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The Reaction of the State Courts to
Gertz v. Robert Welch, Inc.

Erik L. Collins*

J. Douglas Drushal**

In Gertz v. Robert Welch, Inc., the Supreme Court invited the states to establish their own standards of liability for defamation of private persons, so long as these standards did not fall below a federal constitutional minimum. The authors focus on how state courts have responded to this invitation, both in establishing standards of care for publishers or broadcasters of defamatory matter and in addressing a series of questions left unanswered by Gertz.

For over a decade the Supreme Court of the United States has struggled to find a proper accommodation between the law of defamation and the freedoms of speech and press protected by the first amendment.1 In Gertz v. Robert Welch, Inc.,2 the Court redefined federal constitutional limitations so that in cases involving private individuals, states would have considerable latitude in setting standards for liability: "We hold 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[s] injurious to a private individual."3 While it would be permissible for state legislatures to adopt such a standard by statute, to date only state courts have accepted the Court's invitation. This article will analyze the most significant state court decisions4 and present the varied standards of liability that have emerged. Special attention will also be given to a series of questions raised by Gertz, but left unanswered in the Court's opinion. But first it is necessary to briefly examine the Gertz opinion and the issues raised therein.5

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3. Id. at 347 (footnote omitted).

4. This article covers reported cases available as of November 1, 1977.

5. This article does not purport to evaluate the merits of Gertz, but rather accepts Gertz as a starting point for analysis. For two perspectives on the merits of Gertz,
I. GERTZ V. ROBERT WELCH, INC.

A. Background

Elmer Gertz was a Chicago attorney who was engaged to represent the family of a youth who had been killed by a Chicago police officer in 1968. The wrongful death action arising out of the incident, along with other matters, received a good deal of publicity, including some which portrayed Gertz in a less than favorable light. In particular, American Opinion, the organ of the John Birch Society, falsely accused Gertz of having framed the police officer who killed the youth, of having an extensive criminal record, and of being an official in Marxist-Leninist organizations. Gertz brought a libel action in federal district court against Robert Welch, Inc., publisher of American Opinion. A jury trial resulted in a $50,000 award for Gertz, but it was set aside by the trial court and judgment was entered for the defendant. Notwithstanding Gertz' status as a private figure, the trial court applied the "actual malice" standard of New York Times Co. v. Sullivan because the alleged libel involved a matter of public concern. In the view of the trial judge, Gertz had not met the strict New York Times test because he had only shown that the defendants acted negligently. On appeal the court of appeals affirmed. Its holding was based upon the intervening decision of the Supreme Court in Rosenbloom v. Metromedia, Inc., in which a plurality held that

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6. For the facts of Gertz, see 418 U.S. at 325-32.
9. 376 U.S. 254 (1964). The New York Times standard requires a public official to show that the defendant had acted with "actual malice," that is, that the defendant acted "with knowledge that [the defamatory matter] was false or with reckless disregard of whether it was true or not." 376 U.S. at 279-80. The plaintiff must show this by "convincing clarity." Id. at 285-86. This standard was extended to "public figures." Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).
11. Whether a standard is strict or loose depends on one's position in a lawsuit. The term "strict" is used in this article to mean that proof of the plaintiff's case is more difficult. References to "looser" standards will similarly refer to the plaintiff's burden of proof. These terms are defined vis-à-vis the plaintiff for convenience.
12. 471 F.2d 801 (7th Cir. 1972).
the New York Times standard should be applied to all matters of public interest or concern regardless of the plaintiff's status. The court of appeals questioned the district court's conclusion that Gertz was a private figure, but it left the issue unresolved, finding that New York Times applied, and that Gertz had failed to meet its requirements.

B. The Supreme Court Opinion

In an attempt to work an accommodation between state defamation laws and first amendment freedoms of speech and press, the Supreme Court reversed the Seventh Circuit. The Court agreed with the trial judge's finding that Gertz was a private figure. Thus, the central issue became "whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements." This was essentially the same issue that had divided the court in Rosenbloom. In Gertz, however, the Court explicitly rejected the subject matter analysis of Rosenbloom, adopting instead a test which focused exclusively on the status of the plaintiff. Under the Court's analysis, the "private" plaintiff is subject to a different standard from the "public" plaintiff, regardless of the subject matter of the alleged libel.

This approach was seen as a better way to strike a balance between the countervailing interests of freedom of speech and a free press, on the one hand, and the states' interest in compensating private individuals for harm from defamatory falsehoods, on the other. The subject matter test of Rosenbloom was rejected because it would unduly burden the interests of the states in protecting their citizens.  

14. Id. at 43–48. The plurality opinion in Rosenbloom established the proposition that the strict New York Times standard must be met by a plaintiff regardless of his status as a public official, public figure, or private figure, whenever the subject matter of the alleged defamation libel involves "matters of public or general concern." Id. at 44–45.
15. 471 F.2d at 805.
17. Compare 418 U.S. at 351–52 with 322 F. Supp. at 998–99. This aspect of the decision was itself disputed, given that Gertz had "long been active in community and professional affairs, . . . published several books and articles . . . [and] was consequently well-known in some circles." 418 U.S. at 351.
18. 418 U.S. at 332.
20. See note 14 supra.
22. Id. at 343.
23. Id. at 341–46.
24. Id. at 346.
bloom was also criticized for forcing the judiciary "‘to decide on an ad hoc basis which publications address issues of ‘general or public interest’ and which do not—to determine . . . ‘what information is relevant to self-government.’ ’"25 The Court doubted "‘the wisdom of committing this task to the conscience of judges.’”26

The Court justified its position by noting distinctions between private persons and public officials or public figures.27 First, private persons cannot gain access to the media as easily as public persons and are thus unable to counteract defamation by "‘self-help.'" This renders private persons more vulnerable to injury than public persons.28 Second, private persons have not accepted the consequences of public notoriety to the same extent as public officials and public figures. The latter are deemed to have assumed the risk of being subjected to certain levels of defamatory falsehoods concerning their activities. They are consequently less deserving of protection than private persons.29 While the Court realized that these propositions might not hold true in every case,30 it concluded that a general rule was essential in order to guide the media in their coverage of both private and public persons.31

For the above reasons, the Court retreated from Rosenbloom and concluded that "‘the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood[s] injurious to the reputation of a private individual.’”32 It therefore established a constitutional minimum below which the states may not fall, in order to ensure that first amendment concerns are respected:

We hold 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[s] injurious to a private individual. This approach provides a more equitable boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation.33

26. 418 U.S. at 346.
27. Id. at 344–45.
28. Id. at 344.
29. Id. at 344–45.
30. Identical arguments were raised by the plaintiff, and were rejected by the Court in Rosenbloom. 403 U.S. at 45–48.
31. 418 U.S. at 343–44.
32. Id. at 345–46.
33. Id. at 347–48 (footnote omitted).
Yet, a state’s countervailing interest in compensating a defamed plaintiff extends only to recovery for “actual injury.” Therefore, the Court conditioned the recovery of presumed or punitive damages upon a showing of *New York Times “actual malice.”*34 This damage limitation is a substantial modification of the common law, which permits recovery of damages without proof of actual loss because injury is presumed to flow from the very fact of publication.35 It provides little room for experimentation on the part of the states, however, and therefore will not be subjected to close scrutiny in this article.36

The primary question remaining after *Gertz* is what standard of care will be adopted in response to the Court’s invitation to the states to develop their own rules.37 This question is considered in Part II of this article. Other questions raised by *Gertz,* which are not necessarily left to the states to resolve, are simply left unanswered by the Court’s opinion: Is the holding of *Gertz* limited to media defendants38 or is it applicable to all defamation defendants? Does *Gertz* apply only to libel or to all forms of defamation? Is *Gertz* limited to cases in which the subject matter of the libel is a matter of public or general interest or concern? What standard of proof must a plaintiff meet, under the local

34. *Id.* at 350. The Court in *Gertz* feared that the “uncontrolled discretion of juries to award damages” where no loss was actually proven could lead to unpredictability and disparity in damage awards and to the selective punishment of the expression of unpopular views. *Id.* at 349–50. The Court did, however, define “actual injury” rather broadly to include “impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.” *Id.* at 350.

35. *Id.* at 349–50. See note 9 *supra.*

36. While most state courts have simply followed the outlines of *Gertz* on damage limitations, some have gone further and held that punitive damages may never be recovered against a media defendant. *E.g.,* Stone v. Essex County Newspapers, Inc., 330 N.E.2d 161, 169 (Mass. 1975); Taskett v. King Broadcasting Co., 86 Wash. 2d 439, 447, 546 P.2d 81, 86 (1976). This prohibition is apparently based upon the belief that first amendment concerns outweigh any countervailing state interest which would permit the recovery of damages in excess of those actually incurred.

37. While the majority in *Gertz* went no further than to proscribe “liability without fault,” there is language in the case which contemplates the adoption of a negligence standard. *See* 418 U.S. at 353 (Blackmun, J., concurring); *id.* at 354–55 (Burger, C.J., dissenting); *id.* at 360 (Douglas, J., dissenting); *id.* at 366–67 (Brennan, J., dissenting); *id.* at 375–76, 392 (White, J., dissenting).

38. This article uses “media defendant” to mean a journalistic defendant, and “non-media defendant” to refer to a non-journalistic defendant. Since the defendants in *Gertz* and in the reported State court decisions following *Gertz* have been media journalists (*see* cases cited in notes 135–36 *infra*), neither the Supreme Court nor the state courts have been forced to distinguish between journalistic and non-journalistic media defendants. It should be noted, however, that substantially different considerations may be involved where the defendant is an entertainment medium, rather than a journalist. Anderson, *supra* note 5, at 424 n.18.
standard of care? Has falsity become an element of the plaintiff's case? How have state defamation statutes been affected by *Gertz*? To the limited extent that state courts have addressed these collateral issues, Part III of this article will present and analyze their responses.

