

PUBLIC FIGUREHOOD IN THE DIGITAL AGE

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INTRODUCTION

“IM FAMOUS – on MySpace.”¹

The T-shirt slogan may be tongue-in-cheek, but it reflects an important truth: the digital age, marked by the rise of new media and social networking, is radically transforming what it means to be “famous.”² What implications does this have for the legal understanding of what it means to be a public figure?

The concept of “public figurehood” has been explored most extensively in the context of defamation law.³ In the landmark case of

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1. I'm Famous on Myspace T-shirts, Zazzle.com, http://www.zazzle.com/im_famous_on_myspace_tshirt-235471316444495429 (last visited May 23, 2011).

2. Rex Sorgatz, *The Microfame Game*, N.Y. MAG., June 17, 2008; Clive Thompson, *Clive Thompson on The Age of Microcelebrity: Why Everyone's a Little Brad Pitt*, WIRED, Dec. 2007, at 84; Jason Tanz, *Almost Famous*, WIRED, Aug. 2008, at 107.

3. This certainly has implications outside of the defamation context, most notably with respect to privacy torts, but we confine our analysis here to libel and slander.

New York Times Co. v. Sullivan,⁴ the Supreme Court ruled that public officials must establish “actual malice” when suing for defamation. A second major case in this area, *Gertz v. Robert Welch, Inc.*, holds that the *New York Times* rule applies not just to public officials, but to “public figures” as well.⁵ *Gertz*—as interpreted and applied by lower courts as the basis for developing various tests for public figurehood—continues to be good law.

As we shall argue, profound changes to the media landscape have rendered *Gertz* obsolete. We do not develop a new standard from whole cloth, however, but believe that Justice Brennan’s plurality opinion in *Rosenbloom v. Metromedia*,⁶ decided several years before *Gertz*, provides a superior framework for approaching defamation claims in the digital age.

The question of who is or is not a public figure, far from being an abstract academic inquiry, has very real implications for the media, old and new alike, and for public discourse. In the words of Justice Brennan, “the rules we adopt to determine an individual’s status as ‘public’ or ‘private’ powerfully affect the manner in which the press decides what to publish and, more importantly, what not to publish.”⁷

In Part I, we review the relevant case law concerning who constitutes a public figure. In Part II, we provide a more detailed discussion of the *Rosenbloom* case. In Part III, we explain why Justice Brennan’s opinion in *Rosenbloom* is particularly well-suited for addressing public figurehood in a world of instant and pervasive communication.

I. THE PUBLIC FIGURE CONCEPT IN DEFAMATION LAW: FROM NEW YORK TIMES TO GERTZ

Before we turn to focus specifically on *Gertz*, *Rosenbloom*, and their divergent approaches to public figurehood, a brief survey of the key Supreme Court decisions is in order. This background will make clear why public figure status matters and how the concept has evolved in the case law over time.

In 1964, in *New York Times Co. v. Sullivan*,⁸ the Supreme Court set forth important First Amendment limitations on the defamation torts of libel and slander. The Court held that public officials cannot recover

4. *New York Times Co. v. Sullivan*, 376 U.S. 254, 282 (1964).

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

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

7. *Lorain Journal Co. v. Milkovich*, 474 U.S. 953, 954 (1985) (Brennan, J., dissenting from denial of certiorari); see also Rodney A. Smolla & W. Coleman Allen, *Statement from Iseman’s Lawyers*, N.Y. TIMES, Feb. 19, 2009, available at <http://www.nytimes.com/2009/02/20/business/media/20lawyers.html#> (arguing that the issue of who is a public figure “deserves ongoing scrutiny, certainly in our schools of law and journalism, but also in the arena of public debate”).

