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MEDIA LAMENT—THE RISE AND FALL OF INVOLUNTARY PUBLIC FIGURES

MARK L. ROSEN*

INTRODUCTION

In the seminal decision of *New York Times Co. v. Sullivan*,¹ the Supreme Court of the United States created a qualified constitutional privilege for defendants in defamation² actions brought by public officials. In a series of subsequent decisions, this privilege was extended to suits by public figures³ and finally to actions by individuals involved in matters of public concern.⁴ Throughout this period, increasing protection was afforded to the news media because the Court considered the necessity for the uninhibited flow of public information to be of paramount importance.⁵

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¹ 376 U.S. 254 (1964).

² Defamation encompasses the torts of libel, or written defamation, and slander, or oral defamation. W. PROSSER, *THE LAW OF TORTS* § 111, at 737 (4th ed. 1971). Defamatory words are those "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, Inc.*, 262 N.Y. 99, 102, 186 N.E. 217, 218 (1933). Thus, the essence of a defamation action is the alleged injury to reputation. W. PROSSER, *supra*, at 739.

At common law, a plaintiff could establish a prima facie case by proving: (a) the defamatory character of the communication; (b) its publication by the defendant; (c) its application to the plaintiff; (d) that the recipient understood the communication to be defamatory; and (e) that the recipient understood it was intended to be applied to the plaintiff. RESTATEMENT (SECOND) OF TORTS § 613 (1977). The defendant was held strictly liable because the statements were presumed false. See *Eaton, The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1353 (1975). The presumption of liability could be rebutted only if the defendant established an affirmative defense such as truth or privilege. See W. PROSSER, *supra*, §§ 114-16, at 776-801. If a defamation plaintiff was unable to prove actual injury, some courts awarded presumed damages, those being compensation for injury "which would normally be expected to result from publication of the statement." *Eaton, supra*, at 1354. Punitive damages could be assessed against the defendant upon a finding of "common law malice," defined as spite, hatred or ill-will. See W. PROSSER, *supra*, § 113, at 772.

³ *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

⁴ *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

⁵ See note 108 and accompanying text *infra*.

The Court's 1974 decision in *Gertz v. Robert Welch, Inc.*⁶ threatened to reverse the trend favoring the media by narrowing the class of publications protected by the privilege. In the 6 years since *Gertz*, it has become apparent that the threat is now a reality. Last term, the Supreme Court decided *Herbert v. Lando*,⁷ *Hutchinson v. Proxmire*,⁸ and *Wolston v. Reader's Digest Association*,⁹ three cases that have the potential of exposing the media to greater liability. The more compelling consequence of these decisions, however, is the possibility of increasing media self-censorship, a result contrary to the spirit of *New York Times*.

This Article will discuss the effects of these recent decisions on the news media. It does not purport to be an extensive analysis of the current substantive law of defamation. Instead, its focus is on identifying both the real and potential problems now faced by the defamation defense bar and its media clients.

THE PRE-GERTZ DECISIONS

People in Public Life

An understanding of the present state of the law of defamation and its effects on the media must begin with a conceptual awareness of the evolving judicial attitude during the past 16 years. Preliminarily, an analysis of the rationale underlying the Supreme Court's decision in *New York Times Co. v. Sullivan*¹⁰ is essential. *New York Times* not only marks the commencement of a "federal" law of defamation,¹¹ but it also begins the process whereby emphasis, which was traditionally placed on precise pleadings *in haec verba*, gradually shifted to an exploration of the public or private status of the defamed individual.

New York Times concerned the publication of an advertisement protesting police violence and the treatment of black protesters and demonstrators. Montgomery Alabama Police Commis-

⁶ 418 U.S. 323 (1974).

⁷ 441 U.S. 153 (1979).

⁸ 443 U.S. 111 (1979).

⁹ 443 U.S. 157 (1979).

¹⁰ 376 U.S. 254 (1964).

¹¹ Prior to *New York Times*, the prevention and punishment of libelous statements was thought "never . . . to raise any Constitutional problem." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); see *Konigsberg v. State Bar*, 366 U.S. 36 (1961); *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961); *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *Near v. Minnesota*, 283 U.S. 697 (1931).

sioner Sullivan sued the Times claiming that since he was charged with and was responsible for the police activities in question, the false allegations of improper conduct were libelous and actionable.¹²

A jury in an Alabama state court awarded Commissioner Sullivan \$500,000 in damages,¹³ a verdict sustained by the Alabama Supreme Court.¹⁴ The Supreme Court granted certiorari and thus began its assault on the right of states to award damages in a libel action concerning the conduct and performance of a public official involved in a matter of public interest.

Mr. Justice Brennan analyzed the Alabama common law which, for all practical purposes, limited the Times to a defense based almost exclusively on "truth."¹⁵ Speaking for six members of the Court, he expressed "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include . . . sharp attacks on governmental and public officials."¹⁶ The Court clearly and concisely recognized the right of a newspaper to publish erroneous statements without fearing the imposition of strict liability.¹⁷ The Court noted that all errors could not be prevented and

¹² 376 U.S. at 256-57.

¹³ *Id.* at 256. The trial judge charged the jury that the statements in the advertisement were libelous per se and the defendants were not protected by any privilege. The defendants therefore could be held liable if the jury found that they had published the statements and if the advertisement was "of and concerning" the plaintiff. *Id.* at 262. The court refused to charge the jury that they must be convinced of the defendant's actual intent to harm in order to award punitive damages. The defendants' request that a verdict for the plaintiff differentiate between compensatory and punitive damages was also refused. *Id.*

¹⁴ 273 Ala. 656, 144 So. 2d 25 (1962). The Alabama Supreme Court upheld the trial court's ruling that the statements were libelous per se. *Id.* at 673, 144 So. 2d at 37. The court also refused to overturn the verdict as excessive. It stated that malice could be inferred, *inter alia*, from the Times' irresponsibility in failing to verify the facts in the advertisement with the articles on the subject contained in their files, and from their failure to print a retraction requested by the plaintiff. *Id.* at 686-87, 144 So. 2d at 50-51. The defendants' argument that the advertisement was political and therefore protected by the Bill of Rights was rejected by the Alabama Supreme Court, stating that "[t]he First Amendment . . . does not protect libelous publications." *Id.* at 676, 144 So. 2d at 40.

¹⁵ 376 U.S. at 267. Since the words were libelous per se, the defendants' only defense was to prove their truthfulness. While the defendants might have asserted the privilege of fair comment, the success of that defense also depended on the truth of the facts commented upon. *Id.*

¹⁶ *Id.* at 270.

¹⁷ *Id.* at 279-80. It has been suggested that although the term "chilling effect" was not used in its discussion, the Court nevertheless applied the concept in its analysis of the deterrence created by requiring libel defendants to demonstrate truth. See Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 825 (1969). "Chilling effect" has been

therefore "must be protected if the [constitutional] freedom of expression are to have . . . 'breathing space.'"¹⁸

Consistent with this approach, the Court held that a public official could not recover damages for the publication of a defamatory falsehood unless the plaintiff established that the publication was made with "actual malice."¹⁹ A "qualified privilege"²⁰ prohib-

defined as focusing "attention on the practical consequences of State action for the conduct of the individual." *Id.* at 808. Courts have used the term to describe the way certain forms of state action inhibit the individual's exercise of his first amendment rights without actually prohibiting the exercise of them as such. *See, e.g., Shelton v. Tucker*, 364 U.S. 479, 486-87 (1960).

¹⁸ 376 U.S. at 271-72. Justice Brennan stated that "[a]uthoritative interpretation of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries or administrative officials and especially one that puts the burden of proving truth on the speaker." *Id.* at 271. The Court also stated that injury to the reputation of a government official did not warrant repressing speech unless there was a "clear and present danger." *Id.* at 272-73.

Having found neither factual error nor defamatory content alone sufficient to suppress speech, the Court concluded that the combination of the two also was insufficient. *Id.* at 273.

¹⁹ *Id.* at 279-80. Actual malice, defined by the *New York Times* Court as defendant's knowledge of the falsity, or reckless disregard of the truth or falsity, of his publication, *id.* at 279-80, is distinct from "common-law malice"—defendant's ill-will, spite or hostility—which a pre-*New York Times* libel plaintiff had to prove to enhance damages or to defeat a defendant's assertion of a conditional privilege. *See W. Prosser, supra*, note 2, at 794-95. The use of the term "actual malice" caused a great deal of confusion in the lower courts and forced the Supreme Court to reverse numerous libel judgments because common-law malice instructions were given to the jury. *See, e.g., Greenbelt Corp. Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970); *Beckley Newspaper Corp. v. Hanks*, 389 U.S. 81 (1967); *Henry v. Collins*, 380 U.S. 356 (1965) (per curiam). In *Garrison v. Louisiana*, 379 U.S. 64 (1964), the Court sought to clarify "actual malice" stating that a "reasonable-belief standard . . . is not the same as the reckless-disregard-of-truth standard," *id.* at 79, and that "only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions," *id.* at 74. The Court further elaborated on the "actual malice" test in *Saint Amant v. Thompson*, 390 U.S. 727 (1968), stating: "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* at 731. *See also Time, Inc. v. Pape*, 401 U.S. 279 (1971). Although adopting a subjective approach to "actual malice," the Court has stated that expressions of good faith will not relieve a defendant of liability where, for instance, a story "is based wholly on an unverified anonymous telephone call," *Saint Amant*, 390 U.S. at 732. Moreover, the Court has stated that "recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *Id.* Yet despite the injection of some objectiveness into a subjective test, the Court has practically acknowledged that ignorance can be a shield to liability. *See id.* at 731-32; *accord, Airlie Foundation, Inc. v. Evening Star Newspaper Co.*, 337 F. Supp. 421, 427-28 (D.D.C. 1972).

The *New York Times* Court held that actual malice must be proven with "convincing clarity." 376 U.S. at 285-86. This level of proof was restated in terms of "clear and convincing" by the Court in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 30 (1971). Clear and convincing proof relates only to actual malice; a plaintiff may prove the other elements of

ited recovery of either actual or punitive damages, absent proof that the false statements were made with knowledge of or with reckless disregard of their falsity. First amendment freedoms would not survive, the Court reasoned, if critics of official conduct were guarantors of the veracity of all the statements they published.²¹

Three years after the application of the "actual malice" test to defamatory publications about the activities of public officials, the companion cases of *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*²² provided the Supreme Court with the opportunity to again express its interest in stressing the importance of the plaintiff's "status" as the basis for fashioning new rules of constitutional magnitude. In the *Butts* case, an article in the *Saturday Evening Post* accused the plaintiff, the University of Georgia athletic director, of conspiracy to fix a football game.²³ In *Walker*, the

defamation by a preponderance of the evidence. *Goldwater v. Ginzburg*, 414 F.2d 324, 341 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970). But see *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275-76 (1971).

