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William Richard Carroll

Recent Decisions

CONSTITUTIONAL LAW—FIRST AMENDMENT—FREEDOM OF THE PRESS—CONSTITUTIONAL PRIVILEGE FOR DEFAMATION—PRIVATE INDIVIDUAL—LIBEL—DAMAGES—The United States Supreme Court, applying the first amendment to a libel action, has held that a publisher enjoys no constitutional privilege for defamation of a private individual; the states may allow an award of actual damages under any standard that does not impose strict liability, but "actual malice" must be shown for recovery of presumed or punitive damages.

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

In 1968, Richard Nuccio, a Chicago policeman, shot and killed a youth named Ronald Nelson; Nuccio was prosecuted and convicted of second-degree murder. Nelson's family retained Elmer Gertz as counsel in a civil suit against Nuccio. In March of 1969, respondent published a magazine article purporting to demonstrate that the prosecution of the police officer was part of a Communist plot to discredit local law enforcement agencies and create a national police force capable of sustaining a Communist dictatorship.[1] Although Gertz had played no part in the criminal prosecution, the author charged that Gertz had masterminded the alleged Communist plot. The editor printed an introduction stating the author had done extensive research, but he made no effort to verify or substantiate the author's charges.[2]

After publication of the article, Gertz sued the publisher for libel in federal district court.[3] The publisher-respondent asserted the constitutional privilege established in *New York Times Co. v.*

1. The article in *American Opinion*, a monthly magazine of the John Birch Society, was entitled "Frame-Up: Richard Nuccio and the War on Police." Gertz v. Robert Welch, Inc., 418 U.S. 323, 325-26 (1974).

2. Among other things, Gertz was described as a "Leninist," a "Communist-fronter," and an official of the National Lawyers Guild, which planned "the Communist attack on the Chicago police during the 1968 Democratic Convention." In truth, Gertz had been a member of the National Lawyers Guild some 15 years earlier; otherwise, the statements were gravely inaccurate. The magazine also printed a photograph of Gertz, bearing the caption: "Elmer Gertz of Red Guild harasses Nuccio." *Id.* at 326-27.

3. Gertz v. Robert Welch. Inc., 306 F. Supp. 310 (N.D. Ill. 1969). Federal jurisdiction was based upon diversity of citizenship.

Sullivan.[4] The court, however, found the publisher potentially liable under Illinois law[5] because at that point it considered the privilege applicable only to defamations of public officials and public figures—and Gertz was neither.[6] The court submitted only the issue of damages to the jury.[7] After the jury awarded Gertz $50,000, the court granted the publisher's motion for judgment notwithstanding the verdict.[8] In so doing, the court extended the constitutional privilege to comment upon any public issue without regard to the public or private status of the person defamed.[9] The Seventh Circuit affirmed,[10] finding that the subject of the article was a "matter of significant public interest"[11] and that Gertz had failed to present evidence sufficient to overcome the publisher's limited privilege.[12]

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4. 376 U.S. 254 (1964). *New York Times* was the first in a series of decisions acknowledging a constitutional privilege against liability for defamation. The Court held that an elected public official could not recover for a defamatory falsehood relating to his official conduct unless the statement was made with "actual malice"—knowledge that it was false, or reckless disregard of whether it was true or false. *Id.* at 279-80. For a discussion of the scope of the privilege at the time of the lower court rulings in *Gertz* see notes 40-42 *infra*.

5. The trial court denied the publisher's pre-trial motion to dismiss on the grounds that Gertz had failed to allege special harm. Since Illinois law had uniformly held it libel per se to falsely label a person a Communist, *e.g.*, Brewer v. Hearst Publishing Co., 185 F.2d 846 (7th Cir. 1950); Spanel v. Pegler, 160 F.2d 619 (7th Cir. 1947); Whitby v. Associates Discount Corp., 59 Ill. App. 2d 337, 207 N.E.2d 482 (1965); Dilling v. Illinois Publishing & Printing Co., 340 Ill. App. 303, 91 N.E.2d 635 (1950), a showing of special damages was not required. 306 F. Supp. at 310-11. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 111, at 744 (4th ed. 1971) [hereinafter cited as PROSSER]; Note, *The Accusation of Communism as Slander Per Se*, 4 DUKE B.J. 1 (1954).

