Constitutional Law - First Amendment - Freedom of Speech and Press - New York Times Standard Is Inapplicable to a Defamed Individual Who Is Neither a Public Official nor a Public Figure, and Only Actual Injury is Compensable Absent Showing of Actual Malice

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RECENT DEVELOPMENTS

CONSTITUTIONAL LAW — FIRST AMENDMENT — FREEDOM OF SPEECH AND PRESS — NEW YORK TIMES STANDARD IS INAPPLICABLE TO A DEFAMED INDIVIDUAL WHO IS NEITHER A PUBLIC OFFICIAL NOR A PUBLIC FIGURE; AND ONLY ACTUAL INJURY IS COMPENSABLE ABSENT SHOWING OF ACTUAL MALICE.

Gertz v. Robert Welch, Inc. (U.S. 1974)

As part of a continuing effort to expose a purported nationwide Communist conspiracy to harass and discredit local law enforcement officials, respondent Robert Welch published in his monthly periodical American Opinion an article which contended that Chicago policeman Richard Nuccio had been falsely convicted of murder in the shooting death of Ronald Nelson. In the article, petitioner Elmer Gertz, who had represented Nelson's family at the coroner's inquest and at trial in civil litigation against Nuccio, was described as "Vice President, of the Communist National Lawyers Guild,"2 a "Leninist,"3 and a "Communist-fronter."4

Petitioner filed a diversity action for libel in the United States District Court for the Northern District of Illinois, alleging that the statements published by respondent were false and had damaged his reputation in the community.5 Ruling that the statements were libelous per se under Illinois law,6 the trial court withdrew all issues from the jury except that of dam-

2. Id. at 6.
3. Id. at 12.
4. Id. at 17. Furthermore, a picture of the petitioner with the caption "Elmer Gertz of Red Guild harasses Nuccio" was included in the article. Although petitioner was described in this manner, his role in the Nuccio affair was not the focus of the article. The trial court characterized the main theme of the article as:
   [M]ore general and far reaching than just the trial of one Chicago policeman for murder. Instead, it painted the picture of a conspiratorial war being waged by the Communists against the police in general. Caught up in the web of the alleged conspiracy, aside from Gertz, was such a disparate cast of characters as the Lake View Citizens Council, the Walker Report, a Roman Catholic priest, and the Chicago Seed (an underground newspaper). In fact, although Gertz's picture was displayed in the body of the article, he did not play a very prominent role in the article's expose of the purported war on police.
6. Id. at 311. In the majority of jurisdictions, a libel per se is a written publication of false words which by their plain and ordinary meaning, are injurious on their face without resort to innuendo or extrinsic facts to convey the defamatory meaning
Although the jury assessed petitioner's damages at $50,000, the court granted respondent's motion for judgment n.o.v. The Court of Appeals for the Seventh Circuit affirmed the decision. On writ of certiorari, the United States Supreme Court reversed and remanded for a new trial, holding that in an action for libel: 1) states may define their own standard of care to be applied in cases involving defamatory statements about a person who was neither a public official nor a public figure, even though the statements concerned an issue of public or general concern; 2) compensation to defamed persons must be limited to the actual injury suffered; and 3) presumed and punitive damages could not be awarded absent proof of actual malice.


See W. Prosser, HANDBOOK OF THE LAW OF TORTS § 112, at 763–64 (4th ed. 1971). In such a case, "the existence of damage [is] conclusively assumed from the publication of the libel itself, without other evidence that there [is] any damage at all." Id. at 762.

Early Illinois cases had held that falsely characterizing a person as a Communist was libel per se. See Spanel v. Pegler, 160 F.2d 619, 622 (7th Cir. 1947); Dilling v. Illinois Publish. and Print. Co., 340 Ill. App. 303, 305, 91 N.E.2d 635, 636 (1950). However, later Illinois appellate court decisions narrowed the definition of libel per se where extrinsic facts were necessary to make out the defamatory meaning conveyed. See Coursey v. Greater Niles Township Publish. Corp., 82 Ill. App. 2d 76, 81–82, 227 N.E.2d 164, 167 (1967); Whitby v. Associates Discount Corp., 59 Ill. App. 2d 337, 340–41, 207 N.E.2d 482, 485 (1965). To be actionable where extrinsic facts are utilized, the libel must fall into one of four categories: 1) those imputing the commission of a criminal offense; 2) those imputing a loathsome disease; 3) those affecting a particular party in his profession, business, or trade; or 4) those imputing unchastity to a woman. See W. Prosser, supra note 6, at 754–60, 763. See also Whitby v. Associates Discount Corp., supra, at 340–41, 207 N.E.2d at 484.

7. 322 F. Supp. at 998. The trial judge had previously concluded that even if the narrowed libel per se category was the present law in Illinois, plaintiff's complaint nonetheless establishes a per se case of defamation, for it meets the requirement that the challenged statements "prejudic[e] a particular party in his profession or trade." 306 F. Supp. at 311, quoting Whitby v. Associates Discount Corp., 59 Ill. App. 2d 337, 340, 207 N.E.2d 482, 484 (1965).

