Constitutional Law--Defamation: Case Notes

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In *Time, Inc. v. Firestone* the Supreme Court considered the first amendment limitations on the liability of the media for publishing defamatory falsehoods in reports of judicial proceedings. The Court determined that the protection of the *New York Times v. Sullivan* standard, which requires proof of either knowledge of falsity or reckless disregard for the truth in the publication of statements about the official conduct of a public official, does not automatically extend to reports of judicial proceedings. The Court held that the standard to be applied by the states in fixing liability for defamatory falsehoods in reports of judicial proceedings must satisfy the requirements first enunciated in *Gertz v. Robert Welch, Inc.*, namely, proof of actual injury and a finding of some degree of fault. It declined, however, to further broaden the first amendment protection of the press.

*Firestone* presented the Court with an opportunity to extend the *New York Times* umbrella of first amendment protection to the narrow subject matter categorized as reports of judicial proceedings. This extension would have been appropriate because these reports are, by their nature, in the public interest. Moreover, they constitute a category of speech sufficiently definite to avoid the undue expansion of first amendment protection at which the Court's previous rejection of the "matters of public concern" test was aimed. The Court's disinclination to so expand the *New York Times* privilege leaves the freedom of the press to report judicial proceedings to the protection of the constitutional standards delineated in *Gertz*, standards which may prove inadequate. It is the purpose of this Case Note to discuss the impact of *Time, Inc. v. Firestone* on constitutional limitations to recovery in defamation actions against the media.

I. The Facts

On December 15, 1967, the Circuit Court of Palm Beach County, Florida, granted the divorce requested by Russell Firestone, heir to the tire fortune, from Mary Alice Firestone. The initial complaint for separate maintenance had been filed by Mrs. Firestone; her husband counterclaimed for divorce on grounds of extreme cruelty.

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1 424 U.S. 448 (1976).
and adultery, and the lengthy trial that followed became a *cause celebre* in social circles. The circuit court opinion, hardly a model of clarity, did not specify the grounds on which the divorce had been granted. The opinion read in part, "the equities in this cause are with the defendant; that defendant's counterclaim for divorce be and the same is hereby granted." However, the decision also alluded to testimony of marital infidelity by both parties, discounted much of it, and later in the opinion granted an award of alimony to Mrs. Firestone.

The editorial staff of *Time* magazine was alerted to the fact that a final judgment had been rendered in the Firestone divorce proceeding. On the basis of four sources a news item was composed and included in the December 22, 1967, issue. The item, in the "Milestones" section of the newsmagazine, appeared as follows:

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

Within a few weeks Mrs. Firestone demanded a retraction from *Time*, alleging that a portion of the article was "false, malicious, and defamatory." Time declined to issue the requested retraction, and Mrs. Firestone brought a libel action in the Florida courts.

The libel action in the Florida circuit court resulted in a jury verdict for Mrs. Firestone, and judgment in the amount of $100,000 for mental pain and anguish. The Florida District Court of Appeals reversed the judgment on constitutional grounds, basing its decision on *Rosenbloom v. Metromedia, Inc.* In *Rosenbloom* the United States Supreme Court extended the *New York Times* umbrella of first amendment protection to press coverage of events

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1. 424 U.S. at 454.
2. Id. at 468 (Powell, J., concurring).
3. Id. at 451.
4. Id. at 450-51.
5. Id. at 451.
6. Id. at 452 (emphasis added).
7. "Under Florida law the demand for retraction was a prerequisite for filing a libel action, and permits defendants to limit their potential liability . . . by complying with the demand." 424 U.S. at 452 n.1. See Fla. STAT. ANN. §§ 770.01, 770.02 (1963).
in the public interest. The Supreme Court of Florida reversed the district court decision, stating that the subject matter of the publication was not a "matter of public interest" as that term was used in *Rosenbloom*, and denied the protection of the constitutional privilege. The supreme court indicated that on remand the district court should apply the Florida common-law standard of liability for defamation actions, which imposes strict liability in cases of defamatory falsehoods. On remand the district court maintained its reversal of the lower court's judgment, this time on common-law grounds. On final review the Florida Supreme Court held that no common-law privileges applied to the published item, and affirmed the judgment of the trial court in favor of Mrs. Firestone. One element that probably added to the difficulties of the Florida courts in reaching a final determination in this case was the fact that the constitutional principles governing common-law defamation actions were being reviewed and revised by the United States Supreme Court during the time the litigation moved through the Florida appellate process.