II. STANDARDS OF CARE ADOPTED BY THE STATES

A. Negligence

While *Gertz* provided that a negligence standard would pass constitutional muster in suits by private persons against media defendants, even in areas of general or public interest, the Court made little attempt to spell out specific guidelines as to how negligence should be defined or employed by the states choosing this standard. Historically, the concept of negligence in tort law has involved an injured plaintiff whose injury was caused by a defendant's breach of a duty of care owed to the plaintiff. Ordinarily, the standard of conduct is characterized as "reasonable care under like circumstances," and the burden of proof is usually on the plaintiff to show the lack of reasonable care by a preponderance of the evidence.

2. Restatement (Second) of Torts

The drafters of the Restatement (Second) of Torts responded to *Gertz* by adopting the following standard of liability for a media defendant who has defamed a private person (or a public person in a matter unrelated to his public capacity):

One who publishes a false and defamatory communication concerning a private person, or concerning a public official or public figure in relation to a purely private matter not affecting his conduct, fitness or role in his public capacity, is subject to liability, if, but only if, he

(a) knows that the statement is false and that it defames the other,

(b) acts in reckless disregard of these matters, or

(c) acts negligently in failing to ascertain them.

Thus, a defendant who is a "professional disseminator of news," or a reporter, is liable under subsection (c) if he negligently publishes false and defamatory information about a private person or a public person.

40. *Id.* § 32, at 151.
41. *Id.* § 38, at 208–09.
42. RESTATEMENT (SECOND) OF TORTS § 580B (1977). The drafters of the Restatement have acknowledged the influence of *Gertz* on § 580B in Comment c(1) to that section.
in his private capacity. The defendant is held "to the skill and experience normally possessed by members of [his] profession." The defendant is not deemed to have acted negligently if he "acted reasonably in checking the truth or falsity or defamatory character of the communication before publishing it."

The Restatement suggests a number of factors and attendant questions which a state court or legislature should consider when implementing a negligence standard. The first of these concerns is the timeliness of the news story: "Was the communication a matter of topical news requiring prompt publication to be useful, or was it one in which time and opportunity were freely available to investigate? In the latter situation, due care may require a more thorough investigation." A second factor concerns the degree of legitimate public or private interest in the subject matter which the defendant was attempting to promote in publishing the information:

Informing the public as to a matter of public concern is an important interest in a democracy; spreading of mere gossip is of less importance. How necessary was this communication to these recipients in order to protect the interest involved? If there was no substantial interest to protect in publishing the communication to these recipients, then a reasonable person would be hesitant to publish the communication unless he had good reason to believe that it was accurate.

The third factor involves the extent of the damage to the plaintiff's reputation or the injury to his sensibilities which would be produced if the communication proves to be false. Was the communication defamatory on its face? Would its defamatory connotation be known only to a few? How extensive was the dissemination? How easily might the plaintiff protect his reputation by means at his own disposal?

3. States Adopting a Negligence Standard

The first state courts to respond to Gertz adopted standards that approximated the "matter of public interest or concern" test announced in Rosenbloom. In these jurisdictions, some private plain-

43. Id. at Comment g. The drafters of the Restatement, however, doubted that Gertz was limited to media defendants. Id. at Comment e.
44. Id. at Comment g.
45. Id.
46. Id. at Comment g. The drafters of the Restatement, however, doubted that Gertz was limited to media defendants. Id. at Comment e.
47. Id.
48. Id.
49. Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 538 P.2d 450, cert. denied,
tiffs must meet stricter tests than others. The tide has shifted, however, and the majority of states which have considered the issue have opted for some form of a negligence standard, with a few states


50. See notes 95–121 infra and accompanying text.


In Peagler an automobile dealer and his dealership alleged defamation by a newspaper’s reporting of Better Business Bureau complaints.

Cahill involved a radio broadcast identifying the plaintiff and his family as left-wing sympathizers and implying that each family member was “disloyal to his country and was a Communist or a Communist sympathizer.” 56 Haw. at 525, 543 P.2d at 1359-60. The alleged defamation occurred during a discussion of the plaintiff’s opposition to the Honolulu mayor’s call for stiff sentences for criminals.

In Troman the defendant published in the Chicago Sun-Times a photograph of the plaintiff’s house along with a story about youth gangs terrorizing a suburban area of Chicago. The caption for the photo implied that one of the gang leaders lived in the house and that it served as headquarters for the gang.

Gobin involved the publication in the Dodge City Daily Globe of erroneous information received from the county attorney which stated that the plaintiff had pleaded guilty to cruelty to animals arising out of an alleged incident of pig starvation. In fact, the plaintiff had not pleaded guilty to such a charge. The Supreme Court of Kansas applied a negligence standard of care to the allegedly erroneous reporting of judicial proceedings.

Jacron involved a slander action by a private plaintiff against his former employer. In a telephone conversation with the plaintiff’s current employer, the defendant implied that the plaintiff had stolen merchandise from the defendant. The implication was false to the extent that the merchandise was in fact the subject of a bona fide dispute between the plaintiff and the defendant.

In Stone, an experienced newspaper reporter, misinterpreting an arraignment for the possession of a dangerous drug, erroneously identified the plaintiff as the accused. A news editor, who knew the plaintiff and who was surprised by the report, printed the story without further confirmation.

In Maloney a newspaper defended a suit based on a report that the plaintiff demolition corporation admitted demolishing the wrong building and that the plaintiff had been adjudged liable for a specific damage award. Whether plaintiff’s status as a private or a public person was influenced by its status as a corporation was not addressed in the court’s opinion. For a discussion of a case in which a corporation’s status was determinative in holding it to be a public person, see note 121 infra.

In Martin the owner of a pet shop brought an action in libel and slander against a television station. The problem arose from four broadcasts in which the defendant’s newsmen charged the plaintiff with the mistreatment of animals and the sale of an animal to a person who alleged to have already owned the animal. The charges were subsequently found to be false.
apparently awaiting only the appropriate case in which to do so.52

52. Perhaps the most prominent state court defamation suit in which Gertz played an important role, but in which no standards of liability were clearly established, was Firestone v. Time, Inc., 305 So. 2d 172 (Fla. 1974), vacated and remanded, 424 U.S. 448 (1976). The plaintiff, the socially prominent wife of the scion of a wealthy family, sued her husband for separate maintenance. Mr. Firestone counter-sued for divorce, charging his wife with adultery and extreme cruelty. In granting the divorce, the trial court awarded Mrs. Firestone substantial alimony. Time magazine, erroneously believing that the trial court had found Mrs. Firestone guilty of adultery, published a small news item to that effect. Florida law is clear that a party found guilty of adultery cannot be awarded alimony.

The Supreme Court of Florida found that the published remarks were both untrue and libelous and upheld a jury verdict for Mrs. Firestone. 305 So. 2d at 178. As the court had noted in a prior opinion in the same case, Firestone v. Time, Inc., 271 So. 2d 745, 747 (Fla. 1972), quashing and remanding Time, Inc. v. Firestone, 254 So. 2d 386 (Fla. App. 1971), libel per se is actionable unless absolutely privileged. 305 So.2d at 177. Under Florida law the publication of a judicial proceeding constitutes a qualified privilege, but only if it is fair, impartial, and accurate as to all material matters. Id. (citing Shiell v. Metropolis Co., 102 Fla. 794, 136 So. 537 (1931)). Given the court’s finding that the news item in Time was inaccurate, id. at 177-78, the qualified privilege was inapplicable, and Time, Inc. would appear to have been absolutely liable in direct contravention of the constitutional limitation enunciated by the Supreme Court of the United States in Gertz. See note 33 and accompanying text supra.

The Supreme Court of Florida apparently did not recognize this conflict with Gertz, for it cited Gertz with approval in holding that “this erroneous reporting is clear and convincing evidence of the negligence in certain segments of the news media in gathering the news.” Id. at 178. One might argue that with this holding the court adopted a negligence standard for private plaintiffs. But in its prior opinion in Firestone the court had taken great pains to point out that its decision was based in large measure on the separate maintenance-divorce proceeding not being a matter of public interest or concern. 271 So. 2d at 747-52, quoted in 305 So. 2d at 175. In its later opinion the court made no express finding that a negligence standard was being adopted via Gertz. 305 So. 2d at 176-78.

The Supreme Court of the United States upheld the finding of the Supreme Court of Florida that the separate maintenance-divorce proceeding was not a matter of public interest or concern and that Mrs. Firestone was not a public figure. 424 U.S. 448, 453-57. It remanded the case on the issue of fault, however, indicating that it could not determine
State courts choosing a negligence standard have typically adopted the language of *Gertz* or have paraphrased its holding. For example, the Supreme Court of Illinois has held:

> [I]n a suit brought by a private individual to recover actual damages for a defamatory publication whose substantial danger to reputation is apparent, recovery may be had upon proof that the publication was false, and that the defendant either knew it to be false, or, believing it to be true, lacked reasonable grounds for that belief. . . . [N]egligence may form the basis of liability regardless of whether or not the publication in question related to a matter of public or general interest.53

Similarly, the Supreme Court of Washington has held:

> [A] private individual, who is neither a public figure nor official, may recover actual damages for a defamatory falsehood, concerning a subject of general or public interest, where the substance makes substantial dangers to reputation apparent, on a showing that in publishing the statement, the defendant knew or, in the exercise of reasonable care, should have known that the statement was false, or would create a false impression in some material respect.54

whether the Florida court had adopted a negligence standard and, if it had, whether negligence had been satisfactorily demonstrated. *Id.* at 464–64.

Connecticut is a state that has apparently adopted a negligence standard without expressly doing so. In *Corbett v. Register Publishing Co.*, 356 A.2d 472 (Super.Ct. Conn. 1975), a family sued the local newspaper for alleged defamation resulting from a story which had incorrectly identified the husband as the father of a youth who had been arrested in connection with unruly juvenile behavior. The Superior Court of Connecticut held that the plaintiffs would have to demonstrate malice-in-fact but equated malice-in-fact with a “failure to make a reasonably careful investigation of the facts before publication.” *Id.* at 475 (quoting *Osborne v. Troup*, 60 Conn. 475, 493 (1891)). The court added: “Judicial gloss seems to have diluted [malice-in-fact] to misconduct amounting essentially to negligence.” 356 A.2d at 475.

