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COMMENT

REPLY AND RETRACTION IN ACTIONS AGAINST THE PRESS FOR DEFAMATION: THE EFFECT OF *TORNILLO* AND *GERTZ*

I. INTRODUCTION

Prior to the Supreme Court's 1964 decision in *New York Times Co. v. Sullivan*,¹ the possibility of providing the remedies of reply and retraction as alternatives to the traditional damage action for libel resulting from press publication had been examined and advocated by numerous legal writers.² Since at that time there was believed to be no bar to an action for monetary redress for libellous statements by the press,³ the investigation of such remedies was generally grounded on the belief that damages simply were not an adequate vindication of reputation⁴ or that the action for damages was both sordid and inconvenient for most individuals.⁵ With the announcement in *Times* and its progeny that in a large number of libel cases involving press publication a damage award cannot be constitutionally imposed,⁶ these theretofore "alternative"⁷ remedies took on a manifestly more important

1. 376 U.S. 254 (1964).

2. See Chafee, Possible New Remedies for Errors in the Press, 60 Harv. L. Rev. 1 (1946) [hereinafter cited as Chafee]; Donnelly, The Right of Reply: An Alternative to an Action for Libel, 34 Va. L. Rev. 867 (1948) [hereinafter cited as Donnelly]; Leflar, The Social Utility of the Criminal Law of Defamation, 34 Texas L. Rev. 984, 1026-27 (1956); Leflar, Legal Remedies for Defamation, 6 Ark. L. Rev. 423 (1952); Morris, Inadvertent Newspaper Libel and Retraction, 32 Ill. L. Rev. 36 (1937); Pedrick, Senator McCarthy and the Law of Libel: A Study of Two Campaign Speeches, 48 Nw. U.L. Rev. 135, 178-84 (1953); Riesman, Democracy and Defamation: Fair Game and Fair Comment I, 42 Colum. L. Rev. 1085, 1109-17 (1942); Riesman, Democracy and Defamation: Fair Game and Fair Comment II, 42 Colum. L. Rev. 1282, 1315-16 (1942); Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 940-43 (1956); cf. Kelley, Elections and the Mass Media, 27 Law & Contemp. Prob. 307, 324 (1962) (advocating right of reply for campaign candidates as a check on partisan favoritism in the press).

3. "Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals." *Near v. Minnesota*, 283 U.S. 697, 718-19 (1931). See also *Konigsberg v. State Bar*, 366 U.S. 36, 49-50 (1961); *Barr v. Matteo*, 360 U.S. 564 (1959); *Farmers Union v. WDAY, Inc.*, 360 U.S. 525 (1959); *Roth v. United States*, 354 U.S. 476, 483 (1957); *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *Pennekamp v. Florida*, 328 U.S. 331, 348-49 (1946); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). In *Schenectady Union Publishing Co. v. Sweeney*, 316 U.S. 642 (1942), *aff'g per curiam* 122 F.2d 288 (2d Cir. 1941), the Court was equally divided on the issue of constitutional limitations of the libel laws.

As the Court in *Times* stated, however, the dicta in these cases "implied no view as to what remedy might constitutionally be afforded to public officials." 376 U.S. at 268.

4. See, e.g., Leflar, The Social Utility of the Criminal Law of Defamation, 34 Texas L. Rev. 984, 1025 (1956).

5. See, e.g., Chafee 7; Donnelly 896.

6. *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964).

7. Of the authorities cited in note 2 *supra*, only Chafee investigates the remedies from the

character.⁸ Added to the reasons relied upon by the pre-*Times* advocates was the reality that absent these remedies numerous libellous statements would go completely without redress. Indeed, the rationale of the *Times* decision was believed by many actually to enhance and support arguments favoring establishment of reply and retraction.⁹

Two decisions of the Supreme Court late last term, *Gertz v. Robert Welch, Inc.*,¹⁰ and *Miami Herald Publishing Co. v. Tornillo*,¹¹ by elucidating (indeed perhaps altering) the rationale for the press privilege announced in *Times* and by dealing broadly with one of the particular remedies, have shed considerable light—and doubt—on the constitutionality of imposing reply or retraction in libel actions against the press. The purpose of this Comment is to assess the effect of these decisions relative to this issue.

II. THE ARGUMENTS FOR ALTERNATIVE REMEDIES SINCE

New York Times Co. v. Sullivan

In *Times*, the Supreme Court held that a public official could not bring an action in damages for libellous press statements unless it could be shown "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."¹²

Although the Court dealt only with monetary redress,¹³ its reasoning established a proscription applicable to other remedies as well.¹⁴ The Court reaffirmed the view that the first amendment envisions an open forum of ideas from which accurate, informed conclusions can be gleaned.¹⁵ The first

point of view of a complete replacement of the action for damages. Chafee 6-7. His eventual recommendation, however, is to supplement the damage remedy with an optional retraction or, if defendant chooses not to retract, a right of reply. *Id.* at 34-35.

8. See Note, Vindication of the Reputation of a Public Official, 80 Harv. L. Rev. 1730, 1756 (1967) [hereinafter cited as Vindication].

9. See Berney, Libel and the First Amendment—A New Constitutional Privilege, 51 Va. L. Rev. 1, 47 (1965); Pedrick, Freedom of the Press and the Law of Libel: The Modern Revised Translation, 49 Cornell L.Q. 581, 605-08 (1964) [hereinafter cited as Freedom of the Press]; Pierce, The Anatomy of an Historic Decision: *New York Times Co. v. Sullivan*, 43 N.C.L. Rev. 315, 346-48 (1965) [hereinafter cited as Pierce].

10. 94 S. Ct. 2997 (1974).

11. 94 S. Ct. 2831 (1974).

