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Havalunch v. Mazza--The Scrambling of Constitutional and Common Law Defamation Analysis in West Virginia

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HAVALUNCH v. MAZZA—THE SCRAMBLING OF CONSTITUTIONAL AND COMMON LAW
DEFAMATION ANALYSIS IN WEST VIRGINIA

I. INTRODUCTION

The tort of defamation and the first amendment of the United States Constitution1 have clashed repeatedly since the United States Supreme Court decided New York Times Co. v. Sullivan2 in 1964. Prior to that decision, the first amendment did not affect recovery for defamation. Since 1964, however, courts have struggled to accommodate the competing interests inherent in defamation actions and the first amendment: a state’s desire to protect an individual’s reputation from harm and the societal goal of uninhibited, robust and wide-open discussion. The pendulum tipped toward maximizing “free speech” during the 1960s and early 1970s, but recent Supreme Court decisions have emphasized recovery for reputational injury.3 A sliding scale of first amendment protection has developed which focuses on the “status” of a particular defamation plaintiff. Such plaintiffs are classified as public officials, public figures or private figures in order to determine the standard of care owed them by media defendants. The more public the person, the more difficult recovery will be.

Since Sullivan, the West Virginia Supreme Court of Appeals has had few opportunities to reconcile state common law defamation principles with the first amendment and article III, section 74 of the state constitution. Its latest opportunity came in

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1 “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .”
4 No law abridging the freedom of speech, or of the press, shall be passed; but the legislature may by suitable penalties, restrain the publication or sale of obscene books, papers, or pictures, and provide for the punishment of libel, and defamation of character, and for the recovery, in civil actions, by the aggrieved party, of suitable damages for such libel, or defamation.
Havalunch, Inc. v. Mazza, a case involving a libel action brought by a Morgantown restaurant. The eating establishment claimed that a critical newspaper review of its food and "atmosphere" injured its business reputation. In a 4-0 decision, the state supreme court reversed an award of $15,000 in punitive damages and ordered the complaint dismissed.

The court based its decision on both constitutional and common law principles of defamation law. The utilization of both in a case which did not present complex legal issues indicates the court's inability to deal with the constitutional dimension given defamation law by the Supreme Court. This Note will focus on one aspect of the court's opinion, although all the various grounds of decision will be noted briefly. In its decision, the state supreme court employed approximately two paragraphs of analysis in determining that Havalunch, a public restaurant, was a private figure. This decision forced the court to decide what degree of fault such libel plaintiffs must prove in West Virginia. The Supreme Court had left states free to adopt varying standards in such cases, as long as the common law practice of awarding damages without fault was not reinstated. The Supreme Court of Appeals, with no analysis whatsoever and no explanation of its reasoning, adopted negligence as the standard of care in private figure defamation actions.

This Note will discuss the court's conclusion that Havalunch constituted a private figure by applying the facts to the principles adopted by the Supreme Court for public figure/private figure analysis. Such an analysis was not present in the Havalunch decision. Next, the Note will discuss the court's adoption of a negligence standard and will explore the competing public policy

6 The term "libel" usually refers to written communications, the term "slander" to oral statements. "Defamation" encompasses both libel and slander. See generally W. PROSSER, LAW OF TORTS §§ 111-12 (4th ed. 1971) (hereinafter referred to as Prosser).
7 Mr. Justice McGraw disqualified himself. 294 S.E.2d at 78.
8 The Supreme Court's decision in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), mandated reversal of the jury's award of $15,000 in punitive damages. Under federal constitutional law, punitive damages may be awarded for defamation only upon a showing that the defendant acted with actual malice. Id. at 347. Therefore, any other issues reached by the court were unnecessary to dispose of the case.
9 Id. at 349.
10 294 S.E.2d at 73.
arguments which the negligence and actual malice standard symbolize. The Note will argue that public policy, state common law defamation principles and the state constitution all supported adoption of the actual malice rather than negligence standard.

II. Havalunch, Inc. v. Mazza

The facts of Havalunch are not complex. In 1973, Mary Mazza, a student at West Virginia University, was a reporter for the Daily Athenaeum, the school's student newspaper. An editor assigned Mazza to write a humorous review of eating establishments in the university city. As part of this assignment, Mazza visited the Havalunch eatery for the first time. The court's opinion aptly described the result.

She ordered a bacon, lettuce and tomato sandwich which she found not at all to her liking. The bacon was overcooked, the bread was dry and the lettuce had wilted. While ingesting her sandwich, she observed the atmosphere and her careful gaze remarked the amblings of one peripatetic roach. The roach did not enhance the overall ambience provided for the enjoyment of her food, so she left half her sandwich uneaten and departed the Havalunch with the opinion that it was not an establishment which she would recommend to a friend.¹¹

This less than auspicious visit produced a concise report in the newspaper's restaurant review.

HAVALUNCH—Bring a can of Raid if you plan to eat here. And paint your neck red; looks like a truck stop. You'll regret everything you eat here, especially the BLT's. 164 Pleasant Street.¹²

At trial, the restaurant produced evidence that the establishment's clientele consisted of business and professional persons during the day, with students and elderly persons dining at night. The jury found for the plaintiff, awarding $15,000 in punitive damages, but no compensatory damages. The state supreme court unanimously reversed the verdict.¹³

In his opinion, Mr. Justice Neely identified three separate grounds for reversing the lower court. First, the court held that an award of punitive damages was invalid since the plaintiff had

¹¹ Id. at 72.
¹² Id.
¹³ The decision was 4-0.
not shown actual malice on the defendant's part, a requirement mandated by federal constitutional law. Thus, this flaw in the case sufficed to render the verdict incorrect. Unfortunately, the court decided to reach other issues, the result of "an obligation to the bar to adumbrate this Court's direction in the law of defamation . . . ." Thus, the court held that the common law doctrine of fair comment provided the defendant with a qualified privilege which Havalunch had not overcome at trial. Next, the court labeled the restaurant a private figure, with it having to prove negligence to recover. Finally, the court tied the fair comment qualified privilege to the private figure/negligence constitutional determination by holding that Mazza had not been negligent in forming her opinion from facts observed during her visit. This aspect of the opinion ignored the fact that the fair comment qualified privilege concerns expression of opinion while the public

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14 Gertz, 418 U.S. 323.
15 Id. at 347.
16 Interestingly, the court avoided reaching these issues only six months prior to Havalunch. Both parties in Webb v. Fury, 282 S.E.2d 28 (W. Va. 1981), had briefed the public/private figure determination issue and the standard of fault to be applied in private figure cases. That highly-publicized case involved a libel suit by a coal company against two environmental organizations and a farmer for communications made to federal agencies and statements contained in an organizational newsletter. Since application of defamation law probably would have resulted in a trial (the case was before the court on a writ of prohibition request), the state supreme court relied instead on the right to petition contained in the federal and state constitutions. The court did note in passing, however, that the state constitution's freedom of the press clause would protect the defendants regarding communications made in the newsletter. The court did not elaborate on this finding.

17 At common law, the fair comment qualified privilege "was not limited to officers and candidates, but extended to other matters of public concern . . . ." Prosser, supra note 6, at 322. Since the fair comment privilege went to public issues as well as public officials, the constitutionization of the privilege in Sullivan appeared to apply it to public issues. The Supreme Court rejected this approach in Gertz.

Among the states prior to Sullivan, a split of authority existed over the extent of the privilege. The majority recognized the privilege only in regard to opinion based on true underlying facts. The minority viewpoint permitted use of the privilege even where the underlying facts were incorrect. The minority viewpoint, to which West Virginia adhered, was adopted by the Supreme Court in Sullivan. See infra notes 118-27 and accompanying text.

18 294 S.E.2d at 76.
19 Id. at 74.
20 Id. at 76.
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The inadequacies of the court's analysis in Havalunch are many. For example, the court failed to cite any West Virginia cases dealing with defamation from the common law viewpoint or to discuss the state constitutional principles relating to freedom of the press and defamation. The opinion failed to distinguish between expressions of opinion, and the effect of federal constitutional defamation cases on common law privileges relating to opinion, and misstatements of fact, the heart of the Sullivan decision. The most glaring omission was the lack of analysis given the classification of Havalunch as a private figure, and the adop-


22 W. VA. CONST. art. III, § 7-8.

23 In Gertz, 418 U.S. at 339 (1974), the Supreme Court proclaimed, "Under the First Amendment, there is no such thing as a false idea." This has led some commentators and courts to conclude that a defamation action cannot be based on opinion where the underlying facts are disclosed. Sack, supra note 21, at 154. The Louisiana Supreme Court recognized this argument in Mashburn v. Collin, 355 So.2d 879 (La. 1977), a restaurant review case similar to Havalunch and cited in the state supreme court's opinion. In Mashburn, the court ruled that a defamation action cannot be based on opinion alone.

We conclude, therefore, that the First Amendment freedoms as defined by the New York Times-Gertz series of decisions afford, at the very least, a defense against defamation actions for expressions of opinion about matters of public concern made without knowing or reckless falsity . . . . While the states are free to impose liability for misstatements of fact about private individuals made with fault, they may impose liability for expressions of defamatory opinions about matters of public concern only when made with knowing or reckless falsity.

Id. at 885. The court's reference to actual malice is puzzling unless it meant to incorporate the view that at common law, the fair comment privilege could be defeated only by a showing of malice.

The Louisiana court found that operation of a public restaurant to be a matter of public concern. Id. at 889. Since the court correctly recognized that a public/private figure determination was irrelevant either to a fair comment privilege analysis or a "no false idea" constitutional defense, the court did not classify the restaurant as a public or private figure, unlike the West Virginia court in Havalunch. See also Sack, supra note 21, at 181 n. 141, for listing of other jurisdictions which have declared that an opinion cannot be the basis for a defamation action. Compare with RESTATEMENT (SECOND) OF TORTS § 566 (1977).

tion of the negligence standard for such libel plaintiffs. The court failed to utilize the correct analysis for status determinations or to cite any cases which had either adopted a negligence or actual malice standard for private figure plaintiffs.24

It is these latter errors which this Note will address. The facts of Havalunch will be analyzed to determine whether it truly qualified as a private figure. The question of actual malice v. negligence for private figure plaintiffs will be explored. As a preface to these discussions, the Note will trace the evolution of defamation law in the United States and West Virginia from its common law origins to its present constitutional underpinnings.