8. *New York Times*, 376 U.S. at 266.

damages for defamation absent proof that the statement in question was made with “actual malice.” In his opinion, a ringing endorsement of free speech values in a democracy, Justice Brennan wrote:

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice”—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.⁹

This was a profoundly important development, as explained by Judge Robert D. Sack:

Against the backdrop of centuries of Anglo-American law permitting regulation of speech to protect reputation, this statement—protecting speech about public matters irrespective of its impact on reputation—was revolutionary. . . . It set a single standard for libel suits by public officials against the press in every court in the nation. Implicitly, it subjected all actions for defamation to constitutional scrutiny.¹⁰

The plaintiff in *New York Times* was a public official (L.B. Sullivan, one of three elected city commissioners in Montgomery, Alabama).¹¹ In the 1967 case of *Curtis Publishing Co. v. Butts*,¹² the Court extended the *New York Times* rule to “public figures” as well as public officials. The case involved a private individual, a university athletic director and former head football coach, who was accused in a newspaper article of conspiring to fix a football game. The Court issued a confusing raft of separate opinions in *Curtis*, but in a concurrence in the result, which was controlling on this issue, Chief Justice Warren expressed the view that the *New York Times* standard should apply to cases involving “public figures” as well as “public officials.”¹³ As Chief Justice Warren sensibly noted, “differentiation between ‘public figures’ and ‘public officials’ and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy. Increasingly in this country, the distinctions between governmental and private sectors are blurred.”¹⁴

Due to the fragmentation of the Court, *Curtis* did not generate a definitive rule on applicability of the *Times* standard to plaintiffs who are

9. *Id.* at 279-80.

10. ROBERT D. SACK, *SACK ON DEFAMATION: LIBEL, SLANDER & RELATED PROBLEMS* § 1:2.2 (4th ed. 2010).

11. *New York Times*, 376 U.S. at 256.

12. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967).

13. *Id.* at 164 (Warren, C.J., concurring in the result).

14. *Id.* at 163.

not public officials. That ruling came several years later, when the Court decided *Gertz*¹⁵—which remains the governing law in this area some thirty-five years later.

As set forth in Justice Powell's opinion for the Court, *Gertz* presented “the extent of a publisher's constitutional privilege against liability for defamation of a private citizen.”¹⁶ The *Gertz* Court held that the “actual malice” rule of *New York Times* does not apply to private persons (in this case, an attorney who represented a party in high-profile litigation).

Justice Powell noted that “[t]heoretically, of course, the balance between the needs of the press and the individual's claim to compensation for wrongful injury might be struck on a case-by-case basis.”¹⁷ But such an approach would present the following difficulty:

[It] would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an ad hoc resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application. Such rules necessarily treat alike various cases involving differences as well as similarities. Thus it is often true that not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority.¹⁸

In other words, the *Gertz* approach finds some of its justification in concerns of efficiency and ease of application.

In reaching the conclusion that private-figure plaintiffs should not have to comply with the rigorous *New York Times* standard when suing for defamation, the *Gertz* Court drew distinctions between different types of defamation plaintiffs. It began with what could be described as *Gertz*'s first rationale:

The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.¹⁹

15. *Gertz v. Robert Welch, Inc.*, 418 U.S. 334 (1974).

16. *Id.* at 325.

17. *Id.* at 343.

18. *Id.* at 343-44.

19. *Id.* at 344.

It then offered a second justification:

[T]he communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual. . . . [P]rivate individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.²⁰

In light of these differences, the *Gertz* Court declined to extend the *New York Times* standard to defamation suits brought by private individuals.

Having concluded that the *Times* rubric applies only to suits brought by public figures, the *Gertz* Court identified two ways of attaining public figure status:

In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.²¹

The first designation describes a “pervasive” or “all-purpose” public figure, and the second designation describes a “limited purpose” public figure.²² In determining whether a private individual should be subject to the *New York Times* “actual malice” standard, a court must consider the “nature and extent of an individual’s participation in the particular controversy giving rise to the defamation.”²³

Taken together, *New York Times* and *Gertz* provide much of the framework against which defamation claims are evaluated today. As noted by Judge Sack, “[t]he *New York Times* and *Gertz* cases have affected the vast majority of defamation cases decided after them,” with state and lower federal courts filling in many of the gaps left by these cases.²⁴

20. *Id.* at 345. A somewhat crisper formulation was offered by the Supreme Court in *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 164 (1979): “[P]ublic figures are less deserving of protection than private persons because public figures, like public officials, have ‘voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.’”

21. *Gertz*, 418 U.S. at 351.

22. SACK, *supra* note 10, § 1:5 at 1-33 to -34.

23. *Gertz*, 418 U.S. at 352.

