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DEFAMATION AFTER FIRESTONE: IMPLICATIONS OF THE SUPREME COURT'S EFFORT TO ZERO IN ON THE PUBLIC FIGURE

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In December, 1967, after a 17-month divorce trial complete with sensational testimony and national news coverage, Russell Firestone, the heir to the rubber fortune, was granted a divorce from his wife, Mary Alice. A week later, *Time* magazine reported the divorce as having been granted to Mr. Firestone on the grounds of extreme cruelty and adultery.¹ Although Mr. Firestone had sought divorce on those two grounds, Mrs. Firestone brought a libel action against *Time* arguing that its report of adultery was not a ground upon which the divorce decree was granted and therefore the report was false, malicious and defamatory.² The case remained in the Florida appellate process until 1974, when the Florida Supreme Court upheld a \$100,000 judgment against Time Inc.³

The United States Supreme Court granted certiorari in *Time, Inc. v. Firestone*⁴ and addressed four issues. The first issue was whether Mrs. Firestone was a public figure⁵ under the Court's recent decision in *Gertz v. Robert Welch, Inc.*⁶ If so, she would have been required to prove that *Time* had published its defamatory report of her divorce proceeding with actual malice.⁷ In deciding that she was not a public figure, the Court narrowed the *Gertz* definition of public figure by confining determinations of this status to three mutually exclusive standards.⁸ The second issue was whether a news report of a judicial proceeding deserves the protection of the actual malice standard even if the report is defamatorily false or inaccurate.⁹ The Court held that the Constitution provides no "blanket privilege for reports of judicial proceedings."¹⁰ This confirmed what *Gertz* had implied: that the constitutional protection afforded reports of judicial proceedings depended on whether the defamed person is a public or a private

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1. *Time*, Milestones, December 22, 1967, at 77.

2. The divorce court did not grant the divorce decree on any of Florida's eight recognized statutory grounds for divorce, but rather granted it because neither party was domesticated. In 1972, the Florida Supreme Court agreed with the divorce court's conclusion that the facts warranted that the Firestone marriage should be terminated, albeit on the different yet legally acceptable ground of extreme cruelty. *Firestone v. Firestone*, 263 So. 2d 223, 225 (Fla. 1972). Two years later and during Mrs. Firestone's suit against *Time*, the Florida Supreme Court noted that Florida law in effect in 1967 precluded the awarding of alimony to a wife found guilty of adultery. Since Mrs. Firestone had been awarded alimony, the court concluded she had not been found guilty of adultery. "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, . . . This is a flagrant example of 'journalistic negligence.'" *Firestone v. Time, Inc.*, 305 So.2d 172, 178 (Fla. 1974).

3. *Firestone v. Time, Inc.*, 305 So. 2d 172 (Fla. 1974).

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

5. See text accompanying notes 55-99 *infra*.

6. 418 U.S. 323 (1974).

7. See text accompanying note 25 *infra*.

8. See text accompanying notes 55-99 *infra*.

9. See text accompanying notes 112-131 *infra*.

10. 424 U.S. at 456.

figure.¹¹ The third issue was whether *Time's* report of the divorce proceedings was accurate or inaccurate.¹² The Court decided that the constitutional interest in assuring the freedoms of speech and press to publishers emphasized in *Gertz* dictated that more tolerance for inaccuracy be afforded reports of judicial proceedings concerning those persons subject to the actual malice standard than similar reports concerning those persons subject to a state fault standard of less than actual malice.¹³ The fourth issue was whether *Gertz* required Mrs. Firestone to prove actual injury to her reputation.¹⁴ The Court determined that a state can permit a defamed private person to forego proving his reputation was damaged and compensate this person for other actual injuries upon a showing of fault.¹⁵ The Court thereby neutralized the protection that the actual injury requirement of *Gertz* provided against uncontrolled jury discretion in awarding defamation damages.¹⁶ The Court, however, after deciding the issues in Mrs. Firestone's favor, vacated and remanded her libel judgment because no Florida court in finding *Time* liable applied any type of fault standard as required by *Gertz*.¹⁷

Firestone is the Court's first application of its new approach to mass media defamation as outlined in the *Gertz* decision. As such, it is the latest addition to a continuing effort by the Court to strike the balance between the legitimate state interest in protecting the reputation of its citizens through its libel laws and the constitutional interest in protecting speech and the press. This note examines the Court's development of the constitutional protections to be applied in cases of mass media defamation, considers the current status of these judge-made protections in view of the Court's recent pronouncements in the *Firestone* case, and evaluates the need for legislation in the current transformation of defamation law by the Court.

DEFAMATION AND THE LIABILITY OF THE MASS MEDIA THROUGH *GERTZ* v. ROBERT WELCH, INC.: A SHORT HISTORY

Prior to the landmark decision in *New York Times v. Sullivan*,¹⁸ the judge-made common law developed a qualified privilege¹⁹ of fair comment which, absent proof of malice²⁰ or excessive publication,²¹ absolved the media from liability for commenting about matters of public concern or upon people involved with the public's welfare.²² Despite this unequivocal privilege, courts disagreed

11. See text accompanying notes 112-131 *infra*.

12. *Supra* note 11.

13. *Supra* note 11.

14. See text accompanying notes 100-111 *infra*.

15. *Supra* note 14.

16. *Supra* note 14.

17. 424 U.S. at 464.

18. 376 U.S. 254 (1964).

19. The defense of privilege emanates from the recognition that certain conduct otherwise actionable may so further an interest deemed important to society that it is entitled to immunity. Where the privilege is not thought to be of paramount importance to society, it is qualified and can be lost by abuse. *Restatement of Torts*, Introductory Note, ch. 25, topic 2, tit. B, at 223 (1938).

20. The malice required to defeat the privilege occurs when the defamatory opinion is not published to further the interest for which the privilege is given, namely, the promotion of public awareness and discussion of matters of public concern, but rather is made from spite or ill-will. *Supra* note 19 at sec. 603.

21. Excessive publication is proven by showing the defamatory opinion was knowingly published to persons not having a bona fide interest in the matter communicated. *Supra* note 19 at sec. 604.

22. See *supra* note 19 at sec. 606.

as to its application. The majority of courts applied the privilege solely to statements of opinion provided that the supporting facts were true,²³ whereas a minority of courts applied the privilege "to misstatements of fact as well as opinion about the conduct of public officials, at least if such misstatements were not negligent, deliberate or reckless."²⁴

In *New York Times*, the U.S. Supreme Court acknowledged this minority position and held that the Constitution limits a state's power to award libel damages to a public official. In short, the Court firmly established that the First Amendment guarantees the privilege to make defamatory statements concerning official conduct unless such statements were made with actual malice. This term has been defined as knowledge of the statement's falsity or reckless disregard as to whether the statement was false or not.²⁵ The Court's position, at least with regard to public officials, protected the media even more than did the common law's fair comment privilege. This decision marked the starting point of the Court's 10-year effort to widen the scope of this new constitutional privilege.

In *Rosenblatt v. Baer*,²⁶ although the Court admitted that its decision in *New York Times* had left the parameters of the public official category unclear, the strong interest in debating public issues and the persons in a position to influence the resolution of those issues, required that the designation of public official for purposes of the *New York Times* actual malice standard apply "at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."²⁷

In 1967, in *Curtis Publishing Co. v. Butts*,²⁸ the Court expanded the scope of this privilege. It required that the actual malice standard be applied to defamation cases brought by a public figure, and defined this public figure category as a non-public official who, by reason of his personal fame or notoriety or his intimate involvement "in the resolution of important public questions . . . shape[s] events in areas of concern to society at large."²⁹ Since the public evinces a continuing public interest in him, the public figure, like the public official, has "ready access . . . to [the] mass media of communication, both to influence policy and to counter criticism of [his] views and activities."³⁰

On the heels of this important expansion of the actual malice standard came *Beckley Newspapers Corp. v. Hanks*,³¹ where the Court made it clear that the actual malice standard to be met by public persons suing for defamation was not satisfied by evidence indicating the publisher was motivated by spite or ill-will towards the public official or public figure. Further, in *St. Amant v. Thompson*,³² the Court provided its requirement for proving the reckless disregard

23. W. Prosser, *Handbook of the Law of Torts* 819 (4th ed. 1971) [hereinafter cited as Prosser].

24. 1 A. Hanson, *Libel and Related Torts* 106 (1969); Prosser, *supra* note 23, at 820.

