NOTES

CONSTITUTIONAL LAW—THE FIRST AMENDMENT DOES NOT INSULATE THE PRESS FROM LIABILITY IN A DEFAMATION ACTION BROUGHT BY A PRIVATE PERSON EVEN THOUGH SHE IS A PARTY IN A WIDELY PUBLICIZED DIVORCE PROCEEDING—*Time, Inc. v. Firestone*, 96 S. Ct. 958 (1976).

Russell A. Firestone Jr., "the scion of one of America's wealthier industrial families," was granted a divorce from his wife, Mary Alice Sullivan Firestone, in 1967.[1] The divorce was a result of Mr. Firestone's counterclaim to an action for separate maintenance which had been initiated by his wife.[2] In his counterclaim Mr. Firestone alleged "extreme cruelty and adultery" on the part of his wife, and the trial court, finding " 'the equities' " in his favor, granted his divorce.[3]

On the basis of information gathered from several sources,[4]

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[1] Time, Inc. v. Firestone, 96 S. Ct. 958, 963 (1976); *see* Firestone v. Firestone, No. 64 C 2790 C (Fla. Cir. Ct., Dec. 15, 1967).

[2] Time, Inc. v. Firestone, 96 S. Ct. 958, 963 (1976).

[3] *Id.* at 958, 963–64.

[4] *Id.* at 964. The sources from which the item was gathered were a wire service report, a New York newspaper story, a "stringer" assigned to the Palm Beach area, and Time's Miami bureau chief. *Id.* The final judgment of divorce, however, stated in part:

> "This cause came on for final hearing before the court upon the plaintiff wife's second amended complaint for separate maintenance (alimony unconnected with the causes of divorce), the defendant husband's answer and counterclaim for divorce on grounds of extreme cruelty and adultery . . . .
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> "According to certain testimony in behalf of the defendant, extramarital escapades of the plaintiff were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, in plaintiff's behalf, would indicate that defendant was guilty of bounding from one bedpartner to another with the erotic zest of a satyr. The court is inclined to discount much of this testimony as unreliable. Nevertheless, it is the conclusion and finding of the court that neither party is domesticated . . . .
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> "The premises considered, it is thereupon
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> "ORDERED AND ADJUDGED as follows:
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> "1. That the equities in this cause are with the defendant; that defendant's counterclaim for divorce be and the same is hereby granted . . . ."

Id. at 963–64 (quoting from Firestone v. Firestone, No. 64 C 2790 C (Fla. Cir. Ct., Dec. 15, 1967)).

The final judgment was affirmed by the Florida supreme court although "lack of domestication"—upon which the trial court had based its grant of divorce—was not a valid ground for divorce in Florida. The supreme court, however, found adequate evidence in the record to support the judgment on grounds of extreme cruelty. Firestone v. Firestone, 263 So. 2d 223, 225 (Fla. 1972), *aff'g in part* Firestone v. Firestone, 249 So.

Time, Inc. published a report in *Time* magazine stating that the divorce had been granted " 'on grounds of extreme cruelty and adultery.' "[5] Mary Alice Firestone, through her attorneys, demanded a retraction from Time, Inc., alleging that the report "was 'false, malicous and defamatory.' "[6] When Time refused her request, Mrs. Firestone instituted a libel suit in Florida circuit court.[7] On Time's motion, the trial court granted summary judgment. This was reversed on appeal, however, and a trial was had on the merits.[8] The jury found in favor of Mrs. Firestone and awarded her $100,000 in compensatory damages, which judgment was ultimately affirmed by the Florida supreme court.[9] On petition by Time, the United States Supreme Court granted certiorari.[10]

In *Time, Inc. v. Firestone*[11] the Court held that Mary Alice Firestone did not have to prove actual malice on the part of Time in the publication of the defamatory report because she "was not a 'public figure.' "[12] The Court also determined that the fact that Time was reporting on a judicial proceeding did not automatically invoke the

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2d 719 (Fla. Dist. Ct. App. 1971). For a list of valid grounds on which divorce may be granted in Florida see FLA. STAT. ANN. § 61.041 (1969), *amending* FLA. STAT. ANN. § 65.04 (1965) (the Florida divorce statute in effect at the time of the Firestone divorce).

[5] Time, Inc. v. Firestone, 96 S. Ct. 958, 964 (1976). The complete Milestones item read:

> "DIVORCED. By Russell A. Firestone Jr., 41, heir to the tire fortune: Mary Alice Sullivan Firestone, 32, his third wife; a onetime Palm Beach schoolteacher; on grounds of extreme cruelty and adultery; after six years of marriage, one son; in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extramarital adventures on both sides, said the judge, 'to make Dr. Freud's hair curl.' "

Id.

[6] *Id.* Notice to the publisher of an allegedly defamatory falsehood is required under Florida law before a defamation proceeding can be instituted. *See* FLA. STAT. ANN. § 770.01 (1963).

[7] Time, Inc. v. Firestone, 96 S. Ct. 958, 964 (1976).

[8] Firestone v. Time, Inc., 231 So. 2d 862, 863–65 (Fla. Dist. Ct. App. 1970). The appellate court reversed because such "subjective elements [as] willfulness, intent, maliciousness or good faith" would necessarily be involved in a determination of liability for an alleged defamatory falsehood. Thus, a jury had to be given the opportunity to hear the evidence and make an independent judgment. *Id.* at 865.

[9] *See* Time, Inc. v. Firestone, 96 S. Ct. 958, 964 (1976); Firestone v. Time, Inc., 305 So. 2d 172, 178 (Fla. 1974), *rev'g* 279 So. 2d 389 (Fla. Dist. Ct. App. 1973); Firestone v. Time, Inc., 271 So. 2d 745, 753 (Fla. 1972), *rev'g* 254 So. 2d 386, 390 (Fla. Dist. Ct. App. 1971), *rev'g* Firestone v. Time, Inc., No. 68 C 977 (Fla. Cir. Ct., July 16, 1970).

[10] Time, Inc. v. Firestone, 421 U.S. 909 (1975).

[11] 96 S. Ct. 958 (1976).

[12] *Id.* at 965–66. For a discussion of the actual-malice standard to be applied in defamation actions see note 21 *infra* and accompanying text.

actual-malice standard[13]—an issue not treated in this Note. Finding no evidence in the record to establish clearly that there had been a finding of fault on the part of Time,[14] the Court, relying on its recent statement of defamation law which required such a showing of fault before liability could attach to media publishers of libelous statements, vacated the judgment and remanded for this determination.[15]

The issue of a newspaper's responsibility under state libel laws was first before the Court in *New York Times Co. v. Sullivan*.[16] In that case *The New York Times* had published an advertisement, sponsored by a group of civil rights advocates, which contained a number of factual inaccuracies.[17] Sullivan, an elected city official, sued the *Times* under Alabama libel law and recovered a judgment of $500,000.[18] On certiorari, the Supreme Court considered the extent

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[13] 96 S. Ct. at 966–67. For a discussion of the basis for this argument see Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Note, *Right of Privacy Versus Freedom of the Press—The Press Cannot Be Restrained from Reporting Facts Contained in Official Court Records*, 24 EMORY L.J. 1205 (1975).

[14] 96 S. Ct. at 969–70; *see also id.* at 971 n.3 (Powell, J., concurring). Although the Florida supreme court had stated that Time's report of the Firestone divorce was "clear and convincing evidence of . . . negligence" and had characterized Time's reportorial procedures in this instance as "a flagrant example of 'journalistic negligence,' " Firestone v. Time, Inc., 305 So. 2d 172, 178 (Fla. 1974), the Supreme Court did not consider this to be an adequate finding of fault. 96 S. Ct. at 969–70.

[15] 96 S. Ct. at 970.

[16] 376 U.S. 254, 256 (1964).

[17] *Id.* at 256–59.

[18] *Id.* at 256. Under the Alabama law in effect at the time, it was "sufficient to state, generally, that the defamatory matter was published or spoken of the plaintiff," in order to recover damages. ALA. CODE tit. 7, § 910 (1960). The Alabama supreme court in this case held that the statements in the advertisement were "libelous per se," and defined this term to mean statements that

> tend to injure a person libeled by them in his reputation, profession, trade or business, or charge him with an indictable offense, or tend . . . to bring the individual into public contempt . . . .

New York Times Co. v. Sullivan, 273 Ala. 656, 673, 144 So. 2d 25, 37 (1962). If the defamatory falsehoods were libelous per se, no proof of actual injury was required. *Id.* at 685, 144 So. 2d at 49 (quoting from Johnson Publishing Co. v. Davis, 271 Ala. 474, 487, 124 So. 2d 441, 450 (1960)).

According to Dean Prosser, libelous statements may be actionable on their face—that is, libelous per se—if they fall into four general categories: imputation of a crime, imputation of a loathesome disease, imputation of unchastity to a woman, or if the statement relates to a matter that affects the plaintiff in his employment. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 112, at 754–60 (4th ed. 1971) [hereinafter cited as PROSSER].

If the allegedly defamatory statement is not libelous on its face, damages may still be recovered, provided that actual injury can be shown to have resulted from the publication. This type of defamation was referred to by Dean Prosser as libel per quod. Prosser, *Libel Per Quod*, 46 VA. L. REV. 839, 839–40, 849 (1960). This terminology and Dean Prosser's distinction between libel per se and libel per quod were not universally

to which the first amendment insulated the press from the impact of state libel law in actions brought by public officials.[19] The Court held that public officials could not recover damages for defamatory falsehoods[20] printed about their public conduct, absent a showing that these statements had been published "with 'actual malice'—that is, with knowledge that [they were] false or with reckless disregard" as to whether or not they were false.[21] The controlling factor in the

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accepted, however. *Compare* Prosser, *More Libel Per Quod*, 79 HARV. L. REV. 1629 (1966), *and* Prosser, *Libel Per Quod*, 46 VA. L. REV. 839 (1960), *with* Eldredge, *Variations on Libel Per Quod*, 25 VAND. L. REV. 79 (1972), *and* Eldredge, *The Spurious Rule of Libel Per Quod*, 79 HARV. L. REV. 733 (1966).

The development of American defamation law from its English common law roots is the subject of excellent treatment by Lovell, *The "Reception" of Defamation By the Common Law*, 15 VAND. L. REV. 1051 (1962), and Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903), 4 COLUM. L. REV. 33 (1904). What ultimately developed from this centuries-long evolutionary process was a tort that imposed strict liability on publishers of defamatory falsehoods in the absence of any "privilege." Jones v. E. Hulton & Co. [1909] K.B. 444, 454–57, *aff'd*, [1910] A.C. 20, 26. For a discussion of this theory of strict liability see PROSSER, *supra*, § 113, at 772-74.