24. SACK, *supra* note 10, § 1:2.6 at 1-20. For example, based on *Gertz*, lower courts have developed tests for limited-purpose public figure status. *See, e.g.*, *Carr v. Forbes, Inc.*, 259 F.3d 273, 280 (4th Cir. 2001) (utilizing a five-factor test).

II. THE ROAD NOT TAKEN: ROSENBLoom V. METROMEDIA

In the decade between *New York Times*, decided in 1964, and *Gertz*, decided in 1974, the Supreme Court decided the case of *Rosenblom v. Metromedia, Inc.*²⁵ In his plurality opinion, Justice Brennan described the issue presented in *Rosenblom* as follows: “whether the *New York Times*’ knowing-or-reckless-falsity standard applies in a state civil libel action brought not by a ‘public official’ or a ‘public figure’ but by a private individual for a defamatory falsehood uttered in a news broadcast by a radio station about the individual’s involvement in an event of public or general interest.”²⁶

As in *Curtis Publishing*, the Court in *Rosenblom* was fragmented, with no opinion garnering a majority of the justices. In a plurality opinion, representing the views of three justices, Justice Brennan rejected the distinction between public and private figures in the defamation context, expressing the view that the *New York Times* standard should apply to all reports of events of “public or general concern.”²⁷ But because Justice Brennan in *Rosenblom* was joined by only two other justices, his opinion did not represent a definitive pronouncement by the Court on whether the rule of *New York Times* applies to defamation suits brought by private individuals. As a result, *Gertz*—in which the Court tackled essentially the same issue, but with an opinion that spoke for a majority of the Court—essentially supplanted Justice Brennan’s *Rosenblom* opinion as the controlling framework.

Justice Brennan articulated the following rule in *Rosenblom*: “We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.”²⁸ Because it does not draw distinctions between types of plaintiffs, this rule is clearer and easier to apply than what would later replace it in *Gertz*.

The *Rosenblom* plurality reached its conclusion through the following reasoning:

1. Free speech is critical to a self-governing society, and it reaches “all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.”²⁹

25. 403 U.S. 29 (1971).

26. *Id.* at 31-32.

27. *Id.* at 52.

28. *Id.* at 43-44.

29. *Id.* at 41 (citing *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940)).

2. The distinction between “public” and “private” is eroding/increasingly blurred.³⁰

3. Freedom of the press isn’t just about political speech. “Comments in other cases reiterate this judgment that the First Amendment extends to myriad matters of public interest.”³¹

4. It makes little sense for free speech guarantees to turn on the fame or obscurity of the individuals involved:

If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not ‘voluntarily’ choose to become involved. The public’s primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant’s prior anonymity or notoriety.³²

Accordingly, Justice Brennan concluded that constitutional protection applies “to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.”³³

Justice Brennan then proceeded to refute the arguments of the petitioner. He rejected the distinction between “public” and “private” figures in the First Amendment context:

Drawing a distinction between ‘public’ and ‘private’ figures makes no sense in terms of the First Amendment guarantees. The New York Times standard was applied to libel of a public official or public figure to give effect to the Amendment’s function to encourage ventilation of public issues, not because the public official has any less interest in protecting his reputation than an individual in private life. While the argument that public figures need less protection because they can command media attention to counter criticism may be true for some very prominent people, even then it is the rare case where the denial overtakes the original charge.³⁴

He then made a broader argument about the elusive nature of “privacy”:

We have recognized that ‘(e)xposure of the self to others in varying degrees is a concomitant of life in a civilized community.’ Voluntarily or not, we are all ‘public’ men to some degree. Conversely, some aspects of the lives of even the most public men fall outside the area

30. *Id.* at 41-42.

31. *Id.* at 42.

32. *Id.* at 43.

33. *Id.* at 43-44.

34. *Id.* at 45-46.

of matters of public or general concern. Thus, the idea that certain ‘public’ figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view is, at best, a legal fiction.³⁵

As we will explore in the next section, this argument has only grown stronger in the intervening years.

III. WHY ROSENBOOM, NOT GERTZ, OFFERS THE BEST STANDARD FOR DECIDING DEFAMATION CLAIMS IN THE DIGITAL AGE.

Widespread use of the Internet has rendered *Gertz* not only obsolete but legally incoherent for two primary reasons: (1) changes in the media landscape have undermined *Gertz*'s self-help rationale, and (2) the digital age has blurred, if not eliminated, the entire public/private distinction this case relied upon. While *Gertz* may have made sense in a particular social and historical context, Justice Brennan's opinion in *Rosenbloom* holds far greater relevance today.

