

# Comments

## The Constitutional Law of Defamation: Are All Speakers Protected Equally?

### INTRODUCTION

Defamation law traditionally protected individuals against “invasion [of their] interest in reputation and good name.”<sup>1</sup> Juxtaposed, however, are the freedoms of speech and press that ensure “uninhibited, robust, and wide-open” debate on public issues.<sup>2</sup> Nevertheless, prior to 1964 the law of libel and slander was governed by state law, entirely outside the purview of the United States Constitution.<sup>3</sup> That year the United States Supreme Court decided *New York Times Co. v. Sullivan*,<sup>4</sup> holding that defamatory speech was not exempt from first amendment scrutiny.<sup>5</sup> From that premise the Court went on to hold that the first amendment<sup>6</sup> mandates limitations on state defamation law.<sup>7</sup>

*New York Times* and its progeny were attempts to balance the interests protected by defamation law and those protected by the first amendment.<sup>8</sup> Although the Supreme Court has never held defamatory speech worthy of constitutional protection for its own sake, it has noted that in some circumstances defamatory falsehoods must be protected “in order to protect speech

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1. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 111, at 737 (4th ed. 1971). See also Eaton, *The American Law of Defamation through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1357–59 (1975).

2. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

3. In *New York Times Co. v. Sullivan* the Supreme Court acknowledged its prior statement that “the Constitution does not protect libelous publications,” 376 U.S. 254, 268 (1964) (citing *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 n.10 (1961); *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 48 (1961); *Roth v. United States*, 354 U.S. 476, 486–87 (1957); *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952); *Pennekamp v. Florida*, 328 U.S. 331, 348–49 (1946); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); and *Near v. Minnesota*, 283 U.S. 697, 715 (1931)).

4. 376 U.S. 254 (1964).

5. *Id.* at 269 (“[L]ibel can claim no talismanic immunity from constitutional limitations.”).

6. The first amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

Although the first amendment acts only as a restriction on Congress, the Supreme Court has held that all provisions of the first amendment have been incorporated into the fourteenth amendment and are therefore binding on the states. Thus, for simplicity, this Comment will speak of the limitations imposed on the states by the first amendment, through the fourteenth, as first amendment limitations. For the cases “incorporating” the first amendment, see *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (establishment clause); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (free exercise clause); *Gitlow v. New York*, 268 U.S. 652 (1925) (free speech clause); *Near v. Minnesota*, 283 U.S. 697 (1931) (free press clause); *DeJonge v. Oregon*, 299 U.S. 353 (1937) (assembly and petition clauses).

7. 376 U.S. 254, 279–80 (1964). See also *infra* notes 47–166 and accompanying text.

8. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341–42 (1974), and the cases cited therein. See also *infra* notes 47–83 and accompanying text.

that matters.”<sup>9</sup> This Comment will attempt to determine which speech “matters” for purposes of the constitutional defamation privileges.

The constitutional defamation privileges clearly emanate from the first amendment. The clause or combination of clauses that give rise to the privileges, however, is unclear. The first amendment protects four separate, albeit overlapping, verbal freedoms: the freedoms of religion, speech, and press, and the right to petition the government for redress of grievances.<sup>10</sup> Although several Supreme Court decisions imply that the constitutional defamation privileges protect only the press and broadcast media,<sup>11</sup> the “chilling effect” of potential defamation suits can also inhibit other first amendment activity.

This problem is exemplified by two lines of cases: one presents the split of authority on whether *New York Times* and other constitutional defamation privileges protect nonmedia speech,<sup>12</sup> and the other culminates in the recognition that the right to petition is entitled to a privilege beyond that afforded by *New York Times* and its progeny.<sup>13</sup> Whether the constitutional defamation privileges protect only the press and broadcast media or whether they extend to all speakers remains an open question.<sup>14</sup>

This Comment will first define the scope of protection provided by constitutional defamation law, without considering whom is entitled to its protection,<sup>15</sup> and then will examine the split of authority on the issue of *New York Times*' applicability to nonmedia speech and to the right to petition.<sup>16</sup> This Comment will also propose a unitary standard under which both media and nonmedia speech are subject to the limitations of *New York Times* and its progeny.<sup>17</sup> This Comment will conclude by demonstrating that heightened protection for persons exercising the right to petition is unnecessary.<sup>18</sup> Adoption of a unitary standard, consistent with precedent and constitutional policy, will clarify one of the major ambiguities inherent in the constitutional law of defamation and will further the policies underlying *New York Times* and the other constitutional defamation decisions.

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9. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).

10. *See supra* note 6. Freedom of assembly, although not a verbal freedom, is a part of freedom of expression since it includes “more than the right to attend a meeting: ‘it includes the right to express one’s attitudes or philosophies by membership in a group . . . .’” NOWAK, ROTUNDA & YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 829 (1978) (citing *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965)). The establishment of religion clause prohibits “government sponsorship of religion.” NOWAK, ROTUNDA & YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 850 (1978). Neither the assembly nor establishment clauses, however, protect any specific verbal freedom.

11. *See, e.g.*, *Herbert v. Lando*, 424 U.S. 448, 456 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347–50 (1974).

12. Courts and commentators have taken at least four different positions on the question whether the constitutional defamation privileges are applicable to nonmedia speech. *See infra* notes 172–75 and accompanying text.

13. *See Webb v. Fury*, 282 S.E.2d 28 (W. Va. 1981) (the right to petition gives rise to an absolute privilege).

14. *See Hutchinson v. Proxmire*, 443 U.S. 111, 133 n.16 (1979) (unnecessary to decide “whether the *New York Times* standard can apply to an individual defendant rather than a media defendant”); *Babbitt v. United Farm Workers*, 442 U.S. 289, 309 n.16 (1979) (*Gertz* applicability to nonmedia defendants is an open question).

15. *See infra* notes 47–166 and accompanying text.

16. *See infra* notes 167–83 and accompanying text.

17. *See infra* notes 184–225 and accompanying text.

18. *See infra* notes 226–339 and accompanying text.

## I. THE CONSTITUTIONAL LAW OF DEFAMATION

A. *The Evolution of the Constitutional Law of Defamation*

To understand the constitutional law of defamation, one must be familiar with the principles of common-law defamation. Gaining that understanding, however, is not an easy task. As Dean Prosser succinctly noted, "[T]here is a great deal of the law of defamation which makes no sense."<sup>19</sup>

1. *The Common-Law Background*

At common law defamation consisted of the "twin torts of libel and slander."<sup>20</sup> Generally, libel was a written defamation and slander was oral. Despite basic similarities, for historical reasons the two torts developed different rules.<sup>21</sup> The brief description that follows, however, will outline only the general rules of common-law defamation, without a pedantic discussion of their nuances.

Defamation is defined as communication that tends "to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."<sup>22</sup> Thus, the function of defamation law is protection of a person's "interest in reputation and good name."<sup>23</sup> That function is served in two ways: first, by granting an injured plaintiff compensation for harm to his reputation;<sup>24</sup> and second, by giving an injured plaintiff the opportunity to "vindicate his reputation . . . in a public forum."<sup>25</sup>

At common law a plaintiff had to establish two elements to state a prima facie case: that the defendant published a statement and that the statement was defamatory.<sup>26</sup> The type of defamation determined its actionability. Libel

19. W. PROSSER, *supra* note 1, § 111, at 737.

20. *Id.* But see L. ELDRIDGE, THE LAW OF DEFAMATION § 13 (1978) (discussing the emergence of a third type of defamation: "the defamacast"—an oral defamations communicated through the broadcast media).

21. W. PROSSER, *supra* note 1, § 112, at 751-52.

22. RESTATEMENT (SECOND) OF TORTS § 559 (1977). Defamation has also been defined as "words which tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society." *Kimmerle v. New York Evening Journal*, 262 N.Y. 99, 100, 186 N.E. 217, 218 (1933).

23. W. PROSSER, *supra* note 1, § 111, at 737.

24. Eaton, *supra* note 1, at 1358.

25. *Id.* at 1353. Since the constitutional privileges may negate a falsely defamed plaintiff's ability to vindicate his reputation in a public forum, some commentators have examined the possibility that an injured plaintiff be entitled to either nominal damages or a retraction for any defamatory falsehood. See, e.g., *id.* at 1431-32; Frakt, *Defamation Since Gertz v. Robert Welch, Inc.: The Emerging Common Law*, 10 RUT.-CAM. L.J. 519, 582 (1979). See also RESTATEMENT (SECOND) OF TORTS § 620 comment c (1977).

Although *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), might be viewed as limiting state authority to enact retraction statutes, Justice Brennan's concurring opinion in *Tornillo* stated that the decision "addresses only 'right of reply' statutes and implies no view on the constitutionality of retraction statutes affording plaintiffs able to prove defamatory falsehoods a statutory action to require publication of a retraction." *Id.* at 258 (Brennan, J., concurring).

26. W. PROSSER, *supra* note 1, § 113. Publication is the term of art used to designate the defamatory comment's "communicat[ion] to some one other than the person defamed. . . . [T]his does not mean that it must be printed or written; . . . [but if] there is no communication to any one but the plaintiff . . . no tort action can be maintained upon the theory of defamation." *Id.* at 766.

was actionable per se: a libel's publication gave rise to a presumption of general damages.<sup>27</sup> Slander was considered less serious than libel, and was thus actionable per se only in specific instances.<sup>28</sup> If the defamation was not actionable per se, the plaintiff had to prove "special damage"<sup>29</sup> to obtain a recovery.<sup>30</sup> The distinction between types of defamation had the incongruous result of allowing some plaintiffs who had suffered no injury to recover damages, while precluding relief to others who incurred serious damage to their reputation but were unable to prove special damage.<sup>31</sup> In either case, however, libel and slander were strict liability torts.<sup>32</sup>

Defamation defendants had the benefit of two affirmative defenses: truth and privilege. At common law the plaintiff's proof of a defendant's publication of a libel or slander gave rise to a presumption of the statement's falsity.<sup>33</sup> Therefore, the defendant had the burden of proving the statement's truth. Proof of the statement's truth, however, constituted a complete defense in civil defamation actions.<sup>34</sup>

The second defense was privilege.<sup>35</sup> Common-law privileges were of two types: absolute and qualified. Absolute privilege gave certain communications made during judicial, legislative, or other governmental proceedings absolute immunity from defamation liability.<sup>36</sup> Qualified privileges gave

27. *Id.* § 112, at 762. There is an exception to the rule that libels are actionable per se. When a plaintiff must prove extrinsic facts to demonstrate a statement's defamatory character, some jurisdictions treat the libel as only actionable "per quod." As an example of a libel *per quod*, Prosser describes a newspaper that published a report that the plaintiff had given birth to twins. The extrinsic fact was that she had been married only one month. *Id.* at 763 n.30.

In 1971 Prosser claimed that the majority of jurisdictions treated libel *per quod* as slander—only actionable per se in specific instances, otherwise requiring proof of special damage. *Id.* at 763. *But see* L. ELDRIDGE, *supra* note 20, §§ 23–28 (arguing that the concept of libel *per quod* is being steadily abandoned).

28. Slanders are actionable per se in only four instances: 1) accusations of crime; 2) accusations that a person suffers from a loathsome disease (usually venereal disease); 3) defamations affecting a plaintiff's business, trade, or professional reputation; and 4) accusations of sexual unchastity or perversion. *See* W. PROSSER, *supra* note 1, § 112, at 754–60; Annot., *Imputation of Homosexuality as Defamation*, 3 A.L.R.4TH 752 (1981).

29. W. PROSSER, *supra* note 1, § 112, at 760–62. To prove special damage the plaintiff generally had to show specific evidence of pecuniary loss.

30. *See supra* notes 27 & 28. *See generally* L. ELDRIDGE, *supra* note 20, §§ 29–34; W. PROSSER, *supra* note 1, § 112.

31. W. PROSSER, *supra* note 1, § 112.

32. To demonstrate the concept of strict liability, Prosser related the following true anecdote:

The defendants published in their newspaper a story . . . to the effect that one Artemus Jones, a person whom they intended and believed to be entirely fictitious, had been seen . . . with a woman not his wife . . . [A] real Artemus Jones [then claimed] that the story had been understood by his neighbors to refer to him [and was subsequently awarded damages]. [T]he defendant's innocence did not excuse him from liability.

*Id.* § 113, at 772. *See generally id.* § 113. *But see* RESTATEMENT (SECOND) OF TORTS § 580B comment b (1976) (stating that the common law requires intent, or at least negligence, in the communication of a defamation to a third party).

33. *See* W. PROSSER, *supra* note 1, § 116, at 798.

34. *Id.* Truth was not necessarily a defense in criminal libel prosecutions. *Id.* at 797–98.

35. Privilege is a defense that allows a defamatory utterance to "escape liability because the defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation." *Id.* § 114, at 776.

