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# FLORIDA DEFAMATION LAW AND THE FIRST AMENDMENT: PROTECTING THE REPUTATIONAL INTERESTS OF THE PRIVATE INDIVIDUAL

JOSEPH KENT BROWN

The role of the private individual<sup>1</sup> in the law of defamation<sup>2</sup> has historically been a subject of extensive judicial concern and scholarly debate.<sup>3</sup> Today all states have defamation laws which provide redress to private individuals whose reputational interests have been damaged by defamatory publications. Essentially, these laws seek to balance two strong and often competing values: the freedom of speech and press<sup>4</sup> and the reputational interests of the pri-

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1. As defined by the courts, a "private individual" is one who cannot be categorized as either a "public official" or a "public figure." See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343-44 (1974). The term "public official" has been defined to apply to "those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). See *Time, Inc. v. Pape*, 401 U.S. 279 (city police officer) *reh'g denied* 401 U.S. 1015 (1971); *St. Amant v. Thompson*, 390 U.S. 727 (1968) (deputy sheriff); *Rosenblatt*, 383 U.S. 75 (1966) (former supervisor of municipal ski resort); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (elected city commissioner). The term "public figure" has been defined to include those who "have assumed roles of especial prominence in the affairs of society," or who occupy "positions of such persuasive power and influence that they are deemed public figures for all purposes," *Gertz*, 418 U.S. at 345, or those who voluntarily inject their "personality into the 'vortex' of an important public controversy." *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967) (former college football coach was held to be a public figure); *Greenbelt Coop. Publishing Ass'n v. Bressler*, 398 U.S. 6 (1970) (prominent real estate developer); *Associated Press v. Walker*, 388 U.S. 130 (1967) (retired army general turned political activist who led a group of demonstrators in a racial disturbance). It is clear, however, that the media cannot create a "public figure" by virtue of its coverage of an individual and then claim the defense of lack of actual malice. *Hutchinson v. Proxmire*, 443 U.S. 111, 134-35 (1979). See *infra* text accompanying notes 119 & 121 for a discussion of the application of the actual malice requirement for public officials and public figures.

2. Defamation, including both libel and slander, is defined by the Florida courts as "the unprivileged publication of false statements which naturally and proximately result in injury to another." *Wolfson v. Kirk*, 273 So. 2d 774, 776 (Fla. 4th DCA 1973).

3. See generally *Anderson, Libel and Press Self-Censorship*, 53 TEX. L. REV. 422 (1975); *Eaton, The American Law Of Defamation Through Gertz v. Robert Welch, Inc. And Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975) [hereinafter cited as *Eaton*]; *Robertson, Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199 (1976) [hereinafter cited as *Robertson*]. See also Meiklejohn, *Public Speech and the First Amendment*, 55 GEO. L. J. 234 (1966); *Pedrick, Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L. REV. 581 (1964).

4. The freedoms of speech and press are among those rights guaranteed by the first amendment. The first amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. In accord with the usage adopted by the United States Supreme Court, this comment does not distinguish between the freedom of speech and press clauses of the first amendment. See *Lange, The Speech and Press Clauses*, 23 U.C.L.A. L. REV. 77 (1975). Some commentators have suggested, however, that the two clauses are distinct and have individual meaning. See *Nim-*

vate individual.<sup>5</sup>

Few rights are more central to the continued maintenance and viability of a democratic society than the constitutional guarantee of freedom of speech and press.<sup>6</sup> It cannot be too often repeated that we are a nation committed to the principle that discussion on matters of public significance should be uninhibited and robust.<sup>7</sup> A necessary concomitant to the advancement of this national philosophy is the recognition of a press that is free and unrestrained by censorship.<sup>8</sup>

Conscious of its virtue, however, a free press can often be abusive of its rights.<sup>9</sup> The advent of increased technological and economic developments in the field of mass communications has allowed contemporary media the means to disseminate information on a scale previously unobtainable.<sup>10</sup> In its contest for mass audi-

mer, *Introduction - Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975); Address by Mr. Justice Stewart, Yale Law School Sequicentennial Convocation, November 2, 1974, reprinted in Stewart, "Or of the Press," 26 HASTINGS L.J. 631 (1975).

5. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Justice Stewart has stated, "[t]he right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty." *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring). Moreover, the protection of an individual's reputation represents important underlying social values:

The repute in which one is held among his fellow men has been proved by the experience of the human race to be a most potent factor in determining his moral, social, and even material well-being. . . . Accordingly no system of civil law can fail to take some account of the right to have one's reputation remain untarnished by defamation.

1 T. STREET, *THE FOUNDATIONS OF LEGAL LIABILITY* 274 (1960).

6. The constitutional guarantee of freedom of speech and press "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359, 369 (1931).

7. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270-71 (1964). (The Court emphasized our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.").

8. Thomas Jefferson, who presented some of the first modules of American thinking on the subject of free speech and press, observed that, "[t]he only security of all is in a free press," and that "[t]he force of public opinions cannot be resisted, when permitted freely to be expressed." *Ross v. Gore*, 48 So. 2d 412, 415 (Fla. 1950).

9. THE COMMISSION ON FREEDOM OF THE PRESS, *A FREE AND RESPONSIBLE PRESS: A GENERAL REPORT ON MASS COMMUNICATION: NEWSPAPERS, RADIO, MOTION PICTURES, MAGAZINES, AND BOOKS*. 1 (1947) [hereinafter cited as *GENERAL REPORT*.]

10. *Id.* at 30.

ence, contemporary media's exercise of its awesome power to exploit and manipulate public opinion can result in devastating effects on the reputational interests of a private individual.<sup>11</sup>

Although society must necessarily tolerate some abuse in exchange for the advantages arising out of an uncensored press,<sup>12</sup> the first amendment was not intended to allow the press its own jurisprudence.<sup>13</sup> Of considerable importance in our society is the right of an individual to protect his or her reputation from false, irresponsible or malicious publications.<sup>14</sup> Thus, the freedoms of speech and press and the reputational interests of private individuals often conflict.

The law of defamation has evolved in an attempt to balance these two apparently irreconcilable interests.<sup>15</sup> Prior to 1964, common law defamation principles governed the standards of liability to be established by plaintiffs in defamation actions.<sup>16</sup> Absent the affirmative defenses of truth<sup>17</sup> or privilege,<sup>18</sup> the publisher of defamatory statements was subjected to strict liability.<sup>19</sup> In 1964, the United States Supreme Court recognized that these harsh common law principles intruded into the zone of protected public speech and were thus incompatible with the first amendment guarantee of freedom of speech and press.<sup>20</sup> In a series of cases originating with

11. *Id.* at vii. The term "media" is used to refer to newspapers, radio, television, motion pictures, magazines and other forms of mass communications. *Id.* at v.

12. *Time, Inc. v. Hill*, 385 U.S. 374, 388-89 (1967).

13. *Gertz*, 418 U.S. at 402-403 (White J. dissenting.) See also GENERAL REPORT *supra* note 9, at 130, 81. "Accountability, like subjection to law, is not necessarily a net subtraction to liberty. . . . The First Amendment was intended to guarantee free expression, not to create a privileged industry."

14. *Gertz*, 418 U.S. at 403.

15. *Id.* at 345.

16. See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 113, at 738 (4th ed. 1971) [hereinafter cited as PROSSER].

17. *Curtis Publishing Co. v. Fraser*, 209 F.2d 1, 7 (5th Cir. 1954) (questions of truth and good motives as a defense to a libel action are for the jury); *Florida Publishing Co. v. Lee*, 80 So. 245 (Fla. 1918) (truth coupled with good motives is a complete defense in a civil action for libel); *Applestein v. Knight Newspapers, Inc.*, 337 So. 2d 1005 (Fla. 3d DCA 1976) (publisher of defamatory statements entitled to summary judgment where no genuine issue of material fact existed as to the truth of the statement).

The Florida Constitution provides that "[i]n all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated." FLA. CONST. art. I, § 4 (1968). This comment, however, will not address criminal defamation actions.

18. See *infra* note 67 and accompanying text.

19. See PROSSER, *supra* note 16, § 113, at 773.

20. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (the common law rule "[d]ampens the vigor and limits the variety of public debate. It is inconsistent with the First

*New York Times Co. v. Sullivan*,<sup>21</sup> the Court displaced common law defamation principles adhered to by the various states and established the existing federal constitutional standards for plaintiffs in defamation actions.<sup>22</sup> Plaintiffs who are judicially characterized as "public officials"<sup>23</sup> are required to prove, in order to recover damages, that the defamatory statement was published with "actual malice," that is, with knowledge that the statement was false or "with reckless disregard of whether it was false or not."<sup>24</sup> This rule was later extended to apply to "public figures."<sup>25</sup> Although the "actual malice" requirement of *New York Times* was briefly reformulated to apply without consideration of the status of the plaintiff where the defamatory publication related to a matter of public interest or general concern,<sup>26</sup> the Court soon repudiated this view.<sup>27</sup>

The United States Supreme Court held in *Gertz v. Robert Welch, Inc.*,<sup>28</sup> that the constitutional guarantee of freedom of speech and press requires a private plaintiff to establish that a defamatory statement was published with negligence in order to recover compensatory damages in a defamation action.<sup>29</sup> This less

and Fourteenth Amendments.")

21. *Id.*

22. 376 U.S. at 279.

23. *Id.* See *supra* note 1 for a definition of "public officials."