Most states, including Alabama, recognized a qualified privilege in their libel laws which was referred to as "fair comment." This was a privilege to comment publicly on the "conduct and qualifications of public officers and public employees." *Id.* § 118, at 819 (footnotes omitted). This privilege did not, however, protect publishers of false statements. *Id.* § 118, at 819–20. Under this prevailing philosophy, the publisher was held to strict liability for publication of a defamatory falsehood, which liability was limited only to the extent "that the defamatory meaning and the reference to the plaintiff . . . be reasonably conveyed to and understood by others." *Id.* § 113, at 773 (footnote omitted). For a compilation of states adhering to this majority rule see Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875, 896 n.102 (1949). For a discussion of the minority position which included false statements in the fair comment privilege see Coleman v. MacLennan, 78 Kan. 711, 715–44, 98 P. 281, 282–92 (1908); PROSSER, *supra*, § 118, at 820; Noel, *supra* at 896–97 & n.103. *See also* note 21 *infra*.

[19] 376 U.S. at 256.

[20] Dean Prosser has defined defamation as

> that which tends to injure "reputation" in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him.

PROSSER *supra* note 18, § 111, at 739 (footnote omitted).

A defamatory statement has also been defined as "one which tends to hold the plaintiff up to hatred, contempt or ridicule, or to cause him to be shunned or avoided." *Id.* (footnote omitted). Dean Prosser expressed the opinion that this definition may have dated back to 1840. *Id.* n.17; *see* Parmiter v. Coupland, 6 M. & W. 105, 108, 151 Eng. Rep. 340, 342 (1840).

[21] 376 U.S. at 279–80. In applying an "actual malice" standard to the facts of this case, the Court ostensibly adopted the "substantial, and vigorous, minority view that even false statements of fact were privileged" and that strict liability could not attach to publishers of such statements provided that they were published "for the public benefit with an honest belief in their truth." PROSSER, *supra* note 18, § 118, at 820 (footnote omitted) & n.9.

Court's decision was the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[22] Since erroneous statements are an inevitable by-

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In adopting this minority position, Justice Brennan "quoted with approval" an opinion by Justice Burch of the Kansas supreme court. Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 215. This opinion by Justice Burch in Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908), has been referred to by Professor Kalven as perhaps "the most elaborate, careful, extended act of balancing" of the two competing interests involved in defamation law: the societal necessity for free access to information and the interest of the states in protecting the reputations of their citizens. Kalven, *supra* at 215. Professor Kalven suggests that the *Times* decision provided an opportunity for the Court to set out a balancing test for constitutional adjudication of defamation suits, but that there is no discussion of any such test in the opinion. *See id.* at 215–16.

The Court's use of the term "actual malice" has led to some confusion. In *Times*, Justice Brennan attempted to define the term by equating it with "reckless disregard." 376 U.S. at 279–80. This seems an attempt to differentiate the *Times* Court's meaning of actual malice and the common law usage of the term. Common law actual malice has been defined as "bad or corrupt motive, personal spite, ill will, or a desire to injure." Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 TEXAS L. REV. 199, 203 (1976). At least one other commentator has indicated that the Court itself may have been "confused and thought it was adopting the common law definition." Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1370 n.91 (1975). Professor Eaton also discusses the confusion among lower courts resulting from the *Times* Court's use of "actual malice" and notes the Court's studious avoidance of continuing use of the term. *See id.* at 1370–75 & n.97.

The Court itself was forced to elucidate its original definition of actual malice. In Garrison v. Louisiana, 379 U.S. 64 (1964), the Court stated that the actual-malice test required a "high degree of awareness of [the] probable falsity" of the statements on the part of the publisher. *Id.* at 74. In St. Amant v. Thompson, 390 U.S. 727 (1968), the Court elaborated on the definition by pointing out

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

Id. at 731. For a discussion of the application of this definition to selected activities see generally Comment, *Calculated Misstatements of Fact Not Protected by First Amendment Guarantees of Free Speech and Press*, 1969 UTAH L. REV. 118.

[22] 376 U.S. at 270. The *Times* Court examined at length the societal and political reasons underlying passage of the first amendment. Justice Brennan pointed out that the debate surrounding the passage of the Sedition Act of 1798, ch. 74, 1 Stat. 596, exemplified the deep antipathy of the citizenry toward attempts to stifle freedom of discussion and debate. The Court also took note of the significant fact that this statute was the first and only attempt by the federal government to impose restraints on the freedom of speech and press. *See* 376 U.S. at 273–77. Although this highly unpopular act was never before the Court in a test of its constitutionality, there are several indications that it was an invalid restraint on the freedoms of speech and press guaranteed by the first

product of this vigorous public debate, the Court found that, if compelled by state libel laws to guarantee the accuracy of the material they print, publishers would be forced to resort to self-censorship, and first amendment values would suffer from a lack of " 'breathing space.' "[23] The Court, however, was careful to limit the applicability of the actual-malice standard to public officials only, specifically reserving the question as to possible extension of the rule.[24]

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amendment. *See, e.g.*, Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 27–28 (1941); 2 T. COOLEY, CONSTITUTIONAL LIMITATIONS 900 (8th ed. W. Carrington 1927); W. O. DOUGLAS, THE RIGHT OF THE PEOPLE 47 (1958).

The *Times* Court acknowledged that the first amendment applies specifically to the federal government, but Justice Brennan pointed out that passage of the fourteenth amendment had made the provisions of the first amendment applicable to the states. The Court noted a series of cases in which it had held that states could not restrict first amendment rights through overbroad criminal statutes and made the statement that "[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." 376 U.S. at 277 (footnote omitted); *see* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 521 (1970) [hereinafter cited as EMERSON].

Although the *Times* Court had ostensibly based its rationale for enunciating the new constitutional rule requiring "actual malice" on Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908), there is in fact an important discrepancy between the standards used in the two cases. *Coleman* permitted insulation for the publisher if he could establish that he believed in the truth of the statements printed. *Id.* at 728–29, 98 P. at 287. The standard set out in *Times*, however, did not take into consideration the "good faith" of the publisher as an affirmative defense. Rather, the *Times* Court grounded its privilege on the requirement that the defamation plaintiff meet the burden of proving actual malice on the part of the publisher. In this shifting of the burden of persuasion, the *Times* Court was not adopting the so-called minority position but essentially was establishing a completely new standard for measuring a new constitutional privilege.

[23] 376 U.S. at 271–72 (quoting from NAACP v. Button, 371 U.S. 415, 433 (1963)).

[24] In *Times*, Justice Brennan wrote:

> We have no occasion here to determine how far down into the lower ranks of government employees the "public official" designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. . . . Nor need we here determine the boundaries of the "official conduct" concept.

376 U.S. at 283 n.23 (citation omitted). The Court was later confronted with a series of cases wherein the "public official" designation required clearer explication. In Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 299 (1971), Monitor Patriot Co. v. Roy, 401 U.S. 265, 271 (1971), and St. Amant v. Thompson, 390 U.S. 727, 728, 730 (1968), the Court extended the "public official" term to include candidates for public office. In Rosenblatt v. Baer, 383 U.S. 75 (1966), the Court rejected the contention that public official status was to be determined by reference to state law and held that the former operator of a county-owned recreation area could fall under the *New York Times* standard. *Id.* at 77, 84–86. In the Court's opinion, public official status should be accorded

> at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.

Id. at 85 (footnote omitted).

This extension took place three years later in the consolidated cases of *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*.[25] *Butts* was a libel suit emanating from a story published in the *Saturday Evening Post* in which Wallace Butts, athletic director at the University of Georgia, had been depicted as having sabotaged a football game by providing the opposing team's coach with Georgia's game plan.[26] In *Walker*, a retired army general and noted opponent of federal intervention in desegregation matters was erroneously reported to have led a group of people in an attack against federal marshals who were enforcing the court-ordered integration of the University of Mississippi.[27] Since neither Butts nor Walker was a public official, the actual-malice standard, at least as applied under *New York Times*, could not be imposed in their libel suits.[28] A majority of the Court, in separate opinions, extended the constitutional rule set out in *Times* to include published defamatory statements concerning persons who were "public figures."[29]

In his opinion Justice Harlan took note of the first amendment guarantees of freedom of speech and of the press, pointing out that they provide the means by which individuals may make their thoughts public and society can engage in general debate on "matters of public interest."[30] Since these essential rights are protected by the

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In reaching its decision in *Rosenblatt*, the Court recognized the existence of a "tension between" state interests in protecting its citizens from libel "and the values nurtured by the First and Fourteenth Amendments." *Id.* at 86. The Court noted, however, that the impetus of the *Times* decision was "that when *interests in public discussion* are particularly strong . . . the Constitution limits the protections afforded by the law of defamation." *Id.* (emphasis added).

[25] 388 U.S. 130 (1967).

[26] *Id.* at 135–37.

[27] *Id.* at 140.

[28] Walker had retired from the Army and was a private citizen. *Id.* Although Butts held the position of athletic director at a state university, he was directly employed by the Georgia Athletic Association, a private corporation. *Id.* at 135. The independence of this Association had been established in Allen v. Regents of the University Sys. of Georgia, 304 U.S. 439, 451 (1938).

[29] 388 U.S. at 164, 170, 172. The extension of the *Times* doctrine as displayed in *Butts* was not unexpected. Various commentators had viewed the *Times* decision as merely the starting point for constitutional protection of the press in defamation actions. *See, e.g.*, Kalven, *supra* note 21, at 221; 44 B.U.L. REV. 563, 568 (1964); 38 S. CAL. L. REV. 349, 354 (1965); 113 U. PA. L. REV. 284, 287 (1964); *cf.* Note, *The Constitutional Law of Defamation and Privacy*: Butts *and* Walker, 53 CORNELL L. REV. 649, 652 (1968) (*New York Times* Court apparently adopted philosophy of Dr. Alexander Meiklejohn, discussed at note 52 *infra*, which is issue-oriented, rather than concerned with a person's status).

[30] 388 U.S. at 149. Justice Harlan expressed the view that the right to make one's opinions public was one of the " 'unalienable' " rights upon which the Declaration of Independence was based. *Id.*

first amendment, any restrictions, such as libel laws, which are placed upon the free exercise of these rights must not contradict the fundamental purposes underlying the amendment.[31] Therefore, Justice Harlan found that basing a constitutional privilege for the press on the distinction between public officials and private individuals was irrational because of the existence in society of " 'private citizens who seek to lead in the determination of . . . policy.' "[32] There would, then, seem to be some requirement for first amendment protection for publishers of defamatory statements concerning these "public figures."