36. *Id.* § 114. For a full discussion of situations in which an absolute privilege is applicable, see L. ELDRIDGE, *supra* note 20, §§ 72–77.

speakers acting in furtherance of important specific interests<sup>37</sup> conditional protection that was lost if the privilege was abused or exceeded.<sup>38</sup>

Although a major purpose of defamation law was to compensate the plaintiff for damage to his reputation, libels and slanders actionable per se gave rise to a presumption of damages without proof of actual harm.<sup>39</sup> Even in libels *per quod*<sup>40</sup> and slanders not actionable per se, which required proof of special damage, once the plaintiff established special damage he could also recover general damages.<sup>41</sup> In either case, if the plaintiff proved malice he could be awarded punitive damages.<sup>42</sup>

Because of their classification as strict liability torts, libel and slander placed the "written or spoken word in the same class with the use of explosives or the keeping of dangerous animals."<sup>43</sup> The threat of strict liability coupled with defamation law's presumptions of falsity and damages<sup>44</sup> necessarily inhibited first amendment activity.<sup>45</sup> Against this common-law background, the Supreme Court decided *New York Times Co. v. Sullivan*.<sup>46</sup>

## 2. The Supreme Court Decisions

When the Supreme Court granted certiorari in *New York Times Co. v. Sullivan*, it squarely faced the issue whether defamatory speech should remain excluded from first amendment protection.<sup>47</sup> The case concerned a political advertisement in the *New York Times* that allegedly defamed a city commissioner of Montgomery, Alabama.<sup>48</sup> The Court, realizing that the first amendment needs "breathing space,"<sup>49</sup> held that defamatory speech is entitled to constitutional protection in some situations.<sup>50</sup> Specifically, the Court held that criticism of the official conduct of public officials is constitutionally

37. Prosser lists the important interests that give rise to a qualified privilege: 1) interest of the publisher; 2) interest of others; 3) common interest of the publisher and his audience; 4) communications to one who may act in the public interest; 5) fair comment on matters of public concern; and 6) reports of public proceedings. W. PROSSER, *supra* note 1, § 115. For a more complete discussion of the scope of the qualified privilege, see L. ELDREDGE, *supra* note 20, §§ 83-94.

38. A qualified privilege could be abused in several ways: the speaker might step outside the scope of the privilege (*i.e.*, publication to a larger audience than necessary); the speaker might communicate the defamation maliciously (in the sense of ill will); or the speaker might knowingly (or, in some jurisdictions, negligently) publish a falsehood. See W. PROSSER, *supra* note 1, § 113, at 792-96.

39. *Id.* § 112. See also *supra* notes 27-30 and accompanying text.

40. See *supra* note 27.

41. W. PROSSER, *supra* note 1, at 761.

42. See Eaton, *supra* note 1, at 1358.

43. W. PROSSER, *supra* note 1, § 113, at 773.

44. See *supra* notes 27-30 & 33 and accompanying text.

45. See *infra* notes 53-56 and accompanying text.

46. 376 U.S. 254 (1964).

47. *Id.* For a list of the Court's prior decisions refusing to afford constitutional protection to defamatory speech, see cases cited *supra* note 3.

48. *New York Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964).

49. *Id.* at 272.

50. *Id.* at 279-80.

insulated from defamation liability absent clear and convincing proof<sup>51</sup> that the defendant acted with "actual malice."<sup>52</sup>

The *New York Times* Court based its holding on the rationale that the fear of a possible defamation suit would inhibit potential critics from voicing complaints about public officials.<sup>53</sup> Although the Court acknowledged that truth is generally a defense in civil defamation actions,<sup>54</sup> it noted that "erroneous statement is inevitable in free debate."<sup>55</sup> From that premise the Court found that the fear of a potential defamation action stemming from an inadvertent error or honest mistake of fact has a chilling effect on the exercise of first amendment rights.<sup>56</sup> To protect against this result, the Court recognized the constitutional defamation privilege.<sup>57</sup> Further, since public officials were already entitled to an absolute defamation privilege,<sup>58</sup> the Court held that government critics were entitled to a similar privilege.<sup>59</sup>

Actual malice, distinct from the common-law concept of malice relating to hatred, spite, or ill will,<sup>60</sup> is defined as knowledge of falsity or reckless disregard of the truth.<sup>61</sup> The actual malice standard ensures that a defamation defendant will not be held liable simply because he has ill will for his target, or because he makes an inadvertent error or honest misstatement of fact.<sup>62</sup> Under the *New York Times* standard a critic of a public official may speak

51. *Id.* at 285-86.

52. *Id.* at 279-80. Actual malice is defined as knowledge or reckless disregard of a statement's falsity. See *infra* notes 125-37 and accompanying text.

53. 376 U.S. 254, 278-79 (1964). The Court recognized that in the absence of a privilege government critics will "steer far wider of the unlawful zone," which will lead to unnecessary "self-censorship" so that not "only false speech will be deterred." *Id.*

54. *Id.* at 278.

55. *Id.* at 271.

56. *Id.* at 278-79.

57. *Id.* at 279-80. Defamation suits brought by public officials have an effect similar to unconstitutional seditious libel laws. *Id.* at 273-78. Although the Sedition Act of 1798 was never "tested in [the Supreme] Court," Justice Brennan's opinion was based on the premise that the Sedition Act was unconstitutional. *Id.* at 276. The *New York Times* Court noted, incidentally, that "no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence." *Id.* at 291 (quoting *City of Chicago v. Tribune Co.*, 307 Ill. 595, 601, 139 N.E. 86, 88 (1923)).

58. See *Barr v. Matteo*, 360 U.S. 564, 574 (1959) (held that federal government officials are entitled to an absolute defamation privilege in performing their official duties). Many state government officials are also entitled to an absolute privilege. See L. ELDREDGE, *supra* note 20, §§ 73-75.

59. 376 U.S. 254, 283-84 (1964). Although the Court did not give government critics an absolute privilege, the Court recognized a privilege that allows a defendant to be subjected to defamation liability only if he at least entertained "serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). The *Barr* Court noted that an absolute privilege for government officials is necessary to preserve the integrity of government and its "effective administration." 360 U.S. 564, 570 (1959). The fear of a potential defamation law suit "would dampen the ardor of all but the most resolute, or the most irresponsible," officials. *Id.* at 571 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)). Thus the absolute privilege is intended "not for [officials'] private indulgence but for the public good." 360 U.S. 564, 575 (1959) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 397 (1951)).

60. See *Henry v. Collins*, 380 U.S. 356, 357 (1965); *Garrison v. Louisiana*, 379 U.S. 64, 70-76 (1964); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). The public debate protected by the first amendment may "well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

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

62. See cases cited *supra* note 60. See also *infra* notes 125-37 and accompanying text.

freely as long as he does not deliberately or recklessly publish falsehoods.<sup>63</sup>

After *New York Times* the next step in the evolution of the constitutional law of defamation was *Curtis Publishing Co. v. Butts*,<sup>64</sup> which extended the *New York Times* actual malice privilege to another class of potential defamation plaintiffs—public figures.<sup>65</sup> Although the two *Curtis Publishing* plaintiffs, Butts and Walker, achieved their status by different routes, the Court deemed both public figures,<sup>66</sup> thus establishing that public figure status may be achieved “by position alone”<sup>67</sup> or by “thrusting . . . [oneself] into the ‘vortex’ of an important public controversy.”<sup>68</sup>

The Court also held that public figure plaintiffs, like public officials, could recover in defamation actions only if they could prove that a defendant acted with actual malice.<sup>69</sup> The Court based this decision on a dual rationale: public figure plaintiffs “commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able ‘to expose through discussion the falsehood and fallacies.’”<sup>70</sup>

*Rosenbloom v. Metromedia, Inc.*,<sup>71</sup> although short-lived, was the third major development in constitutional defamation law. A plurality of the Court, focusing on the public’s need to be informed on public issues, extended the *New York Times* privilege to all matters of “public or general interest.”<sup>72</sup> Justice Brennan did not, however, factor the conflicting reputational interest of private persons into his plurality opinion, noting that a matter of public interest does not become less so “merely because a private individual is involved.”<sup>73</sup>

In 1974 when the Court decided *Gertz v. Robert Welch, Inc.*,<sup>74</sup> a majority of the Court concurred in Justice Powell’s opinion that restricted application

63. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964). But see *Webb v. Fury*, 282 S.E.2d 28 (W. Va. 1981), in which the argument is made that although a defamatory comment may eventually be found to be privileged, the fear of having to defend a defamation lawsuit may nevertheless have a chilling effect on the exercise of first amendment rights. *Id.* at 46 (Neely, J., dissenting).

64. 388 U.S. 130 (1967). The decision was based on tandem cases, *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*. *Id.*

65. *Id.* at 155. See also *Pauling v. Globe-Democrat Publishing Co.*, 362 F.2d 188 (8th Cir. 1966), cert. denied, 388 U.S. 909 (1967). Although decided before *Curtis Publishing Co.*, the *Pauling* Court recognized a public figure privilege.

66. Butts was an athletic director at a major college. 388 U.S. 130, 135 (1967). Walker gained prominence through his participation in the racial desegregation movement in the South. *Id.* at 140.

67. *Id.* at 155.

68. *Id.* Justice Harlan’s lead opinion in *Curtis Publishing Co.* indicated that the public figure privilege would be lost upon “highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting adhered to by responsible publishers.” *Id.* The rule that emerged from *Curtis Publishing Co.*, however, originated in Chief Justice Warren’s concurrence, which provided that the *New York Times* actual malice standard is the proper test. *Id.* at 163–64 (Warren, C.J., concurring). See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974) (stating that the *New York Times* rule is equally applicable to public officials and public figures).

69. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967).

70. *Id.* (quoting *Whitney v. California*, 274 U.S. 357, 377 (Brandeis, J., dissenting)).

71. 403 U.S. 29 (1971).

72. *Id.* at 43.

73. *Id.*

74. 418 U.S. 323 (1974).

of the *New York Times* actual malice privilege to statements concerning public officials or public figures.<sup>75</sup> *Gertz*, therefore, repudiated *Rosenbloom*'s extension of *New York Times* to all matters of public concern and stressed that the relevant consideration when determining the applicability of the *New York Times* privilege is the plaintiff's status—not the subject matter of the defamatory utterance.<sup>76</sup>

In light of *Gertz* the *New York Times* actual malice privilege can now be asserted only against public officials and public figures.<sup>77</sup> *Gertz*, however, abolished strict liability in defamation actions brought against publishers or broadcasters by nonpublic plaintiffs. Although the Court refused to set a specific standard of care, it held that as long as the states do not impose "liability without fault" they may fashion their own standard of care for the discussion of private persons.<sup>78</sup>

The Court's defamation decisions since *Gertz* have primarily been attempts to define the term "public figure," not to further circumscribe the scope of the privileges.<sup>79</sup> Thus, today the first amendment guarantees two privileges: the *New York Times* actual malice privilege<sup>80</sup> and the *Gertz* fault privilege.<sup>81</sup> After an examination of these privileges,<sup>82</sup> this Comment will address the issue of which defendants may assert the *New York Times* and *Gertz* privileges.<sup>83</sup>

75. *Id.* at 345.

76. *Id.* at 345-48. One reason the *Gertz* Court rejected *Rosenbloom* was its recognition of the "difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' . . . [or are] 'relevant to self-government'" *Id.* at 346 (citing *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 79 (1971) (Marshall, J., dissenting)).

77. The Court held that private figures, unlike public figures, are not only more vulnerable to injury, but are also more deserving of recovery. 418 U.S. 323, 345 (1974). The private plaintiff's greater vulnerability stems from his lack of "access to the channels of effective communication [by which] to counteract false statements." *Id.* at 344. The reason private figures are more deserving of recovery than public officials is that most public figures have assumed the risk of adverse publicity by entering politics, by thrusting themselves to the forefront of a public controversy, or by attaining such status that adverse publicity is inevitable. *Id.* at 344-45.

78. *Id.* at 347-48.

79. *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); and *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), have all wrestled with definitions of the term "public figure." After *Gertz* the Court's only other major defamation decision was *Herbert v. Lando*, 441 U.S. 153 (1979), which examined whether a defamation plaintiff has a right to discover a media defendant's editorial process so he could establish the existence of actual malice.

80. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). See also *infra* notes 85-137 and accompanying text.

81. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). See also *infra* notes 138-55 and accompanying text.

82. See *infra* notes 85-155 and accompanying text.

83. While the constitutional law of civil defamation has undergone much growth itself, *New York Times* and its progeny have been applied in numerous other situations: criminal libel (*Garrison v. Louisiana*, 379 U.S. 64 (1964)); labor defamation actions (*Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264 (1974); *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53 (1966)); and invasion of privacy actions (*Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974); *Time, Inc. v. Hill*, 385 U.S. 374 (1967)). See also *Pickering v. Board of Educ.*, 391 U.S. 563 (1968) (a public school teacher may not be dismissed for criticizing her board of education absent proof of actual malice).



