 Until relatively recently, the common law of defamation remained untouched by constitutional principles because of the persistent view of the Supreme Court that libelous words did not constitute a class of speech protected by the first amendment. But in New York Times Co. v. Sullivan, the Court recognized that the first amendment guarantees of freedom of speech and the press did in fact impose limitations upon state libel laws. While the necessity of a constitutional privilege in the defamation area has remained unchallenged, the nature and scope of the privilege have been the subjects of continuous debate among members of the Court over the last thirteen years. Time, Inc. v. Firestone, decided by the Court last Term, demonstrates that the Supreme Court has still offered no definitive ruling on constitutional privilege in defamation actions. The purpose of this article is to examine the history and development of this constitutional privilege and to explicate, through an analysis of Firestone, the confusion inherent in the latest tests derived by the Court.

In New York Times the Supreme Court recognized that the significance of the first amendment is that “debate on public issues should be uninhibited, robust and wide-open.” To ensure against the possibility of state libel laws infringing on first amendment rights as so construed, the Court recognized the need for a constitutional privilege in the defamation area. This privilege would prevent public officials from recovering damages for defamatory falsehoods concerning their official conduct unless they proved with convincing clarity that the statement was made with “actual malice.” Actual malice, the Court determined, exists when a statement is made with knowledge of its falsity or with reckless disregard of its truth.
This privilege represents the recognition by the Court that criticism of the government necessarily involves not only impersonal attacks on general policy, but also criticism of individuals who develop and execute that policy. Consequently, the freedom to criticize the government in an "uninhibited, robust and wide-open" fashion—crucial for a democratic society and compelled by the first amendment—must inevitably involve criticism of individual government officials. In order to prevent individual government officials from vitiating this right to criticize, it is essential that the constitutional privilege protect individual critics from defamation suits brought by plaintiffs who are public officials.9

Once the principle of New York Times was accepted,10 "the invitation to follow a dialectic progression from public official to government policy to public policy to matters in the public domain, like art, [seemed] to be overwhelming."11 The Supreme Court apparently agreed with this assessment because in the companion cases of Curtis Publishing Co. v. Butts and Associated Press v. Walker,12 the Court enlarged the scope of the New York Times privilege to include actions brought by public figures for defamatory falsehoods relating to their public conduct. Chief Justice Warren noted that differentiation between public figures and public officials has no basis in "law, logic, or First Amend-

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12. 388 U.S. 130 (1967). Curtis Publishing Co. v. Butts was the result of an article published by the petitioner in the Saturday Evening Post, which accused the respondent of conspiring to "fix" a football game between the University of Georgia and the University of Alabama. Butts was the athletic director of the University of Georgia and "was a well-known and respected figure in coaching ranks." Id. at 135-36. Associated Press v. Walker stemmed from petitioner's news dispatch reporting on a riot on the University of Mississippi campus which erupted over the attempt to enroll James Meredith by federal marshalls. The dispatch reported that the respondent, General Walker, had personally led a charge against the marshalls. Before this incident General Walker "had pursued a long and honorable career in the United States Army . . . and had . . . been in command of the federal troops during the school segregation confrontation at Little Rock, Arkansas, in 1957." Id. at 140.
ment policy." Public figures, like public officials, frequently influence society. The public therefore has a "legitimate and substantial interest in the conduct of [public figures], 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.'" Public figures were defined as those persons who "commanded a substantial amount of independent public interest at the time of publication" either by position alone or by "purposeful activity amounting to a thrusting of [their] personalities into the 'vortex' of an important public controversy."

In *Rosenbloom v. Metromedia, Inc.*, the privilege was further extended to "all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous." Justice Brennan, writing for the plurality, pointed out that the concept which clearly emerged from the decisions since *New York Times* was that "the First Amendment's impact upon state libel laws derives not so much from whether the plaintiff is a 'public official,' 'public figure,' or 'private individual,' as it derives from the question whether the allegedly defamatory publication concerns a matter of public or general interest." In his view, to distinguish between public and private figures would be as meaningless within the context of first amendment guarantees as the distinction between public officials and public figures rejected in *Butts*. The *New York Times* privilege was created not because public officials had less of an interest in protecting their reputations than private individuals, but because the purpose of the first amendment in encouraging wide-open political debate had to be insured. By extending application of the constitutional privilege to private individuals involved in a matter of public interest or concern, the *Rosenbloom* plurality expanded the privilege to the outermost boundaries of the theory of the first amendment originally enunciated in *New York Times*.