The Connecticut court viewed the claims of two of the three family members as having been “rescued by *Gertz*” from the rigorous *New York Times* standard of liability, which, prior to *Gertz*, Connecticut courts had felt compelled to follow. 356 A.2d at 477 (quoting *Moriarty v. Lippe*, 162 Conn. 371, 294 A.2d 326 (1972)). Since *Gertz* had removed this compulsion, the court found it logical to apply pre-*New York Times* law in defamation suits by private plaintiffs against media defendants. 356 A.2d at 477. Therefore, with regard to two of the family members the court required a trial on the merits to determine whether the defendant had acted negligently—the affidavits which had been filed did not preclude a finding of some degree of fault on the part of the defendant and *Gertz*' constitutional minimum of no media liability without fault was not violated. *Id.*

53. Troman v. Wood, 62 Ill. 2d 184, 198, 340 N.E.2d 292, 299 (1975). Note that “substantial danger to reputation” may mean that in Illinois (and perhaps other states) libel will be limited to the old per se definition, excluding much of what has been traditionally defined as libel per quod. See F. HARPER & F. JAMES, THE LAW OF TORTS 372–73 (1956); W. PROSSER, supra note 39, § 112, at 762–64.

While the rationales advanced by state courts in adopting negligence standards vary, several appear in many, if not all, of the decisions. One of the most common is that reputational interests command constitutional protection. This is raised in jurisdictions where the state constitution, unlike its federal counterpart, expressly refers to the protection of reputation.

For example, the Supreme Court of Illinois read such a passage in its state constitution as an indication of Illinois’ traditional concern to provide its defamed citizens with a right to redress in the state’s courts. A limitation on this right would prevent defamed plaintiffs from preserving and restoring their reputations through an authoritative and public determination that an injurious statement about them is in fact false. Therefore, the court found that the Illinois Constitution offered no support for the adoption of an “actual malice” standard and instead chose to adopt a negligence standard. Similarly, the Supreme Court of Kansas read the Kansas Constitution to protect the reputations of the state’s citizens, to provide them with an adequate remedy at law for injury to reputation, and to render the media liable for injury resulting from abuses.

Closely related to the state constitutional rationale is the argument noted in a number of decisions that nothing in state public policy or prior decisions requires the adoption of a standard stricter than the negligence standard permitted by Gertz. Typical of this approach is the opinion of the Supreme Court of Washington in Taskett v. King Broadcasting Co. Prior to New York Times, Washington courts had

55. “All persons may speak, write and publish freely, being responsible for the abuse of that liberty. In trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense.” ILL. CONST. art. I, § 4.

“Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.” Id. § 12.


57. Id. at 195, 340 N.E.2d at 297.

58. Id. at 198-99, 340 N.E.2d at 299. The New York Times “actual malice” standard, of course, does not deny redress; it simply makes redress more difficult to attain. As a practical matter this added difficulty is often insurmountable.

In Troman, the Supreme Court of Illinois distinguished Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc., 321 N.E.2d 580 (Ind. App. 1975), cert. denied, 424 U.S. 913 (1976), in which the Court of Appeals of Indiana, on the basis of language in article I, section 9 of the Indiana Constitution, see note 113 infra, chose to follow Rosenbloom and adopt the New York Times standard where the defamed plaintiff is a private person but the subject matter of the defamation is one of public or general interest. 62 Ill. 2d at 199, 340 N.E.2d at 299; see notes 113–114 infra and accompanying text.


60. 86 Wash. 2d 439, 546 P.2d 81 (1976).
held that common law malice was not a requirement in defamation actions.\footnote{1} Therefore, the court in Taskett thought that it would be totally consistent to adopt a standard closer to that in force before \textit{New York Times} yet still permitted by \textit{Gertz}—a negligence standard.\footnote{2} Although the court recognized that the first amendment was designed to protect the marketplace of ideas, it concluded that first amendment protections did not extend to "the intentional lie" or the "careless error."\footnote{3}

A third rationale borrows from the reasoning in \textit{Gertz}.\footnote{4} According to this rationale, standards stricter than negligence would impose too great a burden on the private plaintiff\footnote{5} because in modern society the private person is especially deserving of protection for his reputation.\footnote{6} Any chilling effect on the media which may result from a negligence standard has been deemed to be more than offset by a state's interest in protecting the reputation of a private person and compensating him for injury from defamation.\footnote{7} Private persons as a class do not seek public scrutiny and comment\footnote{8} and do not generally have access to the media by which they are able to combat attacks on their reputations.\footnote{9} The courts espousing this rationale are unimpressed by the argument that a negligence standard will result in media self-censorship,\footnote{10} and view

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negligence as an acceptable burden for the press to bear. Therefore, as the Supreme Court of Oklahoma has stated, "[a] reasonable balance between the rights of the news media and the rights of the private individual is best achieved by the negligence test." A fourth reason for the adoption of a negligence standard has been an express distaste for the Rosenbloom alternative. For example, the Supreme Court of Illinois viewed Rosenbloom's "public or general interest" test as impermissibly blurring the distinction between public and private persons and as requiring state courts to assess on an ad hoc basis whether or not the subject matter of the defamation was a matter of public or general interest.

Similarly, the Supreme Court of Hawaii rejected Rosenbloom, refusing to accept the notion that a negligence standard would inhibit free expression. The court foresaw only problems if a subject matter test were applied to claims by private individuals; recovery could be denied not only on showings of "highly unreasonable conduct," but even where the defendant had been shown to possess a "bad or corrupt motive."

A fifth commonly expressed rationale is that too much power is placed in the hands of the media by either a subject matter test or by a standard of liability stricter than negligence. For example, in Troman v. Wood the Supreme Court of Illinois found that a subject matter test would be improper because it would rest in part on what the media believed was news. Similar feelings were echoed by the Supreme Court of Texas regarding the "actual malice" test:

The shortcomings of the New York Times standard are widely recognized . . . . "[S]uch a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity."

73. See note 14 supra.
76. Id. at 535-36 & n.6, 543 P.2d at 1365-66 & n.6.
77. 62 Ill. 2d 184, 340 N.E.2d 292 (1975).
78. Id. at 196, 340 N.E.2d at 297.
4. "Modified" Negligence Standards

Where courts have rejected Rosenbloom, media defendants have often argued that private plaintiffs should be required to overcome an "intermediate" standard. These efforts have been generally unsuccessful. The Supreme Court of Illinois, for example, quickly dismissed three such arguments advanced by a defendant newspaper. In Troman v. Wood, the defendant first argued that under a negligence test the jury would confuse falsity with whether the defendant had made a proper (non-negligent) investigation. The court responded that the trial judge could overcome this problem by giving adequate instructions. Second, the defendant argued that if a negligence standard were necessary to ensure adequate state protection of reputational interests, then the standard should be "gross negligence" or "willful and wanton misconduct" to ensure adequate state protection of free expression. The Illinois court rejected this argument out of hand, refusing to further complicate the law of defamation. The Supreme Court of Texas, faced with a similar argument, responded that distinctions between negligence and gross negligence or irresponsible conduct are not clear and that "[l]imitations upon the right of recovery . . . deemed necessary to protect publishers and broadcasters from an unreasonable degree of liability will undoubtedly be adopted by the courts regardless which label is used."

The final argument raised by the defendant in Troman was that some form of "journalistic malpractice" should serve as the yardstick for negligent conduct by the media. The Illinois court rejected this concept, stating that it would make newspaper practice in the community the controlling standard, and if there were only one newspaper in the community, then that paper would be able to set its own standard for negligence.

In contrast to Troman, the Supreme Court of Kansas adopted just such a "journalistic malpractice" test: "[T]he standard to be applied in determining such negligence is the conduct of the reasonably careful publisher or broadcaster in the community or in similar communities..."

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81. 62 Ill. 2d 184, 340 N.E.2d 292 (1975).
82. Id. at 197, 340 N.E.2d at 298.
83. Id.
84. Id.
85. Id.
87. 62 Ill. 2d at 197-98, 340 N.E.2d at 298-99.
88. Id. at 198, 340 N.E.2d at 299.
under the existing circumstances . . . .” 89 The Kansas court apparently did not foresee any difficulties in holding the offending medium to the standards of its neighbors, despite the apparent likelihood of a single newspaper or broadcast station serving a given Kansas community. Similarly, the Supreme Court of Oklahoma held that under a negligence standard ordinary care “is that level of care which ordinarily prudent persons engaged in the same business would usually exercise under similar circumstances.” 90

5. Conclusion

A review of the decisions in which state courts have adopted negligence standards indicates that for a variety of reasons the courts have not taken full advantage of the opportunity given to them by the Supreme Court in Gertz. The state courts do not seem to be analyzing the issues critically or exploring all the alternatives when these new standards are adopted. For example, a number of courts do not appear to have even considered the possibility of adopting standards stricter than negligence but less strict than New York Times “actual malice.” 91 Additionally, there often is little evidence to indicate that the courts have investigated the problems connected with the adoption of a negligence standard before choosing it as the standard for their states. 92

To date, only one state court decision has addressed with any completeness the myriad of issues raised by Gertz. 93 Most courts have examined only the issues surrounding the adoption of a fault standard. 94 Particularly for those courts seeking more lenient negligence


There are other indications that courts have been sensitive to media interests in post-Gertz cases. The highest courts in Massachusetts and Washington have accepted the argument that punitive damages should not be awarded to any defamation plaintiff. Stone v. Essex County Newspapers, Inc., 330 N.E.2d 161, 164 (Mass. 1975); Taskett v. King Broadcasting Co., 86 Wash. 2d 439, 445, 546 P.2d 81, 85-86 (1976).


92. This could be as much the fault of attorneys representing media defendants as it is the fault of the courts.

93. Jacron Sales Co. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976); see notes 139-51 infra and accompanying text.
standards that do not unduly infringe on first amendment rights, there is a need to carefully consider such issues as how negligence is to be determined and whether the test will encompass more than ordinary negligence as defined by general tort law. This is not meant as a criticism of the negligence standard itself, but rather expresses a disappointment with the lack of precision attending the adoption of the negligence standard.

