UIC Law Review

Volume 8 | Issue 3 Article 9

Spring 1975

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Recommended Citation
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GERTZ v. ROBERT WELCH, INC.: CONSTITUTIONAL PRIVILEGE AND THE DEFAMED PRIVATE INDIVIDUAL

INTRODUCTION

For ten years the Supreme Court of the United States has struggled with defining the penumbra of protection which the first amendment gives to the publisher of defamatory material in state libel actions. When applicable, the first amendment privilege is measured in terms of the actual malice standard proclaimed by the Supreme Court in *New York Times Co. v. Sullivan*;[1] that is, the libelous publication is constitutionally protected unless the plaintiff proves that the publisher had knowledge that the statement was false or recklessly disregarded whether it was false or not.[2] While the scope of protection given to publishers is clear where public officials are involved,[3] defining and applying the constitutional guidelines has proved to be more elusive when a private citizen is libeled.

Typically the problem arises when the citizen is defamed in an article which discusses a matter of public or general interest.[4] Should the publisher be granted the constitutional privilege whenever the defamatory material concerns a matter of public or general interest regardless of whether the defamed citizen is a public or a private person? Or should a distinction be drawn between the individual who has voluntarily exposed himself to the increased risk of injury by thrusting himself into the vortex of the public controversy, and the purely private citizen who has not closely involved himself in the particular public issue? Aside

1. 376 U.S. 254 (1964).

2. *Id.* at 279-80. Although *New York Times* involved a libelous publication, the standard is equally applicable to broadcasts of defamatory statements. *See, e.g.*, Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); St. Amant v. Thompson, 390 U.S. 727 (1968); Garrison v. Louisiana, 379 U.S. 64 (1964); United Medical Labs v. C.B.S., 404 F.2d 706 (4th Cir. 1968). Throughout this note, therefore, references to libelous publications will include defamatory broadcasts and references to publishers will include broadcasters.

3. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (public official—city commissioner); Garrison v. Louisiana, 379 U.S. 64 (1964) (public official—state criminal libel of judge); Rosenblatt v. Baer, 383 U.S. 75 (1966) (public official—minor county employee); St. Amant v. Thompson, 390 U.S. 727 (1968) (public official—deputy sheriff); Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) (public official extended to include candidates for public office); Pape v. Time, Inc., 401 U.S. 179 (1971) (official government report).

4. If the individual is generally well-known in the community (a celebrity), then he is a "public figure" for all purposes and the *New York Times* standard protects the publisher unless actual malice is shown. Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974); Curtis Publishing Co. v. Butts, 388 U.S. 130, 163-64 (1967).

from these questions, assuming that the purely private individual is more deserving of judicial redress for injury, how can the courts aid him without causing self-censorship among the publishers? These were the questions which were presented to the Supreme Court in *Gertz v. Robert Welch, Inc.*[5]

The *Gertz* case originated when Chicago attorney, Elmer Gertz brought a diversity action in federal district court[6] for libel under Illinois law[7] seeking actual and punitive damages from the publisher of a John Birch Society magazine, *American Opinion*, who published an article stating that Gertz was a "Communist-fronter," a "Leninist," and participated in "Marxist" and "Red" activities. The article in general attempted to show that the criminal prosecution of Richard Nuccio, a Chicago policeman convicted of murdering a youth named Nelson, was part of a communist effort to discredit local police. Gertz had represented the murdered youth's family in a civil suit against the policeman prior to the criminal indictment. However, Gertz had nothing to do with the indictment or any other phase of the criminal prosecution of Nuccio.[8]

In an opinion denying the publisher's motion to dismiss the complaint for failure to state a cause of action, the district court stated that under the applicable Illinois law it is libel per se to falsely label one a communist, thus making the publication actionable without proof of special damages.[9] After denial of the motion, the case was tried and the jury returned a verdict for $50,000. But the district court granted the publisher's motion for judgment notwithstanding the verdict.[10] Judge Decker decided that the *New York Times* standard should be applied regardless of whether a public or private individual was involved since the libelous publication concerned a matter of public interest which should be protected by the first amendment.[11]

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5. 418 U.S. 323 (1974).

6. Gertz v. Robert Welch, Inc., 306 F. Supp. 310 (N.D. Ill. 1969).

7. In Illinois it is libel per se to falsely label one a communist. Spanel v. Pegler, 160 F.2d 619 (7th Cir. 1947); Gertz v. Robert Welch, Inc., 306 F. Supp. 310 (N.D. Ill. 1969); Dilling v. Ill. Publishing & Printing Co., 340 Ill. App. 303, 91 N.E.2d 635 (1950); *cf.* Ogren v. Star Printing Co., 288 Ill. 405, 123 N.E. 587 (1919). *Contra*, Ward v. Forest Preserve Dist., 13 Ill. App. 2d 257, 141 N.E.2d 753 (1957).

8. Kachigan, Nuccio's attorney in the criminal case, testified in the district court that Gertz had nothing whatsoever to do with the criminal prosecution. Verbatim transcript in Appendix of Petitioner on Writ of Certiorari at 111, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

9. *See* note 7 *supra*.