B. *The New York Times Privilege.*<sup>84</sup>1. *Public Officials*

Public officials are one of two classes of defamation plaintiffs who must surmount the *New York Times* privilege.<sup>85</sup> The privilege attaches only to criticism of a public official's official conduct<sup>86</sup> or to comment on his fitness for office.<sup>87</sup> Thus, one must consider two questions to determine whether the public official privilege is applicable in a particular case: first, whether the allegedly defamed individual falls within the definition of "public official"; and second, whether the allegedly defamatory utterance concerns either his official conduct or his fitness for office.

The Supreme Court has only vaguely defined the term "public official." In *Rosenblatt v. Baer*<sup>88</sup> the Court noted that not all government employees are public officials. Rather, public officials are government employees who hold "a position in government [that] has such apparent importance that the public has an independent interest in the qualifications . . . of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees."<sup>89</sup> This statement, however, does not provide a clear demarcation between public officials and mere public employees. While presidents, governors, and most elected officials<sup>90</sup> and candidates for elective office<sup>91</sup> are public officials, just "how far down into the lower ranks of government employees the 'public official' designation would extend"<sup>92</sup> is unsettled.

The question of who qualifies as a public official is a matter of federal constitutional law,<sup>93</sup> thus state law standards or designations are not determinative. Under the Supreme Court's *Rosenblatt* test, only those persons in "the hierarchy of government employees who have, or appear to the public to

84. It would be more appropriate to entitle the privilege the *New York Times-Curtis Publishing* privilege because *New York Times* itself applies only to public officials. See *supra* notes 47-63 and accompanying text. In this Comment, however, the term "New York Times privilege" will refer to both public officials and public figures.

85. See *supra* notes 47-63.

86. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

87. *Garrison v. Louisiana*, 379 U.S. 64, 76-77 (1964).

88. 383 U.S. 75 (1966).

89. *Id.* at 86.

90. See Annot., 19 A.L.R.3D 1361 (1968). The annotation cites no case in which an elected official was not held to be a public official. *Klahr v. Winterble*, 4 Ariz. App. 158, 418 P.2d 404 (1966), stretched the idea to its limit, deeming a student elected to a state university senate a public official. See also *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271 (1971) (implying that all holders of elective office are public officials).

91. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271 (1971), held that critics of candidates for elective office are also entitled to the protection of *New York Times*. The Court noted, however, that candidates might more properly be termed public figures, but since any distinction is academic the Court did not resolve the issue. *Id.* See also *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 300-01 (1971). For a cataloging of lower court treatment of the term "public official," see Annot., 19 A.L.R.3D 1361 (1968).

92. *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 n.23 (1964)).

93. *Rosenblatt v. Baer*, 383 U.S. 75, 84 (1966).

have, substantial responsibility for or control over the conduct of governmental affairs" are public officials.<sup>94</sup> A noteworthy point, however, is that the public interest in a government position cannot stem only from "the scrutiny and discussion occasioned by the particular charges in controversy."<sup>95</sup> Since the Supreme Court has said that "'public official[dom]' . . . cannot be thought to include all public employees,"<sup>96</sup> lower courts, by holding that school teachers, police officers, and other mere public employees fall within the category,<sup>97</sup> may have taken an unnecessarily broad view of the term "public official."

The *New York Times* privilege, however, does not create an open season on public officials. To be privileged, a speaker's comments concerning a public official must relate to either the public official's conduct<sup>98</sup> or to a matter affecting his "fitness for office."<sup>99</sup> Although attacks on the public official's private life are not privileged,<sup>100</sup> the constitutional shield is not removed merely because "an official's private reputation, as well as his public reputation, is harmed."<sup>101</sup> Thus, an official's personal attributes are open to privileged criticism only if those personal traits "might touch on an official's fitness for office."<sup>102</sup> For example, allegations of "criminal conduct, no matter how remote in time or place," are relevant to a public official's fitness for office.<sup>103</sup> Once a public official leaves public office, however, his critics retain the *New York Times* privilege only if he remains or becomes a public figure.<sup>104</sup>

## 2. Public Figures

While criticism of public officials is one aspect of public discussion shielded by *New York Times* and its progeny from the inhibiting effect of potential defamation actions, discussion of other matters of public concern is equally deserving of first amendment protection.<sup>105</sup> *New York Times*, how-

94. *Id.* at 85.

95. *Id.* at 86 n.13. *Cf.* *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979) (defamation defendants cannot "create their own defense by making the claimant a public figure").

96. *Hutchinson v. Proxmire*, 443 U.S. 111, 119 n.8 (1979).

97. *See Note, The Constitutional Law of Defamation—Recent Developments and Suggested State Court Responses*, 33 ME. L. REV. 371, 392-93 (1981).

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

99. *Garrison v. Louisiana*, 379 U.S. 64, 76-77 (1964).

100. *New York Times Co. v. Sullivan*, 376 U.S. 254, 301-02 (1964).

101. *Garrison v. Louisiana*, 379 U.S. 64, 76-77 (1964).

102. *Id.*

103. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971). *But cf.* *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 168 (1979) (rejecting the argument that "any person who engages in criminal conduct automatically becomes a public figure").

104. The privilege may sometimes remain intact to protect criticism of a former official's conduct during the time he was in office. *See Rosenblatt v. Baer*, 383 U.S. 75, 87 n.14 (1966).

105. *See Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 40-43 (1971). Although *Rosenbloom* was expressly rejected in *Gertz*, it seems clear that the first amendment interest in public controversies is the same whether public or private persons are concerned. *Gertz* merely promulgated a rule that considered a private person's greater entitlement to and enhanced need for the protection afforded by defamation law. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342-48 (1974).

ever, is limited to discussion of those who have assumed the risk of adverse publicity and criticism. Whereas all public officials have voluntarily entered into the public eye, not all persons involved in events of public concern have assumed this risk. Generally, persons deemed "public figures" affirmatively enter into the public eye, thus assuming the risk of adverse publicity. However, they also gain through their status or position the opportunity to exercise the self-help remedy of using the mass media to effectively rebut defamatory falsehoods. Public figures are therefore both less vulnerable to injury and less deserving of recovery.<sup>106</sup>

As with public officials, the scope of privileged comment on public figures is limited. The Supreme Court has recognized three types of public figures: the all purpose public figure, the limited public figure, and the involuntary public figure.<sup>107</sup> The scope of privileged comment depends on the type of public figure concerned.

All purpose public figures are individuals who "achieve such pervasive fame or notoriety"<sup>108</sup> or "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes."<sup>109</sup> The *New York Times* privilege is apparently applicable to any comment or criticism of an all purpose public figure's life or activities.<sup>110</sup> But "[a]bsent clear evidence of general fame . . . and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life."<sup>111</sup>

Limited purpose public figures are individuals who "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."<sup>112</sup> The first requisite for finding a limited purpose public figure is his involvement in a bona fide public controversy, which is not the equivalent of "controversies of interest to the public."<sup>113</sup> A person must have voluntarily<sup>114</sup> attempted to influence public opinion<sup>115</sup> concerning the public controversy to qualify as a limited public figure.<sup>116</sup> The press can-

106. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-45 (1974).

107. *Id.* at 345.

108. *Id.* at 351.

109. *Id.* at 345. The Court has implicitly held that "all purpose" public figures must have national, not merely local, fame or notoriety. *Time, Inc. v. Firestone*, 424 U.S. 448, 453 (1976).

110. *See, e.g.*, *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976). *See also* *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 167-68 (1979) ("[M]ore than mere newsworthiness [is necessary] to justify application of the demanding burden of *New York Times*."); J. BARRON & C. DIENES, *HANDBOOK OF FREE SPEECH AND FREE PRESS* § 6:12 (1979).

111. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974) (emphasis added).

112. *Id.* at 345.

113. *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976).

114. Examining the issue whether initiation of litigation is a voluntary action, the Court stated that "resort to the judicial process . . . is no more voluntary in a realistic sense than [use of the courts by a] defendant called upon to defend his interest in court." *Id.* *But see* *Street v. National Broadcasting Co.*, 645 F.2d 1227, 1234 (6th Cir. 1981) (implying that bringing a spurious lawsuit or making an accusation of crime without probable cause meets the voluntariness requirement).

115. *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 167-68 (1979).

116. *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976). The *Firestone* Court denied that the public controversy requirement was a resurrection of *Rosenbloom*, because public controversy is not the equivalent of a

not create a public figure merely by publicizing an account of that person's life or activities.<sup>117</sup>

Limited public figures are, therefore, public figures in only specific instances. The *New York Times* privilege attaches only to discussion of the public controversy in which they are involved;<sup>118</sup> for all other purposes limited public figures remain private persons. Whether public figures retain their protected status for purposes of historical discussion after interest in the public controversy has subsided, however, remains an unresolved question.<sup>119</sup>

Although acknowledging that "instances of truly involuntary public figures must be exceedingly rare,"<sup>120</sup> the *Gertz* Court suggested that involuntary public figure status is possible despite the doctrine's inconsistency with the Court's rationale for extending constitutional protection to discussion of public figures. The Court's presumption that public figures voluntarily assume the risk of adverse publicity by entering into the public limelight<sup>121</sup> is completely without merit when one involuntarily becomes a public figure. The Supreme Court's recent defamation decisions have thus stressed the voluntariness element and have virtually ignored the possibility that a person may involuntarily become a public figure.<sup>122</sup> Thus, some commentators believe that the involuntary public figure classification has lost its viability.<sup>123</sup>

Elimination of the involuntary public figure doctrine is a sound idea, given the rationale underlying the public figure aspect of the *New York Times* rule. Assumption of the risk of adverse publicity, however, is only half of the *New York Times*' dual rationale, the other half being the availability of self-help through access to the media. Thus, if a person is ever deemed an involuntary public figure, he will likely be one who receives substantial media attention despite any action on his part.<sup>124</sup> Attributing public figure status other-

matter of public or general interest. *Id.* "[A]pparently 'public controversy' is not to be so narrowly construed as to limit the term to matters of political life and self-government," but rather should be used to distinguish matters that are private, albeit stimulating public interest, and truly public controversies. J. BARRON & C. DIENES, *supra* note 110, § 6:13, at 285.

117. *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979). "Clearly those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Id.*

118. *Time, Inc. v. Firestone*, 424 U.S. 448, 454-55 (1976).

119. In *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979), the Court sidestepped the issue whether a public figure remains a public figure for purposes of later discussion of or historical commentary on the original public controversy. Justice Blackmun, however, intimated that the passage of time can cause the lapse of public figure status. *Id.* at 170 (Blackmun, J., concurring). *But see* *Street v. National Broadcasting Co.*, 645 F.2d 1227 (6th Cir. 1981); *Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977). Both *Street* and *Meeropol* held that the mere passage of time does not affect one's public figure status regarding the original public controversy.

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

121. *See id.* at 344-45.

122. *See* *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 165-68 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448, 453-55 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). *See also* Note, *The Evolution of the Public Figure Doctrine in Defamation Actions*, 41 OHIO ST. L.J. 1009, 1030-35 (1980).

123. *See, e.g.*, J. BARRON & C. DIENES, *supra* note 110, § 6:14. The authors noted, however, that courts may hold constitutionally sufficient a plaintiff's voluntary involvement in a matter "which subsequently [becomes] a focus of public attention." *Id.* § 6:13, at 290.

124. Substantial authority holds that the families, friends, and associates of public figures may be deemed public figures without any affirmative action seeking publicity, or that at least a reduced standard may apply.

wise is a reversion to *Rosenbloom*—forcing a person to surmount *New York Times* merely because of his newsworthiness.

### 3. *The Actual Malice Limitation*

To surmount the *New York Times* privilege a public plaintiff<sup>125</sup> must prove with “convincing clarity”<sup>126</sup> that the defamation defendant acted with actual malice. It is unfortunate that the *New York Times* Court chose the term “actual malice” to name the constitutional threshold. Because of the many common-law definitions attached to the term “malice,” some lower courts were initially confused by the use of this term.<sup>127</sup> Under *New York Times*, malice in the sense of spite, ill will, or desire to do injury, is not constitutionally sufficient to maintain an action.<sup>128</sup> Although the presence of common-law malice may affect a plaintiff’s right to punitive damages,<sup>129</sup> it is irrelevant to attachment of the constitutional privilege.<sup>130</sup>

To reach the constitutional threshold, a public plaintiff must show that the defendant at least “entertained serious doubts as to the truth” of the allegedly defamatory comment.<sup>131</sup> Thus, a plaintiff against whom the privilege is asserted must surmount the “rigorous requirements”<sup>132</sup> of proving a statement’s falsity<sup>133</sup> and the defendant’s knowledge or reckless disregard of that falsity.

