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FIRST AMENDMENT RETROSPECTIVE

FREE SPEECH AND DEFAMATION LAW

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

For more than a decade the Supreme Court has attempted to find the proper balance between an individual's right to compensation for injury to his reputation caused by defamatory speech and the first amendment freedoms of speech and the press. The effort has been characterized by a number of plurality decisions. Nonetheless, the majority of the Court has agreed that a public official or a public figure must prove actual malice (knowing falsity or reckless disregard for the truth) on the part of the defendant in order to recover in a libel action based on a publication concerning a matter of public interest. In 1971, when the Court considered Rosenbloom v. Metromedia, Inc., an action brought by a private citizen complaining of libelous statements in a radio news broadcast, it ruled that the plaintiff had to prove actual malice. The majority could not agree on the reason for requiring proof of actual malice in Rosenbloom, but it appeared that the requirement had been extended to private citizens involved in matters of public interest. In Gertz v. Robert Welch, Inc., a libel action brought by a private citizen, the Seventh Circuit used the "public interest" test to affirm the order of the United States District Court for the Northern District of Illinois entering judgment in favor of the defendant notwithstanding the verdict. The Supreme Court reversed the Seventh Circuit and announced new guidelines for libel actions brought by private citizens which will have a substantial effect on the traditional law of defamation.

This discussion of the case will examine the facts upon which Gertz was based, the development and dimensions of the constitutional privilege to publish libel prior to Gertz, and the treatment of the case by the district court and the Seventh Circuit. An alternative disposition of the case by the Seventh Circuit will be proposed, and the Supreme Court decision and its potential effects will be described.

The defamatory material complained of by Chicago attorney Elmer Gertz was published in the April, 1969, issue of *American Opinion*, a monthly outlet for the views of the John Birch Society. Gertz filed a diversity action for libel against the publisher, Robert Welch, Inc., in the federal district court. In the early 1960's *American Opinion* had begun a campaign to warn its readers of an alleged nationwide communist conspiracy to discredit local law enforcement agencies and create in their stead a national police force capable of supporting a communist dictatorship. In December, 1968, as part of the continuing effort to alert the public to the purported conspiracy, the managing editor of the magazine, Scott Stanley, Jr., commissioned Alan Stang, a regular contributor to *American Opinion*, to write an article about the murder trial of Chicago police officer Richard Nuccio. The article, titled "FRAME UP: Richard Nuccio and The War On Police," concerned the killing of Ronald Nelson, a Chicago youth, by Officer Nuccio in June, 1968, and Nuccio's subsequent criminal trial for murder which resulted in conviction. The article contained several false statements about attorney Gertz, who had no connection with the criminal trial. Gertz had been retained by the Nelson family to represent them in civil litigation against Nuccio. In this capacity he attended the coroner's inquest of Nelson's death. However, although the Nelson homicide and the subsequent criminal trial of Nuccio commanded a great deal of public attention, Gertz did not discuss the criminal or civil litigation with the press.

**The Contents of the Article**

"FRAME-UP" was designed to demonstrate that the testimony against Nuccio at the criminal trial was false and that the prosecution was an accomplice in the alleged communist campaign against the police. The author accused Gertz of orchestrating a massive publicity campaign against Nuccio which resulted in a miscarriage of justice. After describing the negative reaction to the homicide voiced by neighborhood groups and underground or radical newspapers, the author alleged that Gertz must have been responsible for media and public interest in the trial. To substantiate this allegation, he claimed that Gertz had been a member of various allegedly communist or Marxist organizations. Significance was attached to the fact that Gertz had appeared at the inquest to represent the Nelsons only two days after a Lake View community meeting was held to protest the homicide. (However, it was not claimed that Gertz had attended the community meeting.) The role of Gertz as legal counsel for the Sparling Commission, a group of leading citizens which had issued a report on disruptions at a peace

6. Gertz sought $10,001 in actual damages and $500,000 in punitive damages.
march held in Chicago in April, 1968, was cited as further evidence of the likelihood of his involvement in a miscarriage of justice. The remainder of the 18-page article was devoted to a description of the events leading to the homicide, interviews with Lake View community leaders, an examination of testimony at the criminal trial, a statement of the author's opinion about the importance of the trial to the furtherance of the alleged communist conspiracy, and an exhortation to the readers to help overturn the conviction of Nuccio.

Gertz was mentioned by name nine times in the body of "FRAME-UP" and once in a caption under his picture. He was identified as an attorney five times and as the Nelson's attorney four times. The author described Gertz as an attorney for the Nelsons who had filed suits against Nuccio seeking almost one million dollars in damages in the state and federal courts. The contents of the article do not indicate that the author thought Gertz was officially connected with the criminal trial in any capacity.

According to the article, the police file on Gertz took "a big, Irish cop to lift." He was described as a former official of the "Marxist League for Industrial Democracy, originally known as the Intercollegiate Socialist Society, which has advocated the violent seizure of our government" and an officer of the National Lawyers Guild, an allegedly communist organization which "probably did more than any other outfit to plan the Communist attack on the Chicago police during the 1968 Democratic Convention." The author labelled Gertz a "Leninist" and a "Communist-fronter." All of these statements were inaccurate. The implication that Gertz had a criminal record was false. He had never been a member of the "Marxist League for Industrial Democracy" or the "Intercollegiate Socialist Society." Gertz had not been a member or an officer of the National Lawyers Guild for 15 years prior to the publication of the article, and there was no evidence that he or that organization had taken part in the planning of the 1968 demonstrations in Chicago. The charges that Gertz was a "Leninist" or a "Communist-fronter" were also without basis.

