had found the plaintiff guilty of criminal conduct.[238]

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232. *Id.*

233. *Id.*

234. *Id.* at 332; *see also* Minton v. Thomson Newspapers, Inc., 175 Ga. App. 525, 333 S.E.2d 913, 916 (1985) (statement that police arrested plaintiff while "driving under the influence of alcohol" would not carry any greater sting than driving under the influence of drugs); *cf.* Owen v. Carr, 134 Ill. App. 3d 855, 478 N.E.2d 658, 662 (1985) (statement that attorney used legal disciplinary process for purposes of "intimidation" did not necessarily imply criminal conduct but still might be defamatory), *aff'd*, 113 Ill. 2d 273, 497 N.E.2d 1145 (1986); Nearis v. Essex County Newspapers, Inc., 310 N.E.2d 923, 924 (1972) (statement that court committed plaintiff to "Lawrence jail" was not defamatory on theory that it might suggest to readers that court held plaintiff in criminal, rather than civil, contempt); Robinson v. U.S. News & World Report, Inc., 16 Media L. Rep. (BNA) 1695, 1696-97 (N.D. Ill. 1989) (not defamatory to report that plaintiff arrested by F.B.I. rather than state police).

235. 134 Ill. App. 3d 855, 478 N.E.2d 658 (1985).

236. 478 N.E.2d at 663.

237. 738 F.2d 660, 671 (5th Cir. 1984), *reh'g denied*, 738 F.2d 1341 (5th Cir. 1985).

238. *Id.* The court also concluded that the statement that "the New Jersey attorney general's office was 'wondering whether its reach extends to Texas' " could also be considered defamatory in that, in context, it suggested that the plaintiff may have fled from a criminal investigation of his activity. *Id.*; *see also* Adams v. Daily Telegraph Printing Co., 292 S.C. 273, 356 S.E.2d 118, 122 (Ct. App. 1986) (statements broadcast by television station in which father of one of two murdered boys pointed out that plaintiff, the father of the other boy, refused to cooperate with authorities, was hiding behind the Fifth Amendment and had hired an attorney was susceptible to defamatory inference that plaintiff was guilty of murder); Jones v. Garner, 250 S.C. 479, 158 S.E.2d 909, 911 (1968) (jury could have found that term "tax evasion" was used and understood in a defamatory sense to connote criminal concealment rather than legal avoidance); *cf.* King v. Globe Newspaper Co., 490 Mass. 795, 512 N.E.2d 241, 249 (1987) (statement that governor called judge and attempted to persuade him to change sentence is defamatory in that it suggests governor was attempting to interfere improperly with the legal process), *cert.denied*, 108 S.Ct. 1121, 98 L.Ed. 2d 389 (1988).

This seems to be a reasonable construction of the statement, although in dissent on the related issue of falsity Judge Tate argued that the court was reading the statement hypercritically with the eye of a law review note editor in that the plaintiff had been convicted of fraudulent though not criminal conduct.[239]

B. Falsity

Questions involving the proper use of legal terminology often arise in defamation litigation under the issue of truth and falsity. On this issue as well the courts tend to give the press a fair degree of leeway. The courts will not permit the plaintiff to establish falsity simply because a reporter has technically misused a legal term or substituted a more commonly used term for a more technical one. For instance, in *Hovey v. Iowa State Daily*[240] the Iowa Supreme Court held that it was not false to report that the criminal defendant had raped the plaintiff even though in fact the criminal defendant forced her to perform oral sex, which the statute legally classified as "second degree sexual abuse" rather than rape.[241] The court noted that the terms are largely interchangeable even as a legal matter and that whatever difference existed "was not material enough for the inaccuracy to be actionable."[242]

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239. 738 F.2d at 678, 680.

240. 372 N.W.2d 253 (Iowa 1985).

241. *Id.* at 256.

242. *Id.*; *see also* Orr v. Argus-Press Co., 586 F.2d 1108, 1112 (6th Cir. 1978) (terms "swindle", "phony" and "take" are a substantially accurate description of securities fraud allegations against plaintiff), *cert. denied*, 440 U.S. 960 (1979); Lambert v. Providence Journal Co., 508 F.2d 656, 658-59 (1st Cir.) ("murder" carries no greater sting than "killing" or "homicide"), *cert. denied*, 423 U.S. 828 (1975); Contemporary Mission, Inc. v. New York Times Co., 665 F. Supp. 248, 259-60 (S.D.N.Y. 1987) (description of cease and desist order against plaintiff for "failing to deliver merchandise" rather than for "failing to deliver merchandise *or refunds within a reasonable period of time*" is substantially true) (emphasis in original), *aff'd*, 842 F.2d 612 (2d Cir. 1988); Chang v. Michiana Telecasting Corp., 14 Media L. Rep. (BNA) 1889, 1900 (N.D. Ind. 1987) (characterizing secret photocopying and misappropriation of trade secrets as industrial espionage is substantially accurate); Lal v. CBS, Inc., 551 F. Supp. 356, 361 (E.D. Pa. 1982) (statement that defendant's case "is ending in triumph" is substantially true where in context reporter was clearly referring to petition for preliminary relief), *aff'd*, 726 F.2d 97 (3d Cir. 1984); Piracci v. Hearst Corp., 263 F. Supp. 511, 514 (D. Md. 1966) (description of charge as "possession of marijuana" is substantially accurate), *aff'd*, 371 F.2d 1016 (4th Cir. 1967); McKeon v. The Gazette, 11 Media L. Rep. (BNA) 1507, 1508 (Conn. Super. Ct. 1984) (statement that police arrested plaintiff for sale of controlled substance is substantially true whether police arrested him for sale or possession with intent to sell); Brake & Alignment World v. Post-Newsweek, 10 Media L. Rep. (BNA) 2457, 2458 (Fla. Cir. Ct. 1984) (statement that police charged plaintiff with "bilking" customers is true where police had charged him with fraud); Griffin v. Kentucky Post, 10 Media L. Rep. (BNA) 1159, 1160 (Ky. Cir. Ct. 1983) (statement that court convicted plaintiff of nude dancing where she had pleaded guilty to violating the occupational licensing ordinance by dancing semi-nude is true); Drury v. Feeney, 505 So. 2d 111, 113 (La. Ct. App.) (statement that court convicted plaintiff attorney of mail fraud by cheating insurance companies and clients when in fact he was only convicted of mail fraud by cheating clients is substantially true), *writ denied*, 506 So. 2d 1225 (La. 1987); Hamilton v. Lake Charles American Press, Inc., 372 So. 2d 239, 242 (La. Ct. App.) (statement that court had disbarred plaintiff when judge had temporarily stayed his disbarment is substantially true, and statement that court convicted plaintiff of automobile accident fraud when in fact court convicted him of mail fraud by faking automobile accidents is substantially true), *writ denied*, 375 So. 2d 943 (La. 1979); Hopkins v. Keith, 348 So. 2d 999, 1002 (La. Ct. App. 1977) (statement that plaintiff was "convicted for running a gambling game"

Nor will the courts construe a word as bearing a legal connotation where in context it carries a common non-legal meaning. In *Anderson v. Cramlet*,[243] for instance, the Court of Appeals for the Tenth Circuit declined to hold that a statement that plaintiff "kidnapped" his son meant that he had committed the legal crime of kidnapping given that the word is commonly understood to refer to a parent taking or concealing a child from the other parent which was what the plaintiff had done.[244] Likewise the courts will generally not read implications into legal terminology that are not readily apparent to the average reader. In *Sivulich v. Howard Publications, Inc.*[245] an Illinois Court of Appeals refused to conclude that the statement that " '[c]harges of aggravated battery have been filed' " against the plaintiff was false in that it necessarily implied that the police had filed criminal charges.[246] Rather, both in common parlance and from a more technical standpoint the statement could encompass civil as well as criminal charges.[247]

