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The Applicability of the Constitutional Privilege to Defame: Question of Law or Question of Fact?

Commentators have long decried the law of defamation as one of the most complex and frequently irrational areas of tort law.¹ Most agree that it has been frequently abused, and, as a consequence, it has suffered periods of disfavor.² One of its most unattractive features is its obvious conflict with freedom of expression.³ The common law of defamation, however, provided a mechanism for balancing the competing interests of freedom of speech and press against the need for protection from reputational harm. This was accomplished through the recognition of various privileges,⁴ which provided the speaker or publisher with some degree of immunity from liability for defamatory statements where the private or public interest in the communication was considered to outweigh the reputational interests of the defamed individual.⁵

² Id.
³ Id.
⁴ The common law of defamation recognized numerous privileges. Although they varied somewhat among jurisdictions, they fell into three identifiable categories. First, certain very narrowly defined statements, in which the interests of unfettered speech were clearly paramount, were recognized as absolutely privileged. Absolute privileges protected, for example, the statements of participants in judicial proceedings, and of legislative and executive officers of government. See generally 1 F. Harper & F. James, The Law of Torts § 5.22-.23 (1956); W. Prosser, supra note 1, § 111.

Other statements, in which the interest in free speech was less compelling, were recognized as conditionally privileged. Conditional privileges were recognized where a substantial interest of the speaker, a third party, a group, or the public in communicating or receiving the information justified the risk of defamatory harm. Examples of statements conditionally privileged are those made in an effort to collect a debt or recover stolen property; communications made to an employer about the conduct of an employee or by a member of a business entity to another member about business affairs; and statements made to a public officer who has authority to take action in furtherance or protection of the public interest. See generally F. Harper & F. James, supra, § 5.25-.26; W. Prosser, supra note 1, § 115.

Finally, a significant number of jurisdictions recognized a privilege of fair comment or privileged criticism. This privilege applied to speech on matters of public interest including statements about public officials and candidates, public institutions, objects of art and science, and persons who in some way offer their conduct or product to the public for approval. See generally F. Harper & F. James, supra, § 5.28.

⁵ While the absolute privileges provided total immunity from liability for defamation, the conditional privileges could be defeated and the defendant held liable upon proof that the defamatory statement had been published with "actual malice" (spite or ill-will) or in furtherance of interests different from those which the privilege was created to protect. See generally F. Harper & F. James, supra note 4, § 5.27; W. Prosser, supra note 1, § 115, at 792-96.

Fair comment was limited in a majority of jurisdictions to the protection of defamatory opinion based on true underlying facts. A minority of states, however, included within the
In *New York Times Co. v. Sullivan*, the United States Supreme Court found that the common law privileges offered constitutionally inadequate protection of the first amendment interests of free speech and press. In that case, the Court established a constitutional privilege which shielded a publisher from liability for defamatory statements concerning the official conduct of a public official unless the statements were made with knowledge or reckless disregard of their falsity.

Since *New York Times*, the Court and many commentators have become embroiled in controversy concerning the proper scope of the constitutional privilege. Little has been written, however, about the proper roles for the judge and the jury in deciding whether the protection of fair comment defamatory falsehood contained in criticism of public officials and prominent private persons published with a reasonable belief in their truth. Under either view, fair comment did not include defamatory statements concerning purely private matters which had no bearing on the public aspects of the individual's character or behavior. See generally F. Harper & F. James, *supra* note 4, § 5.28.

The Court found that the privilege of fair comment, as recognized in Alabama law, offered inadequate protection for criticism of public officials because it provided that the privilege applied only to criticism based on true statements of fact. The Court discussed with approval the case of *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908), which represented the minority view that the privilege applied also to defamatory falsehood if published with a reasonable belief in its truth. 376 U.S. at 278-81.


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privilege applies in a particular case, and some lower court decisions reflect a growing uncertainty and apparent conflict regarding those functions. A resolution of this confusion and conflict is particularly urgent in light of the importance of the first amendment interests involved and the practical recognition that the question whether the privilege applies will often be the dispositive issue in the case.

This note will explore the question whether the applicability of the constitutional privilege is a question of fact for the jury or a question of law for the judge. The note will begin with a brief summary of the public official and public figure standards which define the present scope of the privilege. It will then examine the scant guidance the Court has offered on the proper roles for the judge and jury in applying these standards, and consider how lower courts confronting the question have interpreted these words of guidance. Finally, it will analyze these interpretations in light of the policies underlying the constitutional privilege and offer a proposal for the proper treatment of the privilege issue.

THE CONSTITUTIONAL PRIVILEGE AND THE Rosenblatt COURT

The Privilege

In the years following the Court's New York Times decision, the constitutional privilege initially underwent considerable expansion in scope. First, the Court extended the privilege to include defama-

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11 See notes 42-53 & accompanying text infra.

