State Court Reactions to Gertz v. Robert Welch, Inc.: Inconsistent Results and Reasoning

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RECENT DEVELOPMENT

State Court Reactions to Gertz v. Robert Welch, Inc.: Inconsistent Results and Reasoning

I. INTRODUCTION

Historically, defamatory language was believed to be outside the protection of the first amendment. In the 1964 decision of New York Times Co. v. Sullivan, however, the United States Supreme Court recognized that the states' interest in protecting individual reputation and the first amendment guarantees of free expression are interrelated, competing values that must be balanced. During the decade following New York Times, the Court attempted to define the proper accommodation between the law of defamation and the first amendment. Gertz v. Robert Welch, Inc., the Court's most recent decision concerning defamation, redefined the basis of liability, limited the award of damages, and modified the proof requirements for recovery by various classes of plaintiffs. In addition, Gertz delegated to the states responsibility for determining, within the limits established by that case, the proper standard of liability for defamation of a private individual. The states that currently have responded to Gertz have not been uniform in their reasoning or conclusions. This Recent Development will examine the state court reactions to Gertz, describe the reasons for the lack of uniformity in their conclusions, and suggest an approach to balancing the first amendment and reputational interests.

1. The term "defamation," as used in this Recent Development, refers to both the actions for libel and for slander. The distinction between the two causes of action, based primarily upon the medium used to publish the defamatory remark, is unrelated to the present inquiry. See note 9 infra and accompanying text.


5. See notes 7-18 infra and accompanying text.

6. See notes 52-76 infra and accompanying text.
II. LEGAL BACKGROUND AND DEVELOPMENT

At common law, the cause of action for defamation was designed to protect the individual's interest in reputation. Because of the importance attached to reputation, the publisher of a defamatory statement was subject to strict liability. Liability arose upon proof that the statement was published to a third party and could be attributed a meaning that would injure the plaintiff's reputation. If the plaintiff proved these elements, the defendant was liable unless he could show that the statement was true or its publication privileged. Privileges were of two types, absolute and qualified, and were based upon a policy that treated the benefit to be gained by permitting publication of certain defamatory statements as greater than the harm that might be done to personal reputation. Two qualified privileges adopted in some jurisdictions were designed primarily to protect the media. One of these, the "fair comment" privilege, extended to the publication of unfounded conclusions based on accurate facts. The other privilege peculiar to the media, the "reporter's" privilege, protected fair and accurate reports of official proceedings. This privilege differed from the defense of truth, which protected any allegedly defamatory speech, because the statements in the proceedings need only be shown to have been reported accurately rather than to have been true. If the

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7. The terms "publisher" and "publication," as used in the discussion of common law defamation, refer to the communicator and communication of any defamatory statement. See W. PROSSER, THE LAW OF TORTS § 113 (4th ed. 1971) [hereinafter cited as PROSSER].

8. Id.

9. RESTATEMENT OF TORTS § 558 (1938).

10. PROSSER, supra note 7, at § 114.

11. Absolute privileges, which provided the publisher with complete immunity, were limited to communications related to certain governmental activities. See RESTATEMENT (SECOND) OF TORTS §§ 585-592 (1976). Absolute privileges were based upon a policy that certain persons, because of their special position or status, should not be deterred from making communications by the risk that a trier of fact might find against them even when they have acted reasonably and without malice. RESTATEMENT (SECOND) OF TORTS, Explanatory Note, Topic 2 (Tent. Draft No. 20, 1974).

12. Qualified privileges were effective only when exercised in a reasonable manner. The reasonableness standard generally meant that the publisher must not have said more or have communicated to a larger audience than necessary, that the publication must have had a socially desirable purpose, and that the publisher must have had reasonable grounds for believing what he said and must not have acted with improper motive. See Developments in the Law-Defamation, 69 HARV. L. REV. 875 (1956) [hereinafter cited as Developments].