Generally, whether a court will consider a statement false when the press has misused a legal term or mischaracterized a legal matter will depend on whether the sting of the inaccuracy is significantly greater than that of the truth. In *Fendler v. Phoenix Newspapers, Inc.*[248] an editorial stated that the plaintiff "is doing four-to-five years in prison because of his fraudulent practices at Lincoln Thrift."[249] Plaintiff had in fact received a four-to-five year sentence but was out on bond pending appeal.[250] The Arizona Court of Appeals concluded that the report was substantially true.[251] It acknowledged that it obviously made a difference to the plaintiff that he was not yet in prison, but as far as the harm to his reputation was concerned, the sting was derived from the fact of conviction and sentence and not from the fact of actual physical confinement.[252]

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when in fact he forfeited a substantial bond on the charge is substantially true); Rosen v. Capital City Press, 314 So. 2d 511, 515 (La. Ct. App. 1975) (statement that police charged plaintiff with illegal distribution of narcotics when police actually charged him with distribution of amphetamines which the law classifies as narcotics is substantially true); Schaefer v. Hearst Corp., 5 Media L. Rep. (BNA) 1734, 1736 (Md. Super. Ct. 1979) (statement that grand jury indicted plaintiff when in fact police had charged him by summons and court had convicted him is substantially correct); Guss v. Times Herald, 14 Media L. Rep. (BNA) 1703, 1704 (Mich. Cir. Ct. 1987) (statement that police charged plaintiff with embezzlement of $140,000 is substantially accurate even though police actually charged him with embezzling $39,000 since it would still remain a felony); DeFalco v. Anderson, 209 N.J. Super. 99, 506 A.2d 1280, 1283 (1986) (describing plaintiff's convictions for taking money illegally from aliens as "extortion" or "shakedown" is not inaccurate); Windsor v. Tennessean, 654 S.W.2d 680, 687 (Tenn. Ct. App. 1983) (statement that plaintiff was *"subverting a court order"* is a substantially accurate way of saying he was *"block[ing] a motion* to return the property") (emphasis in original), *cert. denied*, 465 U.S. 1030 (1984).

243. 789 F.2d 840 (10th Cir. 1986).
244. *Id.* at 844-45.
245. 466 N.E.2d at 1220.
246. *Id.*
247. *Id.*
248. 130 Ariz. 475, 636 P.2d 1257 (Ct. App. 1981).
249. 636 P.2d at 1259.
250. *Id.* at 1260.
251. *Id.* at 1262.
252. *Id.* The court also concluded that a statement that the plaintiff was "convicted of

At some point a misdescription of a legal proceeding will carry a greater sting than the literal truth. In *Zerangue v. TSP Newspapers, Inc.* a newspaper reported that a court had convicted the plaintiffs, two former sheriff's deputies, of malfeasance for having been found guilty of granting a jail inmate a weekend pass in exchange for stolen goods.[253] The court had in fact convicted the deputies of the misdemeanor of malfeasance as a result of releasing the prisoner, but the court had dismissed the felony charge of public bribery relating to the receipt of the stolen goods.[254] The Court of Appeals for the Fifth Circuit concluded that the sting of the story as reported using the inaccurate phrase " 'in exchange for stolen goods' " was significantly greater than the strict truth.[255] "The difference between malfeasance in office and receiving stolen goods is more than the difference between a misdemeanor and a felony. . . . The *Daily World* stories could be viewed as converting a foolish and irresponsible betrayal of the public trust into a rapacious and calculated one."[256] Likewise, in *Martin-Trigona v. Kupcinet* a federal district court held that a report that a court had convicted the plaintiff of forgery and embezzlement was false where on appeal the court had reversed the convictions and as a legal matter expunged the convictions from the record.[257] Consequently, the plaintiff simply was not convicted as of the time that the article was written.

In *Time, Inc. v. Firestone* the United States Supreme Court reviewed the state court record to ensure that the defamatory statements in issue were in

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fraud" was a substantially true characterization of his conviction for making a false bookkeeping entry and failing to file a tax return. *Id.* at 1263. Weisburgh v. Mahady, 147 Vt. 70, 511 A.2d 304, 306 (1986) (report that police arrested plaintiff for removing $5,000 in stolen property when it was actually only $500 was substantially true); *see also* Jones v. Himstead, 7 Media L. Rep. (BNA) 2433 (Mass. Super. Ct. 1981) (statements that plaintiff was a tax delinquent in three towns rather than two, and that a person sued him for $150,000 rather than $125,000 were substantially true.).

253. 814 F.2d 1066, 1068 (5th Cir. 1987).

254. *Id.*

255. *Id.* at 1073. The court indicated that it would consider the charge substantially accurate if the lay reader would regard the difference as a mere technicality. *Id.*

256. *Id.*; *see also* Levine v. CMP Publications, 738 F.2d 660, 668-69 (5th Cir. 1984) (statement that lawsuits accused plaintiff of theft where cases involved possible misappropriation of trade secrets presented jury question on falsity), *reh'q denied*, 753 F.2d 1341 (1985) (en banc); Chang v. Michiana Telecasting, 14 Media L. Rep. (BNA) 1889, 1899 (N.D. Ind. 1987) (providing a dollar value for alleged misappropriation where none listed in legal complaint is more than minor inaccuracy); Kohn v. West Hawaii Today, 65 Haw. 584, 656 P.2d 79, 84 (1982) (report that police seized " 'heroin, cocaine, hashish, and morphine' " from plaintiff's business carries a far greater sting than police's actual seizure of six grams of marijuana); Jones v. Himstead, 7 Media L. Rep. (BNA) 2433, 2441 (Mass. Super. Ct. 1981) (statement that plaintiff built without zoning variance when in fact law changed creating ambiguity after plaintiff had built presents question of fact on substantial truth); Dibble v. WROC TV Channel 8, 142 A.D.2d 966, 530 N.Y.S.2d 388, 389 (1988) (defense of truth is not available where defendant published statement that grand jury " 'indicted [plaintiff] on charges of fraud, embezzlement and securities violations' " when grand jury had only indicted plaintiff on the first charge); Prahl v. Brosamle, 98 Wis. 2d 130, 295 N.W.2d 768, 776 (Ct. App. 1980) (false to state that police charged person with crime where police officer had merely stated he would be charged).

