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Of Defamation and Decisionmaking: Wiemer v. Rankin and the Abdication of Appellate Responsibility

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OF DEFAMATION AND DECISIONMAKING: *WIEMER v. RANKIN* AND THE ABDICATION OF APPELLATE RESPONSIBILITY

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In March, 1986, Ron Rankin published an article assailing the competence and integrity of the Kootenai County Prosecutor, Glen Walker.[1] The article challenged the propriety of Mr. Walker's practice of receiving compensation from municipalities for prosecuting their misdemeanors while also drawing his salary as county prosecutor: "This moonlighting amounts to conducting a private practice at taxpayer's expense." The article also accused Mr. Walker of failing to suppress the prostitution and gambling that were "rampant" in a small community near the Idaho-Washington border. These derelictions were an example of a pattern of misconduct: "As prosecutor, Glen Walker has used his office as a platform to further his ambitions for higher office by selectively choosing to prosecute certain high-profile 'smoking gun' cases, while plea-bargaining away, or failing to file, many other cases." The failure to prosecute "hundreds of misdemeanors and felonies" was the result of Mr. Walker's "statewide political excursions and moonlighting."

> One case, however, which will not disappear for lack of prosecution concerns the death of a 23-year old mother of two, Debbie Weimer [sic] in Post Falls on Saturday, January 11, 1980. Mrs. Weimer [sic] was shot in the chest at point blank range with a 44 Magnum revolver, at about midnight. The Post Falls police responded to the call and Detective Randy Bohn con-

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* Professor of Law, University of Idaho. I would like to thank Monique Lillard for her comments on an earlier draft of this article. The research for this article was partially funded by a University of Idaho College of Law summer research stipend.

1. The article was in *Vox Pop*, a free newspaper published irregularly by Mr. Rankin. Record at 8, Wiemer v. Rankin, 117 Idaho 566, 790 P.2d 347 (1990) (Ronald D. Rankin, *Glen Walker: Inept, Indifferent or Incompetent?*, VOX POP, Mar., 1986, at 3); *id.* at 3 (Affidavit of Ronald D. Rankin); *id.* at 74 (Plaintiff's Memorandum in Opposition to Summary Judgment). For simplicity, the Record and the various appellate briefs will be cited without the additional citation to the report of the case.

ducted the investigation. At about 1:30 A.M., Walker and his staff investigator Merf Stalder (now Kootenai County Sheriff) arrived. Stalder interviewed the husband of the victim and observed the scene. The husband stated that his wife shot herself. Walker and Stalder left the scene at approximately 2 A.M., with Walker telling Det. Bohn that they would be in touch with him on Monday and decide where the autopsy would be conducted. When Bohn, continuing his investigation, contacted the victim's family on Sunday afternoon, he was informed that an autopsy had already been performed that morning at 10 A.M. On Wednesday, Bohn was informed by the family that the body had been released and cremated. The evidence collected by the Post Falls Police Department and by Det. Bohn indicating that the victim did not shoot herself — and which I have personally viewed — is overwhelming. It contains photographs indicating that it was impossible for the victim to have held the gun in the position needed to shoot herself, a laboratory chemical test by the FBI which found no antimony barium from the gun discharge on the hand swabs taken of the victim; lint on the gun indicating it had been wiped clean of fingerprints; a severe wound to the victim's mouth, which Stalder's report confirmed appeared to have come from a blow; and boxes of the victim's clothing and personal effects which had been packed indicating an intent to leave home . . . and more. The thoroughness of the Post Falls police investigation is irrefutable. Bohn, who is now assistant police chief in Post Falls, has personally taken files of the case to the prosecutor's office at least once a year since the incident. He states that each time the files are presented, the current deputy prosecutor has agreed to the merit of the case. Each time the deputy has said he would discuss it with Walker; each time nothing further was done.[2]

Shortly after the article appeared, an attorney for Irvin Wiemer — Debbie Wiemer's husband — wrote Mr. Rankin demanding a retraction of the statements concerning Ms. Wiemer's death and an apology.[3] When Mr. Rankin refused, Mr. Wiemer filed an action for defamation. In his Complaint, Mr. Wiemer alleged that Mr. Rankin "intended to

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2. Record at 8 (Ronald D. Rankin, *Glen Walker: Inept, Indifferent or Incompetent?*, VOX POP, Mar., 1986, at 3).

3. Record at 9 (Letter from J. Ray Cox to Ron Rankin, Mar. 24, 1986). Under IDAHO CODE § 6-712 (1990), a demand for a retraction is required if an individual seeks more than actual damages in a subsequent defamation action.

mean that the Plaintiff was guilty of the murder of his wife, Deborah K. Wiemer, that he had lied to the authorities when he stated to them that his wife had shot herself, and that the author RANKIN had reviewed irrefutable evidence" that justified the allegations.[4]

In his Answer, Mr. Rankin denied that the publication had defamed Mr. Wiemer. He also asserted as affirmative defenses that the publication was privileged, truthful, a fair comment on a newsworthy event, and a report of official records.[5] Following discovery, Mr. Rankin moved for summary judgment. The district court granted the motion[6] and Mr. Wiemer appealed to the Idaho Supreme Court.

The court began its analysis with the allocation of the burden of proving the truth or falsity of the statements. As the court recognized, under federal constitutional law the plaintiff bears the burden of proving the statements are false if the statement discusses a matter of public concern — "even when the person alleging defamation is a private person."[7] Since the matter was one of public concern, Mr. Wiemer

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4. Record at 5 (Complaint).

5. Record at 15-16 (Answer).

6. Although the district court's opinion hops disjointedly from topic to topic, the decision appears to rest on three grounds:

1. the communication was constitutionally-protected opinion. This conclusion was based on two factors: that Mr. Rankin nowhere stated "as a matter of fact" that Ms. Wiemer had been murdered and that the use of terms such as "indicated," "irrefutable," and "overwhelming" demonstrated that Mr. Rankin was offering only his opinion. Record at 206-07, 215-16 (Memorandum Decision).

2. the article was statutorily privileged as "a fair true report, without malice, of a . . . public official proceeding." IDAHO CODE § 6-713(4) (1990). Record at 208-11 (Memorandum Decision).

3. the publication was constitutionally privileged. The court apparently considered Mr. Wiemer to be an involuntary public figure — an "individual who becomes embroiled in a public controversy through no effort of his own." Record at 212 (Memorandum Decision) (quoting Bandelin v. Pietsch, 98 Idaho 337, 340, 563 P.2d 395, 398 (1977)). As such, the court required Mr. Wiemer to prove "malice" and concluded that "there is no evidence that shows with *convincing clarity* that Ronald Rankin acted with the requisite malice in publishing the subject article." Record at 213 (Memorandum Decision). The court confuses the issue, however, by conflating the United States Supreme Court's deliberate-or-reckless-falsity standard with common-law malice. Compare *id.* at 211 with *id.* at 213. And the court further confuses the issue by concluding that — while the article was intended to criticize Mr. Walker rather than Mr. Wiemer — "the malice required to pursue this action must be directed to the plaintiff." *Id.* at 214. The district court's opinion thus can be read as holding Mr. Wiemer failed to prove by clear and convincing evidence that Mr. Rankin was motivated by ill will or spite toward him.

7. Wiemer v. Rankin, 117 Idaho 566, 570, 790 P.2d 347, 351 (1990).

"had the burden of proving that Rankin's statements about Debbie's death were false."[8]

This conclusion led the court to the next issue: whether there was a genuine issue of fact on the falsity of the communication. For the court, this was a question of whether the article's statements were "opinion." Acknowledging that it is often difficult to distinguish "fact" and "opinion," the court adopted a test developed by the Second Circuit Court of Appeals that focuses on whether "an author represents that he has private, first-hand knowledge which substantiates the opinion he expresses."[9] If there is such a representation, the author can be held liable if she fails to disclose "sufficient information upon which the reader could make an independent judgment."[10] The question thus is whether the statement of opinion implies unrevealed facts. The court concluded that Mr. Rankin's article failed under this standard since it stated that there were photographs which demonstrated that it "was impossible for the victim to have held the gun in the position needed to shoot herself."[11] This statement presented "the private, first-hand knowledge that [is] the mark of defamatory opinion" and thus was not constitutionally protected opinion.[12]

Since the article's statements were not opinions, the court turned to the underlying question: was summary judgment properly granted on the falsity of the statements? Noting the police file contained exculpatory information that Mr. Rankin did not reveal, the court concluded "there was a genuine issue of material fact as to the falsity of Rankin's statement that the evidence was overwhelming."[13]

The court turned next to Mr. Rankin's affirmative defenses. The trial court had held that the defendant enjoyed a statutory privilege for "a fair report, without malice, of a . . . public official proceeding."[14] The supreme court reversed since, even if police reports were a "public official proceeding," Mr. Rankin admitted that he had "relied upon

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8. *Id.* at 570-71, 790 P.2d at 351-52. The court adopts the annoying habit of referring to Mr. and Ms. Wiemer by their first names and Mr. Rankin by his last name. The result is a juvenalizing of Irvin and Debbie and of Irvin's suit against Rankin.

9. *Id.* at 571, 790 P.2d at 352 (quoting Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir. 1977), *cert. denied*, 434 U.S. 834 (1977)).

10. *Id.* at 572, 790 P.2d at 353 (quoting Herbert W. Titus, *Statement of Fact Versus Statement of Opinion — A Spurious Dispute in Fair Comment*, 15 VAND. L. REV. 1203, 1216 (1962)).