6. The trial court denied the publisher's motion for summary judgment, ruling that even if the privilege were applicable it would be inconclusive since it could be surmounted by proof of "actual malice" on the part of the publisher. Gertz v. Robert Welch, Inc., 322 F. Supp. 997, 998 (N.D. Ill. 1970).

7. The court added that if Gertz were a public figure or public official the "actual malice" standard would have required a directed verdict for the publisher since Gertz had not proven knowledge of falsity or reckless disregard by the publisher. 322 F. Supp. at 999.

8. *Id.* at 1000. Perhaps the court submitted the damages question, and then sidestepped the answer, because it foresaw further litigation. The only issue left for appeal would be the validity of the standard applied by the court; on remand a jury trial would not be necessary.

9. *Id.* at 999-1000. Curiously, the district court anticipated the Supreme Court's later extension of the privilege to "matters of general concern" in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).

10. Gertz v. Robert Welch, Inc., 471 F.2d 801 (7th Cir. 1972).

11. The recent *Rosenbloom* decision seemed to dictate this result. *Id.* at 805.

12. *See* note 7 *supra*. The publisher escaped liability despite evidence that the editor was negligent in failing to verify the accuracy of his author's manuscript. His omission did not constitute "actual malice" since he could have reasonably believed that the author was trustworthy. 471 F.2d at 806-07.

On certiorari to the Supreme Court,[13] the principal issue was whether a newspaper or broadcaster may claim a constitutional privilege against liability for defamatory falsehoods published about an individual who is neither a public official nor a public figure.[14] The Court held that the first amendment does not protect the publisher[15] from liability to the defamed individual.[16] The private person may recover actual damages under a state standard which does not impose liability without fault, but he must prove "actual malice" to receive presumed and punitive damages.

DECISION OF THE COURT

The *Gertz* Court's search for a middle ground between strict liability for defamation at common law and Court decisions allowing a limited constitutional privilege[17] resulted in three rules of law.[18] So

13. Gertz v. Robert Welch, Inc., 410 U.S. 925 (1973).

14. Gertz v. Robert Welch, Inc., 418 U.S. 323, 332 (1974).

15. Under the common law of torts, a "publisher" is anyone who defames. *See generally* PROSSER, *supra* note 5, § 113, at 766. The common law "publisher" should be distinguished from the modern day "publisher" who prints a newspaper or magazine. Like the other precedents in this area, *Gertz* appears to affect "publishers" and broadcasters only in the latter sense, with no effect upon libel suits between two private individuals. *See* 418 U.S. at 332, 348-50.

16. *Gertz* was clearly a case of libel per se, in which the Court balanced the individual's right to his good name against the constitutional guarantee of freedom of the press. But it is not clear whether the Court meant the balance struck in *Gertz* to affect the common law rules regarding slander vis-à-vis the guarantee of free speech as well. Justice White thought the majority opinion reached "all libels or slanders, whether defamatory on their face or not," 418 U.S. at 395 (White, J., dissenting), although he confined his criticisms to the Court's alteration of the common law of libel per se. *Id.* at 393, 398, 401 n.43. An alternative reading limits the *Gertz* holdings to libel per se despite its close connection with slander, as long as libel is not confined to the printed word. This reading is confirmed by most authorities, who define libel as written or printed words or any defamation with the permanence and wide distribution of written words. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 568A, comment *a* at 53 (Tent. Draft No. 20, 1974).