²⁰ The belief that free communication was extremely important in certain limited circumstances led to the common-law development of privileges that, when applicable, shield a defendant from defamation liability. Common-law defamation privileges are either absolute or conditional. A conditional privilege can be defeated by a showing of "common law malice," whereas an absolute privilege cannot be defeated regardless of the defendant's motives. See W. PROSSER, *supra* note 2, § 114, at 776-77. For a discussion of absolute and conditional privileges see, 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* §§ 5.22-28; Eaton, *supra* note 2, at 1361-63; *Developments in the Law—Defamation*, 69 HARV. L. REV. 875, 917-31 (1956). The fair comment privilege is extensively discussed in Soble, *Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report*, 54 N.Y.U. L. REV. 469 (1979).

²¹ 376 U.S. at 279. The Court believed that requiring government critics to "guarantee the truth of all his factual assertions" would lead to self-censorship. *Id.* "Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true, and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *Id.*

One commentator has noted that *New York Times* lacks language indicating the balancing of interests traditionally used in first amendment cases. See Kalven, *The New York Times Case: A Note on "the Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 214-17. The Court, however, did not grant libel defendants an absolute privilege and thus impliedly balanced the interest in reputation against the interest in free expression. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974).

²² 388 U.S. 130 (1967).

²³ *Id.* at 135. Although the University of Georgia was a state college, Butts was employed by a private corporation, the Georgia Athletic Association. Butts, therefore, could not be a "public official." *Id.* He was, however, a well-known coach and was negotiating for a position with a professional football team at the time the article was published. *Id.* at 135-36. Butts brought a libel action seeking compensatory and punitive damages totaling \$10,000,000. *Id.* at 137. The only defense raised at trial was one of substantial truth, since

plaintiff was a retired United States Army General, whose objections to the admission of James Meredith as the first University of Mississippi black student were the subject of an Associated Press dispatch stating that he had taken command of a riotous crowd and led a charge against United States Marshalls.²⁴

Although both plaintiffs had received widespread recognition and notoriety, neither was a "public official" engaged in official conduct or activities. Nonetheless, the Supreme Court applied the *New York Times* doctrine, requiring proof of actual malice, to each, because of their status as "public figures."²⁵ Significantly,

the case was tried and completed prior to the *New York Times* decision. *Id.* Subsequent to the decision in *New York Times*, however, the defendant moved for a new trial. The trial court denied the motion on the grounds that *New York Times* was inapplicable because Butts was not a public official and that, even if *New York Times* applied, the evidence at trial was sufficient to establish that the defendant had acted with reckless disregard of the truth or falsity of the accusations in the article. *Id.* at 138-39.

²⁴ Although a private citizen at the time of the riot and publication, Walker had a long career in the federal government and had engaged in political activity. *Id.* at 140. The article at issue stated that Walker had encouraged rioters to use violence and had advised them how to avoid the effects of tear gas. *Id.* Walker sought damages in the amount of \$2,000,000. The jury awarded the plaintiff both compensatory and punitive damages. The trial court, however, found that the evidence was not sufficient to support a finding of "malice" and refused to award damages. The court noted that lack of "malice" would have relieved the defendant of liability if *New York Times* had been applicable. *Id.* at 141-42.

²⁵ *Id.* at 154-55. Justice Harlan, author of the plurality opinion, argued that the *New York Times* seditious libel rationale for the actual malice standard should not be extended to the new public figure because that individual's criticism does not relate to self-government. 388 U.S. at 153-54. Instead, he reasoned, the first amendment interest must be balanced against the states' interest in protecting a private individual's reputation. The state interest was noted to diminish when the plaintiff has "sufficient access to the means of counterargument," *id.* at 155, or when he has assumed the risk of liability by "thrusting . . . his personality into the 'vortex' of an important public controversy," *id.* See also *Time, Inc. v. Hill*, 385 U.S. 374, 407-09 (1967) (Harlan, J., concurring). Thus, rather than extending the actual malice test to public figures, Justice Harlan found that a standard akin to gross negligence should control. 388 U.S. at 155. In contrast to the plurality approach, Chief Justice Warren, concurring in the result, argued that the actual malice standard must be applied to public figures because their "views and actions with respect to public issues and events are often of as much concern to the citizen as the attitudes and behavior of 'public officials' with respect to the same issues and events." *Id.* at 162 (Warren, C.J., concurring). Since modern political policy decisions are now made as a result of the "blending" of government and private economic power, "individuals . . . who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Id.* at 163-64 (Warren, C.J., concurring). Although three justices concurred with Justice Harlan, it was the actual malice standard that ultimately controlled because two justices agreed with the Chief Justice and two reiterated their *New York Times* position that the media should be absolutely privileged. See *Eaton, supra* note 2, at 393 & n. 183. It is interesting to note that the *Gertz* majority adopted a public figure standard which was a hybrid of both the Harlan and Warren approaches. See generally Note, *The Editorial Function and the Gertz Public Fig-*

General Walker's status was viewed in light of "his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy."²⁶

The Public Interest Doctrine

Once the foundation of placing emphasis upon the plaintiff's status was established, a litany of case law developed intertwining the plaintiff's status with the right of the public to be informed of events of public interest.²⁷ The "vortex" plaintiff,²⁸ whether public official or public figure, faced the heavy burden of establishing damages and proving actual malice by "clear and convincing" evidence.²⁹

ure Standard, 87 YALE L.J. 1723, 1731-34 (1978).

²⁶ 388 U.S. at 155.

²⁷ See, e.g., *Letter Carrier v. Austin*, 418 U.S. 264 (1974); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295 (1971); *Time, Inc. v. Pape*, 401 U.S. 279, 280-82 (1971); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 266 (1971); *Greenbelt Coop. Publishing Ass'n v. Bressler*, 398 U.S. 6, 8 (1970); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *Saint Amant v. Thompson*, 390 U.S. 727 (1968); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967) (per curiam); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966); *Henry v. Collins*, 380 U.S. 356 (1965) (per curiam); *Garrison v. Louisiana*, 379 U.S. 64 (1964).

²⁸ See note 25 *supra*.

²⁹ See *Rosenbloom v. Metromedia Inc.*, 403 U.S. 29, 30 (1971) ("clear and convincing proof"); *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964) ("convincing clarity"); note 19 *supra*.

The *New York Times* Court devoted considerable effort to demonstrate that extending the presumption of actual damage to reputation unacceptably burdened free speech where the only defense was truth. 376 U.S. at 283-84. Thus, some courts and commentators have asserted that in addition to proving actual malice, a defamation plaintiff subject to the *New York Times* standard must also prove actual damages. See, e.g., *Lundstrom v. Winnebago Newspapers, Inc.*, 58 Ill. App. 2d 33, 206 N.E.2d 525 (1965); *Arkin & Granquist, The Presumption of General Damages in the Law of Constitutional Libel*, 68 COLUM. L. REV. 1482, 1493 (1968). In *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966), the Court applied the *New York Times* actual malice test, by analogy, to a defamation action arising out of a labor dispute. See *id.* at 65. Therein, the Court stated that it was limiting "the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage." *Id.* at 64-65 (emphasis supplied). Since the Court borrowed the actual malice and actual damages requirements from *New York Times* by analogy, it has often been asserted that *New York Times* requires proof of actual damages. See *Eaton, supra* note 2, at 1389. Several courts, however, refused to apply the *Linn* actual damage requirement to cases falling under *New York Times*. See, e.g., *Goldwater v. Ginzburg*, 414 F.2d 324, 340 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970); *Indianapolis Newspapers, Inc. v. Fields*, 254 Ind. 219, 256-57, 259 N.E.2d 651, 667-68, *cert. denied*, 400 U.S. 930 (1970). This area was further clouded by the dictum in Justice White's concurrence in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 59 (1971) (White, J., concurring). Justice White stated that:

One year after its decision in *Butts* and *Walker*, the Supreme Court further refined the actual malice test. Emphasis shifted slightly to the subjective awareness of the persons responsible for the publication of the alleged defamation.³⁰ The test was not whether a reasonable man would have published or would have investigated before publishing. Rather, a far more stringent standard was applied: "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."³¹

Under this test, neither ill will³² nor intent to inflict harm³³ was to be considered conclusive. Moreover, failure to investigate the truth or to substantiate information gained was insufficient, in itself, to show actual malice.³⁴ There could not be reckless disregard of truth where a false report was based upon a good faith, rational misinterpretation of something newsworthy³⁵ or where the

[I]t would seem that at least five members of the Court would support each of the following rules:

For public officers and public figures to recover for damages to their reputations for libelous falsehoods, they must prove either knowing or reckless disregard of the truth In all actions for libel or slander, actual damages must be proved.

Id.; see Keeton, *Some Implications of the Constitutional Privilege to Defame*, 25 VAND. L. REV. 59, 62-63 (1972).

Although the Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), clarified the issue with respect to private individuals by requiring proof of actual injury, *see id.* at 349, it is still not clear whether public officials or figures must prove actual damages in light of *Linn*. There are, however, strong arguments against requiring such a burden. *See, e.g., Eaton, supra* note 2, at 1389-90.

³⁰ See *Saint Amant v. Thompson*, 390 U.S. 727, 731 (1968).

³¹ *Id.*; see *Garrison v. Louisiana*, 379 U.S. 64, 79 (1964). In *Saint Amant v. Thompson*, 390 U.S. 727 (1968), the Supreme Court declared that "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." *Id.* at 731. Rather, reckless conduct depends upon the defendant's subjective state of mind. *Id.* The Court conceded that use of a subjective reckless disregard test might further limit the number of successful defamation plaintiffs but stated that such a test was necessary "to insure the ascertainment and publication of the truth about public affairs." *Id.* at 731-32; *see* note 19 *supra*.

³² See *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 252 (1974); *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 9-10 (1970); *Beckley Newspaper Corp. v. Hanks*, 389 U.S. 81, 82 (1967) (per curiam); *Rosenblatt v. Baer*, 383 U.S. 75, 81 (1966); *Henry v. Collins*, 380 U.S. 356, 357 (1965) (per curiam); *Garrison v. Louisiana*, 379 U.S. 64, 78 (1964).