11. *Id.* at 572, 790 P.2d at 353 (quoting Ronald D. Rankin, *Glen Walker: Inept, Indifferent or Incompetent*, Vox POP, Mar., 1986, at 3).

12. *Id.* at 572, 790 P.2d at 353.

13. *Id.* at 573, 790 P.2d at 354.

14. Record at 208-11 (Memorandum Decision) (quoting IDAHO CODE § 6-713(4) (1990)).

statements made to him by the investigating officer that went beyond the reports" and these private statements were not part of an official proceeding.[15]

Finally, the court discussed the damage issue. Since Mr. Wiemer had sought punitive damages, this was a question of whether there was a genuine issue of fact that Mr. Rankin had acted with deliberate or reckless falsity. The issue, the court concluded, was whether Mr. Wiemer had introduced clear and convincing evidence that "*the defendant in fact entertained serious doubts as to the truth of his publication.*"[16] After reviewing both the exculpatory evidence in the police file and Mr. Rankin's deposition, the court decided that it was "unable to conclude that Rankin made a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of the charges against Wiemer or that he purposefully avoided the truth."[17] The court therefore affirmed the trial court's summary judgment on the presumed and punitive damages but reversed as to damages for actual harm.[18]

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15. Wiemer v. Rankin, 117 Idaho at 573, 790 P.2d at 354.

16. *Id.* at 575, 790 P.2d at 356 (quoting Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688 (1989), quoting St. Amant v. Thompson, 390 U.S. 727, 731 (1968)). The court noted that it was to consider the quantum of proof necessary to support liability under the substantive standard — here, clear and convincing evidence — in determining whether a genuine issue of material fact exists. *Id.* at 574-75, 790 P.2d at 355-56 (citing Anderson v. Liberty Lobby, 477 U.S. 242 (1986)).

17. *Id.* at 577, 790 P.2d at 358.

18. Justice Bistline dissented on the question of presumed and punitive damages, arguing that the deliberate-or-reckless-falsity standard does not lend itself to summary disposition because the question of whether Mr. Rankin acted with deliberate or reckless falsity

> is an inquiry into the defendant's *state of mind.* This inquiry is properly made by the jury, and not by trial judges through summary judgment proceedings, and especially, as here, not by appellate judges when reviewing district court grants of summary judgments. At summary judgment proceedings the plaintiff need not prove his case, but only needs to sufficiently establish his entitlement to a jury trial.

Id. at 579, 790 P.2d at 360 (Bistline, J., dissenting). Relying on the Supreme Court's decision in *Hutchinson v. Proxmire*, he argued that the issue of a defendant's state of mind "*does not readily lend itself to summary disposition.*" *Id.* at 580, 790 P.2d at 361 (quoting Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979)).

While Justice Bistline initially stated that he concurred in all but the court's decision on the issue of presumed and punitive damages, his dissent is another example of what his dissents have become, quickly raising a host of unrelated issues: whether *Vox Pop* can or ought to be treated as "media" if it is a newsletter rather than a newspaper; whether "the publication — *as to Mr. Wiemer, and as written* — was a matter of public concern," *id.* at 580, 790 P.2d at 361; whether the choice of language is such a rhetorical

The supreme court's analysis is unsatisfactory. The difficulty is not so much that the court reached a wrong result — though some of its conclusions *are* open to serious challenge. Rather, the problem is far more fundamental: the court simply seems to lack a clear understanding of its roles as an appellate court in a judicial system.

Appellate courts have traditionally been thought to have two roles: decisionmaker and teacher.[19] This is simply to say that an appellate court must focus its attention both on the effect of a decision on the particular individuals who are parties to the case and on the general principles that guide the conduct of persons not party to the action.

As decisionmaker, the court is responsible for reviewing the correctness of trial court decisions. This involves assuring at least minimal consistency among the various trial courts in the jurisdiction. As teacher, an appellate court is responsible for specifying decisionmaking methods, either by example or by explicit statement. This role requires the court to develop coherent decisionmaking structures, be they prima facie cases, three-part tests, or the like. It is the role of teacher that largely defines the unique position of courts in the common-law tradition. Cases do more than resolve the dispute before the court; appellate decisions are presumed to have a forward-looking function.

Both of these roles are combined in the most commonly offered justification for judicial lawmaking: such lawmaking is thought to be legitimate only when the decisionmaker offers explanations.[20] The judicial opinion is both an artifact that describes the resolution of a particular case and a statement of principles, standards, rules, and policies arranged in a manner that serves to guide future cases. Leaving aside questions such as whether rationality can ever fully explain a decision,[21] or whether there are many cases in which there is not one right

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overkill as to itself demonstrate recklessness; etc. Justice Bistline does not systematically consider the host of questions that he raises.

19. The terms are the author's; the view that appellate courts perform dual functions is traditional. *See, e.g.*, PAUL D. CARRINGTON, ET AL., JUSTICE ON APPEAL 2-4 (1976); ROSCOE POUND, APPELLATE PROCEDURE IN CIVIL CASES 1-2 (1941); David P. Leonard, *The Correctness Function of Appellate Decision-Making: Judicial Obligation in an Era of Fragmentation*, 17 LOY. L.A. L. REV. 299 (1984). *Cf.* Philip B. Kurland, *Jurisdiction of the United States Supreme Court: Time for a Change?*, 59 CORNELL L. REV. 616, 618 (1974) (dividing the job into three categories by dividing the decisionmaker into error-corrector and consistency-maintainer).

20. *E.g.*, Charles D. Breitel, *The Lawmakers*, 65 COLUM. L. REV. 749, 772-76 (1965). All judicial decisions at least marginally make law since they at least decide that a given rule does or does not apply to these facts, and thus incrementally expand the rule.

21. The development of strict liability for activities now considered "ultrahazardous" is a good example. The question as initially presented was whether the activity that caused injury was like a wagon (and thus subject to liability only if negli-

answer, it is nonetheless quite generally conceded that the court has an obligation to attempt to state the basis of its decision.[22] And its success or failure in this task is the measure of the quality of the decision and the decider.

Against this standard, *Wiemer v. Rankin* is a poor decision. The court fails to provide a reasoned statement of the structure that it employed.[23] Furthermore, the structure that it did employ provides little guidance for the next defamation case because it is both insufficiently comprehensive and too case specific.[24]

These shortcomings become apparent upon review of defamation law. The next sections provide such a review, beginning with Idaho's common law of defamation as it existed prior to 1964 when the United States Supreme Court first held that state defamation law was circumscribed by the federal Constitution.

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gently performed) or like an animal (and thus subject to strict liability). *See* Booth v. Rome, W. & O.T.R.R., 35 N.E. 592 (N.Y. 1893); Losee v. Buchanan, 51 N.Y. 476 (1873); Fletcher v. Rylands, 1 L.R.-Ex. 265 (Exchequer Chamber 1866), *aff'd sub nom.* Rylands v. Fletcher, 3 L.R.-H.L 330 (House of Lords 1868); Hay v. Cohoes Co., 2 N.Y. 159 (1849). The fact that the courts flounder and the rationales for the decisions are inconsistent need not mean that the decisions themselves are incorrect, but only that the court was unable to specify a reasoned basis for the decisions.

22. A variety of benefits are thought to flow from the obligation to give reasons:

> When reasons are announced and can be weighed, the public can have assurance that the correcting process is working. Announcing reasons can also provide public understanding of how the numerous decisions of the system are integrated. In a busy court, the reasons are an essential demonstration that the court did in fact fix its mind on the case at hand. An unreasoned decision has very little claim to acceptance by the defeated party, and is difficult or impossible to accept as an act reflecting systematic application of legal principles. Moreover, the necessity of stating reasons not infrequently changes the results by forcing judges to come to grips with nettlesome facts or issues which their normal instincts would otherwise cause them to *avoid*.

PAUL D. CARRINGTON, ET AL., *supra* note 19, at 10. *See also* AMERICAN BAR ASSOCIATION COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS 60 (Approved Draft 1977); KARL N. LLEWELLYN, THE COMMON LAW TRADITION 26-27 (1960); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 13-15 (1979).

23. The effect of similar past failures is to be found in the trial court's decision in *Wiemer*. *See supra* note 6.

24. That next case may again feature Mr. Rankin who has recently been sued by a civil engineering firm for statements he made in a radio broadcast. *See* IDAHONIAN (Moscow), Aug. 5, 1991, at 3A, col. 4.

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Although common-law defamation was generally acknowledged to abound in arcane anomalies and overly-refined distinctions,[25] Mr. Wiemer actually would have faced few problems in vindicating his reputation before 1964. To state a claim for libel under Idaho's common law, Mr. Wiemer would have been required to allege that (1) a defamatory communication (2) about him (3) had been published by Mr. Rankin to a third party and (4) the communication was either actionable without proof of special harm or had actually caused harm.

The torts of defamation — libel and slander[26] — protect an individual's interest in her reputation. This is a relational interest: it is the effect of the communication in leading others to change their relationship with the defamed individual or to withhold some benefit from her that forms the basis of the tort.[27] A communication is "defamatory" when it has the "tendency to lower him in the common estimation of the citizens."[28] Hence, the "fact that the plaintiff himself places an ac-

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25. *See, e.g.*, W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111 (5th ed. 1984) (hereinafter PROSSER) ("It must be confessed at the beginning that there is a great deal of the law of defamation which makes no sense").