8. 322 F. Supp. at 1000 (N.D. Ill. 1970). Respondent asserted a constitutional privilege under New York Times v. Sullivan, 376 U.S. 254 (1964), which the court concluded should apply, since the defamatory article concerned an issue of public interest. Id. at 998–1000. Although this privilege may be defeated if the plaintiff establishes that the defendant published with actual malice, petitioner failed to make such a showing, and judgment n.o.v. was entered for respondent. Id. at 999–1000. See notes 12–14 and accompanying text infra.

9. Gertz v. Robert Welch, Inc., 471 F.2d 801 (7th Cir. 1972). Although the court of appeals found for the defendant, thus affirming the district court's decision, it disagreed with the district court's determination that petitioner was not a public figure. 471 F.2d at 805. The circuit court stated that petitioner's stature as a lawyer, author, lecturer, and participant in matters of public import undermine the validity of the assumption that he is not a "public figure" as the term has been used by the progeny of New York Times.

Id.

10. For a discussion of the types of injury that are compensable in defamation actions, see note 77 infra.

11. For a discussion of actual malice, see note 15 infra.
Before considering the impact and rationale of Gertz, the seminal decision of New York Times Co. v. Sullivan and several of its progeny must be examined. In New York Times, the Supreme Court, for the first time, applied a first amendment freedom of speech and press rationale to publications about public officials. Dispelling the belief that libel laws did not infringe upon first and fourteenth amendment rights, the Court stated that "libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." The Court then enunciated the following doctrine, which became known as the New York Times standard:

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.

12. 376 U.S. 254 (1964). Defendant New York Times published an advertisement entitled "Heed Their Rising Voices" on behalf of the Committee to Defend Martin Luther King and the Struggle for Freedom in the South. Id. at 256-57. The advertisement attempted to raise money for King's defense fund while depicting police brutality towards the civil rights movement; however, the publication contained false statements. Id. at 258. While the publication only mentioned the word "police" and did not mention plaintiff by name, plaintiff alleged that the word "police" referred to him since he was commissioner in charge of police activities. Id. Affirmance of a damage award by the Supreme Court of Alabama was reversed by the United States Supreme Court. Id. at 264, 292.


14. 376 U.S. at 269.

15. Id. at 279-80. Although the New York Times Court adopted the term actual malice, which at common law meant feelings of hatred, spite, corrupt motives, or ill will, it employed the term in a different manner. See Hadlen, Character of Belief Necessary for the Conditional Privilege in Defamation, 25 ILL. L. REV. 865, 865-67 (1931). The Court stated that actual malice must be proved with "convincing clarity," but did not establish any meaningful guidelines to assist plaintiffs in meeting their burden of proof or to assist judges in properly instructing juries. 376 U.S. at 285-86.

Two subsequent Supreme Court decisions have provided some help in defining the parameters of "actual malice." In Garrison v. Louisiana, 379 U.S. 64 (1964), the Court stated that "only those false statements made with the high degree of awareness of their probable falsity" would meet the New York Times actual malice standard. Id. at 74.

In St. Amant v. Thompson, 390 U.S. 727 (1968), the Court, after noting that actual malice "cannot be fully encompassed in one infallible definition," 390 U.S. at 730, stated:

[It is] clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

Id. at 731. The Court then announced several objective criteria to aid in determining whether defendant's publication of the alleged defamatory statements evinced actual
In adopting this doctrine, the Court acknowledged the problem of balancing society's interest in maximizing first amendment freedoms of speech and press with the individual's interest in minimizing injury to his reputation caused by false statements. However, the Court also recognized that "self censorship" would follow from forcing a publisher to guarantee the truthfulness of his statements. Consequently, in the case of public officials, the Court declared that any standard of proof less than actual malice would result in suppression of both falsehoods and worthwhile statements, and thus be constitutionally impermissible.

Although the New York Times Court established a constitutional privilege for defamation, it did not delineate the scope of the privilege. It was not until Rosenblatt v. Baer that the Court defined public officials as those "governmental employees who have, or appear to the public to have, substantial responsibility for control over the conduct of governmental affairs." As to whether the privilege applied to defamation of other than public officials, the Supreme Court has successively expanded the scope of the New York Times doctrine.

malice or reckless disregard: actual malice could be found if the statement "[was] fabricated by the defendant, [was] the product of his imagination, [was] based wholly on an unverified anonymous telephone call," or "where there [were] obvious reasons to doubt the veracity of the informant or the accuracy of his reports." (footnote omitted). See generally Comment, Calculated Misstatements of Fact Not Protected by First Amendment Guarantees of Free Speech and Press, 1969 Utah L. Rev. 118.