³³ *Henry v. Collins*, 380 U.S. 356, 357 (1965) (per curiam).

³⁴ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254, 287 (1964); *see* note 19 *supra*.

³⁵ See *Time, Inc. v. Pape*, 401 U.S. 279, 290-92 (1971); *Waskow v. Associated Press*, 462 F.2d 1173, 1176 (D.C. Cir. 1972). *But cf. Time Inc. v. Firestone*, 424 U.S. 448, 458-60 (1976) (defendant held liable to non-public figure for erroneously interpreting court's ambiguous

plaintiff was not contacted to verify facts.³⁶ Finally, reliance on information from a normally reliable source negated the possibility of actual malice.³⁷

The Shift to the Private Person

As the pendulum continued to swing in favor of providing increasing protection to the publisher of defamatory material, a sharply divided Court, in *Rosenbloom v. Metromedia*,³⁸ bridged another gap when it applied the actual malice standard of knowing falsity or reckless disregard of the truth to a libel action brought by a plaintiff in a previously unprotected status—the “private individual.”³⁹ A plurality of the Court found that concern over the plaintiff’s status, which was the cornerstone of *New York Times, Butts, Walker*, and their progeny, was less important than, and must be subordinated to, the public’s right to be informed of plaintiff’s involvement in matters of public or general interest. As Justice Brennan explained:

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

decree as granting divorce on grounds of adultery).

³⁶ *Hurley v. Northwest Publication Co.*, 273 F. Supp. 967, 974 (D. Minn. 1967), *aff’d*, 398 F.2d 346 (8th Cir. 1968). *See also* *Miller v. News Syndicate Co.*, 445 F.2d 356 (2d Cir. 1971).

³⁷ *Miller v. News Syndicate Co.*, 445 F.2d 356, 357-58 (2d Cir. 1971); *Walker v. Pulitzer Publishing Co.*, 394 F.2d 800, 805-06 (8th Cir. 1968); *Trails West, Inc. v. Wolff*, 32 N.Y.2d 207, 219, 298 N.E.2d 52, 57-58, 344 N.Y.S.2d 863, 872 (1973); *Schnepf v. New York Post Corp.*, 16 N.Y.2d 1011, 1011-12, 213 N.E.2d 309, 309, 265 N.Y.S.2d 897, 897 (1965). *See also* *Rosenbloom v. Metromedia*, 403 U.S. 29, 56 (1971).

³⁸ 403 U.S. 29 (1971).

³⁹ *Id.* at 31. *Rosenbloom* was an action based on two series of radio broadcasts. The plaintiff, a distributor of nudist magazines, was arrested while delivering some of his magazines to a local newsstand. *Id.* at 32-33. Reporting on the arrest, the defendant radio station failed to describe the materials seized as “allegedly” obscene. *Id.* at 33-34. This omission was corrected in subsequent broadcasts of the same news item. *Id.* at 34. The second series of allegedly defamatory broadcasts related to the defendant’s report of the lawsuit brought by the plaintiff seeking a judgment that his magazines were not obscene and prohibiting further police interference with his business. *Id.*

The *Rosenbloom* plaintiff alleged that the characterization of his books as being obscene in the first series of broadcasts was libelous per se and had been proved false by his subsequent acquittal. *Id.* at 36. The second series was alleged to have been defamatory because the defendant referred to the plaintiff as a “smut distributor” and described the lawsuit as an attempt to force the police and district attorney “to lay off the smut literature racket.” *Id.*

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. . . . We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.⁴⁰

GERTZ AND BEYOND

The Retreat

The *Rosenbloom* rationale, coupled with a rule favoring summary judgment in defamation cases,⁴¹ extended the progressive pendulum to a short-lived peak.⁴² Within 3 years after extending the actual malice test not only from public status to private status but to the concept of the public's right to be informed, new ground rules were established. The Supreme Court, which in *Rosenbloom* had struggled with abandoning the plaintiff's status as being of primary importance, reaffirmed such status as being critical in

⁴⁰ *Id.* at 43-44. Justice Brennan stated that *New York Times* and its progeny clearly established "the concept that the First Amendment's impact upon state libel law derives not so much from whether the plaintiff is a 'public official,' 'public figure,' or 'private individual,' as it derives from the question whether the allegedly defamatory publication concerns a matter of public or general interest." *Id.* at 44. Chief Justice Burger and Justice Blackmun joined in Justice Brennan's opinion.

In accordance with his position in previous "constitutional" defamation cases, Justice Black concurred in the result in *Rosenbloom* on the ground that the first amendment does not permit the recovery of a libel judgment against the news media even when the statements are made with knowledge of their falsity. 403 U.S. at 57 (Black, J., concurring). Justice White wrote a separate opinion concurring on the ground that absent a showing of actual malice, the press has a privilege to comment upon the official actions of public servants. *Id.* at 62 (White, J., concurring).

Justice Harlan dissented, stating that states should define for themselves the applicable standard of care for private individuals provided liability without fault was not imposed. He also stated that plaintiff should be required to prove actual damages and that punitive damages should be awarded only upon a showing of actual malice. *Id.* at 64, 73 (Harlan, J., dissenting). Justice Marshall agreed with the conclusion of Justice Harlan that the states should be able to formulate their own standard of liability. He disagreed, however, with allowing plaintiffs to recover punitive damages. *Id.* at 86 (Marshall, J., dissenting). Justice Stewart joined in Justice Marshall's dissent.

⁴¹ See notes 131-34 and accompanying text *infra*.

⁴² For an extensive compilation of federal and state courts which adopted the *Rosenbloom* plurality's holding, see *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 377 n.10 (1974) (White, J., dissenting).

*Gertz v. Robert Welch, Inc.*⁴³ The Court chose to refine and reemphasize the plaintiff's status, however, rather than to alter the definition of actual malice.

Apparently troubled by the uncertainty engendered by the *Rosenbloom* opinion,⁴⁴ the Court in *Gertz* retreated from its broad holding in *Rosenbloom* and produced a majority opinion.⁴⁵ While recognizing that the *New York Times* safeguards against self-censorship were essential, the majority concluded that the *Rosenbloom* plurality had over-extended the privilege by not balancing it against "the competing value served by the law of defamation,"⁴⁶ which the Court described as the "legitimate state interest" in compensating private individuals for damage to their reputations.⁴⁷ Instead of adopting an ad hoc test for balancing "the needs of the press" against the individual's right to compensation, the *Gertz* Court opted for a standard in which the respective protections would be determined by the plaintiff's public or private status.⁴⁸

The Court found "no difficulty in distinguishing among defa-

⁴³ 418 U.S. 323 (1974). In *Gertz*, the plaintiff was an attorney who represented the family of a youth slain by a Chicago police officer, Nuccio, in the family's civil action against the officer. *Id.* at 325. A publication of the John Birch Society, *American Opinion*, had printed an article about a purported communist plot directed at the police, which was allegedly manifested in the criminal trial of Nuccio. *Id.* at 325-26. The article described Gertz as the "architect" of the campaign to discredit the police and claimed that he was a member of an organization dedicated to "the violent seizure of our government." Gertz was also branded a "Leninist" and a "Communist-frontier" in the article. *Id.*

⁴⁴ *See id.* at 354 (Blackmun, J., concurring).

⁴⁵ Justices Stewart, Marshall and Rehnquist joined in Justice Powell's opinion. Justice Blackmun concurred with the Court's opinion and in a separate opinion stated that although he disagreed with the substance of the majority opinion, he was concurring because of his interest in a clearly defined majority position that eliminates the "unsureness engendered by *Rosenbloom's* diversity." *Id.* at 354 (Blackmun, J., concurring).

Dissents were filed by the remaining four justices. Chief Justice Burger favored a gradual evolution of constitutional defamation protections over the seemingly abrupt retreat in *Gertz* from "traditional" defamation law, *id.* at 354-55 (Burger, C.J., concurring). Justice Douglas, opposed to applying the uncertain negligence standard, or even a reckless disregard standard to liability for expression, *id.* at 355-60 (Douglas, J., dissenting), was faithful to his position in *Rosenbloom* and advocated the *New York Times* test as the standard of liability for media defendants against private citizens, *id.* In a piercing dissent, Justice White argued that the majority had intruded impermissibly into the sphere of the states' interest in protecting private persons by ruling strict liability unconstitutional and by imposing restrictions on damage awards. *Id.* at 369-404 (White, J., dissenting).

⁴⁶ *Id.* at 341. In support of their view that the state interest must be considered, the *Gertz* Court reasoned that if media self-censorship was the only interest at stake, the *New York Times* Court would have adopted a media privilege of absolute immunity. *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 343-48.

mation plaintiffs."⁴⁹ It initially noted that "the first remedy of defamation plaintiffs is 'self-help,' " that is, the ability to employ public communication to mitigate the harm caused by the defamatory statement.⁵⁰ Accordingly, the *Gertz* majority reasoned that private individuals are more "vulnerable" to damage and thus more "deserving" of state-fashioned remedies than public officials or public figures, who possess significant access to effective communication channels and therefore have an opportunity to rebut the defamatory statements.⁵¹ More important, the Court emphasized, public individuals "have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them," whereas private individuals have not. The private person "has a more compelling call on the courts for redress of injury."⁵² Thus, with the emphasis on voluntary action, akin to assumption of risk, the Court defined three categories of public figures. First are those individuals who "through no purposeful action of [their] own" have achieved this status, but this "truly involuntary public figure" was noted as being a rarity.⁵³ The second category are those deemed "public figures for all purposes," who, by the "notoriety of their achievements,"⁵⁴ by "occupy[ing] positions of . . . persuasive power and influence,"⁵⁵ or by "achiev[ing] . . . pervasive fame or notoriety,"⁵⁶ have acquired "general fame and notoriety in the community."⁵⁷ The "more common" public figures, those classified as public figures "for a limited range of issues,"⁵⁸ comprise the third category. These are individuals who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."⁵⁹ Both the all-purpose and limited-issue public figures were found to have "assumed roles of especial prominence in the affairs of society"⁶⁰ or, phrased differently, "in the resolution of public questions"⁶¹ and therefore

⁴⁹ *Id.* at 344.

⁵⁰ *Id.*

⁵¹ *Id.* at 344-45.

⁵² *Id.* at 345.

⁵³ *Id.*

⁵⁴ *Id.* at 342.

⁵⁵ *Id.* at 345.

⁵⁶ *Id.* at 352.