THE CONDUCT OF THE DEFENDANT

The author of "FRAME-UP" was not joined as a defendant and did
not testify.\textsuperscript{20} Therefore, the case against the corporate defendant had to be predicated upon the acts or omissions of managing editor Stanley. From his Boston office, the managing editor had consulted with the author a few times by telephone after commissioning the article and before receiving it on February 18, 1969. The managing editor knew nothing about Gertz except what he read in “FRAME-UP.”\textsuperscript{21} The potentially defamatory statements were flat assertions of fact and not attributed to any source. Nonetheless, the managing editor made no effort to verify or substantiate any of the charges against Gertz. He wrote an introduction to the article stating that the author had “just returned from an investigative trip to Chicago, where he conducted extensive research into the Richard Nuccio Case.”\textsuperscript{22} He also wrote the caption which appeared under a picture of Gertz in the body of the article which read “Elmer Gertz of Red Guild harasses Nuccio.”\textsuperscript{23} In addition, in a letter to the readers on the table of contents page of the issue containing “FRAME-UP,” the managing editor wrote, “[W]hen American Opinion's Alan Stang goes after the facts in a story he gets them—just as he has, again, in the very important article beginning on page 1.”\textsuperscript{24}

The April, 1969, issue of American Opinion was placed on sale at newsstands throughout the country during the month of March. The defendant also had reprints of the article about the Nuccio case distributed on the streets of Chicago.\textsuperscript{25} Gertz learned of the article after his law partner’s wife was handed a copy of the reprint while shopping on Chicago’s north side.

\textbf{The Development and Dimensions of Constitutional Privilege}

Throughout the Gertz litigation the threshold issue was whether the defendant’s conduct should be measured by the “New York Times’ knowing-or-reckless-falsity standard.”\textsuperscript{26} In \textit{New York Times Co. v. Sullivan},\textsuperscript{27} the United States Supreme Court determined “the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct.”\textsuperscript{28} The Court held that the constitutional guarantees required “a

\textsuperscript{20} Gertz v. Robert Welch, Inc., 471 F.2d 801, 802 (7th Cir. 1972).
\textsuperscript{22} \textit{FRAME-UP} at 1.
\textsuperscript{23} \textit{Id.} at 9.
\textsuperscript{24} \textit{Id.} at table of contents page.
\textsuperscript{25} About 42,000 copies of the magazine were distributed nationally and about 86,000 reprints were printed, of which about 5,000 were sold or given away in Illinois. Gertz v. Robert Welch, Inc., 471 F.2d 801, 804 (7th Cir. 1972).
\textsuperscript{27} 376 U.S. 254 (1964).
\textsuperscript{28} \textit{Id.} at 256.
federal rule that prohibits a public official from recovering damages for a defamatory falsehood unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

The publication in *New York Times*, as in *Gertz*, was political in nature. It was a full-page advertisement placed in *The New York Times* to solicit funds to support the civil rights movement in the South. However, the plaintiff in *New York Times*, unlike *Gertz*, was an elected public official and was not named in the advertisement. Sullivan was one of three elected city commissioners of Montgomery, Alabama. He based his claim on the fact that the advertisement contained false statements about the conduct of the Montgomery police. He contended that since he was the commissioner of police, readers of the advertisement might reasonably infer that he had ordered the police to do the reprehensible acts charged in the advertisement. As the advertisement did not contain any attacks of a personal character and was endorsed by several persons of good reputation, the *Times* advertising department approved it without checking its contents against recent *Times* news stories concerning the events described in the advertisement.

In reaching its decision in *New York Times*, the Court stated that freedom of expression on public questions is basic to the democratic form of government. It noted that there is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." The question was whether the publication at issue was outside the protection of the first amendment because it was false or because it was injurious to an individual's reputation. The Court decided that in order to encourage vigorous public debate on major issues, some erroneous statements must also be protected. Statements which do injury to the reputation of public officials, the Court found, could not be suppressed because prohibiting such statements would be similar to prohibiting criticism of the Government. Therefore, a rule which prohibited or unreasonably stifled such criticism would be contrary to the spirit of the Constitution.

Although Alabama law did allow a defense of truth in libel actions, the Court decided that constitutional guarantees demanded even greater protection. A publisher who believed that he must prove the truth of all controversial statements to the satisfaction of a court might tend to practice "self-censorship" for the following reasons: Fear of financially crippling damage awards, desire to avoid expensive litigation, and concern about establishing "the truth" in certain situations. As a result, publication of true state-

29. *Id.* at 279-80.
30. *Id.* at 287.
31. *Id.* at 270.
32. *Id.* at 256, 277, 278 n.18. (A jury had awarded $500,000 to Sullivan in *New York Times.*)
ments, as well as false statements, could be deterred. The Court gave little explanation of the requirement that the plaintiff prove knowing or reckless conduct by the defendant. It simply noted that a similar rule had already been adopted in several states\textsuperscript{33} and that a similar privilege was enjoyed by public officials who made libelous statements.\textsuperscript{34} The Court also indicated that considering the contents of the advertisement and the reputation of the persons endorsing it, the failure of the Times to discover the factual inaccuracies prior to publication would support at most a finding of negligence on the part of the Times.