257. 15 Media L. Rep. (BNA) 2369, 2372-73 (N.D. Ill. 1988). The court relied on legal definitions of the term conviction in reaching its decision. *Id.* at 2373. *Cf.* Torres v. Playboy Enter., 7 Media L. Rep. (BNA) 1182, 1185 (S.D. Tex. 1980) (fair report did not protect criminal conviction when it had been reversed four months before article was published).

fact false on the theory that if they were not false then there could be no proof of fault.[258] The Court concluded that the Florida courts properly found that the published statement—that a court had granted the plaintiff's former husband a divorce on the grounds of both extreme cruelty and adultery— was false, because the Florida Supreme Court ultimately held that the judgment was based solely on the former ground.[259] The issue was not whether the published statement carried a greater sting, which it almost certainly did, but rather whether it was an accurate summarization of an unclear trial court opinion.[260] Although the divorce court judge mentioned the evidence of adultery by both parties in the record, it failed to make a formal finding of either adultery or extreme cruelty in its decree.[261] The Supreme Court was unwilling to allow the press much leeway on the issue of truth, at least where the defamatory potential as well as the possibility of error should have been quite plain.[262] As a practical matter, the Court seemed to say that if the press relies on a defense of truth, it must get it right at least with respect to sting even if the truth was not immediately apparent at the time. While this may seem harsh, it is not inconsistent with the common law cases which seem to focus on the accuracy of the gist or sting in determining whether a published statement was true or false. Nor is it necessarily unfair to the publisher as long as the law provides a sufficient degree of breathing space through the issue of fault. Analytically it may make sense for courts to be somewhat unforgiving on the question of falsity but then provide the reporter with a fair margin of error when considering whether the statement was published with negligence or reckless disregard for the truth. That seemed to be the approach that Justice Powell emphasized in his concurrence in *Firestone*.[263]

C. *Fair Report and Accuracy*

A similar issue often arises under the privilege of fair report which protects the defendant only to the extent that the report of judicial or official proceeding is "fair" and "accurate."[264] As with the issue of truth, the courts

258. 424 U.S. 448, 458 (1976).
259. *Id.* at 458-59.
260. *Id.*
261. *Id.*
262. The Court cautioned:

> Petitioner may well argue that the meaning of the trial court's decree was unclear, but this does not license it to choose from among several conceivable interpretations the one most damaging to respondent. Having chosen to follow this tack, petitioner must be able to establish not merely that the item reported was a conceivable or plausible interpretation of the decree, but that the item was factually correct.

Id. at 459.

263. *Id.* at 464-70 (Powell, J. concurring); *see infra* notes 308-323 and accompanying text. In *Firestone*, 305 So.2d 172, 177-78 (1974), the Florida Supreme Court accorded the press far less leeway on the fault issue than Justice Powell. Writing for the United States Supreme Court, Justice Rehnquist seemed to be leaning toward the Florida court's approach. However, Justice Powell and Justice Stewart who joined in Powell's special concurrence were both essential to Justice Rehnquist's majority. *Id.* at 464.

264. The privilege of fair report is usually statutorily based. Fair report can consist of

will excuse defendant's inaccurate use of legal terminology as long as the error does not increase the sting of the allegation.[265] In *Karp v. Hill & Knowlton*, for instance, a federal district court held that it was sufficiently accurate under the New York fair report privilege to state that the plaintiff had defrauded a former employer when a state court had granted a preliminary injunction against plaintiff based on the employer's claims of breach of fiduciary duty, unfair competition, and misappropriation.[266] In applying the New York fair report privilege, the court observed that the New York decisions "evidence a judicial willingness to immunize and even encourage flexi-

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separate privileges covering either judicial or official proceedings and official records. Schiavone Constr. Co. v. Time, Inc., 847 F.2d 1069, 1087, 1087-88 n.28 (3d Cir. 1988). In many jurisdictions a significant body of caselaw defines the scope of the privilege in terms of the type of proceedings and records that are covered. *See, e.g.*, Law Firm of Daniel P. Foster v. Turner Broadcasting Sys., 844 F.2d 955, 961 (2d Cir. 1988) (concluding that New York courts would extend fair report privilege to execution of search warrant issued by federal judge), *cert. denied*, 109 S. Ct. 559, 102 L. Ed. 2d 585 (1988); Lavin v. New York News, 757 F.2d 1416, 1419 (3d Cir. 1985) (New Jersey fair report privilege covers statements made in affidavit submitted to obtain search warrant), *cert. denied*, 474 U.S. 1139 (1986); Bufalino v. Associated Press, 692 F.2d 266, 271-72 (2d Cir. 1982) (reporter cannot rely on Pennsylvania official records privilege where he did not rely on official records in question in writing story), *cert. denied*, 462 U.S. 1171 (1983); Medico v. Time, Inc., 643 F.2d 134, 140 (3d Cir.) (Pennsylvania fair report privilege would cover summary of F.B.I. report on organized crime), *cert. denied*, 454 U.S. 836 (1981); Stone v. Banner Publishing Corp., 677 F. Supp. 242, 246 (D. Vt. 1988) (concluding Vermont privilege does not cover investigation prior to judicial proceedings); Roehsler v. American Broadcasting Co., 11 Media L. Rep. (BNA) 2444, 2448-49 (D.N.J. 1985). (New Jersey fair report privilege does not cover investigative report on topic incidentally before court); Eastern Milk Producers v. Milkweed, 8 Media L. Rep. (BNA) 2100 (N.D.N.Y. 1982) (New York official proceedings privilege covers administrative investigation); Mathis v. Philadelphia Newspapers, 455 F. Supp. 406, 417 (E.D. Pa. 1978) (Pennsylvania common law informal official proceedings privilege covered photograph obtained from F.B.I.); Phillips v. Evening Star Newspaper Co., 424 A.2d 78, 89 (D.C. 1980) (official records privilege does not cover log of police hotline), *cert. denied*, 451 U.S. 989 (1981); Jones v. Taibbi, 400 Mass. 786, 512 N.E.2d 260, 266-67 (1987) (Massachusetts fair report privilege would cover statements by police only if made public as part of official statements); Rouch v. Enquirer & News of Battle Creek, 427 Mich. 157, 398 N.W.2d 245, 252 (1986) (Michigan official records privilege does not extend to records of arrest). *See also* Gobin v. Globe Publishing Co., 216 Kan. 233, 531 P.2d 76, 83 (1975) (applying the standard of negligence to override the qualified privilege of fair report); Sowle, *Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report*, 54 N.Y.U.L. REV. 469 (1979).

265. *See, e.g.*, Zerman v. Sullivan & Cromwell, 677 F. Supp. 1316, 1322-23 (S.D.N.Y. 1988) (stating that plaintiff attorney had brought " 'several unsuccessful appeals' " when he had only brought one along with petition for rehearing and two petitions for certiorari is not sufficiently inaccurate under New York privilege); Ricci v. Venture Magazine, 574 F. Supp. 1563 (D. Mass. 1983) (full report of incident during trial would carry no less sting than the abridged report made by defendant); Eastern Milk Producers v. Milkweed, 8 Media L. Rep. (BNA) 2100, 2103 (N.D.N.Y. 1982) (statement that loan guarantee was "illegal" is a sufficiently accurate characterization of fact that it violated federal regulation); Jones v. Taibbi, 400 Mass. 786, 512 N.E.2d 260, 266 (1987) (stating that police charged plaintiff with murder when police only booked him on suspicion of murder is substantially accurate); Salcedo v. El Diario Publishing Co., 5 Media L. Rep. (BNA) 2308, 2311 (N.Y. App. Div. 1979) (failure to qualify each charge with the word "alleged" is not inacurrate when clear reporter was summarizing charges in indictment); Lekutanaj v. News Group Publications, 12 Med. L. Rep. (BNA) 1782, 1783 (N.Y. Sup. Ct. 1986) (statement that plaintiff was defendant in civil lawsuit when he had simply guaranteed the settlement is substantially accurate under New York fair report privilege).