In his attempt to define the term "public figure," Justice Harlan posited that one was a public figure merely because he happened to hold a particular position, or that one could become a public figure by "thrusting" oneself into the midst of "an important public controversy."[33] In either case, the public figure—like the public official—enjoys some "continuing public interest and . . . sufficient access" to news media to counteract the damaging effects of a defamatory falsehood.[34] On the other hand, Justice Harlan would not have extended the actual-malice test automatically to public figures. Instead, he would have permitted recovery by such plaintiffs merely on a showing of gross negligence on the part of the publisher in publishing the defamatory statement.[35]

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[31] *See id.* at 150. Under Justice Harlan's view, these limitations must not "affect 'the impartial distribution of news' and ideas," place "a special burden on the press," or lay publishers open to "physical or economic retribution solely because of what they choose to think and publish." *Id.* at 151 (citations omitted). *See also* Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267, 279.

[32] 388 U.S. at 147–48 (quoting from Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188, 196 (8th Cir. 1966)).

[33] 388 U.S. at 155. Butts, according to Justice Harlan, might have fallen into the first category: He "may have attained that status [of a public figure] by position alone." *Id.* Walker, on the other hand, fell into the second group; he became a public figure "by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy." *Id.* The "purposeful activity" criterion had been anticipated by the Court in Rosenblatt v. Baer, 383 U.S. 75, 86 n.12 (1966). Professor Robertson, however, in discussing the *Butts* and *Walker* decisions seems to ignore the possibility that one may be a public figure on the basis of position alone. *See* Robertson, *supra* note 21, at 221.

[34] 388 U.S. at 155.

[35] *Id.* Under Justice Harlan's view, such plaintiffs could recover damages if they were able to prove "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers," provided that the content of the defamatory statement was such that a publisher would likely know that the plaintiff's reputation would be injured if the statement were published. *Id.*

A majority of the Court, however, accepted the rationale expressed in Chief Justice Warren's concurring opinion. The late Chief Justice defined a public figure as one who, although not in public office, is "nevertheless intimately involved in the resolution of important public questions," or an individual who molds "events in areas of concern to society at large" merely because he is famous.[36] Since they could find "no basis in law, logic, or First Amendment policy" for differentiating between public officials and public figures, a majority of the Court held that the *New York Times* actual-malice standard should apply to both categories.[37]

While *Butts* and *Walker* mark the first time the Court extended the qualified constitutional privilege set out in *New York Times* to defamation suits involving public figures, it had earlier that term applied the actual-malice standard to an invasion of privacy action brought by a purely private individual in *Time, Inc. v. Hill*.[38] The Court's reasoning in that case had been that a review of a play based on an actual historical event was a matter of public interest.[39] In

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[36] *Id.* at 164.

[37] *Id.* at 163 (Warren, C.J., concurring). Even though the result in these cases was announced by Justice Harlan, his rationale was not controlling, as only Justices Clark, Stewart, and Fortas joined in his opinion. Chief Justice Warren concurred in the result, but he argued for the application of the *Times* standard to defamation suits involving public figures. Although they were unable to accept the late Chief Justice's concurring opinion in toto, Justices Black, Douglas, Brennan, and White agreed that the *Times* standard should be applied to public figures. Thus, the late Chief Justice's concurrence constituted the majority position of the Court as to the standard of proof to be required in similar libel suits. For a discussion of this somewhat confusing opinion see Kalven, *supra* note 31, at 275–78.

The Chief Justice rejected Justice Harlan's gross-negligence standard because he felt that it was "an unusual and uncertain formulation" which would neither provide adequate guidance to a lay jury nor provide for "the protection for speech and debate that is fundamental to . . . society and guaranteed by the First Amendment." 388 U.S. at 163 (Warren, C.J., concurring).

The illogic that the late Chief Justice found in making a distinction between public officials and public figures was based on five factors: 1) Modern technological society had blurred the distinction between governmental and non-governmental functions; 2) Public figures frequently "play an influential role in ordering society;" 3) Both public officials and public figures have reasonably ready access to the media; 4) Inasmuch as public figures are not answerable to the populace by means of standing for election to office, public opinion—as expressed through publication of criticism of their actions—is possibly the only way in which "society can attempt to influence their conduct"; and 5) The *New York Times* standard "balances to a proper degree the legitimate interests traditionally protected by the law of defamation." *Id.* at 163–64.

[38] 385 U.S. 374 (1967).

[39] *Id.* at 388. The Hill family had been held hostage by three escaped convicts. To avoid publicity, the Hills moved to a different state. Some years later a Broadway play based loosely on the Hill family's experiences was reviewed in *Life* magazine. The

addition, lower courts had anticipated the *Butts* extension of the actual-malice standard by applying the *New York Times* rule in a variety of cases which arguably did not fall within the *Times* Court's public official limitation.[40]

"The inevitable consequence of *Time, Inc. v. Hill*"[41] occurred in

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review stated that the play was a "re-enactment" of what had happened to the Hills, when in fact the play was an inaccurate description of those events. *See id.* at 377–79. Hill brought suit under a New York state right-of-privacy statute and was awarded damages. This damage award was affirmed by the New York court of appeals. Hill v. Hayes, 15 N.Y.2d 986, 207 N.E.2d 604, 260 N.Y.S.2d 7 (1965), *aff'g mem.* 18 App. Div. 2d 485, 240 N.Y.S.2d 286 (1st Dep't 1963). *See also* Hill v. Hayes, 13 App. Div. 2d 954, 216 N.Y.S.2d 497 (1st Dep't 1961), *aff'g mem.* 207 N.Y.S.2d 901 (Sup. Ct. Spec. T. N.Y. County 1960 (denying motion for summary judgment). The United States Supreme Court reversed, 385 U.S. at 398, holding that the negligence standard permitted under the New York statute was insufficient protection for the press and that the actual-malice test was to be applied to litigation involving "false reports of matters of public interest." *Id.* at 387–88.

[40] *See, e.g.*, Walker v. Courier-Journal and Louisville Times Co., 246 F. Supp. 231, 234 (W.D. Ky. 1965) (*Times* standard applied to separate libel action arising out of same circumstances as those in *Walker*); Gilberg v. Goffi, 21 App. Div. 2d 517, 526, 251 N.Y.S.2d 823, 832 (1964) (law partner of public official running for re-election must prove actual malice in defamatory statements made regarding law firm). *See also* Comment, *The Expanding Constitutional Protection for the News Media from Liability for Defamation: Predictability and the New Synthesis*, 70 MICH. L. REV. 1547, 1549–50 n.28 (1972) (citing additional decisions). *But see* Pauling v. News Syndicate Co., 335 F.2d 659, 671 (2d Cir. 1964) (*Times* standard not applicable to defamatory statements published regarding plaintiff-scientist who was a "participant in public debate on an issue of grave public concern"); Dempsey v. Time Inc., 43 Misc. 2d 754, 756–57, 252 N.Y.S. 2d 186, 189 (Sup. Ct. Spec. T. N.Y. County 1964) (public figure determination cannot be based upon an event that took place 45 years prior to publication date, as this does not fall "within the purview of even the suggested extension of the *New York Times* case"); Spahn v. Julian Messner, Inc., 43 Misc. 2d 219, 223–24, 250 N.Y.S.2d 529, 535 (Sup. Ct. Spec. & Trial T. N.Y. County 1964) (*Times* standard is specifically to be limited to public officials).

In Pauling v. News Syndicate Co., *supra*, Judge Friendly made the observation that "the public official is the strongest case for the constitutional compulsion of such a privilege" but that he doubted that limitation of the privilege to defamatory statements about public officials would be possible. Indeed, he expected that it would soon be extended to candidates for public office, and then "the participant in public debate on an issue of grave public concern would be next in line." *Id.* at 671. On the extension of the *Times* standard to public figures see generally EMERSON, *supra* note 22, at 526–28; Eaton, *supra* note 21, at 1390–93; Kalven, *supra* note 31, at 291–309; *The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69, 160–66 (1967); 40 GEO. WASH. L. REV. 151, 154 n.20 (1971); Note, *Fair Comment and Fair Mistake—Extension of the* Sullivan *Precedent to Other Matters of Public Interest*, 17 HASTINGS L.J. 346, 350–53 (1965).

[41] *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 225 (1971) (footnote omitted). The authors suggest that once the Court had extended the *Times* privilege to a publisher involved in an invasion of privacy suit because the report concerned an event of public interest, an inexorable impetus was supplied to adoption of a "public interest" standard in defamation cases, because "it would have been anomalous to protect a defendant against liability for invasion of privacy . . . but not against liability for defamation" by means of a public-interest privilege. *Id.* (footnote omitted).

1971 when the *Butts* public-figure standard gave way to a "public interest" standard. In *Rosenbloom v. Metromedia, Inc.*[42] a plurality of the Court, through an opinion by Justice Brennan, announced that the actual-malice test was applicable to defamation actions where "the utterance involved concerns an issue of public or general concern," regardless of the plaintiff's status in society.[43]

In *Rosenbloom*, a radio station, in its early broadcasts concerning the arrest of the plaintiff during a crack-down on pornography, reported that a police official believed that Rosenbloom was " 'a main distributor of obscene material.' "[44] Rosenbloom sued the owners of the radio station for defamation and contended that since he was neither a public official nor a public figure he need, under Pennsylvania law, only prove negligence on the part of the defendant in the

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This extension of the *New York Times* standard to reports of events of public interest had been anticipated by a number of commentators. Professor Emerson, for example, questioned the rationality of a position which granted less first amendment protection "to statements made in discussion of public issues generally than to statements made concerning public officials." EMERSON, *supra* note 22, at 532. He pointed out that there was no

> dispute . . . that the function of the First Amendment is to protect all communication dealing with public issues, not just that involving public officials. Indeed there is little doubt that, for purposes of decision making, what goes on in the nongovernment sector is as important as what takes place in the government sector. . . . On the basis of all the factors underlying the actual malice rule as applied to public officials . . . the system of free expression would suffer serious damage if speakers were not given the same protection in discussing all kinds of public issues.

Id. at 532–33 (footnote omitted). *See also id.* at 540–43; Kalven, *supra* note 21, at 221; Kalven, *supra* note 31; Notes, *supra* note 29; Note, *The Scope of First Amendment Protection for Good-Faith Defamatory Error*, 75 YALE L.J. 642, 644–45 (1966). Judicial decisions also reflected this tendency toward adoption of a public interest standard. *See* pre-*Rosenbloom* cases cited in Comment, *supra* note 40, at 1560–62 & nn.94–96.

[42] 403 U.S. 29 (1971).

[43] *Id.* at 44. Justice Brennan, Chief Justice Burger, and Justice Blackmun composed the plurality; Justices Black and White each filed separate concurring opinions; Justice Harlan dissented; and Justice Marshall filed a dissent in which Justice Stewart joined. Mr. Justice Douglas did not participate in the consideration or decision of the case. *Id.* at 30.

