

4-1-1979

## The Attempt to Develop an Appropriate Standard of Liability for the Defamation of Public and Private People: The Supreme Court and the Federalization of Libel Law

Howard A. Gutman

Follow this and additional works at: <https://archives.law.nccu.edu/ncclr>

 Part of the [First Amendment Commons](#), [Legal Remedies Commons](#), and the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

Gutman, Howard A. (1979) "The Attempt to Develop an Appropriate Standard of Liability for the Defamation of Public and Private People: The Supreme Court and the Federalization of Libel Law," *North Carolina Central Law Review*: Vol. 10 : No. 2 , Article 3.  
Available at: <https://archives.law.nccu.edu/ncclr/vol10/iss2/3>

This Article is brought to you for free and open access by History and Scholarship Digital Archives. It has been accepted for inclusion in North Carolina Central Law Review by an authorized editor of History and Scholarship Digital Archives. For more information, please contact [jbeeker@nccu.edu](mailto:jbeeker@nccu.edu).

# **THE ATTEMPT TO DEVELOP AN APPROPRIATE STANDARD OF LIABILITY FOR THE DEFAMATION OF PUBLIC AND PRIVATE PEOPLE: THE SUPREME COURT AND THE FEDERALIZATION OF LIBEL LAW**

by HOWARD A. GUTMAN

## **INTRODUCTION**

The area of public libel<sup>1</sup> has rapidly evolved since the Supreme Court's historic entrance into the field in 1964, in the case of *New York Times Co. v. Sullivan*.<sup>2</sup> The Supreme Court has imposed federal standards of liability regarding the defamation of public officials, public figures, and private people, in an attempt to prudently balance the public's "right to know" with the individual's interest in his good name. In this article, I shall examine the interests involved in public libel, the state of the law before the Court's entrance into it, and most importantly, the constitutional standards of liability which have emerged from recent Supreme Court decisions balancing the interests in the area. Special attention will be paid to the current standard of liability, the *Gertz* standard, and what I consider to be its defects. I shall conclude the article with an explication of my proposed standard of liability, which I contend, will balance the equities more prudently than any of the standards proposed by the Court.

Public libel involves two conflicting interests: the individual's interest in his good name, and society's interest in the widespread dissemination of information. The interest in good name is "relational,"<sup>3</sup> since it concerns the individual's esteem within the community. Loss of esteem may mean impairment of reputation and standing in the community, personal humiliation, mental anguish and suffering, alienation of associates, and financial loss.<sup>4</sup> At common law, the interest in reputation was deemed so significant that a large group of defamatory statements was actionable on its face, and damages could be awarded without proof of actual injury.<sup>5</sup> One justice declared that the recognition of the individual's interest in his good name, "reflects no more than our

---

1. In the context of this article, the term, public libel, applies to the defamation of public officials, public figures, and private people involved in issues of public interest.

2. 376 U.S. 254 (1964).

3. See Green, *Relational Interest* 31 ILL. L. REV. 35 (1936).

4. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

5. For descriptions of the doctrine of libel *per se*, see W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 111-116 (4th ed. 1971) [hereinafter cited as PROSSER]; Justice White, dissenting, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 369 (1973) [hereinafter cited as White]; Forbes *et al Federalization*

basic concept of the essential dignity and worth of every human being—a concept at the root of any system of ordered liberty.”<sup>6</sup>

Also involved in the area of public libel are the First Amendment guarantees of freedom of speech and press. The First Amendment provides a “right to speak” and, more importantly, a “right to know.” The “right to speak” concerns the individual’s right to speak his mind. The “right to speak” concerns the individual, not the body politic, talkativeness, not information.<sup>7</sup> Guaranteeing a “right to speak” grants an opportunity for individual self-fulfillment and happiness.<sup>8</sup> Most agree that the “right to speak” is subject to reasonable limitations.<sup>9</sup> Few contend that legal sanctions against “misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, [and] conspiracy” violate First Amendment guarantees.<sup>10</sup>

Debate occurs on the subject of restrictions on the discussion of public issues. The discussion of public issues, in contradistinction to the discussion of private issues as those cited above, concerns society’s “need to know.”<sup>11</sup> The “need to know” is the body politics’s desire to acquire useful information by which to conduct its decision-making. Most theorists agree that, in a democracy, intelligent decisions can only be made in an environment of abundant information. To insure this type of environment, the discussion of public issues must be protected.

The constitutional interest in promoting uninhibited discussion of public issues conflicts with the common law interest in securing the individual a means for vindication of his reputation. Libel law regulates speech based upon its content; information-gathering by the people suffers from such regulation. Discussion of public issues is not free if speakers can be punished for their errors. In short, “(w)hatever is added to the field of libel is taken from the field of free debate.”<sup>12</sup>

6. *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966).

7. When the speaker’s words convey information useful to the body politic, the “right to know” becomes the applicable equity. See *supra* notes 9 and 10.

8. See T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6-7 (1970), reprinted in Bloustein, *The First Amendment and Privacy The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 43 (1974), [hereinafter cited as BLOUSTEIN]; Justice Brandeis, concurring, in *Whitney v. California* 274 U.S. 357, 375 (1927); and Bork *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 25-27 (1971).

9. See generally Meikeljohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 [hereinafter cited as Meikeljohn]. See also Bloustein, *supra* note 8, at 44.

10. *Konigsberg v. State Bar of California*, 366 U.S. 36, 49-50n.10 (1961).

11. Dr. Alexander Meikeljohn, an authority on the First Amendment, comments that what is important under the Amendment is not that “everyone shall speak, but that everything worth saying (is) said.” Meikeljohn, *Political Freedom* 26 (1960), reprinted in BLOUSTEIN, *supra* note 8, at 44.

12. *Sweeny v. Patterson*, 128 F.2d 457, 458 (D.C. Cir. 1942), cited in *Public Official and Actual Malice Standards: The Evolution of New York Times Co. v. Sullivan*, 56 IOWA L. REV. 393 (1970) [hereinafter cited as Standards]. Some authors have contended that there are remedies for damage to reputation which not only reinstate the individual’s good name, but also contribute to the public discussion. These remedies include retraction, apology, and right of reply statutes, and the establishment of a public fund to pay for damages. Spacial limitations prohibit the discussion of these and other remedies in this article, though the subject of alternatives to the traditional libel

To complicate this conflict, there is the contention that, "defamed's litigative response is part of the free flow of information and should be encouraged rather than discouraged."<sup>13</sup> That is, the libel action serves the public's "right to know" by correcting misguided impressions of the individual's reputation, especially important if the defamed individual is a public person. The public's perception of the pertinent issue may also be changed by the libel judgment. Finally, the threat of a libel judgment encourages publishers to be responsible and verify their stories before publishing them. So, society's interest in abundant information conflicts not only with the individual's interest in his good name, but also with society's interest in accurate information.

In summary, the different equities present in defamation law conflict with one another. Society's interest in abundant information conflicts with its interest in accurate information and the public's "right to know" is in opposition to the individual's interest in his good name. Before examining how the Supreme Court balanced these equities, it is at first useful to analyze the state of the law before the Court's entrance into the field.

#### I. Public Libel before *New York Times Co. v. Sullivan*

Historically, libelous statements were not entitled to constitutional protection. In *Near v. Minnesota ex rel. Olson*, the Court stated:

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 constitutions.<sup>14</sup>

In *Chaplinsky v. New Hampshire*, the Court uttered its now famous declaration that,

there are certain well-defined and narrowly limited classes of speech, the prevention of which have never been thought to raise any constitutional problem. These include the lewd, and obscene, the profane, the libelous . . . 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.<sup>15</sup>

And in *Beauharris v. Illinois*, the Court remarked: "Nowhere (at the time of the adoption of the Constitution) was there any suggestion that the crime of

---

action is an important one. For discussion of these alternatives, see generally, *Vindication of the reputation of A Public Official* 80 HARV. L. REV. 1730 (1967) [hereinafter cited as *Vindication*]; Barron, *Access to the Press: A First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment*, 52 N.C.L. REV. 1 (1973); and Restatement (Second) of Torts, Special Note at 295-298 (Tent. Draft No. 20, 1974). The Supreme Court did, however, strike down as unconstitutional a Florida right of reply statute in *Miami Herald Publishing Co., Division of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241 (1974).

13. *Vindication*, *supra* note 12, at 1731.

14. 283 U.S. 697, 714-15 (1931).

15. 315 U.S. 568, 571-72 (1942).

libel be abolished."<sup>16</sup> Dicta in a number of other cases reiterated the principle that the punishment of libel does not violate First Amendment guarantees.<sup>17</sup>

Commentary on matters of public interest<sup>18</sup> was, however, protected to some degree in all jurisdictions by the "fair comment" privilege. The majority<sup>19</sup> of jurisdictions extended the privilege only to expressions of opinion, not assertions of fact.<sup>20</sup> In these jurisdictions, false statements even about subjects of public interest were actionable. Furthermore, in these jurisdictions, an opinion based upon facts which were not substantially true was also actionable.<sup>21</sup>

In a minority of jurisdictions, defamatory misstatements of fact made with good faith were privileged.<sup>22</sup> In all jurisdictions, the comment had to be "fair" in order to be privileged. That is, it could not be made with malice but must represent the actual opinion of the critic.<sup>23</sup>

There were two bases for the majority rule protecting only expressions of opinion, and not misstatements of fact. First, it was thought that misstatements of fact were more damaging to the reputations of public people than expressions of opinion.<sup>24</sup> If false attacks were privileged, good men might be deterred from seeking office. Secondly, it was believed that while all honest opinions have some value in the marketplace of ideas, false statements impair

16. 343 U.S. 250, 254-55 (1951).

