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From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and The First Amendment

By James J. Brosnahan*

The clash between society's interest in preserving the integrity of an individual's reputation and the responsibility of the press to inform on matters of public concern has produced a profound and continuing national ambivalence regarding the accountability of the press. Historical expansion of the freedom of the press rested primarily on the libertarian theory that an independent press was indispensable to freedom of political opinion and the concomitant right to criticize the government. Given this theoretical foundation, constitutional protection for the press reaches its zenith where the press is performing its function as critic of the state. Conversely, where the target of adverse commentary is a private individual, the constitutionally protected status of the press is most tenuous.

The problem is best illuminated by consideration of the following hypothetical. Three days before the filing deadline for candidacy for public office, a newspaper receives information from a reliable informant, whom it has used before, that a potential candidate has taken a bribe. The paper does what it can in the time available to confirm the accuracy of the report. Clearly the public should be advised of reliable information that a would-be candidate for office has committed a serious offense relevant to his qualifications for office. The information is published, and the candidate, under extreme public pressure, withdraws from the race. The action taken by the newspaper might well be considered laudatory; however, after the candidate has suffered personal humiliation and impairment of his earning potential, it is determined to an absolute certainty that the published reports were

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false. The dilemma here is clear: the public’s right to know has collided with the individual’s right not to be damaged in his reputation by the publication of defamatory falsehoods.

This article will trace the development of constitutional protection of libelous and defamatory utterances beginning with the watershed case of *New York Times Co. v. Sullivan* through the Supreme Court’s recent decision in *Gertz v. Robert Welch, Inc.* Substantive and procedural developments since *New York Times* will be described, with particular emphasis given to the distinctive constitutional approach adopted by the majority of the Court in *Gertz*. The *Gertz* opinion brings about three major developments which substantially depart from the reasoning of the *New York Times* decision and its progeny: (1) adoption of a constitutional balancing test which weighs the First Amendment interest in the institutional autonomy of the media against the state’s interest in compensating an individual for wrongful injury to his reputation; (2) reformulation of the “public figure” concept and (3) significant alteration of the common law rules governing damages in libel actions.

**Pre-New York Times Law and Theory**

Prior to the Supreme Court’s decision in *New York Times Co. v. Sullivan*, a publisher printed materials susceptible of a defamatory meaning at his peril. The American Law Institute’s Restatement of the Law of Torts, promulgated in 1938, listed truth and consent as defenses to the publication of defamatory material; it also recognized a very narrow conditional privilege. Section 598 provided, under the heading of a “public interest” defense, that:

> [a]n occasion is conditionally privileged when the circumstances induce a correct or reasonable belief that (a) facts exist which affect a sufficiently important public interest, and (b) the public interest requires the communication of the defamatory matter to a public officer or private citizen and that such person is authorized or privileged to act if the defamatory matter is true.

The comments to that section made clear that the privilege applied only when a substantial interest of the public, such as the prevention of

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6. *Id.* § 583.
7. *Id.* § 598.
8. *Id.*
crime or the apprehension of criminals, was threatened. The comments specifically stated that the rule "does not afford a privilege to publish false defamatory statements of fact about public officers or candidates for office" and "is not intended to constitute an all-inclusive category of public interests which may be protected by the publication of defamatory communications concerning others." As he so often had done, Professor Prosser succinctly summarized the common law doctrine of strict liability for the publication of false defamatory matter when he said:

The effect of this strict liability [for defamatory publications] is to place the printed, written or spoken word in the same class with the use of explosives or the keeping of dangerous animals. If a defamatory meaning, which is false, is reasonably understood, the defendant publishes at his peril, and there is no possible defense except the rather narrow one of privilege.

As the law of defamation developed a rule of strict liability, commentators and judges developed various interpretations of the relationship of the First Amendment to the law of defamation. Three interpretations bear directly on the conflict between libel law and the First Amendment. These are Justice Black's so-called "absolute" theory, Professor Emerson's balancing theory, and Professor Meiklejohn's theory of absolute privilege for statements pertaining to matters of "governing importance."

In a number of the First Amendment cases, Justice Black enunciated the view that the language of the First Amendment is to be given literal effect. Under his interpretation the words "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." applied without qualification to Congress under the First Amendment and to the states through the Fourteenth Amendment. In Roth v. United States, Justice Black concurred in the dissent in which Justice Douglas stated:

I reject too the implication that problems of freedom of speech and of the press are to be resolved by weighing against the values of free expression, the judgment of the Court that a particular form of that expression has "no redeeming social importance." The First Amendment, its prohibition in terms absolute, was designed to preclude courts as well as legislatures from weighing the values

9. Id., comment a.
10. Id., comment b.
12. U.S. CONST. amend. I.
of speech against silence. The First Amendment puts free speech in the preferred position.\textsuperscript{14}

Justice Black's absolute theory was articulated in various contexts over the years.\textsuperscript{15} Indeed, he carried this interpretation into \textit{New York Times Co. v. Sullivan} in a concurring opinion which would have protected all speech irrespective of malice.\textsuperscript{16}

Professor Emerson's view of the First Amendment was that "[t]he Court must in each case balance the individual and social interest in freedom of expression against the social interests sought by the regulation which restricts expression."\textsuperscript{17} This balancing approach resembles the methodology employed by the Court in resolving a variety of constitutional issues.

