COMMENT

*GERTZ v. ROBERT WELCH, INC.**:* NEW CONTOURS ON THE LIBEL LANDSCAPE —A PYRRHIC VICTORY FOR PLAINTIFFS

I
INTRODUCTION

Eleven years ago, in *New York Times v. Sullivan*,[1] the United States Supreme Court formulated a constitutional privilege of fair comment[2] in the law of libel. Citing a "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials,"[3] the Court held that absent a showing of actual malice, libelous statements directed against a public official relating to his official conduct were protected by the first amendment. Three years later, recognizing that public figures often play as important roles in the resolution of public questions as do public officials, the Court extended the privilege to embrace public figures.[4] Finally, in *Rosenbloom v. Metromedia, Inc.*,[5] the Court,

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* 418 U.S. 323 (1974).

1. 376 U.S. 254 (1964). New York Times v. Sullivan involved a police commissioner in Alabama who was allegedly libeled by an advertisement published in the *New York Times* which made false statements about the conduct of the police in civil rights demonstrations in the South. The commissioner recovered $500,000 in damages and on appeal the Alabama Supreme Court affirmed. The Supreme Court of the United States reversed, holding that a public official could not recover damages for defamatory statements pertaining to his official conduct unless he could prove actual malice—that the statements were made with knowledge of their falsity or with reckless disregard for their veracity.

2. There was a fair comment privilege at common law. In jurisdictions where it existed, the privilege immunized publishers from liability for statements which were false but which bore upon the official conduct and qualifications of public officials and public employees. The privilege was usually restricted to the expression of an opinion and did not cover misstatements of fact. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 118 at 819 (4th ed. 1971).

3. 376 U.S. at 270.

4. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), involved the libel of a former football coach at the University of Georgia who had been charged with "fixing" a football game between the University of Alabama and the University of Georgia. Though no majority opinion was forthcoming, Justice Harlan wrote an opinion in which Justices Clark, Stewart, and Fortas joined. Justice Harlan thought that a public figure who is not a public official should be allowed to recover damages for libel only upon a showing of highly unreasonable conduct on the part of the defendant. Chief Justice Warren concurred in the result only, joined by Justices Brennan and White. Chief Justice Warren urged an extension of the *New York Times* rule requiring proof of actual malice to include public figures. Justice Black, joined by Justice Douglas, concurred in the result, reiterating his view that any libel law violated the first amendment. Although *Butts* does not explicitly extend *New York Times* to cover public figures, it requires, at the very least, that a public figure prove actual malice to recover under the various rationales in that case.

5. 403 U.S. 29 (1971). *Rosenbloom* involved a radio station which broadcast the news of

again emphasizing the importance of unencumbered public debate, held that the media would be protected from nonmalicious libel suits brought by private persons if such persons were embroiled in events of genuine public interest.

The Supreme Court abruptly withdrew this last extension of the privilege in *Gertz v. Robert Welch, Inc.*,[6] a case in which a plurality of the Court acknowledged that a private individual has significant personal and economic interests in maintaining an undamaged reputation and that society's interest in freedom of speech must be sensitive to those individual interests.

Speaking for a plurality of four, Justice Powell attempted the delicate task of renovating the law of libel to give increased protection to the individual's reputation while simultaneously preventing increased pressure of self-censorship upon the press. Abandoning the approach taken in *Rosenbloom*, in which the Court gave constitutional protection to issues of public interest, the Court in *Gertz* adopted an approach in which constitutional protection depended upon the status of the individual. The unfortunate result of adopting this view was that, while it became easier for the plaintiff to recover than under *Rosenbloom*, the Court's retreat from *Rosenbloom* exposed the press to greater liability in the discussion of public affairs. To compensate for the possible dangers of self-censorship, the Court greatly restricted the damages a plaintiff might recover. These changes in the law of damages, however, so substantially limited recovery that *Gertz* is anything but a victory for the plaintiff.

This Comment will analyze the Court's new doctrinal approach and *Gertz's* three far-reaching results: the abandonment of strict liability in libel, the requirement that plaintiffs prove actual damages, and the proscription on the award of punitive damages except upon proof of malice. Finally, this Comment will suggest a modification of the *Rosenbloom* model which it is believed is better tailored to protecting both the individual's reputation and society's interest in a free press.

II
BACKGROUND

Elmer Gertz, an attorney, represented a Chicago family in a civil action against a former city policeman who had been convicted of second degree murder of their son. Although Gertz was not involved in the investigation and prosecution of the policeman, the *American Opinion*, a nationwide periodical which disseminates the views of the John Birch Society, stated that he was involved in an alleged nationwide Communist conspiracy to discredit local law enforcement agencies. An article, containing substantial and scurrilous untruths, characterized Gertz as a "Leninist" and "Communist-fronter" and ac-

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petitioner's arrest for possession and solicitation of allegedly obscene materials. Petitioner later obtained a declaratory judgment that the materials were not obscene and brought an action for libel against the station for its reference to him in their newscasts as a "smut-racketeer" and "girlie-book peddler." Justice Brennan wrote the plurality opinion, joined by Chief Justice Burger and Justice Blackmun, finding that although Rosenbloom was not a public figure, he was nevertheless involved in an event of significant public interest and the *New York Times* rule should apply to him. Justices Black and White concurred in the result only, while Justices Harlan, Stewart and Marshall dissented.

6. 418 U.S. 323 (1974).

cused him of being a member of seditious organizations. The article contained his photograph with the caption: "Elmer Gertz of the Red Guild harasses Nuccio."[7]

Petitioner Gertz brought an action for libel in federal court against Robert Welch, Inc., publisher of the *American Opinion*, basing the action upon diversity of citizenship. The first issue which the district court had to consider was whether the libel was actionable without proof of damages, that is, libelous per se.[8] In denying a motion to dismiss, the court held that under Illinois law any statement which would be slanderous per se if spoken would likewise be libelous per se if written.[9] Because a statement casting aspersions on a person's fitness to practice his profession is slanderous per se, the court reasoned that the article accusing Gertz of being a Communist cast "grave doubts" upon his professional qualifications "to uphold and apply our system of laws" and, therefore, was libelous per se.[10]

The second issue which came before the district court was whether the *New York Times* fair comment privilege would immunize a publisher from liability arising from the defamation of one neither a public official nor a public figure but whose name was nevertheless linked to an issue in the public interest.[11] While the court originally found that the *New York Times* rule did not protect the publisher because the libeled plaintiff was neither a public official nor a public figure,[12] the court reconsidered the issue,[13] deciding that since the article dealt with a matter in the public interest, the *New York Times* privilege could be stretched to protect the publisher.[14] The court entered a

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7. *Id.* at 326-27. "Red Guild" refers to the National Lawyer's Guild which respondent characterized as a "Communist" organization. Nuccio was the name of the convicted policeman.

8. Gertz v. Robert Welch, Inc., 306 F. Supp. 310 (N.D. Ill. 1969). The term "libelous per se" means a libel which at common law was actionable without proof of special damages. The assumption was that the libel was of such a character that the law would presume that one so libeled must have suffered damages. Libel per se must be distinguished from the term "libel per quod," which constitutes a class of libels which are not actionable on their face but only become so with the aid of extrinsic facts or circumstances. Generally, the plaintiff had to prove the harm that resulted from libels per quod. *See* PROSSER, *supra* note 2, § 112 at 762-64.

9. 306 F. Supp. at 311, *citing* Whitby v. Associates Discount Corp., 59 Ill. App. 2d 337, 207 N.E.2d 482 (3d Dist. 1965). At common law, slander was actionable without proof of damages if the slanderous statement (1) insinuated that a person suffered from a loathsome disease, (2) imputed unchastity to a woman, (3) accused a person of a crime, or (4) cast aspersions on a person's fitness to carry out his profession or business. In most jurisdictions libelous statements which fit into one of these four categories were libelous per se, that is, actionable without proof of actual damages. PROSSER, *supra* note 2, § 112 at 754-60. Prior to *Gertz*, in most states, any statement defamatory on its face was libelous per se. *See id.* at 763.

10. 306 F. Supp. at 311. An attorney is an officer of the court and is sworn to uphold the Constitution. According to the court, Communist doctrine which advocates the violent overthrow of the Government is necessarily inconsistent with such an oath. Therefore, accusing an attorney of being a Communist casts doubt upon his qualifications to practice law.

11. Gertz v. Robert Welch, Inc., 322 F. Supp. 997 (N.D. Ill. 1970). Since this suit commenced prior to the Supreme Court's holding in *Rosenbloom*, the lower court relied primarily on Time v. Hill, 385 U.S. 374 (1967), an invasion of privacy suit in which the Court had extended the *New York Times* rule to private figures involved in events of public importance. *Hill* was the harbinger of *Rosenbloom*, its counterpart in the law of libel.

12. 322 F. Supp. at 998.

13. *Id.* at 999-1000.

14. *Id.* at 1000. This was prior to the Supreme Court's decision in *Rosenbloom*, although the Court had granted certiorari to hear the case.

judgment notwithstanding the verdict for the defendant, and petitioner Gertz appealed.