17. The Court faces a thorny problem each time it attempts to balance the right to a free press against the right to privacy. For early thoughts on this problem see the classic article, Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). *See also* Leflar, *The Free-ness of Free Speech*, 15 VAND. L. REV. 1073 (1962); Merin, *Libel and the Supreme Court*, 11 WM. & MARY L. REV. 371 (1969).

As Justice White noted in *Gertz*, the Court hesitated to rule on defamation prior to its decision in *New York Times*, 418 U.S. at 370 (White, J., dissenting). Libel was considered a form of speech totally unprotected by the first amendment, and the states were left free to set the penalty. *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250, 254-55 (1952); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942); Near v. Minnesota, 283 U.S. 697, 714-15 (1931); Patterson v. Colorado, 205 U.S. 454, 462 (1907).

long as the states do not impose "liability without fault," they may define the appropriate standard of liability to which a publisher may be held for defamation of a private individual.[19] If such a standard requires less than "actual malice" the states may allow recovery for actual damages, but "actual malice" must be shown for an award of presumed or punitive damages.[20] Defamation cases brought by public officials or public figures, as opposed to "private individuals," continue to require a showing of "actual malice" on the part of the publisher.[21]

One is not a public figure for all purposes unless he has general fame or notoriety in the community *and* is pervasively involved in the affairs of society. Mere involvement in a particular controversy, moreover, does not necessarily transform an otherwise private individual into a public figure with regard to that controversy unless the nature and extent of his involvement so dictate.[22] The constitutional privilege extends to defamation of a private individual only when the defamation concerns the individual's relationship to the controversy *and* the individual is involved in the controversy in some significant way.[23]

At present, a majority of the Court seems to accept the position that the first amendment guarantees of free speech and press were intended to abolish the crime of seditious libel and prevent prosecution for criticism of the government, although they do not constitute general license for obscenity, profanity, and defamation. *See, e.g.*, 418 U.S. at 383 (White, J., dissenting). A persistent minority claims that any attempt to restrict speech mires the Court in a constitutional "quagmire." *Id.* at 355-56 (Douglas, J., dissenting). For an overview of the Court's ongoing attempt to balance the competing rights of privacy and free speech see Warnock, *The New York Times Rule—The Awakening Giant of First Amendment Protections*, 62 Ky. L.J. 824 (1974).

18. The divisive nature of the issue is apparent from the alignment of the Court in *Gertz*. The plurality opinion was written by Justice Powell and joined without comment by Justices Stewart, Marshall and Rehnquist. Justice Blackmun would have retained presumed and punitive damages, but his concern that the Court should "come to rest in the defamation area and to have a clearly defined majority position that eliminates the unsureness engendered by *Rosenbloom*'s diversity" prompted his hesitant concurring vote. 418 U.S. at 354 (Blackmun, J., concurring).

Chief Justice Burger's brief dissent suggested he would support strict liability for defamation of private individuals. *Id.* at 354. Justice Douglas dissented on his customary ground that the first amendment gives the media an absolute privilege. *Id.* at 355. Justice Brennan adhered to the "matter of general concern" test he authored in *Rosenbloom*. *Id.* at 361 (Brennan, J., dissenting). Justice White's lengthy dissent stressed that strict liability and presumed damages should be retained for defamations of private individuals. *Id.* at 369.

19. 418 U.S. at 347.

20. *Id.* at 349.

21. *Id.* at 342-43.

22. *Id.* at 352.

23. Justice Brennan's *Rosenbloom* opinion alluded to the refinement of the public figure

The Court rejected the publisher's contention that Gertz had become a public official by his appearance in court.[24] Nor had he achieved the pervasive fame or notoriety of a public figure for all purposes and in all contexts;[25] Gertz was indeed well-known in some circles, but this was not enough to make him a public figure in the broad sense.[26] Finally, the Court found that Gertz's role in the event had not made him a limited public figure by virtue of voluntary involvement or by being drawn into the controversy.[27]

THE *Gertz* RULES

The three rules of law[28] established in *Gertz* are best understood

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definition supplied by *Gertz* when he stated that every activity of a public figure was not automatically the subject of public or general interest. *Rosenbloom* left open the question of the scope of the constitutional protection for comment on a "person's activities not within the area of public or general interest." Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44 n.12 (1971).