B. Reversion to Rosenbloom

Even though most jurisdictions have responded to Gertz by adopting a negligence standard in all defamation cases involving private plaintiffs, some have not. The minority jurisdictions have preserved the Rosenbloom rule, or some approximation of it. Two of the earliest cases started an apparent trend toward refusing to adopt the negligence test contemplated by Gertz. These cases were Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc., decided six months after Gertz, and Walker v. Colorado Springs Sun, Inc., decided nine months after Gertz. In Aafco, the Indiana Court of Appeals did not articulate a particular standard but noted that it could choose "either a Gertz or Rosenbloom conceptualized privilege." It chose the latter. In Walker, the Supreme Court of Colorado was more specific:

[W]hen a defamatory statement has been published concerning one who is not a public official or a public figure, but the matter involved is of public or general concern, the publisher of the statement will be liable to the person defamed if, and only if, he knew the statement to be false or made the statement with reckless disregard for whether it was true or not.

95. See notes 13–14 supra and accompanying text.
96. See note 37 supra.
97. 321 N.E.2d 580 (Ind. App. 1975), cert. denied, 424 U.S. 913 (1976). In Aafco, a series of newspaper stories were written about an electrical fire which had caused the deaths of two small children. The stories also reported that the plaintiff had failed to obtain a permit for a furnace installation at the children’s residence three weeks prior to the fire. The plaintiff sued for libel, contending that a fire inspector’s report repudiated any claim that the plaintiff was responsible for the blaze.
98. 188 Colo. 86, 538 P.2d 450, cert. denied, 423 U.S. 1025 (1975). Walker involved newspaper articles and letters to the editor in the Colorado Springs Sun accusing antique dealers of dealing in stolen goods and refusing to return stolen property to its rightful owner. For a discussion of Walker, see 36 Ohio St. L.J. 929 (1975).
99. 321 N.E.2d at 585.
100. Id. at 585–90.
101. 188 Colo. at 98–99, 538 P.2d at 457. The court did qualify Rosenbloom (see notes 9, 13–14 supra and accompanying text) by adopting a unique definition of “reckless disregard.” Rosenbloom had incorporated the definition of reckless disregard which the
Both courts viewed the results as compelled by their respective determinations of what was necessary to properly accommodate the law of defamation and the freedoms of speech and press.\textsuperscript{102} These two factors were the same two which had been balanced with different results in \textit{Gertz}.\textsuperscript{103} The Indiana and Colorado courts chose to be more protective of the press because they believed that this better encouraged free debate, which they viewed as essential to democracy.\textsuperscript{104} A corollary to this was their belief that a lesser fault standard would lead to media self-censorship, and a concomitant lessening of free debate.\textsuperscript{105} While these assumptions may or may not be correct, and it is doubtful they could ever be tested empirically, the focus of both courts on the rights of the media, rather than on the rights of the defamed private person, clearly pointed the way toward the resolution of these cases.\textsuperscript{106}

Further justifications were offered by the courts in \textit{Aafco} and \textit{Walker}. Both rejected the reasoning in \textit{Gertz} that the judiciary should not decide on an \textit{ad hoc} basis what is and what is not a matter of public or general interest or concern.\textsuperscript{107} Neither court saw any difficulty or impropriety in making this decision, as other courts had done after \textit{Rosenbloom}.\textsuperscript{108} Also evident was a distaste for the distinction between

\begin{footnotesize}
\begin{enumerate}
\item Court formulated in St. Amant \textit{v.} Thompson, 390 U.S. 727, 731 (1968): "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." The Supreme Court of Colorado rejected this definition, feeling that "reckless disregard" should be given the meaning generally attributed to it in tort law, although it did not see fit to provide that meaning. \textit{See generally W. Prosser, HANDBOOK OF THE LAW OF TORTS} § 34, at 184–86 (4th ed. 1971) (wherein "reckless" is used interchangeably with "wilful" and "wanton" to mean "conduct which is still merely negligent, rather than actually intended to do harm, but which is so far from a proper state of mind that it is treated in many respects as if it were so intended." \textit{Id.} at 184). The net result is a "hybrid standard of liability—\textit{Rosenbloom} minus \textit{St. Amant.}" 36 OHIO ST. L.J. 929, 938 (1975).
\item 321 N.E.2d at 587; 188 Colo. at 99, 538 P.2d at 457.
\item See text accompanying notes 23–24 \textit{supra}.
\item 321 N.E.2d at 586–87; 188 Colo. at 99–100, 538 P.2d at 457–58.
\item 321 N.E.2d at 587; 188 Colo. at 100, 538 P.2d at 458.
\item This is not necessarily meant as criticism of these rationales, for their adoption is little different from the adoption of contrary rationales by courts choosing negligence standards. The key is whether the court focuses on the rights of the defamed plaintiff or the media defendant. \textit{See} text accompanying notes 55–94 \textit{supra}. This comment is made merely to illustrate the policies which underlie the minority result and point out the difficulty in predicting results in states that have not yet analyzed the question.
\item 321 N.E.2d at 590; 188 Colo. at 101–02, 538 P.2d at 459; \textit{see} text accompanying notes 25–26 \textit{supra}.
\end{enumerate}
\end{footnotesize}
public and private figures, which the Indiana Court of Appeals characterized as "mak[ing] no sense in terms of our constitutional guarantees of speech and press." Few public persons were thought to have the access to the media assumed by the Supreme Court in Gertz, and the effectiveness of that self-help remedy, even if available, was questioned. Public persons were thought to have assumed the risk of defamation no more than private persons. The Indiana Court of Appeals in Aafco also placed some reliance on language in the Indiana Constitution, but its reliance is of such dubious value that it is unlikely to be followed by other state courts.

While similar to the results in Aafco and Walker, the fault standard adopted by the New York Court of Appeals in Chapadeau v. Utica Observer-Dispatch, Inc., is sufficiently different to warrant special note. As stated by the court:

109. 321 N.E.2d at 587. This antagonism toward the distinction between private and public plaintiffs demonstrates that the focus of Aafco and Walker was on the first amendment protections of media defendants rather than on the interest of states in compensating their citizens for injury to reputation. Discrediting the distinction, however, does not favor the adoption of either Rosenbloom or a negligence standard but rather only militates toward treating all persons alike. Attacking the distinction goes as much against the reasoning of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), in which the defamed plaintiff was a public official, and Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), in which the defamed plaintiff was a public figure, as it does against Gertz.

110. See text accompanying note 28 supra.

111. 321 N.E.2d at 587.

112. Id. at 588; see text accompanying note 29 supra.

113. 321 N.E.2d at 585-86. The relevant portion of the Indiana Constitution provides: "No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write or print, freely on any subject whatever: but for the abuse of that right, every person shall be responsible." IND. CONST. art. 1, § 9, reprinted in Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc., 321 N.E.2d 580, 586 n.4 (Ind. App. 1974), cert. denied, 424 U.S. 913 (1976).

114. The text of the constitutional provision relied upon by the court in Aafco did not literally support the court's result, for it covered speech concerning "any subject whatever" and in no way focused on matters of public or general interest or concern. As is typical of state constitutional language, it also makes allowances for defamation law when it notes that "for the abuse of that right [of free speech and a free press], every person shall be responsible." IND. CONST. art. 1, § 9. Thus, reliance on this constitutional provision was wholly misplaced, as the provision may easily be read to support a contrary result. For a good critique of the technique of relying on state constitutions which contain language similar to that of the Federal Constitution to reach a result different than that arrived at in Gertz, see Cahill v. Hawaiian Paradise Park Corp., 56 Haw. 522, 543 P.2d 1356 (1975).

115. 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975). In Chapadeau the defendant newspaper correctly reported that the plaintiff, a public school teacher, had been arrested for possession of heroin but, in the same article, erroneously reported that the plaintiff had been arrested at a party where police found drugs and beer. The plaintiff brought a libel action.
We now hold that within the limits imposed by the Supreme Court where the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition, the party defamed may recover; however, to warrant such recovery he must establish, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.16

This standard resembles Rosenbloom insofar as it imposes a stricter fault standard upon a plaintiff when the subject matter of the defamation is not purely a private matter. But while Rosenbloom identified non-private defamation as that "involving matters of public or general concern,"117 Chapadeau identifies it as that "arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition." This may encompass fewer topics than the Rosenbloom standard.118

The standard also differs from Rosenbloom in that Rosenbloom, by incorporating New York Times, required a plaintiff to demonstrate "actual malice"119 with "convincing clarity."120 Chapadeau, on the other hand, requires that the plaintiff show "by a preponderance of the

116. Id. 2d at 199, 341 N.E.2d at 571, 379 N.Y.S.2d at 64. This standard is unique — no other state has adopted a similar one in the wake of Gertz. It is interesting to note that the language from Chapadeau which is quoted in the text is very similar to the language of Justice Harlan in Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967):
   We consider and would hold that a "public figure" who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.
   Whether the New York Court of Appeals was relying on this language is uncertain because it makes no citation to Justice Harlan's opinion; however, the similarity in the language of the two opinions seems more than coincidental. Therefore, the standard in Chapadeau might be characterized as less strict than the New York Times standard. (Concurring in Butts, Chief Justice Warren noted that the standard announced by Justice Harlan was a relaxation of the New York Times standard. 388 U.S. at 163.)

117. See note 14 supra and accompanying text.

118. The phrases "legitimate public concern" and "warranting public exposition" suggest this narrower scope. The term "arguably," however, suggests a broader standard. The New York Court of Appeals gave no guidance on this point other than to imply that it was not directly following Rosenbloom. 38 N.Y.2d at 199, 341 N.E.2d at 571, 379 N.Y.S.2d at 64.

119. "Actual malice" was defined in New York Times to mean "in the knowledge that [the defamatory matter] was false or with reckless disregard of whether it was true or not." 376 U.S. at 279–80; see note 9 supra. "Reckless disregard," as defined in St. Amant v. Thompson, means the publisher "entertained serious doubts as to the truth of [the] publication." 390 U.S. at 731; see note 101 supra.

120. See note 9 supra.
evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." This is a lesser fault standard in that it does not focus upon the publisher's subjective doubts about the truth of the statement giving rise to the plaintiff's claim.  