During the seven years following the New York Times decision, the requirement that some plaintiffs in a civil libel action prove with "convincing clarity"\textsuperscript{35} that the defamatory statement was made with knowledge of its falsity or with reckless disregard of whether it was false or not was gradually extended by the Supreme Court to cover plaintiffs who were not elected public officials. The class was expanded to include appointed public officials,\textsuperscript{36} candidates for public office,\textsuperscript{37} and other "public figures."\textsuperscript{38}

The Court also gave some indication of the reasons for its conclusion that the Constitution did not protect statements made with knowledge of or reckless disregard of their falsity but did protect negligently made defamatory statements. In Garrison v. Louisiana\textsuperscript{39} the Court articulated its reasoning in arriving at this position:

At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration. \ldots That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the orderly manner in which economic, social, or political change is to be effected.\textsuperscript{40}

In 1968 the Court explained that proof of negligence would not satisfy constitutional demands because "the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies."\textsuperscript{41}

33. Id. at 280 n.20.
34. Id. at 282-83.
35. Id. at 285-86.
40. Id. at 75 (citation omitted).
Immediately following New York Times Co. v. Sullivan, Supreme Court decisions began to take note of the states' interest in preventing injury to the reputations of their citizens. However, between 1964 and 1971, in recognition of the national commitment to open and vigorous debate on public issues, the Court applied the New York Times standard to the defendant's conduct in a variety of fact situations and legal actions. These included an action for invasion of privacy, a libel action arising out of a labor dispute, and a suit by a teacher to regain his job after being dismissed for making defamatory statements about the school system.

Despite litigation subsequent to New York Times, the concept of publishing with "reckless disregard" of the truth or falsity of the defamatory statement has not been clearly defined by the Court. Discussing the New York Times standard, Mr. Justice Harlan said, "Impositions [of liability for defamatory statements] based on misconduct can be neutral with respect to content of the speech involved, free of historical taint, and adjusted to strike a fair balance between the interests of the community in free circulation of information and those of individuals in seeking recompense for harm done by the circulation of defamatory falsehood." Having extolled the neutrality and objectivity of a standard based on conduct, Mr. Justice Harlan proceeded to announce a subjective definition of publishing recklessly—publishing "despite the publisher's awareness of probable falsity."

In St. Amant v. Thompson, the Court admitted that the term "reckless disregard" could not "be fully encompassed in one infallible definition." Early in the opinion it adopted Mr. Justice Harlan's subjective definition of the term and set forth its own equally subjective definition stating: "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." However, later in the opinion the Court delineated

42. See Garrison v. Louisiana, 379 U.S. 64, 72 n.8 (1964); Rosenblatt v. Baer, 383 U.S. 75, 86 (1966); Rosenblatt v. Baer, id. at 91-94 (concurring opinion of Stewart, J.).
43. The cases are collected in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 30 n.1 (1971). In Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967) (opinion of Harlan, J.) it is suggested that public figures can recover upon a showing of "highly unreasonable conduct constituting extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers," but this measure of the standard of care was not used by the Court in later cases.
48. Id.
50. Id. at 730.
51. Id. at 731.
conduct on the part of a defendant which could lead to a finding of reckless disregard:

The defendant in a defamation action . . . cannot . . . automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them into circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.52

Despite the supposed objectivity of the standard and the amplification of prohibited conduct in St. Amant, the Supreme Court has yet to consider a case in which it has found that the evidence would sustain a determination that the defendant published with "reckless disregard."53

**Extension of the Privilege In A Case Involving A Private Citizen**

In 1971 the Supreme Court considered a case which brought into focus the competing interests of preventing and redressing attacks on an individual's reputation and encouraging robust, uninhibited debate on public issues. In Rosenbloom v. Metromedia, Inc.,54 the plaintiff was a private citizen whose arrest for possession of allegedly obscene literature was reported on a local radio station's regular news broadcasts. Rosenbloom was a distributor of nudist magazines in the Philadelphia metropolitan area. The report, which was telephoned in to the station by one of the arresting officers, stated that the materials in Rosenbloom's possession were "obscene" (omitting the word "allegedly") and described his arrest as being part of a crackdown on "smut merchants." A few months later a jury acquitted Rosenbloom of the criminal obscenity charge under instructions of the trial judge that, as a matter of law, the nudist magazines Rosenbloom distributed were not obscene.

The Court ruled, in a 5-3 decision,55 that the New York Times standard should be applied to the defendant's conduct. However, the justices in

52. Id. at 732 (footnote omitted) (emphasis added).
54. 403 U.S. 29 (1971).
55. Mr. Justice Douglas did not take part in the decision.
the majority could not agree on the reasons for applying the *New York Times* standard. Mr. Justice Brennan announced the judgment of the Court in an opinion in which Messrs. Justice Burger and Blackmun joined.\(^6\)

Mr. Justice Brennan examined *New York Times* and its progeny and found that in all cases the defamatory falsehood occurred in a report of an event of "public or general interest."\(^6\) He noted that constitutional guarantees of freedom of speech and the press were intended to protect free discussion on subjects other than politics in the narrow sense and included "myriad matters of public interest."\(^6\) Therefore, he concluded:

If a matter is a subject of public or general concern, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved . . . . We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous. . . .\(^6\)

The opinion also discussed and rejected the arguments that a private individual requires greater protection from defamatory utterances than the public person because he has less access to the media to deny the defamatory material or because he has not assumed the risk of defamation by deliberately placing himself in the public eye. Mr. Justice Brennan noted that any individual's ability to effectively counter defamatory material depends on whether the media has a continuing interest in the story and suggested that retraction or right-of-reply statutes might be a better solution to the problem.\(^6\) In his opinion, the notion that public people have exposed their entire lives to public scrutiny and private individuals remain completely out of the public eye was not realistic. Citing *Time, Inc. v. Hill*,\(^6\) he concluded that in the American society all persons are "public" persons to some degree and all persons can expect privacy in some aspects of their lives.

