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Losing the Struggle to Define the Proper Balance Between the Law of Defamation and the First Amendment - Gertz v. Robert Welch, Inc.: One Step Forward, Two Steps Back

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Losing the Struggle to Define the Proper Balance Between the Law of Defamation and the First Amendment—Gertz v. Robert Welch, Inc.: One Step Forward, Two Steps Back

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[1]

"If by *Liberty of the Press* were understood merely the liberty of discussing the Propriety of Public Measures and political opinions, let us have as much of it as you please: But if it means the Liberty of affronting, calumniating, and defaming one another, I for my part, am myself willing to part with my Share of it when our Legislators shall cheerfully consent to exchange my *Liberty* of Abusing others for the Privilege of not being abus'd myself."[2]

"Newspapers, magazines, and broadcasting companies are businesses conducted for profit and often make very large ones. Like other enterprises that inflict damage in the course of performing a service highly useful to the public . . . they must pay the freight; and injured persons should not be relegated [to remedies which] make collection of their claims difficult or impossible unless strong policy considerations demand."[3]

I.

Introduction

In June of 1974, the United States Supreme Court found itself again struggling "to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment."[4] The case was *Gertz v. Robert Welch, Inc.*[5] and the principal issue before the Court was the extent of a media publisher's constitutional privilege against liability for circulation of defamatory falsehoods about a *private* citizen.

It is paradoxical that the apparently antithetical goals sought to be achieved by a guarantee of freedom of expression and a strict limitation on that expression had not seriously clashed at an earlier

1. U.S. Const. amend. I.
2. 10 The Writings of Benjamin Franklin 38 (. Smyth ed. 1907).
3. Buckley v. New York Post Corp., 373 F.2d 175, 182 (1967).
4. 418 U.S. 323, 325 (1974).
5. *Id.* at 323.

date. The Supreme Court's entry into the area of this conflict began ten years ago with its focus at that time on the public, rather than the private, individual.[6] In its last attempt at harmonizing the competing values involved in a case also dealing with a private individual, the Court was severely divided and produced no definitive ruling.[7] Hence, clarification in this important problem area, recently left in turmoil and uncertainty, was sorely needed.

The objective of this comment is threefold: *first*, to examine from a historical perspective the nature of the coexistence between a free press and an individual's vindiction for injury to reputation; *second*, to provide an analysis of the *Gertz* decision and dissent with an eye toward the extensive modification of the substantive law of defamation resulting from the Court's "equitable balancing"; and, finally, to offer a critical appraisal of the holding in *Gertz* in light of its abandonment of historical reason and precedent and failure to correctly weigh the opposing interests at stake.

II.

Historical Developments

In order to understand fully the import of the *Gertz* decision, it is necessary to delve into the historical evolution of the law of defamation.

While one of the earliest forms of action for defamation can be traced back to the Salic Law of the fifth century,[8] the seignorial courts of thirteenth and fourteenth century England provided the main arena for early defamation litigation.[9] Because of the local nature of these manorial courts, the injured reputation could be healed in the very presence of those who heard the objectionable words.[10] At the same time, the ecclesiastical courts were punishing defamation as a sin and with the decline of the manorial courts, the Church became the only avenue of redress open to those allegedly defamed.[11]

Eventually, the civil action for defamation found its way into the Star Chamber. The case *De Libellis Famosis*, handed down in

6. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
7. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).
8. 2 F. Pollock & F. Maitland, The History of English Law 537 (Cambridge University Press 1968).
9. Veeder, *The History and Theory of the Law of Defamation*, 3 Colum. L. Rev. 546, 549 (1903).
10. *Id.*
11. F. Pollock & F. Maitland, *supra* note 8, at 538.

1605, is considered the formal starting point of English libel law.[12] The action concerned defamatory material contained in a poem about the Archbishop of Canterbury. The case, as reported by Coke, set out the following:

> Every libel (which is called *libellus, seu infamatoria scriptura*) is made either against a private man, or against a public person. If it be a private man it deserves a severe punishment, for although the libel be made against one, yet it incites all those of the same family, kindred, or society to revenge, and so tends *per consequens* to quarrels and breach of the peace, and may be the cause of shedding of blood, and of great inconvenience; if it be against a magistrate, or other public person, it is a greater offence, for it concerns not only the breach of the peace, but also the scandal of government. . . .

The chamber then held:

> a libeller shall be punished either by indictment at common law, or by bill, if he deny it, or *ore tenus* on his confession in the Star Chamber, and according to the quality of the offence he may be punished by fine or imprisonment, and if the case be exorbitant, by pillory and loss of his ears.[13]

The Star Chamber was abolished in 1640, but censorship remained alive through a series of licensing acts until the close of the seventeenth century.[14]

By the middle of the eighteenth century, the concept of freedom of the press in England had evolved into freedom from prior restraint. According to Blackstone:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraint upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity.[15]

That the English common law of libel together with the somewhat conflicting concepts of free expression were both transported to the American colonies is a generally accepted premise. Colonial libraries contained treatises by Coke and Blackstone, and a significant number of Americans studied law in London from 1760 until

12. Veeder, *supra* note 9. at 566.
13. *Case de Libellis Famosis* (1605), 5 Co. Rep. 125a.
14. Veeder, *supra* note 9, at 568.
15. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND § 151.

the outbreak of the Revolution.[16] The evidence suggests, then, that pre-Revolutionary thought on a free press went no further than the Blackstonian definition which allowed for punishment (after publication) of whatever was considered "improper, mischievious or illegal." In fact, it was not until 1774 in an "Address to the Inhabitants of Quebec" that the Continental Congress issued a pronouncement on the value of freedom of the press:

> The last right we shall mention regards freedom of the press. The importance of this consists, besides the advancement of truth, science, morality and acts in general, in its diffusion of liberal sentiments on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officials are shamed or intimidated into more honorable and just modes of conducting affairs.[17]

Conspicuous by its absence in the original draft of the Constitution was any guarantee of intellectual liberty. The states involved in the ratification procedure repeatedly condemned the lack of any affirmation of freedom of speech, and several of the states inserted a declaration of the right in their ratifications of the Constitution.[18] However, the guarantees of freedom of expression in effect in ten of the fourteen states, which by 1792 had ratified the Constitution, gave no absolute protection for *every* utterance,[19] and thirteen of the fourteen states provided for the prosecution of libel.[20] In its first session Congress proposed a Bill of Rights which included the present First Amendment, and in 1791 the Bill of Rights became

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16. Merin, *Libel and the Supreme Court*, 11 WM. & MARY L. REV. 371, 375 (1969).

17. 1 JOURNAL OF CONTINENTAL CONGRESS 104, 108 (ed. 1904), quoted by Mr. Chief Justice Hughes in Near v. Minnesota, 283 U.S. 697, at 717 (1931).

18. Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 5 (1941).

19. DEL. CONST. art. I, § 5 (1792); GA. CONST. art. 61; MD. CONST., *Declaration of Rights*, art. 38 (1776); MASS. CONST., *Declaration of Rights*, art. 16 (1780); N.H. CONST. art. 1, § 22 (1784); N.C. CONST., *Declaration of Rights*, art. 15; PA. CONST., *Declaration of Rights*, art. 12 (1776); S.C. CONST. art. 43 (1778); VT. CONST., *Declaration of Rights*, art. 14 (1777); VA. BILL OF RIGHTS § 12 (1776).

20. Act to Secure the Freedom of the Press, 1 CONN. PUB. STAT. LAWS 355 (1818); DEL. CONST. art. 1, § 5 (1792); GA. PENAL CODE, div. 8, § 8 (1817); DIGEST OF THE LAWS OF GEORGIA 364 (Prince 1822); Act of 1803, ch. 54, II MD. PUBLIC GENERAL LAWS 1096 (Poe 1888); Commonwealth v. Kneeland, 37 Mass. (20 Pick) 206, 232 (1838); Act for the Punishment of Certain Crimes Not Capital (1791), LAWS OF N.H. 253 (1792); Act Respecting Libels (1799), N.J. REV. LAWS 411 (1800); People v. Crosswell, 3 Johns. Cas. 337 (N.Y. 1804); Act of 1803, ch. 632, 2 Laws of N.C. 999 (1821); PA. CONST. art. 9, § 7 (1790); R.I. CODE OF LAWS; *Proceedings of the First General Assembly and Code of Laws*, 44-45 (1647); R.I. CONST. art. 1, § 20 (1842); Act of 1804, 1 LAWS OF VT. 366 (Tolman 1808); Commonwealth v. Morris, 3 Va. (1 Va. Cas.) 176 (1811).

a part of the Constitution.[21] While the full reach of the First Amendment, as interpreted by the Framers of the Constitution, is a subject for speculation exceeding the scope of this comment, the amendment's architect, James Madison, prophetically summarized contemporary thought on freedom of expression:

> Among those principles deemed sacred in America, among those sacred rights considered as forming the bulwark of their liberty, which the Government contemplates with awful reverence and would approach only with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind than the liberty of the press. That this *liberty* is often carried to excess; that it has sometimes degenerated into *licentiousness* is seen and lamented, *but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good with which it is allied; perhaps it is a shoot which cannot be stripped from the stalk without wounding vitally the plant from which it is torn. However desirable those measures might be which might correct without enslaving the press, they have never yet been devised in America.*[22] (Italics added.)