12 Upon application of the constitutional privilege, a plaintiff must show by "clear and convincing proof" that the defendant published the allegedly defamatory statement with knowledge or in reckless disregard of its falsity. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 30 (1971); New York Times Co. v. Sullivan, 376 U.S. 254, 285-86 (1964). Moreover, summary judgment has been deemed by some courts as particularly appropriate in cases where the plaintiff cannot make a strong showing that he will be able to meet this high burden of proof. See, e.g., Washington Post Co. v. Keogh, 365 F.2d 965 (D.C. Cir. 1966), cert. denied, 385 U.S. 1011 (1967). As a result, very few actions are successful if the constitutional privilege is held applicable and the finding of the privilege becomes the "paramount issue" in the case. Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 330 N.E.2d 161 (1975); see Eaton, supra note 9, at 1375.

13 Even before expansion of the privilege by the Court, lower courts found New York Times to authorize application of the privilege in a broad range of cases. See Eaton, supra note 9,
tion of public figures14 as well as public officials; finally a plurality of the Court expanded it to include even defamation of private individuals involved in matters of "public or general interest."15 In *Gertz v. Robert Welch, Inc.*,16 however, a new majority expressed concern that the expansion of the privilege under the public interest rationale threatened to defeat the valid reputational interests of private individuals.17 With these concerns in mind, the majority chose to reconfine the scope of the privilege to protect only defamation of public officials and public figures.18

The present public official and public figure standards contain two basic elements.19 The first element focuses on the status of the individual. To be deemed a public official for the purposes of the privilege, an individual must occupy a governmental position of sufficient public importance to warrant "independent interest in the qualifications and performance of the person who holds it."20

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17 Justice Powell, writing for the majority, argued that private individuals were less likely than public officials or public figures to have sufficient access to media channels to effectively rebut a defamatory falsehood and thereby minimize its adverse effects and, more importantly, private individuals could not be considered to have voluntarily placed themselves in a position which invited public attention. He also argued that the subject matter test of *Rosenbloom*, by committing the determination of what was a "matter of public interest" to the ad hoc decision of judges, subjected publishers to strict liability for defamatory error should a judge in a particular case find the subject matter unrelated to an issue of public interest. *Id.* at 344-46.
18 The majority expressly approved the application of the constitutional privilege to defamatory statements concerning public officials and public figures. *Id.* at 343. In order to protect first amendment interests in cases involving private individuals, the Court chose the radical step of reshaping defamation law at its roots, abolishing strict liability for defamatory falsehoods and limiting recovery to actual damages unless knowledge or reckless disregard of falsity has been proved. *Id.* at 347-50.
19 Some commentators have pointed out that *Gertz* may be read as a total rejection of the use of subject matter considerations as a basis for applying the privilege, and that the pre-*Gertz* requirement that the subject matter of the defamatory statement relate to the public aspects of the public official's or public figure's character or activities may no longer be a part of the privilege. See, e.g., Eaton, *supra* note 9, at 1443-46. This seems an unlikely reading of the Court's intention and in fact contradicts the Court's proposition that most public figures will become so only "for a limited range of issues." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974). In the discussion to follow, the standard is treated as retaining the second subject matter element.
20 *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966). The Court stated that such "independent
The standard by which a private individual may be deemed a public figure is considerably more complex. In most cases, an individual will become a public figure only if he has voluntarily injected himself into a particular public controversy in order to influence its resolution.\textsuperscript{21} The second element necessary for application of the privilege is that the defamatory statement refer to the individual in his public capacity. In the case of a public official, the statement must refer to his official conduct or be relevant to his fitness for office.\textsuperscript{22} In the case of a public figure, the statement must relate to that limited range of issues with respect to which he has been deemed a public figure.\textsuperscript{23}

\textit{Rosenblatt v. Baer}

With only one exception, the United States Supreme Court has decided the applicability of the constitutional privilege in the case

\textsuperscript{21} Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974). The Court's full definition was somewhat broader:

Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.

\textsuperscript{22} In \textit{New York Times}, the Court announced that the privilege applied to allegedly defamatory statements concerning the "official conduct" of public officials but declined to further define the term. 376 U.S. 254, 283 n.23 (1964). The same year, however, the concept was expanded to include "anything which might touch on an official's fitness for office." Garrison v. Louisiana, 379 U.S. 64, 77 (1964). Under this formulation the Court has found that "as a matter of constitutional law . . . a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness for office." Monitor Patriot Co. v. Roy, 401 U.S. 265, 277 (1971). Like the public official standard, it is possible that this concept will shrink in scope in the aftermath of \textit{Gertz}.

before it as a matter of law. In *Rosenblatt v. Baer*, however, the Court refrained from deciding the issue of the plaintiff's status as a public official and offered its only explicit guidance on the proper roles of the judge and jury on the privilege issue.