II. THE CONSTITUTIONAL BACKGROUND

The tort of defamation, in form either libel or slander, is essentially an invasion of the interest of reputation and good name. The law governing recovery for defamation was, until 1964, solely the business of the states, untouched by the limitations of the first amendment: "Under typical state defamation law, the defamed private citizen had to prove only a false publication that would subject him to hatred, contempt, or ridicule." Libelous words were generally viewed as a class of speech wholly unprotected by the Constitution. *New York Times v. Sullivan* changed this analysis significantly. In that case, the Supreme Court of Alabama affirmed a judgment in favor of a state official allegedly defamed by statements published in the *New York Times*. The Supreme Court, in a unanimous decision, reversed the state court's decision and determined that there was a first amendment privilege protecting criticism of the official conduct of public officials. This constitutional privilege pro-

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15 271 So. 2d 745 (Fla. 1972).
17 305 So. 2d 172 (Fla. 1974).
19 See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 111, at 737 (4th ed. 1971) [hereinafter cited as PROSSER].
21 *Id.*
hibits a public official from recovering damages for a defamatory falsehood concerning his official conduct absent proof that the statement was made with either knowledge of falsity or reckless disregard for the truth. The Court reasoned that one of the central functions of the first amendment is to assure an opportunity for free and vigorous political discussion, in order to make government responsive to the people. Without this constitutional protection the states would be able to impose standards for determining liability that would inhibit public debate:

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . "self-censorship." 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.

Such self-censorship would act as a prior restraint on the press and would be contrary to the first amendment.

The Supreme Court in Curtis Publishing Co. v. Butts included within the privilege reports about parties classed as "public figures." The defamation plaintiffs involved were classed by the Court as public figures because "they commanded a substantial amount of independent public interest at the time of the publications." The enunciation of the first amendment privilege in New York Times, and the extension of that privilege to defamation actions brought by public figures, suggested that a continuing expansion of constitutional limitations to recovery in defamation actions was both logical and inevitable.

The extension of the New York Times privilege to include publications of defamatory falsehoods pertaining to "matters of public concern" appeared certain after the decision in Time, Inc. v. Hill.

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23 Id. at 279.
24 Id. at 269.
25 Id. at 279.
26 388 U.S. 130 (1967).
27 Id. at 154.
29 385 U.S. 374 (1967). This case involved application of a New York privacy statute. Although Hill was not a defamation action, the holding of the Court indicated that the reasoning would apply in defamation actions:

We hold that the constitutional protections for speech and press preclude the applica-
and was apparently accomplished by the decision in *Rosenbloom v. Metromedia, Inc.* Justice Brennan, writing for the plurality in *Rosenbloom*, determined that the *New York Times* protection should extend to defamatory falsehoods relating to private persons if the statements concerned "matters of public or general interest." Thus it appeared that the news media was to have a broad constitutional protection for reporting events in the public interest.

The expansion of the privilege that had begun with *New York Times* was halted, and its extension in *Rosenbloom* was reversed, by the Supreme Court's decision in *Gertz v. Robert Welch, Inc.* In *Gertz* the Court repudiated the *Rosenbloom* extension of the *New York Times* privilege to "matters of public concern." However, the Court affirmed the application of the constitutional privilege if the defamation plaintiff was either a "public official" or a "public figure." The Court thus affirmed the first amendment principles enunciated in *New York Times* and *Butts*. Additionally, the Court announced two first amendment limitations to recovery by a defamation plaintiff against a media defendant, thereby effectively "constitutionalizing" major areas of the law of defamation. The first limitation prohibits the states from imposing liability without fault, but leaves it to the states to define for themselves the appropriate standard of liability. The second requirement restricts defamation plaintiffs to compensation for "actual injury," unless there is some proof of either knowledge of falsity or reckless disregard for the truth. With the enunciation of these two first amendment principles, the Court created a new constitutional law of defamation, some of it fashioned out of whole cloth. This major ruling in defamation law is now being evaluated and criticized by courts and commentators.

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Id. at 387-88.


412 U.S. at 44.


418 U.S. at 347.

Id. at 349.

See Eaton, supra note 33, at 1410.
alike.\textsuperscript{37} \textit{Time, Inc. v. Firestone} provides an opportunity to study its application and effect.