16. See 376 U.S. at 267-70.
17. 376 U.S. at 279.
18. Id.
19. See notes 13 & 14 and accompanying text supra.
20. 376 U.S. at 283 n.23.
22. Id. at 83 (footnote omitted). Plaintiff, a former county recreation supervisor, alleged that a newspaper column contained defamatory falsehoods concerning his handling of finances as supervisor of a ski resort. Id. at 77-79. The Supreme Court of New Hampshire, in affirming the trial court's damage award, held the New York Times standard inapplicable. Baer v. Rosenblatt, 106 N.H. 26, 203 A.2d 773 (1964). The United States Supreme Court reversed, and remanded the case to the state court with instructions that it hear new evidence to determine whether plaintiff was a public official. Id. at 86-88. The fact that plaintiff was no longer in public office when the statement was published was not held controlling when the matter was still of public interest. Id. at 87 n.14. However, the Court stated:

[T]here may be cases where a person is so far removed from a former position of authority that comment on the manner in which he performed his responsibilities no longer has the interest necessary to justify the New York Times rule.

Id.

In the following cases, the individuals involved were either implicitly or explicitly held to be public officials: Time, Inc. v. Pape, 401 U.S. 279 (1971) (Chicago deputy chief of police detectives); Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) (candidates for elective public office); Pickering v. Board of Education, 391 U.S. 563 (1968) (members of local schoolboard); St. Amant v. Thompson, 390 U.S. 727 (1968) (local deputy sheriff); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967) (county clerk).
In *Time, Inc. v. Hill,* 23 the Court applied the *New York Times* standard to an action under a right of privacy statute, 24 concluding that the statute conflicted with the constitutional guarantees of speech and of the press. As the Court stated:

We have no doubt that the subject of the Life article, the opening of a new play linked to an actual incident, is a matter of public interest. . . . Erroneous statement is no less inevitable in such a case than in the case of comment upon public affairs, and in both, if innocent or merely negligent, "... it must be protected." 25

Nevertheless, Justice Brennan, who wrote for the majority, cautioned that *Hill* was a right of privacy action and not a libel action. 26 But the readiness of the Court to look to the public interest of the subject rather than to the status of the individuals logically led to the application of the public interest test to libel actions. 27

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23. 385 U.S. 374 (1967). In 1952, Hill and his family were held hostage in their home for nineteen hours by escaped convicts, before being released unharmed. *Id.* at 378. Three years later, *Life* magazine falsely stated that a new Broadway play reenacting the Hill family's experience was opening soon. *Id.* at 377. Plaintiff Hill sued under New York's right of privacy statute and was awarded compensatory damages by the court. *Id.* at 376 & n.1, 378-79. The New York Court of Appeals affirmed, *Time, Inc. v. Hill,* 15 N.Y.2d 986, 207 N.E.2d 604, 260 N.Y.S.2d 7 (1965). On writ of certiorari, the United States Supreme Court reversed and held the *New York Times* standard applicable. 385 U.S. at 387-88.

24. The statute provides in pertinent part:

§ 50. Right of privacy.
A person, firm or corporation that uses for advertising purposes, or for the purpose of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

§ 51. Action for injunction and for damages.
Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages.


25. 385 U.S. at 388.

26. Justice Brennan added that:
Were this a libel action, the distinction which has been suggested between the relative opportunities of the public official and the private individual to rebut defamatory charges might be germane. And the additional state interest in the protection of the individual against damage to his reputation would be involved.

*Id.* at 391.

In *Curtis Publishing Co. v. Butts*\(^\text{28}\) and its companion case, *Associated Press v. Walker*,\(^\text{29}\) the Supreme Court tergiversated from the approach used in *Hill* and focused on the status of the defamed individual. Although the Court agreed that constitutional protection should be extended to defamatory statements concerning public figures as well as public officials, no majority could agree on a controlling rationale concerning the extent of that protection. However, five Justices, in three separate opinions, urged application of the *New York Times* standard to all cases involving public figures;\(^\text{30}\) the remaining four Justices applied a restricted *Times* standard to such cases.\(^\text{31}\)

Announcing the judgments of the Court, Justice Harlan expounded the rule adopted by a minority of the Court.\(^\text{32}\) He stated that:

> [T]he rigorous federal requirements of *New York Times* are not the only appropriate accommodation of the conflicting interests at stake. . . . [A] "public figure" who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.\(^\text{33}\)

\(^{28}\) 388 U.S. 130 (1967). In *Butts*, plaintiff, an athletic director of the University of Georgia, alleged that the *Saturday Evening Post* falsely reported that in a telephone conversation with University of Alabama football coach Paul Bryant, he had given information to Bryant which was to result in a "fix" of an upcoming game between the two schools. *Id.* at 135-37. Although a jury verdict resulted in judgment for plaintiff of $60,000 general damages and $3,000,000 punitive damages, on remittitur, the judgment was reduced to $400,000. *Curtis Publishing Co. v. Butts*, 225 F. Supp. 916, 920 (N.D. Ga. 1964), aff'd 351 F.2d 702 (5th Cir. 1965), aff'd 388 U.S. 130 (1967).

