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# Gertz and Firestone: A Study in Constitutional Policy-Making

Gerald G. Ashdown\*

## I. INTRODUCTION

The Supreme Court's decision in *Gertz v. Robert Welch, Inc.*<sup>1</sup> has generated much discussion of defamation law and its constitutional limitations.<sup>2</sup> Commentators have criticized or defended the decision and its implications according to their own perceptions of which of the conflicting interests involved—protection of individual reputation or freedom of speech and press—should prevail.<sup>3</sup> It is not my intent to dwell on issues already discussed or to criticize directly the arguments of others. Rather, I will focus on the most important aspects of *Gertz* and *Time, Inc. v. Firestone*,<sup>4</sup> the Supreme Court's most recent defamation-first amendment decision, in order to present a clear analysis of current constitutional policy in the critical area of freedom of expression.

The Court in *Gertz* and *Firestone* claimed to strike a new balance between the two policies of protecting individual reputation, on the one hand, and safeguarding first amendment

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

2. See, e.g., Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422 (1975) [hereinafter cited as Anderson, *Press Self-Censorship*]; Anderson, *A Response to Professor Robertson: The Issue Is Control of Press Power*, 54 TEX. L. REV. 271 (1976) [hereinafter cited as Anderson, *Control of Press Power*]; Brosnahan, *From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and the First Amendment*, 26 HASTINGS L.J. 777 (1975); Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975); Frakt, *The Evolving Law of Defamation: New York Times Co. v. Sullivan to Gertz v. Robert Welch, Inc. and Beyond*, 6 RUT.-CAM. L.J. 471 (1975); Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221 (1976); Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199 (1976).

3. Compare Robertson, *supra* note 2 (praising *Gertz* for its protection of the individual from media irresponsibility) with Anderson, *Press Self-Censorship*, *supra* note 2, and Anderson, *Control of Press Power*, *supra* note 2 (criticizing *Gertz* for its negative effect on the press).

4. 424 U.S. 448 (1976).

freedoms, on the other.<sup>5</sup> Careful scrutiny of the decisions, however, reveals what appears to be a conscious determination by the Court to limit what can safely be published or broadcast. While purporting merely to enhance the protection of private individuals caught up in matters of public interest, the Court appears to have utilized libel law to implement a third policy: control of media power and influence by forcing media self-censorship.<sup>6</sup>

In order to understand the subtle, yet powerful, impact of *Gertz* and *Firestone*, the constitutional history of libel law must be briefly analyzed. This Article will then examine the Supreme Court's articulated rationale for its change in position and will consider whether the media were actually given the protection the Court purported to provide. Finally, the Article will demonstrate that the combination of several factors in the cases—the approval of a negligence standard for private plaintiffs, the narrow definition of “public figure,” and the refusal to grant special protection to reports of judicial proceedings—indicates, consistent with the general socio-political conservatism of the present Court,<sup>7</sup> the emergence of a new policy of media censorship. This policy is intended to restrict media

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5. See *Time, Inc. v. Firestone*, 424 U.S. 448, 456-57 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

6. Professor Anderson also believes that the changes in libel law occasioned by *Gertz* result in unacceptable control of the press. Anderson, *Press Self-Censorship*, *supra* note 2; Anderson, *Control of Press Power*, *supra* note 2. For the view that modern libel law serves “the interest in securing responsibility in dissemination of information,” see Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L.Q. 581, 582 (1964).

7. *Gertz* appears to exhibit the same conservative socio-political policy toward freedom of the press that the Burger Court has displayed in other contexts. The Court has manifested this conservatism most conspicuously in its criminal procedure decisions. Recent Burger Court decisions have, for example, limited the applicability of the exclusionary rule, see *United States v. Donovan*, 97 S. Ct. 658 (1977); *Stone v. Powell*, 428 U.S. 465 (1976); *United States v. Janis*, 428 U.S. 433 (1976); *United States v. Peltier*, 422 U.S. 531 (1975); *United States v. Calandra*, 414 U.S. 338 (1974), and validated questionable police search and seizure practices under the fourth amendment, see *South Dakota v. Opperman*, 428 U.S. 364 (1976); *United States v. Miller*, 425 U.S. 435 (1976); *United States v. Watson*, 423 U.S. 411 (1976); *Texas v. White*, 423 U.S. 67 (1975); *United States v. Robinson*, 414 U.S. 218 (1973); *Schnecko v. Bustamonte*, 412 U.S. 218 (1973). The Court has also restricted the operative effect of the *Miranda* rules, see *United States v. Mandujano*, 425 U.S. 564 (1976); *Beckwith v. United States*, 425 U.S. 341 (1976); *Michigan v. Mosley*, 423 U.S. 96 (1976); *Oregon v. Hass*, 420 U.S. 714 (1975); *Harris v. New York*, 401 U.S. 222 (1971), and cut back on the fifth amendment privilege against self-incrimination, see *Anderson v. Maryland*, 427 U.S. 463 (1976); *Fisher v. United States*, 425 U.S. 391

coverage to matters of immediate political relevance, that is, to matters involving persons with present or potential political impact. This restriction will effectively limit the information available to the public and could ultimately reduce the influence of the media in American society. As a consequence, freedom of expression will be curtailed.

## II. NEW YORK TIMES AND ITS PROGENY: THE LAW AND PHILOSOPHY

### A. THE DECISIONS

Prior to 1964, when the Supreme Court decided *New York*

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(1976); *Ritchie, Compulsion Which Violates the Fifth Amendment: The Burger Court's Definition*, 61 MINN. L. REV. 383 (1977). Similarly, it has limited the sixth amendment right to counsel. See *Ross v. Moffet*, 417 U.S. 600 (1974); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Kirby v. Illinois*, 406 U.S. 682 (1972).

Outside the sphere of criminal procedure the Burger Court has also tended to interpret restrictively other constitutional protections. A noteworthy example of its perspective is *Doe v. Commonwealth's Attorney of Richmond*, 425 U.S. 901 (1976), a 6-3 affirmance, without opinion or oral argument, of a three-judge federal district court decision upholding the constitutionality of Virginia's sodomy statute. *Doe v. Commonwealth's Attorney of Richmond*, 403 F. Supp. 1199 (E.D. Va. 1975). The plaintiffs, seeking declaratory and injunctive relief, claimed that, as applied to private homosexual conduct between consenting adults, the statute violated their constitutional right to privacy. In affirming the three-judge court, the Supreme Court reversed a ten-year trend of granting increasing protection to privacy claims, again signaling its conservative stance toward certain matters of social and political concern. The Court's most recent decisions in sex discrimination suits also suggest that the era of increased judicial protection for women may be ending. See *Mathews v. De Castro*, 97 S. Ct. 431 (1976) (denial of social security benefits to divorced woman with child in her care held not a violation of equal protection); *General Elec. Co. v. Gilbert*, 97 S. Ct. 401 (1976) (employer's exclusion of pregnancy-related disabilities from its disability income protection plan does not violate Title VII's sex discrimination prohibition). In its treatment of freedom of the press issues, the Burger Court's philosophical bent is evident by its withdrawal of some protection for the media and curtailment of freedom of the press. See *Pell v. Procunier*, 417 U.S. 817 (1974) (prison regulations prohibiting all interviews between the press and specific inmates do not violate first amendment); *Miller v. California*, 413 U.S. 15 (1973) (obscene material is not protected by the first amendment); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (first amendment does not provide a testimonial privilege for a newspaper reporter that would allow him to refuse to reveal his sources of information regarding criminal activity); *Anderson, Press Self-Censorship*, *supra* note 2, at 451-52.

The most notable exception to the Court's apparently restrictive socio-political policy is its abortion decisions. See, e.g., *Sendak v. Arnold*, 97 S. Ct. 476 (1976) (summary affirmance); *Planned Parenthood of Central Mo. v. Danforth*, 427 U.S. 52 (1976); *Roe v. Wade*, 410 U.S. 113 (1973).

*Times Co. v. Sullivan*,<sup>8</sup> a publisher, broadcaster, or speaker could be held strictly liable for the publication or utterance of a defamatory falsehood, unless he could show that the statement was privileged.<sup>9</sup> In *New York Times*,<sup>10</sup> the Court constitutionalized the common law privilege of fair comment,<sup>11</sup> holding that the freedoms of speech and press<sup>12</sup>

require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.<sup>13</sup>

Although this decision was limited to public officials, the Court broadened the application of the constitutional malice standard in 1967 in the companion cases of *Curtis Publishing Co. v. Butts*<sup>14</sup> and *Associated Press v. Walker*,<sup>15</sup> both of which

8. 376 U.S. 254 (1964).

9. 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 5.5, at 364 (1956); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 113, at 772-73 (4th ed. 1971).

10. The plaintiff was the elected Commissioner of Public Affairs in Montgomery, Alabama. He sued four black Alabama clergymen and the *New York Times*, alleging that a paid political advertisement in the *New York Times* describing unlawful activities by Montgomery police necessarily defamed him as supervisor of the police department. 376 U.S. at 256.

11. The common law privilege of "fair comment" protected the honest expression of opinion on matters of legitimate public interest, as long as the statements made were not factually inaccurate. The privilege was applicable to criticisms of public officials of all levels and rank from the President of the United States on down to the humblest municipal officer, to candidates for public office, to those in charge of public institutions, and to criticism of literary, artistic, scientific, dramatic productions and performances of various sorts submitted for public approval.

1 HARPER & JAMES, *supra* note 9, § 5.28, at 456-57. Only statements of opinion were protected; the privilege was not usually extended to factual errors, PROSSER, *supra* note 9, § 118, at 819-20, although a small number of jurisdictions protected factual inaccuracies if the misstatement was not malicious, *see, e.g., Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908). In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court constitutionalized this minority view of the privilege. The Court, however, adopted a more stringent definition of malice than the common law standard of ill will, spite, or bad or corrupt motive. *See text accompanying note 13 infra.*

12. The first amendment applies to the states through the due process clause of the fourteenth amendment, *see, e.g., Bigelow v. Virginia*, 421 U.S. 809, 811 (1975), which creates the conflict between freedom of expression and state libel laws; *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963); *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

13. 376 U.S. at 279-80.

14. 388 U.S. 130 (1967).

15. *Id.*

involved libel actions brought by public figures<sup>16</sup> against media defendants. There was no majority opinion, but five members of the Court agreed that at least the "actual malice" rule should cover all public persons, public figures as well as public officials.<sup>17</sup>

*Rosenbloom v. Metromedia, Inc.*<sup>18</sup> was the logical culmination of the Court's progressively expansive application of the first amendment to libel litigation. Instead of focusing on the status of the plaintiff, the Court emphasized the nature of the subject matter discussed in the allegedly libelous statement,<sup>19</sup> and extended the *New York Times* malice standard to any statement about an issue of public interest.<sup>20</sup> Thus, after *Rosenbloom*, even a private person who became involved in a matter of general or public interest had to show knowledge of falsity or reckless disregard for the truth to recover for defamation.

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16. Wally Butts, the plaintiff in *Curtis Publishing Co.* was, at the time of the article in question, athletic director at the University of Georgia. Although Georgia is a state university, Butts was employed by the Georgia Athletic Association, a private corporation. *Id.* at 135. The plaintiff in *Associated Press* was Edwin A. Walker, a retired Army officer, who was adamantly opposed to federal intervention in the integration process in the South. As a result of his political activities, Walker had gathered a following known as the "Friends of Walker" and had gained some political prominence. *Id.* at 140.

17. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), was a plurality opinion; no majority was able to agree on what standard to apply to "public figures." Justice Harlan, in an opinion in which Justices Clark, Stewart, and Fortas joined, wrote that public figures could recover "on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.* at 155. Chief Justice Warren, joined by Justices Brennan and White, would have applied the *New York Times* standard, while Justices Black and Douglas reaffirmed the position they had taken in *New York Times* that the first amendment provided the media with absolute immunity from liability for defamation. Thus, five Justices favored at least applying the *New York Times* test to public figures, and the Court has indicated in subsequent opinions that this was in effect the holding of the case. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 336 n.7 (1974). See also *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970).

18. 403 U.S. 29 (1971). *Rosenbloom* was an action by a distributor of nudist magazines against a local radio station which had broadcast a story on the plaintiff's arrest for obscenity.

19. See text accompanying notes 47-49 *infra*.

20. Although Justice Brennan's opinion in *Rosenbloom* spoke only for a plurality of three, the reasoning of Justices Black and Douglas that the first amendment provides the media with absolute immunity from liability for defamation would also support the holding. See *Rosenbloom v. Metromedia Inc.*, 403 U.S. 29, 57 (1971) (Black, J., concurring); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 170-72 (1967) (Black, J., joined

Knowledge of falsity was an unambiguous standard;<sup>21</sup> the only nebulous aspect of the test was recklessness. The Court, however, provided clear guidance to state tribunals by indicating that "reckless disregard for the truth [was] not measured by whether a reasonably prudent man would have published, or would have investigated before publishing,"<sup>22</sup> but rather, by whether "[t]here [was] sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."<sup>23</sup> This definition of "reckless disregard" complemented the "actual malice" standard, providing a stringent test to protect the media<sup>24</sup> from self-imposed censorship caused by the threat of libel litigation.<sup>25</sup>

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by Douglas, J., concurring and dissenting); *Garrison v. Louisiana*, 379 U.S. 64, 79-83 (1964) (Black, J., joined by Douglas, J., concurring; Douglas, J., joined by Black, J., concurring); *New York Times v. Sullivan*, 376 U.S. 254, 293-97 (1964) (Black, J., joined by Douglas, J., concurring).

21. Whenever a plaintiff demonstrates by a preponderance of evidence that the defendant-publisher probably knew his statements were untrue, the plaintiff is entitled to recover. See *Indianapolis Newspapers, Inc. v. Fields*, 254 Ind. 219, 259 N.E.2d 651, cert. denied, 400 U.S. 930 (1970).

22. 403 U.S. at 56 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)).

