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A Way Out of Defamation's Maze of Confusion, 20 J. Marshall L. Rev. 97 (1986)

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COMMENTS

A WAY OUT OF DEFAMATION'S MAZE OF CONFUSION

INTRODUCTION

A client walks into your law office and informs you that some scoundrel had defamed his good reputation. He seeks your advice about his alternatives for relief and his chances of success. What legal advice would you give him?

Simplicity has never been the hallmark of defamation law.¹ Instead, numerous levels of protections and privileges have developed.² Therefore, it is imperative that you, as a conscientious lawyer, make a number of important determinations before you take any legal action. For example, is your client a public official?³ Is he an all-purpose public figure?⁴ Is your client a limited-purpose public figure?⁵ Or did your client in any way thrust himself to the forefront of a public controversy?⁶

In addition to analyzing the status of your client, you must also consider who is a potential defendant. Could a defendant be classified as a nonmedia defendant or is a defendant more likely to fit into the media category?⁷ Does the defamatory speech involve a matter of public concern or is it a matter of private discourse?⁸ Whether a valid claim for defamation exists in your client's case de-

1. Defamation law consists of the torts of libel and slander. Libel originally concerned only written or printed statements but was later extended to include pictures, signs, statues, and other forms of communication. W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 112 (5th ed. 1984). Slander was usually of an oral character. *Id.*; RESTATEMENT (SECOND) OF TORTS § 504 (1977). The evolution of defamation has been criticized by many authors. *See, e.g.*, W. PROSSER, HANDBOOK OF THE LAW OF TORTS 112, at 571 (4th ed. 1971) (historic development of defamation described as erratic); Lovell, *The "Reception" Of Defamation by the Common Law*, 15 VAND. L. REV. 1051 (1962).

2. *See infra* notes 9-40 and accompanying text; W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 113-14 (5th ed. 1984).

3. *See infra* notes 46-55 and accompanying text.

4. *See infra* notes 56-60, 128-31 and accompanying text.

5. *See infra* note 132 and accompanying text.

6. *Id.*

7. *See infra* notes 15-18, 108-11, 144-55 and accompanying text.

8. *See infra* notes 19-22, 72-76, 104-07 and accompanying text.

pends on the answers to the foregoing questions. The constitutional protections afforded the defendant and the applicable standard of liability will depend on these answers.

Of the many problems in the defamation area, three are most perplexing in today's society. One problem concerns the dual level of defamation protection determined by the status of the plaintiff.⁹ The United States Supreme Court, in *Gertz v. Robert Welch, Inc.*,¹⁰ dictated that the "actual malice"¹¹ standard of liability, first enunciated

9. See *infra* notes 46-71 and accompanying text.

10. 418 U.S. 323 (1974). Plaintiff, Elmer Gertz, a prominent civil rights attorney, represented a Chicago family in a suit against a policeman who had killed a family member. *Id.* at 325. Because of Gertz' involvement in this litigation, defendant's publication, the John Birch Society magazine, *American Opinion*, accused Gertz of involvement in a Communist conspiracy to discredit law enforcement agencies. *Id.* at 326. The article alleged that Gertz had helped Communist forces in setting up the murder trial of the Chicago policeman, Nuccio. *Id.* at 326. Although the jury awarded \$50,000 to Gertz, the district court entered judgment notwithstanding the verdict, finding the *New York Times* standard applicable despite the private status of Gertz. 322 F. Supp. 997 (N.D. Ill. 1970). The Court of Appeals for the Seventh Circuit affirmed on the grounds that the publication involved a matter of public interest. 471 F.2d 801 (7th Cir. 1972), cert. granted, 410 U.S. 585 (1973). The United States Supreme Court reversed, holding that private plaintiffs do not have to meet the *New York Times* actual malice standard. 418 U.S. 323 (1974).

Gertz stimulated a wave of analytical interpretation and commentary. See, e.g., Ashdown, *Gertz and Firestone: A Study in Constitutional Policy-Making*, 61 MINN. L. REV. 645 (1977) (analysis of balancing process); Brosnahan, *From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and the First Amendment*, 26 HASTINGS L.J. 777 (1975) (discussion of the Court's decisions and approach to libel); Christie, *Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches*, 75 MICH. L. REV. 43 (1976) (discussion of decisions from 1964-1976); Cohen, *Libel: State Court Approaches In Developing a Post-Gertz Standard of Liability*, 1984 ANN. SURV. AM. L. 155 (survey of state court standards of liability); Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975) (a thorough analysis of American defamation law); Frakt, *Defamation Since Gertz v. Robert Welch, Inc.: The Emerging Common Law*, 10 RUT.-CAM. L.J. 519 (1979) (the implications of Gertz); Frakt, *The Evolving Law of Defamation: New York Times Co. v. Sullivan to Gertz v. Robert Welch, Inc. and Beyond*, 6 RUT.-CAM. L.J. 471 (1975) (the difficulties of defamation law); Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199 (1976) (stable decision); Spencer, *Establishment of Fault in Post-Gertz Libel Cases*, ST. LOUIS U.L.J. 374 (1977) (discussion of standards of liability); Trager, *The Impact of Gertz on the Law of Libel in Illinois*, 1979 S. ILL. U.L.J. 73 (implication of Gertz on Illinois law); Note, *The Gertz Case: Unbalancing Media Rights and Reputational Interests*, 2 W. ST. U.L. REV. 227 (1975) (discussion of balancing process considering media defendants); Comment, *Defamation Law in the Wake of Gertz v. Robert Welch, Inc.: The Impact on State Law and the First Amendment*, 69 NW. U.L. REV. 960 (1975) (analysis of state law after the Gertz decision).

For an interesting discussion of the Gertz opinion and an analysis of libel law after the *Dun & Bradstreet* opinion, see Gertz, *Gertz on Gertz: Reflections on the Landmark Libel Cases*, TRIAL MAG. Oct. 1985, at 67 (written by Elmer Gertz, the central figure in the case).

11. The phrase "actual malice" is a confusing term of art which is not studiously avoided by the Court. Eaton, *supra* note 10, at 1370 n.87. "Actual malice," as used by the *New York Times* Court in the constitutional sense, is distinguished from "legal malice," which refers to spite or ill will as an element of common-law defama-

ated in *New York Times v. Sullivan*¹² is not constitutionally required when a private individual is defamed.¹³ Thus, public officials and public figures must prove actual malice, while private individuals may recover as long as liability is not imposed without fault.¹⁴

A second vexing problem involves the different levels of defamation protection predicated upon the status of the defendant.¹⁵ Several United States Supreme Court decisions imply that the constitutional defamation privileges protect only the press and broad-

tion. R. SACK, *LIBEL, SLANDER, AND RELATED PROBLEMS* 42-43 (1980); 3 *RESTATEMENT (SECOND) OF TORTS* § 580A comment d (1977) (ill will does not in itself constitute actual malice, thereby taking communication outside the protection of the Constitution).

12. 376 U.S. 254 (1964). *New York Times* marked the United States Supreme Court's entrance into the area of defamation. The case involved a libel action brought by the city commissioner of Montgomery, Alabama against the *New York Times* for publication of an allegedly defamatory advertisement. The United States Supreme Court reversed the decision of the Alabama Supreme Court stating:

The constitutional guarantees require, we think a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

376 U.S. at 279-80.

For a helpful analysis of the background and facts of the case, see Pierce, *The Anatomy of an Historic Decision: New York Times Co. v. Sullivan*, 43 N.C.L. REV. 315 (1965). For a discussion of the history of *New York Times*, the background of the decision, the participants and their contentions, and the case itself as it progressed through the courts, see Lewis & Ottley, *New York Times v. Sullivan, Continuing Impact on Libel Law*, TRIAL MAG. Oct. 1985, at 59.

13. *Gertz*, 418 U.S. at 343-50.

14. See *New York Times*, 376 U.S. at 279-80; *Gertz*, 418 U.S. at 343-50. See also *infra* notes 46-71.

15. Because of Justice Powell's constant use of the phrase "publishers and broadcasters" throughout the *Gertz* opinion, several state courts have held *Gertz* inapplicable to nonmedia defamation actions. See, e.g., *Rowe v. Metz*, 195 Colo. 424, 579 P.2d 83 (1978); *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252 (Minn. 1980); *Harley-Davidson Motorsports, Inc. v. Markley*, 279 Or. 361, 568 P.2d 1359 (1977); *Denny v. Mertz*, 106 Wis. 2d 636, 318 N.W.2d 141 (1982), *cert. denied*, 459 U.S. 883 (1982). Other state courts, however, have held *Gertz* applicable despite the nonmedia status of the defendant. See, e.g., *Antwerp Diamond Exchange v. Better Business Bureau*, 130 Ariz. 523, 637 P.2d 733 (1981); *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976).