III. Application of the \textit{New York Times} Privilege to Reports of Judicial Proceedings

In \textit{Firestone} the Court totally abandoned the use of the \textit{Rosenbloom} "subject matter" test in the application of the \textit{New York Times} rule—that is, the Court decided that it would no longer attempt to ascertain whether the publication in question concerned a "matter in the public interest."\textsuperscript{38} Instead, the Court determined that respondent was not a "public figure" as meant by \textit{Butts} and \textit{Gertz}, and therefore held the \textit{New York Times} standard inapplicable.\textsuperscript{39} The protection afforded factually correct reports of judicial proceedings in \textit{Cox Broadcasting Corp. v. Cohn}\textsuperscript{40} was also held not to apply in this instance. Additionally, the Court applied the constitutional principles developed in \textit{Gertz}, further explaining their meaning and effect. The principles developed in these cases, as discussed by the Court in \textit{Firestone}, now comprise the framework of constitutional protection afforded published reports of judicial proceedings.

A. The Common-Law Background

At common law there is a generally recognized privilege that protects some reports of judicial and other public proceedings against defamation actions.\textsuperscript{41} The justification for this privilege is the public's interest in information concerning governmental affairs.\textsuperscript{42} When the privilege applies it is usually qualified in some manner. Some jurisdictions extend the privilege only if the report in question can be characterized as fair and accurate.\textsuperscript{43} The privilege may be lost if the report is published solely for the purpose of defaming a person and not for the purpose of informing the public.\textsuperscript{44} It is up to the individual states to determine whether or not to extend this privilege, and to what extent. Generally, however, the common law of defamation extends

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\begin{itemize}
    \item \textsuperscript{38} 424 U.S. at 455.
    \item \textsuperscript{39} Id.
    \item \textsuperscript{40} 420 U.S. 469, 491 (1975). \textit{See} notes 46 & 47 \textit{infra} and accompanying text.
    \item \textsuperscript{41} \textit{See} Prosser, \textit{supra} note 19, § 118, at 830.
    \item \textsuperscript{42} Id.
    \item \textsuperscript{43} Id. at 832.
    \item \textsuperscript{44} \textit{See} Restatement (First) of Torts § 611, comment \textit{a} (1938).
\end{itemize}
special treatment to publications whose subject matter is a report of a judicial proceeding, due to the public interest served by publicizing such information.\textsuperscript{45}

B. \textit{Factually Accurate Reports of Judicial Proceedings}

The Supreme Court opinion developing the first amendment privilege to report judicial proceedings was the decision in \textit{Cox Broadcasting Corp. v. Cohn}.\textsuperscript{46} In \textit{Cox Broadcasting} the Court held that the states may not impose sanctions for the publication of truthful information contained in official court records open to the public.\textsuperscript{47} The petitioner in \textit{Firestone} sought to have the reasoning of \textit{Cox Broadcasting} extended to safeguard even inaccurate and false statements, at least when neither knowledge of falsity nor reckless disregard for the truth had been established.\textsuperscript{48} The Court rejected this extension of the holding, and determined that the constitutional protection of \textit{Cox Broadcasting} extends only to published reports that are absolutely accurate.\textsuperscript{49}

The final "accurate" interpretation of the decree in the \textit{Firestone} divorce proceeding was arrived at in a rather obscure manner. The Florida Supreme Court's explanation of the final determination of the grounds for divorce illustrates the difficulty one would have had in discovering them:

In reviewing the divorce proceeding on certiorari, this court expressly determined that the trial judge "did not find the wife guilty of adultery." Rather, it was pointed out that the divorce was granted for lack of "domestication," in the language of the trial judge, which of course was not one of the statutory grounds at the time of divorce. We affirmed the decree . . . , but on the ground of "extreme cruelty" . . . .\textsuperscript{50}

This illustrates that it can be difficult to accurately report to the public court decisions, which are often ambiguous and complex. Indeed, Justice Brennan, in his dissenting opinion in \textit{Firestone}, pointed