23. *Id.*

24. In this Article I am primarily concerned with freedom of the press. It can be persuasively argued, however, that the *New York Times* line of cases, although dealing with media defendants, should also apply to individual speakers, since the first amendment protects freedom of speech as well as freedom of the press. This would leave only private defamation involving matters of no public interest unprotected by the first amendment. But see Stewart, *Or Of the Press*, 26 *HASTINGS L.J.* 631, 633-35 (1975), in which Justice Stewart argues that immunity from liability for defamation is designed to protect only the press as an institution and not the individual speaker.

25. Altogether, the Court decided 12 cases between *New York Times* and *Gertz*, interpreting and applying the constitutional privilege. They are, in order of decision: *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Henry v. Collins*, 380 U.S. 356 (1965); *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970); *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971); *Time, Inc. v. Pape*, 401 U.S. 279 (1971); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295 (1971); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

The Court also applied the knowing or reckless falsity test to privacy cases. In *Time, Inc. v. Hill*, 385 U.S. 374 (1967), it held that the plaintiffs could not recover for an invasion of privacy based on falsification unless they satisfied the *New York Times* "actual malice" standard. Their action, although based on false statements, was not one for defamation, because the inaccuracies were actually laudatory. First amendment protection is not restricted to cases of falsification but extends to other

## B. THE POLICY: BALANCING THE INTERESTS

The Supreme Court's extension of the constitutional malice standard to all publications and statements of public interest indicates that, in this line of decisions, it resolved the conflict between individual reputation and privacy<sup>26</sup> and the first amendment by giving paramount consideration to freedom of speech<sup>27</sup> and press. Although the Court did not hold that all discussions of public matters were absolutely privileged,<sup>28</sup> it recognized that the common law defense of truth inadequately protected freedom of the press: "[E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"<sup>29</sup>

If truth were the only defense to libel, publishers would be deterred not only from making false statements but truthful

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forms of privacy actions as well, such as "public disclosure of private facts." See, e.g., *Meeropol v. Nizer*, 381 F. Supp. 29, 37 (S.D.N.Y. 1974); *O'Hilderbrandt v. CBS*, 40 Cal. App. 3d 323, 114 Cal. Rptr. 826 (1974); *Kapellas v. Kofman*, 1 Cal. 3d 35, 37-38, 459 P.2d 912, 923-24, 81 Cal. Rptr. 360, 371-72 (1969); *Costlow v. Cusimano*, 34 App. Div. 2d 196, 199, 311 N.Y.S.2d 92, 95 (1970); *Estate of Hemingway v. Random House, Inc.*, 23 N.Y.S.2d 771, 782, 244 N.E.2d 250, 258, 296 N.Y.S.2d 341, 353 (1968).

It is difficult to devise a workable first amendment standard for such cases, since the absence of falsification makes knowledge of falsity or reckless disregard for the truth an inappropriate test. See *Briscoe v. Reader's Digest Ass'n*, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971). If, however, the facts disclosed are of public record, their publication is absolutely protected from an action based on invasion of privacy. *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975).

26. Many cases of defamation also include a cause of action for invasion of privacy, especially when the party aggrieved is a private individual. See note 25 *supra*.

27. Even if the *New York Times* line of cases do not protect an individual speaker, see note 24 *supra*, freedom of the press is intertwined with free speech, for the media supply the public with the information necessary to exercise freedom of speech effectively. Therefore, infringement of freedom of the press indirectly infringes free speech. Cf. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756-57 (1976); *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 122 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

28. Only Justices Black and Douglas found in the first amendment an absolute privilege against a defamation action resulting from the discussion of public matters. See, e.g., *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 57 (1971) (Black, J., concurring); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 170-72 (1967) (Black, J., joined by Douglas, J., concurring); *New York Times Co. v. Sullivan*, 376 U.S. 254, 293-97 (1964) (Black, J., joined by Douglas, J., concurring).

29. *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).



ones as well. If a publisher was uncertain that he could prove the truth of a story to a jury's satisfaction, or if he did not want to undergo the expense of having to do so, the common law defense of truth would force him "to make only statements which 'steer far wider of the unlawful zone.'"<sup>30</sup>

Realizing the ambiguity of the standard of reasonable care,<sup>31</sup> the Court rejected a negligence criterion for similar reasons. Because the press could not gauge exactly how a jury would evaluate its attempts to verify a story's accuracy, it would resort to self-censorship,<sup>32</sup> suppressing accurate, newsworthy information that could not be indisputably verified before publication. This would avoid the possibility of liability based on a jury's retrospective determination that the defendant had failed to exercise reasonable care. As the Court stated in *Rosenbloom*, "it is not simply the possibility of a judgment for damages which results in self-censorship. The very possibility of having to engage in litigation . . . is threat enough."<sup>33</sup>

The "actual malice" rule was adopted as the only workable standard that would both allow recovery for intentional or reckless defamation and effectively protect the media from self-censorship precipitated by the threat of litigation and large damage awards.<sup>34</sup> Striking this balance between individual rep-

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30. *Id.* at 279 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

31. See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 50 (1971); *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967).

32. *Id.*

33. 403 U.S. at 52-53.

34. Unlike Professor Anderson, I believe that the knowing or reckless falsity standard adequately protects the media from self-censorship induced by potential libel actions. Professor Anderson contended that because the *New York Times* malice standard only becomes significant as a jury instruction, after a major portion of defense costs have been incurred, the expense of defending a libel action fosters media self-censorship. Citing an article from *Juris Doctor*, he asserted that defense costs of a "full-fledged libel suit" probably begin at about \$20,000, and he mentioned that *Rosenbloom* reportedly cost nearly \$100,000 to defend. Anderson, *Press Self-Censorship*, *supra* note 2, at 435-38. While some suits certainly result in high defense costs, Anderson's analysis ignores those never brought in the first place, those dropped before trial, and those terminated by either a motion to dismiss or summary judgment. In this group of cases the *New York Times* rule has functioned effectively.

To buttress his argument that the *New York Times* standard is ineffective, Professor Anderson cited *American Digest* figures demonstrating the increase in libel cases at the appellate level—117 reported decisions in 1973 compared with 87 in 1963. *Id.* at 430 n.43. This comparison, however, does not indicate the number of cases involving media defendants. Moreover, even if the proportion of media defendants had in-

utation and privacy interests and freedom of expression was more difficult than the familiar task of reaching some accommodation between conservative and progressive social policies,<sup>35</sup>

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creased in the ten-year period, a comparatively large number of appellate cases in 1973 might have reflected attempts by appellate courts to specify the perimeters of *Rosenbloom*. Professor Anderson also supplied estimates by the general counsel of the American Newspaper Publishers Association that 1100 libel suits were filed against newspapers alone in the period from 1963 to 1974. *Id.* Even assuming the accuracy of this statistic, it ignores the changes in the *New York Times* standard during this period, see text accompanying notes 10-20 *supra*, which created uncertainty among litigants, attorneys, and judges about the exact impact of these decisions on libel actions. More important, however, this statistic is misleading since it ignores the suits voluntarily dropped or dismissed prior to trial or disposed of by summary judgment. The knowing or reckless falsity standard encourages dismissals or summary judgments.

Even if the plaintiff survives the initial stages of a lawsuit, he will still have difficulty establishing that a defamatory statement was published with knowledge of falsity or reckless disregard for the truth. See *e.g.*, *Mistrot v. True Detective Publishing Corp.*, 467 F.2d 122, 124 (5th Cir. 1972); *La Bruzzo v. Associated Press*, 353 F. Supp. 979, 988 (W.D. Mo. 1973); *Belli v. Curtis Publishing Co.*, 25 Cal. App. 3d 384, 397, 402, 102 Cal. Rptr. 122, 130, 134 (1972); *Twohig v. Boston Herald-Traveler Corp.*, 362 Mass. 887, 889, 291 N.E.2d 398, 400-01 (1973); *Schwartz v. Time, Inc.*, 71 Misc. 2d 769, 773, 337 N.Y.S.2d 125, 130 (Sup. Ct. 1972); *Sanders v. Harris*, 213 Va. 369, 371, 192 S.E.2d 754, 757-58 (1972); *Chase v. Daily Record, Inc.*, 8 Wash. App. 1, 2-3, 503 P.2d 1103, 1106 (1972), *rev'd*, 83 Wash. 2d 37, 515 P.2d 154 (1973). In fact, plaintiffs have only been able to demonstrate actual malice under the Supreme Court's definition in a few notable cases. See *Goldwater v. Ginzburg*, 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970) (\$1.00 actual damages, \$75,000 punitive damages); *Field Research Corp. v. Patrick*, 30 Cal. App. 3d 603, 106 Cal. Rptr. 473, *cert. denied*, 414 U.S. 922 (1973) (\$150,000 actual damages, \$150,000 punitive damages); *Indianapolis Newspapers, Inc. v. Fields*, 254 Ind. 219, 259 N.E.2d 651, *cert. denied*, 400 U.S. 930 (1970) (total damages of \$60,000). See also *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 156-62 (1967), in which a plurality of the Court affirmed a judgment of \$460,000 for plaintiff Butts. Although this affirmance was largely based on a gross negligence standard, the conduct of the defendant would probably have satisfied the more rigorous *New York Times* test. *Id.* at 162-70 (Warren, C.J., concurring).

Finally, even assuming the actual malice standard does result in self-censorship, the only alternative is an absolute privilege. Despite the philosophical appeal of absolute immunity, it would leave persons injured by malicious and intentional conduct uncompensated, and could encourage, or at least fail to discourage, grossly irresponsible journalism.

35. See, for example, the Supreme Court decisions on obscenity, *Miller v. California*, 413 U.S. 15 (1973); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966); *Roth v. United States*, 354 U.S. 476 (1957); those concerning capital punishment, *Jurek v. Texas*, 428 U.S. 262 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972); and the recent school busing decisions, *Austin Ind. School Dist. v.*

for libertarian values underlie both of these conflicting concerns. Because these values are philosophically similar, but constitutionally incompatible, the limitations on defamation actions imposed by the *New York Times* line of cases represent a recognition of the pervasive impact and overriding importance of freedom of expression compared to the limited interests protected by defamation law.

Freedom of speech and press protect the transfer of information to and from every member of our society and shape society itself.<sup>36</sup> Without the free exchange of ideas and information, neither participatory democracy nor our culture could survive.<sup>37</sup> Protection of personal reputation and privacy, on the other hand, although a laudable libertarian goal, operates on a relatively isolated individual basis; very few persons are ever harmed by inadvertent factual misstatements. Moreover, injuries caused by false factual statements are often intangible. Defamation arose historically as a dignitary tort to protect the interest in reputation and social esteem. Consequently, once a plaintiff had demonstrated false derogatory statements, the courts simply presumed harm to reputation without proof of actual injury.<sup>38</sup> The Supreme Court has recently indicated in *Paul v. Davis*<sup>39</sup> the narrow significance of the interest in reputation by holding that such an interest is not constitutionally protected by the liberty or property guarantees of the due

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United States, 97 S. Ct. 517 (1977); *Washington v. Davis*, 426 U.S. 229 (1976); *Milliken v. Bradley*, 418 U.S. 717 (1974).

36. See text accompanying notes 45-49 *infra*.

37. Freedom of expression includes both the right to speak and the right to hear. See, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumers Council, Inc.*, 425 U.S. 748, 756-57 (1976), and cases cited therein; T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6-7 (1970). The first amendment, according to Professor Meiklejohn, unqualifiedly protects speech, press, assembly, or petition whenever those activities are used by the people for the governing of the nation, A. MEIKLEJOHN, *POLITICAL FREEDOM*, 24-28, 57 (1960); Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245, 254-56. The forms of thought and expression he places within the first amendment's absolute protection include not only public discussion of public issues, but the dissemination of information and opinion on those issues, and information about education, philosophy, art, and science, as well. Meiklejohn, *supra* at 257. The individual right to "talk" however, is a "liberty of speech" protected not by the first amendment but the fifth. MEIKLEJOHN, *supra* at 36-37. See also Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41, 42-44 (1974).

38. 1 HARPER & JAMES, *supra* note 9, § 5.9, at 372; PROSSER, *supra* note 9, § 112, at 762.

39. 424 U.S. 693 (1976).

process clause.<sup>40</sup> On balance, then, the libertarian value of protecting individual reputations, especially in absence of tangible pecuniary harm, should give way to the more important policy of ensuring free expression. As the Kansas supreme court noted in 1908, in the first decision to recognize the threat of libel law to freedom of speech and press: “[O]ccasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great, and the chance of injury to private character so small, that such discussion must be privileged.”<sup>41</sup>

This recognition of the overriding importance of freedom of expression is reflected in a number of lower court cases foreshadowing *Rosenbloom*.<sup>42</sup> Although prior to that decision the “actual malice” standard was constitutionally required only in libel actions involving plaintiffs who were public persons,<sup>43</sup>

40. After plaintiff had been arrested on a shoplifting charge, a photograph bearing his name was included in a flyer of “active shoplifters” distributed to area merchants. The shoplifting charge was later dismissed, and respondent sued the police chiefs responsible for distributing the flyer under 42 U.S.C. § 1983 (1970). The Court held that something more than simple defamation by a state official must be shown to establish a claim under 42 U.S.C. § 1983, for the interest in reputation was not “liberty” or “property.” Justice Brennan, in dissent, noted that this conclusion was anomalous in light of the Court’s decision in *Gertz*:

It is strange that the Court should hold that the interest in one’s good name and reputation is not embraced within the concept of “liberty” or “property” under the Fourteenth Amendment, and yet hold that that same interest, when recognized under state law, is sufficient to overcome the specific protections of the First Amendment.

*Id.* at 1171 n.11. See text accompanying notes 201-02 *infra*.

The holding in *Paul v. Davis*, however, is consistent with the position taken by the Burger Court in other cases alleging due process violations. With the exception of *Goss v. Lopez*, 419 U.S. 565 (1975), the Court has narrowed the interests that fall within the terms “liberty” and “property” of the due process clause. See *Bishop v. Wood*, 426 U.S. 341 (1976); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Board of Regents v. Roth*, 408 U.S. 564 (1972).