In *Rosenblatt*, the Court reviewed a judgment granted the former manager of a county owned ski area for an alleged libel contained in a newspaper article on the area's financial condition. The Court found that the evidence in the trial record raised at least a substantial argument that the plaintiff was a public official within the meaning of *New York Times*. However, since the trial had been held before the *New York Times* decision, and had failed directly to address the public official issue, the Court chose to remand the case without deciding the question itself. In its instructions to the trial court on remand, the Court stated:

> The record here, however, leaves open the possibility that respondent could have adduced proofs to bring his claim outside the New York Times rule. Moreover, even if the claim falls within New York Times, the record suggests respondent may be able to present a jury question of malice as there defined. Because the trial here was had before New York Times, we have concluded that we should not foreclose him from attempting retrial of his action. *We remark only that, as is the case with questions of privilege generally, it is for the trial judge in the first instance to determine whether the proofs show respondent to be a "public official."*

Further guidance is given in the Court's footnote to this passage. The Court begins the note with a citation to treatise sections and section 619 of the Restatement of Torts, which deal with the functions of judge and jury in deciding questions of common law conditional privileges. The clear implication of the citation is that lower courts may refer to the rules of common law for guidance in determining which issues are for the judge and which are for the jury in constitutional privilege cases. The cited authorities uniformly state that the question whether the privilege applies is a question for the court, while the question whether the defendant acted in such a way as to defeat the privilege is a question for the jury. Following its citation to these authorities, the *Rosenblatt* Court offered an ex-

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21 F. HARPER & F. JAMES, supra note 4, § 5.29, at 466-67; W. PROSSER, supra note 1, § 115, at 796;Restatement of Torts § 619 (1938).

22 Id. at 75 (1966).

23 Id. at 87.

24 Id. at 87-88 (emphasis added).

25 Id. at 88 n.15.
planation of what was to be achieved by the use of these rules, proposing that "[s]uch a course will both lessen the possibility that a jury will use the cloak of a general verdict to punish unpopular ideas or speakers, and assure an appellate court the record and findings required for review of constitutional decisions." 29

While the language and authorities cited by the majority seem to stress a prominent role for the judge on the privilege issue, Justice Black, in a separate opinion, chose to emphasize the fact that jury issues may be present on the privilege question. He expressed his fear that "the words 'in the first instance' will soon be forgotten" and that "[w]hen that happens the rule will be that the Federal Constitution forbids States to let juries decide essentially jury questions in libel cases." 30 Justice Black's comments are difficult to decipher since he consistently maintained that the constitutional privilege was inadequate because it allowed a jury to punish unpopular speech by a finding of knowledge or reckless disregard of falsity. 31 Justice Black, however, was as vehement in his defense of the American jury as he was in his defense of the first amendment as an absolute bar to any governmental infringement on the freedoms of speech and press. 32 Notwithstanding the apparent inconsistency of his position, Black's *Rosenblatt* opinion has been cited by courts concerned that the jury's role in constitutional privilege cases not be completely eroded. 33

**THE PRIVILEGE ISSUE IN LOWER COURTS**

Nearly all courts which have faced the issue cite *Rosenblatt* as authority when deciding whether the privilege issue is for the court as a question of law or for the jury as a question of fact. 34 Although the authority remains constant, the results are far from uniform. 35 In fact, it seems that from the very beginning the *Rosenblatt* dicta

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29 383 U.S. at 88 n.15.
30 Id. at 96.
34 See cases cited notes 36, 42 & 52 infra.
35 See notes 42-53 & accompanying text infra.
failed to give clear guidance to lower courts on the proper treatment of the public official/public figure issue.

The inadequacy of the Court's instructions in *Rosenblatt* is best illustrated by the history of the case on remand. At the original trial of the case, the defendant argued that the alleged defamation was privileged public criticism, and introduced considerable evidence on the history of public comment and controversy concerning the operation of the ski area and the persons in charge of it. On remand, the defendant sought a ruling by the court on the public official status of the plaintiff solely on the basis of this evidence, since the plaintiff had not offered additional evidence on the public official issue. The New Hampshire Supreme Court, however, found that the plaintiff was "entitled to a jury trial on the issue of whether he was a public official." The ruling of the New Hampshire Supreme Court seems to indicate that a jury issue was present because conflicting inferences could be drawn about the plaintiff's status as a public official under the standard announced by the United States Supreme Court. Under this approach, the status of the plaintiff as a public official or public figure, like any other factual issue, would be sent to the jury in cases where reasonable minds might differ on its proper resolution.