The theory advanced by Professor Meiklejohn was derived from the principle of "self-government." If a defamatory statement related to activities by which citizens govern the nation, it should, in his view, be absolutely privileged. If a defamatory statement related to a purely private matter, not having to do with government, it remained subject to legislative control.\textsuperscript{18} It is the Meiklejohn theory of absolute privilege for questions of "governing importance" that most clearly resembles the position taken by the majority in \textit{New York Times Co. v. Sullivan}.

\textbf{New York Times Co. v. Sullivan}

On March 29, 1960, the \textit{New York Times} published a full page advertisement describing certain events alleged to have occurred in Montgomery, Alabama, including an account of alleged activities by police against black demonstrators. L.B. Sullivan, the elected Commissioner of Public Affairs of Montgomery, responsible for supervising the police department, brought a civil action for libel. The jury returned a verdict in his favor and awarded damages in the amount of $500,000. The Supreme Court of Alabama affirmed. In the United States Su-

\textsuperscript{14} \textit{Id.} at 514 (dissenting opinion).


\textsuperscript{17} Emerson, \textit{Toward a General Theory of the First Amendment}, 72 YALE L.J. 877 (1963).

\textsuperscript{18} Meiklejohn, \textit{The First Amendment is an Absolute}, 1961 SUP. CT. REV. 245; \textit{see} Brennan, \textit{The Supreme Court and the Meiklejohn Interpretation of the First Amendment}, 79 HARV. L. REV. 1, 12-14 (1965).
preme Court, all justices agreed, albeit for varying reasons, that the judgment should be reversed.

The opinion of the Court, written by Justice Brennan and joined by Chief Justice Warren and Justices Clark, Harlan, Stewart and White, held that in a state libel trial, a public official must establish "malice," defined as knowing falsity or a reckless disregard for the truth, on the part of the defendant publisher in order to recover money damages for defamatory statements concerning his official conduct. Justice Black, joined by Justice Douglas, concurred on the ground that the First Amendment would prevent money damages in libel suits involving public officials, without regard to the application of a malice standard. Justice Douglas also joined a concurring opinion by Justice Goldberg which argued for an unconditional privilege under the First Amendment allowing citizens to criticize official conduct despite the harm which may flow from excesses or abuses.

The majority opinion contained broad statements generally supporting freedom of speech and the right to publish. Included in the opinion was the observation of Judge Learned Hand, that the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." The Court specifically recognized the danger of abuse, but recalled the counseling of Madison that "[s]ome degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press." Having acknowledged the possibility of abuse, the Court rested its decision upon the need to relieve publishers from the threat of large damage awards which would have an inhibiting and chilling effect upon the publication of information relating to public officials.

A major premise of the Court's decision was that truth as a defense does not provide adequate protection for the First Amendment rights of the press. The Court cited the experience under the Sedition Act, which allowed the defense of truth, and pointed out that the act was

20. Id. at 293-97 (concurring opinion).
21. Id. at 297-305 (concurring opinion).
24. 376 U.S. at 278.
vigorously condemned as unconstitutional in an attack led by Jefferson and Madison. The Court traced the historical debate concerning the Sedition Act and concluded that history had proven the invalidity of that law, noting that Congress by special act actually repaid fines levied under it. Having concluded that the defense of truth was inadequate to allow breathing room for constitutionally protected speech, the majority opinion embarked upon an independent examination of the record in light of the newly announced malice requirement stated above. Application of this standard resulted in the determination that the judgment in favor of Sullivan constituted a forbidden intrusion on the field of free expression.

Justice Black, in his concurring opinion, asserted that the First Amendment provides complete immunity: "An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment." The unanimity of opinion present in New York Times highlights the solid ground supporting constitutional protection for statements concerning the conduct of public officials. A literal reading of Gertz v. Robert Welch, Inc. suggests that the consensus with regard to public officials has survived to date. However, the unanimity of opinion expressed in New York Times gradually dissipated in the intervening years, as lower courts, and eventually the Supreme Court, confronted three major questions left unanswered by New York Times: (1) What is the precise definition and scope of application of the "malice" standard? (2) What procedural safeguards should accompany the constitutional "malice" standard? (3) Who or what comprises the classes of persons or events about which statements can be made with immunity under the First Amendment?

