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Adequate Breathing Space in a Poisonous Atmosphere: Balancing Freedom and Responsibility in the Open Society

David M. Hunsaker*

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INTRODUCTION

News and truth, suggested journalist Walter Lippmann more than fifty years ago, are not the same thing and should be clearly distinguished. The function of news is to signal an event, while truth brings to light the hidden facts and makes a picture of reality on which men can act; only where social conditions take recognizable and measureable shape do news and truth coincide.¹ However valid

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1. W. LIPPMANN, PUBLIC OPINION 226 (Free Press ed. 1965) [hereinafter cited as LIPPMAN].

this hypothesis may be, the press, as well as the public, usually believes the information disseminated by the news media to be the truth.² Nevertheless, the credibility of the media is quickly questioned when a report proves to be false, and the general reader, even though misled by a false report, has no legal remedy.³ Only the object of the report can bring suit—an action for defamation. Specifically, the action can be maintained for libel if the report was written,⁴ or slander if the statement was oral.⁵ In the last decade, the Supreme Court has substantially changed the common law of libel and slander in an effort to balance the rights of the press with an individual's interest in protecting his reputation and privacy. Perceiving a "national commitment" to the "robust and wide-open" debate of public issues, the Court has favored the communications media in constructing this balance.⁶ Effective deliberation of the issues requires "breathing space."⁷ But the degree of constitutional protection which should be afforded defamatory falsehoods has yet to be resolved. This article will: (1) examine the current balance, hesitantly arrived at by an "evanescent majority" of the Supreme Court,⁸ between the competing values of defamation and the first amendment; (2) explore three issues of workability under the balance which relate particularly to first amendment problems; and (3) propose a theory of first amendment-defamation interrelationships which has not yet been explored, and which suggests that further federal limitation of the state's power to protect its citizens from defamatory falsehoods is likely to counteract the first amendment values the Supreme Court has tried to promote.

2. "Indeed, newsmen now almost invariably depict themselves not merely as reporters of the fragments of information that come their way, but as active pursuers of the truth In the post-Watergate era, moreover, even critics of the press attribute to it powers of discovery that go well beyond reporting new developments." Epstein, *The American Press: Some Truths About Truths*, reprinted in *ETHICS AND THE PRESS: READINGS IN MASS MEDIA MORALITY* 60-61 (J. Merrill & R. Barney eds. 1975) [hereinafter cited as *ETHICS AND THE PRESS*].

3. LIPPMAN, *supra* note 1, at 209.

4. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 111, at 737 (4th ed. 1971) [hereinafter cited as *PROSSER*].

5. *Id.*

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

7. *Id.* at 272. See also *NAACP v. Button*, 371 U.S. 415, 433 (1963).

8. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 380 (1974) (White, J., dissenting). See also Anderson, *Libel and Press Self-Censorship*, 53 *TEX. L. REV.* 422, 459 n.183 (1975).

I. DEFAMATION AND THE FIRST AMENDMENT

A. *Development of the Law of Defamation*

The law of defamation has evolved to serve several distinct purposes. The early Anglo-Saxon kings punished slander in local secular courts not only to remedy the dishonor and personal insult it caused, but also to preserve the peace by eliminating personal vendettas.⁹ After the Norman invasion and the separation of ecclesiastical and secular jurisdictions, and until the late sixteenth century, slander became the province of the ecclesiastical courts.¹⁰ Since the church courts relied on public knowledge of crimes and public accusations to maintain order, the perjurer and false accuser posed a threat to the fair and effective administration of ecclesiastical justice.¹¹ Thus, slander was readily punished and the defamation suit soon became a popular vehicle for vindication and self-defense, following most secular trials which ended in acquittal.¹²

During the reign of Elizabeth I, the common law lawyers, aware of the popularity of the slander action in the ecclesiastical courts, began to pursue defamation actions.¹³ By 1650, the popularity of the

9. Jones, "Actions for Slander"—Defamation in English Law, Language, and History, 57 Q. J. OF SPEECH 274-75 (1971) [hereinafter cited as Jones]. "A society not far removed from self-help and the blood-feud, which it sought to replace with the rule of law and the commutation of felonies, did not tolerate mischief that was often the cause of bitter and bloody vendettas." *Id.* See also 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 537 (2d. ed. 1899) [hereinafter cited as 2 F. POLLOCK & F. MAITLAND].

10. See the writ *Circumspecte agatis* and the statute *Articuli cleri* in 1 STATUTES OF THE REALM 101, 171 (1810). Jones notes that "[t]he only positive interest of the crown in this area of the law was expressed in 1275 in the statute *de scandalum magnatum*, which was reenacted in the fourteenth and sixteenth centuries, and which threatened punishment of persons circulating seditious stories that provoked discord between the king and the notables." Jones, *supra* note 9, at 275.

11. Jones, *supra* note 9, at 275.

12. See, e.g., B. WOODCOCK, MEDIEVAL ECCLESIASTICAL COURTS IN THE DIOCESE OF CANTERBURY 88-89 (1952); 2 F. POLLOCK & F. MAITLAND, *supra* note 9, at 538. Both the church and secular courts, which shared jurisdiction over defamation without apparent distinction, exacted penalties from the defendant. Jones, *supra* note 9, at 278. Besides *penance*, the usual ecclesiastical form of punishment, the church courts exacted amercement, which could take the form of damages for the specific injury (*detrimentum*) and compensation for the insult (*dedignacionem*). The penalties imposed in the local secular courts also distinguished between dishonor or public shame and specific temporal loss. *Id.* See also F. MAITLAND & G. BAILDON, THE COURT BARON 27, 40, 48 (1891).

13. The first treatise on the common law of defamation was John March's ACTIONS FOR SLAUNDER, published in 1647, which distinguished between defamatory words which were

action in common law courts was so great that judges imposed rules of interpretation and limitations, often quite arbitrarily, in an attempt to lighten the dockets.¹⁴

Libel arose within a different institutional framework. The eruption of religious and constitutional controversy in the sixteenth and seventeenth centuries increased official concern over sedition, political dissent, and particularly the influential role of the press in promoting these ideas. To suppress the flow of harmful information, the charge of libel was more easily proven and covered a broader range of falsehoods than common law slander.¹⁵ Words never considered to be defamatory when spoken were libelous and criminal when published. A libel defendant even lacked the safeguard against an unjust verdict assured by common law slander: truth, an absolute defense in slander, was not admissible in libel. Furthermore, malicious intent was assumed in libel rather than an issue to be proved as in slander. Until 1800, the only issue for the jury in libel was the fact of publication.¹⁶

Thus, we owe our present confusing and often unjust rules of defamation to a mixture of historical forces and political objectives evolving through the middle ages to the eighteenth century.

B. *Purposes Served by the Law of Defamation*

The function of the law of defamation like the function of all tort law is primarily to compensate for injury. Unlike torts that seek to protect a person's physical condition, defamation compensates injury to the plaintiff's relational interests.¹⁷ These interests form the basis of human society and its institutions and are, therefore, highly valued and merit state protection.¹⁸

actionable per se, and those which required proof of special damages. Jones, *supra* note 9, at 279.

14. Plucknett cites the epitome of scholastic (and in this case, literal) hairsplitting. The statement, "Sir Thomas Holt struck his cook on the head with a cleaver, and cleaved his head; the one part lay on one shoulder and the other part on the other" was held not to be actionable because the slanderer had never accused the plaintiff of actually *killing* his cook. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 495 (5th ed. 1956).

15. The law of libel did not begin to coalesce with the common law of defamation until well into the 18th century, and integration was never complete. See PROSSER, *supra* note 4, § 112 at 751-52.

16. Jones, *supra* note 9, at 282. Jones notes that the royal courts, which only begrudgingly punished slander, rushed to chastise the courts' critics to preserve its untarnished image. *Id.*

17. See Green, *Relational Interests*, 31 ILL. L. REV. 35 (1936).

18. By way of analogy, the late Wolfgang Friedman once observed that the extending or

Since the courts are protecting an individual's relationships with others, the public nature of the tort—publication of the defamatory statement—has always been an element of the plaintiff's case. Similarly, the action is not viable without proving or presuming injury to the plaintiff's reputation.¹⁹

By protecting relational interests, the law of defamation has the collateral effect of encouraging citizens to seek public office and become active in civic and community life.²⁰ For example, a prospective candidate knows that he has a legal remedy to defamatory campaign muckraking. Thus, extreme fortitude in the face of falsehoods and malicious rumors is not the only, nor the most important, qualification for public office or community leadership.²¹

Vindicating the victim of a "published" falsehood has been frequently cited as an objective of defamation law equal in importance to compensation.²² When a statement is determined to be defama-

withholding of international "relations" to a new state such as Biafra, by other nations, could well determine the survival of that state as a sovereign entity. Freedom of association is, of course, a form of communication, and a right firmly protected by the first amendment. *NAACP v. Alabama*, 357 U.S. 449 (1958). But no court has ever articulated the first amendment interest in free association as a basis for allowing recovery for its restriction due to defamatory falsehoods. "State action" is not directly involved in the restriction, to be sure, but neither is it involved in private acts of discrimination which Congress has seen fit to regulate with the approval of the Supreme Court. See *Hearings on S. 1732 Before the Senate Comm. on Commerce*, 88th Cong., 1st sess. pts. 1 & 2; 42 U.S.C. §§ 2000a-2000a-6 (1970).

19. PROSSER, *supra* note 4, § 111 at 737, § 112 at 761. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), the Court, in limiting recovery for negligent defamations to "actual injury," stated that customary types of actual harm included impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. In *Time, Inc., v. Firestone*, 424 U.S. 448 (1976), the Court suggested that given permissive state law, humiliation and mental anguish may be recovered in the absence of any proof or assertion of harm to reputation. For criticism of this result, see Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1437-39 (1975) [hereinafter cited as Eaton].

20. See *Post Publishing Co. v. Hallam*, 59 F. 530 (6th Cir. 1893). As Chief Justice Burger noted in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974):

[T]he advocate is not to be invidiously identified with his client. The important public policy which underlies this tradition—the right to counsel—would be gravely jeopardized if every lawyer who takes an "unpopular" case, civil or criminal, would automatically become fair game for irresponsible reporters and editors who might, for example, describe the lawyer as a "mob mouthpiece" for representing a client with a serious prior criminal record, or as an "ambulance chaser" for representing a claimant in a personal injury action.

Id. at 355 (Burger, C.J., dissenting).

21. *But cf. Craig v. Harney*, 331 U.S. 367 (1947) (Court stressed that the privilege of fair comment will protect newspapers in most cases).