Turning to the individual interests protected by the law of defamation,

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56. Mr. Justice Black concurred in the result because of his belief that the first amendment was intended to leave the news media free from the harassment of libel judgments. 403 U.S. at 57. Mr. Justice White concurred because he felt that absent actual malice as defined in *New York Times*, the news media should be able to report on the official actions of public servants in full detail. Id.
57. 403 U.S. at 30-31 (footnote omitted).
58. Id. at 42.
59. Id. at 43-44 (footnote omitted) (emphasis added).
61. 385 U.S. 374 (1967). *Hill* was brought under a New York statute prohibiting invasion of privacy for commercial purposes. The article involved concerned the opening of a play on Broadway and stated that the play was based on actual events in the life of the Hill family. The play was apparently in fact inspired by these events and other similar events. The *New York Times* standard was held applicable.
Mr. Justice Brennan decided that the interest of Rosenbloom in this case was the protection of his public reputation and good name. However, under Pennsylvania libel law, this interest had already been subordinated to other important social goals by permitting an absolute privilege to utter defamatory material in judicial proceedings, legislative proceedings, and executive communications, as well as a qualified privilege to report on material originally published under an absolute privilege. Mr. Justice Brennan felt that the interest of a private citizen in his public reputation and good name was properly subordinated to the freedoms of speech and the press and that permitting recovery on a showing of mere negligence would not provide "adequate 'breathing space' for these great freedoms."62 The holding of the Rosenbloom case was:

[A] libel action, as here, by a private individual against a licensed radio station for defamatory falsehood in a newscast relating to his involvement in an event of public or general concern may be sustained only upon clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not.63

The dissents, filed by Messrs. Justice Harlan and Marshall (joined by Mr. Justice Stewart), suggested that the interests of the states in providing redress for injury to private citizens' reputations would be better served by permitting the states to define for themselves the applicable standard of care for libels of private citizens as long as they did not impose liability without fault. Mr. Justice Harlan indicated that presumed damages should be prohibited and punitive damages awarded only in cases where actual malice is proved. Mr. Justice Marshall advocated a total prohibition of presumed and punitive damages. The dissents also questioned the wisdom of permitting the court to determine what was a matter of "public or general concern."64

FEDERAL DISTRICT COURT OPINIONS IN GERTZ

After Gertz had filed his complaint in the federal district court, the defendant moved to dismiss the complaint for failure to state a claim upon which relief could be granted. The grounds for the motion were apparently the failure to allege special damages. The court denied the motion ruling that statements contained in the article constituted libel per se under Illinois law and that therefore special damages need not be pleaded.65 The court noted:

As an attorney, plaintiff is an officer of the court and has sworn

62. 403 U.S. at 50.
63. Id. at 52 (footnote omitted) (emphasis added).
64. Id. at 78 (dissenting opinion of Marshall, J.); id. at 62 (dissenting opinion of Harlan, J.).
to uphold the Constitution and laws of the United States. Communist doctrine, teaching among other things the propriety of violent overthrow of American government, is of necessity inconsistent with this oath and with the attorney's calling... The instant charges 'impute to him a want of the requisite qualifications to practice law... and therefore are actionable per se.'

Having answered the complaint, Robert Welch, Inc., filed a pretrial motion for summary judgment. It stated that Gertz was a public official or a public figure and that the article concerned an issue of public interest and concern. Therefore, the defendant contended, Gertz could not recover unless he could prove that Robert Welch, Inc., had published defamatory falsehoods with knowledge of their falsity or with reckless disregard for whether they were true or not. The defendant claimed that Gertz could not prove actual malice as defined in New York Times. The motion was supported by an affidavit from Stanley, the managing editor, which said that he had relied on the author's reputation. The managing editor claimed that although a number of Stang's works had been printed by Robert Welch, Inc., he had not received any information which "seriously" challenged the truth of the factual averments in the author's writings. The court denied the motion for summary judgment finding that the factual dispute on the issue of malice was such that it could not conclude, as a matter of law, that defendant either had or had not acted with actual malice. The court observed:

In the instant case a jury might infer from the evidence that defendant's failure to investigate the truth of the allegations, coupled with its receipt of communications challenging the factual accuracy of this author in the past, amount to actual malice, that is, 'reckless disregard' of whether the allegations were true or not... And whether these challenges to the author's accuracy were 'serious' or not is a matter for the jury, rather than defendant to determine.