⁵⁷ *Id.* at 351-52.

⁵⁸ *Id.* at 351.

⁵⁹ *Id.* at 345.

⁶⁰ *Id.*

⁶¹ *Id.* at 351.

"invite attention and comment."⁶²

Thus, if a plaintiff were cast in the role of a public personality, the familiar defamation rules announced in *New York Times* would apply. If the plaintiff defamed by the media were a private individual, however, the states would be permitted to fashion their own rules and standards of liability, with the caveats that strict liability could not be imposed,⁶³ that presumed and punitive damages could be exacted only if *New York Times* actual malice was shown,⁶⁴ and that only actual damages "supported by competent evidence concerning the injury" could be awarded.⁶⁵

After reinstating the public-private distinction, the *Gertz* majority continued its assault on *Rosenbloom* by rejecting the "general or public interest" rationale. Not only was it deemed to be hostile to state interests, but its application "would occasion the . . . difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of 'general or public interest' and which do not—to determine . . . 'what information is relevant to self-government.'"⁶⁶ Beyond the difficulty in applying such a rule, the Court questioned the prudence of leaving these decisions to the "conscience of judges."⁶⁷

Significantly, many plaintiffs prior to the *Gertz* decision likely would have been deemed public figures.⁶⁸ The narrowing of that status under *Gertz* becomes evident in the Court's analysis of the plaintiff's "public" activities. Noting *Gertz*'s extensive participation in civic and professional organizations and activities and his numerous legal publications, the majority "would not lightly assume" that such endeavors convert an individual into a public figure for all purposes.⁶⁹ Emphasizing that the jurors had never heard of the plaintiff prior to trial, the Court concluded that there was no "clear evidence" of his "general fame and notoriety in the community."⁷⁰ Nor could the Court deem him a limited-issue public figure, since the test "look[s] to the nature and extent of an

⁶² *Id.* at 345.

⁶³ *Id.* at 347.

⁶⁴ *Id.* at 349.

⁶⁵ *Id.* at 350.

⁶⁶ *Id.* at 346 (citation omitted).

⁶⁷ *Id.*

⁶⁸ See Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 449 n. 136 (1975).

⁶⁹ 418 U.S. at 351-52.

⁷⁰ *Id.* at 352.

individual's participation in the particular [public] controversy giving rise to the defamation."⁷¹ Turning to the facts in *Gertz*, the majority reasoned that the plaintiff had neither participated in the criminal trial that set the stage for the defamatory remarks nor discussed the prosecution or civil litigation with the press and thus had neither "thrust himself into the vortex of this public issue, nor . . . engage[d] the public's attention in an attempt to influence the outcome."⁷²

The significance of the *Gertz* decision, beyond redefining defamation law and retrenching from short-lived advances in press freedoms,⁷³ was the creation of new first amendment terminology, which, for the most part, was not clearly defined. Now, *New York Times* protection was to be determined by one's "general fame or notoriety in the community," apparently contoured by any one activity or any combination of widely-known activities⁷⁴ or by "voluntary injection" into a "public controversy" in an attempt "to influence its outcome." The plaintiff's participation in the particular controversy is to be measured by the "nature and extent of his activity." Moreover, although the court acknowledged the possibility of an involuntary public figure,⁷⁵ that category of public figure was not addressed in the *Gertz* analysis. Nor did the Court explain how the inquiry whether a particular event is a "public controversy" would avoid the ad hoc determinations it sought to shun by summarily rejecting the *Rosenbloom* "matters of public and general interest" standard, a problem exacerbated by the Court's failure to distinguish clearly between the terms.⁷⁶

The Pendulum Continues to Swing

Many of the questions left unanswered in *Gertz* were to be analyzed 2 years later in *Time, Inc. v. Firestone*,⁷⁷ wherein a libel suit was based upon an allegedly defamatory report of a divorce proceeding.⁷⁸ The defendant claimed that the plaintiff, Mrs. Fire-

⁷¹ *Id.*

⁷² *Id.*

⁷³ See notes 106-08 and accompanying text *infra*.

⁷⁴ See notes 54-56 and accompanying text *supra*.

⁷⁵ 418 U.S. at 351.

⁷⁶ See generally *Eaton*, *supra* note 2, at 1423-25.

⁷⁷ 424 U.S. 448 (1976).

⁷⁸ In the original Florida action, Mr. Firestone's counterclaim for divorce was granted. Although he alleged adultery and extreme cruelty, the court, in a confusing opinion, apparently granted the divorce on grounds of the Firestones' lack of domestication. To justify its

stone, was a public figure since she was the wife of the internationally known tire manufacturer, was "prominent among the '400' of Palm Beach society," was an "active [member] of the sporting set," and had received sufficient media coverage and publicity so as to "warrant her subscribing to a press-clipping service."⁷⁹

Despite these obvious public acts and activities, the Supreme Court held that Mrs. Firestone was not a public figure for the purpose of her divorce proceeding.⁸⁰ The restrictive analysis previously applied in *Gertz* and the demise of the *Rosenbloom* rationale were clearly sounded. The *Firestone* Court rejected the argument that the highly publicized divorce proceeding was a "public controversy" notwithstanding its popularity to the reading public,⁸¹ to hold otherwise would be a restatement of the *Rosenbloom* doctrine, which the *Gertz* Court had "repudiated."⁸² Moreover, the Court reasoned, the plaintiff did not "freely choose to publicize" the divorce, and resort to the legal system cannot be interpreted as being "voluntary."⁸³ Furthermore, that Mrs. Firestone had held several press conferences "in an attempt to satisfy inquiring reporters" was considered insignificant by the Court, since they were not used

holding, the court stated that Mrs. Firestone's extra-marital affairs were of a nature that would have made "Dr. Freud's hair curl," while her husband's level of activity was compared to "the erotic zest of a satyr." *Id.* at 450-51. This language was mimicked in the *Time* article that became the subject matter of the defamation action. Mrs. Firestone requested *Time* to retract the statements, but such was refused because *Time* believed that the report was factually correct. *Id.* at 452.

⁷⁹ *Id.* at 485 (Marshall, J., dissenting).

⁸⁰ *Id.* at 454.

⁸¹ *Id.*

⁸² *Id.* In rejecting the public figure argument, the Court stated:

Petitioner contends that because the Firestone divorce was characterized by the Florida Supreme Court as a "cause celebre," it must have been a public controversy and respondent must be considered a public figure. But in so doing petitioner seeks to equate "public controversy" with all controversies of interest to the public. Were we to accept this reasoning, we would reinstate the doctrine advanced in the plurality opinion in *Rosenbloom* In *Gertz*, however, the Court repudiated this position

Id.

⁸³ *Id.* The Court stated that Mrs. Firestone's publicity arose because she had been "compelled to go to court by the State in order to obtain legal release from the bonds of matrimony." *Id.* Quoting *Boddie v. Connecticut*, 401 U.S. 371, 376-77 (1971), the Court reaffirmed that "[r]esort to the judicial process . . . is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court." *Id.* In apparent recognition that this statement, taken alone, would conflict with the public figure holding in *Butts*, the Court distinguished Mrs. Firestone's conduct from General Walker's by simply holding that "[s]he assumed no 'special prominence in the resolution of public questions.'" 424 U.S. at 454-55. (citation omitted).

to influence the divorce proceedings or "some unrelated controversy."⁸⁴ Thus, since Mrs. Firestone had not assumed a role "of especial prominence in the affairs of society, other than perhaps Palm Beach society, and did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it," she could not be considered a public figure.⁸⁵

The Fall of the Involuntary Public Figure: The Recent Decisions

The Court's decision in *Firestone* left little doubt that public figure status could not easily be achieved. It lent credence to the *Gertz* Court's prediction that the public figure for all purposes would be uncommon. Of greater import was the barrier presented by the two-tiered test for achieving limited public figure status. Not only must there be a public controversy, but the individual must purposely and extensively participate in it.

In two recent decisions, *Wolston v. Reader's Digest Association*⁸⁶ and *Hutchinson v. Proxmire*,⁸⁷ the Supreme Court reaffirmed the *Firestone* criteria and made all but extinct the concept of "involuntary" public figures.⁸⁸ In *Hutchinson*, the plaintiff re-

⁸⁴ 424 U.S. at 454 n.3.

⁸⁵ *Id.* at 453. Justice Marshall dissented in *Firestone*, arguing that Mrs. Firestone's public activities converted her into a *Gertz* public figure. *Id.* at 484-89 (Marshall, J., dissenting). He noted that prior to the lawsuit, her jet-set activities and marital problems had been a constant attraction for the local media and public. Moreover, he added, she had reason to know that the commencement of the suit would be publicized. The 17-month trial was covered by national news and was the subject of at least 88 local newspaper stories, and she held numerous press conferences throughout this period. Justice Marshall maintained that these activities met the *Gertz* public figure requirements of self-help and voluntary participation in a public controversy. *Id.* at 485-86 (Marshall, J., dissenting). He also rejected the majority's consideration of whether a highly publicized divorce proceeding was a public controversy. In determining public controversies by examining the subject matter of an alleged defamation, it was argued, the Court has returned to the *Rosenbloom* plurality position rejected in *Gertz*. "If *Gertz* is to have any meaning at all, the focus of the analysis must be on the actions of the individual, and the degree of public attention that had already developed, or that could have been anticipated, before the report in question." *Id.* at 489 (Marshall, J., dissenting). Under this inquiry, he concluded, Mrs. Firestone was clearly a public figure. *Id.*

⁸⁶ 443 U.S. 157 (1979).

⁸⁷ 443 U.S. 111 (1979).

⁸⁸ It has been suggested that the involuntary public figure concept met its demise in *Firestone*. See *Schultz v. Reader's Digest Ass'n*, 468 F. Supp. 551, 559 (E.D. Mich. 1979) ("[I]t appears to this Court that . . . *Firestone* . . . forecloses the possibility of one becoming an involuntary figure.").