25. 376 U.S. at 279-280.

26. 383 U.S. 75 (1966).

27. *Supra* note 26 at 85. To gauge the types of positions which state courts have included under this definition see Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 Texas L. Rev. 199, 220 at n. 139 (1976) [hereinafter cited as Robertson].

28. 388 U.S. 130 (1967).

29. *Supra* note 28 at 164 (Warren, C.J., concurring in result).

30. *Supra* note 29.

31. 389 U.S. 81 (1967).

32. 390 U.S. 727 (1968).

portion of the actual malice standard: a showing, supported by sufficient evidence, that the publisher, despite any negligence or failure to investigate on his part, "in fact entertained serious doubts as to the truth of his publication."³³ Thus, it had become apparent that the Court's concern that false and defamatory statements about persons involved in matters of public concern should be afforded First Amendment protection because such statements, made without actual malice, promoted "free and unhindered debate on matters of public importance—the core value of the Free Speech Clause of the First Amendment - . . ." ³⁴ As such, the states' legitimate interest in protecting the reputation of its citizens became obscured in the light of the First Amendment.

In the *Monitor Patriot Co. v. Roy*³⁵ and *Ocala Star-Banner Co. v. Damron*³⁶ decisions of 1971, the Court extended the reach of the actual malice standard protections to include statements concerning candidates for public office. These cases reflected the Court's attitude, expressed in *Garrison v. Louisiana*,³⁷ that the protections of the actual malice standard are not restricted to comments about the "official conduct" of a public official; rather, any statement "which might touch on an official's fitness for office is relevant"³⁸ and thereby protected by the actual malice standard. In short, *Monitor* and *Ocala* signaled that the Court interpreted relevance broadly and in the interest of protecting the free flow of information to the public concerning its public servants, defamed public officials would be required, in most conceivable instances, to prove actual malice in order to recover.

The anticipated upshot of the Court's seven-year progressive increase of the applicability of the actual malice standard came in *Rosenbloom v. Metro-media, Inc.*³⁹ Here, a plurality of the Court held that, regardless of the status of the person defamed, the First Amendment protects all speech on matters of public or general interest except that speech made with knowing or reckless falsity.⁴⁰ Five members of the Court agreed that a defamed private individual involved in an event of public or general interest had the burden of proving actual malice. The three dissenters argued that in private libel the defamed private person should be required to show the publisher was negligent in order to recover any damages.⁴¹ They advocated that each state should be required to determine

33. *Supra* note 32 at 731.

34. *Pickering v. Board of Education*, 391 U.S. 563, 573 (1968).

35. 401 U.S. 265 (1971).

36. 401 U.S. 295 (1971).

37. 379 U.S. 64 (1964).

38. *Supra* note 37 at 77.

39. 403 U.S. 29 (1971).

40. See Cohen, *A New Niche for the Fault Principle: A Forthcoming Newsworthiness Privilege in Libel Cases?* 18 U.C.L.A.L. Rev. 371, 377-378 (1970), in which the writer forecasted that adoption of the *Rosenbloom* privilege to report on matters of public interest would be a complete break with common law libel and could make a public official/public figure privilege irrelevant. In addition, prior to *Rosenbloom*, many lower courts had already extended the application of the actual malice standard to publications possessing a valid public interest. See *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970).

The Blackmun, Brennan, and Warren plurality was concurred in by Justice Black and Justice White. Black argued that the First Amendment protects the news media from libel judgments even if the publication is made with knowledge of its falsity, and would have preferred the holding to have absolved the press from all libel judgments. 403 U.S. at 57 (Black, J., concurring in judgment). White posited that the First Amendment gives the media the privilege to report and comment on the official actions of public servants in full detail, and that the actual malice standard applies to those persons, public or private, involved in or affected by that official action. *Supra* at 62 (White, J., concurring in judgment).

41. 403 U.S. at 72 (Harlan, J., dissenting); *id.* at 86-87 (Marshall, J., dissenting).

an applicable negligence standard, but no state would be permitted to impose a strict liability standard.⁴² The dissenters further argued that defamation damages should be awarded on proof of actual damage, although they disagreed as to the efficacy of awards of punitive damages.⁴³

In summary, *Rosenbloom* signaled that certain members of the Court recognized differences between the public and the private defamation plaintiff that warranted greater protection for the latter in order to promote freedom of the press without abolishing the states' interest in compensating its citizens for actual harm done to their reputations. This decision, which effectively insulated all speech dealing with public issues from defamation liability, was to be short-lived.

In 1973, the Supreme Court granted certiorari to a libel case from the Seventh Circuit, *Gertz v. Robert Welch, Inc.*⁴⁴ In this case, the defendant, the publisher of the John Birch Society's magazine *American Opinion*, published an article expanding his running commentary concerning the supposed nationwide Communist conspiracy to replace local law enforcement agencies with a Communist-controlled national police force. He falsely accused the plaintiff, Elmer Gertz, an attorney hired to represent a family in its civil litigation against a Chicago police officer convicted of the second degree murder of their son, of having orchestrated a "frame up" of the policeman, of being a member of an organization that "'advocated the violent seizure of [the] government,'" and of having a hefty police record.⁴⁵ The Seventh Circuit held that Gertz was required to show the article was published with actual malice. Relying on *Rosenbloom*, the Circuit Court of Appeals affirmed the lower court's decision, pointing out that the defamatory statements about Gertz concerned a matter in which there was "significant public interest," namely "the trial of a Chicago police officer for the crime of murder - or its broader theme - the possible existence of a nationwide conspiracy to discredit local police officers -"⁴⁶ The Supreme Court, however, reversed that decision, holding that Gertz was a private figure and therefore not required to meet the actual malice standard, and remanded the case for a new trial.⁴⁷

The Supreme Court's progressive expansion of the actual malice standard in defamation cases, and the concomitant widening protection afforded the press against libel judgments, was greatly modified by *Gertz*. The Court was concerned with "reconciling the law of defamation with the First Amendment" and identified its options as (1) extending the actual malice standard to different situations, (2) varying the level of constitutional privilege according to the defamed person's

42. *Supra* note 41 at 64 (Harlan, J., dissenting); *id.* at 86-87 (Marshall, J., dissenting).

43. Most states permit the jury, in its discretion, to assess punitive damages over and above any other compensation it has awarded; this is directed at allowing the jury to punish the defendant or to make an effort at deterring like conduct in the future. See Prosser, *supra* note 23, at 9 and McCormick, *Damages* sec. 118 (1935) [hereinafter cited as McCormick]. While Justice Harlan would permit a private plaintiff proving actual malice to recover punitive damages, Justice Marshall and Justice Stewart regarded punitive damages as "windfalls" and a basic threat "to society's interest in freedom of the press" and advocated eliminating them entirely "by restricting the award of damages to proved, actual injuries." 403 U.S. at 77 (Harlan, J., dissenting); *id.* at 84 (Marshall, J., dissenting).

44. 471 F. 2d 801 (7th Cir. 1972), *rev'd*, 418 U.S. 323 (1974).

45. 418 U.S. at 325-326.

46. 471 F.2d at 805.

47. 418 U.S. at 352.

status, or (3) granting the press absolute immunity from defamation liability.⁴⁸ In selecting the second option, the Court decided that the appropriate standard for determining whether the media is liable for its defamatory statements is now dependent on whether the plaintiff is a public official, public figure, or private figure. The Court said that liability for defamation could no longer be based on whether the matter involved is solely one of public interest.