\textsuperscript{45} See \textit{Prosser}, supra note 19, § 118, at 831.
\textsuperscript{46} 420 U.S. 469 (1975). The case involved an action for damages brought by a rape victim's father, in reliance on a Georgia statute making it a misdemeanor to broadcast a rape victim's name. The father claimed that his right to privacy had been invaded by the broadcast of his daughter's name. The information broadcast about the rape victim had been obtained from the indictments, which were public records available for inspection. Since \textit{Cox Broadcasting} was a privacy action, its interpretation and effect in defamation actions was uncertain.
\textsuperscript{47} \textit{Id.}
\textsuperscript{48} \textit{Id.} at 448.
\textsuperscript{49} \textit{Id.} at 457.
\textsuperscript{50} 271 So. 2d at 746 n.1.
out that the probability of inadvertent error in reports concerning the judicial process is great "in view of the complexities of that process and its unfamiliarity to the laymen who report it."\(^5\)

There is perhaps no area of news more inaccurately reported factually . . . than legal news. . . . With too rare exceptions [a reporter's] capacity for misunderstanding the significance of legal events and procedures, not to speak of opinions, is great. But this is neither remarkable nor peculiar to newsmen. For the law, as lawyers best know, is full of perplexities.\(^5\)

Exacerbating the precarious position of the reporter of judicial proceedings is the lack of constitutional protection for a rational interpretation of an ambiguous document when the *New York Times* "actual malice" standard does not apply.\(^5\) The fact that a standard higher than negligence does not apply to inaccurate statements makes the reporter of judicial proceedings extremely vulnerable to liability for defamation. In view of its application in *Firestone*, the requirement that the published item be factually accurate substantially limits the degree of effective protection from self-censorship that the extension of the *Cox Broadcasting* privilege sought by petitioner might have provided.


The first amendment privilege established in *New York Times* v. *Sullivan* provides effective protection against self-censorship by requiring a high degree of culpability on the part of a defamation defendant. The extension of the *New York Times* privilege to "public figures" focused on the individual who was allegedly defamed, rather than on the subject matter of the speech containing the defamatory statement. The public figure test relies on an assumption that, for

\(^5\) 424 U.S. at 478-79. (Brennan, J., dissenting).

\(^6\) Id. at 479-80, (quoting Pennekamp v. Florida, 328 U.S. 331, 371-72 (1946) (Rutledge, J., concurring)).

\(^7\) 424 U.S. at 459 n.4. This was how the Court construed *Time, Inc. v. Pape*, 401 U.S. 279 (1971). *Pape* involved a defamation plaintiff who was a "public official" as defined by *New York Times v. Sullivan*. The defamatory statement made by *Time* was one of many possible rational interpretations of a document that bristled with ambiguities. The Court determined that in this instance the *New York Times* privilege provided constitutional protection against liability for errors of interpretation as well as fact.

*Prosser*, supra note 19, § 118, at 830, interpreted *Time, Inc. v. Pape* to create a privilege for reports of public documents, even inaccurate ones, unless made with either knowledge of falsity or reckless disregard of the truth. As the *Firestone* opinion construes *Pape*, however, there must be a basis other than a "rational interpretation of an ambiguous document"—i.e., the presence of a "public official" or "public figure"—for the extension of the *New York Times* privilege.
purposes of first amendment protection of free speech, all information is of equal importance to the public. That analysis is inappropriate when dealing with reports of judicial proceedings since these reports constitute a subject matter of speech inherently of interest to the public, and their importance requires an uninhibited dissemination of information.

1. The Public Figure Test

It is clear after Firestone that publications of reports of judicial proceedings do not automatically receive the constitutional protection of the New York Times privilege. The decision in Firestone to reject the subject matter test indicates that the New York Times privilege is restricted to cases in which the defamation plaintiff is a "public official" or "public figure." In restricting the analysis to the character of the individual allegedly defamed, rather than considering the nature of the speech, the Court continued to look at the wrong issue. Indeed, the Court seemed to recognize the necessity of considering the subject matter of speech, when it considered the nature of the "public controversy" involved in the public figure test.

The majority opinion sheds light on the meaning of "public controversy" and the constitutional protection a report of a judicial proceeding would receive were a public figure involved. The Court considered two criteria in determining that Mrs. Firestone was not a public figure. The first criterion applied was whether the individual had thrust himself to the forefront of a particular controversy in order to affect its resolution. In applying this requirement, the Court held that Mrs. Firestone had not thrust herself to the forefront of a public controversy. Thus an individual gaining prominence passively or involuntarily is not a public figure for purposes of the first amendment.