12. 376 U.S. at 279-80. Actual malice and, more particularly, reckless disregard are difficult to prove. In the *Times* case, the newspaper's failure to check the accuracy of the story against stories in its own files was held not to establish reckless disregard. *Id.* at 287-88. In *St. Amant v. Thompson*, 390 U.S. 727 (1968), the Court, in reference to reckless disregard, stated: "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* at 731. See also *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967) (actual malice is higher standard than traditional ill-will).

13. "We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct." 376 U.S. at 283.

14. See Vindication 1734-35.

15. The marketplace analogy is from *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market . . ."). More recently, in *Red Lion Broadcasting Co. v. FCC*, 395

amendment, said the Court, " 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people' "16 and " 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.' "17 Recognizing that the first amendment reflects a "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"18 the Court feared that allowing a public official to recover large sums in a libel suit would result in press self-censorship in the form of refusal or reluctance to publish articles on important issues for fear of the substantial liability that might be incurred.19

Most commentators accepted *Times* as the result of a balance between an individual's right to reputation and a free press, particularly in its historic function as a conveyor of information to the public.20 As to the rationale itself, suggestions that it was prompted by the proximity of the state libel law to seditious libel,21 and by the absolute privilege given most public officials in suits against them for defamatory statements made in the course of acts within the scope of their duties,22 were undercut somewhat by extension of the *Times* privilege to publications involving "public figures" in *Curtis Publishing Co. v. Butts*.23 References had also been made to the fact that public officials and public figures: (1) have voluntarily cast themselves into the arena of public affairs and must accept certain necessary consequences of that involvement;24 and (2) usually enjoy sufficient access to the channels of communication to afford them the opportunity to rebut false statements.25

U.S. 367 (1969), Mr. Justice White stated: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . ." *Id.* at 390.

16. 376 U.S. at 269, quoting *Roth v. United States*, 354 U.S. 476, 484 (1957).

17. 376 U.S. at 270, quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

18. 376 U.S. at 270.

19. *Id.* at 278-79, 282. This fear of self-censorship was not new to the Court. See *Smith v. California*, 361 U.S. 147, 153 (1959) (absence of scienter in obscenity ordinance would result in bookseller's tending to restrict books he sells); *Barr v. Matteo*, 360 U.S. 564, 571 (1959) (threat of damage suit for defamation would dampen public official's ardor for performance of his duties). See generally Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 *Sup. Ct. Rev.* 191, 209-12.

20. See, e.g., *Freedom of the Press* 582; *Pierce* 341, 345.

21. See *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 153 (1967); Kalven, *supra* note 19, at 204-08.

22. See *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 153 (1967). The precedent relied upon was *Barr v. Matteo*, 360 U.S. 564 (1959). Although *Times* had been seen as a reaction to the privilege recognized for federal officials in *Barr*, *Sullivan* was a city official.

23. 388 U.S. 130 (1967).

24. See, e.g., *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 70-71 (1971) (Harlan, J., dissenting); *Time, Inc. v. Hill*, 385 U.S. 374, 408 (1967) (Harlan, J., concurring and dissenting); *New York Times Co. v. Sullivan*, 376 U.S. 254, 299 (1964) (Goldberg, J., concurring). See also Noel, *Defamation of Public Officers and Candidates*, 49 *Colum. L. Rev.* 875, 876 (1949), for a pre-*Times* expression of this factor.

25. See, e.g., *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 70 (1971) (Harlan, J., dissent-

However, the subsequent holding of *Rosenbloom v. Metromedia, Inc.*,²⁶ effectively placed the *Times* rationale on a different footing by focusing primarily upon the interest of keeping the public informed on important issues.²⁷ Confronted with this expanded reasoning for the *Times* privilege, appellant's cogent arguments attempting to distinguish him, a private individual, from public officials and public figures with respect to his lack of access to the media for rebuttal, and the involuntariness of his being cast in the limelight, were to no avail.²⁸

After *Rosenbloom*, then, proponents of the alternative remedies of reply and retraction were faced with an underlying theory that thoroughly subordinated reputational interests to an interest in the role of a free press as furthering the public's right to know. Accepting *Rosenbloom's* argument that private individuals have only minimal access to the media, alternative remedies designed to make vindication more realistically obtainable became more important. Mr. Justice Brennan, in fact, appeared to invite adoption of right-to-reply and retraction statutes.²⁹ More importantly, the prevailing rationale was easily reconcilable with and indeed supportive of these new remedies.³⁰

ing). See also *Rosenblatt v. Baer*, 383 U.S. 75, 91-93 (1966) (Stewart, J., concurring) (right of privacy).

26. 403 U.S. 29, 52 (1971) (plurality opinion).

27. *Id.* at 43.

28. *Id.* at 45. Commentators had anticipated such a holding. See, e.g., Freedom of the Press 589, 592; Note, The Scope of First Amendment Protection for Good-Faith Defamatory Error, 75 Yale L.J. 642, 648 (1966). At least one writer feared such a result. Nimmer, The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy, 56 Cal. L. Rev. 935, 955 (1968).

29. In rejecting plaintiff's argument that his lack of access to the media compelled a departure from the *Times* rule, Justice Brennan stated: "Furthermore, in First Amendment terms, the cure seems far worse than the disease. If the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of insuring their ability to respond, rather than in stifling public discussion of matters of public concern." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 47 (1971) (plurality opinion). In a footnote to this statement, it was pointed out that "[s]ome States have adopted retraction statutes or right-of-reply statutes." *Id.* at 47 n.15. But see *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 168 n.18 (1973) (Douglas, J., concurring); Kalven, The Supreme Court, 1970 Term, 85 Harv. L. Rev. 3, 227 (1971).