III. EVOLUTION OF PUBLIC FIGURE/PRIVATE FIGURE DISTINCTION IN DEFAMATION LAW

A. General Common Law

The common law tort of defamation has evolved over the centuries into a doctrine that is both difficult to understand and to apply. As described by one writer,

[T]he English common law of defamation slowly grew into a forest of complexities, overgrown with anomalies, inconsistencies, and perverse rigidities. It became thicketed with brambled traps for innocent defendants, crisscrossed with circuitous paths and dead ends for seriously wronged plaintiffs, and enshrouded in a 'fog of fictions, inferences, and presumptions.'25

The cause of action is based on the idea that defamation constitutes "an invasion of the interest in reputation and good name"26 which every individual possesses.

At common law, the defamation had to be an untrue state-

24 Thirteen states have adopted a negligence standard for private figure libel action while at least three jurisdictions have opted for the actual malice requirement. See infra notes 167-68 and accompanying text. See also Sack, supra note 21, at 250-60.

In adopting the negligence standard, the West Virginia Supreme Court of Appeals did not specify whether that standard was to be based on the "reasonably prudent person" or a standard based on industry practice. Other jurisdictions have split on this question. Compare Taskett v. King Broadcasting Co., 86 Wash. 2d 439, 546 P.2d 81 (1976), with Gobin v. Globe Pub. Co., 216 Kan. 223, 531 P.2d 76 (1975). See generally Sack, supra note 21, at 253-55.


26 PROSSER, supra note six, at 737.
ment about an identifiable party communicated to a third party. A theory of strict liability developed which made a publisher liable for even innocent mistakes. Unlike other torts, a court presumed that the individual had been damaged by publication, regardless of whether actual injury occurred or was shown. A court also presumed that malice, the intent to injure, existed from publication.

To offset these presumptions, the law developed various privileges which insulated a publisher from liability in certain cases. An absolute privilege existed to report legislative and judicial proceedings, and executive department communications. Lesser qualified privileges also protected the defendant, but these could be lost either through unreasonable publication or the existence of express malice, i.e., the actual intent to injure, ill will or spite.

These qualified privileges included accounts of public proceedings, reports on matters of public interest and comment on public issues. The question of privilege related primarily to the allocation of the burden of proof in defamation actions. Once the plaintiff established a prima facie case, the law imposed liability unless the defendant could affirmatively plead truth of the statement or publication under a qualified privilege. Truth, like reports of judicial proceedings, often was an absolute defense. If a defendant plead a qualified privilege, and the court recognized its existence, then the burden of proof shifted to the plaintiff to overcome the privilege. If such proof did not appear, then the defendant had defeated liability.

English common law defamation, transplanted to the United States, continued to develop in the individual states. For almost 200 years, conventional thought did not see any conflict between the first amendment and recovery for defamation. Under the United States Supreme Court's practice of excluding certain speech as outside the first amendment's scope, defamation long

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27 Id. at 776.
28 Id. at 767.
29 Id. at 755.
30 Id. at 772.
31 Id. at 776-85.
32 Id. at 785-96.
33 Id. at 796.
had been an "out" category. As Mr. Justice Murphy said in his oft-quoted dictum:

It has been well observed that such utterances are no essential part of any exposition of any ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.\(^6\)

In 1964, the Supreme Court rejected this two-tier system of analysis in *Sullivan*.

B. The Supreme Court Revolutionizes Defamation Law, 1964-74.

1. Unanimity

In *New York Times v. Sullivan*,\(^7\) the Supreme Court provided first amendment protection to publication of defamatory statements. It did so by taking the common law qualified privilege of "fair comment" and making it part of constitutional law.

The case arose after the newspaper printed a political advertisement concerning police activities in Montgomery, Ala.\(^8\) The advertisement, signed by nationally known persons involved in the civil rights struggle, detailed various actions taken by police against local demonstrators. Although the advertisement did not specifically identify the plaintiff, the city police commissioner, it contained several factual errors concerning alleged police activities.\(^9\) The commissioner claimed that the advertisement defamed him since he controlled police in the city. At trial under Alabama defamation law, the jury awarded a $500,000 verdict. The Supreme Court of Alabama affirmed. A unanimous Supreme Court reversed the decision, and after reviewing the record, ordered the complaint dismissed.\(^10\)

In his opinion for the Court, Mr. Justice Brennan quickly

\(^6\) *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Subsequent Supreme Court decisions have afforded some first amendment protection to obscenity, "fighting" words, and commercial speech, other categories once excluded along with defamatory speech.

\(^7\) *376 U.S. 254* (1964).

\(^8\) *376 U.S. at 257.*

\(^9\) These mistakes included the incorrect identification of a song sung by demonstrators at the state capitol and wrong reasons for exclusion of students at a local black college. *Id.* at 258-59.

\(^10\) *Id.* at 286.
disposed on the argument that defamation did not qualify for first amendment protection. "[L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."\textsuperscript{38} He noted that the advertisement involved "grievance and protest on one of the major public issues of our time . . . ."\textsuperscript{39} The Court rejected the idea that the common law defense of truth sufficiently protected free speech to satisfy the first amendment. Mere falsity of statement or injury to official reputation did not result in forfeiture of protection since the first amendment guaranteed citizens the right to discuss and criticize government conduct.\textsuperscript{40} To meet first amendment requirements, the Court transplanted the fair comment qualified privilege from common law to constitutional principle, providing citizens with a qualified constitutional privilege to defame public officials. At common law, the fair comment privilege could be overcome by a showing of malice, such as ill will or spite. The Court transformed this element also by holding that only actual malice could defeat the qualified constitutional privilege.\textsuperscript{41} Actual malice was defined publication with "knowledge that [the statement] was false or with reckless disregard of whether it was false or not."\textsuperscript{42} Application of the first amendment to defamation actions was grounded on the belief that "public debate should be" uninhibited, robust and wideopen . . . .\textsuperscript{43} In balancing the individual's interest in reputation and the first amendment, the Court concluded that the actual malice standard sufficiently protected public officials. However, the Court refused to afford absolute protection in order to guard against the knowing lie.\textsuperscript{44}

2. Fragmentation

In 1967, a divided Court extended the actual malice standard to public figures. \textit{Curtis Publishing Co. v. Butts}\textsuperscript{45} consolidated two

\textsuperscript{38} Id. at 269.
\textsuperscript{39} Id. at 271.
\textsuperscript{40} Id. at 272-74.
\textsuperscript{41} Id. at 280.
\textsuperscript{42} Id.
\textsuperscript{43} Id. at 270.
\textsuperscript{44} Provision of the actual malice conditional privilege allows plaintiffs to prevail in cases of deliberate falsehoods.
\textsuperscript{45} 388 U.S. 130 (1967). The Butts case involved published reports that the plaintiff, head football coach at the University of Georgia, and University of Alabama head coach "Bear" Bryant had "fixed" a college game. The other case, \textit{Associated Press v. Walker}, 393 S.W.2d 671 (Tex. Civ. App. 1965), \textit{rev'd}, 388 U.S.
cases, one brought by a college football coach and the other by a retired United States Army general. In the consolidated decision, four justices rejected the idea that public figures should have to meet the actual malice standard. Four other justices wanted to extend the rule to such cases. In casting the decisive fifth vote to extend the actual malice standard, Chief Justice Warren found that Butts had met the test, but that the general had not. Thus, the coach's trial court judgment was affirmed while that of Gen. Walker was reversed. The Chief Justice explained his view in a concurring opinion.

To me, 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 . . . . Viewed in this context, then, it is plain that although they are not subject to the restraints of the political process, 'public figures,' like 'public officials,' often play an influential role in ordering society . . . . Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.'

After Butts, the Court had to define the type of proof needed to prove actual malice. In St. Amant v. Thompson, the Court held that a showing of negligence or even gross negligence did not satisfy constitutional requirements. "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." This standard clearly required that the plaintiff show intent to publish an untrue statement, or the disregarding of a statement which

130, concerned a report that retired General Edwin Walker had lead an anti-civil rights mob during a riot at the University of Mississippi.

76 Justices Harlan, Clark, Stewart and Fortas opposed extension of the actual malice standard to public figures.

77 Justices Black, Douglas, Brennan and White approved, as a minimum constitutional safeguard, extension of New York Times to public figures.

78 388 U.S. 130, 162 (Warren, C.J., concurring in the result).

79 Id.

80 Id. at 163-164.


82 Id. at 731.

83 Id.
should have alerted the publisher to its falsity, since the test implied that a responsible publisher would refrain from publication in those instances.

Although Butts had revealed the fragmentation of the Sullivan Court, the justices divided even further in 1971. In Rosenbloom v. Metromedia, Inc., a plurality led by Justice Brennan sought to extend the actual malice standard to discussion of material of "public or general interest." Such an extension had been forecast by commentators after Sullivan.

Rosenbloom involved a plaintiff arrested for distribution of supposedly obscene material. A radio station had broadcast details of the arrest, labeling the literature as obscene rather than "allegedly obscene." A jury acquitted Rosenbloom of criminal charges and he sued the radio station for defamation.

Mr. Justice Brennan's opinion, joined by Chief Justice Burger and Mr. Justice Blackmun, rejected application of first amendment protection based on status.

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.

The remaining six justices split along a variety of doctrines. Mr. Justice Black adhered to his "absolutist" position that recovery for defamation automatically violated the first amendment. Mr. Justice White concurred in the judgment, but feared that the plurality standard swept too broadly. He favored limiting the decision to public issues involving official acts of government officials.