266. 631 F. Supp. 360, 363-64 (S.D.N.Y. 1986); *cf.* Ryan v. Brooks, 634 F.2d 726, 730, 734 (4th Cir. 1980) (court could not find reckless disregard for truth where writer summarized reports of corporate executive's illegal kickback scheme as extortion).

ble characterization of fraud-like conduct. . . . . Thus, even when the term fraud is not part of the judicial record, the courts will permit its use if it fairly characterizes some aspect of a judicial proceeding."[267] Likewise in *Handelsman v. San Francisco Chronicle* a California appellate court held that the use of the criminal term theft to describe a civil action for conversion was not sufficiently inaccurate as a matter of law to fall outside of the California fair report privilege.[268]

In *Jones v. Garner*, however, the South Carolina Supreme Court held that a statement that the plaintiff had engaged in tax evasion was sufficiently inaccurate to fall outside of the fair report privilege if the jury construed it to imply that the police had charged the defendant with criminal conduct since the tax liens on which the reporter relied did not carry such a connotation.[269] In other words, where the defendant chose an ambiguous legal term with a potentially defamatory meaning to paraphrase a non-ambiguous legal document, he ran the risk that reader and the jury would infer the worst.

Just as the statement must be accurate in order to be privileged, it must also be fair. The courts recognize that the press will inevitably need to abridge the events that transpired in the courtroom in order to report them.[270] In describing the severance of plaintiff's trial because the jury may have seen him make a threatening gesture to a government witness, a federal district court in *Ricci v. Venture Magazine* held that the defendant's description was fair even though it omitted the fact that plaintiff's attorney had disputed that the incident had occurred.[271] On the other hand, a court

267. 631 F. Supp. at 364; *see also* Jennings v. Telegram-Tribune, 164 Cal. App. 3d 119, 128, 210 Cal. Rptr. 485, 490 1985) (report that plaintiff was guilty of " 'tax evasion' " and " 'tax fraud' " is accurate description of his no contest plea to charge of failing to file tax return where he had over $400,000 of income); Suriano v. New York News, 11 Media L. Rep. (BNA) 1309, 1310 (N.Y. Sup. Ct. 1984) (report is not inaccurate where reporter wrote that court held doctor liable in malpractice case although jury had found him only seventy percent responsible). *But see* Gurda v. Orange County Publications, 81 A.D.2d 120, 439 N.Y.S.2d 417, 419-20 (1981) (jury could decide the term "defrauded" implied court found plaintiff guilty of a criminal rather than a civil offense, and therefore is inaccurate report of public proceeding).

268. 11 Cal. App. 3d 381, 388, 90 Cal. Rptr. 188, 191 (1970). The reporter testified that he knew the difference, but did not believe that the average reader would. *Id.* at 386, 90 Cal. Rptr. at 190.

269. 158 S.E.2d 909, 911, 913 (S.C. 1968); *see also* Martin-Trigona v. Kupcinet, 15 Media L. Rep. (BNA) 2369, 2374 (N.D. Ill. 1988) (report that plaintiff convicted of two felonies when in fact the appellate court reversed convictions was neither fair nor accurate); Britt v. Knight Publishing Co., 291 F. Supp. 781, 784 (D.S.C. 1968) (reporting police charged plaintiff with offense involving intent to defraud when police only charged him with a crime that did not involve moral turpitude is not substantially correct); *cf.* Crittendon v. Combined Communications, 714 P.2d 1026, 1029-30 (Okla. 1985) (description of pathology report in malpractice suit as stating plaintiff was "healthy" instead of "normal" is substantially accurate); Gurda v. Orange County Publications, 81 A.D.2d 120, 439 N.Y.S.2d 417, 420 (1981) (statement that court fined plaintiff for fraud when court assessed him attorneys fees in civil fraud case presented a jury question as to whether report was fair or inaccurately implied that court had convicted plaintiff of a crime).

270. For instance, a federal district court in Ricci v. Venture Magazine, 574 F. Supp. 1563 (D. Mass. 1983) noted that "[j]udicial proceedings often consist of long periods of unexciting evidence and colloquy, punctuated by occasional exchanges among participants in which depths of human emotion are exposed. Media reports may permissibly focus on the more dramatic occurrences, to the exclusion of the less interesting." *Id.* at 1567.

271. *Id.* at 1568. The court observed that "[the public] understand[s] that participants in a

would not consider fair a report that creates or increases the sting of the defamatory statement through omission. In the significant case of *Schiavonne Construction Co. v. Time, Inc.*, the Court of Appeals for the Third Circuit held that as a matter of law a report was unfair and therefore outside of the protection of the fair report privilege where the defendant reported that an F.B.I. report on the disappearence of Jimmy Hoffa mentioned the plaintiff's name but deliberately omitted mentioning that none of the references " 'suggested any criminality or organized crime associations.' "[272]

Both on the question of falsity as well as accuracy and fairness under the fair report privilege, common sense rather than legal technicality tends largely to guide the decisions the courts reach concerning misleading use of legal terminology. The courts clearly understand that inaccurate descriptions of legal matters can sometimes carry great potential for harm. They tend to proceed on the quite proper assumption that unless the descriptions are aimed specifically at a professional audience, courts must evaluate them from the perspective of the uninitiated layman rather than parse them like a legal document.[273]

D. Fact or Opinion

Both as a matter of common law[274] and constitutional law,[275] the law of defamation protects statements of opinion. In other words, liability can be imposed only with respect to a false and defamatory statement of fact. In drawing the line between protected statements of opinion and unprotected statements of fact where the defamatory allegations involve descriptions of legal matters or legal terminology, the courts have again tended to give the press a fair margin of protection. Although the case of *Karp v. Hill & Knowlton*[276] involved a statement by a corporation's public relations firm to

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trial often make sharply conflicting contentions, and that witnesses often give conflicting testimony. Media reports are not required to remind readers of such well understood matters as these." *Id.*

272. 847 F.2d 1069, 1085-88 (3d Cir. 1988); *see also* Street v. National Broadcasting Co., 645 F.2d 1227, 1233 (6th Cir.) (en banc) (fair report privilege does not cover portrayal of famous Scottsboro trial in docudrama due to lack of neutrality where show omitted plaintiff's version and emphasized derogatory interpretation of events), *cert. dismissed*, 454 U.S. 1095 (1981).

273. *See* Ricci v. Venture Magazine, 574 F. Supp. at 1567 ("cases indicate that courts hearing defamation claims are to apply a common sense standard of expected lay interpretation of media reports of trials, rather than inquiring whether a report was strictly correct in defining legal charges and describing legal rulings").

274. *See generally* R. SACK, LIBEL, SLANDER AND RELATED PROBLEMS 153-187 (2d ed. 1980); Hill, *Defamation and Privacy under the First Amendment*, 76 COLUM. L. REV. 1205 (1976); Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221 (1976). The fact-opinion distinction at common law was quite complex. *Id.* For a critical analysis of the deficiencies of the fact-opinion distinction, see Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WILLIAM & MARY L. REV. 825, 861-87 (1984).

275. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974). Authorities still dispute the proper mode of analysis for distinguishing fact from opinion under the First Amendment. Perhaps the leading case is Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985).