22. See RESTATEMENT OF TORTS § 569, Comment b (1938); *Rosenblatt v. Baer*, 383 U.S.

tory on its face, and thus actionable per se, the plaintiff has been entitled to *nominal damages* even if the jury concludes that no harm to his reputation occurred.²³ The costs of a lawsuit, however, are likely to deter one whose main objective is to clarify the record, rather than to seek compensation for his damaged reputation, unless there is a prospect of collecting punitive damages in addition to nominal damages.²⁴ However, the Supreme Court's decision in *Gertz v. Robert Welch, Inc.*,²⁵ has effectively prevented individuals defamed by the media from vindicating themselves. The *Gertz* decision abolished strict liability and presumed damages for per se defamations by the media, and limited the recovery of punitive damages to instances when the plaintiff can prove knowing or reckless publication of a falsehood.²⁶

To the extent defamation law protects reputations, it also promotes society's interest in privacy. At least one Supreme Court Justice has suggested that the law of libel protects the individual's personality from unwarranted intrusion.²⁷ A person's reputation can be damaged by true facts; absent a legitimate public concern, therefore, the publication of true facts about an ordinary citizen's private life should be actionable whether or not the plaintiff can prove actual damages to reputation.²⁸ The desire here is to shield true, but highly personal, facts from the community at large. This interest, however, is unprotected by libel law, which recognizes truth as an

75, 93 (1966) (Stewart, J., concurring); Note, *Vindication of the Reputation of a Public Official*, 80 HARV. L. REV. 1730 (1967).

23. RESTATEMENT OF TORTS § 569, Comment c (1938).

24. See, e.g., *Reynolds v. Pegler*, 223 F.2d 429 (2d Cir.), cert. denied, 350 U.S. 846 (1955); *Goldwater v. Ginzburg*, 414 F.2d 324 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970).

25. 418 U.S. 323 (1974).

26. *Id.* at 347-50. See notes 103-23 and accompanying text *infra*.

27. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 48 (1971) (Brennan, J.). The plurality opinion was concurred in by the Chief Justice and Justice Blackmun. In *Rosenblatt v. Baer*, 383 U.S. 75 (1966), Justice Stewart observed that "[t]he protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system." *Id.* at 92 (Stewart, J., concurring).

28. See *Warren & Brandeis, The Right to Privacy*, 4 HARV. L. REV. 193 (1890). The most celebrated case was *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (1931), where a motion picture revealed the past history and present identity of a reformed prostitute who had been a defendant in a murder trial seven years previously. There is some speculation whether that case or any "public disclosure of private facts" case would be decided in favor of the plaintiff after *Time, Inc. v. Hill*, 385 U.S. 374 (1967). There is no longer any doubt that a plaintiff has no right to prevent the publication of matters of public record. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

absolute defense, and is protected, if at all, by an action for invasion of privacy.²⁹

Finally, an action for defamation at least partially ensures that only truthful information is disseminated.³⁰ Since first amendment goals are not furthered by false information,³¹ restricting the flow of such information is permissible and beneficial. If undeterred, falsehood may inhibit debate³² and the democratic goals discussion is designed to serve.³³ "Surely, if the 1950's taught us anything," wrote Justice Stewart, "they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society."³⁴ Liability for defamatory falsehoods encourages a publisher³⁵ to investigate and ascertain the truth of potentially harmful statements before disseminating them.³⁶ To perform its decision-making functions in a democracy, the public must not only have accurate and complete information, it must also have faith in the credibility of its informa-

29. Cf. *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971). See also Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968); Kalven, *The Reasonable Man and the First Amendment: Hill, Butts and Walker*, 1967 SUP. CT. REV. 267.

30. See Eaton, *supra* note 19, at 1358.

31. "Neither the intentional lie nor the careless error materially advance society's interest in 'uninhibited, robust and wide-open' debate on public issues." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

32. "It is not at all inconceivable that virtually unrestrained defamatory remarks about private citizens will discourage them from speaking out and concerning themselves with social problems." *Id.* at 400 (White, J., dissenting).

33. See Riesman, *Democracy and Defamation: Fair Game and Fair Comment I*, 42 COLUM. L. REV. 1085, 1088-90 (1942).

34. *Rosenblatt v. Baer*, 383 U.S. 75, 94 (1966) (Stewart, J., concurring).

As Eric Sevareid pointed out some years ago, when journalists confined their coverage of the late Senator Joseph McCarthy simply to what the senator said and did, far from producing objective journalism they were producing "the big lie." For the truth or the meaning of McCarthy could never be discerned from any particular statement he made or act he performed. It could only be discerned by relating the particular action to previous, possibly contradictory, actions; to the web of current and contemporary history in which the actions took place; and to known realities which the senator had ignored or misstated but which were relevant if readers were to be able to understand the senator and to form a judgment about his responsibility.

McDonald, *Is Objectivity Possible?*, 4 THE CENTER MAGAZINE 29 (Sept. 1971), reprinted in *ETHICS AND THE PRESS*, *supra* note 2, at 81. [hereinafter cited as McDonald]. See notes 155-92 and accompanying text *infra*.

35. "Publisher" is used here in the broad sense of one who makes information publicly known, regardless of the medium.

36. Underlying this policy is also the traditional presumption of innocence and a corresponding burden on the accuser to prove the truth of the charges against the accused.

tion sources, if it is expected to use them.³⁷ Some form of accountability is essential, therefore, to justify and maintain that faith.

Thus, the law of defamation serves an impressive array of vital social interests. Its objectives center around compensating injuries to relations that are fundamental to, and definitional of, human society. In addition, defamation law directly or indirectly serves public tranquility, self-defense, privacy, and effective public and community leadership; it also deters the spread of false information and maintains source credibility. Surprisingly, despite the quirks, arbitrary distinctions, and unjust applications of the law of defamation, it has served these interests fairly well. Nonetheless, defamation law needed revamping, and by 1964 the change was long overdue.

C. *The Application of First Amendment Theory to the Law of Defamation*

In 1964, the Supreme Court first indicated what impact the constitutional right to free speech had on the law of defamation. The Court, in *New York Times v. Sullivan*,³⁸ constitutionalized the common law privileges of fair comment and honest mistake of fact,³⁹ and ruled that traditional state libel law must give way to the first amendment:

The constitutional guarantees require, we think, 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.⁴⁰

In the Court's view, the "central meaning" of the first amendment mandated this standard.⁴¹ The framers, argued the Court, were primarily concerned with avoiding a tradition of seditious libel which had severely restrained freedom of the press in England. The

37. See, e.g., Isaacs, *The New Credibility Gap—Readers vs. the Press*, AM. SOC'Y OF NEWSPAPER EDITORS BULL. 1 (Feb. 1969).

38. 376 U.S. 254 (1964).

39. *Id.* at 279-80.

40. *Id.* With the exception of the Court's redefinition of "actual malice," the conditional privilege of fair comment and honest misstatement of fact were both recognized in some jurisdictions. See *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908).

41. 376 U.S. at 273. See Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191 [hereinafter cited as Kalven].

Court concluded that the American Sedition Act of 1798 had been judged invalid under the first amendment by the "court of history" because it imposed an intolerable restraint upon criticism of public officials.⁴² As with criminal libels of the government, libels of public officials, if readily punished, could be used to vindicate government policy and silence criticism.⁴³ As demonstrated by this country's experience with the Alien and Sedition Acts from 1798 to 1801, the defense of truth,⁴⁴ or even substantial truth, was no guarantee that a defendant engaging in honest criticism would prevail. The *New York Times* Court reasoned that what a state could not constitutionally bring about by means of a criminal statute was likewise beyond the reach of its civil law of libel.⁴⁵ It feared that even if a newspaper could absorb the losses from a series of adverse libel judgments, a chilling effect would result, producing self-censorship. While the Court did not state that the first amendment protected dissemination of false facts, it suggested that erroneous statements are inevitable if there is to be uninhibited, wide-open, and robust debate on public issues.⁴⁶ To avoid press self-censorship, the line must be drawn so as to provide adequate "breathing space" for the fruitful exercise of first amendment freedoms.⁴⁷

42. 376 U.S. at 275. At least one noted jurist, Joseph Story, disagreed that the Sedition Act was universally condemned:

It is notorious, that some of the ablest statesmen and jurists of America, at the time of the passage of these [Alien and Sedition] acts, and ever since, have maintained the constitutionality of these laws [T]he most serious doubts may be entertained, whether even in the present day, a majority of constitutional lawyers, or of judicial opinions, deliberately hold them to be unconstitutional.

3 J. STORY, COMMENTARIES ON THE CONSTITUTION § 1289, at 167 n.2 [hereinafter cited as STORY].

43. "No one can doubt the importance, in a free government, of a right to canvass the acts of public men, and the tendency of public measures, to censure boldly the conduct of rulers and to scrutinize closely the policy, and plans of the government. This is the great security of a free government." STORY, *supra* note 42, § 1882 at 741.

44. Unlike the 17th century English libel law, truth was a defense under the American Sedition Act.

45. 376 U.S. at 277. Justice Story also recognized that, practically speaking, a civil award of damages could restrain just as much as a public fine. But he argued that "monstrous consequences" would flow from such a doctrine. "It would prostrate all personal liberty, all private peace, all enjoyment of property, and good reputation." STORY, *supra* note 42, § 1882 at 740-41.

46. In a footnote, Justice Brennan advanced the proposition that "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error'" 376 U.S. at 279 n.19.

47. *Id.* at 271-72.

In *Garrison v. Louisiana*,⁴⁸ the Court logically extended the *Times* rule to criminal prosecutions for libel and held that truth was an absolute defense to libel. Questions remained, however, as to the extent of the constitutional privilege. Did the rule apply to non-media speakers? Did it apply to candidates for public office as well as incumbents in office? Were all public officials, no matter how menial their duties, within the rule? What were the boundaries of "official conduct"? The Court needed to answer these and many other questions in light of the "central meaning" theory of the first amendment it had announced, and several issues were addressed in subsequent cases.

The Court suggested that the term "public official" applied 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 government affairs."⁴⁹ The appearance of substantial responsibility, however, did not mean that the press could create a *Times* public official simply by giving extensive coverage to him; such an interpretation would disregard society's interest in protecting reputation.⁵⁰ In *Monitor Patriot Co. v. Roy*,⁵¹ the Court held that a candidate, whether classified as a public official or a public figure, was clearly within the *Times* rule and the first amendment theory articulated in that decision. More important, the *Roy* case further defined what constituted "relating to official conduct," stating that an allegation of criminal conduct, no matter how remote in time or place, must always be considered relevant to an official's or a candidate's fitness for public office.⁵²

48. 379 U.S. 64 (1964).