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54 403 U.S. 29 (1971).
55 Id. at 43 (plurality opinion).
57 403 U.S. at 33.
58 Id. at 34.
59 Id. at 36.
60 Id. at 43.
61 Id. at 57 (Black, J., concurring in judgment).
62 Id. at 62 (White, J., dissenting).
Justices Harlan, Marshall, and Stewart dissented, rejecting outright the plurality opinion. They argued, although not in total harmony, that the state's interest in protecting reputation outweighed first amendment concerns in cases involving private individuals. They sought to allow the states to define the standard of fault applicable in such actions. Mr. Justice Douglas did not participate in the decision.

Three years later, the Rosenbloom dissents would become law and the "public-or general interest" test discarded in federal constitutional law. The period of expanding first amendment protection in defamation actions ended in Gertz v. Robert Welch, Inc.

3. The "Finality" Of Gertz

In Gertz, the Supreme Court declined to extend the actual malice rule to libel plaintiffs labeled "private figures." Elmer Gertz, a well-known attorney in liberal political circles, had been labeled a communist by the John Birch Society. Gertz sued, with the lower courts ruling that he was a private figure, but that he had to show actual malice to recover. By the time the case reached the Supreme Court, Justices Rehnquist and Powell had replaced Justices Black and Harlan. Both replacements helped form the five-person majority which rejected the Rosenbloom test. Additionally, Mr. Justice Blackmun, who had joined the plurality opinion in Rosenbloom, now joined the Gertz majority. He did so not out of any conviction that the "status" test of Gertz was superior to the "issue" test of Rosenbloom, but rather to provide "certainty" in defamation law. Chief Justice Burger and Justices Brennan, Douglas and White dissented.

Basically, the Gertz majority adopted the views advanced by

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63 Id. at 62 (Harlan, J., dissenting); id. at 78 (Marshall, J., dissenting).
64 Id.
65 Id. at 86.
66 418 U.S. 323 (1974). The case grew out of the shooting of a Chicago teenager by a city policeman. The youth's family retained Gertz as counsel in a wrongful death action. Soon afterwards, the in-house organ of the John Birch Society published an article declaring the lawyer a communist and accusing him of "framing" the officer.
67 Id. at 328-30.
68 Id. at 354 (Blackmun, J., concurring).
69 Id. at 354 (Burger, C.J., dissenting); id. at 355 (Douglas, J., dissenting); id. at 361 (Brennan, J., dissenting); id. at 369 (White, J., dissenting).
Justices Harlan and Marshall in their *Rosenbloom* dissents.\textsuperscript{30} Thus, the Court decided to allow states to set a different standard of fault for suits by private individuals as long as strict liability was not imposed.\textsuperscript{31} Additionally, presumed damages could no longer be given, only those resulting from actual injury.\textsuperscript{32} Moreover, punitive damages could be given only upon a showing of actual malice.\textsuperscript{33} The decision represented a rebalancing of the competing interests. Allowing states to set the standard of fault recognized their interest in protecting a private individual’s reputation. The changes in awarding of damages theoretically safeguarded the media from the common law’s tendency to allow recovery even where no injury occurred. Additionally, no punitive damages could be awarded absent a showing of actual malice.

The majority offered two rationales for adopting a sliding scale of first amendment protection based on status. First, the Court said public persons had greater access to media to counteract defamation—the “more speech/self-help” theory.\textsuperscript{34} Second, public persons voluntarily entered the public arena, therefore, they forfeited some right to protection from false comments.\textsuperscript{35} In contrast, a private individual “has relinquished no part of his interest in the protection of his own good name . . . . Thus, private individuals are not only more vulnerable to injury than public officials and public figures, they are also more deserving of recovery.”\textsuperscript{36,78}

The majority criticized the “public or general interest” standard as an inadequate attempt to balance competing interests.

On the one hand, a private individual whose reputation is injured by [a] defamatory falsehood that does concern an issue of public or general interest has no recourse unless he can meet the vigorous requirements of *New York Times* . . . . On the other

\textsuperscript{30} See generally, 403 U.S. at 62 (Harlan, J., dissenting); id. at 78 (Marshall, J., dissenting).

\textsuperscript{31} 418 U.S. at 347.

\textsuperscript{32} Id. at 349. The court did not define actual injury, saying it “is not limited to out-of-pocket loss.” Id. at 350. This “limitation” on recovery, then, may not be a restriction at all. See, e.g., Ashdown, *Gertz and Firestone: A Study in Constitutional Policy-Making*, 61 MINN. L. REV. 645, 670-71 (1977).

\textsuperscript{33} 418 U.S. at 349. This requirement alone was sufficient to dispose of the *Havalunch* case.

\textsuperscript{34} Id. at 344.

\textsuperscript{35} Id. at 345.

\textsuperscript{36} Id.
hand, a publisher or broadcaster of a defamatory error which a court deems unrelated to an issue of public or general interest may be held liable in damages even if it took every reasonable precaution to ensure the accuracy of its assertion."

Having adopted a bifurcated status test, the Court then divided the public figure category first announced in Butts. It noted in passing that one could become an involuntary public figure, but expressed serious doubt on how this could occur.\textsuperscript{78A} The majority then divided voluntary public figures into two types. Persons of "pervasive power and influence"\textsuperscript{77B} who "have assumed roles of especial prominence" would be public figures for any purpose. Individuals who had "thrust themselves to the forefront of particular public controversies in order to enforce the resolution of the issues involved"\textsuperscript{78D} would be public figures in actions arising out of the specific public controversy. Subsequent cases have dealt almost exclusively with the latter classification.

Thus, the Court had taken a decade to move from Sullivan to the issue focus of Rosenbloom to the status standard of Gertz. From now on, a plaintiff's status as a public or private individual would be the key in determining how the first amendment affected defamation actions. Since Gertz, a nearly unanimous Court has considered three cases asking "who is a public figure?"\textsuperscript{81}

C. Refining the Public Figure Definition

Gertz had only outlined the parameters of the public figure definition. It took only two years for a case to arrive in front of the Supreme Court to test Gertz's neat categories.

\textsuperscript{77} Id. at 346.
\textsuperscript{78} Id. at 345.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} The Supreme Court has dismissed writs of certiorari in two cases involving the public figure question by agreement of the parties. The first, Street v. NBC, No. 80-6835, cert. dismissed, 50 U.S.L.W. 3477 (Dec. 4, 1981) concerned a woman involved in the famous "Scottsboro Boys" rape trial in 1931. The legal question involved whether her public figure status obtained in 1931 remained in force today for purposes of a movie on that trial. The lower court had held the woman to be a public figure today. The second case, Wilson v. Scripps-Howard Broadcasting Co., No. 81-412, cert. dismissed, 50 U.S.L.W. 3505 (Dec. 18, 1981), dealt with which party has the burden of proving the falsity or truthfulness of statements in a private figure libel suit. The lower court had placed the burden of proving falsity upon the plaintiff.
Time, Inc. v. Firestone\(^{82}\) concerned the publication of the results of a well-publicized divorce in Florida in Time magazine. The article said that a member of the Firestone family had obtained a divorce from his wife on grounds of adultery.\(^{83}\) This was erroneous because Florida law did not allow alimony awards in divorce actions given on grounds of adultery and Mrs. Firestone had been granted alimony.\(^{84}\) Despite the extensive publicity concerning the trial itself and the fact that Mrs. Firestone participated in news conferences, the Supreme Court found that she was a private individual.\(^{85}\)

The Court focused on the nature of the controversy to conclude that the plaintiff had not thrust herself into the public's eye voluntarily and that no public controversy existed.\(^{86}\) Although the public certainly was interested in the trial, the Court made a value judgment similar to that it found wanting under the Rosenbloom test. Newsworthiness, said the Court, did not necessarily equal a public controversy.\(^{87}\) Thus, if a judge did not consider the information particularly needed by the public, no public controversy existed.

Two 1979 cases, the most recent involving definition of public figures,\(^{88}\) indicate that the Court wants to narrow the public figure classification. This will allow more persons to be considered private individuals and thus escape the actual malice requirement in some jurisdictions.

In Hutchinson v. Proxmire,\(^{89}\) the Wisconsin senator had awarded his monthly "Golden Fleece" award to the federal agency which had given research grants to the plaintiff. The trial court and the Circuit Court of Appeals for the District of Columbia held that Hutchinson was a public figure for "comment on his receipt of federal funds for research projects."\(^{90}\) These courts had focused on the plaintiff's application for public funds and the subsequent reporting of the award.\(^{91}\) Additionally, they had found that the

\(^{82}\) 424 U.S. 448 (1976).
\(^{83}\) Id. at 452.
\(^{84}\) Id. at 451.
\(^{85}\) Id. at 454 n.3.
\(^{86}\) Id. at 454.
\(^{87}\) Id.
\(^{88}\) See note 81, supra.
\(^{89}\) 443 U.S. 111 (1979).
\(^{90}\) Id. at 134.
\(^{91}\) Id. at 119.
plaintiff's ability to respond to Proxmire's charges demonstrated sufficient access to the media. In an 8-1 decision, the Court held that the scientist was a private individual.

In rejecting the access finding, the Supreme Court noted that access must be present before the alleged defamation occurs. Otherwise, the Court reasoned, any attempt to respond would turn a private individual into a public figure. Hutchinson's grant applications were insufficient to indicate that he had voluntarily entered a controversy to influence its outcome. Additionally, general taxpayer concerns with expenditures of public funds did not create a specific controversy for the plaintiff to enter.

The second case, Wolston v. Reader's Digest Association, Inc., reinforced the conclusion that public figure classifications will be more difficult for media defendants to obtain. Wolston had been held in contempt in 1958 for not appearing before a grand jury investigating Soviet espionage activity. His failure to appear drew extensive media coverage at the time. In 1979, the defendant published a book labeling Wolston a Soviet agent. The lower courts held Wolston to be a limited public figure, apparently in relation to actions by law enforcement agencies during the espionage investigation. Additionally, Wolston had met the voluntariness requirement by failing to appear before the grand jury.