17. See *White v. Nichols*, 3 How. 366 (1845); *Pollard v. Lyon*, 91 U.S. 225 (1876); *Dorr v. United States*, 195 U.S. 138 (1904); *Nalle v. Oyster*, 230 U.S. 165 (1913); *Baker v. Warner*, 231 U.S. 588 (1913); *Washington Post Co. v. Chaloner*, 250 U.S. 290 (1919), *reprinted in White, supra* note 5, at 384. See also *Patterson v. Colorado*, 205 U.S. 454, 462 (1907); *Schenectady Union Publ. Co. v. Sweeny*, 316 U.S. 642 (1942); *Pennekamp v. Florida*, 328 U.S. 331, 348-49 (1945); *Dennis v. United States*, 341 U.S. 494, 522n.10 (1950); *Roth v. United States*, 354 U.S. 476, 482-83 (1957); *Konigsberg v. State Bar of California*, 366 U.S. 36, 49-50n.10 (1961); *Times Film Co. v. City of Chicago*, 365 U.S. 43, 48 (1961). But see *Whitney v. California*, 274 U.S. 357, 375-76 (1927); *Stromberg v. California*, 283 U.S. 359, 369 (1931); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Roth v. United States*, 354 U.S. 476, 484 (1957); *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958); *N.A.A.C.P. v. Button*, 371 U.S. 415, 433, 445 (1963). See also *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

18. For an explanation of which subjects were within the scope of the term public interest, see Note, *Fair Comment* 62 HARV. L. REV. 1208-10 [hereinafter cited as *Fair Comment*], and RESTATEMENT OF TORTS §606, comment a (1938).

19. Approximately three-fourths of the states adhered to the majority position. See Berney, *Libel and the First Amendment-A New Constitutional Privilege*, 51 VA. L. REV. 9n.40 (1965) [hereinafter cited as Berney].

20. See PROSSER, *supra* note 5, at 621-22.

21. See *Fair Comment*, *supra* note 18, at 1212.

22. For the most notable exposition of the minority position, see *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908).

23. See RESTATEMENT OF TORTS § 606(1) (1938), and Berney, *supra* note 19, at 10n.47. The comment or accusation does not, however, have to be one which a man of reasonable intelligence and judgment would make, for "If the public is to be aided in forming its judgment upon matters of public's 'right to know' would also be abridged if in an investigation of a price-fixing scheme matter how foolish or prejudiced, be privileged." RESTATEMENT OF TORTS § 606, comment c (1938). See *H.E. Crawford Co. v. Dun & Bradstreet, Inc.* 241 F.2d 387 (4th Cir 1957).

24. See Veeder, *Freedom of Public Discussion* 23 HARV. L. REV. 419 (1910). For a critique of that idea, see Noel, *Defamation of Public Officers and Candidates*, 49 Colo. L. Rev. 894-96 (1949) [hereinafter cited as Noel].

the public's ability to acquire accurate information about public affairs.<sup>25</sup> While the individual's good name was adequately protected by the majority fair comment rule, the Supreme Court would hold in the case of *New York Times Co. v. Sullivan* that the rule violated First Amendment guarantees.

## II. The *New York Times* Case

The publication in question in the case of *New York Times Co. v. Sullivan*, was an advertisement placed in the *New York Times* on March 29, 1960 by supporters of the civil rights movement calling themselves *The Committee to Defend Martin Luther King and the Struggle for Freedom in the South*. The advertisement entitled "Heed Their Rising Voices," spoke of mistreatment of civil rights workers by the Alabama police. The advertisement stated:

In Montgomery, Alabama, after students sang "My Country Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truck-loads of police armed with shotguns and tear gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission . . . Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times for 'speeding,' 'loitering' and similar 'offenses.' And now they have charged him with 'perjury'—a felony under which they could imprison him for ten years.<sup>26</sup>

Some of the incidents were inaccurately described and some cited have never occurred.<sup>27</sup> William B. Sullivan, a city commissioner for Montgomery in charge of the police department, contended that some of the statements in the advertisement referred to him and that the inaccuracies constituted libel. Sullivan brought an action for libel in Alabama state court against the publisher of the advertisement.

The fair comment privilege in Alabama, like those in the majority of jurisdictions, was limited to the expression of honest opinions based upon true underlying facts. Defendant was precluded from resort to the privilege because of the inaccuracies in the statements. The jury was instructed that defendant's

---

25. See Noel, *supra* note 24, at 892.

26. *New York Times Co. v. Sullivan*, 376 U.S. 254, 257-58 (1964).

27. 1. The students sang the National Anthem, not "My Country Tis of Thee." 2. Students were expelled for demanding service at a lunch counter in the Montgomery County Courthouse, not for leading the demonstration. 3. Most, but not all of the students had protested the expulsion. 4. Those students had protested by boycotting classes on a single day, not by refusing to register for the ensuing semester. 5. The dining hall was not padlocked and the only students barred from eating were those without proper meal tickets. 6. The police did not "ring" the campus nor were they called to the campus in connection with the demonstration, though they were deployed near the campus in large numbers. 7. Dr. King had been arrested four, not seven, times and it was questionable whether Dr. King had, in fact, been arrested for loitering. See *Id.* at 258-59 and Kalven, *The New York Times Case: A Note On 'The Central Meaning of the First Amendment,'* 1964 SUP. CT. REV. 198.

statements were libelous per se and unprivileged, so that plaintiff could be awarded a judgment upon a finding that the statements were made by the defendant and "of and concerning plaintiff."<sup>28</sup> The jury decided that the two requirements had been met and awarded Sullivan a verdict for 500,000 dollars, not divided into compensatory and punitive portions. The judgment was affirmed by the Alabama Supreme Court.

The United States Supreme Court reversed and decided that the majority rule of fair comment, as applied to the defamation of public officials, violated First Amendment guarantees. The Supreme Court announced a new constitutional privilege for the criticism of the official conduct of public officials. The Court decided that a public official must prove actual malice, knowledge of the falsity of the charges or reckless disregard of whether they were false or not, in order to be awarded a judgment for libel against the publishers of criticism relating to his official conduct.

The basis of the decision was a generalized commitment 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."<sup>30</sup> Specifically, three reasons were given for the new rule. First, since public officials have an immunity from libel actions, the critics of public officials should have an analogous immunity.<sup>31</sup> Secondly, though laws punishing private libel do not violate First Amendment guarantees, laws of seditious libel do.<sup>32</sup> Thirdly, and most importantly, to protect speech that matters, true statements and all expressions of opinion, some false statements must also be protected. On this point Justice Brennan speaking for the Court stated, "That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"<sup>33</sup> The Court explained what it considered to be the difficulty of the majority rule of fair comment:

Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact, true, because of doubt whether it can be proved in court or fear of the expense of having to do so.<sup>34</sup>

---

28. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 262-63 (1964).

29. *Id.* at 279-80.

30. *Id.* at 270.

31. See *Id.* at 282-83. The absolute privilege for the utterances of high-ranking governmental officials within the "outer perimeter" of their duties was established in *Barr v. DiMatteo*, 360 U.S. 564 (1959). See also *Spaulding v. Vilas*, 161 U.S. 483 (1896); Becht, *The Absolute Privilege of the Executive in Defamation*, 15 VAND. L. REV. 1127 (1962); Prosser, *supra* note 5, at 114.

32. See note 28, *supra*, at 272-77, and Meikeljohn, *supra* note 9, at 259.

33. *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963), cited in *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964).

34. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

35. The Court did not appear to believe in the independent value of false statements. Rather, the Court believed in the utility of protecting falsehood in order to promote the spread of ideas and truth. One justice in a latter case stated the rationale: "Neither lies nor false communications serve the ends

The foundation of the Court's decision was its fear of media-self-censorship.<sup>35</sup> Little empirical evidence was, however, given for the idea that publishers are greatly swayed by the applicable standard of liability.<sup>36</sup>

Hence, critics of the decision have claimed that it denigrated the reputation of public officials for the sake of an unproved assumption.<sup>37</sup> Most in the scholarly community, however, applauded the decision.<sup>38</sup> Almost all agreed that the decision had dramatically changed libel law, though the exact meaning and significance of the changes would not be seen for a number of years. The terms "public official," "actual malice," and "relating to his official conduct," left undefined in the decision, would later be adequately defined in the progeny of *Times*.

### III. The Scope of the Privilege

#### A. Who is a "Public Official?"

In *Garrison v. Louisiana*,<sup>39</sup> the Court applied the public official designation to a group of Louisiana parish judges. In *Henry v. Collins*,<sup>40</sup> the Court deemed a public official to be a County Attorney and Chief of Police in Mississippi. In *Rosenblatt v. Baer*,<sup>41</sup> the Court determined the minimum range of the term. The Court stated:

. . . the "public official" designation applies at the very least to those among the hierarchy of governmental employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.<sup>42</sup>

---

of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones." *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968). *But see*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 279n.19 (1964).