A. *Changes in the media landscape have undermined Gertz's "self-help" rationale.*

The *Gertz* Court argued that public figures have better access to the channels of communication, and therefore a better ability to counteract false statements: “Private individuals are . . . more vulnerable to injury, and the state interest in protecting them is correspondingly greater.”³⁶ Based on this language from *Gertz*, lower courts determining public figure status would consider such factors as the individual’s “access to channels of effective communication.”³⁷

This analysis reflects a very different—and outdated—media environment. When *Gertz* was decided in 1974, false charges could only be countered through access to a printing press, radio station, or television network—modes of communication that ordinary citizens generally could not tap into. In 2011, however, methods of communication have expanded and changed dramatically. Thanks to the phenomenon of blogging and the rise of social networks like Twitter and Facebook, ordinary citizens have historically unprecedented access to effective communication channels. One can refute false charges not just through newspapers, radio, or television, but through a proliferation of online outlets as well. Aggrieved subjects of media coverage no longer

35. *Id.* at 47–48 (internal citations omitted).

36. *Gertz*, 418 U.S. at 344.

37. *E.g.*, *Hatfill v. New York Times Co.*, 532 F.3d 312, 319 (4th Cir. 2008).

need a newspaper to print retractions of letters to the editor; instead, these subjects can go out and tell their own side of the story on a blog or social networking site.³⁸ (Indeed, if false rumors started online, refuting them online may be the most effective response.)

Because the marketplace of ideas is so robust in the digital age, greater freedom can be granted to the media, both old and new. The constitutional relevance of such changes in the media environment was recognized by justices even prior to *Gertz*. For example, Justice Harlan, whose jurisprudence was frequently less press-friendly than that of some of his colleagues, acknowledged that “falsehood is more easily tolerated where public attention creates the strong likelihood of a competition among ideas.”³⁹

Of course, even in the digital age, famous celebrities still have greater access to communication channels than ordinary citizens. For example, Ashton Kutcher has more than six million followers on Twitter,⁴⁰ while the average Twitter user has only 126 followers.⁴¹ Yet this still fails to legitimate *Gertz*’s rationale. First, perfect equality is not required. In the words of Justice Marshall:

[D]ifficulty in reaching all those who may have read the alleged falsehood surely ought not preclude a finding that [the plaintiff] was a public figure under *Gertz*. *Gertz* set no absolute requirement that an individual be able fully to counter falsehoods through self-help in order to be a public figure. We viewed the availability of the self-help remedy as a relative matter in *Gertz*, and set it forth as a minor consideration in determining whether an individual is a public figure.⁴²

38. This enhanced ability to refute allegations may be relatively new. But the importance of the “privilege of reply, also known as the privilege to speak in self-defense or to defend one’s reputation,” traces its roots back to the common law. *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1559 (4th Cir. 1994).

39. *Time, Inc. v. Hill*, 385 U.S. 374, 407 (1967) (Harlan, J., concurring in part and dissenting in part); *see also* *New York Times Co. v. Sullivan*, 376 U.S. 254, 304 (1964). (Goldberg, J., concurring in the result) (“The conclusion that the Constitution affords the citizen and the press an absolute privilege for criticism of official conduct does not leave the public official without defenses against unsubstantiated opinions or deliberate misstatements. ‘Under our system of government, counterargument and education are the weapons available to expose these matters, not abridgment . . . of free speech’” (quoting *Wood v. Georgia*, 370 U.S. 375, 389 (1962))).

40. *See* <http://twitter.com/Aplusk>.

41. Charles Arthur, *Average Twitter User Has 126 Followers, and Only 20% of Users Go via Website*, GUARDIAN, June 29, 2009, 3:24 PM), <http://www.guardian.co.uk/technology/blog/2009/jun/29/twitter-users-average-api-traffic>.