The banner of free speech [only recently] had been unfurled when, in 1798, the Federalist Congress passed the Alien and Sedition Acts, purportedly to control French revolutionary subversion but often used to muzzle Republican opposition. The Acts[23] punished by a $2,000 fine and two years' imprisonment "any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress, or the President, with intent to defame." Truth was available to the defendant as a defense and the jury was expressly authorized to determine both the law and the facts.[24] Public outrage against the Acts helped elect a Republican to the Presidency in 1800 and President-elect Jefferson was committed to allowing the Acts to lapse.[25] In 1832 the Acts were expressly repealed.[26]

While federal prosecution for seditious libel was on the wane,

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21. Z. CHAFEE, *supra* note 18, at 5.
22. 6 WRITINGS OF JAMES MADISON 1790-1802, 336 (G. Hunt, ed. 1906).
23. Alien and Sedition Acts of July 14, 1798, 1 Stat. 596.
24. *See* People v. Croswell, 3 Johns. Cas. 337 (N.Y. 1804) for an account of a common law prosecution of seditious libel. Alexander Hamilton, for the defense, defined liberty of the press as the right to "(publish) with impunity, truth with good motives and for justifiable ends, whether related to men or measures." 3 Johns. Cas. at 352.
25. H. NELSON & D. TEETER, LAW OF MASS COMMUNICATION 28 (1969).
26. F. MOTT, JEFFERSON AND THE PRESS 7 (1943).

civil actions for defamation were thriving in the courts.[27] To create liability for defamation, an unprivileged publication of defamatory matter was required, which was either libel actionable *per se* (liability attached without special harm resulting), or slander actionable either *per se* or upon proof of special damages.[28] The common law privilege of fair comment on matters of public interest in general was commonly accepted; however, the defense of privilege was not extended to false assertions of fact.[29] Thus, a New York court held that "[the] privilege cannot be claimed on the ground that the statements were criticisms of matters of public interest, unless the truth of the facts published is admitted or established."[30] More leeway was granted to newspaper accounts of activities of public persons: "newspaper publications alleging maladministration of public affairs are not libelous by reason of any prima facie defamatory matter therein contained, if the publisher, believing upon reasonable grounds that the facts alleged were true, published them in good faith. . . ."[31] In 1938 the American Law Institute adopted the theory that criticism of persons involved in matters of public concern is privileged, if the criticism represents the actual opinion of the critic on truly stated facts or privileged statements of fact.[32]

The free press clause of the First Amendment had never been thought to raise a serious bar to defamation actions. Rather, the view was well settled that the Bill of Rights merely embodied those guarantees and immunities which had existed in England prior to the American Revolution,[33] including, presumably, the Blackstonian definition of liberty of the press.[34] The state of the law was well summarized by the Florida Supreme Court in 1933:

> Freedom of the press has long been a stated constitutional guarantee, yet it has always been held from an early date that the constitutional guarantee of "freedom of the press" did not secure to libelers immunity from civil or criminal prosecution, but was

27. 32 Am. Digest, 1853 *et. seq.* (Century ed. 1902).
28. RESTATEMENT OF TORTS §§ 558, 569, 570, 575 (1938).
29. Hallam v. Post Publishing Co., 55 F. 456 (6th Cir. 1893).
30. Fry v. Bennett, 7 N.Y. Super. Ct. 54 (1841).
31. Palmer v. City of Concord, 48 N.H. 211, 97 Am. Dec. 605 (1868). *But see* Post Publishing Co. v. Moloney, 50 Ohio St. 71, 33 N.E. 921 (1893): "False and defamatory words, spoken or published of him [a public officer] as an individual are not privileged on the ground that they related to a matter of public interest, and were spoken or published in good faith." *Id.* at 71, 33 N.E. at 921.
32. RESTATEMENT OF TORTS § 606 (1938). *See* § 607 (public officers and candidates), § 608 (public institutions), § 609 (objects of art and science).
33. Robertson v. Baldwin, 165 U.S. 275 (1897).
34. 4 W. BLACKSTONE, *supra* note 15.

> simply intended to secure to the conductors of the press the same rights and immunities, and such rights and immunities only, as were enjoyed by the public at large.[35]

The U.S. Supreme Court continued to recognize that "the unconditional phrasing of the First Amendment was not intended to protect every utterance,"[36] and that libels were not protected by the First Amendment. As Chief Justice Hughes stated in *Near v. Minnesota*:[37]

> it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our Constitution.[38]

III.

FROM *New York Times* TO *Rosenbloom*: INCREASING CONSTITUTIONAL PROTECTION FOR THE NEWS MEDIA.

As already alluded to, prior to 1964 the First Amendment guarantees of freedom of speech and press were not considered as restrictions on the common law tort of defamation. Then, in 1964, the Supreme Court decided *New York Times Co. v. Sullivan*,[39] the landmark decision which first confronted at a constitutional level[40]

35. Layne v. Tribune Co., 108 Fla. 177, 146 So. 234 (1933). *Accord*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1952), wherein the classic statement is found: "There are certain self-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, *the libelous* and the insulting or "fighting words"—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (emphasis added). *Cf.* Beauharnais v. People, 343 U.S. 250 (1952) (Douglas, J., dissenting).

36. Roth v. United States, 354 U.S. 476, 483 (1957).

37. 283 U.S. 697 (1931).

38. *Id.* at 715.

39. 376 U.S. 254 (1964).

40. The Supreme Court in deciding *New York Times* adopted to a great extent the rationale of the Kansas case of Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908). *Coleman* represented the minority view of the fair comment doctrine, which conditionally privileged false statements of fact made with an honest belief in their truth, at least as far as they pertained

the conflict between freedom of expression and the law of defamation. *New York Times* involved allegedly defamatory statements printed in a political advertisement run by the *Times*. The advertisement endorsed civil rights demonstrations and impliedly charged the Montgomery, Alabama police with mistreating black students and civil rights leaders involved in the demonstrations. Several misstatements of fact were contained in the advertisement and a police commissioner (an elected government official) established in an Alabama state court that the factual discrepancies referred to him and constituted libel *per se*. A jury found the defendants liable and rendered judgment accordingly, awarding both general and punitive damages totaling $500,000. The Alabama Supreme Court affirmed[41] and the defendants appealed to the United States Supreme Court on the ground that this decision violated their rights of freedom of speech and of the press guaranteed to them by the First Amendment as applied to the states through the Fourteenth Amendment.

The Supreme Court, in an opinion written by Justice Brennan, prefaced its decision[42] by stating,

> [t]hus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. . .[43]

and then reversed, concluding that a "rule compelling the critic of official conduct to guarantee the truth of all his factual assertions"[44] would deter protected speech, and lead to "self-censorship". To combat this feared result, the Court announced its monumental constitutional privilege:

> 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.[45]

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to public officers and candidates, in the absence of proving malice. For further authority supporting this minority view, *see* cases collected in Annot., 110 A.L.R. 412, 435-41 (1937) and 150 A.L.R. 358, 362-65 (1944).

41. New York Times Co. v. Sullivan, 273 Ala. 656, 144 So. 2d 25 (1962).

42. Two Justices, Black (with Douglas joining) and Goldberg, wrote concurring opinions arguing for an absolute rather than a qualified privilege.

43. New York Times Co v. Sullivan, 376 U.S. 254, 270 (1964).

44. *Id.* at 279.

45. *Id.* at 279-80. Both *New York Times* and its progeny have helped to clarify the meaning and the scope of the terms comprising the new constitutional privilege. The term "public official" was explained to a certain

This constitutional privilege (subsequently referred to as the *New York Times* standard) which will only be lost upon a showing of "actual malice", has been the springboard for the expanding constitutional protection given the news media from tort liability for defamation.