It is interesting to note that between *Gertz* and *Firestone*, the Supreme Court considered two cases in which the plaintiffs arguably were involuntary figures. In both cases, how-

search scientist, whose research was supported by federal grants, was a recipient of Senator William Proxmire's "Golden Fleece of the Month Award," a vehicle that the senator used "to publicize what he perceived to be the most egregious examples of wasteful government spending."⁸⁹ The senator also criticized the plaintiff's research in a press release, newsletter, television interview, and Senate speech.⁹⁰ Both the district court and circuit court of appeals concluded that Hutchinson was a limited public figure, reasoning that he had successfully applied for research grants and that he had media access that enabled him to respond to the announcement of the award. The Supreme Court reversed the previous grant of summary judgment in favor of the defendant, holding that neither of the facts relied upon by the lower courts proved that Hutchinson was a public figure prior to the controversy surrounding the award, and "[h]e did not have the regular and continuing access to the media that is one of the accouterments of having become a public figure."⁹¹ Addressing whether a public controversy was involved, the Court reasoned that "concern about general public expenditures" is not such an event.⁹² Additionally, the plaintiff had neither "thrust himself [n]or his views into public controversy to influence others,"⁹³ nor "assumed any role of public prominence in the broad question of concern about expenditures."⁹⁴

The *Wolston* decision, decided on the same day as *Hutchinson*, is further, if not conclusive, evidence of the demise of the involuntary public figure. The plaintiff in *Wolston* sued the publishers and author of a 1974 non-fiction book that had identified the plaintiff as an indicted Soviet espionage agent. The record demonstrated that in 1958 the plaintiff had failed to appear before a fed-

ever, that question was not reached. See *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974); *Gordon v. Random House, Inc.*, 349 F. Supp. 919 (E.D. Pa. 1972), *vacated*, 486 F.2d 1356 (3d Cir. 1973), *aff'd*, 419 U.S. 812 (1974).

⁸⁹ 443 U.S. at 114.

⁹⁰ *Id.* at 115-18.

⁹¹ *Id.* at 136.

⁹² *Id.* at 135. Reasoning that by labelling "concern about general public expenditures" as a public controversy would be a return to the rejected *Rosenbloom* subject matter test, and that, by so classifying, all persons who "received or benefitted" from public grants would be a public figure, the Court rejected that part of Proxmire's public figure argument. *Id.*

⁹³ *Id.*

⁹⁴ *Id.* Merely applying for federal funding or publishing in professional publications, the Court reasoned, does not "[invite] that degree of public attention and comment" to give one public figure status. *Id.*

eral grand jury that was investigating his knowledge of a suspected spy ring. He later responded to a criminal contempt order to show cause, at which time he pleaded guilty and was sentenced.⁹⁵ These events attracted the news media's attention, resulting in the publication of fifteen newspaper articles in New York and Washington. The publicity subsided following the sentencing, and the plaintiff returned to private life.⁹⁶

Although the statements about the plaintiff were found to be false, the lower federal courts agreed that the plaintiff was a limited-issue public figure and, finding no actual malice, respectively granted and affirmed the defendants' motion for summary judgment. In reversing, the Supreme Court accepted the defendant's contention that the public controversy involved was "the propriety of the actions of law-enforcement officials in investigating and prosecuting suspected Soviet agents,"⁹⁷ but it did not agree that Wolston had achieved public figure status. The Court rejected the lower courts' rationales that by failing to appear at the hearing Wolston had "stepped center front into the spotlight," thereby "invi[te] attention and comment in connection with the public questions involved in the investigation of espionage."⁹⁸ Rather, it found that such activity did not amount to a "voluntary thrust[ing]" or "inject[ing]."⁹⁹ The Court hinted, however, that Wolston might qualify as an involuntary figure: "It would be more accurate to say that petitioner was dragged unwillingly into the controversy. The government pursued him in its investigation."¹⁰⁰ The inquiry into involuntariness did not proceed further, though, and the Court returned to the "nature and extent" of Wolston's voluntariness. Failing to comply with the subpoena, even with knowledge of the potential attendant publicity, was

not decisive on the question of public figure status
[P]etitioner never discussed this matter with the press and limited his involvement to that necessary to defend himself of the contempt charge. It is clear that [he] played only a minor role in

⁹⁵ 443 U.S. at 161-63.

⁹⁶ *Id.* at 163.

⁹⁷ *Id.* at 166 n.8. Although the Court had difficulty identifying the particular public controversy involved, it accepted the defendant's definition because "it is clear that petitioner fails to meet the other [public figure] criteria." *Id.*

⁹⁸ *Id.* at 165 (quoting *Wolston v. Reader's Digest Ass'n*, 578 F.2d 427, 431 (D.C. Cir. 1979)).

⁹⁹ 443 U.S. at 166.

¹⁰⁰ *Id.*

whatever public controversy there may have been concerning the investigation of Soviet espionage. We decline to hold that his mere citation for contempt rendered him a public figure for purposes of comment on the investigation of Soviet espionage.¹⁰¹

Moreover, the Court stated that the mere involvement in a public controversy does not transform a private individual into a public person so as to impose upon him the rigorous burden of proving actual malice by clear and convincing evidence:

Petitioner's failure to appear before the grand jury and citation for contempt no doubt were "newsworthy," but the simple fact that these events attracted media attention also is not conclusive of the public-figure issue. A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention. To accept such reasoning would in effect re-establish the [now repudiated] doctrine advanced by the plurality opinion in *Rosenbloom v. Metromedia, Inc.*¹⁰²

The Court additionally rejected the notion that the plaintiff had used the contempt order "as a function to create public discussion about [the public controversy]" in order to assume "special prominence in resolution of public issues."¹⁰³ Nor is "any person who engages in criminal conduct automatically . . . a public figure for purposes of comment on a limited range of issues relating to his conviction."¹⁰⁴ Thus, concluded the Court, the plaintiff was not a public figure because, "[to] hold otherwise would create an 'open season' for all who sought to defame persons convicted of a crime."¹⁰⁵

FUTURE OBSERVATIONS

The impact of *Gertz* and its progeny will be seen in a number of areas related to defamation litigation involving media defendants. Primarily, these effects are the potential for an increase in media self-censorship, an increase in the number of defamation actions and their attendant costs, first amendment forum shopping, and the demise of the use of summary judgment in these actions.

¹⁰¹ *Id.* at 167.

¹⁰² *Id.*

¹⁰³ *Id.* at 168 (quoting *Gertz*, 418 U.S. at 351).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 169.

Media Self-Censorship

At the heart of the Court's defamation decisions from *New York Times* to *Rosenbloom* was the concept that free and uninhibited debate of public issues was essential for the proper governing and development of our democratic system. Any doctrine which would impede such discussion was deemed inimical to our conception of self-government and societal advancement. Thus, first amendment freedoms were construed to limit the potential for litigation and to avoid the dangers of self-censorship. With the placing of emphasis on the public's right to be informed and on the corresponding need to prevent a "chilling" of the flow of public information, the transition from the *New York Times* and *Butts* status tests to the *Rosenbloom* content standard—a shifting of first amendment analysis which brought with it an increased safeguarding of the media—appeared to be a logical progression.

Gertz and its progeny represent a departure from this trend. Under their public controversy-public figure standard, the security in reporting that the media enjoyed under pre-*Gertz* law apparently will be replaced by an awareness that publications once covered by the *New York Times* privilege, in many instances, will not be protected under *Gertz*. This awareness, combined with the potential for increased litigation costs¹⁰⁶ and the threat of inconsistent state holdings,¹⁰⁷ probably will be translated into self-censorship. For example, nearly all media publications at issue in the short-lived *Rosenbloom* era were found to be subject to the qualified privilege and thus protected by "federal" defamation jurisprudence.¹⁰⁸ By abandoning the *Rosenbloom* rationale and returning to a status test apparently stricter than that envisioned by the *Butts* plurality, *Gertz* and the subsequent decisions in *Firestone*, *Hutchinson*, and *Wolston* have effectively taken media protection from the sphere of federal law and placed it into the labyrinth of state law, where "actual malice," in most cases, has been replaced by ordinary negligence.¹⁰⁹ Rather than chance the plaintiff's lower burden under state standards, the media will often be forced to delete stories that might subject them to liability. If *Gertz* fosters

¹⁰⁶ See notes 122-30 and accompanying text *infra*.

¹⁰⁷ See Frakt, *Defamation Since Gertz v. Robert Welch, Inc.: The Emerging Common Law*, 10 RUT.-CAM. L. J. 518, 560 (1979).

¹⁰⁸ See authorities cited in Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 U.C.L.A.L. REV. 915, 927 n.99 (1978). See also note 42 *supra*.

¹⁰⁹ See note 145 and accompanying text *infra*.

both a bias in favor of orthodox media reporting and augmented censorship by libel attorneys,¹¹⁰ the probability of self-censorship increases.

One of the major effects of the post-*Gertz* decisions on the news media is their restrictive interpretations of the requirements for achieving public figure status. Analysis of these decisions reveals the elusive nature of the public figure concept as it is presently applied. First, the number of all-purpose public figures apparently will be minute, a point acknowledged by the Court itself.¹¹¹ Moreover, the Court's definition of this species of public figures, *i.e.*, those who hold "positions of . . . persuasive power and influence" or who have "achieve[d] . . . pervasive fame or notoriety" and thus "general fame or notoriety in the community," indicates that it is the media's coverage of these personalities that results in the requisite notoriety. Ironically, if the media begins censoring publications concerning newsworthy individuals who have not yet reached the exposure level of a Johnny Carson¹¹² or Mayor Alioto¹¹³ for fear of potential litigation, the probability is small that new all-purpose public figures will be created.¹¹⁴

Second, the concept of an involuntary public figure is hypothetical at best. The Court has not clearly defined this status,¹¹⁵ and even where it has recognized that a private person may have been drawn into the public spotlight, it has failed to decide, or even address, the status question in terms of the involuntariness of that individual's public exposure.¹¹⁶ Apparently, merely being drawn into a particular controversy will not suffice; once drawn in, the "nature and extent" of an individual's participation may have

¹¹⁰ See Anderson, *supra* note 68, at 438-41, 453-58.

¹¹¹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

¹¹² See Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976).

¹¹³ See Alioto v. Cowles Communications, Inc., 430 F. Supp. 1363 (N.D. Cal. 1977).

¹¹⁴ See generally Frakt, *supra* note 107, at 531-32.

¹¹⁵ The *Gertz* Court described the involuntary public figure as "someone [who may become] a public figure through no purposeful action of his own . . ." *Gertz*, 418 U.S. at 345, and "is drawn into a particular public controversy," *id.* at 351. This "definition" was neither expanded upon by the *Gertz* Court nor even mentioned in *Wolston* and *Hutchinson*. The uncertainty engendered by the hypothetical possibility of an involuntary public figure is reflected in lower court decisions. Compare *Rosanova v. Playboy Enterprises, Inc.*, 580 F.2d 859 (5th Cir. 1978) with *Schultz v. Reader's Digest Ass'n*, 468 F. Supp. 551 (E.D. Mich. 1979). See also *Meeropol v. Nizer*, 381 F. Supp. 29 (S.D.N.Y. 1974), *aff'd*, 560 F.2d 1061 (2d Cir. 1977).