24. Such a finding would "sweep all lawyers under the *New York Times* rule as officers of the court and distort the plain meaning of the 'public official' category beyond all recognition." 418 U.S. at 351. The dissenting Chief Justice agreed, stating that any other result would jeopardize the right to counsel. *Id.* at 355 (Burger, C.J., dissenting).

25. *Id.* at 351-52.

26. Gertz had been active in community and professional affairs, had served as an officer in various clubs and organizations, and had published a few articles on legal subjects. *Id.*

27. The Court reversed and remanded because the trial court had not anticipated the new liability and damages rules. Despite the court's acknowledgement of Gertz's private status and its refusal to apply the "actual malice" standard, it had permitted the jury to impose liability without fault and to presume damages without proof of injury. *Id.* at 352.

28. This note will be limited to a discussion of the rules forbidding liability without fault and defining "private individual." While a complete analysis of the damages issue is beyond the scope of this note, it should be observed that the arguments advanced by the *Gertz* majority in support of abandonment of presumed and punitive damages were effectively countered in Justice White's dissent.

At common law, plaintiffs could recover damages without proof of actual harm, due to the difficulty of demonstrating the exact manner and extent of injury to reputation. *See* PROSSER, *supra* note 5, § 112, at 762-64. *But cf.* RESTATEMENT (SECOND) OF TORTS § 621, comment *b* at 286 (Tent. Draft No. 20, 1974). *See generally* Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903); *Developments in the Law—Defamation*, 69 HARV. L. REV. 875 (1956). Recovery of at least nominal damages lets the plaintiff use the courts to restore his good name. Murnaghan, *From Figment to Fiction to Philosophy—The Requirement of Proof of Damages in Libel Actions*, 22 CATH. U.L. REV. 1, 13 (1972). *See also* RESTATEMENT (SECOND) OF TORTS § 620, comment *a* at 284 (Tent. Draft No. 20, 1974).

The *Gertz* Court forbade presumed damages absent proof of "actual malice" in the belief that the threat of excessive awards in multiple lawsuits would have a chilling effect on the media. *See* 418 U.S. at 349. Justice White suggested, however, that lower courts are responsible for the fairness of a jury's award, *id.* at 394-97, and even substantial jury awards would not threaten free expression since the press has sufficient resources to meet these claims. *Id.*

against the background of the common law policy imposing strict liability for defamation and the concept of the "public figure" as explicated earlier by the Court in *Rosenbloom v. Metromedia, Inc.*[29]

A. *Any Standard Greater Than Liability Without Fault*

The common law provided a cause of action for defamation supported merely by proof of publication, without regard to the intentional or negligent nature of the defendant's act.[30] Strict liability was grounded on four policy considerations. The common law retained the ecclesiastical law presumption that the defendant acted with evil intent since defamation was a moral sin.[31] It recognized no value in protecting falsehoods; neither an intentional lie nor an accidental falsehood could benefit society.[32] The common law also adhered to the adage, "Every man must be presumed to know and to intend the natural and ordinary consequences of his acts."[33] Finally, the common law recognized that a plaintiff would find it almost impossible to show whether the defendant's conduct was

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at 390-92. The Court not only ignored the common law rationale behind presumed damages but it did so without proof that the feared chilling effect upon the media was more than mere speculation. *Id.* at 379-80, 388 n.26, 404 (White, J., dissenting).

The Court did admit that the extent of damage can be difficult to measure in monetary figures; it failed, however, to recognize that with its standard of proof the damage issue might never be faced. *Id.* at 348-50. The Court virtually eradicated the private plaintiff's remedy even though the impact of the publication on the individual is identical whether the publication is negligent or malicious. *Id.* at 395 (White, J., dissenting).

