STATE TORT ACTIONS FOR LIBEL AFTER *GERTZ v. ROBERT WELCH, INC.*: IS THE BALANCE OF INTEREST LEANING IN FAVOR OF THE NEWS MEDIA?

I. INTRODUCTION

The United States Supreme Court recently reviewed the scope of first amendment restrictions on state tort actions for libel in *Gertz v. Robert Welch, Inc.*,[1] and held that a newspaper publishing defamatory falsehoods concerning a private individual could not claim a constitutional privilege against liability. Further, if state law permits recovery under a standard requiring less than a showing of knowledge of falsity or of reckless disregard for truth, first amendment considerations require that damages be limited to compensation for actual injury. This holding drastically affects the existing common law remedies for an action of libel in the various states.[2] This note will first outline the common law remedies for libel, using Ohio law as a typical example, and placing special emphasis on culpability and damage considerations. Thereafter, decisions by the Supreme Court requiring first amendment consideration for actions in libel will be reviewed. The purpose of this note is to follow the Supreme Court's attempts to balance the state interest in protecting the reputation of private persons against the interest of the news media in protection from unconstitutional censorship. In conclusion this note will suggest that the Court's attempt to reach an equilibrium has fallen short by greatly reducing the possibility of a private person's exoneration of his own name.

II. *Gertz v. Robert Welch, Inc.*

In 1968 a Chicago policeman killed a youth and the victim's parents retained attorney Elmer Gertz to initiate civil proceedings against the police officer. In the March, 1969, issue of *American Opinion*, a monthly magazine published by Robert Welch, Inc. and espousing the views of the John Birch Society, there appeared an article entitled: "FRAME-UP: Richard Nuccio and the War on Po-

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[1] 418 U.S. 323 (1974).

[2] Common law tort actions for libel vary in some aspects from state to state. Although the *Gertz* case arose in Illinois, the Ohio case law parallels Illinois decisions concerning libel actions. *See*, note 24 and accompanying text, *infra*. For purposes of this paper decisions of Ohio courts will be used to trace the development of the common law tort action of libel.

lice." The article was an effort of the magazine to warn its readers of a nationwide conspiracy to discredit local police departments. The magazine believed that a communist-inspired conspiracy wanted to replace local police departments with a federal police force which could be used to support a communist dictatorship. In an effort to confirm this belief, the managing editor commissioned a regular contributor to investigate the pending suit against the accused police officer.

The article stated that Gertz, as the architect of the "frame-up," had a large police file. Other statements in the article labeled the attorney a "Leninist" and a "Communist-fronter." The article named Gertz as an "official of the Marxist League for Industrial Democracy, originally known as the Intercollegiate Socialist Society, which has advocated the violent seizure of our government."[3]

Gertz sought $10,001 actual damages and $500,000 punitive damages on each of two counts. The district court denied defendant's motion to dismiss for failure to state a claim upon which relief could be granted, finding that, under Illinois law, to falsely label someone a communist is libel *per se*.[4] At trial, the managing editor of *American Opinion*, Scott Stanley, Jr., stated that the article's writer, Alan Stang, had contributed articles in the past and had always been accurate.[5] Stanley admitted that he had not checked the accuracy of the article. The jury awarded damages of $50,000.[6] The district court set aside the verdict on the grounds that recent Supreme Court cases[7] granted a limited privilege under the first and fourteenth amendments. Since the article in the *American Opinion* concerned a matter of public interest, the district court determined that the recent Supreme Court rule requires a plaintiff involved with a matter of public interest to prove actual malice.[8] Failing in this, the publisher of the article is entitled to immunity for his exercise of the first amendment right to inform the public.

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[3] 306 F. Supp. 310 (N.D. Ill. 1969).

[4] *Id.* The court noted that the scope of *per se* actions in Illinois recently have been narrowly construed. Coursey v. Greater Miles Township Publishing Corp., 82 Ill. App. 2d 76, 227 N.E.2d 164 (1967); Mitchell v. Peoria Journal-Star, Inc., 76 Ill. App. 2d 154, 221 N.E.2d 516 (1966). The alleged defamatory statement here was found by the court to injure the plaintiff in his trade, which is a requirement for a *per se* action of defamation. A discussion of the common law requirements for an action of libel follows in section three of this note.

[5] 322 F. Supp. 997, 999 (N.D. Ill. 1970).

[6] *Id.* at 998.

[7] Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Time, Inc. v. Hill, 385 U.S. 374 (1967); New York Times v. Sullivan, 376 U.S. 254 (1964).

[8] Actual malice was defined by the Supreme Court to be knowledge of falsity or reckless disregard for the truth. New York Times v. Sullivan, 376 U.S. 254, 286-88 (1964).

Elmer Gertz appealed from the district court's opinion on two grounds.[9] He denied first that false statements are entitled to a first amendment privilege; he argued secondly that if the privilege does apply, then actual malice had been proved.

The court of appeals affirmed the district court determination that the article concerned a matter of public interest. The court stated that the truth of a statement is not the determining factor for the first amendment privilege and to hold otherwise would undermine the rule. What is required, rather, is to prove actual malice and thus it must be shown that the publisher had a "high degree of awareness of . . . probable falsity."[10] The court of appeals concluded that the record revealed a failure of the plaintiff to establish actual malice to the required standard of "convincing clarity."[11]

The Supreme Court's grant of Gertz's writ of certiorari[12] stated that the Court intended to review the existing balance between first amendment protection for a free press and common law libel actions.[13] The Court had attempted to delineate this balance in an earlier case, but had been unable to reach a controlling rationale for the result.[14] The consequent confusion of the lower courts' attempt to apply constitutional standards without the guidance of a majority opinion of the Surpeme Court convinced the Justices that a reconsideration of the existing accommodation was desirable.[15]

A majority of the Justices in *Gertz* were able to agree on a standard of fault for determining liability in a defamation case involving a private person.[16] The Court held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood. . . ."[17] Further, the Court made clear that although the state had a legitimate interest in compensating injured reputations of private persons, and could establish a less restrictive fault standard (*i.e.* proof of negligence as the minimum standard of

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[9] 471 F.2d 801, 802 (7th Cir. 1972).

[10] St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

[11] New York Times v. Sullivan, 376 U.S. 254, 285-86 (1964).

[12] 410 U.S. 925 (1973).

[13] 418 U.S. at 325.

[14] Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).

[15] In the three year interim Justices Powell and Rehnquist joined the Court, filling vacancies left by Justices Harlan and Black.

[16] Justice Powell wrote the majority opinion and was joined by Justices Stewart, Marshall, Rehnquist and Blackmun. In his concurring opinion, Justice Blackmun state that if his vote were not needed to create a majority holding, he would adhere to the plurality opinion in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).

