Traditionally, Americans have cherished both their good name and their right to free speech. As ingrained as these qualities are in the very fabric of our society, they sometimes run counter to each other. Some respected members of the judiciary insist that the first amendment provides absolute protection for all forms of communication, including that which is false and defamatory. The other extreme exposed is that only "explicitly political" communication comes within the Constitution's protection.

Throughout much of our history, the courts have not found the right of free speech to be in direct conflict with one's right to maintain his good name. State defamation laws usually provided ready relief to the injured party without considering the speaker's consequential loss of free expression. The courts, having recently recognized this imbalance, have developed and implemented vari-

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ous tests and criteria in an effort to find some common ground between the two extremes. The United States Supreme Court in *Time, Inc. v. Firestone* significantly clarified the state of the law in its accommodation of the values of "good name" and "free speech." In this case, *Time* magazine published an inaccurate account of a celebrated divorce proceeding. The Court found Mrs. Firestone not to be a "public figure" and remanded the case for a determination of fault on the part of the publisher. The effect of this decision can be better appreciated by reviewing the historical developments preceding it.

**TORT ATTRIBUTES OF DEFAMATION**

The tort of defamation has always rested within the domain of the states. Depending on the nature of the defamation, an injured party had an action for either slander or libel. Recovery for slander, except in a few instances, was predicated upon proof of actual damages. Recovery for libel depended upon the nature of the publication. If the libel was clear on its face, the defendant was strictly liable. Proof of actual damage was essential where libel had to be shown by extrinsic facts. For both of these actions there existed several narrowly defined defenses.

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5. 424 U.S. 448 (1976) [hereinafter cited as *Firestone*].
8. Libel is defined as that invasion of one's good name or reputation through the written word, while slander covers those invasions by the spoken word. W. Prosser, *Handbook of the Law of Torts* § 112 (4th ed. 1971) [hereinafter cited as *Prosser*].
9. Where the publication is slanderous per se, that is, where the plaintiff is accused of unchastity, committing a heinous crime, having a loathsome disease, or harming a business reputation, proof of special damages is unnecessary. *Id.* § 112, at 754-60.
10. *Id.* § 112, at 754.
11. The word "publisher" as used throughout this article refers to any person who publicly discloses information about another. *Id.* § 113, at 766.
12. "Libelous on its face" means that the introduction of extrinsic facts is not necessary to establish the defamatory meaning. *Id.* § 111, at 748.
13. *Id.* § 112, at 762-63.
14. Certain publications are privileged. Absolute privileges extend over all that one says or writes while exercising his official duties, in either the judicial, legislative, or executive branch of the government. Any defamatory remarks made with the consent of the plaintiff or made between husband and wife are absolutely privileged. Political broadcasts
Plaintiffs in defamation actions based on common law precepts found court remedies to be quite adequate. The defenses of privilege and truth proved to be minor obstacles. This often forced the publisher to impose vigorous self-censorship.\textsuperscript{15} To strike a balance more favorable to the publisher and insure the continued free exchange of ideas demanded by the first amendment, the Supreme Court in \textit{New York Times Co. v. Sullivan}\textsuperscript{18} limited the power of the states to award libel judgments.

\textbf{NEW YORK TIMES AND ITS PROGENY}

\textit{New York Times}, the seminal case of modern defamation law, involved a private group which ran an advertisement critical of a public official. He brought a libel action, claiming injuries to his good character amounting to $500,000. The jury found for the public official and awarded the entire amount of damages claimed.\textsuperscript{17}