[44] *Id.* at 33. George Rosenbloom was a distributor of nudist magazines to news dealers in and around Philadelphia. *Id.* at 32. In October of 1963, as the police were making an arrest of a news dealer on charges of selling obscene materials, Rosenbloom arrived to make a delivery and was arrested. Three days later the police, under warrant, searched Rosenbloom's home and seized his inventory. Rosenbloom, who had been released on bail, surrendered to the police and was rearrested. *Id.* at 32–33.

A police captain informed the radio station of the arrest and the station broadcast a news report which contained the defamatory characterization referred to in the text. *Id.* at 33. In later newscasts the reference to "obscene material" was amended to read " 'reportedly obscene.' " *Id.* at 34. After his acquittal on the obscenity charges, Rosenbloom brought a libel suit against Metromedia, the owner of the station. *Id.* at 36.

preparation of the newscasts.[45] A plurality of the Court disagreed, concluding that the "public figure"-"private individual" distinction was no longer a viable standard by which to assess constitutional privilege.[46] According to Justice Brennan, the public-private distinction simply had no basis "in terms of the First Amendment guarantees."[47] Rather, the proper basis for the constitutional privilege derives from an evaluation of the event—not the person—involved, *i.e.*, whether the defamatory report "concerns a matter of public or general interest."[48]

The plurality found the argument that public figures enjoy wide media access which enables them to respond to defamatory falsehoods to be an "unproved, and highly improbable, generalization," the truth of which depended in large measure on the continuing interest of the media in the story—an eventuality which the plurality labelled "unpredictable."[49] Justice Brennan, as a result, found the media access argument "too insubstantial a reed on which to rest a constitutional distinction."[50] Secondly, the plurality dismissed the thesis that one might "assum[e] the risk of defamation by voluntarily thrusting

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[45] *Id.* at 40–41. Rosenbloom prevailed at trial where he apparently established a lack of " 'reasonable care and diligence' " on the part of Metromedia in the preparation of the offending newscasts. *Id.* at 38–40 (quoting from Purcell v. Westinghouse Broadcasting Co., 411 Pa. 167, 179, 191 A.2d 662, 668 (1963)). The Third Circuit reversed. Rosenbloom v. Metromedia, Inc., 415 F.2d 892, 898 (3d Cir. 1969). The court held that

> in the present factual context the proper accommodation between the First Amendment protections and the state law of defamation is found by requiring a plaintiff to meet the standard of proof formulated in New York Times Co. v. Sullivan . . . .

Id. at 896.

[46] 403 U.S. at 44. The plurality catalogued its prior defamation and invasion of privacy decisions from the more recent *Time, Inc. v. Hill* back through *New York Times*, pointing out that in each instance the first amendment consideration had been coupled with a concomitant public-interest rationale. *Id.* at 41–44. In addition, Justice Brennan intimated that a first amendment public-interest doctrine had been recognized as early as 1940 when the Court had stated that " '[f]reedom of discussion . . . must embrace *all issues* about which information is needed or appropriate to enable . . . society to cope with the exigencies' " that it faces. *Id.* at 41 (quoting from Thornhill v. Alabama, 310 U.S. 88, 102 (1940) (emphasis added)).

[47] 403 U.S. at 45–46 (footnote omitted). The plurality noted that the *New York Times* standard was designed to promote vigorous debate on public issues, but was not the result of any determination that the public official in any way differs from the private person in his interest in protecting his reputation. *Id.*

[48] *Id.* at 44. Justice Brennan pointed out that the general thrust in defamation law in the United States had been toward acceptance of a public-interest standard. *Id. See* notes 41 & 46 *supra*; Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858, 861 & n.4 (5th Cir. 1970) (citing cases).

[49] 403 U.S. at 46–47.

[50] *Id.* at 47.

himself into the public eye" on the ground that such a concept has no basis in the underlying premises of the first amendment.[51] The perpetuation of the public figure "legal fiction," in Justice Brennan's view, "could easily produce the paradoxical result" of allowing defamatory statements to be published about a public figure's private life—even though society at large has no legitimate interest in the events reported—while at the same time "dampening discussion of issues of public or general concern because they happen to involve private citizens."[52]

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[51] *Id.* One commentator has remarked that

> [e]ach person as a concomitant of living in society takes the risk of exposing himself to others in varying degrees. . . . [W]hatever the strength of this assumption of risk argument, one should not lóse sight of the most fundamental consideration: the discussion of public issues should not be hampered simply because the issue involves a private citizen.

Comment, *supra* note 40, at 1568 (footnote omitted).

[52] 403 U.S. at 48. Justice Brennan based the determination that the public-figure concept was a legal fiction on the fact that the structure of modern life makes everyone a "public" person in some way. *Id.* "Conversely, some aspects of the lives of even the most public men fall outside the area of matters of public or general concern." *Id.* (footnote omitted). *Cf.* Griswold v. Connecticut, 381 U.S. 479 (1965). For a similar view see Comment, *supra* note 40, at 1567–69.

Justice Brennan's plurality opinion in *Rosenbloom* seems to be strongly rooted in the constitutional philosophy of the late Alexander Meiklejohn. For an extensive presentation of Professor Meiklejohn's philosophy see A. MEIKLEJOHN, POLITICAL FREEDOM (1960); A. Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245; D. Meiklejohn, *Public Speech and the First Amendment*, 55 GEO. L.J. 234 (1966). Justice Brennan himself has discussed Professor Meiklejohn's philosophy. *See* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965). Dr. Bloustein has argued, however, that Justice Brennan misinterpreted the thrust of Professor Meiklejohn's philosophy. Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41, 73–77 (1974).

Professor Meiklejohn drew a distinction between the right of the indivdual "to speak whenever, wherever, however he chooses," and the "need to hear" on the part of society. A. MEIKLEJOHN, POLITICAL FREEDOM 25, 57 (1960). It is the latter, in his opinion, that is protected absolutely by the first amendment. "The First Amendment . . . is not the guardian of unregulated talkativeness"; rather, "[w]hat is essential is not that everyone shall speak, but that everything worth saying [is] said." *Id.* at 26. In discussing the first ten amendments Professor Meiklejohn stated:

> They are not a "Bill of Rights" but a "Bill of Powers and Rights." The Second through the Ninth Amendments limit the powers of the subordinate agencies in order that due regard shall be paid to the private "rights of the governed." The First and Tenth Amendments protect the governing "powers" of the people from abridgement by the agencies which are established as their servants. In the field of our "rights," each one of us can claim "due process of law." In the field of our governing "powers," the notion of "due process" is irrelevant.

A. Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 254. *See also* Note, *The Constitutional Law of Defamation and Privacy*: Butts *and* Walker, 53 CORNELL L. REV. 649, 651–58 (1968).

Mr. Justice Harlan, dissenting, took issue with the plurality opinion because it would require a "case-by-case" determination of liability, and thus would seem to run counter to the intent of *New York Times* in which "a rule of general application" had been set out.[53] Justice Harlan also disagreed with the extension of the actual-malice standard to defamation suits involving purely private plaintiffs.[54] He believed that a public figure did have greater access to the media "to rebut falsehoods" and, unlike the private plaintiff, the public figure "may be held to have run the risk of publicly circulated falsehoods concerning [him]."[55] He therefore concluded that states should be permitted to set their own "standard of care so long as they do not impose liability without fault."[56]

The plurality opinion in *Rosenbloom* thus marked the broadest extension of the *New York Times* actual-malice standard.[57] However,

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[53] 403 U.S. at 63. Justice Harlan noted that the Court should apply "generally applicable rules" where possible "in order to preserve a measure of order and predictability in the law." *Id.* Employment of such general rules, according to Justice Harlan, is also requisite to achieving a proper balance of the competing interests involved: The right of the state to protect the reputations of its citizens and the right of the press to avoid the necessity of self-censorship. *See id.* at 64–66.

[54] *Id.* at 69. The *Times* standard had originally been limited to public officials and public figures. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130, 163 (1967) (Warren, C.J., concurring); New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

Justice Harlan expressed the view that there is indeed a difference "between the public and the private" person. In his view, "true First Amendment concerns" could best be protected by continuing to apply the actual-malice standard only to public officials and public figures. 403 U.S. at 69 (Harlan, J., dissenting). He would not allow states to continue to make defamation liability rest on the mere fact that the statement was false in cases where the plaintiff was a private person; he would require a showing of a breach of a "reasonable care" standard. *Id.*

[55] 403 U.S. at 70.

[56] *Id.* at 64. Although Justice Harlan's conclusion was in *Rosenbloom* a minority, it was soon to become the controlling criterion for establishing liability for defamatory falsehoods involving private persons. *See* Time, Inc. v. Firestone, 96 S. Ct. 958 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

Justice Marshall, joined in his dissenting opinion by Justice Stewart, strongly argued against the plurality position in that it would require courts to determine what events are "of legitimate public interest." 403 U.S. at 79. Requiring such determinations to be made by courts, Justice Marshall wrote, was a dangerous portent for press freedom. He also pointed out that the plurality had failed "to provide guidelines or standards" to assist courts in this determination. *Id. See also* Kalven, *supra* note 31, at 283–84. Like Justice Harlan, Justice Marshall argued against the ad hoc requirement of the plurality position on the ground that such a procedure would lack predictability for those involved in the litigation. Like Justice Harlan in another respect, Justice Marshall also expressed the opinion that "[a] generally applicable resolution [was] available" in this case. 403 U.S. at 81 (Marshall, J., dissenting).

[57] For a discussion of the *Rosenbloom* decision see Eaton, *supra* note 21, 1394–99; Keeton, *Some Implications of the Constitutional Privilege to Defame*, 25 VAND. L. REV. 59 (1972); Comment, *supra* note 40.

the failure of the plurality position to attract more than three of the Justices[58] left defamation law unsettled. A resolution was attempted in *Gertz v. Robert Welch, Inc.*,[59] where a new majority comprised of some of the *Rosenbloom* dissenters and two of the then recently appointed Justices[60] effectively overruled *Rosenbloom*, holding that

> so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.[61]

In *Gertz*, the plaintiff, an attorney, had been depicted as a member of a Communist group and an "architect of the 'frame-up' " of a police officer. In fact, he had merely represented a family in a civil action against a police officer who had been convicted of the second degree murder of their son.[62] At the defamation trial, the publisher contended that Gertz, having once served on a city housing committee, was a public official.[63] It was also asserted that Gertz was a public figure, apparently because he had been involved in civil and professional groups and had published a number of books and articles on legal subjects.[64] The trial court determined that Gertz was neither a public official nor a public figure and submitted the case to the jury under Illinois law, charging that such printed statements

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[58] *See* note 43 *supra*.