42. *Time, Inc. v. Firestone*, 424 U.S. 448, 486 (1976) (Marshall, J., dissenting); *see also* *Carr v. Forbes*, 259 F.3d 273, 282 n.2 (4th Cir. 2001) (“Of course, the Arizona and South Carolina media do not have the international readership of *Forbes* magazine. However, a court does not ask whether a defamation plaintiff has ever had access to a media outlet with the

Second, even if an aggrieved party might not initially have a large audience, reaching prominent speakers who do have sizable followings is no longer difficult. Thanks to advances in communications technology, getting one's side of the story before someone who does have a major bully pulpit might be as simple as sending an e-mail or "tweeting at" that individual. And the "crowdsourced" nature of news these days, in which thousands of citizen-journalists get involved in exploring all sides of an issue, also helps to ensure that multiple viewpoints are represented, especially with respect to the most controversial issues of the day.

The case of Shirley Sherrod, a former official at the U.S. Department of Agriculture, illustrates how disparities in access to media channels matter much less today than in the past. Sherrod had a much smaller audience than conservative activist Andrew Breitbart, publisher of the website BigGovernment.com, who posted portions of an edited video suggesting that Sherrod had acted in a racially discriminatory manner. In the ensuing controversy, Sherrod was forced to resign from her government job. Yet correcting the record in the digital age was easy: once the NAACP released the full video, Media Matters was quickly able to deconstruct the alleged smear campaign. This not only led to an apology to Sherrod from President Barack Obama and an offer to return to the Department of Agriculture from Secretary Tom Vilsack, but widespread sympathy for Sherrod's plight and outrage against Breitbart.⁴³

B. *The digital age has significantly eroded the "public figure" versus "private figure" distinction.*

The *Gertz* Court, above all else, drew a sharp distinction between public figures and private figures. Public figures "have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them," unlike private figures. Moreover, "[p]rivate individuals are not only more vulnerable to injury than public officials and public

same size readership of the allegedly defamatory publication; such an inquiry would effectively prohibit widely read publications from ever commenting on local controversies. Our inquiry is rather whether the evidence demonstrates that the defamation plaintiff had access to channels of effective communication to respond to the allegedly defamatory statements. Carr clearly had such access.").

43. Media Matters has prepared a very thorough timeline of the Shirley Sherrod controversy. See *Timeline of Breitbart's Sherrod Smear*, MEDIA MATTERS (July 22, 2010, 7:38 AM), <http://mediamatters.org/research/201007220004>. Sherrod has sued Breitbart for defamation. See Ashley Hayes, *Former USDA Employee Sues Conservative Blogger Over Video Posting*, CNN POLITICS (Feb. 15, 2011, 11:15 AM), <http://www.cnn.com/2011/POLITICS/02/14/sherrod.lawsuit>. In her complaint she notably claims Breitbart acted with "actual malice." Complaint at 18, *Sherrod v. Breitbart*, No. 0001157-11 (Super. Ct. D.C. Feb. 11, 2011), available at <http://static1.firedoglake.com/28/files/2011/02/20110211-Sherrod-Complaint-File-Stamp.pdf>.

figures; they are also more deserving of recovery.” The *Rosenbloom* plurality opinion, by Justice Brennan, expressed a very different view: “Voluntarily or not, we are all ‘public’ men to some degree.”

Justice Brennan’s words ring even more true in the digital age. First, what the *Gertz* framework may have once offered in clarity or ease of administration no longer makes up for what it sacrifices in terms of accuracy. In the age of “microcelebrity,” fame—along with its associated benefits and burdens⁴⁴—is distributed along a spectrum, not according to a dichotomy.⁴⁵ One way of thinking about this is through Chris Anderson’s “long tail” rubric.⁴⁶ Instead of a world with a few huge celebrities and millions of “nobodies,” we now live in a world with a “long tail” of minor celebrities (e.g., reality TV stars, prominent bloggers). As Anderson notes, “not all celebrities are Hollywood stars. As our culture fragments into a million tiny microcultures, we are experiencing a corresponding rise of microcelebrities.”⁴⁷

Second, and on a closely related note, the *Gertz* approach fails to take into account the rise of “niche celebrity.” Thanks to the rise of highly targeted blogs, interest groups within social networks, or even social networking sites for specific interest groups, becoming a “celebrity” within a particular area of interest, trade or profession, or geographical location is startlingly easy.