Although the protection *New York Times* and *Curtis Publishing* afford defamation defendants is frequently termed a “privilege,” that term is a misnomer.<sup>134</sup> Since *New York Times* requires the plaintiff to prove actual malice with convincing clarity,<sup>135</sup> the privilege is not an affirmative defense, like the common-law privileges,<sup>136</sup> but is instead an element of the plaintiff’s prima facie case. To recover in a defamation action, public figures or public officials

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*See, e.g.*, *Rebozo v. Washington Post Co.*, 637 F.2d 375 (5th Cir. 1981), *cert. denied*, 454 U.S. 964 (1981) (close friend of former President Nixon); *Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977) (the children of Ethel and Julius Rosenberg); *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976) (Johnny Carson’s wife). *See also* Note, *An Analysis of the Distinction Between Public Figures and Private Defamation Plaintiffs Applied to Relatives of Public Persons*, 49 S. CAL. L. REV. 1131 (1976).

125. This Comment will use the term “public plaintiff” to refer to both public officials and public figures.

126. *New York Times Co. v. Sullivan*, 376 U.S. 254, 285–86 (1964).

127. For a discussion of the confusion emanating from the use of the term “actual malice,” see Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1370–75 (1975).

128. *See supra* notes 60–61 and accompanying text.

129. *See infra* notes 161–66 and accompanying text.

130. *See supra* notes 60–61 and accompanying text.

131. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

132. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974).

133. Since a plaintiff has the burden of proving knowledge or reckless disregard of falsity, it seems that the plaintiff a fortiori also has the burden of proving falsity. *But see* Eaton, *supra* note 1, at 1381–86 (argues that the burden of proof on the issue of falsity is still an open question).

134. *See* L. ELDRIDGE, *THE LAW OF DEFAMATION* § 53, at 293 (1978). Nevertheless, this Comment will continue to refer to the protections afforded by *New York Times* and *Gertz* as privileges.

135. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80, 285–86 (1964).

136. *See supra* notes 35–38 and accompanying text.

must therefore sustain the burden of proving with convincing clarity<sup>137</sup> that the defendant either knew an allegedly defamatory statement was false or at least seriously doubted its truth.

### C. *The Gertz Privilege*

#### 1. *Scope of the Privilege*

In *Gertz v. Robert Welch, Inc.*<sup>138</sup> the Supreme Court readdressed the issues raised in *Rosenbloom v. Metromedia, Inc.*<sup>139</sup> Justice Brennan's plurality opinion in *Rosenbloom* stated that the *New York Times* privilege was applicable not only to public plaintiffs, but to all "matters of public or general concern."<sup>140</sup> *Gertz*, however, explicitly rejected *Rosenbloom*'s expansion of the *New York Times* privilege, thus limiting it to discussion of public officials and public figures.<sup>141</sup> Although the Court refused to extend the *New York Times* privilege to discussion of private persons merely because they are involved in matters of public concern,<sup>142</sup> it realized that so restricting *New York Times* left defamation defendants with no protection from state imposition of strict liability in suits brought by nonpublic plaintiffs.<sup>143</sup> The Court, therefore, opted for the mere prohibition of strict liability, promulgating an intermediate standard that prohibits the imposition of defamation liability without "fault."<sup>144</sup>

#### 2. *The Fault Requirement*

The *Restatement (Second) of Torts* articulates "five distinct contexts in which the question of fault may arise."<sup>145</sup> The *Restatement*, however, takes

137. *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964). The Court articulated the rationale behind the convincing clarity standard:

[Generally,] "an erroneous verdict in the defendant's favor [is no more serious] than . . . an erroneous verdict in the plaintiff's favor." . . . In libel cases, however, we view an erroneous verdict for the plaintiff as most serious. Not only does it mulct the defendant for an innocent misstatement . . . [a lesser standard] would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate.

*Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 50 (1971) (quoting *In Re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring)).

One commentator noted that the convincing clarity standard "reduces self-censorship in two related ways as well: it facilitates summary judgment in unmeritorious cases, and it extends the power of appellate courts to reverse jury verdicts for plaintiff." Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199, 248 (1976). Cf. *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82 (1967) (Although the petitioner failed to object to the erroneous jury instruction, the Court examined the record to determine the sufficiency of the evidence.).

138. 418 U.S. 323 (1974).

139. 403 U.S. 29 (1971).

140. *Id.* at 44.

141. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-48 (1974).

142. *Id.* at 346.

143. *Id.* at 346-47.

144. *Id.* at 347. Although this section of the Comment examines the constitutional law of defamation without consideration of whom it protects, one must be aware that the *Gertz* privilege applies only to media speakers. *Id.*

145. RESTATEMENT (SECOND) OF TORTS § 580B comment b (1977) [hereinafter referred to as the *Restatement*]. The five contexts are:

(1) Publication to a third party (e.g., a communication mailed directly to the defamed person comes to the attention of a third party);

the position that the *Gertz* privilege requires defendants to establish "fault" in only three of the five contexts: a statement's falsity, its defamatory character, and its effect on a particular plaintiff.<sup>146</sup>

The *Restatement* further posits that the plaintiff must carry the burden of proof on the fault issue.<sup>147</sup> Although the Supreme Court has not yet addressed the question of whether absence of fault is an affirmative defense or whether a defamed plaintiff's case must include proof of the defendant's fault, lower federal courts have examined the issue. For example, in *Wilson v. Scripps-Howard Broadcasting Co.*<sup>148</sup> the Sixth Circuit held that the plaintiff had the burden of proving that a defendant acted with fault.<sup>149</sup> The *Wilson* court observed that casting the *Gertz* fault privilege as an affirmative defense would negate the privilege in some cases. A defendant who merely failed to meet his burden of proof might be subject to liability without affirmative proof of fault. Since *Gertz* requires that liability cannot be imposed without fault, placing the burden of proof on the defendant would be unconstitutional.<sup>150</sup> The *Wilson* court further held that the *Gertz* fault standard has two components: falsity and carelessness.<sup>151</sup> Thus, the private plaintiff must prove that the allegedly defamatory remark is false and that the defendant acted with the requisite degree of carelessness in failing to ascertain the remark's falsity.<sup>152</sup>

As long as strict liability is not imposed, states are free to set their own standard of carelessness.<sup>153</sup> They have differed on whether mere negligence or a higher degree of fault is required.<sup>154</sup> As a lower limit, however, liability for

(2) Truth or falsity of the communication (*e.g.*, a statement is false despite a bona fide belief in its truth);

(3) Defamatory character of the communication (*e.g.*, a statement not defamatory on its face is made so because of extrinsic facts unknown to the defendant);

(4) Content of the communication (*e.g.*, a typographical error or slip of the tongue, or words with more than one meaning); and

(5) Reference to the plaintiff (*e.g.*, reference to another person or a fictitious person, is reasonably understood as referring to the plaintiff).

*Id.* at 222.

146. *Id.* comments d-f.

147. *Id.* comment j.

148. 642 F.2d 371 (6th Cir. 1981).

149. *Id.* at 374-76.

150. *Id.* at 375-76.

151. *Id.* at 375.

152. *Id.* See RESTATEMENT (SECOND) OF TORTS § 580B(a) (1977). Under the *Restatement's* approach the "carelessness" element consists of three sub-elements: carelessness about the statement's falsity, its defamatory character, and its effect on the plaintiff. The *Restatement* further notes that the common law already requires intent or fault in the communication to a third party. *Id.* § 580B comment b. The *Gertz* privilege clearly requires fault concerning falsity. 418 U.S. 323, 347-48 (1974). See *supra* notes 145-51 and accompanying text.

The additional elements for which the *Restatement* requires fault may stem from *Gertz's* statement that additional fault may be required for "statements [that fail to make] substantial danger to reputation apparent." 418 U.S. 323, 348 (1974) (citing *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967)). That statement seems, however, to be concerned mainly with what is known as defamation *per quod* and thus may constitutionalize the distinction between *per se* and *per quod* liability.

153. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974); *Wilson v. Scripps-Howard Broadcasting*, 642 F.2d 371, 375 (6th Cir. 1981).

154. States have taken at least three approaches to the standard of care demanded by the *Gertz* fault requirement. The majority of jurisdictions that have addressed the issue have settled for a negligence standard. J. BARRON & C. DIENES, *supra* note 110, § 6:4, at 250. See, *e.g.*, *Troman v. Wood*, 62 Ill. 2d 184, 340 N.E.2d 292 (1975); *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976). Other states, however, have opted for

the defamation of a private figure cannot be imposed absent proof by a preponderance of the evidence that the alleged defamation was false and that the defendant acted negligently in failing to ascertain its falsity.<sup>155</sup>

#### D. Constitutional Limitations on Damages

The Supreme Court in *Gertz*, balancing the competing interests represented by defamation law and the first amendment, also set limits on the damages that may be imposed in defamation actions.<sup>156</sup> At common law, damages were presumed in actions based on libel or slander *per se*.<sup>157</sup> The *Gertz* Court, however, held that first amendment values outweigh an allegedly defamed plaintiff's interest in receiving such "gratuitous awards" of damages.<sup>158</sup> Thus, no defamation plaintiff is entitled to general damages absent proof of actual malice.<sup>159</sup> Although an injured plaintiff is not required to prove his actual loss in monetary terms, judges or juries may award compensatory damages based only on a plaintiff's "actual injury."<sup>160</sup>

*Gertz* also limited state imposition of punitive damages in defamation actions.<sup>161</sup> At common law, punitive damages could be assessed if the defendant acted maliciously (in the sense of with ill will).<sup>162</sup> *Gertz*, however, bars imposition of punitive damages absent proof that the defendant acted with actual malice.<sup>163</sup> Since actual malice is an element of a public plaintiff's

higher standards. *See, e.g.*, *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975) (gross negligence); *Walker v. Colorado Springs Suns, Inc.*, 188 Colo. 86, 538 P.2d 450 (1975) (actual malice in matters of public concern). For a more complete cataloging of state court responses, see J. BARRON & C. DIENES, *supra* note 110, §§ 6:4-6:8; Frakt, *Defamation Since Gertz v. Robert Welch, Inc.: The Emerging Common Law*, 10 RUT-CAM. L.J. 519 (1979); Note, *The Constitutional Law of Defamation—Recent Developments and Suggested State Court Responses*, 33 ME. L. REV. 371 (1981).

155. The *Restatement* takes the position that the negligence standard and proof by a mere preponderance of the evidence are constitutionally sufficient. RESTATEMENT (SECOND) OF TORTS § 580B comments g, j (1977). *See also* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 353 (1974) (Blackmun, J., concurring) ("[T]he Court now conditions a libel action by a private person upon a showing of negligence as contrasted with a showing of willful or reckless disregard.")

Whether *Gertz* requires additional proof of fault for defamations *per quod* (not defamatory without knowledge of extrinsic facts) remains unsettled. *See supra* notes 27 & 152. This issue was raised in *Gertz* but was not resolved. 418 U.S. 323, 348 (1974). The *Restatement* seems to take the position that *Gertz* also requires, in proper cases, proof that a defendant was negligent in failing to ascertain a statement's defamatory character and its effect on the particular plaintiff. RESTATEMENT (SECOND) OF TORTS § 580B(a) (1977).

156. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974).

157. *See supra* notes 26-31 and accompanying text.

158. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

159. *Id.*

160. *Id.* at 349-50. Although actual injury is not the equivalent of common-law special damage, *Gertz* requires specific proof of damage or harm. Actual injury, not limited to "out-of-pocket loss," includes damages for "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Id.*

161. *Id.* at 350. The Court noted that

jury discretion [in awarding punitive damages] is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views.

162. *See supra* note 42 and accompanying text.

163. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).



prima facie case,<sup>164</sup> this limitation does not affect defamation suits brought by public plaintiffs. Under *Gertz*, however, states may validly impose liability with proof of fault less than actual malice.<sup>165</sup> So although private plaintiffs may recover compensatory damages on proof of mere fault, they may not recover punitive damages absent proof that the defendant acted with actual malice.<sup>166</sup>

## II. THE PROBLEM

While a libel disseminated through the mass media may be the most likely to attract the public's attention, defamations can arise in other contexts. Thus far this Comment has examined constitutional defamation law without discussion of to whom the protection extends. Since *Gertz* was implicitly limited to defamation actions brought against publishers and broadcasters<sup>167</sup>—persons shielded by freedom of the press—the question whether other first amendment activity is similarly privileged remains unanswered.

The first amendment protects four types of verbal expression: the freedoms of religion, speech, and press, and the right to petition the government for redress of grievances.<sup>168</sup> Libels or slanders, however, can arise in any of these contexts. The following, for example, can all give rise to potential defamation liability: a minister's sermon or a discussion during a church committee meeting (religion); a friendly discussion at a local tavern or a statement made during a P.T.A. meeting (speech); or a letter to a congressman or a lobbyist's pitch to a legislator (right to petition). The question is whether under *New York Times* and *Gertz* these types of activities are entitled to the same degree of protection afforded the press. Some courts have found the *New York Times* and *Gertz* rules inappropriate in nonmedia contexts. The problem is illustrated in two lines of cases reaching dichotomous results. The first series of decisions hold that nonmedia speech is entitled to either less or none of the protection afforded by *New York Times* and *Gertz*.<sup>169</sup> The second

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164. See *supra* notes 147–49 and accompanying text.