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

11. The case first clearly expressing this proposition was United Medical Labs v. C.B.S., 404 F.2d 706 (4th Cir. 1968). The district court cited five other federal cases following this proposition which were decided while *Gertz* was pending (1969-1970). Time, Inc. v. Ragano, 427 F.2d 219 (5th Cir. 1970) (published photo of attorney with reputed Cosa Nostra gangsters); Wasserman v. Time, Inc., 424 F.2d 920 (D.C. Cir. 1970)

On appeal, the appellate court affirmed the lower court's judgment.[12] The court of appeals first considered the article as a whole, and then looked at the article more narrowly in its references to Gertz to discover whether the publication was "of any *significant* public interest."[13] The court concluded that because the article concerned the possible existence of a nationwide conspiracy to discredit the local police, the subject matter of the article as a whole was of significant public interest.[14] Looking at the article more narrowly, the court concluded that the references to Gertz were entitled to constitutional protection under the *New York Times* standard since they were integrally connected to the article's main thesis which it had decided was of significant public interest.[15]

The court completely ignored the extent of Gertz's actual involvement in the public issue discussed in the article. Gertz, in fact, stood on the periphery having no connection with the public controversy. He merely acted as counsel for the victim's family in civil litigation. The court looked only to see if the defamatory statements were integrally related to a matter of public interest; and since they were, it rigidly applied the *New York Times* formula.[16]

The court followed the plurality opinion of a case that had recently been decided by the Supreme Court, *Rosenbloom v. Metromedia, Inc.*[17] The plurality in this decision extended the *New York Times* standard to defamatory statements that involve matters of public interest regardless of whether the plaintiff is a public or private person.[18]

The Supreme Court granted certiorari[19] to reconsider how

(same facts as the *Ragano* case); Bon Air Hotel, Inc. v. Time, Inc., 436 F.2d 858 (5th Cir. 1970) (article concerning condition of public accommodations at hotel); Rosenbloom v. Metromedia, Inc., 415 F.2d 892 (3rd Cir. 1969), *aff'd by a plurality opinion*, 403 U.S. 29 (1971) (radio broadcast of arrest for possession of allegedly obscene material); Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir. 1969) (article concerning intervention in election campaign of foreign government).

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

13. *Id.* at 805. The court added in n.8 that it included the word "significant" to the test because it believed there were still some areas of privacy to which the *New York Times* standard did not apply.

14. *Id.*

15. *Id.* at 805-806.

16. Judge Kiley in a concurring opinion considered that the controlling factor should have been that Gertz was not closely involved in the public issue. But with "considerable reluctance" he agreed that the Supreme Court trend was to decide the question as the majority had. *Id.* at 808.

17. 403 U.S. 29 (1971). The plurality opinion was written by Justice Brennan, joined by Chief Justice Burger and Justice Blackmun.

18. *Id.* at 43-44. The plurality later stated that "[d]rawing a distinction between 'public' and 'private' figures makes no sense in terms of the first amendment guarantees." *Id.* at 45-46.

19. 410 U.S. 925 (1973).

far the constitutional protection should be extended in a defamation action by a private citizen.[20] This question had been left unsettled by the Court in *Rosenbloom.*

THE ROSENBLOOM PLURALITY

In *Rosenbloom,* although five Justices agreed that constitutional privilege prevented Rosenbloom from recovering damages for a libel action,[21] they could not agree on any clear-cut rationale for this result. The Supreme Court had considered the application of constitutional protection to publishers when private citizens are injured by defamatory falsehoods on only one other occasion, in *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker,*[22] and similarly had failed to agree on the appropriate standard.

The Justices were able to agree that both Butts and Walker, although private citizens, were "public figures." Butts was a public figure because of his general fame as a college football coach and Walker was a public figure because he had thrust himself into the vortex of a public controversy involving civil rights.[23] Justice Harlan, writing for the majority, defined a public figure as someone who commands a substantial amount of continuing public interest and has access to the means of counterargument to expose the defamatory falsehoods.[24]

However, the Justices were split on the question of the appropriate constitutional standard for the protection of a publisher who defames a non-government citizen.[25] Justice Harlan, joined by Justices Clark, Stewart, and Fortas, refused to extend the *New York Times* standard blindly and tried to balance the competing interests in civil libel actions applying a reasonable care standard. They would allow a public figure to recover

on a showing of highly unreasonable conduct constituting an

20. Gertz v. Robert Welch, Inc., 418 U.S. 323, 325 (1974).

21. *Rosenbloom* was a libel action brought by a nudist magazine distributor in the district court against a radio station for a broadcast reporting his arrest for possession of obscene material. The radio broadcast omitted the word "allegedly" before the word "obscene." Rosenbloom was acquitted of all criminal charges and the court found as a matter of law that the magazines were not obscene. The jury in the libel case returned a verdict for Rosenbloom which was reversed by the court of appeals which held the *New York Times* standard applicable. Rosenbloom v. Metromedia, Inc., 415 F.2d 892 (3rd Cir. 1969).

22. 388 U.S. 130 (1967); *cf.* Time, Inc. v. Hill, 385 U.S. 374 (1967) (application of the *New York Times* standard in a right of privacy action).

23. Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967). Seven Justices agreed that both Butts and Walker were public figures.