For an analysis of the media/nonmedia distinction, see Schiffrin, *Defamatory Nonmedia Speech and First Amendment Methodology*, 25 UCLA L. REV. 915 (1978) (a look at the balancing methodology); Stewart, *Or of the Press*, 26 HASTINGS L.J. 635 (1975) (different levels of protection guaranteed by the "speech" and "press" clauses); Note, *Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Nonmedia Defendants*, 95 HARV. L. REV. 1876 (1982) (in some contexts, nonmedia defendants deserve *New York Times* protection); Note, *The Public Figure Plaintiff v. The Nonmedia Defendant in Defamation Law: Balancing the Respective Interests*, 68 IOWA L. REV. 517 (1983) (analysis of the competing policies); Note, *First Amendment Protection Against Libel Actions: Distinguishing Media and Nonmedia Defendants*, 47 S. CAL. L. REV. 902 (1974) (constitutional privilege should be different for each group); see also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939, 2953 n.4, 2958 n.7 and cases cited therein; *infra* notes 144-56 and accompanying text.

cast media.¹⁶ Courts and commentators have taken no less than four different positions on the question whether the constitutional protections are applicable to defamatory, nonmedia speech.¹⁷ Nonetheless, the question whether constitutional privileges protect only the press and broadcast media or whether they extend to all speakers remains open.¹⁸

The third problem concerns the different levels of defamation protection determined by the status of the speech itself.¹⁹ In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,²⁰ the United States Supreme Court limited the application of *Gertz* to matters of "public concern,"²¹ adding another confusing twist to the existing law. Thus, not only must courts determine the status of the plaintiff and the status of the defendant, but they must also determine the status of the speech to ascertain the appropriate standard of liability. This maze of distinctions, privileges, and standards continues to confuse courts and commentators alike.²²

This comment first discusses the evolution of these problems and the policy reasons for the myriad of distinctions.²³ Justice Brennan's views in the area of defamation will then be analyzed.²⁴ Next, the flaws of both the Court's and Justice Brennan's approaches will

16. See, e.g., *Gertz*, 418 U.S. at 332. Justice Powell's carefully worded opinion in *Gertz* framed the issue in the case as "whether a newspaper or broadcaster that publishes defamatory falsehoods" about a private individual may claim the protection of the constitutional privilege, and referred repeatedly to the press and broadcast media. *Id.*

17. At least four different positions have been taken on the issue: (1) neither the *New York Times* nor *Gertz* privileges apply to nonmedia defendants. See, e.g., *Calero v. De Chem. Corp.*, 68 Wis. 2d 487, 228 N.W.2d 737 (1975); see also Stewart, "Or of the Press," 26 HASTINGS, L.J. 631, 635 (1975); (2) the *New York Times* privilege applies to nonmedia defendants, but *Gertz* does not. See, e.g., *Wheeler v. Green*, 286 Or. 99, 107, 593 P.2d 777, 783 (1979) (*New York Times* applicable to all defendants); *Harley-Davidson Motorsports v. Markley*, 279 Or. 361, 368, 568 P.2d 1359, 1364 (1977) (*Gertz* does not apply to nonmedia defendants); (3) the *New York Times* privilege applies to nonmedia defendants, but *Gertz* applies to nonmedia defendants only in matters of public interests; and (4) *New York Times* and *Gertz* both apply to nonmedia defendants. See, e.g., *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976).

18. The Court recently sidestepped the media/nonmedia issue in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985).

19. See *Dun & Bradstreet*, 105 S. Ct. at 2940-45.

20. 105 S. Ct. 2939 (1985).

21. *Id.* If it is determined that the speech is on "matters of public concern," then the *Gertz* limitations apply. *Id.* If the speech involves no matter of public concern, the *Dun & Bradstreet* Court held that the state interest adequately supports awards of presumed and punitive damages — even absent a showing of actual malice. *Id.* at 2946. For the Court's analysis of "public concern," see *infra* note 76.

22. Dean Prosser stated that "it must be confessed at the beginning that there is a great deal of the law of defamation which makes no sense. It contains anomalies and absurdities for which no legal writer even has had a kind word. . . ." W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 111, at 771 (5th ed. 1984).

23. See *infra* notes 29-80 and accompanying text.

24. See *infra* notes 81-118 and accompanying text.

be illustrated.²⁵ Finally, this comment proposes an approach to the defamation labyrinth that is practical to apply and accommodates the competing interests at stake.²⁶

To fully understand the current state of defamation law, it is necessary to review its evolution. This review will be divided into two parts: first, the common law of defamation,²⁷ and second, the important United States Supreme Court decisions beginning in 1964.²⁸ Defamation began as a common law tort, but the United States Supreme Court has greatly changed the common law rules.²⁹ As this comment will show, the Court's pronouncements have both added confusion and failed to articulate a theory capable of implementation while accommodating the competing interests at stake.³⁰

COMMON LAW BACKGROUND

Prior to 1964, English common law principles governed the law of defamation in the United States.³¹ Although the common law of defamation developed to deter attacks on personal reputation and to provide compensation to individuals whose reputations had been injured, the rules that emerged were quite confusing. The English

25. See *infra* notes 119-64 and accompanying text.

26. See *infra* notes 165-82 and accompanying text.

27. See *infra* notes 31-41 and accompanying text.

28. See *infra* notes 45-79 and accompanying text.

29. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). See also *supra* note 12.

30. The state's interest in protecting the reputation of private individuals must be balanced against the first amendment interest in protecting freedom of speech.

In contrast with the balancing approach, there is the Black-Douglas absolutist view that law imposing liability for the use of language is unconstitutional. See Black, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 548 (1962) (speech given by Justice Black). Another approach is advanced by Professor Alexander Meiklejohn. Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245 (basis of theory is that speech relevant to self-government should be protected).

31. The torts of slander and libel, which make up defamation, evolved independently of one another. Contributions to the law of slander, the oral form of defamation, were made by the English seignorial and ecclesiastical courts before jurisdiction over slander actions passed to the common law courts. Libel, generally the written form of defamation, was at one time the basis of claims within the province of the Court of Star Chamber until the Court was abolished, after which the common law courts took jurisdiction. In essence, the American courts completely adopted the English common law of defamation. An American defendant accused of injuring another's reputation faced the same general principles of liability, damages, and presumptions of malice as his English counterpart. See Eaton, *supra* note 10, at 1350; Note, *Developments in the Law — Defamation*, 69 HARV. L. REV. 875, 903 (1956). The evolution of defamation law has been criticized by many commentators. See, e.g., W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 112, at 751 (4th ed. 1971) ("[t]he erratic and anomalous historical development of the law of defamation"); Courtney, *Absurdities of the Law of Slander and Libel*, 36 AM. L. REV. 552 (1902).

For a more thorough analysis of the history of defamation law, see Eaton, *supra* note 10, at 1350 n.1.

common law of defamation was indeed "a forest of complexities . . . inconsistencies and perverse rigidities with circuitous paths and dead ends for seriously wronged plaintiffs."³² Unfortunately, many of the pitfalls remain with us today.

Placing the defamatory statement in evidence and proving that the defendant was responsible for its publication³³ established a prima facie case of libel.³⁴ Malice and actual injury were presumed from the publication of the statement.³⁵ Courts could award general damages for injury proven or presumed, and could award punitive damages if malice was shown. Thus, defamation was treated as a strict liability tort.³⁶

Once the plaintiff had made out a prima facie case, the defendant could establish that the communication was true or that the communication was either absolutely or conditionally privileged in order to avoid liability. Truth was, and still is, a complete defense, regardless of motives. The defendants need only show that the imputation is substantially true.³⁷ If the defendant establishes an absolute privilege,³⁸ such as for a judge at trial, it is a complete defense,

32. Eaton, *The American Law of Defamation Through Gertz v. Robert Welch Inc., and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975), quoted in Yasser, *Defamation as a Constitutional Tort: With Actual Malice For All*, 12 TULSA L.J. 601, 602 (1977).

33. A defamatory statement is one that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. RESTATEMENT (SECOND) OF TORTS, § 559 (1965).

Publication is a word of art in defamation law. W. PROSSER AND W. KEETON, *supra* note 1, 113 at 797. The element of communication is given the technical name of "publication," but this does not mean that it must be printed or written; it may be oral, or conveyed by means of gestures, or the exhibition of a picture or statue. *Id.*

34. See, e.g., Eaton, *supra* note 10, at 1353.

35. *Id.* These rules applied in cases of libel *per se*, i.e., where the defamatory meaning of statement was evident on its face. If the defamatory meaning was apparent only when additional facts were known, or by insinuation, then the statement was considered libel *per quod*. When the statement was considered libel *per quod*, plaintiff had to show special damages as part of his case. See W. PROSSER AND W. KEETON, *supra* note 1, at 795.

36. Eaton, *supra* note 10, at 1352. Joel Eaton stated that "historically, the law of defamation has been characterized by a strict liability as severe as anything found in the law." *Id.*

37. *Id.* at 1353, n.16.

38. Cohen, *supra* note 10, at 158. For a general discussion of the absolute privilege, see W. PROSSER AND W. KEETON, *supra* note 1, at 114. Absolute privileges protect all statements made in the course of judicial and legislative proceedings, and certain executive communications. See, e.g., Yasser, *supra* note 32, at 608.

This absolute immunity extends to all statements made in the course of the proceedings if arguably relevant to the subject matter of the proceedings. *Irwin v. Murphy*, 129 Cal. App. 713, 19 P.2d 292 (1933) (the jurors); *McDavitt v. Boyer*, 169 Ill. 475, 48 N.E. 317 (1897) (counsel); *Ginger v. Bowles*, 369 Mich. 680, 120 N.W.2d 842 (1963) (the judge); *Laun v. Union Elec. Co.*, 350 Mo. 572, 166 S.W.2d 1065 (1942) (parties to the litigation); *Nadeau v. Texas Co.*, 104 Mont. 558, 69 P.2d 586 (1937) (the published judicial opinions); *Massey v. Jones*, 182 Va. 200, 28 S.E.2d 623 (1944) (witnesses).

irrespective of the defendant's motives or the reasonableness of his conduct. A conditional privilege is, however, dependent on the defendant's good behavior; the defendant must act properly or the privilege is defeated.³⁹ A conditional privilege rebuts the presumption of malice so the plaintiff has to prove malice in order to prevail.⁴⁰

The history of the common law of defamation is long and involved. This history has adversely affected the product and produced some remarkable rigidities and technicalities.⁴¹ There have been many calls for a complete overhaul and reform of the law of defamation, but attempts at reform have produced little in way of results.⁴²

As it has developed over the years, the law of defamation has sought to attain a proper balancing of conflicting interests. On the one hand is the injured party's interest in his good reputation, his honor, and his dignity.⁴³ On the other hand is the freedom to speak as one pleases.⁴⁴

THE CONSTITUTIONAL LIMITATIONS ON STATE DEFAMATION LAW

Prior to 1964, Supreme Court dictum stated that libelous publications were not within the protections guaranteed by the first amendment.⁴⁵ In 1964, however, the United States Supreme Court joined the field of reformers when it decided the landmark case of *New York Times v. Sullivan*.⁴⁶ In *New York Times*, a public official

The legislative privilege extends to all statements made by the legislators and to printed records of the proceedings. *Methodist Federation for Social Action v. Fastland*, 141 F. Supp. 729 (D.D.C. 1956); *Dillon v. Balfour*, 20 L.R. Jr. 600 (1887).