The opinion of the Court in Firestone also puts special emphasis on the nature of the "public controversy" that is required for an individual to be a public figure. In its discussion the Court indicated that all controversies of interest to the public are not necessarily in

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51 The Court in Gertz also entered into an extensive discussion of the meaning of the term "public figure." 418 U.S. 323, 351-53.
52 Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974). The Court in Gertz did recognize a class of "public figures" who, because of general fame or notoriety in the community, and pervasive involvement in the affairs of society, would be deemed public figures for all aspects of their lives. 418 U.S. at 352. It may be interpreted from this that public figures of this type would be subject to constitutional limitations on recovery for defamation without necessarily "thrusting themselves" forward into the public eye. The Court in Firestone did not consider any possibility of Mrs. Firestone's belonging to this category.
53 424 U.S. at 453.
the nature of a public controversy, and determined that dissolution of a marriage through judicial proceedings was not the type of public controversy referred to in *Gertz.*

However, in making such an assessment of a public controversy, the Court entered into a discussion of the term “public controversy” that resurrects the precise difficulties that *Gertz* was designed to avoid. A major concern in *Gertz* was that “matters of public concern” is an excessively vague definition of a protected area of speech. The Court was concerned that it would be necessary for the lower courts to become involved in what Justice Marshall characterized in his dissent in *Rosenbloom* as “the dangerous business of deciding what information is relevant to self-government.” In the analysis of the public figure issue in *Firestone,* however, the Court inquired into the nature of the controversy involved, an analysis similar to the subject matter test rejected in *Gertz.*

The Court’s conclusion that the controversy was insignificant, *i.e.* not a public controversy, was not based on articulated standards, and undoubtedly was based to some degree on the subjective judgment of the Justices. While the Court may have clarified the issues for determining whether an individual is a public figure, it has not yet set forth predictable standards for the lower courts to apply in making this determination. Nevertheless, it is clear that if a public figure is the subject of a defamatory statement in a report of a judicial proceeding, the publisher will be extended the constitutional protection of the *New York Times* standard in a defamation action.

2. The Subject Matter Test

The holding in *Firestone* that reports of judicial proceedings are not automatically within the protection of the *New York Times* rule is a continuation of the Court’s retreat from the *Rosenbloom* expansion of constitutional privilege—a retreat begun by the Court’s rejection in *Gertz* of the subject matter test. The Court reasoned as follows:

Presumptively erecting the *New York Times* barrier against all plaintiffs seeking to recover for injuries from defamatory falsehoods

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57 *Id.* at 454.
58 See 424 U.S. at 488 (Marshall, J., dissenting).
59 418 U.S. at 339.
60 If an individual who is not a public figure were defamed in a report of a judicial proceeding concerning a “public official” or “public figure,” the *New York Times* rule presumably would not be applicable in a suit by that individual after *Firestone.* See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).
61 424 U.S. at 456.
published in what are alleged to be reports of judicial proceedings would effect substantial depreciation of the individual's interest in protection from such harm, without any convincing assurance that such a sacrifice is required under the First Amendment. 62

The Court has thus continued to focus on the individual involved in the defamation action, rather than on the informational value of the speech.

The Court in Firestone conceived its role in defamation actions involving the media to be to strike a balance between "the public's interest in an uninhibited press and its equally compelling need for judicial redress of libelous utterances." 63 In Gertz the Court had determined that the legitimate state interest in compensating injury to the individual's reputation is substantially greater when the individual is not a public official or public figure. 64 In Firestone the issue of the proper balance to be struck was complicated by the fact that reports of judicial proceedings were involved, a subject matter inherently important to the public. The Court, however, was satisfied that the interests clashing here were substantially the same as those present in Gertz, and that the balance struck there applied.