\(^{29}\) 388 U.S. 130 (1967). In *Walker*, plaintiff, a retired army general, instituted a defamation action against Associated Press, alleging that Associated Press misstated his participation in riots which had occurred on a college campus. *Id.* at 140-41. The news dispatch stated that Walker had advised the crowd to use violence and that he had led them in a charge against federal marshals. *Id.* at 140. Even though a verdict was returned in favor of plaintiff for $500,000 compensatory damages and $300,000 punitive damages, the trial court judge refused to enter judgment for the punitive damages because there was no evidence of actual malice. *Id.* at 140-41. Although the Texas Court of Civil Appeals affirmed, *Associated Press v. Walker*, 393 S.W.2d 671 (Tex. Civ. App. 1965), the United States Supreme Court reversed. 388 U.S. at 142. See generally *Note, The Constitutional Law of Defamation and Privacy: Butts and Walker*, 53 CORNELL L. REV. 649 (1968).

\(^{30}\) The three opinions were filed by Chief Justice Warren, Justice Black joined by Justice Douglas, and Justice Brennan joined by Justice White. 388 U.S. at 162, 170, 172.

\(^{31}\) Justice Harlan, joined by Justices Clark, Stewart, and Fortas, espoused this viewpoint. *Id.* at 133.

\(^{32}\) An opinion joined by a minority of the Court is not within the rule of stare decisis. *E.g.*, 21 C.J.S. COURTS § 189(a) (1940).
Refusing to accept Justice Harlan's standard, Chief Justice Warren advocated that an unrestricted *New York Times* standard should be applied to all public figures. This rule was adopted by a majority of the Court.

In *Rosenbloom v. Metromedia, Inc.*, the Supreme Court returned to the *Hill* analysis and considered the public interest of the subject matter rather than the status of the participants. The plurality of the Court observed that *New York Times* and the decisions following it concerned discussion of events which were of public interest, despite the fact that the participants in those events were public officials, public figures, or private individuals. Characterizing the distinction between these categories as artificial, the Court stated that the public's right to know about a certain event should depend on whether it was "a matter of public or general interest." Therefore, the Court extended "constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are"

34. Id. at 164 (Warren, C.J., concurring). Nevertheless, Chief Justice Warren concurred in both results because, after applying the *Times* standard, he concluded that Butts was able to prove actual malice whereas Walker was not.

35. Justice Black and Justice Douglas dissented in *Butts*, but concurred in *Walker* "in order for the Court to be able at this time to agree on [a disposition of] this important case based on the prevailing constitutional doctrine expressed in *New York Times Co. v. Sullivan,*" 388 U.S. at 170 (Black, J., concurring in *Walker* and dissenting in *Butts*), quoting *Time, Inc. v. Hill*, 385 U.S. 374, 398 (1967) (Black, J., concurring). However, they still adhered to the view "that the First Amendment was intended to leave the press [absolutely] free from the harassment of libel judgments." 388 U.S. at 172.

Justice Brennan and Justice White concurred in *Walker* and dissented in *Butts*. Id. (Brennan, J., concurring in *Walker* and dissenting in *Butts*). They agreed with Chief Justice Warren that the *New York Times* standard should apply to public figures; however, they concluded that neither Walker nor Butts had proved actual malice.

36. 403 U.S. 29 (1971). In *Rosenbloom*, plaintiff, a distributor of nudist magazines, was arrested twice on obscenity charges. *Id.* at 32–33. Alleging that the magazines were not obscene, plaintiff subsequently filed suit against city officials to enjoin the police from further interfering with his business. *Id.* at 34. Defendant's radio station aired a broadcast about the legal action, referring to plaintiff and two other publishers as "girllie book peddlers" and characterizing the suit as an attempt to get the police "to lay off the smut literature racket." *Id.* at 34. However, plaintiff was not mentioned by name. *Id.* After plaintiff was acquitted on obscenity charges, he instituted a libel suit against Metromedia. *Id.* at 36. The trial judge failed to hold the *New York Times* standard applicable. See *id.* at 39–40. Finding for the plaintiff, the jury awarded $25,000 general damages and $725,000 punitive damages, which was reduced to $250,000 on remittitur. *Id.* at 40. Although Metromedia filed for judgment n.o.v., it was denied. George Rosenbloom v. Metromedia, Inc., 289 F. Supp. 737 (E.D. Pa. 1968). Reversing the trial judge's denial of judgment n.o.v., the Court of Appeals for the Third Circuit held the *Times* standard applicable despite the fact that plaintiff was neither a public official nor public figure. George A. Rosenbloom v. Metromedia, Inc., 415 F.2d 892, 896 (3d Cir. 1969). The Supreme Court affirmed, 403 U.S. at 57.

37. Justice Brennan wrote the opinion, joined by Chief Justice Burger and Justice Blackmun. Justice Black and Justice White wrote separate opinions concurring in the result. For a discussion of what effect a plurality opinion has, see note 32 supra.

38. 403 U.S. at 44.

39. *Id.* at 41.
famous or anonymous."