[17] 418 U.S. at 347.

calpability rather than actual malice), this standard could apply only to the recovery of *actual* damages. The Court emphasized that the recovery of presumed or punitive damages required a showing of constitutional actual malice, (*i.e.*, knowledge of falsity or reckless disregard for the truth). Applying these standards to the facts before the Court, the majority affirmed the court of appeals' dismissal of Gertz's appeal.

In order to estimate the effect of this ruling on state tort actions for libel, it will be necessary to briefly outline the remedies available to a wrongfully defamed individual under common law. By comparing the common law practices to the recently articulated first amendment restrictions on those practices, an estimate of the future protection to individuals offered by state libel actions will emerge.

III. THE DEVELOPMENT OF THE ACTION OF LIBEL IN OHIO

> Let the lying lips be put to silence which cruelly, disdainfully and despitefully speak against the righteous.[18]

The civil action for libel dates back to man's earliest legal code. An action for libel is cited in Exodus[19] and was part of Greek and Roman law.[20] As the law later developed in England, monetary relief replaced the harsh physical punishments which were the standard relief offered by the early courts.[21]

In one of the first actions for libel in Ohio, Judge Wright of the Ohio Supreme Court stated:

> Where one, falsely and maliciously, orally charges another with anything involving moral turpitude, which, if true, will subject him to infamous punishment, or that tends to exclude him from society, or to prejudice him in his office, profession, trade, or business, the parties accused may seek redress by a suit in slander, and recover without proof of actual damages. Where the words are false, the law infers malice, and where their natural tendency is to injure, the law presumes damages . . . . [W]here the slander is written and published, it is denominated libel. . . . Words of *ridicule* only, or of contempt, which merely tend to lessen a man in public esteem, or to wound his feelings, will support a suit for libel, because of their being embodied in a more permanent and enduring form; of the

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[18] Psalm 31.

[19] Exodus 23:1.

[20] For a complete survey of the ancient origins of the law of defamation, *see* M. NEWELL, THE LAW OF DEFAMATION, LIBEL AND SLANDER (1890).

[21] For an article outlining the development of the action for libel in England, *see* Lovell, *The "Reception" of Defamation by the Common Law*, 15 VAND. L. REV. 1051 (1962).

> increased deliberation and malignity of their publication, and of their tendency to provoke breaches of the public peace.[22]

In a case brought by a federal district court judge against the editor of a newspaper for an article depiciting the judge as a "purse-proud aristocrat" who was "anxious to put down the Bank of the United States to promote his own pecuniary interests" the Ohio Supreme Court held:

> A libel is a censorious or ridiculing writing, picture, or sign, made with a mischievous and malicious intent toward government, magistrates, or individuals. It does not necessarily charge the plaintiff with a crime, for it its design be wanton and malicious ridicule, and the tendency of the publication to hold up the plaintiff to the scoffs and sneers of society; to degrade him and lessen his standing, an action may well be sustained. So, likewise, if its tendency will naturally excite to passion and revenge, and consequent breaches of the peace.[23]

These early cases reflect the concern of the courts about the injury inflicted upon individual reputations by false statements. Both cases recognize the need for an action in libel to prevent injured parties from seeking self-help remedies.

The common law action of libel requires the plaintiff to prove four elements. The defendant must have (1) made a statement (2) that is defamatory and (3) published the statement (*i.e.*, made it known to third parties). The statement must also be (4) read by third parties as concerning the plaintiff (this element is also called *colloquim*). In Ohio a distinction has developed between an action based on words which are libelous *per se* and words which are libelous *per quod*.[24] For

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[22] Watson v. Trask, 6 Ohio 532, 533 (1834) (citations omitted).

[23] Tappan v. Wilson, 7 Ohio 191, 193-94 (1835).

[24] Bigelow v. Brumley, 138 Ohio St. 574, 593, 37 N.E.2d 584, 594 (1941). The distinction between libel *per se* and libel *per quod* is not uniform in this country. Dean Prosser, in his article *Libel Per Quod*, 46 VA. L. REV. 839 (1960), states that there are three current distinctions. A minority of the states (Delaware, Iowa, Louisiana, Minnesota, Mississippi, New Jersey and Texas) follow the English Rule of recognizing all libels as libel *per se* and therefore not requiring pleading or proof of special damages even where extrinsic proof is required to establish the defamatory meaning of the statement. A majority of the states, including Ohio, require the pleading of special damages in libel *per quod* actions unless the defamatory statement falls into one of four categories. If the defamatory statement (1) imputes a criminal act, (2) imputes unchastity, (3) impugns the plaintiff's trade or business, or (4) exposes the plaintiff to ridicule or contempt in his community (*e.g.*, loathsome disease), then the defamation is treated as libel *per se*. The newest trend of the law is to require pleading special damages in all libel cases unless the defamation falls within one of the above four categories. Dean Prosser states that Virginia has adopted this theory and is joined by Washington. Recently Illinois has announced its intention to follow the Virginia model. Mitchell v. Peroria Journal-Star, Inc., 76 Ill. App. 2d

words to be libelous *per se* they must, on their face, accuse the plaintiff of an illegal or immoral act.[25] If the words that are the source of the action are susceptible of an innocent reading, then Ohio courts apply the rule of *mitior sensus* and assume the inoffensive interpretation.[26] If extrinsic facts must be known to the reader to make the statement defamatory, then the action is one of libel *per quod* and the plaintiff must meet special pleading requirements to maintain his action. The plaintiff has the burden of pleading (1) the extrinsic facts that render the apparent innocent statement a defamatory one, (2) that the readers knew the necessary extrinsic facts, and (3) that the plaintiff suffered injury thereby.[27]

The distinction between action for libel *per se* and *per quod* can be crucial in the determination of the burdens of allegation, of proof of defamation, and of proof of damages. If the words are determined to be libelous *per se*, the plaintiff need neither plead nor prove special damages (*i.e.*, damages which result from the defamation though they are not a natural or probable result and thus cannot be assumed), since general damages (*i.e.*, those that are the natural and necessary result of the defamatory statement) will be presumed as a matter of law. In an action based on words that are determined to be libelous *per quod*, on the other hand, the plaintiff must prove that the article had a defamatory meaning, and to recover damages the plaintiff must plead and prove special damages.[28]

Malice is a necessary element of the action of libel.[29] The term "malice" as used in Ohio connotes a concept of willfulness and un-

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154, 221 N.E.2d 516 (1966). This article has been criticized. *See* Eldredge, *The Spurious Rule of Libel Per Quod*, 79 HARV. L. REV. 733 (1966) and Dean Prosser's reply, Prosser, *More Libel Per Quod*, 79 HARV. L. REV. 1629 (1966).