24. *New York Times*, 376 U.S. at 285-86 (Mr. Justice Brennan stated that "actual malice" must be shown with "convincing clarity.") In *St. Amant v. Thompson*, 390 U.S. 727 (1968), Justice White attempted to elaborate on the meaning of "reckless disregard." "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* at 731.

25. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). See *supra* note 1 for a definition of "public figures."

26. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (private individual libeled by false and defamatory newscast relating to his involvement in an event of public or general concern may be sustained only upon clear and convincing proof that the defamatory falsehood was published with actual malice). See *supra* text accompanying notes 126-35.

27. *Gertz*, 418 U.S. at 346. The "extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge [the] legitimate state interest [of protecting the reputational interests of a private individual] to a degree that we find unacceptable." *Id.*

28. 418 U.S. 323.

29. *Id.* at 347-50. Although the Court defined the lesser standard to be established by private plaintiffs in terms of "fault," Blackmun in his concurring opinion assumed that the standard was one of negligence. *Id.* at 353-54. The negligence standard established by *Gertz* for private individuals is limited to the recovery of compensatory damages for "actual injury." *Id.* at 349. Private plaintiffs seeking presumed and punitive damages must prove publication with "actual malice." *Id.* This holding abolished the common law concept of presumed damages for plaintiffs alleging defamation per se. See *supra* text accompanying note 60.

A question left unresolved by *Gertz* was whether the negligence standard extended to

exacting standard for private individuals serves to accommodate society's commitment to "free and robust" discussion on public issues with the states' strong interest in protecting the reputational interests of the private individual.<sup>30</sup> Unlike public officials or public figures, private individuals have less access to the means for effectively rebutting attacks on their reputation.<sup>31</sup> Moreover, the *Gertz* Court reasoned that private individuals do not voluntarily expose themselves to media attention and were thus more deserving of protection.<sup>32</sup> The Court nevertheless concluded that the states were free to fashion for themselves a more stringent standard than minimum negligence for private individuals, provided media defendants were not subjected to a standard of liability without fault.<sup>33</sup>

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non-media defendants. In *Gertz*, the Court used terms such as "newspaper" and "broadcaster" to define the negligence standard, indicating that its holding applied solely to media defendants. Commentators have suggested that the *Gertz* standard is limited to media defendants. See Eaton, *supra* note 3, at 1417: "The rules fashioned in *Gertz* clearly were meant to apply only in defamation suits against the press. . . . But ultimate expansion of *Gertz* to provide equal standards for recovery against both media and non-media defendants seems predictable." *Id.*; Robertson *supra* note 3, at 218 ("[l]imiting *Gertz* to media defamation entails a functional preference for members of the press and broadcasting industries over other communicators"). Most states which have addressed the issue have extended the actual malice protection to non-media defendants when the defamed plaintiff is a public official or public figure. Note, *Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Nonmedia Defendants*, 95 HARV. L. REV. 1876, 1878 n.12 (1982).

30. *Gertz* at 348. The Court stated that a negligence standard for private individuals "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." *Id.*

31. *Id.* at 344. The Court recognized that the first available remedy to one whose reputation has been damaged by defamatory falsehoods is that of "self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation." *Id.*

32. *Id.* at 344-45. The Court reasoned that public officials and figures, through their conscious efforts to involve themselves in public affairs, must necessarily accept the inevitable concomitant of public criticism for their actions. The Court stated: "[T]he communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual." *Id.* at 345

33. *Id.* at 347. "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 injurious to a private individual." *Id.*

Seventeen states and the District of Columbia have expressly adopted as a matter of state law the *Gertz* negligence standard for private plaintiffs in defamation actions. Eight states have, like Florida, assumed without discussion that a private plaintiff must show that the defamatory falsehood was published with negligence in order to recover damage in defamation actions. These states have applied the *Gertz* negligence standard even if the defama-

Almost a decade after the Supreme Court's decision in *Gertz*, recent developments in Florida defamation law have focused on the appropriate standard of liability to be established by private plaintiffs in defamation actions, where the defamatory publication relates to a matter of public interest or general concern.<sup>34</sup> Most Florida courts have either held, or assumed without discussion, that Florida law follows those standards articulated by the United States Supreme Court under the first amendment, and require a private individual to establish only that the defamatory falsehood was published with negligence.<sup>35</sup> This standard applies even if the

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tory publication relates to a matter of public interest or general concern.

Only four states have adopted as a matter of state law the standard of "actual malice" for private individuals where the publication relates to a matter of public interest or general concern as set forth in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

In three cases, federal courts have construed relevant state law as having adopted the *Gertz* negligence standard for private plaintiffs. Only one federal court has construed state law as having adopted the *Rosenbloom* standard for private plaintiffs, choosing instead an intermediate standard of *gross* negligence. See *Miami Herald Publishing Co. v. Ane*, 423 So. 2d 376, 385 n.3 (Fla. 3d DCA 1982), for a complete citation of these decisions.

New York has refused to adopt either the *Gertz* or *Rosenbloom* standard for private plaintiffs, choosing instead an intermediate standard of *gross* negligence. *Chapadeau v. Utica Observer-Dispatch, Inc.*, 379 N.Y.S.2d 61 (1975) (private individuals must prove gross negligence where the defamatory publication relates to a matter of public concern). See the information compiled in *Miami Herald Pub. Co. v. Ane*, 423 So. 2d 376 at 385 n.3 (Fla. 3d DCA 1982).

The negligence standard for private individuals has been adopted by the RESTATEMENT (SECOND) OF TORTS § 580B (1977), which provides:

Defamation of Private Person

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.

In addition, the Florida standard jury instructions require a negligence standard for private plaintiffs in defamation actions. Florida Standard Jury Instructions in Civil cases § MI 4.3, at 1 (1978).

34. See *Miami Herald Publishing Co. v. Ane*, 423 So. 2d 376. The third district held in accord with existing federal constitutional standards for plaintiffs in defamation actions and the majority of jurisdictions, that private individuals need only establish that the defamatory falsehood was published with negligence. This rule applies even where the defamatory publication relates to a matter of public interest or general concern. See *infra* text accompanying notes 191-92. In *Tribune Co. v. Levin*, 7 FLA. L.W. 2549 (Fla. 2d DCA Dec. 10, 1982), the second district held in accordance with *Ane* that under Florida defamation law a private plaintiff whose reputation has been damaged by a defamatory newspaper article can recover damages upon a showing of negligence.

35. See *Karp v. Miami Herald Publishing Co.*, 359 So. 2d 580 (Fla. 3d DCA 1978), *appeal dismissed*, 365 So. 2d 712 (Fla. 1978). In this case both parties stipulated that the standard to be applied to private individuals in defamation actions is the *Gertz* standard of

publication relates to a matter of public interest or general concern.<sup>36</sup> The Florida Supreme Court, however, has never explicitly adopted that view.<sup>37</sup>

This comment will examine Florida defamation law and its attempts to formulate a post-*Gertz* standard for private plaintiffs. Part I will briefly examine relevant aspects of Florida's common law defamation principles. The various defenses available to a media defendant at common law, including the conditional privilege of "fair comment" on matters of public interest, will be discussed. Part II will discuss the decisions of the United States Supreme Court which assumed an essential role in the evolution of existing federal constitutional standards for plaintiffs in defamation actions. Part III will outline the impact of these decisions on the law of defamation in Florida, including recent Florida decisions which have reaffirmed the principles and standards for private individuals articulated by the United States Supreme Court. Following an examination of these recent Florida developments, this comment will analyze the implications of adopting an actual malice standard

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negligence. The third district relied on the Supreme Court of Florida's decision in *Firestone v. Time, Inc.*, 305 So. 2d 172 (Fla. 1974), *rev'd*, 424 U.S. 448 (1976), *order on mandate*, 332 So. 2d 68 (Fla. 1976), to apply the *Gertz* negligence standard. Although the United States Supreme Court agreed that the Supreme Court of Florida had apparently adopted a negligence standard in *Firestone*, the Court nevertheless reversed the Florida Supreme Court for its failure to specifically delineate a standard of liability for private individuals in defamation actions. 424 U.S. at 463-64. *See also* *From v. Tallahassee Democrat, Inc.*, 400 So. 2d 52, 55 (Fla. 1st DCA 1981), *petition for review denied*, 412 So. 2d 465 (Fla. 1982); *Helton v. United Press Int'l*, 303 So. 2d 650, 651 (Fla. 1st DCA 1974) (private plaintiffs no longer required under *Gertz* to prove actual malice to recover damages in defamation actions but the court did not articulate what standard of liability must be established); *Finkel v. Sun Tattler Co.*, 348 So. 2d 51 (Fla. 4th DCA 1977) (*per curiam*), *cert. denied*, 358 So. 2d 135 (Fla. 1978) (recognizing that the standard of liability to be established by private individuals differs from that governing public figures but neglected to state what that standard was). The *From* court emphasized that several post-*Gertz* Florida defamation decisions had apparently adopted a negligence standard for private plaintiffs but stated "the Supreme Court of our state has not had or taken the opportunity to adopt an actual malice or simple negligence standard, and we restrain ourselves from doing so in this case." *From*, 400 So. 2d at 55.

36. *Miami Herald Publishing Co. v. Ane*, 423 So. 2d 376; *Tribune Co. v. Levin*, 7 Fla. L.W. 2549.