49. *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

50. That interpretation, said the Court, "would virtually disregard society's interest in protecting reputation. The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in the controversy." *Id.* at 86-87 n.13.

Eaton observes that the distinction between "the scrutiny of the position occupied and scrutiny occasioned by the particular charges in controversy has been all but ignored" by the lower courts. Eaton, *supra* note 19, at 1377.

51. 401 U.S. 265 (1971).

52. *Id.* at 277. A newspaper columnist had charged that the plaintiff had been a "small-time bootlegger" during Prohibition. In *Garrison*, the Court had previously ruled that "anything which might touch on an official's fitness for office is relevant," regardless of the effect on his private reputation. 379 U.S. 64, 77 (1964).

It was unclear whether the *New York Times* Court intended to shift the burden of proving falsity to the plaintiff. While nothing in *Times* suggested that proof of falsity was part of the plaintiff's prima facie case, that was implied in subsequent cases. For example, in *Garrison v. Louisiana*, Justice Brennan stated: "We held in *New York Times* that a public official might be allowed the civil remedy only if he establishes that the utterance was false and that

The Court had been unclear on whether the *Times* privilege benefited the news media only. The defamatory article in the *Times* case was a newspaper advertisement paid for by the defendant civil rights leaders; but, in stating that the character of the article was unimportant, the Court was responding to the issue of the first amendment protection of commercial and non-commercial speech, rather than whether the privilege applied to non-media speakers.⁵³ Despite contrary assertions by Justice Stewart,⁵⁴ nothing in the *New York Times* decision suggests separate or superior rights inherent in freedom of the press as distinguished from freedom of speech.

Given the broad purpose of encouraging uninhibited debate, which the Supreme Court attributed to the first amendment, expansion of the *Times* rule seemed inevitable.⁵⁵ The extension was anticipated by lower courts which applied the rule to plaintiffs who had projected themselves into "the arena of public policy, public controversy, and 'pressing public concern.'" ⁵⁶

In 1967, the Supreme Court extended the *Times* rule to public

it was made with knowledge of its falsity or in reckless disregard of whether it was false or true." 379 U.S. 64, 74 (1964). See also *Rosenblatt v. Baer*, 383 U.S. 75, 84 (1966); *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 8 (1970); *Arkin & Granquist, The Presumption of General Damages in the Law of Constitutional Libel*, 68 COLUM. L. REV. 1482, 1482 n.5 (1968). But see *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), where Justice White, writing for the Court, stated that "the prevailing view is that *truth is a defense*." *Id.* at 489-90. (emphasis added).

Eaton argues, however, that restatements of the *Times* ruling are loose characterizations of the privilege and do not indicate where the burden of proving falsity must lie. Eaton, *supra* note 19, at 1383-84. "In addition, there would seem to be some serious illogic in a procedure which allows a defamation defendant to establish in his defense a privilege designed to protect false speech, which has the effect of requiring the plaintiff—after the privilege is established—to prove the speech false. If the plaintiff then proves the speech false he has accomplished absolutely nothing . . ." *Id.* at 1385-86.

53. 376 U.S. 254, 265-66 (1964). The Court did say that the "paid advertisement" was an important outlet for non-media speakers who otherwise had no means of access to the public. The Court seemed to be concerned more with not inhibiting access to the press, rather than in fashioning a different rule concerning non-media speakers.

54. Stewart, *The Role and Rights of the Press*, Washington Post, Nov. 11, 1974 at A-20 [hereinafter cited as Stewart]; also reprinted as, *The Free Press: The Great American Risk*, 2 BARRISTER 17 (Spring 1975), and as *Or of the Press*, 26 HASTINGS L.J. 631 (1975). Justice Stewart's view is that the freedom of the press clause was intended to create a "fourth branch of government," the *institutionalized* press, as a check on the other three branches. See notes 103-23 and accompanying text *infra*.

55. "[T]he invitation to follow a dialectic progression from public officials to government policy to public policy to matters in the public domain . . . seems to me to be overwhelming." Kalven, *supra* note 41, at 221.

56. *Pauling v. Globe-Democrat Publishing Co.*, 362 F.2d 188, 197 (8th Cir. 1966), *cert. denied*, 388 U.S. 909 (1967).

figures in *Curtis Publishing Co. v. Butts*.⁵⁷ The *Butts* Court held that the *Times* standard, requiring proof of actual malice, applied to plaintiffs who were not public officials, but who had attracted public attention either through the positions they held in society or their activities in affairs of public concern.

Since "public figure" was not a new concept in the law of torts, various definitions of the term existed, particularly as it related to a privileged invasion of privacy.⁵⁸ At common law, a public figure was defined as a person who, by his accomplishments or by adopting a profession, gave the public a legitimate interest in his doings,⁵⁹ even though he had not sought publicity or public attention.⁶⁰

This definition encompassed a wide range of personalities. In *Curtis Publishing Co. v. Butts*,⁶¹ Justice Harlan, utilizing these traditional tort principles, found that both a college football coach and a retired army officer were public figures under the *New York Times* standard. While *Butts* was a public figure solely by his position as a coach at a major college, Walker became one by his purposeful activity in a civil rights demonstration which thrust him into the vortex of an important public controversy.⁶²

In a concurring opinion, Chief Justice Warren's definition was phrased somewhat differently: public figures are those individuals

57. 388 U.S. 130 (1967). Justice Harlan, in an opinion concurred in by Clark, Stewart, and Fortas, affirming a judgment against the *Saturday Evening Post* for falsely reporting that University of Georgia football coach Wally Butts had fixed a game between Georgia and Alabama, argued that a negligence standard was sufficient protection for the first amendment interest in debate on public issues when that debate involved public figures rather than government officials. Chief Justice Warren, while concurring in the judgment, believed that the *Times* "actual malice" standard should apply, but found it to have been met in the *Butts* case. *Id.* at 162. Justice Brennan, joined by Justice White, agreed with the Chief Justice that the *Times* rule should apply, but dissented from the judgment affirming *Butts* because they did not believe that the standards had been properly presented to the jury. *Id.* at 172. Justices Black and Douglas dissented from the judgment, arguing that the first amendment gave full press immunity "from the harassment of libel judgments." *Id.* The Court was unanimous in reversing a libel judgment against Associated Press in the companion *Walker* case. In announcing the *Walker* judgment, Justice Harlan noted that the *New York Times* standard, rather than the negligence standard, would apply on remand, since Justices Black and Douglas had joined the three *Times* adherents for that purpose. *Id.* at 146-55.

58. See Note, *Right of Privacy vs. Free Press: Suggested Resolution of Conflicting Values*, 28 IND. L.J. 179 (1958).

59. PROSSER, *supra* note 4, § 118 at 823.

60. *Id.* at 825. See also RESTATEMENT OF TORTS § 867, *Comment f*. The privilege has been extended to public disclosure of private facts and in many jurisdictions, non-defamatory "false light" invasions of privacy.

61. 388 U.S. 130 (1967).

62. *Id.* at 155.

who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large."⁶³

As the definitions differed, so did the reasons for including public figures under the *Times* rubric. The justification which most clearly compliments the *Times* first amendment theory is that advanced by Chief Justice Warren. He believed that public figures are semi-public officials because they have the power to influence the resolution of public issues: since some governmental power has shifted to the public sector in the form of committees, corporations, and associations, many who do not hold public office are in a position to influence important public issues.⁶⁴ Citizen interest in such persons is therefore legitimate and substantial, and freedom to engage in robust debate over their role in public issues and events is as important as the concern for the activities of public officials. Discussion about public figures is particularly crucial, Warren thought, because, unlike public officials, public figures are not restrained by the political process; public opinion, expressed by and through the media, "may be the only method by which society can attempt to influence their conduct."⁶⁵

The late Chief Justice would classify a public figure according to the degree of power and influence over the decision-making process the individual possessed. Certainly, one measure of this influence would be the extent to which such persons have access to the mass media, "both to influence policy and to counter criticism of their

63. *Id.* at 164 (Warren, C.J., concurring).

64. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 163-64 (1967) (Warren, C.J., concurring).

Increasingly in this country, the distinctions between governmental and private sectors are blurred. Since the depression of the 1930's and World War II there has been a rapid fusion of economic and political power, a merging of science, industry, and government, and a high degree of interaction between the intellectual, governmental, and business worlds [P]ower has also become much more organized in what we have commonly considered to be the private sector. In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.

Id.

65. *Id.* at 164.

views and activities."⁶⁶ Other Court members, however, in justifying the extension of the *New York Times* standard within the central meaning of the first amendment, viewed media access as the focal point. Justice Harlan thought the epistemological premise underlying the national commitment to wide-open debate was that "speech can rebut speech, propaganda will answer propaganda," and the result will closely approximate the "truth" and wiser governmental policies.⁶⁷ Thus, the preferred remedy for false speech is more speech.⁶⁸ One who has access to the media can expose the fallacies of the defamatory statements,⁶⁹ and has less need of the state's protection. Presumably, under this rationale, as long as an individual had access to the media to answer defamatory charges against him, he could be held to the *Times* or comparable standard⁷⁰ of proving fault on the part of the defendant, regardless of whether the plaintiff held the power to affect public issues.

The access rationale has been criticized by commentators⁷¹ as well as by members of the Court. Justice Brennan, who concurred with Chief Justice Warren's definition of public figures in *Butts*,⁷² rejected the argument as a means of distinguishing between public figures and private individuals: even the public figure who can command the attention of the media cannot vindicate his reputation after a damaging charge has been made against him. Although he can publicly deny the charge, a denial would be ineffective since it would not receive the prominent coverage of the original story.⁷³

66. *Id.*

67. *Id.* at 153.

68. The source of this "marketplace" theory is usually considered to be Thomas Jefferson, who stated in his First Inaugural: "If there be any among us who would wish to dissolve this Union, or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated, where reason is left free to combat it." Reprinted in 7 *THE WORLD'S BEST ORATIONS* 2611, 2614 (D. Brewer ed. 1899).

69. 388 U.S. at 155.

70. Justice Harlan then favored a "reasonable and prudent publisher" standard to be applied to public figures. See note 57 *supra*. His refusal to apply the more restrictive *Times* standard was based on the facts that: (1) public figures, unlike public officials, had no privilege against libel actions for *their* utterances, citing *Barr v. Matteo*, 360 U.S. 564 (1959); (2) nor do they occupy positions "which would permit a recovery by [them] to be viewed as a vindication of governmental policy"; and (3) actions against such persons cannot be analogized to prosecutions for seditious libel. 388 U.S. at 153-54.