The Court recognized that the actual malice requirement substantially subordinates the state's legitimate power to use its libel laws to compensate its citizens for wrongful injury to their reputations. The Court found the actual malice standard necessary to accommodate the competing needs of encouraging the press to report about matters of public interest and concern, and of protecting the reputation of those who actively sought public attention or achieved expected notoriety through their achievements.⁴⁹ Moreover, the Court labeled the latter need a "limited state interest" because the public person enjoyed an access to the media to rebut false statements and chose to open his life to public scrutiny. The absence of these factors for private figures, however, required that the state interest rather than the First Amendment interest be emphasized.⁵⁰

The Court therefore held that when the substance of the media's defamatory statement makes substantial danger to reputation apparent, "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."⁵¹ Furthermore, the Court restricted the relief to be afforded by the states in private defamation cases to compensation for actual injury. Consequently, awards of presumed or punitive damages cannot be made unless actual malice is established by the private plaintiff.⁵²

48. *Supra* note 47 at 333.

49. *Supra* note 47 at 342-343.

50. *Supra* note 47 at 343-345.

51. *Supra* note 47 at 347-348. Although the Court did not explicitly outline the standard, three of the justices indicated the Court was thinking of a negligence standard. *Id.* at 350; *id.* at 353 (Blackmun, J., concurring); *id.* at 355 (Burger, C.J., dissenting).

Many state courts simply follow *Gertz* and have adopted a negligence standard. *See, e.g.,* Stone v. Essex County Newspapers, Inc., - Mass. -, 330 N.E. 2d 161 (1975); Taskett v. King Broadcasting Company, 86 Wash. 2d 439, 546 P. 2d 81 (1976). Additionally, some state courts interpret *Gertz* as minimally requiring a negligence standard in private defamation cases. *See* Jacron Sales Co., Inc. v. Sindorf, 276 Md. 580, 350 A. 2d 688 (1976) (adopted negligence standard set forth in *Restatement (Second) of Torts* sec. 580B (Tent. Draft No. 21, 1975) in private defamation). However, certain state courts require private defamation plaintiffs to meet a higher standard of fault. *See, e.g.,* Aafco Heating & Air Con. Co. v. Northwest Pub., Inc., - Ind. App. -, 321 N.E. 2d 580 (1974) (defamed private person involved in an event of general or public interest must prove actual malice); Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y. 2d 196, 341 N.E. 2d 569 (1975) (defamed private person involved in a matter of legitimate public concern must establish publisher acted with grossly irresponsible conduct).

Arguendo, the Court's omission of a delineated fault standard in defamation actions involving private persons leaves the common law malice standard viable. Since *Gertz* only forbids the states to adopt a fault standard of strict liability, nothing prevents a state from adopting or maintaining an ill-will fault standard, *i.e.*, one that entitles a defamed private person to his actual damages upon proof that the defamatory report was made because the defendant sought to gratify his personal animosity toward the plaintiff.

52. Presumed damages refers to the common law practice of allowing the jury, in certain instances, to presume present and future damage to the plaintiff's reputation, self-esteem, and physical and psychological well-being, simply from proof that the defamation was communicated to a third party. McCormick, *supra* note 43, sec. 116. *See* Robertson, *supra* note 27, at 215 where the author concludes that "no definitive constitutional restriction existed prior to *Gertz* limiting the availability of presumed and punitive damages. *Gertz* requires proof of knowledge of falsity or reckless disregard of the truth as a minimum requisite to recovering presumed and punitive damages, and may signal the complete excision of these concepts from the law of defamation. Plaintiffs who recover on the lesser showing of fault must prove 'actual injury.'"

Finally, the most important distinction drawn in *Gertz* was that of distinguishing the public figure from the private figure, since the latter, in most states, would not have to surmount the actual malice barrier in order to recover for injury from media defamation. The Court defined a public figure as assuming "special prominence in the resolution of public questions" and divided the term into two categories: (1) one who "voluntarily injects himself or is drawn into a particular public controversy" is a public figure "for a limited range of issues" and (2) one who achieves "such pervasive fame or notoriety" is a public figure for "all purposes and in all contexts."⁵³ Within the parameter of these two categories, the Court indicated that since most evaluations of who is a public figure would center on the former category, a more meaningful analysis would be had "by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation."⁵⁴

In summary, *Gertz* said a defamed private person (one who is neither a public official nor a public figure) is not constitutionally required to prove actual malice by a publisher who claims, in defense, that his report was privileged because the private person was engaged in a matter of public or general interest. The states, without imposing strict liability, may now define the standard for adjudging a publisher's liability for defamatory statements which injure a private person. A private person may not, however, recover punitive or presumed damages absent proof of actual malice. To the extent the private person establishes the publisher's liability under the respective state standard, he may only recover for proven actual injury. Thus, the impact of *Gertz* on the constitutional protection given defamatory falsehoods by the media was to replace the judicial focus from that of a predominantly ad hoc judicial determination of whether the publication in question concerned an issue of general or public interest to that of administering Court-prescribed criteria for determining the plaintiff's status, public or private, and allocating constitutional protection according to that status.

THE IMPACT OF FIRESTONE

1. The Narrowing of the Gertz Standards for a Public Figure

In *Firestone*, the Court rejected *Time's* contention that Mrs. Firestone was a public figure by specifically quoting from the *Gertz* majority opinion:

In *Gertz v. Robert Welch, Inc.* . . . , we have recently further defined the meaning of "public figure" for the purposes of the First and Fourteenth Amendments: "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."⁵⁵

53. 418 U.S. at 351.

54. *Supra* note 53 at 352.

55. 424 U.S. at 453 (emphasis added).

Thereafter, the Court goes on to evaluate Mrs. Firestone as a public figure *solely* in terms of this selected passage. In contrast, Justice Marshall, dissenting and arguing that Mrs. Firestone was a public figure by the terms of *Gertz*, evaluates the concept of public figure from other enumerated criteria in *Gertz* understood by him and certain commentators as integral elements of the *Gertz* public figure formula.⁵⁶

It appears that the Court, by relying entirely on the foregoing passage from *Gertz*, has made an intentional omission that has narrowed the standards for determining who is a public figure. That this omission is significant and planned, as opposed to fortuitous and inadvertent, can be gleaned from an examination of the Court's specific language in *Gertz* and *Firestone*. The initial language in *Gertz* concerning those classified as public figures said that "[T]hose who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures. . . ."⁵⁷ Further language indicated that "public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals . . ."⁵⁸ Additionally, the Court noted that

[A]bsent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.⁵⁹

In evaluating who is a public figure, the Court stated that the public figure designation was determined according to two standards:

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.⁶⁰

Despite this language, the Court, in *Firestone*, omitted any reference to these standards for evaluating whether Mrs. Firestone was a public figure. Instead, it emphasized that public figures are people who "have assumed roles of especial prominence in the affairs of society. . . [or] occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. . . [or]

56. *Supra* note 55 at 484 (Marshall, J., dissenting).

See Brosnahan, *From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and The First Amendment*, 26 *Hastings L.J.* 777, 794 (1975) ("Thus, under the reasoning of the majority, 'voluntary notoriety' and 'access to the media' constitute basic criteria of the public figure status."); Comment, *As Times Goes By: Gertz v. Robert Welch, Inc. And Its Effect on California Defamation Law*, 6 *Pacific L.J.* 565, 576 (1975) ("The Court suggested several guidelines for categorizing an individual as a public figure, all of which were based largely upon the rationale that such persons have assumed the risk of public criticism.")

57. 418 U.S. at 342.

58. *Supra* note 57 at 344.

59. *Supra* note 57 at 352.