41. *Coleman v. MacLennan*, 78 Kan. 711, 724, 98 P. 281, 286 (1908).

42. See, e.g., *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970); *Wasserman v. Time, Inc.*, 424 F.2d 920 (D.C. Cir. 1970); *United Medical Laboratories v. CBS*, 404 F.2d 706 (9th Cir. 1968); *Sellers v. Time, Inc.*, 299 F. Supp. 582 (E.D. Pa. 1969), *cert. denied*, 400 U.S. 830 (1970); *Bishop v. Wometco Enterprises, Inc.*, 235 So. 2d 759 (Fla. Dist. Ct. App. 1970); *Farnsworth v. Tribune Co.*, 43 Ill. 2d 286, 253 N.E.2d 408 (1969); *Garfinkel v. Twenty-First Century Publishing Co.*, 30 App. Div. 2d 787, 291 N.Y.S.2d 735 (1968).

43. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

many courts focused instead on the statements on which the action was based; if they concerned a matter of public interest, courts applied the knowing or reckless falsity standard, often without even considering whether the plaintiff was a public official or public figure.<sup>44</sup> The decisions broadly interpreted freedom of communication to ensure that information would not be withheld from the "marketplace of ideas" because of the threat of court suits. *Coleman v. MacLennan*,<sup>45</sup> the first decision to extend the common law privilege of fair comment to false factual statements, recognized the need for a broad view of freedom of expression that would encompass "matters of public concern [as well as] public men, and candidates for office."<sup>46</sup>

In *Rosenbloom* itself, Justice Brennan, writing for the plurality, struck the same note. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."<sup>47</sup> The guarantees of speech and press extended not only to comments upon public officials, public affairs, or public personalities, but to all relevant information necessary to enable a person to cope with a complex society.<sup>48</sup> It was to protect this interest in the free flow of information that the *Rosenbloom* plurality focused on the public nature of the issue discussed rather than the plaintiff's status:

If a matter is a subject of public or general interest, it suddenly cannot become less so merely because a private individual is involved, or because in some sense the individual did not "voluntarily" choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety.<sup>49</sup>

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44. See *Gertz v. Robert Welch, Inc.*, 322 F. Supp. 997 (N.D. Ill. 1970); cases cited in note 42 *supra*.

45. 78 Kan. 711, 98 P. 281 (1908).

46. *Id.* at 723, 98 P. at 285 (emphasis added). It was this minority view of the privilege of "fair comment" that the Supreme Court elevated to a constitutional doctrine in *New York Times v. Sullivan*, 376 U.S. 254, 280-82 (1964). See note 11 *supra*.

47. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 41 (1971) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940)).

48. *Id.* at 42. As the Supreme Court recognized in *Winters v. New York*, 333 U.S. 507 (1948), the communication of ideas necessary to enable us to so cope is not limited to statements intended to inform. "The line between the informing and the entertaining is too elusive for the protection of [freedom of the press]. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine." *Id.* at 510.

49. 403 U.S. at 43.

Thus, after a careful balancing process,<sup>50</sup> the Court permitted freedom of speech and press to dominate, but not eradicate, the individual interest in reputation and privacy. The *New York Times* line of decisions effectively protected the discussion and transmission of ideas and information, while still allowing recovery for the knowing or reckless disregard of individual rights. The primary advantage of this position was its certainty: anything of public interest would be protected by the constitutional standard, and therefore could be published with relative impunity while individuals, whether public or private, would be shielded from gross media irresponsibility and malice.

### III. GERTZ AND FIRESTONE: A CHANGE IN PERSPECTIVE AND POLICY

#### A. THE DECISIONS

In 1974 the Supreme Court, with two new members,<sup>51</sup> drastically altered the logical and consistent resolution of the conflict between libel law and freedom of expression that had prevailed during the previous ten years. In doing so, it tipped the balance toward protection of individual reputation and produced a potential for media self-censorship.

*Gertz v. Robert Welch, Inc.*<sup>52</sup> was a libel action brought by a prominent Chicago attorney, Elmer Gertz, against Robert Welch, Inc., the publisher of *American Opinion*, a monthly outlet for the views of the John Birch Society. In 1969, *American Opinion*, as part of a continuing campaign to warn the country of an imagined conspiracy to establish a national police

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50. That this position represented careful balancing, rather than blind preference as Robertson suggests, Robertson, *supra* note 2, at 205-12, is manifested by the Court's failure to grant to media defendants the same absolute privilege that public officials then enjoyed. See *Barr v. Mateo*, 360 U.S. 564, 570-72 (1959). Preventing intimidation of public officials, the rationale for the *Barr* holding, was deemed more compelling than preventing self-censorship. But see *New York Times Co. v. Sullivan* 376 U.S. 254, 302-04 (1964) (Goldberg, J., concurring). The *Gertz* opinion also recognized that the *New York Times* line of cases reflected judicial balancing of conflicting interests. "The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation." 418 U.S. at 341.

51. Justices Powell and Rehnquist were the new members of the Court.

52. 418 U.S. 323 (1974).

force with communist leanings, ran an article about a Chicago police officer named Richard Nuccio who had been convicted of second degree murder for the shooting death of a Chicago youth.<sup>53</sup> In the course of this article, Gertz, who was representing the dead youth's parents in a civil action against Nuccio, was portrayed as being responsible for framing Nuccio with murder, even though he had had only minimal connection with the criminal proceedings. He was also falsely accused of, among other things, having a lengthy criminal record and being a "Leninist" and "Communist-fronter." Gertz filed a diversity action in federal district court and won a jury verdict of \$50,000 after the court had rejected the publisher's contention that Gertz was a public official or public figure. The judge, however, entered judgment for the defendant notwithstanding the verdict, on the ground that the *New York Times* privilege protected Robert Welch, Inc., because the article concerned a matter of public interest.<sup>54</sup> The Seventh Circuit affirmed, citing the Supreme Court's intervening decision in *Rosenbloom* and agreeing with the district court that Gertz had failed to show "actual malice" by clear and convincing evidence.<sup>55</sup>

The Supreme Court reversed. With both new members of the Court joining in the five-Justice majority, the Court retreated from the plurality position in *Rosenbloom* and held that, although a matter of public interest was involved, the *New York Times* malice standard was not constitutionally required when a private individual was defamed.<sup>56</sup> Justice Powell, writing for the majority, reasoned that a private person, unlike a public figure, neither had access to the media to counteract false statements nor had assumed the risk of publicity. The state's interest in compensating private individuals for harm inflicted by defamation was therefore correspondingly greater.<sup>57</sup>

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53. The article was entitled "FRAME-UP: Richard Nuccio And The War On Police." *Id.* at 325-26.

54. *Gertz v. Robert Welch, Inc.*, 322 F. Supp. 997 (N.D. Ill. 1970).

55. *Gertz v. Robert Welch, Inc.*, 471 F.2d 801 (7th Cir. 1972).

56. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974). In addition to Justices Powell and Rehnquist, who voted with the majority, Justice Blackmun reversed the position he had taken in *Rosenbloom* and joined the majority, on the ground that "it is of profound importance for the Court to come to rest in the defamation area and to have a clearly defined majority position that eliminates the unsureness engendered by *Rosenbloom's* diversity." He somewhat surprisingly stated, "[i]f my vote were not needed to create a majority, I would adhere to my prior view," *id.* at 354 (Blackmun, J., concurring), which is a most curious method of constitutional adjudication.

57. *Id.* at 344-46.

"[S]o long as they [did] not impose liability without fault, the States [could] define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."<sup>58</sup> This holding permitted states to adopt a negligence standard for private plaintiffs, whether or not the defamatory statement involved a matter of public interest. Many lower courts have accepted that invitation.<sup>59</sup> *Gertz* did place one apparent limitation on libel actions by private plaintiffs' against media defendants: recoveries were restricted to compensation for "actual injury"<sup>60</sup> unless the *New York Times* malice standard was satisfied.<sup>61</sup>

Since the Court in *Gertz* distinguished between public and private persons, it had to define "public figure" for constitutional purposes.<sup>62</sup> A person could either "achieve such pervasive fame or notoriety that he becomes a public figure . . . in all contexts" or he could "voluntarily [inject] himself or [be] drawn into a particular public controversy and thereby [become] a public figure for a limited range of issues."<sup>63</sup> The Court found that Elmer Gertz satisfied neither of these criteria.<sup>64</sup>

The meaning of "public figure" was further elaborated in *Time, Inc. v. Firestone*,<sup>65</sup> the Supreme Court's most recent

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58. *Id.* at 347.

59. See e.g., *Helton v. United Press Int'l*, 303 So. 2d 650 (Fla. Dist. Ct. App. 1974); *Cahill v. Hawaiian Paradise Park Corp.*, 56 Hawaii 522, 543 P.2d 1356 (1975); *Troman v. Wood*, 62 Ill. 2d 184, 340 N.E.2d 292 (1975); *Govin v. Globe Publishing Co.*, 216 Kan. 223, 531 P.2d 76 (1975); *Jacron Sales Co v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976); *Stone v. Essex County Newspapers, Inc.*, 330 N.E.2d 161 (Mass. 1975); *Thomas H. Maloney & Sons v. E.W. Scripps Co.*, 43 Ohio App. 2d 105, 334 N.E.2d 494 (1974), *cert. denied*, 423 U.S. 883 (1975); *Exner v. American Medical Ass'n*, 12 Wash. App. 215, 529 P.2d 863 (1974). See also *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 341 N.E.2d 570 (1975), in which the New York court of appeals apparently adopted a gross negligence standard.

60. 418 U.S. at 349-50.

61. *Id.* For an analysis of this limitation, see text accompanying notes 119-32 *infra*.

62. The "public official" category was untouched by the decision and remains relatively uncontroversial.

63. 418 U.S. at 351. See text accompanying notes 161-69 *infra*.

64. The Court found that there was no "clear evidence of general fame or notoriety in the community," apparently because none of the prospective jurors called at the trial had ever heard of Gertz. 418 U.S. at 352. Nor had he, through his involvement in the civil action against Nuccio, "thrust himself into the vortex of this public issue [or] engage[d] the public's attention in an attempt to influence its outcome." *Id.*

65. 424 U.S. 448 (1976).



attempt to resolve the conflict between personal reputation and freedom of expression. Mary Alice Firestone, the former wife of Russell Firestone, of the Firestone Tire and Rubber Company, had sued Time, Inc., alleging that its report that Mr. Firestone had been granted a divorce on the grounds of "extreme cruelty and adultery" was false and defamatory.<sup>66</sup> After Mrs. Firestone was awarded a judgment of \$100,000 in the Florida courts, the Supreme Court granted certiorari to hear Time's constitutional claim. Time argued that since the Florida supreme court had characterized the Firestone divorce "as a 'cause celebre,' it must have been a public controversy and respondent must be considered a public figure."<sup>67</sup> Thus, Time claimed, Firestone could recover only by establishing "actual malice."<sup>68</sup> The Court, however, in a 5-3 decision,<sup>69</sup> found that Mary Firestone did not satisfy the definition of "public figure," since a divorce proceeding was not the sort of "public controversy" contemplated by *Gertz*, and in any event, Mrs. Firestone had not "voluntarily" thrust herself into the public limelight.<sup>70</sup> In emphasizing volition, the Court apparently intended to eschew the language in *Gertz* that public figure status could be involuntary.<sup>71</sup>

Time also claimed that all press reports of judicial proceedings should be judged by the *New York Times* standard because information about the nation's courts was so important to all citizens that it merited special protection.<sup>72</sup> The Court rejected this argument, suggesting that it would amount to nothing more than a return to the *Rosenbloom* standard,<sup>73</sup> that *Cox Broadcasting Corp. v. Cohn*<sup>74</sup> already protected accurate reports of information in official court records open to public inspection, and that further protection for false reports would improperly

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66. *Id.* at 450-52.

67. *Id.* at 454.

68. *Id.* at 452-53.

69. Justice Stevens took no part in the consideration or decision of the case.

70. 424 U.S. at 453-55.

71. "More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Gertz v. Robert Welch, Inc.*, 418 U.S. 345, 351 (1974) (emphasis added).

72. 424 U.S. at 455.

73. *Id.* at 456. Justice Rehnquist, in his majority opinion, never clearly recognized that petitioner *Time* was merely asking the Court to carve out a small segment of the *Rosenbloom* subject matter standard—reports of judicial proceedings—for special first amendment protection.

74. 420 U.S. 469 (1975). See text accompanying notes 203-05 *infra*.

balance the competing interests.<sup>75</sup> The majority found compensable injury under its *Gertz* formulation, but remanded *Firestone* for a determination of negligence.<sup>76</sup>

B. POLICY FORMULATION: PURPORTED REALIGNMENT OF THE INTERESTS BY STRIKING A NEW BALANCE

The Supreme Court justified its decision in *Gertz* by emphasizing the need to protect private persons' reputations, but in reformulating the balance between that interest and the first amendment, it also professed to give the media additional protection. All prospective plaintiffs would have to show fault and, in the absence of demonstrated malice, proof of actual damages. Careful analysis of this new balance, however, leads to the conclusions that the preferential treatment given private persons is unjustifiable and that the additional protection for the media is illusory. Both these conclusions strengthen the inference that limitation of media freedom may well have been the Court's primary objective.

1. *Preferential Treatment for Private Persons*

The Court in *Gertz* refused to apply the *New York Times* standard to private persons because "the state interest in compensating injury to the reputations of private individuals requires that a different rule should obtain with respect to them."<sup>77</sup> This suggests that private plaintiffs are permitted to recover merely by demonstrating media negligence because society has a stronger interest in protecting their reputations than in safeguarding public figures' good names. Viewed in the light of first amendment values, this distinction makes little sense. The *New York Times* standard protected media statements about public persons not because their reputations deserved less protection,<sup>78</sup>

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75. 424 U.S. at 456.

76. *Id.* at 462-64.