The Progeny of New York Times

The Definition of "Malice"

In New York Times the Supreme Court required a plaintiff who was a public official to establish that a defamatory statement was made with knowledge of its falsity or reckless disregard of its truth. Al-

25. Id. at 273, 276.
26. See text accompanying note 19 supra.
27. 376 U.S. at 283-92.
28. Id. at 297.
30. See text accompanying note 19 supra.
though "reckless disregard" sounds at first much like a standard of "gross negligence," it has been definitively interpreted to require a "conscious awareness of probable falsity."\textsuperscript{31} In \textit{St. Amant v. Thompson},\textsuperscript{32} with only Justice Fortas dissenting, the Court found the award of damages faulty because nothing in the record indicated an awareness by the defendant of the probable falsity of the statement. Having announced the principle that the failure to investigate does not in itself establish the requisite state of mind, the Court concluded that other actions by the defendant, which were claimed to show that he was "heedless," did not amount to positive proof that he possessed conscious awareness of probable falsity.\textsuperscript{33} This, of course, is a heavy burden for a plaintiff to meet inasmuch as affirmative evidence of a knowing state of mind must be produced. In a footnote in the \textit{Gertz} decision, the majority touched briefly upon the definition of reckless disregard in an uncritical recitation of prior cases, including \textit{St. Amant v. Thompson};\textsuperscript{34} thus, it appears that at least five members of the present Court would adhere to the "reckless disregard" standard announced in \textit{St. Amant}.

\textbf{Additional Procedural Safeguards}

Although rejecting Justice Black's literal interpretation of the First Amendment, the Supreme Court over the years has nonetheless sought, in various ways, to fashion a set of protective rules that will discourage the bringing of libel actions where the alleged defamatory statements relate to matters in the public arena. It has correspondingly sought to encourage that degree of editorial confidence which is a precondition to a decision to publish. One result of these efforts has been the replacement of the "preponderance of the evidence" standard of proof by a standard which requires the plaintiff to prove the elements of a libel action involving "public officials" and "public figures" by clear and convincing evidence.\textsuperscript{35} It is unclear whether juries are able or willing to be guided by the courts' instructions on standard of proof, but the clear and convincing standard undoubtedly offers additional tactical advantages to the defendant.\textsuperscript{36}

\begin{enumerate}
\item St. Amant v. Thompson, 390 U.S. 727, 731 (1968).
\item 390 U.S. 727 (1968).
\item \textit{Id.} at 733.
\item Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 30 (1971).
\item See generally on the standard of proof Time, Inc. v. Pape, 401 U.S. 279 (1971); Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 83 (1967); Waskow v. Associated Press, 462 F.2d 1173, 1175 (D.C. Cir. 1972); Firestone v. Time, Inc., 460 F.2d 712, 718 (5th Cir. 1972); Time,
The imposition of the clear and convincing evidence standard is a good example of the judicial procedural tinkering necessary once Justice Black's interpretation of the First Amendment is rejected. In addition, a number of courts have followed the Supreme Court's lead in making independent findings of fact on motions for summary judgment to determine the existence of malice in cases where constitutional considerations so require. Appellate courts have also required a de novo review to determine whether the evidence is sufficient to sustain a finding of malice.

Classes of Persons and Events Within the Realm of Constitutionally Protected Discussion and Debate

The galvanizing force which brought unanimity to the Supreme Court in New York Times was the fact that Mr. Sullivan was clearly a public official. He had direct governmental responsibility for the Montgomery police force and had voluntarily assumed a position which was the legitimate subject of substantial public debate. Two years after New York Times, in Rosenblatt v. Baer, the Court suggested the minimal perimeters of the "public official" classification. The plaintiff in Rosenblatt was a former employee of a county, having served in the capacity of supervisor of the county's recreation area. The Court said:

It is clear, therefore, that the "public official" designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.