60. *Supra* note 57 at 351.

have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."⁶¹ This shift in emphasis by the Court is crucially significant when examined in terms of what both passages included. First, both recognize a public figure for all purposes, but in a different sense. While *Gertz* emphasized "pervasive fame or notoriety"⁶² *Firestone* emphasizes "persuasive power and influence."⁶³ Second, *Gertz* recognized a class of involuntary public figures who are "drawn into a particular public controversy"⁶⁴ whereas *Firestone* does not. Conversely, *Firestone* emphasizes a public figure who assumes a role "of especial prominence in the affairs of society"⁶⁵ whereas *Gertz* did not. Here, the distinguishing emphasis is on voluntariness. Although qualifying language in *Gertz* indicated that such persons "assume special prominence in the resolution of public questions,"⁶⁶ the logical connotation implied here is that any assumption of leadership in resolving a public issue will come after being involuntarily brought into a public controversy. Third, both recognize a public figure who voluntarily injects or thrusts himself into a particular public controversy, yet *Firestone* draws a crucial conjunctive distinction, namely, the purpose must be "in order to influence the resolution of the issues involved."⁶⁷ Thus, by examining the standards emphasized by *Firestone* in light of the language discussing the concept of a public figure in *Gertz*, one can fairly infer that the Court in *Firestone* recognized that although *Gertz* reaffirmed the public figure doctrine, it had left the range of its application cloudy.

Therefore, by applying the three mutually exclusive standards to evaluate whether Mrs. Firestone was a public figure, the Court: (1) reaffirmed an all-purpose public figure category measured from the standard of "persuasive power and influence"; (2) reiterated a standard applied to one who assumes a role of "especial prominence in the affairs of society" and eliminated the involuntary public figure standard that allowed one to be "drawn into a public controversy"; and (3) emphasized that the third and final standard for defining a public figure not only requires that one thrust himself to the forefront of a public controversy, but that he do so "in order to influence the resolution of the issues involved."

The fact that the Court has limited the determination of a public figure to these three standards can be seen from its determination that Mrs. Firestone was a private figure. On one side, the Court responded to each of *Time's* contentions that Mrs. Firestone was a public figure by confining its refutation to the parameters of the delineated standards chosen from *Gertz*. First, the Court stated that Mrs. Firestone "did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society, and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it."⁶⁸ Second, the Court rejected the argument that the Florida Supreme Court's designation of Mrs. Firestone's divorce as a "cause celebre" meant that the judicial proceeding was a public controversy thereby

61. *Supra* note 57 at 345; see 424 U.S. at 453.

62. 418 U.S. at 351.

63. 424 U.S. at 453.

64. 418 U.S. at 351.

65. 424 U.S. at 453.

66. 418 U.S. at 351.

67. 424 U.S. at 453.

68. *Supra* note 67.

making Mrs. Firestone a public figure. To accept such an argument, the Court said, would be to categorize all public controversies as being subject to the actual malice standard. The Court emphasized that such a subject matter classification for determining when the actual malice standard is applicable was rejected in *Gertz*.⁶⁹ Likewise, the Court spurned the argument that the Firestone divorce proceeding was a public controversy, thereby making Mrs. Firestone a public figure, by emphasizing that Mrs. Firestone had no choice but to go to court to seek a divorce and as such "[S]he assumed no 'special prominence in the resolution of public questions.'"⁷⁰ Third, the Court precluded the argument that Mrs. Firestone's press conferences, held during her rather lengthy divorce proceeding, made her a public figure, saying that no assumption could be made that she intended to use these conferences to influence the merits or outcome of her divorce proceeding or "to thrust herself to the forefront of some unrelated controversy in order to influence its resolution."⁷¹

On the other side, Justice Marshall, dissenting in *Firestone*, also utilized *Gertz* language to support his contention that Mrs. Firestone was a public figure. First, he noted that: (1) the Florida Supreme Court had characterized Mrs. Firestone as a prominent member of Palm Beach society, and had said her "'marital difficulties were. . . well-known,' and [her] lawsuit became 'a veritable *cause celebre* in social circles across the country'"; (2) she subscribed to a press clipping service; (3) she instituted the suit for separate maintenance against her husband and probably knew the public would take interest in it; (4) her divorce proceeding attracted national news coverage as well as frequent coverage by Miami and Palm Beach newspapers; and (5) she held several press conferences during the divorce proceedings.⁷² "These facts are sufficient to warrant the conclusion that Mary Alice Firestone was a 'public figure' for purposes of reports on the judicial proceedings she initiated."⁷³ Second, he argued that Mrs. Firestone's access to the media "for purposes relating to her lawsuit" meant she could resort to the self-help remedy characteristically more readily available to public figures.⁷⁴ Third, and more importantly, he contended that because Mrs. Firestone had *chosen* to be socially active, to subscribe to a press clipping service, to initiate her suit for separate maintenance, and to hold press conferences during that lawsuit, she had voluntarily assumed the risk of careful public scrutiny and, as befits a public figure, was characteristically less deserving of protection against defamatory falsehood than a private person.⁷⁵ Fourth, he stated that language in *Gertz*, following the standards exclusively adopted from *Gertz* by the *Firestone* majority, declared that even if the generalities it discussed did not pertain to every instance, "'the communications media are entitled to act on the assumption that. . . public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.'"⁷⁶ Thus, Marshall seemed to be arguing

69. *Supra* note 67 at 454.

70. *Supra* note 67 at 454-455.

71. *Supra* note 67 at 455 n.3.

72. *Supra* note 67 at 485 (Marshall, J., dissenting).

73. *Supra* note 72.

74. *Supra* note 72 at 485-486.

75. *Supra* note 72 at 486-487.

76. *Supra* note 72 at 486.

that even if all of Mrs. Firestone's actions failed to qualify her as a public figure, *Time* was within its rights under *Gertz* to assume that by her actions she voluntarily sought to expose herself to public scrutiny and was thus a public figure.

Therefore, the fact that the Court did not subscribe to Justice Marshall's convincing arguments that other standards discussed in *Gertz* dictated that Mrs. Firestone was a public figure, and instead elected only to consider the case facts in light of the newly emphasized narrower standards from *Gertz*, is highly significant. An analysis of the Court's application of these standards to the facts of *Firestone* reveals that the Court has restricted evaluations of a public figure to three independent yet mutually exclusive standards.

Although the Court's analysis that Mrs. Firestone was a public figure centered around the third standard of thrusting oneself to the forefront of a public controversy in order to influence the resolution of the issues involved, this neither suggests nor concludes that this is the sole standard by which to evaluate whether a defamation plaintiff is a public figure. To the contrary, as the Court noted, it is the more commonly applicable standard and the only standard the Court found applicable to Mrs. Firestone.⁷⁷ *Firestone* indicated that one can be a public figure by assuming a prominent role in societal affairs, but the Court flatly stated that Mrs. Firestone "did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society. . . ."⁷⁸ The Court, however, elaborated no further, leaving one only to speculate as to the parameters for this standard. Clearly, Mrs. Firestone's involvement in Palm Beach society did not meet the Court's meaning of "affairs of society" no matter how especially prominent her role therein may have been and despite the national news coverage her divorce proceedings received.

This second *Firestone* standard would seem to include a plaintiff such as Wally Butts in *Curtis Publishing Co. v. Butts*.⁷⁹ In *Curtis*, a defamatory article in *The Saturday Evening Post* accused Mr. Butts, the athletic director and former head football coach at the University of Georgia, of fixing the 1962 University of Alabama/University of Georgia football game by providing the Alabama coach with the details of Georgia's strategy for the game.⁸⁰ Noting that not only had the Court in *Curtis* found Mr. Butts to be a public figure, but also that the Court in *Gertz* "specifically noted that that decision was 'correct'," Justice Marshall stated that the *Firestone* public figure language would not render Butts a public figure.⁸¹ To the contrary, however, it is clear that this standard would include a person such as Mr. Butts, who was a voluntarily prominent person prior to the *Post*'s defamatory report. Thus, it would appear that the emphasis of the standard centers on voluntarily prominent people such as professional athletes, entertainers and the like who, one commentator says, "lower courts have long regarded as public figures."⁸²

77. *Supra* note 67.

78. *Supra* note 77 (emphasis added).

79. 388 U.S. 130 (1967).