The fault standard adopted by the Court of Appeals of Louisiana in LeBoeuf contained both a New York Times standard and a negligence standard:

For a publication to be actionable as libel it must be shown that the publisher had knowledge of the falsity or demonstrated reckless disregard of the truth. At a minimum a publisher must have some knowledge which would place him on his guard, making him aware that further research was necessary to insure the veracity of his report. Gertz v. Robert Welch, Inc.

327 So. 2d at 431. The first sentence of the LeBoeuf standard paraphrases the New York Times standard. See note 9 supra. It is applicable only insofar as the defamed plaintiff is a public figure or a public official, or if the state has elected to follow Rosenbloom and the subject matter is of public or general interest or concern. Since LeBoeuf did not involve a public figure or official and the matter was probably one of public interest or concern (an arrest for murder), it might be argued that by this language the Court of Appeals of Louisiana had impliedly adopted Rosenbloom after Gertz. This would read too much into the language, however, for the court did not explicitly consider the fault standard issue posed by Gertz. Moreover, the second quoted sentence is consistent with a negligence standard. For this reason the first sentence, then, appears to be no more than a gratuitous comment by the court. Indeed, a prior decision by the Court of Appeals of Louisiana had contained language suggesting the adoption of a negligence standard. See Wilson v. Capital City Press, 315 So. 2d 393, 397-98 (La. App. 1975).

The subject matter of the alleged defamation in Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 497 (D.D.C. 1976), was clearly one of public or general interest or concern—the sponsoring of parties by the plaintiff corporation on behalf of government contracting officials with whom it dealt. The District Court for the District of Columbia held that Rosenbloom should govern as a result of the plaintiff's status as a corporation. The court reasoned that a corporation has no private life, making the rationales of Gertz inapposite. A corporation should therefore be treated like a public figure—the latter has "lost claim to his private life" and the former "never has a private life to lose." 417 F. Supp. at 955. Recovery would thus be allowed only upon meeting the requirements of the New York Times standard, as developed in Rosenbloom. Id. at 956. Alternatively, even without considering the inapplicability of the Gertz rationales, the court noted that this particular corporation was a public figure and should therefore be held to the New York Times standard regardless of Gertz. Id. at 956-57.

While the reasoning of the district court in Martin Marietta is not wholly illogical, it creates a distinction unknown at the common law by placing special handicaps on a corporation as a defamation plaintiff. A corporation cannot, of course, be defamed in the
C. Prognosis

There are a number of cases which have addressed the issue of a media defendant’s standard of care but have managed to avoid deciding it. The issue cannot be sidestepped indefinitely, however, and eventually every state will be forced to address this issue and to adopt a specific fault standard. This article has demonstrated that these states have at least two distinct lines of authority from which to choose. It is believed that most states will follow the majority negligence rule, and they will be correct in doing so, for the adoption of a negligence standard is the best alternative for a number of reasons.

_Gertz_ and almost all of the state court decisions construing it have explicitly stated that the issue at hand was to find the proper accommodation between the competing interests of the freedoms of speech and press and the protection of reputation served by the law of defamation. In this regard, _Gertz_ held that the interests of the first amendment are adequately protected by any standard short of strict liability. Because a negligence test is sufficient to protect all federal constitutional interests, only the existence of additional state interests on the free speech and free press side of the balance could justify the adoption of a standard stricter than negligence when private parties are involved. It is submitted that no such state interests are likely to be found.

The first amendment is the bulwark protecting the freedoms of speech and press; rarely, if ever, have state interests stood out as more protective of these freedoms than the first amendment. There is no reason to believe that the interests of the states in these freedoms are more compelling today than they have been in the past. The courts which have determined that the first amendment alone does not adequately protect the state’s own interest in the freedoms of speech and press have simply created new state interests.

same manner as an individual, but the law protects its business reputation and standing in the community. W. PROSSER, __supra__ note 101, § 111, at 745–46. This realization properly led to the rejection of the reasoning of _Martin Marietta_ in _Trans World Accounts_, Inc. v. Associated Press, 425 F. Supp. 814 (N.D. Cal. 1977). In _Trans World Accounts_, the district court chose not to follow _Martin Marietta_ not only because California law made no distinction between personal and corporate reputation, but also because it believed that the Supreme Court had rejected _Rosenbloom_ in its entirety in _Gertz_. __Id__. at 819. The district court could find no first amendment basis for the distinction made in _Martin Marietta_. __Id__.


123. _See_ text accompanying notes 23–33, 64–79, 102–12 __supra__.

124. _See_ text accompanying note 33 __supra__.
In addition, the rationales put forward by these courts in adopting a standard stricter than negligence\textsuperscript{125} have not been persuasive. Reliance on state constitutional language is often inappropriate as state constitutions generally hold the media expressly responsible for abuses of their freedoms of speech and press found in the first amendment and parallel state provisions.\textsuperscript{126} Thus, when courts announce that a reversion to Rosenbloom is necessary to protect free debate, they are simply expressing a disagreement with Gertz on an issue that is largely incapable of empirical proof. While each state court must interpret its own constitution, and while it is not improper for two courts to interpret similar language differently, it is disingenuous for a court to rely on state constitutional language which on its face is more limited in its protection of free speech and free press than the Federal Constitution.\textsuperscript{127}

It was also improper for these courts to decide that they should be in the business of deciding what is or is not a matter of public or general interest or concern.\textsuperscript{128} The Supreme Court expressly disapproved of this function in Gertz,\textsuperscript{129} and with good reason. There are no satisfactory tests by which one can decide what is or is not of public or general interest and attempting to do so on an \textit{ad hoc} basis can only result in arbitrary and inconsistent results. The criticism by these courts of the distinction drawn by the Supreme Court between public and private persons\textsuperscript{130} may have some theoretical validity, but this distinction has been firmly engrained into the law of defamation in the fourteen years since \textit{New York Times}. It is too late in the day for state courts to attack this fundamental principle of federal constitutional law.

Finally, the adoption of a Rosenbloom test, while purporting to balance the first amendment and the law of defamation, tends to emphasize the former at the expense of the latter. It is extremely difficult for a defamed plaintiff to recover under the "\textit{New York Times} malice" aspect of the Rosenbloom analysis, because of its emphasis on subjective elements.\textsuperscript{131} While this is appropriate in the case of a public person or a public official, because he will be more able to protect his reputation through self-help, the private person has no such

\begin{enumerate}
\item \textsuperscript{125} See notes 102–12 supra and accompanying text.
\item \textsuperscript{126} See notes 113–14 supra.
\item \textsuperscript{128} See text accompanying note 107 supra.
\item \textsuperscript{129} See text accompanying notes 25–26 supra.
\item \textsuperscript{130} See text accompanying notes 27–29, 109–12 supra.
\item \textsuperscript{131} See notes 9, 101 supra.
\end{enumerate}
alternate means of protecting his legitimate reputational interests. Thus, even though the media may have a legitimate interest regarding matters of public interest or concern, a balancing of interests requires an equal recognition of the importance of the private individual’s interest. For this reason, states which wish to afford the media more protection than is available under a traditional negligence standard should adopt variations on the negligence theme and not impose the unreasonable burdens of Rosenbloom. The Supreme Court itself suggested one such variation in its damage limitation in Gertz.

In summary, the adoption of the majority rule is the best alternative open to states addressing the issue of a media defendant’s standard of care. A negligence standard gives proper emphasis to the protection of reputation served by the law of defamation, while at the same time sufficiently protecting first amendment interests.

III. Issues Unanswered by Gertz

As mentioned in part I, the Supreme Court opinion in Gertz left a number of unanswered questions that will have to be addressed by state and federal courts. Unresolved constitutional issues center on the scope of Gertz: Is Gertz limited to media defendants or does it also extend to non-media defendants? Is Gertz limited to libel, or does it extend to other forms of defamation? The adoption by states of fault standards requires the resolution of more diverse problems: Is Gertz limited to matters of public or general interest or concern? What burden of proof must a plaintiff meet under the state standard of care? Has falsity become an element of the plaintiff’s case? How have state defamation statutes been affected by Gertz?

A. Is Gertz Limited to Media Defendants?

Gertz was a libel action concerning a media defendant; most litigation has similarly involved mass media defendants, particularly

132. See notes 89-90 supra and accompanying text.
133. See text accompanying notes 34–35 supra.
134. The mere fact that negligence has become the standard for a majority of jurisdictions militates for its adoption in future cases in order to achieve uniformity in the law. One might argue that the Supreme Court itself did not contemplate uniform reactions to Gertz, since it expressly left adoption of fault standards to the states. However, the Court had to leave the states this leeway in order to avoid overreaching into matters of state concern. The Court’s function in Gertz was simply to state what minimums were necessary to protect the interests of the Federal Constitution. The other half of the balance, the law of defamation, is a matter of state law, and the Court correctly left its delineation to the states. If the language of the Gertz court contemplates any standard, that standard is negligence. See note 37 supra.
DEFAMATION OF PRIVATE PERSONS

newspapers. Others, of course, can commit the tort of defamation. The question therefore arises whether Gertz extends to all defendants or just to media defendants.

The Court's opinion in Gertz does not expressly address this issue. The opinion speaks solely in terms of media defendants. In phrasing the issue in Gertz, the Court spoke of "whether a newspaper or broadcaster" is entitled to claim a constitutional privilege, and the holding speaks in terms of "a publisher or broadcaster." In addition, the opinion contains no dictum on whether its rationales extend beyond the media context; thus, Gertz provides no direct support for applying its holding to non-media defendants.

Since Gertz, almost every case to address the fault standard issue has involved a media defendant. Only two states have considered the problem of Gertz' application to the non-media defendant. Maryland has applied Gertz to all defendants, while Wisconsin has declined to extend Gertz to non-media defendants. The Court of Appeals of Maryland reached its result in Jacron Sales Co. v. Sindorf, a slander action brought by a private individual against his former employer. The plaintiff was neither a public official nor a public figure, the subject matter of the defamation was not a matter of public or general interest or concern, and the defendant was not a member of the media. The Court of Special Appeals of Maryland had held that Gertz did not extend to the defamation of a private individual concerning purely


136. Cahill v. Hawaiian Paradise Park Corp., 56 Haw. 522, 543 P.2d 1356 (1975); Martin v. Griffin Television, Inc., 549 P.2d 85 (Okla. 1976); Taskett v. King Broadcasting Co., 86 Wash. 2d 439, 546 P.2d 81 (1976). Defamation by radio and television broadcast may be seen as libel or as slander or as a type of defamation apart from both libel and slander. Courts tend to muddle or ignore this question, perhaps because any real distinction between libel and slander bears only on the historical origins of the dichotomy. W. PROSSER, supra note 101, § 112, at 753–54.