276. 631 F. Supp. 360 (S.D.N.Y. 1986).

a trade journal as opposed to a statement by the press itself, it provides a nice illustration of a common judicial approach in the area. In that case the plaintiff in the defamation action, Karp, had been sued by Buckingham on a variety of unfair trade claims and had been subjected to an injunction by a federal district court.[277] The appellate court set aside the injunction due to an insufficient showing of irreparable harm, indicating that it was unlikely that Karp would ultimately prevail on most of its claims.[278] When the court announced the decision, Hill & Knowlton, the public relations firm for the plaintiff in the trade secret case, issued a press release stating that "[t]he ruling supports our claim that Mr. Karp defrauded Buckingham. . . ."[279] Karp sued Hill & Knowlton for defamation.[280] The court concluded that "[a]s one interpretation of a relatively complex and lengthy judicial opinion, the statement could never be proven right or wrong, much less 'true' or 'false'. . . . and because the context in which it was presented earmarked it as such, it was non-actionable opinion."[281] Likewise in *Jenkins v. KYW* the United States Court of Appeals for the Third Circuit held that a reporter's statement suggesting that a criminal judge had failed to abide by his oath by imposing too lenient of a sentence on a convicted murderer was simply a

277. *Id.* at 361-62.
278. *Id.* at 361.
279. *Id.* at 362.
280. *Id.*
281. *Id.* at 365. *See, e.g.*, Price v. Viking Penguin, Inc., 16 Media L. Rep. (BNA) 2169, 2177 (8th Cir. 1989) (statement that F.B.I. agent "knowingly prepared" witness to give false testimony was protected opinion); Janklow v. Newsweek, 788 F.2d 1300, 1303-05 (8th Cir.) (en banc) (implication that plaintiff attorney general persecuted Indian activist because the latter had accused him of raping a teenage girl is statement of opinion), *cert. denied*, 479 U.S. 883 (1986); Lewis v. Time, Inc., 710 F.2d 549, 552-56 (9th Cir. 1983) (statement that attorney who had been successfully sued for malpractice and fraud was "shady practitioner" and should be disbarred is statement of opinion based on true factual statement); Information Control v. Genesis One Computer Corp., 611 F.2d 781, 784 (9th Cir. 1980) (press release by defendant in lawsuit that plaintiff was using lawsuit to avoid payment of its obligations is protected opinion); Godbehere v. Phoenix Newspapers, 15 Media L. Rep. (BNA) 2050, 2051-52 (Ariz. Super. Ct. 1988) (statement quoting federal officials as saying that state drug bust was "illegal and publicity stunt" is statement of opinion); Reddick v. Craig, 719 P.2d 340, 346-47 (Colo. Ct. App. 1985) (statement in letters to editor referring to county budget as "swindles" and "excess . . . 'take' " are statements of opinion); Slavik v. News Journal, 428 A.2d 15, 16 (Del. 1981) (statement that public official had " 'abused' his office" is matter of opinion where appellate court had reversed his felony conviction for perjury but where he had pleaded guilty to obstruction of justice); Hoag v. Charlotte Republican-Tribune, 5 Media L. Rep. (BNA) 1535, 1540 (Mich. Cir. Ct. 1979) (statement that court convicted defendant on basis of plaintiff's testimony which turned out to be false is statement of opinion); Rinaldi v. Holt, Rhinehart & Winston, Inc., 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d (statement that judge is unfit for office and ought to be removed is a statement of opinion); *cf.* Scott v. News Herald, 25 Ohio St. 3d 243, 496 N.E.2d 699, 706-08 (1986) (statement by sportswriter that high school wrestling coach "beat the law with the 'big lie' " arguably implying that he committed perjury at administrative hearing is statement of opinion), *cert. denied*, 434 U.S. 969 (1977); Marks v. New York News, 4 Media L. Rep. (BNA) 2280 (N.Y. Sup. Ct. 1974) (editorial stating that judge is incompetent and calling for his removal is statement of opinion); Haas v. Painter, 62 Or. App. 719, 662 P.2d 768, 771 (1983) (statement implying that prosecutor responsible for police failure to give Miranda warnings to juvenile murder suspect by discouraging contact between police and prosecutor before investigation is complete is statement of opinion); Camer v. Seattle Post-Intelligencer, 45 Wash. App. 2d 29, 723 P.2d 1195, 1202 (1986) (quotes from lawyers that plaintiff's statements were " 'frivolous' and constitute a 'nuisance' " are statements of opinion), *cert. denied*, 482 U.S. 916 (1987).

statement of the reporter's opinion.[282]

A party, however, is not at liberty to say anything it chooses about a legal matter and then characterize it as a non-actionable opinion. In *Tomson v. Stephan*, for instance, a federal district court held that the defendant and party to a confidential settlement of a sexual harassment case made statements of fact when he asserted that the charges had been " 'without merit' and 'totally unfounded'."[283] As the court noted, the statements by a party with first hand knowledge of the underlying incident and the resulting settlement was equivalent to an assertion that the incident had not in fact occurred as opposed to an objective third party's assessment of the case.[284]

The courts recognize that reporters and writers, especially when they are editorializing, often use strong language to describe participants and events in legal proceedings. Often the clear intent as well as the meaning conveyed to the ordinary reader is one of strong censure rather than an attempt to make a factual assertion, even though they employ legal terminology or a description of a legal proceeding. Given the general public nature of legal proceedings, such commentary can be socially significant and should not be unduly discouraged. Consequently, the courts tend appropriately to provide a fair margin of protection by policing the fact opinion distinction with an inclination toward finding opinion.

E. Proof of Fault

In defamation litigation courts most often consider press misuse of legal terminology under the issue of proof of fault. As noted above, constitutional law requires a public figure or public official plaintiff to prove that the defendant published the defamatory statements with actual malice, defined as knowledge of falsity or reckless disregard for the truth.[285] A private figure plaintiff must at least establish that the defendant was negligent in publishing the defamatory falsehoods.[286]

Generally, a plaintiff has difficulty establishing that a reporter or editor knew that a description of a legal proceeding was false, or that the use of a

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282. 829 F.2d 403, 408-09 (3d Cir. 1987).

283. 699 F. Supp. 860, 866 (D.C. Kan. 1988).

284. *Id.*; *see also* Cianci v. New Times Publishing Co., 639 F.2d 54, 62 (2d Cir. 1980) (statement that plaintiff, a mayor, raped a woman at gunpoint ten years earlier and paid her off to obstruct justice is statement of fact not opinion); Ragano v. Time, Inc., 302 F. Supp. 1005, 1009-10 (M.D. Fla. 1969) (publishing picture of attorney with his organized crime figure clients and labeling those pictured as "hoodlums" is statement of fact and not opinion), *aff'd*, 427 F.2d 219 (5th Cir. 1970); Silsdorf v. Levine, 59 N.Y.2d 8, 449 N.E.2d 716, 719-21, 462 N.Y.S.2d 822, 826-27 (statement that " 'it pays to do business with the Mayor' " following recitation of allegations against him could be construed as statement of fact indicating he had used his public office illegally), *cert. denied*, 464 U.S. 831 (1983); Rinaldi v. Holt, Rinehart & Winston, Inc., 397 N.Y.S.2d 943, 951 42 N.Y.2d 369, 381-82, 366 N.E.2d 1299, 1304, (statement that judge was " 'probably corrupt' and that his sentences of certain defendants were suspiciously lenient, with strong undertones of conspiracy and illegality" are statements of fact), *cert. denied*, 434 U.S. 969 (1977).

285. *See supra* notes 18-20 and accompanying text. For a discussion of proof of fault in media defamation litigation beyond the context of legal affairs coverage, see Bloom, *supra* note 11.

286. *See supra* note 21 and accompanying text.

legal term of art was inaccurate, or even that he proceeded in disregard of strong reasons to believe that this was so. The courts well understand that the law is complex and its language is often confusing to the non-legally trained reporter. Consequently the misuse of a legal term or a misstatement regarding the effect of a legal proceeding scarcely shows that the reporter must have known that the statement was false. Indeed the more natural inference is that he almost certainly did not. The Supreme Court's decision in *Time, Inc., v. Pape*[287] is an important precedent in this area. In that case a reporter for the defendant, *Time* magazine, wrote that a report of the United States Civil Rights Commission stated that the plaintiff, a police officer, searched and arrested a black man in a brutal and illegal manner when in fact the report was only summarizing the facts set forth in the complaint that the man had filed with the Commission.[288] The Court held that the plaintiff could not establish actual malice where the reporter was simply adopting one rational interpretation of an inherently ambiguous document.[289] This is an important principle for the reporter covering legal proceedings who will frequently be placed in the position of having to decipher and explain ambiguous legal documents under deadline pressure with little assistance.