26. Broadly, the distinction between libel and slander is the difference between a written and a verbal defamation. *See generally id.* The applicable rules may differ depending upon the classification of the defamation as either libel or slander since written communications are treated more harshly because writing "implies a deliberate purpose to do harm, whereas detrimental words are often spoken thoughtlessly or in a passion. Weight is allowed, also, to the more enduring character and wider vogue of published statements." Dwyer v. Libert, 30 Idaho 576, 582, 167 P. 651, 652 (1917) (quoting Farley v. Evening Chronicle Publishing Co., 87 S.W. 565, 568 (Mo. App. 1905)). *See also* State v. Sheridan, 14 Idaho 222, 236-37, 93 P. 656, 660-61 (1908).

27. Professor David Anderson has presented the most detailed analysis of the relational interests potentially injured by a defamatory communication. He concludes that there are "at least four distinct types of reputational harm": first, the defamation may interfere with the person's existing relations with others, e.g., her family, friends, or business associates may desert her; second, the defamation may interfere with future relations with others, e.g., people who do not now know the defamed person may be less willing to associate with her when they do meet her; third, the defamation may destroy a favorable public image, e.g., a public figure's image may be tarnished; and fourth, the defamation may create a negative public image, e.g., a person without a current public image may acquire an unfavorable one. *See* David Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747, 765-66 (1984).

28. Dwyer v. Libert, 30 Idaho at 583, 167 P. at 652. In the traditional rhetorical formulation of the standard, the communication must tend to "impeach the honesty, integrity, virtue, or reputation" of a person and "thereby to expose him to public hatred, contempt, or ridicule." *Id.* (quoting REV. CODES § 6737 (currently codified at IDAHO CODE § 18-4801 (1987))). Although the statute defines libel for the purposes of establishing criminal sanctions, the Idaho Supreme Court has repeatedly relied upon it in civil libel actions. *See, e.g.*, Gough v. Tribune-Journal Co., 73 Idaho 173, 178, 249 P.2d 192, 194-95

tionable connotation on the statements does not make such statements actionable."[29]

Where the communication is facially defamatory — where, for example, it amounts "to a charge which, if true, would subject the party charged to infamous punishment"[30] — it is actionable *per se*. In evaluating the communication, "the entire article must be read and considered as a whole in the plain and natural meaning of the words used, and as a person of ordinary intelligence and perception would understand the article."[31] When the language is "plain and unambiguous," it is a question of law for the court whether the communication is actionable *per se*.[32]

Mr. Wiemer alleged that Mr. Rankin's article libeled him by charging him with murder and with lying to the police to cover up the crime. Although Mr. Rankin's article did not explicitly state this charge, Mr. Wiemer contended that this accusation was both what Mr. Rankin intended and how the communication would be understood by the reader.[33]

(1952); Jenness v. Co-Operative Publishing Co., 36 Idaho 697, 701, 213 P. 351, 352 (1923); Carpenter v. Grimes Pass Mining Co., 19 Idaho 384, 389, 114 P. 42, 44 (1911).

29. Bistline v. Eberle, 88 Idaho 473, 478, 401 P.2d 555, 558 (1965). The communication may, of course, give rise to potential liability under some other theory such as intentional infliction of emotional distress. *See, e.g.*, Alcorn v. Anbro Engineering, Inc., 468 P.2d 216 (Cal. 1970). Furthermore, the tort clearly has elements in common with other emotional distress claims.

30. Dayton v. Drumheller, 32 Idaho 283, 287, 182 P. 102, 103 (1919). A communication is actionable *per se* not only when it alleges the commission of an infamous crime, but also when it asserts that a person lacks such "basic virtues" as truthfulness, Dwyer v. Libert, 30 Idaho at 582-83, 167 P. at 652, or engages in "any immoral or vicious practices," Jenness v. Co-Operative Publishing Co., 36 Idaho at 703, 213 P. at 353. *See also* Richeson v. Kessler, 73 Idaho 548, 551, 255 P.2d 707, 708 (1953). *Cf.* Pacific Packing Co. v. Bradstreet Co., 25 Idaho 696, 139 P. 1007 (1914) (standards applicable to libel of businesses); Mann v. Bulgin, 34 Idaho 714, 203 P. 463 (1921) (standards applicable to slander); Douglas v. Douglas, 4 Idaho 293, 39 P. 934 (1895) (same).

31. Gough v. Tribune-Journal Co., 73 Idaho at 178, 249 P.2d at 195.

32. Gough v. Tribune-Journal Co., 75 Idaho 502, 508, 275 P.2d 663, 666 (1954); Bistline v. Eberle, 88 Idaho at 478, 401 P.2d at 558. Idaho's law on libel and slander *per se* did not correspond to the general common-law rules on the subject. *Compare* Gough v. Tribune-Journal Co., 75 Idaho at 508, 275 P.2d at 666 *with* PROSSER, *supra* note 25, at 788-97.

33. Mr. Wiemer's complaint provided the following innuendo or statement of how the language would be read and understood by a reasonable person:

> By said words published in the newspaper as aforesaid, Defendant RANKIN meant and intended to mean that the Plaintiff was guilty of the murder of his wife, Deborah K. Wiemer, that he had lied to the authorities when he stated to them that his wife had shot herself, and that the author RANKIN had reviewed irrefutable evidence of such claimed facts. Said words so published, and

Mr. Wiemer's allegations were sufficiently borne out by the article to warrant submitting the case to the jury. After noting that "[t]he husband stated that his wife shot herself," Mr. Rankin declared that "[t]he evidence collected by the Post Falls Police Department and by Det. Bohn indicating that the victim did not shoot herself — and which I have personally viewed — is overwhelming." The article then listed some of the evidence and praised the "thoroughness of the Post Falls police investigation [which] is irrefutable" before concluding that several deputy prosecutors have agreed on "the merit of the case."[34] The thrust of the article is that the Post Falls Police had an irrefutable case that Ms. Wiemer was murdered and, but for the incompetence of Mr. Walker, the case would have been prosecuted. Since it was a case of murder rather than suicide, Ms. Wiemer's husband — who had told the police that his wife "shot herself" — was necessarily lying and thus was the prime suspect. Since the communication would be read by an ordinary person as making these charges, it is libelous *per se* under Idaho's common law.

Plaintiff next had the burden of proving that the communication was "of and concerning" him.[35] Although Mr. Wiemer was not explicitly named in the article, he was the decedent's husband and was referred to as such in the article. Furthermore, he alleged that "any reasonable person who read . . . the charges . . . would reasonably know that the Plaintiff was meant thereby."[36] This element does not present a substantial proof problem since the language can be read as referring to plaintiff — all that is required to reach the jury on the issue.

The third element of plaintiff's prima facie case required plaintiff to prove that defendant published the communication.[37] To "publish"

> the context of the article within which said words were published, were generally read by persons who were readers of said publication, and were understood by such readers to have such meaning . . . .

Record at 5 (Complaint). An innuendo is used "where the language of the alleged defamation is vague or ambiguous, and explanatory allegations are required to show the intent of the defendant, and the sense in which the article is understood by its readers." Gough v. Tribune-Journal Co., 75 Idaho at 508, 275 P.2d at 666. The libel *per se* rules apply even if innuendo is required. Dayton v. Drumheller, 32 Idaho 283, 287, 182 P. 102, 103 (1919) (overruled on other grounds by Richeson v. Kessler, 73 Idaho 548, 255 P.2d 707 (1953)).

34. Record at 8 (Ronald D. Rankin, *Glen Walker: Inept, Indifferent or Incompetent?*, Vox Pop, Mar., 1986, at 3).

35. *See* Farber v. Cornils, 94 Idaho 326, 328, 487 P.2d 689, 691 (1971).

36. Record at 5 (Complaint). This language is the "colloquium," the allegation that the communication complained of was "of and concerning" plaintiff.

37. Hemminger v. Tri-State Lumber Co., 57 Idaho 697, 702, 68 P.2d 54, 55 (1937).

a communication is simply " 'to make it known to any person other than the person libeled.' "[38] Mr. Rankin acknowledged that he is the publisher of the allegedly libelous communication.[39]

The final issue is the measure of damages. At the common law, plaintiff was not required to plead or prove special damages if the communication was libelous *per se*. In such cases, substantial damages were presumed.[40] Furthermore, Mr. Wiemer would have been entitled to punitive damages upon proof that Mr. Rankin published the communication "maliciously or wantonly."[41]

Thus, a jury would have been justified in giving a verdict for Mr. Wiemer against Mr. Rankin under Idaho's common law of libel. The statements in Mr. Rankin's article could be understood by a reasonable reader as charging Mr. Wiemer with murdering his wife and lying to the police, charges that are libelous *per se*. Such charges entitle Mr. Wiemer to substantial damages — unless Mr. Rankin's publication was privileged.

Common-law privileges fall into three categories: defenses — most commonly truth — and two classes of true privileges, absolute and conditional.

The truth of a defamatory communication was a complete defense to any common-law defamation action. It was a defense rather than part of plaintiff's prima facie case because, where the communication "is actionable *per se*, the falsity of the defamatory words is presumed, and it is not necessary that the plaintiff shall in the first instance offer any proof that the words were false."[42] A plaintiff in a defamation action

> is suing to recover damages for injury to his good name and reputation, caused by the language uttered by [defendant]. The damage of which [plaintiff] complains does not result from the falsity of the charges made by [defendant]. The damage to [plaintiff] is just as great whether the charges were true or false; hence [plaintiff] is relieved of proving the falsity of the charges. But the law will not suffer him to recover damages for

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38. O'Malley v. Statesman Printing Co., 60 Idaho 326, 333, 91 P.2d 357, 360 (1939) (quoting Age-Herald Publishing Co. v. Huddleston, 92 So. 193, 197 (Ala. 1921)).