71. See Cohen, *A New Niche for the Fault Principle: A Forthcoming Newsworthiness Privilege in Libel Cases?*, 18 U. CAL. L.A.L. REV. 371 (1970); Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267.

72. 388 U.S. at 172.

73. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 46-47 (1971) (Brennan, J.). Justice

Assumption of the risk has become a third justification for including public figures within the *Times* rule. A public figure, by voluntarily encountering public controversy,⁷⁴ has arguably assumed the risk of being defamed in the course of public debate.⁷⁵ While assumption of risk may be a useful doctrine for some purposes in tort law,⁷⁶ Justice Brennan considered its application to defamation to be at best a legal fiction.⁷⁷ More important, the assumption of risk rationale seems unrelated to the first amendment objectives of promoting free debate.⁷⁸

The definitions of public figures and justifications for including them within the *Times* rule were blended in Justice Powell's majority opinion in *Gertz v. Robert Welch, Inc.*⁷⁹ where the Court refused to extend the *New York Times* standard to individuals who were

Harlan, however, thought it "quite clear that the public person has a greater likelihood of securing access to channels of communication sufficient to rebut falsehoods concerning him than do private individuals in this country who do not toil in the public spotlight." *Id.* at 70 (Harlan, J., dissenting).

At the same time, Justice Brennan considered that right of reply and retraction statutes would be the appropriate remedy for a private individual who had been defamed in the course of discussion of public issues. *Id.* at 47 & n.15.

74. Cf. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967) (Harlan, J.).

75. According to the *Gertz* formulation, public figures "invite attention and comment," and "the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." 418 U.S. 323, 345 (1974). Eaton considers this "the underlying theory of the Court's grant of ample 'breathing space' to the media's coverage of public figures and its insistence on traditional tort accountability for reasonably foreseeable injury to private individuals." Eaton, *supra* note 19, at 1420.

76. See PROSSER, *supra* note 4, § 68. The doctrine has been criticized and its abolition called for. See, e.g., 2 F. HARPER & F. JAMES, *LAW OF TORTS* § 21.1, at 1162-92 (1956); Payne, *Assumption of Risk and Negligence*, 35 CAN. B. REV. 350 (1957); James, *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185 (1968).

77. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 48 (1971). Justice Harlan, however, continued to defend his position first announced in *Butts*:

[O]ur willingness to assume that public personalities are more impervious to criticism, and may be held to have run the risk of publicly circulated falsehoods concerning them, does not rest solely upon an empirical assertion of fact, but also upon a belief that, in our political system, the individual speaker is entitled to act upon such an assumption if our institutions are to be held up, as they should be, to constant scrutiny.

Id. at 70-71 (Harlan, J., dissenting).

78. The assumption of risk doctrine might deter private persons from seeking any access to the media in order to discuss public issues for fear that such voluntary exposure might transubstantiate them into public figures who have assumed the risk of defamation. Indeed, Justice Brennan argues that "the private individual often desires press exposure either for himself, his ideas, or his causes," which "Constitutional adjudication must take into account . . ." *Id.* at 47 n.15.

79. 418 U.S. 323 (1974).

neither public officials nor public figures. Justice Powell acknowledged that some people might be cast into the public spotlight through no purposeful action of their own, but he thought such cases were exceedingly rare. Public figures are those who are especially prominent in society, and thereby "invite attention and comment."⁸⁰ Thus, public figure status may be accorded to (1) those persons who by (a) occupying positions of "persuasive power and influence,"⁸¹ (b) their "pervasive involvement in the affairs of society,"⁸² or (c) the "notoriety of their achievements,"⁸³ have acquired such "general fame or notoriety in the community"⁸⁴ that they are "deemed public figures for all purposes"⁸⁵ and "in all contexts,"⁸⁶ or (2) more commonly, to those persons who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved,"⁸⁷ and thereby become public figures "for a limited range of issues."⁸⁸ In this latter, and more common category, an individual's status turns on "the nature and extent of . . . [his] participation in the particular controversy giving rise to the defamation."⁸⁹ The *Gertz* Court also clarified the first amendment values supporting the extension of the *Times* standard to public figures. Chief Justice Warren's "power" rationale was stressed in articulating the role of the public person in society.⁹⁰ The voluntary nature of the individual's activities was also stressed, indicating the assumption of risk analogy.⁹¹ Access to the media, while recognized as usually more available to public officials and public figures, was downplayed as a constitu-

80. *Id.* at 345.

81. *Id.*

82. *Id.* at 352.

83. *Id.* at 342.

84. *Id.* at 351-52.

85. *Id.* at 345.

86. *Id.* at 351.

87. *Id.* at 345.

88. *Id.* at 351.

89. *Id.* at 352. The Court considered as probative the fact that plaintiff, a Chicago attorney, (a) played a minimal role in the public controversy surrounding the prosecution of a police officer for manslaughter, (b) never discussed the issue in any context with the press and was never quoted as having done so, and (c) while operating as a civil advocate did not engage the public's attention in an attempt to influence the resolution of the "police brutality" issue. *Id.*

90. *See id.* at 345, 352.

91. *See note 75 supra.*

tional justification for the application of the *Times* rule.⁹² Given the "absolutist" ruling in *Miami Herald Publishing Co. v. Tornillo*,⁹³ decided the same day as *Gertz*, that the Constitution prohibits any "right-of-access" statutes, the deprecation of the "access" rationale and of the "marketplace" view of the first amendment⁹⁴ may have been necessary to avoid the appearance of contradictory decisions.⁹⁵

While the dissenters and commentators warned that the *Gertz* majority was "evanescent,"⁹⁶ the public figure/private individual distinction was not only reaffirmed in the 1976 decision *Time, Inc. v. Firestone*,⁹⁷ but the theory gained an additional adherent.⁹⁸ Justice Rehnquist, writing for a majority of the Court, believed that Mary Alice Firestone, former wife of the scion of one of America's wealthier industrial families, was not a public figure under the *Gertz* formulation because she: (1) did not voluntarily become involved in a public controversy, (2) did not choose to publicize questions concerning the propriety of her marriage, (3) was not prominent in the resolution of public questions, and (4) did not use her access to the media to influence the outcome of the divorce proceedings, nor "as a vehicle by which to thrust herself to the forefront of some unrelated controversy in order to influence its resolution."⁹⁹

92. See 418 U.S. at 344. "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." *Id.* at 344 n.9.

93. 418 U.S. 241 (1974).

94. I have argued elsewhere that the marketplace theory of the first amendment required a different result in *Miami Herald*. Hunsaker, *The Print Media and Equal Time*, FREEDOM OF INFORMATION CENTER REPORT No. 0016 (April, 1975) [hereinafter cited as Hunsaker].

95. Justice White sensed the incongruity:

To me it is a near absurdity to so deprecate individual dignity, as the Court does in *Gertz*, and to leave the people at the complete mercy of the press, at least in this stage of our history when the press, as the majority in this case so well documents, is steadily becoming more powerful and much less likely to be deterred by threats of libel suits.

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 263 (1974) (White, J., concurring).

96. See note 8 and accompanying text *supra*.

97. 424 U.S. 448 (1976).

98. Chief Justice Burger, who had dissented in *Gertz*, implying that he agreed with much of Justice White's dissent, 418 U.S. 323, 354-55 (1974), joined in the majority opinion written by Justice Rehnquist. Justice Marshall, who had been a member of the *Gertz* majority, dissented in *Firestone* as to the application of the *Gertz* rule in the particular case, rather than to its continuing validity. 424 U.S. at 484. Justice Blackmun, who was a "reluctant" member of the *Gertz* majority, offered no hesitation in *Firestone*. Justices Brennan and White dissented for reasons completely opposite to their reasons for dissenting in *Gertz*. 424 U.S. at 471, 481. Justice Stevens took no part in the case.

99. 424 U.S. at 453-55 (1976).

Firestone indicates that the Supreme Court has adopted both the power and influence and the assumption of risk rationales. The Court also decided that access to the press,¹⁰⁰ without attempting to influence the outcome of a *public controversy*,¹⁰¹ is not a crucial factor in determining whether the plaintiff is a public figure; the Court was apparently determined to prevent expansion of the *Times* standard to *any* plaintiff who had access to the media. Several issues relating to the workability of the new standards, however, remain unclear.

II. PUBLIC INTEREST, PRIVATE INDIVIDUALS, AND MEDIA SELF-CENSORSHIP

The rationale and workability of the *Gertz* formula has received considerable criticism in the past two years¹⁰² and this article will not engage in another exhaustive analysis. Because the following three issues directly relate to first amendment theory, however, they merit discussion: (1) whether a distinction between media and non-media defendants is justified; (2) whether a negligence standard for defamation of private individuals is a workable balance; and (3) whether first amendment values might be better served by a public interest, rather than a public figure formulation.

A. *Media v. Non-Media Speakers*

Considerable evidence supports the assumption that the *Gertz* Court limited the application of its new rules to *media* defendants. *Gertz* consistently refers to publishers and broadcasters,¹⁰³ media

100. Mrs. Firestone held several press conferences during the divorce proceedings. Justice Marshall considered this fact dispositive of the issue of whether she was a public figure. 424 U.S. at 485 (Marshall, J., dissenting).

101. Despite extensive coverage of the trial by two Miami papers, the Court held that "[d]issolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in *Gertz*" *Id.* at 454. The Court also ruled that while *Cox Broadcasting* had given the press an absolute privilege to report truthfully and accurately judicial proceedings, no such privilege extended to inaccurate and defamatory reports, and defendants could be held to a standard of due care. *Id.* at 457.

102. See, e.g., Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422 (1975) [hereinafter cited as Anderson]; 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, *supra*, note 19. But see Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199 (1976).

103. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974).

liability,¹⁰⁴ the news media,¹⁰⁵ and media.¹⁰⁶ The Court reinforced this assumption by reiterating the language in *Firestone*.¹⁰⁷ Whether the same limitation was intended in *New York Times* is not clear. Regardless of the Court's specific intent, the question remains: is a distinction between media and non-media defendants warranted? Justice Stewart has asserted that the distinction is justified given the "freedom of the press" clause of the first amendment.¹⁰⁸ He suggested that:

[T]he Court's approach to [freedom of the press] cases has uniformly reflected its understanding that the Free Press guarantee is, in essence, a *structural* provision of the Constitution . . . [extending] protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection.¹⁰⁹

Stewart conceives of the press as a *fourth estate*, which exists apart from the government as a check on the three official branches,¹¹⁰ and thus a watchdog overseeing the conduct of public officials.