39. See Yasser, *supra* note 32, at 608. For example, a common law conditional privilege could be overcome by a showing that the statement was circulated more widely than necessary to serve the public policy the privilege was designed to promote. Cohen, *supra* note 10, at 158.

40. W. PROSSER & W. KEETON, *supra* note 1, at 824.

41. Wade, *The Communicative Torts and the First Amendment*, 48 Miss. L.J. 671, 672 (1977). For a more thorough analysis on the history of defamation, see *id.* at 672. n.5.

42. Wade, *supra* note 41, at 672.

43. *Id.*

44. U.S. CONST. amend. I. The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press, . . ." *Id.*

45. See, e.g., *Konigsberg v. State Bank of Cal.*, 366 U.S. 36, 49 n.10 (1961); *Roth v. United States*, 354 U.S. 476, 266 (1957); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942); *Near v. Minnesota*, 283 U.S. 697, 715 (1931). For a later discussion of the same issue, see *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

Defamation law was analogized to personal assault, remedial by government without raising first amendment issues. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 23 at 631 (1978).

46. 376 U.S. 254 (1964). For an exposition of the law laid down in the case, see RESTATEMENT (SECOND) OF TORTS, § 580A (1977). The case is discussed at length in a

brought a defamation suit against a newspaper publisher and several individual defendants.⁴⁷ The Court recognized for the first time that there are constitutional limitations on state defamation laws. In doing so, the Court restructured defamation law.⁴⁸

The *New York Times* Court acknowledged that the first amendment rights of free speech and free press could conflict with the state's interest in providing individuals with redress for injuries to their reputations.⁴⁹ Justice Brennan, writing for the Court, disallowed recovery for damages absent proof that the defamatory communication was published with "actual malice."⁵⁰ The Court found that "the defense of truth, standing alone, was insufficient to protect freedom of expression."⁵¹ The first amendment interest needed additional protection.

To safeguard the first amendment interest, Justice Brennan wrote that the Constitution requires

a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.⁵²

This new federal rule thus limited the states.⁵³ *New York Times*, however, created a great deal of unfortunate confusion in two areas. First, the Court redefined "actual malice," a concept that had a

number of articles. See, e.g., Berney, *Libel and the First Amendment — A New Constitutional Privilege*, 51 VA. L. REV. 1 (1965); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191; Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L.Q. 581 (1964).

From reviewing the opinion, it is very clear that the Court was influenced by the Meiklejohn theory of self-government. Wade, *The Communicative Torts and the First Amendment*, 48 MISS. L.J. 671, 682 (1977).

47. *New York Times*, 376 U.S. at 254.

48. *Id.* at 279-80. See also *infra* notes 49-55 and accompanying text.

49. *New York Times*, 376 U.S. at 279-83.

50. The *New York Times* Court declined to specify "how far down into the lower ranks of government employees the 'public official' designation would extend . . . or otherwise to specify categories of persons who would or would not be included." *Id.* at 283 n.23. However, the Court has defined "public official" to include "at the very least . . . 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." *Rosenblatt V. Baer*, 383 U.S. 75, 85 (1966).

The Court's redefinition of "actual malice" in terms of the scienter alternative has caused a good deal of unfortunate confusion. Eaton, *supra* note 10, at 1370. There is considerable evidence in *New York Times* that the Court itself was confused and thought it was adopting the common law definition of actual malice, Eaton, *supra* note 10, at 1370 n.91.

51. See Eaton, *supra* note 10, at 1366. See also *New York Times*, 376 U.S. at 278-89.

52. *New York Times*, 376 U.S. at 279-80.

53. See, e.g., Eaton *supra* note 10, at 1366.

prior specific meaning.⁵⁴ Second, the Court failed to set boundaries for "official conduct" of a "public official."⁵⁵ The *New York Times* decision left unresolved how far this constitutional privilege extended.

Just three years after *New York Times*, a majority of the Supreme Court agreed to extend the constitutional privilege to defamatory criticism of "public figures"⁵⁶ in the companion cases of *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*.⁵⁷ Although there was no majority opinion, a majority of the Court agreed that the actual malice rule should cover not only public officials but public figures as well. Although the appropriate standard of protection to apply to public figures provoked a sharp, three-way split, the result was an extension of the constitutional privilege.⁵⁸

Four years after *Butts* and *Walker*, the Supreme Court decided *Rosenbloom v. Metromedia, Inc.*⁵⁹ In *Rosenbloom*, a distributor of nudist magazines filed suit against a local radio station which had broadcast a story on the plaintiff's arrest for obscenity.⁶⁰ Although the Court was highly fragmented, a majority agreed that the *New York Times* actual malice protection should extend to any defamatory falsehood if the statements concerned matters of "general or public interest."⁶¹ *Rosenbloom* logically culminated the Court's pro-

54. See *supra* notes 11, 50 and accompanying text.

55. *New York Times*, 376 U.S. at 283, n.23. The Court eschewed the task of marking off the boundaries of the two concepts. *Id.* See also *supra* note 50.

56. For the Court's attempt to define public figure, see *infra* notes 131-32 and accompanying text.

57. 388 U.S. 130 (1967). In the *Butts* case, the *Saturday Evening Post* had accused University of Georgia football coach Wally Butts of conspiring to "fix" a football game with coach Paul "Bear" Bryant of the University of Alabama. *Id.* at 135. *Walker* involved an *Associated Press* story which discussed the participation of Walker, a retired general, in a riot which followed implementation of federal desegregation policies. *Id.* at 140.

58. No majority was able to agree on what standard to apply to "public figures." Justice Harlan, joined by Justices Clark, Stewart, and Fortas, wrote that public figures could recover "on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.* at 155. Chief Justice Warren, joined by Justice Brennan and White would have applied the *New York Times* standards, while Justice Black and Douglass reaffirmed the position they had taken in *New York Times* that the first amendment provided the media with absolute immunity from liability for defamation. Thus, five Justices favored at least applying the *New York Times* test to public figures. *Id.* Professor Kalven aptly titles his account of the *Butts* opinions "You Can't Tell the Players Without a Score Card." See Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267, 275.

59. 403 U.S. 29 (1971).

60. For a more thorough description of the facts of the case and the lower court decisions, see Eaton, *supra* note 10, at 1394-97.

61. *Rosenbloom*, 403 U.S. at 44. Following the *Rosenbloom* decision, which adopted the public interest test, lower courts found a wide range of situations that were deemed to be of public interest. See, e.g., *Truetler v. Meredith Corp.*, 455 F.2d

gressively expansive application of the first amendment to libel litigation. Instead of focusing on the status of the plaintiff, the Court emphasized the nature of the subject matter discussed in the libelous statement.⁶² Thus, after *Rosenbloom*, even a private person who became involved in a matter of general or public interest had to prove actual malice to recover for defamation.

Private Figures: The Court Retreats

Gertz v. Robert Welch, Inc.,⁶³ decided in June, 1974, partially restricted the expansive application of the first amendment to defamatory communications. The Court laid down several new principles and tipped the balance toward protection of individual reputation. The *Gertz* Court concluded that the protection afforded the media under *Rosenbloom* was too broad. The Court held that "[t]he

255 (8th Cir. 1972) (an announcement of candidacy for the mayor of Omaha); *Time, Inc. v. Johnstone*, 448 F.2d 378 (4th Cir. 1961) (the story of how a little known professional athlete was forced to quit playing basketball a decade before the article was published); *Credit Bureau of Dalton, Inc. v. CBS News*, 332 F. Supp. 1291 (N.D. Ga. 1971) (the practices of credit bureaus); *Spern v. Time, Inc.*, 324 F. Supp. 1201 (W.D. Pa. 1971) (ordination and religious diploma mill rackets); *Medina v. Time, Inc.*, 319 F. Supp. 398 (D. Mass. 1970), *aff'd*, 439 F.2d 1129 (1st Cir. 1971) (the events of My Lai); *Sellers v. Time, Inc.*, 299 F. Supp. 582 (E.D. Pa. 1969), *aff'd*, 423 F.2d 887 (3d Cir. 1970); *cert. denied*, 400 U.S. 830 (1970) (a lawsuit arising out of a stray golf shot); *All Diet Foods Distribs., Inc. v. Time, Inc.*, 56 Misc. 2d 821, 290 N.Y.S.2d 445 (Sup. Ct. 1967) (health foods). See also *Ashdown*, *supra* note 12, at 666-69.

When media defendants are not involved, the courts have developed one clear category of cases in which they find no public interest — credit reporting. *Eaton*, *supra* note 12, at 1402, n.223. See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985); *Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25 (5th Cir. 1973), *cert. denied*, 415 U.S. 985 (1974); *Oberman v. Dun & Bradstreet, Inc.*, 460 F.2d 1381 (7th Cir. 1972); *Kansas Elec. Supply Co. v. Dun & Bradstreet, Inc.* 448 F.2d 647 (10th Cir.), *cert. denied*, 405 U.S. 1026 (1972); *Grove v. Dun & Bradstreet, Inc.*, 438 F.2d 433 (3d Cir.), *cert. denied*, 404 U.S. 898 (1971); *Baird v. Dun & Bradstreet, Inc.*, 445 Pa. 266, 285 A.2d 166 (1971).

Several writers asserted that the extension of the constitutional privileges to all matters of public interest would effectively destroy the law of defamation. See, e.g., Note, *The End of the Line: Rosenbloom v. Metromedia*, 31 U. PITT. L. REV. 734 (1970) (written after lower court opinion). See also Cohen, *A New Niche for the Fault Principal: A Forthcoming Newsworthiness Privilege in Libel Cases?*, 18 UCLA L. REV. 371 (1970) (may be on the verge of a major revolution in the law of libel).