For some years after the *Rosenblatt* case, the question of the proper treatment of the privilege issue received little attention. During those years, the privilege was undergoing its period of expansion, and the threshold question in the application of the privilege was not the status of the defamed individual, but rather the public interest value of the subject matter of the defamatory statement.

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38 108 N.H. at 369, 237 A.2d at 131.
39 Id. at 371, 237 A.2d at 133. Quoting the Restatement of Torts § 619 and the other authorities cited in the United States Supreme Court opinion, the New Hampshire court concluded that the status of the plaintiff as a public official depended "on facts not yet found." Id. The court gave little indication as to just what "facts" these might be, stating only that the plaintiff's responsibility for the general financial transactions and management of the ski area, was insufficient to establish that his position invited public scrutiny and discussion independent of that caused by the alleged defamation. Id. at 370, 237 A.2d at 132.
40 While the plaintiff did dispute the defendant's assertion that the plaintiff's position and the controversy surrounding it called for application of the public official status, the plaintiff had not come forward with his own evidence on his position, duties and the public interest in the operation of the ski resort to counter the defendant's motion for summary judgment.
41 The issue of whether the defamatory statement was on a matter of public interest and therefore privileged was uniformly decided by courts as a matter of law. See, e.g., Firestone v. Time, Inc., 271 So. 2d 745, 751 (Fla. 1972). This treatment was the one adopted by the Restatement. *Restatement of Torts* § 618 (1938). A few states have retained the public interest test as the basis for the application of the privilege as a matter of state law. See
However, with the return to the status-based privilege announced by the Court in *Gertz*, the question of the proper treatment of the privilege issue and the meaning of the Court's *Rosenblatt* dicta have received attention once again.

In the increasing number of cases in which the issue is addressed, a majority of courts hold that the status of the plaintiff as a public official or public figure is a question of law to be decided by the court. Although some courts reach that conclusion with little difficulty, others express considerable uncertainty in treating the plaintiff's status as a question for the court.

While no court has explicitly held that the plaintiff's status as a public official or public figure is a question of fact, a few courts seem to treat the issue as a fact question. In *Cahill v. Hawaiian Paradise Park Corp.*, for example, the Supreme Court of Hawaii reversed a summary judgment which had been granted in favor of the defendant and remanded the case for development "on a full trial record," concluding that there was a "genuine issue of fact whether any of the plaintiffs were public figures." Similar language appears

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in *Martin Marietta Corp. v. Evening Star Newspaper Co.*\(^7\) In discussing the public figure issue on a defendant's motion for summary judgment, the District of Columbia federal district court seems to treat the issue as it would any other factual issue, stating that "view[ed] . . . in the light most favorable to plaintiff . . . all reasonable jurors would agree that Martin Marietta Corporation is a public figure under the standard set out in Gertz v. Robert Welch, Inc."\(^8\)

The Supreme Court of Montana, however, has taken the most novel approach to the issue. In *Madison v. Yunker,*\(^9\) the Montana court reversed a summary judgment for a libel defendant and remanded the case for trial.\(^9\) Anticipating that the defendant might raise the constitutional privilege, the court commented that "[w]hatever the plaintiff’s status, it is a question for the jury to determine, because of the [Montana] constitutional provision that the jury under instructions of the court is the judge of both law and fact [in libel cases]."\(^10\)

Finally, at least one court has held that the question of the defamatory statement's relevance to the plaintiff's public status may present a factual issue for jury resolution. In *Foster v. Laredo Newspa-

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\(^8\) *Id.* at 954.

\(^9\) ___ Mont. ___., 589 P.2d 126 (1978).

\(^10\) The trial court had granted summary judgment on the basis of a Montana retraction statute which required a demand for retraction as a prerequisite to an action for libel. The Montana Supreme Court held that the statute violated the Montana constitutional guarantees that its “courts of justice shall be open to every person, and speedy remedy afforded to every injury of character.” *Id.* at ___, 589 P.2d at 131.

\(^11\) *Id.* at ___, 589 P.2d at 133. What weight should be given to the court's dicta is questionable. The question of the constitutional privilege and its proper treatment was certainly not a question directly before it, nor does it seem that the issue had even been developed below. Furthermore, the comment is directly contrary to a previous holding of the court in a case where the privilege issue was directly before it. In *Manley v. Harer*, 82 Mont. 30, 36, 264 P.2d 937, 939-40 (1928), the Montana Supreme Court held that notwithstanding the constitutional provision that in an action for libel the jury shall determine the law as well as the facts, the question whether the alleged libelous communication is privileged or not is one for determination by the trial court as one of law.