The first major expansion of applicability of the *New York Times* standard came three years later. In 1967, a majority of the Supreme Court agreed that the proper resolution of the consolidated cases *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*,[46] required the extension of the *New York Times* qualified privilege to defamatory falsehoods concerning "public figures"—those non-"public officials" who "are nevertheless intimately involved in the resolution of important public questions, or, by rea-

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extent by the fact that the plaintiff in *New York Times* was an elected government official. However, the scope of that term was not clearly defined until Rosenblatt v. Baer, 383 U.S. 75 (1966), when, where dealing with a non-elected government employee, the Court decided that "the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, *or appear to the public to have*, substantial responsibility for or control over the conduct of government affairs." (Emphasis added.) *Id.*, at 85. The subject matter limitation of the privilege-requiring comment relating to "official conduct"—was explained in Garrison v. Louisiana, 379 U.S. 64 (1964), to extend to criticism regarding "anything which might touch on an official's fitness for office." *Id.*, at 77. *New York Times* held that "reckless disregard" would not necessarily be established by a newspaper failing to test the accuracy of its assertions against information in its own files. Common law "ill will" malice was distinguished and ruled insufficient to establish "recklessness" and with the decision in St. Amant v. Thompson, 390 U.S. 727 (1968), the Court almost eliminated anything short of knowledge of falsity from establishing liability. They held publication in reckless disregard of the truth to be publication when aware of probable falsity by requiring sufficient evidence to establish that the "defendant in fact entertained serious doubts as to the truth of his publication." *Id.*, at 731.

Although Time, Inc. v. Hill, 385 U.S. 374 (1967), concerned invasion of privacy rather than defamation, it is significant for purposes of this article in that the *New York Times* privilege was allowed against a non-public plaintiff. However, the opinion for the Court, authored by Justice Brennan, pointed out that this case, not being a libel action, was not expanding on *New York Times*. The opinion speculated, however, that "[w]ere this a libel action, the distinction which has been suggested between the relative opportunities of the public official and the private individual to rebut defamatory charges *might* be germane. And the additional state interest in the protection of the individual against damages to his reputation would be involved." (Footnotes omitted and emphasis added.) *Id.*, at 390-391.

46. 388 U.S. 130, 162 (1967).

son of their fame, shape events in areas of concern to society at large."[47] In *Curtis*, the plaintiff Butts, the athletic director for the University of Georgia, was considered a "public figure" in his libel suit against the *Saturday Evening Post* which charged that Butts had conspired to fix a football game between his school and the University of Alabama. In the companion case, Walker was a retired general who had been active in various political affairs,[48] receiving wide publicity on the issue of school segregation for his strong statements against physical federal intervention. He was determined to be a "public figure" in his libel action against the Associated Press for its accounting of his participation in a massive campus riot resulting from federal desegregation efforts. Under *New York Times*,[49] neither Butts nor Walker could rightly be classified as a "public official" since the athletic director at the University of Georgia was employed by a *private* organization, not an agency of the State, and Walker had *retired* from the Army. However, a majority of the Court concluded that the important underlying reasons for the *New York Times* standard, those of protection

47. *Id.*, at 164 (Chief Justice Warren's concurring opinion). The Court could not agree upon a majority opinion. Of the four opinions filed, Justice Harlan's opinion, joined by three other Justices, announced the result in both cases. The recovery of damages by Butts was affirmed, five members of the Court feeling that Constitutional standards had been met. However, one member of the Court voted to reverse Walker's prior damage recovery, none feeling a sufficient constitutional standard had been proved. Justice Harlan and his companions, Justice Clark, Justice Stewart, and Justice Fortas wished to apply a lower standard of "actual malice" than that required by *New York Times*—one that required a "showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." 388 U.S. 130, 155 (1967).

Chief Justice Warren concluded in his concurring opinion that the same standard, the *New York Times* higher standard of "actual malice", should govern both "public official" and "public figure" cases. (This is the principle for which these cases stand.) Chief Justice Warren stated:

> And surely as a class these 'public figures' have as ready access as 'public officials' to mass media of communication, both to influence policy and to counter criticism of their views and activities. Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials'. The fact that they are not amenable to the restraints of the political process only underscores the legitimate and substantial nature of the interest, since it means that public opinion may be the only instrument by which society can attempt to influence their conduct." *Id.* at 164.

A majority of the Court agreed with the Chief Justice, favoring at least the application of the *New York Times* standard.

48. *Id.* at 140. Justice Harlan, in his opinion which announced the result in both cases, found that Walker "could fairly be deemed a man of some political prominence."

49. *Supra* note 45.

against self-censorship and advancement of discussion on public issues, also compelled application of the "actual malice" standard of *New York Times* to protect defamatory criticism about the public life[50] of "public figures".

The third significant increase in protection for the news media from liability for defamation came with the decision in *Rosenbloom v. Metromedia, Inc.* in 1971.[51] Prior to *Rosenbloom*, the Court's handling of modern defamation cases against the mass media clearly appeared to depend solely upon the status of the person defamed: namely, one deemed a "public official" or "public figure" had the burden of establishing "actual malice" behind the defamatory publication or the matter would be held to be constitutionally protected under the First Amendment,[52] while one considered merely a private individual had no such burden, and therefore had only to prove the common law elements of the tort.[53] *Rosenbloom* has generally been cited for its apparent repudiation of the "plaintiff's status" approach to deciding defamation cases.[54]

Rosenbloom was a distributor for nudist magazines who was arrested on obscenity charges while delivering magazines to a newsstand. Following the seizure of his entire inventory of books and magazines by the police, Rosenbloom sought and received injunctive relief prohibiting further interference with his business, claiming that his magazines were not obscene. Shortly after he was acquitted of obscenity charges, he filed suit for libel against defendant Metromedia, Inc., which had neglected to specify in two of its broadcasts relating his arrest and the seizure of his materials that the materials were only "allegedly" or "reportedly" obscene and further for impliedly referring to him as a "girlie-book peddler" and his magazines as "smut literature" when reporting on Rosenbloom's suit for injunctive relief. He obtained a judgment against

50. 388 U.S. 130, 162, 164 (1967). (Chief Justice Warren's concurring opinion.)

51. 403 U.S. 29 (1971).

52. *See* New York Times Co. v. Sullivan, 376 U.S. 264 (1964), the line of cases expounding on that decision, *supra* note 45, and Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

53. *Supra* note 28; *see also* W. PROSSER, THE LAW OF TORTS §§ 111-116 (4th ed. 1971).

54. *But see* Comment, *Misinterpreting the Supreme Court: An Analysis of How the Constitutional Privilege to Defame Has Been Incorrectly Expanded*, 10 IDAHO L. REV. 21 (1974), *see* note 58 *infra* for explanation.

Metromedia, Inc. for the broadcasts in the district court, but the Third Circuit Court of Appeals reversed, holding that the *New York Times* privilege was applicable even though Rosenbloom could only be classified as a private individual and not as a "public figure".[55] The Circuit Court concluded that the *event* which the defamatory statements concerned, if a "matter of public interest", and not the status of the plaintiff, should be accorded controlling importance in determining when "actual malice" need be proved "if the recognized important guarantees of the First Amendment are to be adequately implemented."[56]

The Supreme Court affirmed the Circuit Court's conclusions in a 5 to 3 decision.[57] Three separate opinions were filed by the Court in affirming (along with two dissenting opinions), but a majority of the court did not agree on a controlling rationale. Justice Brennan authored the plurality opinion, joined by Chief Justice Burger and Justice Blackmun, stating the conclusion for which *Rosenbloom* has generally been thought to stand.[58] Those Justices concluded that constitutional protection in the form of the *New York Times* standard, should be extended "to all discussion and communication involving matters of public or general concern, *without regard to whether the persons involved are famous or anonymous.*"[59] (Emphasis added.) The plurality thereby rejected the theretofore important distinction between public persons and private individuals with regard to their respective burdens of proof in establishing media liability for defamation.[60] Consequently, fol-

55. Rosenbloom v. Metromedia, Inc., 415 F.2d 892 (3d Cir. 1969).

56. *Id.* at 896. The Circuit Court of Appeals relied heavily upon Time, Inc. v. Hill and lower federal court decisions (as set out in the opinion) as support for their conclusion.