37. *See Firestone v. Time, Inc.*, 305 So. 2d 172, 178 (Fla. 1974), *rev'd*, 424 U.S. 448 (1976), *order on mandate*, 332 So. 2d 68 (Fla. 1976). Although the Supreme Court apparently adopted without discussion a negligence standard for private individuals through its use of such language as "convincing evidence of . . . negligence" and "flagrant example of journalistic negligence" to describe the degree of care exercised by the publisher of defamatory statements, the United States Supreme Court reversed the decision of the Supreme Court of Florida for failing to delineate, at least, a negligence standard as established in *Gertz*.

for private individuals involved in matters of public interest or general concern. This comment concludes that Florida defamation law is consistent with the first amendment guarantee of freedom of speech and press as interpreted by the United States Supreme Court. Florida law requires a private plaintiff to establish that a defamatory statement was published with negligence, even if the publication relates to a matter of public interest or general concern. This conclusion is compelled by neither Florida common law precedent nor Florida constitutional law, but rather, draws support from the consistent adherence by the Florida courts to the defamation decisions of the United States Supreme Court.

Prior to *New York Times* and its progeny, there was no need for defamation plaintiffs in Florida to prove any negligence or actual malice on the part of a publisher of defamatory statements. It was enough if a plaintiff established that the statement was defamatory and that it referred to him. To alleviate the harshness of this system, Florida courts recognized a conditional privilege to comment on matters of public interest involving public figures. If the statement was conditionally privileged, the burden of proof would shift to the plaintiff to establish that the statement was published with malice. This privilege was subsequently accorded constitutional protection by the United States Supreme Court in *New York Times Co. v. Sullivan*.<sup>38</sup>

To the extent that states such as Florida recognized a conditional privilege of fair comment on matters of public interest or general concern involving private plaintiffs, the United States Supreme Court in *Gertz* expressly disfavored this approach recognizing that individual reputational interests were inadequately protected.<sup>39</sup> Moreover, the determination of what constitutes a matter of "public interest" creates uncertainty and confusion. Accordingly, Florida courts have effectively removed this privilege by adopting the negligence standard for private plaintiffs established in *Gertz*; determining instead the degree of protection to be accorded a media defendant by focusing on the character or status of the plaintiff himself and not by examining the subject matter of the publication. The negligence standard relieves a media defendant from the rigors of strict liability, thus serving the original purpose of the conditional privilege. Therefore, the latter has been appropriately discarded in favor of the former.

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38. 376 U.S. 254.

39. *Gertz*, 418 U.S. 346.

Florida has long recognized a pervasive and strong interest in protecting individual reputations. The negligence standard for private individuals accommodates this legitimate interest and is sufficient to ensure free and open discussion on public issues. A more stringent standard for private individuals would inadequately serve to protect the reputational interests of the private individual, creating an improper balance between reputational interests and the constitutional guarantee of freedom of speech and press. Such a standard would impair to an appreciable extent the underlying philosophy of and justification for the defamation action in the context of modern society.

### I. FLORIDA COMMON LAW DEFAMATION PRINCIPLES

Defamation, including both libel and slander, is defined by the Florida courts "as the unprivileged publication of false statements which naturally and proximately result in injury to another."<sup>40</sup> The law of defamation has evolved to serve a number of important purposes.<sup>41</sup> The primary purpose of defamation law is to compensate those whose reputation has been attacked by false and malicious publications.<sup>42</sup> Historically, defamation actions were the province of the local seignorial courts.<sup>43</sup> As the deterioration of these courts became evident, the ecclesiastical courts assumed jurisdiction of defamation actions, punishing the defamatory utterance as a sin.<sup>44</sup>

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40. *Wolfson v. Kirk*, 273 So. 2d 774, 776 (Fla. 4th DCA 1973). See the RESTATEMENT (SECOND) OF TORTS § 559 (1977), which defines a defamatory communication in more narrow terms: "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." The elements for a cause of action in defamation are set out below:

Elements Stated

To create liability for defamation there must be:

- (a) a false and defamatory statement concerning another;
- (b) an unprivileged publication to a third party;
- (c) fault amounting at least to negligence on the part of the publisher;

and

(d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

*Id.* at § 558.

41. See *Eaton supra* note 3, at 1357-59. The author outlines a number of purposes served by the law of defamation. Like all tort law, the primary purpose of defamation law is to compensate for injury. Additionally, defamation law serves as a means for the plaintiff to rebut and correct attacks made on his reputation. Moreover, the defamation action serves to deter the publication of falsehoods, ensuring that only truthful information is disseminated.

42. *Id.* at 1357.

43. *PROSSER supra* note 16, § 111, at 737-38. See generally; Veeder, *History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903.)

44. See *PROSSER, supra*, note 16, § 111, at 737-38.

When the power of the ecclesiastical courts subsequently dissipated, the common law courts gradually assumed control of defamation actions.<sup>45</sup>

Judicial attitudes expressed in Florida's early defamation decisions reflect a jealous guardianship of the reputational interests of the private individual.<sup>46</sup> The right of an individual to protect his reputation from malicious publications was considered a sacrosanct concept and any attempt to impugn one's personal reputation was looked upon with extreme disfavor.<sup>47</sup> In *Hayes v. Todd*,<sup>48</sup> the Supreme Court of Florida considered the following language from jury instructions issued by a circuit judge in a libel case:

Exemplary damages are such as not only compensate the wrong done, but also tend to protect all good citizens of the state from like wrongs from the reckless and malicious tongue of such lawless persons as have no regard for the good name of their fellows, or for the fair name and virtue of the women of the land, but turn themselves loose, like ravenous wolves, to destroy that which money cannot buy, and that which, when lost, the power of earth cannot restore.<sup>49</sup>

Although the Florida Supreme Court viewed the language utilized by the circuit judge as "somewhat intemperate," the court found that no prejudice had resulted to the defendant.<sup>50</sup>

At common law, plaintiffs in defamation actions alleging either libel or slander were required to prove only that the publication was defamatory and that the publication referred to the plaintiff.<sup>51</sup> Absent the affirmative defenses of truth or privilege, the publisher of defamatory statements was subjected to strict liability.<sup>52</sup> Libel was defined by the Florida courts as a malicious publication in any written or visual form, "which exposes a person to distrust, hatred, contempt, ridicule, or obloquy, or which causes such person to be

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45. *Id.*

46. *Layne v. Tribune Co.*, 146 So. 234 (Fla. 1933); *Commander v. Pedersen*, 156 So. 337 (Fla. 1934).

47. *See supra* note 46.

48. 15 So. 752 (Fla. 1894).

49. *Id.* at 755.

50. *Id.*

51. *Briggs v. Brown*, 46 So. 325, 330 (Fla. 1908).

52. *See* RESTATEMENT OF TORTS § 578 (1938); PROSSER, *supra* note 16, § 113, at 773. For a complete discussion of the defenses available under Florida's common law defamation principles, see Rahdert & Snyder, *Rediscovering Florida's Common Law Defenses to Libel and Slander*, 11 STET. L. REV. 1 (1981) [hereinafter cited as *Defenses*].

avoided, or which has a tendency to injure such person in his office, occupation, business or employment."<sup>53</sup>

Florida courts also distinguished between two types of libel: libel per se and libel per quod.<sup>54</sup> The two differed basically in the plaintiff's burden of proving injury resulting from the defamatory publication.<sup>55</sup> A plaintiff alleging libel per se did not have to establish either actual malice or negligence on behalf of the publisher.<sup>56</sup> A negligence standard was unavailable at common law<sup>57</sup> and malice in cases alleging libel per se was presumed as a matter of law.<sup>58</sup> Moreover, plaintiffs alleging libel per se did not have to plead or prove damages resulting from the defamatory publication.<sup>59</sup> Damages to the plaintiff were necessarily imputed because a publication constituting libel per se was injurious to an individual's professional, official or personal relations on its face without consideration of extrinsic facts or innuendo.<sup>60</sup>

A defamatory statement constituting libel per quod, however, had to be accompanied by an allegation and subsequent proof of damages.<sup>61</sup> The defamatory nature of words and statements actionable per quod was not apparent on the face of the publication, rather the publication had the effect of injuring the plaintiff.<sup>62</sup> In order to determine this damaging effect, Florida courts considered

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53. *Briggs*, 46 So. at 330.

54. *Layne*, 146 So. at 236.

55. *Id.*

56. Florida recognized five categories of statements which were defamatory per se. These included statements imputing to plaintiff the commission of a crime; a venereal disease or other loathsome or communicable disease; conduct incompatible with plaintiff's trade, business or office or accusing a woman of unchastity. *Campbell v. Jacksonville Kennel Club*, 66 So. 2d 495, 497 (Fla. 1953). The fifth category included statements which subject a plaintiff to public hatred, distrust, ridicule, contempt, or disgrace. *Briggs*, 46 So. 325. This category applied to both libel and slander. *Joopanen v. Gavagan*, 67 So. 2d 434 (Fla. 1953); *Sharp v. Bussey*, 187 So. 779 (Fla. 1939). To determine whether the language of the publication was actionable per se, the court would construe the language as the "common mind" would. *Loeb v. Geronemus*, 66 So. 2d 241, 245 (Fla. 1953).

57. See Hallen, *The Character of Belief Necessary for the Conditional Privilege in Defamation*, 25 Nw. U.L. Rev. 865 (1931) [hereinafter cited as Hallen].

58. *Commander v. Pedersen*, 156 So. at 339.