The trial took place prior to the Supreme Court decision in Rosenbloom v. Metromedia, Inc. The court determined that the defendant had to show that Gertz was either a public official or a public figure in order to require Gertz to prove actual malice on the part of the defendant. At the conclusion of the trial, it ruled that Gertz was not a public figure thus making the New York Times test inapplicable to the case. However, the court also indicated that there was not sufficient evidence of malice to create a jury question on that issue. Having already ruled that some statements in the article were libelous per se, the court submitted the case to the jury un-
der instructions that withdrew from its consideration all issues except the measures of damages. The jury awarded Gertz $50,000.

Robert Welch, Inc., then moved for judgment notwithstanding the verdict. In reconsidering the matter, the court determined that the applicability of the *New York Times* test of malice depended not upon whether the plaintiff was a public official or figure but upon whether the publication concerned a matter of public interest.\(^7\) Describing the subject matter of "FRAME-UP" as "more general and far reaching than just the trial of one Chicago policeman for murder," and as painting a "picture of a conspiratorial war being waged by Communists against the police in general,"\(^7\) the court ruled that the publication was clearly one of public interest. Since it had already decided that Gertz had not produced sufficient evidence at trial to meet the *New York Times* test, the district court entered an order of judgment notwithstanding the verdict in favor of the defendant. The plaintiff appealed the order to the United States Court of Appeals for the Seventh Circuit.

**SEVENTH CIRCUIT OPINION IN Gertz**

The Seventh Circuit opinion focused on two questions: (1) Is the *New York Times* test of actual malice applicable to this case, and (2) If the test is applicable, was the evidence of actual malice insufficient to permit the jury to consider the questions of malice? In resolving these complex issues the Seventh Circuit had the benefit of the Supreme Court decision in *Rosenbloom v. Metromedia, Inc.*\(^7\) For purposes of its opinion the court assumed that the district court was correct in ruling that the article contained charges which were libelous per se and that Gertz was not a public figure. It agreed with the district court finding that there was significant public interest in the subject matter of "FRAME-UP" whether that subject matter was described as "the trial of a Chicago police officer for the crime of murder" or the "possible existence of a nationwide conspiracy to discredit local police officers."\(^7\)

In considering the narrower question of whether the references to the

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\(^72\) Gertz was argued in the court of appeals on January 31, 1971. The decision was reached in *Rosenbloom* on June 7, 1971. The Seventh Circuit decided *Gertz* on August 1, 1972, and denied a rehearing on Sept. 7, 1972.

\(^73\) Gertz v. Robert Welch, Inc., 471 F.2d 801, 805 (7th Cir. 1972).
plaintiff in the article were a matter of public interest, the appellate court noted:

It is one thing to omit the word ‘alleged’ from an otherwise accurate comment on a newsworthy subject; it is quite another to include a gratuitous and collateral remark about a participant in a public controversy. The omission, even if it makes the comment false, does not enlarge its subject matter beyond the area in which First Amendment protection is properly afforded. But the addition of an unnecessary and irrelevant comment about a private individual is not automatically protected simply because it is contained in an article dealing generally with an important subject.\(^\text{74}\)

Nonetheless, the Seventh Circuit found that the references to the plaintiff’s alleged “Communist-front” associations were “integral” to the development of the thesis of a national conspiracy against the police. Even assuming the falsity of the central thesis, the court found the \textit{New York Times} standard applicable. The court observed that “a false statement of fact made in support of a false thesis is protected unless made with knowledge its falsity or with reckless disregard of its truth or falsity.”\(^\text{75}\)

Having held that the \textit{New York Times} test of actual malice was applicable to the case, the court examined the evidence to see if it would support the charge that defendant had published recklessly. The Seventh Circuit found that the managing editor’s mere failure to verify the accuracy of defamatory statements in the article did not constitute recklessness since he did not know anything about Gertz except what he read in the article and could reasonably assume that the author was trustworthy. In the opinion of the court the managing editor’s “apparent disposition to assume that a lawyer who could file a . . . case against a policeman may well be a ‘Communist-fronter,’”\(^\text{76}\) plus the failure to investigate did not constitute the clear and convincing proof of malice required by \textit{New York Times}.

Finally, in its examination of the policy questions involved, the court discussed the tension between encouraging freedom of expression and encouraging responsible publications, making no reference to the states’ interest in redressing harm to the reputations of their citizens or the high value this society places on the worth of an individual.\(^\text{77}\) The Seventh Circuit also expressed concern about treating \textit{The New York Times} differently from the John Birch Society because of having more sympathy with the point of view of the \textit{Times}, but totally ignored the factual distinctions determinative of culpability of the defendant’s conduct in \textit{New York Times} and \textit{Gertz}. The

\[^{74}\] \textit{Id.} at 805-06 (footnote omitted).
\[^{75}\] \textit{Id.} at 806.
\[^{76}\] \textit{Id.} at 807.
court of appeals decided to accept the trial court's conclusions on the question of recklessness and affirmed the judgment notwithstanding the verdict in favor of Robert Welch, Inc.

AN ALTERNATIVE DISPOSITION

Although the United States Court of Appeals for the Seventh Circuit affirmed the district court judgment for Robert Welch, Inc., the opposite conclusion would have been equally tenable. According to Supreme Court mandates, the Seventh Circuit could have reversed the district court and ordered the case remanded for a new trial on two grounds.