80. *Supra* note 79 at 135-136. The Court did not find Butts to be a public official, presumably from the fact he was paid by a private corporation. *Id.* at 135-136 n.2, 154.

81. 424 U.S. at 489-490 n.2 (Marshall, J., dissenting).

82. Note, *An Analysis of the Distinction Between Public Figures and Private Defamation Plaintiffs Applied to Relatives of Public Persons*, 49 S. Cal. L. Rev. 1131, 1208 (1976) [hereinafter cited as *An Analysis*].

Justice Marshall's dissent shows that disagreement among the justices resulted from the Court's determination in *Firestone* that "[D]issolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in *Gertz*. . . ."⁸³ Despite the fact that *Firestone* affirmed the Court's allegiance to the *Gertz* position that rejected categorizing a public figure according to whether the matter involved was one of public interest, Justice Marshall sensed that the Court had made an ad hoc decision to reject his analysis of Mrs. Firestone being a public figure in favor of its own judicial whim that Mrs. Firestone's divorce proceeding was not a matter of legitimate public interest.⁸⁴ To the contrary, it is clear that the Court has not established such an ad hoc public interest test that would call for judicial divination of who is a public figure, but instead adopted and applied as a criterion the "public controversy" standard outlined in *Gertz*.⁸⁵

This "public controversy" standard requires that a plaintiff who thrusts himself to the forefront of a matter of public interest in order to influence the resolution of the issues involved therein, prove that the publisher defamed him with actual malice. Further, as set out by the Court in *Gertz*, the matter of public interest is that particular event which gives rise to the defamation.⁸⁶

Turning to the Court's determination that Mrs. Firestone was a private figure, it is clear that the matter of public interest giving rise to *Time*'s defamatory report was the divorce proceeding itself; moreover, it is equally clear that the Court did not consider that this fact alone made Mrs. Firestone a public figure. The Court was also concerned that Mrs. Firestone had no choice but to go to court to obtain her divorce. In short, the Court did not regard her resort to the only forum available for relief from her failing marriage as evidencing any voluntariness on her part to push herself to the forefront of the divorce proceeding, and the Court thereupon held her not to be a public figure.⁸⁷

Likewise, the Court decided that Mrs. Firestone's press conferences held during the divorce proceeding failed to make her a public figure, despite the obvious fact Mrs. Firestone voluntarily became involved in these conferences. The Court said that these interviews should not have affected the merits or the outcome of the trial, and also that the Court could not assume that Mrs. Firestone intended any such purpose. Moreover, the Court saw no indication that Mrs. Firestone intended to use the press conferences to thrust herself to the forefront of some unrelated matter of public interest in order to influence its outcome.⁸⁸

Thus, on the one hand, the Court refused to label Mrs. Firestone a public figure because she did not thrust herself to the forefront of her divorce proceeding due to the involuntary nature of a judicial proceeding, and, on the other hand, the Court, while tacitly recognizing the obvious fact that Mrs. Firestone had voluntarily chosen to participate in her press conferences, refused to label her a public figure on the fact of voluntariness alone, noting that it could not be assumed that she had held the interviews in order to influence the resolution of the trial or any related matter of public interest.

83. 424 U.S. at 454.

84. *Supra* note 83 at 487-488 (Marshall, J., dissenting).

85. 418 U.S. at 345.

86. *Supra* note 85 at 352.

87. 424 U.S. at 455.

88. *Supra* note 87 at 454-455 n.3.

Therefore, the Court's "public controversy" standard as adopted by *Firestone* is a two-pronged test requiring the plaintiff (1) to have thrust himself to the forefront of the matter of public interest, and (2) to have done so for the purpose of influencing the resolution of the issues involved in that matter of public interest.

The applicability of this standard can be seen by examining the actions of retired Major General Edwin Walker in *Associated Press v. Walker*,⁸⁹ Wally Butts in *Curtis*,⁹⁰ and the analysis of the U.S. district court in *Hotchner v. Castillo-Puche*.⁹¹ Walker, as the Court implies, is a good example of a private person who becomes a public figure under the "public controversy" standard.⁹² He became involved in a matter of public interest concerning the enrollment of James Meredith at the University of Mississippi. Walker thrust himself to the forefront of that public issue by holding radio and television interviews; his purpose in so doing was to exert his influence in order to insure that the resolution of that issue was the refusal of university enrollment to Meredith.⁹³ Athletic Director Butts, however, although involved in a matter of public interest concerning his alleged participation in a conspiracy to fix a Georgia/Alabama football game, is not a public figure under this standard. Like Mrs. Firestone, Butts did not thrust himself to the forefront of the alleged conspiracy; his "voluntariness" was also not realistic since he was obligated to answer the charges and defend himself in court. In *Hotchner*, the plaintiff, a confidant and biographer of Ernest Hemingway, was defamed by a book which questioned the intimacy and genuineness of his relationship with Hemingway.⁹⁴ The defendant argued that Mr. Hotchner was a public figure, saying that Hotchner's biography of Hemingway, and his adaptations of Hemingway's works for the media and the arts, had voluntarily injected Hotchner into the public controversy "of Hotchner's personal relationship with Hemingway."⁹⁵ The Court concluded that Hemingway's later years as an expatriate were a matter of "considerable public interest," and relying on dicta in *Curtis*, determined *inter alia* that the plaintiff had indeed thrust himself into "the controversy surrounding the later years of Ernest Hemingway's life" and noted that Hotchner had not entered the public discussion as a neutral biographer, critic, or observer of Hemingway.⁹⁶ Although the Court reasoned that Hotchner's access to publications to rebut defamations concerning him was also an important factor in determining that Hotchner was a public figure, a reading of the case indicates that Hotchner had chosen to involve himself in the public issue concerning Hemingway's last years in order to resolve that issue according to his personal perception, understanding and observations. Therefore, the decision that Hotchner was a public figure would be sustained under the "public controversy" standard of *Firestone*.

This two-part test seems quite clearly to waylay Justice Marshall's fears

89. This case, on certiorari to the Court of Civil Appeals of Texas, 2d Supreme Judicial District, was decided together with *Curtis Publishing Co. v. Butts*.

90. 388 U.S. 130 (1967).

91. 404 F. Supp. 1041 (S.D.N.Y. 1975), *rev'd on other grounds*, 551 F.2d 910 (2nd Cir. 1977).

92. 388 U.S. at 140, 155.

93. *Supra* note 92 at 159 n.22.

94. 404 F. Supp. at 1043, 1047.

95. *Supra* note 94 at 1046.

96. *Supra* note 94 at 1046-1047.

that the Court was determining whether a public controversy exists solely by subjectively deciding whether the public interest involved was relevant and legitimate. To the contrary, existence of a specific public issue giving rise to the defamation is a prerequisite for testing the standard and the existence of the public issue alone will not render the plaintiff a public person. Further, the proof required to satisfy the requirements of the standard negates the ad hoc nature of the determination, which is his primary complaint.

In *Firestone*, the Court described the all purpose public figure as one who occupies a position of persuasive power and influence, yet neither the majority nor any dissenting opinion discussed Mrs. Firestone according to this standard.⁹⁷ It is clear, however, that the Court recognizes this standard. It has been suggested that *Gertz* requires that the name of such a person be a household word but does not require that the person's fame extend beyond the local community or be of national importance.⁹⁸ Yet, in his dissent, Justice Marshall does not even suggest that Mrs. Firestone's prominence "among the '400' of Palm Beach Society," her publicized social activities, or her frequent press coverage, made her a public figure for all purposes. This suggests that the Court sees fame or notoriety as axiomatically accompanying this standard, and instead emphasizes the power and influence public persons in this category must wield. Thus, although courts and publishers should be in agreement as to when this standard applies, analyzing the standard in terms of power and influence seems most consistent with the majority's concern in *Firestone* for aligning the public figure standards along the lines of conscious determined efforts towards abandoning anonymity.⁹⁹

In conclusion, therefore, it is submitted that *Firestone* has not, as suggested by Justice Marshall, established the requirement that a person can only become a public figure by trying to influence the resolution of a public controversy, but rather has clearly narrowed the definition of public figure according to three independent and mutually exclusive standards: (1) the voluntary assumption of a role of especial prominence in the affairs of society; or (2) the occupying of a position of such persuasive power and influence that one is deemed a public figure for all defamatory utterances concerning him; or (3) the thrusting of oneself to the forefront of a matter of public interest in order to influence the resolution of that public issue according to one's particular persuasion.