Believing that Gertz should really have been characterized as a public figure, but accepting the lower court's finding that he was a private citizen, the Seventh Circuit[15] relied on the Supreme Court's intervening opinion in *Rosenbloom v. Metromedia, Inc.*[16] to affirm the lower court's decision in favor of the defendant. The Supreme Court granted certiorari to reconsider the extent of a publisher's liability for the defamation of a private person.[17]

"Because the jury was allowed to impose liability without fault and was permitted to presume damages without proof of damages,"[18] the Supreme Court reversed the Seventh Circuit, which had followed the rule set out in *Rosenbloom*, and remanded the case for a new trial. The Court held that states could apply any standard except absolute liability to the defamation of private persons by a publisher or broadcaster when substantial danger to their reputation is apparent to the publisher.[19] The Court further provided that in the future recovery could only be predicated upon the allegation and proof of actual damages,[20] and that punitive damages could only be awarded upon proof of actual malice.[21]

III
RATIONALE

The rationale of Justice Powell's plurality opinion was consistent with the general approach to constitutional issues involving libel taken by the Court in the progenitors of *Gertz*: balancing the state's interest in protecting the individual's reputation against society's interest in a free press.[22] The plurality reaffirmed the balance struck in *New York Times* as it applied to public officials and public figures,[23] but weighed the considerations differently as they applied to the private citizen.

The plurality articulated two reasons why the balance struck in *Rosenbloom* gave inadequate weight to the individual's reputation. First, the private person does not choose to expose himself to public criticism and abuse as does one who thrusts himself into public affairs.[24] Second, the private person is inherently more vulnerable to defamatory injury than the public figure because he has no access to the media and is thus poorly equipped to rebut the calumny of a licentious press.[25] Justice Powell argued that, on the other hand,

15. Gertz v. Robert Welch, Inc., 471 F.2d 801 (7th Cir. 1972).
16. 403 U.S. 29. *See* note 5 *supra*.
17. 418 U.S. at 325.
18. *Id.* at 352.
19. *Id.* at 347-48. A libel whose defamatory potential is apparent to the publisher is a libel defamatory on its face. Libel per se included statements defamatory on their face as well as those which were slanderous per se if written. *See* PROSSER, *supra* note 2, § 112 at 762-63.
20. 418 U.S. at 349.
21. *Id.* For a discussion of the content of the actual malice standard, *see* text accompanying notes 138-39 *infra*.
22. *Id.* at 348.
23. *Id.* at 343.
24. *Id.* at 345.
25. *Id.* at 344.

by assuming an "influential role in ordering the affairs of society,"[26] a public figure tacitly assumes the risk of injury; and when injury occurs, his prominence usually permits him to reply to defend his good name. This reasoning led Justice Powell to make a distinction between public and private figures and to conclude that the private citizen was more deserving of protection from the state.[27]

In reaching this conclusion, however, Justice Powell faced a dilemma. While the actual malice standard imposed in *Rosenbloom* was really insuperable for the private plaintiff,[28] a relaxation of that requirement might result in the exercise of too much self-censorship by the press in commenting upon public affairs.[29] Powell attempted to extricate himself from this predicament by abandoning the actual malice standard in the case of a private citizen while limiting compensatory damages to those a plaintiff could prove he actually suffered and allowing punitive damages only upon proof of actual malice. Thus, according to the Court's new holding, states could adopt any standard of liability, except strict liability, with respect to private individuals, but the measurement of compensatory damages would be withdrawn from the province of the jury. These adjustments, the plurality believed, would better protect the private plaintiff and would militate against any tendency by the press to refrain from commentary on important public issues.

IV
THE CONCURRING OPINION

Justice Blackmun, writing a separate opinion, joined the *Gertz* plurality because he thought that the Court's new limitations on damages removed the "specters of presumed and punitive damages,"[30] which might have a stifling effect on the press. Furthermore, he believed that his concurrence would create a majority which would end the uncertainty engendered by *Rosenbloom*.[31] Citing a "sadly fractionated"[32] Court in *Rosenbloom*, in which only three Justices in a bare majority of five agreed on a single rationale,[33] he thought it necessary that the law "come to rest in the defamation area."[34]

Justice Blackmun's opinion had a curious twist. He voted with the plurality to bring stability to the law, but he indicated that he thought *Rosenbloom* was the more logical result.[35] Technically, this creates a majority, but Blackmun's opinion seems unprincipled if he votes contrary to what he believes to be the better rule. His joining the plurality with these reservations makes the Court in *Gertz* almost as "fractionated" as it was in *Rosenbloom*.

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26. *Id.* at 345, *quoting* Curtis Publishing Co. v. Butts, 388 U.S. at 164 (Warren, C.J., concurring in result).
27. *Id.* at 344-46.
29. *Id.* at 346-49.
30. *Id.* at 354 (Blackmun, J., concurring).
31. *Id.*
32. *Id.*
33. *See* note 5 *supra*.
34. 418 U.S. at 354 (Blackmun, J., concurring).
35. *Id.* at 354.

The rationale in *Gertz*, despite Blackmun's concurrence in the holding, commands the full support of only four Justices.

V
DISSENTING OPINIONS

Justice Douglas dissented and reaffirmed his position that any libel law abridges freedom of speech and of the press.[36] He argued that juries still retained too much latitude to make punitive awards, even under the limitations on damages imposed by *Gertz*.[37] Arguing that jury awards are essentially unreviewable, Douglas thought that *Gertz* posed a significant threat to the press.[38]

Chief Justice Burger's cryptic dissent objected to the Court's abandonment of the orderly development of the law with respect to private plaintiffs and to the Court's "embark[ation] on a new doctrinal theory which has no jurisprudential ancestry."[39] Precisely to what he referred is unclear. Paradoxically, he voted to reinstate the jury's original verdict for the plaintiff—a result inconsistent with *Rosenbloom*, in which he had previously joined.[40] He complained that the contours of the Court's negligence doctrine were so amorphous as to have a potentially inhibiting effect on the press.[41] Then, seeming to change his position again, he stated that the right to counsel would also be jeopardized if "every lawyer who takes an 'unpopular' case, civil or criminal, would automatically become fair game for irresponsible reporters and editors,"[42] for under *Gertz*, a libeled attorney involved in a sensational public trial would have to prove actual injury and some degree of culpability on the part of the defendant to recover. Burger's evident concern for the attorney defending an unpopular client, however, offers no key to understanding his dissent: under the *Rosenbloom* rule, to which Burger had previously subscribed, the attorney would have to prove that the defendant acted with actual malice, clearly a more onerous task than proving actual injury and negligence.

Justice Brennan dissented because he believed that the departure from the actual malice standard in *Rosenbloom* did not give adequate "breathing space" for "free and robust debate—so essential to the proper functioning of our system of government."[43] He abjured the plurality's distinction between public

36. *Id.* at 356-57 (Douglas, J., dissenting).
37. *Id.* at 359-60.
38. *Id.* at 360.
39. *Id.* at 355 (Burger, C.J., dissenting).
40. It is not obvious to what Chief Justice Burger objects. If he repudiates the Court's holding that strict liability is unconstitutional, it would seem he would uphold the judgment n.o.v. on the basis of *Rosenbloom* in which he had previously joined. On the other hand, if he objects to the Court's shift in focus from the public issue in *Rosenbloom* to the individual's status in *Gertz*, it would seem he would affirm the lower court's finding that *Rosenbloom* disposed of the question. It is possible that he continues to support the *Rosenbloom* rule which requires proof of actual malice, but that he has made an implicit finding that Gertz was not involved in an issue of public interest. This would be consistent with his statement that a lawyer defending an unpopular client should not be fair game for reporters. However, if he has made such a determination, he does not state it.
41. 418 U.S. at 355 (Burger, C.J., dissenting).
42. *Id.*
43. *Id.* at 361 (Brennan, J., dissenting).

and private citizens, arguing that the public's primary interest is in the event, not the notoriety of the individual involved.[44] He adhered to his position in *Rosenbloom*, insisting that the media in general were no more responsive to public than to private figures, and that even if they were, debate on public issues cannot be suppressed merely because a private person is involved.[45] He feared that the reasonable care standard enunciated in *Gertz* would induce publishers to refrain from commenting on public events because of the difficulty of assessing the standard of care to which they would be held.[46]

For reasons contrary to Justice Brennan's, Justice White also dissented. He objected to the Court's emasculation of the state libel laws, pointing out that the Framers had intended libel laws to coexist with a free press.[47] He criticized the Court's new rule requiring proof of actual damages, arguing the inherent impossibility of proving actual injury to reputation, and emphasizing that even when only nominal awards were made, the libel laws served a vindicatory function by enabling the injured party to obtain a judicial declaration that the defamation was false.[48] Furthermore, White thought that the plurality's decision would cause the courts to declare the libel laws of most states unconstitutional because almost every state allowed recovery of damages in some situations without proof of injury.[49] Where the litigant must show that the defendant was negligent, the Court's decision would shift the burden from the culpable publisher to the innocent plaintiff.[50] Moreover, White found the new rule for punitive damages equally unfortunate, believing that punitive damages should play a role in deterring a publisher from departing from the standard of care.[51] Nor was he persuaded by the plurality's argument that juries gave unpredictable, irrational awards and that courts could not adequately police them; he concluded that the jury had served well in the area of libel.[52] Rejecting the *Gertz* decision,[53] and never having subscribed to the *Rosenbloom* reasoning,[54] Justice White presumably decided the case on the basis of *New York Times*,[55] voting to reinstate the jury verdict because the libel did not involve criticism of a public official or public figure.