The error in the Court's resolution of this problem is that, while the analysis in Gertz of the interest in protecting an individual's reputation may have been applicable to the defamation plaintiff in Firestone, 65 the analysis concerning the competing interest of first amendment protection of free speech was not. 66 This competing interest in Gertz was analyzed only in relation to the broad category of speech concerning "matters in the public concern." Undue expansion of that class of speech was thought to be inevitable because of the vagueness of that category. 67 The possibility of such an unlimited expansion of the application of the New York Times privilege clashed

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62 Id.
63 Id. at 456-57.
64 418 U.S. at 345.
65 Justice Marshall, dissenting in Firestone, considered respondent to be a "public figure" within the meaning of Gertz and Butts. 424 U.S. at 489-90.
66 The published article that contained the defamatory statements in Gertz was part of a continuing effort of the magazine American Opinion to alert the public to an alleged nationwide communist conspiracy. The article was political in nature, was not a report of a judicial proceeding, and was not considered by the Court to be a report of a judicial proceeding. The defamatory statements accused a lawyer, Elmer Gertz, of having been an official of Marxist organizations advocating violent overthrow of the government, and labeled Gertz as a "Leninist" and a "Communist-fronter." 418 U.S. at 325-26.
67 Many cases have employed the concept of "matters of public concern" to reach decisions in situations involving an alleged libel of a private individual. For citation to representative cases, see Comment, The Expanding Constitutional Protection for the News Media from Liability for Defamation: Predictability and the New Synthesis, 70 Mich. L. Rev. 1547 (1972).
with the Court's concern with providing adequate protection to the interest in reputation. The Court recalled Justice Marshall's dissent in the *Rosenbloom* decision, and reiterated his apprehensions that the courts might become involved "in the dangerous business of deciding what information is relevant to self-government."68 However, the type of speech at issue in *Firestone* is a less expansive, more definite category of speech not nearly as susceptible to unlimited expansion as is the phrase "matters in the public concern."69 By extending the *New York Times* rule to cover only this subject matter, the Court would have avoided involvement in Justice Marshall's "dangerous business." This would have kept the courts removed from political debate, leaving them with only the factual determination of whether a published item was a bona fide report of a judicial proceeding.70

Reports of judicial proceedings are by their nature in the public interest, especially to those concerned with the administration of government, and a public benefit is served when the media report them.71 Justice Brennan, in the majority opinion in *New York Times* v. *Sullivan*, stated that "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" is a central principle of the first amendment.72 The profound and extensive involvement of the judicial branch in American government and society indicates the need for public scrutiny of its decisions. Reports of judicial proceedings could have been extended the protection of the *New York Times* privilege on the basis of the indispensable service the media perform by subjecting judicial processes to public criticism.73 As stated in *Cox Broadcasting*: "With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice."74 The Court reasoned in that case that freedom to report information contained in public court records was "of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business."75 In the view of Justice Rehnquist writing for the Court in *Firestone*, however, "[t]he details

69 The Court in *Cox Broadcasting v. Cohn* had no difficulty with determining whether or not a published statement was a report of a judicial proceeding. 420 U.S. 469 (1975).
70 *Id.* at 495.
71 Cf. notes 41 & 42 *supra* and accompanying text.
72 376 U.S. at 270.
75 *Id.* at 495.
of many, if not most, courtroom battles would add almost nothing towards advancing the uninhibited debate on public issues thought to provide principal support for the decision in *New York Times*.'

The Court thus adopted the method of accommodation between the competing interests that had been developed in *Gertz*, dismissing the difference in first amendment interests that should have resulted in extension of the *New York Times* privilege.

*New York Times* and its progeny extended the first amendment protection of free speech because of the Court's belief that "to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones." Without constitutional protection of some erroneous publications a publisher would be subject to pressures that would inevitably lead to self-censorship. For even with a great expenditure of time and effort in attempting to ensure a true report, if the report was eventually determined to be false, the publisher might be subject to liability. Thus, as shown above, a standard of liability short of the *New York Times* test affords inadequate protection of the press for reports of judicial proceedings.

IV. THE CONSTITUTIONAL REQUIREMENTS OF *Gertz*

The Court in *Firestone* believed that the constitutional limitations announced in *Gertz*, though short of the protection of the *New York Times* standard, were an adequate safeguard for the interests of free expression, and provided the necessary "breathing space" for the press in publishing reports of judicial proceedings. However, close scrutiny of the application of these limitations in *Firestone* demonstrates that they afford very little protection to media defendants.

A. Proof of Fault

One constitutional requirement articulated in *Gertz* is that there must be some finding of fault on the part of a defendant charged with publishing defamatory material. The Court left it up to the states to establish their own standards of liability. A defamation plaintiff

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24 U.S. at 457.


24 U.S. at 457.

Some state common-law privileges, such as the "fair comment" privilege, may be effective in protecting freedom of expression. In addition, some states may reject the *Gertz* reasoning and return to *Rosenbloom* standards, since *Gertz* establishes only minimum requirements.