The Supreme Court, again in an 8-1 vote, rejected the public figure determination. It characterized the plaintiff as being "dragged" into court, similar to the "lack of choice" made by Mrs. Firestone in contesting her divorce. The Court said a trial court must examine the "nature and extent" of an individual's participation in determining voluntary participation. Wolston, like Gertz, had not discussed his case with the press. Additionally, he had not played a major role in any controversy regarding

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92 Id. at 134.
93 "He (Hutchinson) did not have the regular and continuing access to the media that is one of the accouterments of having become a public figure." Id. at 136.
94 Id. at 135.
96 Id. at 162.
97 Id. at 166 n.8.
98 Id. at 167.
99 Id. at 166.
100 424 U.S. 448.
101 443 U.S. at 167.
102 Id.
the appropriateness of government actions. Once again the Court explained that it would not let media attention determine public figure status. "A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention . . . . A libel defendant must show more than mere newsworthiness to justify application of the demanding burden of New York Times."103

These cases, taken together with Firestone and Gertz, indicate that a libel plaintiff must almost make a conscious decision to attract the public's attention. Mere attention is not enough; the trial court must look at the manner and quality of participation. The evidence must show that the plaintiff voluntarily entered an existing public controversy with the intention of influencing the outcome. Media access is another fundamental factor to be considered. Mr. Justice Blackmun, concurring in Wolston, perhaps summed up the requirements best. "[A] person becomes a limited-issue public figure only if he literally or figuratively 'mounts a rostrum' to advocate a particular view."104

III. DEFAMATION ACTIONS IN WEST VIRGINIA

A. Common Law

Case law is sparse in West Virginia concerning defamation actions, but the common law appears to track that prevalent in other jurisdictions prior to New York Times v. Sullivan. Strict liability was imposed for false statements. The plaintiff had only to show publication of a defamatory statement by the defendant to subject the publisher to liability.105 As in other jurisdictions, a claim of libel was actionable without proof of damages.106 West Virginia courts recognized the qualified privileges by which strict liability could be defeated. As defined in an early case, "[w]henever . . . the defendant is acting bona fide in the discharge of any legal, moral or social duty, his answer will be privileged."107 To receive the benefit of a qualified privilege, a defendant had to prove that

103 Id. at 167-68.
104 Id. at 169 (Blackmun, J., concurring in result).
106 Id.
the occasion or event which sparked publication was privileged, such as a report on a public proceeding, and that the communication had been made within the scope of the privilege.\(^{108}\)

Many of the defamation cases in West Virginia differentiated between slander and libel only in the manner each was published.\(^{109}\) Additionally, little distinction was made in substantive requirements for common law defamation actions and suits brought under the state’s “insulting words” statute.\(^{110}\) An examination of two cases reveals how qualified privileges operated and the leeway they gave judges in deciding cases.

*Barger v. Hood,*\(^{111}\) decided in 1920, concerned a dispute between two publishers who had contracted to publicize the town of Keyser. The plaintiff failed to perform his part of the contract; therefore, the defendant secured the services of another publisher. The various parties exchanged published charges of dishonesty and engaged in character assassination.\(^{112}\) As a defense, the defendant pled the qualified privilege which permitted one to protect business interests. The defendant claimed that his published charges had been an attempt to protect the original publicity contract.\(^{113}\) The state supreme court agreed, ruling that the publication had been conditionally privileged. The pleaded privilege, however, limited publication of the rebuttal only to persons with similar interests as the defendant. Since publication had occurred in a newspaper read by persons without the defendant’s interest, the court held that the privilege had been lost and imposed strict liability.\(^{114}\)

When the plaintiff could not show abuse of the qualified privilege, the defendant escaped liability. In *Swearingen v. Parkersburg Sentinel Co.*,\(^{115}\) a newspaper editorialized concerning a public official’s handling of public funds. A state audit furnished the basic facts for the editorial. The defendant pled several qualified privileges, including fair comment. The supreme court of appeals held that “[a]nything connected with the plaintiff’s of-

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109 See, e.g., id.
111 87 W. Va. 78, 104 S.E. 280 (1920).
112 Id. at 83-84; id. at 283.
113 Id.; id.
114 Id.; id.
ficial duties was a proper subject of discussion which, if made without malice, was not libelous." The court then ruled that the defendant's action had not exceeded the privilege; therefore, the plaintiff had to show express malice to recover. It could not do so and no liability attached to the newspaper company.

West Virginia defamation law did differ from that in other jurisdictions in two important respects. In many states, the defense of truth, if proven, operated as an absolute bar to recovery. West Virginia law required more. Article 3, section 8, of the state constitution permitted truth to be pled as a defense, provided that publication occurred "with good motives and for justifiable ends." Consequently, in prosecuting a defamation action, proof of ill will or spite which caused publication of a true statement, defamatory in nature, theoretically could permit recovery.

A second difference concerned the extent of the fair comment qualified privilege. This privilege allowed opinion criticism, especially newspaper editorials, on matters of public interest. The majority of jurisdictions permitted the privilege to protect only expressions of opinion based upon true facts. The opinion could be incorrect as long as the underlying information was true. The minority view extended protection to incorrect opinion based on incorrect facts.

In Bailey v. Charleston Daily Mail Association, the state supreme court adopted the minority view. In discussing the opposing views, the court said the majority view feared extension

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116 Id. at 744, id. at 215.
118 Prosser, note 6 supra, at 792.
120 See Sullivan, 376 U.S. at 280 n.20, for a listing of jurisdictions adhering to the minority view.
121 126 W. Va. 292, 27 S.E.2d 837. The case involved a defamation suit brought by a state official who claimed that an editorial had libeled him. The editorial had recited facts surrounding the state's purchase of a bridge, and had implied that political friends of the official had profited from the deal. Id. at 295, id. at 839. The editorial contained incorrect statements of fact which created a false impression. Id. at 301, id. at 842. Under the majority rule, the fair comment privilege did not protect the publication and the defendant was liable for damages. Under the minority view, the qualified privilege attached, but could be overcome by the plaintiff on a showing of excessive publication or ill-will.
of the privilege would prevent qualified persons from seeking office for fear of defamation.\textsuperscript{122} Additionally, extension would give the media a "license to libel".\textsuperscript{123} In contrast, the minority view believed extension would open the dishonest official to exposure.\textsuperscript{124} Moreover, the honest public official would not be injured by allowing official acts "to be canvassed with a freedom and latitude consistent with good faith and that freedom of statement is conducive to a high standard in the activities of the public press."\textsuperscript{125} The court then explained why it preferred the minority view.

A citizen of a free state having an interest in the conduct of the affairs of his government should not be held to strict accountability for misstatement of fact, if he has tried to ascertain the truth and, on a reasonable basis, honestly and in good faith believes that the statements made by him are true.\textsuperscript{126}

The state supreme court decided Bailey in 1943. Twenty-one years later, the United States Supreme Court would adopt the minority view, albeit with the more stringent actual malice standard, and make it constitutional law in Sullivan.\textsuperscript{127}

In general, then, defamation law in West Virginia paralleled that in other states. The additional requirements for truth as a defense theoretically narrowed a defendant's ability to escape liability. Bailey, however, gave some thought to the need of allowing some errors to go unpunished in order to meet higher societal goals—open debate on the actions of government officials and a higher standard of conduct by these officials. The cases show that West Virginia courts, like those elsewhere, gave little thought to the interplay between defamation, the first amendment and the state constitution's freedom of the press clause.

B. Post-Sullivan Decisions

The state supreme court had ruled on only three constitutional defamation cases prior to Havelunch.\textsuperscript{128} All involved public officials or candidates for public office. The opinions, especially that in

\textsuperscript{122} Id. at 304; id. at 843.
\textsuperscript{123} Id.; id.
\textsuperscript{124} Id.; id.
\textsuperscript{125} Id. at 304-05; id.
\textsuperscript{126} Id. at 306-07; id. at 844.
\textsuperscript{127} See generally, Sullivan, 376 U.S. 254.
\textsuperscript{128} In Mauck v. City of Martinsburg, 200 S.E.2d 216 (W. Va. 1981), the court relied on a qualified privilege involving employer-employee relations to shield the city from liability. Id. at 221. The court avoided defamation law altogether
HAVALUNCH v. MAZZA

The first post-Sullivan case did not occur until ten years after the Supreme Court's landmark decision. In Starr v. Beckley Newspapers Corp., the court ruled on a certified question asking whether a municipal policeman was a public official within the Sullivan definition. The case dealt with a published report that the officer's son had been jailed on a bad check charge. The story's headline, however, identified the officer as having been arrested. More than 11,000 copies of the newspaper were printed and distributed before anyone noted the mistake. The court had no difficulty in concluding that Starr was a public official since St. Amant v. Thompson, decided by the United States Supreme Court in 1968, had involved a deputy sheriff. The Supreme Court had not hesitated to declare the law enforcement officer a public official and to require him to prove actual malice to recover.

The next case, Sprouse v. Clay Communications, Inc., distinguished between published articles and headlines. In 1968, Jim Sprouse and Arch Moore, Jr., opposed one another for governor. Just before the election, the Moore staff supplied the Charleston Daily Mail with information regarding an out-of-state land development company headed by Sprouse. The Daily Mail, a Republican newspaper and ardent Moore supporter, printed several stories and editorials concerning the company's actions in buying land and then selling it to the U.S. Forest Service. These articles implied that Sprouse had acted unethically and perhaps illegally. Although the articles appeared fairly neutral, the headlines included such phrases as "Sprouse's Land Grab,' 'Candidate Cleans Up,' and 'Realty Bonanza.'" Sprouse lost the election and sued for defamation. A jury returned a verdict of $250,000 in compensatory and $500,000 in punitive damages.