36. One author stated that, "The *Times* privilege has failed to prevent self-censorship because it does little to reduce the cost of defending against libel claims." Anderson, *Libel and Press Self-Censorship* 53 TEX. L. REV. 424-25 (1975) [hereinafter cited as Anderson]. *See also* White, *supra* note 5, at 390.

37. Lewis Green asserted that, "The judgment in the New York Times Case was not proof of a fundamental inadequacy of the law of libel; it was simply a breakdown of the judicial process in certain southern states, similar to the breakdown in the enforcement of the criminal law in these same states . . . In short, I suggest that the new rule eradicates a very valuable element in our society, and adds little in return. Green, *The New York Times Rule; Judicial Overkill*, 12 VILL. L. REV. 732, (1967).

38. *See* Berney, *supra* note 19, at 58; Pedrick, *Freedom Of The Press And The Law of Libel: The Modern Revised Translation*, 49 CORNELL L. Q. 581, 608 (1964); Comment, *The New Constitutional Definition of Libel and Its Future*, 60 NW. L. REV. 95 (1965) (The article does, however, give an excellent discussion of the alternative remedies available to the Court.); McNamara, *Recent Developments Concerning Constitutional limitations on State Defamation Laws*, 18 VAND. L. REV. 1454-55 (1965); Nelson, *Newsmen and The Times Doctrine*, 12 VILL. L. REV. 738 (1967); and Kalven, *supra* note 27. Alexander Meikeljohn was quoted as saying, "It is (the decision) an occasion for dancing in the streets." Kalven, *supra* note 27, at 22In.125.

39. 379 U.S. 64 (1964). The *Garrison* case also applied the *Times* standard to a criminal, as opposed to civil, libel action:

40. 380 U.S. 356 (1964).

41. 383 U.S. 75 (1966).



In that case, the Court applied the designation to a *retired* county supervisor of a recreation area, because the management of the area "was still a matter of lively public interest."<sup>43</sup>

Later cases held public officials to be: a county clerk running for re-election,<sup>44</sup> a deputy sheriff,<sup>45</sup> the members of a local schoolboard,<sup>46</sup> a senatorial candidate in a primary election,<sup>47</sup> a deputy chief of detectives,<sup>48</sup> and a mayor running for election as a county tax assessor.<sup>49</sup>

The Supreme Court has applied the public official designation to a wide variety of people including officeholders, political candidates, and retired officials. Inferior courts have also liberally interpreted the term, to the point of deeming an ordinary policeman,<sup>50</sup> a school principal,<sup>51</sup> and a part-time accountant for public waterworks,<sup>52</sup> public officials.

#### B. What constitutes "actual malice?"

The public official<sup>53</sup> plaintiff must prove three things in order to be awarded a judgment against critics of his official conduct. He must first prove that the statements were made "of and concerning him."<sup>54</sup> "Impersonal discussion of governmental activity" is privileged.<sup>55</sup> Secondly, plaintiff must prove that the statements were false.<sup>56</sup> The exaggeration, half-truth, or accusation is not

43. *Id.* at 87n.14.

44. *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967).

45. *St. Amant v. Thompson*, 390 U.S. 727 (1968).

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

47. *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971).

48. *Time, Inc. v. Pape*, 401 U.S. 279 (1971).

49. *Ocala Star Banner Co. v. Damron*, 401 U.S. 295 (1971).

50. *Tucker v. Kilgore, Ky.*, 388 S.W. 2d 112 (1965). *Gilligan v. King*, 48 Misc. 2d 212 (1965).

51. *Reaves v. Foster, Miss.*, 200 So. 2d 453 (1967).

52. *Krutech v. Schimmel*, 27 App. Div. 2d, 837, 278 N.Y.S. 2d 25 ( ). This case, and two of the above, was cited in *Prosser*, *supra* note 5, at 82ln. 18. For other citations of illustrative cases, see DiMatteo, *Time Marches On: The Courts Continuing Expansion of the Application of the Actual Malice' Standard*, 47 NOTRE DAME LAW. 160n. 83 (1971) [hereinafter cited as DiMatteo], and Standards, *supra* note 12, at 395n. 18.

53. The Supreme Court has applied the actual malice standard to the defamation of public figures (*Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, 388 U.S. 130 (1967), see text *infra* at notes 78-89) and labor disputes (*Linn v. United Auto Plant Workers*, 383 U.S. 53 (1965); *Letter Carriers v. Austin*, 418 U.S. 264 (1974)) so the discussion of the actual malice standard will encompass these cases, in addition to the cases involving public officials.

54. *New York Times Co. v. Sullivan*, 376 U.S. 254, 290-94 (1964).

55. *Rosenblatt v. Baer*, 383 U.S. 75, 82 (1966).

56. See *Garrison v. Louisiana*, 379 U.S. 64 (1964) and *Monitor Patriot v. Roy*, 401 U.S. 265, 272, (1971). The RESTATEMENT (SECOND) OF TORTS has stated that, "To create liability for defamation, there must be publication of matter which is both defamatory and false. The truth of a defamatory statement of fact is a complete defense to an action for defamation, although it is made for no good purpose and is inspired by ill will toward the person about whom it is published and is made solely for the purpose of harming him. RESTATEMENT (SECOND) OF TORTS § 582 (1)(a) (Tent. Draft No. 21, 1975).

57. *Letter Carriers v. Austin*, 418 U.S. 264, 275 (1974).

prohibited.<sup>57</sup> Likewise, the use of the derisive epithet or rhetorical hyperbole is allowed.<sup>58</sup>

Thirdly, plaintiff must present "clear and convincing"<sup>59</sup> proof that defendant published false statements with either knowledge of their falsity or with reckless disregard of the truth. Knowledge of the falsity of the charges is demonstrated by proof of an "intent to inflict harm through falsehood," but not by proof of simply an "intent to inflict harm."<sup>60</sup> Proof of only common-law malice will not suffice to defeat the privilege; plaintiff must prove that defendant published knowing his words to be false.

Reckless disregard of the truth is shown by proof that defendant published his statements with a "high degree of awareness of their probable falsity."<sup>61</sup> Recklessness is clearly not demonstrated by proof of only ordinary negligence. The Court has stated: "The test which we laid down in *New York Times* is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard of the truth."<sup>62</sup>

Decisions in three cases illustrate this principle. In *St. Amant v. Thompson*,<sup>63</sup> lack of investigation into and verification of sworn statements by an informant did not constitute recklessness. In *Ocala Star Banner Co. v. Damron*,<sup>64</sup> sloppy investigation confusing the plaintiff with his brother, resulting in a false allegation that the plaintiff had been charged with the crime of perjury, did not constitute recklessness. And in *Time, Inc. v. Pape*,<sup>65</sup> omission of the word "alleged," representing a rational but incorrect interpretation of an ambiguous document, did not constitute recklessness.

What then would constitute reckless disregard of the truth? The Court gave some indication in *St. Amant v. Thompson*:

[Recklessness is probably] shown where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. . . . [It is also shown] when the

58. *Greenbelt Publishing Assn. v. Bresler*, 398 U.S. 6, 14 (1970). And in a later case, the Court stated that "however pernicious an opinion may seem, we depend on its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

59. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). See also *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 83 (1967).

60. *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964). See also *Henry v. Collins*, 380 U.S. 356, 357 (1965); *Beckley Newspaper Corp. v. Hanks*, 389 U.S. 81, 82 (1967); *Greenbelt Publishing Assn. v. Bresler*, 398 U.S. 6, 10, 11 (1970); *Rosenbloom v. Metromedia*, 403 U.S. 29, 52n. 18 (1971); *Letter Carriers v. Austin*, 418 U.S. 264, 291-92 (1974).

61. See *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

62. *Garrison v. Louisiana*, 379 U.S. 64, 79 (1964).

63. 390 U.S. 727 (1968).

64. 401 U.S. 295 (1971).

65. 401 U.S. 279 (1971). The difference between recklessness and negligence is shown by the fact that the rational interpretation of an ambiguous document, not actionable under a standard of recklessness is probably actionable under a negligence standard. See *Time, Inc. v. Firestone*, 424 U.S. 448, 459n.4 (1976).

publisher's allegations are so inherently improbable that only a reckless man would have put them into circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.<sup>66</sup>

And in *Curtis Publishing Co. v. Butts*,<sup>67</sup> recklessness appears to have been shown by a lack of verification of source material, combined with a policy of "sophisticated muckraking" in a situation where investigation was necessary and possible. In no other case has the Court found recklessness.

#### C. What Criticism Relates to the Official Conduct of Public Officials?

Criticism relating to official conduct encompasses "anything which might touch on an official's fitness for office," even though such criticism "may also affect the official's private character."<sup>68</sup> Included are allegations of criminal conduct, "no matter how remote in time or place."<sup>69</sup> The criminal charges in *Garrison v. Louisiana*,<sup>70</sup> (corruption); *Rosenblatt v. Baer*,<sup>71</sup> (speculation); *St. Amant v. Thompson*,<sup>72</sup> (also corruption); *Monitor Patriot Co. v. Roy*,<sup>73</sup> (previous bootlegging); and *Ocala Star Banner Co. v. Damron*,<sup>74</sup> (prejury); were all held to relate to official conduct in that they might have touched on the official's fitness for office. Criticism of an official's policy on fluoridation,<sup>75</sup> misleading charges of police brutality,<sup>76</sup> and allegations of a "diabolical plot,"<sup>77</sup> were also held to relate to official conduct.