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44. *Id.* at 362.
45. *Id.* at 362-64.
46. *Id.* at 366.
47. *Id.* at 381-82 (White, J., dissenting).
48. *Id.* at 393.
49. *Id.* at 370.
50. *Id.* at 390.
51. *Id.* at 396.
52. *Id.* at 394-95.
53. Justice White joined Chief Justice Warren in *Butts*, concurring in the result on the grounds that the *New York Times* rule should be extended to include public figures as well as public officials. 388 U.S. at 172. This, however, is as far as he is willing to extend *New York Times*. 418 U.S. at 398-99. He dissented in *Gertz* because the libelee in that case was neither a public official nor a public figure, thus, not coming within the *New York Times* rule.
54. Justice White concurred in the result in *Rosenbloom*, but rejected the plurality's rationale. He believed that the libel involved criticism of official (police) conduct, bringing it within the *New York Times-Butts* rule. 403 U.S. at 61 (White, J., concurring in result).
55. 418 U.S. at 398-99.

VI
CRITICAL ANALYSIS

A. The Plurality's Doctrinal Approach

1. The Balancing Approach

The Court's philosophical orientation in *New York Times* and its descendants involves an attempt to reconcile society's interest in freedom of expression with the countervailing private interest in the individual's reputation. The first amendment guarantees of free speech and of a free press are rooted in the beliefs that the truth may best be gleaned from a "multitude of tongues"[56] and that a free press is essential for the unimpeded flow of information, for the expresssion and testing of ideas upon which an informed, self-governing people rely. On the other hand, the individual has a legitimate interest in protecting his reputation from defamatory injury. A person's reputation is essential to his livelihood, to the maintenance of good relations with others, and to his emotional and physical well-being. The law of libel seeks to redress reputational injury;[57] it also provides a forum in which a plaintiff may vindicate his reputation.[58] And, to the extent that it deters libelous speech, the law of libel limits the propagation of injurious falsehoods in which society has no interest.[59]

To ignore either of these interests is unacceptable. The power to defame with impunity gives the press the power to destroy any aspect of an individual's life which depends upon the maintenance of his good name. While abuse of this power may arguably be more theoretical than real,[60] freeing the press from all constraints of liability would leave the individual's reputation at the mercy of the media.

Applying a standard of absolute liability to the publication of all untruths, however, is no more acceptable to a nation committed to "uninhibited, robust and wide-open debate"[61] than an absolute immunity from defamation. As James Madison pointed out, "[s]ome degree of abuse is inseparable from the

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56. As Judge Learned Hand acknowledged in United States v. Associated Press, 52 F. Supp. 362 (S.D.N.Y. 1943):

> [The newspaper] industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.

Id. at 372.

57. Gertz v. Robert Welch, Inc., 418 U.S. at 341.

58. *Id.* at 372 (White, J., dissenting).

59. *Id.* at 340 (Opinion of Court) (citation omitted). The term "libelous speech" is used only to refer to false *statements of fact*. False ideas or opinions are absolutely protected by the Constitution. *Id.* False statements of fact are not useful in the decision-making process. Indeed, they can interfere with that process.

60. Private citizens who are not public officials or public figures generally will not be important enough to attract the attention of the press. Consequently, they will have a rather remote danger of being libeled. Libel by another private person, rather than the press or media, is more likely.

61. New York Times v. Sullivan, 376 U.S. at 270. *See* text accompanying note 3 *supra*.

proper use of every thing; and in no instance is this more true than in that of the press."[62] Theoretically, strict liability makes a publisher the guarantor of everything he prints. The limited resources a publisher has for ascertaining the truth of his information, his dependence upon the services and information of others, and the exigency of getting into print that which is newsworthy while it is newsworthy might cause him to curtail publication of even potentially defamatory material unless he were given some margin for error. Meaningful comment on issues of public concern necessarily requires that the press not be forced to exercise self-censorship.

A recognition of the "essential dignity and worth of every human being,"[63] of society's interest in the unencumbered circulation and expression of ideas, and of the fact that neither absolute immunity nor absolute liability protects both of these interests leads ineluctably to a balancing approach. The Court may balance the social and individual interests either by formulating a general rule to be applied in all cases, or by weighing the competing interests on a case by case basis.[64]

Since *New York Times*, the Court has consistently taken the former approach.[65] In *Rosenbloom*, the Court announced that in order to recover for damage to reputation, a private figure involved in an event of public interest must prove that the defendant published the libel with knowledge that it was false or with reckless disregard for its veracity.[66] In *Gertz*, the Court reconsidered the problem of the private litigant and changed its doctrinal approach. The Court held that where the defamatory potential of a statement was apparent, the outcome of the decision should turn on whether a private rather than a public figure was involved instead of whether a public issue was present. *Gertz* thus represents a shift from a model emphasizing the presence of a legitimate public issue to one emphasizing the individual's status.

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62. Gertz v. Robert Welch, Inc., 418 U.S. at 340, *quoting* Madison, 4 ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION OF 1787 571 (1876).

63. Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring). Justice Stewart recognized the individual's right to protect his reputation:

> It is a fallacy however, to assume that the First Amendment is the only guidepost in the area of state defamation laws. It is not. As the Court says, "important social values . . . underlie the law of defamation. Society has a persuasive and strong interest in preventing and redressing attacks upon reputation."
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> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments.

Id.

64. *See* Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963). The Court rejects ad hoc balancing as not feasible. 418 U.S. at 343-44.

65. The Court in *New York Times* eschewed any balancing formula, attempting to articulate a basis for its decision in terms of the historical basis of the first amendment. Nevertheless, it could be said that in *New York Times*, the court did balance society's interest in public debate against the individual's reputation. *See* Kalven, *The New York Times Case: A Note on the Central Meaning of the First Amendment*, 1964 SUP. CT. REV. 191, 214-17.

66. 403 U.S. 29; *see* note 5 *supra*.

2. The Court's Rationale

The considerations which led to the *Rosenbloom* decision led the Court to reach almost the opposite conclusion in *Gertz*. In each case the Court was concerned with both the private litigant's ability to obtain access to the media in order to vindicate his reputation and the fact that the private figure, unlike the public figure, did not voluntarily thrust himself into the vortex of public affairs.

Writing for the plurality, Justice Powell first concluded that "public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals."[67] Since the private figure is usually less able to rebut defamation, he is more deserving of the state's protection.

This contention, however, is not as sound as it appears; public officials and public figures are very likely to be in no better position to defend themselves than are private persons. While the wealthiest person in the world or a high public official like the President or a Senator has effective access to the channels of communication, many individuals, whom the courts include in the expansive definitions of "public figures"[68] and "public officials"[69] cannot command the attention of the media whenever they desire to be heard.[70] Justice Brennan's argument in *Rosenbloom* underscores this position:

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67. 418 U.S. at 344.

68. *See, e.g.*, Greenbelt Cooperative Publishing Assoc., Inc. v. Breslar, 398 U.S. 6 (1970) (real estate developer seeking a zoning variance); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (university football coach); Hensley v. Time, Inc., 336 F. Supp. 50 (N.D. Cal. 1971) (minister and Universal Life Church); News Journal Co. v. Gallagher, 233 A.2d 166 (Del. Sup. Ct. 1967) (chairman of city Republican committee); Beatty v. Ellings, 285 Minn. 293, 173 N.W.2d 12 (1969), *cert. denied*, 398 U.S. 904, *rehearing denied*, 399 U.S. 917 (1970) (person active in opposing local urban renewal project); Gilberg v. Goffi, 21 App. Div. 2d 517, 251 N.Y.S.2d 823 (2d Dept. 1964), *aff'd*, 15 N.Y.2d 1023, 207 N.E.2d 620, 260 N.Y.S.2d 29 (1965) (partner in mayor's law firm).