A good example of a niche celebrity, related to the blog that one of us founded, *Above the Law* (www.abovethelaw.com), might be Evan Chesler. Chesler is the presiding partner of Cravath, Swaine & Moore, one of the nation’s most powerful and prestigious law firms.⁴⁸ Chesler is

44. There’s a reason why people try out by the thousands for reality shows (i.e., the chance to be humiliated on national television). Fame has its privileges. *See Waldbaum v. Fairchild Publ’ns*, 627 F.2d 1287, 1294-95 (D.C. Cir. 1980) (“Fame often brings power, money, respect, adulation, and self-gratification. It also may bring close scrutiny that can lead to adverse as well as favorable comment. When someone steps into the public spotlight, or when he remains there once cast into it, he must take the bad with the good.”).

45. *See* Thompson, *supra* note 2 (“Microcelebrity is the phenomenon of being extremely well known not to millions but to a small group – a thousand people, or maybe only a few dozen.”); Sorgatz, *supra* note 2 (“The point is that renown is no longer the exclusive province of a select few. Nano-celebrity is there for the taking, if you really want it.”); Jason Tanz, *Internet Famous: Julia Allison and the Secrets of Self-Promotion*, WIRED, July 15, 2008 (noting that blogger Julia Allison “may not be famous by the traditional definition,” but that “to a devoted niche of online fans – and an even more devoted niche of detractors – she is a bona fide celebrity”).

46. CHRIS ANDERSON, *THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE* (2006).

47. *Id.*; *see also* Nicholas Lemann, *Amateur Hour*, THE NEW YORKER, Aug. 7, 2006, at 44 (“Most citizen journalism reaches very small and specialized audiences and is proudly minor in its concerns. David Weinberger, another advocate of new-media journalism, has summarized the situation with a witty play on Andy Warhol’s maxim: ‘On the Web, everyone will be famous to fifteen people.’”).

48. *Evan R. Chesler, CRAVATH, SWAINE & MOORE L.L.P.*,

not a public official, and he is not, by the traditional analysis, a general-purpose public figure. It would even be difficult to cast him as a limited-purpose public figure, since he is generally not trying to influence the resolution of any issue of public concern.⁴⁹ Chesler's decisions in leading Cravath are just decisions he makes in the course of doing his job—like the attorney in *Gertz*.

But Evan Chesler is, within the legal profession and the world of large law firms, a definite niche celebrity, a figure of great interest in this particular field. How should he be covered? The legal profession is wealthy, powerful, and prominent, and he is a leading figure within it. Why shouldn't he have to demonstrate "actual malice" with respect to reporting that covers his leadership of Cravath?

There are hints in prior case law that fame within a community or a sector can be constitutionally significant. As stated by the Court in *Rosenblatt v. Baer*, "[t]he subject matter may have been only of local interest, but at least here, where publication was addressed primarily to the interested community, that fact is constitutionally irrelevant."⁵⁰

Niche celebrity might also be relevant in terms of evaluating the damage inflicted by falsehoods, a consideration identified by the *Gertz* Court in establishing greater protection for private individuals. The Supreme Court's major defamation precedents often involved plaintiffs with local or limited fame who were covered by giant news outlets with national or international reach, like the *New York Times* or *Time* magazine. Damages in such cases could be high, as at least one court has noted:

Dissemination to a wide audience creates special problems. For example, an individual may be well known in a small community, but the publication covers a larger area. In such a situation, it might be

<http://www.cravath.com/echesler> (last visited Apr. 1, 2011).

49. A possible exception to this might be the use of the billable hour as the dominant billing method for lawyers, if one considers this to be an issue of public concern. Chesler has mounted a vigorous critique of the billable hour, speaking out and writing against it in widely read, mainstream-media publications. E.g., Evan Chesler, *Kill the Billable Hour*, FORBES, Jan. 12, 2009, at 26.