165. Despite its acknowledgment that "jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship," the Court declined the opportunity to abolish punitive damages. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). The argument for total abolition of punitive damages, however, has been made. See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 81–86 (1971) (Marshall, J., dissenting).

Furthermore, at least one state court has held punitive damages impermissible in defamation actions under the state constitution. *Hall v. May Dep't Stores*, 292 Or. 131, 637 P.2d 126 (1981). States that do not follow the Oregon rule must still determine the situations in which punitive damage awards will be appropriate. It seems probable that in addition to the *Gertz* actual malice requirement malice (in the sense of ill will) will also be required as a matter of state law. See *Alioto v. Cowles Communications, Inc.*, 430 F. Supp. 1363 (N.D. Cal. 1977), *aff'd*, 623 F.2d 616 (9th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981). Thus, in the presence of both actual malice and common-law malice, states are likely to retain punitive damages as a means of deterring and punishing malicious defamation.

166. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

167. See, e.g., *id.* at 347, 350.

168. See *supra* notes 6 & 10.

169. See *infra* notes 172–75 and accompanying text.

line culminated in a recent decision that held that the right to petition gives rise to an absolute defamation privilege.<sup>170</sup>

Occupying one end of the spectrum is the Supreme Court's holding in *Gertz*, implicitly limited to publishers and broadcasters. The opinion has caused confusion and has led to disparate treatment of defamation defendants in the lower courts.<sup>171</sup> The precise issue is whether the *New York Times* and *Gertz* privileges are applicable to nonmedia defendants—speakers to whom the freedom of the press is inapplicable. At least four different positions have been taken on the issue: (1) neither the *New York Times* nor *Gertz* privileges apply to nonmedia defendants;<sup>172</sup> (2) the *New York Times* privilege applies to nonmedia defendants, but *Gertz* does not;<sup>173</sup> (3) the *New York Times* privilege applies to nonmedia defendants, but *Gertz* applies to nonmedia defendants only in matters of public interest;<sup>174</sup> and (4) *New York Times* and *Gertz* both apply to nonmedia defendants.<sup>175</sup>

The Supreme Court has refused to resolve this issue despite numerous opportunities to do so. The Court's refusal to apply the *Gertz* privilege in nonmedia contexts could have far-reaching results. States remain free to impose defamation liability on nonmedia defendants even though those defendants act without fault. More incredibly, states are free to impose defamation liability on true statements.<sup>176</sup> In an attempt to avoid these potentially draconian results, lower courts analyzing the various Supreme Court defamation decisions have tried to explain the apparent distinction the Court draws between media and nonmedia defendants. This Comment will demonstrate that the Court's distinction is illusory, with no basis in either policy or precedent.

*Webb v. Fury*<sup>177</sup> occupies the other end of the spectrum, imbuing the right

170. *Webb v. Fury*, 282 S.E.2d 28, 37 (W. Va. 1981).

171. See *infra* notes 173–75 and accompanying text.

172. See, e.g., *Calero v. Del Chem. Corp.*, 68 Wis. 2d 487, 228 N.W.2d 737 (1975). See also Stewart, "Or of the Press," 26 HASTINGS L.J. 631, 635 (1975).

173. See *Wheeler v. Green*, 286 Or. 99, 107, 593 P.2d 777, 783 (1979) (*New York Times* applies to all defendants); *Harley-Davidson Motorsports v. Markley*, 279 Or. 361, 368, 568 P.2d 1359, 1364 (1977) (*Gertz* does not apply to nonmedia defendants).

174. Terms or criteria other than "public interest" have also been used. Several commentators have suggested that courts should analyze the subject matter or context of the speech in question in determining whether the privilege is applicable. See Kalven, *The Reasonable Man And The First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267 (political speech); Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 U.C.L.A. L. REV. 915 (1978) (general balancing of first amendment interests and the values served by defamation law); Note, *Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Nonmedia Defendants*, 95 HARV. L. REV. 1876 (1982) (balancing the interests of the speaker, his audience, and the target of the defamatory remark).

175. See, e.g., *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976); RESTATEMENT (SECOND) OF TORTS §§ 580A comment h, 530B comment e (1977).

176. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), "The Court . . . left open the question whether the [first amendment] require[s] that truth be recognized as a defense in a defamation action brought by a private person . . ." *Id.* at 490. An across-the-board application of *New York Times* and *Gertz*, however, would mandate a constitutional defense of truth. Public officials and public figures would be required to prove that the allegedly defamatory statement was false and that the defendant acted with "actual malice" in failing to ascertain its falsity. Private persons would be required to prove only that the defendant was at fault in publishing a false and defamatory statement. See *Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371 (6th Cir. 1981), and *supra* text accompanying notes 148–55.

177. 282 S.E.2d 28 (W. Va. 1981).

to petition with protection beyond that afforded by *New York Times* and *Gertz*. The United States Supreme Court's most significant right to petition decisions have only tangentially been based on constitutional law. Under the *Noerr-Pennington* doctrine<sup>178</sup> the Court held that as a matter of statutory interpretation antitrust law does not prohibit lobbying or other attempts to seek government action even if that activity is undertaken with the intent of reducing or hindering competition.<sup>179</sup> In *Webb* the West Virginia Supreme Court of Appeals, relying primarily on an intermediate series of decisions that expanded the *Noerr-Pennington* doctrine beyond the confines of antitrust law, held that the right to petition, guaranteed by the United States and West Virginia Constitutions,<sup>180</sup> gives rise to an absolute defamation privilege.<sup>181</sup> The *Webb* court, however, acknowledged that if the petitioning had been a mere sham the privilege would have been forfeited.<sup>182</sup> Narrowly interpreting *Noerr-Pennington's* sham exception, the court noted that the defendant's petitioning was legitimately directed toward influencing governmental policy and thus was not susceptible to defamation liability.<sup>183</sup> By simultaneously extending the *Noerr-Pennington* doctrine to defamation law and narrowly construing its sham exception, the *Webb* court granted defamatory speech a level of constitutional protection never before recognized.

### III. A CASE FOR A UNITARY STANDARD

#### A. *The Basis: The Unitary Nature of the First Amendment*

In *Thomas v. Collins*<sup>184</sup> the Supreme Court described the relationship between the first amendment freedoms: "It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a *single guaranty* with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights."<sup>185</sup> The Supreme Court has consistently viewed the different first amendment freedoms as merely different aspects of the same guaranty—the right of free expression.

Addressing the importance of the right to petition, the Supreme Court noted that "the very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances."<sup>186</sup> The Court thus recog-

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178. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).

179. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961).

180. U.S. CONST. amend. I; W. VA. CONST. art. III, § 16.

181. 282 S.E.2d 28, 43 (W. Va. 1981).

182. *Id.* at 40-43.

183. *Id.* At 43.

184. 323 U.S. 516 (1945).

185. *Id.* at 530 (emphasis added).

186. *United States v. Cruikshank*, 92 U.S. 542, 552 (1875).

nized the central role that the right to petition plays within the scheme of the Bill of Rights. In further emphasizing that role, the Court noted that

the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected, both in origin and in purpose, with the other First Amendment rights of free speech and free press.<sup>187</sup>

So while the Court has emphasized the importance of the rights of petition and assembly, it has done so by placing them on an equal footing with the more highly visible rights of free speech and press.

The Supreme Court has also refused to grant members of the press greater rights than the general public. The press has argued for special rights in two contexts: access to news and protection from intrusion. The Court, however, has refused to recognize a special privilege in either context. The Court has consistently held that “[t]he Constitution does not . . . accord the press special access to information not shared by members of the public generally.”<sup>188</sup> Additionally, the Court has refused to fashion a special press privilege shielding newsmen or newsrooms from grand jury investigations,<sup>189</sup> police searches,<sup>190</sup> or civil discovery.<sup>191</sup>

The *Gertz* Court’s apparent distinction between media and nonmedia speakers is inconsistent with the Court’s longstanding position that the first amendment is a single guaranty. This Comment will demonstrate that the *New York Times* and *Gertz* privileges should protect all speakers similarly, regardless of whether the speaker is a member of the press or whether the speaker’s audience is the government or his neighbor.

### B. *Defamation and Nonmedia Speech*

When *New York Times* was decided in 1964, one commentator noted that the decision might “prove to be the best and most important [decision the Court] has ever produced in the realm of *freedom of speech*.”<sup>192</sup> Others have argued that *New York Times* and its progeny created only a press privilege, which one commentator has labelled the creation of a “mediaocracy.”<sup>193</sup> Notably, former Supreme Court Justice Potter Stewart stated that neither

187. *United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass’n*, 389 U.S. 217, 222 (1967).

188. *Pell v. Procunier*, 417 U.S. 817, 834 (1974). *See also Houchins v. KQED*, 438 U.S. 1 (1978); *Saxbe v. Washington Post*, 417 U.S. 843, 857 (1974).

189. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

190. *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

191. *Herbert v. Lando*, 441 U.S. 153 (1979).

192. Kalven, *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 194 (emphasis added).

193. Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 U.C.L.A. L. REV. 915, 923 (1978). For one commentator’s view that *New York Times* and its progeny have created merely a media privilege, see Note, *First Amendment Protection Against Libel Actions: Distinguishing Media and Non-Media Defendants*, 47 S. CAL. L. REV. 902, 924-38 (1974).

*New York Times* nor its progeny gave “an individual [rather than the institutional press] any immunity from liability for either libel or slander.”<sup>194</sup>

There are three relevant considerations in determining whether the creation of a special media privilege is appropriate: precedent, policy, and practicality. Looking first to precedent, primary support for the proposition that *Gertz* does not apply to nonmedia defendants can be found in the language of the opinion itself.<sup>195</sup> The Court’s refusal to resolve an issue not before it—precedent by omission—<sup>196</sup> is not, however, a sound basis for distinguishing between media and nonmedia defendants.

The Court has already weighed the competing interests that arise in the discussion of public and private plaintiffs.<sup>197</sup> Even if *Gertz*’ balancing of first amendment values is limited to speech protected by freedom of the press, the balance should not be different for nonmedia speech, given the unitary nature of the first amendment.

Former Justice Stewart and others advocating the creation of a media-ocracy base their arguments on the idea that the absence of such a privilege would make the freedom of the press a “constitutional redundancy,”<sup>198</sup> given the free speech clause. That argument is simply not viable, since the framers thought of freedom of speech and press as interchangeable.<sup>199</sup>

*Herbert v. Lando*,<sup>200</sup> decided after *Gertz*, is perhaps the most significant decision indicating the unitary nature of the first amendment within the field of defamation law. In *Herbert* the Supreme Court refused to recognize a special press evidentiary privilege barring civil discovery of a media defendant’s editorial process.<sup>201</sup> Since public plaintiffs have the onerous burden of establishing actual malice,<sup>202</sup> information relevant to that issue is necessary to the plaintiff’s prima facie case. Finding the press’ claim for preferential treatment without merit, the Court held that “[c]ourts have traditionally admitted any direct or indirect evidence relevant to the state of mind of the defendant and necessary to defeat a conditional privilege or enhance damages. The rules are applicable to the press and other defendants alike.”<sup>203</sup>

A brief reading of the *New York Times-Gertz* line demonstrates that the exclusion of nonmedia defendants from the protection of the *New York Times*

194. Stewart, “*Or of the Press*,” 26 HASTINGS L.J. 631, 635 (1975) (emphasis in original). Reflecting on Stewart’s position, one commentator noted the irony that the decision “regarded as the best and most important opinion in the realm of freedom of speech is described by [former] Justice Stewart as having nothing to do with freedom of speech.” Shiffirin, *supra* note 193, at 921.

195. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347, 350 (1974) (the requirement of fault and the limitations on damages are limited to defamation actions brought against publishers or broadcasters).

196. *Id.* at 325. (*Gertz* concerned an action against a magazine).

197. See *supra* notes 47–78 and accompanying text.

198. Stewart, *supra* note 194, at 633.

199. See, e.g., L. LEVY, LEGACY OF SUPPRESSION 174 (1960); Nimmer, *Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 639–41 (1975).

200. 441 U.S. 153 (1979).

201. *Id.* at 169.