¹¹⁶ See, *e.g.*, *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 167 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351-52 (1974).

to be voluntary. In *Wolston*, for example, the plaintiff clearly was drawn into the public controversy by both the government and the media. Once in the spotlight, however, he never actively sought publicity and his public activities were limited to responding to the contempt charges.¹¹⁷

The prospect of being deemed an involuntary public figure is further complicated by the Court's insistence that one may become a public figure in only one of two ways—by having general fame or notoriety or by voluntarily thrusting oneself into the controversy and attaining continuing media access regarding the limited issue.¹¹⁸ Taking this literally, even if the *Wolston* plaintiff had actively engaged the media after having become involved in the controversy, but prior to the alleged defamation, by definition he could not have become an involuntary public figure, nor could he have been deemed a voluntary public figure because he had not thrust himself into the controversy in the first instance. Yet, he may have nevertheless become a public figure because of his voluntary involvement with the media.

Overcoming the two-tiered test for limited-issue public figure status will prove to be formidable. At the outset, the events that constitute public controversies are uncertain. The Court has offered little guidance other than stating that the *Rosenbloom* concept of newsworthiness is an inappropriate analytical starting place and that a highly publicized divorce proceeding, a newsworthy criminal prosecution and concern about federal expenditures are not such controversies. Accordingly, definitions of public controversy apparently will turn on the particular issues the individual courts subjectively view as being publicly important. Thus, the courts will be making ad hoc "moralistic value-laden" choices of issues "with which society, and thus the media, *should* be concerned,"¹¹⁹ a result which the *Gertz* Court sought to avoid. As one commentator has noted, the potential for media self-censorship increases dramatically under the public controversy standard because the press initially will have to make these subjective predictions.¹²⁰ Even if a public controversy is determined to exist, the actions that will constitute sufficient voluntary conduct for "thrusting" purposes remain uncertain. Under *Firestone* and *Wol-*

¹¹⁷ *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 167 (1979).

¹¹⁸ *See id.* at 166.

¹¹⁹ Frakt, *supra* note 107, at 528-29.

¹²⁰ *Id.* at 529-30.

ston, it is clear that resort to the judicial system for resolution of a marital dispute or appearing in court to defend against criminal charges, respectively, are not the type of voluntary activities envisioned. Nor will merely being drawn into a controversy by the defendant's defamation or by the media or other third parties be considered voluntary.

Attempting to reconcile the uncertainties of the post-*Gertz* decisions by analyzing the Court's definitions of the *Gertz* terminology can leave one bewildered. Apparently, a broader analysis is required. Under such an approach, it would appear that no matter how an individual becomes involved in a public controversy, save for being drawn in by the defamation, he may achieve public figure status by actively and extensively engaging in conduct bound to "invite attention and comment", i.e., voluntarily increasing the "nature and extent" of his participation.¹²¹ At that point, the media apparently can assume that the person risks exposure to the media. It is clear, however, that merely responding to reporters' inquiries about the controversy into which he had been drawn will not be deemed voluntary. Of course, this entire inquiry is irrelevant if there was no public controversy.

The result of these decisions, then, is that the *New York Times* privilege now may be limited to those publications concerning public officials, the "rare," all-purpose public figure, and the restricted class of persons who voluntarily draw public attention to their involvement in a particular controversy. The potential for media liability therefore increases because the class of plaintiffs who must carry the heavy burden of proving actual malice significantly decreases. To avoid exposure to this augmented liability, the media likely will have to engage in expanded self-censorship—deleting those potentially defamatory stories involving individuals who do not fit precisely into the "safe" categories.

¹²¹ Although the *Gertz* Court noted that public figures may be able to effectively rebut defamatory statements because of their access to the media, see 418 U.S. at 344, the post-*Gertz* decisions clearly indicate that a private individual's media access, no matter how extensive, is not by itself determinative of his constitutional status. *Firestone* clearly illustrates this conclusion. Notwithstanding the extensive media coverage of Mrs. Firestone's activities, and her press-clipping service, press conferences, and association with her nationally known husband—all indicia of extensive media access—the Court held that she was not a public figure.

B. *The Potential for Litigation*

The anxiety created by the public figure limitations expressed in *Firestone* was heightened in 1979 when media defendants suffered setbacks on several fronts. Not only was the plaintiff's status becoming more restrictively defined,¹²² but even where such public figure status was conceded, relief for the media proved to be an elusive concept. In *Herbert v. Lando*,¹²³ the Supreme Court held that the media was not protected or privileged during pre-trial discovery from inquiries into the "state of mind" of the defendants involved in the editorial process that resulted in the allegedly defamatory publication, provided such inquiry was relevant to the plaintiff's proof of actual malice.¹²⁴

Notwithstanding that the *Lando* decision may have a chilling effect on editorial functioning,¹²⁵ the plaintiff's burden of proving *New York Times* actual malice may appear to be lightened by permitting such extensive discovery.¹²⁶ This perception may encourage

¹²² *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979).

¹²³ 441 U.S. 153 (1979). Herbert, a retired army officer, had served active duty in Vietnam. During 1969-1970 he received extended news coverage as a consequence of accusing his superiors of covering-up war crimes and atrocities. *Id.* at 155-56. In 1973, on the television show "60 Minutes," a segment was included on Herbert and his accusations. Claiming that the show had "falsely and maliciously portrayed him as a liar," Herbert brought the libel action against Lando, the producer and author of a related article, Columbia Broadcasting System, Inc., the network, Mike Wallace, the announcer, and *Atlantic Monthly*, the publisher of Lando's article. *Id.*

¹²⁴ *Id.* at 171-72. The thrust of the *Herbert* Court's discussion focused on cases decided prior to *New York Times* that inquired into the defendants' state of mind during the editorial process. These decisions developed qualified privileges to protect publishers from liability for defamation when no malice was shown. *Id.* at 163-64; see, e.g., *Nalle v. Oyster*, 230 U.S. 165 (1913). According to these opinions, in order to find malice the plaintiff had to show that the defendant acted with an unacceptable motive. Sometimes this motive was displayed by ill-will, sometimes by the author's intent or purpose, and other times by a showing of negligence. To find this motive, state of mind inquiry was imperative. 441 U.S. at 164 & n.12. The Court also noted that numerous courts had accepted state of mind evidence without facing constitutional objections. *Id.* at 165. For a list of these cases see 441 U.S. at 165 n.15.

¹²⁵ See generally Frakt, *supra* note 107, at 534; *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 149 (1979).

¹²⁶ Prior to *Lando*, whether a media defendant's editorial processes were completely immunized from an adversary's pretrial inquiry was uncertain. Although pre-*New York Times* cases indicated that state of mind evidence is relevant proof of common-law malice, see cases cited in *Lando*, 441 U.S. at 165 n.15, subsequent decisions did not expressly extend this rule to *New York Times* actual malice inquiries. *Cf. id.* at 173 n.21 (Often . . . the defendant . . . first presents . . . direct evidence about the editorial process . . . to establish . . . lack of malice.") (emphasis supplied). Language in two of the Court's recent media

the belief that the chances of recovery will improve in suits against the media—a conviction that may be fortified by the plaintiff victories in *Hutchinson* and *Wolston*. Thus, it is conceivable that the class of potential plaintiffs now will expand. The possibility of increased litigation also becomes greater in light of the *Firestone* implication that the *Gertz* actual damages requirement in state actions may be satisfied by some evidence of mental suffering alone, a result that apparently contravenes the *Gertz* holding that presumed damages may not be awarded unless the actual malice standard is met.¹²⁷

The extensive discovery permitted by *Lando* as well as the potential for increased litigation and expanded liability signal a sharp rise in litigation costs, a result which may be economically devastating in some sectors. Not all media defendants have the where-

decisions appeared to support the existence of an absolute privilege for editorial processes: see *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974); *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 124 (1973), discussed in *Herbert v. Lando*, 568 F.2d 974, 979 (2d Cir. 1977), *rev'd*, 441 U.S. 153 (1979). Thus, potential plaintiffs without direct evidence of actual malice, believing that the editorial process was privileged, may have been dissuaded from bringing suit or may have faced early summary judgment if the court so believed. In rejecting the possibility of an editorial process privilege, the *Lando* Court disagreed with the second circuit's reliance on *Tornillo* and *Columbia Broadcasting* and construed the pre-*New York Times* decisions as supporting the admissibility of direct state-of-mind evidence in actual malice cases. See *Lando*, 441 U.S. at 167. Although such an interpretation may be erroneous, see *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 149, 153 & n.43 (1979), the *Lando* decision nevertheless removes the uncertainty engendered by previous cases and thereby may inspire increased litigation.

¹²⁷ See *Time, Inc. v. Firestone*, 424 U.S. 448, 475 n.3 (1976) (Brennan, J., dissenting). Although the expansive pretrial discovery process in *Lando* was uniformly viewed with chagrin by media advocates, see, e.g., *Frakt, supra* note 107; *Friedenthal, Herbert v. Lando: A Note on Discovery*, 31 STAN. L. REV. 1059 (1979); *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 149 (1979). But see *Franklin, Reflections on Herbert v. Lando*, 31 STAN. L. REV. 1035 (1979), there are indications that media defendants will not be permitted to use for their benefit the plaintiff's failure to utilize extensive editorial process discovery. In a separate and more recent action, the *Lando* defendants attempted to persuade the district court to dismiss a defamation suit on grounds that the plaintiff had not engaged in a "wave of discovery depositions" of those responsible for the production of the allegedly defamatory film in question. *Uhl v. Columbia Broadcasting Sys., Inc.*, 476 F. Supp. 1134 (W.D. Pa. 1979). The court denied the motion, declaring that this type of discovery was not always necessary in determining the state of mind and that to hold otherwise would permit only wealthy plaintiffs to sue in defamation. *Id.* at 1141. The court noted that the plaintiff was a private person who did not seek to be on television and who had hired a small-town, solo-practitioner attorney. Furthermore, as a private person, he did not have to prove actual malice. The court compared this situation to the one in *Herbert*, where the plaintiff was a public figure who voluntarily sought and obtained media coverage and who did have to prove actual malice. It concluded that depriving a litigant like *Uhl* of his day in court because he did not engage in extensive discovery would show a "bleak prospect for American justice." *Id.*

withal of the corporate conglomerates, who view defensive litigation as no more than one of many costs of doing business. While the concept of libel insurance has been available for years by a limited number of companies who specialize in providing insurance to the media, ever increasing premiums, coupled with larger retentions, have become the rule rather than the exception.¹²⁸ Consequently, the economic burden that potentially is being placed upon small publishers is severe.¹²⁹ As the *Rosenbloom* rationale envisioned, "[t]he very possibility of having to engage in litigation [is] an expensive and protracted process."¹³⁰