40. Id. at 85.
The Court's own difficulties with the uncertainties of that definition were manifested by its action in remanding the case for trial.\textsuperscript{41}

In \textit{Monitor Patriot Co. v. Roy},\textsuperscript{42} the Court addressed the question of what matters relating to the official conduct of a public official are of such significance as to bring public discourse thereof within constitutional safeguards. In an opinion by Justice Stewart, the Court held that protection applied to discussion of matters pertaining to any alleged conduct which touched upon a candidate's or official's fitness for office. Having resolved that "relevance" was to be interpreted broadly, the Court held "as a matter of constitutional law that a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness for office . . . ."\textsuperscript{43} However, the Supreme Court recently reaffirmed that incidental service on governmental committees or other minor governmental activities does not warrant "public official" designation where the defamatory statement is totally unrelated to such minor involvement.\textsuperscript{44}

In \textit{Curtis Publishing Co. v. Butts},\textsuperscript{45} a unanimous Court expanded the class of plaintiffs subject to First Amendment scrutiny to include public figures. Despite the unanimity on the basic constitutional question, two distinct definitions of "public figures" appeared in the opinions of the Court. The concept in the opinion by Justice Harlan, joined in by Justices Clark, Fortas and Stewart, may be summarized as follows: a public figure-plaintiff is one who because of status or conduct is the voluntary subject of continuing and substantial public interest independent of the publication at issue, and who therefore has access to the means of counterargument sufficient to rebut the defamatory falsehood directed at him.\textsuperscript{46} The definition by Chief Justice Warren, concurred in by the four remaining members of the Court, included not only persons who "by reason of their fame, shape events in areas of concern to society at large" but also those who are "intimately involved in the resolution of important public questions . . . ."\textsuperscript{47} Under Chief Justice Warren's view, the most important factor was involvement in


\textsuperscript{42} 401 U.S. 265 (1971).

\textsuperscript{43} Id. at 277. See also Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971); Comment, 70 Mich. L. Rev. 1547, 1551-53 (1972).


\textsuperscript{45} 388 U.S. 130 (1967).

\textsuperscript{46} Id. at 154-55.

\textsuperscript{47} Id. at 164.
public issues or events for he assumed that such involvement itself guaranteed access for the purpose of controverting defamatory criticism. 48

Consistent with Chief Justice Warren’s emphasis on “involvement in public issues,” subsequent decisions in the federal courts continued to expand the scope of the New York Times privilege. For example, in Cepeda v. Cowles Magazines and Broadcasting, Inc., 49 the Ninth Circuit defined “public figures” as follows:

“Public figures” are those persons who, though not public officials, are “involved in issues in which the public has a justified and important interest.” Such figures are, of course, numerous and include artists, athletes, business people, dilettantes, anyone who is famous or infamous because of who he is or what he has done. 50

Other courts went beyond the status of the plaintiff and applied the New York Times rule on the independent ground that the subject of the allegedly defamatory publication was a matter of public interest. 51 When the Supreme Court eventually confronted the question of whether to extend New York Times coverage to parties other than public officials or public figures, no more than three justices could agree on any single standard of protection.

In an opinion by Justice Brennan, joined only by Chief Justice Burger and Justice Blackmun, the Supreme Court, in Rosenbloom v. Metromedia, Inc., 52 held that the New York Times privilege applied to defamatory statements regarding a private individual’s involvement in a matter of public or general concern. Justice Black, in a one paragraph concurring opinion, reasserted his absolutist view of the First Amendment. 53 Justice Douglas did not participate in the decision. While only three justices supported the adoption of the New York Times rule, all eight participating justices approved of some form of constitutional protection for publications concerning matters of public interest, despite the fact of injury to the reputation of persons without prior notoriety. There the matter rested until the Court’s decision in Gertz v. Robert Welch, Inc. 54 in June 1974.

48. Id.
49. 392 F.2d 417 (9th Cir. 1968).
50. Id. at 419.
52. 403 U.S. 29 (1971).
53. Id. at 57.
Gertz v. Robert Welch, Inc.

The plaintiff in Gertz was an attorney in a civil action involving the family of a youth who had been shot and killed by a police officer. The shooting incident had also resulted in the criminal conviction of the officer for second degree murder. The plaintiff neither participated in the criminal proceeding nor discussed the officer with members of the press; nevertheless, the defendant-publisher released an article characterizing the plaintiff as the “architect” of the prosecution which was part of a nationwide Communist conspiracy to discredit local law enforcement agencies. The article contained false accusations with respect both to the plaintiff’s membership in Communist-front organizations and to his criminal record. On appeal, the Seventh Circuit applied the New York Times privilege to sustain a judgment for the defendant on the ground that the defamatory statements concerned an issue of significant public interest.55

The Supreme Court, with a majority of five, held that the constitutional privilege established in New York Times does not extend to defamatory falsehoods about an individual who is neither a public official nor a public figure. Rather than expanding the New York Times privilege to defamatory statements made in connection with the reporting of an event of public interest, the Court imposed a number of restrictions on the law of libel designed to accommodate freedom of the press with the state’s interest in protecting a private individual’s reputation. Specifically, the Court held that (1) the state may not impose liability without fault, but within that limitation may define any other standards of media liability where the defamatory statement concerns a private individual56 and (2) in cases where liability is not based upon a showing of knowing or reckless falsity, the state may only permit recovery of actual damages—recovery of either presumed or punitive damages was proscribed.57 Having determined that the plaintiff was neither a public official nor a public figure,58 the Court reversed and remanded for a new trial.