24. *Id.*

25. The term, "non-government citizen," includes both the public figure and the purely private individual. The term is used in contradistinction to the term "government official".

extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.[26]

Chief Justice Warren joined by Justice Brennan and Justice White thought that the *New York Times* standard should apply.[27] Justices Black and Douglas held, as a result of their strict reading of the first amendment, that all libel actions against publishers are prohibited.[28]

In *Rosenbloom*, the plurality opinion written by Justice Brennan and joined by Chief Justice Burger and Justice Blackmun held that the *New York Times* standard should apply regardless of whether the falsely defamed party was a public figure or a private individual when a matter of public or general interest is involved.[29] Earlier in *Time, Inc. v. Hill*[30] Justice Brennan had recognized that there was a common law privilege of commenting on newsworthy persons and events as long as the facts were not misstated.[31] But he went beyond this common law privilege in this action for invasion of privacy by extending the *New York Times* privilege to protect the publisher for even erroneous statements of fact when a matter of public interest is involved.[32]

The *Hill* case was an important extension of the *New York Times* privilege but the case was an action for invasion of privacy not an action for defamation. Also, the Court did not clearly disregard the fact that Hill was a newsworthy person connected with an event of public interest.[33] But in *Rosenbloom*, a defamation action, Justice Brennan went even further and expressly disregarded the defamed person's connection with the

26. Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967). *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 828 (4th ed. 1971) (hereinafter cited as PROSSER) which points out that the lower federal and state courts initially refused to apply the *New York Times* standard to anyone who was not a public officer or employee.

27. Curtis Publishing Co. v. Butts, 388 U.S. 130, 163-64 (1967).

28. *Id.* at 170. *See* note 71 *infra.*

29. *See* note 18 *supra.*

30. 385 U.S. 374 (1967). *Hill* involved a published article about the opening of a play based on an experience that Hill and his family had when their home was invaded by three escaped convicts. The article contained some false statements of fact but was not defamatory.

31. *Id.* at 384. For a more thorough discussion of the common law privilege of "fair comment" and the *Hill* case see PROSSER 819-30; 1 HARPER & JAMES, THE LAW OF TORTS § 5.28 at 456-63 (1956); 53 C.J.S. *Libel and Slander* §§ 130-34 (1948).

32. Time, Inc. v. Hill, 385 U.S. 374, 387-88 (1967). The court discussed the similarity between the actions of privacy and libel.

> [A]ll libel cases concern public exposure by false matter, but the primary harm being compensated is damage to reputation. In the 'right of privacy' cases the primary damage is the mental distress from having been exposed to public view, although injury to reputation may be an element bearing upon such damage.

Id. at 385 n.9.

33. *Hill* was decided prior to *Butts* which applied the constitutional standard where public figures were involved.

matter of public interest. He held that as long as the defamatory material was written about a matter of public interest the broadcaster was protected by the *New York Times* privilege regardless of the status of the defamed person.[34]

Justice Harlan, in a dissenting opinion in *Rosenbloom* stated as he had in *Hill* and *Butts* that there is a difference between the interests protected between a public and a private plaintiff, and a reasonable care standard should be applied when a purely private individual is involved.[35] He also preferred to limit the award of punitive damages to cases where there exists a "reasonable and purposeful relationship to the actual harm done . . . ."[36]

Justices Marshall and Stewart in their dissenting opinion in *Rosenbloom* held that the state should be free to set any standard of liability in these cases as long as they do not impose strict liability.[37] They would also restrict damages to actual loss, since they held that punitive and presumed damages threaten a free press and result in windfalls rather than compensation to the individual.[38]

Thus the Supreme Court in *Rosenbloom* had failed to agree on a satisfactory rationale. But the three dissenting Justices, Harlan, Marshall and Stewart, agreed that the status of the plaintiff is important in defamation cases and offered some alternatives to the blind application of the *New York Times* privilege when a purely private individual is defamed.[39] The Justices were able to resolve their split of opinion in the *Gertz* case which was factually more appropriate for deciding the issues.[40]

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34. *See* note 18 *supra*; note 11 *supra* (federal cases expressing this proposition); Farnsworth v. Tribune Co., 43 Ill. 2d 286, 253 N.E.2d 408 (1969) (applying the proposition to an article charging Farnsworth with medical quackery, an area of public concern. Farnsworth was represented by an attorney named Elmer Gertz who quickly found himself in the same position in the *Gertz* case).

35. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 69-72 (1971).

36. *Id.* at 75. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 396-97 (1974) (Justice White's dissenting opinion); PROSSER 14.

37. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 86 (1971).

38. *Id.* at 84-86. The jury in *Rosenbloom* awarded $750,000 in punitive damages which was reduced on remittitur to $250,000.

39. The views of Justices Marshall and Stewart were apparently persuasive enough to convince two newcomers to the Court, Justices Powell and Rehnquist, to join with their views in the *Gertz* case.

40. *Rosenbloom* was not a good factual situation for resolution of the issue of whether the constitutional privilege will be extended to all matters of public interest regardless of the status of the individual. *See* note 21 *supra* for the facts of *Rosenbloom*. Reports of arrests and trials are always newsworthy matters of public interest and the accused criminal involuntarily becomes a public figure. *See* PROSSER 824-25. Rosenbloom was not a purely private individual, but rather a public figure to which constitutional privilege should logically apply because of his involvement in newsworthy matters. *Cf.* Rosenbloom v. Metromedia Inc., 403 U.S. 29, 62 (1971) (Justice White's concurring opinion).

THE GERTZ CASE

After discussing the *Rosenbloom* case, Justice Powell examined the guideposts he would use in formulating the *Gertz* opinion—the two legitimate competing interests found in defamation cases.[41] On the one hand, he recognized that the first amendment requires that some falsehood must be tolerated in order to protect the freedom of speech and press, since punishment of error would lead publishers to self-censorship of even legitimate ideas.[42] On the other hand, he recognized that states have a legitimate interest in compensating private individuals for injury to their reputation through state libel law.[43] Justice Powell's general intention was to accommodate these two interests.