In Webb v. Fury, 282 S.E.2d 28 (W. Va. 1981), a libel case which involved the public/private figure determination. Instead, the court relied on an absolute first amendment right to petition theory and ordered the complaint dismissed.

130 Id. at 449-50, 201 S.E.2d at 912.
133 Id. at 683-84.
134 Id. at 685.
135 On appeal, the state supreme court disallowed the original punitive damage award of $750,000 as "excessive." Id. at 681.
On appeal, the state supreme court relied on Monitor Patriot Co. v. Roy\textsuperscript{138} to hold that political candidates must prove actual malice. The court then attempted to repeat the definition of that standard as used by the Supreme Court.

In libel actions ‘malice’ does not connote the mere dislike of one party for another or the intent of one party to injure another . . . . In libel law, ‘malice’ has a much narrower definition and requires not only a deliberate intent to injure, but also an intent to injure through the publication of false or misleading defamatory statements known by the publisher or its agents to . . . injure through publication of such defamatory statements with reckless and wilfull disregard for their truth.\textsuperscript{137}

The court appeared to state that the personal motives of the publisher could be shown to show actual malice. \textit{Herbert v. Lando},\textsuperscript{138} a 1979 Supreme Court decision, supports such a theory. Later in the opinion, however, the court set forth the elements needed for recovery by a political candidate. Listed separately from actual malice was the requirement that material be “published with an intent to injure.”\textsuperscript{139}

The \textit{Sprouse} requirements for recovery may be read in two ways. Mr. Justice Neely may have confused actual malice and the intent to injure, making each a separate element of recovery when he really only meant that proof of intent went toward showing actual malice. Alternatively, he may have deliberately made intent to injure a separate category in order to make the actual malice test more stringent in West Virginia than that announced by the Supreme Court in \textit{Sullivan}.\textsuperscript{140} Intent to injure and

\textsuperscript{138} 401 U.S. 265 (1971).
\textsuperscript{137} 211 S.E.2d at 681-82.
\textsuperscript{138} 441 U.S. 153 (1979).
\textsuperscript{139} 211 S.E.2d at 683. A public official must also show a false statement, defamatory in nature, which was known at the time of publication to be false. \textit{Id.}
\textsuperscript{140} Given Mr. Justice Neely’s authorship of the \textit{Havalunch} opinion and its adoption of the less stringent negligence standard, it is difficult to believe that the \textit{Sprouse} definition of actual malice was intended to make recovery for public officials and public figures more difficult in West Virginia than elsewhere.

\textsuperscript{141} In \textit{Gertz}, the court limited recovery to actual injury unless actual malice was proven. The West Virginia Supreme Court of Appeals disallowed punitive damages in \textit{Sprouse} even though the plaintiff had shown actual malice. The court reasoned that punitive damages “may only be recovered in cases where the award of actual damages is insufficient to dissuade others in the future.” 211 S.E.2d at 692.

However, the court said \textit{Sprouse} had demonstrated $250,000 in actual damages. Equating defamation with actual malice to an intentional tort, the court
knowledge of falsity, while similar, are distinct issues. Sprouse has confused the definition of actual malice in West Virginia.

The Sprouse case also pointed out how the Gertz requirement of actual injury damages can be circumvented. Although the court reduced the trial court's award to $250,000, it made no specific ruling on what injuries the plaintiff actually had suffered. Presumably, they flowed from mental anguish, embarrassment and perhaps any damage to Sprouse's law practice. 141

As did Starr, the final case arose on a procedural question. Neal v. Huntington Publishing Co. 142 involved a former county sheriff who had run for Congress in 1972. The newspaper had carried a political advertisement imputing criminal conduct to a "sheriff." An organization supporting a candidate for sheriff in Ohio had placed the advertisement, but had failed to specify which sheriff or which county election. 143 Ruling on a certified question, the court held that extrinsic evidence could be introduced to identify the person allegedly libeled.

Thus, the post-Sullivan cases do not provide much guidance on defamation law in West Virginia. Of course, much of the common law has been altered by Sullivan, Butts, and Gertz. What remained to be settled at the state level was the standard of fault to be applied in private figure libel actions. In Havalunch, Inc. v. Mazza, 144 the West Virginia Supreme Court of Appeals concluded that a private figure must prove negligence in order to recover.

This Note will conclude that federal constitutional law would have made it difficult to classify the restaurant as a public figure. Thus, the state supreme court reached the correct result in classifying the eatery a private figure, despite its lack of analysis. The Note will conclude, however, that state common law, the state constitution, and public policy pointed toward adoption of the ac-

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141 223 S.E.2d 792 (W. Va. 1976).
142 The advertisement appeared in a newspaper which circulated in three states and more than 25 counties. Each county was electing a sheriff during the 1972 campaign.
143 Havalunch, supra note five.
tual malice standard for all defamation plaintiffs, including private figures.

V. UNANSWERED QUESTIONS

A. Havalunch As A Public Figure

As discussed previously, recent Supreme Court decisions have narrowed the public figure classification. However, the state supreme court failed to discuss or even cite *Hutchinson* or *Wolston*. Rather, the court declared that "it is a close question" whether a restaurant such as Havalunch engaged in "a business of sufficient public concern to place it in the public figure or public issue category." Mr. Justice Neely concluded that the restaurant qualified for private figure status based on the large number of restaurants in Morgantown. Moreover, the eatery had not solicited reviews nor held itself out "as a place of particular interest or culinary quality.

Proper analysis of the public figure determination in *Havalunch* should have been conducted through use of the three-prong test of *Gertz-Wolston*. First, did a pre-existing controversy exist prior to publication of the restaurant review? Second, did the plaintiff voluntarily inject itself into the dispute? Third, did any such participation occur with an intent to influence the result of the controversy?

1. Public Controversy

This requirement has been criticized because of its subjective nature. Determination of whether a public controversy ex-

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145 Id.
146 The language reveals the court's confusion between constitutional and common law defamation principles. A public figure determination applies to the constitutional analysis required under *Gertz* and *Butts'* actual malice standard. Had the United States Supreme Court adopted the Rosenbloom "public or general interest" test, then the actual malice standard would have attached had the restaurant's operation been found a matter of public concern. Under *Gertz*, a finding of public concern, without a finding of public figure status, relates only to the availability of the common law qualified privilege of fair comment to the defendant. Cf. Mashburn v. Collin, 355 So.2d 879 (La. 1977) (restaurant review).
147 294 S.E.2d at 74.
148 The court apparently used this language to distinguish a non-descript diner from an eating facility which advertised itself as offering a particular cuisine. See Mashburn v. Collins, 355 So. 2d 879 (La. 1977).
ists, the Gertz test, differs little from a requirement that the publication concern matters of "public or general interest," the Rosenbloom criterion. The subjectivity criticized by the Gertz majority\(^\text{149}\) as inherent in the Rosenbloom test is heightened by the Supreme Court's insistence that newsworthiness does not equal public controversy.\(^\text{150}\) Consequently, a judge rather than the media has been invested with the power to determine what the public should hear or read.

In any event, it is readily apparent that no controversy existed regarding Havalunch itself prior to the review's publication. Indeed, the restaurant review was a supplement to the Daily Athenaeum's normal reporting fare. Mazza had never eaten at the restaurant prior to her assignment to review the food and service. Although the quality of eating establishments in a college town often is a hotly disputed topic, neither this general issue nor the restaurant itself was part of any pre-existing controversy.

2. Voluntariness of Havalunch's Participation With Intent To Influence A Controversy

Even if a controversy existed prior to publication of the review, participation in the dispute must have been undertaken voluntarily with an intent to influence the outcome. In cases involving business entities rather than natural persons, at least one court has found that corporate status points strongly toward a public figure determination regardless of the presence of the voluntariness and intent factors.\(^\text{151}\) The majority of courts, however, have reaffirmed the Supreme Court's mandate that such a deter-

\(^{149}\) Gertz, 418 U.S. at 346.


\(^{151}\) Martin Marietta Corp. v. Evening Star Newspaper, 417 F. Supp. 947 (D.D.C. 1976). The court reasoned that since corporations do not possess "personal" reputations, the Gertz requirement did not apply.

This traditional doctrine does no more than recognize the obvious fact that a libel action brought on behalf of a corporation does not involve 'the essential dignity and worth or every human being' and, thus, is not 'at the root of any decent system of ordered liberty.' Consequently, a corporate libel action is not 'a basis of our constitutional system,' and need not force the first amendment to yield as far as it would be in a private libel action.

Id. at 955.
mination must be based on the facts of a particular case, not the plaintiff's organizational status.152

For the most part, these cases have dealt with large business enterprises, not a small retail establishment such as Havalunch. The possible rationale for distinguishing corporate and human plaintiffs begins with injuries for which each may recover. Natural persons may be awarded damages for actual injury to business and personal reputation, for mental anguish and embarassment.153 A corporation cannot suffer mental injuries; its damages are limited to those directly involving the business operation.154 In Havalunch, the jury apparently believed that the restaurant had suffered no injury to business or reputation since it did not award any compensatory damages.