69. *See, e.g.*, St. Amant v. Thompson, 390 U.S. 727 (1969) (deputy sheriff); Rosenblatt v. Baer, 383 U.S. 75 (1966) (former supervisor of county recreation area); Henry v. Collins, 380 U.S. 356 (1965) (county attorney and chief of police); New York Times v. Sullivan, 376 U.S. 254 (1964) (police commissioner); Clahr v. Winterble, 4 Ariz. App. 158, 418 P.2d 404 (1966) (student elected to university senate); Tagawa v. Maui Publishing Co., 49 Hawaii 675, 427 P.2d 79 (1967) (member of board of county supervisors); Reaves v. Foster, 200 So. 2d 453 (Miss. Sup. Ct. 1967) (principal of attendance center for colored children); Eadie v. Pole, 91 N.J. Super. 504, 221 A.2d 547 (1966) (city assessor); Kruteck v. Schimmel, 27 App. Div. 2d 837, 278 N.Y.S. 2d 25 (2d Dept. 1967) (auditor of local water works); Cabin v. Community Newspapers, Inc., 50 Misc. 2d 574, 270 N.Y.S.2d 913, (Sup. Ct. 1966), *aff'd*, 27 App. Div. 2d 543, 275 N.Y.S.2d 396 (2d Dept. 1966) (member of local school board); Schneph v. New York Post Corp., 23 App. Div. 2d 822, 259 N.Y.S.2d 775 (1st Dept. 1964), *aff'd*, 16 N.Y.2d 1011, 213 N.E.2d 309, 265 N.Y.S.2d 897 (1965) (city attorney).

70. Much has been written about a right of access for libeled plaintiffs. Indeed, Justice Brennan suggested in his opinion in *Rosenbloom* that this might be a way to alleviate the problem of nonaccess by giving the plaintiff who is not well known an opportunity to rebut the libel. 403 U.S. at 47 n.14. But on the same day that *Gertz* was announced, the Court also held unconstitutional a Florida statute which granted a political candidate a right to equal space to reply to criticism by a newspaper. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). Justices Brennan and Rehnquist concurred but stated that they read the majority opinion as expressing no view on the constitutionality of retraction statutes giving plaintiffs who could prove defamation a statutory action to require publication of a retraction. *Id.* at 258.

> [i]n the vast majority of libels involving public officials or public figures, the ability to respond through the media will depend upon the same complex factor on which the ability of the private individual depends: the unpredictable event of the media's continuing interest in the story.[71]

Unfortunately, the plurality never answers Justice Brennan's objection, but even if their contrary conclusion were true, its importance would be diminished by the fact that the opportunity to rebut a defamatory accusation hardly restores one's reputation to its prior place;[72] moreover, it may even exacerbate the injury. To emend the libel, plaintiffs must reach those who have read or heard the libel, and even if they can, their credibility may not be great enough to overcome it. In obtaining a forum, the plaintiff will likely reach many who have not seen the libelous words before, but unless he is more credible than the publisher, he will merely be republishing the libel and injuring himself further.[73]

According to Justice Powell, the second and more compelling reason for distinguishing between public and private plaintiffs is the fact that the public figure voluntarily exposes himself to sharp criticism which may result when one enters the public arena, whereas the private figure does not.[74] However, this distinction between public and private figures based upon *volition* is artificial since one may become a public figure whether or not one chooses to do so. One can become a public figure merely by being elevated to that status by the press or by receiving unsolicited news coverage. But more importantly, while one person may voluntarily become involved in public discussion and another may not, such a distinction has a very remote connection with the respective interests protected by the first amendment and state libel laws.[75]

A public official or public figure has at least as much interest in protecting his reputation as the private figure. While the necessity of uninhibited public discussion may require that both public and private figures subordinate their claims to privacy to the public interest in some contexts,[76] it does not follow that the public figure must relinquish a claim to protection from defamation for all purposes.[77] Conversely, when the public figure's interest in his reputation must be partially sacrificed in the interest of spirited public discussion, the private person should not automatically be shielded from public inquiry. As

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71. 418 U.S. at 363 (Brennan, J., dissenting), *quoting* Rosenbloom v. Metromedia, Inc., 403 U.S. at 46-47.

72. Even Justice Powell admits this in a footnote to the plurality opinion: "Of course, an opportunity for rebuttal seldom suffices to undo the harm of a defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie." 418 U.S. at 344 n.9.

73. This is why the plaintiff must have credibility as well as a forum. A retraction by the publisher or a judicial finding that the libel was false would provide both. *See* text accompanying notes 162-63 *infra*.

74. 418 U.S. at 344.

75. *Id.* at 364 (Brennan, J., dissenting), *quoting* Rosenbloom v. Metromedia, Inc., 403 U.S. at 48.

76. *See* New York Times v. Sullivan, 376 U.S. at 270-72.

77. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. at 44 n.12, 48. Some aspects of the lives of even the most public men, according to Justice Brennan, fall outside of matters of public or general concern. *Id.* at 44 n.12.

Justice Brennan observed in *Rosenbloom*, "Matters of public or general interest do not 'suddenly become less so because a private individual is involved.' "[78] Whether one braves the risk of criticism by venturing an opinion, by seeking involvement in public affairs, or by hiding behind a pall of dark obscurity, the need for relevant, accurate information and vigorous public debate remains unchanged.

However unconvincing Justice Powell's reasoning in *Gertz* may be, the law has changed, and so has the Court's doctrinal approach. Before examining the new approach, this Comment will look briefly at the underlying premise in the line of cases which began with *New York Times*.

*3. The Underlying Premise in the Pre-*Gertz *Cases*

New York Times was viewed by the Court as a case bordering on seditious libel.[79] When criticism of official conduct is viewed as criticism of government, an action for libel by a public official can become a powerful means of suppressing public debate.[80] This possibility is inconsistent with the notion that

> [t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.[81]

Whatever protection criticism of official conduct might have received by means of the common law fair comment privilege,[82] the Court held that the guarantees of free speech were directed toward public discussion, requiring the aegis of constitutional protection.[83] One prominent first amendment scholar, Professor Kalven, wrote that the Court in *New York Times* discovered the "central meaning" of the first amendment.

> The Amendment has a "central meaning"—a core of protection of speech without which democracy cannot function, without which in Madison's phrase, " 'the censorial power' would be in the Government over the people and not in the people over the Government." There are other freedoms protected by it. But at the center there is no doubt what speech is protected and no doubt why it is protected. The theory of the freedom of speech clause was put right side up for the first time.[84]

The general premise that freedom of expression on political issues is protected by the first amendment was reiterated in subsequent libel decisions by the

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78. 418 U.S. at 362 (Brennan, J., dissenting), *quoting* Rosenbloom v. Metromedia, Inc., 403 U.S. at 43.

79. 376 U.S. at 291-92.

80. This could "transmut[e] criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom government is composed." *Id.* at 292. *See* Kalven, *supra* note 65, at 204-10.

81. Stromberg v. California, 283 U.S. 359, 369 (1931).

82. *See* note 2 *supra*.

83. 376 U.S. at 269.

84. Kalven, *supra* note 65, at 208. *See* Bloustein, *The First Amendment and Privacy: The Supreme Court Justices and the Philosopher*, 28 RUTGERS L. REV. 41 (1974).

Court, which couched it in language drawn from *Thornhill v. Alabama*:[85] "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."[86]

In *Curtis Publishing Co. v. Butts*,[87] some members of the Court recognized that a differentiation between public officials and public figures for the purpose of determining the limits of constitutional protection against defamation becomes progressively less defensible as public figures play increasingly more prominent roles in the resolution of important public questions.[88] Accordingly, the constitutional privilege was extended to embrace public figures. Five years later in *Rosenbloom*, Justice Brennan, beginning with that same premise,[89] found that the distinction between public persons and private persons was untenable when applied to the discussion of legitimate public issues. Thus, prior to *Gertz*, this major premise—that the first amendment was directed toward protecting political expression—underlay every extension of *New York Times*. With this in mind, this Comment now turns to the distinction the *Gertz* plurality made between public and private plaintiffs.

4. The Gertz *Model*

As noted above, a model which determines the scope of constitutionally permissible defamation on the basis of a person's fame or notoriety bears little relation to the important values protected by either the first amendment or state libel laws. Such a model may also have two undesirable consequences. Applied to a private citizen, such an approach might inhibit public discussion; applied to a public official or public figure, it could lead to an invasion of that person's privacy unwarranted by society's need to be informed.

Justice Brennan's opinion in *Rosenbloom*[90] and three dissenting opinions in *Gertz* evinced a concern that the *Gertz* approach would lead to self-censorship by the press.[91] They argued that if a publisher in the discussion of public affairs faces a standard of negligence, such a standard would impose too great a burden upon the press in terms of guessing what steps must be taken to satisfy a jury that their action was reasonable. This could cause the press to steer wide of any discussion of public affairs involving private figures.[92] The validity of this argument is undercut somewhat by two new variables introduced in *Gertz*: the heightened burden of proof required to recover punitive damages and the shift in the burden of proof required to recover actual damages. Both of these barriers to recovery should reduce the publisher's fear of outrageous damage awards and frivolous suits.[93] The force of Justice Brennan's

85. 310 U.S. 88 (1940).

86. *Id.* at 102, *quoted in* Time v. Hill, 385 U.S. at 388, Curtis Publishing Co. v. Butts, 388 U.S. at 147; Rosenbloom v. Metromedia, Inc., 403 U.S. at 41 and Gertz v. Robert Welch, Inc., 418 U.S. at 362 (Brennan, J., dissenting).