Speaking for the Court, Justice Powell explained the reasons for distinguishing a private individual from a public figure. First he stated:

> Public officials and public figures usually enjoy greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals do.[44]

Since the plaintiff cannot resort to self-help, he is more vulnerable and needs more protection.[45] Justice Powell also distinguished the two classes of plaintiffs on the basis that public of-

41. Gertz v. Robert Welch, Inc., 418 U.S. 323, 341-43 (1974). Although not clearly articulated by the Court, there are actually two levels of competing interests. On one level the federal interest embodied in the first amendment competes with the state interest embodied in the law of libel. On the second level the interest of the publisher in protecting his right to free expression competes with the interest of the private individual in protecting his reputation.

42. *Id.* at 340-41. This idea has historical roots which can be traced to the founding fathers and is echoed throughout the decisions on defamation. *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254, 271 (1964) (quoting James Madison).

43. Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974). It is not unusual for the Court to talk about libel in terms of the state's interest. Historically, the common law of libel in this country has been exclusively a state remedy. Except for a brief and unsuccessful attempt in the Sedition Act of June 25, 1798, ch. 58, § 1-6, 2 Stat. 570, the federal government has never enacted a libel or slander law. For an excellent discussion of the historical background of the state law of libel and the first amendment see Justice White's dissent, Gertz v. Robert Welch, Inc., 418 U.S. 323, 380-88 (1974). *See also* New York Times v. Sullivan, 376 U.S. 254 (1964) (Justice Brennan's discussion of the Sedition Act of 1798).

44. Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974). This distinction was pointed out in Curtis Publishing Co. v. Butts, 388 U.S. 130, 155, 164 (1967). In Justice Brennan's dissent in *Gertz*, he repeated his argument made earlier in the *Rosenbloom* case that denials rarely receive the prominence of the original stories and therefore this distinction is meaningless. Gertz v. Robert Welch, Inc., 418 U.S. 323, 363-64 (1974). Justice Powell admitted that rebuttal will not undo the harm of the defamation but dismissed Justice Brennan's argument as irrelevant. *Id.* at 344. It appears that Justice Brennan made a good argument which the majority failed to answer.

45. Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974).

ficials and public figures have generally chosen and sought their positions accepting the risks and consequences which result from involvement in public affairs.[46] "No such assumption is justified with respect to a private individual."[47]

Justice Powell reasoned that in order to protect the state's right to compensate private individuals for defamatory falsehoods, it is unacceptable to follow the plurality in *Rosenbloom* which would extend the *New York Times* test to all matters of public or general interest regardless of the type of plaintiff involved.[48] Justice Powell instead substituted the guidelines set forth in the dissenting opinion of Justices Stewart and Marshall in *Rosenbloom*, holding that:

> [S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.[49]

Justice Powell also adopted from the same dissenting opinion the limitation on the state's interest which shall extend

> no further than compensation for actual injury. . . . [T]he States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard of the truth.[50]

The Court justified this limitation by describing the common law of defamation as an "oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss."[51] The majority also supported this limitation with four other reasons. First, presumed and punitive damages permit the "uncontrolled discretion of juries to award damages when there is no loss . . . ."[52] Second, they "inhibit the vigorous exercise of First Amendment freedoms."[53] Third, they invite

46. *Id.* This distinction does not apply to every factual situation, as can be illustrated by examining the *Butts* decision. This analysis was used to classify Walker as a public figure since he had taken a belligerent stand in a controversial civil rights issue, but was not used in the case of Butts, who had chosen employment as a football coach. The majority classified Butts a public figure because of the substantial amount of public interest he generated, not because he had voluntarily assumed a risk of being libeled. Curtis Publishing Co. v. Butts, 388 U.S. 130, 154-55 (1967).

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

48. *Id.* at 346. *See* note 43 *supra.*

49. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).

50. *Id.* at 349. This rule has since been followed in Drotzmanns, Inc. v. McGraw-Hill, Inc., 500 F.2d 830 (8th Cir. 1974), which remanded the case for trial in accordance with the *Gertz* opinion.

51. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974).

52. *Id.* The jury is not allowed complete, "uncontrolled discretion" in awarding damages since the judge also plays an important role in this question. *See* 1 HARPER & JAMES, THE LAW OF TORTS § 5.29, at 467 (1956). *See* text accompanying notes 30-31 *supra.*

53. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974).

"juries to punish unpopular opinions rather than to compensate individuals for injury sustained by the publication of a false fact."[54] And finally, "[s]tates have no substantial interest in securing for plaintiffs . . . gratuitous awards . . . far in excess of any actual injury."[55]

In discussing actual injury Justice Powell noted that the Court need not define actual injury since the trial courts can do this. But immediately thereafter he listed what he considers to be the more

> customary types of actual harm inflicted by defamatory falsehood, [including] impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.[56]

Justice Powell further clarified that although there must be evidence concerning the injury, the evidence does not have to assign "an actual dollar value to the injury."[57]

Finally, the opinion set forth some tests for determining whether a private citizen is a public figure or a private individual.[58] There are two types of public figures. The first type has achieved "such pervasive fame or notoriety that he becomes a

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54. *Id.* Only a small minority of jurisdictions (Louisiana, Massachusetts, Nebraska, Washington, and Puerto Rico) have already rejected punitive damages entirely. Fassitt v. United T. V. Rental, Inc., 297 So. 2d 283 (La. App. 1974); Stone v. Essex County Newspapers, Inc., 311 N.E.2d 52 (Mass. 1974) (libel case citing dissenting opinion of Justices Stewart and Marshall in *Rosenbloom* with approval); Abel v. Conover, 170 Neb. 926, 104 N.W.2d 684, 688 (1960); Chase v. Daily Record, Inc., 8 Wash. App. 1, 503 P.2d 1103 (1972) (libel case citing *Rosenbloom* dissent with approval); Ganapolsky v. Park Gardens Development Corp., 439 F.2d 844 (1st Cir. 1971) (law of Puerto Rico); MASS. ANN. LAWS ch. 231, § 93 (1956) (specifically disallows punitive damages in libel or slander actions). *See also* PROSSER 9 n.61.

55. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974).

56. *Id.* at 350. The Court thus listed the traditional elements of general damages which were insufficient of themselves to make slander actionable, but could be recovered once special damages, pecuniary in nature, had been proven. *See* PROSSER 761; 1 HARPER & JAMES, LAW OF TORTS § 5.30 (1956); 53 C.J.S. *Libel and Slander* §§ 241-45 (1948).

57. Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974). The Court here was apparently not referring to special damages in the form of monetary loss, which at common law were necessary to plead a cause of action for slander. It has never been the law that one must assign "an actual dollar amount" to the injury. 53 C.J.S. *Libel and Slander* § 238 (1948). The Court's discussion of damages unfortunately lacks the depth necessary for easy analysis.

58. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130, 154-55, 163-64 (1967). The tests set forth in *Gertz* are basically the same tests that the Court applied in *Butts*, but the *Gertz* opinion refines them and states them with more clarity. Thus, while the Court in *Butts* speaks of commanding "continuing public interest" whether by reason of the plaintiff's "position" (an ambiguous word) or because of thrusting himself into the "vortex of an important public controversy," the *Gertz* opinion is more specific in talking about achieving the status "in all contexts" by reason of "pervasive fame" and achieving the status for a "limited range of issues" by "injecting himself" or being "drawn into" a particular public controversy.

public figure for all purposes and in all contexts."[59] In addition to this celebrity type of individual, there is the more common type who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues."[60] The Justices determined that since Gertz did not fit into the celebrity category, they would apply the test for the more common type of public figure which is to look to "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation."[61] Here, Gertz had represented a private client and had taken no part in the criminal prosecution of officer Nuccio.[62] Because Gertz "did not thrust himself into the vortex of this public issue,"[63] he was not a public figure. Since Gertz did not meet these tests, the *New York Times* standard was inapplicable and the Court remanded the case to the district court for a new trial.[64]

This case was a five to four decision. Justice Blackmun, who had been one of the plurality in *Rosenbloom*, wrote a separate concurring opinion[65] in which he agreed with Justice Powell's opinion for two reasons. First, he agreed that removing presumed and punitive damages will give "adequate breathing space for a vigorous press."[66] And secondly, he believed that it is necessary to have a clearly defined majority on this issue.[67] However he made it clear that "[i]f my vote were not needed to create a majority, I would adhere to my prior view."[68]

Chief Justice Burger and Justice White wrote separate dissenting opinions in which both objected to such radical changes in defamation law when they have "no jurisprudential ancestry."[69] Both of them would permit Gertz to prevail and would

59. Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974).
60. *Id.* The implications of this test are important since the defamed person can be a public figure for one particular issue, but if the publisher steps outside of this issue and publishes a defamatory statement unrelated to it, the defamed person will be considered a private individual.
61. *Id.* at 352. This is a further refinement not considered in *Butts*. *See* note 58 *supra*.
62. *See* note 8 *supra*.
63. Gertz v. Robert Welch, Inc., 418 U.S. 323, 352 (1974).
64. *Id.* After the Supreme Court decision was rendered, Robert Welch, Inc., insisting its position was still correct, again printed and circulated the article about Gertz.
65. *Id.* at 353.
66. *Id.* at 354.
67. *Id.*
68. *Id.*
69. *Id.* at 355. Chief Justice Burger did not explain what he meant by "jurisprudential ancestry," but apparently he was referring to the history and theory of the law of defamation which Justice White explored in his dissenting opinion. Chief Justice Burger's position, that this area of the law should evolve with respect to private citizens, seems quite inconsistent with his previous position as one of the plurality in *Rosenbloom* which called for an abandonment of distinctions between public and private plaintiffs.

reinstate the jury's verdict. Justice White in his dissenting opinion, well-supported by authority, examined the historical reasons for the law of defamation and concluded that:

> [Y]ielding to the apparently irresistible impulse to announce a new and different interpretation of the First Amendment, the Court discards history and precedent in its rush to refashion defamation law in accordance with the inclinations of a perhaps evanescent majority of the Justices.[70]

Justice Douglas, in his dissenting opinion, took his familiar absolutist position that there can be no accommodation between free speech and the law of libel.[71] He would reinstate the decision of the court of appeals which refused to allow recovery for discussion of public affairs.[72]

Justice Brennan, in a separate dissenting opinion, still adhered to his views expressed in the *Rosenbloom* plurality opinion.[73] He held that the *New York Times* standard should be extended to all cases involving matters of public interest, regardless of the notoriety of the individual involved.[74] He answered Justice Powell's arguments for distinguishing public and private individuals by pointing out that the public figure's ability to respond through the communications media is unpredictable at best.[75] Also he pointed out that even the private individual risks some exposure to the public view just by social interaction.[76] Finally, Justice Brennan thought that not enough protection is given to publishers and broadcasters by limiting damages to actual injury.[77]

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70. *Id.* at 380.