The restaurant's corporate status ties directly to the question of participation in public controversy. Havalunch admittedly was a profit-oriented business which catered to the public. Operation of a public business has been argued as sufficient to support a finding of public figure or at least of public interest.155 In this case, however, no evidence existed of a particular advertising campaign designed to draw public attention to itself.156 Moreover, under the Supreme Court's analysis, the mere fact that a person or business is a legitimate subject of a reporter's story does not automatically transform one into a public figure. "Voluntary" operation of a public restaurant can be equated with the finding of involuntariness made by the Supreme Court in Firestone and Wolston. In those cases, the subjects of news stories appeared in court not of their own choosing. In Havalunch, the restaurant operated on its own accord, but such operation did not render it immediately subject to public figure status. If a person who voluntarily engages in criminal conduct is not necessarily a public figure, as the Supreme Court has said in dictum, then awarding

152 See, e.g., Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980). The Court of Appeals for the First Circuit rejected the argument that corporations inherently enjoy greater media access than individuals. Id. at 589.
153 Prosser, supra note six, at 761.
154 West Virginia case law reflects this view. "[A corporation] may sue and recover for a libel, spoken or published, against it as a corporate entity, or for slander upon it, injuriously affecting its trade or business." Coal Land Development Co. v. Chidester, 86 W. Va. 561, 564, 103 S.E. 923, 925 (1920) (emphasis added).
155 Martin Marietta Corp., supra note 151.
public figure status to a small diner seems difficult to support.\textsuperscript{157}

An articulated, but informal principle in the public figure determination deals with the plaintiff's access to the media prior to publication of the alleged defamatory article. Media access has been a recurrent theme in defamation cases since \textit{Sullivan}. The Supreme Court justified adoption of the actual malice standard for public officials and public figures on the theory that they commanded media attention and could use "more speech" to counteract defamatory statements.\textsuperscript{158} Conversely, the court has used a finding of no access to define the private figure and to justify different treatment of such individuals.\textsuperscript{159}

Like the formal principles, the question of media access turns on the facts in each case. The court's opinion in \textit{Havalunch} specifically noted that the restaurant had not solicited any reviews nor held itself out as a "special" place to dine.\textsuperscript{160} There is no evidence to show that Havalunch had ready access to media outlets. Since access must be more than "fleeting,"\textsuperscript{161} the access question must be resolved in the restaurant's favor.

The Supreme Court has made it clear that courts must determine public figure status on a case's particular facts. The manner of a person's participation is the crucial consideration. Conduct must be "calculated to draw attention to (a person) in order to invite public comment or influence the public . . . ."\textsuperscript{162} A court must examine \textit{what a plaintiff did or how that action influenced the controversy's outcome}. The Court based this requirement on the common-sense assumption that persons participate in public matters to influence the outcome. Therefore, given the lack of intentional participation in a public controversy to influence the

\textsuperscript{157} "This reasoning leads us to reject the further contention of respondents that any person who engages in criminal conduct automatically becomes a public figure . . . ." \textit{Wolston}, 443 U.S. at 168.

\textsuperscript{158} "'Public figures' have as ready access as 'public officials' to mass media of communication, both to influence policy and to counter criticism of their views and activities." \textit{Butts}, 388 U.S. at 164 (Warren, C.J., concurring in result).


\textsuperscript{160} 294 S.E.2d at 74.

\textsuperscript{161} To be a public figure, one must have "regular and continuing access to the media." \textit{Hutchinson}, 443 U.S. at 136.

\textsuperscript{162} "We emphasized that a court must focus on the 'nature and extent of an individual's participation in the particular controversy giving rise to defamation.'" \textit{Id.} at 157.
outcome and the lack of media access, \(^{163}\) the state supreme court correctly found the restaurant to be a private figure in terms of constitutional analysis. \(^{164}\)

VI. WEST VIRGINIA'S ADOPTION OF THE NEGLIGENCE STANDARD FOR PRIVATE INDIVIDUALS

Once the West Virginia Supreme Court of Appeals classified Havalunch as a private figure, it adopted negligence as the standard of care owed such plaintiffs. The court made this decision without analyzing the competing considerations and without explaining the reasons for its choice. \(^{165}\) Instead, it merely cited Gertz as authority for adopting a standard based on fault. \(^{166}\) Moreover, the court did not discuss or even cite cases from other jurisdictions which have adopted either a negligence \(^{167}\) or an actual malice standard. \(^{168}\) These cases are important because they reflect the continuing division over the Supreme Court's rejection of the "public or general interest" test outlined in *Rosenbloom*. Courts

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\(^{163}\) Another line of argument to have *Havalunch* labeled a public figure would have been the extensive regulation of the restaurant industry. In American Benefit Life Ins. Co. v. McIntrye, 375 So. 2d 239 (Ala. 1979) (per curiam), the Alabama Supreme Court held an insurance company to be a public figure. "It cannot be successfully argued that a corporation whose dealings are subject to close regulation by our state government, and, indeed, whose very existence as an entity is owing to that government, does not invite attention and comment from the news media." *Id.* at 242. See also Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341, 1348 (S.D.N.Y. 1977).

\(^{164}\) Such a finding was irrelevant to whether the fair comment privilege protected the defendant's publication.

\(^{165}\) 294 S.E.2d at 73.

\(^{166}\) *Id.*


favoring a negligence standard approve the balancing of interests reflected in Gertz. Those jurisdictions adopting a higher standard of fault generally approve the Rosenbloom standard. Therefore, this Note will examine decisions from both sides of the argument in order to provide the analysis not present in Havalunch. The Note will conclude that the supreme court of appeals should have adopted actual malice as the standard for all defamation plaintiffs, without any requirement of a finding of public issue or public controversy.

A. Negligence Standard

Since 1974, at least thirteen states have adopted a negligence standard as an element of a defamation suit brought by a private individual. These courts reason, as did the Gertz majority, that this standard protects both the reputational interest of the individual, while negating the inhibiting effects of common law strict accountability.

A recent Utah Supreme Court decision, Seegmiller v. KSL, Inc., 169 typifies this view. The trial court held that the plaintiff had to prove actual malice to recover. The Utah Supreme Court reversed and remanded the case, adopting a negligence standard of recovery. Since the plaintiff did not enjoy “pervasive power” and had not voluntarily become involved in some public controversy, the court found the plaintiff to be a private individual. 170 In justifying the public/private distinction, the court said that private persons are involuntary news figures and have little ability to rebut press accounts effectively. 171 Additionally, information about a public person often is more relevant to the decision-making process. Moreover, a public person assumed certain risks while a private person had not. 172


In Preston & Land, 220 Va. 118, 255 S.E.2d 509 (1979), the Virginia Supreme Court held that private individuals must show actual malice to recover. The court defined actual malice, however, in terms of ill will or spite, common law malice. The validity of this holding is questionable since showing ill will does not equal fault. New York has adopted a standard approaching gross negligence. Chapadeau v. Utica Observer-Dispatch, Inc., 33 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S. 61 (1975).

169 626 P.2d 968 (Utah 1981). The case involved a report that the plaintiff had been treating his horses inhumanely.

170 Id. at 972.

171 Id. at 973-74.

172 Id. at 974.
The Utah court's rejection of the actual malice standard, as in other jurisdictions, may have been motivated by the always present fear of a press run amuck. "Society has not interest in the dissemination of statements which are false and which could have been prevented through the exercise of reasonable care."\textsuperscript{173} While the value of a falsehood has been debated,\textsuperscript{174} society has, in the past and very much today, distrusted the motives and actions of the press.

B. Actual Malice Standard

Jurisdictions embracing a higher degree of fault, either gross negligence or actual malice, adopt the philosophy that the first amendment protects discussion of issues and events relevant to an informed citizenry. Its protection, therefore, should not turn on the notoriety or obscurity of the plaintiff.

The Colorado Supreme Court was one of the first jurisdictions to reject the Supreme Court's invitation to adopt a negligence standard. \textit{Walker v. Colorado Springs, Inc.}\textsuperscript{175} involved published articles about the ownership of certain stolen property. An antique dealer had unknowingly purchased stolen property taken in a home burglary. When the owner discovered the whereabouts of her property, she asked for its return. The dealer offered to sell it to her for what he thought he could obtain on the market. The woman refused.\textsuperscript{176} The Colorado court adhered to the \textit{Rosenbloom} test, saying that the negligence rule resulted in self-censorship.

Our ruling here results simply from our conclusion that a simple negligence rule would cast such a chilling effect upon the news media that it would print insufficient facts in order to protect itself against libel actions; and that this insufficiency would be more harmful to the public interest than the possibility of lack of adequate compensation to a defamation-injured private individual.\textsuperscript{177}

Thus, as in \textit{Rosenbloom} and \textit{Gertz}, the decision turns on how

\textsuperscript{173} Id.

\textsuperscript{174} Whether false statements are "valuable" to society has been hotly debated. Compare "there is no constitutional value in false statements of fact,"; \textit{Gertz}, 418 U.S. at 340, with Emerson, \textit{supra} note 56, at 536.

\textsuperscript{175} 188 Colo. 86, 538 P.2d 450, cert. denied, 423 U.S. 1025 (1975).

\textsuperscript{176} Id. at 89; 538 P.2d at 451-53.

\textsuperscript{177} Id. at 99; 538 P.2d at 458.
the competing interests are to be weighed. Does a private person's reputation weigh against the first amendment scale greater than that of a public person? Does a test based on status further the first amendment's central purpose—a national commitment to open discussion and debate? The Supreme Court fragmented in trying to decide these questions. Left to their own devices, state courts are repeating the same arguments and making the same analyses as the Court did in Rosenbloom and Gertz.

C. West Virginia's Standard

In Havalunch, the state supreme court opted for a negligence standard in cases involving private figure libel plaintiffs. However, the court's lack of analysis in making this decision and the lack of need to reach that question in the particular case render the choice somewhat suspect. It can be argued that any judicial attempt to balance freedom of the press and defamation is a never-ending struggle to perform the impossible. Courts should, perhaps, give up the fight and decide openly which interest has more individual and societal value. At the federal level, this would be possible since the Constitution protects freedom of the press, but not the right to recover for defamation. A different situation exists at the state level, however. For example, the West Virginia Constitution provides for both freedom of the press and recovery for defamation. Consequently, these constitutional provisions collide in enforcement.

Despite the court's action in Havalunch, this Note will argue that West Virginia should adopt an across-the-board actual malice standard. No distinction between public and private persons need be made. Additionally, the "public or general interest" and the "public controversy" tests should be abandoned. They force courts to make a subjective value judgment on what "news" or information the public needs. Adoption of the actual malice standard is supported by the state constitution, public policy and both state constitutional and common law defamation decisions.