418 U.S. at 346.
may be required to prove only a publisher's lack of ordinary care, or a state may hold a publisher to a lesser duty of care and require proof of reckless disregard for the truth.\textsuperscript{81} There must be in all cases a conscious weighing of the evidence at some level of decision to determine whether there was actionable negligence. Such a finding may be made in the first instance by an appellate court.\textsuperscript{82} It was the absence of any apparent assessment of the issue of fault that resulted in the order to vacate the judgment of the Supreme Court of Florida.\textsuperscript{83} The\textit{ Firestone} explanation of the requirements of a fault standard should enable courts to avoid this problem in the future by making an explicit determination of fault.

The protection against liability for defamation provided by a simple fault standard is inadequate to protect freedom of expression. Its dependence on the idiosyncracies of the jury make it an unpredictable standard that could result in self-censorship:

No one with the slightest appreciation for the myriad uncertainties of common law negligence would rely on the belief that reasonable care will preclude an adverse verdict. If the common law concept of negligence is applied to defamation, the extent of a publisher's constitutional protection will depend on a jury's relatively unfe
terred, ex post facto appraisal of his conduct, and since the publisher has no way of knowing how large the jury will make the prohibited zone, he has no choice but to steer wide of it.\textsuperscript{84}

Because of this reliance on the determination of the jury, it is important that a review be made of the evidentiary basis for that determination. The opinion of the Court in\textit{ Firestone} was expressly concerned with whether a finding of fault had been made and, because of this focus, did not reach the issue of the sufficiency of the evidentiary basis supporting that finding. The Court did indicate that its review might extend to the evidentiary basis of a finding of fault when it stated: "If we were satisfied that one of the Florida courts which considered this case had \textit{supportably} ascertained petitioner was at fault, we would be required to affirm the judgment below."\textsuperscript{85} Unless the Court is willing to review findings of negligence made by the

\textsuperscript{81} 424 U.S. at 464-65 (Powell, J., concurring).
\textsuperscript{82} \textit{Id.} at 461: "Nothing in the Constitution requires that the assessment of fault in a civil case tried in a state court be made by a jury, nor is there any prohibition against such a finding being made in the first instance by an appellate, rather than a trial, court."
\textsuperscript{83} In\textit{ Firestone}, two Justices, Marshall and White, thought that there was a conscious finding of fault in the Florida Supreme Court. Four Justices, Marshall, Powell, Stewart, and Brennan, believed such a finding was not supported by the evidence.
\textsuperscript{84} Anderson,\textit{ Libel and Press Self-Censorship}, 53 Tex. L. Rev. 422, 460 (1975).
\textsuperscript{85} 424 U.S. at 461-62 (emphasis added).
state courts, the standards imposed by the states could in effect approach strict liability, and the constitutional protection provided reports of judicial proceedings by the proof of fault requirement would lack effectiveness.

B. Actual Injury

The second constitutional requirement articulated in the Gertz decision is that defamation plaintiffs must prove and can recover only for “actual injury.” The significance of this aspect of the decision is the requirement of proof of any alleged injury. The common-law presumption of damages and potential assessment of punitive damages were made unconstitutional in a defamation action against media defendants, absent proof of reckless disregard for the truth. In this respect this new constitutional principle wrought a radical change in the law of defamation. The Court justified the requirement of proof of actual injury by reference to the inhibiting effect gratuitous awards of money damages greatly in excess of injury might have on free expression: “The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms.”

The Court’s requirement of proof of actual injury created ambiguity, however, about the extent to which the Supreme Court was taking over the law of defamation. The Court in Gertz did not define the term “actual injury,” and it was unclear whether the Court intended to limit the types of injuries for which damages could be recovered in a defamation action, or simply to require proof of actual injury of any type. Time’s theory in Firestone is evidence of the confusion possible after the Gertz decision. Time argued that, because of the withdrawal of any claim for damages to reputation, there could be no recovery for any other damages—e.g., emotional injury—consistent with Gertz. The Firestone decision clarified the ambiguity by indicating that these aspects of the law of defamation, i.e., the types of injuries recoverable and whether a claim of injury to reputation was a prerequisite to recovery, were still for the individual states to resolve. As the Firestone Court interpreted the Gertz decision, in the area of damages the Constitution required competent