39. Record at 31 (Affidavit of Ronald D. Rankin).

40. Barlow v. International Harvester Co., 95 Idaho 881, 896, 522 P.2d 1102, 1107 (1974); Weeks v. M-P Publications, Inc., 95 Idaho 634, 636, 516 P.2d 193, 195 (1973); Jenness v. Co-Operative Publishing Co., 36 Idaho 697, 702, 213 P. 351, 353 (1923); Pacific Packing Co. v. Bradstreet Co., 25 Idaho 696, 702-03, 139 P. 1007, 1009 (1914).

41. Hewett v. Samuels, 46 Idaho 792, 796, 272 P. 703, 703-04 (1928). *See also* Dwyer v. Libert, 30 Idaho 576, 586, 167 P. 651, 654 (1917).

42. Mann v. Bulgin, 34 Idaho 714, 718, 203 P. 463, 464 (1921).

> injuries to a reputation which he does not justly deserve to have. In such case "though there may be damage sufficient accruing from it, yet, if the fact be true, it is *damnum absque injuria*."[43]

While the court has been solicitous for publishers,[44] it also has recognized that truth is inherently a factual question for the jury.[45] Such is the case here. While Mr. Rankin asserted the truth of his publication,[46] the question of whether Mr. Wiemer murdered his wife cannot be resolved on the pleadings. Mr. Rankin's defense of truth thus would not have justified the trial court's summary judgment.

Mr. Rankin also asserted two additional common-law privileges: the communication was privileged as a fair comment on a matter of public concern and as a report of a public proceeding.[47] The privileges are conditional rather than absolute because they are based upon the importance of the interest shared by the publisher and the recipient of the communication[48] rather than upon Mr. Rankin's status.[49] Since the

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43. *Id.* at 721, 203 P. at 465 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *125).

44. It is not necessary that every particular of the charge be absolutely true; all that is required is that the substance or "sting" of the charge be true. The Idaho Supreme Court has traditionally adopted a liberal interpretation of this defense, recognizing that some play must be allowed for the "hyperbole of speech." Weeks v. M-P Publications, Inc., 95 Idaho at 638, 516 P.2d at 197 (quoting Jenness v. Co-Operative Publishing Co., 36 Idaho at 702, 213 P. at 353)). For example, plaintiff's employer called him a "thief" and accused him of stealing "first grade lumber" and selling it. The court held that plaintiff's admission that he had taken some mill ends sufficiently established the sting of the accusation. Laughton v. Crawford, 68 Idaho 578, 201 P.2d 96 (1948). *See also* Baker v. Burlington Northern, 99 Idaho 688, 587 P.2d 829 (1978); Hemingway v. Fritz, 96 Idaho 364, 529 P.2d 264 (1974).

45. *E.g.*, Dwyer v. Libert, 30 Idaho 576, 167 P. 651 (1917). This is the most significant procedural distinction between a privilege and a defense: a defense will generally require a trial; a privilege, on the other hand, will often serve as the basis for a summary judgment.

46. Record at 16 (Answer).

47. *Id.*

48. *See generally* Gardner v. Hollifield, 96 Idaho 609, 612-13, 533 P.2d 730, 733-34 (1975); Bistline v. Eberle, 88 Idaho 473, 478, 401 P.2d 555, 558 (1965); Gough v. Tribune-Journal Co., 75 Idaho 502, 508-09, 275 P.2d 663, 667 (1954).

49. Absolute privileges are based upon the status of the person publishing the allegedly defamatory communication. Gardner v. Hollifield, 96 Idaho at 612-13, 533 P.2d at 733-34. Such privileges reflect the recognition that certain types of governmental proceedings are so important that those involved must be able to act without fear for their personal fortunes. Thus the Idaho Constitution provides that no member of the state legislature shall, "for words uttered in debate in either house, be questioned in any other place." IDAHO CONST. art. 3, § 7. A similar privilege attaches to participants in judicial proceedings. Richeson v. Kessler, 73 Idaho 548, 551, 255 P.2d 707, 709 (1952). *See also* Overman v. Klein, 103 Idaho 795, 654 P.2d 888 (1982); Carpenter v. Grimes Pass Placer

privileges are conditional, they give protection from liability only when they are in fact exercised to further the protected interest. Stated differently, conditional privileges are lost when they are abused — whether by a lack of belief in the truth of the communication, through "excessive" publication, or otherwise.[50]

In Idaho, the two common-law privileges have been subsumed into a single statutory privilege.[51] The Idaho Code provides that the publication in a newspaper of "a fair and true report, without malice, of a . . . public official proceeding, or of anything said in the course thereof" is privileged.[52] While a strong argument can be made that the police investigatory reports were not "public" in the sense of being an "open" proceeding, the Idaho Supreme Court's resolution of this issue is preferable. The court held that the privilege is inapplicable because Mr. Rankin relied upon statements made by the investigating officers that went beyond the police reports.[53]

Had Mr. Wiemer been able to bring his claim under Idaho's common law of libel, it is likely that he would have prevailed. Mr. Rankin's statements charging Mr. Wiemer with murdering his wife satisfied the prima facie case for libel and Mr. Rankin's asserted privileges were either inapplicable or would have required a trial because of their significantly factual basis. Thus, at a minimum, Mr. Rankin would not have been entitled to a summary judgment. Furthermore, by allocating the burden of establishing the truth of the statements to the defendant, the common law provided a defamed individual with a substantial advantage in the ambiguous situations that lead to most litigation. Here,

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Mining Co., 19 Idaho 384, 114 P. 42 (1911). Since Mr. Rankin was not a participant in any governmental proceeding, he has no claim to an absolute privilege.

50. *See* Gough v. Tribune-Journal Co., 75 Idaho at 510, 275 P.2d at 667-68.

51. It is not apparent that the legislature intended to abolish the separate common-law fair comment and public proceeding privileges when it enacted IDAHO CODE § 6-713(4) in 1963. Mr. Rankin apparently did not think so for he pled each as a separate defense. The supreme court — perhaps as a result of the decision of the trial court — treats the pleadings as raising only the statutory claim. *See* Wiemer v. Rankin, 117 Idaho 566, 573, 790 P.2d 347, 354 (1990).

52. The section provides in full:

> A privileged publication in a newspaper which shall not be considered as libelous is one made:
>
> . . . .
>
> (4) By a fair and true report, without malice, of a judicial, legislative or other public official proceeding, or of anything said in the course thereof, or of a charge or complaint made by any person to a public official, upon which a warrant shall have been issued or an arrest made.

IDAHO CODE § 6-713 (1990).

53. Wiemer v. Rankin, 117 Idaho at 573, 790 P.2d at 354.

for example, Mr. Rankin would have been required to prove that Mr. Wiemer did in fact murder his wife.

Mr. Wiemer, of course, was not able to bring his claim as a common-law libel action. In 1964, the United States Supreme Court constitutionalized defamation by holding that the First and Fourteenth Amendments to the United States Constitution prohibited a state from imposing common-law liability on the publishers of all defamatory communications.[54]

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While the Supreme Court has constitutionalized the law of defamation, defining the contours of the constitutional privilege has proven problematic. In part, this is a result of the way in which the constitutional privilege operates. Unlike traditional privileges that impose proof requirements on the defendant,[55] the constitutional privilege imposes proof requirements on the plaintiff. For example, at the common law truth was a defense; under the constitutional privilege, on the other hand, proof of falsity becomes an element of plaintiff's prima facie case. A privilege that alters the prima facie case violates the common law's traditional dichotomy between plaintiff's and defendant's cases, introducing an element of unfamiliarity and thus uncertainty.

The second source of problems has been the Court's unwillingness to adhere to a consistent rationale for the privilege. The Court has offered two different types of rationales, one focusing on the communication and the other on the identity of the plaintiff; in crucial ways, the two are inconsistent.

The Court grounded the *New York Times* decision on what it termed "the central meaning of the First Amendment": a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[56] This communication-content rationale justifies a privilege that extends beyond the facts of the *New York Times* case to include communications on any matters of public concern.[57] At the same time, the Court employs plaintiff-sta-

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54. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Prior to *New York Times*, libelous speech was treated as beyond the protective reach of the First and Fourteenth Amendments. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

55. *See, e.g.*, Bistline v. Eberle, 88 Idaho 473, 478, 401 P.2d 555, 558 (1965).

56. New York Times Co. v. Sullivan, 376 U.S. at 270, 273.

57. The Court has not been entirely consistent even in its statement of the communication-content rationale, vacillating between speaker-focused and society-focused formulations. *Compare* Bose Corp. v. Consumers Union, 466 U.S. 485, 503-04 (1984) ("The First Amendment presupposes that the freedom to speak one's mind is not only an as-

tus classifications to trigger the application of the constitutional privilege. The Court has justified this approach by arguing that private persons are both more vulnerable to defamations and more worthy of protection than public persons.[58] But a communication-content rationale is not necessarily congruent with a plaintiff-identity rule. The inconsistency was demonstrated in a defamation action brought by a private person caught up in a district attorney's anti-pornography campaign. The communication was clearly one of public concern and thus protected under the speech-content rationale; the plaintiff was equally clearly not a public figure and the speech thus not protected under the plaintiff-status rationales.[59] The Court has not as yet effectively resolved the tension between these two rationales. The result is an overly complex classification system that seeks to accommodate both.[60]

The result of nearly thirty years of Supreme Court defamation decisions thus is a varied and sometimes inconsistent tapestry of dominant themes and dead ends, of continuing threads and false starts. Given this history, a summary is more useful than a chronology.[61]

STATUS OF PLAINTIFF: The status of the plaintiff is one of two threshold criteria that trigger the application of the constitutional privilege. As such, determining the plaintiff's status is the initial step in the analysis of any defamation case.