[59] 418 U.S. 323 (1974). For a general discussion of this decision see Anderson, *Libel and Press Self-Censorship*, 53 TEXAS L. REV. 422 (1975); Anderson, *A Response to Professor Robertson: The Issue Is Control of Press Power*, 54 TEXAS L. REV. 271 (1976); Beytagh, *Privacy and a Free Press: A Contemporary Conflict in Values*, 20 N.Y.L.F. 453 (1975); Robertson, *supra* note 21; *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 139 (1974); Note, Gertz v. Welch: *Reviving the Libel Action*, 48 TEMPLE L.Q. 450 (1975).

[60] Justice Powell wrote the Court's opinion in *Gertz*. He was joined by Justices Stewart, Marshall, Blackmun and Rehnquist. 418 U.S. at 324. Justices Marshall and Stewart had dissented in *Rosenbloom*, *see* notes 43 & 56 *supra*, and Justices Powell and Rehnquist had been appointed to the Court to replace Justices Harlan and Black, respectively, *see* 404 U.S. III, IV & nn.*, 1–3 (1972).

[61] 418 U.S. at 347 (footnote omitted). This was the position advocated by Justice Harlan in his dissent in *Rosenbloom*. *See* notes 54–56 *supra* and accompanying text.

[62] 418 U.S. at 326. The magazine was a publication of the John Birch Society and was distributed nationally to the public. *Id.* at 325, 327. Gertz brought suit under Illinois libel law claiming injury to "his reputation as a lawyer and a citizen." *Id.* at 327.

[63] *See id.* at 351. The publisher alternatively contended that Gertz was "a 'de facto' public official" because he had attended the coroner's inquest into the boy's death. *Id.* It was contended that acceptance of either alternative would have necessitated proof of actual malice as a prerequisite to recovery by Gertz. *Id.* at 327–28.

[64] Gertz v. Robert Welch, Inc., 322 F. Supp. 997, 998 (N.D. Ill. 1970), *aff'd*, 471 F.2d 801 (7th Cir. 1972), *rev'd*, 418 U.S. 323 (1974).

constituted libel per se and required no finding of fault for recovery.[65] After the jury had returned a verdict in favor of Gertz, the court entered a judgment notwithstanding the verdict on the ground that the publication discussed an issue "of public interest."[66] In so doing, the district court had anticipated the plurality decision in *Rosenbloom*.[67]

In rejecting the district court's "public interest" analysis, the *Gertz* Court stressed that what was essentially at stake was the striking of a correct balance between the state's interest in ensuring that defamed citizens are compensated and the interest of the publisher in maintaining an unfettered press.[68] In the Court's view, such a balance required a rejection of the *Rosenbloom* public-interest analysis and a return to the public figure-private individual approach that had been developed in *Butts*.[69] Justice Powell's rationale for the return to the public-figure analysis was twofold. First, use of a public-interest rationale would lead to ad hoc decisions on the part of the Court, resulting in uncertainty and "render[ing the Court's] duty to supervise the lower courts unmanageable."[70] Second, he believed that the *Rosenbloom* analysis did not provide adequate protection for either of the two competing interests involved in defamation litigation. A plaintiff involved in an event of public interest would be forced to surmount "the rigorous requirements" of the actual-malice standard. If the event were deemed not to be of the requisite public interest, the press, no longer protected by the Constitution, would be subject

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[65] *Id.* For a discussion of the concept of libel per se see note 18 *supra*.

[66] Gertz v. Robert Welch, Inc., 322 F. Supp. 997, 1000 (N.D. Ill. 1970), *aff'd*, 471 F.2d 801 (7th Cir. 1972), *rev'd*, 418 U.S. 323 (1974). The court noted that

> [t]he penumbra of material protected by the guarantee of freedom of speech has been extended to include matters of public interest, whether or not public officials or public figures are involved.

322 F. Supp. at 999. In support of this position, the trial court cited a number of judicial decisions which had held that events of public interest were within the protection of the first amendment. *See, e.g.*, Time, Inc. v. Hill, 385 U.S. 374 (1967); Wasserman v. Time, Inc., 424 F.2d 920 (D.C. Cir.), *cert. denied*, 398 U.S. 940 (1970) (photograph of a lawyer lunching with reputed gangsters is of public interest); Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970) (deteriorating condition of a hotel serving guests at a national golf tournament).

[67] The motion for judgment notwithstanding the verdict was granted in 1970 while the *Rosenbloom* decision was not announced until 1971.

[68] *See* 418 U.S. at 343.

[69] *See id.* at 343, 345–46.

[70] *Id.* at 343, 346. In addition, the Court questioned the "wisdom" of requiring judges to make ad hoc decisions as to " 'what information is relevant to self-government.' " *Id.* at 346 (quoting from Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 79 (1971) (Marshall, J., dissenting)).

to ordinary libel law, which might provide for liability without fault.[71]

In reinstating the public-figure analysis, the *Gertz* Court set forth criteria by which courts could identify such individuals. Initially, Justice Powell stated that such an identification could be made on the basis of the "notoriety of . . . achievements" of the person involved "*or* the vigor and success with which [he seeks] the public's attention."[72] Essentially, a public figure is one who possesses an "especial prominence in the affairs of society."[73] Justice Powell emphasized that public figures generally have come to the forefront of public attention as a result of their own voluntary acts, but he acknowledged that "[h]ypothetically," some public figures may not have voluntarily sought public exposure.[74] The Justice went on to indicate that there were, in fact, two distinct categories of public figure: the "public figure for all purposes" and the "public figure for a limited range of issues."[75]

He indicated that the former is an individual who maintains a position of "persuasive power and influence."[76] In a not entirely consistent manner, he subsequently described such a public figure as one who has gained "pervasive fame or notoriety."[77] Finally, and again inconsistently, Justice Powell added a new requirement: A public figure for all purposes must not only enjoy "general fame or notoriety in the community," but he *must also* be "pervasive[ly] involve[d] in the affairs of society."[78] The public figure for a limited range of issues was defined as one who has interjected himself into or has been drawn into a public controversy in order to have an impact on its resolution.[79] Justice Powell concluded that the most "meaning-

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[71] 418 U.S. at 346.

[72] *Id.* at 342 (emphasis added).

[73] *Id.* at 345.

[74] *Id.* Justice Powell seems to have found this eventuality unlikely, however, stating that "the instances of truly involuntary public figures must be exceedingly rare." *Id.*

[75] *Id.* at 351.

[76] *Id.* at 345.

[77] *Id.* at 351. There is more than a subtle difference between "power and influence" and "general fame or notoriety." While not necessarily mutually exclusive, the two descriptions are not necessarily concomitants. For example, an executive of a large corporation may have a great deal of "power and influence" over the affairs of society, yet be relatively unknown outside the higher echelons of business or politics. Conversely, a well-known sports figure may exercise almost no influence over the affairs of society, and yet his fame is pervasive.

[78] *Id.* at 352. This third characteristic of the public figure seems to be more restrictive than the previous two criteria that Justice Powell set out. Appending the necessity for "pervasive involvement in the affairs of society" to the previously noted criteria would apparently severely limit the public-figure category.

[79] *Id.* at 345, 351.

ful" analysis by which to identify these individuals would be to examine "the nature and extent of [their] participation in the particular controversy giving rise to the defamation."[80]

In applying these tests to the facts of *Gertz*, the Court indicated that in order for an individual to be deemed a public figure his fame or notoriety must extend throughout his community, and not exist merely within a small social or professional circle.[81] Thus, although Gertz was "well-known in some circles," no proof was offered as to his fame in the community at large.[82] He was therefore deemed not to be a public figure,[83] and damages for defamation could be awarded to him without his having to establish actual malice in the publication of the news story.[84]

Underpinning the *Gertz* decision and its revival of the public-figure standard was the media-access rationale which had been so important to the *Butts* majority.[85] Applying this rationale to both categories of public figures, Justice Powell determined that such access is usually "significantly greater" for public officials and public figures than it is for private individuals.[86] To some degree, however, the media-access criterion was discounted on the basis that rebuttals are rarely as effective as the original defamatory statement.[87] Nonetheless, the opinion clearly stated that a consideration of media access was not "irrelevant."[88]

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[80] *Id.* at 352.

[81] *Id.* at 351–52. One commentator has interpreted the facts of *Gertz* as implying that a public figure must be a "household name." Robertson, *supra* note 21, at 227–29. Professor Robertson believes that this status could be proved if the jury members are "generally familiar with the plaintiff" or if public opinion polls should establish the plaintiff's general fame in the community. *Id.* at 224 (footnote omitted).

[82] 418 U.S. at 351–52. In *Gertz*, the Court apparently gave greater weight to the absence of any general fame or notoriety on the part of the plaintiff than to his involvement in civil affairs. It will be recalled from *Butts*, however, that the active involvement of one in an important public controversy may lead to his attaining public-figure status. *See* 388 U.S. at 155. It is difficult to believe that Gertz, having served on a housing committee and having taken part in the activities of other civic groups, would not have fallen within this standard. *See* note 90 *infra*.

[83] 418 U.S. at 352. The *Gertz* Court quickly disposed of the publisher's contention that Gertz was a public official or a "de facto public official," by stating first that there was "little basis" for these assertions, and second that prior Supreme Court decisions had not given the concept of a "de facto public official" any recognition. *Id.* at 351.

[84] *Id.* at 352.

[85] *See* 388 U.S. at 155.

[86] 418 U.S. at 344. The Court gave no substantiation for this statement.

[87] *See id.* at 344 n.9.

[88] *Id.* The Court indicated that media rebuttal was not, by itself, expected to provide adequate protection for the reputations of public officials and public figures. *See id.* at 344 & n.9.

Gertz left unresolved a number of problems. Although the characteristics of the public figure for all purposes were defined as "general fame or notoriety in the community, and pervasive involvement in the affairs of society,"[89] questions remained as to what would constitute the community, how pervasive the fame or involvement had to be, and what interests were to be termed "affairs of society." Furthermore, in defining a public figure for a limited range of issues, the Court would seem to require that a plaintiff either act voluntarily or be "drawn into a particular public controversy"; however, the Court did not make clear what constitutes a voluntary act, how one may be drawn into an issue, or even what a public controversy is.[90] Because its decision lacked clarity, the *Gertz* Court was placed in the position of having to define its terms on an ad hoc basis. Yet it was precisely in order to avoid such piecemeal determinations that the Court in *Gertz* had rejected the *Rosenbloom* plurality position.[91]

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[89] *Id.* at 352. However, for an indication that there is a lack of consistency in the definition of the term see notes 76–78 *supra* and accompanying text. *See also* Robertson, *supra* note 21, at 223 & n.157.