It is clear that the Court continues to emphasize that the distinction among defamation plaintiffs is based on status. It is also apparent, however, that by eliminating the involuntary public figure category of plaintiffs who are "drawn into" particular controversies, the Court now emphasizes that voluntariness is an essential criterion for evaluating whether a person is a public figure. Yet, allowing for the fact that the voluntariness of normally private persons in certain matters of public interest could be more apparent than real, the Court has required that the voluntariness of such persons be for the purpose of influencing the resolution of that matter of public interest.

97. 424 U.S. at 453.

98. An Analysis, *supra* note 82 at 1209 n. 427.

99. In *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976), the court decided that columnist, author, commentator, candidate, and critic William F. Buckley, Jr., is a public figure for all purposes. The court does not discuss him as a public figure in terms of his pervasive involvement in society's affairs or the notoriety or general fame that he obviously possesses, but rather in terms of his influence and power as the leading advocate of conservative politics and ideology.

2. A Private Defamation Plaintiff is No Longer Required to Prove Damage to Reputation

The common law tort of defamation protects the interest one has in being looked upon with respect, esteem and confidence by fellow members of one's community; consequently, courts have considered damage to reputation as the essence of defamation.¹⁰⁰ Accordingly, in *Firestone*, *Time* argued that Mrs. Firestone could not recover consistent with *Gertz* as, prior to the commencement of her libel action against *Time*, she withdrew any claim she had against the publisher for injury to her reputation.¹⁰¹ In response, the Court said:

Petitioner's theory seems to be that the only compensable injury in a defamation action is that which may be done to one's reputation, and that claims not predicated upon such injury are by definition not actions for defamation. But 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.¹⁰²

Although the Court's reply seems rather thorough at first glance, it is at best superficial. It would appear that *Time* was not arguing against the obvious, namely, that *Gertz* permits the states to compensate private persons for any proven actual injury suffered as a result of a defamatory falsehood (including, but not restricted to, impairment of reputation, mental suffering, mental anguish and the like). Moreover, it would not appear that *Time* was arguing that *Gertz* prevented Mrs. Firestone from choosing which proven actual injury she would seek compensation for. To the contrary, it appears that *Time*'s concern centered on Florida permitting Mrs. Firestone to recover against *Time* for libel without presenting any evidence of damage to her reputation; in short, *Time* was arguing that Florida courts had presumed that Mrs. Firestone's reputation had been damaged.¹⁰³

Although *Gertz* clearly held that a state is prohibited from permitting recovery of presumed damages absent proof of actual malice, the Court in *Firestone* easily discounted *Time*'s argument by noting that Florida had complied with *Gertz* by only compensating Mrs. Firestone for actual injury (mental pain

100. Prosser, *supra* note 23, at 739. In *Gertz*, the Court specifically noted that the plaintiff Gertz had originally filed his libel action against the publisher of *American Opinion* claiming "that the falsehoods published by respondent injured his reputation as a lawyer and a citizen." 418 U.S. at 327.

101. 424 U.S. at 460.

102. *Supra* note 101.

103. Justice Brennan notes that it appeared from the record that *Time* was "affirmatively precluded from offering evidence to refute any possible jury assumption in this regard by a pretrial order granting Plaintiff's Motion to Limit Testimony." *Supra* note 101 at 475 n.3 (Brennan, J., dissenting).

and anguish) supported by "competent evidence."¹⁰⁴ Such a peripheral analysis, however, ignores the very state interest by which the Court authorized state compensation for defamatory injury. In *Gertz*, the Court recognized "the strong and legitimate state interest in compensating private individuals for *injury to reputation*" and thereupon adopted the actual injury requirement to insure "that state remedies for defamatory falsehood reach *no farther than is necessary to protect the legitimate interest involved*."¹⁰⁵ Although the actual injury requirement of *Gertz* does not require a private plaintiff to recover for injury to reputation as a prerequisite to recover for other actual injuries, it seems that allowing a state to permit a private person who does not prove actual malice to recover in a defamation action, without at least presenting evidence concerning damage to reputation, clearly violates the express state interest.

Justice Brennan, in his *Firestone* dissent, suggests that better view. Unlike the majority in *Firestone*, he interprets *Gertz* as allowing a private plaintiff, who is unable to prove actual malice, to recover for defamation injuries *only* after proving, with "competent evidence," actual injury to reputation. Justice Brennan then sees *Gertz* as allowing the defamed private plaintiff, after proving actual injury to his reputation, to recover for *any* actual injury by submitting "competent evidence."¹⁰⁶ Such an analysis would require that Mrs. Firestone must plead and prove actual injury to her reputation prior to recovering for *any* actual injury resulting from the defamation. This interpretation incorporates the Court's concern for accommodating the state interest with the important constitutional interest in promoting the vigorous exercise of first amendment freedoms. Moreover, it prevents a return to the doctrine of presumed damages which invites gratuitous jury awards and unwarranted jury vindictiveness against unpopular opinion.¹⁰⁷

The majority opinion in *Firestone* permits a shift in emphasis in most private defamation actions from a focus on the damage to one's reputation to a focus solely on the plaintiff's internal subjective emotional injuries. This, in turn, increases the probability that the danger of uncontrolled jury discretion will not be reduced, as the *Gertz* prohibition against presumed damages intended.¹⁰⁸ Juries will now be able to speculate as to the plaintiff's loss of reputation and may include that presumption in their assessment of damages for "proven" emotional injuries.

Consequently, it would appear that a prospective publisher of a report of a judicial proceeding concerning a private person may be inclined to censor these

104. *Gertz* requires that compensation awarded to private persons for a defamatory falsehood be supported by competent evidence concerning the injury if the plaintiff does not prove actual malice. 418 U.S. at 350. The Court determined that the competent evidence requirement was satisfied by the testimony of Mrs. Firestone's minister, attorney, friends, and neighbors who "testified to the extent of [Mrs. Firestone's] anxiety and concern over Time's inaccurately reporting that she had been found guilty of adultery. . . [and Mrs. Firestone's own testimony whereby she elaborated] her fears that her young son would be adversely affected by this falsehood when he grew older." 424 U.S. at 460-461.

105. 418 U.S. at 348-349 (emphasis added).

106. 424 U.S. at 475 n.3 (Brennan, J., dissenting). Defendant's burden should consist of establishing a prima facie case of damage: proof that the defendant communicated the defamatory falsehood to a third person who understood its application to the plaintiff. See *Restatement of Torts* sec. 613, comment d at 301 (1938).

107. 418 U.S. at 349.

108. *Supra* note 107 at 349-350.

reports in order to avoid the possibility of an excessive jury award.¹⁰⁹ More importantly, by not being required to prove damage to reputation, a private person might be encouraged to sue a publisher for libel in a marginal or frivolous case, hoping all along for a settlement with the publisher who certainly wants to avoid large litigation expenses.¹¹⁰ Furthermore, a publisher may find it rather difficult to utilize summary judgment procedures against such a plaintiff as the publisher would be forced to prove that no issue of genuine material fact exists, *i.e.*, that the plaintiff did not suffer an emotional injury. Moreover, since people's emotional makeups radically differ, and injury thereto is difficult to discount without the opportunity to observe witnesses' testimony, and since most states will adopt a negligence fault standard and thereby involve juries in private defamation cases, courts will be reluctant to grant summary judgment in these cases.¹¹¹

Therefore, *Firestone* appears to have subverted the protection of the *Gertz* actual injury requirement in defamation cases involving private persons unable to prove actual malice. By permitting Florida to allow Mrs. Firestone to forego proving actual injury to her reputation from the *Time* article, the Court has encouraged state courts to permit a defamation plaintiff to only seek damages for emotional injuries without first having to base his claim for damages on a proven actual injury to his reputation. This practice, in turn, reintroduces the very evil of presumed damages that the actual injury requirement was designed to prevent, and needlessly encourages the press to censor itself.