30. See note 9 *supra* and accompanying text. One writer, however, has expressed the belief that "enhanced marketplace" principles are totally misplaced in defamation: "Indeed the whole discussion of competition of ideas and counterargument seems to me misplaced in this context. These are, to be sure, key principles when we are talking about doctrines and ideas. Here, with Mr. Justice Brandeis, we look to counterargument as the correct remedy for the mischief of false and pernicious ideas and doctrine. And we grant an absolute privilege to false doctrine. All this is well understood, widely shared, and invaluable.

"But these notions sound only the faintest echo when we turn to false statements of fact about individuals. For centuries it has been the experience of Anglo-American law that the truth never catches up with the lie, and it is because it does not that there has been a law of defamation. I simply do not see how the constitutional protection in this area can be rested on the assurance that counterargument will take the sting out of the falsehoods the law is thereby permitting."

The arguments for availability of these remedies ran generally along the following lines. The Court has stressed the overriding interest of the press's role in informing the populace on matters of importance. Remedies such as reply and retraction, which *add* information to the marketplace, are manifestly more consonant with this interest than a damage award.³¹ Since the Court apparently still recognized an important interest in reputation,³² remedies designed to repair a damaged reputation while increasing the flow of information to the public would be ideal.³³ Since the Court has left vindication for the marketplace, why not insure that more "right conclusions" are made? Furthermore, the cost of providing a right to reply or retraction would probably be substantially less than the cost of monetary damages.³⁴ Thus, the fear of self-censorship is less acute. Although none of the commentators confronted the first amendment problem raised by compulsory publication, it might also have been argued that the resultant gains of reputation vindication and marketplace enhancement would overshadow this concern.

III. *Gertz v. Robert Welch, Inc.*³⁵

Petitioner in *Gertz* was a reputable attorney retained to represent the family of a deceased youth in civil litigation against the policeman, Nuccio, who was convicted of second-degree murder in connection with the youth's death.³⁶ Respondent, publisher of *American Opinion*, an outlet for right-wing extremist views, commissioned and published an article on the policeman's trial for murder, which generally purported to demonstrate that the prosecution was part of a communist campaign against law enforcement agencies. Although only remotely connected with the murder trial, petitioner was charged in the article with having contrived the policeman's "frame-up," with being a "Communist-fronter," and with having a police file that took "a big, Irish cop to lift."³⁷ In fact, petitioner had no criminal record and there was no evidence that he was connected with the Communist Party. Petitioner's picture was included in the article over the caption "Elmer Gertz of the Red Guild harasses Nuccio."³⁸

In the resultant diversity suit for defamation, petitioner was awarded a verdict of \$50,000 by a jury which had been given the case only after substantial argument before the court on whether the *Times* privilege applied and whether petitioner was a "public figure" under *Butts*.³⁹ Upon reflection, however, the district court judge concluded that the *Times* privilege should

Kalven, *The Reasonable Man and the First Amendment*: Hill, Butts, and Walker, 1967 Sup. Ct. Rev. 267, 300 (footnotes omitted).

31. See, e.g., *Freedom of the Press* 605.

32. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 48 (1971) (plurality opinion).

33. E.g., *Freedom of the Press* 605; *Pierce* 346.

34. *Vindication* 1742.

35. 94 S. Ct. 2997 (1974).

36. *Id.* at 3000.

37. *Id.*

38. *Id.* at 3001.

39. *Id.* at 3001-02.

apply regardless of petitioner's status since the article concerned a public issue, thus anticipating the holding in *Rosenbloom* a year later. Since petitioner did not meet the "actual malice" standard, judgment *n.o.v.* was entered for respondent.⁴⁰ The court of appeals, with the benefit of the Supreme Court's intervening decision in *Rosenbloom*, affirmed,⁴¹ in part relying upon both the applicability of *Times* and the lack of actual malice.⁴²

In a five to four decision, the Supreme Court reversed,⁴³ the majority choosing *Gertz* as a vehicle for rejecting the plurality opinion in *Rosenbloom* and announcing a new rule for private individuals. On a broader scale, the majority opinion altered what was believed to be the underlying rationale—especially after *Rosenbloom*—for the press privilege that has evolved since the *New York Times* case.

Writing for the majority, Justice Powell acknowledged that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters,"⁴⁴ but expressly pointed out that "[t]he need to avoid self-censorship by the news media is . . . not the only societal value at issue";⁴⁵ compensating injury to the reputation of individuals is also a "legitimate state interest."⁴⁶ Accepting the *Times* and *Butts* decisions as correct, the Court stated:

[W]e do not find their holdings justified solely by reference to the interest of the press and broadcast media in immunity from liability. Rather, we believe that the *New York Times* rule states an accommodation between this concern and the limited state interest present in the context of libel actions brought by public persons. . . . [W]e conclude that the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them.⁴⁷

Stating that it had "no difficulty in distinguishing among defamation plaintiffs,"⁴⁸ the Court did so distinguish on precisely the grounds which, though often advanced as justification for the *Times* rule, had been expressly

40. 322 F. Supp. 997 (N.D. Ill. 1970), *aff'd*, 471 F.2d 801 (7th Cir. 1972), *rev'd*, 94 S. Ct. 2997 (1974).

41. 471 F.2d 801 (7th Cir. 1972), *rev'd*, 94 S. Ct. 2997 (1974).

42. *Id.* at 805-07. In finding no malice, the circuit court noted that the managing editor knew nothing about petitioner except what he learned from the article. *Id.* at 807. Appellant in *Rosenbloom* had argued that it was precisely his previous anonymity that made proof of actual knowledge of falsity almost impossible and hence compelled a departure from *Times* in his case. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 n.18 (1971) (plurality opinion).

43. 94 S. Ct. at 3003.

44. *Id.* at 3007.

45. *Id.*

46. *Id.* at 3008.

47. *Id.* at 3008-09.