59. *Id.*

60. *Layne*, 146 So. 234. The rule of presumed damages has been abolished by the United States Supreme Court's decision in *Gertz*. 418 U.S. at 349. Thus, the distinction between libel per se and libel per quod is of historical relevance only. "Since pleading and proof of actual injury are required in most cases per *Gertz*, all libels governed by *Gertz* are, in effect, libel per quod." *From v. Tallahassee Democrat, Inc.*, 400 So. 2d 52, 57 (Fla. 1st DCA 1981).

61. *Campbell v. Jacksonville Kennel Club*, 66 So. 2d 495 (Fla. 1953); *Tip Top Grocery Co. v. Wellner*, 186 So. 219 (Fla. 1938); *Commander v. Pedersen*, 156 So. 337 (Fla. 1937).

62. See *supra* note 61.

the circumstances and conditions surrounding the publication, including the local opinions of those in the vicinity.<sup>63</sup> The Florida courts, however, viewed the pernicious quality of both an action in libel per se and per quod as embodied in the fact that "they are the natural and proximate causes of pecuniary damage to those concerning whom such words are maliciously [uttered]."<sup>64</sup>

In an attempt to mitigate the harsh results that sometimes accrued to the media defendant at common law, Florida courts recognized several defenses to the strict liability standard. Available to the defendant at common law were the affirmative defenses of truth and privilege.<sup>65</sup>

A privileged publication was defined by the Florida courts as a statement or communication which would otherwise be defamatory and actionable except if "the defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation."<sup>66</sup> The privilege defense was subdivided into two distinct classifications: absolute privilege and conditional privilege.<sup>67</sup> Of the numerous privileges available to a defendant at common law, the most important for purposes of constitutional analysis, was the conditional privilege of "fair comment" on matters of public interest.<sup>68</sup>

The conditional privilege of "fair comment" was developed in response to judicial recognition that in some circumstances societal interests were ill served by a harsh strict liability standard.<sup>69</sup> The

63. *Layne*, 146 So. at 236.

64. *Id.*

65. *See infra* note 67.

66. PROSSER, *supra* note 16, § 114, at 776. *See also* Briggs, 46 So. 325; Abraham v. Baldwin, 42 So. 591 (Fla. 1906).

67. An absolute privilege granted the publisher of defamatory falsehoods absolute immunity from liability in defamation actions. The privilege extended to legislative and judicial proceedings. *State v. Tillet*, 111 So. 2d 716 (Fla. 2d DCA 1959); *Coogler v. Rhodes*, 21 So. 109 (Fla. 1897). The privilege was not defeated by showing that the defamatory statement was published with malice. *Coogler*, 21 So. 109. The privilege was limited, however, to apply only to statements which were relevant to the proceedings. An irrelevant statement would only be conditionally privileged. *Taylor v. Alropa Corp.*, 189 So. 230 (Fla. 1939).

68. The privilege required a showing of malice to sustain an action for defamation for comment concerning "public officials, political candidates, community leaders from the private sector or private enterprises which affect public welfare, persons taking a public position on a matter of public concern, and those who offer their creations for public approval such as artists, performers, and athletes." 1 A. HANSON, LIBEL AND RELATED TORTS ¶¶ 108-40 (1969). *See also* M. NEWELL, THE LAW OF SLANDER AND LIBEL IN CIVIL AND CRIMINAL CASES §§ 487-504 (4th ed. 1924).

69. *See supra* note 67.

application of conditional privilege to a defamatory publication relating to a matter of public interest or concern, would under certain conditions, relieve from strict liability the defendant who was without the benefit of a negligence standard at common law.<sup>70</sup> Determining the parameters of conditional privilege, however, was not a simple task. In *Jones, Varnum & Co. v. Townsend's Administratrix*,<sup>71</sup> the Supreme Court of Florida first defined the scope of a conditional privilege. A publication would be privileged and thus not presumed malicious if:

fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned, . . . [or] [i]f fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any [named] limits.<sup>72</sup>

Phrased somewhat differently, a conditional privilege of "fair comment" was said to apply "[w]here a person is so situated that it becomes right, in the interests of society, that he should tell to a third person certain facts, then, if he bona fide, and without malice, does tell them, it is a privileged communication."<sup>73</sup> Conditional privilege was therefore an affirmative defense.<sup>74</sup> The application of the doctrine to an otherwise defamatory falsehood would shift the burden of proof to the plaintiff to show that the defamatory statement was published with malice.<sup>75</sup> Malice, which was referred to as "express malice" or "actual malice" by the Florida courts, was defined as "ill will, hostility, [or] evil intention to defame and injure."<sup>76</sup> If the plaintiff could establish actual malice on behalf of the publisher, the conditional privilege of fair comment was lost.<sup>77</sup>

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70. See Hallen *supra* note 57, at 874.

71. 21 Fla. 431 (1885).

72. *Id.* at 456 (quoting *Toogood v. Spyring*, 149 Eng. Rep. 1044 (Ex. 1834) (bracketed language in quotation attributable to the Florida Supreme Court)).

73. *Coogler*, 21 So. at 112. See also *Arnold v. Chase*, 114 So. 856 (Fla. 1927). In reversing a criminal conviction entered against a newspaper for the publication of a defamatory article relating to a candidate for city commissioner, the *Arnold* court stated that "[i]t is a well-settled rule that communications relating to the public welfare, if made in good faith, are privileged." 114 So. at 857.

74. *Coogler*, 21 So. at 112.

75. *Id.*

76. *Montgomery v. Knox*, 3 So. 211, 217 (Fla. 1887).

77. *Loeb v. Geronemus*, 66 So. 2d 241, 244 (Fla. 1953).

In *White v. Fletcher*,<sup>78</sup> the Supreme Court of Florida recognized a conditional privilege of fair comment to criticize the conduct and qualifications of " 'public officials' or 'public men.' " <sup>79</sup> White, a police officer for the City of Orlando, received extensive public attention as a result of his alleged involvement with a prostitute. A newspaper article which discussed the incident contained a statement issued by the chairman of the civil service board that White was "not fit to be a police officer."<sup>80</sup> White sued the board chairman for libel. The court held that as a policeman, White was a public officer and thus subject to fair comment.<sup>81</sup> The court stated that "one who seeks public employment or public office . . . submits his private character to the scrutiny of those whose patronage he implores."<sup>82</sup>

Similarly, in *Abram v. Odham*,<sup>83</sup> the Supreme Court of Florida applied the conditional privilege of fair comment to defamatory statements made about one who had "injected himself" into a matter of great political interests.<sup>84</sup> In *Abram*, a candidate in the 1954 gubernatorial election campaign responded to certain derogatory statements concerning his candidacy contained in an election polling survey, by calling the pollster, and the poll itself, "a phony."<sup>85</sup> In holding that the candidate's statements were conditionally privileged the court essentially determined that the pollster had become a public figure and thus subject to fair comment, by injecting himself into the center of an important public event.<sup>86</sup>

These cases appear to have anticipated the decision of the United States Supreme Court in *New York Times Co. v. Sullivan*<sup>87</sup> where the Court constitutionalized the privilege to comment on public persons. In fact, the Supreme Court of Florida later relied on *Abram* and the *New York Times* decision to recognize a conditional privilege for fair comment on a matter of public interest involving a public figure.<sup>88</sup> In *Gibson v. Maloney*,<sup>89</sup> the court held

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78. 90 So. 2d 129 (Fla. 1956).

79. *Id.* at 131.

80. *Id.* at 130.

81. *Id.* at 131.

82. *Id.* (quoting *Kennett v. Barber*, 31 So. 2d 44, 46 (Fla. 1947)). See also *Crowell-Collier Publishing Co. v. Caldwell*, 170 F.2d 941, 943 (5th Cir. 1948) (court recognized a conditional privilege to comment of matters of public interest involving the governor of Florida).

83. 89 So. 2d 334 (Fla. 1956).

84. *Id.* at 336.

85. *Id.* at 335.

86. *Id.* at 336.

87. 376 U.S. 254 (1964).

88. *Gibson v. Maloney*, 231 So. 2d 823 (Fla. 1970) *cert. denied*, 398 U.S. 951 (1973).

that a publisher who adopted an editorial policy aimed at arousing public indignation against certain business interests became a public figure subject to fair comment.<sup>90</sup> Thus, the defendant's disparaging remarks about the individual were conditionally privileged under the doctrine of fair comment.<sup>91</sup> The *Gibson* court also relied on its earlier decision in *Jacova v. Southern Radio & Television Co.*,<sup>92</sup> an invasion of privacy case, in which the court denied recovery to a plaintiff who became an actor in a newsworthy event.<sup>93</sup> The *Gibson* court concluded that "under the command of the *Abrams*, [sic] *Jacova* [sic] and *Sullivan* cases, the comment made by Gibson was 'fair comment' on a public matter relating in part to an individual who had by choice made himself newsworthy and a part of the passing scene."<sup>94</sup>

Some Florida commentators have argued that the Florida Supreme Court's reliance on *Jacova* established as a matter of state law an actual malice standard for private individuals involved in matters of public interest or general concern.<sup>95</sup> This analysis ignores the distinction between defamation and invasion of privacy actions. The two differ in theory and are subject to separate legal analysis.<sup>96</sup> Moreover, this is essentially the same type of conditional privilege which was expressly disfavored by the United States Supreme Court in *Gertz*. Protection of individual reputational interests is inadequate and uncertainty and confusion is created in determining exactly what is, and is not, a matter of "public interest."<sup>97</sup> Although *Gertz* left the states free to define their own standard of liability for private individuals,<sup>98</sup> Florida courts, by adopting the negligence standard, have effectively removed this conditional privilege and *Gibson* has not been relied on by Florida

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89. *Id.*

90. *Id.* at 824.