137. 418 U.S. at 332; see text accompanying note 18 supra.

138. Id. at 347; see text accompanying note 33 supra.


140. 276 Md. at 582–83, 350 A.2d at 689–90.
Although it affirmed the judgment of the Court of Special Appeals, the Court of Appeals of Maryland concluded that \textit{Gertz} should be read as a rejection of the \textit{Rosenbloom} subject matter test, on grounds that it failed to adequately recognize a state's interest in the protection of its citizens' reputations. The court noted that \textit{New York Times} had not been limited to media defendants; rather its focus had been on the exercise of first amendment rights, not on the person or entity exercising them. Not only could the Maryland court see no distinction drawn between types of defendants in the Supreme Court cases, it also could not discern any persuasive basis for distinguishing media and non-media cases. The rationale for the application of a constitutional privilege in \textit{New York Times}, \textit{Curtis} and \textit{Gertz} is that the defense of truth is not alone sufficient to assure free and open discussion of important issues. Issues of public interest may equally be discussed in media and non-media contexts, and the need for a constitutional privilege, therefore, obtains in either case. . . . The proposition that the press enjoys greater rights than members of the public generally was rejected by the Supreme Court in \textit{Pell v. Procunier}.

For these reasons, the Court found that Jacron Sales Company fell within the protection of \textit{Gertz}. Since \textit{Gertz} allowed any standard other than strict liability, the Maryland court announced that it would impose the Restatement (Second) of Torts standard to cases of unprivileged defamation. Yet because Jacron Sales Company raised a common law conditional privilege for the communication of information concerning an individual from his former employer to a new or prospective employer, it could only be held responsible upon

\begin{quote}
142. 276 Md. at 588–90, 350 A.2d 693–94. The Maryland court’s reading of \textit{Gertz} has been confirmed by the Supreme Court. Time, Inc. v. Firestone, 424 U.S. 448, 454–57 (1976).
143. 276 Md. at 591–92, 350 A.2d at 694–95.
144. \textit{Id}. at 592, 350 A.2d at 695 (citation omitted).
145. 276 Md. at 594, 350 A.2d at 696.
146. \textit{See} text accompanying notes 42–48 supra.
147. 276 Md. at 594–97, 350 A.2d at 696–98 (quoting \textit{RESTATEMENT (SECOND) OF TORTS} § 580B (Tent. Draft No. 21, 1975)).
\end{quote}
a showing of express or actual malice.\textsuperscript{149}

In addition to the above analysis, the Maryland court offered several policy rationales for its extension of \textit{Gertz}.

"Regardless of constitutional strictures, it would be a bizarre result as a matter of tort law to hold individual defendants liable without fault while the media were liable only for negligence. The standard tort rationale for strict liability is that it serves to spread the cost of injury over all users of a given product; in short, it is a theory of enterprise liability. Further, an individual's defamatory statement is, on the whole, likely to create a smaller risk of harm than a media publication. Finally, the media are more likely to be aware of the risk of liability, and thus more likely to insure against it. . . ."\textsuperscript{150}

In addition, the court found substantively identical policy considerations in a comment to section 580B of the Restatement (Second) of Torts.\textsuperscript{151}

Unlike the Court of Appeals of Maryland, the Supreme Court of Wisconsin has refused to extend \textit{Gertz} to defamation actions against

\textsuperscript{149} Jacron Sales Co. v. Sindorf, 276 Md. 580, 597–600, 350 A.2d 688, 698–700 (1976). By "express or actual malice" the Maryland court was not requiring \textit{New York Times} "actual malice." \textit{See note 9 supra.} Rather, it defined "malice" as ""a reckless disregard of truth, the use of unnecessarily abusive language, or other circumstances which would support a conclusion that the defendant acted in an ill-tempered manner or was motivated by ill-will.” 276 Md. at 599–600, 350 A.2d at 699 (quoting Stevenson v. Baltimore Club, 250 Md. 482, 286-87, 243 A.2d 533, 536 (1968)).

\textsuperscript{150} 276 Md. at 592–93, 350 A.2d at 695 (quoting \textit{The Supreme Court, 1973 Term}, 88 HARV. L. REV. 41, 148 n.52 (1974)).

\textsuperscript{151} 276 Md. at 593–94, 350 A.2d at 696 (quoting \textit{RESTATEMENT (SECOND) OF TORTS} § 580B, Comment e (Tent. Draft No. 21, 1975)):

"[T]he protection of the First Amendment extends to freedom of speech as well as to freedom of the press, and the interests which must be balanced to obtain a proper accommodation are similar. It would seem strange to hold that the press, composed of professionals and causing much greater damage because of the wider distribution of the communication, can constitutionally be held liable only for negligence, but that a private person, engaged in a casual private conversation with a single person, can be held liable at his peril if the statement turns out to be false, without any regard to his lack of fault. . . ."

This comment now appears in \textit{RESTATEMENT (SECOND) OF TORTS} § 580B, Comment e (1977). \textit{See generally} text accompanying notes 42–48 \textit{supra.}

The analysis of \textit{Jacron} was subsequently reaffirmed by the Court of Appeals of Maryland in General Motors Corp. v. Piskor, 277 Md. 165, 352 A.2d 810 (1976). In \textit{Piskor}, an employee brought actions for slander, libel, and false imprisonment against his corporate employer after the defendant's security guards had barred the plaintiff from leaving the defendant's plant and had taken the plaintiff to a guardroom on suspicion of theft. Piskor's detention and questioning in the glass-enclosed guardroom were observed by his fellow employees, thereby giving rise to his claims in libel and slander. The court of appeals reversed an award of actual and punitive damages and remanded the case for determination of the issue of whether abuse by excessive communication defeated the existence of any common law conditional privilege in the defendant.
non-media defendants. The facts of *Calero v. Del Chemical Corp.* were substantively identical to those in *Jacron*: a private individual brought an action in libel and slander against his former employer concerning a matter not of public or general interest or concern. The Wisconsin court viewed the *New York Times-Rosenbloom-Gertz* line of cases as implementing a conditional privilege based on "fundamental First Amendment considerations that arise from the danger [to the self-governed] of media self-censorship and ... the need to purge the 'obsolete doctrine that the governed must not criticize their governors. ...'" A constitutionally protected conditional privilege arose to protect "matter[s] of public concern" in self-government and extended to "newspapers, television and radio, or comments made about public officials or public figures." The Wisconsin court did not view the case as involving first amendment concerns:

In the instant case, we are not dealing with a conditional privilege based on first amendment principles but rather with one based on a public policy favoring the encouragement of a free interchange of information under certain circumstances. The circumstances are the inquiry by a prospective employer of a former employer. In such a case, one must prove only 'express malice' which is a defamatory statement motivated by ill will, spite, envy, revenge, or other bad or corrupt motives ... and such express malice must be shown by the preponderance of the evidence. In the case before us there is no matter of general or public interest; there is no public official or public figure; there is no involvement of the media, either broadcast or print. It is thus different than the issues raised involving an alderman running for mayor. ...

Notwithstanding the absence of a first amendment privilege, the court held that the defendants' communications to the plaintiff's prospective employers fell within the common law privilege, and conditioned the recovery of punitive damages upon a showing of "express malice."
Until the Supreme Court decides whether to extend Gertz to non-media defendants, state courts are left with the choice faced by the courts in Jacron and Calero: they can either extend the protections of the first amendment to all defendants or limit those protections to media defendants. It is submitted that the rationales underlying Gertz and the first amendment, as well as logic, favor the former course.

The Jacron court was correct in recognizing that although Gertz is not literally applicable to non-media defendants, its rationales, as well as those of all of the Supreme Court’s defamation decisions since New York Times, are applicable to media and non-media defendants alike. Gertz attempted to strike a balance between the states’ interest in compensating injury to reputation, and the first amendment interests in free expression. The states’ interest is necessarily the same regardless of the nature of the defendant. If first amendment concerns on the other side of the balance are equivalent for both the media and the non-media, then Gertz should extend to the non-media context. First amendment concerns are equivalent in both contexts. By its very language the first amendment applies to both “speech” and “press.” While most decisions of the Supreme Court have involved media defendants, the Court has not always drawn a sharp distinction between media and non-media cases. Finally, the court in Jacron

contained in a credit report. The court analyzed Gertz, id. at 932, 119 Cal. Rptr. at 85–86, but held it inapplicable because of the commercial nature of the credit report. The court held that credit reports obtained no protection from the first amendment so that the defendant was not protected by Gertz. Id. at 934, 119 Cal. Rptr. at 87. Because the fundamental premise of this case was rejected in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976), it does not aid in evaluating the applicability of Gertz beyond the media context. The Court of Appeals of Indiana faced this issue in Patten v. Smith, 360 N.E.2d 233 (Ind. App. 1977), but simply relied on its prior adoption of Rosenbloom via Gertz in Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc., 321 N.E.2d 580 (Ind. App. 1974), to require a New York Times standard of liability in a defamation action arising from random mailings of a trade association brochure, which the court regarded as a publication whose informational content was a matter of public or general interest or concern.

159. See text accompanying note 23 supra.

160. “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .” U.S. Const. amend. I.


Outside the defamation context the Court has not limited first amendment protection to members of the media. See, e.g., City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm., 429 U.S. 167 (1976) (non-union public school teacher’s reading of petition entitled to first amendment protections); Tinker v. Des
properly noted the anomaly that would result if *Gertz* were limited to media defendants. The media, unlike private individuals, are likely to be knowledgeable in the law of defamation and cognizant of the need for care in presenting reports. It would be anomalous indeed if the media, whose defamation can cause widespread harm, have to be at least negligent in order to be held liable, while the unaware private citizen can be held strictly liable for a much lesser harm. Neither policy nor reason require such a result.