48. *Id.* at 3009. The Court acknowledged that decisions on a case-by-case basis might best serve the competing interests. But "ad hoc resolution of the competing interests . . . is not feasible" since it "would lead to unpredictable results and uncertain expectations." *Id.* (emphasis deleted). Ad hoc balancing in first amendment cases has been criticized for a number of reasons. See, e.g., Emerson, *Toward a General Theory of the First Amendment*, 72 *Yale L.J.* 877, 912-14 (1963).

rejected by the *Rosenbloom* plurality and implicitly were of no significance in light of the *Rosenbloom* holding.⁴⁹ Viewing "self-help" as the "first remedy of any victim of defamation,"⁵⁰ the *Gertz* majority stated:

Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.⁵¹

More importantly, according to the Court:

An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. . . .

Those classed as public figures stand in a similar position. . . . For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. . . . [and] have thrust themselves to the forefront of particular public controversies [T]hey invite attention and comment.

. . . [T]he communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehoods concerning them. No such assumption is justified with respect to a private individual.⁵²

The Court concluded that "the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual"⁵³ and held that: "[S]o 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 injurious to a private individual."⁵⁴

The Court added, however, that the competing state interest found sufficient to warrant the inapplicability of *Times* "extends no further than compensation for actual injury."⁵⁵

[W]e hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.⁵⁶

Since the district court had withdrawn all issues except the matter of damages from the jury's consideration, the Supreme Court remanded for a new trial.⁵⁷

49. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 46-47 (1971) (plurality opinion).

50. 94 S. Ct. at 3009.

51. *Id.*

52. *Id.* at 3009-10.

53. *Id.* at 3010.

54. *Id.*

55. *Id.* at 3011.

56. *Id.*

57. *Id.* at 3013. Admitting that were his vote not needed for a majority, he would adhere to the views expressed by the *Rosenbloom* plurality, in which he had joined, Justice Blackmun concurred in *Gertz* and added: "I feel that it is of profound importance for the Court to come to rest in the defamation area and to have a clearly defined majority position that eliminates the unsureness engendered by *Rosenbloom's* diversity." *Id.* at 3014 (Blackmun, J., concurring).

IV. *Miami Herald Publishing Co. v. Tornillo*⁵⁸

Appellee Tornillo, a candidate for the Florida House of Representatives, was criticized by the *Miami Herald* in two 1972 pre-election editorials.⁵⁹ After the *Herald* refused to print his replies to the editorials, Tornillo sued for declaratory and injunctive relief under a 1913 Florida statute⁶⁰ giving a criticized candidate the right to demand that such replies be printed free of cost. Non-compliance with the statute was a first-degree misdemeanor. The Florida circuit court held the statute an unconstitutional infringement of freedom of the press.⁶¹ The Florida Supreme Court reversed,⁶² finding that

The four dissenters took widely divergent views. The Chief Justice preferred not to alter the "orderly development" of the law in this area. He would reinstate the jury verdict, however, since he felt that the "public policy which underlies . . . [the right to counsel and the right of the advocate not to be invidiously identified with his client] would be gravely jeopardized if every lawyer who takes an 'unpopular' case . . . would automatically become fair game for irresponsible reporters and editors . . ." Id. at 3014-15 (Burger, C.J., dissenting). Justice Douglas re-emphasized his often-expressed views that the first and fourteenth amendments prohibit any penalty on the press for defamatory statements. Id. at 3015-17 (Douglas, J., dissenting). Justice Brennan adhered to his plurality opinion in *Rosenbloom*. Id. at 3017-22 (Brennan, J., dissenting). Justice White wrote a vigorous dissent, viewing the decision as "an ill-considered exercise of the power entrusted to this Court, particularly when the Court has not had the benefit of briefs and argument . . .," and as a significant and detrimental alteration of the law of defamation in this area. Id. at 3022 (White, J., dissenting). His concurring opinion in *Tornillo* asserts that the Gertz decision "trivializes and denigrates the interest in reputation by removing virtually all the protection the law has always afforded." *Miami Herald Publishing Co. v. Tornillo*, 94 S. Ct. 2831, 2842 (1974) (White, J., concurring). While the majority in *Gertz* responded that "one might have viewed today's decision . . . as a more generous accommodation of the . . . interest in [reputation] than the law presently affords," 94 S. Ct. at 3010-11 n.10, it seems clear that Justice White was assessing the changes wrought by *Gertz* in light of the pre-*Rosenbloom* law.

58. 94 S. Ct. 2831 (1974).

59. Id. at 2832-33 & n.1. Both centered on appellee's qualifications for office in view of his having been Executive Director of the Classroom Teachers Association (CTA), a teachers' collective bargaining agent, which appellee had led in a one-month strike in 1968. One editorial characterized the strike as "an illegal act against the public interest and clearly prohibited by the statutes," id. at 2832 n.1, while another stated that the strike would not be an issue "were it not a part of a continuation of disregard of any and all laws the CTA might find aggravating." Id. at 2833 n.1. Voters were told that "it would be inexcusable . . . if they sent Pat Tornillo to Tallahassee . . ." Id. at 2832-33 n.1.

60. Fla. Stat. Ann. § 104.38 (1973) providing in pertinent part: "If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree . . ."

61. 38 Fla. Supp. 80, 82 (Dade County Cir. Ct. 1972), rev'd, 287 So. 2d 78 (Fla. 1973), rev'd, 94 S. Ct. 2831 (1974).

62. 287 So. 2d 78, 87 (Fla. 1973), rev'd, 94 S. Ct. 2831 (1974).

the statute assures, rather than abridges, the right of expression guaranteed by the first amendment.⁶³

The United States Supreme Court unanimously reversed,⁶⁴ holding that the statute violated the first amendment guarantee of a free press.⁶⁵ After extensively reviewing the various arguments of "access to the press" proponents,⁶⁶ the Court concluded that the weight of constitutional authority was opposed to any compulsion to print and that "press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."⁶⁷ In terms reminiscent of the "self-censorship" logic of *Times*,⁶⁸ the Court added that the penalty exacted by the statute "in terms of the cost in printing and composing time and materials and in taking up space"⁶⁹ cannot be disregarded:

[I]t is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have *available*.

Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the . . . statute, editors might well conclude that the safe course is to avoid controversy⁷⁰

But the Court was quick to emphasize the broader ground for its holding:

Even if a newspaper would face no additional costs . . . and would not be forced to forego publication of news or opinion . . . the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors.⁷¹

63. *Id.*

64. 94 S. Ct. 2831, 2840 (1974).

65. *Id.* at 2839.

66. *Id.* at 2836-37.

67. *Id.* at 2838-39.

68. See note 19 *supra* and accompanying text.

69. 94 S. Ct. at 2839.

70. *Id.* (footnote omitted).

71. *Id.* A similar result was reached in *Opinion of the Justices to the Senate, — Mass. —*, 298 N.E.2d 829 (1973) (advisory opinion) where the court held in the affirmative that a proposed bill regulating the publication of political advertisements would violate the first amendment (House No. 3460 entitled "An Act further regulating the publication of political advertisements by newspapers or other periodicals"). *Id.* at —, 298 N.E.2d at 835. The bill proposed that a newspaper publisher who publishes a paid political advertisement concerning a candidate for public office must publish a paid advertisement concerning any other candidate for the same public office. Similarly, if an advertisement is published tending to aid, injure or defeat any position with respect to a question submitted to the voters, the publisher must print any paid advertisement on any other position with respect to the same question. *Id.* at —, 298 N.E.2d at 831. While conceding the laudatory purpose of the bill, the court found it a "paradox" since instead of insuring a more equitable dissemination of information, it could produce "the chilling effect of discouraging newspapers . . . from accepting any political advertisements." *Id.* at —, 298 N.E.2d at 833-34. "Indeed," said the court, "no set of circumstances may exist which would support a legislative mandate that a newspaper or other publication of general circulation must publish a political advertisement." *Id.* at —, 298 N.E.2d at 835.

V. THE EFFECT OF *Gertz* AND *Tornillo* ON REPLY AND RETRACTION
TO DEFAMATORY PUBLICATIONS

Having based its decision on important distinctions between private and public individuals,⁷² the *Gertz* Court appears to have undermined a number of arguments in favor of the reply and retraction remedies. By allowing private individuals to recover actual damages, the majority in *Gertz* substantially expanded the right of private individuals to vindication, thereby removing the compelling need for an alternative remedy brought about by the *Rosenbloom* plurality.⁷³

The Court's acceptance of one distinguishing characteristic between "public" and "private" individuals, *viz.*, the ability of public people to gain access to the media for rebuttal,⁷⁴ defeats any argument for a judicially or statutorily imposed access in the form of reply or retraction where public officials or public figures subject to the *Times* rule are involved. Society's interest in the free flow of information remains important (and consistent with the aims of reply and retraction), but *Gertz* highlights the fact that this interest is not necessarily paramount when defamatory publication is involved.⁷⁵ The state's interest in protecting reputations of private individuals was deemed sufficiently strong to warrant promoting it above the interest in a free press.⁷⁶ Thus the constitutionality of reply and retraction might well have to depend more significantly upon their reputation-vindicating effect.

Tornillo is of interest here concerning the marketplace enhancement effect of reply and retraction, which has so often been advanced as a point in their favor. Chief Justice Burger expressly acknowledged that a "responsible press is an undoubtedly desirable goal."⁷⁷ The abstract proposition that the widest possible dissemination of opinions, information, and beliefs is to everyone's advantage probably adequately reflects the view of each of the Justices. Yet *Tornillo* points out that press responsibility neither is mandated by the Constitution nor can it be legislated.⁷⁸ According to the Court:

It has yet to be demonstrated how governmental regulation of [the choice of material to go into a newspaper] can be exercised consistent with First Amendment guarantees of a free press⁷⁹

72. 94 S. Ct. at 3009.

73. See text accompanying note 29 *supra*. The *Rosenbloom* plurality was being followed extensively by the states and the federal judiciary. 94 S. Ct. at 3025-26 n.10 (White, J., dissenting).

74. 94 S. Ct. at 3009. The *Gertz* majority proffered this distinction without questioning its truth—yet its truth is questionable. Do public persons, especially public figures, really have greater access to the media? Newspapers may decline to print rebuttals; or they may print them surrounded by repetitions and refinements of the disputed statements. Particularly where there is only one newspaper in an area, the opportunity for meaningful access may be more fanciful than real. See, e.g., Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641, 1678 (1967). Other media present similarly difficult access problems.

75. 94 S. Ct. at 3008-09.

76. See notes 45-47 *supra* and accompanying text.

77. 94 S. Ct. at 2839.

78. 94 S. Ct. at 2839.