In *Bandelin v. Pietsch* a reporter wrote that a public figure attorney had been " 'judged in contempt of . . . court' " when in fact the order on which the reporter relied only directed the prosecuting attorney to initiate contempt proceedings.[290] Citing *Pape* the Supreme Court of Idaho concluded that even though the reporter purported to have some familiarity with legal concepts, a court could not predicate a finding of reckless disregard on the misinterpretation of the court order.[291] Likewise in *Orr v. Argus - Press Co.*

287. 401 U.S. 279 (1971).

288. *Id.* at 280-83.

289. *Id.* at 289-90. *But cf.* Sprague v. Walter, 357 Pa. Super. 570, 516 A.2d 706 (1986) (deletion of the phrase "re-write, which excised 'hearsay' and realigned " 'allegedly' " from description of trial testimony, was one of several factors raising inference of reckless disregard), *aff'd*, 518 Pa. 425, 543 A.2d 1078, *appeal dismissed*, 109 S.Ct. 548, 102 L.Ed.2d 576 (1988).

290. 98 Idaho 337, 563 P.2d 395, 396, *cert. denied*, 434 U.S. 891 (1977). The court later judged the attorney in contempt; however, an appellate court reversed the conviction. *Id.*

291. 563 P.2d at 399; *see also* Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072, 1090-91 (3d Cir. 1984) (insufficient evidence of reckless disregard where editor misread footnote in government report as stating plaintiff as well as another individual had his sentence reduced when in fact he had the charge dismissed), *cert. denied*, 474 U.S. 864 (1985); Waskow v. Associated Press, 462 F.2d 1173, 1176 (D.C. Cir. 1972) (insufficient evidence of reckless disregard shown where reporter wrote that the court had convicted the plaintiff with Dr. Spock and two others, relying on Associated Press bulletin that stated that the plaintiff had participated in a demonstration with Spock and the two others, and that a court had convicted all "three"); Buchanan v. Associated Press, 398 F. Supp. 1196, 1204 (D.D.C. 1977) (federal district court did not find reckless disregard for the truth where reporter wrote that evidence in judicial proceeding concerned campaign contributions when it in fact pertained to expenditures, considering story was written under deadline pressure and "almost all the reporters who were present at the hearing were very confused about precisely what was going on"); Wanless v. Rothballer, 115 Ill. 2d 158, 503 N.E.2d 316, 323 (1986) (court could not find sufficient evidence of reckless disregard for the truth where reporter may have misunderstood details of and was careless in explaining village attorney's fee arrangements with village and private clients suggesting a double payment or a conflict of interest), *cert.denied*, 482 U.S. 929 (1987);

the Court of Appeals for the Sixth Circuit relied on *Pape* in concluding that a court could not base a finding of reckless disregard for the truth on a reporter's characterization of an indictment charging an attorney with thirty four violations of the state securities laws as "fraud."[292]

In most of these cases nothing particularly ambiguous or confusing about the legal terminology in issue appears to a lawyer, but the terminology might well appear quite misleading to the lay reporter and reader. *Dupler v. Mansfield Journal*[293] is a good example. There, a reporter drew the quite understandable but incorrect conclusion that a police officer who had conducted a search without a warrant had conducted an illegal search.[294] Perhaps the reporter should have known better, but the fact that he made the mistake was not sufficient to show that it was highly likely that he was aware of his error.

In some cases questions arise as to whether the legal terminology or description really was ambiguous. For instance, *Melon v. Capital Cities Press* involved a statement in a police report that the police arrested three individuals on a variety of specified drug charges. The court concluded that the statement was ambiguous.[295] One could construe the statement as suggesting that the police arrested each individual on each specific charge or that the police arrested each on only some of the charges or alternatively that it carried only the latter meaning.[296] In such a case, this determination was a question of fact for the jury to resolve.[297]

Similarly, mere overstatement or exaggeration of a legal charge or its significance generally cannot constitute a showing of reckless disregard for the truth.[298] For example, stating that a court convicted the plaintiff of conspir-

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Fitzpatrick v Philadelphia Newspapers, Inc., 17 Media L. Rep. (BNA) 1210, 1215 (Pa. Super. 1988) (insufficient evidence of reckless disregard where newspaper referred to individual as a client of plaintiff attorney although plaintiff only argued at consolidated appearance on behalf of the individual and co-defendant).

292. 586 F.2d 1108, 1113-14 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979).

293. 64 Ohio St. 2d 116, 413 N.E.2d 1187 (1980), *cert. denied*, 452 U.S. 962 (1981).

294. 413 N.E.2d at 1193; *see also* Handelman v. Hustler Magazine, 469 F. Supp. 1053, 1054-59 (S.D.N.Y. 1979) (insufficient evidence of reckless disregard where reporter erroneously assumed that if fees for one of the lawyers in an estate proceeding totaled $100,000, fees for the other six attorneys must total six times that amount); Standke v. B. E. Darby & Sons, Inc., 291 Minn. 468, 480-82, 193 N.W.2d 139, 141-42, 148 (1971), *cert. dismissed*, 406 U.S. 902 (1972) (insufficient evidence of reckless disregard where defendant incorrectly assumed after some research that grand jury was legally required to issue report).

295. 407 So. 2d 85, 86-87 (La. Ct. App. 1982), *cert. denied*, 409 So. 2d 656 (La. 1982).

296. *Id.*

297. *Id.*

298. Williams v. Pasma, 202 Mont. 66, 656 P.2d 212, 216 (1982) (insufficient evidence of reckless disregard where reporter wrote that plaintiff was " 'charged" rather than " 'indicted' ") *cert. denied*, 461 U.S. 945 (1983); DeCarvalho v. daSilva, 414 A.2d 806, 809, 815 (R.I. 1980) (insufficient evidence of reckless disregard where newspaper inaccurately suggested more than one conviction and exaggerated underlying facts); Tilton v. Cowles Publishing Co., 76 Wash. 2d 707, 459 P.2d 8, 18-19 (1969) (insufficient evidence of reckless disregard where reporter wrote that allegations in complaint stated that plaintiff engaged in " 'illegal' " rather than " 'unlawful' " action arguably suggesting that it constituted a criminal, instead of a civil, violation), *cert. denied*, 399 U.S. 927 (1970); *cf.* Bryant v. Associated Press, 595 F. Supp. 814, 816 (D.V.I. 1984) (insufficient evidence of reckless disregard where reporter wrote that police arrested plaintiff and charged him with arson when in fact police arrested plaintiff and charged

acy to commit burglary when in fact the police only charged him with the offense does not by itself amount to a showing of reckless disregard for the truth.[299] Cases such as these recognize that a reporter is not expected to comprehend legal nuances that might be obvious to a lawyer; misuse of legal terminology thus does not by itself indicate that the reporter must have known that a statement was probably untrue.

A case can arise, of course, where under the circumstances a reporter misuses a legal term of art so egregiously or states the nature or significance of a legal proceeding so incorrectly that the factfinder may infer that he must have been aware that what he was writing quite likely was false. In *DiLorenzo v. New York News* a reporter wrote that a court convicted the plaintiff, a judge, of perjury but that the court dropped the charges when in fact the court had acquitted the judge of some charges and the court dropped the remainder without any conviction.[300] The reporter testified that he knew that the police had charged the plaintiff and that he got out from under the indictment and admitted that he " 'did not have a clear understanding of the various legal steps leading to dismissal of the charges.' "[301] The New York appellate court concluded that reporting that a court had convicted the judge of criminal charges when the reporter did not really know that that was the case could give rise to an inference of reckless disregard.[302] This seems correct because the reporter was aware that he really did not know whether the serious charges that he was reporting were true or not.