71. *Id.* at 356-57. Justice Douglas's position has remained constant in refusing to accommodate freedom of speech with competing concerns. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 293 (1964); Rosenblatt v. Baer, 383 U.S. 75, 94 (1965); Time, Inc. v. Hill, 385 U.S. 374, 398 (1966); Curtis Publishing Co. v. Butts, 383 U.S. 130, 170 (1967); *cf.* Barrenblatt v. United States, 360 U.S. 109, 134 (1959). Justice Douglas did not take part in *Rosenbloom*.

72. Gertz v. Robert Welch, Inc., 418 U.S. 323, 360 (1974).

73. *Id.* at 361.

74. *Id.* at 362.

75. *Id.* at 363. *See* note 44 *supra*. Justice Brennan suggests in *Rosenbloom*, as an alternative to libel actions, the enactment of right of reply statutes which would remove this element of unpredictability to respond through the communications media. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 47 n.15 (1971). *See also* Donnelly, *The Right of Reply: An Alternative to Action for Libel*, 34 VA. L. REV. 867 (1948).

76. Gertz v. Robert Welch, Inc., 418 U.S. 323, 364 (1974). It may be true that one must expect some abuse from normal social interaction. But it is submitted that when a person is libeled and his reputation, profession, and mental equanimity are injured by defamatory falsehoods, the law should not consider this one of the normal abuses flowing from social interaction. *Cf.* Knierim v. Izzo, 22 Ill. 2d 73, 85, 174 N.E.2d 157, 164 (1961): "A line can be drawn between the slight hurts which are the price of a complex society and the severe mental disturbances inflicted by intentional actions wholly lacking in social utility."

77. Gertz v. Robert Welch, Inc., 418 U.S. 323, 367-68 (1974).

ACCOMMODATION AND NEW COMPLEXITY

Balancing Interests

The *Gertz* case can be analyzed by considering what the petitioner requested the Court to do. Gertz in his brief asked the Court for an "accommodation of those rights . . . in the area of defamation."[78] The Court in *Gertz* struggled to define the proper accommodation between the two competing concerns of the need for a vigorous and free press protected by the first amendment and the state's legitimate interest in compensating private individuals for harm caused by defamatory falsehood.[79] In seeking this accommodation the Court tried to lay down broad rules of general application rather than attempt to decide the issue on an ad hoc basis.[80]

The *Rosenbloom* plurality had defined this accommodation by proposing the extension of the *New York Times* standard whenever a matter of public interest was involved regardless of the status of the defamed individual. This standard had been justified as necessary to insure sufficient "breathing space to the First Amendment values."[81] The Court in *Gertz* was also concerned with giving adequate breathing space to freedom of speech.[82] Justice Powell held that the strict application of the "public or general interest test" of *Rosenbloom* "inadequately serves both of the competing values at stake."[83] *Rosenbloom* would have required, for example, that a private individual meet the rigors of the *New York Times* standard if he was defamed in an article concerning any legitimate public issue, even one with which the private individual had no connection. Conversely the publisher would have speculated at his peril on whether the contents of a particular article would be held to be a matter of public interest.[84] Thus the *Rosenbloom* test not only removed the focus of the Court from the harm suffered by a private individual but also served as a potential impetus to self-censorship of the press.

The Court in *Gertz* attempted to solve the problem in an equitable manner by balancing the competing interests involved. Although the majority did not clearly separate them, there are

78. Petitioner's Brief for Certiorari at 53, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).
79. Gertz v. Robert Welch, Inc., 418 U.S. 323, 341-48 (1974). *See* note 41 *supra*.
80. Gertz v. Robert Welch, Inc., 418 U.S. 323, 343-44 (1974).
81. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 (1971). *See* note 18 *supra*.
82. Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974).
83. *Id.* at 346.
84. *Id.*

actually two levels of interests that are being balanced.[85] At the first level the Court attempted to accommodate the state interest with federal interest. On the one hand, the majority will permit the states to define for themselves the appropriate standard of liability, which preserves the legitimate state interest in compensating private individuals injured by defamatory falsehoods. On the other hand, the Court will not permit the state to impose liability without fault, recognizing the federal interest embodied in the first amendment in giving publishers "adequate breathing space" needed for freedom of speech and press.[86]

At the second level, the majority balanced the defamed individual's interest with the publisher's interest. On the one hand, the defamed private individual's interests are protected since the Court permits him to bring an action for libel without having to meet the rigors of the *New York Times* actual malice standard. And on the other hand, the publisher's interests are protected since the Court will not permit the defamed party to recover presumed or punitive damages unless the *New York Times* actual malice standard is used.

Limiting Damages

Justice Powell's discussion of actual and presumed damages is ambiguous and incomplete. This is because he never expressly refers to the common law rules on presumed damages. Generally, scholars have noted that the common law rules are arbitrary and are based on antiquated distinctions.[87] But some general principles have evolved.

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85. *See* note 41 *supra.*

86. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347-48 (1974). *See also* PROSSER 772-74 which notes that "[t]here has been something of an undercurrent of rebellion against the strict liability rule, and a tendency to hold that at least negligence is essential to the cause of action."