1 The Rosenbloom Court reasoned that, by affording constitutional protection on the basis of whether a matter was of public or general concern, both the public interest in protecting first amendment freedom of speech and of the press and the private interest in protecting the individual's reputation would be better served. Nevertheless, this constitutional protection would be lost if the plaintiff proved the publication was made with actual malice.

Justice Harlan dissented, expressing the view that in cases not involving a public official or public figure, the plaintiff should prove at least negligence on the part of the defendant in publishing the alleged defamatory statements. He also advocated that the plaintiff prove actual damages as a requisite for recovery, with damages limited to those which were reasonably foreseeable upon publication. However, if plaintiff could prove that the defendant published with actual malice, Justice Harlan would allow recovery of punitive damages where "the amount of punitive damages awarded bears a reasonable and purposeful relationship to the harm done."

In a separate dissenting opinion, Justices Marshall and Stewart, as did Justice Harlan, espoused adoption of a standard requiring proof of at least negligence in publication of defamatory statements. Although they would have permitted recovery for actual losses, Justices Marshall and Stewart, unlike Justice Harlan, rejected allowance of punitive damages.

The minority views of Justices Harlan, Marshall, and Stewart in Rosenbloom have been of tremendous import. With the change in the personnel of the Supreme Court, and with Justice Blackman's especially strong belief in the need for a majority position, these views coalesced to form the majority rationale in Gertz.

Writing for the majority in Gertz, Justice Powell began by recognizing that coextensive with society's interest in protecting some defamatory statements, in order to avoid censorship of the news media, was the
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state interest in compensating defamed individuals for actual injury suffered because of those statements. Then returning to the Butts approach, the Court distinguished between public officials and public figures on the one hand, and private individuals on the other. The Gertz majority reaffirmed the applicability of the New York Times standard in suits involving public officials and public figures, but refused to apply that rigorous standard in actions concerning private individuals.

The Court weighed society’s interest in an uninhibited press against the competing state interest in compensating defamed individuals for injury to their reputations. In concluding that the state interest was more compelling, the Court considered two factors to be determinative. First, the Gertz Court noted that private individuals, unlike public officials or public figures, lacked access to the media to rebut defamatory falsehoods and redress injury to their reputations. Therefore, private individuals were more vulnerable to injury and the state interest in protecting their reputation was greater. Second, the Court posited that public officials and public figures “have voluntarily exposed themselves to increased risk of injury from defamatory falsehoods concerning them.” Public officials accepted closer public scrutiny by seeking office and public figures invited attention and comment by the nature of their activities. On the other hand, private individuals neither sought office nor thrust their personality “into the ‘vortex’ of an important public controversy.” Therefore, the Court concluded that the need of private individuals to be compensated for injury caused by defamatory statements was greater and that such individuals were more deserving of recovery.

Since private individuals were more vulnerable to injury and were more warranted in recovering, the Court determined that the state interest outweighed society’s interest. The Court reasoned that the New York Times standard would deleteriously affect this legitimate state interest, and thus refused to apply it. Rather, the responsibility was conferred upon the states to define a standard of liability, as long as it was not liability without fault, to be applied to publishers of defamatory statements injurious to private individuals.

The Gertz Court refused to abjure the distinction between public officials, public figures, and private individuals, and declined to apply the

54. Id. at 341-42.
55. Id. at 343.
56. Id.
57. Id. at 344.
58. Id.
59. Id. at 345.
60. Id.
62. 418 U.S. at 345.
63. Id. at 346.
64. Id. at 347-48.
Rosenbloom public or general interest test. Repudiation by the Court of the rationale advanced by the plurality in Rosenbloom was based on two considerations. First, the Court stated that the extension of the Times standard to matters of public or general interests would adequately serve neither the state's nor society's interest. On one hand, extending the Times rule would afford insufficient rights to the states to enforce a legal remedy for defamed private individuals. Under the Times standard, the meritorious claim of a defamed private individual would go uncompensated if he failed to demonstrate by clear and convincing evidence that the publication was made with actual malice. The Court found this impermissible, given the greater state interest in protecting the individual. On the other hand, the Court reasoned that extending the Times rule would produce media self-censorship. If a publisher's defamatory statement was found not to concern an issue of public or general interest, he would be liable for both general and punitive damages, despite the care he took to insure the veracity of the statements. To avoid liability, the news media would refrain from publishing anything which they determined might subject them to potential liability; this, the Court reasoned, would result in media self-censorship and thus, be impermissible.

Second, the extension of the Times standard to matters of public or general concern would force state and federal judges to determine on an ad hoc basis what issues are of general or public interest. As stated by Justice Marshall in his dissent in Rosenbloom:

[C]ourts are not simply to take a poll to determine whether a substantial portion of the population is interested or concerned in a subject, courts will be required to somehow pass on the legitimacy of interest in a particular event or subject.