Limitations in the Use of Summary Judgment

As previously discussed, the *New York Times* holding was based, to a large extent, on the belief that large verdicts in defamation suits would have a chilling effect on public discussion.¹³¹ The Court recognized that even the threat of litigation posed a substantial danger to the freedom of discussion on matters of public concern.¹³² Thus, as the actual malice standard became more firmly embedded in the web of legal precedent, summary judgment for the defendant became an especially appropriate means to swiftly and expeditiously vindicate first amendment rights.¹³³ Use of sum-

¹²⁸ Cf. Anderson, *The Selective Impact of Libel Law*, reprinted in, *MASS MEDIA AND THE SUPREME COURT* 241 (S. Devol ed. 1971) (most publications and broadcasters cannot afford libel insurance). The problems caused by the high cost of libel insurance is exacerbated by insurers requiring prospective policyholders to have fairly libel-free records, W.E. FRANCOIS, *MEDIA LAW AND REGULATION* 132 (1978), or to obtain whole or partial indemnification agreements from their authors, Anderson, *supra* note 68, at 433 & n.57. Other insurance policies omit punitive damages.

¹²⁹ Cf. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 610 n.40 (1976) (Brennan, J., concurring) (describing the effect of prior restraints on small newspapers).

¹³⁰ *Rosenbloom*, 403 U.S. at 52.

¹³¹ See *New York Times*, 376 U.S. at 277-79.

¹³² See *Rosenbloom*, 403 U.S. at 52-53 (quoting *Speis v. Randall*, 357 U.S. 513, 526 (1958)).

¹³³ See *Time, Inc. v. Johnston*, 448 F.2d 378, 383 (4th Cir. 1971). Numerous federal and state jurisdictions have recognized summary judgment to be a beneficial device in first amendment defamation actions. According to this "rule" of granting summary judgments, *Guitar v. Westinghouse Electric Corp.*, 396 F. Supp. 1042, 1053 (S.D.N.Y.), *aff'd mem.*, 538 F.2d 309 (2d Cir. 1976) (mem.), defamation cases should be disposed of as quickly as possible to avoid a chilling of the exercise of first amendment freedoms, see, e.g., *Schuster v. U.S. News & World Report, Inc.*, 602 F.2d 850, 855 (8th Cir. 1979); *Southard v. Forbes*, 588 F.2d 140, 145 (5th Cir. 1979); *Lewis v. Time, Inc.*, 83 F.R.D. 455, 456 (E.D. Cal. 1979); *Herbert v. Lando*, 568 F.2d 974, 991 (2d Cir. 1977), *rev'd*, 441 U.S. 153 (1979); *Anderson v. Stanco Sports Library, Inc.*, 542 F.2d 638, 641 (4th Cir. 1976); *Time, Inc. v. McLaney*, 406 F.2d 565, 566 (5th Cir.), *cert. denied*, 395 U.S. 922 (1969); *Washington Post Co. v. Keough*, 365 F.2d

mary judgment in defamation actions was deemed "essential" to avoid the evils of self-censorship and to encourage the virtue of public debate.¹³⁴

Following the *Gertz* decision, concern was expressed that the rule in favor of summary judgment might be threatened by the Court's failure to define both actual injury and the burden necessary to prove it.¹³⁵ It was further feared that those state courts adopting a negligence standard would be hesitant to grant summary judgment.¹³⁶ The possibility that the rule would be completely "abrogated" was voiced by Justice Brennan in his dissenting opinion in *Firestone*.¹³⁷ It was not until *Lando*, however, in which the Court held that direct state of mind discovery was available,¹³⁸ that the potential for abrogation of the rule became a reality. In so holding, the *Lando* Court may have impliedly directed that summary judgment should not be granted prior to such extensive discovery. That the trend against use of summary judgment had become fairly embedded was thereafter expressed in *Hutchinson*. In reversing a summary judgment previously granted to the defendant, the Court referred to its earlier decision in *Lando*, and stated that the "rule" favoring summary judgment should be reevaluated:

Considering the nuances of the issues raised here, we are constrained to express some doubt about the so-called "rule." The proof of "actual malice" calls a defendant's state of mind into question, . . . and does not readily lend itself to summary disposition.¹³⁹

Although the Supreme Court chose to avoid directly "dealing

965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967); *Meeropol v. Nizer*, 381 F. Supp. 29, 32 (S.D.N.Y. 1974); *Cerrito v. Time, Inc.*, 302 F. Supp. 1071, 1075-76 (N.D. Cal. 1969), *aff'd*, 449 F.2d 306 (9th Cir. 1971); *Cefalu v. Globe Newspaper Co.*, 391 N.E.2d 935, 937 (Mass. 1979); *Greenberg v. CBS*, 69 App. Div. 2d 693, 700, 419 N.Y.S.2d 988, 991 (2d Dep't 1979); *Curran v. Philadelphia Newspapers, Inc.*, 395 A.2d 1342, 1346 (Pa. 1978). *See also* 6 MOORE'S, FEDERAL PRACTICE § 56.17[40], at 56-928 n.8 (2d ed. 1976). *But see* *Taggart v. Wadleigh-Maurice, Ltd.*, 489 F.2d 434, 438 (3d Cir. 1973) (chilling effect of self-censorship outweighed by possibly premature dismissal).

¹³⁴ *See* *Washington Post Co. v. Keough*, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967); note 15 *supra*.

¹³⁵ *See, e.g.,* *Anderson, supra* note 68 at 467-68.

¹³⁶ *See id.*

¹³⁷ *Time, Inc. v. Firestone*, 424 U.S. 448, 475 n.3 (1976) (Brennan, J., dissenting).

¹³⁸ 441 U.S. at 171-72.

¹³⁹ 99 S. Ct. at 2680 n.9 (citations omitted).

with such complex issues" in *Hutchinson*,¹⁴⁰ it is unlikely that they will be ignored for long.¹⁴¹ It must be expected and anticipated that litigants seeking to narrowly construe first amendment freedoms will advocate the widespread application of *Herbert* and *Hutchinson* principles, a problem that cannot be avoided by the court.

It is more than likely that the holding in *Herbert* and the dictum in *Hutchinson* will become familiar phrases in all first amendment motions for summary judgment.¹⁴² As a matter of practical consideration as well as tactical philosophy, pretrial discovery now must be exhaustive before a motion for summary judgment is considered. Not only must the litigants engage in extensive depositions, but resort to broadly based interrogatories, notices to admit, and the full panoply of discovery devices may be deemed essential before a "gun shy" judiciary will summarily dispose of otherwise privileged publications.¹⁴³

¹⁴⁰ *Id.*

¹⁴¹ See *Karaduman v. Newsday, Inc.*, 71 App. Div. 2d 411, 422 N.Y.S.2d 426 (1st Dep't 1979); *Greenberg v. Columbia Broadcasting System Inc.*, 69 App. Div. 2d 693, 419 N.Y.S.2d 988 (2d Dep't 1979).

¹⁴² In *Cianci v. New Times Publishing Co.*, 486 F. Supp. 368 (S.D.N.Y. 1979), for example, the plaintiff argued that *Lando* requires state-of-mind evidence before summary judgment can be granted and that the *Hutchinson* dictum precludes summary judgment. Rejecting this reasoning, the court stated that *Lando* "should not be read as unraveling the entire tapestry of First Amendment safeguards woven by the Supreme Court over the last fifteen years," and that the *Hutchinson* dictum "is simply of no relevance to the present motion [for summary judgment] which raises no issue of actual malice or state of mind." 486 F. Supp. at 371.

¹⁴³ One of the major criticisms of Justice White's majority opinion in *Lando* was his failure to provide trial judges with adequate guidelines for checking discovery. See *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 149, 158-61 (1979). See also 441 U.S. at 176-77. Although three of the Justices expressed concern about the problems posed by unchecked discovery, see *id.* at 179 (Powell, J., concurring); *id.* at 191 & n.11 (Brennan, J., dissenting in part); *id.* at 199 (Stewart, J., dissenting), it was Justice Brennan who proffered a truly workable compromise. Rather than precluding the possibility of any editorial process privilege, as the majority had done, he argued that there should be a *qualified* constitutional privilege which would protect editors' "predecisional communications," *id.* at 181 (Brennan, J., dissenting in part), including "[i]deas expressed in conversations, memoranda, handwritten notes and the like," *id.* at 193 (Brennan, J., dissenting in part) (quoting *Herbert v. Lando*, 568 F.2d 974, 993 (2d Cir. 1977) (Oakes, J., concurring), *rev'd*, 441 U.S. 153 (1979)). This privilege, however, would be subject to the public figure's ability to establish, to the trial judge's satisfaction, a *prima facie* case of the defamatory publication's falsity. *Id.* at 197 (Brennan, J., dissenting in part). This *prima facie* showing would make the claim of injured reputation "specific and demonstrable," and thus, the privilege could not be invoked. *Id.*

Had the majority adopted Justice Brennan's compromise, some of the fears of extended discovery might have been eliminated. For example, if the defendant was assured that the court would grant his motion for summary judgment upon the plaintiff's failure to demon-

The State Response and the Potential for Forum Shopping

In recognizing the state interest in compensating private individuals for defamatory injury, the *Gertz* Court permitted the states to adopt their own fault standards for defamation actions brought by non-public personalities.¹⁴⁴ Subsequently, the vast majority of states adopted an ordinary negligence standard,¹⁴⁵ with most applying the preponderance of evidence standard coupled with the requirement that plaintiffs prove falsity.¹⁴⁶ A minority of states, in contrast, have rejected an ordinary negligence standard in the belief that it would not afford sufficient protection to media defendants and have instead employed either a gross negligence standard¹⁴⁷ or variations of the *New York Times* actual malice

strate prima facie falsehood, the potential for self-censorship might be curtailed. See generally *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 149, 160 (1979).