A. *The "Right to Reply" to Defamatory Statements in the Press*

Tornillo did not deal expressly with reply to defamatory statements. Indeed, the Florida statute embraced numerous press charges that would not constitute libel.⁸⁰ Except for allegation of an "illegal" strike, the editorials in question did not appear supportive of a defamation action.⁸¹ The statute, while limited to candidates for nomination or for election, is more properly a part of the broader question of "access to the press,"⁸² the breadth of which is reflected in the Chief Justice's lengthy review of the access philosophy.⁸³

"Access" in its most fundamental and original sense looks to a governmentally enforced right to air one's views.⁸⁴ The statute challenged in *Tornillo* attempted such an enforcement. Conflict with the first amendment's stark command that "Congress shall make no law . . . abridging the freedom . . . of the press"⁸⁵ reaches its peak in this access rationale. A related, but narrower, theory has evolved primarily through the case law. The key in these cases has been that individuals desiring access allege and prove a governmental infringement of *their own* right to speak. Governmental or state action thus becomes a prerequisite to this cause of action and the lower court cases are replete with a variety of such findings.⁸⁶ The theory, however, has never been successfully invoked against the press primarily for the predictable failure to find any governmental action associated with the publishing function.⁸⁷

Reply to *defamatory* statements should be recognized as a significantly

80. See note 60 *supra*.

81. See note 59 *supra*.

82. Professor Barron is the foremost advocate of a broad access theory. See J. Barron, *Freedom of the Press for Whom?* (1973); Barron, *Access—The Only Choice for the Media?*, 48 *Texas L. Rev.* 766 (1970); Barron, *Access to the Press—A New First Amendment Right*, 80 *Harv. L. Rev.* 1641 (1967).

83. 94 S. Ct. at 2835-37.

84. See generally Barron, *Access to the Press—A New First Amendment Right*, 80 *Harv. L. Rev.* 1641 (1967). See also *Miami Herald Publishing Co. v. Tornillo*, 94 S. Ct. at 2831.

85. U.S. Const. amend. I, § 2.

86. See *Radical Lawyers Caucus v. Pool*, 324 F. Supp. 268 (W.D. Tex. 1970) (state bar journal's refusal to publish advertisement announcing a lawyers' caucus against the Vietnam War found unconstitutional abridgement of free speech); *Lee v. Board of Regents of State Colleges*, 306 F. Supp. 1097 (W.D. Wis. 1969), *aff'd*, 441 F.2d 1257 (7th Cir. 1971) (state campus newspaper's flat ban on accepting editorial advertisements when commercial advertising was freely accepted was abridgement of free speech); *Zucker v. Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969) (public high school's newspaper's refusal to publish student protest against the war abridged student's first amendment rights); *Kissinger v. New York City Transit Authority*, 274 F. Supp. 438 (S.D.N.Y. 1967) (municipal transit authority's refusal of subway advertising space to anti-war poster abridged free speech rights). But see, e.g., *Lehman v. City of Shaker Heights*, 94 S. Ct. 2714 (1974) (city transit system's exclusion of all political advertising from car card space did not violate candidate's first or fourteenth amendment rights); *Avins v. Rutgers, State Univ.*, 385 F.2d 151 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968) (no constitutional right to have appellant's article published in the law review of a state-financed school).

87. See *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971); *Chicago Joint Bd., Amalgamated Clothing Workers v. Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971); *Resident Participation of Denver, Inc. v. Love*, 322 F. Supp. 1100 (D. Colo. 1971).

different problem.⁸⁸ The cause of action is established in defamation and no governmental action is needed. All that is in question is the remedy that can be imposed. Fears that the "access" theory would occasion an inordinate number of replies are somewhat alleviated by recognition that the term "defamatory statements" defines a significantly narrower field than does "criticism" or "attack" of one's official record,⁸⁹ or an "everyman's right" of access.⁹⁰

Even prior to *Tornillo*, however, a number of valid criticisms could have been lodged against a right to reply. Whether a self-serving reply can adequately rebut defamatory press statements is questionable.⁹¹ Also, if removing falsity from the marketplace is an ideal goal, it is difficult to see how reply can accomplish this result in those cases where falsity has been shown. Since the result of a reply is to alert the public that a *dispute* exists over the accuracy of a statement, the result is a deception where the statement is indeed false. This benefits neither the public nor the plaintiff.⁹² Therefore, reply would seem more useful where falsity cannot be shown quickly. But to be effective at all, a reply must be published quickly,⁹³ and this seriously militates against its use when a protracted lawsuit is necessary to establish falsity. If the mere allegation of false defamatory statements could entitle a plaintiff to reply,⁹⁴ however, the occasions for reply increase considerably, rekindling the fear of burdensome access and, to some, the self-censorship effect proscribed in *Times*.

Tornillo alone appears to sound the death knell of all arguments favoring reply. Even though dealing with what the record had shown to be an infrequently utilized access statute,⁹⁵ the Court still raised the self-censorship flag.⁹⁶ More importantly, it found in its prior decisions a recognition that compulsion to publish was as onerous as restraint from publishing. Whatever the advantages of reply as a remedy for defamation, it is not seen how this first amendment barrier could be surmounted.

88. See Note, The Constitutionality Under the First Amendment of Statutes Granting a Right of Reply or Access to the Print Media, 31 Wash. & Lee L. Rev. 323, 339 n.79 (1974).

89. See, e.g., Fla. Stat. Ann. § 104.38 (1973), set out at note 60 supra.

90. See, e.g., Barron, supra note 84.

91. Retraction appears to be more desirable and effective in vindicating reputation. Chafee 28-29, 33-34. But see Pedrick, Senator McCarthy and the Law of Libel: A Study of Two Campaign Speeches, 48 Nw. U.L. Rev. 135, 181 (1953) (the author would choose reply if given a choice).

It is interesting to note that, at common law, making space available for reply was held immaterial on the issue of mitigation of damages, whereas retraction was material. Cf. notes 101-02 infra and accompanying text.

92. Vindication 1747; cf. Freedom of the Press 602 (ineffectiveness of self-serving reply where defamatory charge is from an official source, such as the government).

93. See, e.g., Chafee 30-31; Freedom of the Press 605.

94. Compare the suggestion concerning the communications media made by Pedrick, supra note 91, at 180.

95. 94 S. Ct. at 2834.

96. See notes 68-70 supra and accompanying text.

B. *Retraction of False Statements*

In *Tornillo*, the Court was writing on a clean slate since American jurisprudence has had little or no experience with reply⁹⁷ or access.⁹⁸ The same is not true of retraction.