77. 418 U.S. at 343. The "different rule" of which the Court spoke was a license to the states to apply a less rigorous standard than *New York Times* as long as they did not impose strict liability. *Id.* at 347.

78. See *Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 321 N.E.2d 580, 587 (Ind. App. 1974), *cert. denied*, 424 U.S. 913 (1976), a decision that rejected the *Gertz* invitation to employ a lesser privilege in the case of private individuals and retained instead the *New York Times-Rosenbloom* standard. See also *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 46 (1971) (plurality opinion). "The *New York Times* standard was applied to libel of a public official or figure to give effect to the [First] Amendment's function to encourage ventila-

but because the public had an interest in their actions. That the individual participating in a public event is a "private" person does not diminish either the public's interest in being informed or the media's interest in reporting. The Court in *Gertz* nevertheless attempted to justify its preferential treatment of this group on two grounds: private persons, because they did not have access to channels of communication to counteract false statements, were more vulnerable to injury than public figures, and because they had not assumed the risk of publicity, were more "deserving" of protection.<sup>79</sup> Both justifications, however, suffer from serious logical flaws.

The argument that public figures usually enjoy significantly greater access to the channels of communication, and hence have a better opportunity to rebut false statements, is little more than an empty generalization. As Justice Brennan noted in his plurality opinion in *Rosenbloom*<sup>80</sup> and his dissent in *Gertz*,<sup>81</sup> any discrepancy in access to channels of communication exists only for very prominent people who command media attention; for all other individuals, whether public or private, access to the media depends on the unpredictable event of continuing media interest.<sup>82</sup> Furthermore, even when a report generates widespread interest, media sources may be reluctant to denounce each others' stories, since this would invite competitors to retaliate and could create a "news reliability" war.<sup>83</sup> Similarly, because publishers hesitate to print statements that contradict their own charges, access to the original source of an allegedly defamatory story may be equally unavailable.<sup>84</sup> Finally, even

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tion of public issues, not because the public official has any less interest in protecting his reputation than an individual in private life."

79. 418 U.S. at 344-45.

80. 403 U.S. 29, 46 (1971).

81. 418 U.S. at 363.

82. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 363 (1974) (Brennan, J., dissenting); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 46 (1971).

83. See *Eaton, supra* note 2, at 1420-21. Eaton notes that while a public figure involved in a story of widespread interest may have access to competing channels of communication to rebut the defamation, if the interest in the story is only local, access is unlikely. Local media sources shy away from disseminating denunciations of their competitors' stories.

84. *Id.* *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), dramatically illustrates the reluctance of the media to publish rebuttals contradicting their own statements. In *Tornillo* the newspaper refused to print the reply by a political candidate to charges made in political editorials even though a statute required it to do so. The Supreme Court upheld the newspaper's refusal, striking down the statute as an interference with freedom of the press. See text accompanying note 213 *infra*.

if a rebuttal were widely disseminated, it would tend to be discounted as self-serving.<sup>85</sup> The *Gertz* majority recognized this weakness of the self-help rationale:

Of course, an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie. But the fact that the self-help remedy of rebuttal, standing alone, is inadequate to its task does not mean that it is irrelevant to our inquiry.<sup>86</sup>

Thus, because self-help is so uncertain and deficient a remedy, it is "too insubstantial a reed on which to rest a constitutional distinction."<sup>87</sup>

The *Gertz* majority relied more heavily on the theory that private citizens, unlike public figures, did not assume the risk of public scrutiny and therefore deserved more protection from defamation. The validity of this theory turns, in part, on the Court's definition of "public figure" as a person of general fame or notoriety, or a person who voluntarily injects himself into a public controversy.<sup>88</sup> Although the latter can perhaps be said to have assumed a risk of increased media attention, the risk differs, if at all, only in the slightest degree from that which all citizens assume in our complex and interactive society.<sup>89</sup> The chances of drawing public attention are always high: every citizen "assumes the risk of media comment when he becomes involved, whether voluntarily or involuntarily, in a matter of general or public interest."<sup>90</sup> It is difficult to perceive why one who enters the public arena voluntarily should forfeit the protection of libel laws that "private persons" enjoy.

The Court may have intended to suggest that a public figure's assumed risk differs qualitatively from that which all citizens assume, for it drew its argument partly by analogy to the position of public officials.<sup>91</sup> Because public officials' per-

85. *Eaton, supra* note 2, at 1420.

86. 418 U.S. at 344 n.9.

87. *Id.* at 363-64 (Brennan, J., dissenting).

88. *Id.* at 345; *Time, Inc. v. Firestone*, 421 U.S. 448, 453 (1976).

89. See text accompanying notes 62-63 *supra*. "Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press." *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967). See also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 364 (1974) (Brennan, J., dissenting); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 47-48 (1971).

90. See *Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 321 N.E.2d 580, 588 (Ind. App. 1974), *cert. denied*, 424 U.S. 913 (1976).

91. Although the Court did not explicitly argue that the risk differs qualitatively, it stated:

sonal attributes are germane to their fitness for public duty,<sup>92</sup> they put their "characters in issue" by entering the public arena and can expect that even the private details of their lives will be discussed. They may therefore be said to assume a risk not only of media exposure but of defamation as well. Extending this rationale, however, to the general category of public figures is particularly inapt. A person of pervasive fame or notoriety, such as a talented musician or professional athlete, no more invites public attention to his private life than does a private individual involved in a public event. Neither expects that his private life, which is irrelevant to the reasons he is in the public arena, will be publicly discussed. Thus, even if the Court intended to distinguish qualitatively between the type of risk public and private persons assume, that distinction does not logically support the assumption of risk argument.

Finally, the assumption of risk doctrine, as a matter of general tort law, is in effect a method of defining whether the defendant has a duty toward the plaintiff.<sup>93</sup> As evidenced by the growing judicial disfavor with the doctrine,<sup>94</sup> it is illogical to condition the defendant's duty of care on whether the plaintiff voluntarily or involuntarily encountered the risk of

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An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties. . . . [T]he public's interest extends to "anything which might touch on an official's fitness for office. . . . Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character." Those classed as public figures *stand in a similar position*.

418 U.S. at 344-45 (citations omitted and emphasis added).

92. See note 91 *supra*.

93. See James, *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185 (1968).

94. Assumption of risk is being replaced with contributory or comparative negligence. The jurisdictions abolishing assumption of risk as a separate defense have done so in the belief that the doctrine is confusing and that courts can reach the same result under a negligence and contributory negligence analysis. See, e.g., *Parker v. Redden*, 421 S.W.2d 586 (Ky. 1967); *Felgner v. Anderson*, 375 Mich. 23, 133 N.W.2d 136 (1965); *McGrath v. American Cyanamid Co.*, 41 N.J. 272, 196 A.2d 238 (1963). Assumption of risk has also been eliminated as a defense under the Federal Employer's Liability Act, 45 U.S.C. § 54 (1970), and most jurisdictions adopting comparative negligence rules have replaced assumption of risk with a comparative fault approach. See, e.g., *Nga Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 829, 532 P.2d 1226, 1240-41, 119 Cal. Rptr. 858, 875 (1975); *Springrose v. Willmore*, 292 Minn.

harm. It is the reasonableness of the plaintiff's conduct that is, or should be, central to the inquiry. Since voluntarily exposing oneself to media attention cannot generally be characterized as "unreasonable," it is inequitable to restrict recovery for this class of plaintiffs while facilitating it for those whose exposure was "involuntary."<sup>95</sup>

The Court's stated justifications for granting preferential treatment to private persons therefore lack force. Indeed, the Court appears to have relied almost entirely on what may only be characterized as legal fictions in order to reach a desired result. The insubstantiality of the Court's reasoning supports the conclusion that protection of individual reputation may have been less important to the decisions than was curtailment of media activities.

## 2. *Additional Protection for the Media*

In *Gertz*, the Court disclaimed divorcing itself philosophically from the *Rosenbloom* view<sup>96</sup> that the first amendment must protect discussion of matters of public interest as well as public persons.<sup>97</sup> While recognizing the importance of the first amendment policies,<sup>98</sup> it purported merely to better

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23, 24, 192 N.W.2d 826, 827 (1971); *McConville v. State Farm Auto. Ins. Co.*, 15 Wis. 2d 374, 113 N.W.2d 14 (1962); CONN. GEN. STAT. ANN. § 52-572h (West 1975).

95. The access to the media and assumption of the risk distinctions are also inapposite when a local public figure is defamed by a national publication. A person who has gained some notoriety in his own community or thrust himself to the forefront of a local controversy has not assumed the risk of national exposure, nor does he usually have access to national publications. Nevertheless, the Court appears to consider the local community the relevant focal point for making the public figure determination. In *Gertz*, the majority noted that "[a]lthough petitioner was . . . well known in some circles, he had achieved no general fame or notoriety *in the community*." 418 U.S. at 351-52 (emphasis added).

96. Justice Harlan, who never wanted to extend the *New York Times* privilege beyond public officials, recognized in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 147 (1966), that the "Founders . . . felt that a free press would advance 'truth, science, morality, and arts in general' as well as responsible government." And the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 41 (1971), accepted the premise that "[f]reedom of discussion . . . must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."

97. If the majority had returned to the pre-*Rosenbloom* position, the states could have imposed common law strict liability when private individuals sued the media.

98. This conclusion is not based on a belief that the considerations which prompted the adoption of the *New York Times* privilege for defamation of public officials and its extension to public

accommodate the competing interests by extending more protection to private persons. The court buttressed this disclaimer by offering the media a *quid pro quo*: in exchange for eliminating the constitutional requirement that private plaintiffs demonstrate actual malice to recover, all plaintiffs would be required to show fault<sup>99</sup> and, absent proof of malice, only recovery for "actual injury"<sup>100</sup> would be permitted. Careful analysis is required to gauge the effect of these protections and to assess the Court's underlying policy objective.

The holding in *Gertz* that the states may define for themselves the standard of liability when a private plaintiff alleges defamation,<sup>101</sup> so long as they do not impose strict liability, applies to all private persons, whether or not they are caught up in matters of public interest.<sup>102</sup> That the Court intended to protect publishers and broadcasters from liability without a showing of fault is clear from Justice Powell's majority opinion:

The 'public or general interest' test for determining the applicability of the *New York Times* standard to private defamation actions inadequately serves both of the competing values at stake. On the one hand, a private individual whose reputation is injured by defamatory falsehood that does concern an issue of public or general interest has no recourse unless he can meet the rigorous requirements of *New York Times*. . . . On the other hand, a publisher or broadcaster of a defamatory error which a court deems unrelated to an issue of public or general interest may be held liable in damages even if it took every reasonable precaution to ensure the accuracy of its assertions.<sup>103</sup>

Since private persons not involved in matters of public interest formerly could have recovered without any showing of fault,<sup>104</sup> the Court's standard theoretically gave the media "new" protection.

This additional protection is, however, almost entirely theoretical. First, even though the common law permitted plaintiffs to recover without showing any form of fault,<sup>105</sup> large recov-

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figures are wholly inapplicable to the context of private individuals. Rather, we endorse this approach in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation.

418 U.S. at 348-49.

99. See notes 102-07 *infra* and accompanying text.

100. 418 U.S. at 349-50.

101. *Id.* at 347-49.

102. *Id.* at 347. See text accompanying note 58 *supra*.

103. *Id.* at 346 (emphasis added). See also *id.* at 390-92 (White, J., dissenting).

104. See generally PROSSER, *supra* note 9, § 113, at 771-74; RESTATEMENT OF TORTS §§ 479-80 (1938).

105. 1 HARPER & JAMES, *supra* note 9, § 5.5, at 364; PROSSER, *supra* note 9, § 113, at 771-74; RESTATEMENT OF TORTS, §§ 579-80 (1938).

eries based on strict liability alone were probably rare.<sup>106</sup> The Gertz fault requirement is therefore of little pragmatic significance to media defendants.<sup>107</sup> Second, and more important, in light of the development of the law under the *New York Times* standard,<sup>108</sup> the proscription of strict liability for private plaintiffs not involved in matters of public interest touches so few cases as to be virtually irrelevant. Publishers rarely, if ever, have been involved in libel actions in which the plaintiff was a private individual and the defamatory statements concerned purely private matters. Members of the media have no incentive, economic or otherwise, to report on such events, for their function is to disseminate information of interest to the public. Given that function and perspective, combined with the expertise publishers and broadcasters develop in assessing public interest, it is reasonable to presume that everything published or broadcast, including coverage of private persons, involves only matters of general public interest.<sup>109</sup>

Examination of the case law bears this out. Nearly all the reported attempts to show that allegedly defamatory statements were not of public interest have been unsuccessful.<sup>110</sup> Everything from information about racial and religious issues<sup>111</sup>

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106. See Anderson, *Press Self-Censorship*, *supra* note 2, at 443. Professor Anderson points out that the *Restatement of Torts* recognized thirteen common law privileges. *Id.* at 443 n.97. The practical effect of these privileges was to require the plaintiff to prove "something akin to fault." *Id.* at 443.

107. The only suits the Gertz requirement would preclude are cases of purely inadvertent error; such cases were rare even at common law. Morris, *Inadvertent Newspaper Libel and Retraction*, 32 *ILL. L. REV.* 36 (1937).

108. See notes 110-18 *infra* and accompanying text.

109. This is essentially the view of Justice Douglas. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 357 n.6 (Douglas, J., dissenting). But see Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 *SUP. CT. REV.* 267, 284. See also Cohen, *A New Niche for the Fault Principle: A Forthcoming Newsworthiness Privilege in Libel Cases*, 18 *U.C.L.A. L. REV.* 371, 380 (1970).

110. See, e.g., *Mistrot v. True Detective Publishing Corp.*, 467 F.2d 122 (5th Cir. 1972); *LaBruzzo v. Associated Press*, 353 F. Supp. 979 (W.D. Mo. 1973); *Roketenetz v. Woburn Daily Times, Inc.*, 294 N.E.2d 579 (Mass. App. 1973); cases cited in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 377 n.10 (1974) (White, J., dissenting).