50. *Rosenblatt v. Baer* 383 U.S. 75, 83 (1966); *see also* *Lorain Journal Co. v. Milkovich*, 474 U.S. 953, 963 (1985) (Brennan, J., dissenting from denial of certiorari) (arguing that a high school wrestling coach was a limited purpose public figure because of his involvement in "a public controversy of concern to residents of the local community [that was] as important to them as larger events are to the Nation"); *id.* at 964-65 (arguing that the Court's commitment to free speech "applies as much to debate in the local media about local issues as it does to debate in the national media over national issues," and that "[t]his Court's *obligation* to preserve the precious freedoms established in the First Amendment is every bit as strong in the context of a local paper's report of an incident at a local high school as it is in the context of an advertisement in one of the Nation's largest newspapers supporting the struggle for racial freedom in the South").

appropriate to treat the plaintiff as a public figure for the segment of the audience to which he is well known and as a private individual for the rest. In any event, the defamation's audience may be relevant in assessing damages, for injury may be less if the audience does not know of the victim and will have no occasion to interact with him in the future.⁵¹

Of course, this gives rise to another question: Why are niche publishers—who might cover matters that are important to just a limited group of people, or even matters of debatable importance—entitled to full First Amendment protection? The response can be found in the Supreme Court's decision in *Time, Inc. v. Hill*, which takes a commendably broad view of free speech:

The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. . . .

Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period. No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression.⁵²

One might argue that providing niche publishers with broad constitutional protection fails to consider Google and other search engines, which effectively take what might have been a niche publication, read by a limited audience, and broadcast it to a much wider range of readers. But using one of these search engines already places the user in “niche” territory. Unlike the front page of the *New York Times* or another general-interest newspaper, where a reader might come across a defamatory falsehood about someone the reader had never heard about before and had no prior interest in, a search engine isn’t putting in front of the user information that the user wasn’t already looking for in a targeted way.

Finally, technology has eroded privacy in so many different ways. As Justice Brennan declared in *Rosenbloom*, “[v]oluntarily or not, we are all ‘public’ men to some degree.” Or as Justice Brennan wrote in the earlier

51. *Waldbaum v. Fairchild Publ'ns*, 627 F.2d 1287, 1295 n.22 (D.C. Cir. 1980).

52. *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) (internal citations omitted).

case of *Time, Inc. v. Hill*:

Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.⁵³

In this day and age—of blogs, where our private misadventures can be written about at length; of streaming video and YouTube, where said misadventures can be seen and heard by total strangers; of Facebook, where “friends” can post pictures of us, against our will (maybe we can “de-tag,” but we can’t remove); of full-body scanners at the airport—Justice Brennan’s words ring more true than ever, for better or worse. We are more “public” and more interconnected than ever.

Of course, one could imagine a regime in which people who went out of their way to protect their privacy—e.g., Howard Hughes-like hermits, who eschew Facebook and Twitter, don’t leave home often, etc.—might be treated differently under the law, and given more favorable treatment as defamation or privacy-tort plaintiffs. But the default rule—for average people, who take no extraordinary measures to protect her privacy—would treat them as fairly public individuals.

C. Objections to adoption of the *Rosenbloom* rule can be overcome.

The most obvious counterargument is that adopting the *Rosenbloom* rule and applying the “actual malice” standard even to private individuals, as long as the subject matter is of public or general concern, would create a regime too favorable to publishers, speakers, and defamatory speech at the expense of private citizens. There are several responses to this position.

First, the experiences of various states suggest that *Rosenbloom* is a workable standard. At least three states, Colorado, Alaska, and Indiana, have essentially adopted the *Rosenbloom* approach, and two others, New Jersey and New York, have standards similar to *Rosenbloom*.⁵⁴ There is no indication that the *Rosenbloom* rule has proven unworkable or resulted in excessive defamatory speech in these jurisdictions.

Second, to the extent that *Rosenbloom* results in a more favorable regime for publishers and speakers, it simply reflects the law evolving to

53. *Id.*

54. James C. Mitchell, *Rosenbloom’s Ghost: How a Discredited Decision Lives on in Libel Law*, 40 IDAHO L. REV. 427, 436-38 (2004). Mitchell’s main criticism of *Rosenbloom* is that deciding what constitutes a matter of “public concern” can be difficult—a subject that lies beyond the scope of the current discussion, but certainly an important issue for courts that follow *Rosenbloom* to keep in mind.

accommodate advances in communications technology. Free speech and First Amendment concerns receive strong legal protection in the online context—perhaps most notably thanks to Section 230 of the Communications Decency Act of 1996, which insulates operators of interactive computer services from being held liable for defamatory content provided by third parties.⁵⁵ As the Ninth Circuit stated in *Batzel v. Smith*, construing Section 230:

Congress made this legislative choice [of enacting Section 230] for two primary reasons. First, Congress wanted to encourage the unfettered and unregulated development of free speech on the Internet, and to promote the development of e-commerce. Section 230(a), “Findings,” highlights that:

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.⁵⁶

Applying old rules to new media does not make sense as a policy matter. It would prevent society from reaping the full rewards of new communications technologies by inhibiting speech. As the Fourth Circuit explained in *Zeran*:

Interactive computer services have millions of users. The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect.⁵⁷

Accordingly, by enacting Section 230, Congress replaced the traditional tort law doctrine of republication liability with a new framework for the online world. It's a compromise that seems to have worked fairly well; almost 15 years after its enactment, Section 230 is alive and well.