15. Id. at 928.

16. Id.
publisher was unable to establish a privilege in an action for defamation, then the plaintiff was entitled to recover presumed damages\textsuperscript{17} without proof of actual harm, but was required to specifically plead and prove special and exemplary damages.\textsuperscript{18}

These common law rules were not modified substantially until the Supreme Court's decision in \textit{New York Times Co. v. Sullivan},\textsuperscript{19} which held that there are constitutional restrictions upon the cause of action for defamation. In \textit{New York Times}, a local government official in Montgomery, Alabama brought an action for damages arising from the publication of a defamatory advertisement in defendant's newspaper.\textsuperscript{20} Following a $500,000 judgment for the plaintiff,\textsuperscript{21} the defendant newspaper petitioned the Supreme Court for review, contending that its first and fourteenth amendment rights had been violated.\textsuperscript{22} The Court recognized that the issue was whether the common law standard of strict liability should be applied in an action brought by a public official against critics of his official conduct.\textsuperscript{23} Basing its decision on the premise that media discussion of public matters is an activity protected by the Constitution, the Court held that a public official may recover damages from the media only upon proof that the defamatory statement relating to his official conduct was made with "'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."\textsuperscript{24} The Court characterized the constitutional guarantee of free expression as a "profound national commitment,"\textsuperscript{25} and recognized the absolute and qualified privi-

\textsuperscript{17} For all libel actions and certain actions for slander, damage to reputation was presumed to have resulted from the publication. The jury was permitted to find substantial damages on the basis of this presumption, and was required to return at least nominal damages. \textit{Developments, supra} note 12, at 934.

\textsuperscript{18} \textit{Prosper, supra} note 7, at § 115.

\textsuperscript{19} 376 U.S. 254 (1964).

\textsuperscript{20} Respondent, one of three elected commissioners in Montgomery, Alabama, alleged that he had been defamed by statements in a full-page advertisement published in the \textit{New York Times} on March 29, 1960. Although respondent was not mentioned by name, he contended that these statements attributed misconduct to him as the Commissioner who supervised the police department.

\textsuperscript{21} When \textit{New York Times} was decided, four other defamation suits had been filed against the \textit{Times} by other Montgomery City Commissioners. One suit had resulted in a $500,000 verdict, and the damages sought in the other three totaled $2,000,000. 376 U.S. at 277 n.18.

\textsuperscript{22} The source of the constitutional protection relied upon by the defendant was the first amendment, which has been incorporated into the fourteenth amendment, and therefore applied to the states. \textit{See, e.g.}, Smith v. California, 361 U.S. 147 (1959).

\textsuperscript{23} 376 U.S. at 268.

\textsuperscript{24} \textit{Id.} at 279-80.

\textsuperscript{25} \textit{Id.} at 270.
leges that were extended at common law to the discussion of public matters. The Court decided, however, that the privileges did not protect sufficiently the constitutional guarantee of free expression, particularly in light of the possibility of large judgments and the requirement that the defendant bear the burden of proving truth. Reasoning that the common law privileges were insufficient to prevent "self-censorship" of the mass media, the Court concluded that the Constitution required that strict liability should not be applied in actions for defamation brought by public officials whose official conduct has been criticized. The Court failed, however, to define in detail its "actual malice" standard, and did not provide guidelines for determining which parties and what acts fall within the "public official, official conduct" category.

In the decade following New York Times, the Court defined and expanded the scope of its decision. Two leading cases decided after New York Times gave content to the meaning of actual malice and public official. First, in St. Amant v. Thompson, the Court held that actual malice could be established only when the defendant "entertained serious doubts as to the truth of his publication." Secondly, the public official requirement was clarified in Rosenblatt v. Baer, an action concerning the supervisor of a county-owned recreation area. The Rosenblatt Court stated that the public official designation applied to government employees "who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." Clear expansion of the New York Times standard began in Curtis Publishing Co. v. Butts,

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26. See notes 11-16 supra and accompanying text.
27. 376 U.S. at 277-79.
28. Rather than define its use of the term, the Court cited state court cases that had used "actual malice." Id. at 280. For a discussion of the confusion that this created in the lower federal courts see Eaton, The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer, 61 Va. L. Rev. 1349, 1370-71 (1975).
29. 376 U.S. at 283 n.23. The New York Times Court states:
   We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included.
Id.
30. See note 3 supra.
32. Id. at 731.
34. Id. at 85.
35. 388 U.S. 130 (1967). Defendant magazine, The Saturday Evening Post, published an article charging that plaintiff, the football coach at the University of Georgia, had conspired to "fix" a football game. The Court held that Butts, as a "public figure" who commanded a substantial amount of independent public interest at the time of the publication,
when the public official concept was applied to "public figures." Chief Justice Warren, in his concurring opinion, defined "public figures" as those who "are 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." The focus of the Court shifted from individuals to issues in *Rosenbloom v. Metromedia, Inc.*, when the Court extended the *New York Times* standard of actual malice "to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous." Although recognizing that the holding in *New York Times* had been limited specifically to situations concerning public officials, Justice Brennan's plurality opinion contended that the first amendment concern was with the free debate of all matters of public concern, regardless of whether the plaintiff was a private individual. Consistent with this reading of *New York Times*, the *Rosenbloom* opinion contended that society's interest in protecting individual reputation must often yield to other important social goals. In a dissenting opinion, Justice Harlan advocated the imposition of a negligence standard of liability for private individuals defamed by the news media. Harlan reasoned that a private citizen who never sought publicity and who has only limited access to the media for rebuttal deserves a greater degree of protection than does a public figure or public official. A majority of the *Rosenbloom* Court rejected the negligence standard in actions for defamation, fearing that self-censorship of the mass media would result from the inherent uncertainty of a reasonable-