[90] *See* 418 U.S. at 351–52. This indefiniteness applies to the facts of *Gertz* to the same extent it does to post-*Gertz* decisions. It is easier to understand how the Court dismissed the argument that Gertz might be a public figure for all purposes than it is to comprehend the logic behind its dismissal of the contention that he might be a public figure for a limited range of issues. Certainly Gertz did not possess the national notoriety of either Butts or Walker. On the other hand, in its indecisive definition the *Gertz* Court did not require national fame, but required only that the plaintiff have attained this characteristic in some nebulous community. *See* 418 U.S. at 352.

At least two commentators have expressed the view that Gertz was, logically, as much a public figure as either Butts or Walker, inasmuch as

> Gertz was a member of numerous boards and commissions in Illinois, had published several books on civil rights matters, had frequently been honored by civil rights groups and had represented some rather famous clients . . . . His publishing record belies the notion that he was a poor, helpless, private individual who could not gain access to the press. Gertz was a public figure in every sense of the term as defined by the Supreme Court in *Curtis v. Butts*. The *Rosenbloom* rule should not have been at issue in the case.

Pember & Teeter, *Privacy and the Press Since* Time, Inc. v. Hill, 50 WASH. L. REV. 57, 75 (1974) (footnote omitted).

However, in Anderson, *Libel and Press Self-Censorship*, 53 TEXAS L. REV. 422, 449 (1975) the author argued that the extent of Gertz' notoriety distinguished him from Butts and Walker. Anderson further noted that Gertz should have been deemed a public figure for a limited range of issues:

> The shooting [of Nelson] and the subsequent murder indictment were the subject of widespread public debate, and there was no reason to believe that the civil action by the youth's family would not attract similar attention. By agreeing to represent the family in its suit, it could be said that Gertz voluntarily injected himself into the controversy.

Id. (footnote omitted).

[91] *See* 418 U.S. at 346.

Time, Inc. v. Firestone[92] is itself an example of such an ad hoc determination.

In *Firestone*, Time proffered two arguments in support of its proposition that the standard to be applied in determining liability for the defamatory report was actual malice as defined by the Court in *New York Times*.[93] First, Time contended that Mary Alice Firestone was a public figure.[94] Secondly, Time argued that the news story

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[92] 96 S. Ct. 958 (1976).

[93] *See* note 21 *supra* and accompanying text. *See also* Recent Developments, New York Times *Standard is Inapplicable to a Defamed Individual Who is Neither a Public Official Nor a Public Figure; and Only Actual Injury is Compensable Absent Showing of Actual Malice*, 20 VILL. L. REV. 867, 869 n.15 (1975).

[94] Brief for Petitioner at 31, Time, Inc. v. Firestone, 96 S. Ct. 958 (1976) [hereinafter cited as Brief for Petitioner]. Time pointed out that Mary Alice Firestone had been " 'drawn into a particular public controversy,' " *id.* (quoting from Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974)), and that she had also fulfilled the *Butts* requirement in that she " 'commanded a substantial amount of independent public interest.' " Brief for Petitioner, *supra* at 31 (quoting from Curtis Publishing Co. v. Butts, 388 U.S. 130, 154 (1967)).

Time also relied on statements made by the Supreme Court of Florida about the notoriety of the Firestones' marital relationship, to the effect that the Firestones " 'were well known[,] . . . prominent among the "400" of Palm Beach society, and were also active members of the sporting set.' " Brief for Petitioner, *supra* at 31 (quoting from Firestone v. Time, Inc., 271 So. 2d 745, 751 (Fla. 1972)). Time proceeded to stress that this court had characterized the divorce proceedings as a " *'cause celebre'* " and that Mrs. Firestone had held press conferences " 'and allowed herself to be quoted in relation thereto.' " Brief for Petitioner, *supra* at 32–33 (quoting from Firestone v. Time, Inc., 271 So. 2d 745, 751 (Fla. 1972)). Time then attempted to make a bootstrap argument by adverting to affidavits produced at trial which clearly established that "the divorce proceedings received daily publicity." Brief for Petitioner, *supra* at 33. In essence, Time was arguing that the press could make someone a public figure simply by writing about their affairs.

Time next argued "that the Firestone divorce was a public controversy about which the press had a duty to report." Brief for Petitioner, *supra* at 33. Referring to Chief Justice Warren's concurring opinion in *Butts*, Time argued that "[p]ublic controversies involving public figures are not limited to government operations." *Id.* Again, Time made its bootstrap argument and contended that because the divorce proceedings had been the subject of such extended and widespread publicity, Mrs. Firestone was "a central figure in a public controversy." *Id.* at 34. This being so, Time maintained, Mary Alice Firestone would certainly fall within the *Gertz* criterion for deducing who is to be deemed a public figure, *i.e.*, one who " 'voluntarily injects himself or is drawn into a particular public controversy.' " *Id.* (quoting from Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974)).

Citing McFarland v. Hearst Corp., 332 F. Supp. 746 (D. Md. 1971), and Edmiston v. Time, Inc., 257 F. Supp. 22 (S.D.N.Y. 1966), Time proffered the opinion that

> the bringing of a lawsuit involves, in some measure, the decision to put one's disputes before a public tribunal and thereby forego a degree of anonymity, the principal "normative consideration" justifying different treatment for public and private individuals. And defendants in lawsuits are likewise individuals "drawn into a particular public controversy".

"was a report of a judicial proceeding," and thus state libel laws should not be applied.[95] Justice Rehnquist rejected both contentions, initially dispensing with the argument that Mrs. Firestone was a public figure.[96] He cited *Gertz* for the proposition that a public figure was one who was extremely influential and powerful or one who by her own volition brought herself to the center of attention in matters of " 'public controvers[y] in order to influence the resolution of the issues involved.' "[97] Mary Alice Firestone, in Justice Rehnquist's view, had not "assume[d] any role of especial prominence," nor had the fact that she had held press conferences for reporters interested in the divorce proceedings made her a public figure.[98] The opinion stated that to equate a public controversy such as the Firestone di-

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Brief for Petitioner, *supra* at 34 (quoting from Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974)).

Time also contended that Mrs. Firestone was a public figure because she was married to Russell Firestone. Quoting from Cepeda v. Cowles Magazines and Broadcasting, Inc., 392 F.2d 417, 419 (9th Cir.), *cert. denied*, 393 U.S. 840 (1968), Time stated that the term "public figure" had been defined broadly and included " 'artists, athletes, *business people*, dilettantes, anyone who is famous or infamous because of who he is or what he has done.' " Brief for Petitioner, *supra* at 35 (emphasis added). Certainly Russell A. Firestone Jr. fit this description, the argument ran, and therefore when Mary Alice "became embroiled in a public controversy because of her relationship to Russell Firestone she became a public figure." *Id.* This designation as a public figure by relationship has achieved some measure of acceptance. *See* Carson v. Allied News Co., 529 F.2d 206, 210 (7th Cir. 1976); Meeropol v. Nizer, 381 F. Supp. 29 (S.D.N.Y. 1974).

Mrs. Firestone countered these various arguments by positing that 1) deeming her a public figure on the basis of the notoriety of the divorce proceedings would be an unacceptable return to *Rosenbloom* which *Gertz* had forestalled; 2) she could "not be *made* a 'public figure' by the newspapers because of publications of her divorce where she was not a 'public figure' of her own right"; and 3) "[s]he was merely a housewife who had the misfortune of being married to a wealthy man." Brief of Respondent at 20, 22, Time, Inc. v. Firestone, 96 S. Ct. 958 (1976) (emphasis in original) [hereinafter cited as Brief for Respondent].

[95] *See* Brief for Petitioner, *supra* note 94, at 25–31 (relying on Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)); *contra*, Brief for Respondent, *supra* note 94, at 15–17. Although outside the scope of this Note, it should be mentioned that the basis of this first amendment argument was that the press should enjoy first amendment protection for reports of judicial proceedings because of the necessity for informing the public of important court proceedings. While such constitutional protection had been acknowledged by the Court for truthful reports in *Cox Broadcasting*, Time argued that even false reports of judicial proceedings should be protected by requiring the imposition of the *New York Times* standard to defamation suits resulting from such erroneous reports. Brief for Petitioner, *supra* note 94, at 26–31. *See generally* Cox Broadcasting Corp. v. Cohn, *supra*; Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Craig v. Harney, 331 U.S. 367 (1947).

[96] 96 S. Ct. at 965.

[97] *Id.* (quoting from Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974)).

[98] 96 S. Ct. at 965–66 & n.3. *But see id.* at 980–81 (Marshall, J., dissenting); notes 105–09 *infra* and accompanying text.

vorce "with all controversies of interest to the public" would be to resurrect the approach of the *Rosenbloom* plurality which had been abandoned by the Court in *Gertz*.[99] Although conceding that the divorce might attract some public interest, Justice Rehnquist reasoned that Mrs. Firestone was forced to institute legal proceedings "in order to obtain . . . release from the bonds of matrimony,"[100] and that this legal action did not constitute a public controversy within the meaning of the *Gertz* decision.[101] Moreover, he suggested that Mrs. Firestone had apparently not sought the publicity that accompanied the divorce proceedings for the purpose of influencing their disposition.[102]

Justice Marshall emphatically dissented. In his view, Mary Alice Firestone was clearly "a 'public figure' for purposes of reports on the judicial proceedings she initiated."[103] Not only had she established herself as a prominent figure prior to the divorce proceedings by associating with the Palm Beach " 'sporting set' ,"[104] but she had also instituted a series of press conferences during the proceedings and had subscribed to a press clipping service.[105] Furthermore, she was in a firm position to institute what the *Gertz* Court had termed self-help measures;[106] that is, her access to the local communications

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[99] 96 S. Ct. at 965.

[100] *Id. See* Boddie v. Connecticut, 401 U.S. 371 (1971).

[101] 96 S. Ct. at 965.

[102] *Id.* at 965 n.3. In this rather cryptic footnote, Justice Rehnquist dismissed rather summarily the importance of the fact that Mrs. Firestone had held a number of press conferences during the divorce proceedings. He wrote that

> there is no indication that she sought to use the press conferences as a vehicle by which to thrust herself to the forefront of some *unrelated* controversy in order to influence its resolution.

Id. (emphasis added). In support of this statement Justice Rehnquist cited *Gertz*; however, the *Gertz* language identified as public figures those who "thrust themselves to the forefront of particular public controversies in order to influence the resolution *of the issues involved*," not to influence the resolution of some "unrelated controversy." *Compare id. with* 418 U.S. at 345.

The meaning and application of Justice Rehnquist's statement is unclear. There would seem to be no reason for determining one's status as a public figure or a private individual on the basis of one's use of the media to influence the outcome of some totally unrelated controversy.

[103] 96 S. Ct. at 980 (Marshall, J., dissenting).