87. 388 U.S. 130 (1967). *See* note 4 *supra*.

88. 388 U.S. at 162 (Warren, C.J., concurring in result).

89. 403 U.S. at 41.

90. *Id.* at 52-53.

91. 418 U.S. at 355 (Burger, C.J., dissenting); *id.* at 359-60 (Douglas, J., dissenting); *id.* at 365-66 (Brennan, J., dissenting).

92. *Id.* at 360, 366.

93. *But see* Justice White's comment: "To me, it is quite incredible to suggest that threats of

argument, therefore, depends upon the extent to which *Gertz* erects barriers to successful recovery.

The other problem with the *Gertz* model is that any court bound by *Gertz*'s public-private dichotomy may tend to focus on the status of the individual and fail to inquire whether the public's interest in the issues is legitimate or whether the defamatory remarks are even relevant to any public issue.[94] In the past, when the publisher sought to invoke the constitutional privilege against a public official suing for libel, *New York Times* required that the libelous criticism pertain to *official* conduct,[95] assuring that the focus of the privilege was directed toward public issues. This emphasis, however, began to be eroded by the holding in *Garrison v. Louisiana* that "anything that might touch on an official's fitness for office"[96] is constitutionally protected as commentary on his suitability to hold office. Indeed, the cases extending *New York Times* showed no real concern that some aspects of a public figure's conduct might not be relevant to the resolution of public questions.[97] The plurality in *Gertz* partially curbs this erosion, recognizing that at least some persons should not be classified as public figures for all purposes and that public status should depend upon the nature of their participation in "the particular controversy which gives rise to the defamation."[98] Nevertheless, given the extreme breadth of the public figure category[99] and the artificiality of the public-private approach,[100] the presence of an important public issue tends to force private figures into the public figure category. Therefore, the reputation of neither public nor private figures is adequately protected by the *Gertz* model.

B. The Abandonment of Strict Liability

When *Gertz* was decided, all states recognized some form of libel per se,[101] which under certain circumstances allowed one to recover damages by merely showing that one had been libeled. Proof of damages, malice, or fault on the part of the publisher was unnecessary. Generally, two kinds of libel were actionable per se: those statements which if spoken would have fit into one of the four traditional categories of slander per se,[102] and those statements whose defamatory potential was obvious on their face without the need for extrinsic facts.[103] As far as libel per se was concerned, unless the publisher could interpose truth[104] or one of the limited common law privileges such as

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libel suits from private citizens are causing the press to refrain from publishing the truth. I know of no hard facts to support this proposition, and the Court furnishes none." *Id.* at 390 (White, J., dissenting).

94. Rosenbloom v. Metromedia, 403 U.S. at 48.

95. 376 U.S. at 279.

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

97. While there is a footnote to Justice Brennan's *Rosenbloom* opinion which suggests that some aspects of an official's private life would not properly be the subject of public inquiry, 403 U.S. at 44 n.12, neither *Rosenbloom* nor *Butts* required that the defamatory remarks be relevant to a legitimate public issue as did *New York Times*.

98. 418 U.S. at 352.

99. *See* text accompanying notes 68-69 *supra*.

100. *See* text accompanying note 75 *supra*.

101. *See* text accompanying notes 117-20 *infra*.

102. *See* note 9 *supra*.

103. *See* PROSSER, *supra* note 2, § 112 at 762-63.

104. In most jurisdictions truth was a complete defense to libel; in some jurisdictions it was a

the fair comment privilege,[105] he was strictly liable for damage to the libelee's reputation.[106] Even if the defendant published a retraction or apology, evidence of such fact was usually admissible only to mitigate punitive damages.[107]

Gertz held that states could impose any standard of liability except strict liability to the defamation of a private citizen by the media. The plaintiff must now show not only that the publisher's remarks were defamatory on their face, but also that he in fact sustained injury to his reputation, and, at the very least, that the defendant was negligent.[108] As a consequence, the plaintiff faces nonsuit if he cannot prove that the defendant was negligent. He may never get his case to the jury unless he can prove that the publisher's acts departed from the standard of care established in the jurisdiction.[109]

Most importantly, however, not only will the plaintiff go uncompensated for his injury, but he will lose an important opportunity to vindicate his reputation in a judicial forum.[110] This is a curious result in light of Justice Powell's finding that the law prior to *Gertz* abridged the state's interest in protecting the individual's reputation to an unacceptable degree.[111] One part of the rationale which led to the holding in *Gertz* urged that the private litigant who did not have an opportunity to respond to a libel could not vindicate his reputation.[112] Nevertheless, under *Gertz* the ability to vindicate one's reputation is actually diminished since a litigant unable to prove negligence is likely to be deprived of a judicial finding that the defendant's remarks were false.

A final difficulty with the new damage rule which prohibits strict liability is that it generates a rather wide spectrum of possible standards of liability—from simple negligence to absolute immunity.[113] The problems which may result for the press are explored below.[114]

C. Proof of Actual Damages

Gertz also held that only damages which the plaintiff can prove he actually suffered are recoverable. While this rule comports well with the thrust of compensatory damages in tort law,[115] this policy is frustrated in the law of libel by the fact that damages to the reputation are inherently speculative and almost

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defense provided the publication was nonmalicious; in a few jurisdictions truth was not a defense. *Id.* § 116 at 797.

105. *See* note 2 *supra*.

106. *See* PROSSER, *supra* note 2, § 113 at 773.

107. *See id.* § 116 at 799.

108. If strict liability is not permitted, then the next least stringent standard will be negligence. This means that the plaintiff will have to prove that the defendant breached his duty of care. *See id.* § 30 at 143.

109. The case does not necessarily have to go to the jury but may be tried by the judge alone, in which case he would make findings of fact.

110. Justice White makes the point that a judicial forum lends credibility to one's rebuttal of a libel even though the plaintiff may recover no award. 418 U.S. at 372 (White, J., dissenting). *See generally* RESTATEMENT OF TORTS § 569, comment *b* at 166 (1938) [hereinafter RESTATEMENT].

111. 418 U.S. at 345-46.

112. *See* text accompanying note 67 *supra*.

113. Under *Gertz* a state is not precluded from applying the *Rosenbloom* rule, or even a rule of absolute immunity, if it chooses to do so. *See* text accompanying note 154 *infra*.

114. *See* text accompanying notes 150-53 *infra*.

115. *See* PROSSER, *supra* note 2, § 2 at 7.

impossible to prove.[116] The common law acknowledged this difficulty by allowing libeled plaintiffs to recover general damages;[117] damages to the reputation were simply presumed to have occured as the natural and probable result of defamation.[118] No proof was necessary and a determination as to the amount of damage the plaintiff might have suffered was left to the jury.[119] Damage was deemed not to have necessarily resulted when knowledge of extrinsic facts was required to perfect the libelous imputation; then, it was necessary for the plaintiff to plead and prove special damages.[120] Nevertheless, prior to *Gertz* the libeled plaintiff could usually recover damages for reputational injury without proving any specific damages.

Under *Gertz*, however, the libeled party must prove by competent evidence that damage has occurred; a presumption of such damage will no longer be entertained. While actual damages may include injury to reputation, mental anguish, and pain and suffering,[121] as well as direct financial injury, there must be proof of their occurrence.[122]

Because such evidence is difficult to obtain, this qualification is fatal. Witnesses who will testify that the defamatory statements have lowered the plaintiff in their esteem are not easily found;[123] damages for pain and suffering are extremely difficult to establish due to their speculative nature. Thus, under *Gertz* the plaintiff's primary strategy will be to avoid nonsuit: once the case reaches the jury, he should have a reasonable chance of recovery even under a more limited instruction simply because the standards for awarding compensatory damages under *Gertz* remain as elusive as before.[124]

D. Recovery of Punitive Damages

Under *Gertz* the plaintiff must prove actual malice to recover punitive damages. According to *New York Times*, proof of actual malice requires a showing that the defendant published the statements knowing that they were false or published them with reckless disregard for their truth.[125] Later, the Supreme Court clarified the reckless disregard standard. They rejected the argument that a reasonable belief that the libelous statements were false constituted reckless behavior. Instead, the Court required the plaintiff to show that the defendant *actually* entertained serious doubts as to the truth of the statements, but published them anyway.[126] Thus, to prove actual malice, the plain-

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116. "[T]he effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to the person defamed." RESTATEMENT, *supra* note 110, § 621, comment *a* at 314. *See generally* Note, *Developments in the Law–Defamation*, 69 HARV. L. REV. 875, 891-92 (1956) [hereinafter *Defamation*], C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 116 at 422-30 (1935).

117. 4 J. SUTHERLAND, DAMAGES § 1206 at 4510-14 (4th ed. 1916).

118. *See* PROSSER, *supra* note 2, § 112 at 762-63.

119. *See id.*

120. *See id.* at 760.

121. 418 U.S. at 350.

122. *Id.*

123. *See Defamation*, *supra* note 116, at 891-92.

124. *See* MCCORMICK, *supra* note 116, § 120 at 444.

125. 376 U.S. at 280.