[25] Sweeny v. The Beacon Journal Publishing Co., 66 Ohio App. 473, 35 N.E.2d 471 (1941).

[26] Johnson v. Campbell, 91 Ohio App. 483, 108 N.E.2d 749 (1952). This limiting interpretation is followed by Illinois, John v. Tribune Co., 24 Ill. 2d 437, 181 N.E.2d 105 (1962) *cert. denied*, 371 U.S. 877 (1962); Montana, Manley v. Harer, 73 Mont. 253, 235 P. 757 (1925); North Dakota, Ellsworth v. Martindale Hubbell Law Directory, 66 N.D. 578, 268 N.W. 400 (1936); Oklahoma, Tulsa Tribune Co. v. Kight, 174 Okla. 359, 50 P.2d 350 (1935).

[27] McCarthy v. Cincinnati Enquirer, Inc., 101 Ohio App. 297, 136 N.E.2d 393 (1956). The best example of libel *per quod* is the case of a newspaper which published an erroneous report that plaintiff had given birth to twins. Although the words, on their face, do not allege any impropriety on the part of the plaintiff, the extrinsic fact that some readers knew that plaintiff had been married only a month caused the publication to be libelous *per quod*. Morrison v. Ritchie & Co., 39 Scot. L. Rep. 432 (Ct. Sess., 1902).

[28] *See* Isham, *Libel Per Se and Libel Per Quod in Ohio*, 15 OHIO ST. L.J. 303 (1954). This article discusses the problem of determining the proper test for distinguishing the two categories of libel, and the issue as to whether it is the court or the jury that should make the determination.

[29] Harris v. Reams, 2 Ohio Dec. Reprint 281 (C.P., Logan, 1860).

lawfulness[30] rather than of personal animosity.[31] An express or implied intent of the defendant to hurt the plaintiff is necessary,[32] but as the common law considered neither mistake nor good faith to be a defense, an intent to injure is usually assumed by the courts.[33]

The purpose of the court in awarding damages is to make the injured party whole from the harassment he has suffered.[34] The jury is to arrive at the amount by considering the character and standing of the plaintiff, the gravity of the libel, and any mitigating circumstances (such as a retraction) by the defendant.[35] In either libel *per se* or libel *per quod*, punitive damages are available only if the plaintiff can prove that the defendant acted with express malice (*i.e.*, intent to injure[36]) or with recklessness.[37]

It may be seen through case law that the courts of Ohio have sought to protect the individual's right to an untarnished reputation. The purpose of the common law in creating this legal right was to prevent the "breaches of the public peace" which personal libels tended to provoke.[38] It is important to note that the culpability of the defendant was not considered in determining liability. Rather, it was only a factor in the consideration of punitive damages. In order to protect this right of reputation, the legal system allowed general damages to compensate the plaintiff.

> In many cases the effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to the person defamed.[39]

In an Ohio libel action one court summarized the liability of a defendant by stating that, "whenever a man publishes, he publishes at his peril."[40]

In Ohio, libeling an individual as a communist is libel *per se*. In

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[30] State v. Cass, 5 Ohio N.P. 381 (C.P., Lucas, 1898).

[31] *Id.*

[32] Van Derveer v. Sutphin, 5 Ohio St. 294 (1855).

[33] Wilson v. Apple, 3 Ohio 270 (1827).

[34] Pugh v. Starbuck, 1 Ohio Dec. Reprint 143 (Super. Ct. Cinti., 1845).

[35] Rollins v. Pennock, 2 Ohio Dec. Reprint 735 (C.P. Logan, 1862).

[36] Van Derveer v. Sutphin, 5 Ohio St. 294 (1855).

[37] Haywood v. Foster, 16 Ohio 88 (1847). The court stated that it was necessary to allow a larger award of damages against a defendant who acted with knowledge of the falsity of his statements than against the defendant who acted only negligently. To aid in this differentiation, the court held that punitive damages can be assessed against a knowing defendant but not against a merely negligent defendant.

[38] Watson v. Trask, 6 Ohio 532 (1834).

[39] RESTATEMENT (FIRST) OF TORTS § 621, comment a (1938).

[40] Petransky v. Repository Printing Co., 51 Ohio App. 306, 309, 200 N.E. 647, 648 (1935).

Ward v. League for Justice,[41] a right-wing publisher labeled a union officer as "being one of the most active and treacherous Communists in Ohio."[42] The court concluded that

> the published words, if believed, would naturally tend to expose the plaintiff . . . to public hatred, contempt and ridicule, and deprive him of the benefits of public confidence and social intercourse, and such publication is therefore libelous per se and an action will lie therefore, although no special damage is alleged.[43]

The court considered the effect of falsely labeling an individual a communist with the prevailing social attitude towards communism and cited a New York case which held that falsely charging a lawyer with being a communist was libel *per se* in light of recent war events, legislation, and public attitudes towards communism.[44] The Ohio supreme court dismissed the defendant's appeal, stating that no debatable constitutional question was involved.[45]

Such was the state of the law of libel in Ohio when the Supreme Court of the United States decided *New York Times v. Sullivan* in 1967.

IV. THE SUPREME COURT CREATES A FEDERAL LAW OF LIBEL

A. *The* New York Times *Case*

In *New York Times Co. v. Sullivan*,[46] the Supreme Court added constitutional considerations to the common law action of libel. The case concerned an advertisement published by The New York Times on March 29, 1960, soliciting contributions to the legal defense of a civil rights figure. The Police Commissioner of Montgomery, Alabama brought suit for defamation, alleging factual misrepresentation concerning the actions of the Montgomery police department.[47] The Alabama court used the common law libel doctrine that all libels are libel *per se*, and the jury awarded damages of $500,000.[48]

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[41] 57 Ohio L.Abs. 197 (Ct. App. 1950).

[42] *Id.* at 202.

[43] *Id.*

[44] Levy v. Gelber, 175 N.Y. Misc. 746, 25 N.Y.S.2d 148 (Super. Ct. Bronx, 1941).

[45] 154 Ohio St. 367, 95 N.E.2d 769 (1950).

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

[47] Specifically, the advertisement stated that truckloads of police ringed the campus and that when students attempted to protest by refusing to re-register, their dining hall was padlocked in order to starve the students into submission. The advertisement further alleged that the police had arrested Dr. Martin Luther King seven times. The prosecution proved that the police never encircled the campus and that Dr. King was arrested only four times.

[48] 273 Ala. 656, 144 So. 2d 25 (1962).