The Court has created two general categories: "public persons" and "private persons." "Public persons" are either "public officials" or "public figures." The "public official" designation applies to policy-

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pect of individual liberty — and thus a good unto itself — but also is essential to the common quest for truth and the vitality of society as a whole") *with* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 (1985) ("We have long recognized that not all speech is of equal First Amendment importance. It is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection' "). *See generally* ZECHARIAH CHAFEE, FREE SPEECH IN THE UNITED STATES 31-35 (1941); MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH § 1.03 (1984).

58. The Court has offered two rationales that were intended to distinguish between public and private persons. First, private persons are vulnerable to injury because they lacked ready access to the media to counteract defamatory falsehoods. Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974). Second, private persons are more deserving of protection because, unlike public persons, they have not "voluntarily exposed themselves to increased risk of injury from defamatory falsehood." *Id.* at 345. Given their greater vulnerability and merit, the Court concluded that the state interest in protecting private individuals was entitled to greater weight relative to the constitutional values of free speech. In subsequent cases, the Court has emphasized the assumption-of-risk rationale. Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 164 (1979); Time, Inc. v. Firestone, 424 U.S. 448, 453 (1976).

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

60. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

61. *See* appendix.

making officers, "those among the hierarchy of governmental employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[62] "Public figures," on the other hand, are individuals who, although not employed by a government, nonetheless "have assumed roles of especial prominence in the affairs of society."[63] Public figures may be either "general public figures" — individuals who "occupy positions of such pervasive power and influence that they are deemed public figures for all purposes" — or, more commonly, "contextual public figures" — individuals who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[64]

The contextual public figure classification has proven the most controversial and doctrinally problematic. Since this is the category in which the speech-content and plaintiff-status rationales are most obviously joined, the confusion is not surprising. The Court has responded by adopting increasingly restrictive interpretations. A public controversy, for example, cannot simply be equated with any controversy of interest to the public: "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."[65] A party in a scandalous Palm Beach divorce did not become a public figure because the dissolution of a marriage is not a "public controversy."[66] Similarly, a suspected Russian spy was a private person because he had not attempted to influence the outcome of any public controversy.[67] What appears to

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62. Rosenblatt v. Baer, 383 U.S. 75, 85 (1966). Candidates for such offices are included. Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971); Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971).

63. Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

64. *Id.*

65. Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 167 (1979).

66. Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976). As the dissent in *Firestone* noted, plaintiff's appearances in the press prior to the divorce were frequent enough to warrant subscribing to a press-clipping service and she held several press conferences during the course of the divorce proceedings. *Id.* at 484-85 (Marshall, J., dissenting). *Cf. id.* at 454 n.3 (fact that plaintiff held press conferences insufficient to convert her into a public figure).

67. Wolston v. Reader's Digest Ass'n, 443 U.S. at 166 n.8.

be required is a preexisting dispute,[68] the outcome of which will affect some segment of the public in a determinable way.[69]

SPEECH CONTENT CLASSIFICATION: The second threshold criterion that triggers application of the constitutional privilege is the content of the speech. The Court reintroduced this criterion in *Greenmoss* when it reinterpreted[70] *Gertz* as a decision involving "expression on a matter of undoubted public concern."[71] Unfortunately, the Court provided little guidance in distinguishing "matters of public concern" from "matters of purely private concern." The Court's statement — "[w]hether . . . speech addresses a matter of public concern must be determined [by the expression's] content, form, and context"[72] — amounts to little more than a requirement that the courts consider everything.

Again, at least part of the difficulty is traceable to the Court's *Greenmoss* inconsistent rationales.[73] The decision begins by noting that "[l]ike every other case in which this Court has found constitutional limits to state defamation laws, *Gertz* involved expression on a

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68. The defamatory communication cannot itself create the public controversy. Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979); Rosenblatt v. Baer, 383 U.S. 75, 86 n.13 (1966).

69. *See generally* Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1296-97 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980).

70. *Greenmoss* presents a revisionist interpretation of *Gertz*—indeed, a reinterpretation that stands the earlier decision on its head. *Gertz* was a reaction to *Rosenbloom*, a decision in which a plurality of the Court followed the public-concern rationale to its logical conclusion: the content of the speech was determinative, the status of the plaintiff irrelevant. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43 (1971). The five other justices authored four additional opinions embodying widely-divergent positions. In response to these divisions, the *Gertz* decision was an attempt to establish a common ground that avoided the application of the deliberate-or-reckless-falsity standard to all communications on matters of public concern. The decision did so reemphasizing the status of the plaintiff as the crucial element. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-48 (1974). As the Court in *Firestone* subsequently noted, it was the breadth of the protection accorded by the public-concern standard that led the Court in "*Gertz* to eschew a subject-matter test for one focusing upon the character of the defamation plaintiff." Time, Inc. v. Firestone, 424 U.S. at 456.

71. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 756 (1985) (plurality). *See also id.* at 764 (Burger, C.J., concurring); *id.* at 774 (White, J., concurring).

72. *Id.* at 761 (quoting Connick v. Meyers, 461 U.S. 138, 147-48 (1983)).

73. The *Rosenbloom* decision might initially appear to offer the closest point of reference. The discussion of "matters of public concern" in *Greenmoss*, however, implies a far narrower concept than does *Rosenbloom*'s discussion of "public or general interest." In part this is due to the different roles played by the concept(s) in the two decisions. In *Rosenbloom*, the term triggered the application of the deliberate-or-reckless-falsity standard and thus increased First Amendment protection; in *Greenmoss*, on the other hand, it is employed to reduce that protection by carving an exception from the more stringent *Gertz* rule on damages.

matter of undoubted public concern."[74] Thus, for example, the Palm Springs divorce involved matters of "undoubted public concern" — even though the case did not involve a "public controversy." The Court's statement appears to support a broad interpretation of the protection accorded by the public concern requirement. In the same opinion, however, the plurality emphasizes the political self-governance rationale of the First Amendment, that assuring an "unfettered interchange of ideas for the bringing about of political and social changes desired by the people" lies at "the heart of the First Amendment's protection."[75] It is at least difficult to square the restrictive self-governance rationale with a juicy Palm Beach divorce.

While the decision thus has a core of ambiguity, at least one point is apparent: "public concern" is necessarily a broader classification than "public controversy." Statements on matters of public concern may discuss an individual who has not become a public figure by being involved in a public controversy.

LIABILITY AND DAMAGE STANDARDS: By treating plaintiff-status and speech-content classifications as constitutionally-significant variables, the Court has created at least three categories:[76] public person/public

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74. 472 U.S. at 756.

75. *Id.* at 759 (quoting First National Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978), and Connick v. Meyers, 461 U.S. at 145).

76. Given the definitions of the plaintiff status classifications, it is likely that the fourth possibility — public person/private concern — is an empty category. First, the Court has emphasized that "society's interest in the officers of government is not strictly limited to the formal discharge of official duties." Gertz v. Robert Welch, Inc., 418 U.S. at 344. Rather, "[t]he public official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant." Garrison v. Louisiana, 379 U.S. 64, 77 (1964). Given this expansive language, it is unlikely that there is any topic that lies outside of the protected sphere — though this conclusion is obviously subject to dispute. This result is even clearer regarding the two types of public figures. Since general public figures "occupy positions of such pervasive power and influence that they are deemed public figures for all purposes," Gertz v. Robert Welch, Inc., 418 U.S. at 345, by definition such individuals have no matters of "private concern." Finally, since contextual public figures are individuals who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved," *id.* at 345, they are defined by the public controversy in which they have become involved. Therefore, any communications relevant to that controversy is privileged and outside the area defined by the controversy, the individual remains a private figure. Thus, the public person/private concern classification appears to be an empty category.

The Court may have reached the same conclusion: in a recent review of the "two forces that may reshape the common-law landscape," it did not include the public/private category in its discussion. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1986).

concern, private person/public concern, and private person/private concern.

Public person/public concern: As originally enunciated in the *New York Times* decision, the First and Fourteenth Amendments precluded application of common-law defamation to public officials:

> The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[77]

This deliberate-or-reckless-falsity standard was subsequently extended to all "public persons."[78]

The standard requires "subjective awareness of probable falsity."[79] On occasion the requisite subjective awareness may be proved by external factors. For example, recklessness may be found when "allegations are so inherently improbable that only a reckless man would have put them into circulation," "where there are obvious reasons to doubt the veracity of the informant or the accuracy of [her] reports,"[80] or when the publisher fails to investigate when the veracity of the information has been challenged.[81] Nonetheless, the requirement of subjective awareness is a significant hurdle for plaintiffs: the simple failure to

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77. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). As the Court has acknowledged, the term "actual malice" was a poor choice because it is easily confused with traditional common-law requirements of spite or ill will. *E.g.*, Masson v. New Yorker Magazine, Inc., 111 S. Ct. 2419, 2429-30 (1991).

78. Curtis Publishing Co. v. Butts, 388 U.S. 130, 163 (1967) (Warren, C.J., concurring). *See* Gertz v. Robert Welch, Inc., 418 U.S. at 336 n.7.