57. Justice Douglas took no part in the consideration or decision of this case.

58. *See* Comment, *Misinterpreting the Supreme Court: An Analysis of How the Constitutional Privilege to Defame Has Been Incorrectly Expanded*, 10 IDAHO L. REV. 213 (1974), for a convincing analysis of the opinions in *Rosenbloom* leading to the conclusion that the Supreme Court did not in fact extend the *New York Times* privilege to all discussion and communication involving matters of public concern. The author points out that only four Justices, the plurality and Justice Black, agreed in extending the "actual malice" standard at least to matters of general or public concern, and therefore it should not have been considered a bona fide statement of the law. And further, that Justice White's opinion, representing the fifth affirming vote, would be the only one that all five would have agreed with!

59. 403 U.S. at 43-44.

60. Justice Brennan for the plurality stated: "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant

lowing the plurality opinion, a private individual even unintentionally involved in a matter of general interest could not recover for injury to his reputation without establishing "actual malice" by the publisher of the defamatory material by clear and convincing proof.

Two other Justices concurred in the *Rosenbloom* result but for different reasons, with neither following the plurality. Justice Black reiterated his long-held conviction in absolute immunity for the news media from liability for defamation as being required by the First Amendment.[61] Justice White concurred on a *much narrower* ground, declining to broaden the constitutional privilege to the extent advocated by his affirming brethern. He basically restricted his holding to the particular circumstances of the case, deciding that in the absence of "actual malice" as defined in *New York Times*, "the First Amendment gives [the news media] a privilege to report and comment upon the official actions of public servants in full detail, with no requirement that the reputation or privacy of an individual involved in or affected by the official action be spared from public view."[62]

In retrospect, the two dissenting opinions in *Rosenbloom* are extremely noteworthy. Three years after *Rosenbloom*, in its decision of *Gertz v. Robert Welch, Inc.*[63]—the focal case of this article—a majority of the Court will have adopted this dissenting rationale as the foundation of its decision. Justice Harlan, in a persuasive dissenting opinion,[64] argued that the long recognized distinction between public and private persons, heretofore controlling the applicability of the *New York Times* standard, should not be abandoned. He maintained that it seemed "quite clear that the public person has a greater liklihood of securing access to channels of communication sufficient to rebut falsehoods concerning him than do private individuals . . .,[65] and further, "that public personalities are more impervious to criticism, and may be held to have run the risk

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and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety." 403 U.S. at 43 (footnote omitted).

61. 403 U.S. at 57 (Black, J. concurring); Justice Douglas, who did not participate in this decision, shares this view.

62. *Id.* at 62 (White, J. concurring).

63. 418 U.S. 323 (1974).

64. 403 U.S. at 62.

65. *Id.* at 70.

of publicly circulated falsehoods concerning them. . . ."[66] After balancing the competing interests in free speech and news media liability for defamation, he decided that when dealing with defamation of *private* individuals, a state should be free to allow the plaintiff to recover *actual damages* upon a standard of its choosing, as long as the state did not impose liability without fault.[67]

Justice Marshall, joined by Justice Stewart, authored the other dissenting opinion.[68] He believed that the plurality's position was a threat to the protections of both the conflicting, yet fundamental, societal interests. On the one hand, the "public or general concern" test would place the courts in the unhealthy position of having to determine "what information is relevant to self-government",[69] and on the other hand, the test would inadequately protect "private individuals from being thrust into the public eye by the distorting light of defamation,"[70] since arguably all human events are "matters of public or general concern." Justice Marshall agreed with the view of dissenting Justice Harlan that liability without fault should be proscribed, but differed in opinion on the availability of punitive damages. He concluded that even if actual malice is proved, recovery of punitive damages should be prohibited since "the self-censorship that results from the uncertainty created by the discretion [of the jury in awarding punitive damages] as well as the self-censorship resulting from the fear of large judgments themselves"[71] would be greatly reduced without preventing victims of defamation compensation for real injuries.

Thus, seven years after the creation of a constitutional privilege designed to safeguard criticism of the public acts of "public officials", the *New York Times* privilege had been greatly expanded to what many believed to be protection for all comment involving "matters of public or general concern." Unfortunately, this extensive growth meant a concomitant erosion of the private individual's shield against injury to his reputation—the law of defamation.

IV.

GERTZ V. ROBERT WELCH, INC.

With the law of defamation being unsettled following *Rosenbloom*, the Supreme Court seized upon an opportunity to clarify

66. *Id.*
67. *Id.* at 64.
68. *Id.* at 78.
69. *Id.* at 79.
70. *Id.*
71. *Id.* at 84 (Marshall, J., dissenting).

matters in June, 1974, with the defamation case of *Gertz v. Robert Welch, Inc.*[72]

Gertz was a reputable attorney in the Chicago area who was retained by the family of a murdered youth to represent them in civil litigation against the convicted murderer, a Chicago policeman. Robert Welch, Inc., publishes *American Opinion*, a magazine expressing the views of the John Birch Society. The magazine published an article alleging that the policeman's murder trial was a "frame-up" and part of a nationwide Communist conspiracy to discredit local law enforcement agencies. Gertz, solely as part of his duty in representing the victim's family in its civil litigation, attended the coroner's inquest into the youth's death and filed civil damage actions. He refrained from press exposure and was not involved in the criminal prosecution of the police officer. But, despite this distant association with the murder trial, the article falsely depicted him as the architect of this phase of the conspiracy. The article also erroneously implied that Gertz had a criminal record, and further, without any substantiation, labeled him a "Leninist" and a "Communist fronter." No attempt was made by the managing editor of the magazine to confirm these damaging accusations.

Gertz brought a diversity suit for libel against the magazine in an Illinois U.S. District Court. During the litigation, the court ruled that some of the allegations in the article constituted libel *per se* under Illinois law and, in effect, that Gertz should not be considered to be either a public official or a public figure.[73] Due to the finding of libel *per se*, the case was submitted to the jury on the question of damages alone, with the result that a verdict for plaintiff Gertz of $50,000 was returned. The court, however, upon reconsidering the defendant magazine's position, decided to enter a judgment for the defendant notwithstanding the jury's verdict, believing that the *New York Times* privilege was applicable to the discussion of any public issue irrespective of the plaintiff's status.[74] Gertz's appeal to the Court of Appeals for the Seventh

72. 418 U.S. 323 (1974).
73. Gertz v. Robert Welch, Inc., 306 F. Supp. 310 (N.D. Ill. 1969).
74. 322 F. Supp. 997 (N.D. Ill. 1970). This conclusion was consistent with other lower federal court decisions being decided around this time and was a harbinger of the view adopted by the *Rosenbloom* plurality, *supra* note 59, in 1971.

Circuit was unsuccessful, primarily as the result of the Supreme Court having just decided *Rosenbloom*. The appellate court, relying on Justice Brennan's plurality opinion, considered *Rosenbloom* to dictate use of the *New York Times* standard whenever concerned with news media coverage of a matter of public concern. Following the *Rosenbloom* plurality and without regard to the status of the person defamed, the Court of Appeals affirmed and held that the *American Opinion* article concerned an issue of public interest; the Court further held that Gertz had not shown by clear and convincing evidence publication with "actual malice" as required by the *New York Times* standard.[75]

Upon review by the Supreme Court Justice Powell stated that certiorari had been granted "to reconsider the extent of a publisher's constitutional privilege against liability for defamation of a private citizen."[76] The outcome of the case was a five to four decision reversing and remanding the matter for further proceedings not inconsistent with the majority opinion. At first glance, the five to four division of the members of the Court is misleading because two of the dissenting Justices favored greater protection for the news media while the other two Justices argued for safeguarding the rights of a defamed private citizen.

Justice Powell delivered the majority opinion in which Justices Marshall, Stewart, Rehnquist, and Blackmun joined.[77] He determined the central issue of the case to be "whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements."[78]

After discussing the important media defamation cases since *New York Times*, Justice Powell reiterated the underlying rationale of each: that while there was no constitutional value in factual misstatements, punishments for these errors that are inevitable in free

75. 471 F.2d 801 (1971). The Court of Appeals found no evidence to suggest that the managing editor of the magazine knew the statements to be false and cited St. Amant v. Thompson, 390 U.S. 727 (1968), *supra* note 45, for its holding that proof of failure to investigate the accuracy of printed matter, without more, will not establish a sufficient "degree of awareness . . . of probable falsity" to constitute reckless disregard for the truth.