The Court may have eliminated presumed and punitive damages under the negligence standard to compensate the media for the loss of its broader privilege under the *Rosenbloom* "matter of general concern" test. *See* notes 53-56 *infra* and the accompanying text. It might have accomplished this same result by setting a more stringent standard, such as gross negligence, for liability to a defamed private individual. *See* note 39 *infra*.

29. 403 U.S. 29 (1971). *See* notes 43-44 *infra*.

30. Originally, the common law attached liability to intentional and negligent defamation; innocent or "accidental" defamation went unpunished. Liability for all defamations was imposed when later courts shifted their attention to the harm inflicted upon the plaintiff rather than the actions which caused it. *See* Hulton & Co. v. Jones, 2 K.B. 44 (1909), *aff'd* A.C. 20 (1910), the case traditionally credited with establishment of strict liability for any defamation; PROSSER, *supra* note 5, § 113, at 772.

31. PROSSER, *supra* note 5, § 113, at 772 n.18; Smith, *Jones v. Hulton: Three Conflicting Judicial Views as to a Question of Defamation*, 60 U. PA. L. REV. 365, 370 (1912) [hereinafter cited as Smith].

32. False *facts* have never been considered worthy of protection, although they are inevitable in free debate. The first amendment introduced the concept that there is no such thing as a "false *idea*." 418 U.S. at 339-40 (emphasis added).

33. *See* Smith, *supra* note 31, at 386. This concept is similar to strict liability in the use of explosives and the keeping of dangerous animals. *See* PROSSER, *supra* note 5, § 113, at 773.

intentional or negligent. In the absence of well-developed rules of discovery, only the defendant could have knowledge of his state of mind during publication.[34]

The *Gertz* abrogation of the common law rule of strict liability reflects the fact that the major policies supporting it are no longer as meaningful as they once were. Since our system of government is based on the separation of church and state, ecclesiastical law has no current relevance. The Court has recognized that constitutional protection must be extended to *some* falsehoods in order to advance *all* free speech.[35] Although an author might well be "presumed to know and to intend the natural and ordinary consequences of his acts," that presumption seems less applicable to a modern publisher[36] who is no longer able to have first-hand knowledge of all he prints. In addition, rules of court allowing exhaustive discovery aid the modern plaintiff in proving the publisher's intent.[37]

As a safeguard for freedom of the press, *Gertz* required that the defamed private individual must prove some fault by the publisher. The formulation of an exact standard was left to the states, with the suggestion that some form of negligence would be appropriate. The Court believed the new rule would insure a more responsible press without unduly restricting its freedom.[38] While negligence may be shown more easily than "actual malice," the individual's cause of action is limited to factual misstatements whose content would "warn a reasonably prudent editor or broadcaster of its defamatory potential."[39]

B. *The Private Individual*

In *New York Times*, the Court held that defamations of elected

34. Smith, *supra* note 31, at 373.

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

36. *See* note 15 *supra*. The specialization and complexity of most publishing enterprises support the notion that the modern publisher has less opportunity to know the truth of what he publishes than those closer to the source of the information.

37. *See, e.g.*, FED. R. CIV. P. 26; FED. R. CRIM. P. 16.

38. *See* 418 U.S. at 354 (Blackmun, J., concurring).

39. *Id.* at 348. Justice Harlan's proposal for liability to public persons under a gross negligence standard offers some guidance for an acceptable formulation, Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967): "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." He suggested a standard of simple negligence for private persons in his *Rosenbloom* dissent: "a standard . . . of reasonable care where the plaintiff is an ordinary citizen." 403 U.S. at 69.

public officials were privileged unless made with "actual malice"—knowledge of the falsity or reckless disregard for the truth or falsity of the statements.[40] Prior to *Gertz*, the Court had extended the "actual malice" standard to appointed public officials, candidates for public office,[41] and public figures.[42] *Rosenbloom v. Metromedia, Inc.*[43] applied the "actual malice" standard to private individuals whose actions involved them in a "matter of general concern."[44] This further extension of the standard was based on the