[104] *Id.* (quoting from Firestone v. Time, Inc., 271 So. 2d 745, 751 (Fla. 1972)).

[105] 96 S. Ct. at 980 (Marshall, J., dissenting).

[106] *Id.* In discussing the media-access remedy in *Gertz*, Justice Powell had pointed out that "[t]he first remedy of any victim of defamation is self-help" by using the means available "to contradict the lie or correct the error," thus reducing the adverse effect on one's reputation. 418 U.S. at 344. *Gertz* had relied heavily on the media-access argument to underpin its rejection of the *Rosenbloom* plurality position and return to the public figure-private individual analysis: "Public . . . figures usually enjoy significantly greater

media enabled her to correct the false statements levelled against her.[107] Acknowledging that her access to the national news media might not be as extensive, Justice Marshall nonetheless concluded that the *Gertz* self-help rationale never contemplated that the self-help remedy be fully effective,[108] particularly when access to local media enabled the person defamed to communicate her views to the local residents—"presumably the audience Mrs. Firestone would have been most interested in reaching."[109] Furthermore, Justice Marshall did not read *Gertz* as requiring that one purposefully seek public attention in order to be deemed a public figure.[110] Even if her activities could not clearly be categorized as indicating Mrs. Firestone's voluntary assumption of the risk of defamation, they were enough to warrant such an assumption on the part of the press.[111]

Justice Marshall also criticized the majority for having analyzed, in part, the public-figure issue in terms of whether the Firestone divorce proceedings fell within the meaning of public controversy.[112]

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access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Id.* (footnote omitted).

[107] 96 S. Ct. at 980 (Marshall, J., dissenting). Justice Marshall observed that Mrs. Firestone had evidently been featured in numerous articles about the divorce in the local press, and had held "several press conferences." He thus concluded that she was "hardly in a position to suggest that she lacked access to the media for purposes relating to her lawsuit." *Id.*

[108] *Id.* It was stated that "*Gertz* set no absolute requirement that an individual be able fully to counter falsehoods through self-help in order to be a public figure." *Id.* For the *Gertz* position on the effectiveness of media access see 418 U.S. at 344 n.9.

[109] 96 S. Ct. at 980 (Marshall, J., dissenting). Justice Marshall read *Gertz* as viewing self-help to be merely "a minor consideration in determining whether an individual is a public figure," claiming that it is certainly not to be construed as determinative in itself. *Id. But see* 418 U.S. at 344–45 & n.9, where it would appear that the *Gertz* Court was doing somewhat more than relegating the self-help argument to a "minor consideration."

[110] *See* 96 S. Ct. at 980–81. In any event, Justice Marshall proceeded to show how Mrs. Firestone had, in fact, actively participated in events which resulted in her becoming a public figure within the reasoning of *Gertz*. She had, it was pointed out, voluntarily chosen to join the " 'sporting set,' " knowing full well of the attendant publicity; she had subscribed to the press-clipping service—an indication "that she was not altogether uninterested in the publicity she received"; she had chosen, fully aware of her position in society as one upon whom the media focused their attention, to go into court to seek separate maintenance. *Id.* at 980–81. Justice Marshall drew the conclusion from these premises that "Mrs. Firestone would appear to be a public figure under *Gertz*." *Id.* at 981.

[111] *Id.* at 981 (quoting from Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974)).

[112] 96 S. Ct. at 981. Justice Marshall stated that the majority, in order to avoid the logical conclusion that Mrs. Firestone was a public figure, had focused on "the subject matter of the . . . defamation," and had found that the divorce "was not a 'public controversy' as that term [had been] used in *Gertz*." *Id.*

He compared this analysis with that employed by the *Rosenbloom* plurality, which had based the applicability of the *New York Times* actual-malice test on a finding that the matter was "of 'public or general concern.' "[113] In other words, the *Firestone* majority's determination that Mrs. Firestone was not a public figure because the divorce proceedings could not be deemed a public controversy under *Gertz*, represented a return to the *Rosenbloom* rationale that the event, rather than the person's status, is the determining factor in a finding of liability for defamation.[114]

Since Mary Alice Firestone would seem to be a public figure for a limited range of issues as defined by the *Gertz* majority,[115] Justice Marshall's analysis appears to be correct.[116] The majority's failure to come to the same conclusion suggests that the Court has read the rather vague public-figure criteria propounded in both *Gertz* and *Butts* in a different light. For example, Justice Marshall believed that Mrs. Firestone's association with the " 'sporting set' " of Palm Beach society indicated that she was well-known in the community.[117] The majority, however, in concluding that she "did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society,"[118] suggests that "community" may encompass more than the immediate locality. This position seems inconsistent with *Gertz*, where the majority implied that "community" could mean the city or town in which the plaintiff resided.[119]

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[113] *Id.*

[114] *Id. See* 418 U.S. at 346–47. According to Justice Marshall:

> If *Gertz* is to have any meaning at all, the focus of analysis must be on the actions of the individual, and the degree of public attention that had already developed, or that could have been anticipated, before the report in question.

96 S. Ct. at 982 (Marshall, J., dissenting).

[115] *See* text accompanying notes 75, 79–80 *supra*.

[116] Applying these criteria to Mary Alice Firestone, it would seem that she fell within these defined limits. She did, as Mr. Justice Marshall pointed out, voluntarily enter the social elite of Palm Beach with an awareness of the likelihood of attendant publicity. 96 S. Ct. at 981. She not only expected this publicity, but she also apparently fostered it by granting press conferences during the divorce proceedings. She knew that there would be a good deal of publicity given to her law suit for separate maintenance, and if one examines her role in the divorce proceedings—which were shown to be widely covered in the press—it will be seen that she played a major part in them. *See id.*

[117] *See* 96 S. Ct. at 981.

[118] *Id.* at 965.

[119] 418 U.S. at 351–52. The term "community" was not specifically defined in *Gertz*. In fact, the *Gertz* Court itself seems to have used the term in two different senses. In examining Gertz' position in the "community," the Court referred to the fact that he had "long been active in community . . . affairs" and noted his membership in "local civic groups." *Id.* at 351. The Court went on to draw the conclusion that Gertz was not a public figure, however, because he was not generally known "in the commu-

The *Firestone* majority and Justice Marshall also disagreed as to the meaning of "voluntary" as it relates to an evaluation of the activities that brought the defamation plaintiff into the controversy.[120] The majority opinion indicates that acts stemming from exigency or legal compulsion are not "voluntary." Mary Alice Firestone's instituting separate maintenance proceedings, for example, was not construed as the kind of voluntary act which warranted the conclusion that she had "thrust herself to the forefront of [a] particular public controversy" so as to be deemed a public figure.[121] Although this

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nity" and it was pointed out that none of the members of the jury panel "had ever heard of [him]." *Id.* at 351–52. While there seems to be some apparent inconsistency in this, it would appear that the *Gertz* Court was employing "community" to mean the local geographical area, perhaps Cook County or the city of Chicago. There is no indication that the Court here envisaged a statewide or national community.

The *Firestone* Court, however, seems to have shifted its interpretation of the clear implication of *Gertz*' community limitations. By intimating that it did not accept Mrs. Firestone's prominence in the Palm Beach community to be dispositive of the issue, the Court implied that "community" must extend beyond the immediate locality. The *Firestone* Court, however, made no statement which would provide any guidance to future courts in making a public figure determination.

It could be argued that because *Time* magazine was an international publication and had publicized the allegedly defamatory report internationally (or at least nationally), "community" should be read to mean either the entire United States or the world, since "community" could logically be read to mean that area in which the defamation had been spread.

However, the publication in *Gertz* had also been distributed nationally, yet the Court in that case had made no indication that it viewed "community" to mean anything but the immediate locality. That the *Firestone* Court should dismiss Mrs. Firestone's fame in Palm Beach and its environs seems an important redefinition of the *Gertz* Court's concept of "community."

[120] *Compare* 96 S. Ct. at 965 *with id.* at 980–81 (Marshall, J., dissenting).

[121] *Id.* at 965. Although Mrs. Firestone had not sought a divorce, but rather separate maintenance, the *Firestone* majority analogized her being "compelled to go to court by the State in order to obtain legal release from the bonds of matrimony," *id.*, to the situation in Boddie v. Connecticut, 401 U.S. 371 (1971), wherein the Court had stated that

> [r]esort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court. For both groups this process is not only the paramount dispute-settlement technique, but, in fact, the only available one.

Id. at 376–77.

The *Firestone* majority seems to have misread the wording of the divorce judgment here. This order points out that the original action was initiated "upon plaintiff wife's second amended complaint for *separate maintenance*. . . ." Firestone v. Firestone, No. 64 C 2790 C at 1 (Fla. Cir. Ct., Dec. 15, 1967) (emphasis added). The judge in the divorce proceedings also alluded to the fact that "[p]laintiff strongly resists her husband's claim for divorce . . . ." *Id.* at 3. It must also be borne in mind that Mrs. Firestone appealed the original grant of divorce all the way to the Florida supreme court. *See* Firestone v. Firestone, 263 So. 2d 223, 225 (Fla. 1972), *aff'g in part* Firestone v. Firestone, 249 So. 2d 719 (Fla. Dist. Ct. App. 1971), *aff'g* Firestone v. Firestone, No.

activity was not voluntary and hence did not fall within the purview of the *Gertz* voluntary-involvement standard, the fact that Mrs. Firestone was compelled by exigency to institute separation proceedings would seem to lead to the conclusion that she nonetheless *was* a public figure, in that she had been—in *Gertz* terms—"drawn into" the controversy.[122] The failure of the *Firestone* majority to reach this conclusion, however, would seem to lead to one of two inferences: either the involuntary involvement in a public controversy is no longer a viable criterion for designating one a public figure, or else the extent to which or the method by which one is "drawn into" a public controversy in order to become a public figure is limited to extremely narrow circumstances which the Court has left yet undefined.

The *Firestone* decision also signals both a de-emphasis and, at the same time, a noticeable shift in the Court's application of the media-access criterion. The Court never evaluated Mrs. Firestone's wide access to the news media in any positive sense.[123] Rather, the majority introduced two new questions into the media-access analysis: first, whether in fact a defamation plaintiff uses the media to his advantage[124] and second, whether a plaintiff uses the media to influence the resolution of a completely "unrelated controversy."[125] Neither of these questions seems particularly relevant to a media-access evaluation. Traditionally, the analysis focused on access, not usage.[126] Thus, the courts would look to whether or not the particu-

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64 C 2790 C (Fla. Cir. Ct., Dec. 15, 1967). It may therefore be contended that Mrs. Firestone was not seeking "to obtain legal release from the bonds of matrimony," 96 S. Ct. at 965, as Justice Rehnquist stated.