1. West Virginia Constitution

The state constitution contains two provisions concerning freedom of the press and defamation. Article 3, section 7 provides that "[n]o law abridging the freedom of speech, or of the press, shall be passed, but the legislature may by suitable penalties . . . provide for the punishment of libel, and defamation of
character, and for the recovery, in civil actions, by the aggrieved party, of suitable damages . . . ." Section 8 of that same article specifies that a true statement, published with good motives and justifiable ends, constitutes an absolute bar to a defamation suit. Consequently, West Virginia is a state where individuals have a constitutional right to recover for defamation, subject only to the strictures of the first amendment and the state's freedom of the press provision.

2. Prior Case Law

As discussed previously, the development of the common law defamation suit in West Virginia paralleled that in other jurisdictions. The two primary differences were the added constitutional requirement on use of truth as a defense and the extension of the fair comment qualified privilege to misstatements of fact. The latter difference supports adoption of an actual malice standard because it reflects a sensitivity to the inhibiting effects of financial liability on anyone attempting to engage in open discussion. Such sensitivity was implicit in the state supreme court's extension of the fair comment common law privilege in Bailey v. Charleston Daily Mail Association, perhaps the only pre-Sullivan state decision to consider the interplay between defamation and an active press.

In that case, the defendant newspaper claimed that the allegedly defamatory editorial dealt with "a matter of public interest and concern . . . , and, that although untrue statements may appear therein, that such statements were made in good faith without malice . . . ." Although application of the fair comment privilege placed West Virginia in the minority view, this was the position adopted by the United States Supreme Court in Sullivan. The West Virginia court's opinion foreshadowed the Supreme Court's rationale for applying the first amendment to defamation actions.

Once appointed or elected, the unyielding requirements of public

178 W. VA. CONST. art. 3, § 7.
179 "In prosecutions and civil suits for libel, the truth may be given in evidence, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the verdict shall be for the defendant." W. VA. CONST. art. 3, § 8.
180 See supra notes 121-27 and accompanying text.
182 Id. at 303-04; 27 S.E.2d at 843.
welfare demand that a public official keep in view only one object—the strict performance of his duties in accordance with law and the unchanging principles of honest government. The slightest departure from such standards of conduct can be neither excused nor condoned. Adherence to a high standard of official conduct is stimulated by investigation and reasonable and honest criticism.183

Since the Bailey court specifically limited its decision to comment on official conduct of public offices, it can be argued that the case supports distinguishing between public and private persons. The case, however, concerned a state official and his performance of official duties. In its holding, the court developed a rule of law for that type of fact situation. Unlike cases involving statutory or constitutional questions, common law decisions tried to stay with the fact situation rather than expand application of the holding.184 Additionally, the court specifically adopted a rule of law “conducive to a high standard in the activities of the public press.”185 If a forerunner of Sullivan found that the press needed protection to enhance its ability to perform its societal role, the maximum constitutional standard of actual malice should be adopted.

Two recent decisions of the West Virginia Supreme Court of Appeals, both decided on constitutional grounds, indirectly support adoption of the Sullivan standard.186 In State ex rel. Daily Mail Publishing Co. v. Smith,187 the court relied on developed first amendment doctrine to declare unconstitutional a statute prohibiting a newspaper from publishing the names of juveniles charged with crimes. Two newspapers, and several broadcast media, had published the name of a youth accused of killing a classmate. The court found the statute to be a prior restraint on the press. The state’s asserted interest—the ability to assure a youthful offender a prejudice-free future—did not meet the constitutional test for prior restraint.188 This case reflected the present court’s sensitivity to the role of open discussion in society.

183 Id. at 303; 27 S.E.2d at 842-43 (emphasis added).
185 126 W. Va. at 305, 27 S.E.2d at 844.
186 See notes 187-95 and accompanying text.
188 Id.
The second decision, State ex rel. Herald Mail v. Hamilton, involved an attempt by a criminal defendant to exclude the public and the press from a pre-trial hearing. The trial judge had ordered the hearing closed after the defendant claimed that a public proceeding would interfere with his right to a fair trial. After reviewing recent Supreme Court decisions on the closure issue, which had distinguished pre-trial and trial proceedings, the state supreme court reversed the closure order. Relying on Article 3, sections 14 and 17, which relate to public trials, the court held that the right of access is a personal right of each member of the public. Therefore, the court said that the West Virginia court provision is broader than the sixth amendment to the federal constitution.

Although the state constitution's freedom of the press clause did not play a part in the decision, the court considered the effect that exclusion of the press would have on society. Herald Mail, then, exemplifies the broad interpretation given West Virginia constitutional provisions. Adoption of the actual malice standard, based on the state's freedom of the press clause, would be consistent with the court's past treatment of freedom of the press issues.

3. Policy Considerations

The Rosenbloom-Gertz policy battle has been carried on by the state courts as each jurisdiction defines its defamation action. Jurisdictions adopting a negligence standard cite the Gertz rationale: lack of access, forfeiture of protection by public persons, the state interest in protecting reputation, and the judicial balancing inherent in deciding what is of "public or general interest."

189 267 S.E.2d 544 (W. Va. 1980).
191 "Trials of crimes, and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men, public . . . ." W. VA. CONST. art. 3, § 14.
192 "The courts of this state shall be open . . . ." Id. at art. 3, § 17.
193 267 S.E.2d at 547.
194 Id. at 549-50.

Those states adopting a higher standard rely on Rosenbloom's belief that the first amendment protects issue discussion regardless of a person's status, that no difference exists in the reputational interests of public and private persons, that problems occur in defining public controversy, and that self-censorship results under a negligence standard. These factors can be arranged and weighed according to a court's pre-existing preferences. Indeed, it is difficult not to believe that decisions regarding the standard of fault are based on a judge's personal conviction of the value and role of the media in society. Several of the cited considerations will now be examined.

a. Access to the media

In Gertz, the Supreme Court reasoned that a private individual lacked the resources to effectively rebut defamatory statement with additional speech. This, therefore, justified imposition of a higher standard of care on a defendant. This rationale has been applauded and attacked by commentators, depending on their personal predilections toward the press.

It would, however, be difficult to find a practicing journalist who believes that influential persons are not able to generate media attention more easily than a private person quite suddenly "discovered" by an enterprising reporter. For example, suppose a newspaper publishes an article based on a public report that an attempted murder occurred during a family argument. If the family involved is that of a local prominent citizen, then the newspaper often, for various reasons, would be likely to publish a family member's rebuttal. If, on the other hand, the police had charged a high-school dropout familiar to authorities from past incidents, his or the family's side of the story likely would get little consideration. This decision, of course, would reflect the news

196 418 U.S. at 344.
197 See, e.g., Eaton, The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer, 61 Va. L. Rev. 1349, 1420-21 (1975); (Gertz assumes that the media will grant public figures rebuttal time).

The question of the effectiveness of the self-help remedy has been questioned by the Supreme Court. "Of course, an opportunity for rebuttal seldom suffices to undo the harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie." Gertz, 418 U.S. at 344 n.9.

195 This statement is based on the author's personal experiences as a professional journalist.
judgment of a reporter or an editor regarding what interests the public. More “news” exists than resources for reporting it. The “yesterday’s news is old news” theory also negates the idea that access is available to those without special attention-getting powers.

b. Forfeiture of protection

The Gertz rationale rests largely on the proposition that public persons forfeit some right to legal protection of their reputations by engaging in public activity. By remaining unknown, private individuals retain all rights to full protection of the law. Such a view is difficult to square on an equitable basis. Theoretically, society’s interest in the good name of Johnny Carson or Jack Smith is the same. Individuals certainly believe their reputations to be worthy of equal treatment.

The Supreme Court’s argument is that a public person voluntarily accepts the risk of being defamed. This assumes, however, that persons consciously weigh the benefits and costs of public activity. Persons usually engage in such actions for various reasons, including civic duty. By protecting private persons more, the law encourages non-participation on issues of great importance. This can and will have great consequences for a democratic society dependent on grass roots participation for true representation.

3. Purpose of the First Amendment

The Rosenbloom plurality, and its adherents, trace their theory to the Supreme Court’s decision in Sullivan. That case, they reasoned, was based on a “national commitment to robust and wide-open debate.” Thus, debate need not be “political” in the sense of government. “Our efforts to live and work together in a free society not completely dominated by governmental regulation necessarily encompasses far more than politics in a narrow sense.”

The first amendment covers a broad range of protected activities. Although consisting of only 45 words, it protects several...
fundamental rights. Therefore, courts should focus on what is being discussed, not whom. “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.”

In interpreting Sullivan, however, the status of the plaintiff cannot be dismissed so easily. Sullivan was the police commissioner of a fair-sized southern city. A great deal of the Supreme Court’s opinion devoted itself to explaining that criticism of public officials constituted criticism of government. Such criticism, the Court said, lies at the very core of the first amendment. A citizen cannot be prohibited from discussing an official’s performance; therefore, such laws as Sedition Act of 1798 were unconstitutional. Still, the overriding impact of Sullivan remains the protection of open discussion. Certainly this was the rationale used to extend the actual malice rule to public figures in Butts.

4. The negligence standard and self-censorship

The overriding concern of Rosenbloom and of courts adopting its rationale concerns the effect of a negligence standard on the media. Such an uncertain standard, left in the hands of judges and juries, will result in self-censorship. Whether one publisher used “reasonable care” in its reporting often will be obscured by a jury’s desire to reward the plaintiff and punish the defendant. Such a finding will necessarily depend on the facts of each case.

Arguments against the negligence standard appear difficult to justify for they sound like the media do not want to be judged by standards of responsibility prevalent in the industry. This is not the issue, however. Rather, what is the standard’s effect? Does it promote good standards in the profession? Or does it promote timidity out of fear that a jury will not believe that the publisher acted reasonably in preparing and publishing an article?