The United States Supreme Court reversed the state court's decision,\textsuperscript{18} finding it too restrictive of first amendment guarantees.\textsuperscript{19} The Court held that defamation of a public official concerning his official conduct requires a showing of actual malice.\textsuperscript{20} This purposely set a high standard. The Court intended to ferret out the

\begin{itemize}
  \item Qualified privileges attach to communications of less importance in terms of public policy. Where one sought to protect the interests of himself or others, those held in common between them, or those of the public in general, the court looked to the circumstances and decided whether a privilege existed. Id. § 115, at 785-92.
  \item In addition to privilege, the truth of a publication has always been deemed an adequate defense. Id. § 116, at 796-99.
  \item 376 U.S. 254 (1964) [hereinafter cited as \textit{New York Times}.]
  \item Id. at 256-57.
  \item Id. at 292.
  \item Id. at 269-79.
  \item The Court defined actual malice as making a statement "with knowledge that it was false or with reckless disregard of whether it was false or not." \textit{New York Times} at 280. This should not be confused with common law malice which requires proof of ill will or spite. Instead, determination revolves around knowledge of the publication's falsity. Cantrell \textit{v.} Forest City Publishing Co., 419 U.S. 245, 251-54 (1974). The Court has further refined the definition of the term "actual malice." The Court found actual malice present in \textit{St. Amant v. Thompson}, 390 U.S. 727, 731-32 (1968) (finding evidence that serious doubts existed about the reliability of the matter at the time of publication). The Second Circuit reached a similar conclusion in \textit{Goldwater v. Ginzburg}, 414 F.2d 324, 327-35 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970) (published facts deliberately falsified). Actual malice was not found in \textit{Time, Inc. v. Pape}, 401
defendant's state of mind at the time of publication. A mere negligence or "reasonable man" test insufficiently protected the freedoms guaranteed by the Bill of Rights. The actual malice test went one step further and required proof of publication with knowledge of falsity or in reckless disregard of the truth.

The Court allowed the press to criticize a public official, not because of his public position, but to fulfill the more substantive need of true public discussion. New York Times created what amounted to a constitutional privilege protecting the debate of public issues. The lasting importance of the case lies in its emphasis on the issue involved rather than the type of person injured.

CLARIFICATION OF New York Times

The Court illuminated upon this holding over the next ten years. The cases of Garrison v. Louisiana and Rosenblatt v. Baer, for example, helped clarify the term "public issue." In Garrison, all activity engaged in by a public official while conducting the public's business deserved constitutional protection. The soiling of the official's private along with his public reputation was irrelevant because of the public's interest in knowing about his official conduct. At a minimum, those government employees having substantial responsibility qualified as public officials. In


26. 379 U.S. 64 (1964). In this case, the district attorney of a large metropolitan city called a press conference at which he publicly admonished the conduct of several local judges. He was subsequently tried without a jury before a judge who was not among those criticized, and convicted of criminal defamation under the Louisiana criminal defamation statute. Id. at 65.
27. 383 U.S. 75 (1966). In this case, a local newspaper published a column critical of the performance of a county recreation supervisor. The Court, finding the matter false and defamatory, awarded damages for the injury sustained. Id. at 77.
29. Id. at 76-77.
Rosenblatt the Court elaborated on the characteristics of public officials and re-emphasized that any publication about them constituted a public issue. The classification of "public issue" automatically followed the finding of "public official," thereby expanding the constitutional privilege.

In Curtis Publishing Co. v. Butts, the Court widened the scope of the constitutional protection by creating a new classification of individuals, "public figures," whose activities were of significant public interest. There, the Court looked to such criteria as the plaintiff's profession and his willingness to voluntarily interject himself into the midst of public controversy. Where, through such activities, the plaintiff had achieved sufficient distinction to generate a measurable degree of public interest, he deserved the label "public figure." Like a public official, he possessed sufficient means of countering false or inaccurate charges. Therefore, public criticism of him was to be free and open.

Since New York Times focused on the public interest, the distinction drawn between "public official" and "public figure" in Curtis seemed immaterial. The Court recognized this in Rosenbloom v. Metromedia, Inc. In that case, a radio station aired a news item about the confiscation of an individual's inventory of allegedly obscene magazines. Rosenbloom was neither a "public official" nor a "public figure" under the earlier definitions employed by the Court. The Court held the public's interest to lie with what actually transpired and not with the actor's prior degree of exposure before the public. As long as the publication was of significant interest to the public, distinctions between public officials and public figures were of no moment.