13. Id. at 163 (Warren, C.J., concurring).
14. Id. at 164 (Warren, C.J., concurring).
15. Id. at 154.
16. Id. at 155.
17. 403 U.S. 29 (1971).
18. Id. at 44.
19. Id.
20. Id. at 45-46.
21. Id. at 46.
Three years later, in *Gertz v. Robert Welch, Inc.*, the Court concluded that the *Rosenbloom* plurality failed to balance adequately this first amendment requirement of robust political debate against the interests that private individuals have in their reputations. In *Gertz* the Court reconsidered the extent of a publisher's constitutional privilege from liability for defamation of a private individual. To the new majority which coalesced in *Gertz*, the threshold question was no longer the extent to which the first amendment compelled displacement of the state libel laws, but rather how to accommodate the interest of the press in immunity from liability with the state interest in compensating private individuals for injury to their reputations. The Court concluded that the accommodation of these interests reached with regard to public officials and public figures was correct, but that a different rule should apply to private individuals.

The majority in *Gertz*, unlike Justice Brennan in *Rosenbloom* and Chief Justice Warren in *Butts*, had no difficulty distinguishing among the different classes of defamation plaintiffs. The distinction was made on two grounds. First, public plaintiffs have greater access to the media than private plaintiffs.

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*Inc. and Beyond: An Analytical Primer, 61 Va. L. Rev. 1349, 1412 (1975).*


24. *Id.* at 346. "The extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge this legitimate state interest to a degree that we find unacceptable." *Id.*

25. *Id.* at 325.

26. In the intervening years between the decisions in *Rosenbloom* and *Gertz* the membership of the Supreme Court changed. Justices Black and Harlan were succeeded by Justices Powell and Rehnquist, and the transition from the Warren Court to the Burger Court became more evident.


The right of a man to the protection of his own reputation for 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. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments.

*Id.* at 92.

28. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974). *But see* Martin Marietta Corp. v. Evening Star Newspaper, 417 F. Supp. 947 (D.D.C. 1976), which held that *Rosenbloom* was the proper standard for determining the applicability of the "actual malice" test in libel actions brought by corporations. *Id.* at 954. The district court held that *Rosenbloom* was controlling in this limited context, despite its rejection in *Gertz*, because corporations did not possess the individual interests which the Court sought to protect in its later opinion. *Id.* at 955. *See* notes 30-33 *infra* and accompanying text.

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and thus are better able to counteract false statements about themselves than are private plaintiffs. Private individuals are therefore more vulnerable to injury from defamatory falsehoods; hence, the interest of the state in providing a remedy for such persons is greater. Secondly, the Court considered public officials and public figures to have voluntarily assumed the risk of injury from defamatory falsehood because of their prominent status in society. Private individuals, however, have not intentionally risked such injury to their reputations. Consequently, the Court reasoned, their need for a remedy is more compelling.

The Supreme Court thus concluded in *Gertz* that a state may require less than actual malice to impose liability in defamation suits concerning private individuals provided that some degree of fault is shown. *Gertz* affirmed *New York Times* and *Butts* on their facts but held that *Butts* was the outer limit to which the actual malice standard could be applied. While the Court was unwilling to force a private individual to prove actual malice in order to recover actual (or compensatory) damages, it was equally unwilling to allow that individual to recover on the basis of common law strict liability. Some finding of fault was required by the Constitution. The states were permitted to define for themselves a standard of liability less demanding than that required by *New York Times*.

By its expansive application of constitutional principles to the law of defamation, the Supreme Court in *Gertz*, in effect, destroyed what was left of the common law. Under *Rosenbloom* a private person, employing a strict liability theory, could still recover under state law for a defamatory falsehood concerning

30. Id.
31. Id.
32. Id. at 345.
33. Id.
34. Id. at 348.
35. Id. at 343.
36. Id. at 342-43. "The Court today refuses to apply *New York Times* to the private individual, as contrasted with the public official and the public figure. It thus withdraws to the factual limits of the pre-*Rosenbloom* cases. It thereby fixes the outer boundary of the *New York Times* doctrine . . . ." Id. at 353. (Blackmun, J., concurring).
37. Id. at 347. "Nor does the Constitution require us to draw so thin a line between the drastic alternatives of the *New York Times* privilege and the common law of strict liability for defamatory error." Id. at 346.
38. Id. at 347. Recovery under this lesser showing was limited by the Court to actual injury. In order to recover punitive damages, "actual malice" would still have to be proved. Id. at 349.
activities not within the area of public or general interest.\textsuperscript{39} \textit{Gertz}, however, completely obliterated the distinction between defamatory falsehoods concerning a person's private and public activities, treating defamation in both areas the same. Recovery was permitted only upon a showing of negligence at the very least. \textit{Gertz} also modified \textit{New York Times} and \textit{Butts} by requiring proof of actual malice by every public person regardless of whether the alleged defamation related to public conduct or not.\textsuperscript{40} Consequently, the analysis shifted from the subject matter of the alleged defamation to the status of the individual plaintiff. Instead of looking at whether a first amendment interest was presented by the facts of a particular case—whether the facts raised an issue of public interest or concern—the Court looked at the "nature and extent of an individual's participation in the particular controversy giving rise to the defamation."\textsuperscript{41}