79. Gertz v. Robert Welch, Inc., 418 U.S. at 334 n.6. "The standard is a subjective one — there must be sufficient evidence to permit the conclusion that the defendant actually had a 'high degree of awareness of . . . probable falsity.' " Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688 (1989) (quoting Garrison v. Louisiana, 379 U.S. at 74). That is, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

80. St. Amant v. Thompson, 390 U.S. at 732. *See also* Herbert v. Lando, 441 U.S. 153, 160 (1979) ("[P]roof of the necessary state of mind could be in the form of objective circumstances from which the ultimate fact could be inferred.").

81. Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. at 683-84; Curtis Publishing Co. v. Butts, 388 U.S. at 157-58 (plurality); *id.* at 169-70 (Warren, C.J., concurring); *id.* at 173 (Brennan, J., with White, J., dissenting).

investigate allegations is, in itself, insufficient even when a reasonable person would have done so.[82]

In addition to altering the substantive liability standard, the Court increased the quantum of proof required to establish that substantive standard: plaintiff must provide clear and convincing evidence that the defendant violated the deliberate-or-reckless-falsity standard.[83]

Thus, to recover damages a public person must prove by clear and convincing evidence that the defendant was subjectively aware that the communication was probably false. If plaintiff is able to meet this substantial burden, she may obtain actual, presumed, and punitive damages.

Private person/public concern: In *Gertz*, the Court concluded that the balance struck in the *New York Times* decision between the state interest in compensating individuals for harm inflicted by defamatory falsehoods and the constitutional value of uninhibited debate was inappropriate when the individual was a private rather than a public person. Instead of extending the deliberate-or-reckless-falsity standard to private persons, the Court held, "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood."[84]

The negligence-minimum state-choice standard applies, however, only to "compensation for actual injury."[85] While states may permit recovery of presumed or punitive damages, they may do so only when liability is based on the more stringent deliberate-or-reckless-falsity standard.[86] While the Court declined to define "actual injury," it noted that it "is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."[87]

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82. *See, e.g.*, St. Amant v. Thompson, 390 U.S. at 732; Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 84-85 (1967) (per curiam).

83. New York Times Co. v. Sullivan, 376 U.S. 254, 285-86 (1964). *See also* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 773 (1986); Bose Corp. v. Consumers Union, Inc., 466 U.S. 500, 511 (1980); Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974).

84. Gertz v. Robert Welch, Inc., 418 U.S at 347. This rule applies at least "where . . . the substance of the defamatory statement 'makes substantial danger to reputation apparent.' " *Id.* at 348. The Court did not address the quantum of proof applicable to this standard. The logic of the decision, however, suggests that it also is a question of state law.

85. *Id.* at 349.

86. *Id.*

87. *Id.* at 350.

Private person/private concern: Until the *Greenmoss* reinterpretation of *Gertz*, it was generally assumed that the negligence-minimum state-choice standard applied to all private-person defamation actions. Since the Court in *Greenmoss* decided only that presumed and punitive damages could be awarded on a showing of less than deliberate-or-reckless falsity, the applicable liability standard remains an open question.[88] The holding — as well as the opinion's underlying philosophy — suggests that the states are free to apply the common law's strict liability standards. Nonetheless, a subsequent statement hedges on the issue: "When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet*, the constitutional requirements do not necessarily force any changes in at least some of the features of the common-law landscape."[89]

TRUTH/FALSITY: Issues of truth and falsity have a long history in defamation. Two different issues have developed in the context of the constitutional privilege: the burden of persuasion and the factual vs. non-factual dichotomy.

Burden of Persuasion: At the common law, truth was a defense. As the Court recognized in the *New York Times* decision, a rule requiring the speaker to guarantee the truth of the statements leads to self-censorship because of the difficulty or cost of proving truth.[90]

Public persons: In *New York Times*, the Court held that a public official could recover damages only if she could prove that the defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not."[91] Thus, prior to *Hepps*, it was clear that public persons were required to prove "a false publication attended by some degree of culpability on the part of the publisher."[92] The decision in *Hepps*, however, confused the question by introducing a media/non-media dichotomy.[93] It remains uncertain if the dichotomy is applicable to the public-person category of plaintiffs.

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88. "In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages — even absent a showing of [deliberate or reckless falsity]." Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985).

89. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1980). The oracle at Delphi could not have done better.

90. New York Times Co. v. Sullivan, 376 U.S. 254, 278-79 (1964).

91. *Id.* at 279-80.

92. Herbert v. Lando, 441 U.S. 153, 176 (1979). *See also* Garrison v. Louisiana, 379 U.S. 64, 74 (1964) (plaintiff required to prove "that the utterance was false").

93. The addition of the caveat on media defendants runs counter to the majority in *Greenmoss*. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. at 773 (White, J., concurring); *id.* at 784 (Brennan, J., with Marshall, Blackmun, & Stevens, JJ.,

Private person/public concern: This category was involved in *Hepps*. The Court decided that a private person defamed by a communication on a matter of public concern is required to prove that the communication was false — at least "when a plaintiff seeks damages against a media defendant."[94]

Private person/private concern: The Court has offered no guidance on the applicability of the Constitution to this plaintiff/speech category.

Factual vs. non-factual statements: The original source of the constitutional protection for non-factual statements is a passage in *Gertz*:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas. But there is no constitutional value in false statements of fact.[95]

This passage created the impression that opinion was constitutionally privileged and prompted an extended debate on the distinction between opinion and fact.[96] In *Milkovich v. Lorain Journal Co.*,[97] however, the Court refused to create a separate constitutional privilege for opinion. A privilege for opinion would ignore "the fact that expressions of 'opinion' may often imply an assertion of objective fact."[98] Furthermore, such a privilege is unnecessary because "the '"breathing space"' which '"freedoms of expression require in order to survive . . . ,"' is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between 'opinion' and fact."[99] While the Court rejected the terminology of the prior law, its holding — that

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dissenting). *See also* First National Bank v. Bellotti, 435 U.S. 765, 777 (1978) (the "inherent worth of the speech . . . does not depend upon the identity of its source").

94. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986).

95. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974).

96. *See* most notably Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985). The impression that the passage was intended to protect opinion was reinforced by a handful of decisions in which the Court either cited the *Gertz* language with approval, *e.g.*, Bose Corp. v. Consumers Union, 466 U.S. 485, 503-04 (1984), or held that opinion-type communications were protected; *e.g.*, Hustler Magazine v. Falwell, 485 U.S. 46 (1988); Old Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974); Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970).

97. 110 S. Ct. 2695 (1990).

98. *Id.* at 2705.

99. 110 S. Ct. at 2706 (quoting Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 772 (1986), quoting New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964)).

a separate privilege is unnecessary because "opinion" is appropriately protected under other doctrines when it is "non-factual" — actually endorsed the essential elements of that law.[100]

The Court based its conclusion on the argument that there are two distinguishable types of non-factual statements that are entitled to constitutional protection. The first type of protected opinion is "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation."[101] Such statements "will receive full constitutional protection" under the requirement "that a statement on matters of public concern must be provable as false before there can be liability under state defamation law."[102] The second type of opinion, "imaginative expression" and "rhetorical hyperbole," is protected when the statements "cannot 'reasonably [be] interpreted as stating actual facts' about an individual."[103]

Thus, communications not provably false, including statements of imaginative expression, hyperbole, and caricature, are immune from liability under the First and Fourteenth Amendments. The terminology may have changed but the substance of the law did not.[104]

JUDGE/JURY ROLES: Finally, the constitutionalization of defamation has affected the relationship between judge and jury. As is often the case, however, the Supreme Court has precedent that supports both sides of any debate on the proper role of an appellate court reviewing a summary judgment on the issue of deliberate-or-reckless-falsity. On the one hand, the Court has repeatedly undertaken "an independent examination of the whole record" to determine that the "judgment does not constitute a forbidden intrusion on the field of free expression"[105] and has emphasized the importance of independent judicial re-

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100. The two privileges are not coextensive. Under the *Gertz* rationale, *all* opinion is protected. Under *Milkovich*, only two categories of nonfactual statements are protected. Thus, opinions about private individuals on matters not of public concern might be protected under *Gertz* but not under *Milkovich*. The distinction, however, may ultimately be empty given common-law doctrines protecting expressions of opinion.

101. Milkovich v. Lorain Journal Co., 110 S. Ct. at 2706.

102. *Id.*

103. *Id.* (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988)).

104. The Court's most recent defamation decision also relies upon the burden of proving falsity to dispose of doctrinal questions. In *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419 (1991), the Court held that article containing material within quotation marks that was not precisely a quotation could be defamatory if the sting of the "quotation" was defamatory.

105. New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964). *See, e.g.*, Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970); St. Amant v. Thompson, 390 U.S. 727 (1968); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967) (per curiam); Curtis Publishing Co. v. Butts, 388 U.S. 130, 156 (1967).

view and need to evaluate summary judgment motions in light of the quantum of proof required by the substantive standard.[106] On the other hand, the Court also has cautioned against too-ready granting of summary judgments: "[c]onsidering the nuances of the issues raised," the proof of the deliberate-or-reckless-falsity standard "does not readily lend itself to summary disposition" since it "calls a defendant's state of mind into question."[107]

The constitutional privileges thus have significantly — albeit uncertainly — altered the common law of defamation. Despite the lingering uncertainty, however, it is possible to set out a prima facie case for at least two of the three plaintiff/speech categories.