#### IV. The Application of the *Times* Privilege to the Defamation of Public Figures

Two companion cases brought to the Court in 1967, *Curtis Publishing Co. v. Butts*<sup>78</sup> and *Associated Press v. Walker*,<sup>79</sup> concerned the applicability of the *Times* privilege to the defamation of public figures. The publication at issue in *Butts* was an article in defendant's magazine, *The Saturday Evening Post*, entitled "The Story of a College Football Fix." The article accused Wally Butts, then athletic director of the University of Georgia, of conspiring to "fix" the 1962 Georgia-Alabama football game. The basis of the charge was an overheard

66. 390 U.S. at 732.

67. 388 U.S. 130 (1967). Only one justice decided the case on the basis that recklessness had been proven. Four justices based recovery on a less demanding standard, though they also thought that recklessness had probably been shown. *Id.* at 161n.23. Two justices thought that the question of liability should have been determined on remand, though these justices also thought that recklessness had been shown. *Id.* at 172-74.

68. *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964).

69. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971).

70. 379 U.S. 64 (1964).

71. 383 U.S. 75 (1966).

72. 390 U.S. 727 (1968).

73. 401 U.S. 265 (1971).

74. *Id.* at 295.

75. *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967).

76. *Time, Inc. v. Pape*, 401 U.S. 279 (1971).

77. *Henry v. Collins*, 380 U.S. 356 (1965).

78. 388 U.S. 130 (1967).

79. *Id.*

phone call between Butts and the head coach of Alabama, Paul "Bear" Bryant. Eager to change its image to that of "sophisticated muckraker," the Post published the article without any thorough investigation of the phone call or other substantiation for the charge of a "fix."<sup>80</sup> After the article was published, Butts resigned from his post at the University of Georgia and brought a diversity action for libel in district court. In district court, he was awarded a verdict and a judgment for damages in the amount of 3 million dollars. The Court of Appeals affirmed the verdict but reduced the amount of damages to 460,000 dollars.

The second case, *Associated Press v. Walker*, involved an Associated Press news dispatch during the turbulent period when James Meredith, a black student, was forcibly enrolled in the University of Mississippi. The news dispatch, written by a reporter who had been present during the turmoil, claimed that former general Edwin Walker had led a violent crowd against federal marshals attempting to enroll the unwelcome student. Walker, who had spoken out against federal intervention prior to the incident and who had been present during the incident, claimed that the charges that he had aided and abetted violence was false and libelous. In his action for libel in Texas state court, he was awarded 500,000 dollars in damages. The Texas Court of Civil Appeals affirmed and the Texas Supreme Court declined to review. This case was brought to the U. S. Supreme Court with *Butts* on a writ of certiorari.

The Court unanimously reversed the verdict in *Walker*, but affirmed the verdict in *Butts* by a five to four decision. The cases were differentiated on the need for rapid dissemination of the pertinent information and the reliability of the sources. The plurality stated that in *Walker*,

Considering the necessity for rapid dissemination, nothing in this series of events gives the slightest hint of a severe departure from accepted publishing standards . . . [on the other hand] the *Butts* story was in no sense "hot news" and the editors of the magazine recognized the need for a thorough investigation of the serious charges.<sup>81</sup>

While the Associated Press source "gave every indication of being trustworthy and competent,"<sup>82</sup> the *Post* had every reason to doubt the veracity of its source.

Three standards of liability emerged from the decisions. Four justices, Harlan, Clark, Stewart, and Fortas, thought that recovery should be conditioned upon a finding of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."<sup>83</sup> Two justices, Black and Douglas, thought the press should have an absolute immunity from libel judgments. Three justices, Brennan, White, and Chief Justice Warren, thought the actual malice standard to be

---

80. *Id.* at 157-59.

81. *Id.* at 159, 167.

82. *Id.* at 158.

83. *Id.* at 155.

applicable to the defamation of public figures.<sup>84</sup> This standard, the application of the *Times* privilege to the defamation of public figures, became the applicable rule.<sup>85</sup> For in *Walker*, the absolutists gave their support to the standard which would give the press the most protection, the actual malice standard.

Little else can be gleaned from the decisions. No clear definition of the term "public figure" emerged, primarily because the opinion announcing the judgments of the Court was actually a minority opinion espousing a rejected rationale.<sup>86</sup> The issue of limits to the application of the *Times* privilege was also left in limbo. Would criticism of a public figure's private life be privileged or would criticism have to be limited to the area in which the public figure was prominent?

The decision can, however, be criticized in general terms, concerning the wisdom of applying the *Times* rule to those conventionally deemed to be public figures. First, public figures, in comparison to public officials, do not enjoy an immunity from libel actions for their own statements so the analogous privilege rationale developed in *Times* is inapposite.<sup>87</sup> Secondly, the pertinent laws of the instant cases were not laws of seditious libel especially repugnant to democratic

84. The voting was as follows. Justices Harlan, Clark, Stewart, and Fortas comprising the plurality and applying the "highly unreasonable conduct" test voted for recovery in *Butts*, but not in *Walker*. Chief Justice Warren applying the actual malice test also voted for recovering in *Butts*, but not in *Walker*. Justices White and Brennan also applying the actual malice standard thought that the standard had not been met in *Walker*. In *Butts*, these justices voted to remand on the grounds of improper instruction to the jury by the trial judge though they, like Warren, thought that actual malice had been shown. Justices Douglas and Black thought the judgments in both cases constitutionally infirm because the "First Amendment was intended to leave the press free from the harassment of libel judgments." *Id.* at 172. In *Walker*, the justices lend their support to the actual malice standard believing it to give the press more protection than the "highly unreasonable conduct" test propounded by the plurality. For a "judicial scorecard" and a thoughtful analysis of the two cases, see Kalven, *The Reasonable Men and the First Amendment: Hill, Butts, and Walker* 1967 SUP. CT. REV.

85. See *Rosenbloom v. Metromedia*, 403 U.S. 29, 30 (1971); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 328 (1974); *Time, Inc. v. Firestone*, 424 U.S. 448, 453 (1976); Standards, *supra* note 12, at 396; DiMatteo, *supra* note 52, at 157-58; Comment, *The Expanding Constitutional Protection for the News Media from Liability of Defamation: Predictability and the News Synthesis*, 70 MICH. L. REV. 1547, 1549 (1972) (hereinafter cited as the *New Synthesis*); and Forbes *et al.*, *Federalization of State Defamation Law*, 15 WASHBURN L.J. 290, 301 (1976) (hereinafter cited as *Federalization*). But see *Greenbelt Publishing Assn. v. Bresler*, 398 U.S. 6, 12 (1970).

86. In *Greenbelt Publishing Assn. v. Bresler*, 398 U.S. 6 (1970), the Court was forced to fashion its own definition of the term public figure, by using various common law definitions and the definitions suggested by the *Butts* court. The Court's definitions are as follows. The plurality defined a public figure as one who had "commanded a substantial amount of independent public interest at the time of publications . . . [either] by position along [or by the] thrusting of his personality into 'vortex' of an important public controversy." *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 154-55 (1967). Chief Justice Warren defined public figures as those involved in the "resolution of important public questions who by reason of their fame, shape events in areas of concern to society at large." *Id.* at 163-64.

87. See *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 153 (1967); *supra* note 31.

processes.<sup>88</sup> Thirdly, despite Mr. Chief Justice Warren's contention that distinctions between the public and private sectors have become blurred in the twentieth century,<sup>89</sup> in general, the public has a lesser interest in securing uninhibited criticism of public figures than of public officials.

V. *Rosenbloom v. Metromedia*: The Application of the Actual Malice Standard to the Discussion of All Issues of Public Interest

While *Butts* and *Walker* involved the defamation of public figures involved in issues of public interest, *Rosenbloom v. Metromedia* concerned the defamation of a private person during the discussion of an issue of public interest. On October 1, 1963, and again on October 4, in the city of Philadelphia, George Rosenbloom was arrested for possession of obscene material. Respondent's radio station WIP broadcast the following item: "City Cracks Down on Smut Merchants."<sup>90</sup> In its first broadcast of a series, the station said that police had confiscated three thousand obscene books. Later broadcasts were corrected to use the phrase "allegedly obscene."