When the plaintiff is not a public figure, however, and the standard of fault is negligence or the somewhat higher but still objectively measured standard of gross irresponsibility,[303] the chance increases that a reporter's failure to understand and properly explain a legal proceeding or to accurately use a legal term of art will lead to liability. Unlike the reckless disregard standard, which focuses on the reporter's subjective knowledge of the probable truth or falsity of the defamatory allegation,[304] a negligence analy-

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him with inciting a riot); Guthrie v. Annabel, 50 Ill. App. 3d 969, 365 N.E.2d 1367, 1371-72 1977) (insufficient proof of reckless disregard where publisher wrote that seizure of his property by plaintiff constituted "theft" though attorney had advised him that no criminal proceedings could be brought against the plaintiff while civil proceedings were pending).

299. Novel v. Garrison, 338 F. Supp. 977, 983 (N.D. Ill. 1971).

300. 78 A.D.2d 669, 432 N.Y.S.2d 483, 484 (1981).

301. 432 N.Y.S.2d at 484.

302. *Id.* at 486; *see also* McHale v. Lake Charles American Press, 309 So. 2d 556, 568 (La. Ct. App. 1980), *cert. denied*, (reckless disregard found where reporter, who knew bonds approved by plaintiff had been successfully sold in the past, wrote that no one would buy securities on plaintiff's opinion); *cf.* Grebner v. Runyon, 132 Mich. App. 327, 347 N.W.2d 741 (1984) (sufficient evidence of reckless disregard to preclude summary judgment where among other things plaintiff alleged that defendant must have known that a district court could not issue an indictment).

303. *See* Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975) (New York Court of Appeals decided to apply a gross irresponsibility standard to matters "arguably within the sphere of legitimate public concern"). Most reports of judicial proceedings would probably fall within this sphere. *See supra* note 155.

304. St. Amant v. Thompson, 390 U.S. 727, 731 (1968); New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964).

sis turns on whether a reasonable reporter would or should have known that the statement was false regardless of whether the defendant did or did not know. It is likely that many, if not most, jurisdictions will apply a professional standard and thus look to common journalistic custom and practice to determine whether the reporter acted reasonably.[305] Presumably, a newspaper is under a duty to see that a reporter assigned to cover legal matters has received at least a modest introduction to legal and judicial systems.[306] Similarly, a reporter must make a reasonable attempt to ascertain and comprehend the information, verify it, and present it accurately in order to avoid negligently publishing defamatory falsehood.[307]

Time, Inc. v. Firestone[308] is a prominent case involving publication of a defamatory falsehood resulting from a reporter's arguably negligent misunderstanding of a court order. There, the Florida trial court issued a judgment discussing evidence of adultery and mental cruelty by both parties but apparently granted the divorce only on the latter ground in the absence of a specific fact finding on either ground.[309] Relying on information received from a wire service report, a newspaper account, a "stringer" in Florida, and Time's Miami Bureau chief, Time's staff in New York wrote a paragraph stating that Russell Firestone divorced Mary Alice Firestone on grounds of extreme cruelty and adultery. Mary Alice Firestone sued Time for defamation and received a substantial judgment which the Supreme Court of Florida affirmed.[310]

The United States Supreme Court granted certiorari and in an opinion written by Justice Rehnquist held that the plaintiff was not a public figure nor was her divorce litigation a public controversy under *Gertz*.[311] The Court then turned to the question of fault and noted that the Supreme Court of Florida had concluded that "[a] careful examination of the final decree prior to publication would have clearly demonstrated that the divorce had been granted on the grounds of extreme cruelty, ... [and thus] [t]his is a flagrant example of 'journalistic negligence.' "[312] Justice Rehnquist suggested that if in fact the Florida court were making a finding of fault (presumably negligence), it apparently would have sufficed under *Gertz*.[313] Because it was unclear that the Florida court actually intended to make a specific finding of fault, however, the United States Supreme Court vacated

305. *See* Bloom, *supra* note 11, at 341-45.

306. Many of the leading journalism texts provide a fairly detailed description of the legal system along with extensive guidance on how to properly cover the courts and legal affairs. *See, e. g.*, F. FEDLER, REPORTING FOR THE PRINT MEDIA 269-303 (1977); M. MENCHER, NEWS REPORTING AND WRITING 529-548 (1981); H. SCHULTE, REPORTING PUBLIC AFFAIRS 163-279 (1981).

307. *See generally* Bloom, *supra* note 11, at 346-84 (discussing proof of negligence and gross irresponsibility in media defamation cases).

308. 424 U.S. 448 (1976).

309. *Id* at 458-59.

310. *Id.* at 449-50.

311. *Id.* at 448.

312. *Id.* at 463.

313. *Id.* at 463-64.

the judgment and remanded for further proceedings.[314]

In his concurring opinion, Justice Powell questioned whether a court could have properly made a finding of negligence on the record before the court.[315] He pointed out that the reporters, who discussed the judgment with the plaintiff's attorney, were operating under fairly tight deadline pressure, and perhaps most significantly, were attempting to decipher a rather opaque judicial order. On the latter point he noted that the order itself never expressly stated the grounds on which the court granted the divorce. Rather, as the Supreme Court of Florida had explained, the court could not have granted the divorce on grounds of adultery because it ordered the petitioner to pay the respondent alimony which would not have been permissible under Florida law.[316] Without conclusively deciding the issue, Justice Powell indicated that he believed that a reasonably prudent newsman could certainly read the trial court's decree and fail to understand that adultery was not the basis of the judgment.[317] In his dissenting opinion, Justice Marshall argued that the principle of *Time, Inc. v. Pape*, that a court could not base a finding of reckless disregard on a rational interpretation of an ambiguous document, was equally applicable under a negligence approach and would preclude liability.[318]

The *Firestone* dicta on the proof of fault issue suggests that a reporter who writes about private figures involved in legal proceedings risks negligence liability if he is not careful to ensure that he fully understands the significance of the matters he is discussing. Nontheless, on the facts before the Court the concurring opinion of Justice Powell and the dissenting opinion of Justice Marshall seem more persuasive on the issue of fault than the suggestions to the contrary by the majority. The trial court's order was indeed confusing. It would seem unduly burdensome to require a reporter to possess the knowledge of a family law specialist, or for that matter to consult with one, and then base his explanation of the case on a close and not readily apparent reading of the order. Perhaps the most scrupulous reporters would do just that, but surely the Florida Supreme Court was wrong in suggesting that it was clearly unreasonable to fail to take such precautions. Such exactitude seems inconsistent with the degree of leeway that courts ordinarily accord the press when it is attempting to comprehend and explain complex legal matters. Hopefully, Justice Powell's approach would have prevailed if the Court had addressed the issue on the merits rather than in dicta.