¹⁴⁴ 418 U.S. at 349-50. For an overview of the response of the various jurisdictions to *Gertz*, see FRANCOIS, *MASS MEDIA LAW AND REGULATION* 123-29 (2d ed. 1978); Collins & Drushal, *The Reaction of the State Courts to Gertz v. Robert Welch, Inc.*, 28 CASE W.L. REV. 306, 311-21 (1978); Frakt, *supra* note 107, at 536-47; Spencer, *Establishment of Fault in Post-Gertz Cases*, 25 ST. LOUIS L.J. 374, 378-83 (1977).

¹⁴⁵ *E.g.*, *Rosanova v. Playboy Enterprises, Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1979); *Peagler v. Phoenix Newspapers, Inc.*, 114 Ariz. 309, 315, 560 P.2d 1216, 1222 (1977); *Corbett v. Register Publishing Co.*, 33 Conn. Supp. 4, 8, 356 A.2d 472, 475 (Super. Ct. 1975); *Phillips v. Evening Star Newspapers Co.*, 2 MED. L. RPTR. 2201, 2206 (D.C. 1977); *Cahill v. Hawaiian Paradise Park Corp.*, 56 Hawaii 522, 537, 543 P.2d 1356, 1366 (1975); *Troman v. Wood*, 63 Ill. 2d 184, 188, 340 N.E.2d 292, 299 (1976); *Gobin v. Globe Publishing Co.*, 216 Kan. 223, 233, 531 P.2d 76, 84 (1975); *General Motors Corp. v. Piskor*, 277 Md. 165, 171, 352 A.2d 810, 814-15 (1976); *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 597, 350 A.2d 688, 698 (1976); *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 349, 356, 330 N.E.2d 161, 168 (1975); *Walters v. Sanford Herald*, 2 MED. L. RPTR. 1959, 1960 (N.C. 1976); *Thomas H. Maloney & Sons, Inc. v. E. W. Scripps Co.*, 43 Ohio App. 2d 105, 110, 334 N.E.2d 494, 497 (1974), *cert. denied*, 423 U.S. 883 (1975); *Martin v. Griffin Television, Inc.*, 549 P.2d 85, 89 (Okla. 1976); *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412, 418 (Tenn. 1978); *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 819-20 (Tex. 1976), *cert. denied*, 429 U.S. 1123 (1977); *Taskett v. King Broadcasting Co.*, 86 Wash. 2d 439, 445, 546 P.2d 81, 85 (1976).

¹⁴⁶ *E.g.*, *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 597, 350 A.2d 688, 698 (1976).

It should also be noted that a number of states no longer permit punitive damages in defamation actions. See, *e.g.*, *Dixon v. Newsweek, Inc.*, 562 F.2d 626 (10th Cir. 1977); *Walker v. Colorado Springs Sun*, 188 Colo. 86, 538 P.2d 450, *cert. denied*, 423 U.S. 1025 (1975); *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 349, 330 N.E.2d 161 (1975); *Wheeler v. Green*, 286 Or. 99, 100-01, 593 P.2d 777, 778-79 (1979).

In *Sprouse v. Clay Communications, Inc.*, 211 S.E.2d 674, *cert. denied*, 423 U.S. 882 (1975), the court struck down an award of \$500,000 in punitive damages as excessive. Actual damages were assessed at \$250,000. The court mandated that punitive damages could only be levied if the actual damage award "is insufficient to dissuade others in like circumstances from committing similar acts in the future." It reasoned that a verdict of \$750,000 would lead to self-censorship. *Id.* at 692.

¹⁴⁷ See, *e.g.*, *Walker v. Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450, *cert.*

test.¹⁴⁸ For example, in *Chapadeau v. Utica Observer-Dispatch*,¹⁴⁹ the New York Court of Appeals analyzed the *Gertz* decision¹⁵⁰ and fashioned the following standard of liability where the material at issue was "arguably within the sphere of legitimate public concern": "[T]o warrant . . . recovery [a plaintiff] must establish, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."¹⁵¹

Although the potential for increased liability under differing state fault standards presents a threat to the media, particularly in those states employing ordinary negligence, a more compelling concern is the uncertainty of the approach state courts will take on

denied, 423 U.S. 1025 (1975); *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975).

¹⁴⁸ See, e.g., *AAFCO Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 321 N.E.2d 580 (1974), *cert. denied*, 424 U.S. 913 (1976).

¹⁴⁹ 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975).

¹⁵⁰ *Id.* at 199, 341 N.E.2d at 571, 379 N.Y.S.2d at 64. In analyzing *Gertz*, the *Chapadeau* court noted that:

The court felt that private individuals are more vulnerable because they lack a forum to rebut the false statements and that they are more deserving of recovery because they have not thrust themselves into the vortex of public controversy. Consequently, the court concluded that the States should be accorded "substantial latitude" in fashioning a remedy based on fault.

Id.

¹⁵¹ *Id.* at 199, 341 N.E.2d at 571, 379 N.Y.S.2d at 64. The intermediate New York appellate courts have not applied *Chapadeau's* gross negligence standard to defamation actions involving non-media defendants. Rather, common-law defamation standards have been applied. See, e.g., *WDM Planning, Inc. v. United Credit Corp.*, 62 App. Div. 2d 940, 404 N.Y.S.2d 5 (1st Dep't 1978) (mem.), *rev'd on other grounds*, 47 N.Y.2d 50, 389 N.E.2d 1099, 416 N.Y.S.2d 579 (1979); *Neufeld v. Schachner*, 61 App. Div. 2d 952, 403 N.Y.S.2d 41 (1st Dep't 1978) (mem.); *Levine v. Kiss*, 47 App. Div. 2d 544, 363 N.Y.S.2d 101 (2d Dep't 1975) (mem.). *But see* *Rupert v. Sellers*, 65 App. Div. 2d 473, 475, 411 N.Y.S.2d 75, 77 (4th Dep't 1978) (Cardamone, J., concurring).

In a pre-*Gertz* case, the New York Court of Appeals, held that the qualified privileges which extend to the news media may apply as well to the non-media defendant. *Trails West, Inc. v. Wolf*, 32 N.Y.2d 207, 298 N.E.2d 52, 344 N.Y.S.2d 863 (1973). In *Trails West*, the court ruled that "[o]nce public concern or interest is shown . . . the privilege applies, and it matters not who the defendant is." *Id.* at 217, 298 N.E.2d at 57, 344 N.Y.S.2d at 870. This connection between public interest and privilege may show a heavy reliance on *Rosenbloom*, making the application of *Trails West* questionable after *Gertz*. Under another analysis, however, the court's decision may indicate an apparent proclivity to confer a privilege on a non-media defendant if a media defendant is named as a co-defendant. See *Cottom v. Meredith Corp.*, 65 App. Div. 2d 165, 411 N.Y.S.2d 53 (4th Dep't 1978); *Wehringer v. Newman*, 60 App. Div. 2d 385, 400 N.Y.S.2d 533 (1st Dep't 1978); *Commercial Programming Unlimited v. Columbia Broadcasting Systems, Inc.*, 50 App. Div. 2d 351, 378 N.Y.S.2d 69 (1st Dep't 1975).

the question of damages. The *Gertz* Court, which permitted states to award damages for "actual injury," stated that it need not define that term because "trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss . . . [and may] include impairment of reputation . . . personal humiliation, and mental anguish and suffering."¹⁵² The inherent danger of not defining actual injury is illustrated by the *Firestone* majority's conclusion that Mrs. Firestone's \$100,000 verdict, "premised entirely on the injury of mental pain and anguish,"¹⁵³ did not "warrant . . . reexamining."¹⁵⁴ This result is ominous indeed in light of the proof offered by Mrs. Firestone—the testimony of her friends, neighbors, minister, and attorney¹⁵⁵—and becomes dangerously close to an award of presumed damages, *i.e.*, an award premised on the notion that the insult is the injury. Should states adopt the *Firestone* concept of injury, it is quite conceivable that plaintiffs and their attorneys will be encouraged to litigate. Moreover, mental anguish, injury, and the like generally are not discoverable and jury determinations of such injuries are unpredictable. Thus, the media defendant will be threatened by increased litigation, economic burden, and perhaps, non-contestable, exorbitant liability.

The potential plight of interstate news agencies or national wire services is also most interesting to contemplate. On a daily basis, for example, an event of regional or national interest may be published "on the wire." It is certainly within the realm of possibility that a number of such wire service stories may contain defamatory comments or allegations concerning a private person involved in a matter of public interest. While the protection afforded to such a publication in New York under the "gross irresponsibility" standard established in *Chapadeau* may afford sufficient protection to the publisher in that jurisdiction, the identical publication may result in liability in Massachusetts, for example, which applies a simple or ordinary negligence test to determine liability.¹⁵⁶ As a consequence, it seems that first amendment forum shopping may constitute a concept whose time has come of age.

¹⁵² *Gertz*, 418 U.S. at 350.

¹⁵³ *Firestone*, 424 U.S. at 475 n.3 (Brennan, J., dissenting).

¹⁵⁴ *Id.* at 461.

¹⁵⁵ *Id.* at 460-61 & n.6.

¹⁵⁶ *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 349, 330 N.E.2d 161 (1975).

CONCLUSION

The Supreme Court decisions in the post-*Gertz* era represent a significant retreat from the media safeguards established during the *New York Times-Rosenbloom* years. Once protected in an almost absolute sense, the media now may be subject to a greater number of plaintiffs released from the burden of proving actual malice. The Court's *Wolston* and *Hutchinson* decisions indicate that proving voluntary limited-issue public figure status will be an onerous task. Thus, the class of plaintiffs subject to the *New York Times* standard is apparently comprised primarily of public officials and famous public personalities. In addition, media defendants will be facing the vast majority of private individual plaintiffs in state forums that have adopted an ordinary negligence standard. Finally, the extensive discovery endorsed by the *Lando* Court forebodes increased litigation costs, a decrease in the use of summary judgment, and a possible lightening of the burden of proving actual malice. In summary, the media defendant now faces potentially increased litigation and greater litigation costs. To prevent a realization of these possibilities, the media may have to resort to extensive self-censorship.

Whether the next flurry of activity comes in applying new standards of reportorial accuracy to investigative journalists or in heralding the jury system as the ultimate savior of first amendment freedoms, the media lament continues with little, if any, relief in sight. Members of the media, the public, the bench and bar have witnessed the creation, evolution and rejection of first amendment principles and concepts in a time span of less than two decades. While numerous precedents have endured the test of time and are encrusted with tradition, the 16 years following the Court's *New York Times* decision establish, at least in this area of the law, that stare decisis is a relatively meaningless concept.