In a very interesting concurrence in *Tornillo*, Justice Brennan, while joining the majority, added that the opinion, as he understood it, addresses only "right of reply" statutes and implies no view upon the constitutionality of "retraction" statutes affording plaintiffs able to prove defamatory falsehoods a statutory action to require publication of a retraction.⁹⁹

As there currently are no such statutes in force in the United States, Justice Brennan may have been re-inviting experimentation in at least half of the area he staked out in *Rosenbloom*.¹⁰⁰

Retraction in various other forms has long been part of the American law of defamation both at common law and in statutes.¹⁰¹ Some states allow voluntary retraction to be pleaded in mitigation of damages,¹⁰² and voluntary retraction is relevant in negating the existence of the pre-*Times* "malice" necessary to support punitive damages.¹⁰³ Conversely, a failure to retract on demand has been held offerable as evidence of "ill will."¹⁰⁴ Other statutes

97. Fla. Stat. Ann. § 104.38 (1973) (providing a gratuitous reply for candidates for public office whose character has been assailed by a newspaper during a primary or an election); Miss. Code Ann. § 23-3-35 (1972) (gratuitous reply for candidates to editorials concerning their character); Wis. Stat. Ann. § 895.05 (1966) (retraction statute providing for a reply instead of retraction when falsity cannot be readily proved). Nevada's broad right of reply statute was repealed in 1969 (ch. 211, § 71, [1967] Nev. Laws 473, repealed ch. 310, § 10 [1969] Nev. Laws 554) and replaced with a retraction statute. Ch. 310, § 7, [1969] Nev. Laws 553 (codified at Nev. Rev. Stat. § 41.336 (1973)).

The remedy of reply has, however, long been available in European countries. See generally Chafee 7-8. The most famous is France's "droit de réponse," discussed extensively by Chafee 8-16.

98. On the other hand, access to the broadcast media has been preserved by statute and regulation. See 47 U.S.C. § 315(a) (1970) (the fairness doctrine, requiring licensees to afford reasonable opportunity for discussion of conflicting views on issues of public importance, upheld in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)); 47 U.S.C. § 315(a) (1970) (the requirement of affording one candidate for an office equal access to broadcast facilities if another candidate has had access); 47 C.F.R. § 73.123 (1973) (right to reply to personal attack); *id.* (political editorial fairness requirements). Proponents of access to the press have tried to reason by analogy to the above requirements. E.g., J. Barron, *Freedom of the Press for Whom?* (1973). However, the Supreme Court, in *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973), found the analogy totally inapposite. *Id.* at 145 (Stewart, J., concurring); *id.* at 151 (Douglas, J., concurring); *id.* at 182 n.12 (Brennan, J., dissenting).

99. 94 S. Ct. at 2840 (Brennan, J., concurring).

100. See note 29 *supra*.

101. See generally Morris, *Inadvertent Newspaper Libel and Retraction*, 32 Ill. L. Rev. 36 (1937).

102. See *Webb v. Call Publishing Co.*, 173 Wis. 45, 180 N.W. 263 (1920).

103. See *O'Connor v. Field*, 266 App. Div. 121, 41 N.Y.S.2d 492 (1st Dep't 1943).

104. See, e.g., *Reid v. Nichols*, 166 Ky. 423, 179 S.W. 440 (1915) (failure to publish a retraction cannot be offered as evidence unless a demand for retraction has been made).

deal with plaintiff's side of the coin. Thus, a failure to demand a retraction may preclude punitive¹⁰⁵ or general¹⁰⁶ damages. The status of these decisions and statutes after *Times* is a complex question,¹⁰⁷ perhaps even more so after *Gertz* and *Tornillo*.¹⁰⁸ No statute, however, gives an individual a right to compel a published retraction of satisfactorily proven falsehoods. The constitutionality of judicially imposing such a remedy for defamatory press errors has never been decided.¹⁰⁹

As with reply, retraction has been advocated as a means of vindicating reputation while removing a falsehood from the forum of speech, an admittedly desirable goal. These are advantages that monetary redress does not effect. Furthermore, it would appear that retraction is consistent with first amendment principles only if falsity is convincingly shown. Apart from printing costs and the like, retraction of a statement later found to have been true originally is burdensome to a publisher because it undermines his credibility.¹¹⁰ Neither would the public interest appear to be well served by requiring retraction of such statements.

If *Tornillo* has not erected an absolute first amendment bar to any compelled publication, *Gertz* alone might well be sufficient authority with which to strike down compulsory retraction, at least concerning public officials and public figures. The willingness of the *Gertz* majority to base a new defamation rule for private individuals involved in issues of public importance on, *inter alia*, the fact that public individuals have greater access to an audience to indulge in effective "self-help,"¹¹¹ would appear to foreclose a compromise of free press guarantees with an argument that greater access is required for

105. E.g., Ky. Rev. Stat. Ann. § 411.051 (1972).

106. E.g., Cal. Civ. Code § 48a (West 1954).

107. See Vindication 1740-43.

108. For example, the non-equatibility of *Times* malice with "ill-will," *Garrison v. Louisiana*, 379 U.S. 64, 78 (1964), casts considerable doubt on statutes using such terms. After *Gertz* these statutes may have resumed validity at least where private individuals are concerned.