The imposition of limits on the law of libel involves a substantial departure from the New York Times approach in that the focus of the Court switched from the demands of the First Amendment to the legitimate state interest in the law of defamation. While asserting that

55. 471 F.2d 801 (7th Cir. 1972).
56. 94 S. Ct. at 3010.
57. Id. at 3011.
58. Id. at 3012-13.
“there is no constitutional value in false statements of fact,” the Court nevertheless recognized their inevitability in free debate and reaffirmed the need to insulate the media from the danger of self-censorship. But “[t]he need to avoid self-censorship by the news media is . . . not the only societal value at issue,” and the Court’s refusal to extend *New York Times* immunity to private persons was based on respect for the purposes served by state libel law. Indeed, the Court stated that the holdings in *New York Times* and subsequent cases were not justified solely by reference to the interest of the media; rather, “the *New York Times* rule states an accommodation between this concern and the limited state interest present in the context of libel actions brought by public persons.” Since, in the view of the Court, the relative positions of the public and the private person differ, a different rule should obtain with regard to the state’s ability to compensate the private individual for injury to his reputation.

The Court’s focus on the status of the plaintiff rather than on the subject matter of the publication constituted a rejection of the rationale of the plurality in *Rosenbloom*. In the view of the majority, the approach of the *Rosenbloom* plurality did not afford sufficient recognition to the legitimate state interest in enforcing a remedy for wrongful injury to a private person’s reputation. The majority also found the plurality approach unacceptable because it imposed on courts the task of deciding on an ad hoc basis what issues were of “general or public interest”—a task which the majority felt should not be committed to “the conscience of judges.”

Accommodation of the competing values of the First Amendment and the states’ legitimate interest in libel laws took the form of a “constitutionalized” reform of the law of libel. Recognizing the danger of self-censorship which accompanies imposition of liability without fault,

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59. Id. at 3007.
60. Id.
61. Id. at 3008-09 (emphasis added).
62. Id. at 3010. The question of what constituted a matter of public interest presented some difficulty. See, e.g., Treutler v. Meredith Corp., 455 F.2d 255, 259 (8th Cir. 1972); Gospel Spreading Church v. Johnson Publ. Co., 454 F.2d 1050, 1051 (D.C. Cir. 1971); Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858, 862 (5th Cir. 1970); United Medical Laboratories, Inc. v. Columbia Broadcasting Sys., Inc., 404 F.2d 706, 710-11 (9th Cir. 1968), cert. denied, 394 U.S. 921 (1969). However, in practice, the editorial decision to publish carried great weight and appellate courts were very reluctant to find that the subject was not a “matter of public interest.” See Comment, 70 Mich. L. Rev. 1547, 1560-61 n.94 (1972), which cites a great number of cases but lists very few holdings that the defamatory statement in question was not related to a matter of public interest.
the Court concluded that strict liability was incompatible with First Amendment guarantees. With that caveat, the Court left the states free to impose any other standard of care except in cases where the presence of a public official or public figure called for the application of the New York Times standard. Again balancing First Amendment considerations, the Court concluded that the state's legitimate interest extended no further than compensation for actual injury and held that juries could not award either damages for "presumed" injuries or punitive damages. The Court reasoned that allowing awards of presumed and punitive damages vested in juries an uncontrolled discretion enabling them to punish unpopular opinion and thus exacerbated the danger of media self-censorship.

While the Gertz holding involves a substantial departure from the approach and rationale of the Rosenbloom plurality, the decision actually has its roots in the dissents of that case. The Gertz majority adopted the solution proposed by Justice Marshall in his dissent in Rosenbloom, and much of the justification for the rules is found in Justice Harlan's Rosenbloom dissent. Indeed, the unusual concurring opinion filed by Justice Blackmun sets the Gertz decision in context and illustrates the chronic uncertainties that have arisen since New York Times. Justice Blackmun acknowledged that he had joined the plurality in Rosenbloom because he saw it as the logical development of the New York Times doctrine and that he still adhered to that view. However he stated that, because the Gertz approach leaves "sufficient and adequate breathing space for a vigorous press" and because it was "of profound importance for the Court to come to rest in the defamation area," he chose to join the opinion in order to produce what he felt to be a definitive ruling. Thus, while he viewed Gertz as somewhat illogical in view of New York Times, he considered the effect of the decision to be the same.