The United States Supreme Court reversed the state supreme court's decision, holding that the Alabama rule of law inadequately protected the first and fourteenth amendment rights of the press in a libel action concerning a public official.[49] The Court reasoned that a biased local jury could "shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.' "[50] If newspapers faced large damage assessments by local juries with a strict liability standard (*i.e.*, presumption of malice and general damages), newspaper editors would be forced to screen out any news item which may even remotely be found libelous. This strict liability standard would particularly limit

> debate on public issues [which] should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.[51]

In order to protect a free press in its commentary on the actions of a public official, the Court adopted the Kansas state law doctrine of qualified privilege.[52] This privilege added the element of culpability to a tort action and required a plaintiff to prove that the statement was made with "actual malice." The Court defined actual malice as publishing with knowledge that the statement is false or publishing with reckless disregard of whether the statement is true or false.[53] The Court deemed it proper that critics of official conduct were granted a degree of the same immunity from actions in libel that public officials are granted.[54]

Justices Black and Douglas concurred with the majority's conclusion, but believed that the Times had an absolute and unconditional privilege under the first amendment.[55] Mr. Justice Goldberg also concurred with the majority and believed that the first amendment provided an absolute privilege. However, he would limit this absolute privilege to libel actions brought by public officials because

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[49] The first amendment had previously been found to apply to the states through the fourteenth amendment in Stromberg v. California, 283 U.S. 359 (1931).

[50] 376 U.S. at 266.

[51] *Id.* at 270.

[52] The Supreme Court quotes at length from Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908). The Kansas supreme court adopted an "actual malice" standard for culpability and extended the qualified privilege to comments concerning public issues, public men and candidates for public office.

[53] 376 U.S. at 279-80.

[54] Barr v. Mateo, 360 U.S. 564 (1959) determined that government officials are immune from prosecution for libelous statements made in the course of their public duties.

[55] 376 U.S. at 293 (1964).

"[t]he imposition of liability for . . . defamation [of private citizens] does not abridge the freedom of public speech. . . ."[56]

Until *New York Times Co. v. Sullivan*, the law of libel was considered to be unfettered by the Constitution. The peculiar wording of the first amendment seemed to limit that amendment's protection to laws legislated by the federal congress and to legislative work only so far as new laws *abridge* the freedom of the press.[57] Thus, the amendment was thought to permit existing restrictions on the press, including the state libel action.[58] Even past decisions of the Supreme Court sustained this restrictive reading of the first amendment,[59] and referred to "Libelous utterances not being within the area of constitutionally protected speech . . . ."[60]

The Supreme Court did not have to reach the constitutional considerations to protect the New York Times from the "biased juries across the county."[61] Since courts have generally supervised libel awards to prevent jury awards not "based upon a rational consideration of the evidence and a proper application of the law,"[62] the Supreme Court reviewed the evidence and could have reversed the decision by finding that the advertisement in question did not, as a matter of law, concern the plaintiff.[63]

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[56] *Id.* at 301-02.

[57] The first amendment states: 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 (1791). *See* Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L. Q. 581, 586 (1964).

[58] Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 263-66 (1961).

[59] *See, e.g.*, Roth v. United States, 354 U.S. 476 (1957); Merin, *Libel and the Supreme Court*, 11 WM. & MARY L. REV. 371, 373 (1969).

[60] Beauharnais v. Illinois, 343 U.S. 250, at 266 (1952). In Near v. Minnesota, 283 U.S. 697, 715 (1931), the Court said:

> But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our Constitution.

The Court took for granted the immunity of libel actions from first amendment restrictions in the obscenity case of Roth v. United States, 354 U.S. 476, 483 (1957):

> In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. This phrasing did not prevent this Court from concluding that libelous utterances are not within the area of constitutionally protected speech.

[61] E. THOMAS, THE LAW OF LIBEL AND SLANDER 63 (1973).

[62] Reynolds v. Pegler, 123 F. Supp. 36, 39 (S.D.N.Y. 1954).

[63] New York Times v. Sullivan, 376 U.S. 254, 278 (1964). Colloquium is one of the four necessary elements of a libel action.

B. *Expansion of* Times *Immunity to Public Figures*

In the *Times* case, the Supreme Court held that a public official cannot recover damages for false statements made concerning his official conduct unless he can prove that the publisher acted with "actual malice," *i.e.*, knowledge of falsity or reckless disregard for the truth. This first instance of consideration by the Supreme Court of the application of the first amendment to the law of libel could be considered an extension of the common law "fair comment" rule.[64] Under common law the issue would revolve around the question of whether the damaging words were an honest criticism (*i.e.*, fair comment) or a negligent misstatement of fact. Under *Times*, both statements are protected.

The Court's distinction between private persons and public officials was based upon two premises. First, the Court felt that a public official had voluntarily put himself in the public eye and could therefore be considered as voluntarily exposing himself to the attacks of critics. Secondly, the Court believed that a public official, unlike a private person, had access to the news media to answer his defamatory criticism. Therefore, if a plaintiff is deemed a public official he must carry a significantly heavier burden to obtain the advantage available to private citizens of bringing a successful tort action in libel: (1) recovery for damage sustained, (2) vindication of his honor, and (3) deterrence of defamatory statements by the award of punitive damages.

Immediately after the Court tendered its decision in *Times* two problem issues developed. What actions by individuals would classify them as public officials? Further, what actions by the publisher of the defamatory statement would defeat this new first amendment privilege against tort liability?

In *Garrison v. Louisiana*,[65] the Supreme Court answered the second question by limiting a plaintiff's grounds for defeating the publisher's immunity created by the *Times* decision. The Court held that subjective constitutional actual malice (*i.e.*, knowing that the statements were false or having reckless disregard as to whether or not the statements were false) would defeat the constitutional immunity. This subjective standard severely restricts the possibility of recovery by a plaintiff for damages from a defendant who can successfully invoke the constitutional privilege.

[64] At common law newspapers could comment freely on the act of government and government officials. This "fair comment" privilege could be defeated if the statement was malicious and tended to excite revenge. Tappan v. Wilson, 7 Ohio 191 (1835).

[65] 379 U.S. 64 (1964).