The theory is too narrow, however, since it cannot explain governmental licensing and regulation of the electronic media.¹¹¹ More important, the fourth estate rationale does not justify the *Gertz* elimination of common law strict liability for defamation of *private individuals*; the watchdog function of the press is operative only as to government actions. Furthermore, limiting the *New York Times* protection to media defendants makes no sense in the case of public officials, the persons whom the fourth estate is supposed to watch;

104. *Id.* at 353 (Blackmun, J., concurring).

105. *Id.* at 355 (Burger, C.J., dissenting).

106. *Id.* at 362 (Brennan, J., dissenting). Justice White, while referring to "the press and others," *id.* at 389, 392, may still have perceived the majority opinion to reach only media defendants. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 263 (White, J., concurring).

107. *Time, Inc. v. Firestone*, 424 U.S. 449 (1976). The Court referred to "an uninhibited press," *id.* at 456; to "publisher," *id.* at 458; "publisher or broadcaster," *id.* at 464 & n.1 (Powell, J., concurring); and "press and broadcast media," *id.* at 465.

108. Justice Stewart referred to the factual situations in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), *Branzburg v. Hayes*, 408 U.S. 665 (1972), *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973), *New York Times v. United States*, 403 U.S. 713 (1971) (the Pentagon Papers case), and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

109. Stewart, *supra* note 54, at A-20.

110. *Id.*

111. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

non-media speakers can also serve as watchdogs.¹¹² Finally, a first amendment theory committed to wide-open debate on public issues cannot tolerate granting immunity to a newspaper that unknowingly published false statements about a candidate, while punishing an individual at a political rally who makes the same, innocent mistake.¹¹³ The fourth estate theory is too mechanical and monolithic to be useful in balancing legitimate interests, and could be exceedingly dangerous in its application.¹¹⁴

A functional analysis not tied to a "structural" constitutional theory, however, has been offered as justification for distinguishing between media and non-media speakers.¹¹⁵ Factors unique to the media speaker compel greater protection.¹¹⁶ Because of their corporate and financial structure, publishers and broadcasters are more lucrative targets for defamation actions.¹¹⁷ Non-media speakers, usually lacking sources of vast funds, are frequently ignored by plaintiffs.¹¹⁸ However, this "vulnerability factor" does not justify

112. See *Davis v. Schuchat*, 510 F.2d 731, 734 n.3 (D.C. Cir. 1975).

113. See *Eaton*, *supra* note 19, at 1406.

114. *Hunsaker*, *supra* note 94, at 3.

115. At common law, the media enjoyed less protection under the privileges available to it than non-media speakers. Both the fair comment and record libel privileges, which were frequently used by the media, could be defeated either by proving misstatement of fact, see *RESTATEMENT OF TORTS* §§ 606, 611, *Comment d* (1938), or a showing of malicious purpose, see *RESTATEMENT OF TORTS* § 594, *Comment a* (1938). The privilege most often available to non-media speakers; protecting self or others interests, tolerated misstatements of fact if made reasonably and in good faith, and could be defeated only by a showing of malice. See *F. HARPER & F. JAMES, THE LAW OF TORTS* § 5.27, at 453 (1956).

"The interest-duty privileges were used primarily by non-media speakers because the speaker was required to have some official or personal relationship with the recipient and not simply be an officious intermeddler. In most cases a newspaper could not establish this required relationship . . ." Note, *First Amendment Protection Against Libel Actions: Distinguishing Media and Non-Media Defendants*, 47 *S. CAL. L. REV.* 902, 910 (1974) [hereinafter cited as *Distinguishing Defendants*]. Further, the privilege could be defeated by excessive publication, a circumstance which the media could seldom avoid unless the interest sought to be protected was that of the entire community. See *Jones, Interest and Duty in Relation to a Qualified Privilege*, 22 *MICH. L. REV.* 437, 439 (1924).

116. See *Distinguishing Defendants*, *supra* note 115, at 932-36.

117. In *Curtis Publishing Co. v. Butts*, the jury awarded Butts over \$3,000,000; it was later reduced by remittur to \$460,000. 380 U.S. at 138.

118. See *Distinguishing Defendants*, *supra* note 115, at 932 & n.169. *But see Rosenblatt v. Baer*, 383 U.S. 75 (1966); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Henry v. Collins*, 253 Miss. 34, 158 So.2d 28 (1963), *rev'd per curiam*, 380 U.S. 356 (1965) (individual speaker, rather than the medium in which the defamation appeared, was the defendant). There were also a number of individual defendants in *New York Times v. Sullivan*, 376 U.S. 254 (1964).

One solution might be to place statutory ceilings on amounts which can be recovered. This is an idea which is gaining increasing credibility in other areas of tort law such as medical

distinguishing the media from any other non-media defendant with large assets.

Since the communications industry collects and disseminates information on a regular basis, it is impractical if not impossible for the media gatekeepers to check thoroughly all the information collected,¹¹⁹ especially for items regarded as "hot news."¹²⁰ The non-media defendant, however, has greater opportunities and more time to verify the accuracy of reports. Defamatory falsehoods published by the media are usually innocent or inadvertent mistakes, rather than malicious or intentional deception; the reverse is more likely to be true for non-media defendants.¹²¹

The difficulty, therefore, is not in distinguishing between media and non-media defendants; rational reasons exist for according dif-

malpractice, no-fault auto insurance, etc. Another possibility is to limit damages to "actual injury" which "must be supported by competent evidence." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 350. Plaintiffs who can prove "actual malice" under the *Times* rule, however, may be entitled to recover presumed and punitive damages. *Id.* at 349-50.

119. On a metropolitan afternoon paper there is a very large gross intake of words and stories, just for the regional and national news, of over 400,000 words and 2,500 different news items, coming from 22 teletype machines most of which operate 24 hours a day. The paper used 40,000 words in 300 items. This is not counting information coming in for special departments like sports and financial. . . . The initial yes-no decision on the 2,500 stories with 400,000 words is made by three men . . . [who] discard 90 percent of the incoming stories Discarded stories took from one to two seconds of reading each On stories selected for use . . . (read, decide to use it, and indicate the changes [to be] made), [t]he average for observed gatekeepers was about six seconds per story Whatever values the gatekeeper brings to these decisions he brings by reflex.

B. BAGDIKIAN, *THE INFORMATION MACHINES* 102-03 (1971).

120. *Rosenbloom v. Metromedia, Inc.*, 415 F.2d 892, 895-96 (3d Cir. 1969), *aff'd*, 403 U.S. 29, 46 (1971).

Objectivity is affected not so much by mutual adjustments in rhythm and tempo between the media and the actors in the drama of public affairs as it is by the easy—often lazy—assumption adopted by journalists that their breathless journalism is adequate to the communication of public affairs. It is the indiscriminate application of speed and the forcing of all public affairs, no matter how complex, obscure, and developmental they may be, into the mold of instant journalism that threatens objectivity.

McDonald, *supra* note 34, at 79.

121. See *Distinguishing Defendants*, *supra* note 115, at 934-35. However, when defamation by non-media defendants is innocent,

[i]mposition of strict liability upon individuals who are apt to be both less circumspect in their name-calling and less aware of the risk of liability and thus less likely to insure against it, seems to make less sense as a matter of tort law than imposing strict liability upon large enterprises whose daily operations pose a substantial risk of predictable harm.

Eaton, *supra* note 19, at 1418.

ferent rights in *defamation* law. The difficulty lies in justifying the distinction in specific cases and in terms of *constitutional* law:

[T]he traditional doctrine [is] that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods. . . . The informative function . . . of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public¹²²

Eaton has suggested a public speech/private speech distinction rather than the media/non-media approach of *Gertz*.¹²³ While admitting that a distinction between public and private speech would be more difficult to draw, he believes that once drawn, it would be consonant with the purposes of the first amendment enunciated in *Times*.¹²⁴

Although *Gertz* apparently drew a distinction between media and non-media defendants, neither the distinction, nor the rationale is presently clear. Whether Justice Stewart's "fourth estate" theory will prevail or whether the distinction will be lost and negligence or a higher fault standard will be adopted by state courts for media and non-media defendants alike remains to be seen.

B. *Negligence and Self-Censorship*

Admittedly, the Supreme Court's decisions in *New York Times* and its progeny were an attempt to ameliorate the problems of press self-censorship. Professor Anderson has suggested, however, that the *Gertz* rules will exacerbate the problem:¹²⁵

122. *Branzburg v. Hayes*, 408 U.S. 665, 704-05 (1972) (citations omitted). Eaton has collected post-*Gertz* lower court cases which have attempted to distinguish between media and non-media defendants. Eaton, *supra* note 19, at 1418 nn.279 & 281. Mercantile credit reports as well as trade journals have been held to be non-media defendants. *Id.* at 1407 n.241, 1418 n.281.

123. Eaton, *supra* note 19, at 1408 & n.242, 1449-51.

124. *Id.* at 1408 (footnote omitted).

125. "By importing the vocabulary of negligence into defamation, *Gertz* threatens to confuse further what already is one of the most complex areas of the law. Most importantly, it reflects a restrictive view of first amendment goals" Anderson, *supra* note 102, at 425.

If the common law concept of negligence is applied to defamation, the extent of a publisher's constitutional protection will depend on a jury's relatively unfettered *ex post facto* appraisal of his conduct, and since the publisher has no way of knowing how large the jury will make the prohibited zone, he has no choice but to steer wide of it.¹²⁶

Additionally, if "negligence" is to be used, it should refer to a failure to adhere to a set of standards established by "responsible publishers"¹²⁷ or some analogous group. "Knowing" or "reckless" publication of falsehood is a determination not dependent upon such a standard. The effect of *Gertz*, argues Anderson, is to discriminate unjustifiably against media which do not follow orthodox investigatory or verification methods.¹²⁸ Because journalists themselves disagree over what constitutes responsible journalism and the ethics of various journalistic practices,¹²⁹ the Supreme Court will ultimately have to establish the standards.¹³⁰

Moreover, asserts Anderson, since negligence is traditionally an issue entrusted to the special competence of juries, a defendant may have to undergo the expense of an entire trial only to be exonerated. Due to the exorbitant costs involved in defending a libel suit,¹³¹ the relevant question becomes not whether a story is libelous, but whether the subject is likely to sue, and if so, how much will it cost to defend.¹³²

Justice White, however, is skeptical of the self-censorship effect.

126. *Id.* at 460-61.