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36. *Id.* at 164 (Warren, C.J., concurring).
38. *Id.* at 44.
39. Five opinions were written in the *Rosenbloom* case. Chief Justice Burger and Justice Blackmun joined in Justice Brennan's plurality opinion. Justice Black concurred in the judgment, reiterating his position that the press is immune from liability for defamation. Justice Marshall, joined by Justice Stewart, dissented, arguing that adoption of the *New York Times* standard was inappropriate. Justice Harlan also dissented, and suggested that negligence might be an appropriate standard for private plaintiffs. Justice White, concurring in the result, refused to join in any of the opinions, but decided that *New York Times* allows the press to report police arrests. Justice Douglas did not participate in the decision.

40. *403 U.S.* at 49-50.
41. *Id.* at 66-72 (Harlan, J., dissenting).
42. *Id.*
ness standard that would create the possibility of having to litigate numerous claims.43

The Court borrowed much of the reasoning of Justice Harlan’s Rosenbloom dissent in Gertz v. Robert Welch, Inc.,44 the Court’s latest attempt to define the proper accommodation between the constitutional guarantees of free expression and the law of defamation. In Gertz, an attorney claimed that an article published about him in American Opinion, an organ of the John Birch Society, contained false and defamatory statements. The article described plaintiff’s representation of the family of a youth who had been shot and killed by a Chicago policeman as part of a communist plot to discredit the police.45 The trial court entered a judgment notwithstanding the verdict for the defendant magazine, concluding that although plaintiff was not a public official or figure, the actual malice standard applied because the article dealt with a matter of public concern.46 After an extensive reevaluation of the questions presented in the New York Times line of cases, the United States Supreme Court reversed. The Court initially recognized that the protection of debate on public issues must shield some false statements. Reasoning that the harm to reputation that resulted from this protection was unavoidable, the Court held that liability without fault could not be imposed upon the publisher of a defamatory statement concerning public matters.47 Secondly, the Court acknowledged the legitimate state interest in protecting individual reputations. The Court decided that although the New York Times standard was appropriate in actions concerning public officials or figures, a more stringent standard of care was preferable in actions maintained by all private plaintiffs, regardless of whether the publication concerned a matter of public interest.48 The Court referred to the private plaintiff’s lack of access to the media and his involuntary placement in public affairs as the rationale for the distinction between public and private individuals.49 The Court refused to impose a specific standard upon the states. Instead, the Court held that “so long as they do not impose liability without fault, the

43. Id. at 50.  
45. The article portrayed Gertz as the architect of a plot to frame a policeman who was tried and convicted of second degree murder in connection with the killing. The article stated that Gertz was a “Leninist” and a “Communist fronter.” Id. at 326.  
47. 418 U.S. at 341-42.  
48. Id. at 342-43.  
49. Id. at 347.
States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."50 Thirdly, the Court observed that the common law doctrine of presumed damages often resulted in awards disproportionate to actual injury. The Court found that because the states have a legitimate state interest only in the compensation of actual injury, recovery should be restricted to actual damages unless actual malice is shown.51 Thus the Gertz Court delegated to the states the substantial responsibility of defining a standard of care in defamation actions brought by private plaintiffs.