With an almost unqualified privilege protecting media defendants, the definition of public official became critical if any plaintiffs were to have grounds to recover against the media. In a series of cases prior to *Gertz*, the Supreme Court chose to broaden the classification of persons subject to the *Times* first amendment immunity. In the companion cases of *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*,[66] the court considered the issue of extending the *Times* immunity to articles concerned with "public figures." At the time of the alleged libel, the plaintiff Wally Butts was the athletic director of the University of Georgia, but was employed by the Georgia Athletic Association, a private organization.[67] The *Walker* case concerned a retired army general's actions during the University of Mississippi's turmoil over the enrollment of James Meredith. General Walker was a strong critic of federal intervention and the Court considered him to be a "man of some political prominence."[68]

In these two cases the Court was unable to formulate a majority opinion. Justices Harlan, Clark, Stewart, and Fortas joined in the plurality opinion which found that the *Times* requirement of actual malice need not be shown in order for the newspaper to lose its qualified immunity. These Justices found that the newspaper in the *Butts* case was at least grossly negligent and possibly reckless in not checking the story submitted by an unproven source.[69] The plurality opinion, on the other hand, held that the privilege is qualified but should apply with a lesser standard of culpability in a case where the plaintiff is a "public figure." The plurality opinion would apply a standard of "highly unreasonable conduct" as evidenced by "extreme departure from standards of investigation . . . adhered to by responsible publishers."[70] Justices Brennan and White joined with Chief Justice Warren who believed that the *Times* doctrine should be expanded to include plaintiffs who are "public figures." The policy that governed the *Times* decision, the Justices argued, should also control

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[66] 388 U.S. 130 (1967).

[67] Although the University of Georgia is a state institution, the athletic director is hired by the Georgia Athletic Association, a private corporation. This determination was reached in a previous Supreme Court case, Allen v. Regents of the University of Georgia, 304 U.S. 439 (1938). Under state statute athletic associations are not to be considered an agency of the state. GA. CODE ANN. § 32-153 (1969).

[68] 388 U.S. at 140.

[69] *Id.*, at 158. The plaintiff charged that the author's source was on criminal probation. The plaintiff submitted evidence showing that the magazine had a "muckraking" format and that the editors knew of the source's probation, but that the editors published the article without independent confirmation of the accusations. 351 F.2d 702 (5th Cir. 1965).

[70] 388 U.S. at 158.

here. Individuals who publicly advocate a position on issues of concern to the public accept the same threat of criticism as do public officials. Because these public figures are not subject to the "restraint of the political process,"[71] and yet are as influential as public officers, public opinion may be the only method by which public figures may be censured. Justices Black and Douglas would have dismissed both cases because of the absolute immunity that the first amendment requires for the news media.

The *Butts* case was remanded for a determination by the lower court of the level of culpability of the defendant. The *Walker* case was deemed to contain no evidence permitting the conclusion of the presence of actual malice or gross negligence, so it was remanded to the lower court with instructions to dismiss the action.

These companion cases served to extend the application of the *Times* doctrine to "public figures." Four Justices would have lowered the standard to gross negligence, but seven Justices (*i.e.*, those four plus three others) agreed that the defendants would have been held liable if the plaintiffs were able to show actual malice. The plurality contained dicta stating that "public interest" caused these gentlemen to come under the label of "public figures." Chief Justice Warren, in his concurring opinion, echoes the plurality opinion by stating:

> The present cases involve not "public officials," but "public figures" whose views and actions with respect to public issues and events are often *of as much concern to the citizen as the attitude and behavior of "public officials" with respect to the same issues and events.*[72]

The thrust of the Court's judgment pointed to the position of the plaintiff in the social eye. The dicta, however, suggests that the public interest in the issue in which the individuals are enmeshed may be determinative as to whether the privilege may be claimed.

C. *The Expansion of* Times *Immunity to Issues of Public Interest*

In *Rosenbloom v. Metromedia, Inc.*,[73] the Supreme Court upheld a radio station's claim to *Times* immunity in an action for libel brought by a private person, thereby extending the protections of media defendants beyond suits brought by public officials. Rosenbloom was a distributor of nudist magainzines and was arrested for violation of the city's obscenity laws. A radio station owned by Me-

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[71] *Id.* at 164.

[72] *Id.* at 162 (emphasis added).

[73] 403 U.S. 29 (1971).

tromedia, Inc. reported as part of its news coverage that Rosenbloom was the main distributor of obscene material in Philadelphia. Rosenbloom was acquitted of the obscenity charge and sued Metromedia, Inc. for libel. The Supreme Court held that Rosenbloom's action for libel was barred by the *Times* privilege. The Court was unable, however, to reach a majority rationale for its holding. Justice Brennan, who wrote the plurality opinion,[74] stated:

> If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not "voluntarily" choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety.[75]

Justice Brennan found that the prior distinction between private and public individuals based on their access to the media for reply was unproven and probably incorrect. He argued that this distinction would be better resolved by state right-of-reply or retraction statutes rather than by limiting the *Times* privilege.[76] The plurality opinion would permit a successful action for libel against a media defendant concerning an event of public or general interest only upon *clear and convincing proof* that the publication was printed with knowledge of falsity or with reckless disregard for the article's veracity. Thus, the opinion required the plaintiff to meet a more stringent burden of proof for actual malice than the traditional common law standard of proof, requiring only a preponderance of the evidence.[77]

Justice Black concurred, but felt that the first amendment required an absolute immunity for the news media.[78] Justice White also concurred, but on narrower grounds than the plurality rationale. He believed that the *Times* immunity gave the news media

> a privilege to report and comment upon the official actions of public servants in full detail, with no requirement that the reputation or the privacy of an individual involved in or affected by the official

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[74] Justice Brennan was joined by Chief Justice Burger and Justice Blackmun.

[75] 403 U.S. at 43 (footnote omitted).

[76] *Id.* at 46-47. The constitutionality of these statutes has recently been reviewed and restricted by the Supreme Court in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). *See* Note, *Access vs. Fairness in Newspapers: The Implications of Tornillo for a Free and Responsible Press*, 35 OHIO ST. L.J. 954 (1974).

[77] Campbell v. Mansfield Journal Co., Inc., No. 1063 (Ohio Ct. App. 5th Dist., March, 1972) (unreported).

[78] 403 U.S. 29, 57 (1971).

action be spared from public view.[79]

Since Metromedia merely reported the police action taken against Rosenbloom, Metromedia was entitled to the *Times* immunity. Justice White believed that the Court, had "displac[ed] more state libel law than [was] necessary"[80] by considering the public interest in the topic of the article rather than the status of the plaintiff.