The Gertz Modifications

Rosenbloom potentially created an expansion of the constitutional privilege, but the divergent opinions of the Justices ren-

31. Id. at 85.
32. 388 U.S. 130 (1967). This case involved allegations made in a national magazine accusing the athletic director of a major university of conspiring to "fix" football games. Id. at 130. A joint case decided simultaneously concerned itself with a publication of a retired army general's activities aimed at discouraging compliance with court-ordered integration. Id. at 130-31.
33. Id. at 154-55.
34. Id.
35. Id.
36. Id. at 155.
37. 403 U.S. 29 (1971).
38. Id. at 33.
39. Id. at 43-44.
dered its impact unpredictable.\textsuperscript{40} Thus, the Court's opinion in \textit{Gertz v. Robert Welch, Inc.},\textsuperscript{41} was a welcome development. A new majority emerged and shifted the Court's emphasis from the event to the individual. The new test employed distinguished between public figures and private individuals, treating each differently. For purposes of classification, it would seem that at least two criteria merited examination before determining which of the two terms applied. If the individual held access to some means of effective rebuttal of an alleged defamation, he could not then be labeled as "private."\textsuperscript{42} Likewise, his status was the same where his exposure before the public was voluntary.\textsuperscript{43} Thus, the Court abandoned the public issue test in favor of a rule calibrated to the type of person defamed.

The Court also recognized a legitimate state interest in protecting the private individual's reputation.\textsuperscript{44} It left to the states the freedom to define for themselves the standard of liability, other than strict liability, to be imposed for defamatory injuries sustained by a private individual.\textsuperscript{45} The \textit{New York Times} test of actual malice still pertained where public officials or figures were involved.\textsuperscript{46} Hence, the decision, in its focus on the type of individual defamed, apparently limited \textit{Rosenbloom} by narrowing the scope of the constitutional privilege. This was not meant to diminish the fact that some individuals of extraordinary fame would remain public figures for all purposes and not benefit from the \textit{Gertz} holding.\textsuperscript{47}

\textbf{TIME, INC. v. FIRESTONE}

In the "Milestones" section of its December 22, 1967 issue,

\textsuperscript{40} Only Chief Justice Burger and Justice Blackmun joined Justice Brennan in the majority opinion. \textit{Id.} at 30. Justices Black and White concurred but upon different grounds. Justice Black reiterated his belief in the first amendment as an absolute. In his judgment, all discussion and communication is privileged. \textit{Id.} at 57. Justice White disagreed with any further expansion of the \textit{New York Times} rule to include private individuals. Instead he believed the rule as originally enunciated offered adequate protection. \textit{Id.} at 59.

\textsuperscript{41} \textit{418} U.S. 323 (1974) \textit{[hereinafter cited as Gertz].}

\textsuperscript{42} \textit{Id.} at 344.

\textsuperscript{43} \textit{Id.} at 345.

\textsuperscript{44} \textit{Id.} at 344-46.

\textsuperscript{45} \textit{Id.} at 347.

\textsuperscript{46} \textit{Id.} at 342-43.

\textsuperscript{47} \textit{Id.} at 351.
Time magazine published a short article about the divorce of Russell A. Firestone, Jr., from his wife, Mary Alice Firestone. The article referred to, and quoted from, the divorce decree. Shortly after publication, Mrs. Firestone, in accordance with Florida law, requested that Time retract the article, alleging it to be, in part, "false, malicious and defamatory." Time refused and Mrs. Firestone responded with a libel suit. The Florida appellate court concluded that the article was not defamatory. The Florida appellate court also determined that the defendant was guilty of extramarital escapades of the plaintiff that would have made Dr. Freud's hair curl. The court found that the marriage was irretrievably broken.

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48. In Mr. Justice Rehnquist's words, Russell Firestone was the "scion of one of America's wealthier industrial families." *Firestone* at 450.

49. The entire article read as follows:

DIVORCED by Russell A. Firestone, Jr., 41, heir to the tire fortune; Mary Alice Sullivan Firestone, 32, his third wife; a one-time Palm Beach school teacher; 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.* at 452.

50. The Florida state court's final judgment read:

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, and the wife's answer thereto setting up certain affirmative defenses. . . .

. . . 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 bundling from one bed-partner 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, within the meaning of that term as used by the Supreme Court of Florida. . . .