The biases and prejudices of the judges could color their determination of matters of public interest, and the popularity or unpopularity of the issue could also influence their determination. The Gertz majority doubted "the wisdom of committing this task to the conscience of judges." Even though the Court had the opportunity to determine matters of public or general interest, the majority decided that any ad hoc determination would result in uncertainty for both private individuals and the news media.

The Court feared the jury's rather uncontrolled discretion to award damages far in excess of any actual injury. Therefore, unless the defamed individual proved that the publication was made with actual malice, pre-

65. See notes 36-41 and accompanying text supra.
66. 418 U.S. at 346.
67. Id.
68. Id.
69. See id. at 346, 348.
70. Id. at 346.
71. 403 U.S. at 79 (Marshall, J., dissenting).
72. 418 U.S. at 346.
73. Id.
sumed or punitive damages were not recoverable. Presumed damages "invite juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact." Punitive damages function as "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." Also, both presumed and punitive damages would result in a windfall for the plaintiff. Unless presumed damages and punitive damages were eliminated, and actual injury made a prerequisite to recovery, restriction of first amendment freedoms of speech and of the press would result.

Although the Court refused to extend the New York Times standard to private individuals, the respondent claimed that petitioner Gertz was either a public official or a public figure. Consequently, the respondent contends that the Times standard should still apply. Respondent argued that though Gertz did not hold any governmental office when the defamatory statements were made, his appearance at the coroner’s inquest made

74. Id. at 349–50. Since the Supreme Court’s decision in Gertz, several courts have faced the issue of whether punitive damages are recoverable in the case of a public figure where actual malice is established. In Maheu v. Hughes Tool Co., 384 F. Supp. 166 (C.D. Cal. 1974), after a bifurcated trial, the jury found for the plaintiff, on the issue of liability. Id. at 168. On the issue of damages, defendant tool company filed a motion for partial summary judgment pursuant to Fed. R. Civ. P. 56(a), challenging the constitutionality of awarding punitive damages to a public figure. Id. The court held that the first amendment precluded recovery of punitive damages in public figure defamation cases; therefore, section 3294 of the California Civil Code, CAL. CIV. CODE § 3294 (West 1970), insofar as it authorized punitive damages, was unconstitutional. Id. at 173–74. As the court stated:

Because it would be difficult to objectively supervise the exercise of the jury’s discretion in this tender First Amendment area and because unlimited, discretionary awards of punitive damages do not narrowly and necessarily promote the special state interest to protect the reputation and privacy of public figures from special dangers flowing from highly malicious tortious defamation, i.e., the greater probability that harm will be inflicted and that the magnitude of the harm will be larger, this court concludes that the First Amendment precludes plaintiff’s recovery of punitive damages.

However, in Davis v. Schuchat, 510 F.2d 731 (D.C. Cir. 1975), the court allowed punitive damages where actual malice was proven. The court rejected the defendant’s argument that punitive damages were unconstitutional, stating that their reading of the majority opinion in Gertz allowed punitive damages if the New York Times actual malice standard was met. See Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970) (mental and physical health of Presidential candidate Barry Goldwater) (although the case was decided before Gertz, the circuit court considered punitive damages allowable in public official defamation cases where actual malice was established; id. at 340–41).

75. 418 U.S. at 349.
76. Id. at 350. For examples of cases wherein courts have determined that jury awards of punitive damages were excessive, see notes 29 & 36 supra.
77. The Supreme Court did not define the parameters of actual damage, leaving it to the trial courts to frame appropriate instructions in defamation actions. However, the Court did say that actual injury was "not limited to out-of-pocket loss," and may include "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." 418 U.S. at 349–50.
him a "de facto public official." The Court rejected this argument, stating that prior cases did not recognize any such concept. Furthermore, if respondent's argument had been accepted, severe distortion of the definition of public officials would have resulted.

Respondent also argued that petitioner Gertz was a public figure. Because Gertz had been active in local civic groups and professional organizations, and had authored several books and articles, respondent urged that Gertz had achieved national prominence, and thus, was a public figure. Refuting this argument, the Court stated that if an individual gained "persuasive fame or notoriety," he may be a public figure for "all purposes and in all contexts." Here, however, Gertz had not achieved any national prominence. The respondent further argued that petitioner's involvement in the Nuccio affair had made him a public figure. In rejecting this argument, the Court stated that if an individual "voluntarily injects himself or is drawn into a particular public controversy," he may be a public figure for "a limited range of issues." Here, however, Gertz had participated in the coroner's inquest only to the extent of representing his client. He took no part in Nuccio's criminal prosecution, nor did he speak to the news media about the criminal or civil litigation against Nuccio. Hence, the Court deemed the petitioner a private individual for purposes of the law of defamation.