**Impact of Gertz on the New York Times Doctrine**

Since the defamatory allegation in Gertz involved a matter of considerable public concern—the existence of a national conspiracy to discredit the police—the majority opinion in Gertz represents a significant

63. 94 S. Ct. at 3011.
65. Id. at 62 (Harlan, J., dissenting).
66. 94 S. Ct. at 3013-14.
67. Id.
retreat from the *New York Times* commitment to free and open debate on public issues. In a dissenting opinion, Chief Justice Burger argued that the orderly case development following *New York Times* should be preserved and that the "doctrinal theory" applied by the *Gertz* majority had "no jurisprudential ancestry." It is clear that the *Gertz* majority adopted neither Justice Black's unqualified view of the scope of First Amendment protection nor the ad hoc balancing approach espoused by Professor Emerson. In order to define the distinction between the constitutional perspectives underlying the majority opinions in *Gertz* and the *New York Times* line of cases, it is first necessary to examine the First Amendment grounds for the rule announced in the *New York Times* decision.

The fundamental premise supporting the *New York Times* rule is that the freedom of expression upon public questions is a primary right of self-government secured by the First Amendment. Chief Justice Warren, in a concurring opinion in *Curtis Publishing Co. v. Butts*, noted that "the *New York Times* standard is an important safeguard for the rights of the press and public to inform and be informed on matters of legitimate interest." In the majority opinion in *Time, Inc. v. Hill* and in the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, both written by Justice Brennan, the *New York Times* privilege was extended on the basis that the publications under litigation involved matters of public concern. Indeed in *Rosenbloom*, the plurality opinion announced "that the determinant [of] whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern..." 

Justice Brennan, dissenting in *Gertz*, restated the principles that

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69. 94 S. Ct. at 3014 (Burger, C.J., dissenting).
70. The majority opinion expressly rejected the balancing theory on the grounds that it would lead to unpredictable results and uncertain expectations, since it would require careful examination of each libel verdict. *Id.* at 3009.
72. 388 U.S. 130 (1967).
73. *Id.* at 164-65.
74. 385 U.S. 374 (1967).
75. 403 U.S. 29 (1971).
76. 403 U.S. at 40-45; 385 U.S. at 388.
77. 403 U.S. at 44.
78. 94 S. Ct. at 3017.
follow from the view that “ventilation of public issues” is the constitutional justification for the *New York Times* privilege. First, insofar as the paramount public interest relates to the “content, effect and significance” of the event or conduct reported, neither the prior anonymity of the plaintiff-participant nor the involuntary nature of his involvement in the event is relevant to the basic First Amendment interest promoted by *New York Times* immunity.79 Second, judicial reliance on the distinction between private and public parties encourages intrusion into the private aspects of the lives of public figures and discourages discussion of issues of general concern involving persons without prior public exposure.80 Justice Brennan concluded that in light of the constitutional objective of the *New York Times* rule, the private status of a plaintiff could not justify the failure to apply that rule.

The majority in *Gertz* rejected the “public or general interest” test on the grounds that determining what issues are of general concern is not a proper judicial function and that the amorphous concept of public interest issues does not adequately accommodate the competing interests of publishers and private individuals.81 While the majority’s reasoning rests in part on specific considerations supporting a higher level of protection for “private individuals,”82 the Court’s abandonment of “public issues” as a judicial criterion of the *New York Times* privilege may be construed as a repudiation of the justification for First Amendment limitations on state libel law articulated in *New York Times* and its progeny. This development calls into question the nature of the First Amendment interest relied upon by the majority in formulating the novel rules announced in *Gertz*. Analysis of the scope of the majority holding offers at least a tentative answer.

The majority opinion did not set out the precise scope of its holding, and this omission leaves the decision subject to different interpretations of the extent of its reach. First, since the fact situation is similar in many ways to that of *Rosenbloom* and the rationale of that case is reexamined, the decision may be viewed as limited in application to instances in which the defamatory statement concerns a private individual involved in an event of general or public interest. As noted,83 however, the Court expressly rejected the *Rosenbloom* plurality approach in part because it felt that the courts should abstain from determining

79. *Id.* at 3018.
80. *Id.* at 3019.
81. *Id.* at 3010.
82. See text accompanying note 97 infra.
83. See text accompanying notes 81 *supra*,

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what matters are of general or public interest. Thus, insofar as this limited interpretation is inconsistent with the majority's reasoning, the rules expounded in \textit{Gertz} would seem to apply to all defamatory statements about private individuals irrespective of the subject matter of the publication.

A second possible reading is that the Court's new rules govern defamation actions against private parties as well as "the media." Justice White, in his dissent, assumed that the libel law limitations in the majority opinion apply in "each and every defamation action." In a comprehensive analysis of the sweeping changes in common law libel effected by the majority, Justice White was strongly critical of the Court's lack of respect for the history and values supporting state libel laws. His principal criticism was that by abrogating settled principles of libel law, the Court improvidently shifted the risk of a defamatory falsehood from the publisher to the innocent private individual. This conclusion was based on the observation that the majority opinion not only limited the amount of damages which a private individual may obtain but also deprived him of a judicial declaration that the statement was false where negligence is not established.