III. STATE DECISIONS SINCE GERTZ

The courts of eighteen states52 have considered the effect of Gertz upon their law. Several of these courts have examined the opinion without finding it necessary to rule on the standard of liability issue. Courts in Iowa,53 Louisiana,54 and West Virginia,55 for example, have discussed the implications of Gertz, but have employed the New York Times standard upon a finding that the plaintiffs before them were public figures. Intermediate appellate courts in Florida and Texas apparently have decided that Gertz mandates the imposition of the negligence standard in all private plaintiff cases.56

50. Id.
51. Id. at 349-50.
56. Helton v. UPI, 303 So. 2d 650 (Fla. App. 1974); Foster v. Laredo Newspapers, Inc.,
Because of the limits placed upon the states by the Gertz decision, there are three realistic standards of care from which the states may choose. One alternative would be to adopt the Rosenbloom decision and hold that for recovery in actions brought by private plaintiffs concerning an area of public interest, the plaintiff must show actual malice, as defined in *New York Times* and *St. Amant*. Another alternative would be to apply the *New York Times* standard to all defamation actions, regardless of the nature of the issue or the status of the plaintiff. The third alternative would be to adopt the reasoning of the Gertz decision and apply the negligence standard to all defamation actions brought by private plaintiffs. Of the thirteen states that have revised their standard of care since Gertz, nine states generally have adopted the third alternative and followed the Gertz reasoning. Although the Gertz Court did not define a negligence standard, these state courts usually have held that, in defamation actions brought by private plaintiffs, the publisher is subject to liability if the publication was false and the defendant either knew it to be false, or, believing it to be true,

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530 S.W. 2d 611 (Tex. App. 1975). These cases have misread the Gertz holding, because they do not consider the discretion granted to the states in defining their own standard of care. See note 49 supra and accompanying text. The Florida Supreme Court apparently will face the standard of care issue in the near future because the United States Supreme Court has determined that Mary Alice Firestone, the former wife of a wealthy industrialist and the plaintiff in *Time, Inc. v. Firestone*, 96 S.Ct. 958 (1976), is not a public figure. The Court remanded the case to the Florida courts for a decision on the liability of defendant magazine.

57. The primary constraint placed upon the state courts by Gertz is that they cannot impose liability without fault. See note 80 infra.

58. See notes 24, 29, 32, 33 supra and accompanying text.


lacked reasonable grounds for that belief. A recent decision illustrating the rationale relied upon by these courts is *Taskett v. King Broadcasting Co.*, an action arising from defamatory statements made during a television news program. The Washington Supreme Court, which previously had adopted the *Rosenbloom* plurality opinion, recognized the discretion granted to the states by *Gertz*. Framing the issue in terms of a balancing of the conflicting interests of free speech and reputation, the court stressed that "these two competing values must be tempered so that neither social requisite be destroyed." The *Taskett* court recognized that the *New York Times* decision was based upon the need to perpetuate an uninhibited marketplace of ideas, but criticized that decision for its failure to take into account the state's interest in providing its citizens with a remedy for defamation. Although the court conceded that the *New York Times* standard was appropriate for public officials and figures, it found that, because of the "overriding" state interest in protecting private plaintiffs, the actual malice standard was inappropriate for actions by private plaintiffs. The court recognized that some self-censorship of the media might result from its decision, but suggested that greater caution concerning publication of matters involving private plaintiffs may be desirable. Also, the court reasoned that self-censorship often arose from the uncontrolled discretion of juries to award judgments disproportionate to actual harm, and concluded that this would be mitigated by the constraints placed by *Gertz* upon defamation judgments.

A minority of states that have considered the question have
refused to follow the Gertz and Taskett approach of imposing a negligence standard of care. Although none of these courts has extended the New York Times standard to all defamation actions, they have adopted the Rosenbloom plurality opinion and held that a private individual who brings a defamation action concerning an event of general or public interest must prove that the defamatory falsehood was published with knowledge of its falsity or with reckless disregard for whether it was true. A leading case following this approach is AAFCO Heating & Air Conditioning Co. v. Northwest Publications, Inc.,\textsuperscript{71} an action arising from a series of defamatory newspaper articles.\textsuperscript{72} The AAFCO court initially stated that it sought an accommodation between society's interest in freedom of expression and the state's interest in protecting the reputation of private individuals.\textsuperscript{73} The court then cited the Indiana constitution as authority that the interchange of ideas upon all matters of public concern must be unimpaired.\textsuperscript{74} The AAFCO court refused to attach any significance to the plaintiff's status as a public official or figure or a private individual, stating that once a matter of general or public interest is recognized, the status of the plaintiff becomes insignificant.\textsuperscript{75} The court contended that the negligence standard was unacceptable primarily because self-censorship would result from its imposition. Self-censorship was likely, the court suggested, because of the uncertainty attendant upon a reasonable care standard and the possibility of large judgments.\textsuperscript{76} The AAFCO court, therefore, found that the imposition of the Rosenbloom standard was necessary to ensure vigorous, free debate of public issues. Thus a survey of exemplary state defamation decisions since Gertz indicates divergence in both the reasoning process used by the courts and the conclusions they have reached.