3. The Protection to be Given a Defamatory Report of a Judicial Proceeding

Prior to the constitutional incorporation of the actual malice standard into the law of defamation in *New York Times*, publishers of defamatory reports of judicial proceedings could be held liable if the report was inaccurate, or accurate but published with malice.¹¹² Thereafter, the actual malice requirement of *New York Times* meant that public officials and public figures are no longer entitled to recover against publishers by merely proving that the defamatory report was inaccurate. Moreover, with regard to accurate reports, public persons are no longer entitled to recover by proving malice, since a determination that a report is accurate precludes, by definition, proving that the publisher knew his report was false (inaccurate) or had entertained serious doubt as to the truth

109. See Anderson, *Libel and Press Self-Censorship*, 53 Texas L. Rev. 422, 433 (1975) [hereinafter cited as Anderson].

110. 424 U.S. at 475 n.3 (Brennan, J., dissenting).

111. See Anderson, *supra* note 109, at 468-469. Professor Anderson suggests that if *Gertz* is interpreted as precluding any recovery absent proof of actual injury to reputation, summary judgment will be readily available to defendants to preclude costly litigation. Moreover, he notes that such a requirement will prevent a plaintiff from precluding summary judgment by simply filing his own affidavit claiming that he suffered emotional injury. *Id.* at 469 n.218.

112. *Restatement of Torts* sec. 611 (1938); Newell, *Slander and Libel* sec. 466 (4th ed. 1924).

(accuracy) of the report.

Thus, it is apparent that the lone fact of accuracy, in an accurate report of a judicial proceeding concerning a public person, completely protects the publisher against liability for any defamatory statement reported therein.¹¹³ Moreover, since the Court in *Firestone* noted that a report of a judicial proceeding concerning a public person is accurate if the report is at least a rational interpretation of that proceeding, a publisher's burden of proving accuracy does not appear to be difficult.¹¹⁴ This is best illustrated by the earlier case of *Time, Inc. v. Pape*¹¹⁵ in which a Chicago police officer brought a libel action against *Time* for its article about *Justice*, the fifth volume of the second report of the U.S. Commission on Civil Rights. Officer Pape asserted that *Time*, in discussing the report's commentary on police brutality (which had included allegations in a complaint filed by a private citizen against the plaintiff for police brutality), had quoted from a summary of the complaint, "without indicating in any way that the charges were [the private citizen's] rather than independent findings of the Commission."¹¹⁶ The Court reasoned that *Time* had adopted "one of a number of possible rational interpretations of a document that bristled with ambiguities" and decided, as a matter of law, that these facts did not establish actual malice.¹¹⁷ The plaintiff had claimed that *Time*'s conscious omission of the word "alleged" in its article conveyed the libelous impression that the Commission had independently charged him with police brutality. The Court, on the one hand, conceded that both the context of the Commission's report and the "external evidence of the Report's overall meaning" showed that the "charge" was an allegation rather than a Commission finding.¹¹⁸ On the other hand, the Court also determined that *Time* had independently reported that the Commission "took the charges [made against Officer Pape] to be true."¹¹⁹ Yet, the Court still declared the *Time* article to be a rational interpretation of the Commission's report.

Thus, with regard to public persons, it seems the Court's statement in *Firestone* that "demonstration that an article was true would seem to preclude finding the publisher at fault . . ." is true.¹²⁰

It is equally clear that the Court recognizes a conditional privilege for the press to make accurate but defamatory reports of judicial proceedings con-

113. This is confirmed in *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975) [hereinafter cited as *Cox*], where the Court required that truth, or, in the case of a report of a judicial proceeding, accuracy, be recognized as a complete defense to a defamation action brought by a public person:

It is true that in defamation actions, where the protected interest is personal reputation, the prevailing view is that truth is a defense; and the message of *New York Times Co. v. Sullivan* . . . , and like cases is that the defense of truth is constitutionally required where the subject of the publication is a public official or public figure. What is more, the defamed public official or public figure must prove not only that the publication is false but that it was knowingly so or was circulated with reckless disregard for its truth or falsity. *Id.* at 489-490.

114. 424 U.S. at 459 n.4.

115. 401 U.S. 279 (1971).

116. *Supra* note 115 at 282.

117. *Supra* note 115 at 290.

118. *Supra* note 117.

119. *Supra* note 115 at 289.

120. 424 U.S. at 458.

cerning private persons and to thereby be exempt from state-imposed liability.¹²¹ However, it is clear from *Firestone* that the Court, in attempting to balance the First Amendment with the state's interest in compensating private persons for reputation injury, recognizes that a private plaintiff who becomes involved in a judicial proceeding can be expected to attract public attention and perhaps have personally defamatory matters reported to the public. Therefore, in order to balance the competing interests involved, *Firestone* requires that for a report of a judicial proceeding concerning a private person to be accurate, it must at least be a conceivable interpretation of the proceeding that is factually correct.¹²²

In arguing that its report of Mrs. Firestone's divorce proceeding was constitutionally protected, *Time* argued that its report was a rational interpretation of an ambiguous divorce decree.¹²³ The Court rejected this argument by announcing that the breathing space afforded publishers to make a rational interpretation of an ambiguous document is confined to reports concerning persons subject to the actual malice standard.¹²⁴ *Firestone* accordingly denies to a publisher who reports about a judicial proceeding concerning a private person any leeway to offer a defamatory interpretation of these proceedings (short of that provided by the applicable state fault standard) absent proof that the report is factually correct.

Thus, a publisher of a report of a judicial proceeding concerning a private person can only claim his report is accurate, and thereby protected (by *Firestone*) against civil liability, *if the facts he reports to the public are correct*. For example, the Court noted that *Time* had chosen to interpret Mrs. Firestone's ambiguous divorce decree as having been granted for cruelty and adultery, when in fact, "the divorce court never made any such finding. Its judgment provided that Russell Firestone's 'counterclaim for divorce be and the same is hereby granted,' but did not specify that the basis for the judgment was either of the two grounds alleged in the counterclaim."¹²⁵ Therefore, since Mrs. Firestone was deemed a private figure, *Time* was not permitted any constitutional leeway in offering its particular interpretation of the divorce decree, as the Court determined that *Time*'s report was not factually correct.

Yet, with regard to an accurate but defamatory report of a judicial proceeding concerning a private person, the Court had announced in *Cox Broadcasting v. Cohn* that:

[T]he Court has nevertheless carefully left open the question whether the First and Fourteenth Amendments require that truth be recognized as a

121. See *Cox*, *supra* note 113 at 496 where the Court notes:

We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man. Such a rule would make it very difficult for the media to inform citizens about the public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public. At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records. . . Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it.

122. 424 U.S. at 459.

123. *Supra* note 122 at 457-459, 459 n.4. See note 2 *supra*.

124. *Supra* note 122 at 459 n.4.

125. *Supra* note 122 at 458.

defense in a defamation action brought by a private person as distinguished from a public official or public figure. *Garrison*. . . recognized that "different interests may be involved where purely private libels, totally unrelated to public affairs, are concerned; therefore, nothing we say today is to be taken as intimating any views as to the impact of the constitutional guarantees in the discrete area of purely private libels."¹²⁶

Cox thereby confirms that a state is not required by the constitutional guarantees of free speech and free press to recognize a defense of truth (accuracy) where the plaintiff is a private person.