In the present case, it is abundantly clear from the evidence of marital discord that neither of the parties has shown the least susceptibility to domestication, and that the marriage should be dissolved.

. . . The premises considered, it is thereupon

ORDERED AND ADJUDGED as follows:

1. That the equities in this cause are with the defendant; that defendant's counterclaim for divorce be and the same is hereby granted, and the bonds of matrimony which have herefore existed between the parties are hereby forever dissolved.

4. That the defendant shall pay unto the plaintiff the sum of $3,000 per month as alimony beginning January 1, 1968, and a like sum on the first day of each and every month thereafter until the death or remarriage of the plaintiff. . . .

*Id.* at 450-51.


52. *Firestone* at 452.
courts upheld an award of $100,000\textsuperscript{53} without addressing the question of fault.\textsuperscript{64} The United States Supreme Court granted certiorari to review Time's contention that the lower court decisions violated its rights to exercise free speech and to maintain a free press under the first and fourteenth amendments to the United States Constitution.\textsuperscript{56}

Justice Rehnquist applied the \textit{Gertz} public figure test to the facts and, upon finding Mrs. Firestone's rise to notoriety to have been completely involuntary, found her not a public figure. The Florida law which required a state court proceeding to dissolve a marriage forced her to enter the public forum against her own wishes.\textsuperscript{56} While the case may have been of interest to the public, Mrs. Firestone was not a public figure as envisioned by \textit{Gertz}. She was not one of those persons who "assumed roles of especial prominence in the affairs of society" or "thrust themselves to the forefront of particular public controversies."\textsuperscript{56} Justice Rehnquist dismissed as irrelevant several press conferences called on her behalf during the divorce proceeding. He was unable to detect any intent on her part to gain public influence through them.\textsuperscript{58} Although a known socialite and wife of a prominent industrialist, for the purposes of this specific controversy she failed to qualify as a public figure.

Time specifically argued that it could not be held liable without a showing that its publication of a judicial proceeding was with actual malice.\textsuperscript{59} However, \textit{Gertz} limited the application of the actual malice requirement to those instances involving a public figure regardless of whether such material fell within the public interest.\textsuperscript{60} Since the court found Mrs. Firestone not a public figure, it rejected this assertion.\textsuperscript{61} \textit{Gertz} precluded a finding that a blanket privilege existed for the reporting of judicial proceedings.\textsuperscript{62}

\textsuperscript{53} Id.
\textsuperscript{54} Id. at 461.
\textsuperscript{55} Id. at 450.
\textsuperscript{56} The Court had previously held that "[r]esort to the judicial process . . . is no more voluntary in a realistic sense than that of a defendant called upon to defend his interests in court." Id. at 454, \textit{quoting} Boddie v. Connecticut, 401 U.S. 371, 376-77 (1971).
\textsuperscript{57} \textit{Gertz} at 345.
\textsuperscript{58} \textit{Firestone} at 454-55 n.3.
\textsuperscript{59} Id. at 452-53.
\textsuperscript{60} \textit{Gertz} at 346-47.
\textsuperscript{61} \textit{Firestone} at 455.
\textsuperscript{62} This remains true even though the Court recently ruled unconstitutional a state's attempt to suppress the publication of truthful matter found in official court documents open to the public. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 495 (1975).
Any other ruling would have imposed upon a private individual the more stringent actual malice standard intended for public officials and figures. The Court could find little reason for denying a private person the "degree of protection which the law of defamation would otherwise afford them."\(^{63}\)

Even though *Gertz* allowed a private individual a greater chance for recovery, it still required a finding of fault on the publisher's part and competent evidence of actual injury.\(^{64}\) Justice Rehnquist recognized this and reaffirmed the Court's policy of returning some degree of latitude to the states with respect to the remedies they provide for defamation.\(^{65}\)

The only aspect of the lower court decision which ran afoul of *Gertz* was the trial court's assessment of liability without a finding of fault. A mere finding of falsity would not suffice.\(^{66}\) Under Florida law, the jury did not need to find fault but only that the article was defamatory, false, and injurious.\(^{67}\) Although the Florida Supreme Court concluded that *Time* was guilty of "journalistic negligence,"\(^{68}\) this conclusion was unsubstantiated because of the lack of a specific factual finding of fault at the trial level.\(^{69}\) Accordingly, the Supreme Court vacated and remanded to the state court.