\textsuperscript{71} 321 N.E.2d 580 (Ind. App. 1974).
\textsuperscript{72} In AAFCO, defendant newspaper published a series of articles contending that plaintiff had failed to obtain the necessary permits for electrical work done on a single family dwelling. The house had burned, and two children died in the fire. Plaintiff had in fact obtained the necessary construction permits.
\textsuperscript{73} \textit{Id.} at 586.
\textsuperscript{74} \textit{See} note 97 \textit{infra} and accompanying text.
\textsuperscript{75} 321 N.E.2d at 587.
\textsuperscript{76} \textit{Id.} at 588-89.
IV. THE BALANCING PROCESS: CONSTITUTIONAL AND REPUTATIONAL INTERESTS

The task facing the states in the wake of the *Gertz* decision is a difficult one. Despite the apparently irreconcilable conflict between the first amendment interests in uninhibited exchange of information and the states' interest in protecting individuals from defamatory falsehoods, the states have been charged with striking a delicate balance between the two by defining the standard of liability for defamation. By establishing the requirements for recovery by a private plaintiff, each state is able to effectuate its desired balancing of these interests. For example, when the standard of liability imposed by a state for a private plaintiff's recovery becomes more stringent, protection of first amendment interests diminishes and protection of reputation is enhanced. These effects occur because the media is exposed to liability in a greater number of situations, resulting in increased self-censorship of both accurate and inaccurate information. Simultaneously, the citizens of a state benefit from careful media screening of defamatory falsehoods and from more lenient proof requirements for recovery of damages. Conversely, relaxation of the standard of liability values first amendment interests over individual reputation. With a more lenient standard, the media, because it is exposed to liability in fewer instances, may become less cautious in its criticism of private individuals. Simultaneously, defamed persons find it more difficult to vindicate their rights because of the more demanding proof requirements. Thus adoption of the more stringent negligence standard of liability, as in *Taskett v. King Broadcasting Co.*, represents a determination that the states’ interest in protecting reputation is great relative to the importance of first amendment interests in free speech. At the other end of the spectrum, imposition of the actual malice requirement, as in *AAFCO Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, indicates that the importance of first amendment interests has been found to outweigh the interests in protecting reputation.

As has been discussed above, there are only three standards of liability from which the states may choose: alternative A im-

77. See notes 27-29 supra and accompanying text.
78. 86 Wash. 2d 439, 546 P.2d 81 (1976); see notes 62-69 supra and accompanying text.
80. See notes 57 & 58 supra and accompanying text.
81. Realistically, the *Gertz* holdings limit the states to these 3 alternatives. Because liability without fault is prohibited, the states cannot constitutionally impose a standard of
poses the standard adopted in \textit{Rosenbloom v. Metromedia, Inc.};\textsuperscript{82} alternative B requires a showing of actual malice by all private plaintiffs; and alternative C adopts the negligence standard that was preferred in \textit{Gertz v. Robert Welch, Inc.}\textsuperscript{83} In selecting the alternative that will effectuate a proper balance between constitutional and reputational interests, the state courts should focus upon several policy considerations that have been identified by the United States Supreme Court in the line of defamation cases following \textit{New York Times}.\textsuperscript{84} The weight to be attached to the interest in protecting individual reputation must be determined by the plaintiff's need for state aid in protecting his reputation from defamatory falsehoods. This need must, in turn, be ascertained by reference to the attributes of the defamed individual; his ability to gain access to the media to refute false accusations and the extent to which he has placed himself in the forefront of public affairs, thereby "assuming the risk" of adverse commentary.\textsuperscript{85} The importance of first amendment interests in free speech, which are to be balanced against the reputational interests, is measured by the extent to which the public debate necessary for effective self-government will be inhibited by self-censorship of the media that results from apprehension of defamation suits.\textsuperscript{86}