Four other states have similar constitutional provisions making the jury the judge of both law and fact in libel cases. COLO. CONST. art. II, § 10; Mo. CONST. art. I, § 8; S.D. CONST. art. VI, § 5; Wyo. CONST. art. I, § 20. In all these states except South Dakota, courts have nevertheless held that the applicability of a privilege in a libel case is for the judge as a question of law. Walker *v. Colorado Springs Sun*, Inc., 188 Colo. 86, 538 P.2d 450 (1975); Sullivan *v. Strahorn-Hutton-Evans*, 156 Mo. 268, 53 S.W. 912 (1899); Adams *v. Frontier Broadcasting Co.*, 555 P.2d 556 (Wyo. 1976). (No South Dakota case on point was found.)
pers, Inc., the Texas Supreme Court, in reversing a summary judgment granted for the defendant newspaper, found that a factual issue existed whether the allegedly defamatory article related to the plaintiff’s official conduct or fitness for office. Citing Rosenblatt, the court pointed out that while the privilege issue was for the court in the first instance, “the trial court may submit to the jury fact issues relating to the existence of the privilege.”

CONSIDERATIONS IN DETERMINING THE PROPER TREATMENT OF THE PRIVILEGE ISSUE

This confusion and conflict about whether the applicability of the constitutional privilege is a matter of fact or law is clearly at odds with the United States Supreme Court’s expressed intention that the first amendment interests involved be protected by a federal rule which provides “national constitutional protection” free from variation among jurisdictions. Indeed, since the press is increas-

52 541 S.W.2d 809 (Tex. 1976), cert. denied, 429 U.S. 1123 (1977). The plaintiff, who was both a private consulting engineer engaged by the county to work on a local flooding problem and the elected county surveyor, brought a libel action against a newspaper which had published an article concerning the controversy surrounding the flooding problem. The article included the erroneous statement that the plaintiff had platted the housing subdivision where the flooding problems were most severe.

53 Id. at 816 n.10. The Texas Supreme Court found that the plaintiff was not a public figure as a result of his involvement as a consulting engineer in the flooding controversy but that he was a public official as a result of his position of elected county surveyor. Id. at 813-14. Noting, however, that the allegedly defamatory article made no reference to the plaintiff in his capacity as county surveyor and that his involvement in the flooding controversy had been the result only of his duties as a consulting engineer, the court found that a factual issue existed as to whether the article related to his official conduct or fitness for office. Id. at 814-15.

The defendant petitioned the United States Supreme Court for a writ of certiorari, arguing that the Texas Supreme Court’s treatment of the issue constituted an erroneous reading of Rosenblatt and was in conflict with the United States Supreme Court’s own treatment of the issue in cases before it. Petition for a Writ of Certiorari at 2-3, 9-10, 429 U.S. 1123 (1977). Plaintiff argued that since the issue had not in fact been put to a jury this question was not ripe for review. Respondent’s Brief in Opposition at 4, 21-27, 429 U.S. 1123 (1977). The court denied the petition and thus declined the opportunity to further clarify the proper treatment of the issue. 429 U.S. 1123 (1977).

54 Justice Brennan, writing for the majority in Rosenblatt, commented:

Turning, then, to the question whether respondent was a “public official” within [the meaning of] New York Times, we reject at the outset his suggestion that it should be answered by reference to state-law standards. States have developed definitions of “public official” for local administrative purposes, not the purposes of a national constitutional protection. If existing state-law standards reflect the purposes of New York Times, this is at best accidental. Our decision in New York Times, moreover, draws its force from the constitutional protections afforded free expression. The standards that set the scope of its
ingly national in scope, uniform treatment of the applicability of the privilege is essential to the creation of a "breathing space" within which the press can operate without the chilling effect of the threat of liability for defamatory falsehood. Disparate treatment generates uncertainty, and creates a potential for inequity. A defendant in one jurisdiction might be forced to bear the high costs of a full trial before receiving a judgment on the merits; a similarly situated party in another jurisdiction, however, might obtain summary disposition of the issue. Such a situation significantly complicates an assessment of the risks of publication, and may result in a publisher basing his decision to publish not on a federal rule, but rather on how that rule is applied in the jurisdiction he considers least favorable to his position, or in which his costs of defense will be greatest. If the privilege is to function properly as an instrument of "national constitutional protection," the rules which allocate the roles of the judge and jury must be uniform in statement and application.