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

128. Anderson, *supra* note 102, at 453-55.

129. *Id.*

130. The process has already begun. Justice Powell referred to the "reasonably prudent care that a State may constitutionally demand of a publisher or broadcaster prior to a publication whose content reveals its defamatory potential," in suggesting that "[t]here was substantial evidence, much of it uncontradicted, that the editors of *Time* exercised considerable care in checking the accuracy of the story prior to its publication." *Time, Inc. v. Firestone*, 424 U.S. 448, 465-66 (1976) (Powell, J., concurring).

131. "The cost of defending a full-fledged libel suit probably begins at about \$20,000 and can run much higher; the successful defense of *Rosenbloom* is reported to have cost nearly \$100,000." Anderson, *supra* note 102, at 435-36 (footnotes omitted).

132. *Id.* at 425. This view parallels that of Justice Brennan who argued: "It is not simply the possibility of a judgment for damages that results in self-censorship. The very possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate to 'steer far wider of the unlawful zone' thereby keeping protected discussion from public cognizance." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52-53 (1971) (Brennan, J.).

In concurring in the judgment of *Rosenbloom v. Metromedia, Inc.*,¹³³ he declared that self-censorship had not caused the press to become overly cautious when reporting news concerning private citizens.

Justice Harlan, dissenting in *Rosenbloom*, similarly rejected considerations of self-censorship. He argued that the press is a business just as any other, and its function of gathering and reporting information does not confer special immunization from the application of general laws.¹³⁴ All members of our society must act reasonably if their actions might produce adverse consequences to others.¹³⁵ Further, Justice Harlan could find no serious first amendment problems in requiring publishers to compensate victims of negligent defamations if the standard were adjusted to take account of the countervailing interests in an open exchange of ideas.¹³⁶

The cost of potential litigation is a factor which the publisher must consider whatever standard is employed. Whether the defendant knew or entertained serious doubts about a falsehood is a factual issue which may be even more difficult to determine as a matter of law than a question of reasonable conduct. A negligence standard, therefore, is not likely to pose a greater barrier to summary judgment for the defendant than existed with a knowing falsehood standard. One should also not lose sight of the value judgment made by the Court in *New York Times*, and renewed in subsequent cases, that *not all self-censorship is bad*. The need for society to receive information which is true and accurate is a countervailing goal, requiring disseminators to exercise due care in the reporting of information.

C. *Private Individuals and the Public Interest*

Perhaps the greatest criticism of the *Gertz* decision is that the common law distinction between public figures and private individuals, which the decision constitutionalized, is artificial and unrelated to the interests and values the first amendment is intended to serve. Justice Brennan criticized this distinction in his plurality opinion in *Rosenbloom*,¹³⁷ he reasoned that the *Times* standard was applied to libel of a public official or public figure to encourage ventilation of public issues, and not because the public official has any less interest in protecting his reputation than an individual in

133. 403 U.S. 29, 60 (1971) (White, J., concurring).

134. *Id.* at 67 (Harlan, J., dissenting).

135. *Id.* at 70 (Harlan, J., dissenting).

136. *Id.* at 67 (Harlan, J., dissenting).

137. 403 U.S. 45-46 (1970) (Brennan, J.)

private life.¹³⁸ Justice Brennan believed that if ventilation of public issues was an important objective of the first amendment, and this could hardly be denied, the scope of the amendment's protection should not be limited to purely political expression,¹³⁹ with the state free to punish or permit all other speech. The Supreme Court had recognized in *Thornhill v. Alabama*¹⁴⁰ that freedom of the press facilitates self-government by providing needed information to the public. This information should include categories of general concern, beyond knowledge of the activities of public figures. The public's primary interest, according to Justice Brennan, was in the issue or event, rather than the participant's prior notoriety.¹⁴¹

The public interest formula proposed by Justice Brennan, however, is inadequate. The emphasis upon issues rather than participants is idealistic. The public is personality-oriented, and the "who" of a news story is apt to be an important, if not determinative, factor of public interest. More important, the formula increases the problem of balancing first amendment rights against the right to be free from damaging falsehoods, since arguably all human events are within the area of public concern.¹⁴² Extending the *Times* standard to all statements "of public concern" would prevent most plaintiffs from recovering, if not bringing an action; protection against libel would be lost because of the difficulty of proving knowing or reckless falsehood.¹⁴³ Conversely, if the courts were to determine the appropriate subjects of public concern, they would necessarily determine what information is relevant to self-government. The danger such a doctrine portends for freedom of the

138. *Id.* at 46.

139. *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967).

140. 310 U.S. 88, 102 (1939).

141. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 43 (1971). In a footnote, Justice Brennan argues further that in *Associated Press v. Walker*, 388 U.S. 130 (1967), the public's interest in the provocative speech given during the crisis at the University of Mississippi "would certainly have been the same . . . if the speaker had been an anonymous student and not a well-known retired Army general." *Id.* at 43 n.11. This is not at all clear, and in other cases, definitely untrue. To cite a recent example, if Elizabeth Ray had approached the *Washington Post* with the story that she was having an affair with "John Doe," private citizen and maintenance manager of a local department store, who had promised to try to get her a job as a sales clerk, no one would have been interested. It was the fact that the alleged relationship was with Congressman Hayes, a public figure in his own right, and that such conduct by a public official was highly unethical, if not illegal, that aroused public interest.

142. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 79 (1971) (Marshall, J., dissenting).

143. "The number of plaintiffs who have successfully hurdled the actual malice barrier in the decade since *New York Times* is small." Eaton, *supra* note 19, at 1375.

press is apparent.¹⁴⁴ Self-government requires the free flow of information which is truthful and accurate, but the public interest formula, lacking logical or neutral boundaries, fails to insure the dissemination of truthful information. Beyond the need to balance first amendment interests against other legitimate interests lies the need to internally balance first amendment goals and policies, because breathing space is useless in a poisonous atmosphere.

The Warren "power and influence over the decision making process" formulation for public figures, however, does admit of logical and neutral boundaries.¹⁴⁵ Furthermore, Justice Stone, in the 1938 decision of *United States v. Carolene Products Co.*,¹⁴⁶ propounded a doctrine of judicial intervention into legislative activity, which justifies greater protection for speech related to political activity. The Court suggested that legislation which restricted those political processes ordinarily expected to bring about repeal of undesirable legislation would be subject to more exacting judicial scrutiny.¹⁴⁷ Professor Lusky¹⁴⁸ viewed this remark as a recognition by the Court of its special responsibility for the political processes because, unless some non-political agency intervened, interferences with the corrective mechanism would perpetuate themselves.¹⁴⁹

The *Carolene Products* rationale,¹⁵⁰ therefore, provides a basis not

144. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 79 (1971) (Marshall, J., dissenting). It was for this reason that Justice Marshall dissented in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976). The majority, in ruling that Mrs. Firestone was not a public figure, stated that dissolution of a marriage "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." *Id.* at 454. In response, Justice Marshall stated that "[i]f there is one thing that is clear from *Gertz*, it is that we explicitly rejected the position . . . that the applicability of the *New York Times* standard depends upon whether the subject matter of a report is a matter of 'public or general concern.'" *Id.* at 488 (Marshall, J., dissenting).

145. See notes 64-66, 99-101 and accompanying text *supra*.

146. 304 U.S. 144, 152 (1938). The doctrine was propounded "with the casualness of a footnote." See *Kovacs v. Cooper*, 336 U.S. 77, 90 (1949) (Frankfurter, J., concurring). See also *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 600 (1940).

147. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). Examples of restrictive legislative areas included "the right to vote," "the dissemination of information," "interferences with political organizations," and "peaceable assembly." The footnote went on to suggest that similar considerations apply when legislation is directed at "discrete and insular minorities."

148. Professor Lusky of Columbia Law School was clerk to Justice Stone in 1938.

149. Lusky, *Minority Rights and the Public Interest*, 52 *YALE L.J.*, 20, 20-21 (1942).

150. Unfortunately, most of the discussion and controversy over the footnote has been centered on the first paragraph—the so-called "preferred position" doctrine, while the more

only for distinguishing between public and private figures, but for preferring that approach over one of public versus private interest. Both public officials who have "responsibility for or control over the conduct of governmental affairs,"¹⁵¹ and public figures who "play an influential role in ordering society,"¹⁵² possess political power to make major decisions and to constrain the effectiveness of "correctives" against the abuse of power. For them, the libel suit is a powerful weapon against the processes which normally repeal unjust laws, remove corrupt public officials, and "neutralize" overly influential public figures.¹⁵³ The law of defamation becomes an instrument of *control* and not a vehicle to vindicate personal reputation. Consequently, when the exercise of the first amendment rights of freedom of press and freedom of speech are directed toward the conduct of public officials and public figures, greater judicial protection is required. The justification is lacking, however, when private individuals are defamed, whether or not in the context of "matters of public or general concern."¹⁵⁴

Nevertheless, the *Carolene Products* rationale does not prohibit greater expansion of first amendment protection. The Court, for reasons such as procedural convenience or the need for simplicity or facilitation of its overseer functions, might have chosen to expand first amendment protection. The Court, however, has not yet done so, and good reasons exist for the path it has chosen.

logical "central meaning" rationale provided in the second and third paragraphs has received little attention.

151. *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) (Warren, C.J., concurring).

152. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967).

153. Concededly, this is similar to Justice Stewart's "watchdog" theory of the free press clause. The key difference is that the Court, neither in *Carolene Products* nor in *New York Times*, perceived the "watchdog" function to be the exclusive province of the organized press. See note 122 and accompanying text *supra*. Nor should the function of the press be viewed exclusively as watchdog of the government as Mr. Justice Stewart contends. "A stance of 'pure' opposition—opposition as an end in itself, rather than as an expression of some larger, positive political commitment—is self-contradictory in theory and likely to be short-lived in practice. The probability is that an adversary press would eventually ally itself with a political faction and so become partisan—an ideologically divisive factor rather than a politically unifying force. The consequences could be enormous." Weaver, *The New Journalism and the Old*, reprinted in *ETHICS AND THE PRESS*, *supra* note 2, at 105-06.

154. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44 (1971) (Brennan, J.) The conclusion by the Court in *Gertz* thus takes on added significance: "[P]rivate individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery." 418 U.S. at 345.