[122] If, as the Court indicated, she did not voluntarily inject herself into a public controversy and the divorce proceedings were a matter of public interest, as the resulting publicity would seem to indicate, then Mary Alice Firestone could logically be deemed a public figure in that she was "drawn into" a public controversy as required by *Gertz*. *See* 418 U.S. at 351–52.

[123] *See* 96 S. Ct. at 965–66. Indeed, the majority acknowledged her ready access to the media sub silentio by making passing reference to the fact that Mrs. Firestone had made use of press conferences. *See id.* at 965 n.3.

[124] *Id.* at 965 n.3. Justice Rehnquist pointed out that "[s]uch interviews should have had no effect upon the merits of the legal dispute between respondent and her husband or the outcome of that trial." *Id.* He then went on to state that he was not of the opinion that "it can be assumed that any such purpose was intended." *Id.* Thus, if a plaintiff should use the media to affect the outcome of a legal dispute he might be considered a public figure; if he does not, even though he has access to the media, he is not.

[125] *Id.* *See* note 102 *supra*.

[126] Mr. Justice Marshall raised the point that

> *Gertz* did not intend to establish a requirement that an individual attempt to influence the resolution of a particular controversy before he can be termed a

lar defamation plaintiff had an available remedy by which to counteract the effects of the defamatory falsehood.[127] Whether in fact the plaintiff had ever exploited the potential remedy was never material to the analysis.[128] Additionally, the *Firestone* Court's examination of the use of media in an "unrelated controversy" would seem to contradict *Gertz*' mandate that the court focus on "the particular controversy giving rise to the defamation."[129]

These distortions of the media-access scrutiny are not, however, the most serious problem in the *Firestone* decision. *Firestone* is internally inconsistent as well as inconsistent with *Gertz*. Although the opinion disavows the "public interest" rationale of *Rosenbloom*, the distinction made between public controversies and "controversies of interest to the public"[130] is, as Justice Marshall forcefully pointed out,[131] grounded on this rationale. Furthermore, the majority position re-establishes the need to make ad hoc distinctions—a position criticized in both *Gertz* and *Firestone* itself.[132] Clearly, the Court's

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public figure. If that were the rule, Athletic Director Butts in *Curtis Publishing Co. v. Butts* . . . would not be a public figure. We held that Butts was a public figure, and in *Gertz* we specifically noted that that decision was "correct."

96 S. Ct. at 982 n.2 (Marshall, J., dissenting).

[127] *See* 418 U.S. at 344; 388 U.S. at 155.

[128] *See* note 126 *supra*. Indeed, effective use of the media would seem to have little constitutional relevance to a determination of a person's status. The concept underlying the public figure-private individual determination is that the public figure "enjoy[s] significantly greater access" to the media, not that he uses his access more effectively. *See* 418 U.S. at 352.

[129] *Compare* 96 S. Ct. at 965 n.3 *with* 418 U.S. at 352. *See also* note 102 *supra*.

[130] 96 S. Ct. at 965 (majority opinion). Time had argued that because the Firestone divorce was a cause célèbre and was attended by a great deal of publicity, it must be deemed a public controversy. Brief for Petitioner, *supra* note 94, at 32–33. This argument had been rejected by the Florida supreme court, Firestone v. Time, Inc., 271 So. 2d 745, 752 (1972), and by the United States Supreme Court, 96 S. Ct. at 965. The Florida court stated that the divorce proceedings were not "matters of real public or general concern." Firestone v. Time, Inc., 271 So. 2d 745, 752 (Fla. 1972), *rev'd on other grounds*, 96 S. Ct. 958 (1976). The Supreme Court refused to accept Time's equation of public controversy, as employed by the *Gertz* Court, with "all controversies of interest to the public." 96 S. Ct. at 965.

[131] *See* 96 S. Ct. at 981–82 (Marshall, J., dissenting). *See also* notes 112–14 *supra* and accompanying text.

[132] 96 S. Ct. at 981 (Marshall, J., dissenting). Neither the *Firestone* nor the *Gertz* Court set out any determinative criteria or "rule of general application" to guide lower courts in making this determination. Lacking any specificity in terms, there can be no alternative but for the Court to continue reviewing lower court decisions until some consistent standards evolve which will permit lower courts to make decisions as to what constitutes legitimate public controversies. This, of course, is a *Rosenbloom* approach which *Gertz* and *Firestone* expressly abjure. *See* 403 U.S. at 44–45 & n.12. *But see* 418 U.S. at 346; 96 S. Ct. at 965 & 981–82 (Marshall, J., dissenting).

attempt to lend standards to the task of identifying public figures and to use the public-figure analysis to avoid a multiplicity of ad hoc decisions which "render [its] duty to supervise the lower courts unmanageable" has not been successful.[133]

Perhaps the Court should acknowledge that any constitutional standard employed in defamation actions will require ad hoc decisions to be made in determining which plaintiffs warrant greater protection from defamatory falsehoods. This would seem to be true whether a public-figure determination or a public-interest test is used. If this is so, then it seems better reasoned to protect reports because they concern events of public interest than to found such protection on a person's status in society.[134] Rather than creating a greater threat to freedom of the press, as Justice Marshall feared,[135] a return to the public-interest approach would likely give the news media broader protection, in that the range of issues that are not of legitimate public interest seems extremely narrow.[136] Under this approach, for example, the *Firestone* case might have been decided the same way, because most divorce proceedings are probably not of the requisite

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[133] This statement was originally made in *Gertz*. 418 U.S. at 343. In the ensuing period, however, defamation suits have continued to reach the Court, and *Firestone* itself is an example of the effects of the lack of clarity emanating from *Gertz*.

[134] The policy underlying passage of the first amendment was that the people must be able to discuss and debate openly issues necessary for society to function effectively. If one accepts that premise, then the *Rosenbloom* plurality position seems to be based on more solid ground constitutionally than the public figure-private individual dichotomy. *See generally* EMERSON, *supra* note 22, at 517–43; Comment, *supra* note 40.

[135] *Cf.* 403 U.S. at 84 (Marshall, J., dissenting). Justice Marshall had opposed the public-interest test as it had been set out by the *Rosenbloom* plurality largely because it would require courts to make ad hoc decisions and result in a lack of "predictability and certainty" as to what events would be adjudged to be in the public interest. *Id.* at 81. Although he opposed acceptance of the *Rosenbloom* standard, he expressed the opinion that a measure of the self-censorship which he envisaged as resulting from *Rosenbloom* could be avoided by eliminating the possibility of punitive damages being awarded. *See id.* at 84.

[136] *See* Brosnahan, *From* Times v. Sullivan *to* Gertz v. Welch: *Ten Years of Balancing Libel Law and the First Amendment*, 26 HASTINGS L.J. 777, 788 n.62 (1975). For cases holding what might be considered events of minor importance to be public issues under *Rosenbloom* see *e.g.*, Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970) (condition of accommodations at a hotel during a national golf tournament); Hensley v. Life Magazine, Time, Inc., 336 F. Supp. 50 (N.D. Cal. 1971) (issuance of ministerial ordination credentials by Universal Life Church); Sellers v. Time Inc., 299 F. Supp. 582 (E.D. Pa. 1969), *aff'd*, 423 F.2d 887 (3d Cir.), *cert. denied*, 400 U.S. 830 (1970) (law suit arising out of a stray golf shot); Washington v. New York News, Inc., 37 App. Div. 2d 557, 322 N.Y.S.2d 896 (1971) (bishop's attendance at a night club performance by a choir singer from his church); Twenty-Five East 40th St. Restaurant Corp. v. Forbes, Inc., 37 App. Div. 2d 546, 322 N.Y.S.2d 408 (1971) (quality of food served in a restaurant). The obvious inference of these decisions is that there is little that falls outside the limits of "legitimate public interest." *See also* Comment, *supra* note 40, at 1560–61 n.94.

public interest;[137] thus, the actual-malice standard would be inapplicable.[138] Yet the interests of the defamation plaintiff who is not a public official need not be sacrificed to this broader news media protection. Where the event which initiated the defamatory report is deemed to be of sufficient public concern, the proper balance of interests could be achieved by applying a gross negligence standard rather than either a simple negligence or the *Times* actual-malice standard.[139]

Eventually, a broader body of case law would establish clearer precedent as to what issues are, in fact, of public interest. Thus, it is likely that fewer cases falling within defined limits would be appealed unless the litigant felt that the lower court had misinterpreted the established precedents. Eventually, there would be a reduction of the pressure on the Supreme Court to supervise lower-court determinations of defamation issues. While it seems true that use of a public-figure criterion would also eventually provide a body of case law establishing limits on the types of person to fall within this category, it would seem that a public-interest test is better founded on the underlying premises of the first amendment. This amendment was designed to protect the ways and means available to the people for debate and discussion of issues affecting a well-ordered society. Ac-

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[137] If the divorce proceedings of personalities as well known as the Firestones do not fall within this category, it is likely that the same would hold true for all but the most widely known personalities.

[138] Under *Gertz*, *Rosenbloom*, *Walker*, *Butts*, and *Times*, if the defamatory statement does not fall within the limited constitutional privilege granted to the press, state libel laws would obtain. After *Gertz*, however, states must require that at least a showing of negligence be made before liability can attach. *See* 418 U.S. at 347; *cf.* 388 U.S. at 155.

[139] A simple-negligence standard would seem to permit recovery upon too uncertain a basis. Use of such a standard might have the "chilling effect" of self-censorship on the part of the press because of the uncertainty as to what a jury would deem to be negligent acts by a publisher. Although use of a negligence standard in any litigation leads to the same degree of uncertainty, arguably the import to society of a free press seems to warrant use of a standard that provides for more certainty as to the outcome of litigation.

A gross-negligence standard would seem to obviate this problem to some extent, in that the jury would have to find, as Justice Harlan expressed it in *Butts*, "*highly unreasonable conduct* constituting an *extreme* departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." 388 U.S. at 155 (emphasis added). Such a standard would seem, on its face, to reduce the likelihood of increasing numbers of defamation suits, and it would limit recovery to those instances where some tangible fault could be shown, rather than permit recovery for mere, and slight, carelessness.

Establishing actual malice, that is, proving that the publisher had "serious doubts as to the truth of his publication," as mandated by St. Amant v. Thompson, 390 U.S. 727, 731 (1968), would seem to require proof of intent. The gross-negligence standard enunciated by Justice Harlan in *Butts*, however, seems not so formidable a proof requirement. *See* note 35 *supra*.

cepting this as the purpose of the first amendment, it follows logically that use of a public-interest test coupled with a gross negligence standard would best balance the two competing interests involved: the right of the state to protect the reputations of its citizens, and the right of the people to be informed by virtue of the first amendment guarantee of a free and unfettered press.

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