In \textit{New York Times} and its progeny, the Supreme Court has balanced the needs of plaintiffs who are public figures or officials against the first amendment interest in protecting free debate. The cases have concluded that, because public figures have ready access to the media and have voluntarily placed themselves in the public eye, imposition of the actual malice standard achieves the proper accommodation of constitutional and reputational interests when they are plaintiffs. The states which have adopted alternative A,\textsuperscript{87} the \textit{Rosenbloom} standard, have reasoned that the first amendment interest in protecting uninhibited discussion of public matters is no less important than the interest in uninhibited discussion of the activities of public officials. These states have concluded that the

\begin{itemize}
\item \textsuperscript{82} 403 U.S. 29 (1971).
\item \textsuperscript{83} 418 U.S. 323 (1974).
\item \textsuperscript{84} See note 3 supra.
\item \textsuperscript{85} See note 49 supra and accompanying text.
\item \textsuperscript{86} Id.
\item \textsuperscript{87} See note 70 supra.
\end{itemize}
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standard of liability that is imposed when the plaintiff is a public figure should, therefore, also be imposed when a private plaintiff is defamed concerning a matter of public interest. Although these courts have correctly characterized the first amendment values as equivalent in the two situations, it does not follow necessarily that the same standard of liability should be applied in both. The courts that have adopted this line of reasoning have failed to examine the countervailing reputational interests. The examination would reveal that the state's interest in protecting individual reputation increases dramatically when the defamed party is a private citizen. The private individual involved in a matter of public concern does not have the access to the media enjoyed by public figures and officials, and, in addition, has not assumed the risk of being defamed by placing himself in a position of public prominence. Thus the net result of the balancing process is a decrease in the relative value of first amendment interests in uninhibited communication and an increase in the need to protect individual reputation. Retention of the actual malice standard in cases concerning matters of public interest fails to reflect a proper balancing of both constitutional and reputational interests because it does not acknowledge the special needs of a plaintiff who is not a public figure or official. A further argument against adoption of alternative A is that, unlike the determination of whether a person is a public figure or official, the question whether a matter is of public concern often depends on whether the media themselves make it one. Thus it is argued that under the Rosenbloom standard the media themselves determine when they are entitled to the additional protection of the actual malice limitation on recovery for defamation.

Alternative B, which requires a showing of actual malice by all private plaintiffs regardless of whether they are involved in a public matter, possesses all the shortcomings of alternative A and magnifies them by its expanded application of the actual malice standard. Courts choosing this alternative would not only apply the actual

88. See note 75 supra and accompanying text.
89. See Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 71-72 (1971) (Harlan, J., dissenting), wherein Justice Harlan castigated the Court for its failure to balance first amendment and reputational interests, characterizing the plurality's approach as "single-minded devotion to the task of preventing self-censorship."
90. See, e.g., Troman v. Wood, 62 Ill. 2d 184, 340 N.E.2d 292 (1975), which concerned an article that implied that plaintiff's home was being used as the headquarters of a juvenile gang that had committed a series of burglaries. The defendant newspaper claimed that the article concerned a matter of public interest.
91. Id.
malice requirement to private plaintiffs who are defamed in connection with a matter of public concern, but would go one step farther and also apply the requirement to private individuals who are defamed concerning a matter of only private interest. This extension of the Rosenbloom standard serves merely to accentuate the imbalance inherent in alternative A. When a private plaintiff has been defamed concerning a private matter, the weight of the reputational interests has increased because of the greater need for state protection of reputation. In addition the first amendment interests in protecting free speech, which are measured by the extent to which public debate necessary for self-government is inhibited by self-censorship, have diminished. The increased self-censorship that would result by imposing a more stringent standard of liability when a private plaintiff has been defamed regarding a private matter would not inhibit the public debate that is protected by the first amendment. Private matters are not relevant to effective self-government and do not, therefore, fall within the protection of the first amendment.\footnote{92. Even those states adopting alternative A, the Rosenbloom standard, have pointed out that freedom of expression requires "that the interchange of ideas upon all matters of 'general or public interest' be unimpaired." AAFCO Heating & Air Conditioning Co. v. Northwest Publications, Inc., 321 N.E.2d 580, 586 (Ind. App. 1974) (emphasis added). See also Walker v. Colorado Springs Sun, Inc., 538 P.2d 450 (Colo. 1975); Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975). None of these courts has contended that the first amendment is concerned with matters of only private interest.} Thus the first amendment interests are relatively unimportant in this situation. Alternative B fails to reflect the results of this balancing process, which favors reputational interests over first amendment interests when private matters, rather than public ones, are the subject of media inquiry.