79. Id.
80. Id.
81. Id.

82. Since the Supreme Court had not defined public figure in Butts, the lower courts have fashioned their own guidelines for determining whether an individual is a public figure. To be a public figure, an individual must be a nationally prominent person, Walker v. Courier-Journal and Louisville Times Co., 246 F. Supp. 231, 233-34 (W.D. Ky. 1965), rev'd on other grounds, 368 F.2d 189 (6th Cir. 1966); or the individual must have voluntarily thrust himself into a discussion on issues of public interest, Pauling v. Globe-Democrat Co., 362 F.2d 188, 195, 197 (8th Cir. 1966), cert. denied, 388 U.S. 909 (1967). This definition has subsequently been adopted by the Supreme Court in Greenbelt Coop. Publish. Ass'n v. Bresler, 398 U.S. 6, 8-9 (1970).

83. See 418 U.S. at 351.
84. 418 U.S. at 351. Before the Supreme Court would deem an individual a public figure "for all purposes and in all contexts," clear evidence of the person's prominence or involvement in the affairs of society was required. Id. at 352. "We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes." Id.
85. Id. at 351.
86. Id.

87. Chief Justice Burger and Justices Douglas, Brennan, and White dissented separately. Taking a pragmatic approach, Chief Justice Burger viewed the law of defamation as having developed in a uniform manner consistent with a basic rationale in both the state and federal courts. 418 U.S. at 354 (Burger, C.J., dissenting). He, therefore, unlike the majority, would not have abandoned the previous development with respect to private individuals. Consequently, he would have reinstated the verdict of the jury and entered judgment on that verdict. Id. at 355 (Burger, C.J., dissenting).

Justice Douglas adhered to the belief, which he shared with the late Justice Black, that the news media should be absolutely immune from liability for defamation actions. Id. at 356 (Douglas, J., dissenting). See Dun & Bradstreet, Inc. v. Grove, Trustee, et al., 404 U.S. 898, 903-04 (1971) (Douglas, J., dissenting from denial of
Although the Court in *Gertz* has laid down broad rules of general applicability and has supposedly “come to rest in the defamation area,” this decision is subject to some criticism. First, the Court’s assertion that lack of access to the media to reply to defamatory statements justified refusal to extend the *New York Times* standard to private individuals was not founded on empirical data, and, as the majority acknowledged, “an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood.” Furthermore, in making this assertion, the Court failed to consider the justification elaborated in *New York Times* for establishing a constitutional privilege in defamation actions. That justification was to insure that “debate on public issues [w]ould be uninhibited, robust, and...
wide-open,” by giving “effect to the [First] Amendment’s function to encourage ventilation of public issues.” Access or lack of access to the media was not germane to this justification. Moreover, the problem of lack of access to the media might be rectified, as suggested by Justice Brennan, by the use of retraction and right of reply statutes.

In permitting the states to impose their own standards of liability where the defamatory statement “makes substantial danger to reputation apparent,” the Court subordinated the possibility of censorship to the state interest in protecting the reputations of defamed private individuals. The states may impose any standard of liability except liability without fault. If the state imposed an ordinary negligence standard, censorship of the media may result because of the difficulty in defining negligence. In dissenting Justice Brennan’s words, if this standard was adopted, the news media would be faced with “the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait.” However, if the state imposed a gross negligence standard, it is questionable whether

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90. 376 U.S. at 270.
92. Id. at 47 n.15. The right to reply argument has been substantially weakened since on the same day Gertz was decided, the Court held in Miami Herald Publish. Co. v. Tornillo, 418 U.S. 241 (1974), that a state cannot guarantee the right to reply. In Tornillo, plaintiff, a teachers’ collective bargaining agent, had been a candidate for the Florida House of Representatives. Id. at 243. When defendant publishing company criticized the plaintiff and his candidacy in its newspaper editorials, plaintiff sought to have defendant print his replies to the editorials pursuant to Florida’s right of reply statute, FLA. STAT. § 104.38 (1971). 418 U.S. at 243-44. Defendant refused to print the replies; thereafter, plaintiff brought suit under the statute seeking injunctive and declaratory relief and actual and punitive damages. Id. at 244. Defendant argued that the statute was unconstitutional. Id. at 245. The Circuit Court for Dade County held that the statute violated the first amendment guarantee of freedom of the press and was, therefore, unconstitutional. Miami Herald Publish. Co. v. Tornillo, 38 Fla. Supp. 80 (1972). The Supreme Court of Florida, upholding the statute, reversed. Miami Herald Publish. Co. v. Tornillo, 287 So. 2d 78 (Fla. 1973). In a unanimous opinion delivered by Chief Justice Burger, the United States Supreme Court held that the statute violated the first amendment guarantee of freedom of the press. 418 U.S. at 258. The Court held that “press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.” 418 U.S. at 256. Although Tornillo involved a statute which granted the right to reply only to a political candidate, its rationale could plausibly be applied to private individuals. Furthermore, the same rationale could be used to hold retraction statutes unconstitutional. 418 U.S. at 368 n.3 (Brennan, J., dissenting). See Comment, Reply and Retraction In Actions Against the Press for Defamation: The Effect Of Tornillo and Gertz, 43 FORDHAM L. REV. 223 (1974); Note, Vindication Of the Reputation Of a Public Official, 80 HARV. L. REV. 1730 (1967); Note, Conflict Within the First Amendment: A Right of Access to Newspapers, 48 N.Y.U.L. REV. 1200 (1973); Comment, The Right Of Reply: An Alternative To an Action For Libel, 34 Va. L. REV. 867 (1948).
94. See W. PROSSER, supra note 6, § 34, at 183-84.
95. 418 U.S. at 355 (Burger, C.J., dissenting).
RECENT DEVELOPMENTS