A careful reading of the majority and dissenting opinions, however, would suggest a somewhat narrower scope. The majority initially framed the issue as whether a "newspaper or broadcaster" may claim the \textit{New York Times} privilege for defamatory statements about a private individual. The opinion thereafter repeatedly referred to "publisher or broadcaster," the "press and broadcast media," the "communications media" and the "media." The exact wording of the holding is that, with the exception of liability without fault, "the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of [a] defamatory falsehood injurious to a private individual." Justice Blackmun read the majority opinion as applicable to "a media's liability," Chief Justice Burger's dissent was cast in terms of the "news media," and Justice Brennan's dissent centered

\begin{footnotesize}
\begin{enumerate}
\item 84. 94 S. Ct. at 3022 (White, J., dissenting).
\item 85. \textit{id.} at 3031-35.
\item 86. \textit{id.} at 3003.
\item 87. \textit{id.} at 3007, 3010.
\item 88. \textit{id.} at 3008, 3011.
\item 89. \textit{id.} at 3008, 3010.
\item 90. \textit{id.} at 3007.
\item 91. \textit{id.} at 3010 (emphasis added).
\item 92. \textit{id.} at 3014 (Blackmun, J., concurring).
\item 93. \textit{id.} (Burger, C.J., dissenting).
\end{enumerate}
\end{footnotesize}
on “media reports.”

The language employed seems to indicate that the Court’s new rules apply only when a media institution is the defendant. This interpretation finds strong support in the rationale in Gertz for curtailing state control in the libel field. The Court noted that the responsibility for informing the public on a daily basis lies with the press, and that “[o]ur notions of liberty require a free and vigorous press that presents what it believes to be information of interest or importance . . . .”

The threat posed by libel law is that of self-censorship which would impair the very functioning of a self-governing society which depends upon free dissemination of information. Thus, the press, more than any other institution, must be insulated from restraints which might induce self-censorship. The limitation of the holding to the institution of the press is also supported by the distinction, drawn by the Gertz Court, that public officials and public figures enjoy greater access to the media than private individuals.

Thus, the constitutional principle that emerges from Gertz appears to be founded upon recognition of the unique status of the institution of the press in American society. Focus on the institution of the media—rather than its operation in a specific context—best explains the Court’s paradoxical observation that the New York Times privilege provides both too little and too much protection for the press. Too little protection is provided because, although a stricter standard of liability governs, application of the standard is conditioned upon discussion of a matter of general or public interest. In rejecting the Rosenbloom plurality view, the Court asserts that courts should not second guess the press as to what is of relevance to the public. If protection is to be afforded, it must apply to the full panoply of the media’s operations. However, the state’s interest in providing a remedy for wrongful injury to a private person’s reputation requires that this protection not be absolute, nor as stringent as New York Times would have it. Thus, the Court concluded that the proper constitutional balance could be achieved by removing the spectre of strict liability and large damage awards thereby eliminating the threat of self-censorship without endangering the institutional autonomy of the press.

The second major doctrinal development in Gertz is the reformulation of the scope of the “public figure” concept originally defined by

94. Id. at 3018 (Brennan, J., dissenting).
Justice Harlan in *Curtis*. In distinguishing public from private plaintiffs, the Court in *Gertz* reasoned that public officials and public figures usually enjoy significantly greater opportunity to counteract false statements than do their private counterparts and that the class of public figures is comprised almost exclusively of persons who voluntarily assume positions of prominence. The Court did not reject the theoretical possibility of an involuntary public figure, but it did conclude that the media were entitled to assume that public figures have voluntarily incurred the risk of closer public scrutiny. Thus, under the reasoning of the majority, "voluntary notoriety" and "access to the media" constitute basic criteria of the public figure status.

The Court, however, departed from Justice Harlan's definition by shifting the focus of the public figure question to "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." It should be noted that the effect of this change is to enlarge the public figure concept delineated by Justice Harlan, since the latter was confined to plaintiffs who become the subjects of public interest by virtue of events independent of those giving rise to the defamatory publication. Notwithstanding this apparent shift toward a more expansive view of the "public figure," Justice Brennan, quoting at length from his opinion in *Rosenbloom*, challenged the majority's definition on the ground that the factors relied on were irrelevant to the constitutional interest in comprehensive coverage of newsworthy events. Justice Brennan's criticism is particularly significant given the majority's reliance on voluntary notoriety as a criterion of the public figure, since those who deliberately seek anonymity are excluded from this category regardless of the level of public interest in their activity. The potential chilling effect of removing *New York Times* protection from investigative reporting of clandestine activities is a factor supporting Justice Brennan's views. Further, the majority's distinction between public and private plaintiffs, unlike the dichotomy between public and private issues, is one not easily made by editors and broadcasters and may therefore increase the threat of self-censorship.