**CONCLUSION**

The importance of *Firestone* lies in the almost total acceptance of the *Gertz* decision by a sizeable majority of the Court. The majority opinion drew heavily on *Gertz*.\(^{70}\) The concurring opinion, written by Justice Powell, differed only with respect to what con-

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63. *Firestone* at 457.

64. *Gertz* at 347. In *Firestone*, the Florida Supreme Court partially justified its award of damages with testimony from Mrs. Firestone herself, her minister, her doctor, and several friends and neighbors attesting to injuries she sustained upon being branded an adulteress. *Firestone* at 460-61.

65. Id. at 460-61.

66. Despite accurate reproduction of the court's decree, *Time* quoted the divorce decree out of context, ignoring its internal inconsistencies. It reported that the divorce rested on grounds of extreme cruelty and adultery. In reality, the court had granted the husband's counterclaim for divorce without specifying the grounds. *Id.* at 458-59. See notes 49 and 50 supra.

67. *Id.* at 461.


69. *Firestone* at 463-64.

70. Justice Rehnquist was joined in his majority opinion by Chief Justice Burger and Justices Stewart, Blackmun, and Powell. *Id.* at 449.
The dissent of Justices White and Marshall voiced support for Gertz, disagreeing only with its application. For example, Justice Marshall disagreed with the labeling of Mrs. Firestone as a private individual. Only Justice Brennan disagreed with the Gertz rationale. He still adhered to his dissent in Gertz that the first amendment required more room in which to function than the majority allowed. While the final tally was five to three, the Gertz standard won approval by the wider margin of seven to one.

Firestone illustrates both the strides that have been made in the last twelve years and the ground still left to be covered. Definitions now exist for the concepts of "public official" and "public figure." There remains little room for doubt as to the general types of individuals within these definitions. However, Firestone demonstrates that controversy still exists when one attempts to label a specific individual as "private" or seeks to determine whether the court has made a finding of "fault." Perhaps additional cases will make application of these terms more predictable.

The Firestone Court also confirmed its decision in Gertz to retreat from the extreme reached in Rosenbloom. It shifted the focus from the event to the individual. The pertinent question now does not revolve around whether the defamation is of interest to the public, but whether the defamed person deserves the label "public" or "private." This rationale certainly offers a much more realistic approach to the problem. Under Rosenbloom, it was conceivable that a private individual, unwillingly thrust into the lime-

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71. The essence of Justice Powell's concurrence was that the standard to be employed when determining the existence of fault is one of due care in publishing the matter. He was satisfied that there was substantial evidence supportive of Time's claim that it acted without negligence, and that such evidence was not properly considered by the Florida courts. Id. at 470. He concurred with the outcome only because it reaffirmed Gertz, feeling that to do otherwise might give the Court an appearance of fragmentation on the basic principles involved. Id. at 464.

72. Justice White felt that requiring proof of fault in a case predating Gertz in origin interfered with the state's acknowledged power to protect the individual. Id. at 483 (White, J., dissenting).

73. Id. at 486-87. Justice Marshall also took issue with the Court's remand, believing that adequate evidence of fault had been gathered by the lower courts. Id. at 491-92 (Marshall, J., dissenting).

74. Gertz at 361 (Brennan, J., dissenting). Justice Brennan also wrote the decision for the majority in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).

75. Firestone at 481 (Brennan, J., dissenting).

76. Justice Stevens took no part in the consideration or decision of this case. Id. at 464.
light, would be required to prove actual malice. This fails to adequately protect an individual's interest in his reputation. A person wishing to be in the public eye undoubtedly must accept criticism. If such criticism is false, he must expect to shoulder a heavier burden of proof to attain a recovery. In recognizing this, the Firestone-Gertz approach moved toward a greater protection of an individual's reputation while still recognizing the limitations imposed by the first amendment.

Donald J. Tracy—'78