**B. Does *Gertz* Apply Only to Libel?**

Since defamation by the media will usually be analyzed as libel, the question whether *Gertz* is limited to libel or extends to all forms of defamation is quite similar to the question of its applicability to non-media defendants. While both media and non-media defendants can commit libel, generally only non-media persons will commit slander. Still, the question is distinct from the media versus non-media question.

*Gertz* does not address this question. The Court's discussion focused on statements made by the press and the broadcast media—matters traditionally regarded as libelous if defamatory—and the Court expressed no views on non-libelous forms of defamation. Similarly, almost all state court cases addressing *Gertz* have involved libel or defamatory matter which has traditionally been regarded as libel.

The only state court to address the issue has been the Court of Appeals of Maryland. In *Jacron*, the Maryland court held that *Gertz* applied to slander as well as to libel. Unfortunately, the court's analysis of this issue was inextricably entwined with its analysis of whether *Gertz* extended to non-media defendants. While recognizing that the two questions were distinct, the court did not give separate reasons for its conclusions.

Nevertheless, the Maryland court's conclusion that *Gertz* should extend to all forms of defamation is sound. The arguments supporting this conclusion are essentially those which would extend *Gertz* to non-media defendants. The distinction between libel and slander is

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162. See notes 135–36 supra and accompanying text.
163. See notes 135–36 supra.
165. See notes 142–51 supra and accompanying text.
166. 276 Md. at 590–94, 350 A.2d at 694–96.
167. See notes 142–51, 159–61 supra and accompanying text.
largely historical and has little basis in either policy or logic.\textsuperscript{168} The interests balanced in \textit{Gertz}, reputation and free expression, do not vary from libel to slander. The first amendment does not distinguish spoken from written expression. To limit \textit{Gertz} to libel would be as anomalous as limiting it to media defendants; it would also further complicate this area of the law. While the common law developed a distinction between libel and slander,\textsuperscript{169} the issue whether to extend \textit{Gertz} to all forms of defamation is a matter of federal constitutional law, and there is simply no constitutional basis for differentiating between written and spoken defamation.

C. Is Gertz Limited to Matters of Public Interest?

Since the Supreme Court in \textit{Gertz} expressly rejected Rosenbloom's subject matter test in favor of a status-of-the-plaintiff test,\textsuperscript{170} it may seem odd to ask whether \textit{Gertz} applies only in cases where the subject matter of the defamation is a matter of public or general interest or concern. Yet some courts have so limited its applicability. For example, in \textit{Jacron} the Court of Special Appeals of Maryland held that \textit{Gertz} applied only to matters of public interest or concern. Purely private defamation actions—that is, defamations involving a private plaintiff and a matter not of public or general interest—were to be resolved under the common law.\textsuperscript{171} However, most courts, including the Court of Appeals of Maryland in \textit{Jacron},\textsuperscript{172} have rejected this limitation on \textit{Gertz}' applicability and have held that the application of \textit{Gertz} is to be determined without regard to the subject matter of the defamation.\textsuperscript{173} A number of courts have suggested a similar result, but since the defamation at issue was a matter of public interest, these courts did not expressly state what course they would follow if the defamation at issue involved a purely private matter.\textsuperscript{174} Other courts

\textsuperscript{168} W. Prosser, \textsc{Handbook of the Law of Torts} § 112, at 764 (4th ed. 1971).

\textsuperscript{169} \textit{Id.} § 112, at 751–52.

\textsuperscript{170} \textit{See} text accompanying notes 20–22 supra.


have limited the language of their decisions to matters of public or general interest or concern and have given no intimation as to the result for a purely private defamation. 175

The issue of whether Gertz applies only in cases involving matters of public or general interest or concern should not be confused with the question of whether a state will adopt a Rosenbloom-like standard in the wake of Gertz. 176 Those state courts which have elected to follow Rosenbloom necessarily had before them a defamation concerning a matter of public or general interest, 177 the essential element of Rosenbloom. Where a court is faced with a case involving a purely private matter, however, Rosenbloom would not require the New York Times standard; the only issue would be whether to involve the Gertz proscription against strict liability (and its limit on damages). 178 Most courts have said or implied that Gertz will apply in this situation. Gertz itself implicitly supports this result. As already discussed, Gertz rejected the subject matter test of Rosenbloom in favor of a status-of-the-plaintiff approach. 179 In this way the Court held that first amendment interests are best protected by focusing on the status of the defamed party. 180 It is contrary to both logic and the Court's analysis to re-employ a subject matter test to determine the scope of the announced rule. For this reason, Gertz should be applied to matters of purely private interest as well as those of public concern. 181

D. What Burden of Proof Must a Plaintiff Meet?

In Gertz, the Supreme Court did not discuss burden of proof. Nor does the issue relate directly to any of the factors weighed in Gertz. If

\[\text{N.E.2d 494, 500 (Krenzler, J., concurring), cert. denied, 423 U.S. 883 (1975); Martin v. Griffin Television, Inc., 549 P.2d 85 (Oklahoma 1976).}\]

176. See notes 95-121 supra and accompanying text.
177. See notes 97, 98, 115, 121 supra.
178. Implicit in Rosenbloom was the notion that if the subject matter of the defamation is not a matter of public or general interest or concern, then the New York Times standard would be inapplicable, and the common law would determine whether, and to what extent, the defendant would be held liable. See Rosenbloom v. Metromedia, Inc., 403 U.S. at 40-44, 44 n.12 (1971). See also text accompanying note 171 supra.
179. See text accompanying notes 20-22 supra.
181. This resolution of the question becomes more complicated in states which have applied a Rosenbloom analysis. Cases involving private plaintiffs are divided into those that raise matters of public concern, and those which involve purely private matters. Under Rosenbloom, the first group is governed by "New York Times malice," which is permissible under Gertz because it exceeds strict liability. See text accompanying note 33 supra. Because the second group does not include matters of public interest or concern, Rosenbloom would not require any special standard; but, Gertz would still require more than common law strict liability.
the Supreme Court considered this problem at all, it probably meant to include burden of proof within the latitude given the states to determine their own standard of care. Insofar as burden of proof is a necessary element of a fault standard, the Court has impliedly left the matter to the states.

1. **Negligence Jurisdictions**

In states adopting a negligence standard,\textsuperscript{182} consistency would require that the defamed plaintiff demonstrate the defendant’s negligence by a preponderance of the evidence as in other negligence contexts.\textsuperscript{183}

Only a few courts have explicitly considered the issue of a private plaintiff’s burden of proof. In *Jacron*, the Court of Appeals of Maryland held that negligence must be shown by a preponderance of the evidence.\textsuperscript{184} It viewed a clear and convincing burden as a function of *Rosenbloom* and *New York Times*,\textsuperscript{185} a combination which it had rejected.\textsuperscript{186} According to the Maryland court, a preponderance of the evidence burden “is the quantum of proof ordinarily required in other types of actions for negligence, and is apt to be more readily understood by juries.”\textsuperscript{187} Citing *Jacron*, the Supreme Court of Arizona also adopted a preponderance test.\textsuperscript{188} By rejecting the *Rosenbloom-New York Times* combination with its “rigorous” burden of proof and instead adopting a negligence standard, the Supreme Court of Illinois has impliedly adopted a preponderance of the evidence burden.\textsuperscript{189} Finally, the drafters of the Restatement (Second) of Torts have noted that it is “doubtful” that the clear and convincing proof standard will be imposed after *Gertz*.\textsuperscript{190}

2. **Rosenbloom Jurisdictions**

In states adopting a *Rosenbloom*-like standard,\textsuperscript{191} the burden of proof question arises in two contexts. The first concerns a case in which the subject matter of the defamation is not one of public or general interest or concern. Since no court in a *Rosenbloom*-like

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182. See text accompanying notes 39–94 *supra*.
185. See note 9 *supra*; text accompanying notes 119–20 *supra*.
186. 276 Md. at 580, 350 A.2d at 698.
187. *Id.*
191. See notes 95–121 *supra* and accompanying text.
jurisdiction has been faced with this situation, it is difficult to speculate on the burden of proof that will be adopted, because the fault standard itself is unclear. For example, if a negligence standard is adopted for cases not concerning matters of public interest or concern, then a preponderance of the evidence burden of proof would likely be adopted. On the other hand, if in these cases the standard approaches Rosenbloom, and becomes more strict, the plaintiff's burden may correspondingly approach the "convincing clarity." burden, discussed below.

The second situation arises in a case like Rosenbloom, where the subject matter of the defamation is a matter of public or general interest or concern. In this situation Rosenbloom incorporates the New York Times burden of proof: the plaintiff must demonstrate with convincing clarity that the defendant acted with "actual malice." If, after Gertz, a state simply adopts Rosenbloom, it typically also adopts a convincing clarity burden of proof. This was the approach of the Supreme Court of Colorado and the Court of Appeals of Indiana, and, to a limited extent, of the United States District Court for the District of Columbia.

192. See notes 176–81 supra and accompanying text.
193. See note 178 supra.
194. See text accompanying notes 182–90 supra.
195. See note 9 supra; text accompanying notes 119–20 supra.

Some courts have neither adopted a negligence standard nor totally followed Rosenbloom. See notes 115–21 supra and accompanying text. For example, although it was later reversed on this issue, the Court of Appeals of Arizona responded to Gertz by reverting to its pre-New York Times common law malice standard, and also re-adopted its prior burden of proof—clear and convincing evidence. Peagler v. Phoenix Newspapers, Inc., 26 Ariz. App. 274, 547 P.2d 1074 (1976), rev'd, 114 Ariz. 309, 560 P.2d 1216 (1977). While phrased differently, this would seem to be essentially the same burden as convincing clarity. See id. at 281–82, 547 P.2d at 1081–82. The New York Court of Appeals adopted a fault standard resembling Rosenbloom, though less strict. Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975); see notes 116–21 supra and accompanying text. In formulating its rule, however, the court explicitly held that the new standard need only be shown by a preponderance of the evidence. Id. at 199, 341 N.E.2d at 571, 379 N.Y.S.2d at 64; see text accompanying notes 116, 121 supra.
3. Conclusion

There is no clearly "correct" response to the burden of proof question. Burden of proof is one means by which state courts can take advantage of the leeway the Supreme Court provided in Gertz to adjust the difficulty of the plaintiff's case to satisfy state interests. A court can ease a strict standard of liability by choosing a less demanding burden of proof; or it can afford the defendant some relief under a less strict standard by increasing the plaintiff's burden. Perhaps an interest in avoiding undue complication of an area of law which is already complicated militates in favor of adopting a preponderance standard in negligence states.