In dissent, Justice Harlan argued that Rosenblocm was a private individual and, therefore, the relevant state libel laws were applicable. Justice Harlan, however, would prohibit any state statute from imposing liability unless it also required a minimal standard of fault.[81] Justice Marshall, joined by Justice Stewart, dissented because of the inadequate protection afforded personal reputations by the expansion of the *Times* doctrine. Justice Marshall believed that a better balance of first amendment protection for the news media and relief for the injured private person would be to allow damages, but to restrict damage awards to actual injury. State libel laws would be applicable for determining liability but, in agreement with Justice Harlan's dissent, there could be no finding of liability without some standard of fault.[82]

The issue of limiting damage recoveries tc actual injury was considered from three different perspectives. Justice Harlan would allow punitive damages only after actual damages were proved, and furthermore, the punitive damages would have to have a "reasonable relationship" to the actual damages. Justice Marshall believed that recoveries must be limited to actual damages only to avoid self-censorship by newspapers fearful of substantial general damage awards by the jury. He felt that Justice Harlan's "reasonable relationship" standard would be futile in avoiding self-censorship since the jury would not have an objective standard to apply. The plurality opinion dismissed the actual damage restrictions as an unrealistic solution to the self-censorship problem. The mere possibility of costly litigation and substantial actual damage awards would still serve to inhibit newspaper publishers. The plurality opinion emphasized that a more practical solution would be to require a culpability standard (*i.e.*, actual malice) coupled with a higher standard of proof (*e.g.*, clear and convincing evidence).

Although *Rosenbloom* was decided without a majority opinion,

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[79] *Id.* at 62.
[80] *Id.* at 59.
[81] *Id.* at 64.
[82] *Id.* at 86-87.

it accurately defined the *Times* doctrine as it was applied by lower courts prior to the *Gertz* decision.[83] *Times* was concerned with protecting public debate on public issues by immunizing the news media from actions in libel by *"public officials."* *Butts* broadened this constitutional protection to actions brought by *"public figures."* *Rosenbloom* serves to extend the *Times* immunity to any actcn for libel where the defamatory statement concerns a *public issue* without considering the status of the plaintiff.

D. *The Effect of* Rosenbloom *on Ohio Libel Actions*

Soon after the *Rosenbloom* decision was announced by the Supreme Court, a case involving a local newspaper as defendant in a libel action came before the Ohio courts.[84] Plaintiff Carl A. Campbell sought damages in the amount of $350,000 for a false newspaper article that stated that Carl Campbell, 35, had been fined $157 and sentenced to six months in jail for driving while intoxicated. The article further stated that Campbell had been convicted of driving while intoxicated on four prior occasions and that Campbell was currently a teacher in the Canton school system. The following day the newspaper printed a retraction on the first page of the newspaper explaining that the convicted individual was Carl Campbell, a truck driver, not Carl A. Campbell, the school teacher. The trial court granted the defendant a summary judgment on the basis of the *Times* immunity. On appeal, the Ohio appellate court treated the plurality opinion of *Rosenbloom* as if it had commanded a majority of the Surpeme Court.[85] The majority opinion quoted at length from *Rosenbloom* and held that the Supreme Court required that states adopt an actual malice test for libel actions involving the news media coverage of an event of public interest.

In considering whether actual malice was absent from this case, the court quoted extensively from depositions taken of the reporter of the article and the city editor of the paper. The facts disclosed that the reporter turned in the first account of the conviction of Carl

[83] Lower courts are not required to follow Supreme Court decisions which are not supported by a majority opinion. United States v. Pink, 315 U.S. 208 (1942). For a brief listing of lower court decisions which barred a private individual from bringing an action for libel against a member of the news media because of the public interest in the defamatory article, *see* Case Note, 40 GEO. WASH. L. REV. 151, 154 n. 20 (1971).

[84] Campbell v. Mansfield Journal Co., Inc., No. 1063 (Ohio Ct. App. 5th Dist., March 1972) (unreported).

[85] Judge Putnam, in the majority opinion, wrote: "Mr. Justice Brennan *speaking for the majority*, in commenting upon the theory of negligence as a part of the law of libel, said . . . *Id.* at 8-9 (emphasis added).

Campbell within half an hour of the news deadline. The city editor read the account and asked the reporter if this Carl Campbell was the same Campbell who taught in the Canton school system. The editor "thought" the reply was yes so he instructed the reporter to add that information to the article. The editor admitted that he knew Carl A. Campbell from board of education meetings and that he had not made any effort to make a more positive identification. The city editor also admitted that he did not know if the reporter knew Carl A. Campbell and that the only reason the editor had asked the reporter if the two names were the same was the fact that the school was in the reporter's beat. The editor further stated that he had no doubt of the truth of the article or he would have done some additional investigation. The reporter stated that he had no knowledge of the occupation of Carl Campbell. He said that he was not asked by the editor if Campbell was a teacher but was in fact *told* that the two Campbells were the same and that this information should be included in the story. The reporter also stated that he never doubted the truth of the article.

The majority opinion interpreted *Rosenbloom* as extending the *Times* privilege to "include comment on private persons in matters of public interest but did not change the standard of care known as 'actual malice, that is, knowledge of falsity or a reckless disregard of whether a fact is false or not.' "[86] The court found that the defendants had not "entertained a doubt as to the truth of the identification, much less, a 'reckless disregard as to whether it was true or false.' "[87] The court held that *Rosenbloom* requires the plaintiff to establish his case by "clear and convincing" proof rather than the previous state standard of a mere preponderance.

In conclusion, the court ruled that to maintain an action for libel in Ohio against a member of the news media for an article concerning an *event* of public interest, the plaintiff must prove by a clear and convincing standard that the defendant (1) had knowledge that the stated facts were false, or (2) that the article was published with reckless disregard as to whether it was false or not. For reckless disregard "the defendant in fact [must] entertain serious doubts as to the truth of his publication."[88]

In his concurring opinion, Judge Rutherford also interpreted *Rosenbloom* as extending the *Times* immunity to cases involving

[86] *Id.* at 23.
[87] *Id.* at 24.
[88] St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

public issues. However, Judge Rutherford found that there was a genuine dispute as to the issue of whether the false statement was published with reckless disregard of the truth. He concurred with the majority, however, because of the plaintiff's failure to prove actual damages—a necessary element for recovery under *Rosenbloom* for private individuals involved in a public event. Judge Rutherford noted that the damage to Campbell's reputation was not permanent, that he was under no threat of losing his job, and that, outside of any "momentary personal concern" pending retraction, he had suffered no actual damage.

This case changed the common law action of libel in Ohio as it pertained to private individuals suing members of the news media. Yet, the court based this change on a Supreme Court opinion which did not receive the support of a majority of the Court. In the most recent Ohio libel case, a private individual suing a newspaper for libel saw his case dismissed for failure to meet the stringent criteria established by the *Campbell* case.[89] After *Rosenbloom* an Ohio plaintiff could no longer hold a newspaper liable *per se* for defamation, nor could he seek general damages for injury to personal reputation.