Finally, adoption of the *Rosenbloom* rule is not the most extreme pro-media/pro-free-speech position one could take. Justices writing decades ago articulated stronger viewpoints. For example, Justices Black

55. 47 U.S.C. § 230 (1998).

56. *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003); *see also Zeran v. America Online, Inc.*, 129 F.3d 327, 330-31 (4th Cir. 1997) (“The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium.”).

57. *Zeran*, 129 F.3d at 331 (citations omitted).

and Douglas expressed the view that even the *New York Times* standard infringes on free speech unconstitutionally—despite the fact that it is a standard that makes it very difficult for libel plaintiffs to prevail.⁵⁸

CONCLUSION

Justice Brennan's observation that "we are all 'public' men to some degree," from a 1971 opinion, has proven prescient. Some 35 years later, writers in the Internet age would observe that "[w]e are all public figures now."⁵⁹ The legal understanding of who is a public figure must now catch up.

On a somewhat optimistic note, there are some indications that libel lawsuits are decreasing—perhaps as a result of some of the changes in the media landscape discussed above. It appears that the number of libel cases going to trial has declined:

The number of libel cases going to trial has dropped to the point where it's not worth doing the survey on an annual basis, said Sandy Baron, the executive director of the Media Law Resource Center. Ms. Baron was speaking about the annual—and now biannual—survey of libel and privacy trials that her firm rounds up and produces into a study. In the most recent study, the Media Law Resource Center found that libel trials in the 2000s were down more than 50 percent from the 1980s. In the 1980s, the center found 266 trials; in the '90s, that number dropped to 192; in the past decade it dropped to 124. In 2009, only nine surfaced.⁶⁰

What's behind the change? Perhaps the Web, which has (1) created a flood of content, making any individual negative publication less prominent, and (2) given aggrieved parties more outlets for responding to criticism they see as unfair.⁶¹

58. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 293 (1964) (Black, J., concurring) (explaining that "I vote to reverse exclusively on the ground that the Times and the individual defendants had an absolute, unconditional constitutional right to publish in the Times advertisement their criticisms of the Montgomery agencies and officials"); *Time, Inc.*, 385 U.S. at 374, 398 (1967) (Black, J., concurring) (predicting that the *New York Times* "doctrine too is bound to pass away as its application to new cases proves its inadequacy to protect freedom of the press"); *id.* at 401 (Douglas, J., concurring); *Gertz v. Robert Welch, Inc.*, 418 U.S. 334, 356 (1974) (Douglas, J., dissenting) ("I have stated before my view that the First Amendment would bar Congress from passing any libel law.").

59. David Lat, *Brokeback Lawfirm: Gera Grinberg — Who Is This Guy?*, ABOVE THE LAW (Feb. 14, 2007, 1:52 PM), <http://abovethelaw.com/2007/02/brokeback-lawfirm-gera-grinberg-who-is-this-guy/>; Tanz, *supra* note 45.

60. John Koblin, *The End of Libel*, THE NEW YORK OBSERVER MEDIA MOB (June 8, 2010, 9:23 PM), <http://www.observer.com/2010/media/end-libel>.

61. *Id.* (citing a media lawyer who stated, "[p]eople who used to feel frustrated that they couldn't get their viewpoint across now can" by "put[ting] their response on a Web site" or "find[ing] an outlet that will publish it").

It is too early to know, however, whether the recent decline in libel trials will be a lasting development. Rather than assume this to be the case, society is far better served by recognizing and revisiting the archaic legal precedent surrounding modern defamation law. Only by rejecting *Gertz* and adopting Justice Brennan's more fluid *Rosenbloom* position, treating us all as public figures to some degree, can such law begin to make sense in the age of new media and social networks.