By analyzing the facts on the basis of the plaintiff's status in society without acknowledging the nature of the activity in which the plaintiff was involved, the Court in \textit{Gertz} reinterpreted the first amendment. \textit{New York Times} had erected a constitutional privilege to protect the media against crippling liability resulting from defamation suits brought by public officials and public figures. The Court recognized this privilege not because such individuals had a lesser interest in protecting their reputations than private individuals, but because uninhibited debate on public issues, guaranteed by the first amendment and critical to the preservation of democratic government, would necessarily and inevitably implicate discussion of public persons and their involvement in important social issues. \textit{Gertz}, on the other hand, constructed a two-tiered constitutional privilege which would apply regardless of the nature of the issues involved but which would be defeasible on different standards of fault (either actual malice or negligence) depending on the status of the individual plaintiff. This meant that the first amendment protects all speech about public persons and not just that which involves public interest or concern.\textsuperscript{42} It was exactly this kind of two-tiered
approach which Chief Justice Warren believed had no basis in “law, logic, or First Amendment policy.” In his concurring opinion in *Gertz*, Justice Blackmun echoed this belief by characterizing the result in that case as “illogical.”

The illogic of the holding in *Gertz* was aptly demonstrated by the Supreme Court’s recent decision in *Time, Inc. v. Firestone*. *Firestone* involved an action for libel brought by Mary Alice Firestone against the publishers of *Time* magazine. The action was based on an item which appeared in *Time* concerning the result of the domestic relations litigation between Mrs. Firestone and her husband, Russell A. Firestone, “heir to the immense Firestone rubber fortune.” The item stated in pertinent part: “DIVORCED. By Russell A. Firestone, Jr., 41, heir to the tire fortune: Mary Alice Sullivan Firestone, 32, this third wife; a onetime Palm Beach schoolteacher; on grounds of extreme cruelty and adultery . . . .”

The divorce was the result of an action for separate maintenance instituted by Mrs. Firestone after she and her husband separated in 1964. He counterclaimed for divorce on the grounds of extreme cruelty and adultery. After a lengthy and nationally publicized trial, the Circuit Court of Palm Beach County, Florida, issued a judgment granting the divorce requested by Mr. Firestone. The decree stated that the cause of action arose out of the plaintiff wife’s complaint for separate maintenance, and that the defendant husband had answered and counterclaimed for divorce on the grounds of adultery and extreme cruelty. The court found the equities to be on the side of the defendant and therefore granted his counterclaim for divorce. The court, however, also ordered the defendant to pay the plaintiff $3,000 per month as alimony.

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49. *Id.*
50. *Id.*
53. *Id.* at 450-51. The actual decree reads as follows:
This cause came on for final hearing before the court upon the plaintiff wife's
Time received the Associated Press dispatch which had flashed the news of the decree within hours of its issuance.\textsuperscript{64} It also obtained an account from an article which was to run in the New York Daily News the next day.\textsuperscript{55} In an effort to verify the facts, Time checked the story with its Maimi bureau chief and a "stringer" in Palm Beach.\textsuperscript{66} Shortly after publication Mrs. Firestone demanded a retraction\textsuperscript{67} from Time as she considered its report of her divorce to be libelous. The alleged libel was Time's report that Mrs. Firestone had been found guilty of adultery.\textsuperscript{68} Time, however, refused to retract its report. Mrs. Firestone commenced the libel action in March 1968 and the suit resulted in a verdict of $100,000 for her.\textsuperscript{59}

On appeal the Florida District Court of Appeal reversed.\textsuperscript{60} The court held that Time was entitled to the New York Times privilege because the divorce of Mary Alice Firestone was an event of great public interest. Further, as there was no evidence of actual malice by Time, the magazine was not liable for the defamation.\textsuperscript{61} The Florida Supreme Court reversed this ruling and held that reports of divorce proceedings were not matters of real public or general concern. Such reports were therefore not constitutionally protected.\textsuperscript{62} On remand, the district court of ap-