111. See *Gospel Spreading Church v. Johnson Publishing Co.*, 454 F.2d 1050 (D.C. Cir. 1971) (church tax exemption); *Washington v. New York News, Inc.*, 37 App. Div. 2d 557, 322 N.Y.S.2d 896 (1971) (bishop's attendance of night club performance); *DeVore v. Time, Inc.*, 73 Misc. 2d 240, 341 N.Y.S.2d 726 (Sup. Ct. 1971) (racial discrimination in fashion industry).



to hotel and restaurant accommodations<sup>112</sup> have been classed as public concerns. Only four recent cases have clearly concluded that the publication or broadcast in question was not a matter of public interest:<sup>113</sup> of these four, one was reversed by the United States Supreme Court,<sup>114</sup> and three are questiona-

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112. See *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970); *Twenty-five E. 40th St. Restaurant Corp. v. Forbes, Inc.*, 30 N.Y.2d 595, 282 N.E.2d 118, 331 N.Y.S.2d 29 (1972); *Steak Bit of Westbury, Inc. v. Newsday, Inc.*, 70 Misc. 2d 437, 334 N.Y.S.2d 325 (Sup. Ct. 1972).

113. *Stearn v. MacLean-Hunter, Ltd.*, 46 F.R.D. 76 (S.D.N.Y. 1969); *Firestone v. Time, Inc.*, 271 So. 2d 745 (Fla. 1972); *Matus v. Triangle Publications, Inc.*, 445 Pa. 384, 286 A.2d 357 (1971), *cert. denied*, 408 U.S. 930 (1972); *Old Dominion Branch No. 496 v. Austin*, 213 Va. 377, 192 S.E.2d 737 (1972), *rev'd on other grounds*, 418 U.S. 264 (1974). Borderline cases include *Taggart v. Wadleigh-Maurice, Ltd.*, 489 F.2d 434 (3d Cir. 1973), *cert. denied*, 417 U.S. 937 (1974); *Buckley v. Esquire, Inc.*, 344 F. Supp. 1133 (S.D.N.Y. 1972); *Francis v. Lake Charles Am. Press*, 262 La. 875, 265 So.2d 206 (1972), *appeal dismissed*, 410 U.S. 901 (1973). In *Taggart*, the court reversed a summary judgment for the defendants and remanded for a factual determination of whether plaintiff had been "drawn out as a performer" rather than merely photographed as a participant in a newsworthy event (in this case, the Woodstock rock festival). The court intimated that section 51 of the New York Civil Rights Law would apply to the former, whereas the first amendment would protect the latter. In *Buckley*, the district court merely denied defendant's motion for summary judgment and suggested that there was a question of material fact as to whether the article in defendant's magazine dealt with a public figure's public or private life, since the *New York Times* privilege applied only to the former. *Francis* held simply that the *Rosenbloom* privilege did not apply to a plaintiff mistakenly identified by defendant as involved in a matter of public interest.

When media defendants are not involved, the courts have developed one clear category of cases in which they find no public interest—credit reporting. *Eaton, supra* note 2, at 1402 n.223. See, e.g., *Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25 (5th Cir. 1973), *cert. denied*, 415 U.S. 985 (1974); *Oberman v. Dun & Bradstreet, Inc.*, 460 F.2d 1381 (7th Cir. 1972); *Kansas Elec. Supply Co. v. Dun & Bradstreet, Inc.*, 448 F.2d 647 (10th Cir. 1971), *cert. denied*, 405 U.S. 1026 (1972); *Grove v. Dun & Bradstreet, Inc.*, 438 F.2d 433 (3d Cir. 1971), *cert. denied*, 404 U.S. 898 (1971); *Baird v. Dun & Bradstreet, Inc.*, 446 Pa. 266, 285 A.2d 166 (1971).

114. *Old Dominion Branch No. 496 v. Austin*, 213 Va. 377, 192 S.E.2d 737 (1972), *rev'd*, 418 U.S. 264 (1974). Because the Supreme Court of Virginia found that a reference to plaintiff-appellees as "scabs" in a union newsletter was not a matter of public interest, it refused to apply the *New York Times* standard of knowing or reckless falsity, using instead the common law concept of actual malice (a corrupt motive, hatred, personal spite or ill will). The court believed this satisfied the requirements for labor disputes delineated by *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966). 213 Va. at 383-84, 192 S.E.2d at 742-43. The Supreme Court reversed: Virginia should have applied the *New York Times* standard because the federal labor law policy is to encourage union freedom of speech. 418 U.S. at 280-82. Although this decision did not rest directly on a finding that the public interest was involved, that assumption is implicit.

ble.<sup>115</sup> In *Matus v. Triangle Publications, Inc.*,<sup>116</sup> for example, the Pennsylvania supreme court found no public interest in a comment by the host of a radio talk show that plaintiff had charged an exorbitant fee for plowing the broadcaster's driveway. This holding can be questioned because the plaintiff was regularly engaged in the snowplowing business and the comments caused considerable listener interest.<sup>117</sup> Thus, contrary to Justice Powell's statement in *Gertz*, judges seldom have trouble deciding "on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not."<sup>118</sup> In short, the problem the Court purported to solve by requiring the fault standard is virtually nonexistent.

The other professed first amendment protection *Gertz* provided the media was limiting recoveries to "actual injury," presumed and punitive damages<sup>119</sup> being allowed only if the plaintiff satisfied the *New York Times* standard.<sup>120</sup> The Court purported to change the common law "presumed damages rule," whereby under some circumstances defamation was actionable without proof of harm.<sup>121</sup> The practical effect of this limitation, however, given the majority's concept of "actual injury," is minimal.

115. *Stearn v. MacLean-Hunter, Ltd.*, 46 F.R.D. 76 (S.D.N.Y. 1969) (critic commenting on personal motives of author); *Firestone v. Time, Inc.*, 271 So. 2d 745 (Fla. 1972); *Matus v. Triangle Publications, Inc.*, 445 Pa. 384, 286 A.2d 357 (1971).

116. 445 Pa. 384, 286 A.2d 357 (1971).

117. *Id.* at 387-88, 286 A.2d at 359.

118. 418 U.S. at 346.

119. The primary cause of self-censorship may well be the proliferation of libel actions and the unwillingness to undergo the expense of libel litigation. See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52-53 (1971); Anderson, *Press Self-Censorship*, *supra* note 2, at 430-38. Both the cost of defending a libel action and the threat of substantial compensatory damages may exacerbate self-censorship as much as a threat of punitive damages.

Moreover, the purported *Gertz* change in punitive damages recovery was not a change in the status quo. Prior to *Gertz*, virtually all plaintiffs had to establish knowing or reckless falsity in order to recover. See notes 110-18 *supra* and accompanying text. Upon making that showing punitive damages would be recoverable. After *Gertz* punitive damages are available upon the same showing.

120. 418 U.S. at 349-50.

121. At common law, certain defamatory material was considered actionable per se; proof of the defamation itself established the existence of damages and the jury was permitted to estimate an amount without any evidence of injury being presented. PROSSER, *supra* note 9, § 112, at 754. Some states drew a distinction between libel that was actionable per se and slander, confining per se slander to cases in which the defend-

The Court expressly disclaimed defining "actual injury."<sup>122</sup> It nevertheless stated that actual injury was not confined to out-of-pocket loss,<sup>123</sup> and could include "the more customary types of actual harm inflicted by defamatory falsehood such as impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."<sup>124</sup> Although the opinion further suggested that such injuries must be proved by "competent evidence," the Court noted that "there need be no evidence which assigns an actual dollar value" to them.<sup>125</sup> In short, the actual injury requirement presents but a small bar to plaintiffs; they need not show tangible harm and "competent evidence" could amount to nothing more than the testimony of friends or colleagues that they thought less of the plaintiff after hearing the defendant's statements. The jury is just as free to guess at the dollar amount to assign to an intangible injury as under the common law *per se* rule. By refusing to require the translation of negative community reaction into actual tangible harm, the Court left the presumed damages rule essentially intact. Had the Court been concerned with both protecting reputational interests and insulating the media from arbitrary awards, a better course would have been to limit plaintiff's recoveries to compensation for pecuniary harm, as required under the common law special damages rule.<sup>126</sup> A plaintiff who has suffered tangible harm provides a more compelling reason to restrict first amendment interests than does one whose harm is intangible and, perhaps, even hypothetical.

Not content to retain the presumed damages concept in euphemistic form, the *Gertz* majority noted that recoverable injury could include humiliation and mental distress. This statement was an open invitation to the states to change the very

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ant had accused the plaintiff of a crime, of having a loathsome disease, or of having made statements that affected the plaintiff's trade or business. *Id.* See also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 371-76 (White, J., dissenting). In the absence of *per se* defamation, the plaintiff had to prove special damages. See note 126 *infra*.

122. 418 U.S. at 349-50.

123. *Id.* at 350.

124. *Id.*

125. *Id.*

126. At common law, plaintiffs were required to show special damages in order to sue where the defendant's statements were not actionable *per se*. Normally, special damages must be pecuniary, such as the loss of customers or business, of a particular contract, of employment, or of a financially advantageous marriage. See 1 HARPER & JAMES, *supra* note 9, § 5.14, at 388-89; PROSSER, *supra* note 9, § 112, at 760-61.

definition of the tort of defamation.<sup>127</sup> At common law, the tort was designed to remedy injury to a relational interest—lowered esteem in the eyes of the community—rather than to provide recovery for mental distress or humiliation.<sup>128</sup> The *Gertz* standard, by permitting such recoveries whether or not harm to reputation is proved,<sup>129</sup> actually increases, rather than limits, both the likelihood and potential magnitude of compensatory awards.

That *Gertz* encouraged states to redefine defamation is evident from the *Firestone* decision. The plaintiff had withdrawn her claim for damage to reputation before trial and sought recovery only for mental anguish. The defendant argued on appeal that in the absence of harm to reputation there was no cause of action for libel. Although the Florida district court agreed,<sup>130</sup> the Florida supreme court reinstated the \$100,000 verdict on the ground that plaintiff had offered competent evi-

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127. As the Supreme Court noted in another context, "damage to reputation is, of course, the essence of libel." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275 (1971). This point was stressed by Justice White in his dissent in *Gertz*:

At the heart of the libel-and-slander-*per-se* damage scheme lay the award of general damages for loss of reputation. They were granted without special proof because the judgment of history was that the content of the publication itself was so likely to cause injury and because "in many cases the effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to the person defamed."

418 U.S. at 372-73 (citations omitted). See also *Eaton*, *supra* note 2, at 1437.

128. See F. POLLOCK, *THE LAW OF TORTS* 181 (15th ed. 1951); PROSSER, *supra* note 9, § 111, at 737. Although the publication of a *per se* libel raised the presumption of damage to reputation under the common law, the rule developed not to provide recovery for the insult or for any resulting mental distress but to compensate for reputational injury and to serve a vindictory function. If the defendant demonstrated that the plaintiff's reputation had not been injured, usually by introducing evidence of his previous bad reputation, the plaintiff could not recover compensatory damages but could still receive a nominal award. 1 HARPER & JAMES, *supra* note 9, § 5.30, at 468. See also *Eaton*, *supra* note 2, at 1437-38; Eldredge, *Practical Problems in Preparation and Trial of Libel Cases*, 15 VAND. L. REV. 1085 (1962).

Once either defamation *per se* or special damages were shown, the common law did permit recovery for "general" damages, including mental distress or pain and suffering. PROSSER, *supra* note 9, § 112, at 761. But these damages were "parasitic" to the cause of action, not, as *Firestone* allows, elements of it.

129. See *Eaton*, *supra* note 2, at 1437-39. "Negligent infliction of mental distress by publishing a falsehood may well be a tort, but it is not the tort of defamation." *Id.* at 1438.

130. *Time, Inc. v. Firestone*, 279 So. 2d 389, 394 (Fla. Dist. Ct. App. 1973).

dence of actual injury under *Gertz*.<sup>131</sup> The United States Supreme Court upheld this determination:

Florida has obviously decided to permit recovery for other injuries without regard to measuring the effect the falsehood may have had upon a plaintiff's reputation. This does not transform the action into something other than an action for defamation as that term is meant in *Gertz*. In that opinion we made it clear that States could base awards on elements other than injury to reputation, specifically listing 'personal humiliation, and mental anguish and suffering' as examples of injuries which might be compensated consistently with the Constitution upon a showing of fault. Because respondent has decided to forgo recovery for injury to her reputation, she is not prevented from obtaining compensation for such other damages that a defamatory falsehood may have caused her.<sup>132</sup>

Media defendants thus gained little from *Gertz* and *Firestone*. The supposed elimination of the presumed damages rule is without practical effect, since recovery for harm to reputation is still available without proof of financial loss. Moreover, plaintiffs may now recover for noneconomic harm such as mental distress. The "result is clearly to invite gratuitous awards of money damages far in excess of any actual injury and jury punishment of unpopular opinion rather than compensation to individuals for injury sustained by the publication of a false fact."<sup>133</sup> This outcome, coupled with the logical insubstantiality of the private/public person distinction, makes it necessary to reject the Court's explanation that it was simply realigning competing individual and first amendment interests and to focus instead on the immediate effect of the decisions—restriction of media power and influence.

### C. MEDIA CONTROL

An initial perusal of *Gertz* and *Firestone* leaves the impression that the decisions will significantly limit media freedom by encouraging self-censorship. That effect, combined with the weakness of the Court's rationale, indicates that the policy underlying these cases is to restrict media freedom and concomitantly reduce the influence of the press in American society. The extent to which *Gertz* and *Firestone* represent an actual shift in the Court's attitude toward the media and an attempt to limit

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131. 305 So. 2d 172, 176 (Fla. 1974), *vacated on other grounds*, 424 U.S. 448 (1976).

132. *Time, Inc. v. Firestone*, 424 U.S. 448, 460 (1976).