III. THE NECESSITY FOR BALANCING FREEDOM AND RESPONSIBILITY

*In an ideal world, the responsibility of the press would match the freedom and public trust given it.*¹⁵⁵

A. *The Growing Issue of Press Credibility*

Professor Anderson noted that the *Times* privilege has had little effect in preventing defamation actions from being filed or appealed.¹⁵⁶ In 1963, a year before the *Times* decision, 87 appellate decisions in libel cases were reported. In 1973, the number had risen to 117.¹⁵⁷ As many as 1100 libel suits have been filed against newspapers alone between 1963 and 1974, an increase of several hundred per cent since the late 1950's.¹⁵⁸ Given the trend toward "advocacy journalism" during the same period, one inference to be drawn from the statistical increase in libel suits is that the media are making more libelous statements.¹⁵⁹

The increase in libel suits, whether or not induced by the *Times* decision, is indicative of an increasing questioning of the credibility of the news media. Several factors, besides the greater protection afforded the press by decisions such as *New York Times*, account for this concern. What is probably the major reason was noted by the Supreme Court in *Miami Herald Publishing Co. v. Tornillo*: "Chains of newspapers, national newspapers, national wire and news services and one-newspaper towns, are the dominant features of a press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events."¹⁶⁰

155. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 51 (1971) (Brennan, J.)

156. Anderson, *supra* note 102, at 424-25.

157. *Id.* at 430 n.43.

158. 4 *More* 6 (Sept. 1974).

159. Cf. Stein, *The Muckraking Book in America, 1946-1973*, 52 *JOURNALISM Q.* 297 (1975): "Since the mid-1960's, muckraking has had an important resurgence in the United States. Through numerous outlets it has reached highly receptive publics." Thus, while Anderson contends that *New York Times* did not reduce the threat of libel suits and therefore, self-censorship, he seems to assume that media reporting behavior and content has not changed, accounting for the increase in lawsuits.

160. 418 U.S. 241, 249 (1974). Consider the newspaper industry: By 1972, more than 150 national and regional chains owned nearly half of American dailies and 65% of total daily circulation. The ten largest groups held one third of total American circulation. Baer, *Concentration of Mass Media Ownership: Assessing the State of Current Knowledge* 35-43, RAND CORP. REP. NO. R-1584-HSF, Sept. 1974. In 1910, there were 2,442 dailies in the United States which competed with each other in 689 cities; in 1970 the total was down to 1,748 with

Increased monopolization of the press has brought it more power to control and influence political decision-making. Empirical studies indicate: (1) that chain newspapers are more likely to make political editorial endorsements, and that the endorsements are homogenous within the chain;¹⁶¹ (2) that editorial endorsements have a significant influence on the political process, particularly among independents, and on the selection of state and local candidates;¹⁶² and (3) that noncompeting newspapers making editorial endorsements of political candidates give biased coverage of that candidate.¹⁶³

Decreasing competition, however, has not eliminated the incentive to publish potentially libelous material as a means of economic survival.¹⁶⁴ In concurring with the judgment in *Butts*, Chief Justice

effective competition in only 42 cities. Note, *Media and the First Amendment in a Free Society*, 60 *Geo. L.J.* 867, 892-93 (1972).

161. Wackman, *Chain Newspaper Autonomy as Reflected in Presidential Campaign Endorsements*, 52 *JOURNALISM Q.* 411 (1975) [hereinafter cited as Wackman]. "In all four elections [1960, 1964, 1968 and 1972] . . . 85% or more of the [chain] papers endorsing a candidate supported the same candidate Clearly these data run counter to the insistence of chain spokesmen that their endorsement policies are independent from chain direction." *Id.* at 419. In 1972 nearly 75% of the chains, and 85% or more of the papers within each chain, endorsed Richard M. Nixon. *Id.* at 418.

162. See Gregg, *Newspaper Editorial Endorsements and California Elections, 1948-62*, 42 *JOURNALISM Q.* 532 (1965); McCombs, *Editorial Endorsements: A Study of Influence*, 44 *JOURNALISM Q.* 545 (1967); Robinson, *The Press As King-Maker: What Surveys from the Last Five Campaigns Show*, 51 *JOURNALISM Q.* 587 (1974). Some of the unsettling implications of these findings are posed by Wackman:

[I]n those elections where one candidate is heavily favored by the media, it may be that newspaper endorsements strongly influence the size of the favored candidate's majority. In part this may explain the overwhelming victories of President Johnson in 1964 and President Nixon in 1972. Could it also be that this phenomenon gives the winning candidate a somewhat distorted image of a mandate? Seen in the context of the homogeneity of chains, if one or two members of a chain switch, are all likely to? Does this help to facilitate an enormous electoral victory—and a false notion about a national mandate? Did this notion about an overwhelming mandate, perhaps influenced by a homogenous chain-owned press, affect the behavior of the winners? Both Johnson and Nixon, for example, behaved as though they had a strong mandate to carry out their programs, yet both left office as singularly unpopular presidents.

Wackman, *supra* note 161, at 420. One further speculation might be entertained: but for chain-newspaper endorsements would there have been a Vietnam or a Watergate?

163. Wilhoit & Auh, *Newspaper Endorsement and Coverage of Public Opinion Polls in 1970*, 51 *JOURNALISM Q.* 654 (1974) [hereinafter cited as Wilhoit & Auh].

164. Anderson asserts that: "[E]ven where competition exists, little can be gained by taking chances. Publishers and broadcasters gain or lose their audiences for reasons that are unrelated to boldness or timidity of their journalism." Anderson, *supra* note 102, at 433. *But see* Wilhoit & Auh, *supra* note 163.

Warren noted that an editorial decision had been made to change the image of the Saturday Evening Post. In hope that circulation would be increased, the magazine would begin a program of sophisticated muckraking.¹⁶⁵

At the same time, close affiliation between a newspaper and a candidate for political office might provide incentive for defamation. In *Sprouse v. Clay Communication, Inc.*,¹⁶⁶ the Supreme Court of Appeals of West Virginia upheld a lower court finding that a newspaper had conspired with a candidate for governor to destroy the character of the opposing candidate.¹⁶⁷ Finally, Epstein has observed that "the logic of daily journalism often impels immediate publication which, though it might result in a prized 'scoop,' divorces the journalist from responsibility for the veracity or consequences of the disclosure."¹⁶⁸

The result of increasing media power and aggressiveness has been the widening of a credibility gap, attested to by persons inside and outside the media. Katharine Graham, publisher of the *Washington Post*, admitted that not only are the American people not satisfied with their press, but that the nation's publishers are acutely aware of the general indictment.¹⁶⁹ As Michael Novak recently observed, "[t]hose in the national media who hoped to develop a public more critical about its government, its merchants and its corporations have also made the people cynical about the press."¹⁷⁰

165. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 169 (1967) (Warren, C.J., concurring).

166. 211 S.E.2d 674 (W.Va.), *cert. denied*, 423 U.S. 991 (1975).

167. *Id.* at 674.

168. ETHICS AND THE PRESS, *supra* note 2, at 66. "Jack Anderson was thus able to explain a blatantly false report about the arrest for drunken driving of Sen. Thomas Eagleton, then Vice Presidential nominee of the Democratic Party, by saying that if he had delayed publication to check the allegation he would have risked being scooped by competitors." *Id.*

169. *Quoted in A FREE AND RESPONSIVE PRESS: THE TWENTIETH CENTURY FUND TASK FORCE REPORT FOR A NATIONAL NEWS COUNCIL 3* (1972). [hereinafter cited as *A FREE AND RESPONSIVE PRESS*]. According to public opinion polls, while 48% of the public sampled considered television news to be the most believable, only 21% of the respondents considered newspapers to be the most credible. B. ROPER, *WHAT PEOPLE THINK OF TELEVISION AND OTHER MASS MEDIA, 1959-1972* (1972). Nevertheless, 42% of the general public and 53% of the college educated believed television news gave slanted or distorted coverage of political and social issues. *AIPO Poll*, Jan. 15, 1970. Similarly, one study of a California city found that respondents discounted on the average one-third of what they read in the newspapers and one-fifth of what they saw on television. J. LYLE, *THE NEWS IN MEGALOPOLIS* 39-42 (1967). See also LeRoy & Smith, *Perceived Ethicality of Some TV News Production Techniques by a Sample of Florida Legislators*, 40 *SPEECH MONOGRAPHS* 326 (1973).

170. Novak, *Why the Working Man Hates the Media*, reprinted in *ETHICS AND THE PRESS*, *supra* note 2, at 108-09.

In response to growing public distrust of the media, the Twentieth Century Fund, in 1975, established a National News Council (NNC) composed of fifteen members drawn from the press and the public at large.¹⁷¹ Even before the Council was established, Justice Brennan in *Gertz* had proposed a national news council as a means of press self-evaluation.¹⁷² Investigation reveals, however, that the Council has not accomplished its purpose.

The creation of an independent agency¹⁷³ "to appraise and report annually upon the performance of the press" was initially met by journalists with uniform hostility,¹⁷⁴ and even though a council has finally been established, major opposition still exists.¹⁷⁵ This opposition is critical, since the Council is dependent upon the media to publish or broadcast its findings.¹⁷⁶ Limited funding and low visibility also prevent the NNC from effectively maintaining media credibility.¹⁷⁷ Further, its limited purposes of appraising and reporting prevent it from solving the problem of press credibility.¹⁷⁸ Finally, the solution appears to be no more effective than measures which could be taken by defamed individuals themselves; publication of a correction or retraction is dependent upon the editorial policy of the newspaper, whether the request for the right of reply or retraction comes from the individual or the National News Council.¹⁷⁹

171. National News Council, in *THE PUBLIC INTERESTS* 13 (1975). See also *A FREE AND RESPONSIVE PRESS*, *supra* note 169.

172. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 365 (1974) (Brennan, J., dissenting).

173. The Hutchin's Commission on Freedom of the Press was first proposed in 1947. *A FREE AND RESPONSIBLE PRESS: A GENERAL REPORT ON MASS COMMUNICATION: NEWSPAPERS, RADIO, MOTION PICTURES, MAGAZINES, AND BOOKS*, at v (1947) [hereinafter cited as *A FREE AND RESPONSIBLE PRESS*].

174. Isaacs estimates that at least 95% of the nation's publishers bitterly rejected and vilified the Commission's Report. Isaacs, *Why We Lack A National Press Council*, reprinted in *MASS MEDIA AND COMMUNICATION* 593 (2 ed. C. Steinberg 1972).

175. *REPORT OF THE COMMITTEE TO EVALUATE THE NATIONAL NEWS COUNCIL* 5 (1976).

176. W. DICKENSON, *EDITORIAL RESEARCH REPORTS* 469 (1971) [hereinafter cited as *DICKENSON*].

177. *REPORT OF THE COMMITTEE TO EVALUATE THE NATIONAL NEWS COUNCIL* 5 (1976).

178. Since its functions are limited to investigating and reporting complaints of inaccuracy and unfairness only in national sources of news, "[t]he Council is not a panacea for the ills of the press or a court weighing complaints about the responsibility of the press." *A FREE AND RESPONSIBLE PRESS*, *supra* note 169, at 2.