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201 Id. at 43.
202 376 U.S. at 273-76.
203 388 U.S. at 164 (Warren, C.J., concurring in result).
204 "Reasonable care is an 'elusive standard' that 'would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait' [citation omitted]." 403 U.S. at 50.
The media claim that every "anti-media" decision will "chill" their operations. Thus, they resemble the little boy crying "wolf." There are, however, identifiable reasons for believing that a negligence standard inhibits the reporting of needed information.

First, the question of negligence usually is a question of fact for the jury. Consequently, a negligence standard would make it easier for a plaintiff to survive a motion for summary judgment and impose the intimidating costs of litigation on a defendant. This is especially true in West Virginia since the state supreme court has ruled that summary judgments are to be granted rarely in negligence actions. Judges should be able to decide whether the plaintiff could show, by clear and convincing proof, that the defendant made the statement with actual malice.

The cost of litigation relates directly to use of the negligence standard and summary judgment motions. The institutional press in this country, for good or bad, is commercial in nature. Profit means survival. If a publisher thinks a story will cost him money in legal fees, the temptation to "kill" the article presents itself. Of course, this temptation will be handled differently by publishers. The timid and profit-conscious will suppress. The powerful and financially stable will publish. Still, the overall effect of the negligence standard has been accurately observed by Mr. Justice Brennan.

[The negligence standard gives insufficient breathing space to First Amendment values . . . It is not simply the possibility of a judgment for damages that results in self-censorship. The very possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate to 'steer far wider of the unlawful zone' thereby keeping protected discussion from public cognizance.]

205 "Furthermore, our Court has been wary of allowing summary judgment in negligence cases since it is the jury's peculiar province to determine conflicting facts." Bd. of Educ. v. Van Buren and Firestone, Architects, Inc., 267 S.E.2d 440, 443 (W. Va. 1980). The court, perhaps, would be more lenient in cases involving freedom of the press.

206 The use of summary judgment has been recognized as an effective tool to protect defendants in defamation cases. For example, the Washington Supreme Court has ruled that libel plaintiffs must introduce evidence of "convincing clarity" which establishes a prima facie case in order to withstand a defendant's motion for summary judgment. Mark v. The Seattle Times, 635 P.2d 1081, 1089 (Wash. 1981).

207 403 U.S. at 52-53 (plurality opinion).
This concern over financial liability also was a factor in the Court's application of constitutional principles to defamation law. In *Sullivan*, the plaintiff had been awarded $500,000 for an article which had not even mentioned him by name. Fear of financial loss was classified as having a harmful effect on the media.

In the end, though, claims of self-censorship remain that—claims. As in other first amendment issues, the varying contentions cannot be proved empirically. Courts accept or reject these arguments depending on the desired result. A more certain and constitutionally-based rationale is needed.

VI. AN ACTUAL MALICE STANDARD FOR EVERYONE

The debate over negligence or actual malice usually is couched in terms of first amendment theory. The state constitution's free press clause, and the debate over its adoption give us little guidance on its intended effect. But it is safe to assume that Article 3, section 7, was modeled after the first amendment. Therefore, first amendment policy arguments should apply equally to state freedom of the press provisions. Adoption of the actual malice standard for all defamation actions will provide certainty in the law and eliminate subjective judicial decisions over what is a public controversy or of the public interest. Additionally, it will still allow for defamation recovery as provided for in the state constitution.

A. Certainty

As first amendment theory has developed, the Supreme Court has tried to provide "definitional balancing" by providing broad rules of general application. Such rules provide notice of what activity the first amendment protects and what lies outside its full scope. The actual malice rule typifies this process. In *Sullivan*, the Court weighed the competing interests and then laid down a rule which accommodated these interests, at least in theory.

This desire for certainty prompted the fifth vote in *Gertz*. Mr. Justice Blackmun, who had joined the plurality opinion in *Rosenbloom*, switched positions in *Gertz*. He did so not out of a belief that one position was superior to the other, but because he wanted

\[206 W. VA. CONST. art. 3, § 7.\]

\[209 "Because an ad hoc resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application." 418 U.S. at 343-44.\]
“certainty” in defamation law. That has not been accomplished, although it may be argued that the Court’s recent decisions in Hutchinson and Wolston will help achieve this result. Instead, courts have struggled with the public figure determination. Additionally, state courts have split over whether a negligence or actual malice standard should be adopted for private individuals. Application of the actual malice standard to all plaintiffs will provide certainty to all litigants. All will know the rules of the game and will not have to depend on a set of easily manipulated criteria to determine the fault standard applicable to each case.

B. Elimination of the “Public” Determination

Both Rosenbloom and Gertz require courts to make a subjective determination regarding the “public nature” of an issue. Under Rosenbloom, a judge had to decide whether the alleged defamatory publication dealt with a matter of “public or general interest.” The Gertz majority rejected this judicial role. “[I]t would occasion the additional difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of ‘general or public interest’ and which do not . . . We doubt the wisdom of committing this task to the conscience of judges.”

Having said that, the Court then went on to hold that “public figure” status rests, in part, on a person’s voluntary participation in a public controversy. What is or is not a public controversy requires just as much subjective determination as that undertaken in Rosenbloom.

Still, state courts have labored since Gertz to adopt one of the two competing views. Courts have acknowledged the conceptual difficulties in making either “public” determination, but have not chosen to fashion their own rules. A more simple, more

210 The Court was sadly fractionated in Rosenbloom. A result of that kind inevitably leads to uncertainty. I feel that it is of profound importance for the Court to come to rest in the defamation area and to have a clearly defined majority position that eliminates the unsuresness engendered by Rosenbloom’s diversity. If my vote were not needed to create a majority, I would adhere to my prior view.

Id. at 354 (Blackmun, J., concurring).

211 A recent study of defamation cases has concluded that Hutchinson and Wolston have not affected appellate decisions to date. Franklin, Swig Media for Libel: A Litigation Study, 1981 AM. BAR. FOUNDATION RESEARCH J. 797.

212 Id. at 346.

manageable, and more certain rule would be application of the actual malice standard to all defamation actions.

Determination of what is in the public interest should be left to the editorial processes of a reporter or editor. The media is a commercial institution which depends on public acceptance for survival. If the public is not interested in the product, that publication will not exist for very long. Of course, this view assumes that it is better for the media to determine, along with the public, what should be publicized than judges. The Supreme Court, in recent cases, has demonstrated its belief that judges should make the subjective decision of what the public should know. Thus, Mary Alice Firestone's divorce is not worthy of expanded protection, nor are the right-wing charges of the John Birch Society. The Court has set itself up as arbiter of what the public needs to know, a position traditionally left to the media. "The very essence of a system of free expression is that the participants are the ones who judge standing, prestige, the weight to be accorded a particular speaker, and all similar matters. These issues are to be fought out in the public forum, not decided by government authorities."

Application of the actual malice requirement to defamation in its entirety must be reconciled with a West Virginia citizen's constitutional right to sue for defamation. Rejection of the Gertz rationale would have represented a policy judgment on which interest is to be accorded greater weight. Examination of the underlying basis for freedom of expression and the tort of defamation provides support for favoring freedom of expression and adoption of an actual malice standard.

The first amendment and the state's freedom of the press constitutional provisions establish and protect our system for freedom of expression. Various purposes and rules have been advanced as justification for free expression. It has been said that "freedom of expression is essential as a means of assuring individual self-fulfillment," and "an essential process for advancing knowledge and discovering truth." An oft-cited purpose is the need "to provide for participation in decision making by all members

214 418 U.S. at 323.
215 Emerson, supra note 56, at 543.
216 Id. at 6.
217 Id.
of society." 218 A fourth principle is that freedom of expression achieves "a more adaptable and hence a more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus." 219 A historic, but often unarticulated role, is that actions taken by the media under the first amendment act to check abuses of power by government. 220

Arrayed against these purposes are those concerning recovery for defamation. Injury to reputation encompasses two aspects: economic injury and community standing. Defamation actions also seek to compensate injury to a person's feelings. Another role, often unmentioned by courts or commentators, is the control over the media represented by a defamation suit. Judges do not wish to provide the press with a supposed "license to libel"; therefore, financial recovery will keep the media within limits. This theory is one justification for the majority rule not extending the fair comment common law privilege to misstatements of fact. 221

It seems clear that the fundamental factors inherent in freedom of expression require that defamation restrictions be removed to the greatest extent possible from the media. Free speech and press rights include

the right to form and hold beliefs and opinions, and information through any medium—in speech, writing, music, art, or in other ways. To some extent, it involves the right to remain silent. From the observer's side it includes the right to hear the views of others and to listen to their version of the facts. 222

Exercise of these rights should occupy a prominent, even perhaps dominant position in a democratic society. Certainly, they are intrinsically superior to the recovery of monetary damages.

VI. CONCLUSION

The Havalunch decision is the latest attempt by the West Virginia Supreme Court of Appeals to grapple with the intricate relationship between constitutional and common law defamation principles. Unfortunately, the court seems unable to recognize the

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218 Id. at 7.
219 Id.
221 126 W. Va. 292, 27 S.E.2d 837 (1943) (adopting minority rule).
222 Emerson, supra note 56, at 3.
differences between these two lines of law. In Havalunch, the court reached issues unnecessary to decide the case in order to "settle" state law. Instead, the court, with a minimum of analysis, made mistakes. It adopted negligence as the standard of fault a private figure defamation plaintiff must show in West Virginia in order to recover damages. This decision was made without considering past state law in the constitutional and common law areas of defamation, without considering the public policy implications of an actual malice rather than a negligence standard, and without considering the role of a free press in today's society. These considerations pointed toward adoption of an actual malice standard for all libel plaintiffs. Mr. Justice Neely may have wanted to "adumbrate" the court's direction in defamation law; alas, he and the court decided a significant question of law with little analysis. A little thought might have resulted in a better result or at least a more defensible one.

W. Martin Harrell