76. 418 U.S. 323, 325 (1974).

77. It is important to note that Justice Blackmun, who represents the decisive fifth vote, filed a concurring opinion stating that the need for a clear majority holding and not his true support for the opinion and judgment of the Court, was the reason he joined in the majority opinion. 418 U.S. at 354.

78. 418 U.S. at 332.

debate creates a serious risk of self-censorship that is incompatible with the guarantees of the First Amendment. Therefore, that Amendment demands protection of some falsehood to insure adequate "breathing space"[79] for socially beneficial speech. However, as a majority of the Court has long recognized, the "need to avoid self-censorship by the news media is . . . not the only societal value at issue."[80] Also worthy of preservation is the law of defamation that serves the legitimate state interest in compensating individuals for injury from defamatory falsehood.

With the appropriate balance between these competing values of paramount concern, the majority held that a media publisher or broadcaster of defamatory statements that make "[S]ubstantial danger to reputation apparent. . ."[81] to one who is not a public official or public figure, will be unable to invoke the *New York Times* protection against liability for defamation on the ground that the falsehoods concerned a matter of public interest.[82] Justice Powell pointed out that the *New York Times* standard which is "[A]n extremely powerful antidote to the inducement to media self-censorship . . ."[83] due to its demanding proof requirements is the proper accommodation between the fruitful exercise of free speech and press and the "[*l*]*imited* state interest present in the context of libel actions brought by *public* persons."[84] (Emphasis added.) However, when the victim of the defamatory falsehood is a private individual, a majority of the Court believes that requiring proof of publication with "actual malice" prior to any damage recovery too often would result in an insurmountable barrier in light of considerations which called for greater protection for the private person. The majority reasoned that a state's interest in protecting private individuals by allowing damage recovery for injury to reputation is greater than a state's interest in the realm of a public

79. *Id.* at 342, *quoting* N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963) (Brennan, J., opinion of the Court).

80. *Id.* at 343, *quoting* Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967) (Harlan, J., opinion of the Court).

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

82. 418 U.S. at 346. Although the Court did not expressly overrule *Rosenbloom*, the *Rosenbloom* plurality's "public or general concern" test (generally what the case was thought to stand for) was severely criticized as "inadequately serving both of the competing values at stake." *Id.* at 346.

83. *Id.* at 341.

84. *Id.* at 342.

official or public figure for two reasons. First, the private person usually has fewer and less effective opportunities to counteract false statements than a public person with relatively greater access to the media; the private individual is more vulnerable to injury resulting from the defamation.[85] Secondly, the private person has not voluntarily assumed the aggravated risk of closer public scrutiny which is an inevitable consequence of involvement in public matters; therefore, he is also more deserving of recovery.[86] Citing these reasons, the majority concluded that the extension of the "actual malice" standard to private defamations as urged by the *Rosenbloom* plurality would abridge to an unacceptable degree the important interest a state has in compensating a private citizen for harm to his reputation. Furthermore, the suggested *Rosenbloom* extension would require "[T]he additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not. . .."; the majority believed this situation to be clearly an unhealthy situation.[87] In an attempt to more equitably balance the competing concerns involved, the Court then held that, "[*S*]*o long as they do not impose liability without fault*, the States define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehoods injurious to a private individual."[88] (Emphasis added.) This holding was limited to cases where "[T]he substance of the defamatory statement 'makes substantial danger to reputation apparent' " to insure a sufficient warning to a "[R]easonably prudent . . ." media publisher of the statement's "[D]efamatory potential."[89]

After reaching what they considered to be the appropriate equilibrium between First Amendment guarantees and a private individual's remedy for defamation, the majority of the Court focused its attention on the extent of permissible damage recovery. The Court hastened to establish that the *reason* for its allowing states to impose liability on media defamers for a degree of fault lower than that required by *New York Times*—would be fully satisfied by limiting damage recovery to compensation for "[A]ctual injury"[90]

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85. *Id.* at 344.
86. *Id.* at 345-46.
87. *Id.*
88. *Id.*
89. *Id.* at 348.
90. *Id.* at 350. Although the Court did not define "actual injury", it stated that it "is not limited to out-of-pocket loss. Indeed the more customary types of actual harm inflicted by defamatory falsehood include im-

that is supported by "[C]ompetent evidence".[91] The majority argued that due to the "largely uncontrolled discretion of juries to award damages" the common law rule providing for presumed damages upon proof of publication "unnecessarily compounds the potential inhibit[ion to] the vigorous exercise of First Amendment freedoms" and additionally "invites juries to punish unpopular opinion."[92] Therefore, unless the private individual can prove that the defendant violated the *New York Times* standard, recovery of presumed damages is prohibited. The Court further significantly altered the common law by holding that punitive damage awards based on traditional standards of spite or ill-will and not based on a showing of knowing falsity or reckless disregard for the truth will hereafter be unconstitutional.[93] Justice Powell explained that not only would punitive damages foster, like the doctrine of presumed damages, media self-censorship, but also that punitive damages are "[W]holly irrelevant to the state interest that justifies a negligence standard for private defamation actions,"[94] compensation for injury.[95]

In closing, the majority ruled that the trial court was correct in refusing to characterize Gertz as either a public official or public figure. It held there was little basis for a public official designation since prior to the defamatory charges Gertz "[H]ad never held any remunerative governmental position."[96] As to the public figure characterization, the Court stated that this status may be reached in two ways. One, a person may through his widespread involvement in the affairs of society, achieve such "[G]eneral fame or

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pairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."

91. *Id.* While requiring damage awards to be based on competent evidence, the Court stated evidence as to the actual dollar value of the injury was not essential.

92. *Id.* at 349.

93. *Id.*

94. *Id.*

95. It is interesting to note that a recent U.S. District Court case, Maheu v. Hughes Tool Co., 384 F. Supp. 166 (C.D. Cal. 1974), further restricted the recovery of punitive damages in defamation cases by holding that a *public figure* may not, even on proof showing *New York Times* "actual malice", recover punitive damages.

96. 418 U.S. at 349. The Court rejected defendant's argument that Gertz was a "de facto public official" by his attending the coroner's inquest, by stating that such a concept is not supported by case authority.

notoriety in the community" that he becomes a public person "[F]or all aspects of his life."[97] Secondly, and "[M]ore commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues."[98] In either event, the Court said, "[S]uch persons assume special prominence in the resolution of public questions."[99] The majority found that while Gertz was well known in some circles he had neither attained sufficient fame or notoriety in the community, nor significantly involved himself with the particular public controversy at issue to be correctly classified as a public figure for this case.[100]

In summary, the five-man majority (per Powell,J.) in *Gertz v. Robert Welch, Inc.*[101] basically made the following rulings in regard to defamation actions by private citizens against the news media:

1. When dealing with published statements whose substance "makes substantial danger to reputation apparent", the States may not impose liability unless *at least* negligence is established, since liability for the publication without fault is no longer constitutional.
2. The *New York Times* privilege is not available to the media even if the statements about the private individual address "matters of public or general concern."
3. Even upon a showing of negligence, the private plaintiff will be limited in recovery of damages to the amount necessary to compensate him for "actual injury" which must be proved by "competent evidence." The States may not permit recovery for either presumed or punitive damages *unless* liability is based on knowing falsity or reckless disregard for the truth.