179. It should also be noted that the "Personal Attack Rule" under the FCC's Fairness Doctrine, whereby an individual maligned may be afforded the right of reply, is severely restricted in scope and application, and is no real substitute for either the vindication of reputation or a vehicle for maintaining media credibility. See, e.g., *Healy v. FCC*, 460 F.2d 917 (D.C. Cir. 1972); *Straus Communications, Inc. v. FCC*, 530 F.2d 1001 (D.C. Cir. 1976).

B. *Press Credibility and the Central Meaning of the First Amendment*

The decline in credibility of the news media is not a minor problem which is likely to be resolved by "independent" press councils. Its consequences are significant, and pose a major threat to the purposes of the first amendment. If the public distrusts the media, it will not use the information that the media disseminates. While this alone frustrates the goal of uninhibited debate, the greater harm occurs when the public substitutes, for the information it was receiving from the press, information from their friends, neighbors, or worse, from their own imaginations.¹⁸⁰

Demands for governmental control would become hard to resist as press irresponsibility reaches this point. As early as 1947, the Commission on Freedom of the Press predicted that the American democracy will not indefinitely tolerate concentrations of media power which become irresponsible and strong enough to thwart the aspirations of the people, and the government would eventually be used to break up power.¹⁸¹ If this prospect seems far-fetched, one need only recall the public reaction to Vice-President Agnew's speech in 1969 concerning television news bias and the need for comprehensive control of the media. Senators and Congressmen, responsive to their constituents' anger, called for licensing of journalists and for creation of government-sponsored watchdog councils to require newspapers to present conflicting views on issues of public importance, to require newspapers to print all advertisements sub-

180. Baker, *Task Force Report on Mass Media and Violence*, National Commission on the Causes and Prevention of Violence, reprinted in *ETHICS AND THE PRESS*, *supra* note 2, at 182-83. See also G. ALLPORT & L. POSTMAN, *THE PSYCHOLOGY OF RUMOR* (1947); T. SHIBUTANI, *IMPROVISED NEWS: A SOCIOLOGICAL STUDY OF RUMOR* (1966).

When the public does not believe the information they receive from the news media or thinks the media are omitting important facts, there will be increased reliance on less formal sources for information. Ordinarily, this means they ask their friends and neighbors, or worse, they supply the information from their own imaginations. The consequences of such a breakdown of formal channels of communication can be very serious [A]lmost any after-action report on the recent civil disorders will confirm that rumors run rampant during periods of great stress and almost invariably involve gross exaggerations The direction of distortion of information received through informal communication is almost invariably toward the group's preconceptions.

Baker, *Task Force Report on Mass Media and Violence*, National Commission on the Causes and Prevention of Violence, reprinted in *ETHICS AND THE PRESS*, *supra* note 2, at 182-83.

181. A FREE AND RESPONSIBLE PRESS, *supra* note 173.

mitted, to empower the FCC to enforce the Fairness Doctrine on newspapers, and to create a right of reply for any organization or individual made the subject of an editorial comment by a newspaper.¹⁸²

The progressive effects of press irresponsibility, therefore, are the decline of credibility and public trust, subsequent reliance on rumor and distorted information, and finally, demands for greater government control and regulation. Whether first amendment purposes and values are viewed narrowly or broadly, press irresponsibility has a devastating effect. Under the narrower *Carolene Products* approach, the news media can only keep the corrective political mechanisms free from restraint and interference by public officials and public figures if it is a credible source. The public must have confidence that reports of bad laws, corrupt officials, and manipulative public figures are accurate, if it is to act on the reports and make the government more responsive to human needs.¹⁸³ Under the broader "self-governance" rationale articulated in *Thornhill v. Alabama*,¹⁸⁴ press credibility is still crucial. If the public distrusts the media as a source of information, it will not act on that information as a means of self-governance.

182. A FREE AND RESPONSIVE PRESS, *supra* note 169, at 2-3. Commenting on the recent substitution of a "subjective" for the traditional "objective" definition of *responsibility*, Journalism Professor Emeritus J. Edward Gerald asserted:

The two definitions represent precisely opposed professional positions which may be likened to democratic and authoritarian governments. In one the official and the journalist, although they have clear roles to play, are responsive to the people and can be rewarded or punished by them. In the other, particularly in this age of mass communication, the people are responsive to the journalist and he will lead them according to that gutsy feeling he has about men and issues. The only way the people can correct or change the gutsy journalist is by revolution—the alteration or destruction of the privately-owned mass communication system.

Gerald, *Truth and Error—Journalism's Tournament of Reason*, reprinted in, *ETHICS AND THE PRESS*, *supra* note 2, at 138.

183. For example, a non-credible press would have failed to convince the American public of the abuses of power and usurpation of liberties by the Nixon administration. Watergate would have been regarded (and for a while, was so regarded) as just one more example of distorted, sensationalized journalism. President Nixon and his staff made every effort to discredit the news media reporting of the unfolding of the Watergate affair as "outrageous, vicious, distorted reporting." See C. BERNSTEIN & B. WOODWARD, *ALL THE PRESIDENT'S MEN* 168-77, 208-211, 297 (Warner Books ed. 1975). While undoubtedly, most of the reporting was "responsible," a complete and accurate account of Watergate may never be available. After investigating Nixon's charges of "outrageous" and "distorted" reporting, the National News Council determined on May 14, 1974 that it was impossible to get to the truth of the matter. DICKENSON, *supra* note 176, at 454.

184. 310 U.S. 88, 102 (1940).

CONCLUSION: FREEDOM AND RESPONSIBILITY IN THE OPEN SOCIETY

*Accountability, like subjection to law, is not necessarily a net subtraction from liberty The First Amendment was intended to guarantee free expression, not to create a privileged industry.*¹⁸⁵

In an era of increasing power of mass communication, increasing sophistication and mechanisms of exploitation and manipulation of public opinion, and increasing wariness and cynicism by the public of the mass media, the need for accountability has become acute. Industry self-regulation, even if agreed to, will not maintain credibility; the National News Council does not have the resources, scope, or support to make more than isolated inquiries into alleged media irresponsibility.

Government regulation, on the other hand, has been somewhat successful in protecting the public from false and misleading advertising, with legislation requiring truth in packaging and full disclosure of securities transactions. Regulation, however, has failed to produce "fairness" in electronic journalism.¹⁸⁶ Furthermore, little has been or can be done to fragment large ownership concentrations of broadcasting or newspaper outlets. For example, the FCC rules concerning diversification of media ownership are frequently relaxed where a licensee has a good program record,¹⁸⁷ and the current cross-media ownership regulations do not attempt to separate existing newspaper-broadcasting combinations.¹⁸⁸ Even the anti-trust laws are circumvented, since Congress has exempted newspapers from their full impact.¹⁸⁹ Beyond the limitations of government-induced accountability, however, are the dangers, inherent in government regulation, of censorship and suppression which the first amendment was adopted to prevent.¹⁹⁰

185. A FREE AND RESPONSIBLE PRESS, *supra* note 173, at 81, 130.

186. It should be noted that "guaranteed" access to either broadcasting or newspapers has received little or no support from the Court. *See CBS v. Democratic Nat'l Comm.* 412 U.S. 94 (1973); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

187. *See Comparative Hearings Involving Renewal Applicants*, 22 F.C.C.2d 424, 18 P&F Radio Reg.2d 1901, 1907 (1970).

188. *Newspaper-Broadcast Cross-Ownership*, 50 F.C.C.2d 1046, 32 P&F Radio Reg.2d 954 (1975).

189. 15 U.S.C. § 1803 (1970).

190. *Cf. Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 63-80 (1972) (D.C. Cir. 1972) (Bazelon, C.J. dissenting). Government regulations on the media are constantly suscep-

The common law action for defamation thus remains the most effective check on media irresponsibility, and is the greatest safeguard against loss of credibility in the press. Unlike press boards and government regulatory agencies, the libel action is available to any citizen who believes and can prove his reputation has been damaged by a negligently published falsehood. The issue is tried in his community by a jury of his peers, with the normal safeguards against an unjust verdict available to the defendant.

Although the role of libel law in the system of freedom of expression has been "relatively minor and essentially erratic,"¹⁹¹ its role in perpetuating trust in the media is significant.¹⁹² Knowing that the libel suit stands as a check against falsehood and damaging inaccuracy, the private citizen is able to place his faith more completely in the truthfulness of news media reports on which he may be totally dependent for knowledge. While it would be hyperbole to state that only the common law of defamation stands between the current concern over media credibility and the collapse of the privately owned mass communication system, the need to restore faith both in government and the media remains critical, and the availability of a private remedy against media abuses will play a substantial role in restoring and maintaining that faith.

The United States Supreme Court has sensed these concerns and has refused to expand the *New York Times* privilege to an elusive standard of "public interest." Whether by its decision to eliminate strict liability it has given with one hand and taken away with the other, as argued by Justice White, remains to be seen. What has not

tible to the charge of inhibiting freedom of expression. See, e.g., Hon. Harley O. Staggers, 30 F.C.C.2d 150, 21 P&F Radio Reg.2d 912 (1971) (*Selling of the Pentagon*); Rogers & Clevenger, Jr., *The Selling of the Pentagon: "Was CBS the Fullbright Propaganda Machine?"*, 47 Q. J. of Speech 266 (1971); Atlanta NAACP, 36 F.C.C.2d 635 (1972) (*J.B. Stoner case*); Brandywine Main Line Radio, Inc. v. FCC, 473 F.2d 16, 63-80 (1972) (D.C. Cir. 1972) (Bazelon, C.J., dissenting); D. Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213; Report on Fairness Doctrine, 48 F.C.C.2d 1, 30 P&F Radio Reg.2d 1261 (1974).

191. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 519 (1970).

192. Lippmann noted:

[E]ach of us tends to judge a newspaper, if we judge it at all, by its treatment of that part of the news in which we feel ourselves involved. The newspaper deals with a multitude of events beyond our experience. But it deals also with some events within our experience. And by its handling of those events, we most frequently decide to like it or dislike it, to trust it or refuse to have the sheet in the house.

LIPPMAN, *supra* note 1, at 208.

yet been recognized, however, and what must now be vehemently stressed, is that only a finite amount of "breathing space" is available to the media under the first amendment. Beyond that limit lies a "poisonous atmosphere" of lies, distortion, distrust, and disillusion capable of bringing down both the press and the open society which it serves. Although the turbulence of Vietnam, violent protest, and Watergate has subsided, we continue to push against those outer limits.