Rosenbloom later sought an injunction against police interference with his business and the disparaging characterization of his business by various news media. WIP characterized the action in this way:

The girlie-book peddlers say the police crackdown and continued reference to their borderline literature as smut or filth is hurting their business . . . if the injunction is not granted . . . it could signal an even more intense effort to rid the city of pornography.<sup>91</sup>

In May of 1964, Rosenbloom was acquitted of the obscenity charges under instruction from the trial judge that, as a matter of law, the materials were not obscene. Rosenbloom then brought a diversity action for libel, contending that the characterization of his books as obscene, he and his associates as "girlie-book peddlers," and his injunctive suit as an attempt to force police to "lay off the smut literature racket," constituted libel per se.<sup>92</sup>

In District Court, Rosenbloom was awarded 750,000 dollars in damages which were reduced to 250,000 dollars on remittur. The Court of Appeals reversed holding that the *Times* privilege applied despite the fact that Rosenbloom was not a public figure or public official. The U.S. Supreme Court affirmed and the plurality held that the *Times* privilege applies to the discussion of public issues without regard to the status of the person defamed. Because the plurality rule became the rule of law in most jurisdictions, it is worth examining.<sup>93</sup>

88. See *Id.* at 153-55.

89. See *Id.* at 164.

90. *Rosenbloom v. Metromedia*, 403 U.S. 29, 33 (1971).

91. *Id.* at 35.

92. See *Id.* at 36.

93. See cases cited in White, *supra* note 5, at 377-79n.10; New Synthesis, *supra* note 84, at 1560-62n.94-96; Anderson, *supra* note 36, at 447n.121. For a criticism of the lower court's acceptance of the *Rosenbloom* plurality as a rule of law, see Note, *Misinterpreting the Supreme Court: An Analysis of How the Constitutional Privilege to Defame Has Been Incorrectly Expanded*, 10 IDAHO L. REV. 213 (1974).

The plurality thought that neither the interest in information nor in good name was correctly protected by distinctions in standards of liability between public figures and private people. The plurality theorized that such distinctions may,

... easily produce the paradoxical result of dampening discussion of issues of public or general concern because they happen to involve private citizens while extending constitutional encouragement to discussion of aspects of the lives of 'public figures' that are not in the area of public or general concern.<sup>94</sup>

The plurality thought that differentiating between public figures and private people was not meaningful in terms of either access to the media or assumed risk of defamation. On the contention that public figures can counter defamation better than private people, the plurality stated:

Denials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story. . . . In the vast majority of libels involving public officials or public figures, the ability to respond through the media will depend on the same complex factor on which the ability of a private individual depends: the unpredictable event of the media's continuing interest in the story. Thus the unproved, and highly improbable, generalization that an as yet, undefined class of "public figures" involved in matters of public concern will be better able to respond through the media than private individuals also involved in such matters seems too insubstantial a reed on which to rest a constitutional distinction.<sup>95</sup>

The plurality continued:

If the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern.<sup>96</sup>

The plurality also rejected the idea that public figures had lost some stake in their reputation because of their assumption of prominence. The plurality contended that the elaboration of constitutional privileges to defame public officials and public figures in no way reflected a devaluation of the importance of good name to these two classes of people, but represented a recognition of the importance of protecting uninhibited discussion of public issues. After concluding that public people had lost no reputational interest because of their status, the plurality decided that neither had private people acquired one. The plurality concluded that private people deserve no special consideration be-

---

94. *Rosenbloom v. Metromedia*, 403 U.S. 29, 48 (1971).

95. *Id.* at 46-47.

96. *Id.* at 47; *See also, supra* note 12.

cause, 'exposure of the self to others in varying degrees is a concomitant of life in a civilized community.'<sup>97</sup>

The new standard is appealing. Status determinations are eliminated. Substituted in their place is the ostensibly simple task of determining whether an issue is public or private. To insure that "debate on public issues should be uninhibited, robust, and wide-open,"<sup>98</sup> protection is given to the debate itself in lieu of granting a privilege to defame notable people. Information not pertaining to subjects of public interest, such as commentary on the private lives of public figures, is left unprotected. Information about subjects of public interest is, however, protected; and it is finally recognized that there is a substantial public interest in acquiring information about public issues in which private people are involved.

The difficulty with the new standard is that lower courts have held few topics to be beyond the octopus-like scope of the term "public interest."<sup>99</sup> Public interest has been found in subjects ranging from errant golf shots to the behavior of a political candidate's children.<sup>100</sup> One author thought that under the *Rosenbloom* standard, "the very fact that a news medium reports an event might be said to create a virtually conclusive presumption that the event is of public concern."<sup>101</sup> Little remains of the interest in good name if the discussion of almost all issues is given the protection of the actual malice standard. The *Rosenbloom* standard protects unimportant information with the cost of giving the citizen little recourse for injury to his reputation. The Court in *Gertz v. Robert Welch, Inc.* would attempt to balance more prudently the interests in good name and free press.

#### VI. *Gertz v. Robert Welch*: Rejection of *Rosenbloom*, Affirmation of *Butts* and *Walker*, and Some New Rules for Media Defamation of Private People

Petitioner Elmer Gertz was a lawyer representing a family named Nelson in civil litigation against a policeman named Nucio. Nucio had been found guilty of second degree murder for the killing of the Nelson youth. Respondent Robert Welch, Inc. published *American Opinion*, a monthly magazine of the John Birch Society. An article in the magazine entitled, "Frame Up: Richard Nucio And The War On Police," falsely stated that petitioner had framed Nucio in the criminal prosecution, had a criminal record, had taken part in the 1968 demon-

---

97. *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967). *Time* involved the conflict between freedom of speech and the private individual's right to privacy. The Court in that case concluded that a private individual must prove actual malice on the part of the publisher of an article about a subject of public interest. The decision in *Time* was a precedent for the use of a public issue standard, though right to good name and right to privacy considerations differ.

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

99. See *New Synthesis*, *supra* note 84, at 1560-62n. 94-96; White, *supra* note 5, at 377-79n. 10.

100. See *Sellers v. Time, Inc.*, 299 F. Supp. 582 (E.D. Pa. 1969); *News-Journal Co. v. Gallagher*, 133 A. 2d 166 (1967).

101. Note, *Media Privilege to Report Events of Public Interest*, 85 HARV L. REV. 222, 226 (1971).



strations in Chicago, and had been a member of the "Marxist League for Industrial Democracy," and the "Intercollegiate Socialist Society."<sup>102</sup>

In his suit for libel in district court, Gertz was denied recovery for damages because the court found he had not proved actual malice on the part of the publisher as required by *Rosenbloom*. The Court of Appeals affirmed also finding the *Times* standard apposite. The U. S. Supreme Court reversed and held that a private person need not prove actual malice on the part of the publisher of an article about a subject of public interest or concern.<sup>103</sup> The Court decided that only public figures and public officials are required to prove actual malice in an action for libel. The Court rejected, but did not explicitly overrule, the *Rosenbloom* standard and elaborated a complicated set of rules for determining the standard of liability in a given situation.

The Court first decided that public figures must prove actual malice in their actions for libel. Two categories of people were said to fall within the scope of the term. The first category is comprised of those few people who are deemed to be public figures for all purposes because of their assumption of roles of "especial prominence in the affairs of society."<sup>104</sup> The second category is comprised of that greater number of people who are public figures for the purpose of a particular issue because they, "have thrust themselves to the forefront of (that) particular public controversy in order to influence the resolution of the issues involved."<sup>105</sup> In both categories, the *Gertz* Court conditioned its public figure test on the voluntariness of the plaintiff in seeking publicity, either by occupying a prominent role in society or by attempting to influence the resolution of a particular issue. The public figure's exposure to defamation was deemed justifiable because of his ability to respond through the media.<sup>106</sup> Ability to respond and voluntariness in incurring risk to reputation, factors deemed unimportant by the *Rosenbloom* plurality, were accorded decisive significance by the *Gertz* Court.

Because the private person had not voluntarily run the risk of injury to good name and because he had little likelihood of "securing access to channels of communication sufficient to rebut falsehood concerning him,"<sup>107</sup> the Court thought that he was more deserving of recovery than the public figure and should not

102. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 326 (1974).

103. The Court's opinion was written by Justice Powell and the majority was composed of Justices Stewart, Marshall, Powell, Rehnquist, and Blackmun. Justice Blackmun, however, who had joined the plurality in *Rosenbloom*, stated that he joined in the Court's opinion only to create a majority. See: *Id.* at 353 (separate opinion of Justice Blackmun). Justice Blackmun's reticence in joining the majority's opinion undercuts the vitality of the majority position, and some authors have even spoken of the Court's opinion as being in fact, a plurality opinion. I will, however, speak of the opinion of the five justices as a majority position and the rules propounded as rules of the Court.

104. *Id.* at 345.

105. *Id.* See note 86 *supra* for the two-tier public figure standard suggested by the *Butts* plurality, upon which the *Gertz* public figures standard appears to be based.

106. The Court stated: "Public officials and public figures usually enjoy significantly greater access to the channels of effective communication, and hence, have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Id.* at 344 (Footnote omitted).

107. J. Harlan, dissenting, in *Rosenbloom v. Metromedia*, 403 U.S. 29, 70 (1971) cited in *Id.* at 338.

have the burden of proving actual malice. On the other hand, leaving the standard of liability to the rules of state tort law could result in a publisher being held liable in damages for defamatory error though he had taken "every reasonable precaution to ensure the accuracy of (his) assertions."<sup>108</sup> The Court, therefore, attempted to reach a prudent middle ground of recovery between the restrictiveness of actual malice and the relative ease of state tort law.