Several arguments can be made that the status of the defamed individual as a public official or public figure, and the relevance of the allegedly defamatory statement to that status, should be treated as questions of fact to be decided by the jury unless reasonable minds could not differ on their proper resolution. First, although the common law rules cited by the Rosenblatt Court state that the applicability of the privilege is a question of law for the judge, the operation of these rules presents particularly fine distinctions, and allows the judge considerable discretion in deciding which issues reach the jury. This discretion to involve the jury in resolving difficult questions is particularly appropriate in defamation cases since the harm the defamed person suffers is to his community relations and the jury theoretically embodies local community values. By treating the applicability of the constitutional privilege as a question of fact, and therefore for the jury in cases where reasonable minds might differ, jury resolution of difficult or doubtful privilege questions is preserved.

The Court's own disposition of the privilege issue, however, does

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principles cannot therefore be such that "the constitutional limits of free expression in the Nation would vary with state lines."

383 U.S. 75, 84 (1966) (footnotes and citation omitted).


See, e.g., W. Prosser, supra note 1, § 115, at 796.

not support the conclusion that it intended to extend its approval to the flexibility with which the cited common law rules were applied. In no case has the Court indicated that a jury issue might be present either on the plaintiff’s status as a public official or public figure, or on the relevance of the allegedly defamatory statement to that public status. In fact, the language of the Court strongly suggests that its intention in *Rosenblatt* was to adopt the Restatement formulation of the common law rule as a federal rule on the allocation of judge and jury roles in constitutional privilege cases: that is, that the applicability of the privilege in a particular case is a matter of law for the judge, and the question of the defendant’s possible abuse of the privilege (defined by *New York Times* as knowledge or reckless disregard of falsity) is a question of fact for the jury.

One might argue that regardless of what the Court intended in the early days of *Rosenblatt*, treating the privilege issue as a question of fact more closely conforms to the Court’s recent return to the status-based privilege announced in *Gertz*. In that case the Court emphasized the individual’s voluntariness in receiving media attention as an important factor distinguishing public officials and public figures from private individuals, and thus in determining the appropriateness of applying the constitutional privilege. Several commentators have pointed out that this emphasis can be read as a shift away from the basic first amendment rationale toward one closely resembling the tort doctrine of assumption of the risk. If such a reading of *Gertz* is correct, the application of the privilege would

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44 Recent decisions have frequently resolved particularly close public figure questions. One judge seemed to feel there was at least room for reasonable disagreement with the Court’s finding that prominent Chicago attorney Elmer Gertz was not a public figure, commenting “perhaps if attorney Gertz was not a public figure, nobody is.” Hotchner v. Castillo-Puche, 404 F. Supp. 1041, 1044 (S.D.N.Y. 1975) (Brieant, J.), rev’d, 551 F.2d 910 (2d Cir.), cert. denied, 434 U.S. 834 (1977).

43 Justice Brennan’s language closely tracks that of the rule in the RESTATEMENT OF TORTS § 619 (1938), and specifically refers only to the issue of the defendant’s knowledge or reckless disregard of falsity as a possible jury issue. *Rosenblatt* v. Baer, 383 U.S. 75, 77, 87-88 (1966). His further comment in a footnote that the purpose of the recommended procedure is to guarantee the proper functioning of the privilege as a constitutional protection, is inconsistent with the notion that he intended to authorize the importation of the flexibility with which the procedural rules were applied at common law. *Id.* at 88 n.15. Finally, both *New York Times* Co. v. Sullivan, 376 U.S. 254, 285 (1964), and *Speiser* v. *Randall*, 357 U.S. 513, 525 (1954), which Justice Brennan cites at the conclusion of his comment, stress the importance of procedural rules in cases involving first amendment interests.

42 “An individual who decides to seek public governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. . . . These classed as public figures stand in a similar position. . . . [T]hey invite attention and comment.” *Gertz* v. Robert Welch, Inc., 418 U.S. 323, 344-45 (1974).

41 *E.g.*, Eaton, *supra* note 9, at 1419-20.
involve an assessment of the subjective factors of the individual’s knowledge of the risk of defamatory harm, and his voluntariness in exposing himself to it. Such assessments are generally considered questions of fact particularly suited for jury resolution. If these are the factors which determine the applicability of the constitutional privilege, that issue should be reserved as a question of fact for the jury.

This argument, however, both overstates the Court’s reliance on tort principles and misinterprets the Court’s use of the concept of voluntariness. While traditional tort law principles receive a more favorable consideration in Gertz and its progeny than in previous cases, the narrower status-based privilege retains a basis in first amendment theory and recognizes that essentially political speech, and the press as the disseminator of information of self-governing importance, must be free from the chilling effect of liability for defamatory error. The Court’s retention of the privilege protecting defamatory statements about the official conduct of public officials is certainly consistent with such a view. In addition, even the Court’s new and narrower definition of public figures seems rooted in the recognition that certain individuals outside government occupy positions of sufficient political power that statements concerning them should also be included within the privilege. Thus, public figures are defined as those who occupy positions of great “persuasive power and influence” or those who, without occupying such positions of general power and influence, achieve political importance through their active attempts to influence the resolution of particular “public controversies.” These are clearly first amendment considerations foreign to any tort law theory.