V. *Gertz*: THE SUPREME COURT ATTEMPTS TO RE-EVALUATE THE BALANCE OF INTERESTS

Originally an action for libel served four purposes. It permitted the plaintiff to vindicate his honor, it insured the recovery of any damages, it deterred undersirable speech by imposing punitive damages in appropriate cases, and it provided a lawful alternative to individual acts of revenge. After *Rosenbloom* it became almost impossible to hold a newspaper liable for defamation.[90] Although *Rosenbloom* was decided by only a plurality of the Court, its acceptance by lower courts as a constitutionally-required limitation on libel actions was widespread, and consequently received much criticism.[91] In response, the Supreme Court chose to reconsider the existing imbalance between first amendment protections and the need to provide a forum for an injured plaintiff.

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[89] Mead v. Horvitz Publishing Co., No. 2083 (Ohio Ct. App. 9th Dist., 1973) (unreported); *appeal denied* Vol. XLVI Ohio Bar 1484 (Oct. 18, 1973); *cert denied*, 416 U.S. 985, *rehearing denied* 419 U.S. 887 (1974).

[90] *See* Note, *Public Official and Actual Malice Standards: The Evolution of New York Times v. Sullivan*, 56 IOWA L. REV. 393 (1970).

[91] See E. THOMAS, THE LAW OF LIBEL AND SLANDER, 63 (1973); Note, *Misinterpreting the Supreme Court: An Analysis of How the Constitutional Privilege to Defame Has Been Incorrectly Expanded*, 10 IDAHO L. REV. 213 (1974).

The majority of the Court in *Gertz*[92] acknowledged that some erroneous statements of fact should not be theoretically subject to constitutional protection since they do not *per se* aid uninhibited discussion of public issues. However, requiring the media to "guarantee the accuracy of [all] factual assertions" was in violation of the *spirit* of the first amendment since the threat of liability would require the newspapers to exercise a too-stringent level of self-censorship. A "breathing space" which would protect some false speech in the interest of protecting all true speech was the solution.[93] Defining the boundaries of this "space" was the problem before the Court in *Gertz*, given the perspective afforded by litigation under *Times* and *Rosenbloom*. The Court recognized that under *Times* some worthy public officials were denied an equitable recovery. Nevertheless, the limited state interest in protecting public persons was outweighed by the need of immunity by the news media. However, the state had a much greater interest in compensating private persons, and the majority set forth a different standard for actions brought by private persons.

The Court's attempt to accommodate this state interest involved two prongs — one directed to the status of the plaintiff, the other to the damages permissable under state statute. The Court returned to the *Times* case to reinstate the private versus public figure distinction in order to define the status of the plaintiff. In creating guidelines for lower courts to follow, the Court reasoned that a differentiation based upon the status of the plaintiff would be easier to apply objectively than a subjective standard of public interest. As in *Times*, this test was rationalized as being based on the availability of avenues of rebuttal for public persons as a means of a self-help remedy. A second justification for this private versus public standard is the assumed voluntary acceptance of the risk of published comments by public persons. The Court stated that those persons who become public figures involuntarily "must be exceedingly rare."[94] The Court concluded its consideration of the conflicting interests by stating that, "private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery."[95] By eliminating the "public interest" distinction, judges would

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[92] Justice Powell was joined by Justices Marshall, Stewart, Rehnquist, and Blackmun. Marshall, Stewart, Rehnquist, and Blackmun.

[93] NAACP v. Button, 371 U.S. 415, 433 (1963).

[94] Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974). The Court further stated that even in situations where involuntary public figures are involved, the media may reasonably assume that the person voluntarily accepted his public status.

[95] *Id.* at 345.

no longer find themselves in the difficult position of deciding what information should be of concern to the public. The breathing space was thereby contracted so as to include only public officials or figures.

The majority believed that a proper accommodation also required a restriction on the state's ability to exact damages. Therefore, the second prong of the holding prevented the states from imposing strict liability by requiring a fault standard in *all* libel cases involving a member of the news media. Requiring the plaintiff to prove the defendant-news-broadcaster's fault is in accord with two of the major goals of the common law libel action: *i.e.*, punishing a culpable defendant and allowing a plaintiff to vindicate his reputation. At the same time members of the news media are protected from the "rigors of strict liability for defamation,"[96] thus satisfying the guarantees of the first amendment. If the majority of the court had stopped here, then all of the goals of a libel action would have been fulfilled (a culpable party would be liable to a defamed person). However, even after recognizing the compelling state interest in protecting private individuals from damage to their reputations, the Court placed additional restrictions on the recovery of monetary damages.

In limiting liability restrictions to a fault standard, the majority stated that they were recognizing the legitimate state interest in *compensating private* individuals for *actual* damages. General or punitive damages are prohibited by first amendment considerations in the absence of proof of actual malice, which is defined as knowledge of falsity or reckless disregard for truth. The majority believed that this limitation on recovery was necessary to protect the media from the "largely uncontrolled discretion of juries" which may lead those juries "to punish unpopular opinion rather than to compensate individuals for injury."[97] By limiting recoveries to actual damages, however, the Court ignored the fact that "in many cases the effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the efforts thereof in loss to the persons defamed."[98] The Court foresaw that actual damages would not be limited to monetary loss but would have included mental anguish, humuliation and loss of community standing as actual injury. The Court concluded its opinion by stating that in the case at bar, Gertz could not be held to be a public figure since he did not engage in any attempt to influence public attitudes, and his participation in this public affair

[96] *Id.* at 348.
[97] *Id.* at 349.
[98] See *supra* note 39 and accompanying text.

was limited to actions required by him as attorney for his client. The Court remanded for jury determination of fault and actual damages in line with the Court's new constitutional limitations on state libel actions.

Justice Blackman stated in his concurring opinion that he joined in the majority opinion because be believed that it offered an adequate "breathing space" for the press, but that he would nevertheless have preferred a wider immunity afforded the news media—*i.e.*, the *Rosenbloom* test of *issues* of public interest.

Chief Justice Burger dissented because he believed that the law of libel respecting private individuals should be left to the states. He would not impose constitutional requirements for the determination of liability or damage recoveries on current state law. Further, Chief Justice Burger believed that if the Court failed to promote a public policy of protecting lawyers from defamation in their representative role, the sixth amendment right to counsel might be jeopardized.

Justice Douglas dissented because he believed that the first amendment requires an absolute privilege for the news media which cannot be the subject of an "accommodation" with a state interest in protecting individuals from false statements concerning their reputation. Justice Douglas joined the majority in its belief that a jury's imposition of damages may inhibit the press, but his belief lead to a different result — only a complete immunity, rather than a limitation based on actual damages, could offer the protection to the press required by the first amendment.