The *Gertz* rules for media defamation of a private person<sup>109</sup> are as follows: states may not impose liability without fault though they are free to develop another standard; punitive or presumed damages cannot be awarded absent a finding of actual malice; absent that finding, states may compensate only for actual injury which encompasses all normal tort damages including humiliation and suffering.<sup>110</sup> The fault requirement prohibits absolute liability for erroneous statements; states must find a defendant at least negligent before holding him liable. A state does, however, have the option of conditioning recovery upon fulfillment of a more restrictive standard than negligence such as actual malice.

After elaborating the proper standards of liability for public figures and private people, the Court proceeded to the issues in the instant case. The Court found *Gertz* not to be a public figure under the new definition because he had not "general fame or notoriety in the community,"<sup>111</sup> and had not "thrust himself into the vortex of this public issue."<sup>112</sup> The Court then decided whether a constitutionally permissible standard of liability for the media defamation of a private person had been applied. The Supreme Court found the trial court in

108. *Id.* at 346.

109. This discussion examines what appear to be the minimum parameters of the standard. See notes 134-45 *supra*.

110. See *Id.* at 347-50 for the Court's explanation and justification of the new rules. see, however, White, *supra* note 5 for a harsh and detailed criticism of the rules. For a good overview of the standard, see Frakt, *The Evolving Law of Defamation: New York Times Co. v. Sullivan to Gertz v. Welch, Inc. And Beyond*, 6 RUT.'CAM. L.J. 47 (1975) [hereinafter cited as Frakt]. And for the thesis that the rules operate on the "wrong side of the litigation," see Anderson, *supra* note 36.

111. The Court Stated:

Petitioner has long been active in community and professional affairs. He has served as an officer of local civic groups and of various professional organizations, and he has published several books and articles on legal subjects. Although petitioner was consequently well known in some circles, he had achieved no general fame or notoriety in the community. None of the prospective jurors called at the trial had ever heard of petitioner prior to this litigation, and respondent offered no proof that this response was typical of the local population. We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life.

112. The Court thought *Gertz* not to be a limited purpose public figure because,

[he] played a minimal role at the coroner's inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution of Officer Nuccio. Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having done so. He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome.

error in that the jury was permitted to impose liability without fault and to presume damages without proof of injury.<sup>113</sup> The Court, therefore, reversed and remanded.

VII. *Time, Inc. v. Firestone*:<sup>114</sup> "Sowing The Seed of *Gertz*"<sup>115</sup>

*Time, Inc. v. Firestone* concerned the defamation of a person of uncertain status involved in an issue of apparent public interest. On December 15, 1967, Russell Firestone, an heir to the Firestone rubber fortune, was granted a divorce from respondent, Mary Alice Firestone, on the grounds of extreme cruelty and a lack of domestication. *Time* magazine erroneously reported that the divorce had been granted for extreme cruelty and adultery, perhaps misled by the fact that Mr. Firestone's original claim was for extreme cruelty and adultery.<sup>116</sup>

Mrs. Firestone filed a libel action against the publisher of *Time* magazine and was awarded 100,000 dollars in damages in Florida Circuit Court. The verdict was ultimately affirmed by the Florida Supreme Court.<sup>117</sup> The U.S. Supreme Court accepted the case on a writ of certiorari.

Following *Gertz*, the Supreme Court first decided the question of Mrs. Firestone's status. The court determined that Mrs. Firestone was neither an all-purpose or limited-purpose public figure within the *Gertz* definition of the term. The Court stated:

Respondent did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society, and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it.<sup>118</sup>

The Court found that not only had Mrs. Firestone's participation in the divorce not constituted voluntary involvement, but that a divorce "cause celebre" was not a "public controversy" within the *Gertz* definition of that term.<sup>119</sup> An individual is not, therefore, rendered a public figure simply by voluntary participation in an issue of interest to the public; he must participate in a "public

---

113. See *Id.* at 352. See note 110 *supra* for summary of these rules. Because Illinois had a doctrine of libel per se at the time of publication, (See note 5 *supra*) and therefore held some statements to be actionable on their faces and permitted recovery of damages without proof of injury in these areas, the fault and actual injury requirements could not have been met.

114. 424 U.S. 448 (1976).

115. This is Marsha Taubenhau's appropriate title. See Taubenhau, *Time, Inc. v. Firestone: Sowing The Seeds of Gertz*, 43 BROOKLYN L. REV. 123 (1976).

116. See 424 U.S. at 451-52.

117. For a good discussion of the legal tribulations which occurred in the instant case, see Recent Decisions, *The Firestone Case: A Judicial Exercise In Press Censorship*, 25 EMORY L.J. 705-8 (1976).

118. *Time, Inc. v. Firestone*, 424 U.S. 448, 453 (1976).

119. *Id.* at 454-55. But see, Justice Marshall's dissent in which he contends that Mrs. Firestone had voluntarily participated in a "public controversy" (*Id.* at 484), and she therefore, should have been deemed a public figure for the purpose of the divorce.

See Christie, *Injury to Reputation And The Constitution: Confusion Amid Conflicting Approaches*, 75 MICH L. REV. 43, 54 (1976) for a similar argument.

controversy," though the exact meaning of the term is not yet known.<sup>120</sup>

After determining that Mrs. Firestone was not a voluntary participant in a "public controversy," the Court decided whether a constitutionally permissible standard of liability for media defamation of a private person had been used. The Court found the rendering of a judgment without a prior finding of fault on the part of the publisher constitutionally infirm under the *Gertz* standard.<sup>121</sup> The Court, therefore, vacated and remanded. In formulating its decision, the *Firestone* Court relied upon the *Gertz* rules for standards of liability and status determinations. Whether the *Gertz* rules should retain their vitality in the future is a question that will be discussed in the conclusion of this article.

### VIII. The *Gertz* Rules and Libel Law Today

Before discussing future developments, it is at first useful to summarize the state of libel law, today. Public officials must still prove actual malice in libel actions against critics of their official conduct. The class of public officials is comprised of at the least, "those among the hierarchy of governmental employees who have, or appear to the public to have, substantial responsibility for, or control over the conduct of governmental affairs."<sup>122</sup> Criticism relating to official conduct encompasses "anything which might touch on an official's fitness for office."<sup>123</sup> Actual malice is shown by "clear and convincing proof"<sup>124</sup> that defendant had either an "intent to inflict harm through falsehood"<sup>125</sup> or a "high degree of awareness" of the probable falsity of his statements.<sup>126</sup>

---

120. The Court did not define the term "public controversy", except to say that it does not include "all controversies of interest to the public" such as a marriage "cause celebre." *Id.* at 454.

121. The Court stated:

*Gertz* established, however, that not only must there be evidence to support an award of compensatory damages, there must also be evidence of some fault on the part of a defendant charged with publishing defamatory material. No question of fault was submitted to the jury in this case, because under Florida law, the only findings required for determination of liability were whether the article was defamatory, whether it was true, and whether the defamation, if any, caused respondent harm.

The failure to submit the question of fault to the jury does not of itself establish non-compliance with the constitutional requirements established in *Gertz*, however. Nothing in the Constitution requires that assessment of fault in a civil case tried in a state court be made by a jury, nor is there any prohibition against such a finding being made in the first instance by an appellate, rather than a trial court. The First and Fourteenth Amendments do not impose upon the States any limitations as to how, within their own judicial systems, fact finding tasks shall be allocated. If we were satisfied that one of the Florida courts which considered this case had supportably ascertained petitioner was at fault, we would be required to affirm the judgment below." *Id.* at 461-62.

Further in its opinion, the Court stated that the Florida Supreme Court's characterization of the report by Time, as a flagrant example of journalistic negligence, *Id.* (at 463) did not constitute a "conscious determination" of fault. So, to have satisfactorily decided the issue of fault, a court has to have had made some inquiry into the standard of care used by the defendant, and have found defendant guilty of at least negligence

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

123. *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964).

124. *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 342 (1974).

125. See generally *supra* note 60.

126. See *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

Public figures must also prove actual malice to be awarded judgments for libel. Public figures for all purposes are those who occupy roles of "especial prominence in the affairs of society."<sup>127</sup> Public figures for the purposes of a particular public controversy are those who "have thrust themselves to the forefront of (that) particular public controversy in order to influence the resolution of the issues involved."<sup>128</sup>

Private persons are not required to prove actual malice, but must show some degree of fault on the part of a media disseminator of defamatory falsehoods.<sup>129</sup> If fault can be shown, compensation is limited to actual injury unless actual malice has been proved, in which case presumed or punitive damages may be awarded.<sup>130</sup>

Libel law today is rightly characterized as a "confused and meandering state of affairs."<sup>131</sup> The *Gertz* Court introduced nuances and distinctions into the law which could confound even the most knowledgeable jurist. A court in a defamation case is first called upon to determine the status of the plaintiff. But the two-tier public figure definition is not susceptible of easy application, as can be seen in some decisions by lower courts after *Gertz*.<sup>132</sup> Particularly difficult is ascertaining at what point an individual's involvement in an issue renders him a public figure for the purposes of that issue. In short, as one district court judge observed, "[d]efining public figures is much like trying to nail a jellyfish to the wall."<sup>133</sup>

If an individual is not deemed a public person, the rules of liability become almost unfathomable. It is clear that some constitutional protection is given to some types of defamation not involving public people. Exactly what types of defamation are given constitutional protection is the difficult question. The view best supported by dicta in *Gertz* is that, in cases involving defamation of private people, constitutional protection is given only if the media is the instrument of defamation. The *Gertz* Court spoke of the "appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private person."<sup>134</sup>

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

128. *Id.*

129. *Id.* at 347.