109. Only one recent case has been found dealing with compulsory retraction. In *Brown v. Murphy*, 355 F. Supp. 416 (S.D.N.Y. 1973), plaintiff H. Rap Brown sought an order from the district court compelling a magazine to print a retraction of an article it published entitled "The Man Who Shot Rap Brown." Brown's allegation was that the inaccuracies were prejudicial to his concurrent state trial. The court denied the request somewhat perfunctorily: "There appears to be no authority empowering courts, whether federal or state, to compel a private magazine to publish a correction or retraction of a previously published article. Nor should this court establish such a precedent." *Id.* at 417. There was no discussion of the possible advantages of retraction—indeed, it appears they were never raised. Since the action was brought in the context of assuring a fair trial, the court may have believed that the "system" contained adequate well-defined safeguards to preclude any injurious effect of an erroneous publication. Also, it is apparent that the court's decision was based largely on its reluctance to interfere with state criminal trials in progress. *Id.* at 416-17 (relying on *Younger v. Harris*, 401 U.S. 37 (1971)). To justify the need for a retraction, Brown requested an evidentiary hearing to determine the falsity of the publication. However, since such determination might be an issue in Brown's criminal trial, the court thought such a hearing "would be inappropriate in the instant case." 355 F. Supp. at 417.

110. See Chafee 26, 29-30; Vindication 1742-43 & n.84.

111. See note 50 *supra* and accompanying text.

public individuals. Although occasions for retraction do not appear numerous, and the cost of space and materials would be substantially less than prohibitive, self-censorship could still be raised as an obstacle on the authority of *Tornillo*. More importantly, were retraction compellable merely on a showing of falsity, an attack could be made that this imposition of "liability"¹¹² without proof of actual malice runs afoul of the basic *Times* rule. Conversely, were malice provable and hence damages recoverable, the need for retraction becomes questionable.

As to private individuals, *Gertz*, in allowing actual damages, arguably has removed the more compelling need existing since *Rosenbloom* for some alternative form of redress.¹¹³ Yet the Court's explicit recognition of the access problem confronting private individuals could make it receptive to a solution through retraction. Furthermore, while retraction sought by public persons may raise "liability without malice" problems, retraction sought by private individuals need not be predicated on a showing of malice, as *Gertz* makes clear.¹¹⁴ Since the *Gertz* Court also declared that the state's interest in protecting reputations extended only as far as actual damages,¹¹⁵ there appears to be no valid reason why the interest could not extend to a potentially less expensive remedy such as retraction. *Gertz* does suggest, however, in emphasizing the strong state interest in compensating injurious defamation, that the retraction remedy must be posited primarily as a means to that end.

Tornillo did not, of course, deal with compulsory retractions in any form, much less in the context of defamatory publication. The decision can be easily read, however, as a condemnation of all forms of compulsory publication. Yet Justice Brennan's concurring opinion suggests investigation of whether any basis exists for removing retraction from the sweep of *Tornillo's* proscription.

Retraction of defamatory falsehoods, of course, is distinguishable from the *Tornillo* situation on two readily perceived grounds. The Court did not deal with retraction; the reply issue it did confront, as earlier pointed out,¹¹⁶ was substantially broader than a remedy for defamatory press errors. On the one level, should *Tornillo* be read to bar replies as a category, retraction would appear to offer significantly more advantages than reply, measured in terms of fewer fears evoked. Indeed, were the self-censorship argument the primary ground for the Court's decision, retraction arguably raises much less fear than the reply situation or the broader reply right with which the Court was actually confronted. Perhaps the mere presence of retraction in our law for so many years would alone be sufficient to make a case concerning a compulsory retraction statute more difficult to decide than *Tornillo*. It is noteworthy that cases giving an evidentiary effect in proving "ill will"¹¹⁷ to a refusal to retract have never been assailed on a first amendment ground that in essence they

112. This requires reading the *Times* bar to monetary redress as a bar to liability in any form. See note 13 *supra* and accompanying text.

113. See text accompanying note 73 *supra*.

114. See text accompanying note 54 *supra*.

115. 94 S. Ct. at 3011.

116. See text accompanying notes 88-94 *supra*.

117. See note 104 *supra* and accompanying text.

coerce publication.¹¹⁸ The *Times* Court expressly left undecided whether refusal on demand would evidence the newly-announced "malice" standard,¹¹⁹ and no clarification has come in the ten years following that decision.

On another, more simplified level, the chief distinction between reply and retraction, as pertains to the *Tornillo* holding, may well be the fact that retraction does not seem to compel the same kind of reaction. Although the holding in *Tornillo* appears to reach all compelled publications, the Chief Justice's extensive review of the arguments advanced by proponents of the "purest" access possible, *i.e.*, an everyman's right of access, may support a conclusion that the Court had that situation paramount in mind. Retraction of defamatory statements adequately proven false does not evoke the same scope and resultant fears of "government coercion" clearly occasioned by pure access, the Florida reply statute, or, to some degree, even reply to defamatory falsehoods.

It is submitted that the Court's broad framing of the access issue resulted in the breadth of the proscription announced against compelled publication and that the reply and retraction *remedies* are not per se foreclosed by *Tornillo* alone. However, when coupled with the inherent disadvantages of reply, even the narrowest reading of *Tornillo* severely cripples that remedy. Although retraction does not clearly compel a different result, it may be subject to sufficiently important competing interests, particularly where private individuals are concerned, to permit valid arguments for its imposition.

VI. CONCLUSION

The *Gertz* and *Tornillo* decisions have seriously undercut arguments heretofore advanced in favor of providing the alternative remedies of reply and retraction in actions against the press for defamatory publications. Specifically, the two decisions easily can be read to raise an insurmountable bar to the reply remedy. Retractions would not appear to be any more favored, but could possibly pass constitutional muster, especially where private individuals are concerned.

In short, the long-advocated and acknowledged advantages of reply and especially retraction in the defamation context remain intact. Perhaps unfortunately, their implementation appears to have been put off by a single day's decisions of the Supreme Court.

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118. Indeed, it is the plaintiffs who have attacked these statutes, generally on due process and equal protection grounds. See generally Comment, Constitutional Aspects of Retraction Statutes, 27 *Fordham L. Rev.* 254 (1958).

119. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 286 (1964).