When the plaintiff is a public person and the communication is on a matter of public concern, plaintiff may recover actual, presumed, and punitive damages if she proves by clear and convincing evidence that (1) a false, (2) factual, and (3) defamatory communication (4) "of and concerning" her (5) was published by the defendant (6) who knew that the communication was untrue or published it with reckless disregard for its truth or falsity.[108]

When the plaintiff is a private person and the communication is on a matter of public concern, she may recover actual damages if she proves that (1) a false, (2) factual, and (3) defamatory communication (4) "of and concerning" her (5) was published by the defendant (6) who was at least negligent in determining the truth of the communication — the precise degree of fault being a question of state law. If the plaintiff seeks presumed and punitive damages, she is required to establish by clear and convincing evidence that the defendant acted with deliberate or reckless falsity — the degree of culpability associated with the public person status.

Finally, the Court has provided only limited guidance on the standards that are applicable when the plaintiff is a private person and the communication is on a matter of purely private concern. In *Greenmoss*,

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106. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1985); Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 511 (1984). The Court has justified heightened review by pointing to the special nature of First Amendment values: "Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of [deliberate or reckless falsity]." Bose Corp. v. Consumers Union, Inc., 466 U.S. at 511. The Court also has emphasized the need to evaluate summary judgment motions in light of the quantum of proof required by the substantive standard. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. at 254 (on a motion for summary judgment, "the judge must view the evidence presented through the prism of the substantive evidentiary burden").

107. Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979).

108. *Cf.* Herbert v. Lando, 441 U.S. 153, 199-200 (1979) (Stewart, J., dissenting).

the Court announced only that the states were free to require a plaintiff to prove less than deliberate or reckless falsity to obtain presumed and punitive damages. While the opinion's highly restrictive view of the First Amendment suggests that the states might have the power to use traditional common-law standards in this plaintiff/speech category, the Court retreated into delphic language. As a result, the prima facie case for this category is uncertain.

Against this background, it is finally possible to assess the Idaho Supreme Court's decision in *Wiemer*.

iii

The Idaho Supreme Court's most obvious shortcoming in *Wiemer v. Rankin* is its lack of direction: the court seems to have no understanding of how to decide a defamation case. The failure to set out a decisional structure leads the court to begin at the wrong point. As a result, the structure that does emerge from the opinion is disjointed.

As the previous section demonstrated, the threshold issues in any defamation action are the plaintiff-status and speech-content classifications. Any analysis of a defamation action should begin with a determination of these two issues because they determine the elements of the plaintiff's prima facie case — the liability standard, the quantum of proof required, and the types of damage available — as well as the defenses and privileges the defendant may assert. The court did decide these issues. It did so, however, not in the context of determining the prima facie case but rather in the process of determining which party bore the burden of persuasion on truth or falsity. The plaintiff-status and speech-content classifications do determine this question. By treating the allocation of the burden of persuasion as the primary issue, however, the court failed to recognize — or at least failed to do so explicitly — the more fundamental role played by the plaintiff-status and speech-content classifications.

This is more than a question of style, more than a preference for one format of judicial decisionmaking over another. By failing clearly to acknowledge that the status and content classifications determine the entire structure of the defamation action, the court failed both as decisionmaker and as teacher.

The court's failure to be explicit about the analytical scheme led — or at least contributed — to an incorrect decision. When, as in *Wiemer*, the plaintiff is a private person[109] and the communication is

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109. Mr. Wiemer was a private person because he was neither a public official (he was not employed by a government) nor a general public figure (he lacked the requisite celebrity status). He also does not fit within the contextual public figure category since,

on a matter of public concern,[110] plaintiff may recover actual damages if she proves that (1) a false, (2) factual, and (3) defamatory communication (4) "of and concerning" her (5) was published by the defendant (6) who was at least negligent in determining the truth of the communication — the precise degree of fault being a question of state law. If the plaintiff seeks presumed and punitive damages, she is required to prove by clear and convincing evidence that the defendant either knew that the communication was false or published it with reckless disregard for its truth or falsity.

In its opinion, the court did address most of these elements. The failure to set out an explicit decisional structure, however, necessitates a search through the opinion. That search reveals that the court did conclude that Mr. Wiemer was required to prove that the communication was false,[111] that the communication was defamatory,[112] that it was "of and concerning" Mr. Wiemer,[113] and that Mr. Rankin had published the article.[114]

The court also discussed the requirement that the communication be factual. It correctly recognized that "[a]n assertion that cannot be proved false cannot be held libelous."[115] Its application of this standard, however, is strangely skewed and misses the point. The court focuses on Mr. Rankin's deposition and on the information contained in

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as the court notes, "Even assuming that there may have been public controversy about Debbie's death and the failure to prosecute Irvin for homicide, there is no indication in the record here that Irvin thrust himself to the forefront to influence the resolution of the issues involved." Wiemer v. Rankin, 117 Idaho 566, 570, 790 P.2d 347, 351 (1990).

110. The matter clearly is one of public concern since "[t]he performance of a public official is at the heart of the subjects covered by the freedom of speech and the freedom of the press protections under the First Amendment." *Id.* at 570, 790 P.2d at 351.

111. Mr. Rankin's statements were matters of public concern and "[t]herefore, Irvin had the burden of proving that Rankin's statements about Debbie's death were false." *Id.* at 571, 790 P.2d at 352.

112. "A statement imputing that a person is guilty of a serious crime such as homicide is defamatory per se." *Id.* at 570, 790 P.2d at 351. While the United States Supreme Court has not specifically considered whether common-law "defamatory per se" classifications can be employed to establish that a communication is defamatory, the Court has given no indication that they are problematic.

113. "[W]e interpret the article as imputing not only that Irvin lied about Debbie's committing suicide, but also that he killed Debbie." *Id.* at 570, 790 P.2d at 351.

114. "In his answer Rankin admitted the publication of the article." *Id.* at 569, 790 P.2d at 350.

115. *Id.* at 571, 790 P.2d at 352 (quoting Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (1977)). *Wiemer* was decided before the Supreme Court's decision in *Milkovich* clarified the proper approach to the fact vs. non-fact dichotomy. As the quote from *Hotchner* demonstrates, however, the *Milkovich* decision altered terminology rather than substance. If the Idaho court had correctly applied *Hotchner*, it would have complied with *Milkovich*.

the police files. Since there was exculpatory as well as inculpatory evidence in the files, the court concluded that "there was a genuine issue of material fact *as to the falsity of Rankin's statement that the evidence was overwhelming.*"[116]

The artificiality of the court's analysis of the fact versus non-fact issue is revealed in this conclusion. The fact versus non-fact issue is not a question of the publisher's state of mind. The statement that the evidence is "overwhelming" is a statement of opinion; any attempt to demonstrate the truth or falsity of such statements quickly leads to absurdities and, as the court itself noted, it is a question of whether the defamatory statement is provably false since "[a]n assertion that cannot be proved false cannot be held libelous."[117] The thrust of Mr. Rankin's article — as the court elsewhere acknowledges — is that Mr. Wiemer murdered his wife and then lied to the police. This is the underlying factual assertion that must be evaluated as factual or non-factual.[118] The implication that someone committed murder and perjury are "provably false factual connotation[s]" and are not, therefore, constitutionally privileged as non-factual.[119]

More significantly, the court failed to address the question of the degree of fault required to recover damages for "actual harm."[120] When a defamation case involves a private person defamed by a communication on a matter of public concern, the liability standard varies with the type of damages sought. When the plaintiff seeks to recover damages for actual harm, the United States Supreme Court has imposed a negligence-minimum floor but has allowed each state to determine if

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116. *Id.* at 573, 790 P.2d at 354 (emphasis added).

117. *Id.* at 571, 790 P.2d at 352 (quoting Hotchner v. Castillo-Puche, 551 F.2d at 913).

118. For example, as the United States Supreme Court noted in *Milkovich*, the issue was whether the statements implied that Milkovich had perjured himself. This connotation, the Court concluded, "is sufficiently factual to be susceptible of being proved true or false" and therefore was actionable. 110 S. Ct. 2695, 2707 (1990). *Cf.* Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970) (statements that plaintiff's negotiating position was "blackmail" was rhetorical hyperbole and thus protected speech).

119. *See* Milkovich v. Lorain Journal Co., 110 S. Ct. at 2706.

120. The court defined "actual harm" as an amount to compensate plaintiff "for any injury he may have sustained to his general reputation and good name in his community" and an amount to compensate plaintiff "for any injury to [her] feelings, including personal mortification, humiliation, embarrassment, and loss of society of friends or relatives." IDAHO JURY INSTRUCTIONS No. 920, ¶¶ 2, 4; 117 Idaho at 574, 790 P.2d at 355. *Cf.* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) ("actual injury" is "not limited to out-of-pocket loss. Indeed, the more customary types of actual harm include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.").

more than negligence will be required; when the plaintiff seeks presumed and punitive damages, she is required to prove deliberate or reckless falsity.[121] Mr. Wiemer sought actual as well as presumed and punitive damages. The case, therefore, necessarily required the Idaho court to decide the liability standard required to recover actual damages.[122]

Although the court seemed to recognize the issue,[123] it failed to decide it. Despite the fact that *Wiemer* was remanded for trial on the actual-harm issue, the court did not determine what liability standard is applicable in Idaho and thus left the trial court without guidance on the issue.[124] This is the type of error that results from the failure to explicitly state a decisionmaking structure.

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121. Gertz v. Robert Welch, Inc., 418 U.S at 347. This rule applies at least where "the substance of the defamatory statement 'makes substantial danger to reputation apparent.' " *Id.* at 348. The accusation that a person committed murder is one that falls within the *Gertz* rule.