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84 418 U.S. at 348-50.
85 Id.
87 424 U.S. at 461.
evidence concerning the injury, and no more. Thus state courts are free "to permit recovery for other injuries [in a defamation action] without regard to . . . the effect the falsehood may have had upon a plaintiff's reputation." The damages recovered in Firestone indicate that the Gertz proof of actual injury requirement may fail to adequately protect a publisher from the unlimited damage awards it was designed to prevent. The Firestone Court explained that the state courts may establish the damages available to a defamation plaintiff, indicating that the states may adopt a broad concept of actual injury. The disposition of the damages issue in the Florida courts indicates the breadth of discretion remaining in the state courts. The Supreme Court in Firestone failed to consider that the Florida courts’ disposition of the damages issue negated the policy justification of the proof of actual injury requirement in Gertz.

In addition, it appears that the Supreme Court will not question large recoveries permitted by state courts, even when based on rather flimsy evidence. This is indicated by what the Supreme Court in Firestone thought to be sufficient evidence to support the $100,000 award for emotional damages:

The witnesses who testified included respondent's minister, her attorney in the divorce proceedings, plus several friends and neighbors, one of whom was a physician who testified to having to administer a sedative in an attempt to reduce respondent's discomfort wrought by her worrying about the article.

The ability of the state courts to expand recoverable damages indicates that the Gertz principle may not achieve the control of largely discretionary monetary awards that the Gertz Court intended.

Thus the open-ended nature of a defamation plaintiff's available...
damages casts doubt upon the effectiveness of the constitutional requirement of proof of actual injury in providing first amendment protection for reports of judicial proceedings. An application of the New York Times privilege to this category of speech would have avoided the problems involved in applying the principles enunciated in Gertz, since there would then be no question of the effectiveness and degree of constitutional protection afforded this limited subject matter.

V. CONCLUSION

The First Amendment insulates from defamation liability a margin for error sufficient to ensure the avoidance of crippling press self-censorship in the field of reporting public judicial affairs. To be adequate, that margin must be both of sufficient breadth and predictable in its application.44

Time, Inc. v. Firestone presented a situation in which the first amendment interests in reports of judicial proceedings should have supported application of the New York Times privilege to this limited area of speech. This would have provided an adequate margin for reporting public judicial affairs. Instead, the Court indicated its intention to let that margin for error be defined primarily by the constitutional principles first enunciated in Gertz. But the ability of the states to expand the concept of "actual injury," as did the Florida courts, indicates that the margin for error was not broadened by this requirement. In addition, while the "proof of fault" requirement may provide a wider margin for error than common-law strict liability, it lacks predictability because of its dependence on the nuances of the jury. The important constitutional interest in freedom to report judicial proceedings requires a greater level of protection for that limited class of speech than the Gertz standards provide. There is the possibility under Cox Broadcasting of the greater constitutional protection of the New York Times rule in specific circumstances, but its application is severely restricted and does little to add breadth to the margin for error.

The Court has chosen to adopt the Gertz privileges for reports of judicial proceedings, and the impact of this on first amendment freedom of the press can be understood only in terms of its practical effects. With Gertz providing the only "breathing space" for publications reporting public judicial affairs, publishers must be especially concerned about the degree of constitutional protection they may

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44 Id. at 481 (Brennan, J., dissenting).
have. They must be aware of the possibility of a defamatory falsehood any time it is not possible to quote a source verbatim. This will not be possible in many situations, because of the length or the complexity of the source.

[N]o less true than in other areas of government, error in reporting and debate concerning the judicial process is inevitable. Indeed, in view of the complexities of that process and its unfamiliarity to the laymen who report it, the probability of inadvertent error may be substantially greater.\cite{15 Id. at 478-79.}

If a publisher wishes to use his own interpretation or abridged version, he is confronted with some serious and difficult decisions. One option, and perhaps the only safe one, is not to publish. The role of the first amendment in the area of defamation is to prevent such a decision. A publisher's alternative, however, is to seek legal advice, exercise care in the publication of the report, and still face the possibility of lengthy litigation and an adverse judgment. When publishers are confronted with such alternatives, the opportunities for the self-censorship decried by \textit{New York Times} multiply, resulting in a decrease in information reaching the public about the workings of their government.

\textit{Glenn E. Bost II}