Justice Brennan, in his dissenting opinion, stated that the Court should have adopted the plurality opinion of *Rosenbloom*. He defended the *Rosenbloom* decision by citing the rationale of the plurality opinion, (*i.e.*, that public issues do not become less so because a private persons is involved). Justice Brennan believed that the criticism concerning the judicial determination of the public interest of an issue was unfounded since the judiciary has broadly interpreted the scope of public interest. He concluded by stating that any self-censorship by publishers caused by the uncertainty of the public-private determination of an issue would be considerably less than the self-censorship arising from fear of liability from state actions based upon a negligence standard.

Justice White, in his extensive dissent, argued that the majority had failed to demonstrate the first amendment requirements which would entail a complete rewriting of state defamation laws. He criticized the majority opinion for its apparent inconsistency in first concluding that the state interest in protecting the reputations of private

individuals surmounts first amendment considerations and then imposing first amendment limitations on damages in private actions for libel. Justice White criticized the term "liability without fault" as being misleading at best since any falsehood, on its face, implies some degree of fault by even a good faith publisher. He also believed that the majority's fear that libel actions could create an inhibited press was not supported by the growth of newspapers in the face of existing state libel laws. Justice White reiterated the need for general damages in libel actions involving private persons and believed that adequate protections from harsh jury verdicts existed in the mechanisms of remittitur, granting of a new trial by the presiding judge, or appeal.[99] Justice White concluded by stating that he was in agreement with the holding in the *Times* case, but that he believed that the qualified immunity required by the first amendment should have been restricted to cases involving public officials or figures and that the states should be free to fashion laws protecting private individuals from defamatory attacks on their reputation.

VI. THE "IMBALANCE" OF *Gertz*

The Court's purpose in granting certiorari in the *Gertz* case was to reexamine the conflicting interest involved in a libel suit brought by a private person against the news media. The Court recognized that the wide acceptance of *Rosenbloom* as an announcement of constitutional requirements had served to severely restrict, if not to prevent altogether, a plaintiff's attempt to be recompensed for a newspaper's defamation of his reputation if the defamation concerned a matter of public interest. The Court in *Gertz* attempted an "accommodation" between the first amendment concern for a free press and the state interest in providing compensation for injured individuals.

The Court's solution has two parts. First, the plaintiff, in order to recover damages in an action for libel against a newspaper, must meet a fault standard of at least negligence. This culpability requirement should adequately serve to protect innocent publishers of news from unwarranted libel actions. Although this eliminates the libel *per se* actions in Ohio, newspapers which defame private individuals through negligent investiagation can be successfully sued for libel. If this were the only restriction on the common law action for libel, then the Court might have successfully reached an equitable balance, since injured plaintiffs could recover money damages from blameworthy

[99] 418 U.S. at 394 n.31.

newspapers.

Unfortunately, a majority of the Surpeme Court deemed it necessary for a true balancing of interest to require that a private plaintiff's recovery of monetary damages be limited to actual injury. The Court reasoned that an injured plaintiff deserved to be compensated for injury but should not be allowed to recover a windfall under the guise of general or punitive damages. This rationale assumes that injuries to an individual's reputation are readily apparent even though it may be difficult to assign a monetary value to these injuries.[100] Ohio courts have given a restrictive interpretation to the term "actual damages" that was not envisioned by the Supreme Court.[101] The availability of general damages in state actions provided compensation for very real, yet hard-to-prove injury. The need to recompense injured individuals is compelling. Public individuals may properly be assumed to have "self-help" avenues open to them, since newspapers will generally be eager to print those officials' reactions to a defamatory statement concerning them. However, private individuals who find that the courts are closed to them may present the danger of violence that was recognized by one of the first Ohio cases involving a defamed individual, and "their [the defamatory statements] tendency to provoke breaches of the public peace"[102] may well be the result.

VII. CONCLUSION

The Supreme Court could have provided the needed "breathing space" for the news media by allowing the media a qualified privilege against public persons, which could only be defeated by clear and convincing proof of actual malice. For defamations of private individuals, plaintiffs could have been required to show the media to have been at fault. By severely limiting a private individual's ability to recover damages from the "subtle" injuries associated with the tort of libel, the Court may well have foreclosed the action of libel to a plaintiff injured by a member of the news media.

Victims of a defamatory attack by the media may now be more

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[100] For example, a defamed real estate developer may never be aware of potential investors who fail to invest because of a newspaper's negligent report of the developer's credit and therefore the injured developer will not be able to prove this loss as actual damages. This was the plaintiff's claim, which was dismissed on summary judgment, in Mead v. Horvitz Publishing Co., No. 2083 (Ohio Ct. App. 9th Dist., June 13, 1973) (unreported). See *supra*, note 98 and accompanying text.

[101] *See* Campbell v. Mansfield Journal Co., Inc., No. 1063 (Ohio Ct. App. 5th Dist., March, 1972) (J. Rutherford concurring) (unreported).

[102] Watson v. Trask, 6 Ohio 532, 533 (1834).

successful in bringing their action under a theory of invasion of a right of privacy, by alleging specifically that the defamatory statement places the plaintiff in a "false light" in the public eye.[103] In *Time, Inc. v. Hill*,[104] the Court applied the *Times* immunity to protect a magazine from a "newsworthy" individual suing under the "false light" theory of an invasion of privacy. In the recent case of *Cantrell v. Forest City Publishing Co.*,[105] the Supreme Court upheld a federal district court's judgment that allowed a newspaper to be held liabile for actual damages under the "false light" theory of an invasion of privacy. The district court awarded actual damages to the plaintiff since the reporter had portrayed the plaintiff "knowingly and with reckless disregard for the truth in a false light." Under the theory of *respondeat superior* the defendant newspaper was held liable for the defamatory article written by its agent within the scope of his employment. In light of *Gertz*, defamed plaintiffs may abandon the action of libel in favor of a "false light" action brought against the news media if the *Times* "actual malice" standard can be met as to the culpability of the agent-reporter.

What the Court tried to give with one hand in *Gertz*—a less stringent standard of culpability than the actual malice standard for the use of private individuals—it took away with the other by preventing recovery for the presumed damages emanating from a defamatory attack on the reputation of an individual. The Court may seek to ease the burden of future plaintiffs in libel actions by following the *respondent superior* theory to allow "actual damage" recoveries against publishers for the "actual malice" of their agents.

William I. Kohn

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[103] For a description of this cause of action *see* W. PROSSER, TORTS § 117 (4th ed. 1971); and Wade, *Defamation and the Right to Privacy*, 15 VAND. L. REV. 1093 (1962).

[104] 385 U.S. 374 (1967).

[105] 419 U.S. 245 (1974).