The remaining alternative, adoption of the negligence standard preferred by Gertz in all actions brought by plaintiffs who are not public figures or public officials, is the only standard of liability that achieves the desired balancing of first amendment guarantees and the interests in protecting individual reputation. Because the private plaintiff, unlike the public figure or official, lacks the means to protect his reputation without state aid, he is dependent upon the courts for vindication of his interests. Alternative C recognizes that the special needs of the private plaintiff require a more stringent standard of liability than is imposed when the plaintiff is a public figure or official who has ready media access and has voluntarily assumed the risk of defamatory comment by placing himself in the public eye. The question facing the states is not whether all self-
censorship of the media should be prevented, but, rather, what degree of self-censorship effectuates a reasonable accommodation of both first amendment interests and the needs of a private plaintiff.\textsuperscript{93} The Gertz standard of liability achieves this reasonable accommodation of both interests when the plaintiff is a private citizen. Just as liability without fault intolerably inhibits free expression by causing extensive self-censorship of the media,\textsuperscript{94} imposition of a standard of liability less stringent than alternative C intolerably burdens defamed private individuals by preventing vindication of their rights. Each state is, of course, free to sacrifice the reputational interests of its citizens to prevent all self-censorship of the media, but that approach fails to recognize that a certain degree of self-censorship may be desirable to protect private plaintiffs and that a reasonable balance can be attained by adoption of the Gertz standard.

V. CONCLUSION

Although the balancing approach outlined above indicates that the negligence standard of liability should be adopted, a different result may be mandated in some states by circumstances that attach special significance to either of the competing interests that are being balanced. For example, four states have based their decisions under Gertz on the apparent dictates of state constitutional provisions.\textsuperscript{95} Two of these states, Kansas and Oklahoma, have interpreted their free expression clauses as requiring special deference to reputational interests, and have, therefore, adopted the Gertz standard of negligence for actions maintained by private individuals.\textsuperscript{96} An Indiana court has found that its constitution mandates that the interchange of ideas remain unimpaired, and, in order to accommodate the increased importance of free expression in that state, adopted

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Every person may freely speak, write, or publish his sentiments on all subjects, being responsible for the abuse of that right. . . .

the Rosenbloom standard. The fourth state, Hawaii, determined that the provisions of its constitution pertaining to free expression were substantially the same as the federal Constitution, and, therefore, required adherence to alternative C, the Gertz negligence standard. Circumstances such as these, which are peculiar to the individual states, properly are considered in determining an appropriate standard of liability. The state courts should be aware, however, that a decision to adopt a particular standard because of special circumstances may have repercussions beyond its borders. Possible interstate effects arise because a statement published in one state may create liability for defamation in another state. Because national magazines, large newspapers, and national broadcasting networks are subject to the requirements of the defamation laws in all of the states in which they operate, the standard of liability adopted by one state may affect their conduct in another. To illustrate, if one state within an organization's area of publication adopts a negligence standard and another retains the actual malice requirement, the publisher must adhere to the more stringent negligence standard or expose himself to liability in that state. The end result is that the negligence standard guides the publisher's conduct in all of the states in which he operates. A state which has determined that the proper balance between reputational and constitutional interests is reflected in the actual malice standard finds that the greater amount of self-censorship connected with the negligence standard is being exercised within its borders, at least by those publishers who also operate within the state which has adopted the negligence standard.

The state courts must, of course, be guided by conditions within their own boundaries, but they should not adopt a standard of lia-


No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely on any subject whatever: but for the abuse of that right, every person shall be responsible.

IND. CONST. art. I, § 9.


No law shall be enacted . . . abridging the freedom of speech or of the press.

HAWAI CONST. art. I, § 3.

99. The New York Times case illustrates this possibility. Although printed in and distributed from New York, the Times was found liable for defamation in the Alabama state courts.

100. For a more detailed discussion of lack of uniformity among the states as a cause of media self-censorship, see 12 CALIF. WESTERN L. REV. 172, 186-88 (1975).
bility based on special circumstances without carefully considering the effects of their actions on surrounding states. More importantly, special circumstances should not become the focal point of the state's inquiry to the degree that they obscure the essential nature of the state's task—accommodation of both constitutional and reputational interests by careful balancing.

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