The law for defamation actions brought by public officials or public figures was not changed; however, the class of persons who will be characterized as public figures may have been narrowed.[102]

In *Gertz*, members of the Court also filed one concurring and four dissenting opinions. Justice Blackmun clarified his association with the majority in his concurring opinion.[103] Sensing some "illogic"[104] in the majority holding, he was reluctant to uncondi-

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97. *Id.* at 351-52.
98. *Id.* at 351.
99. *Id.*
100. Earlier dicta in Justice Harlan's majority opinion may be indicative of a reduction in the scope of the definition of "public figure". He states that "[H]pothetically, it may be possible for someone to become a public figure through no purposeful action of his own, *but the instances of truly involuntary public figures must be exceedingly rare.*" (Emphasis added) *Id.* at 345.
101. *Id.* at 323.
102. *Supra* note 100.
103. 418 U.S. at 353.
104. *Id.* It will be remembered that Justice Blackmun joined the *Rosen-*

tionally support the Court's reasoning and warned of a dissent under different circumstances.[105] His "joining" the majority was only occasioned by both the Court's decision to severely limit the applicability of presumed and punitive damages—thereby "[E]liminat[ing] significant and powerful motives for self-censorship . . ."[106] and his concern over the present uncertainty in the defamation area, believing that a definitive ruling was essential at this time.[107]

As previously mentioned, two of the dissents were critical of the majority for being too harsh on the news media, while the other two thought them too lenient and misguided for undervaluing the rights of the private individual. Justice Douglas reiterated his "absolutist" position, a view long-shared by the late Justice Black, in his dissent.[108] He continues to advocate that the Court's struggle to properly balance these competing values is hopeless in light of the unequivocal command of the First Amendment. He argues that "[A]n unconditional right to say what one pleases about public affairs . . . [should] be *the minimum guarantee* of the First Amendment."[109] However, the true extent of his recommended liberal protection cannot be fully appreciated without realizing that he believes that "[A]ny matter of sufficient general interest *to prompt media coverage* may be said to be a *public affair.*"[110] (Emphasis added.) Justice Brennan, the author of the *Rosenbloom* plurality, continued to adhere to the views he expressed in that case in his attack on the *Gertz* majority.[111] He discounted the Court's distinction between "public" and "private" plaintiffs for reasons which he stated in *Rosenbloom.* The access to the media inequality was

bloom plurality opinion which advocated extension of *New York Times* to the private individual involved in "matters of public concern". *See supra* note 59.

105. *Id.* at 354. He stated that "[I]f my vote were not needed to create a majority, I would adhere to my prior view."

106. *Id.*

107. Justice Blackmun's concern was largely the result of what he termed the "sadly fractionated" Court in *Rosenbloom.* 318 U.S. at 354.

108. 418 U.S. at 357.

109. *Id.* at n.6. Justice Douglas adopts this statement made by former Justice Black in his concurring opinion in New York Times Co. v. Sullivan, 376 U.S. 254 at 297 (1964). (Emphasis added.)

110. *Id.*

111. *Id.* at 361.

dismissed as "unproved" and "highly improbable", and the assumption of the risk argument was discredited. Justice Brennan believed it extraneous to the matters under consideration.[112] He predicted a greater impetus toward self-censorship resulting from the *Gertz* decision due to the "elusive" liability standard of reasonable care capable of being established presumably by a mere preponderance of the evidence.[113] Justice Brennan further cautioned that the flexibility of a negligence standard would create the ominous potential for a jury to convert the standard into "[A]n instrument for the suppression [of unpopular opinion.]"[114]

The two dissenting Justices favoring retention of greater protection for the reputational interests of the private individual were Chief Justice Burger and Justice White. The Chief Justice, in a rather vague opinion, expressed his disagreement with the Court's abandonment of traditional defamation law.[115] He indicated that the majority's new negligence theory could conceivably jeopardize an individual's right to counsel "[I]f every lawyer who takes an 'unpopular' case, civil or criminal, would automatically become fair game for irresponsible reporters and editors. . . ."[116] Justice White convincingly exposes the flaws in the Court's decision with his powerful dissent.[117] Disturbed by the majority's lack of appropriate concern for the remedial rights of a private individual defamed by the mass media, he clearly illustrates the significant extent to which the Court has discarded historical reason, precedent, and logic in light of modern conditions, in reaching their "[E]quitable compromise. . . ."[118] Agreeing with Justice White's conclusion that a grossly improper balance has been struck between the competing interests involved, resulting in inadequate protection for the ordinary citizen, the authors have adopted with modification or expansion some of his arguments in their criticism of *Gertz*. Therefore, to avoid repetition, the existence and nature of these ideas present in Justice White's dissent will be noted and fully developed later during evaluation of the majority holding.

Criticism

The changes in the law of defamation resulting from the *Gertz* decision are substantial and warrant scrutiny. Through a consid-

112. *Id.* at 363.
113. *Id.* at 366.
114. *Id.* at 367, citing Monitor Patriot Co. v. Roy, 410 U.S. 265, 277 (1971).
115. *Id.* at 354.
116. *Id.* at 355.
117. *Id.* at 369.
118. *Id.* at 389.

eration of *New York Times v. Sullivan* in juxtaposition with an apparent concern for injury to reputation, the Court has effectively abrogated a private individual's right to seek redress against the news media in all but perhaps the most exaggerated cases. While few will quarrel with the concept that the First Amendment "[R]ests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society,"[119] the *Gertz* majority apparently believes that a free press and a responsible press are somehow antitretical. The Court's nullification of liability without fault, presumed injury to reputation, and punitive damages may erect nearly insurmountable barriers for redress to private citizens defamed by the media.

Liability without fault for publication of material which is reasonably understood to be defamatory has existed in the majority of American jurisdictions for a long period of time. The inception of this doctrine is in the celebrated English case of *Jones v. E. Hulton & Co.*[120] In *Jones,* it was held that "Negligence is immaterial on the question of libel or no libel."[121] The Restatement of Torts in its initial publication adopted absolute liability in 1938.[122] The effect of liability without fault has been to place defamatory words in the same class with such inherently dangerous activities as the use of explosives and the keeping of wild animals, and thus the rule has not gone without criticism.[123] Pennsylvania, for example, disapproved liability without fault in 1939 in a case arising out of defamatory comments broadcast by the N.B.C. radio network. The court held that although radio was a powerful agency for communication, a radio broadcasting company should not be held liable without fault for defamatory publications in broadcast programs.[124]

Notwithstanding the criticism leveled against liability without fault, the question arises as to whether the *Gertz* majority's use of the First Amendment is the proper method by which to topple existing and established state law. Indeed, it is submitted that

119. Associated Press v. United States, 326 U.S. 1, 20 (1945).
120. 2 K.B. 444 (1909), *aff'd* A.C. 20 (1920).
121. 2 K.B. at 482 (1909).
122. RESTATEMENT OF TORTS § 580 (1938); *see also* § 579.
123. W. PROSSER, LAW OF TORTS 773 (4th ed. 1971).
124. Summit Hotel Co. v. National Broadcasting Co., 336 Pa. 182, 8 A.2d 302 (1939).

absolute liability for defamation may be a necessity for the plaintiff whose reputation is seriously injured but "fault" on the part of the defendant is lacking. As Jeremiah Smith wrote in commenting on *Jones v. E. Hulton & Co., supra,*:

> The utterance of charges which are not true in fact and are defamatory in their nature is not essential to the progress of the community in comfort or civilization, nor does it generally tend to promote the public welfare. . . . (I) believe that more harm than good would result from making proof of negligence a requisite to the plaintiff's *prima facie* case, or from allowing to the defendant the defense of carefulness.[125]

The majority's abolition of absolute liability applies only where the substance of the defamatory statement "makes substantial danger to reputation apparent."[126] In other words, the statement in question can be reasonably expected to injure reputation. Thus, if a newpaper publishes an article about a private citizen, the substance of which can be expected to cause harm, but the publisher is without "fault", he is simply not liable, regardless of the truth or falsity of the article. Justice White persuasively argues that to force the innocent victim to bear the injury is totally unacceptable, for "[A]s between the two, the defamer is the only culpable party. It is he who circulated a falsehood that he was not required to publish."[127]

Liability without fault is not the only citadel to crumble at the hands of the *Gertz* majority. In "[A]ttempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment,"[128] the Court has held that both presumed and punitive damage awards to private citizen defamation plaintiffs in most all cases are to be relegated to the scrap heap of legal history.

The *Gertz* majority, in striking down the law of presumed damages in certain forms of defamation actions, confronts a long and well-established set of rules. For centuries the common law has distinguished oral slander from written libel. In order to maintain an action for slander, the plaintiff is required to plead and prove special damage, unless the slander involves imputation of crime, loathsome disease, unchastity on the part of a woman, or is injurious to business or profession.[129] In libel actions, the English common law recognized that the printed word carried a much greater potential for harm when misused than words merely

125. Smith, *Jones v. Hulton: Three Conflicting Judicial Views as to a Question of Defamation*, 60 U. PA. L. REV. 365, 471-72 (1912).
126. 418 U.S. at 348.
127. *Id.* at 392.
128. *Id.* at 349.
129. C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 415 (1935).

spoken.[130] Thus, proof of special damage was not required, and the fact of injury was conclusively presumed by the fact of publication.[131]

Prior to the *Gertz* decision, authorities in this country were rather sharply divided over whether to follow the English rule of presumed damages in all cases of libel, or to limit presumed damages to statements which were defamatory on their face.[132] It is important to note, however, that both lines of argument assumed retention of presumed damages, the only issue being to what extent. The state of the law at the time of the *Gertz* decision, as noted by Justice White, was that all states recognized that certain categories of defamation were actionable *per se,* without proof of special damage, and that general damages for injury to reputation could be recovered without such proof. The reason for such a rule is sound and grounded in common-sense. Simply, the reason is that, in many cases, "[T]he effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to the person defamed."[133] What then is the rationale of the *Gertz* majority in overturning such a well-considered and established rule?