E. Has Falsity Become an Element of the Plaintiff's Case?

Under the orthodox view of the law of defamation falsity is not an element of the plaintiff's claim for relief. A plaintiff need only show that the statement complained of was defamatory; its falsity enters the case by way of the defendant's affirmative defense of truth. Gertz, however, has raised the question of whether falsity has become an element of the plaintiff's case. In phrasing both the issue and the holding the Court spoke of "defamatory falsehood[s]." At least two interpretations of these words are possible. One is that the Court simply made the mistake made by many courts and assumed that "defamatory" is necessarily synonymous with "false," making "defamatory falsehood" redundant. Such a misstatement of the common law seems unlikely. A more plausible reading is that the Court intentionally made falsity an element of the tort of defamation. Further analysis of the opinion supports this conclusion.

The constitutional minimum in Gertz requires a plaintiff to demonstrate, at the very least, that the defendant acted negligently. One may ask, "Negligent with regard to what?" The logical response must be, "Negligent as to whether the statement complained of was true or false." In Gertz, the Court recognized the need to permit some false

201. "Defamatory" refers to "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. It necessarily involves the idea of disgrace . . . ." Id. § 111, at 739. Thus, a true statement could be defamatory.
203. Id.
204. 418 U.S. at 332, 347; see text accompanying note 18 supra.
205. See note 201 supra.
statements as a necessary concomitant of free debate. The Court reasoned that a rule of strict liability would compel a publisher or broadcaster to guarantee the accuracy (or truth) of his statements and would necessarily result in media self-censorship.206 “‘Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.’”207 Therefore, a fair reading of the Court’s opinion in Gertz reveals that in all defamation cases in which first amendment considerations arise, it is impermissible to put the burden of proving truth on the defendant. Rather, the burden of proving the falsity of the allegedly defamatory statement rests with the plaintiff.208

State courts have generally ignored this problem. The only court to explicitly discuss it was again the Court of Appeals of Maryland.209 In Jacron the court concluded: “‘[T]ruth is no longer an affirmative defense to be established by the defendant, but instead the burden of proving falsity rests upon the plaintiff, since under this standard, he is already required to establish negligence with respect to such falsity.’”210 This proposition should similarly hold for non-negligence jurisdictions, so that falsity becomes part of showing “actual malice” or other standard of liability. The Supreme Court of Illinois has also included falsity as an element of the plaintiff’s case, but without discussing its reason for doing so.211 Similarly, the Supreme Court of Arizona included falsity as an element of the plaintiff’s case but did so without any analysis of Gertz.212 The Supreme Court of Oklahoma seems to have reached a contrary result, but in the case in question it did not fully consider the implications of Gertz and therefore is not persuasive authority contradicting the conclusion that falsity has become an element of the plaintiff’s case.213

The drafters of the Restatement (Second) of Torts have stated that

206. 418 U.S. at 340.
207. Id. at 340–41. (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964)).
210. Id. at 597, 350 A.2d at 698.
213. Martin v. Griffin Television, Inc., 549 P.2d 85, 94 (Oklahoma 1976). The court held that there was no reversible error in a jury instruction which placed the burden of proving truth on the defendant. The court was only discussing the phrasing of the instruction as it related to that burden. It did not consider the propriety of such a burden. It assumed that the burden was proper and held that the instruction adequately reflected it.
they express no opinion on the extent to which the common law rule of placing on the defendant the burden of proof to show the truth of the defamatory communication has been changed by the constitutional requirement that the plaintiff must prove the defendant’s negligence or greater fault regarding the falsity of the communication.214

The Restatement (Second) does, however, eliminate from the section on burden of proof the provision placing the burden of proving truth on the defendant, and adds a provision requiring the plaintiff to show “the defendant’s negligence, reckless disregard or knowledge regarding the truth or falsity and the defamatory character of the communication . . . .”215 In addition, the Restatement (Second) removes the provision for the defense of truth from the “Defenses to Actions for Defamation” chapter and replaces it with a new provision in its chapter on “Invasions of Interest in Reputation,” which is worded quite generally, without reference to parties, defenses, or burdens of proof: “One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true.”216 Still, the drafters of the Restatement (Second) did not see fit to require a showing of falsity as a necessary ingredient for a cause of action in defamation.217 Rather, in their comments they stated that since a plaintiff is required to show some degree of fault on the part of the defendant,218 the plaintiff must necessarily demonstrate the falsity of the defamatory communication:

The burden of proof of showing fault is undoubtedly upon the plaintiff. If the plaintiff has the burden of showing that the defendant was negligent in failing to ascertain the falsity or the defamatory character of the statement, or that he acted recklessly or knowingly in this regard, there remains little, if any, significance in the common law position that truth of the statement is a defense to be raised by the defendant and on which he had the burden of proof . . . . As a practical matter, in order to meet the constitutional obligation of showing defendant’s fault as to truth or falsity, the plaintiff will necessarily find that he must show the falsity of the defamatory communication.219

215. Id. § 613(1)(g). Compare RESTATEMENT OF TORTS § 613(1), (2)(a) (1938) with RESTATEMENT (SECOND) OF TORTS § 613 (1)(g), (2) (1977).
218. Id. at § 558(c).
219. Id. § 580B, Comment j; accord, id. § 613, Comment j.
Therefore, although the Restatement (Second) does not formally make the demonstration of falsity an element of the plaintiff’s case, the drafters have done so indirectly through their comments and by removing truth as an element of the defendant’s case. In so doing, they have followed what has been shown to be a fair reading of *Gertz*—that falsity is an element of the plaintiff’s case.

F. Effect on State Defamation Statutes

The law of defamation is almost exclusively a creature of the common law; a few states have, however, codified part of the law of defamation.\(^{220}\) The question facing the courts of these states is how *Gertz* has affected their constitutionality. In *Martin v. Griffin Television, Inc.*,\(^{221}\) the Supreme Court of Oklahoma held several statutory provisions unconstitutional under *Gertz* because they provided for a presumption of malice from the publication of injurious matter for which no justification could be shown and they required the plaintiff to show only that the defendant had published the allegedly defamatory statement.\(^{222}\) *Martin* is the only decision which has addressed this question, but statutes in other states appear equally vulnerable to constitutional challenge under *Gertz*.\(^{223}\)

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\(^{221}\) 549 P.2d 85, 90 (Okla. 1976).

\(^{222}\) *Id.* Section 1445 was held to be unconstitutional:

An injurious publication is presumed to have been malicious if no justifiable motive for making it is shown.

OKLA. STAT. ANN. tit. 12, § 1445 (1961). Portions of § 1443, concerning privileged communications, and § 1444, concerning the plaintiff’s burden of proof and the defendant’s defenses, were also held to be unconstitutional:

In all cases of publication of matter not privileged under this section, malice shall be presumed from the publication, unless the fact and the testimony rebut the same. . . .

*Id.* § 1443.

In all civil actions for libel or slander, it shall be sufficient to state generally what the defamatory matter was, and that it was published or spoken of the plaintiff, and to allege any general or special damage caused thereby, *and the plaintiff to recover shall only be held to prove that the matter was published or spoken by the defendant concerning the plaintiff*. . . .

*Id.* § 1444 (emphasis added) (emphasized portion held to be unconstitutional).

The relevant portions of the above sections were reprinted by the Oklahoma court in *Martin v. Griffin Television, Inc.*, 549 P.2d 85, 90 (Okla. 1976).

\(^{223}\) In light of the foregoing discussion regarding falsity becoming part of the plaintiff’s case after *Gertz*, *see* text accompanying notes 200–19 *supra*, the constitutionality of the Pennsylvania statute, PA. STAT. ANN. tit. 12, § 1584a (Purdon Cum. Annual Pocket Part 1977–78) (which codifies verbatim the burden of proof requirements of Restatement of Torts § 613 (1938)), is suspect. *See also* OKLA. STAT. ANN. tit. 12, § 1444 (1961). Constitutional challenges may also be raised against the Ohio statute, OHIO REV.
IV. CONCLUSION

In *Gertz v. Robert Welch, Inc.*, the Supreme Court once again struggled to accommodate the competing interests of the law of defamation and the first amendment. The effect of *Gertz* has been to shift the focal point of one aspect of this struggle from the Supreme Court to the state courts.

A majority of state courts have responded to the Court’s invitation in *Gertz* by adopting a negligence standard; a minority of jurisdictions have adopted a *Rosenbloom*-like standard, which involves a stricter test in certain cases. Regardless of what kind of fault standard a jurisdiction adopts, attention must be paid to the issues not expressly answered by the Court in *Gertz*. *Gertz*’s applicability is far-reaching and should not be limited to cases involving media defendants, defamation in the form of libel, or cases in which the subject matter of the defamation is a matter of public or general interest or concern. As in their selection of a standard of care, state courts have much leeway in the burden of proof they place on a plaintiff. They can match a fault standard with a burden of proof or temper a standard by a greater or lesser burden. In addition, *Gertz* has made proof of falsity an element of the plaintiff’s case in all defamation suits. The effect of this on state statutes may be substantial depending upon the degree to which, and manner in which, a state has codified its law of defamation.

It is difficult to predict whether *Gertz* will achieve a “proper” accommodation between the competing interests of reputation and freedom of expression. But *Gertz* has left the states with no choice but to consider the impact of state-protected interests on this problem. Although the analysis outlined in this article suggests that it is unnecessary, it is anticipated that state courts will struggle for many years to respond to the revolutionary mandate of *Gertz*.

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224. For example, state courts could combine a *Rosenbloom*-like standard with a preponderance of the evidence burden. See, e.g., Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975); notes 116–21 *supra* and accompanying text.