40. *See* note 4 *supra*. *New York Times* involved allegedly libelous statements about an elected official in Montgomery, Alabama. The statements appeared in the *Times* in a political advertisement condemning local police treatment of civil rights demonstrators. 376 U.S. at 256-57. The rule of the case, which prohibits recovery unless the defamed party can prove the statement was made with knowledge of falsity or reckless disregard for truth or falsity, is usually referred to as the *New York Times* "actual malice" standard. For further discussion see Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191.

41. For examples of the broadening application of the "actual malice" standard to various public officials see Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) (candidate for public office); Pickering v. Board of Educ., 391 U.S. 563 (1968) (school board member); Rosenblatt v. Baer, 383 U.S. 75 (1966) (any government employee who has or appears to have substantial responsibility).

42. In Curtis Publishing Co. v. Butts, 388 U.S. 130 (1966), the Court extended the "actual malice" standard to comments about "public figures." A "public figure" is one who is not a public official but is "nevertheless intimately involved in the resolution of important public questions or, by reason of fame, shapes events in areas of concern to society at large." *Id.* at 164 (Warren, C.J., concurring in result).

The facts in *Butts* and a consolidated action, Associated Press v. Walker, demonstrate the type of involvement which can make one a public figure. Butts, athletic director at the University of Georgia, sued the *Saturday Evening Post* for a story alleging that he had conspired to "fix" a football game. Although he was employed by a private corporation rather than by the state of Georgia he "was a well-known and respected figure in coaching ranks." *Id.* at 136. In *Walker*, a retired army officer sued Associated Press over a news dispatch which alleged that he had encouraged rioters and led a crowd attempting to thwart James Meredith's enrollment at the University of Mississsippi. The plaintiff had been engaged in political activities and "could fairly be deemed a man of some political prominence." *Id.* at 140.

43. 403 U.S. 29 (1971). Rosenbloom, a distributor of nudist magazines, was arrested for possession and sale of allegedly obscene materials. After his acquittal on the grounds that the magazines were not obscene, he sued a news broadcaster who referred to the books as unqualifiedly "obscene" and to Rosenbloom as a "smut distributor" and "girlie-book peddler." *Id.* at 32-36. The Supreme Court decided *Rosenbloom* after the *Gertz* trial court's final decision but before the appeal of that case. *See* notes 5-12 *supra* and the accompanying discussion in text.

44. The plurality nowhere defined the limits of a "matter of general concern." The Court stated the test of whether the privilege applied was:

> whether the utterance involved concerns an issue of public or general concern, albeit leaving the delineation of the reach of that term to future cases. . . . [T]hat is not a problem in this case, since police arrest of a person for distributing allegedly obscene magazines clearly constitutes an issue of public or general interest.

same policy, reflected in the first amendment, which supported the original creation of the privilege:[45] the press must be free to inform the public and to advance vigorous debate about governmental and public issues. The problem the Court faced in creating and extending the limited constitutional privilege under the "actual malice" standard was the conflict between the need for an uninhibited press and the legitimate interest in redressing wrongful injury to the private individual.[46]

Justice Brennan's plurality opinion in *Rosenbloom* made no distinction between public and private persons.[47] His choice of "matters of general concern" as the test for applicability of the privilege clearly favored the interest in free press.[48] Although Justices Harlan and Marshall disagreed on other points, they agreed that the plurality had not given enough attention to the interest of private individuals.[49] Their major objection was the plurality's failure to recognize that the private individual has less access to the media than a

403 U.S. at 44-45 (footnote omitted). For examples of application of the "actual malice" standard to "matters of general concern" by state and federal courts, see 418 U.S. 377-79 n.10 (White, J., dissenting). *Gertz* was the first case after *Rosenbloom* in which the Supreme Court faced the problem of defining a "matter of general concern."