Censorship of the media would result. Although several courts have construed gross negligence "as requiring willful misconduct, or recklessness,"\textsuperscript{97} most courts consider that "gross negligence falls short of a reckless disregard of consequences. . . ."\textsuperscript{98} Although a gross negligence standard might differ from the \textit{New York Times} actual malice standard, a forceful argument could be made that a gross negligence standard would still afford sufficient first amendment space for free expression.

The possibility of these varying definitions of negligence may lead to lack of uniformity of the law between the states and result in a dilution of the freedoms of speech and of the press. Therefore, the Supreme Court may be required to forge a constitutional definition of negligence. In addition, since liability without fault is also difficult to define,\textsuperscript{99} the Court may also have to develop a constitutional definition of this concept.

The \textit{Gertz} Court refused to extend the \textit{New York Times} rule to matters of public or general interest because "this approach would lead to unpredictable results and uncertain expectations, and it could render [the Supreme Court's] duty to supervise the lower courts unmanageable."\textsuperscript{100} In making this statement the Court ignored the considerable number of lower court decisions which have articulated a definition of a matter of public or general concern.\textsuperscript{101} Furthermore, the Court failed to acknowledge its own ability to articulate standards which would better guide judges in determining what issues are of public or general interest. Instead of discarding the entire rationale of \textit{Rosenbloom},\textsuperscript{102} the Court might have tried to ameliorate the approach adopted therein. Then, when defamation cases did arise, judges could look to the guidelines established by the Supreme Court, as well as to the already sizeable body of case law, to determine issues of public interest.

Prior to \textit{Rosenblatt}, the objection to ad hoc determination by judges could have been made with respect to public officials.\textsuperscript{103} However, since the Court articulated a public official standard in \textit{Rosenblatt}, very few determination problems have occurred. A similar argument could be made by analogy with respect to public interest; if the scope of matters of public or general interest were articulated clearly, the Court's concern with ad hoc determination might have been abated.

Because the Court believed the state interest extended only to compensating defamed private individuals for actual injury, presumed or punitive damages were not recoverable absent a showing of actual malice as required in \textit{New York Times}. In effect, this eliminated recovery for all

\textsuperscript{97} W. Prosser, \textit{supra} note 6, § 34, at 183 (footnotes omitted).
\textsuperscript{98} \textit{Id.}
\textsuperscript{99} 418 U.S. at 379-80 (White, J., dissenting).
\textsuperscript{100} \textit{Id.} at 343.
\textsuperscript{102} 403 U.S. 29 (1971). See note 36 and accompanying text \textit{supra}.
\textsuperscript{103} 383 U.S. 75 (1966). See notes 21-22 \textit{supra}.
libels which were defamatory on their face, and all slanders which historically were actionable per se. To recover, the allegedly defamed individual must prove culpability on the part of the publisher, i.e., that the publisher acted either in negligence or in reckless disregard of the truth. In addition, he must prove actual injury to his reputation. Unfortunately, some of the effects of a defamatory statement are subtle and not capable of proof in court; therefore, an individual with a meritorious claim may not be fully compensated. Thus, the common law presumption of general damages may be necessary to compensate for the harm inflicted by the defamation.

According to the Gertz majority, punitive damages were a product of uncontrolled jury discretion; fear of exorbitant punitive damage awards led to self-censorship of the media. Therefore, the Court prohibited recovery of punitive damages, unless New York Times actual malice was shown; this achieved control over the jury's discretion while avoiding self-censorship of the media. This was a short-sighted view, however, for concomitant with the jury's discretion to award punitive damages is its ability to compensate for a broad range of actual injury. The Court did not attempt to restrain the jury's discretion in compensating actual injury. Arguably, therefore, the damage award which plaintiff was precluded from receiving because of the elimination of punitive damages could still be given to him under the guise of compensation for actual harm. To further exacerbate the problem, the states could "fashion novel rules for the recovery of damages." This could result in large damage awards if the newly fashioned rules were used in conjunction with the customary types of actual harm inflicted by a defamatory falsehood; or it could result in a damage award where otherwise there would be no recovery at all.

Because of these potential problems, it is likely that, in the future, the Court will be forced to fashion a constitutional definition of actual injury. If such a definition were developed, the Court would have to employ the same analysis used in Gertz and balance the interest of society in an uninhibited press against that of the individual in compensation for injury from defamatory statements. In addition, the Court would have to decide in each case whether the evidence was sufficient to meet the burden of proving actual injury. Thus, the Court would be involved in an ad hoc determination — supposedly the same evil which caused the Court to...