87. *See, e.g.*, W. PROSSER, SELECTED TOPICS ON THE LAW OF TORTS 100 (1954); MCCORMICK, DAMAGES 418 (1935); Veeder, *History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903). It may be useful to distinguish between the terms used to describe damages in the law of defamation. "Special damages" are damages which must be supported by specific proof. Courts have usually required them to be pecuniary in nature. This term is used to distinguish it from damages which are assumed to flow if the defamation can be fitted into one of the four arbitrary categories of slander per se. These assumed damages are also known as "presumed damages." The four categories are: first, imputations of crime; second, imputations of a loathsome disease; third, words defaming one's business, trade, profession, or office; and fourth, imputations of unchastity to a woman. When a cause of action is established either because the words fit into one of the categories or because "special damages" are proven, then "general damages" are recoverable for any harm to reputation, and for humiliation and physical illness. *See* text accompanying note 56 *supra.* "General damages" are sometimes called "parasitic" since they are only recoverable if a cause of action is established. The term "actual damages" is a less precise term. It is used by Prosser and by the Court to mean that proof must be introduced of actual harm before a cause of action is established. The term "punitive"

If a libel is defamatory on its face (libel per se)[88] and does not require extrinsic facts to show its defamatory meaning it is actionable without proof of damages since the common law presumes some general injury necessarily resulted from publication. The defamed individual may recover general damages and in addition whatever special pecuniary damages he can prove. All courts except Virginia follow this rule.[89] But there is a split of authority when the libel is not defamatory on its face (libel per quod) and requires extrinsic facts to make out the defamatory meaning. Ten jurisdictions[90] follow the old common law rule that a libel which is not defamatory on its face is actionable without proof of damage. While twenty-four states, including Illinois, support the rule that if a libel is not defamatory on its face the same rules apply as if it were slander and thus it is not actionable without proof of special damages in situations where slander would not be.[91] When libel per quod requires proof of special damages, and the pecuniary loss is shown, general damages are recoverable without any more proof of actual injury.[92]

Although the language in *Gertz* limits the application of these common law rules, it does so only if three conditions occur. First, the plaintiff in the libel action must be a private individual. Second, the defendant must be a publisher or broadcaster. Third, the private individual's proof of liability of the publisher must be based on a standard less demanding than the *New York Times* actual malice standard, such as a negligence standard. When all of the conditions concur then the Court forbids the states to permit presumed damages.[93] In all other situations the Supreme Court has neither expressly nor impliedly changed the common law rules on damages.

Thus, a public official or a public figure who brings an action

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or "exemplary damages" is used to refer to damages which are awarded beyond compensation for injury in order to punish the defendant when there are aggravating circumstances. For a more thorough discussion of these terms see PROSSER 9, 754-61.

88. "Libel per se" originally referred to those types of words which were damaging in themselves and required no extrinsic facts to show their defamatory meaning. *E.g.* "John is a crook." "Libel per quod" on the other hand referred to words which were not defamatory on their face but only became so if other extrinsic facts were shown. *E.g.* "John has dirty hands when he works." The extrinsic fact making this statement defamatory is that John is a dentist.

89. Gertz v. Robert Welch, Inc., 418 U.S. 323, 374 (1974) citing RESTATEMENT (SECOND) OF TORTS, Explanatory Note § 569, at 84 (Tent. Draft No. 11, April 15, 1965).

90. *Id.*

91. *Id.* at 374-75. *See* Mitchell v. Peoria Star-Journal, Inc., 76 Ill. App. 2d 154, 221 N.E.2d 516 (1966); Whitby v. Associates Discount Co., 59 Ill. App. 2d 337, 297 N.E.2d 482 (1965).

92. PROSSER 761-63.

93. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347-50 (1974).

for libel will still be entitled to all the common law presumptions that the state follows. These presumptions will also be available to the private individual whose proof of liability is based upon a showing of falsity or reckless disregard of the truth, that is, the *New York Times* standard.[94]

The effect of the Court's change in this area is limited, therefore, to the situation where a private individual brings a libel action against a publisher and bases his proof of liability on a less demanding standard than the *New York Times* standard. In these situations, if the libel is defamatory on its face (libel per se), then the common law presumption of general damages is eliminated and actual damages must be proven. If the libel is not defamatory on its face (libel per quod) the law is changed in states following the old rule since actual damages must now be proven. In states following the special damages rule of libel per quod, the private individual must prove both special and actual damages in situations where slander would require proof of special damages.[95]

It is a mistake to interpret the *Gertz* case as eliminating libel per se. Upon a close reading of the case it is apparent that while libel per se has had the doctrine of presumed damages pruned from it, the main branch is still flourishing.[96] The majority never explicitly or impliedly says that there are no longer words which on their face are defamatory. It merely imposes an additional burden on the private plaintiff in a libel case, that of proving actual damages.[97] Thus, a defamed private plaintiff under a relaxed standard can still plead that the words published were libel per se, defamatory on their face, but additionally must plead and prove actual damages.

Pleading and proving actual damages may prove to be a great burden and may even be

> impossible in a great many cases where, from the character of the defamatory words and the circumstances of the publication, it is all but certain that harm has resulted in fact.[98]

These cases may involve subtle effects and changes in the be-

94. The Court's language, "at least when liability *is not* based on a showing of knowledge of falsity or reckless disregard of the truth," *id.* at 349 (emphasis added), implies that conversely when liability *is* based upon the actual malice standard, presumed and punitive damages will be available to the private individual.

95. *See id.* at 393, n.29 (Justice White's dissent).

96. Much confusion resulted in the past from failing to distinguish between defamatory per se and damaging per se. The same confusion could result from a failure to distinguish in *Gertz*. See W. PROSSER, SELECTED TOPICS ON THE LAW OF TORTS 104-105 (1954).