91. *Id.* at 826.

92. 83 So. 2d 34 (Fla. 1955).

93. *Id.* at 37.

94. 231 So. 2d at 826.

95. See *Defenses*, *supra* note 52, at 48. See also Comment, *Defamation, The Private Individual And Matters Of Public Concern: A Proposed Resolution For Florida*, 32 U. FLA. L. REV. 545 (1980).

96. *Jacova v. Southern Radio & Television Co.*, 83 So. 2d 34, 38 (Fla. 1955). See also *Miami Herald Publishing Co. v. Ane*, 423 So. 2d 376, 385 (Fla. 3d DCA 1982).

97. 418 U.S. at 351-52 (repudiating the "actual malice" standard for private individuals involved in matters of public interest or general concern as announced in *Rosenbloom*). See *infra* text accompanying notes 146-47.

98. *Id.* at 347.

courts in the post-*Gertz* development of Florida defamation law.<sup>99</sup>

The privilege of fair comment was further limited in its application only to opinions based on true facts, and not to misstatements of fact.<sup>100</sup> In *Miami Herald Publishing Co. v. Brautigan*, the Third District Court of Appeal held in accordance with the majority of jurisdictions that "no comment can be fair if it is based on misstatements of fact."<sup>101</sup>

The predominant theme surfacing throughout early Florida defamation decisions was the recognition of a private individual's right to protect his reputation from defamatory publication. Although the court recognized the central role of a free and vigorous press in society,<sup>102</sup> the reputational interests of the private individual were considered paramount.

At common law, a private individual seeking redress for injury to reputational interests did not have to establish either actual malice or negligence on behalf of a publisher of defamatory falsehoods.<sup>103</sup> Although the harsh strict liability standard was tempered by the recognition of privileges, the common law approach ultimately had the effect of censorship on public speech which would otherwise be

99. Only one Florida appellate court has relied on *Gibson* in a libel action. In *Bishop v. Wometco Enters.*, 235 So. 2d 759, 761 (Fla. 3d DCA 1970), the court stated that whether a plaintiff was a public official, public figure or involved in a matter of public interest, the *New York Times* rule of actual malice applied. On appeal to the district court after a remand for a new trial, the *Gibson* decision was reversed on the basis of *Rosenbloom*. *Gibson v. Maloney*, 263 So. 2d 632 (Fla. 1st DCA), *cert. denied*, 268 So. 2d 909 (Fla. 1972), *cert. denied*, 410 U.S. 984 (1973).

100. *Miami Herald Publishing Co. v. Brautigam*, 127 So. 2d 718, 723 (Fla. 3d DCA), *cert. denied*, 135 So. 2d 741 (Fla. 1961), *cert. denied*, 369 U.S. 821 (1962).

101. *Id.* "Under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1975).

102. *Layne v. Tribune Co.*, 146 So. 234, 238-39 (Fla. 1933). A republication privilege was established to relieve a newspaper from liability for publishing a false and defamatory news dispatch. The *Layne* decision has not been treated favorably by other jurisdictions. See PROSSER, *supra* note 16, § 113, at 775.

Additional protection was accorded to the publishing press in the form of civil and criminal defamation statutes which prescribed written notice to a publisher or broadcaster of defamatory statements in a newspaper or periodical, as a condition precedent to bringing suit for defamation. Ch. 16070, §§ 1, 2, 1933 Fla. Laws 427 (current version at FLA. STAT. §§ 770.01-.02, 836.07-.08 (1981)). If the defamatory falsehood was determined to have been published in good faith and a correction, apology or retraction was published subsequent to notice, the plaintiff was limited to recovery of actual damages in a civil action and any criminal action was barred. *Id.* See *Ross v. Gore*, 48 So. 2d 412 (Fla. 1950) (upholding the constitutionality of the civil statutes).

103. See *supra* text accompanying notes 54-55.

protected.<sup>104</sup> In 1964, the United States Supreme Court in *New York Times Co. v. Sullivan*, addressed for the first time the compatibility of state defamation laws with the first amendment guarantee of freedom of speech and press.<sup>105</sup>

## II. *New York Times Co. v. Sullivan* AND ITS PROGENY

*New York Times Co. v. Sullivan*, was the first in a series of Supreme Court decisions which substantially altered common law defamation principles and established the existing federal constitutional standards for plaintiffs in defamation actions. *New York Times* was a landmark decision; even had it stood alone, the decision would have signalled a revolution in Florida defamation law and state defamation laws throughout the country.<sup>106</sup>

At issue in *New York Times* was whether state libel laws were limited by the constitutional guarantee of freedom of speech and press. L. B. Sullivan was a city commissioner of Montgomery, Alabama, and the supervisor of the city police force. He sued the *New York Times* and four black clergymen alleging that he had been libeled by statements contained in a *New York Times* paid advertisement entitled "Heed Their Rising Voices."<sup>107</sup> The advertisement was authored by the black clergymen and was aimed at soliciting moral and financial support for the civil rights movement. The advertisement concededly contained a number of false statements.<sup>108</sup> Among those false statements were several references to official action taken by the Montgomery City police force in connection with dispersing student demonstrators. Although the advertisement did not refer to Sullivan by name, Sullivan claimed that the references to "police" could naturally be imputed to him personally as the supervisor of the city police department.<sup>109</sup> The *New York Times* admittedly made no attempt to verify the accuracy of the advertisement.<sup>110</sup>

The trial court instructed the jury that the statements contained in the *New York Times* advertisement were "libelous per se" and

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104. See *supra* note 20.

105. 376 U.S. 254 (1964).

106. PROSSER, *supra* note 16, § 118, at 819. See also *Miami Herald Publishing Co. v. Ane*, 423 So. 2d 376, 383. (Fla. 3d DCA 1982).

107. 376 U.S. at 256.

108. *Id.* at 258.

109. *Id.*

110. *Id.* at 260-61. The *Times* stated that it did not attempt to verify the accuracy of the advertisement because it was authored by several well known individuals and because nothing in the advertisement indicated that it might contain false information.

that under Alabama common law defamation principles, falsity and malice were presumed.<sup>111</sup> The jury, finding that the statements contained in the advertisement were made "of and concerning" Sullivan, awarded Sullivan damages of \$500,000.<sup>112</sup> The Supreme Court of Alabama affirmed and the *New York Times* appealed.<sup>113</sup>

The United States Supreme Court considered the case "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."<sup>114</sup> The Court "refused to recognize an exception for any test of truth . . . especially one that puts the burden of proving truth on the speaker."<sup>115</sup> Justice Brennan, writing for six members of the Court, declared that common law defamation principles which subjected a media defendant to strict liability for a defamatory publication were incompatible with the first amendment.<sup>116</sup> The Court emphasized that the first amendment guarantee of freedom of speech and press "does not turn upon the 'truth, popularity, or social utility of the ideas and beliefs which are offered,'"<sup>117</sup> and that the false statement, inevitable in discussion on public issues or of public officials, "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"<sup>118</sup> The constitutional guarantee of freedom of speech and press thus requires:

a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.<sup>119</sup>

The Court found that "actual malice" was lacking on behalf of both the *New York Times* and the individual clergymen and, thus, reversed the judgment of the Supreme Court of Alabama.<sup>120</sup>

The "actual malice" requirement of *New York Times* was ex-

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111. *Id.* at 262.

112. *Id.* at 256.

113. *Id.* at 263-64.

114. *Id.* at 270.

115. *Id.* at 271.

116. *Id.* at 278-79.

117. *Id.* at 271 (quoting *NAACP v. Button*, 371 U.S. 415, 445 (1963)).

118. *Id.* at 271-72 (quoting in part, *Button* 371 U.S. at 433).

119. *Id.* at 279-80.

120. *Id.* at 285-86, 292.

tended three years later to apply to public figures.<sup>121</sup> In *Curtis Publishing Co. v. Butts*, and a companion case, *Associated Press v. Walker*,<sup>122</sup> Chief Justice Warren, joined by five members of the Court, held that public figures must prove actual malice to recover damages in defamation actions.<sup>123</sup> The Court stated that public figures are those who have "attained that status by position alone" or those whose "purposeful activity amount[s] to a thrusting of [their] personalit[ies] into the 'vortex' of an important public controversy."<sup>124</sup> In both cases, the court concluded, public figures "commanded sufficient continuing public interest and had sufficient access to the means of counter-argument to be able to 'expose through discussion the falsehood and fallacies' of the defamatory statements."<sup>125</sup>

The first opportunity for the Court to address the applicability of the *New York Times* rule to private individuals resulted in no majority opinion.<sup>126</sup> In *Rosenbloom v. Metromedia, Inc.*, Justice Brennan, writing for the plurality, suggested that a private individual who is injured by a defamatory publication which relates to a

121. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). See *supra* note 1 for a definition of "public figures."

122. *Butts*, 388 U.S. 130.

123. *Id.* at 162, 164. The rationale for extending the "actual malice" requirement of *New York Times* to public figures was expressed by Chief Justice Warren in his concurring opinion:

In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.

Viewed in this context, then, it is plain that although they are not subject to the restraints of a political process, 'public figures,' like 'public officials,' often play an influential role in ordering society. And surely as a class these 'public figures' have as ready access as 'public officials' to mass media of communication, both to influence policy and to counter criticism of their views and activities. Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials'.

*Id.* at 163-64.

124. *Id.* at 155.