122. While the court did discuss the deliberate-or-reckless-disregard standard, its discussion of this issue is itself problematic. On the one hand, the majority was insufficiently sensitive to the possibility that Mr. Rankin, seeking ammunition for his attack on the prosecutor, approached Ms. Wiemer's death with a preconceived story line and thus willfully blinded himself to the contrary evidence. Such preconceptions have been treated as evidence of deliberate or reckless disregard in other defamation cases. In *Gertz*, for example, following remand the plaintiff won a substantial compensatory and punitive damage award. The verdict was affirmed because, as the court noted, the editor "conceived of a story line, solicited Stang, a writer with a known and unreasonable propensity to label person or organizations as Communist, to write the article; and after the article was submitted, made virtually no effort to check the validity of statements that were defamatory." Gertz v. Robert Welch, Inc., 680 F.2d 527, 539 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983). *See also* Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 683-84 (1989); Curtis Publishing Co. v. Butts, 388 U.S. 130, 169-70 (1967) (Warren, C.J., concurring).

Justice Bistline's dissent, on the other hand, makes too much of the fact that Mr. Walker rather than Mr. Wiemer was the target. This will be the case almost by definition in most private person/public concern defamation cases. It was, for example, the situation in *Gertz*, where the thrust of the defamatory article was an alleged communist conspiracy to destroy local police forces. The materials on Mr. Gertz occupied a small fraction of the article and he figured far less prominently in the "conspiracy" than several other individuals. *See* Alan Stang, *Frame-Up: Richard Nuccio and the War on Police*, AM. OPINION, Apr., 1969, at 1. The issue simply is not whether the communication "targeted" the defamed person.

123. Wiemer v. Rankin, 117 Idaho at 574, 790 P.2d at 355.

124. The court only states ambiguously that Mr. Wiemer "would be entitled to recover damages for any actual injury he may have sustained without proving actual malice on Rankin's part." *Id.* at 574, 790 P.2d at 355. This, of course, merely states the question. Since the Idaho common law imposed strict liability, *e.g.*, Pacific Packing Co. v. Bradstreet Co., 25 Idaho 696, 701, 139 P. 1007, 1012 (1914), the court cannot simply fall back on the prior law. Furthermore, a state court ought not simply reassert the com-

The court thus failed in its responsibilities as decisionmaker. The most basic element of the decisionmaking role is the duty to decide those questions necessary to resolve the dispute. The court did not do so in *Wiemer* because it did not decide what liability standard is applicable to Mr. Wiemer's claim for damages from actual harm — a question that the district court will necessarily face on remand in this particular case.

The court's failure as decisionmaker is arguably traceable to its failure as teacher. As teacher, an appellate court has responsibility to set out methods of making decisions, either by example or by explicit statement. The court must consider not only the litigants but also the general principles that will condition the conduct of persons not party to the suit. In *Wiemer*, the court did not provide the necessary guidance; it avoided providing the lower courts with an analytical structure for deciding defamation cases. The decision offers only sketchy guidance on the proper methodology for deciding defamation actions, on the elements of plaintiff's prima facie case, on the burdens of proof. The court simply decided a variety of issues *seriatim*. Had the court acknowledged that the plaintiff-status and speech-content classifications determine the entire prima facie case, it logically would have been forced to confront that prima facie case and thus would have been likely to recognize that the liability standard was an open issue. The failure to begin at the beginning caused the court to end before the ending.

The court must take its role as teacher seriously. Its decisions necessarily are models for lower courts and the court therefore has an obligation to define the proper decisionmaking method — be it a prima facie case, a three-part balancing test, or the like[125] — with sufficient clarity and breadth that the lower courts will have a decisionmaking structure to guide them in future cases.

The *Wiemer* decision fails to provide this structure.

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mon law as a "states-rights" reflex. Defamation law was anomalous before the Supreme Court constitutionalized it and too much has changed to avoid a thoughtful reexamination of the common-law's doctrines.

125. The court does provide some guidance for the resolution of future cases. In its analysis of the opinion issue, for example, it fashions a two-step test to determine when there is a sufficiently factual basis to treat the communication as one of fact rather than opinion. Wiemer v. Rankin, 117 Idaho at 571-72, 790 P.2d at 352-53.

	DEFINITIONS	LIABILITY STANDARD FOR DAMAGES						BURDEN OF PERSUASION ON TRUTH/FALSITY
		actual damages			presumed & punitive damages			
		liability standard	burden of persuasion	quantum of proof	liability standard	burden of persuasion	quantum of proof	
public person/ public concern	**"public person"**[1] includes: 1. **"public officials"** who are "those among the hierarchy of governmental employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs"[2] 2(a) **"general public figures"** are those who "occupy positions of such pervasive power and influence that they are deemed public figures for all purposes"[3] 2(b) **"contextual public figures"** are those who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved[4] **"public concern"**: the Court has offered no clear definition of "matters of public concern"[5]	deliberate -or-reckless falsity[7]	plaintiff[6]	clear and convincing evicence[8]	deliberate -or-reckless falsity[10]	plaintiff[9]	clear and convincing evidence[11]	plaintiff bears the burden of proving falsity[12]
public person/ private concern	this category may not exist: **public official:** since "anything which might touch on an official's fitness for office" is privileged,[13] it is unlikely that there is any topic that lies outside of the protected sphere; nonetheless, this is the one potential member of the category **general public figures** by definition can be no matters of "private concern" because individuals in this category are "deemed public figures for all purposes"[14] **contextual public figures** outside the area defined by the controversy, the individual remains a private figure[15]	the Court has provided no guidance on the applicability of the Constitution to this plaintiff/ speech category	?	?	?	?	?	?
private person/ public concern	**"private person"** is a residual category covering all non-public persons[16] **"public concern"**: the Court has offered no clear definition of "matters of public concern"[17]	negligence-minimum state choice[19]	plaintiff[18]	?	deliberate or reckless falsity[20]	plaintiff	clear and convincing evidence[21]	at least in actions with media defendants, plaintiff bears the burden of persuasion[22]
private person/ private concern	**"private person"** is a residual category covering all non-public persons[23] **"private concern"** is a residual category covering all matters not of "public concern"[24]	less than deliberate or reckless falsity[25]	?	?	less than deliberate or reckless falsity[26]	?	?	?

1. "[A] public person [includes t]hose who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office." Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974).

2. Rosenblatt v. Baer, 383 U.S. 75, 85 (1966). Candidates for such offices fall within the classification. Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971); Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971).

3. Gertz. v. Robert Welch, Inc., 418 U.S. at 345.

4. Gertz. v. Robert Welch, Inc., 418 U.S. at 345.

5. See the discussion of speech content classifications in the text.

6. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

7. New York Times Co. v. Sullivan, 376 U.S. at 279-80. The standard requires proof of "subjective awareness of probable falsity." Gertz v. Robert Welch, Inc., 418 U.S. at 334 n.6. "The standard is a subjective one—there must be sufficient evidence to permit the conclusion that the defendant actually had a 'high degree of awareness of probable falsity.' " Harte-Hanks Communications, Inc. v. Connaughton, 109 S. Ct. 2678, 2696 (1989) (quoting Garrison v. Louisiana, 379 U.S. 64, 74 (1964)).

8. New York Times Co. v. Sullivan, 376 U.S. at 285-86.

9. New York Times Co. v. Sullivan, 376 U.S. at 289-90.

10. New York Times Co. v. Sullivan, 376 U.S. at 279-80. The standard requires proof of "subjective awareness of probable falsity." Gertz v. Robert Welch, Inc., 418 U.S. at 334 n.6. "The standard is a subjective one—there must be sufficient evidence to permit the conclusion that the defendant actually had a 'high degree of awareness of probable falsity.' " Harte-Hanks Communications, Inc. v. Connaughton, 109 S. Ct. 2678, 2696 (1989) (quoting Garrison v. Louisiana, 379 U.S. 64, 74 (1964)).

11. New York Times Co. v. Sullivan, 376 U.S. at 285-86.

12. Herbert v. Lando. 441 U.S. 153, 176 (1979); Garrison v. Louisiana, 379 U.S. 64, 74 (1964); New York Times v. Sullivan, 376 U.S. at 279-80. This presumes that Hepps's media/nonmedia distinction either will not be applied outside the private person categories or that it will be rejected entirely. See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986).

13. Garrison v. Louisiana, 379 U.S. 64, 77 (1964).

14. Gertz. v. Robert Welch, Inc., 418 U.S. at 345.

15. Gertz. v. Robert Welch, Inc., 418 U.S. at 345.

16. See the extended discussion in Gertz v. Robert Welch, Inc., 418 U.S. at 342-46.

17. See the discussion of speech content classifications in the text.

18. See Gertz. v. Robert Welch, Inc., 418 U.S. at 350.

19. Gertz. v. Robert Welch, Inc., 418 U.S. at 347. This standard is applicable at least where "the substance of the defamatory statement 'male substantial danger to reputation apparent.'" Id. at 348.

20. Gertz. v. Robert Welch, Inc., 418 U.S. at 349.

21. Gertz. v. Robert Welch, Inc., 418 U.S. at 348-50.

22. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. at 777.

23. See the extended discussion in Gertz v. Robert Welch, Inc., 418 U.S. at 342-46.

24. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758-59 (1985).

25. The Court has not addressed this question. Since, however, it held in Greenmoss that presumed and punitive damages were permissible on a showing of less than deliberate or reckless falsity, it unlikely that a greater showing would be required to recover damages for actual harm. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. at 761.

26. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. at 761.