The Court splintered into five opinions in *Rosenbloom*, none of which commanded more than three votes. One approach, adopted by Justices Brennan, Burger, Blackmun, and, to some extent, Justice White would have extended *New York Times* to an expanding variety of situations. 403 U.S. at 44, 62. Another would have varied the level of constitutional privilege for defamatory falsehood with the status of the person defamed. This view was shared by Justices Harlan, Marshall, and Stewart. *Id.* at 64, 78. Justice Black reaffirmed his view that the media have absolute immunity from liability for defamation. *Id.* at 57. Justice Douglas took no part in the consideration of the case.

45. In *New York Times*, the Court recognized a profound constitutional commitment for debate on public issues even though there might be "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S. at 270.

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

47. "Drawing a distinction between 'public' and 'private' figures makes no sense in terms of the First Amendment guarantees." 403 U.S. at 45-46.

48. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 337 (1974).

49. Justice Harlan proposed that there should be a different standard for private individuals, deprived of access to channels of communication sufficient to rebut falsehoods, 403 U.S. at 70-72 (Harlan, J., dissenting); that there should be an ad hoc approach for determining whether a person is a public figure, *id.* at 76; and that the states should be free to define any standard of care for the private individual other than "liability without fault." *Id.* at 64. Justice Marshall, joined by Justice Stewart, thought that private individuals should be allowed to recover as long as the standard was not "strict liability," *id.* at 86-87 (Marshall, J., dissenting), and that the "general concern" test was too broad. *Id.* at 79. The dissents differed in that Justice Harlan would have allowed punitive damages, *id.* at 75, but Justice Marshall would not. *Id.* at 84-86.

public person, and consequently his interest in maintaining his good reputation deserves more state protection.[50] Justice Marshall argued that the plurality had gone too far in extending the media's immunity since almost anything could be a "matter of general concern."[51] He further noted that the "matter of general concern" standard gave the lower courts no guidelines for determining whether the privilege was applicable.[52]

In *Gertz*, the Court sharply contracted the scope of *Rosenbloom* by denying the constitutional privilege when a private individual is defamed, regardless of whether the matter is one of "general concern."[53] The Court stated that the *New York Times* "actual malice" standard properly accommodated the competing interests at stake when a public person was defamed,[54] but the extension of the "actual malice" standard to private individuals was unacceptable.[55] A majority of the Court now shared the *Rosenbloom* dissenters' justified concern that there had been an improper balance between the media's broad privilege and the private individual's restricted remedy.[56]

The *Gertz* Court defined a "public person" as one who holds government office or who is classified as a public figure by reason of the notoriety of his achievements or by reason of the vigor and success with which he seeks the public's attention.[57] The old "matter of general concern" test contained an element of "newsworthiness" that encompassed everything in a newspaper or broadcast.

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50. Justice Harlan emphasized that public persons are more impervious to criticism. *Id.* at 70-71 (Harlan, J., dissenting). Justice Marshall rejected the plurality's contention that it made no difference whether the individual chose to become a "matter of general concern." He felt that the plurality doctrine undermined society's interest in protecting private individuals from unwanted public scrutiny. *Id.* at 79 (Marshall, J., dissenting).

51. *Id.*

52. Justice Marshall somewhat facetiously suggested that the lower courts might simply "take a poll to determine whether a substantial portion of the population is interested or concerned in a subject." *Id.*

53. The Court did not specifically overrule *Rosenbloom*, but expressed dissatisfaction with the extension of the *New York Times* test because it abridged to an unacceptable degree the state interest in protecting an individual's reputation. 418 U.S. at 345-46. In his dissent, Justice White characterized the majority's action as a repudiation of the *Rosenbloom* plurality and an acceptance of the liability standard set forth by the *Rosenbloom* dissenters. *Id.* at 378-79.

54. *Id.* at 342-43.

55. *Id.* at 343.

56. *See id.* at 347-48; note 49 *supra*.