62. *Rosenbloom*, 403 U.S. at 44. Justice Brennan stated that:

It is clear that there has emerged from our cases decided since *New York Times* the concept that the First Amendment's impact upon state libel laws derives not so much from whether the plaintiff is a "public official," "public figure," or "private individual," as it derives from the question whether the allegedly defamatory publication concerns a matter of public or general interest.

Id.

63. 418 U.S. 323 (1974). For a general discussion of the facts of the case, see *supra* note 10.

When *Gertz* reached the Supreme Court, the composition of its members had changed; Justice Powell and Rehnquist occupied the seats vacated by Justices Harlan and Black. *Eaton*, *supra* note 10, at 1409.

extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge the legitimate state interest to a degree that we find unacceptable."⁶⁴

Thus, the Court retreated from Justice Brennan's plurality position in *Rosenbloom*. In so doing, the Court held that although a matter of public interest was involved, the *New York Times* malice standard was not constitutionally required when a private individual was defamed.⁶⁵ The Court reasoned that the state's interest in compensating private individuals was greater than its interest in compensating public persons.⁶⁶ The Court, therefore, held that as long as liability was not imposed without fault, the states could define the appropriate standard of liability.⁶⁷ This holding permitted states to adopt a negligence standard for private plaintiffs.⁶⁸

Gertz also placed one apparent limitation on libel actions by private plaintiffs against media defendants. The Court required that state remedies "reach no farther than is necessary to protect the legitimate interest involved"⁶⁹ and concluded that "it is necessary to restrict defamation plaintiffs who do not prove [actual malice] to compensation for actual injury."⁷⁰ A private plaintiff who established liability under a standard less demanding than *New York Times*, therefore, could not recover presumed or punitive damages.⁷¹

64. *Gertz*, 418 U.S. at 346.

65. *Id.* at 344-46.

66. *Id.* The Court stated that "private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery." *Id.* at 345.

67. *Id.* at 347. The Court stated that "this approach provides a more equitable boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals . . . yet shields the press and broadcast media from the rigors of strict liability. . . ." *Id.* at 347-48.

68. State courts have followed the reasoning of *Gertz* and adopted a negligence standard. See, e.g., *Mobile Press Register, Inc. v. Faulkner*, 372 So. 2d 1282 (Ala. 1979); *Peagler v. Phoenix Newspaper, Inc.*, 114 Ariz. 309, 560 P.2d 1216 (1977); *Dosrill v. Arkansas Democrat Co.*, 265 Ark. 628, 590 S.W.2d 840 (1979), *cert. denied*, 444 U.S. 1076 (1980); *Troman v. Wood*, 62 Ill. 2d 184, 340 N.E.2d 292 (1976); *Danny v. Mertz*, 106 Wis. 2d 636, 318 N.W.2d 141, *cert. denied*, 459 U.S. 883 (1982). See generally *Frakt, Defamation Since Gertz v. Robert Welch, Inc.: The Emerging Common Law*, 10 RUT-CAM. L.J. 519 (1979) (an analysis of lower court decisions since *Gertz*).

For a discussion of state court reactions to *Gertz*, see Comment, *Defamation and State Constitution: The Search for a State Law Based Standard After Gertz*, 19 WILLAMETTE L.J. 665 (1983). See also Cohen, *supra* note 10; Gerdtz and Wolff, *State Court Reactions to Gertz v. Robert Welch, Inc.: Inconsistent Results and Reasoning*, 29 VAND. L. REV. 1431 (1976).

69. *Gertz*, 418 U.S. at 349.

70. *Id.* Actual injury was not limited to out-of-pocket loss, but included impairment of reputation, personal humiliation, and mental anguish and suffering. *Id.* at 350.

71. *Id.* at 349-50. The Court declared "[S]tates may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." *Id.* at 350. The Court reasoned the common law doctrine of presumed and punitive damages invites juries to

On June 26, 1985, the Supreme Court decided *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,⁷² probably the most important case interpreting *Gertz*. The issue in *Dun & Bradstreet* was whether nonmedia defendants are entitled to the same constitutional safeguards as media defendants, one of the unresolved issues of *Gertz*.⁷³ The Court sidestepped this issue, however, and concluded that the *Gertz* limitation on damages to actual injury does not apply when the speech is not a matter of public concern.⁷⁴

The Court considered the competing interests at stake here different from those weighed in *Gertz*, and determined that a false credit report was not of public concern.⁷⁵ Although the Court limited the application of *Gertz* to speech involving matters of public concern, it failed to adequately define "public concern" for constitutional purposes. Thus, the Court added another confusing twist to the inquiry, yet offered little, if any, guidance for lower courts.⁷⁶

Where does defamation law stand today? The two landmark cases of *New York Times v. Sullivan*⁷⁷ and *Gertz v. Robert Welch*,

punish unpopular opinion rather than compensate for injured reputation. *Id.* The Court also pointed out that states have no substantial interest in securing for plaintiffs gratuitous awards far in excess of actual injury. *Id.* at 349.

In essence, the Court reasoned that presumed and punitive damages cannot be reconciled with the first amendment, absent a showing of actual malice. *Id.* at 349. *But see Dun & Bradstreet*, 105 S. Ct. at 2946 (Court allowing presumed and punitive damages). For a discussion on this issue, see Lewis, *New York Times Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 COLUM. L. REV. 603, 608 (1983); Note, *Punitive Damages and Libel Law*, 98 HARV. L. REV. 847 (1985). See also Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 2 & nn. 6-7 (1982) (discussion of the general growth of punitive damage awards in various fields of tort law). See generally W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS, 2 (5th ed. 1984) (punitive damages are in excess of the amount necessary for compensation). For an interesting article discussing the chilling effect in one situation, see Curley, *How Libel Suit Sapped the Crusading Spirit of a Small Newspaper*, WALL ST. J., Sept. 29, 1983, at I, col. I.

For a discussion of the large punitive damage awards in recent libel suits, see Brief of Washington Post, Amicus Curiae, in Support of Reversal at 12-16, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (U.S. Oct. 3, 1984) (No. 83-8) (the brief reviews several of the most important cases decided in the last few years; the punitive damage awards in these cases ranged from \$200,000 to several million).

72. 105 S. Ct. 2939 (1985).

73. *Id.* at 2942. Although petitioner and respondent argued the media/nonmedia distinction to the Court in their briefs, the Court did not address this issue. *Id.*

74. *Id.* at 2946. The Court stated that "in light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages — even absent a showing of 'actual malice.'" *Id.*

75. *Id.* at 2947.

76. Although the Court makes a constitutional distinction on the status of the speech, it only states that "whether . . . speech addresses a matter of public concern must be determined by the [expression's] content form, and context . . . as revealed by the whole record." *Id.* at 2947. This is hardly a detailed analysis.

77. 376 U.S. 254 (1964).

Inc.,⁷⁸ together well cover the area of defamation. Today, *New York Times* applies to public persons —public officials or public figures — and requires that the defendant's statement, to impose liability, must not only be defamatory and false, but also intentionally or recklessly made. *Gertz* applies to cases involving a private person as plaintiff (at least against media defendants) and holds that the defendant's conduct must be at least negligent in regard to the falsity of the statement. Additionally, *Gertz* provides that the plaintiff can only recover for actual harm. However, *Dun & Bradstreet* altered this final holding and the Court allowed presumed damages when the speech did not involve a matter of public concern.⁷⁹ Thus, as defamation stands today, states are allowed to provide different levels of protection depending upon the status of the plaintiff, the status of the defendant, and the status of the speech.

When the Court began to apply first amendment limitations to defamation law, there was no consensus on the meaning or theory of the free-speech provision or on the test for its application. On the whole, the Court has applied a balancing approach.⁸⁰ The balancing approach, however, lacks predictability and leaves many questions unanswered. By employing this balancing process, the Court has created a "forest of complexities" that requires a more viable and practical alternative to accommodate the two competing interests.

JUSTICE BRENNAN AND DEFAMATION LAW

Defamation law today would be drastically different if Justice Brennan could convince a majority of the Court to follow his views. Justice Brennan would not have the constitutional protections afforded a defendant hinge on the distinctions that the Court has developed. Writing for the majority in *New York Times*, Justice Brennan stated that libel can claim "no talismanic immunity from constitutional limitations."⁸¹ An analysis of Justice Brennan's views since 1964 shows that he is the Court's most vigorous advocate of the constitutional privilege and consistently demands forceful protection for the first amendment interest.

Justice Brennan's opinion in *New York Times* broke new ground and became a landmark for the future. Justice Brennan initially rejected the argument that defamation is not given first amendment protection. In doing so, he stated that the label given to

78. 418 U.S. 323 (1974).

79. *Dun & Bradstreet*, 105 S. Ct. at 2946.

80. See, e.g., Comment, *The Public Figure Plaintiff v. The Nonmedia Defendant in Defamation Law: Balancing the Respective Interests*, 68 IOWA L. REV. 517 (1983). See also *supra* note 30.

81. *New York Times*, 376 U.S. at 269.

the speech is not controlling, and that defamation "must be measured by the standards that satisfy the first amendment."⁸²

In addition, Justice Brennan noted that *New York Times* was not an ordinary defamation action of the kind referred to in earlier Supreme Court opinions. This action involved a government official suing for criticism of his official conduct. Justice Brennan recognized that the first amendment was designed to ensure that the people's censorial power could not be fettered by fear of government-sponsored repression.⁸³ The "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"⁸⁴ is recognized and embodied in the first amendment.⁸⁵

Having determined that public speech on public issues was constitutionally protected, Justice Brennan demonstrated that even false speech on public issues was within this protective mantle. He reasoned that "erroneous statement is inevitable in free debate" and concluded that "it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"⁸⁶ Justice Brennan concluded that a rule compelling the critic of official conduct to guarantee the truth of all his factual assertions would lead to self-censorship.⁸⁷ Thus, Justice Brennan's view was that the first amendment was intended primarily to protect criticism of the government in a free society.⁸⁸ The stage was thus set and Justice Brennan set out the "constitutional privilege."⁸⁹

From a careful analysis of the *New York Times* majority opinion, it is clear that the Meiklejohn theory of self-government⁹⁰

82. *Id.*

83. *Id.* at 272-76.