133. *Id.* at 475 n.3 (Brennan, J., dissenting).

coverage to matters at the core of self-government or to absolutely verifiable information, can be more precisely gauged by examining in detail several factors in the decisions—the likely impact of the private person negligence standard, the definition of “public figure,” and the refusal to grant a special privilege to reports of judicial proceedings.

### 1. *Negligence Standard for Private Persons*

The primary mechanism for ensuring press self-censorship is the Court's grant of permission to the states to impose negligence liability on media defendants in actions brought by private plaintiffs. Because it is impossible to predict what a jury will label “reasonable care,” media reports on matters involving private persons will demand extreme caution.<sup>134</sup> In evaluating the defendant's conduct, a jury made up of private citizens may be influenced by sympathy toward the plaintiff rather than by concern for the relatively abstract matter of first amendment freedoms. Media liability may thus effectively turn on falsity alone, with little weight given to the defendant's efforts to verify a story before publication.

This scenario describes perfectly what happened in *Firestone*. Time's erroneous report that Russell Firestone had been granted a divorce from his wife on grounds of extreme cruelty and adultery was an honest and entirely reasonable misinterpretation of a cryptic judicial decision. The circuit court judge, while noting that the parties had indulged in sexual escapades and granting Mr. Firestone's counterclaim which alleged extreme cruelty and adultery, also awarded Mrs. Firestone alimony. Florida law did not permit an alimony award when the divorce was based on adultery;<sup>135</sup> thus, the decree could not have been granted on that ground and Time was legally in error. The mistake was hardly unreasonable, however, given the ambiguity

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134. Justice Brennan, dissenting in *Gertz*, noted:

The reasonable-care standard is “elusive,” . . . ; it saddles the press with “the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait.” . . . Under a reasonable-care regime, publishers and broadcasters will have to make pre-publication judgments about juror assessment of such diverse considerations as the size, operating procedures, and financial condition of the newsgathering system, as well as the relative costs and benefits of instituting less frequent and more costly reporting at a higher level of accuracy.

418 U.S. at 366 (citations omitted).

135. See Justice Rehnquist's account of the facts in his opinion for the Court in *Firestone*, 424 U.S. at 450-51.

of the decree and Time's unfamiliarity with the technicalities of Florida law. Furthermore, Time checked and double-checked the story and even called the plaintiff's attorney and the judge for verification.<sup>136</sup> The Florida appeals court, the first court to review Mrs. Firestone's libel judgment, found that Time had done everything possible to check the story's accuracy,<sup>137</sup> but the Florida supreme court reversed, stating:

[T]his erroneous reporting is clear and convincing evidence of the negligence in certain segments of the news media in gathering the news . . . . A careful examination of the final decree prior to publication would have clearly demonstrated that the divorce had been granted on the grounds of extreme cruelty, and thus the wife would have been saved the humiliation of being accused of adultery in a nation-wide magazine. This is a flagrant example of "journalistic negligence."<sup>138</sup>

The United States Supreme Court held this bare statement insufficient to support the conclusion that the courts below had actually found negligence,<sup>139</sup> so it remanded to the Florida courts for that determination.<sup>140</sup>

That the Court remanded the issue demonstrates one major impact of the Court's adoption of a negligence standard. In previous libel cases the Court had reviewed the facts in order to protect media defendants from unrealistic findings of liability that contravened prevailing constitutional standards.<sup>141</sup> The

136. There were checks and double checks, quite extensive in scope considering the obvious press of time forced by journalistic deadlines. Nowhere was there proof Time was even negligent, much less intentionally false or in reckless disregard of the truth.

. . . . In addition to Time's rational interpretation of the pleadings, testimony and decree, it investigated independently at length. It contacted its Miami bureau and its Palm Beach stringer several times by wire and phone to substantiate information. Plaintiff's attorney and the judge were called for verification.

*Time, Inc. v. Firestone*, 254 So. 2d 386, 389-90 (Fla. Dist. Ct. App. 1971), *rev'd*, 271 So. 2d 745 (Fla. 1972), *modified*, 279 So. 2d 389 (Fla. Dist. Ct. App. 1973), *rev'd*, 305 So. 2d 172 (Fla. 1974), *vacated*, 424 U.S. 448 (1976).

137. *Id.*

138. *Firestone v. Time, Inc.*, 305 So. 2d 172, 178 (Fla. 1974), *vacated*, 424 U.S. 448 (1976).

139. *Time, Inc. v. Firestone*, 424 U.S. 448, 462-63 (1976).

140. *Id.* at 463-64. The Court stated: "It may well be that petitioner's account in its 'Milestones' section was the product of some fault on its part, and that the libel judgment against it was, therefore, entirely consistent with *Gertz*."

141. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 286-88 (1964), the Court examined the evidence and concluded that the New York Times was not guilty of knowledge of falsity or reckless disregard for

remand, especially in light of Time's lack of negligence,<sup>142</sup> implies that appellate review of jury findings of negligence will be extremely circumspect and will not afford media defendants even "last-ditch" protection from arbitrariness.

The uncertainty engendered by a negligence standard and the imposition of something approaching strict liability in cases like *Firestone* encourage media self-censorship. To ensure relative security from libel actions, material disseminated will have to be limited to reports involving public persons, and thus protected by the *New York Times* standard, or statements about private persons that can be verified with absolute accuracy. While this arguably guarantees more responsible reporting, it exacts too high a price. Much information important to the public simply cannot be absolutely verified and hence will tend to be "voluntarily" suppressed; as Justice Douglas noted in his dissent in *Gertz*, "it may well be the reasonable man who refrains from speaking."<sup>143</sup>

Defamation cases brought by private plaintiffs illustrate the type of information that may fail to reach the public in the future because, although reliable and accurate, it can neither be verified before publication nor proved absolutely accurate in court. *Rosenbloom*, for example, concerned the enforcement of obscenity laws, *Gertz* an alleged communist conspiracy, and *Firestone* the activity of the nation's courts. Other decisions have involved subjects such as organized crime,<sup>144</sup> toy safety,<sup>145</sup> fraud

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the truth, and in *Associated Press v. Walker*, a companion case to *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 158-59 (1967), the plurality found the "irresponsible publisher" standard there employed unsatisfied. In *Butts*, however, the evidence was "ample to support a finding of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.* at 158. Although the trial court decision in *Butts* preceded *New York Times*, the conduct of the defendant would have satisfied the *New York Times* knowing or reckless falsity standard. *Id.* at 165-67 (Warren, C.J., concurring).

142. See 424 U.S. at 493 (Marshall, J., dissenting).

143. 418 U.S. at 360. The function of the first amendment in protecting the dissemination of material is also discussed in the Supreme Court's obscenity decisions. See, e.g., *Miller v. California*, 413 U.S. 15 (1973); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966); *Roth v. United States*, 354 U.S. 476 (1957). Cf. *Stanley v. Georgia*, 394 U.S. 557 (1969) (first amendment prohibits making mere private possession of obscene material a crime).

144. *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), cert. denied, 409 U.S. 1125 (1973); *Cerrito v. Time, Inc.*, 449 F.2d 306 (9th Cir. 1971); *Time, Inc. v. Regano*, 427 F.2d 219 (5th Cir. 1970).

145. *F. & J. Enterprises, Inc. v. CBS*, 373 F. Supp. 292 (N.D. Ohio 1974).



by computer training school,<sup>146</sup> drug distribution,<sup>147</sup> business kick-backs,<sup>148</sup> and the flammability of baby cribs.<sup>149</sup> Reports on these issues are vital to preserving the free marketplace of ideas and an informed citizenry. The very function of a free press is to transfer ideas and information so that the public is fully and freely informed; self-government and participatory democracy are thereby facilitated.<sup>150</sup> To the extent that *Gertz* and *Firestone* limit media freedom, they restrict this flow of information and consequently curtail freedom of expression.<sup>151</sup>

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146. *Commercial Programming Unltd. v. CBS*, 81 Misc. 2d 678, 367 N.Y.S.2d 986 (Sup. Ct. 1974), *rev'd on other grounds*, 50 App. Div. 2d 351, 378 N.Y.S.2d 69 (1975).

147. *El Meson Español v. New York Magazine Corp.*, 389 F. Supp. 357 (S.D.N.Y. 1974), *aff'd*, 521 F.2d 737 (2d Cir. 1975).

148. *Lawlor v. Gallagher Presidents' Report, Inc.*, 394 F. Supp. 721 (S.D.N.Y. 1975).

149. *ABC v. Smith Cabinet Mfg. Co.*, 312 N.E.2d 85 (Ind. App. 1974).

150. Speech may be thought to serve the function of self-fulfillment, *see* T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970). Freedom of the press, on the other hand, has no intrinsic value apart from facilitating the transfer and communication of ideas and information. Meiklejohn believes the first amendment is designed primarily to further the socio-political interest in being informed, so that citizens may govern themselves effectively, Meiklejohn, *supra* note 37, at 255, and would extend absolute protection to the receipt of ideas and information relevant to this purpose. *Id.* at 256. Although a majority of the Supreme Court has never taken the absolutist position, it adhered to this basic view of freedom of expression in the *New York Times* line of cases. It also recognized that the first amendment protects the receipt of information in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

151. Although *Gertz* and *Firestone* limit freedom of expression by reducing the amount and kind of information that will flow to the public, this restriction was probably not the Court's primary objective. This conclusion can be inferred from the Court's recent decisions extending and protecting freedom of speech. *See* *Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm.*, 97 S. Ct. 421 (1976) (upholding, on freedom of speech grounds, the right of a non-union teacher to speak at meeting of the board of education in face of the claim that such action interfered with labor-management relations and as such was a prohibited labor practice under Wisconsin law); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (holding a Virginia statute banning the advertising of prescription drugs to violate the first amendment, and thus extending first amendment protection to "commercial speech"); *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975) (city ordinance prohibiting exhibition of non-obscene motion pictures by drive-in theaters, visible from "any public street or public place," in which "the human male or female bare buttocks, human female bare breasts, or human bare pubic areas are shown," an unconstitutional restriction of freedom of expression); *Procunier v. Martinez*, 416 U.S. 396 (1974) (invalidating prison regulations authorizing censorship of mail on ground that they restricted right of free speech of both prisoners and their correspondents; such censorship impermissible unless rea-

In the political arena, the deterrent effect of the negligence standard portends even more drastic consequences. Increased government secrecy, combined with the complex nature and widespread effect of governmental decision making, makes greater, rather than less, media coverage important. Moreover, private persons, such as corporate heads or lobbyists, may either affect or dictate many important political decisions.<sup>152</sup> Thus, even if media coverage is to be restricted to matters at the core of self-government, protection for coverage of private persons should not be withdrawn. Perhaps in this area, more than any other, the first amendment interest in media coverage of persons with potential political impact, or political events with which private persons may be connected, should outweigh the occasional harm to a private individual's reputation. The difficulty of clearly separating private from public interests, however, will cause publishers to restrict dissemination of information with clear political significance. A New York trial judge, in rejecting the *Gertz* standard and adhering to *Rosenbloom*,<sup>153</sup> identified the

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sonably limited to a substantial governmental interest and minimal procedural safeguards provided). *But see* *Greer v. Spock*, 424 U.S. 828, 837-38 (1976) (upholding military regulations denying political candidates access to military installations; unlike public parks and streets, military bases, given their traditional functions, are not "public forums" for individual expression); *Hudgens v. NLRB*, 424 U.S. 507 (1976) (no constitutional right to use a privately owned shopping center as forum for first amendment rights). Rather, the burden on freedom of expression is merely a consequential effect of the Court's effort to restrict media power and influence.

152. The link between private industry and government has been well documented. *See, e.g.*, A. BERLE, *POWER WITHOUT PROPERTY* (1959); J. GALBRAITH, *THE NEW INDUSTRIAL STATE* 326-42 (1967); C.W. MILLS, *THE POWER ELITE* 269-97 (1956); C. REICH, *THE GREENING OF AMERICA* 91-140 (1970). One good example of this relationship is the Vietnam War, which was perpetuated, in part, to serve the needs of private enterprise and the American economy. *See* R. BARNET, *THE ECONOMY OF DEATH* 57-128 (1969); GALBRAITH, *supra*; P. SLATER, *THE PURSUIT OF LONELINESS* 29-53 (1971); Zavialev, *Who Formulates Policy in America Today*, *INT'L AFF.*, May, 1970, at 48. Another example is congressional lobbyists whose sole task is to ensure governmental decisions that benefit their clients. Private businesses may also influence the government through legal and illegal political and campaign contributions as was made apparent during the Nixon Administration.

With the contraction of *New York Times* protection, much material of direct political significance may never be published or broadcast because of the involvement of a private person and the publisher's uncertainty as to his ability to prove its accuracy in court. *See, e.g.*, *Lewis v. Vallis*, 356 Mass. 662, 255 N.E.2d 337 (1970) (sometime and intermittent political candidate accused of criminal activity); *Arber v. Stahlin*, 382 Mich. 300, 170 N.W.2d 45 (1969) (unfair campaign practices).

153. *Commercial Programming Unltd. v. CBS*, 81 Misc. 2d 678, 367

problem succinctly: "Were it not for a press unafraid to publish matters of public interest although there be risk . . . that . . . a private individual might be the subject of innocent misstatement, the most significant saga of official corruption in our history might never have been told . . ." <sup>154</sup> The reference, of course, was to Watergate.

## 2. *The Definition of "Public Figure"*

Although the Supreme Court in the companion cases of *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*<sup>155</sup> had expanded the constitutional protection afforded the media to include public figures, it never clearly defined the concept. The Court merely noted that both plaintiffs "commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able to 'expose through discussion the falsehood and fallacies' of the defamatory statements."<sup>156</sup> Later decisions by both the Supreme Court and lower courts interpreted the concept of "public figure" fairly liberally,<sup>157</sup> but the term received little refinement because, even prior to *Rosenbloom*,<sup>158</sup> courts tended to focus not on the plaintiff's

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N.Y.S.2d 986 (Sup. Ct.), *rev'd on other grounds*, 50 App. Div. 2d 351, 378 N.Y.S.2d 69 (1975).