The court could have found that in view of the holding in *Rosenbloom v. Metromedia, Inc.*,\(^78\) the issue of the applicability of the *New York Times* standard depended not only upon the publication's subject matter being of general or public interest, but also upon the plaintiff's involvement in such a matter.\(^79\) Such an approach was taken in *Gordon v. Random House, Inc.*,\(^80\) decided by the same circuit court which originally held that the *New York Times* test should be applied in *Rosenbloom v. Metromedia, Inc.*\(^81\)

In *Gordon* the plaintiff was a retail merchant of the Jewish faith. A book titled *The Negroes and the Jews* was published by the defendant. In the prologue to the book Gordon was described as a hardworking merchant in a changing neighborhood who had become the victim of race riots in 1964. The material about Gordon was juxtaposed with the story of Earl, a black itinerant who hated Jews, especially those in the retail business who sold cheap goods to blacks at high prices. Gordon claimed that the prologue falsely implied that he was a dishonest merchant who cheated blacks and caused racial tensions. Random House indicated that the author of the book had told the publishers that the statements about Gordon were based on an actual inter-

\(^78\) See 403 U.S. 29, 52 (1971). "We thus hold that a libel action, as here, by a private individual against a licensed radio station for defamatory falsehood in a newscast relating to his involvement in an event of public or general concern may be sustained only upon clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not." (emphasis added).

\(^79\) See Gertz v. Robert Welch, Inc., 471 F.2d 801, 808 (7th Cir. 1972) (concurring opinion of Kiley, J.): "I cannot find that Gertz was closely involved with the asserted national Communist conspiracy, as Rosenbloom was with the 'smut literature racket.'" In *Rosenblatt v. Baer*, 383 U.S. 75 (1966), the Supreme Court reversed and remanded finding that since *New York Times* was decided between the trial and appeal of the case, the question of Baer's status as a public official was not clearly presented at trial or clearly ruled on by the trial judge. In *Gertz* the question of his involvement in an event of public or general concern was similarly undeveloped at trial because *Rosenbloom* had not yet been decided.

\(^80\) 486 F.2d 1356 (3d Cir. 1973), *vacated mem.*, 95 S. Ct. 27 (1974) (remanded to Third Circuit for further consideration in light of *Gertz*).

view with him. The publisher made no further investigation of the potentially defamatory material but advertised the book as being based on "actual interviews." Gordon denied ever being interviewed by the author and showed that Earl was never interviewed by the author.

The *Gordon* court concluded, on the basis of *Rosenbloom*, that the trial judge must decide as a matter of law whether the subject matter of the alleged defamatory material constituted a matter of public or general interest and whether the plaintiff's actions constituted involvement in such a matter. In the *Gordon* case the court said the issue of involvement should be determined by a consideration not only of the fact that Gordon had permitted his 1964 riot experiences to be printed in a Philadelphia newspaper but also by an examination of his entire lifestyle.

Thus in *Gertz*, instead of focusing on the question of the relevancy of the plaintiff's alleged communist-front associations to the article's central thesis, the court could have focused on the plaintiff's involvement in an event of general or public concern. Clearly *Gertz* was not involved in the Nuccio murder trial. The question to be decided would have been: Did *Gertz*, by filing civil suits on behalf of the Nelsons, or by representing the Nelsons at the coroner's inquest, or by acting as legal counsel for the Sparling Commission, or by maintaining a membership in the National Lawyers Guild prior to 1955, become sufficiently involved in an event of general or public concern to require that he prove the defamatory falsehoods were published with knowledge that they were false or with reckless disregard of whether they were false or not? Since that question was not decided at trial, the Seventh Circuit could have remanded for further development of the evidence or a more specific ruling on the issue of involvement.

Even assuming that *Gertz* was sufficiently involved in an event of public interest to make the *New York Times* standard applicable, the *Gordon* decision suggests that the conduct of the defendant would furnish another ground for reversal at the appellate court level in *Gertz*. Citing *St. Amant v. Thompson* for its suggestion that a court might impute a reckless state of mind when "the publisher's allegations are so inherently improbable that only a reckless man would have put them into circulation," the *Gordon* court indicated that the inherent improbability of Earl's statements, coupled with Random House's failure to verify that the book was based on actual interviews before advertising it as such, would require a jury determination of the issue of recklessness. In *Gordon* the court suggested that Earl's allegation that Jewish merchants were cheating blacks and creating racial tensions

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82. *See Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971) in which a test of the relevancy of defendant's statement to plaintiff's fitness for public office was rejected by the U.S. Supreme Court.


84. *Id.* at 732.
would present a jury question as to its inherent improbability. The state-
ments in *Gertz* which indicated that a practicing attorney, who had taken an
oath to uphold the Constitution and law of the United States, had actively
participated in the framing of a police officer for the crime of murder, had a
criminal record, and belonged to organizations which advocate the violent
overthrow of the American government seem equally improbable. Supreme
Court decisions which suggest that mere failure to investigate does not consti-
tute recklessness in civil libel cases were based on facts which were quite dif-
ferent from *Gordon* and *Gertz*. In *New York Times*, for example, the
plaintiff's name was not mentioned in the defamatory advertisement, and
the advertisement was sponsored by several persons of good reputation.
In *Gertz*, as in *Gordon*, the plaintiff was mentioned by name in the pub-
lication and potential for defamation was clear. In both cases the publisher
did more than merely fail to investigate; it made statements which apparently
vouched for the accuracy of the defamatory material. In *Gertz*, unlike
*Gordon*, there was no evidence that the author had assured the publisher
that he had interviewed the plaintiff or any other reliable source. Accord-
gingly, the Seventh Circuit might have ruled that the district court erred by not
permitting the jury to decide whether the managing editor's circulation of in-
herently improbable charges not attributed to any source, coupled with his
statements vouching for their accuracy without having verified them, consti-
tuted reckless conduct. Such a decision might have precluded the Supreme
Court decision and the resultant wholesale revamping of the law of defama-
tion.