130. *Id.* at 349-50.

131. Elovitz, *Libel Law: A Confused And Meandering State of Affairs*, 6 CUM. L. REV. 667 (1976).

132. In two cases, relatives of well-known people were deemed public figures despite their seeming lack of especial prominence or desire to become involved in a particular issue. See *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976); *Meeropol v. Nizer*, 381 F. Supp. 29 (D.D.N.Y. 1974). Much of the discussion of the public figure cases is based upon Feinstein, *Persistence of Illogic: Further Constitutional Aspects of the Law of Defamation*, 5 HOFSTRA L. REV. 635, 654-55 (1977). See also Note, *The Editorial Function and the Gertz Public Figure Standard*, 87 YALE L.J. 1723, 1748 (1978).

133. *Rosanova v. Playboy Enterprises, Inc.* 411 F. Supp. 440, 443 (S.D. Ga. 1976).

134. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348 (1974). See also *Id.* at 340-41, 354-55 (C. J. Burger dissenting).

This view has, however, been rejected by most law reviews and lower courts which have examined it.<sup>135</sup> The Second Restatement of Torts explained the imprudence of restricting the rules to media defamation:

It would seem strange to hold that the press, composed of professionals and causing much greater damage because of their wider distribution of the communication, can constitutionally be held liable only for negligence, but that a private person, engaged in a casual conversation with a single person, can be held liable at his peril if the statement turns out to be false, without regard to his lack of fault.<sup>136</sup>

Not only is it unclear which disseminators of information are protected, it is also unclear what type of information is protected. Must a communication pertain to a matter of public interest?<sup>137</sup> It would appear paradoxical that media defamation not pertaining to a public issue would be constitutionally protected, though defamation by a non-media source relating to a matter of public concern might not. Yet, in *Firestone*, the Court appeared to sanction exactly that type of rule. In that case, the Court extended constitutional protection (the *Gertz* rules for defamation of non-public people; see text *supra* at note 110 for the statement of those rules) to media defamation not concerning a "public controversy," while refraining from granting a constitutional privilege to defame during the discussion of a public issue if the defamer is not part of the media.<sup>138</sup>

Not only is it unclear as to the ambit of constitutional protection under the Court's rulings, also unclear is what protection must accrue to protected communications. The Court stated that in protected areas, in the absence of a showing of actual malice, awards of damages are limited to compensation for "actual injury."<sup>139</sup> Yet, in *Gertz* the Court thought compensation to be per-

135. See Note, *The Editorial Function and the Gertz Public Figure Standard*, 87 YALE L.J. 1723, 1724n.6(1978); Note, *Constitutional Law—Reformulation of the Constitutional Privilege to Defame*, 24 KAN. L. REV. 406, 418-20 (1976); Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221, 1237 (1976); Collins & Drushal, *The Reaction of the State Courts to Gertz v. Robert Welch, Inc.*, 28 CASE W. L. REV. 306, 332-34 (1978) (hereinafter cited as Collins); Frakt, *supra* note 110, at 509-10 pointing out that the Court has applied the actual malice standard to non-media defamation in *Garrison v. Louisiana*, 379 U.S. 727 (1968) and *St. Amant v. Thompson*, 390 U.S. 727 (1968). See cases cited in Frank at 509-10 in which state courts applied the actual malice standard to non-media defamation cases. For state court holdings that the *Gertz* privilege is not restricted in the media, see *Jacron Sales Co., v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976); *General Motors Corp. v. Piskor*, 277 Md. 165, 352 A.2d 810 (1976). For the general idea that the First Amendment provides no special rights to the press, see *Branzburg v. Hays*, 408 U.S. 665 (1972); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978). For the idea that *Gertz* can be limited to the media because of special guarantees contained in the press clause, see Justice Stewart, *Or of the Press*, 26 HASTINGS L. J. 631 (1975); Nimmer, INTRODUCTION—IS FREEDOM OF THE PRESS A REDUNDANCE: WHAT DOES IT ADD TO FREEDOM OF SPEECH, 26 HASTINGS L.J. 639 (1975); Brosnahan, *From Times V. Sullivan to Gertz v. Welch: Ten Years* 26 HASTINGS L.J. 777, 793 (1975); *Calero v. Del. Chem. Corp.*, 68 Wis.2d 487, 500, 228 N.W.2d 737, 745 (1975).

136. RESTATEMENT (SECOND) OF TORTS § 580 B. comment D (Tent. Draft No. 21, 1975).

137. Justice White dissenting in *Gertz* thought the *Gertz* rules for defamation of non-public people would apply to all defamatory suits, regardless of the issue involved. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 373n.5 (1973).

138. See *Time, Inc. v. Firestone*, 424 U.S. 448.

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

mitted for "mental anguish and suffering."<sup>140</sup> And in *Firestone*, the Court permitted recovery for factors unrelated to compensation for actual injury.<sup>141</sup> So the protective influence of the actual injury requirement appears confusing and illusory.

More important than the question of damages is the question of general liability for defamatory statements. The Court in *Gertz* stated that, "... so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability. . . ."<sup>142</sup> The court holds that, at the least, publishers must be found negligent before being held liable. And most states have chosen to adopt a negligence standard in protected areas involving private people.<sup>143</sup>

But a standard of journalistic negligence is not easily manageable. No clear or widely-accepted definition of journalistic negligence has yet been developed.<sup>144</sup> The effect of this unclarity may be to allow juries to evaluate negligence on the basis of the content of the material published rather than on the investigatory procedures employed.<sup>145</sup>

#### IX. A Proposal For An Alternative Standard of Liability

The *Gertz* standard has failed to provide a workable mechanism for balancing the conflicting equities present in the area of public libel. The ambiguity surrounding the *Gertz* definitions of the terms "especial prominence," "public controversy," and "actual injury," leads to uneven results and possible punishment of unpopular opinion. In addition, the ambit question remains unresolved:

140. *Id.* at 350.

141. *Time, Inc. v. Firestone*, 424 U.S. 448, 460 (1976). Justice Brennan comments: "In this case, the \$100,000 damage award was premised entirely on the injury of pain and anguish. All claims as to injury to reputation were withdrawn prior to trial, and no evidence concerning damage to reputation were presented at trial." *Id.* at 475n.3 (J. Brennan dissenting).

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

143. See *Collins*, *supra* note 135, at 343.

144. *Id.* at 326-27; Anderson, *supra* note 36, at 454-62; Green, *Continuing the Privacy Discussion: A Response to Judge Wright and President Bloustein* 46 TEX. L. REV. 750, 754 (1968); Kalven, *The Reasonable Man And The First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267, 302-08; Anderson, *A Response to Professor Robertson; The Issue Is Control of Press Power*, 54 TEX. L. REV. 271, 278-80 (1976).

145. J. Brennan notes: "And most hazardous, the flexibility which inheres in the reasonable-care standard will create the danger that a jury will convert it into an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks,' which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail." Justice Brennan, dissenting, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 367 (1974) citing *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). See *Time, Inc. v. Hill*, 385 U.S. 374, 383 (1967); Anderson *supra* note 36, at 454-56; Note, *Media Privilege to Report Matters of Public Interest*, 85 HARV. L. REV. 222, 228 (1971). For an example of apparent punishment of unpopular views and unorthodox style, see *Sprouse v. Clay Communications, Inc.*, W. Va. 211 S.E. 2d 674 (1975) *cert. denied*, (1975). For a defense of the reasonable care standard, see Justice Harlan's separate opinion in *Time, Inc. v. Hill*, 385 U.S. 374, 406 (1967).

What forms of communication are given the protection of the *Gertz* rules for defamation of non-public people?<sup>146</sup> Not only in its unclarity, but also in its assignment of constitutional protection is the *Gertz* standard defective. Discussion of the private lives of all-purpose public figures is protected by the actual malice standard while discussion of public issues involving private people is given lesser or no protection.

An alternative method of assigning constitutional protection is the public concern standard. This standard would protect the discussion of all issues of public concern, without regard for the status of the person defamed, with the actual malice standard.<sup>147</sup> Speech not relating to matters of public concern would not be given federal protection, and the applicable standard of liability would be determined by each state. The term, public concern, applies to the discussion of all activities relating to the functioning of self-government.<sup>148</sup> Included are those issues of social and political importance for which the public must receive information if it is to sagaciously conduct its decision-making.<sup>149</sup>

---

146. See notes 134-38 *supra*, for discussion of the ambit question.

147. The actual malice standard is used instead of the reasonable care standard because of the unclarity, and possibility of punishment of unpopular opinion, inherent in the latter standard. See notes 145-56 *supra*. An absolute privilege is not employed because, as Justice Brennan notes:

"Although honest utterance, even if inaccurate, may further the fruitful exercise of the right to free speech, it does not follow that the lie, knowingly and deliberately published . . . should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective tool to unseat the public servant or even topple an administration. That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood, (along with reckless falsehood) falls into that class of utterances which 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."

*Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Moreover, the substantial body of case law (see notes 52-67 *supra*) surrounding the actual malice standard facilitates easy implementation. For the views of the absolutists on the Court, however, see J. Black, concurring, in *New York Times Co. v. Sullivan*, 376 U.S. 254, 293 (1964); J. Goldberg, concurring, in *New York Times Co. v. Sullivan*, 376 U.S. 254-97 (1964); J. Douglas, concurring, in *Garrison v. Louisiana*, 379 U.S. 64, 80 (1964); opinion of J. Black in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 170 (1967). See also *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) for a statement adducing the value of false statements in free debate.

148. For substantiation, for the view that the First Amendment was intended to apply to all matters relating to self-government, see Meikeljohn, *supra* note 9; Bloustein, *supra* note 8; Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Steel, *Freedom To Hear: A Political Justification of The First Amendment*, 46 WASH. L. REV. 311 (1971).

149. Some matters of political importance are discussion of pending legislation, commentary on the functioning of governmental bodies, commentary on institutions, companies, and individuals in their relation to government, plans for reform of government, and speech relating to the official conduct of public officials. Since the public activities of public officials are almost invariably of substantial importance to the body politic, there seems little sense in differentiating between the public concern standard and the standard developed in *Times* and its progeny. Matters of social



"Public concern" is differentiated from mere "public interest." A public interest test<sup>150</sup> may protect issues of which the public has a curiosity about or a "lurid thirst for details;" the public concern test protects only those issues of governing importance. So, while a socialite's divorce may be a matter of public interest, it is not a matter of public concern.<sup>151</sup>

The determination of what constitutes public concern is made by the courts in the interest of the people. Such a task seems neither inherently inappropriate nor inordinately difficult. Though the *Gertz* Court questioned the wisdom of having state and federal court judges decide "what information is relevant to self-government,"<sup>152</sup> under the *Gertz* test, subject matter analysis also occurs in the guise of determining whether an issue is a "public controversy" and the defamed individual a public figure.<sup>153</sup>

In contrast to the public figure tests, the public concern test seems to place emphasis on the most pertinent factor in the assignment of constitutional protection, the nature of the issue. It is the nature of the issue, not the status of the defamed which, in general, relates to the public's right to know.<sup>154</sup> For example, in *Gertz*, would the allegations of a conspiracy to discredit the police have been any less important if *Gertz* had occupied a less prominent place in society? One of the defects of public figure standards is that they fail to recognize

---

importance are those matters which though not explicitly political, may have a significant effect upon people's lives. Some such matters would be allegations of a fix in a nationally important football game (*Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967)), the turbulent activities at a college campus surrounding the enrollment of the first black student at the school (*Associated Press v. Walker*, 388 U.S. 130 (1967)), and allegations of a nationwide conspiracy to discredit the police, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The truth or falsity of the statements contained in such articles is not the factor which determines whether constitutional protection should be given. The crucial factor is the nature of the issue discussed. So, while the statements in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 329 (1971) may have been truer than the statements in the other articles, the issue involved, the tribulations of a minor distributor of pornographic material, seems not to be a matter of social or political importance.

150. For the most notable justification and exposition of the public interest test, see Justice Brennan's plurality opinion in *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971).

151. The Florida Supreme Court applying the public concern test and finding Mrs. Firestone's activities not to be of public concern, conceived its task as that of differentiating between "mere curiosity or the undeniably prevalent morbid or prurient intrigue with scandal, or with the potentially humorous misfortune of others, on the one hand and real or general concern on the other" *Firststone v. Time, Inc., Fla.*, 271 So. 2d 745, 748 (1972). See also Bloustein *supra* note 8 discussing the difference between "public interest meaning curiosity and "public interest" meaning "value of the public of receiving information of governing importance." Bloustein, *supra* note 8, at 56-57. The concern of this paper is obviously with the latter.

152. J. Marshall, dissenting, in *Rosenbloom v. Metromedia*, 403 U.S. 29, 79 (1971) *cited in Gertz v. Robert Welch, Inc.*, 418 U.S. 325, 346 (1974). See Comment, *Defamation: 'Real' Public Concern-A 'More Apt' Test For Constitutional Privilege*, 26 FLA. L. REV. 131 (1973).

153. See J. Marshall, dissenting, in *Time, Inc. v. Firestone*, 424 U.S. 448, 488-89 (1976).

154. Justice Brennan states: "The public's primary interest is in the event; the public focus is on the conduct of the participant and on the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety." *Rosenbloom v. Metromedia*, 403 U.S. 29, 43 (1971).

the importance of society acquiring information about all of its members.<sup>155</sup> As the Court stated in *Thornhill v. Alabama*,<sup>156</sup>

Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.<sup>157</sup>

Ideas of reputational differences between public and private people should not condition the flow of information to the body politic.<sup>158</sup> First, it is a dubious assumption that public people can invariably counter defamatory statements better than private people can. The strength of the denial or explanation seems to be the factor upon which the ability to assuage the effects of defamatory statements depends, not the defamed's previous notoriety or anonymity.<sup>159</sup>

Another dubious idea upon which public figure standards are based is the idea that some individuals have voluntarily assumed a risk of injury to reputation by their general prominence in society or participation in a particular issue. Such an idea runs counter to the democratic ideal of encouraging participation in the vital affairs of the day. As one commentator notes:

There is an underlying premise in *Gertz* that merely by being successful in life's endeavors or by participating in public or civic affairs, one loses the substantial protection retained by those who shrink from the spotlight or engage in more mundane pursuits.<sup>160</sup>

And equally objectionable under *Gertz* is the idea that some substantial constitutional interest is served by protecting unbridled incursion into the private

---

155. Many situations can be envisaged in which the public's "right to know" is violated if commentary on the activities of private people involved in matters of public concern is not protected by the actual malice standard. For example, if a reporter discovered a "payola" scheme between a public official and a private citizen, the public's "right to know" is abridged if only the reporter's comments about the public official's involvement are protected by the actual malice standard. The public's "right to know" would also be abridged if in an investigation of a price-fixing scheme among a number of corporations, only the statements pertaining to the activities of the public figures involved were protected by the actual malice standard. In both examples, and in many other situations, the inquiry into personal status detracts from the real issues at hand, and limits the public's right to know without compelling justification.

156. 310 U.S. 88 (1940).

157. *Id.* at 102.

158. See also notes 104-09 *supra*, for the *Gertz* court's concepts of reputational differences between public and private people. For a sharp criticism of the idea of reputational differences, see *Rosenbloom v. Metromedia*, 403 U.S. 29, 46 (1971). And for the idea that sometimes public people may have a greater stake in their reputations than private people, see *Vindication*, *supra* note 12, at 1737.

159. See also notes 95-96 *supra*.

160. Frakt, *supra* note 110, at 487. Frakt also raises the idea that varying judicial remedies according to status may be in violation of the Fourteenth Amendment's guarantee of equal protection for all citizens.

affairs of those unfortunate people considered to be all-purpose public figures.<sup>161</sup>

The other difficulty with the *Gertz* public figure standard, as stated previously, is its lack of clarity and complexity. Applying the *Gertz* two-tier public figure test is no easy task, even for the most knowledgeable judge and jury.<sup>162</sup> Applying the test, when combined with the task of untangling the *Gertz* fault and liability requirements, seems an almost insurmountable task for a court.<sup>163</sup> Uneven results and subsequent self-censorship by the press can be the only result of such an ambiguous standard.

In contrast, the public concern test reveals its utility in its clarity. A court using the public concern test has only to ascertain the nature of the pertinent issue to determine the applicable standard of liability. The costs of the litigation and the probability of appeal are reduced with the decrease in the number of legal issues involved. Moreover, when the lawful zone is clear, wide, and well-protected, publishers can publish controversial or unverifiable information without undue fear of subsequent punishment.<sup>164</sup> And plaintiffs, public and private, can ascertain under what circumstances legal remedies exist for injury to their reputations. It is clear that in the area of public libel "some degree of certainty is at least as valuable a part of justice as perfection."<sup>165</sup> If only the current Court would realize such.

---

161. The *Gertz* rules may "easily produce the paradoxical result of dampening discussion of issues of public or general concern because they happen to involve private citizens while extending constitutional encouragement to discussion of aspects of the lives of 'public figures' that are not in the area of public or general concern" *Rosenbloom v. Metromedia*, 403 U.S. 29, 48 (1971). And as E. Bloustein points out, an appropriate standard of liability is one which will "assure the robust exposition of public issues without inviting the lurid exploitation of private lives" Bloustein, *supra* note 8 at 95.

162. See notes 132-33 *supra*.

163. One author gives a not all encompassing list of twenty-three issues that a Court must accurately resolve in order to determine liability in a given post-*Gertz* libel case. See Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221, 1223-24 (1976).

164. See Anderson, *supra* note 36; and *Rosenbloom v. Metromedia*, 403 U.S. 29, 52-53 (1971), explaining why *Gertz* induces self-censorship by its unclarity and lack of comprehensive protection.

165. *Cassell & Co. v. Broome*, A.C. 1027, 1054 (1972) cited in Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221, 1225 (1976).