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97. 94 S. Ct. at 3009.
98. *Id.* at 3009-10.
99. *Id.* Justice Harlan, on the other hand, contended that public figure status was conditioned on notoriety which arose from events or conduct which were not the subjects of the defendant's publication. See text accompanying note 46 *supra*.
100. See text accompanying note 46 *supra*.
101. *Id.* at 3018-19 (Brennan, J., dissenting).
The third major deviation from the New York Times approach lies in the majority's promulgation of rules on damages. In the language of the Court, "the States may not permit recovery of presumed or punitive damages when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." Literally interpreted, this language would permit recovery of presumed and punitive damages where a state conditions media liability for defamation of a private individual on a showing of knowing falsity or reckless disregard. Under this literal interpretation, the damages rules raise two questions.

The first is how much latitude a state has to permit the plaintiff to take maximum advantage of the Gertz rules. For example, could a state establish two standards of liability—one "negligence," allowing recovery only of actual proven damages, the other "knowing falsity or reckless disregard," permitting presumed and punitive damages? The second question is whether the Gertz limitations on damages will be extended to cases in which the New York Times standard of liability controls. While the knowing falsity or reckless disregard test implies a significant degree of fault on the part of the media publisher, the Court's primary justification for restricting damages awards when the state is left free to define the standard of liability is that the "state interest extends no further than compensation for actual injury." It is difficult to understand how the state's legitimate interest would differ when a public official or public figure is the target of a defamatory statement, particularly considering the majority's judgment that such plaintiffs have "voluntarily" subjected themselves to this risk and have better opportunity to vindicate their reputations. Given the competing First Amendment considerations, an equally strong argument exists for limiting damages under the knowing falsity or reckless disregard standard, at least where a public official or public figure is involved. And the tone of the Court's discussion of the damages limitations leaves the impression that the Court will be receptive to the argument when the question arises.

102. Id. at 3011.
103. Id.
104. Id. at 3009-10.
105. The American Law Institute is presently considering five alternatives to money damages for incorporation in Restatement (Second) of Torts. RESTATEMENT (SECOND) OF TORTS, Special Note at 295-98 (Tent. Draft No. 20, 1974). Tentative Draft No. 20 lists these alternatives as follows:

(1) Declaratory relief, in the form of a declaratory judgment that the particular defamatory statement is false.

(2) Retraction, providing for the reduction of the publisher's liability upon compliance
Conclusion

The profound ambivalence that produced the proliferation of conflicting judicial views after New York Times is reflected in the Supreme Court's recent attempt to reconcile the demands of First Amendment freedom of the press with the law of libel. In Gertz v. Robert Welch, Inc. the Court brought to a halt the extension of the New York Times privilege by refusing to apply the knowing falsity or reckless disregard standard to defamatory falsehoods concerning individuals who are neither public officials nor public figures. Rather than focusing primarily on the media's interest in unfettered airing of matters of public concern, the Court squarely balanced the state's legitimate interest in redressing injury to a private individual's reputation against the need to avoid self-censorship on the part of the media.

Gertz involves a substantial departure from the broad, issue-oriented, protective approach of the Warren Court in New York Times. The constitutional principle which emerges from Gertz is that the societal role of the press—as an independant institution—requires that it enjoy some measure of immunity from punishment for error in the full scope of its operation. The Court therefore eliminated any distinction between matters worthy of public attention and those that are not. Instead, the Court solidified the distinction between “public” and “private” persons—not because the media interest was less demanding, but because the state interest in protecting the private individual was more compelling. Whether the resulting rules will afford more or less protection is largely a matter of speculation, but there seems little question that the Court has retreated from the idea that the First Amendment rights of the press occupy a preferred position in the law of libel.


(3) Injunctive relief. Despite the difficulties attending prior restraint, the draft suggests that intervention to prevent further publication of a statement might be proper once a court has formally determined that the statement is defamatory.

(4) Right of reply. This alternative would require an offending newspaper to furnish the defamed person a suitable opportunity to publish a reply in its columns. Further consideration is moot, however, for the Supreme Court in Miami Herald Publ. Co. v. Tornillo, 94 S. Ct. 2831 (1974), held such a statute unconstitutional as a violation of freedom of the press.

(5) Self-help. Consideration of this alternative in a civilized society seems unnecessary.