Moreover, while the Gertz opinion emphasizes the public officials’ and public figures’ voluntary assumption of the risks of media attention and the likelihood that they will have sufficient access to the media to effectively rebut defamatory falsehoods concerning them, Justice Powell makes clear that the Court offers these factors as a way of distinguishing broadly between public and private persons generally. Treatment of these matters as factual issues which must be proved to the satisfaction of a jury before application of the

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42 While knowledge of the risk and voluntariness in assuming it are the basic elements of the assumption of the risk defense, its form varies substantially and it has been the subject of considerable debate and criticism. See W. Prosser, supra note 1, § 68.
43 Id. at 455; 10 C. Wright & A. Miller, Federal Practice & Procedure, § 2728, at 553 (1973).
45 Id. at 345.
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privilege seems clearly contrary to Justice Powell's statement that the Court is announcing "broad rules of general application . . . [which] necessarily treat alike various cases involving differences as well as similarities." 66

Treating the applicability of the privilege as a question of fact presents several other serious drawbacks. While there certainly would be cases in which the plaintiff's status and the relevance of the allegedly defamatory statement clearly falls inside or outside the scope of the privilege, the number of cases in which reasonable minds might differ on the issue is potentially quite large. This is especially true in public figure cases, where a relatively large amount of factual data may be presented concerning the individual's activities and the circumstances surrounding them. 67 This factual data is quite likely to support conflicting inferences about whether the elements of the public figure standard are satisfied.

While a significantly large number of cases would go to the jury under this approach, jury resolution of the applicability of the privilege has considerable disadvantages. First, jury resolution of the issue in a particular case is less predictable than a decision by the court. A jury would have no guidance as to what factors might have influenced past juries in similar cases. Rather, it would be guided only by the instructions of the judge on the requirements of the applicable standard. It is difficult to imagine what such instructions might contain, other than some of the often-quoted language of the Court on the subject of who is a public official or public figure. This language is notably vague, and by itself would offer little guidance for or control over the jury's decision. 68 Second, since jury decisions

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66 Id. at 343-44. Justice Powell notes also that "it is often true that not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority," id. at 344, and that "[e]ven if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them," id. at 345 (emphasis added).

67 Resolution of the public figure issue will often involve consideration of the plaintiff's activities and speech over a considerable period of time as well as a broad range of data concerning the historical, political and social context in which that behavior took place. In Wolston v. Reader's Digest Ass'n, 429 F. Supp. 167 (D.D.C. 1977), aff'd, 578 F.2d 427 (D.C. Cir. 1978), rev'd, 99 S. Ct. 2701 (1979), for example, the trial court and appellate court considered plaintiff Wolston's entire life history in reaching their decisions that Wolston was properly deemed a public figure. The United States Supreme Court held that Wolston was not a public figure but did not indicate that such an expansive range of facts was not relevant in determining the public figure issue.

68 Both judges and commentators have found the Court's language difficult to apply. See note 21 supra. It is submitted that jurors, without the opportunity to sift through the reported cases and consider the particular facts and nuances of the various statements of the standard, would be at a substantially greater disadvantage. See Wolston v. Reader's Digest Ass'n, 578
would have no binding effect on future juries considering similarly fine distinctions, they would not contribute to the development and refinement of the scope of the privilege. Although some refinement would be provided in appellate opinions, the essence of this approach would necessitate the affirmance of a reasonable jury decision, even though that decision might conflict with another jury decision in a factually similar case. As a consequence, there would develop a category of cases, perhaps quite broad, within which applicability of the privilege would be solely within the discretion of the jury.

Moreover, such an approach provides little protection against the possibility that the application of the privilege will depend on the popularity of the individuals or ideas involved in just those cases where that danger is greatest. It is unlikely that a responsible decisionmaker will allow personal bias or opinion to influence his decision on the applicability of the privilege in cases where the defamatory statement is clearly inside or outside the scope of the privilege; should that occur, an appellate court could easily detect the operation of that bias and overturn the decision. The danger that such extraneous factors will play a subtle role in influencing the decisionmaker is much greater in cases where the applicability of the privilege presents a particularly close question, capable of differing but nonetheless rational conclusions about its proper outcome. Treatment of the applicability of the privilege as a question of fact, however, calls for jury resolution of the privilege issue in just such close cases. Furthermore, under this approach, an appellate court would be compelled to affirm any reasonable jury decision. As a consequence, effective appellate review will be foreclosed in exactly those areas where constitutional protection of unpopular ideas and their advocates is most sorely needed.