Only 19 states recognize truth as a complete defense to a defamation action. In the remaining 31 jurisdictions, truth does not completely exonerate the defaming party from any liability.¹²⁷ Therefore, a publisher will not be precluded from liability through a claim of accuracy in a state which allows truth only to be used in mitigation of damages (in a defamation action) and which has a fault standard of less than actual malice. Similarly, in a state which recognizes truth as a defense (to a defamation action) and which also has a fault standard of less than actual malice, a jury could find a publisher liable despite the accuracy of his report, provided the plaintiff could prove that the publication took place in violation of the individual state's fault standard. In a state which recognizes truth as a complete defense, however, or which has adopted actual malice as its fault standard for private defamation, proof of the accuracy of the report would *per se* preclude holding the publisher liable. Therefore, after *Firestone*, it appears that accurate reports of judicial proceedings concerning private persons may or may not be privileged depending on the individual state's fault standard and the differences statutorily applied by individual states to the use of truth as a defense against a defamation action.

To summarize, *Firestone* has established that the test for determining whether a report of a judicial proceeding is accurate differs according to the status of the plaintiff. Specifically, a report concerning a public official or a public figure, who are subject to the actual malice fault standard, must at least be a rational interpretation of the proceeding, whereas a report concerning a private person, who can be subject to a fault standard of less than actual malice, must be a factually correct conceivable interpretation of the proceeding. Furthermore, the Court recognizes that the designation of a report concerning a person subject to the actual malice standard as accurate is, by definition, a complete defense to a defamation action.

126. 420 U.S. 469, 490-491 (1975). However, Justice Powell argued that *Gertz* had mandated that truth be recognized as a complete defense to a private defamation suit because of its requirement that a state fault standard "be related to the defendant's failure to avoid publication of 'defamatory falsehood' . . . if the statements are true, the standard contemplated by *Gertz* cannot be satisfied." *Id.* at 499 (Powell, J., concurring).

127. Thomas, *The Law of Libel and Slander and Related Action* 39-43 (3rd.ed. 1973). Sixteen of these states recognize that proving the truth of defamatory statements only serves to mitigate damages. The remaining 15 adopt a qualified defense which may require the defendant to prove that the true statement was a matter of public interest or proper for public information or that it was published for the public good and not for spiteful or personal interests. *But see Restatement (Second) of Torts* sec. 582, comment a at 37 (Tent. Draft No. 21, 1975) (doubting the validity of such statutes because they infringe on the freedom of speech and press).

Firestone is, however, unclear as to whether accuracy in a report concerning a private person who is subject to a fault standard of less than actual malice protects the publisher from liability for libel. The Court has declared that a state is not constitutionally required to recognize a defense of truth in defamation cases where the plaintiff is a private person. This seems to allow any of the 31 states not recognizing truth as a complete defense in a defamation action to hold a publisher liable for an accurate yet defamatory report of a judicial proceeding. In *Firestone*, the Court said that "[T]he public interest in accurate reports of judicial proceedings is *substantially* protected by *Cox*. . . [and] demonstration that an article [is] true would seem to preclude finding the publisher at fault, see *Cox*. . . ." ¹²⁸ This statement may mean that the Court would recognize holding a publisher liable for an accurate report of a judicial proceeding concerning a private person as a legitimate exercise of the state's interest in compensating private persons for injury to reputation. However, in order to balance the competing interest of the First Amendment, it would appear that the Court in such cases would require that the content of the accurate report "warn a reasonably prudent editor or broadcaster of its defamatory potential." ¹²⁹

Finally, in regard to inaccurate and defamatory reports of judicial proceedings, *Firestone* announced that "*Gertz* provides an adequate safeguard for the constitutionally protected interests of the press and affords it a tolerable margin for error by requiring some type of fault." ¹³⁰ Thus, by itself, the inaccuracy of a report of a judicial proceeding does not subject the publisher to liability for defamation injuries caused by the publication of the report. However, by reintroducing presumed damages into private defamation, ¹³¹ the Court has encouraged publishers subject to a fault standard of less than actual malice to curtail the reporting of judicial proceedings concerning private persons.

AFTER FIRESTONE: A NEED FOR LEGISLATION

Since *New York Times*, it has been clear that the Court has been striving to develop a national standard to determine when the media should be held liable for publishing a defamatory falsehood. *Firestone* is the Court's most recent effort to eliminate the uncertainties that have arisen from this 12-year effort. As such, it appears that the decision has provided some clarification.

First, the constitutional protection given defamatory reports of judicial proceedings by the media is neither an absolute privilege to report about activities in the courts nor a right that is lost only by proof that the report was published with actual malice. Rather, the protection afforded defamatory reports of judicial proceedings, and the margin of permissible inaccuracy allowed to a publisher, is now dependent on the status of the person defamed.

Second, the Court has chosen to narrow the criteria for determining who is a public figure from the rather amorphous language discussed in *Gertz* into three mutually exclusive standards.

128. 424 U.S. at 457-458 (emphasis added).

129. 418 U.S. at 348.

130. 424 U.S. at 457.

131. See text accompanying notes 108-111 *supra*.

Third, in a private defamation case, a state may not award damages without specifically having applied its fault standard to the case.

In addition to the foregoing clarifications, *Firestone* has also created some confusion. First, a private plaintiff may now sue in defamation without pleading injury to reputation. Heretofore, damage to reputation has been the essence of a defamation case.

Second, *Firestone* permits defamation plaintiffs to seek damages based only on emotional injuries, and reinstates the power of juries to presume damages and to grant gratuitous money awards to plaintiffs. *Gertz* had clearly prohibited awards of presumed damages to a defamed private plaintiff absent proof of actual malice, and acknowledged that the actual injury requirement was expressly designed to prevent such jury action.

It seems apparent that most of the impetus for the continuing refinement and standardization of defamation law will have to come from the judicial process. In promulgating a national standard for defamation, the Court, as one commentator notes, has adopted a federal rule having the same force and effect as if it had been adopted by Congress.¹³² It seems doubtful that Congress will attempt to devise such a standard, as Congressional legislation aimed at affecting the substantive development of this standard runs the risk of being held unconstitutional for restraining first amendment freedoms.

There is an important public policy need for legislation to provide the plaintiff with alternative, non-money remedies, designed to vindicate the plaintiff's reputation without impairing first amendment freedoms and protections.

State legislatures, therefore, have an opportunity, within the limitations prescribed by the Supreme Court, to establish alternative remedies for defamation, in order to provide a faster and easier means for a defamed person to restore his reputation.

An award of money damages to a plaintiff in a defamation case, based on injury to his reputation and feelings (or, after *Firestone*, for injury to his feelings alone) is often unrelated to reason or logic; clearly, it can be a windfall for the plaintiff.

Moreover, if the plaintiff fails to prove either actual malice or the particular state's fault standard, he will not be entitled to damages; thus, the plaintiff's reputation may be all the more damaged, as it will appear that the defamation was true.

It therefore appears that the sole utilization of the damage remedy as a vindication for a defamatory falsehood by the media seems of questionable value.¹³³

The American Law Institute has suggested *inter alia* that these goals can be achieved by the use of a declaratory relief remedy and the awarding of attorney fees in defamation actions.¹³⁴ Legislation permitting a plaintiff in a defamation case to seek a declaratory judgment that the statement published is untrue would

132. Lawhorne, *Defamation and Public Officials: The Evolving Law of Libel* 282 (1971).

133. See *Restatement (Second) of Torts* sec. 621, Special Notes on Remedies for Defamation Other Than Damages at 81-82 (Tent. Draft No. 21, 1975).

134. *Supra* note 133 at 82-85.

allow the plaintiff to reestablish his reputation but would provide for no monetary award other than attorney fees. The statutory provision authorizing the awarding of the plaintiff's attorney fees in such actions would encourage a plaintiff to defend his reputation through the means of a suit for a declaratory judgment, and would provide an equitable alternative to the present remedy of exclusively seeking money damages.

Thus, state legislation providing alternative remedies for defamation, in addition to the present practice of awarding money damages, will provide the essential augmentation that the ongoing judicial transformation of defamation law needs.