The majority pleads an attempt to reconcile existing state law with the "constitutional command" of the First Amendment. "It is necessary," Justice Powell argues for the majority, "to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury."[134] The majority states that the Court is not invalidating state law "[B]ecause we doubt its wisdom", but the explanation for the Court's holding belies its denial. Justice Powell states "The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous

130. Thorley v. Lord Kerry, 4 Taunt. 355, 128 Eng. Rep. 367 (1812). Interestingly, Mansfield, C.J., took issue with this established principle in his opinion of the case, but felt compelled to follow the authorities.
131. W. PROSSER, *supra* note 123, at 762.
132. Murnaghan, *From Figment to Fiction to Philosophy—The Requirement of Proof of Damages in Libel Actions*, 22 CATH. U.L. REV. 1 (1972).
133. RESTATEMENT OF TORTS § 621, comment (a) (1938).
134. 418 U.S. at 350.

exercise of First Amendment freedoms."[135] But if allowing a private citizen involved in a matter of public concern to bring a defamation action does not "inhibit" the exercise of free speech and press, as the *Gertz* majority holds, it is difficult to understand the majority's reluctance to fully compensate that person for his loss. The Court has created a mere illusory right and the majority would do well to heed the words of Dean Prosser:

> [I]t is clear that proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact.[136]

In addition to the somewhat cavalier renunciation of presumed damages, the majority was also compelled to jettison the generally followed rule which allowed for punitive damages where the publisher was actuated by ill will, namely, common law malice. In its stead the *New York Times* standard, knowledge of falsity or reckless disregard for the truth, is established as the benchmark against which to measure the availability of exemplary damages. Again the inquiry must be made—What is the majority's justification for so bold a step? The Court evinces a pronounced distrust of jury awards of punitive damages saying, "[J]ury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, . . . [and punitive damages] are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury."[137] But punitive damages were never thought to be compensatory; rather, they serve as a deterrent to wrongful conduct. With the growing consolidation of news sources into corporate conglomerates, the abolition of punitive damages can do little to deter irresponsible journalism, and indeed may foster it. The majority also argues that "juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm done," but offers no evidence to support the claim. As Justice Harlan stated:

> To exempt a publisher, because of the nature of his calling, from an imposition generally extracted from other members of the community, would be to extend a protection not required by the constitutional guarantee. We think the constitutional guarantee of freedom of speech and press is adequately served by judicial control over excessive jury verdicts. . . .[138]

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135. *Id.*
136. W. PROSSER, *supra* note 123, at 765.
137. *Id.*
138. Curtis Publishing Co. v. Butts, 388 U.S. 130, 160 (1966). *See also* C. MCCORMICK, *supra* note 129, at 278.

Such reasoning is still sound, and the *Gertz* majority has failed to meet the burden of persuading us otherwise.

The majority, in its attempt to more equitably accommodate the competing values involved, has failed to thoroughly analyze these values and their respective and relative needs of judicial protection. While the Court properly examined the abstract doctrines of freedom of expression and protection of private reputation with which it was dealing, conspicuously absent is any realistic consideration of the inherent strengths or weaknesses associated with the preservation of these conflicting goals. Reacting over-zealously to an exaggerated fear of media self-censorship, assumed to result from potential liability for defamation, the Court completely ignored the modern powerful status of the communications industry.[139] Justice White, in his forceful dissent, cogently argued that the law of libel "[P]oses no realistic threat to the press and its service to the public"[140]; further, he recognized that "[T]he press today is vigorous and robust."[141] His disbelief in the theory that the threat of defamation actions brought by private individuals is producing a "chilling effect" on the media is supported by a recent study detailing the significant growth and success of the news business.[142]

This study demonstrates that there is a definite trend toward consolidation within the mass media caused ostensibly out of necessity for economic survival.[143] There has been a striking reduction both in the total number of different newspapers being published nationwide and the number of American cities in which there is a competing newspaper published under separate ownership.[144] This reduction has resulted in almost one-half of the country's newspaper circulation being controlled by fewer than thirty large ownership groups.[145] However, total daily circulation has increased

139. *See* Comment, *Media and the First Amendment in A Free Society*, 60 GEO. L.J. 867 (1972), for a thorough examination of the significance and influence of the mass media.

140. 418 U.S. at 390 (White, J., dissenting).

141. *Id.*

142. *Supra* note 140, at 892-93.

143. *Id.* at 899. Reference is made to the Newspaper Preservation Act of 1970 (15 U.S.C. §§ 1801-04) wherein Congress acknowledged that consolidation of small newspapers was sometimes required to preserve a paper not economically competitive with its larger counterparts; in effect, a grant from Congress of immunity from antitrust laws.

144. *Id.* at 892.

145. *Id.*

to well over 62 million copies and profits in the newspaper industry have been far from lean.[146] Quite to the contrary, profits have been substantial with several owners reporting "[Y]early profits in the tens of millions of dollars, with after tax profits ranging from seven to fourteen percent of gross revenues."[147] The newspaper industry has become "big business" and is one of the largest employers in America. Other media outlets, such as radio and television, are also very strong and influential, with many being either owned by or affiliated with various newspaper chains.[148] To suggest that fear of the occasional defamation action brought by the private person may intimidate this hardy industry, thereby "[I]nducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press,"[149] borders on the absurd.

The news media and the law of defamation have co-existed in this country, in various forms, for almost two centuries with no harmful effects or self-censorship on the part of the media being evident. The mass media is stronger and more dangerously powerful than ever before, and yet, a majority of the Court impliedly chooses to distribute the risk of loss from a defamatory statement to the wholly innocent victim rather than the more culpable and more financially able media publisher. Remembering that a human being's reputation, possibly his entire life, is at stake, could the Framers have intended, or even dreamed the First Amendment would be used to accomplish such an inequitable result? At best, such an argument is implausible, particularly when it is recalled that we are dealing with statements of slight, if any, social value, yet with obvious destructive potential, i.e., factual misstatements. Clearly, in almost every conceivable case, the press could better bear the burden of falsehood generally created by its own irresponsibility. And why shouldn't it? All other private businesses and professions are subject to liability for their mistakes, and protection has usually been found through insurance and not through judicially created exceptions. It has aptly been said that,

> [a]countability, like subjection to law, is not necessarily a net subtraction from liberty . . . . The First Amendment was intended

146. *Id.*
147. *Id.*
148. *Id.* at 893. It has been estimated that almost every American household has a radio (not to mention the number of cars), and over three-fourths of these households listen to at least one newscast daily. It has further been calculated that, in 1970, the average home watched television almost six hours a day.
149. 418 U.S. at 343.

to guarantee free expression, not create a privileged industry.[150]

Granted, the news business is unique in that it is constitutionally protected from governmental restraints and considered an essential protector of our form of government. However, with this justified position of importance should come a professional responsibility of equal degree for accurate reporting to private individuals foreseeably affected by media publications. Surely, this responsibility for accuracy should be great when dealing with material defamatory on its face in order to insure against the certain resulting injury to someone by mistake upon publication. The *Gertz* decision, by normally[151] requiring proof of at least negligence in the publication of a defamatory falsehood to establish liability (in itself a difficult and expensive task), and even then demanding proof of actual injury prior to any damage compensation, will do little to encourage responsible publication by the powerful communications industry. In fact, due to this great disparity in relative strengths between the private individual and the mass media, coupled with these new, much more demanding requirements for the successful vindication of a damaged reputation, the Court may have gone toward fostering *more* irresponsibility instead of less.[152]

Perhaps the most dangerous potential consequence of the Court's decision to further immunize the news media by removing the teeth

150. COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS 130, 181 (1947).

151. Assuming, as undoubtedly will be true in the vast majority of cases, *New York Times* "actual malice" will not be possible to establish.

152. Justice White adds to the problem of the already grossly disproportionate power of the news media, compared to the private citizen, by pointing out that "the David and Goliath nature of this relationship is all the more accentuated by the Court's holding in the Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) case, decided the same day as *Gertz*, that an individual criticized by a newspaper's editorial is precluded by the First Amendment from requiring that newspaper to print his reply to that attack." 418 U.S. at 401, n.43 (White, J., dissenting).