**Gertz In The Supreme Court**

The Supreme Court granted certiorari in *Gertz v. Robert Welch, Inc.* to
reconsider the extent of a publisher's constitutional privilege against lia-
Bility for defamation of a private citizen. The Court noted that it had consid-
ered this question before in *Rosenbloom v. Metromedia, Inc.* but had not
been able to agree on the reason for application of the *New York Times*
standard in that case. In *Gertz* the Court rendered a 5-4 decision which reversed the Seventh Circuit and the district court. The opinion of
the Court, written by Mr. Justice Powell, in essence adopted the sug-

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85. See Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 56 (1971); St. Amant v.
Thompson, 390 U.S. 727, 733 (1968); Beckley Newspapers Corp. v. Hanks, 389 U.S.
81, 84-85 (1967); Curtis Publishing Co. v. Butts, 388 U.S. 130, 153 (1967); New York
87. In *Gordon* the publisher advertised that the book was based on "actual inter-
views," and in *Gertz* the managing editor wrote that the author had "conducted extensive
research" and gotten the "facts."
89. 403 U.S. 29 (1971).
90. 94 S. Ct. 2997 (1974).
gestions of the Rosenbloom dissenters\textsuperscript{91} concerning the disposition of a case involving the defamation of a private citizen.

In the majority opinion the Court first reviewed New York Times and its progeny and the five opinions filed in Rosenbloom. It then delineated the two societal values which come into conflict in a libel case: the need to avoid self-censorship by the news media and the desire to compensate individuals for the harm inflicted upon them by defamatory falsehoods. The Court accepted the correctness of the New York Times rule as a reasonable resolution of the conflict between these two interests when the plaintiff is a public official or a public figure but decided that the New York Times test should not be applied when the plaintiff is a private individual. Disagreeing with the plurality opinion in Rosenbloom, the Court determined that public officials and figures do have more access to the media and a more realistic opportunity to counteract false statements than do private citizens. It also indicated that most public officials and figures do assume the risk of injury from defamatory falsehood by placing themselves in the public eye and inviting attention and comment from the media. A private individual, the Court concluded, is more vulnerable to injury (because of lack of effective means to counteract falsehoods) and more deserving of recovery (because he has not invited comment) than public persons. Therefore, the Court reasoned, the states' interest in protecting private individuals from defamation is greater and deserving of more recognition than permitted under the New York Times test. Since, in the Court's view, Rosenbloom abridged the states' legitimate interest to an unacceptable degree and presented the additional difficulty of requiring courts to determine which publications concern matters of public interest, the Court refused to be bound by the Rosenbloom plurality opinion. Instead the Court announced new guidelines which it concluded would better accommodate the competing interests than the Rosenbloom decision:

\[\text{So long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood to a private individual \ldots \text{. At least \ldots where, as here, the substance of the defamatory statement 'makes substantial danger to reputation apparent.'}}\]

\[\text{\ldots [T]he States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.}\]

\[\text{\ldots In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by New York Times may recover only such damages as are sufficient to compensate him for actual injury.}\textsuperscript{92}\]

\textsuperscript{91} 403 U.S. 29, 62 (1971) (dissenting opinion of Harlan, J.); \textit{id.} at 78 (dissenting opinion of Marshall, J.).

\textsuperscript{92} 94 S. Ct. 2997, 3010-12 (1974).
By discarding the rigid *New York Times* rule, the Court intended to protect the legitimate interest of redressing injury to the reputation of private citizens, but at the same time, by limiting recovery in defamation suits brought by private citizens to compensation for actual injury, the Court hoped to reduce the likelihood of self-censorship on the part of the press. The Court did not define "actual injury" but indicated that actual injury was not limited to out-of-pocket loss and could include compensation for impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. The *Gertz* case was remanded for a new trial under the new guidelines.

The ramifications and potential effects of the *Gertz* majority opinion are emphasized in the dissenting opinions of Messrs. Justice White and Brennan. After reviewing the development and current status of the law of defamation, Mr. Justice White observed that the Court "has federalized major aspects of the libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 States." 93 Justice White enunciated three major changes in the law of defamation in cases in which the plaintiff is a private citizen. First, a private plaintiff will no longer be able to recover in a defamation action simply by proving that the allegedly defamatory statement was false, injurious to his reputation, and deliberately communicated to a third party. Since a publisher will not be strictly liable for defamatory utterances, the private plaintiff will also have to prove that the publisher's conduct was blameworthy. Second, damage to reputation will not be presumed even when the defamatory utterance is libelous per se. The plaintiff will have to offer proof of loss of standing in the community in cases where the utterance is defamatory on its face and in cases where special damages have to be pleaded and proved unless the defendant's conduct has violated the *New York Times* standard. Third, the private plaintiff will not be able to recover punitive damages simply by proving malice in the sense of ill will or hatred. Proof of actual malice, as it is defined in *New York Times* will be required. 94 Mr. Justice White concluded that defamation judgments will be extremely difficult for private citizens to obtain under the majority decision and that an individual's right to prevent and redress injury to his reputation is deserving of greater protection than is afforded under the majority guidelines.