84. *New York Times*, 376 U.S. at 270.

85. See Eaton, *supra* note 10, at 1368.

86. *New York Times*, 376 U.S. at 271-72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

87. *Id.* at 78-79.

88. See, e.g., Note, *Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Nonmedia Defendants*, 95 HARV. L. REV. 1876 (1982) (a discussion of politically based first amendment theories).

89. The new federal rule, *New York Times'* actual malice standard, has been widely denominated as the constitutional privilege to defame. See Eaton, *supra* note 10, at 1366.

90. Doctor Meiklejohn's theory proceeds from the hypothesis that "the principle of the freedom of speech . . . is a deduction from the basic American agreement that public issues shall be decided by universal suffrage." A. MEIKLEJOHN, *POLITICAL FREEDOM* 27 (1960). The notion is that the Constitution's commitment to freedom of speech is nothing more than a reflection of our commitment to self-government. *Id.* at 20-27.

The attractiveness of a politically based interpretation of the first amendment is easily understood, and its pull has drawn favorable commentary from a diverse group of respected commentators as well as from several members of the Court. See, e.g., G. ANASTAPLO, *THE CONSTITUTIONALIST* (1971); BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978); Bloustein, *The First Amendment Problems*, 47 IND. L.J. 1 (1971); Bren-

strongly influenced Justice Brennan. Dr. Meiklejohn's theory is a politically based interpretation of the first amendment and advocates the proposition that speech concerning self-government should be forcefully protected. However, it is equally clear that instead of adopting the Meiklejohn theory entirely, Justice Brennan's opinion also balanced the conflicting interests of the individual and the state in determining the exact nature of the principles to be applied. Refinements were, of course, needed to clarify the terms employed by Justice Brennan and to answer the question of how far this process would extend.

In *Curtis Publishing Co.*, Justice Brennan joined the majority which held that the first amendment protects defamatory falsehoods published about public figures as well as those about public officials.⁹¹ Justice Brennan agreed that there is no significant reason for distinguishing public officials from public figures "in law, logic, or First Amendment policy."⁹² While extension of the constitutional privilege in *Curtis Publishing Co.*, was tied to the public status of the plaintiff, there were indications that the Court was prepared to extend the privilege to the outer limits of Justice Brennan's *New York Times* first amendment theory.⁹³

Rosenbloom v. Metromedia, Inc.,⁹⁴ was the vehicle to bring this extension about. When the decision was handed down, Justice Brennan had been convinced that the first amendment theory he had fashioned in *New York Times* could not be tied to the status of the defamed plaintiff.⁹⁵ Expanding the protection of the constitutional privilege to the limits, Justice Brennan wrote that the constitutional privilege extended "to all discussion and communication involving

nan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Meiklejohn, *Public Speech and the First Amendment*, 55 GEO. L.J. 234 (1966). The first amendment theory fashioned by Justice Brennan substantially echoed the long urged views of Dr. Alexander Meiklejohn: Public discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents. Though they govern us, we, in a deeper sense, govern them. Over our governing, we have sovereign power. Although the works of Dr. Meiklejohn were not cited by Justice Brennan, he has virtually conceded their direct influence. See Brennan, *supra*.

91. *Curtis Publishing Co.*, 388 U.S. at 155. The Justices could not agree, however, on how to define a "public figure." See also Eaton, *supra* note 10, at 1391-92.

92. *Curtis Publishing Co.*, 388 U.S. at 163 (Warren, C.J., concurring). Justice Brennan joined in this part of the concurring opinion of Chief Justice Warren. *Id.* at 172.

93. See *Time, Inc. v. Hill*, 385 U.S. 374 (1967). In *Time*, a "false light" invasion of privacy case, the Court extended to news reports the constitutional privilege of matters in the public interest, even where a private individual was involved. See also Eaton, *supra* note 10, at 1394.

94. 403 U.S. 29 (1971). For an analysis of the various positions in *Rosenbloom*, see Keeton, *Some Implications of the Constitutional Privilege To Defame*, 25 VAND. L. REV. 59 (1972).

95. See *supra* note 62.

matters of public or general concern."⁹⁶

Justice Brennan's plurality opinion concluded that a determination as to the standard does not depend on who the plaintiff is, but on the nature of the circumstances. The real question, therefore, is whether the event or occurrence is a matter of public or general interest. This opinion brought the position of the Court very close to the Meiklejohn interpretation. Although the Court was highly fragmented, lower courts accepted, with near unanimity, Justice Brennan's plurality opinion as controlling.⁹⁷

All these cases led ultimately to *Gertz*. Apparently sensitive to the fact that Justice Brennan's plurality opinion in *Rosenbloom* had nearly destroyed the common law of defamation, the new Court⁹⁸ renounced the extension of the constitutional privilege in *Rosenbloom*. Although four Justices dissented, Justice Brennan was alone in rearguing the substance of his plurality position in *Rosenbloom*.⁹⁹

Justice Brennan, dissenting in *Gertz*, reasoned that to strike the proper accommodation between the competing interests at stake, the Court should require states to apply the *New York Times* malice standard to all actions involving matters of public or general interest. This standard would promote our commitment to robust and wide-open debate. Justice Brennan believed that a reasonable care standard, where private individuals are involved, would lead to self-censorship.¹⁰⁰ He could not agree that free and robust debate is permitted adequate breathing space when states may impose all but strict liability. In essence, Justice Brennan viewed the Court's holding in *Gertz* as failing to give the first amendment interest adequate weight in the balancing process.

As to the Court's latest retreat in *Dun & Bradstreet*,¹⁰¹ Justice

96. *Rosenbloom* 403 U.S. at 43-44.

97. See, e.g., Note, *Misinterpreting the Supreme Court: An Analysis of How the Constitutional Privilege to Defame Has Been Incorrectly Expanded*, 10 IDAHO L. REV. 213, 217 nn.22-26 (1974). Some courts simply called the plurality opinion a majority opinion. *West v. Northern Publishing Co.*, 487 P.2d 1304, 1305 (Alas. 1971); *Trials West, Inc. v. Wolff*, 32 N.Y.2d 207, 215, 344 N.Y.S.2d 863, 868, 298 N.E.2d 52, 56 (1973).

98. When *Gertz* reached the Supreme Court, the composition of the Court which had fractionated so badly in *Rosenbloom* had changed; Justice Powell and Rehnquist occupied the seats vacated by Justice Harlan and Black. Eaton, *supra* note 10, at 1408-09. The new Justices joined Justices Marshall and Stewart in adopting the substance of the views which they and Justice Harlan had proffered in *Rosenbloom*. *Id.* At the same time, Justices Marshall and Stewart abandoned their *Rosenbloom* position that punitive damages were constitutionally proscribed. *Id.* These four were joined by Justice Blackmun, who unabashedly switched his vote because of the "profound importance for the Court to come to rest in the defamation area." *Gertz*, 418 U.S. at 353-54.

99. *Gertz*, 418 U.S. at 361-69.

100. *Id.* at 366-68.

101. *Dun & Bradstreet*, 105 S. Ct. 2939 (1985) (presumed and punitive damages

Brennan wrote a stinging dissent which was well reasoned and constitutionally sound.¹⁰² He again viewed the Court's position as giving in sufficient weight to the first amendment interests at stake. Because the first amendment permits restraints on speech only when they are narrowly tailored to advance a legitimate government interest, Justice Brennan concluded that the "ready availability and unconstrained application of presumed and punitive damages in libel actions in too blunt a regulatory instrument to satisfy this First Amendment principle. . . ."¹⁰³

In addition, Justice Brennan criticized the Court's distinction between matters of public concern and matters of private discourse. He faulted the opinion for failing to offer any substantive analysis or guidelines on what is a matter of "public concern."¹⁰⁴ Furthermore, even accepting the idea that the distinction can be made, Justice Brennan viewed the "impoverished definition[s]"¹⁰⁵ of "public concern" as irreconcilable with first amendment principles.¹⁰⁶ Even if speech does not directly implicate the central meaning of the First Amendment, Justice Brennan believes it is an important part of our public discourse and should receive constitutional protection.¹⁰⁷ He views *Dun & Bradstreet* as cutting away at the protective mantle that *Gertz* established.

Justice Brennan also addressed the media/nonmedia distinction in his *Dun & Bradstreet* dissent.¹⁰⁸ Recognizing that the press is protected to ensure the vitality of first amendment guarantees, he stated that "the rights of the institutional media are no greater and no less than those enjoyed by other individuals. . . ."¹⁰⁹ Justice Brennan reasoned that any distinction would be irreconcilable with the first amendment principle that "the inherent worth of [speech] does not depend upon the identity of its source. . . ."¹¹⁰ Thus, Justice

allowed if speech is not of public concern).

102. *Id.* at 2954-65 (Brennan, J., dissenting).

103. *Id.* at 2956. Justice Brennan reasoned that states must use "finer instruments to ensure adequate space for protected expression." *Id.*

104. "Without explaining what is a 'matter of public concern,' the plurality opinion proceeds to serve up a smorgasbord of reasons why the speech at issue here is not. . . ." *Id.* at 2959 (emphasis in original).

105. Justice Brennan was describing the analysis presented by Justice Powell and Justice White. *Id.* at 2960.

106. *Id.*

107. Justice Brennan was of the view that even if the speech were appropriately characterized as a matter of only private concern, the elimination of the *Gertz* restrictions on presumed and punitive damages would still violate basic first amendment requirements. *Id.*

108. *Id.* at 2958-59.