154. *Id.* at 687, 367 N.Y.S.2d at 996.

155. 388 U.S. 130 (1967).

156. *Id.* at 155 (quoting in part from *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis and Holmes, JJ., concurring)).

157. *See, e.g.*, *Greenbelt Coop. Publishing Ass'n. v. Bresler*, 398 U.S. 6 (1970) (prominent local real estate developer); *News-Journal Co. v. Gallagher*, 233 A.2d 166 (Del. 1967) (realtor and chairman of local Republican Committee); *Gibson v. Maloney*, 231 So. 2d 823 (Fla.), *cert. denied*, 398 U.S. 951 (1970) (editor of small weekly newspaper); *Urchisin v. Hauser*, 221 So. 2d 752 (Fla. Dist. Ct. App. 1969), *rev'd on other grounds*, 231 So. 2d 6 (1970) (city prosecutor); *A.S. Bell Co. v. Barnes*, 238 Md. 56, 265 A.2d 207 (1970), *cert. denied*, 403 U.S. 921 (1971) (candidate for delegate to state constitutional convention); *Beatty v. Ellings*, 285 Minn. 293, 173 N.W.2d 12, *cert. denied*, 398 U.S. 904 (1969) (opponent of local urban renewal); *Rose v. Koch*, 278 Minn. 235, 154 N.W.2d 409 (1967) (university professor); *Lloyds v. UPI*, 63 Misc.2d 421, 311 N.Y.S.2d 373 (Sup. Ct. 1970) ("foremost" trainer-driver of standard bred horses); *Trexler v. El Paso Times, Inc.*, 439 S.W.2d 883 (Tex. Civ. App.), *rev'd on other grounds*, 447 S.W.2d 407 (Tex. 1969) (university professor); *Tilton v. Cowles Publishing Co.*, 76 Wash. 2d 707, 459 P.2d 8 (1969), *cert. denied*, 399 U.S. 427 (1970) (local fireman and policemen running a local election); *Grayson v. Curtis Publishing Co.*, 72 Wash. 2d 999, 436 P.2d 756 (1967) (college basketball coach).

158. After *Rosenbloom*, the "public figure" issue became largely irrelevant, *see text* accompanying note 49 *supra*, because the Court found the matter of public interest determinative for purposes of applying the *New York Times* standard.

status, but on whether the issue was of public interest, granting *New York Times* protection when it was.<sup>159</sup>

Because it stressed the constitutional distinction between private individuals and public figures, the *Gertz* majority had to define "public figure" to guide lower courts in differentiating between these two groups. The definition that emerges from *Gertz* and *Firestone* provides an effective tool to implement the Court's objective of restricting media coverage and influence to matters of imminent political relevance. Only reports about public officials who enjoy governmental decision-making authority, and other persons who either actually attempt, or are in a position to influence governmental policies are protected by the *New York Times* standard. Media defendants will often find it difficult to show that a plaintiff falls within this narrow class.

Although the Court discussed public figures in various contexts in *Gertz*,<sup>160</sup> when specifically deciding whether petitioner Elmer Gertz fell within the category, Justice Powell defined the concept as follows:

That designation [public figure] may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.<sup>161</sup>

In *Firestone*, however, the Court selected slightly different language from the *Gertz* opinion to define "public figure," emphasizing the individual's influence on public questions.

For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures *have thrust themselves* to the forefront of particular public controversies in order to influence the resolution of the issues involved.<sup>162</sup>

The Court has thus developed a dual-level test for determining whether a plaintiff is a public figure: the "general" public figure must have the power potentially to influence public opin-

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159. See cases cited in note 42 *supra*.

160. 418 U.S. at 345, 351-52.

161. *Id.* at 351.

162. 424 U.S. at 453 (quoting from *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974)) (emphasis added).

ion, and the "special" public figure must actually attempt to affect the resolution of a public issue.

The "general" public figure's possible influence on public opinion appears to be measured by notoriety or prominence. *Gertz* and *Firestone* demonstrate, however, that this condition is difficult to meet. In the former case, the Court concluded that Elmer Gertz had insufficient fame or notoriety to be a public figure,<sup>163</sup> despite the fact that he had authored four books and many articles appearing in "historical, legal, literary . . . and other publications;"<sup>164</sup> had represented some rather famous clients including Nathan Leopold and the publishers of Henry Miller's *Tropic of Cancer*;<sup>165</sup> had made television and radio appearances locally and around the country;<sup>166</sup> had been the subject of over forty articles in Chicago papers;<sup>167</sup> and had served as an officer of local civic groups and various professional organizations.<sup>168</sup> That this degree of notoriety did not satisfy the Court's test renders superfluous any reference to Mary Alice Firestone's prominence in Palm Beach society, which the Court also found insufficient.<sup>169</sup> Only plaintiffs such as William F. Buckley<sup>170</sup> and Johnny Carson,<sup>171</sup> both of whom were designat-

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163. The court of appeals questioned the trial court's assumption that Gertz was not a public figure. "Plaintiff's considerable stature as a lawyer, author, lecturer, and participant in matters of public import undermine [sic] the validity of the assumption that he is not a 'public figure' . . ." 471 F.2d 801, 805 (7th Cir. 1972). This issue was not decided, however, because it affirmed on the *Rosenbloom* rationale.

The Supreme Court may have concluded that petitioner Gertz lacked sufficient general fame and notoriety because "[n]one of the prospective jurors called at the trial had ever heard of petitioner prior to this litigation, and respondent offered no proof that this response was atypical of the local population." 418 U.S. at 352.

164. Brief for Petitioner at 152-53 app., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

165. In *Pember & Teeter, Privacy and the Press Since Time, Inc. v. Hill*, 50 WASH. L. REV. 57, 75 (1974), the authors conclude that "Gertz was a public figure in every sense of the term as defined by the Supreme Court in *Curtis v. Butts*. The *Rosenbloom* rule should not have been at issue in the case." The Court, however, obviously restricted the definition of public figure in *Gertz*.

166. Brief for Petitioner at 153 app., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

167. *Id.* at 107.

168. 418 U.S. at 351.

169. 424 U.S. at 453. *But see id.* at 484-87 (Marshall, J., dissenting), in which Justice Marshall concluded that respondent Mary Alice Firestone was a "public figure" under the *Gertz* definition.

170. *See Buckley v. Littell*, 394 F. Supp. 918 (S.D.N.Y. 1975), *aff'd*, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 97 S. Ct. 785 (1977).

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

ed public figures by lower courts, would seem to meet the Court's standard, since they clearly command enough public attention to influence public decisions, if they so choose.<sup>172</sup>

The "special" public figure must actually attempt to affect the resolution of public questions. Although the Court indicated that it was necessary to look "to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation,"<sup>173</sup> more than mere submission to the possibility of media exposure is required. The shooting and murder trial involved in *Gertz* was widely publicized. *Gertz*, by agreeing to represent the family in the civil action against Nuccio, voluntarily submitted to the possibility of media exposure. He did not, however, at any time intentionally seek such exposure or conduct himself in a manner calculated to attract media interest.<sup>174</sup> Thus, he had made no conscious effort to influence a public question, and therefore was not a special public figure.<sup>175</sup>

In the cases decided since *Gertz*, the lower courts have

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172. On the other hand, some decisions since *Gertz* holding the particular plaintiff to be a general public figure are quite questionable. See *Carey v. Hume*, 492 F.2d 631, 634 n.3 (D.C. Cir.), *cert. denied*, 417 U.S. 938 (1974) (plaintiff Carey, general counsel to United Mine Workers, held to be a public figure "because of the recent focus of public attention upon the affairs of the United Mine Workers"); *Bergman v. Stein*, 404 F. Supp. 287, 297 n.11 (S.D.N.Y. 1975) (private businessman who owned and operated nursing homes and who became involved in press and state investigation of nursing home business was said in dictum to be a person of "general fame or notoriety in the community, and pervasive involvement in the affairs of society" (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974)); *Montandon v. Triangle Publications, Inc.*, 45 Cal. App. 3d 938, 946, 120 Cal. Rptr. 186, 191, *cert. denied*, 423 U.S. 893 (1975) (author of new book, *How to Be a Party Girl*, defamed with reference to upcoming appearance on television "talkshow"); *Basarich v. Rodeghero*, 24 Ill. App. 3d 889, 892-93, 321 N.E.2d 739, 742 (1974) (court failed to clearly delineate whether high school teachers and athletic coaches were public officials or public figures but seemed to indicate that they could be considered both since they were "of as much concern to the community as are other 'public officials' and 'public figures'"); *Kapiloff v. Dunn*, 27 Md. App. 514, 524, 343 A.2d 251, 258 (1975) (high school principal); *James v. Gannett Co.*, 47 App. Div. 2d 437, 439, 366 N.Y.S.2d 737, 738-39 (1975), *rev'd on other grounds*, 40 N.Y.2d 415, 353 N.E.2d 834, 386 N.Y.S.2d 871 (1976) (belly dancer performing in nightclubs). These decisions can be viewed as either an attempt to protect defendants in libel actions by a broad construction of "public figure," or, as appears more likely, simply a failure to perceive the restricted definition of "public figure" in *Gertz*.

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

174. See Robertson, *supra* note 2, at 224.

175. The Court apparently has also eliminated the possibility that a person may become an involuntary public figure. Although Justice Powell recognized in *Gertz* that it was "possible for someone to become

also restricted the special public figure category to persons who have actively attempted to influence resolution of a public issue.<sup>176</sup> *Exner v. American Medical Association*<sup>177</sup> involved a physician plaintiff who was an active opponent of water fluoridation and was allegedly defamed in the American Medical Association's journal *Today's Health*. He had written books and magazine articles, lectured, and litigated on the subject of fluoridation. The court held that "plaintiff was a public figure in regard to the limited issue of fluoridation by having abandoned his anonymity, by having assumed leadership and by having attempted to influence the outcome of the issue."<sup>178</sup> In *Fram v. Yellow Cab Co.*,<sup>179</sup> the plaintiff, president of Peoples Cab Company of Pittsburgh, was defamed in a television news program. He had previously appeared before the Pittsburgh City Council and on the local news to criticize defendant Yellow Cab and the Public Utilities Commission. A federal court held that he was a public figure since he had "thrust himself into the controversy as he freely and openly criticized the P.U.C. and Yellow Cab. Like General Walker . . . Fram has thrust his person into the 'vortex' of a public controversy."<sup>180</sup> In *Cera v. Mulligan*,<sup>181</sup> the court found that plaintiff chiro-

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a public figure through no purposeful action of his own," he also stated that "instances of truly involuntary public figures must be exceedingly rare." 418 U.S. at 345. The Court in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), however, appears to have eliminated even that possibility; it relied, in part, on plaintiff-respondent Mary Alice Firestone's lack of voluntary involvement to hold that she was not a "public figure." Justice Rehnquist, writing for the majority, stated that "respondent [did not] freely choose to publicize issues as to the propriety of her married life . . . . [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.* at 454 (emphasis added). This treatment of voluntariness calls into question the reasoning in cases like *Meeropol v. Nizer*, 381 F. Supp. 29 (S.D.N.Y. 1974). Although the court found in *Meeropol* that the plaintiffs, the children of Julius and Ethel Rosenberg, had been defamed in defendant Nizer's book, *The Implosion Conspiracy*, it granted defendant summary judgment on the ground that plaintiffs were public figures and had shown no evidence of actual malice. These plaintiffs were not public figures for all purposes nor had they voluntarily involved themselves in the controversy.

176. The Supreme Court itself used General Walker, the plaintiff in *Associated Press v. Walker*, 388 U.S. 130 (1967), as a benchmark. *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976).

177. 12 Wash. App. 215, 529 P.2d 863 (1974).

178. *Id.* at 224, 529 P.2d at 870.

179. 380 F. Supp. 1314 (W.D. Pa. 1974).

180. *Id.* at 1334.

181. 79 Misc. 2d 400, 358 N.Y.S.2d 642 (Sup. Ct. 1974).

practitioners were public figures because they had participated in a television debate on the virtues of chiropractic medicine.<sup>182</sup> The plaintiffs had requested television time to respond to a previously televised film critical of their profession.<sup>183</sup>

The special public figure definition is also restricted by the requirement that the individual be involved in a "public controversy."<sup>184</sup> The Supreme Court in *Gertz*, however, provided no criteria for identifying a "public controversy," although, interestingly, it criticized *Rosenbloom*<sup>185</sup> for "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—

182. 79 Misc. 2d at 406, 358 N.Y.S.2d at 648.

183. *Id.* Other cases in which plaintiffs were found to be public figures include *Vandenburg v. Newsweek, Inc.*, 441 F.2d 378 (5th Cir. 1971) (major college track coach, allegedly defamed in article appearing in *Newsweek* entitled "The Angry Black Athlete"); *Hotchner v. Castillo-Puche*, 404 F. Supp. 1041, 1046-47 (S.D.N.Y. 1975) (plaintiff, the author of *Papa Hemingway*, was defamed in another book about Hemingway written by a Spanish author; court held that plaintiff "injected himself into the controversy surrounding the later years of Ernest Hemingway's life"); *Guitar v. Westinghouse Elec. Corp.*, 396 F. Supp. 1042 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 309 (2d Cir. 1976) (citing general language from *Gertz*, 418 U.S. at 345, the court held free-lance writer who had just published new book on how to keep people from relocating in the suburbs to be a public figure, evidently on the theory that she had thrust herself into a public controversy); *Johnson v. Board of Junior College Dist. No. 508*, 31 Ill. App. 3d 270, 276, 334 N.E.2d 442, 447 (1975) (junior college professors, defamed in college publication, had become involved in controversy regarding what textbooks would be used in their courses).