126. St. Amant v. Thompson, 390 U.S. 727, 732-33 (1966); Garrison v. Louisiana, 379 U.S. 64, 74 (1964).

tiff will need evidence establishing either that the defendant intentionally published an untruth or that he seriously doubted the veracity of the published statements. Rarely will the plaintiff have the evidence necessary to support either inference as to the defendant's state of mind. As a result, punitive damages will seldom be awarded after *Gertz*.

This limitation on punitive damages is a laudable rule. The rationale behind awarding punitive damages is the deterrence and punishment of reprehensible conduct.[127] Although Justice White suggests that punitive damages may be employed to deter *any* departure from the standard of care,[128] the difficulty the press faces in ascertaining the appropriate standard makes it unfair to award them except to punish the most egregious conduct. The press has had reason to fear juries' broad discretion in awarding punitive damages.[129] By virtually eliminating punitive damages, which are not compensation for injury to the plaintiff, but a mere windfall gain, the Court has helped to reduce the possibility of inflated awards.

VII

A Proposed Solution To The Problems Posed By *Gertz*

In light of the foregoing analysis, the *Rosenbloom* model, which emphasizes the nature of the event or issue rather than the person involved, seems better adapted to protecting both the individual's reputation and society's interest in uninhibited debate on public issues. If the *Rosenbloom* approach were once again adopted, the press would enjoy substantial immunity from defamatory liability in comment upon public interest issues. In this context, the plaintiff would have to prove actual malice to recover. However, when such public interest issues are not involved, the retention of presumed damages and the removal of the bar on strict liability would make it possible for the litigant to recover since he would be defeated by neither the failure to prove actual damage nor the inability to establish the defendant's negligence.

The extent to which these two interests would be protected would depend critically upon the scope of what is in the public interest and whether the courts can realistically make such determinations. For example, if the legitimate public interest is too narrowly defined, the press may be inhibited; or, if too broadly defined, the libelee would have no protection from defamatory attack. The virtues of the model—that it is capable of protecting both social and individual interests—disappear if the appropriate balance between the two cannot be struck.

The decisions which anticipated *Rosenbloom* and those which followed in its wake suggest that the problem has not been with drawing the perimeter of protected discussion too narrowly.[130] Rather, the real problem is that the pub-

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127. *See* Prosser, *supra* note 2, § 2 at 9-14.

128. 418 U.S. at 396 (White, J., dissenting).

129. *E.g.*, New York Times v. Sullivan, 273 Ala. 656, 144 So. 2d 25 (1962), *rev'd*, 376 U.S. 254 (1964), in which the police commissioner recovered $500,000 against the *New York Times* in an alleged libel which made no mention of the commissioner by name but only general statements about police conduct in Alabama.

130. *See, e.g.*, Gospel Spreading Church v. Johnson Publishing Co., 454 F.2d 1050 (D.C. Cir. 1971) (size of estate left to church by elder); Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th

lic interest encompasses too much. Anything is arguably within the area of public or general concern.[131] If the actual malice standard marks everything the public may be interested in, an individual's reputation will receive no real protection.

The difficulty with the *Rosenbloom* approach is that it articulates no standard for determing the limits of the public's concern for purposes of constitutional protection.[132] Although a number of cases decided both before and after *Rosenbloom* have taken this approach, they have merely been decided on an ad hoc basis, and have formulated no general guidelines for determining what is in the public interest.[133] Indeed, several members of the Court have questioned whether courts can even "pass on [the] legitimacy of the interest in a particular event or subject; [determining] what information is relevant to self-government."[134] They fear that allowing a court to make such determinations could seriously threaten freedom of the press because the realm of protected issues might be too small.[135] It must be emphasized, however, that courts, acting in such a role, would not be defining the boundaries of public discussion, but rather the limits of legal protection for false statements of fact, statements in which society has no interest anyway. Admittedly, this involves the resolution of some complex factual questions. But equally troublesome factual determinations arise under *Gertz*: for example, determining who is a public figure in the context of heated public discussion.[136]

Cir. 1970) (accommodations by hotel during Master's Golf Tournament); United Medical Laboratories, Inc. v. Columbia Broadcasting Sys., Inc., 404 F.2d 706 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1969) (mail order clinical testing labs); West v. Northern Publishing Co., 487 P.2d 1304 (Alaska Sup. Ct. 1971) (article linking taxicab companies to illegal liquor sales to minors); Gallman v. Carnes, 254 Ark. 987, 497 S.W.2d 47 (1973) (article concerning law professor and assistant dean); Priestly v. Hastings & Sons Publishing Co. of Lynn, 271 N.E. 2d 628 (Mass. Sup. Jud. Ct. 1971) (architect commissioned by town to build a school); Twenty-Five East 40th Street Restaurant Corp. v. Forbes, Inc., 30 N.Y.2d 595, 282 N.E.2d 118, 331 N.Y.S.2d 29 (1972) (article about a restaurant's food); Washington v. New York News, Inc., 37 App. Div. 2d 557, 322 N.Y.S.2d 896 (1st Dept. 1971) (attendance of bishop at nightclub performance); All Diet Foods Distribs., Inc. v. Time, Inc., 56 Misc. 2d 821, 290 N.Y.S.2d 445 (Sup. Ct. 1967) (health foods); Autobuses Internacionales S. De. R. L., Ltd. v. El Continental Publ. Co., 483 S.W.2d 506 (Tex. Ct. Civ. App. 1972) (article about bus company's fare hike). For a substantial body of case law in which the courts have decided whether particular subjects or issues are in the public interest, *see* Comment, *The Expanding Constitutional Protection for the News Media From Liability for Defamation: Predictability and the New Synthesis*, 70 MICH. L. REV. 1547, 1560-62, n.94-96 (1972) [hereinafter *Predictability*]; Annot., 19 A.L.R.3d 1361, 1384-85 (1968); Gertz v. Robert Welch, Inc., 418 U.S. 377-80 n.10 (White, J., dissenting).

131. Rosenbloom v. Metromedia, Inc., 403 U.S. at 79 (Marshall, J., dissenting).

132. *Id.*

133. *See* note 130 *supra*. Although the lack of a majority in *Rosenbloom* meant that the case had no precedential value, nevertheless, between the time *Rosenbloom* was decided and the time *Gertz* was argued, seventeen states had adopted the *Rosenbloom* standard by judicial decision. 418 U.S. at 377-80 n.10 (White, J., dissenting).

134. 403 U.S. at 79 (Marshall, J., dissenting). Justice Powell agrees in *Gertz* that the courts cannot realistically make these distinctions between what information is and is not relevant to self-government. 418 U.S. at 346. However, Justice Brennan argues that the substantial body of case law both before and after *Rosenbloom* makes this duty manageable. *Id.* at 369 (Brennan, J., dissenting).

135. 403 U.S. at 79 (Marshall, J., dissenting).

136. Justice Brennan pointed out in *Rosenbloom* that the Harlan-Marshall position in that case (adopted by Justice Powell in *Gertz*) plunges the courts even more deeply into the fact-finding

One major flaw in the *Rosenbloom* model is that it lacks a judicial standard for determining what is in the public interest. Needed is a workable standard which encourages the ventilation of public issues while protecting the privacy of all citizens when the discussion of important public issues is not at stake. A test which serves both of these values must give some margin for defamatory error to issues of public importance by protecting at least those libels, which if true, would be germane to the discussion of that issue. Such an inquiry should focus upon:

1. Whether the subject matter of the libel is entitled to first amendment protection because it is the subject of a legitimate public issue?[137]
2. If so, is the subject matter of the libel reasonably relevant to the issue being discussed?[138]

The range of issues which must be protected in the public interest from defamation suits needs to be much narrower than the range of issues in which the public has a more general interest. The sphere of constitutionally protected defamation should have as its radius the "central meaning of the first amendment,"[139] those matters which are profoundly political, whose discussion is relevant to self-government, or which enable us to cope with the exigencies of our times.[140] It should include no more.

Of course, what things are profoundly political and exigent may be subject to both broad and narrow interpretation.[141] However, by focusing on the "central meaning of the first amendment," the scope of the "public interest" can be more sharply defined. The proposed test, by protecting only that defamatory matter relevant to an issue of legitimate public concern, would give adequate freedom to publishers to comment on public affairs while sufficiently protecting the individual's reputation.

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process. He argued that the courts will be called upon to determine whether defamatory statements were negligently made, to decide whether the plaintiff in fact suffered actual damages, and to fashion constitutional definitions of negligence and actual damages. *Id.* at 53 (Opinion of Court). In addition, the Court must still make the difficult determination of who is a public figure and who is a private figure.

137. This is the *Rosenbloom* test. The proposed test would allow recovery on a showing of actual malice.

138. *See* text accompanying notes 93-97 *supra*. The relevancy requirement was suggested in Note, *The Scope of First Amendment Protection for Good Faith Defamatory Error*, 75 YALE L.J. 642, 652 (1966).