109. *Dun & Bradstreet*, 105 S. Ct. at 2959.

110. *Id.* at 2957 (quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978)). Justice Brennan noted that "first amendment difficulties lurk in the definitional questions such an approach would generate." *Id.*

Brennan and at least five other Justices agree that the media should not be afforded additional protection.¹¹¹

How Would Justice Brennan Apply The First Amendment Limitations?

As a strong advocate of first amendment interests, Justice Brennan views this Court as improperly balancing the competing interests and provoking increased self-censorship. From his perspective, freedoms of expression are not given the breathing space that they need to survive. As evidenced from his opinions, Justice Brennan gives substantially more weight to the first amendment interest than the present majority.¹¹²

In *Dun & Bradstreet*, Justice Brennan would have at least applied the constitutional protections of *Gertz*. However, his opinions throughout the years intimate that the first amendment guarantees of free speech and press should be even more forcefully protected.¹¹³ Significant weight should be given to these rights which are "given explicit protection by the First Amendment."¹¹⁴ Justice Brennan dissented in *Gertz* itself because the constitutional protections afforded should not depend on whether the plaintiff is a private or public person.¹¹⁵

Prior to *Gertz*, Justice Brennan led the way for the expansive application of the constitutional privilege.¹¹⁶ Indeed, if Justice Brennan had his way, he would drastically restructure the defamation law labyrinth as we know it. An analysis of his opinions shows that Justice Brennan would eliminate all the distinctions and obviate the confusion among courts about which standards to apply. Although he would not go quite as far as Justices Black and Douglas,¹¹⁷ Justice Brennan would certainly apply the *New York Times* standard to almost every conceivable defamation case.¹¹⁸

111. *Id.* at 2959 (Chief Justice Burger and Justices White, Marshall, Blackmun, Stevens and Brennan).

112. *See, e.g., Gertz*, 418 U.S. at 361-69; *Dun & Bradstreet*, 105 S. Ct. at 2954-65.

113. *See, e.g., Gertz*, 418 U.S. at 361-69; *Dun & Bradstreet*, 105 S. Ct. at 2954-65.

114. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 361 (1974) (Brennan, J., dissenting).

115. *Gertz*, 418 U.S. at 361-69. Justice Brennan noted that the first amendment was designed to promote wide-open debate on public issues and matters of public or general interest do not suddenly become less so merely because a private individual is involved. *Id.* at 362.

116. *See Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

117. Justices Black and Douglas took an absolutist view: any law imposing liability for the use of language is unconstitutional. *See, e.g., Black, Justice Black and First Amendment "Absolutes: A Public Interview*, 37 N.Y.U. L. REV. 548 (1962).

118. *See Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (*New York Times*

THE COURT AND JUSTICE BRENNAN: A CRITIQUE

Justice Brennan is the Court's most vigorous advocate of the constitutional privilege espoused in *New York Times v. Sullivan*: a publisher is liable only if he communicates a false and defamatory statement with actual malice. For Justice Brennan, the *New York Times* privilege is the touchstone, to be applied across the board, rather than nibbled away at by absurd distinctions.¹¹⁹ The Court, on the other hand, has failed to articulate a constitutionally sound theory that is practical to implement. Although both claim to strike a balance between the competing interests, both the Court's and Justice Brennan's approaches suffer from serious logical and practical flaws.

Present Day Distinctions: Unsound and Unworkable

By weighing the competing interests at stake in every defamation case, the Court has created some perplexing problems which have propelled defamation into a state of profound confusion.¹²⁰ Different levels of constitutional protection apply depending on whether or not the plaintiff is a public or private person,¹²¹ whether or not the defendant is classified as a media or nonmedia defendant,¹²² and whether or not the speech is "of public concern."¹²³ Is there any constitutional basis on which to draw these distinctions?

Trying to interpret the common law and the Supreme Court's decisions, federal and state judges bravely attempt to render the law intelligible. The more realistic among them, however, find a "fog of fictions, inferences, and presumptions."¹²⁴ Those who insist that the maze is understandable find clear cases of "slander which is libelous *per se* . . ."¹²⁵ Trying to draw the line between the various distinctions, few emerge with all faculties intact. The result is that although our judges struggle to find their way through the labyrinth, they succeed only in hammering out false or partial passageways which only add to the confusion.¹²⁶

standard applies to any communication of public interest); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 361 (1974) (Brennan, J., dissenting) (does not matter if person is private or public for *New York Times* to apply).

119. See Yasser, *supra* note 32, at 620.

120. See, e.g., W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 111 (4th ed. 1971); Yasser, *supra* note 32, at 602.

121. See *supra* notes 47-71 and accompanying text.

122. See *supra* notes 15-18 and accompanying text.

123. See *supra* notes 19-21 and accompanying text.

124. *Coleman v. MacLennan*, 78 Kan. 711, 740, 98 P. 281, 291 (1908); see also Yasser, *supra* note 32, at 602.

125. *Douglas v. Janis*, 43 Cal. App. 3d 931, 941, 118 Cal. Rptr. 280, 286 (1974).

126. Yasser, *Defamation as a Constitutional Tort: With Actual Malice For All*, 12 TULSA L.J. 601, 602 (1977).

Public v. Private Individual

One puzzle is determining the status of the plaintiff. The recent Supreme Court defamation decisions make it abundantly clear that whether the plaintiff is a public person is of critical importance. Although courts have little trouble with the public official category,¹²⁷ the public figure category has created a great deal of uncertainty. The *Gertz* opinion explained that there are two types of public figures: (1) a person who has attained "pervasive fame or notoriety"¹²⁸ and so has become a public figure for all purposes, and (2) a person who participates in a "public controversy"¹²⁹ and becomes a public figure for a limited range of issues. The Court's failure to adequately define "public figure"¹³⁰ has forced the lower courts to fashion their own understanding of the term. A few lower courts have tried, with limited success, to devise coherent tests,¹³¹ but most have

127. The perimeters of the public official category were drawn shortly after *New York Times*. *Rosenblatt v. Baer*, 383 U.S. 75 (1966). In *Rosenblatt*, Justice Brennan offered this definition:

[T]he "public official" designation applies at the very least to those among the hierarchy of government employees who have, or appear to have public to have, substantial responsibility for or control over the conduct of governmental affairs Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, . . . the *New York Times* malice standards apply.

Id. at 85-86.

In *Garrison v. Louisiana*, 379 U.S. 64 (1964), however, the Court found it necessary to reformulate the rules:

The *New York Times* rule is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed. The public official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, *anything which might touch on an official's fitness for office is relevant*. 379 U.S. at 77 (emphasis added). This text has been referred to as *Garrison's* all-embracing "relevance" test. See, e.g., *Eaton supra* note 10, at 1381.

128. See *Gertz*, 418 U.S. at 351. Earlier in the opinion the Court noted that some people "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes." *Id.* at 345. "More commonly, [however], those classed as public figures have thrust themselves to the forefront of particular controversies in order to influence the resolution of the issues involved. *Id.*

129. Comment, *Defining a Public Controversy in the Constitutional Law of Defamation*, 69 VA. L. REV. 931 (1983).

130. *Id.* at 531. For an informal survey of the post-*Gertz* cases which illustrate the unpredictable results of the *Gertz* standards, see *Who's a Public Figure? You Figure It Out*, NAT'L L.J., Apr. 21, 1980, at col. 1. Professor Robertson suggests the following reasons for the shortcomings of the *Gertz* public figure standards: "The Court discussed the public figure question only briefly . . . and failed to delineate carefully the constituent parts of the analysis." Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199, 223 (1976).

131. See, e.g., *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir.), cert. denied, 449 U.S. 898 (1980). See also Note, *The "Fleshing Out" of the Gertz Public Figure Standards — Waldbaum v. Fairchild Publications, Inc.*, 12 U.

sunk into a morass of *ad hoc* rulings.¹³²

The *Gertz* Court suggests that society has a stronger interest in protecting the reputations of private persons than in safeguarding the good names of public figures. The justifications offered for the distinction are that public people invite comment about themselves, and that they have access to the media. They, therefore, are less deserving of recovery and less vulnerable to injury than are private persons.¹³³ These justifications, however, suffer from serious logical flaws when viewed in light of first amendment values, as Justice Brennan has pointed out.

The rationale underlying the first justification is that the public person voluntarily assumes the risk of public scrutiny inherent in public life.¹³⁴ The public figure voluntarily exposes himself to a predictable risk of being "burned by the public spotlight."¹³⁵ Thus, the constitutional privilege is "merely an assumption of risk defense in federal disguise."¹³⁶ But the validity of this rationale turns on the assumption that public figures voluntarily assume the known risk of character assassination. It is difficult to perceive why one who enters the public arena voluntarily should forfeit the constitutional protections that a "private person" enjoys.¹³⁷

In addition, the argument that public figures enjoy significantly greater access to the channels of communication, and, therefore, have an opportunity to rebut the charges, is little more than an empty generalization that fails to comport with reality.¹³⁸ The Court

TOL. L. REV. 1027 (1981) (applying *Waldbaum* objective principles to earlier defamation cases).

132. Comment, *Defining A Public Controversy in the Constitutional Law of Defamation*, 69 VA. L. REV. 931 (1983).

133. *Gertz*, 418 U.S. at 344.

134. See *Gertz*, 418 U.S. at 344-45; *Eaton*, *supra* note 12, at 1420; *Yasser*, *supra* note 32, at 620.

135. *Yasser*, *supra* note 32, at 620.

136. *Eaton*, *supra* note 10, at 1420.

137. Is it fair to say that a public person voluntarily assumes the known risk of character assassination? *Yasser*, *supra* note 32, at 620. Justice Brennan, dissenting in *Gertz*, thought that:

[T]he idea that certain 'public figures' have voluntarily exposed their entire lives to public inspection while private individuals have kept their carefully shrouded from public view is, at best, a legal fiction. In any event, such a distinction could 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 lives of 'public figures' that are not in the area of public or general concern.