202. See *supra* notes 126–37 and accompanying text.

203. 441 U.S. 153, 165 (1979).

actual malice privilege is barely supportable. In the pre-*Gertz* decisions the Supreme Court consistently held that the *New York Times* privilege was applicable to nonmedia defendants.<sup>204</sup> Most lower courts therefore concur that *New York Times* and *Curtis Publishing Co.* apply to both media and nonmedia defendants.<sup>205</sup>

One commentator observed, as a basis for distinction, that media and nonmedia speech differ in three significant ways: in their scope of publication, function, and characteristics of their speakers.<sup>206</sup> The first, difference in the scope of publication, cannot entitle the media to preferential treatment. While a nonmedia defendant's ability to limit his audience may reduce the potential for reputational damage,<sup>207</sup> it will generally not affect the issue of liability. Further, because a defamatory statement uttered by the media is widely disseminated, it may have a more devastating effect on a private person's reputation than backyard gossip, the form of speech generally seen as least deserving of first amendment protection.<sup>208</sup>

The second aspect distinguishing media from nonmedia speech is the function served by the institutional media: dissemination of information to the public.<sup>209</sup> While commentators acknowledge that the press serves a valuable service by providing "organized, expert scrutiny of government"<sup>210</sup> and other information necessary to a self-governing state, they overlook the press' underlying motivation—profit. The press is not a collection of nonprofit organizations blazing trails of enlightenment, but is instead a collection of profit-seeking businesses.

Another argument that the press and its apologists advance in support of a special defamation privilege based on the media's unique function is the media's need to circulate "hot news."<sup>211</sup> The media often operates under severe time restraints; however, those restraints are largely the result of competitive pressure. For example, if a newspaper takes the time to verify all its stories, it runs the risk of losing its audience to another publication that can produce the news more quickly. "Mediaocrats" therefore argue that the press should be able to act quickly, even at the risk of defaming the innocent. This argument, however, simply begs the question. If all potential defamation defendants are bound by the same standard of care, no speaker will be given a

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204. *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 76 (1964); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *Cf.* cases cited *supra* note 83.

205. *See, e.g., Jacron Sales Co. v. Sindorf*, 276 Md. 580, 587, 350 A.2d 688, 695 (1976). *See also Wheeler v. Green*, 286 Or. 99, 107-09, 593 P.2d 777, 783-85 (1979) (*New York Times* is applicable to all defendants although *Gertz* is not).

206. *See, e.g., Note, supra* note 193, at 924-38.

207. *Id.* at 926.

208. *See, e.g., Hill, Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1224-25 (1976).

209. *See, e.g., Note, supra* note 193, at 926-29.

210. Stewart, *supra* note 172, at 634.

211. Note, *supra* note 193, at 933.

competitive edge. Even former Justice Stewart's position that the press, as a business, is protected under the Constitution<sup>212</sup> does not affect this analysis.

A final argument in favor of preferential press treatment based on its unique function, is the role of the press as a disseminator of the information that the public needs to function effectively in a self-governing state.<sup>213</sup> The press certainly serves that function; nonmedia speech, however, plays an equally important role in facilitating the use of valuable information. The public must not only receive information from news sources, but must also be able to digest, understand, and use that information through discussion and criticism. It is absurd to consider that a letter published in a letters-to-the-editor column of a newspaper would be constitutionally protected,<sup>214</sup> while the same words spoken to a friend or neighbor would not.

The argument that members of the press are "responsible publishers"<sup>215</sup> is a *non sequitur*. If the press is more responsible than nonmedia speakers, then there is no need to afford the media greater protection. The responsibility stems from the institutional press' duty to keep the public informed of crucial information of public concern. Certainly the press serves that function; however, it also serves less glorious functions. Why should gossip published in so-called "scandal sheets" or "society pages" be given greater protection than backyard gossip? It seems very unlikely that the Supreme Court will accord speech greater protection simply because it is printed in a newspaper. Such a result is an absurdity.

Another argument advanced by mediaocrats in support of a special defamation privilege is that the press has a greater interest in disseminating news than its audience has in discussing the same news. That position gives the institutional press greater protection than, for example, the person who repeats a news story to a friend in an attempt to educate him concerning his vote in an upcoming election. Shielding the press with greater protection in such an instance serves no value. That result would only encourage media brainwashing and audience sterility—the natural result of an audience's exclusive reliance on the institutional media and lack of interaction with other persons. As the Supreme Court has noted, the first amendment guarantees "individuals [the] right to make their thoughts public and put them before the community."<sup>216</sup>

The rationale underlying *New York Times* and *Gertz*, therefore, will be frustrated if nonmedia speech is completely denied constitutional protection. In *New York Times* the Court noted the importance of debate and discussion

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212. Stewart, *supra* note 194, at 633 ("The publishing business is, in short, the only organized private business that is given explicit constitutional protection.").

213. *Id.* at 634.

214. At least one commentator has concluded that anyone who uses the media to communicate with the public is entitled to the same protection generally accorded the media. Hill, *supra* note 208, at 1223-24.

215. See, e.g., Note, *supra* note 193, at 930.

216. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 149 (1967).

of public issues.<sup>217</sup> Since the press does not have a monopoly on the discussion of public issues, most commentators advocate the protection of non-media speech in appropriate cases—although they disagree over what constitutes the touchstone for constitutional protection of nonmedia speech, they do agree that the constitutional defamation privileges do not die at the newspaper office door.<sup>218</sup>

Creation of a subject-matter determinative privilege for nonmedia speech poses both analytical and practical problems. The *Gertz* Court found that a public interest analysis was unmanageable. The Court “doubt[ed] the wisdom of committing . . . to the conscience of judges”<sup>219</sup> the task of determining “what information is relevant to self-government.”<sup>220</sup> Although some commentators have attempted to articulate other standards for determining what nonmedia speech should be protected,<sup>221</sup> each theory necessitates some degree of subject-matter regulation and requires some degree of value judgment concerning the worth of particular speech.

Even if the *New York Times* and *Gertz* privileges are held to apply to only media speech, a difficult question must be answered: Which speakers are protected by the freedom of the press? The Court has noted that “liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph [as well as] the large metropolitan publisher.”<sup>222</sup> Application of any standard of first amendment protection other than a unitary standard will inevitably necessitate a case-by-case evaluation of the merits of particular speech.

No viable basis exists in policy, precedent, or practicality for according the press greater constitutional protection than nonmedia speakers. Absent application of *Gertz* to nonmedia defendants, states are free to impose strict liability in defamation actions, conceivably even for true statements.<sup>223</sup> *Gertz*' extension to nonmedia defendants would end in two results: first, the defense of truth would be constitutionalized so that courts could never impose defamation liability based on either true statements or innocent falsehoods;<sup>224</sup>

217. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (“We consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited.”).

218. See sources cited *supra* note 174.

219. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974).

220. *Id.*

221. See *supra* note 174 and accompanying text.

222. *Branzburg v. Hayes*, 408 U.S. 665, 704-05 (1972). One commentator observed that “[o]ne person’s newspaper may be another’s handbill.” Frakt, *The Evolving Law of Defamation: New York Times Co. v. Sullivan to Gertz v. Robert Welch, Inc. and Beyond*, 6 RUT.-CAM. L.J. 471, 510 (1975). See also Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1416-18 (1975).

223. RESTATEMENT (SECOND) OF TORTS § 580B comment e (1977). See also *id.* § 580A comment h. Cf. Hill, *supra* note 208, at 1227 (“It is possible that the first amendment rule will be adopted [for nonmedia speech] simply in order to avoid the necessity of deciding on a case-by-case basis whether a particular communication is or is not subject to [the constitutional rules.]”); Eaton, *supra* note 222, at 1417 (the ultimate expansion of *Gertz* . . . seems predictable.”).

224. See *supra* notes 145-55 and accompanying text.



and second, damages would be limited to compensation for actual injury, absent proof of actual malice.<sup>225</sup> Both results would fulfill the prophecy that *New York Times* would have a major impact on free speech.

#### IV. DEFAMATION AND THE RIGHT TO PETITION

Prior to *Webb v. Fury*<sup>226</sup> most commentators believed that the *Noerr-Pennington*<sup>227</sup> "privilege" was lost upon proof of actual malice.<sup>228</sup> The Supreme Court's statement that "malicious libel enjoys no constitutional protection in any context"<sup>229</sup> supports this conclusion. In *Webb*, however, the court granted petitioning activity an absolute defamation privilege by drawing an analogy from the *Noerr-Pennington* doctrine of antitrust immunity.<sup>230</sup>

##### A. *The Noerr-Pennington Doctrine*

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*<sup>231</sup> the defendants, a group of railroad companies, mounted a lobbying and publicity campaign seeking "the adoption and retention of laws and law enforcement practices destructive of the trucking business"<sup>232</sup> for the purpose of reducing competition. Despite the plaintiffs' allegation that the campaign was malicious,<sup>233</sup> the Supreme Court unanimously held that the Sherman Antitrust Act was inapplicable to "mere attempts to influence the passage or enforcement of laws."<sup>234</sup> Finding the allegation of malice irrelevant, the Supreme Court stated that

[a] construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.<sup>235</sup>

The antitrust immunity is not lost merely because the government action sought has an anticompetitive purpose or effect.

The Supreme Court, however, has spoken on the *Noerr-Pennington* doctrine only in the context of antitrust law. Despite its expansion by other

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225. See *supra* notes 156-60 and accompanying text.

226. 282 S.E.2d 28 (W. Va. 1981).

227. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).

228. See Costilo, *Antitrust's Newest Quagmire: The Noerr-Pennington Defense*, 66 MICH. L. REV. 333, 348 (1967); Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80, 103 (1977); Walden, *More about Noerr—Lobbying, Antitrust and the Right to Petition*, 14 U.C.L.A. L. REV. 1211, 1247 (1967).

229. *Linn v. United Plant Guard Workers of Am.*, Local 114, 383 U.S. 53, 63 (1966) (emphasis added).

230. 282 S.E.2d 28, 43 (W. Va. 1981).

231. 365 U.S. 127 (1961).

232. *Id.* at 129.

233. *Id.* at 135.

234. *Id.* at 139.

235. *Id.* at 138.

courts, the *Noerr-Pennington* doctrine is not a matter of pure constitutional law. Basing its analysis on a statutory interpretation of the Sherman Antitrust Act, the *Noerr* Court held that "the right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms."<sup>236</sup> The Court did not hold that the right to petition mandated the existence of an antitrust immunity, or that a provision in the antitrust laws inclusive of petitioning activity would be unconstitutional. Instead, the Court merely interpreted the Sherman Act to avoid any possible constitutional conflict.<sup>237</sup>

The Court expanded *Noerr* in *United Mine Workers of America v. Pennington*,<sup>238</sup> which held that "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose."<sup>239</sup> Despite this expansion, the Court has failed to suggest that the *Noerr-Pennington* doctrine is anything other than a matter of statutory interpretation.

Although the *Noerr-Pennington* doctrine, as articulated by the Court, relates only to antitrust law,<sup>240</sup> some lower courts have expanded it beyond the confines<sup>241</sup> of antitrust law. This expansion has, in effect, constitutionalized the *Noerr-Pennington* doctrine. Although most courts facing the issue agree that the first amendment affords petitioning activity protection in contexts other than antitrust,<sup>242</sup> problems arise when they attempt to draw analogies from the factual vacuum of the *Noerr-Pennington* decisions. If the *Noerr-Pennington* immunity is to become a defense in nonantitrust contexts, the rationale and policy considerations underlying the doctrine must be re-examined.

*Sierra Club v. Butz*,<sup>243</sup> which concerned a suit for tortious business interference, was the first decision the *Webb* court relied on to justify the recognition of an absolute defamation privilege. Using sweeping language, the *Sierra Club* court held that civil liability could never be imposed upon valid petitioning activity.<sup>244</sup> Although recognizing that the *New York Times* privilege is lost upon a showing of actual malice, the *Sierra Club* court relied on

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236. *Id.*

237. *Id.*

238. 381 U.S. 657 (1965).

239. *Id.* at 670.

240. See *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

241. See *infra* notes 243-51 and accompanying text.

242. See, e.g., *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 615 (8th Cir. 1980); *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1342-46 (7th Cir. 1977); *Sawmill Products, Inc. v. Town of Cicero*, 477 F. Supp. 636, 642 (N.D. Ill. 1979); *Weiss v. Willow Tree Civic Ass'n*, 467 F. Supp. 803, 816-18 (S.D.N.Y. 1979); *Aknin v. Phillips*, 404 F. Supp. 1150, 1153 (S.D.N.Y. 1975); *Sierra Club v. Butz*, 349 F. Supp. 934, 938-39 (N.D. Cal. 1972); *Arlington Heights Nat'l Bank v. Arlington Heights Fed. Sav. & Loan Ass'n*, 37 Ill. 2d 546, 549, 229 N.E.2d 514, 517 (1967).

243. 349 F. Supp. 934 (N.D. Cal. 1972).

244. *Id.* at 939.

language in *Noerr*, providing that malice does not destroy the antitrust immunity,<sup>245</sup> to support its holding that the first amendment protects "malicious" petitioning. The court, however, did not resolve whether statements made with knowledge or reckless disregard of falsity, hence with actual malice, were to be similarly protected. If the *Sierra Club* court intended to extend *Noerr-Pennington* to protect actual malice, the court failed to adequately distinguish *New York Times*.