Mr. Justice Brennan adhered to the view that the *New York Times* standard should be applied to the defendant's conduct in civil libel actions concerning reports of the involvement of private individuals in events of pub-

93. 94 S. Ct. at 3022.
lic or general concern. He noted that under the majority opinion a private individual could recover in such a case by proving mere negligence or lack of reasonable care. "Under a reasonable care regime," he warned, "publishers and broadcasters will have to make pre-publication judgments about juror assessment of such diverse considerations as the size, operating procedure, and financial condition of the newsgathering system, as well as the relative costs and benefits of instituting less frequent and more costly reporting at a higher level of accuracy." The elusiveness and flexibility of the reasonable care standard combined with its usual burden of proof by the preponderance of the evidence, rather than the clear and convincing proof requirements of *New York Times*, he contended, would create a danger that a jury could use the reasonable care standard to suppress unpopular statements. Moreover, he noted, the majority opinion's indication of acceptable components of actual injury does not really remove the specter of large damage awards. Mr. Justice Brennan concluded that under the majority opinion uncertainty about what a jury will think a reasonable publisher or broadcaster should have done and the broad boundaries of compensation for actual injury could induce the kind of self-censorship that is to be avoided under first amendment guarantees.

**CONCLUSION**

The ramifications and potential effects of the majority opinion in *Gertz* on the law of defamation and first amendment freedoms are both far reaching and uncertain. As Mr. Justice Black once remarked, "No one, including this Court, can know what is and what is not constitutionally . . . libelous under this Court's rulings." Subsequent decisions must be awaited to learn what a reasonable publisher or broadcaster of potentially defamatory material will be expected to do under various circumstances in order to escape liability for the publication of defamatory falsehoods and to learn what constitutes compensable actual injury in a case where the private plaintiff recovers under a less demanding standard than *New York Times* requires. Subsequent decisions may also indicate whether the majority opinion in *Gertz* properly accommodates the conflicting societal values embodied in the law of defamation and the first amendment freedoms or provides an inducement to self-censorship in the discussion of public affairs (as Mr. Justice Brennan suggested) or denigrates the worth of the individual reputation (as Mr. Justice White contended).


96. 94 S. Ct. at 3020.

Other issues are left open by the majority opinion. It is not clear what standard of care will be applied when the publication at issue was not apparently defamatory. It is not clear whether the states can adopt different standards of care to apply to different types of publications. Although the Gertz Court rejects the plurality opinion of Rosenbloom, it recognizes that the states should retain "substantial latitude" in their efforts to enforce a legal remedy for defamatory falsehoods which injure the reputations of private citizens. Thus, seemingly, a state could require that a private individual defamed in a publication dealing with a matter of public interest or general concern prove knowing falsity or reckless disregard for the truth if the state concluded that following the holding of Rosenbloom would adequately protect the interests of its private citizens.

The majority opinion in Gertz seems to represent a positive step in the enforcement of first amendment principles by removing defamatory speech concerning a private citizen from those categories of tortious conduct for which strict liability will be imposed. The Supreme Court decision also prohibits the awarding of presumed and punitive damages in those cases in which a private plaintiff cannot prove that the defendant knew the defamatory statement was false or published with reckless disregard of its truth or falsity. In the future, the private plaintiff in a civil libel action will apparently be required to prove at least that the defendant had a duty not to injure the plaintiff's reputation, that he breached that duty by publishing statements which in the exercise of ordinary care he should have known were false and defamatory, and that the breach proximately caused actual injury to the plaintiff. The private plaintiff who recovers under a less demanding standard than New York Times will also be required to prove by "competent evidence" that he was actually injured by the publication of the defamatory statement.

However, the Supreme Court in Gertz retreated from the position taken by the plurality in Rosenbloom by permitting the private plaintiff defamed in a publication concerning a matter of public or general interest to recover on proof of negligent conduct by the defendant rather than knowing falsity or reckless disregard for the truth. This retreat could have the effect of stifling reporting and discussion of public affairs in which private citizens are involved if standards of ordinary care on the part of the publisher are developed which are simply too expensive and burdensome for the news media to meet. For this reason attorneys representing defendants in defamation suits brought by private citizens would be well advised to employ expert witnesses to inform the fact-finders of the operations and complexities of mass communications so they may better determine what safeguards could reasonably

99. 94 S. Ct. at 3010.
100. Id. at 3012.
be employed to prevent the dissemination of inaccurate information. The danger, suggested by Mr. Justice Brennan, that fact-finders will find unreasonable conduct on the part of a defendant who publishes information that seems unreasonable or too controversial (to the fact-finder) seems real and is to be avoided. This danger may well be avoided by the use of expert testimony and explicit instructions (in jury cases) which underscore the conduct of the defendant rather than the content of the speech. However, during the period in which the guidelines enunciated in *Gertz* are being interpreted and implemented, the Supreme Court must remember that its "duty is not limited to the elaboration of constitutional principles; [it] must also in proper cases review the evidence to make certain that those principles have been constitutionally applied . . . particularly [when] the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.' "

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