It is important to notice that while *Tornillo* dealt with one who would be classed a public person, the holding of the case did not depend on the status of the individual criticized. The Court in *Tornillo* stated that the 'right to reply' statute "fails to clear the barriers of the First Amendment because of its intrusion into the function of the editors", and further that "the choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and *treatment of public issues* and public officials—whether fair or unfair—constitutes the exercise of editorial control and judgment. 418 U.S. at 258 (emphasis added).

from the law of defamation is the very real possibility of discouraging private individuals from entering the public "marketplace of ideas".[153] Permitting the media to defame with virtual impunity in the name of freedom of expression will, to a great extent, defeat that freedom for the vast majority of persons. They will wisely choose to maintain their good reputation at the expense of publicly expressing their opinions on social problems. Few will have the temerity to engage in a "competition of ideas" against a mass media source which has the ability to destroy a person's reputation across the country with one "accidental" slip of the tongue or pen. Combining this destructive ability with the certain result of *Gertz*—a greatly reduced fear of reprisal for error—and the elements of a real and serious "chilling effect" become frightfully apparent. Simply stated, removing the only weapon the private person has to combat the attacks of the press quite conceivably could remove him from debate on public issues.

Very possibly, the effect of *Gertz*, owing to the Court's increasing the strength of an already strong participant[154] in freedom of expression, may be the eventual breakdown of Justice Holmes' charismatic marketplace theory.[155] It will be recalled that the marketplace concept depends for its viability on a clash of diverse and antagonistic ideas hopefully resulting in a survival of the fittest-truth. Since the Court has chosen not to "burden" the press with the requisite responsibilities necessary to guarantee maximum participation in free expression by *all* shareholders in the market, a veritable monopoly of the market by the press may be imminent.[156] The increased immunity of the news media from libel damages is, however, only one of the factors which can destroy the marketplace of ideas that is so essential to a strong democracy. The other is the current trend in the communications industry toward consolidation with its concomitant reduction in diversity of expressed opinion. Together these conditions compel a re-evaluation of the *Gertz* majority's decision concerning the proper accomodation between the law of defamation and the First Amendment. A prophetic warning has been sounded for delay in a situation such as presently exists:

> No democracy . . . certainly not the American democracy [,] will infinitely tolerate concentration of private power irresponsible

153. *See* Merin, *Libel and the Supreme Court*, 11 WM. & MARY L. REV. 371, 418 (1969); Barrow, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1657 (1967).

154. *Id.* Professor Barrow argues that there is indeed more than just one necessary participant in true freedom of expression.

155. Merin, *supra* note 154, at 416; Barrow, *supra* note 154, at 1658.

156. Barrow, *supra* note 154, at 1658.

> and strong enough to thwart the aspirations of the people. Eventually governmental power will be used to regulate private power—if private power is at once *great* and *irresponsible*.[157] (Emphasis added.)

Construction of a hypothetical situation will serve to emphasize the present dilemna of a private citizen defamed, or about to be defamed by the media.[158] Assume a relatively successful private attorney, married and having children, acquires advance knowledge that he is going to be libeled by the press. Can the attorney stop the publication of the falsehood which he can prove false? No, because *Near v. Minnesota,* 283 U.S. 697 (1931), held such injunctions to be "prior restraints" on the constitutional right to freedom of the press. Following publication of the damaging lie, the attorney may want to require the defaming publisher to print his reply to the charges or possibly force a retraction, knowing all along that truth rarely catches up with a lie, but thinking more of quickly fighting the spread of this highly contagious disease and removing at least some of the humiliation he and his family have already suffered. However, according to *The Miami Herald Publishing Co. v. Tornillo,*[159] these remedies have been ruled unconstitutional as an "intrusion into the function of editors".[160] Assuming our attorney can afford the expense of a civil libel action, especially if he has to represent himself for lack of finding another who wants to risk a "contingency" in light of the increased difficulty in establishing liability and proving damages, he may bring suit which will be governed by *Gertz.* However, he is probably beginning to feel economic as well as emotional pains, possibly attributable to the libel. Fewer clients are calling, but he is not sure he can prove this resulted from the defamation. He and his family are becoming desperate now and he considers the waste of invested time and money if he cannot establish negligence, since the paper's charges could, to a jury, be considered a non-negligent mistake. Upon reflection of the futility of the situation, he decides to move away, instead of sue, to avoid the matter being brought up again. Assum-

157. COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS 80 (1947).

158. This hypothetical situation is derived from a note in Justice White's dissent characterizing "the hapless ordinary citizen libeled by the press . . . ." 418 U.S. at 401, n.43 (White, J., dissenting).

159. 418 U.S. 241 (1974).

160. *Id.* at 258.

ing he can escape the reach of the mass media, he may avoid ruin. People who remembered what happened were sorry, of course, and *also* a little less interested in attracting any adverse media attention.

Protection of the First Amendment should not require the sacrifice of those for whose ultimate benefit the Amendment was originally drafted—the private citizen.

V.

CONCLUSION

Freedom of speech and of the press, as embodied in our First Amendment, is a preferred right, essential to any viable democratic government. The value of such freedoms is unquestioned, but there also exist competing needs which require recognition in any free society. The founders of our nation realized the importance of the individual as the essential element of our government "of the people", and an individual's right to his reputation must be considered a need basic to his intended participation in that government. The question then arises: can sufficient free expression coexist with the law of defamation which, to a certain extent, limits total free expression?

The law of defamation protects against false statements which injure reputation. It is important to note that not only "falsity", but a false statement of a defamatory nature is required before liability attaches. As even the *Gertz* majority recognizes: "[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues."[161] Therefore, the strong societal interest in protecting an individual's reputation clearly outweighs any theoretical reasons for sanctioning such statements.

In attempting to establish the outer boundary of the *New York Times* rule, the *Gertz* majority has failed to consider all relevant factors concerning defamation actions brought by private citizens against the news media, thereby striking an improper balance. By abolishing liability without fault, and severely restricting recovery of presumed and punitive damages, the Supreme Court has emasculated the law of defamation thus disarming the defamed private individual and rendering him impotent to combat the powerful press.

161. 418 U.S. at 343.

The law of defamation, being merely a minor limitation on free expression, and no limitation on any value protected by the First Amendment, does not realistically hamper the press in its valuable function, and can only serve to promote more responsible and accurate reporting. Prior to 1964, when no constitutional privilege for defamation existed, reporting was bold and uninhibited and no manifestations of any "chilling effect" were ever exhibited. Therefore the concern over media self-censorship has been greatly exaggerated while the desirable goal of a responsible press has been virtually ignored, thereby sacrificing the private individual to an all too often irresponsible, and yet protected, press.

The *Gertz* majority, by ignoring the reasons behind the common law of defamation and overlooking the realities of modern conditions, has created a dangerous situation. Historically, the law of defamation grew out of a desire to remove disputes about reputation from the streets and into the courtrooms. In addition, the law recognized the real and serious potential for harm inherent in defamatory falsehoods. The Court failed to appreciate the destructive capabilities implicit in defamatory falsehoods disseminated by today's widespread communications industry. It should be evident that a private citizen is nearly powerless to counter the abuse possible from a virtually unrestrained news media. And the *Gertz* majority failed to take into account the enormous strength and economic power of today's consolidating media conglomerates. A very probable result of the failure to recognize such realities will be the removal of the private person from the debate on public issues and render the marketplace of ideas an arena devoid of competition.

As Jerome Lawrence Merin stated in his authoritative article *Libel and the Supreme Court* in 11 *William and Mary Law Review* at 415:

> The proposition that "[w]hatever is added to the field of libel is is taken from the field of free debate" is not necessarily true. Free debate is not a simple phenomenon but is the result of many interrelated factors; it should not be an absolute end; it should be a means toward the end of a free and democratic society. Free debate may aid in achieving and maintaining a democratic society; but freedom cannot be equated with anarchy, since anarchy results in freedom only for the strongest, the richest, the loudest, or the most numerous. Freedom flourishes when it is limited by the boundaries of self-restraint and the rights of others. Free debate

cannot be achieved merely by removing all barriers to public speech and writings because true debate also depends on the willingness of all to enter the public arena, on the presence of, and belief in, the presence of credible statements, and on a responsive, educated, and unintimidated populace.

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AND
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