In the following cases, however, the finding that plaintiff was a public figure is questionable under the *Gertz* requirement of voluntary involvement in a public controversy in an attempt to influence the resolution of public issues: *Buchanan v. Associated Press*, 398 F. Supp. 1196 (D.D.C. 1975) (accountant retained by the Committee to Reelect the President allegedly defamed by wire service story impliedly suggesting his cooperation in the "laundering" of Committee funds); *Jones v. Gates-Chili News, Inc.*, 78 Misc. 2d 837, 840, 358 N.Y.S.2d 649, 652 (Sup. Ct. 1974) (12 year old youth involved in assault on newsboy characterized as "voluntarily involved as a participant in a matter of public interest or concern" and therefore subject to the *New York Times* standard); *Foster v. Laredo Newspapers, Inc.*, 530 S.W.2d 611, 615-16 (Tex. Civ. App. 1975) (county surveyor and paid consultant engineer involved in study of controversy concerning problem of subdivision flooding).

184. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974); *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976). Both requirements must be satisfied before a plaintiff will be considered a special public figure since his participation in the event alone is insufficient unless that event can be labelled a "public controversy."

185. See *Eaton*, *supra* note 2, at 1424, where he astutely points out this inconsistency. *Eaton* cites *Exner*, *Fram*, and *Cera* as support for the proposition that the "task of determining which publications address public issues . . . has been recommitted to the conscience of judges." *Id.*



to determine . . . 'what information is relevant to self-government.' . . . We doubt the wisdom of committing this task to the conscience of judges."<sup>186</sup> By adding the requirement of a "public controversy" to its definition of "public figure" the Court exacerbated the exact problem it professed to have found in *Rosenbloom*.

Determining what is "of public interest," the relevant inquiry under *Rosenbloom*, is not as arduous as the Court suggests.<sup>187</sup> Since publication itself strongly suggests newsworthiness, judges seldom have had difficulty deciding the issue. Whether a "public controversy" exists, however, is a narrower and harder question, since much published material will be of public interest but will not involve a "public controversy."<sup>188</sup> Insofar as controversy requires contestants, competing views, and at least the appearance of a problem to be solved, making this determination will certainly force "judges to decide on an *ad hoc* basis which publications address" public controversies.

The difficult decisions the courts must now make are aptly illustrated by the cases discussed previously, as well as by *Firestone* itself. In *Exner*<sup>189</sup> the court had to determine whether fluoridation was a public issue;<sup>190</sup> in *Fram*, whether a taxicab controversy between two cab companies was of general concern;<sup>191</sup> and in *Cera* whether a debate over chiropractics fit the criteria.<sup>192</sup> Finally, in *Firestone* the Supreme Court held that "[d]issolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public."<sup>193</sup> Thus, the

186. 418 U.S. at 346.

187. See text accompanying notes 110-18 *supra*.

188. See *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976). The Court distinguished public controversies from matters of public interest in response to petitioner *Time's* argument that because a public controversy was involved, respondent should be considered a public figure. "[P]etitioner 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 v. Metromedia, Inc.*" *Id.* See also text accompanying note 193 *infra*.

189. See text accompanying notes 177-78 *supra*.

190. 12 Wash. App. at 220, 529 P.2d at 868.

191. *Fram v. Yellow Cab Co.*, 380 F. Supp. 1314, 1333 (W.D. Pa. 1974).

192. *Cera v. Mulligan*, 79 Misc. 2d 400, 358 N.Y.S.2d 642 (Sup. Ct. 1974). See also *Cahill v. Hawaiian Paradise Park Corp.*, 543 P.2d 1356, 1369 (Hawaii 1975), in which the court remanded the case in part for a determination of whether a "public controversy" was involved.

193. 424 U.S. at 454.

public controversy requirement strongly suggests that the Court intended to restrict the public figure category to politically influential persons, limiting the *New York Times* protection to press reports about matters at the core of self-government.

### 3. *Refusal to Grant Special Protection to Reports of Judicial Proceedings*

That the Court meant to confine media coverage and influence to matters of immediate political significance is also evident from its rejection of Time's assertion in *Firestone* that press coverage of the nation's courts should receive special first amendment protection.<sup>194</sup> Time's argument forced the Court to directly confront the issue of the role of the press in facilitating the flow of important information to the public.

Although it often has no immediate political significance, information about the courts is certainly relevant to self-government. As Justice Brennan noted in his dissent in *Firestone*, "slight reflection is needed to observe the insistent and complex interaction between controversial judicial proceedings and popular impressions thereof and fundamental legal and political changes in the Nation throughout the 200 years of evolution of our political system."<sup>195</sup> Yet the Court rejected Time's argu-

194. *Id.* at 455-57.

195. *Id.* at 477-78. See also *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), in which Justice White, writing for the majority, used the following language to characterize the importance of public knowledge of judicial proceedings and the significance of the press in supplying such information:

[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.

420 U.S. at 491-92.

Even those who view the first amendment restrictively and would confine its central meaning to "explicitly political speech" recognize that it applies to speech concerning governmental proceedings. See Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 25-26 (1971). The Court in *Firestone* may have taken an even narrower view of the first amendment. "The details of many, if not most,

ment on the ground that provision of the safeguard requested would amount to nothing less than a return to the *Rosenbloom* approach.<sup>196</sup>

Presumptively erecting the *New York Times* barrier against all plaintiffs seeking to recover for injuries from defamatory falsehoods published in what are alleged to be reports of judicial proceedings would effect substantial depreciation of the individual's interest in protection from such harm, without any convincing assurance that such a sacrifice is required under the First Amendment.<sup>197</sup>

This position is inconsistent with the Court's interpretation of the protection accorded commercial speech by the first amendment. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,<sup>198</sup> a case decided less than three months after *Firestone*, the Court held that a Virginia statute barring the advertisement of prescription drugs violated the first amendment. In reaching its decision, the Court cited *New York Times*,<sup>199</sup> the very case it declined to follow in *Firestone*. Public knowledge of judicial proceedings is certainly more important than the dissemination of commercial information.<sup>200</sup> Moreover, the Court's reliance on the need to protect reputations as the justification for denying special safeguards to reports of judicial proceedings is particularly suspect in light of *Paul v. Davis*.<sup>201</sup> In that case, decided just before *Firestone*, the Court refused to extend due process protections to the reputational interest and held that simple defamation by a state official did not state a claim under 42 U.S.C. section 1983.<sup>202</sup> The anomaly

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courtroom battles would add almost nothing toward advancing the uninhibited debate on public issues thought to provide principal support for the decision in *New York Times*." 424 U.S. at 457.

196. *Id.* at 456. Justice Rehnquist either failed or refused to recognize that petitioner Time was not seeking a return to *Rosenbloom* but was simply requesting that the Court carve out a subset of matters of public interest or concern—reports of judicial proceedings—for special *New York Times* protection. Under the argument made by Time, the actual malice standard would apply to public officials, public figures, and reports of judicial proceedings. See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 62 (1971) (White, J., concurring).

197. 424 U.S. at 456.

198. 425 U.S. 748 (1976).

199. *Id.* at 765 n.19.

200. *But see* *Virginia State Bd. of Pharmacy v. Citizens Consumer Council*, 425 U.S. 748 (1976), where the Court stated: "As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763.

201. 424 U.S. 693 (1976).

202. See note 40 *supra* and accompanying text.

of expanding first amendment protection for commercial endeavors, but refusing to grant adequate media protection for reports of judicial proceedings in the name of "reputation" reinforces the presumption that the Court was attempting to restrict the media.

The Court's stated reason for rejecting Time's argument was that *Cox Broadcasting Corporation v. Cohn*<sup>203</sup> already protected the news media. In *Cox*, a privacy action, the Court had held that the states could not impose civil liability for the publication of accurate and truthful information contained in official court records open to public inspection.<sup>204</sup> Thus, the *Firestone* majority declared that the public interest in receiving accurate information about the courts was protected by *Cox*, and that *Gertz* provided "an adequate safeguard for the constitutionally protected interests of the press and afford[ed] it a tolerable margin for error by requiring some type of fault."<sup>205</sup>

The facts of *Firestone*, however, indicate that the protection afforded by the fault standard is inadequate. Despite Time's reasonable interpretation of the divorce decree,<sup>206</sup> and its careful checks and double-checks on the accuracy of its story, the jury found it liable for defamation.<sup>207</sup> In the context of judicial proceedings, "breathing space" for the press is especially important, both because of the critical public significance of such proceedings and because the potential for inadvertent error is large. Legal material is esoteric, filled with technical rules and confusing jargon which require expertise to interpret.<sup>208</sup> Since even competent lawyers frequently misunderstand the effect of a legal rule or decision, reporters unfamiliar with the law are much more likely to do so. The finding of liability by the Florida courts in *Firestone*, coupled with the Supreme Court's refusal to review the facts on the negligence issue,<sup>209</sup> indicates

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203. 420 U.S. 469 (1975). The action in *Cox* was brought by the father of a rape victim after the broadcast of the name of the deceased rape victim in a television news report. The appellee, relying on a Georgia statute making it a misdemeanor to publish or broadcast the name or identity of a rape victim, sought money damages, claiming his right to privacy had been invaded.

204. *Id.* at 491.

205. 424 U.S. at 457.

206. See text preceding note 135 *supra*; *Time, Inc. v. Firestone*, 424 U.S. 448, 479 n.9 (Brennan, J., dissenting).

207. See *Time, Inc. v. Firestone*, 254 So. 2d 386, 389-90 (Fla. Dist. Ct. App. 1971), *rev'd*, 271 So. 2d 745 (Fla. 1972). See text accompanying notes 135-40 *supra*.

208. 424 U.S. at 478-79.

209. See text accompanying notes 139-42 *supra*.

that media negligence may be substantially equated with inaccuracy and that the *Gertz* fault standard will inadequately protect media coverage of the nation's courts. The *Cox* privilege, limited as it is to truthful accounts, provides no better shield, for inaccuracy alone may still result in liability. Because the media will thus be forced to ensure absolute accuracy before publication, the problem of self-censorship will become acute. The ultimate effect of the Court's refusal to grant *New York Times* protection to reports on judicial proceedings, important as such reports are to self-government, is that freedom of expression will be significantly abridged.

#### IV. CONCLUSION

A careful look at the Supreme Court's professed bases for distinguishing private individuals from public persons in libel litigation—access to the media and assumption of the risk of media coverage—reveals the insubstantial logic underlying the preferential protection for private persons. The additional safeguards that the Court claimed to provide the media—requiring all plaintiffs to show fault and limiting recovery to actual injury—are also illusory. These conclusions suggest that instead of simply striking a new balance between the two established interests recognized in previous media libel cases, the Court manipulated them to conform to its new policy of media control.

Evidence of the Court's intent to restrict wide-open media coverage to matters with potential political impact is provided by the increased protection accorded private individuals, the narrow definition of "public figure," and the Court's refusal to apply the *New York Times* malice standard to reports of judicial proceedings. Preferential treatment for private plaintiffs and the restrictive definition of "public figure" assure active media self-censorship except when the publication or broadcast involves a person who may have present or potential political influence, as measured by an ability to affect, either directly or indirectly, governmental decisions. The Court's refusal to provide *New York Times* protection to reports of judicial proceedings lends support to this theory because information concerning the operation of the legal system, although ultimately tremendously important to self-government, is not always of immediate political relevance.<sup>210</sup> Since freedom of speech protects the receipt

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210. It should be noted, however, that reports of judicial proceedings may have as much political significance as media coverage of a person with general fame or notoriety.

and dissemination of information as well as the right to speak,<sup>211</sup> the Court's restriction on what can safely be published or broadcast encourages media self-censorship and restricts freedom of expression.<sup>212</sup>

This conclusion is not contradicted by other recent Supreme Court decisions that favor the press. In *Miami Herald Publishing Co. v. Tornillo*,<sup>213</sup> the Court struck down a Florida "right of reply" statute that allowed any candidate for political office whose personal character was assailed to demand that the paper print, free of charge, any reply he or she wished to make. The Court held the statute an unconstitutional infringement of freedom of the press.<sup>214</sup> This holding is compatible with the analysis presented in this Article, because *Tornillo* clearly involved material of imminent political impact, the only category of press reporting that is sufficiently insulated from libel actions after *Gertz*.

The other recent decision is *Nebraska Press Association v. Stuart*,<sup>215</sup> a case in which the Court refused to sanction the imposition of judicial gag orders in the reporting of criminal proceedings because the defendant had not met his heavy burden of showing potential prejudice and unfairness.<sup>216</sup> Like *Tornillo*, this holding is not inconsistent with the analysis of *Gertz* and *Firestone* suggested above. *Nebraska Press* involved a prior restraint on the press, a restriction that is much more direct and invidious than the subtle impact of *Gertz* and *Firestone*.

Libel law is an unobtrusive but effective means of controlling media power and influence. Unlike direct attempts to restrict the press, it operates quietly, but its impact is powerful. The Court's language in *Gertz* and *Firestone* does not directly indicate an intent or attempt to limit media coverage. Nevertheless, these decisions will force media self-censorship of material whose accuracy cannot be verified. While there is nothing unhealthy in attempting to ensure that information that reaches the public is truthful and accurate, the mischief is suppressing

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211. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756-57 (1976), and cases cited therein.

212. See note 151 *supra*.

213. 418 U.S. 241 (1974).

214. *Id.* at 256-58.

215. 427 U.S. 539 (1976).

216. *Id.* at 569.

much accurate and reliable data that does not concern a politically influential personality or is not absolutely verifiable prior to publication.

The confused state in which the Supreme Court has left libel law will undoubtedly magnify the restrictive policies implicit in the *Gertz* and *Firestone* decisions.<sup>217</sup> However one may view the intent behind these decisions, and whether or not one agrees with the analysis presented above, it is clear that the Court's recent forays into the area of libel law will have a debilitating effect on the influence of the press in American society.

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217. Publishers and broadcasters who disseminate their material nationally, for example, must anticipate liability based on negligence since some states in which their product appears have, after *Gertz*, adopted a negligence standard for plaintiffs who are private persons. For decisions that have embraced a negligence standard for private plaintiffs, see note 59 *supra*.