125. *Id.* (quoting in part *Whitney v. California*, 274 U.S. 357, 377 (Brandeis, J., dissenting)). In a concurring opinion, Chief Justice Warren also stressed the necessity of "balanc[ing] to a proper degree the legitimate interests traditionally protected by the law of defamation against the Constitutional guarantee of freedom of speech and press." 388 U.S. at 164.

126. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

matter of public interest or general concern, must prove actual malice to recover damages.<sup>127</sup> In *Rosenbloom*, a radio station broadcast reports that George Rosenbloom, a distributor of nudist magazines, was arrested and charged with the possession of obscene literature. Rosenbloom alleged that the radio station's characterization of the magazines seized in his possession as "obscene" constituted "libel per se" under state defamation law.<sup>128</sup> In addition, Rosenbloom claimed that the radio station's references to him and his associates as "smut distributors" and "girlie-book peddlers" were false and defamatory.<sup>129</sup> Subsequent to the radio station broadcast, Rosenbloom was acquitted of the criminal obscenity charges following a jury determination that the magazines he distributed were not obscene.<sup>130</sup>

The Supreme Court affirmed the decision of the court of appeals which had applied the actual malice requirement of *New York Times* to the case. In a five to three decision, the plurality suggested that actual malice must be shown where a private individual seeks to recover damages for a defamatory publication which relates to a matter of public interest or general concern.<sup>131</sup> Justice Brennan, joined by Chief Justice Burger and Justice Blackmun, emphasized that the constitutional protection of freedom of speech and press does not apply solely where discussion on public issues involves public officials or public figures. Rather, "[t]he public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety."<sup>132</sup>

Noticeably absent from the plurality's discussion was the previous approach utilized by the Court in balancing between the competing values of state defamation laws and the first amendment. Reputational interests of the private individual were not considered. Rather, the Court stated that "[i]f the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of mat-

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127. *Id.* at 32. The Court agreed with the court of appeals' application of the *New York Times* actual malice standard to private individuals involved in matters of public interest or concern.

128. *Id.* at 36.

129. *Id.*

130. *Id.*

131. *Id.* at 31-32.

132. *Id.* at 43.

ters of public concern."<sup>133</sup>

Justice Black concurred separately stating that the first amendment guarantee of freedom of speech and press protects a media defendant from libel judgments even where a defamatory falsehood was published with knowledge of its falsity.<sup>134</sup> Justice White also concurred but limited the application of *New York Times* to "report and comment upon the official actions of public servants in full detail, with no requirement that the reputation or the privacy of an individual involved in or affected by the official action be spared from public view."<sup>135</sup> Justice Marshall, joined by Justice Stewart, dissented. In his view the application of *New York Times* to a private individual under any circumstances would give the first amendment too broad a construction and would effectively nullify the state's defamation laws which provide the private individual with his only means for redress of defamatory falsehoods.

In 1974, the dissenting opinion in *Rosenbloom* became a majority in *Gertz v. Robert Welch, Inc.*,<sup>136</sup> where the Court returned to the balancing approach utilized in its earlier defamation decisions. Gertz, an attorney, was retained by the family of a youth killed by a Chicago policeman to institute a civil action against the officer. The *American Opinion*, an organ of the John Birch Society, published an article entitled "Frame-Up: Richard Nuccio and the War on Police" which accused Gertz of being a "Leninist" and a "com-

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133. *Id.* at 47. In the plurality's view, the presumed dangers of press censorship that would result from a negligence standard, caused "society's interest in protecting individual reputation" to yield. *Id.* at 49. The Court stated: "In an ideal world, the responsibility of the press would match the freedom and public trust given it. But from the earliest days of our history, this free society, dependent as it is for its survival upon a vigorous free press, has tolerated some abuse." *Id.* at 51.

One commentator observes that the "*Rosenbloom* test became a virtual carte blanche for the media." Robertson, *supra* note 3, at 206. The author notes that following *Rosenbloom*, "of over a hundred reported decisions dealing with the matter of public interest question, only six clearly concluded that the media publication or broadcast in question did not qualify." *Id.* The author refers to this as the "'bootstrap' effect of the *Rosenbloom* test" emphasizing that "[i]n our society the media decide what is to be a matter of public or general concern, and the courts have shown scant interest in second guessing that determination." *Id.* See also Eaton, *supra* note 3, at 1402-03.

[T]he news media, which had largely conditioned notions of what matters are of public interest, was operating within a legal boundary which it had more or less drawn for itself. 'Public interest' had become 'newsworthiness.' By erecting a constitutional defense of ignorance for defamatory statements touching on some matter in the public interest, *Rosenbloom* had nearly destroyed the law of defamation.

*Id.*

134. *Rosenbloom*, 403 U.S. at 57.

135. *Id.* at 62.

136. 418 U.S. 323.

munist-fronter."<sup>137</sup> The article further implied that Gertz had a criminal record.<sup>138</sup>

Gertz sued the publisher of the magazine alleging that the statements were false. The district court, relying on the Supreme Court's decision in *Rosenbloom*, held that the *New York Times* requirement of actual malice applied regardless of the status of the plaintiff and entered judgment against Gertz.<sup>139</sup> The court of appeals affirmed.

The Supreme Court, with Justice Powell writing for the majority, stated that the state's interest in protecting the reputations of private individuals requires a rule other than that in *New York Times* to determine the standard of liability to be established by private individuals.<sup>140</sup> The Court emphasized that unlike public officials or public figures who have access to "the channels of effective communication"<sup>141</sup> necessary to rebut and correct falsehoods attacking their reputation, private individuals can seek redress only through state defamation laws.<sup>142</sup> Moreover, the Court stressed that private individuals do not "invite attention and comment" from the news media as do public officials and figures.<sup>143</sup> As a result, the Court determined that private individuals are more deserving of protection.<sup>144</sup>

Noting that the *Rosenbloom* Court was "sadly fractionated,"<sup>145</sup> the Court stated that the application of the reformulation of the *New York Times* rule announced in *Rosenbloom* to private individuals would effectively nullify the states' legitimate interest in protecting the reputations of their citizens.<sup>146</sup> Moreover, the *Rosenbloom* rule "would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest.'" The Court noted its doubts concerning "the wisdom of committing this task to the conscience of judges."<sup>147</sup>

The Court held that even where "the substance of the defama-

137. *Id.* at 326.

138. *Id.*

139. *Id.* at 329.

140. *Id.* at 343.

141. *Id.* at 344.

142. *Id.*

143. *Id.* at 345.

144. *Id.*

145. *Id.* at 354.

146. *Id.* at 345-46.

147. *Id.* at 346.

tory statement 'makes substantial danger apparent,' " the private plaintiff must establish that the defamatory falsehood was published with negligence.<sup>148</sup> The Court emphasized that this approach strikes a proper balance between society's interest in free and robust discussion on public issues and the state's strong interest in protecting the reputational interests of the private individual.

Nevertheless, the Court concluded that, "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."<sup>149</sup>

### III. THE IMPACT OF *New York Times* ON FLORIDA DEFAMATION LAW

The impact of the *New York Times* line of decisions on Florida defamation law was immediate. Florida courts consistently sought to follow those standards articulated by the United States Supreme Court in determining the appropriate standard of liability to be established for public officials,<sup>150</sup> public figures<sup>151</sup> and private individuals. Following the *Rosenbloom* reformulation of the actual malice requirement of *New York Times*, Florida courts determined the appropriate standard for private individuals by focusing on the subject matter of the defamatory publication.<sup>152</sup> In *Nigro v. Miami Herald Publishing Company*, the Third District Court of Appeal examined a newspaper article which referred to certain individuals as "top members of the Mafia," and "Cosa Nostra men."<sup>153</sup> The named individuals sued for libel denouncing any involvement in criminal activity and claiming that they were legitimate businessmen.<sup>154</sup> The court applied the rule announced in *Rosenbloom* stating that crime, and more specifically, control of organized crime,

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148. *Id.* at 347-48.

149. *Id.* at 347.

150. *Coleman v. Collins*, 384 So. 2d 229 (Fla. 5th DCA 1980) (city attorney characterized as public official required to establish "actual malice" on the part of publisher of defamatory statements); *Finkel v. Sun Tattler Co.*, 348 So. 2d 51 (Fla. 4th DCA 1977) (former city attorney is a public official subject to "actual malice" standard); *Palm Beach Newspapers v. Early*, 334 So. 2d 50 (Fla. 4th DCA 1976) (school superintendent is a public official and therefore must prove publication with "actual malice" as prescribed in *New York Times*).

151. *Lampkin—Asam v. Miami Daily News, Inc.*, 408 So. 2d 666 (Fla. 3d DCA 1982). An author who sought publicity for her research by presenting her book to a local newspaper is a public figure and must prove actual malice to recover damages in defamation action.

152. *Firestone v. Time, Inc.*, 271 So. 2d 745, 748-49; *Nigro v. Miami Herald Publishing Co.*, 262 So. 2d 698 (Fla. 3d DCA), *cert. denied*, 267 So. 2d 834 (Fla. 1972).

153. *Nigro*, 262 So. 2d at 699.

154. *Id.*

was a matter of public interest or general concern and thus private plaintiffs seeking to recover damages in defamation actions must show that the publication issued with malice.<sup>155</sup>

When *Rosenbloom* was implicitly overruled by the United States Supreme Court in *Gertz*, however, Florida courts discontinued their adherence to *Rosenbloom* and applied a negligence standard to private plaintiffs as established in *Gertz*. In *Karp v. Miami Herald Publishing Company*,<sup>156</sup> the Third District Court of Appeal stated that the standard applicable to private plaintiffs in defamation actions is negligence.<sup>157</sup> There the court held that a newspaper, which had erroneously reported that the plaintiffs faced deportation hearings because they had entered the country illegally, was not negligent because the reporter who had covered the story received his information from a reliable source and had further made reasonable efforts to verify the information.