139. Kalven, *supra* note 65 at 208.

140. Thornhill v. Alabama, 310 U.S. at 102.

141. Commentators have taken rather diverse positions on what the scope of the first amendment protection for libel should be. Solicitor General Bork draws the line between the "explicitly political" and all else. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971). On the other hand, Alexander Meiklejohn took the position that four broad categories of speech should have absolute protection: (1) education in all of its aspects; (2) achievements in philosophy and sciences; (3) literature and the arts; (4) public discussion of public issues. Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245, 256-57. Professor Kalven advocated a position approaching Meiklejohn's. He wrote: "The invitation to follow a dialectic progression from public official to government policy to matters in the public domain, like art, seems to me to be overwhelming." Kalven, *supra* note 79, at 221. Justice Douglas takes a view similar to Meiklejohn's in *Gertz*. 418 U.S. at 357 n.6.

The second branch of the test deals with the relevance of a defamatory statement to the issue under discussion. As noted before, the fact that one may properly be the subject of political discussion in some contexts should not require him to surrender a claim to privacy for all purposes.[142] Only those elements of the libel which are reasonably relevant to the legitimate public issue are justifiably protected by the Constitution.

By way of illustration, consider the application of the proposed test to the facts in *Rosenbloom*. There, a radio station which broadcast the news of petitioner's arrest for possession and solicitation of allegedly obscene materials, characterized him in its newscast as a "smut-racketeer" and "girlie-book peddler." The plurality of the Court found that although Rosenbloom was not a public figure, the issue being commented upon involved an event of significant public interest so that the constitutional fair comment privilege should apply.

Assume that the broadcaster had gone on to allege, erroneously, that the plaintiff was a mental defective or that he was mentally ill. Applying the *Rosenbloom* holding alone to these facts, a court would find that the allegations about the petitioner's mental condition should be shielded by the first amendment. But under the proposed relevancy criterion, the libelee could recover for those remarks made about his mental condition since they were obviously irrelevant to the issue of enforcing the local obscenity ordinances. Suppose further that the petitioner runs for public office. His personal qualities, traits, and psychological stability are then properly a subject of public inquiry. In the absence of malice, statements made concerning his mental condition should be constitutionally privileged in this context whether true or not. The suggested relevancy criterion carefully tailors the scope of the constitutional privliege to fit the needs of public discussion for effective self-government, but stops there to assure that the publisher's privilege does not cut unnecessarily into another individual's privacy.

Applying the proposed test to the facts in *Gertz*, a court would probably find that an alleged Communist conspiracy to destroy the effectiveness of local police would be an issue deserving constitutional protection. Since Gertz's alleged membership in seditious organizations, if true, would be reasonably relevant to the issue under discussion, he would be denied recovery unless he could prove that the defendant acted with actual malice.However, given the facts of this case, Gertz might be able to satisfy the actual malice requirement by showing that the defendant published the statements with reckless disregard for their truth.[143]

VIII
PRACTICAL EFFECTS

A. On the Law

As the law now stands, the holding in *Gertz* is limited to statements whose defamatory potential is apparent on their face. With few exceptions this will

142. *See* text accompanying notes 76-78 *supra*.

143. Under the proposed test, Gertz would not be required to prove actual damages because the modified *Rosenbloom* test does not require a showing of actual injury.

include those statements which are slanderous per se as well as those libelous per se.[144] Beyond this, however, *Gertz* does not reach, and this raises the question as to the state of the law with respect to libels per quod, libels which can be proven only with the aid of extrinsic facts. *Rosenbloom*, which *Gertz* at least in part overrules, made no distinction between libels per se and libels per quod. For statements libelous per quod, *Rosenbloom* apparently is still good law. If this is true, the law of libel with respect to publishers and broadcasters takes on the following dimensions:[145]

1. Where the plaintiff is a public official or public figure, he must prove actual malice to recover under *New York Times* or *Butts*.
2. Where the plaintiff is a private citizen and,
   a. the statement is libelous per se,[146] according to *Gertz*, the plaintiff may recover only if he can show he sustained actual injury, and, *at the very least*, that the defendant was negligent;
   b. the statement is libelous per quod,[147] but the issue is one of public interest, the plaintiff will have to prove actual malice to recover under *Rosenbloom*;
   c. the statement is libelous per quod, but the issue is not one of public interest, the plaintiff must prove actual injury.[148]

The Court's holding on the recovery of actual and punitive damages, unlike its prohibition on strict liability, does not appear to be limited to libels defamatory on their face, but includes all libels against the media. It is, however, not clear whether the limitation on damages applies to lawsuits against nonmedia defendants.[149] While the tendency of lower courts to apply the *Gertz* damage rule to all libels may be irresistible, it is not necessarily warranted by a reading of the case. While first amendment issues will usually be present in an action against a publisher, they will less often be at stake in a contest between two private litigants. In such an area, where first amendment freedoms are less frequently in issue, presumed damages might still survive and punitive damages could be recoverable on a showing of less than actual malice. But becuase most libel actions will be brought against the media—for these libels are surely the most injurious—*Gertz* rewrites most, if not all, of the law of libel.

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144. *See* note 146 *infra*.

145. The holding in *Gertz*, both with respect to strict liability and actual and punitive damages, appears to be limited to suits against publishers or broadcasters. 418 U.S. at 325. *See* note 149 and accompanying text *infra*.

146. The holding actually reaches only libels defamatory on their face. But libels which were actionable without proof of special damages because they fit into one of the four traditional categories of slander would almost necessarily be defamatory on their face. *See* note 8 *supra*.

147. A statement libelous per quod is one not libelous per se. Libel per se included libels defamatory on their face. *See* note 145 *supra*. Hence, *Gertz* does not reach libels per quod. For a definition of libel per se and libel per quod, *see* note 8 *supra*.

148. Although *Gertz* does not apply to this category of libels with respect to the holding on strict liability, the holding with regard to proof of actual and punitive damages is broader and does apply here. Since the issue is not one of public interest, *Rosenbloom* is inapplicable. The result is that the plaintiff does not have to prove negligence, but must still prove actual injury.

149. While the actual language of this part of the holding expresses no such limitation, this

B. *On the Publisher*

The Court's retreat from *Rosenbloom*'s actual malice requirement increases the media's exposure to liability for libels which involve a discussion of an important public issue. Yet the abandonment of strict liability reduces the media's liability for libels not arising in the context of a legitimate public issue.[150] The net effect of the *Gertz* decision probably will be to increase the media's exposure to liability overall because libel suits will arise more often in the context of hotly contested public issues.

Furthermore, since each jurisdiction may adopt any standard of liability, from simple negligence to absolute immunity, a potential defendant whose publication enjoys nationwide distribution may be subjected to a multiplicity of standards of care under the single publication rule.[151] Realistically, this means that the publisher will be required to conform to the strictest duty of care imposed by any jurisdiction in which he could be sued. However, the publisher's problem of ascertaining the appropriate standard of care is complicated by the confused conflict of laws rules.[152] It becomes extremely difficult, then, for a publisher to know precisely what steps he must take to verify the truth of his statements. While some members of the Court have argued that the uncertainty *Gertz* engenders will cause the press to avoid discussion of controversial issues,[153] the barriers the prospective plaintiff must overcome in order to recover in *Gertz* are, nonetheless, so substantial that this may be an unwarranted concern.

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segment of the opinion is buttressed by a concern that the publisher might be unnecessarily inhibited if the plaintiff were permitted to recover more than actual damages. The Court gives two reasons for its conclusion. First, the doctrine of presumed damages is considered to be an "oddity of tort law" that may inhibit the exercise of first amendment rights because juries have the power to punish unpopular opinions. Second, there is no justification for punitive damages because they serve no compensatory purpose; they are merely a windfall gain to the plaintiff. While both of the above appear to be cogent reasons for rejecting the traditional doctrines of presumed and punitive damages, regardless of whether the plaintiff is a publisher or merely another citizen, the Court spoke only in terms of the media in articulating the second of these reasons. A precise reading, then, suggests that the Court intended to limit the holding on damages to suits aganist the media. This reading is further supported by the fact that the entire issue decided by the Court is framed in the context of a suit by a private citizen against a publisher or broadcaster. In granting certiorari, the Court undertook to decide this specific question. 418 U.S. at 325. Therefore, one should not conclude too hastily that the demise of presumed and punitive damages is complete.

150. *Rosenbloom* left untouched the common law of libel where an issue of public interest was not involved. Prior to *Gertz*, the publisher was strictly liable for those remarks which were libelous per se. In this area, *Gertz* eases the burden on the media, because now the plaintiff must prove at least that the defendant was negligent.

151. *See* Justice Brennan's argument at 418 U.S. at 366; Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 960-70 (1953). For a discussion of the single publication rule, *see* PROSSER, *supra* note 2, § 113 at 769. This rule allows a libeled plaintiff to bring an action in any jurisdiction in which distribution occurred. Of course, if the plaintiff brings suit and loses in one jurisdiction, he would be barred by res judicata from bringing suit in another. Furthermore, it is not always possible for the plaintiff to sue in just any jurisdiction in which the libel was "technically" published. Some forums may decline to hear the case if the litigant has insufficient contacts with that forum. *E.g.*, Curtis Publishing Co. v. Birdsong, 360 F.2d 344 (5th Cir. 1966).