418 U.S. at 364 (Brennan, J., dissenting).

138. To begin with, it is not entirely accurate to say that the public person has superior access to the media. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). In *Tornillo*, the Court held that a Florida "right of reply" statute was unconstitutional because it violated the first amendment guarantee of a free press. *Id.* This implies that a public person who is defamed by the media has no legal right to reply through the media. *Yasser*, *supra* note 32, at 621.

itself expressed dislike for this rationale and implicitly disclaimed it, stating that "an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with the lie."¹³⁹ Thus, because self-help is so uncertain and inadequate a remedy, Justice Brennan stated that it is "too insubstantial a reed on which to rest a constitutional distinction."¹⁴⁰ Moreover, any discrepancy in access to channels of communication exists only for very prominent people who command media attention; for all other individuals, whether public or private, access to the media depends on the unpredictable even of continuing media interest.¹⁴¹

Media v. Nonmedia Defendant

Another illogical distinction the Court makes is the different level of protection afforded media defendants.¹⁴² In *Gertz*, the Court never expressly limited its holding to media defendants.¹⁴³ However, Justice Powell's carefully worded opinion referred repeatedly to the press and broadcast media.¹⁴⁴ Therefore, according to some courts and commentators, the *Gertz* issue and decision applies only to media defendants.¹⁴⁵ This view seems to be a reasonable interpretation of the present Court's stance. The Court conveniently sidestepped the media/nonmedia issue in *Dun & Bradstreet*.¹⁴⁶ In doing so, the Court bypassed the opportunity to obviate the confusion among lower courts as to whether *Gertz* applies to nonmedia, as well as to media defendants. The question that remains open, therefore, is what level of protection nonmedia defendants are afforded?

It facilitates analysis to recognize that the terms "media" and "nonmedia" are not self-defining, nor has the Court attempted to define them.¹⁴⁷ Attempts at defining the terms could create addi-

139. *Gertz*, 418 U.S. at 344 n.9. Professor Cohen has called the greater access to channels of communication justification a "make-weight argument." Cohen, *supra* note 10, at 376.

140. *Gertz*, 418 U.S. 363-64 (quoting *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 46-47 (1971)).

141. *Id.* at 363. Furthermore, even when a report continues to generate interest, media sources are not apt to print denunciations of the news stories of a competitor because this would invite retaliation and could create a "news reliability" war. See Ashdown, *supra* note 10, at 662; Eaton, *supra* note 10, at 1420-21.

142. See *supra* notes 15-18 and accompanying text.

143. Note, *supra* note 129, at 1042 (quoting *Rosanova v. Playboy Enterprises, Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976)). See also Comment, *Defining a Public Controversy in the Constitutional Law of Defamation*, 95 VA. L. REV. 931 (1983).

144. *Gertz*, 418 U.S. 325-52. Justice Powell referred to "a newspaper or broadcaster," "press and broadcast media," "publisher or broadcaster," "news media," and other like phrases in the opinion. *Id.*

145. See *supra* notes 15-18 and accompanying text.

146. See *supra* note 74 and accompanying text.

147. See, e.g., *Dun & Bradstreet*, 105 S. Ct. at 2958 (Brennan, J., dissenting).

tional first amendment difficulties,¹⁴⁸ and would add further complexity and inconsistent rulings to an already exceedingly complex tort.¹⁴⁹ Given the infinite variety of publications that might come within the board definition of "media," it is clear that the line between media and nonmedia is too obscure to form the basis of a constitutional principle.¹⁵⁰

The first amendment on its face protects freedom of expression and does not accord special treatment to any group of speakers. Although the proposition that freedom of the press is different from freedom of speech has received some distinguished academic support,¹⁵¹ neither the language nor the history of the first amendment supports the view that "media" expression should be exalted above other speech.¹⁵² Furthermore, providing special protection for the media contradicts the principle of equal liberty of expression in a free society where everyone should have an opportunity to present his ideas in the marketplace.¹⁵³

Because the value of speech does not depend on whether the words are uttered by the "media" or the "nonmedia" citizens, it follows that the extent of the first amendment's protection does not depend on the speaker's identity. In deciding the level of constitutional protection available, it is entirely inappropriate to distinguish between "media" and "nonmedia" defendants.¹⁵⁴ The distinction is

148. *Id.*

149. *Id.* at 2958 n.7. Justice Brennan recognized that owing to transformations in the technological and economic structure of the communications industry, there has been an increasing convergence on what might be labelled "media" and "nonmedia." *Id.*

Because of increased technology, any person with access to a xerox copier machine has media power. As a practical matter, in this technological age, we can all possibly be characterized as communications media. Yasser, *supra* note 32, at 624.

Although the Court avoided the issue in *Dun & Bradstreet*, it has been stated that the "ultimate expansion of *Gertz* to provide equal standards for recovery against both media and nonmedia defendants seems predictable." Eaton, *supra* note 10, at 1417. *But see* Stewart, "Or of the Press," 26 HASTINGS L.J. 635 (1975) (Justice Stewart urges the drafters must have meant something by using the separate speech and press clauses).

150. *Dun & Bradstreet*, 105 S. Ct. at 2958 nn.6-8 and accompanying text.

151. *See, e.g.,* Nimmer, *Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975); Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199 (1976); Stewart, *supra* note 149.

152. *See* Hill, *Defamation and Privacy*, 76 COLUM. L. REV., 1205 (1976); Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 778 (1975); Van Alstyne, *Comment: The Hazards to the Press of Claiming a "Preferred Position,"* 28 HASTINGS L.J. 761 (1977). Indeed, there are several cases decided by the Supreme Court in which the defendants could not be classified as communications media. *See, e.g.,* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (several individual defendants).

153. *See* Eaton, *supra* note 10, at 1417-18.

154. Yasser, *supra* note 32, at 624. Further, the fact that "media" defendants are likely to disseminate their statements more widely goes to the issue of damages and not first amendment protection. *Id.*

unsound and unworkable. It seems ridiculous to provide additional protection for those who have the potential to do the most damage, while affording little protection to those whose statements are not widely disseminated.¹⁵⁵

Public v. Private Concern

By retreating and limiting the application of *Gertz* to matters of public concern,¹⁵⁶ the *Dun & Bradstreet* Court creates the very confusion *Gertz* sought to eliminate. The public concern or content-based approach is a more blurred focus, and a clear line between matters of public concern, and those which are not, can never be drawn.¹⁵⁷ The Court's approach simply adds another confusing question to the inquiry which judges will have to decide on and *ad hoc* basis.

From this analysis, it can be seen that the Court's approach has placed defamation law on the verge of chaos. It lacks a sense of predictability. The status of a certain party or the status of the speech will often be outcome determinative. Yet, an attorney cannot determine with certainty what status his client will be judged to be. Our judicial system, shackled by these decisions, has become incapable of making such determinations in a consistent, equitable, and intellectually satisfy manner.¹⁵⁸ Certainly, a fair balancing of one's right to his good reputation with another's right to speak freely can better be accomplished outside of the maze of modern defamation law.¹⁵⁹

Justice Brennan: Actual Malice For All

Under Justice Brennan's approach, defamation would very much resemble an intentional tort. His approach would at least do away with the absurd distinctions noted above. To recover, a plaintiff would have to prove with convincing clarity that the defendant made a defamatory statement, with "actual malice" required for all who complain of injury to their reputation.¹⁶⁰

155. See, e.g., *Eaton*, *supra* note 10, at 1418.

156. *Dun & Bradstreet*, 105 S. Ct. at 2942.

157. See *Gertz*, 418 U.S. at 343. The Court noted that the *Rosenbloom* public interest approach "would lead to unpredicted results and uncertain expectations, and it could render [the Court's] duty to supervise the lower courts unmanageable. . . . [A]n ad hoc resolution . . . in each particular case is not feasible. . . ." *Id.*

158. See *Christie, Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches*, 75 MICH. L. REV. 43 (1976) (discussion of decisions from 1964-76); *Courtney, Absurdities of the Law of Slander and Libel*, 36 AM. L. REV. 552 (1902).

159. See *Yasser*, *supra* note 32 at 603.

160. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 361 (1974) (Brennan, J., dissenting); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). A similar position is advanced by Ray Yasser.

Such an approach is enviable in that it would lead to predictable results and certain expectations. It would eliminate the *ad hoc* resolution of the competing interests at stake in each particular case. However, such an approach would not give adequate weight to the side of the scale protecting individual reputations. Although the *New York Times* standard provides an extremely powerful antidote to the inducement of media self-censorship of the common law rule of strict liability, it exacts a correspondingly high price from victims of defamatory falsehood.¹⁶¹ As Justice Powell correctly reasoned in *Gertz*, "many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test."¹⁶²

Adopting the *New York Times* test across the board is clearly not the proper accommodation between the law of defamation and the first amendment. Although the approach is not without value, it comes at too great a cost.¹⁶³ The *New York Times* standard is appropriate for public officials because the speech involved implicates the central meaning of the first amendment.¹⁶⁴ In other instances, however, requiring plaintiffs to meet the rigorous requirements of *New York Times* would ignore the state's interest in protecting individual reputation. The *New York Times* standard is an onerous burden to bear for plaintiffs and a viable alternative is available which will adequately accommodate the first amendment interest, while not ignoring the reputational interest. A suggested approach follows.

A Better Approach

A better approach to the law of defamation would be for *New York Times* to be read narrowly, requiring only public officials to prove actual malice. Courts should apply the *Gertz* requirements of fault, in the form of negligence and actual damages, to all other types of defamation.¹⁶⁵ This approach would, of course, require the

Yasser, *Defamation as a Constitutional Tort: With Actual Malice For All*, 12 TULSA L.J. 601 (1977).

161. *Gertz*, 418 U.S. at 342.