Similarly, in *Helton v. United Press International*,<sup>158</sup> the First District Court of Appeal reversed the judgment of the trial court which had applied the *Rosenbloom* standard to private plaintiffs. The court noted that in *Gertz* the United States Supreme Court receded from *Rosenbloom* and that "the doctrine of 'public or general issue' is no longer available to the media as a defense in a defamation suit by a citizen who is neither a public official nor a public figure."<sup>159</sup> The court held that under Florida defamation law, which parallels the federal constitutional standards for plaintiffs in defamation actions, private plaintiffs "are no longer required to prove knowledge of falsity or reckless disregard for the truth as apparently was required by the progenitors of *Gertz*."<sup>160</sup>

The Supreme Court of Florida has had the opportunity to address the appropriate standard of liability to be established by private plaintiffs in defamation actions only once in the post-*New York Times* era.<sup>161</sup> In *Firestone v. Time, Inc.*,<sup>162</sup> the Supreme Court of Florida adopted without discussion a negligence standard

155. *Id.* at 700.

156. 359 So. 2d 580 (Fla. 3d DCA), *appeal dismissed*, 365 So. 2d 712 (Fla. 1978).

157. In *Karp*, the parties agreed with the trial judge's determination that the *Gertz* negligence standard should apply to private individuals. 359 So. 2d at 581.

158. 303 So. 2d 650 (Fla. 1st DCA 1974).

159. *Id.* at 651.

160. *Id.*

161. *Firestone v. Time, Inc.*, 305 So. 2d 172 (Fla. 1972) (per curiam), *vacated*, 424 U.S. 448 (1976).

162. *Id.*

for private plaintiffs in defamation actions.<sup>163</sup> *Time Magazine* published as part of its "Milestones" column an article detailing the divorce proceedings of Russell and Mary Firestone.<sup>164</sup> The article falsely stated that the Firestone divorce was granted on grounds of "adultery" when the actual basis for dissolution was "extreme cruelty."<sup>165</sup> Mary Firestone, the divorced wife, sued the publisher of *Time* for libel. The district court concluded that because Russell Firestone was heir to the "immense Firestone rubber fortune" and the divorce proceeding had generated sensational nationwide publicity, the publication in *Time* related to a matter of public interest or general concern and was constitutionally protected under the *Rosenbloom* decision then in effect.<sup>166</sup> The Supreme Court of Florida reversed the decision of the district court, finding that the *Times'* article did not relate to a matter of public interest, as defined by the United States Supreme Court in *Rosenbloom*.<sup>167</sup> On appeal, after remand to the district court, the Supreme Court of Florida once again considered the case,<sup>168</sup> this time in the wake of the United States Supreme Court's most recent pronouncement on the subject of private individuals in *Gertz*. The Florida Supreme Court, while appearing to revert to the common law principle of strict liability, cited with approval the United States Supreme Court's decision in *Gertz*, noting the "convincing evidence of . . . negligence" on the part of *Time* magazine.<sup>169</sup> The court stated that a careful examination of the Firestone divorce decree would have revealed that "adultery" was not a basis for the dissolution.<sup>170</sup> The court described the actions of *Time* as a "flagrant example of 'journalistic negligence,'"<sup>171</sup> implying that no higher standard was required for private plaintiffs.

The United States Supreme Court remanded the case to the Supreme Court of Florida for failing to apply, at a minimum, a negligence standard as established in *Gertz*.<sup>172</sup> Justice Rehnquist, writing for the majority, noted that the Florida Supreme Court,

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163. *Id.* at 178.

164. *Firestone v. Time, Inc.*, 271 So. 2d 745, 746 (Fla. 1972), *rev'd on other grounds*, 305 So. 2d 172 (Fla. 1974) (per curiam), *vacated*, 424 U.S. 448 (1976).

165. *Id.*

166. 254 So. 2d 386, 388-89 (Fla. 4th DCA 1971).

167. 271 So. 2d at 752.

168. 305 So. 2d 172 (Fla. 1974), *vacated*, 424 U.S. 448 (1976).

169. *Id.* at 178.

170. *Id.*

171. *Id.*

172. *Time, Inc. v. Firestone*, 424 U.S. 448, 464 (1976).

through its use of the term "negligence" to describe the degree of care exercised by *Time*, had apparently adopted the negligence standard for private individuals as articulated in *Gertz*.<sup>173</sup> The Court nevertheless concluded that the Supreme Court of Florida had not expressly shown a finding of fault on the part of *Time* by the lower court and that a remand was warranted.<sup>174</sup> Justice Powell, joined by Justice Stewart, concurred and based his discussion on the assumption that the Supreme Court of Florida would apply a negligence standard to private plaintiffs.<sup>175</sup> Justice White dissented because in his view the Supreme Court of Florida had indeed made a "sufficiently 'conscious determination' " of negligence on behalf of *Time*,<sup>176</sup> and he would therefore affirm the decision of the Florida Supreme Court on the basis of *Gertz*.<sup>177</sup>

On remand, the Supreme Court of Florida directed the Fourth District Court of Appeal to vacate the trial court's decision "for further proceedings in the trial court not inconsistent with the decision by the Supreme Court of the United States in this matter."<sup>178</sup> Therefore, the most recent pronouncement by the Florida Supreme Court on the appropriate standard of liability to be established by private plaintiffs, adopted without discussion the negligence standard of *Gertz*.

Recent Florida decisions have removed any doubt which may have previously existed concerning the appropriate standard for private plaintiffs under Florida defamation law. In *Miami Herald Publishing Company v. Ane*,<sup>179</sup> the Third District Court of Appeal held that under Florida law, private plaintiffs need only show that a defamatory falsehood was published with negligence, in order to recover compensatory damages.<sup>180</sup> In *Ane*, the media defendant was held liable for statements contained in a newspaper article which falsely implicated the private plaintiff in a seizure of illegal drugs on the basis that the article was published with negligence. Aurelio Ane, a beer distributor in Key West, Florida, was generally reputed to be an honest man.<sup>181</sup> On November 21, 1977, a beer truck containing three tons of marijuana was seized outside of

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173. *Id.* at 463.

174. *Id.* at 464.

175. *Id.* at 464-65.

176. *Id.* at 484.

177. *Id.*

178. *Firestone v. Time, Inc.*, 332 So. 2d 68, 69 (Fla. 1976).

179. 423 So. 2d 376 (Fla. 3d DCA 1982).

180. *Id.* at 378.

181. *Id.* at 379.

Marathon, Florida, by deputies of the Monroe County Sheriff's office. Greg Kirstein, a reporter for the defendant *Miami Herald*, was assigned to cover the event from his local office in Key West. Kirstein discovered from officials of the Monroe County Sheriff's office that the licensed owner of the seized beer truck was Lillian Fernandez. A subsequent check with the Florida Department of Motor Vehicles confirmed this information. Upon further investigation, Kirstein was able to locate the previous owner of the seized beer truck and the company to which the owner had leased the truck, Universal Brands. The president of Universal Brands, Marvin Kimmel, told Kirstein in a telephone conversation that Universal Brands no longer leased the truck and that the previous owner had told Kimmel that the truck had been sold prior to the seizure to the plaintiff, Aurelio Ane.

Kirstein admittedly made no effort to determine the accuracy of this "hearsay information."<sup>182</sup> No other source connected Ane with the subject beer truck. Moreover, the Monroe County Sheriff's office had "specifically told" Kirstein that Ane was not "a suspect in the case."<sup>183</sup>

On November 22, 1977, an article by Kirstein based largely on "unverified and contradicted hearsay"<sup>184</sup> appeared in the local section of the *Miami Herald*. This publication caused Ane personal shame, humiliation and "considerable mental anguish."<sup>185</sup> The article read as follows:

**"TRUCK ADVERTISED BEER: CARRIED MARIJUANA BALES"**

*An 'Old Milwaukee' beer truck, sold only last Thursday by a Miami firm to a Key West distributor, was confiscated early Monday carrying about three tons of baled marijuana on U.S. 1 in Marathon, Monroe County Sheriff's officials said.*

The driver of the truck, 40-year-old William W. Horton, Slip 22, Tropical Marina, Key West, was charged with possession of more than 100 pounds of marijuana and an invalid driver's license. He was being held on \$150,000 bond at the sheriff's Marathon sub-station late Monday.

Sheriff's officials promised 'a full-scale investigation' and said they have 'several other suspects' in the case. *THE LARGE red-and-white truck, which Monday contained bales either wrapped in burlap or packaged in cartons from Columbia, had been pur-*

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182. *Id.*

183. *Id.*

184. *Id.* at 380.

185. *Id.* at 380, 390.