97. The private plaintiff apparently has the option of proving actual damages or proving constitutional actual malice which would entitle him to presumed and punitive damages. *See* note 94 *supra*.

98. PROSSER 765.

havior of third persons towards the plaintiff which may be impossible to trace or to prove.[99] It is difficult to see how the Supreme Court can say in these cases that "there is no loss,"[100] especially if the words are defamatory on their face. Moreover, this seems inconsistent with their earlier discussion in *Gertz* of the importance of protecting private individuals.[101]

Although Justice White refers to the Court's treatment of punitive damages as "judicial overkill," punitive damages have not been totally eliminated in all libel cases.[102] Like presumed damages, the Court limited punitive damages to the situation where the defamed plaintiff is a private individual and is proving the liability of the publisher under a more relaxed standard than the *New York Times* actual malice standard.[103] The majority has placed restrictions on the discretion of the jury to award them in these situations.

Many states have already recognized the dangers involved in allowing juries wide discretion in assessing punitive damages. Some require that common law malice or other aggravating circumstances must be shown before they will be awarded.[104] Most jurisdictions require that actual damage must be proven before juries may impose punitive damages.[105] Still others have adopted the rule cited by Justice Harlan in *Rosenbloom* that punitive damages be limited to cases where there exists "a reasonable and purposeful relationship to the actual harm done . . . ."[106]

Justice Powell's opinion ignores these attempts by the states to control "unpredictable amounts" awarded by juries. In fact, the Court may have engaged in "judicial overkill" in *Gertz* since it was an inappropriate case in which to discuss indiscriminate juries.[107]

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99. Note, *Developments in the Law-Defamation*, 69 HARV. L. REV. 875, 891-92 (1956).

100. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974).

101. *Id.* at 344-45. The interest protected has been referred to as a "relational" interest, that is, it involves the opinion of others in the community of plaintiff. *See* Green, *Relational Interests*, 31 ILL. L. REV. 35 (1936).

102. Gertz v. Robert Welch, Inc., 418 U.S. 323, 397 (1974); *see* note 54 *supra*. *See also* Curtis Publishing Co. v. Butts, 388 U.S. 130, 159-60 (1967) (punitive damages are not a prior restraint).

103. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347-50 (1974).

104. 25 C.J.S. *Damages* § 123(1)-(4) (1966). Mere negligence is generally not a ground for an award of punitive damages; *see* 25 C.J.S. *Damages* § 123(8) (1966).

105. 25 C.J.S. *Damages* § 118 (1966). This is the general rule although some jurisdictions permit the award of punitive damages upon a showing of nominal damages.

106. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 75 (1971); *see* 25 C.J.S. *Damages* § 126(1), at 1116 n.95 (1966).

107. The jury in *Gertz* awarded only $50,000 damages. This is considerably less than the $10,000 actual damages and $500,000 punitive dam-

CONCLUSION

While *Gertz* never expressly overruled *Rosenbloom*, it did overrule the rationale of the plurality.[108] But the "public or general interest" test is not completely invalid. Publications of matters of public and general interest that contain defamatory falsehoods will still be measured by the *New York Times* constitutional standard if they concern a public official or a public figure. The *Gertz* case only found this approach inappropriate when a private individual unconnected with the public issue is involved.

Most courts since *Gertz* have followed the opinion or distinguished it on the facts.[109] However, there has been one state decision, *Aafco Heating & Air Conditioning Co. v. Northwest Publishing, Inc.*,[110] which ostensibly rejected the *Gertz* distinction between public and private plaintiffs. Instead the court adopted the *Rosenbloom* "public or general interest" test because it considered this test to be closer to state law embodied in the state constitution. While this case may be an aberration, it indicates that the issues discussed in *Gertz* may be far from settled. Also, it shows that the *Gertz* opinion may easily be misinterpreted.

The Court in *Gertz* answered the questions presented by balancing the competing interests involved. They refused to blindly extend the *New York Times* privilege to publishers whenever defamatory publications concern a matter of public or general interest regardless of the injured party's status. Instead, they distinguished between the individual involved in the vortex of a public controversy and the private individual who is not closely involved in the public issue. The Court refined and made clear tests for determining whether a defamed party was a private individual or a public figure. While teetering back and forth in balancing the interests may have caused some dizziness and unanswered questions, *Gertz* on the whole swung back the scales in favor of the defamed private individual whose interests had been given little weight by the *Rosenbloom* plurality.

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ages that he requested in his complaint. Gertz v. Robert Welch, Inc., 322 F. Supp. 997 (1970). It was also much less than the $725,000 awarded by the jury in *Rosenbloom* for omitting a word, which was reduced by the court on remittitur to $250,000. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).

108. Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974).

109. Random House v. Gordon, 95 S. Ct. 27 (1974) (mem. followed *Gertz*); Porter v. Guam Publishing, Inc., 94 S. Ct. 3200 (1974) (mem. followed *Gertz*); Drotzmanns, Inc. v. McGraw-Hill, Inc., 500 F.2d 830 (8th Cir. 1974) (followed *Gertz*); Meerpol v. Nizer, 381 F. Supp. 29, 32-34 (S.D.N.Y. 1974) (distinguished *Gertz* on facts); Fram v. Yellow Cab Co., 380 F. Supp. 1314, 1332-34 (W.D. Penn. 1974) (dicta followed *Gertz*).

110. 321 N.E.2d 580 (Ind. App. 1974). *But see* Judge Garrard's dissent, *id.* at 591.