152. *See generally* Prosser, *supra* note 151, at 971-78.

153. 418 U.S. at 355 (Burger, C.J., dissenting); *id.* at 359-60 (Douglas, J., dissenting); *id.* at 365-66 (Brennan, J., dissenting).

C. *On the Plaintiff*

A plaintiff faced substantial difficulties prosecuting an action under *Rosenbloom* because of the likelihood that the defamation usually involved an event of public interest, and would thereby trigger the *New York Times* actual malice standard. *Gertz*'s requirement that the plaintiff prove culpable conduct, actual damages, and, if he seeks punitive damages, malice makes it no easier for him to prevail. While it appears less onerous to require the plaintiff to prove negligence and actual injury under *Gertz* than actual malice under *Rosenbloom*, in reality both standards are so stringent that even *Gertz* is of no real protection to the plaintiff. At least under *Rosenbloom*, the plaintiff had a reasonable chance of recovery when the issue was not one of public interest. Now under *Gertz* the plaintiff is virtually barred from recovery even when first amendment issues are not at stake. Furthermore, as difficult as it will be for the plaintiff to prove simple negligence, this is the minimum he will have to prove. Since states can impose *any* standard except strict liability, they are free to adopt a standard of reckless negligence, actual malice or even absolute immunity.

The cases anticipating and following *Rosenbloom* already provide a strong body of precedent that the plaintiff should be required to prove actual malice in cases involving an issue of public interest.[154] There is no reason why this *Rosenbloom* standard cannot remain the law provided that in cases not involving issues of public interest, the publisher is not subject to strict liability. With the possibility that *Rosenbloom* can be retained in any jurisdiction, the plaintiff has no realistic chance of recovery.

IX
PRACTICAL SOLUTIONS TO THE PROBLEMS POSED BY *GERTZ*

Gertz poses problems both for the libeled plaintiff and for the media. For the private plaintiff the question is how he may best seek redress in light of the new burden of proving actual injury and negligence; for the press, the problem is how to avoid liability and how to predict what the standard of care will be.

A. *The Media*

For the media there are a number of devices such as insurance, indemnification, or retraction, which may distribute or avoid liability for libel altogether. Libel insurance has been used in the newspaper and broadcasting industry.[155] Contracts between publishers and advertisers or writers often contain indemnification clauses.[156] This is a sensible arrangement, since it is the publisher who is usually found liable even though the author is responsible and has the best opportunity to ascertain the facts. Another possible solution to the media's liability problem would be that prior to publication of an article with defamatory potential, or one written by an author with a propensity toward reckless-

154. *See* cases cited in *Predictability*, *supra* note 130, at 1560-61 n.94-96. 418 U.S. 377-80 n.10 (White, J., dissenting).

155. *Defamation*, *supra* note 116, at 914.

156. *Id.*

ness, a publisher might require the posting of bond or entry into a surety arrangement. Aside from these preventive measures, the publisher still has the ordinary remedies of tort law: contribution, indemnification,[157] and possibly the right to implead the author of the libel as a joint tortfeasor.[158]

The publisher's most effective shield against libel suits is retraction. Retraction benefits the publisher by allowing him to ameliorate an injury he may inadvertently and negligently have inflicted. Frequently, it provides adequate satisfaction to a plaintiff who may agree to discharge his cause of action. It also boosts the publisher's credibility with the public and avoids the loss of credibility which might result to the publisher from an adverse judgment in a lawsuit. Furthermore, evidence of retraction may be admissible to mitigate the damages to the plaintiff's reputation.[159]

A prudent and responsible publisher will verify the accuracy of the material he prints, but determining the precise steps which must be taken to satisfy a jury is no easy task when the publisher faces the myriad of standards possible under *Gertz*. One solution to the problems would be for Congress to legislate uniform standards of negligence applicable to all libels. Legislation would reduce the publisher's uncertainty. Congress would have the power to enact such legislation under the commerce clause.[160] But, given the difficulties the plaintiff will have in successfully proving actual injury and even simple negligence, this may be a purely academic concern.

B. The Plaintiff

How the aggrieved plaintiff may redress his injury under *Gertz* is a difficult problem. When the probability of proving actual damages does not justify the expensive ordeal of litigation, the plaintiff should seek another remedy, namely retraction.

It is useful to remember that, except where business opportunities have been lost, pecuniary awards, no matter how generous, do nothing to ameliorate the plaintiff's injury. Only an opportunity to restore one's good name will do that. Although the opportunity to vindicate one's reputation never completely undoes the harm, it does more to right it than any pecuniary award. The aggrieved plaintiff may well do better to make use of retraction when it is available than to prosecute a lawsuit. Litigation is a protracted ordeal and one which may psychologically, emotionally and financially exhaust the plaintiff.[161]

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157. *Id.* at 916.

158. *Id.* In most jurisdictions, one may not implead a joint tortfeasor unless the original defendant can show that he was merely passively negligent and that the co-tortfeasor he seeks to implead was actively negligent. *See* PROSSER, *supra* note 2, § 46 at 292-93. *But cf.* Dole v. Dow Chemical Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972) where a joint tortfeasor was allowed to implead a co-tortfeasor for partial indemnification based upon comparative responsibility for negligence.

159. Since courts will now be resolving the issue of actual damages, evidence of retraction would be relevant. Previously the common law rule was that evidence of retraction was not relevant to presumed damages. This should not survive *Gertz*.

160. Prosser suggests congressional legislation could solve the problem. *See* Prosser, *supra* note 151, at 995-99. Authority to regulate the communications industry was found long ago to be within reach of the commerce clause. *Id. See also* United States v. Guest, 383 U.S. 745 (1966).

161. *See* Donnelley, *The Right to Reply: An Alternative to An Action for Libel*, 34 VA. L. REV. 867, 871-74 (1948).

Indeed, the litigation may actually expose him to additional harassment by the press, for often the defendant, in attempting to minimize his liability, will try to show that the plaintiff had no reputation to damage. The savagery with which he tries to impeach the plaintiff's reputation may compound the harm done by the original libel. Clearly, the difficulty of prevailing under *Gertz* renders litigation a less attractive alternative. With a less than probable chance of recovery, the libelee should settle for a retraction and apology if he can negotiate one. Voluntary retraction, coupled with a public apology, as prominently displayed as the defamatory matter, is the most effective device for restoring the plaintiff's reputation. Negotiating a retraction, moreover, becomes even more critical after *Gertz* because the demise of presumed damages significantly restricts the plaintiff's use of a judicial forum to prove the libel false.

In his dissent, Justice White criticized the abolition of the rule of presumed damages because he felt that even if a plaintiff recovered only a nominal award, he should be entitled to an adjudication that the publication was false.[162] *Gertz* prevents this possibility, but if an adjudication is still sought one might attempt to obtain a declaratory judgment that he has been libeled.[163] For this remedy to be effective, though, a court would have to order that its findings be made public. For example, newspapers and broadcasters might be required by the court to publish an adverse adjudication against them in the case of a libel, but the constitutionality of such an approach remains to be tested.

X
CONCLUSION

For the past decade, the Supreme Court has sought without success to strike the delicate balance between freedom of the press and an individual's right to be free from defamatory injury. The Court's latest experiment in the laboratory of libel, *Gertz v. Robert Welch, Inc.*, has some laudable, but mostly unfortunate, results.

Recognizing at the outset a need to provide greater protection for the private person than the law afforded under *Rosenbloom*, the plurality adopted a model which offered protection to the libelee according to his status as a public or private individual. Because this model took into no account the importance of the issues under discussion and thus left society's interest in the exchange of ideas unprotected, the Court had to make other adjustments in the law of damages to strike an accommodation between competing social and individual concerns. These adjustments proved to be so burdensome that any advantages accruing to the private person under the *Gertz* model were vitiated by the changes in the law of damages. While the new rule awarding punitive damages is defensible since they should properly play no role in libel except upon a showing of the most malicious conduct, nevertheless, the fact that the plaintiff must now prove both fault and actual injury, makes the possibility of recovery

162. 418 U.S. at 376 (White, J., dissenting).

163. *See generally* Note, *Developments in the Law–Declaratory Judgments*, 62 HARV. L. REV. 787, 844-83 (1949); Note, *Vindication of the Reputation of a Public Official*, 80 HARV. L. REV. 1730 (1967).

unlikely except in the most unusual circumstances. Thus, under *Gertz* the private litigant has no more prospect of recovery for libel by the media than he or she did under *Rosenbloom*.

The proposed modification of the *Rosenbloom* model, however, would provide the individual with a more realistic opportunity of recovery except when the presence of a public issue demands the press be given greater latitude for possible negligence. Carefully varying constitutional protection from libel with the issue's importance rather than with the individual's public or private status would result in greater protection to both the individual and society as a whole.

HERBERT J. HAMMOND