57. 418 U.S. at 342.

The new definition, which permits a private individual to become a public person for all purposes[58] or for a limited range of issues,[59] seems a more manageable tool for the lower courts. A determination of what an individual has done to attract public attention[60] is more easily made than a judgment of what issues concern the public.[61] The key to the *Gertz* definition of "public person" is the nature and extent of the individual's involvement in a public controversy. Gertz's disinterest in publicity or public support for his involvement in the controversy gave the Court reason to classify him as a private individual.[62] Under this approach, specific actions of the individual in relation to the controversy are crucial to his status for purposes of applying the limited privilege.

Although the Court did not redefine "public figure" in precise terms, Gertz himself serves as a gauge of the nature and extent of involvement necessary to transform a private individual into a public figure with regard to a particular controversy.[63] Gertz represented a client in a case he knew would receive media coverage, but his voluntary injection into the public controversy was insufficient to make him a limited public figure; the published reports that he was plotting against the police were also insufficient to draw him into the controversy involuntarily. He played a minimal role at the coroner's inquest, took no part in the criminal prosecution, and never discussed the criminal or civil litigation with the press. Nor did he attempt to gain support from the general public.[64] By stressing Gertz's failure to perform certain acts, the Court implied these acts would be relevant, if not conclusive, indicia of a limited public figure. Thus, the nature and extent of involvement would seem to require some affirmative effort to inform, arouse, or influence public

58. In some instances, an individual may become so famous or notorious that he is a public figure in all contexts. *Id.* at 351.

59. "More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Id.*

60. *See* 418 U.S. at 351-52.

61. *See id.* at 346; Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 79 (1971) (Marshall, J., dissenting).

62. *See* text accompanying notes 63-64 *infra*.

63. Although the Court recognized that an individual might become a public figure through no purposeful action of his own, it countered that such instances must be exceedingly rare. 418 U.S. at 345. In any event, the crucial factor was the individual's attempt to influence the resolution of public issues by commanding attention *after* being "drawn into" the fray. *Id.* at 351-52.

64. *Id.* at 352.

opinion once the private individual has become involved, voluntarily or involuntarily, in the controversy.

Unlike the *Rosenbloom* plurality, the Court considered that private individuals cannot obtain ready access to the media to contradict the lie or correct the error.[65] The new definition of the manner in which one becomes a public figure reflects acceptance of the belief that a private individual who has not voluntarily relinquished his interest in the protection of his good name is not only more vulnerable to injury, but also more deserving of recovery.[66] The public person, who has access to the media and can protect himself, has assumed the risk of some false comment by voluntarily subjecting himself to public attention and criticism.[67] One who becomes a public figure through "pervasive involvement" probably has ready access to the media; so should one who becomes a public figure in the "limited" sense since his role in the controversy would command media coverage. Even if it does not, the "limited" public figure may have impliedly consented to media coverage by seeking public attention just as the public official or general public figure.[68] Thus, the "public figure" as conceptualized in *Gertz* reflects the distinction between those who have access to the media and those who do not.

The rules set forth by the Court in *Gertz* go far toward clarifying a difficult and complex area. The Court seems to have struck a meaningful balance of interests in providing the lower courts a concrete, workable distinction between the remedies for defamation available to public and private individuals. By eliminating "liability without fault," the Court has updated a common law rule which had no justification in our society. By contracting *Rosenbloom's* extension of the constitutional privilege, the Court has recognized the private individual's greater need for protection from unwanted excursions into the "marketplace of ideas."

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65. The first remedy of any defamation victim is self-help. The defamed party can attempt to use the media himself to minimize the impact on his reputation. *Id.* at 344.

66. *Id.* at 345.

67. *Id.* at 344-45. While the Court did not use the phrase "assumption of risk," it suggested the accepted meaning of the term.

68. Since the public figure has "thrust" himself into the controversy, he has done so with the presumed intention of inviting attention and comment. *Id.* at 345.