The recent case of *Gazette v. Harris* provides an illustration of a fairly clear instance of negligent reporting of a legal matter due to the reporter's lack of familiarity with the terminology he was summarizing.[319] There, a newspaper editor sent a novice reporter to the courthouse to verify a story about a recent child abuse case. The reporter copied the docket entry with-

314. *Id.* at 464.
315. *Id.* at 464-70.
316. Firestone v. Time, Inc., 172, 178 (Fla. 1974), *vacated*, 424 U.S. 448 (1976).
317. 424 U.S. at 470.
318. *Id.* at 484, 490-91.
319. 229 Va. 1, 325 S.E.2d 713, *cert. denied*, 475 U.S. 1123 (1985).

out a clear understanding of the abbreviated terminology. As a result, he submitted a summary for publication which seemed to indicate that the parents of the child who had in fact filed the complaint were instead being charged with the offense. Unlike *Firestone*, the reporter was aware of his own ignorance and the docket entry was not particularly misleading. The Virginia Supreme Court quite properly held that the jury could find that the reporter and editor had failed to comply with the standard of care reflected by prevailing journalistic custom with respect to the reporting of serious crimes.[320]

Levine v. CMP Publications[321] presented the converse of *Gazette v. Harris*. In *Levine* the reporter clearly understood that the legal proceedings she was covering were civil in nature, but by describing them in language which suggested they were criminal in character, such as "[plaintiff] was convicted of stealing," she negligently defamed the plaintiff.[322] The Court of Appeals for the Fifth Circuit found that the evidence of negligence sufficed to affirm the verdict[323] and also found sufficient evidence of reckless disregard for the truth to affirm an award of punitive damages with respect to one of the two defamatory articles in question.[324]

One should not take those cases to suggest, however, that a defamatory publication resulting from a reporter's misunderstanding of legal proceedings or misuse of legal terminology necessarily leads to a finding of negligence. In *LaMon v. Butler*,[325] for instance, a reporter published a series of articles in which she noted that a municipal court had convicted the plaintiff of assault. This was true, but the plaintiff had appealed the conviction to the superior court. The superior court dismissed the appeal with prejudice, which had the effect of voiding the municipal court conviction.[326] The reporter was aware of the dismissal; in fact, she had had it read over the phone to her. It did not indicate on its face, however, that it had any impact on the municipal court conviction. The reporter testified that she discussed the dismissal order with the city attorney and he informed her that it had no effect

320. *Id.* No attempt to verify the truth of the report was made. The article published only the defendant's names in the three preceding items. The reporter omitted the term "CMPLNT" from the article. Finally, the reporter admitted that it " 'looked like an error'." *Id.* The court in the companion case of Charlottesville Newspapers, Inc. v. Matthews, 229 Va. 1, 325 S.E.2d 713 (1985), affirmed a finding of negligence where a reporter referred to a married pregnant rape victim as "Miss" on several occasions after having read a trial transcript in which she was properly referred to as "Mrs." 325 S.E.2d at 732, 734-35.

321. 738 F.2d 660 (5th Cir. 1984).

322. *Id.* at 673-74.

323. *Id.* The judge in the civil proceeding in issue had specifically stated that he had no authority to adjudicate criminal liability. In addition, the plaintiff had informed the defendant reporter, after she had published it in another article, that it incorrectly made him look like a criminal. Finally, plaintiff's expert witness testified that the phrase in question suggested that the court had criminally convicted the plaintiff, and defendant's expert admitted that the language was potentially libelous. With respect to the first, but not the second article, Judge Tate dissented, arguing that the evidence of negligence as well as of falsity was insufficient. *Id.* at 678.

324. *Id.* at 674-75.

325. 110 Wash. 2d 216, 751 P.2d 842 (1988), *cert. denied*, 110 S. Ct. 61, 107 L.Ed. 2d 29 (1989).

326. 110 Wash. 2d at 222-23, 751 P.2d at 845.

on the municipal court conviction. On these facts, the Supreme Court of Washington held that a court could not find the plaintiff to have acted negligently.[327] At most it should have caused her to conduct a further inquiry, which she did. This result clearly seems correct and very much in line with the cases that tend to give reporters a fair margin of error when interpreting legal documents or orders, at least when they do not proceed in a clearly unreasonable manner.[328]

III. CONCLUSION

A significant number of reported defamation cases involve press reports of legal matters or proceedings. This is not surprising considering that in this area the press is often required to decipher and explain complex and technical information involving potentially defamatory charges under tight deadline pressure. On the threshold issue of the plaintiff's status, and hence the appropriate standard of fault, the Supreme Court has largely developed the public figure doctrine in cases involving press coverage of legal affairs. Both the Supreme Court and the lower courts have tended to construe the concepts of the public figure and the public controversy somewhat narrowly in favor of the plaintiffs. Concern that it would be unfair to require persons who the press has defamed as a result of legal proceedings to surmount the difficult actual malice standard in order to recover compensation for injury to reputation seems to prompt this approach. This seems appropriate as a matter of fairness and as a matter of policy to avoid deterring individuals from asserting or defending legal claims.

Similarly, the Court has considered but declined to adopt a constitutional judicial proceedings privilege which would have extended the strict actual malice standard to all mass media reports of judicial proceedings. Here the Court also appears motivated by a desire to avoid unfairly burdening potential defamation plaintiffs who have not voluntarily assumed celebrity status and who may be unable to fend for themselves in the media marketplace. The Court's recognition of the formidable burden that it has imposed on public figure defamation plaintiffs through the actual malice and clear and convincing evidence standards largely drives the Court's reluctance. It is quite likely that a negligence standard, carefully applied, focusing on the professional standards of the journalism profession will afford the private

327. *Id.*

328. *See also* Grobe v. Three Village Heralds, 69 A.D.2d 175, 420 N.Y.S.2d 3, *aff'd*, 49 N.Y.2d 932, 406 N.E.2d 491, 428 N.Y.S.2d 676 (1980). In that case the evidence of the reporter's statement that plaintiff had pleaded guilty when in fact the court had granted an "adjournment in contemplation of dismissal" after the police officer had told the reporter of the guilty plea was insufficient to find gross irresponsibility. The police officer was the father of the boy that the plaintiff was charged with assaulting. He testified that he believed that an ACOD was interchangeable with a guilty plea. A dissent argued that the fact that the reporter was inexperienced as a police reporter and that a court clerk had told him that the plaintiff " 'had pleaded guilty and received [an] ACOD' " should be sufficient to raise an issue of gross irresponsibility given that the reporter made no further attempt to learn the significance of ACOD. 420 N.Y.S.2d at 5, 6. Apparently under New York law, an adjournment in contemplation of dismissal is not the same as plea of guilty. 420 N.Y.S.2d at 4.

figure plaintiff a fair opportunity to recover and at the same time provide the press with sufficient guidance and adequate protection for professionally responsible reporting. If a need for greater accommodation of the interests in reputation and public information exists, courts could more readily achieve it by applying the public figure doctrine and the clear and convincing evidence rule in the legal affairs context more liberally instead of adopting a judicial proceedings privilege.

If the courts have tilted in the direction of the plaintiffs on the public figure/standard of fault issue, they seem to tilt back in the direction of the defendants on many of the other issues that arise in legal affairs defamation cases. On questions pertaining to the accurate use of legal terminology and the description of legal proceedings, the courts tend to favor defendants, allowing the press a fair margin of error. This pattern holds true under several common law and constitutional doctrines including defamatory meaning, truth, fair report privilege, fact or opinion and proof of fault. The deck is not unfairly stacked against the plaintiff since the cases reveal that a plaintiff with a solid case can still prevail on all of these issues.

When one considers the public figure and legal terminology and description cases together, they evince an effort by the courts to accomodate the interest in the protection of reputation of persons involved in legal proceedings with the important interest in disseminating information about these proceedings to the public. The combination of those two approaches may go a long way toward reducing, although certainly not eliminating, the inevitable tension.