Treatment of the applicability of the privilege as a matter of law


* Treatment of the applicability of the privilege as a question of fact does not mean that jury decisions on the issue would be completely beyond judicial control. The Court has determined that jury decisions on the issue of knowledge or reckless disregard of falsity are “constitutional factfinding,” and therefore subject to de novo review by appellate courts. New York Times Co. v Sullivan, 376 U.S. 254, 285 (1964). Should the applicability of the privilege be treated as a question of fact, de novo review of jury factfinding on this issue would no doubt also be found necessary.

* Under the question of fact approach, the privilege issue would go the jury when reasonable minds might differ on its outcome. While special findings might reveal whether the jury had applied the privilege and therefore whether it had applied the proper standard of fault, it would continue to be impossible for a trial or appellate court to detect the operation of jury prejudice concerning the ideas or personalities involved in the case which may have influenced the jury's decision on the application of the privilege.
avoids many of these difficulties. Under this approach questions of the status of the defamed individual as a public official or public figure and the relevance of the defamatory statement to that public status are to be decided by the judge on the basis of objective facts about the individual’s position or course of conduct, and the text of the defamatory statement. Since these objective facts will not be disputed in most cases, this approach will result in earlier resolution of the privilege issue, and in many cases earlier resolution of the case itself. This early disposition may mean saving the substantial costs of trial for both parties and will lessen the degree to which these costs alone might lead to self-censorship by publishers.

In addition, treatment of the applicability of the privilege as a matter of law will increase certainty and render more accurate prediction of which individuals and which statements about them are protected by the constitutional privilege. As cases are decided and appealed, the scope of the privilege will achieve greater refinement and definition in appellate opinions. While this process will take place over time, there also will be greater short term predictability, since a judge in a particular case will most likely attempt to reach a reasoned decision which is logically consistent with other reported decisions. Thus constrained by stare decisis a judge’s decision is less likely to be the product of sentiment concerning the individuals or ideas involved in the case.

Of course, if these underlying objective facts, such as the government position held by the plaintiff and his duties, or the activities of a potential public figure, were in dispute, resolution of these issues would be within the province of the jury.

No case has been found in which the facts concerning the plaintiff’s public position or activity were disputed. In fact, in the vast majority of cases the applicability of the privilege is decided on motion for summary judgment.

The costs of a full trial in a libel case are high and the possibility of incurring them has been argued to deter publishers from printing statements the truth of which they cannot conclusively prove. See Anderson, supra note 9, at 435-36.

See Comment, supra note 10, at 1152-55.

It may be argued, however, that judges, no less than jurors, are subject to the influence of their own prejudice and opinions. In fact, judges have seemed particularly unsympathetic to defamation plaintiffs and quite ready to resolve close questions on the applicability of the privilege in favor of defendants. See note 13 supra. To the extent that this remains true, placing the question of the applicability of the privilege exclusively in the hands of judges may result in a greater degree of protection for the publishers of defamatory falsehoods than the Court presently considers necessary or appropriate, and a corresponding decrease in the protection of the valid reputational interests of individuals. Given the clear direction of recent United States Supreme Court decisions narrowing the scope of the privilege, however, it seems unlikely that lower courts will continue such expansive application of the privilege.
CONCLUSION

The United States Supreme Court has directly addressed the proper roles for the judge and jury in applying the constitutional privilege only once in *Rosenblatt v. Baer*. While most lower courts continue to cite *Rosenblatt* for authority on the issue, the cases evidence a growing lack of uniformity and uncertainty about the proper treatment of the privilege question.

The Court itself has never found a jury issue to be present on the applicability of the privilege even in arguably close cases; nor do its recent decisions, which narrow the scope of the privilege and evidence a greater regard for the reputational interests of private individuals, support the conclusion that the Court considers the applicability of the privilege to be a question for jury resolution. Treatment of the applicability of the privilege as a question of law for the court is thus the most likely choice of the Court should it squarely face this issue. Furthermore, such treatment better achieves the purposes for which the constitutional privilege was created. Treatment of the privilege issue as a question of fact would create a potentially large category of cases within which the application of the privilege would be at the sole discretion of the jury, and within which the popularity or unpopularity of the parties and ideas involved would be most likely to influence the jury’s decision. Treatment of the applicability of the privilege as a question of law for the judge, however, would provide greater predictability of results, earlier resolution of the issue in most cases, and in many cases a substantial decrease in litigation costs. All of these consequences reduce the likelihood that the threat of liability for defamatory falsehood will unduly burden constitutionally protected speech.

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