*chased Thursday by Aurelio Ane, Key West Distributors Inc. president, according to Marvin Kimmel, president of Miami's Universal Brands Inc.*"<sup>186</sup>

Ane sued the *Miami Herald* and Greg Kirstein for libel on the basis that the false statements contained in the article which referred to Ane as the owner of the confiscated beer truck were defamatory. The trial court instructed the jury that Ane could recover if he established that the *Miami Herald* had been negligent in publishing the false and defamatory article.<sup>187</sup> The jury returned a verdict for Ane and the *Miami Herald* appealed.<sup>188</sup>

Citing "a clear case of journalistic negligence,"<sup>189</sup> the third district affirmed the trial court's decision. The court rejected the *Miami Herald's* contention that Florida law requires a private plaintiff to show that the defamatory statements were published with "actual malice" when the publication relates to a matter of public interest or concern.<sup>190</sup> The court stated that "in accord with established First Amendment law and the overwhelming weight of authority throughout the country," Florida law requires a plaintiff who is neither a public official nor a public figure to establish only that the defamatory falsehood was published with negligence.<sup>191</sup> The court held that this standard applies even to those private individuals who are injured by defamatory publications relating to matters of public interest or general concern.<sup>192</sup>

In reaching its decision, the *Ane* court noted that prior to the United States Supreme Court decision in *New York Times*, Florida defamation law was governed by common law defamation principles.<sup>193</sup> The court emphasized that under the common law system which subjected a media defendant to strict liability absent the affirmative defenses of truth or privilege, Florida law "never required proof that the defendant acted negligently . . . much less that the defendant acted with *New York Times* 'actual malice.'"<sup>194</sup> Stating that all of Florida's common law of defamation "has been

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186. *Id.* at 379-80 (emphasis added in original).

187. *Id.* at 381-82.

188. *Id.* at 382.

189. *Id.* at 390.

190. *Id.* at 382.

191. *Id.* at 378.

192. *Id.*

193. *Id.* at 383.

194. *Id.*

changed,"<sup>195</sup> the court concluded that private plaintiffs in Florida, and in the majority of jurisdictions, are required to establish that false and defamatory statements were published with negligence.<sup>196</sup> This standard, the court continued, is not a prerequisite "of the Florida common law of defamation or Florida constitutional law" but rather is a prerequisite "of the First Amendment to the United States Constitution which heretofore did not exist under Florida law. Florida courts, in turn have consistently sought to follow these federal standards in defamatory actions in the post-*New York Times* era."<sup>197</sup>

The court observed that Florida courts had initially adhered to the reformulation of the *New York Times* rule as announced in *Rosenbloom*, which suggested that private individuals must show actual malice when defamed by a publication relating to a matter of public interest or concern.<sup>198</sup> However, when that decision was repudiated in *Gertz*, Florida courts ceased to follow *Rosenbloom* and instead applied the *Gertz* negligence standard to private plaintiffs.<sup>199</sup> The *Miami Herald* conceded that *Rosenbloom* was no longer good law at the federal level.<sup>200</sup> The *Herald* contended, however, that Florida had adopted as a matter of state law the actual malice standard for private individuals as a result of the Florida Supreme Court's first decision in *Firestone v. Time, Inc.*<sup>201</sup> The third district rejected this analysis stating that the *Firestone* decision, "purely and simply, interprets the First Amendment to the United States Constitution in the context of a libel action and does not even mention, much less interpret" the Florida Constitution.<sup>202</sup> The court emphasized that because *Firestone* is "solely a First Amendment case" applying the *Rosenbloom* standard, "it no longer represents the law in view of *Gertz v. Robert Welch, Inc.*"<sup>203</sup> The court stated that when *Rosenbloom* "died at the federal level, it died in the Florida courts as well."<sup>204</sup> Moreover, the court noted

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195. *Id.*

196. *Id.* at 378.

197. *Id.*

198. *Id.* (citing *Firestone v. Time, Inc.*, 271 So. 2d 745 (Fla. 1972)).

199. *Id.* (citing *Karp v. Miami Herald Publishing Co.*, 359 So. 2d 580 (Fla. 3d DCA), *dismissed*, 365 So. 2d 712 (Fla. 1978)). *See also Helton v. United Press Int'l*, 303 So. 2d 650 (Fla. 1st DCA 1974).

200. *Miami Herald Publishing Co. v. Ane*, 423 So. 2d at 384.

201. 271 So. 2d 745.

202. 423 So. 2d at 384.

203. *Id.*

204. *Id.*

that the ultimate decision of the Supreme Court of Florida in the *Firestone* case adopted, without discussion, a negligence standard for private individuals.<sup>205</sup>

The court next rejected the *Miami Herald's* additional reliance on the early conditional privilege cases stating that none of them can be read "to adopt as a matter of state law" the *Rosenbloom* standard of actual malice for private individuals.<sup>206</sup> To accept this construction of Florida law, the court stated, would mean standing Florida defamation law "on its head."<sup>207</sup>

The law of defamation is designed to advance society's legitimate interest in protecting individual reputations by providing redress to one whose reputation has been damaged by false and defamatory publications. Because a system under which all defamatory publications subject a media defendant to strict liability would deter the dissemination of necessary information, defamation law seeks to ameliorate the intolerable result of press censorship by granting media defendants protection from liability without fault. Defamation law thus achieves its goal by balancing the desire to be free from false and defamatory publications against society's commitment to free and open discussion on matters of public significance.

The adoption of an actual malice standard for private individuals involved in matters of public interest would seriously erode the ability of a private individual to obtain redress for injury to reputation and would create an imbalance between reputational interests and the freedom of speech and press. The *Gertz* Court stressed the inappropriateness of the *Rosenbloom* test of "matter of general or public concern" because it ill served the competing values at stake. The Court recognized the inconsistency and confusion inherent in the determination of what constitutes a matter of public interest or concern. Virtually every item that appears in today's news can arguably be said to constitute a matter of public interest or concern.<sup>208</sup> Because the parameters of public interest are ill-defined, judges in defamation actions involving private plaintiffs would be forced to make ad hoc decisions, on the issue whether a certain publication relates to a matter of public interest. Florida has not developed a workable test for determining matters of public interest or concern and therefore the results of defama-

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205. *Id.* at 383-84.

206. *Id.* at 385.

207. *Id.*

208. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 357 n. 4 (1974) (Douglas, J., dissenting).

tion actions involving private plaintiffs would be inconsistent.<sup>209</sup>

Moreover, to subject a private plaintiff to the rigorous burden of proving actual malice in an area as broad and undefined as public interest, would effectively deny redress to a private individual who has not consented to media exposure. As the Court noted in *Gertz*, the defamation action represents perhaps the sole remedy available to a private individual whose reputation has been involuntarily subjected to injury by media intrusion. Private individuals do not enjoy sufficient access to the means of communication necessary to effectively rebut and correct attacks on their reputation. Further, private individuals do not seek out media attention. Consequently, the states' interest in protecting the reputational interests of the private individual is greater than its interest in protecting public officials or public figures. The negligence standard for private plaintiffs recognizes this strong and pervasive interest and restores the necessary balance between society's commitment to uninhibited and robust discussions on public issues and reputational interests.

The privilege to comment on matters of public interest was developed at common law to mitigate the harsh common law standard of strict liability. The negligence standard serves this original purpose and Florida post-*Gertz* defamation decisions have not relied on the public interest privilege to determine the appropriate standard for private plaintiffs.

### CONCLUSION

The decisions of the United States Supreme Court which established the existing federal constitutional standards for plaintiffs in defamation actions, displaced common law defamation principles. The Court determined that the degree of protection to be accorded a media defendant was determined by focusing on the character or status of the defamed plaintiff. This approach, which ignores the subject matter of the publication itself, repudiated the actual malice requirement for private plaintiffs involved in a matter of public

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209. In *Firestone*, the Florida Supreme Court, relying on *Rosenbloom*, struggled to determine whether the Firestone divorce was a matter of public concern. The court concluded by setting forth a plethora of situations covering almost every aspect of human existence, which would constitute a matter of public concern. The court stated that "matters of real public or general concern are those which invoke common and predominant public activity, participation or indulgence, and cogitation, study and debate; and they include such matters relating generally to the health, well-being and general comfort of the public as a whole." *Id.* at 749.

interest, establishing instead a negligence standard for private individuals. Moreover, the court refused to incorporate into its definition of malice the common law requirement of ill will or intention to defame.

Florida courts have consistently followed those standards articulated by the United States Supreme Court in determining the appropriate standard of liability to be established by private individuals in defamation actions. By adopting the negligence standard announced in *Gertz*, Florida courts essentially have renounced all pre-*Gertz* defamation decisions involving private plaintiffs and have logically removed the conditional privilege to comment on matters of public interest involving private individuals.

The free speech and press guaranteed by the first amendment is an absolute precondition to a free and open society. If divorced from its original purpose, intolerable censorship would result. However, the first amendment was not intended to allow the press its own jurisprudence. Florida defamation law seeks to extract a sense of responsibility in exchange for the freedoms of the press. By following the negligence standard for private individuals established in *Gertz*, Florida courts have recognized the important value society places on the reputational interests of the private individual. Any attempt to remove this important interest by adopting an actual malice standard for private individuals, would give the press a protection not intended by the first amendment and would impair to an appreciable extent the underlying social values of the defamation action in modern society.

The Florida Supreme Court may soon have the opportunity to specifically delineate the standard of liability to be established by private plaintiffs in defamation actions.<sup>210</sup> While the legal community continues to debate the issues surrounding this area, one can be assured that the court, following a review of Florida defamation law and its own decisions concerning private plaintiffs, will be most receptive to a standard of liability less than "actual malice."

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210. As this writing, the Florida Supreme Court has recently called for briefs on the merits in the case of *Miami Herald Publishing Co. v. Ane*, 423 So. 2d 376 (Fla. 3d DCA 1982), which held that Florida defamation law requires a private plaintiff to establish publication with negligence. See *supra* text accompanying note 191.