In *Stern v. United States Gypsum, Inc.*<sup>246</sup> and *Gorman Towers, Inc. v. Bogoslavsky*<sup>247</sup> federal civil rights statutes were held inapplicable to petitioning activity.<sup>248</sup> If the *Noerr-Pennington* doctrine is to be extended to areas of law other than antitrust, the expansion should be limited to cases of statutory interpretation, avoiding, when possible, potential conflicts with the right to petition. For example, in *Stern* the court dealt with a potential conflict with the right to petition, stating that "[i]t is basic to federal jurisprudence that courts must seek any reasonable construction of a statute that is consistent with its legislative purpose so as to avoid serious constitutional doubt"<sup>249</sup>; and thus it held section 1985 of the Federal Civil Rights Act<sup>250</sup> inapplicable to petitioning activity.<sup>251</sup> Despite the use of broader language, the *Stern* and *Gorman Towers* holdings are relatively narrow. One encounters a more difficult problem when the *Noerr-Pennington* defense is asserted in a defamation suit.

#### B. The *Noerr-Pennington* Doctrine's Sham Exception

The *Noerr-Pennington* defense is unavailable when ostensibly valid petitioning activity is a mere sham.<sup>252</sup> In *Noerr* the Supreme Court held that the antitrust immunity was applicable to the defendant's petitioning activity despite the defendant's malicious, anticompetitive intent.<sup>253</sup> The Court, however, laid the groundwork for excluding certain types of petitioning activity from the antitrust immunity by stating that "[t]here may be situations in which a publicity campaign, ostensibly directed toward influencing government action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor."<sup>254</sup>

The Supreme Court expressly acknowledged a sham exception in *California Motor Transport Co. v. Trucking Unlimited*.<sup>255</sup> The defendants were

245. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961).

246. 547 F.2d 1329 (7th Cir. 1977).

247. 626 F.2d 607 (8th Cir. 1980).

248. *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1344 (7th Cir. 1977); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 615 (8th Cir. 1980).

249. 547 F.2d 1329, 1344 (7th Cir. 1977).

250. 42 U.S.C. § 1985 (1976).

251. 547 F.2d 1329, 1344 (7th Cir. 1977).

252. See *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972).

253. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139-41 (1961).

254. *Id.* at 144.

255. 404 U.S. 508 (1972).

alleged to have instituted spurious judicial and administrative proceedings for the purpose of harassing their competitors.<sup>256</sup> The defendants nevertheless asserted that their conduct was insulated from antitrust liability under *Noerr-Pennington*.<sup>257</sup> The Court, however, held that although access to courts and administrative agencies is protected by the first amendment right of petition,<sup>258</sup> petitioning activity that is a mere sham<sup>259</sup> or a pretext for achieving "substantive evils,"<sup>260</sup> is unprotected by the *Noerr-Pennington* immunity. The Court thus concluded that petitioning activity engaged in for the mere purpose of harassing competitors falls within the *Noerr-Pennington* sham exception.<sup>261</sup>

Unfortunately, because both *California Motor* and *Otter Tail Power Co. v. United States*,<sup>262</sup> the Court's only other sham exception decision, concerned petitioning activity directed toward depriving competitors of meaningful access to courts or administrative agencies, some lower courts have interpreted the sham exception very narrowly.<sup>263</sup> For example, in deciding *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers*<sup>264</sup> the Ninth Circuit held that the sham exception "does not extend to direct lobbying efforts . . . , but only to publicity campaigns."<sup>265</sup> Retreating slightly from that position, the *Franchise Realty* court added that the sham exception might also be applicable when "the defendant is not seeking official action by a governmental body, [thus undertaking] 'nothing more' than an attempt to interfere with the business relationships of a competitor."<sup>266</sup> The second position is clearly preferable; the Constitution should not be interpreted to protect any type of sham petitioning activity, whether done directly or indirectly through a publicity campaign.

*California Motor* seems to indicate that the standard for determining a sham varies, depending on the branch of government petitioned.<sup>267</sup> The Court stated that "misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process."<sup>268</sup> Apparently, petitioning activity that results in an "abuse" of the adjudicatory function of either the courts or administrative agencies constitutes a sham.<sup>269</sup> Justice Stewart's

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256. *Id.* at 509.

257. *Id.*

258. *Id.* at 510.

259. *Id.* at 511.

260. *Id.* at 515.

261. *Id.* at 515-16.

262. 410 U.S. 366 (1973).

263. *E.g.*, *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076 (9th Cir. 1976).

264. *Id.*

265. *Id.* at 1080.

266. *Id.* at 1081.

267. 404 U.S. 508, 513 (1972). For a more detailed discussion of this idea, see Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80 (1977).

268. 404 U.S. 508, 513 (1972).

269. *Id.*

concurrence in *California Motor*, while avoiding the evasive concept of abuse, suggests that the “misrepresentations of fact or law to these tribunals”<sup>270</sup> might cause the activity to fall within the sham exception.

In *Woods Exploration & Producing Co. v. Aluminum Co. of America*,<sup>271</sup> an antitrust action, the Fifth Circuit assimilated the variant views of the sham exception and correctly held that the *Noerr-Pennington* immunity is lost when the petitioning activity is either not “designed to influence policy”<sup>272</sup> or when it results in an “abuse of the administrative process.”<sup>273</sup> Even if *Noerr-Pennington* is a doctrine of constitutional law, rather than a doctrine of statutory interpretation, the right to petition should never protect any form of “sham” petitioning. The test for the sham exception should be construed broadly to include all types of sham petitioning, regardless of the particular government entity being petitioned. A grievance addressed to the government with the speaker’s knowledge of its falsity or with reckless disregard of its truth, hence with actual malice, is clearly sham petitioning that should not be entitled to *Noerr-Pennington* protection.

### C. *Webb and its Possible Ramifications*

A conflict arises when, on one hand, the Supreme Court holds the first amendment a single guaranty,<sup>274</sup> and on the other the *Webb* court suggests that the right to petition is entitled to a defamation privilege of greater scope than the other first amendment freedoms.<sup>275</sup> The Supreme Court’s holding that the “First Amendment freedoms need breathing space to survive,”<sup>276</sup> is equally applicable to all first amendment activity. All freedoms of expression need breathing space if they are to remain robust and uninhibited. While the threat of a potential defamation suit will undoubtedly deter some expression, the Supreme Court has held that the *New York Times* and *Gertz conditional* defamation privileges are sufficient protection.<sup>277</sup> The *Webb* court, however, failed to adequately explain why the right to petition is entitled to greater protection.

By recognizing an absolute defamation privilege for petitioning activity, the *Webb* court recognized a constitutional right to give false information to the government. *Webb* is thus inconsistent with both the Supreme Court’s holding that false statements of fact have no constitutional value<sup>278</sup> and the theory of a unitary first amendment.<sup>279</sup> One potential explanation for this inconsistency is that petitioning activity is political speech that should be

270. *Id.* at 517 (Stewart, J., concurring).

271. 438 F.2d 1286 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (1972).

272. *Id.* at 1298.

273. *Id.*

274. *Thomas v. Collins*, 323 U.S. 516, 530 (1945). See also *supra* text accompanying notes 184–91.

275. *Webb v. Fury*, 282 S.E.2d 28, 43 (W. Va. 1981).

276. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

277. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

278. *Id.* at 340.

279. See *supra* text accompanying notes 184–91.

accorded a higher level of first amendment protection. For example, the *Gorman Towers* court seemed to equate *Noerr-Pennington's* reach with political activity.<sup>280</sup> No political speech theory, however, demands recognition of an absolute defamation privilege for all political speech. The Supreme Court expressly repudiated that idea in *New York Times* and *Gertz*.<sup>281</sup> Further, the right to petition is not limited to political matters.<sup>282</sup> Although the right to petition often coincides with the concept of political speech, the two are not identical.

The Supreme Court has consistently refused to extend constitutional protection to lies.<sup>283</sup> Although the Court has recognized an absolute defamation privilege for certain federal government officials,<sup>284</sup> the purpose of the privilege is not to protect the official himself, but instead to protect the "effective administration of policies of government."<sup>285</sup> Recognition of an absolute defamation privilege for petitioning activity would encourage persons seeking to influence the government to use distortion and misrepresentation in their arguments. No one should have a constitutional right to give false information to the government. The policy that some falsehoods should be protected in order "to protect speech that matters"<sup>286</sup> requires that only errors—not knowing or reckless falsehoods—be protected.

Although it has no logical basis in either policy or precedent, *Webb* could have a far-reaching and unexpected impact on defamation law. If courts recognize an absolute petitioning privilege, with a narrowly drawn sham exception, the constitutionality of the well-established common-law torts of abuse of process,<sup>287</sup> malicious prosecution,<sup>288</sup> and wrongful civil proceedings (civil malicious prosecution)<sup>289</sup> might be jeopardized. These torts, based on

280. *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 615 (8th Cir. 1980).

281. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974). But see Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 U.C.L.A. L. REV. 915, 917 (1978) (citing A. MEIKLEJOHN, *POLITICAL FREEDOM* 27 (1960)). For a fuller discussion of the relationship between the first amendment and "political speech," see BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978).

282. "The grievances for redress of which the right of petition was insured . . . are not solely religious or political ones." *United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 223 (1967). A rationale for recognizing a wide scope to the right to petition is that "[i]t matters not that the subject of the grievance may not be political, in the sense of raising public policy issues . . . . Indeed, the fact that a grievance may not arouse sufficient public concern to generate political support makes the individualized exercise of the right to petition all the more important." *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1343 (7th Cir. 1977).

283. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

284. See *Barr v. Matteo*, 360 U.S. 564 (1959). For a full discussion of the government defamation privileges, see generally L. ELDREDGE, *THE LAW OF DEFAMATION* §§ 72-75 (1978).

285. *Barr v. Matteo*, 360 U.S. 564, 569-76 (1959). See also *supra* notes 58-59 and accompanying text.

286. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).

287. Abuse of process occurs when "one . . . uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed." *RESTATEMENT (SECOND) OF TORTS* § 682 (1977).

288. Malicious prosecution occurs when "a private person . . . initiates or procures the institution of criminal proceedings against another who is not guilty of the offense charged, without probable cause and for a purpose other than bringing an offender to justice . . ." *RESTATEMENT (SECOND) OF TORTS* § 653 (1977).

289. Wrongful use of civil proceedings occurs when "one . . . takes an active part in the initiation, continuation or procurement of civil proceedings against another . . . [and] he acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based . . ." *RESTATEMENT (SECOND) OF TORTS* § 674 (1977).

misuse of the judicial system,<sup>290</sup> would clearly fall within the petitioning privilege recognized in *Sierra Club v. Butz*.<sup>291</sup> The issue is whether they fall within *California Motor's*<sup>292</sup> sham exception.<sup>293</sup>

In *California Motor* the Supreme Court held that certain "illegal and reprehensible practice[s] which may corrupt the administrative or judicial processes"<sup>294</sup> fall outside the scope of *Noerr-Pennington* protection, especially if used to deprive another of meaningful access to courts or agencies.<sup>295</sup> Abuse of process, malicious prosecution, and wrongful civil proceedings, however, do not bar access to the courts. On the contrary, these torts force a defendant to appear in court to vindicate himself. Further, under *Noerr-Pennington* a plaintiff's intent is irrelevant.<sup>296</sup> Under a broad definition of the sham exception,<sup>297</sup> those actions might constitute abuse of the judicial process—hence, a sham per se; a doctrine that could conceivably give constitutional protection to those abuses must be rethought.

#### D. Application of the Unitary Standard in Petitioning Cases

The Supreme Court's statement that "malicious libel enjoys no constitutional protection in any context"<sup>298</sup> both illuminates the inconsistency created by *Webb* and recommends a possible resolution. The constitutional protection for defamatory speech is a conditional privilege lost upon proof of actual malice or fault<sup>299</sup>—not an absolute privilege. Explaining the scope and purpose of the *New York Times* privilege, the Supreme Court stated that

[e]ven where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood. Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and ascertainment of truth.<sup>300</sup>

Thus, although the first amendment protects statements made with malice in the sense of ill will, it does not protect statements made with actual malice.

The policy underlying the constitutional defamation privileges disappears when actual malice is present. As the Supreme Court stated, "[T]he constitutional guarantees can tolerate sanctions against *calculated* falsehood without

290. See generally W. PROSSER, *supra* note 1, §§ 119–121.

291. 349 F. Supp. 934 (N.D. Cal. 1972).

292. 404 U.S. 508 (1972).

293. For an excellent discussion of the relationship between the "misuse of legal proceedings" torts and the *Noerr-Pennington* antitrust immunity, see Note, *Limiting the Antitrust Immunity for Concerted Attempts to Influence Courts and Adjudicatory Agencies: Analogies to Malicious Prosecution and Abuse of Process*, 86 HARV. L. REV. 715 (1973).

294. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

295. *Id.* at 513.

296. *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965).

297. See, e.g., *Woods Exploration & Producing Co. v. Aluminium Co. of Am.*, 438 F.2d 1286, 1298 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

298. *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 63 (1966).

299. See *supra* text accompanying notes 125–55.

300. *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964).

significant impairment of their essential function,"<sup>301</sup> because "[a]lthough honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published should enjoy a like immunity."<sup>302</sup> These ideas, reaffirmed in *Gertz*,<sup>303</sup> suggest that the *Webb* court erred in concluding that the first amendment right of petition gives rise to an absolute privilege.

The conflict between *Webb's* interpretation of *Noerr-Pennington* and the Supreme Court's position on malicious libel could be resolved by excluding statements made with actual malice from *Noerr-Pennington* protection. Petitioning activity engaging statements made with either knowledge or reckless disregard of their falsity should be interpreted as sham petitioning falling outside the scope of the *Noerr-Pennington* defense.

The *Webb* dissent<sup>304</sup> suggested such an approach earlier adopted by the Illinois Supreme Court in *Arlington Heights National Bank v. Arlington Heights Federal Savings & Loan Association*,<sup>305</sup> a case cited and quickly dismissed by the *Webb* majority. The *Arlington Heights* court began its analysis with the premise that *Noerr* protects petitioning in contexts other than antitrust. Noticing that the right of petition is "not inherently absolute,"<sup>306</sup> and analogizing from *New York Times*, the court held that "the right of petition should likewise be construed as only conditionally privileged."<sup>307</sup> Relying on *Thomas v. Collins* for the principle that the first amendment freedoms constitute a single guaranty,<sup>308</sup> the *Arlington Heights* court concluded that the petitioning privilege does not shield actual malice.<sup>309</sup>

The privilege recognized in *Arlington Heights* rests on a sound legal foundation.<sup>310</sup> The right to petition is not absolute. The Supreme Court has specifically held that "[n]either the right to associate nor the right to participate in political activities is absolute."<sup>311</sup> Several examples demonstrate that the right to petition is not absolute. Paying government officials to act in a particular manner is a type of petitioning, yet bribery is a crime and the constitutionality of criminal bribery statutes is beyond question. Additionally, in *United States v. Harris*<sup>312</sup> the United States Supreme Court upheld the Federal Regulation of Lobbying Act,<sup>313</sup> which requires the registration of all

301. *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) (emphasis added).

302. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

303. 418 U.S. 323, 340 (1974).

304. 282 S.E.2d 28, 46 (W. Va. 1981) (Neely, J., dissenting).

305. 37 Ill. 2d 546, 229 N.E.2d 514 (1967).

306. *Id.* at 550, 229 N.E.2d at 517.

307. *Id.*

308. 323 U.S. 516, 530 (1945). See *supra* notes 184-87 and accompanying text.

309. 37 Ill. 2d 546, 551, 229 N.E.2d 514, 517 (1967).

310. In *Swaaley v. United States*, 376 F.2d 857 (Ct. Cl. 1967), the court reached the same conclusion. Without dealing with *Noerr-Pennington*, the *Swaaley* court held that the right to petition gives rise to only a conditional defamation privilege, which is lost upon a showing of actual malice. *Id.* at 863.

311. *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 567 (1973).

312. 347 U.S. 612 (1954).

313. 2 U.S.C. §§ 261-270 (1976).



Capitol Hill lobbyists. Although these restrictions impose only slight burdens on the right to petition, they demonstrate that the right is not absolute.

Furthermore, when one considers the actual malice and fault limitations, the absence of an absolute defamation privilege clearly does not impose a substantial burden on the right of petition. As the Supreme Court noted in *Gertz*, “Neither the intentional lie nor the careless error materially advances society’s interest in ‘uninhibited, robust, and wide-open’ debate on public issues.”<sup>314</sup> Little value is served in protecting the right to knowingly or recklessly give false information to the government. The Court’s statement that “there is no constitutional value in false statements of fact”<sup>315</sup> seems unequivocal. Only statements made with knowledge or serious doubts about their falsity can be subjected to liability for defamation when the grievance concerns a public official or public figure.<sup>316</sup> Unless the Court recognizes a constitutional right to give false information to the government, no first amendment freedom will be inhibited by application of the actual malice limitation to the petitioning privilege. Since the Supreme Court has found the fault privilege to be the appropriate standard for discussion of private persons,<sup>317</sup> the petitioning privilege should not offer additional protection when private persons are discussed. The malice alleged in *Noerr* was based on the defendants’ anticompetitive intent to harm their competitors.<sup>318</sup> That malice consisted of ill will, not actual malice. A partial explanation for courts’ confusion over *Noerr-Pennington*’s scope is their failure to distinguish between the two types of malice. Common-law malice, such as anticompetitive intent, is protected by *Noerr-Pennington*; actual malice, however, should not be afforded like immunity. Any petitioning that would otherwise be violative of the antitrust laws is necessarily malicious to competitors. This type of malice must be protected if the *Noerr-Pennington* doctrine is to have any meaning. The Supreme Court explained that it cannot make a difference that a grievance is motivated by self-interest—a contrary holding would “deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.”<sup>319</sup> Protecting malice of ill will, and refusing to protect actual malice, however, is not contradictory. In *Garrison v. Louisiana* the Court, without extending any privilege whatsoever to statements made with actual malice, held that statements made out of hatred, when honestly believed, are privileged.<sup>320</sup>

The policy that prevented the Court from extending an absolute protection to the press—that “absolute protection . . . requires a total sacrifice of the competing value served by the law of defamation”<sup>321</sup>—is equally applic-

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314. 418 U.S. 323, 340 (1974).

315. *Id.*

316. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

317. *See supra* notes 77–78 and accompanying text.

318. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 129 (1961).

319. *Id.* at 138.

320. 379 U.S. 64, 73 (1964).

321. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).

able to persons exercising their right to petition. The major rationale for the Supreme Court's refusal to extend the *New York Times* protection to discussion of all potential plaintiffs is based on the premise that public officials and public figures voluntarily seek publicity and have a greater opportunity to correct any defamatory falsehoods through access to the media.<sup>322</sup> These considerations also militate toward limiting the actual malice petitioning privilege to defamation suits brought by public officials or public figures. The first amendment defamation privileges should protect all persons to the same extent, regardless of the type of first amendment activity concerned. Given the Supreme Court's position on the unitary nature of the first amendment,<sup>323</sup> an interpretation of the *Noerr-Pennington* doctrine that allows all persons petitioning the government to assert the defamation privileges would heal the apparent split between the *New York Times* line of cases<sup>324</sup> and those cases that have extended *Noerr-Pennington* beyond the bounds of antitrust law.<sup>325</sup> A conditional privilege would effectively protect, without unreasonably inhibiting, the right to petition.

An actual malice privilege for grievances concerning public plaintiffs is completely sound. When actual malice is present, the policy behind extending protection to defamatory falsehoods is gone. As the Supreme Court noted in *Gertz*, defamatory falsehoods have no constitutional value in and of themselves, although in some cases defamatory speech is protected "in order to protect speech that matters."<sup>326</sup> The rationale for extending constitutional protection to defamatory speech is to ensure that persons may speak freely without fear of a defamation suit arising from an inadvertent error or honest misstatement of fact.<sup>327</sup> The *Webb* court, however, would likely be troubled by a negligence standard in petitioning cases concerning private persons. This Comment's proposed standard, however, would not create as many problems as might initially appear. The actual malice privilege would remain in effect for all complaints about government officials, certainly a large percentage of the grievances for which redress is sought. Of course, the actual malice privilege would also attach to complaints about public figures.

The Supreme Court has already weighed the competing interests represented by the first amendment and defamation law.<sup>328</sup> A private person has no less interest in his reputation when a letter concerning him is sent to a government official than when the same complaint appears in a newspaper or on television. *Gertz*' rejection of *Rosenbloom* clarified that first amendment values are not dependent on speech being categorized as a matter of public

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322. *Id.* at 344-45.

323. *See supra* notes 184-91 and accompanying text.

324. *See supra* notes 47-166 and accompanying text.

325. *See supra* notes 243-51 and accompanying text.

326. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).

327. *See supra* notes 53-56 and accompanying text.

328. *See supra* notes 47-78 and accompanying text.

concern.<sup>329</sup> In *Gertz* the Supreme Court clarified that when speaking about private persons, the speaker cannot mindlessly spout verbiage, but instead must carefully consider his words before speaking. Nevertheless, a speaker is privileged if he innocently defames a private person.<sup>330</sup>

Further, under *Gertz* negligence is only the minimum protection to which discussion of private persons is entitled. States are free to impose higher standards of care regarding defamation actions concerning private figures.<sup>331</sup> Additionally, the same activity protected by the first amendment right to petition is often simultaneously protected by common-law defamation privileges.<sup>332</sup> If neither the state standard of “fault” nor common-law privileges sufficiently protect petitioning activity, state courts are free to institute new common-law or state constitutional privileges.<sup>333</sup> Federal constitutional jurisprudence need not create an exception to the well-established principle of a unitary first amendment.

Another of the *Webb* court’s concerns in instituting an absolute petitioning privilege was that a speaker’s fear of a potential costly defamation lawsuit—even one that could be won on the merits—would inhibit the exercise of his right to petition.<sup>334</sup> After being advised by an attorney, most defamed plaintiffs, however, are unlikely to institute a losing lawsuit. Although in some cases spurious lawsuits may force “constitutionally innocent” defendants into costly litigation, that potential problem runs throughout American jurisprudence.<sup>335</sup>

The *Webb* dissent argued for a series of procedural protections instead of an adoption of an absolute privilege.<sup>336</sup> This position may prove to be more sound than that advocated by the majority. Although the Supreme Court is reluctant to incorporate procedural rules into the Constitution,<sup>337</sup> states are free to create rules governing the procedure of their courts.

At least one commentator has recommended expanded use of the summary judgment procedure.<sup>338</sup> Summary judgment may be an efficient means of disposing of spurious lawsuits, especially in cases that concern the *New York Times* privilege, which requires convincingly clear evidence of actual malice.

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329. 418 U.S. 323, 346 (1974). *But see* Note, *Protecting the First Amendment Right to Petition: Immunity for Defendants in Defamation Actions Through Application of the Noerr-Pennington Doctrine*, 31 AM. U.L. REV. 147, 169 (1981) (notes that the government—not the public at large—is the audience, thus that the risk of reputational harm is less).

330. 418 U.S. 323, 347 (1974).

331. *See* cases cited *supra* note 154.

332. *See* Note, *Protecting the First Amendment Right to Petition: Immunity for Defendants in Defamation Actions Through Application of the Noerr-Pennington Doctrine*, 31 AM. U.L. REV. 147, 154–61 (1981).

333. *See* *Webb v. Fury*, 282 S.E.2d 28, 43 (W. Va. 1981) (the absolute defamation privilege is based on the right to petition guaranteed by both the West Virginia and federal constitutions).

334. *Id.*

335. *See supra* note 137.

336. 282 S.E.2d 28, 46–47 (W. Va. 1981) (Neely, J., dissenting).

337. *See* *Herbert v. Lando*, 441 U.S. 153, 174 n.23 (1979).

338. *See* Note, *The Constitutional Law of Defamation—Recent Developments and Suggested State Court Responses*, 33 ME. L. REV. 371 (1981).

Judges should ask not only whether the plaintiff can prove actual malice, but whether the plaintiff can prove actual malice with convincing clarity.<sup>339</sup> The potential procedural protections coupled with the *New York Times* and *Gertz* privileges will ensure the opportunity for free and robust exercise of the right to petition.

### CONCLUSION

The constitutional law of defamation represents the Supreme Court's attempt to balance the competing interests represented by state defamation law and the first amendment. Some courts and commentators, however, have interpreted the *New York Times* and *Gertz* privileges narrowly, limiting them to protection of the press and broadcast media. Nevertheless, the rationale and policy underlying the constitutional privileges are appropriate not only in the context of media defamation, but in the context of all first amendment activity.

The rationale behind the constitutional defamation privileges is based on the premise that the fear of a potential defamation lawsuit will inhibit first amendment activity. The rationale is applicable to all forms of speech. A unitary standard of first amendment protection will ensure that all first amendment activity is equally protected from potential defamation liability.

In addition to the soundness of the unitary standard is the desirable results its application will engender: across-the-board application of the *New York Times* and *Gertz* privileges is consistent with the Court's belief that the freedoms of speech, press, religion, and the right to petition work together to ensure a broadly based right to free expression. Any other standard of protection will necessarily require a case-by-case analysis of the constitutional merit of all speech giving rise to potential liability. Under a unitary standard, however, the constitutional defamation privileges protect equally the television anchorman, the opinionated minister, the gregarious bartender, and the concerned citizen writing his congressman.

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339. *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964). See also *supra* note 137.