162. *Id.*

163. *See Gertz*, 418 U.S. at 342-43.

164. *New York Times*, 376 U.S. at 270-80; *see also supra* note 90 and accompanying text.

165. By allowing the states to define for themselves the appropriate standard of liability, short of the liability without fault, the *Gertz* Court clearly approved an option to erect a negligence standard with the duty of care based on the reasonable man. *Gertz*, 418 U.S. at 345-46.

The *Gertz* Court also eradicated the common law's ancient presumption of injury for defamatory statements actionable *per se*. *Id.* at 349. The presumption of injury, the Court concluded "is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss," and it "invites juries to punish unpopular opinion." *Id.* Therefore, the Court held that plaintiffs who establish

Court to repudiate the distinctions that formed the basis of the *Gertz* reasoning.¹⁶⁶ Judged in light of the unforeseen difficulties in the application and reach of the decision, however, reexamination is warranted.¹⁶⁷ A narrow reading of *New York Times* would eliminate all the absurd distinctions, complexities, and inconsistent rulings. No longer would judges have to make *ad hoc* decisions in every case to determine the applicable standard.

However appealing *New York Times*' partial resolution of the conflict between interests might be, once it is extended to new situations, there is no way of preventing its expansion to practically the whole field of injurious falsehood. At the same time, it does not appear that the Court or our society is prepared to abandon its concern for the protection of the individual's reputation.¹⁶⁸ The only way to accommodate the conflicting interests in a manner that is socially acceptable and constitutionally permissible, therefore, is to narrowly read *New York Times* and to generalize the *Gertz* negligence and actual damage solution.

There are many who may regret this resolution, Justice Brennan included, but no single theory completely explains the many principles underlying the first amendment, and defamation law desperately needs restructuring.¹⁶⁹ The variety of doctrines implicating freedom of expression — defamation, obscenity, and privacy, among others — makes it impossible to give the first amendment a single meaning.¹⁷⁰ Nevertheless, most courts and commentators agree that,

liability on a less demanding standard than *New York Times* can only recover compensation for actual injury. *Id.* at 349-50. *But see* *Time, Inc. v. Firestone*, 424 U.S. 448 (1976). In *Firestone*, the plaintiff conceded before trial that the alleged defamatory publication did not injure her reputation. *Firestone*, 424 U.S. at 460. The Court, however, allowed recovery of compensatory damages. *Firestone*, 424 U.S. at 460-61.

166. For example, the public figure/private distinction would have to be repudiated although the Court relied on the distinction to allow differing levels of protection. *See Gertz*, 418 U.S. at 345-46.

167. *See Mississippi River Fuel Corp. v. United States*, 314 F.2d 953, 958 (1963) (Davis, J., concurring). Mindful of the homage due the principle of *stare decisis*, Judge Davis stated that:

A court should not scrutinize its own prior ruling — putting constitutional adjudication, which has its own standards, to one side — merely because, as now constituted, it might have reached a different result at the earlier time. Something more is required before a reexamination is to be undertaken: (a) a strong, even if not yet firm, view that the challenged precedent is probably wrong; . . . (d) unforeseen difficulties in the application or reach of the earlier decision; or (e) inconsistencies in the court's own rulings in the field. 314 F.2d at 958. *See also Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974) (repudiating the underlying basis that formed the *Rosenbloom* public interest test).

168. Christie, *Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches*, 75 MICH. L. REV. 43, 66 (1976).

169. *See Frakt, Defamation Since Gertz v. Robert Welch, Inc.: The Emerging Common Law*, 10 RUT. CAM. L.J. 519 (1979) (proposals for a more uniform law of defamation).

170. *See, e.g., Schauer, Categories and the First Amendment: A Play in Three*

whatever else may lie at the core of the first amendment, political speech rests there.¹⁷¹ Indeed, political speech is "the central meaning" of the first amendment,¹⁷² and the only meaning to which the *New York Times* standard should apply.

Limiting *New York Times* to public officials would not eliminate all the problems facing the tort of defamation. However, it provides a uniform application of the constitutional privilege by eliminating many of the absurd distinctions, while protecting speech which is at the core of the first amendment.¹⁷³ No logical reasons support the notion that legally relevant distinctions exist among victims of defamation or among publishers of defamation.¹⁷⁴ If these distinctions are abolished, the tort of defamation would be stripped of many of the inconsistencies and perverse rigidities which made the common law of defamation absurd in theory and mischievous in practical application.¹⁷⁵ The tort would no longer contain the anomalies and absurdities for which no legal writer ever has had a kind word.¹⁷⁶

Instead, with the exception of public officials, the tort of defamation should be governed by negligence principles. Courts should erect a negligence standard with the duty of care based on the reasonable man or the "reasonably prudent publisher."¹⁷⁷ A publisher would only be held liable on a showing of unreasonable conduct departing from the standard of care ordinarily adhered to by a reason-

Acts, 34 VAND. L. REV. 265, 276-77 (1981); Note, *Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Nonmedia Defendants*, 95 HARV. L. REV. 1876, 1878 (1982).

171. Note, *supra* note 170, at 1878, see also Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CALIF. L. REV. 107, 139-42 (1982) (use of diagrams to illustrate centrality of political speech).

172. See *New York Times*, 376 U.S. at 269-76. Justice Brennan fashioned his first amendment theory around the importance of public discussion and free debate of political issues. *Id.*

173. See *supra* notes 121-59 and accompanying text.

174. See *Gertz*, 418 U.S. at 361-69 (Brennan, J., dissenting); *Dun & Bradstreet*, 105 S. Ct. at 2954-61 (Brennan, J., dissenting); see also Yasser, *supra* note 32, at 625. But see Stewart, "Or of the Press," 26 HASTINGS L.J. 635 (1975) (different levels of protection guaranteed by the "speech" and "press" clauses); Note, *First Amendment Protection Against Libel Actions: Distinguishing Media and Nonmedia Defendants*, 47 S. CAL. L. REV. 902 (1974) (constitutional privilege should be different for each group).

175. Yasser, *supra* note 32, at 625.

176. See W. PROSSER AND W. KEETON, *PROSSER AND KEETON ON THE LAWS OF TORTS*, 111 (5th ed. 1984).

177. See, Christie, *supra* note 168, at 66. See also Eaton, *supra* note 10, at 1426. In *Curtis Publishing Co.*, Justice Harlan proposed the following test for public figures which was somewhat of a lesser hurdle than *New York Times*: "a 'public figure' who is not a public official may . . . recover . . . on a showing of highly unreasonable conduct constituting of extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Curtis Publishing Co.*, 388 U.S. at 155.

ably prudent person under similar circumstances.

Adopting a negligence approach across the board would eliminate unwarranted presumed and punitive damage awards, an oddity of tort law.¹⁷⁸ Thus, a plaintiff could recover only for actual injury, proven by a preponderance of the evidence. In light of the first amendment concern, punitive damages would only be awarded on a showing of willful and wanton misconduct.¹⁷⁹ If a plaintiff could not demonstrate injury, he could at least obtain a judgment to clear his name and nominal damages. Defendants, however, would not be "chilled"¹⁸⁰ and would only have to show that they acted reasonably in order to avoid liability. A negligence approach adequately accommodates the reputational interest of the individual while it allows the first amendment interest breathing space in which to operate.

Moreover, implementing the negligence approach would give defamation law predictability, which has long been lacking. Judges, tort professors, lawyers and litigants are all aware of negligence principles. Applying the negligence theory across the board, with the exception of public officials, would be easy to implement. No matter whom the plaintiff is, whom the defendant is, or what type of speech involved, the essential question focuses on the reasonableness of the questioned conduct. Furthermore, lawyers and clients will know what they are up against before starting the expensive litigation process. Defamation law's doubts and difficulties, and its meaningless and grotesque anomalies, would finally be disposed of.

CONCLUSION

The law in the area of injury to reputation is on the verge of chaos. The Supreme Court's attempt to eliminate the confusion have invariably increased it.¹⁸¹ The underlying reason for these difficulties is rooted in the fundamental assumption of *New York Times* that, by employing a balancing process, it is possible to have different standards of liability depending on who is involved or on what is involved. The result has been to put tremendous pressure on the fact-finding process, which is asked to make largely subjective determinations, such as who is a public figure and what speech is of public concern.

178. See *Gertz*, 418 U.S. at 349.

179. In the last few years, both the number of libel suits and the size of the resulting judgments have increased dramatically. Note, *Punitive Damages and Libel Law*, 98 HARV. L. REV. 847, 847 (1985). For a discussion of punitive damages, see Ellis, *supra* note 71. See also W. PROSSER AND W. KEETON, *supra* note 1, at 845.

180. In constitutional law, any law or practice which has the effect of seriously discouraging the exercise of a constitutional right, i.e. free speech, has been defined as having a chilling effect. BLACK'S LAW DICTIONARY, 217 (5th ed. 1979).

181. See *supra* notes 120-59 and accompanying text.

Although applying *New York Times* across the board, as Justice Brennan advocates, has some value in that it would give defamation law a sense of predictability, it would inadequately serve the reputational interest. The most feasible option to remedy the confusion is to apply the *Gertz* requirements of fault, in the form of negligence and actual damages, to all types of defamation, with the exception of public officials. Public figures ought not to be distinguished from private people and media defendants ought not to be distinguished from nonmedia defendants.¹⁸² The simple truth is that one's legal rights and obligations ought not to depend on one's status as a "public figure" or as a "media" defendant.

A narrow reading of *New York Times* requiring only public officials to prove actual malice and applying a negligence approach to all other defamation actions would adequately accommodate the competing interests. It is socially acceptable and would be easy to implement. In addition, it would provide defamation law with a sense of predictability and eliminate many of the doubts and difficulties. As a practical matter, negligence approach is a more rational approach to the tort of defamation; it provides guidance in finding a way out of the maze.

Terrence P. McAvoy

182. See *supra* notes 120-59 and accompanying text.