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  \item second amended complaint for separate maintenance (alimony unconnected with the causes of divorce), the defendant husband's answer and counterclaim for divorce on grounds of extreme cruelty and adultery . . . . The premises considered, it is thereupon ORDERED AND ADJUDGED as follows:
  \begin{enumerate}
    \item That the equities in this case are with the defendant; that defendant's counterclaim for divorce be and the same is hereby granted, and the bonds of matrimony which have heretofore existed between the parties are hereby forever dissolved . . . .
    \item That the defendant shall pay unto the plaintiff the sum of $3,000 per month as alimony beginning January 1, 1968, and a like sum on the first day of each and every month thereafter until the death or remarriage of the plaintiff . . . .
  \end{enumerate}
\end{itemize}

\textit{Id.}

\begin{itemize}
  \item 55. Time, Inc. v. Firestone, 424 U.S. 448, 451 (1976); Brief for Petitioner at 5.
  \item 56. Id.; Brief for Petitioner at 6.
  \item 57. A demand for retraction is a prerequisite to filing a libel suit under Florida law.
\end{itemize}

\textit{Id. at 452 n.1.}

\begin{itemize}
  \item 58. See text accompanying note 65 infra.
  \item 60. Id. at 390.
  \item 61. Id. The court relied on \textit{Rosenbloom} in applying the New York Times privilege.
\end{itemize}

\textit{Id. at 388. With regard to the showing made by the plaintiff, the court stated: "Nowhere was there proof Time was even negligent, much less intentionally false or in reckless disregard of the truth." Id. at 390.}

\begin{itemize}
  \item 62. Firestone v. Time, Inc., 271 So. 2d 745, 748 (Fla. 1972). See generally Note,
peal held for *Time* on the basis of state law and directed entry of judgment notwithstanding the verdict. The case was appealed to the Florida Supreme Court a second time, where final judgment was rendered directing that the jury verdict for the plaintiff be reinstated. The court invoked the intervening decision in *Gertz* as support for its holding that *Time* was negligent in its publication of the item concerning Mrs. Firestone. On appeal to the Supreme Court of the United States, *Time* contended that the judgment of the Florida Supreme Court was contrary to the holdings in *Butts* and *Gertz* because the respondent was a public figure and because there was no evidence to support a finding of actual malice.

Under the holding in *Gertz*, the first question confronted by the Court in *Firestone* was whether the respondent, Mrs. Firestone, was a public figure. *Gertz* defined as public figures, for all purposes, those persons who assume roles of “especial prominence in the affairs of society,” or who occupy positions of “persuasive power and influence.” Other persons may be classified as public figures for a limited range of issues. These persons were characterized by the Court as having “thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.” Public figures were to be identified “by looking to the nature and extent of an individual’s participation in the particular controversy giving rise to the defamation.” The *Firestone* majority, speaking through Jus-

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63. *Time, Inc. v. Firestone*, 279 So. 2d 389 (Fla. Dist. Ct. App. 1973). The district court of appeal held for *Time* on the basis of the following points: (1) Damage to reputation is an essential ingredient of a libel action; (2) *Time* reported the divorce decree fairly and accurately; (3) Plaintiff’s (Mrs. Firestone’s) evidence was insufficient to deprive *Time* of the common law privilege for reports of judicial proceedings; and (4) Mrs. Firestone did not prove any recoverable actual (compensatory) damages. *Id.* at 394.

64. *Firestone v. Time, Inc.*, 305 So. 2d 172 (Fla. 1974).

65. *Id.* at 178. *Time’s* negligence consisted of reporting that Mrs. Firestone had been divorced on the grounds of adultery, even though she had been awarded alimony. Since Florida law at the time would not allow alimony if there was a finding of adultery, the divorce had to have been granted on the grounds of extreme cruelty. *Id.* This error in the divorce decree was explained by the Florida Supreme Court in *Firestone v. Firestone*, 263 So. 2d 223 (Fla. 1972), five years after publication by *Time*.


tice Rehnquist, held that the respondent had not assumed a role of "special prominence in the affairs of society, other than perhaps Palm Beach society, and . . . [had] not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it." This finding clearly ignores the widespread public attention enjoyed by the respondent prior to the divorce action. Both she and her husband were extremely well-known. In fact, Russell A. Firestone, "heir to the immense Firestone rubber fortune," was identified by the Supreme Court itself as the "scion of one of America's wealthier industrial families."

The Court of Appeals for the Seventh Circuit recently held in *Carson v. Allied News Co.* that the wife of a public figure "more or less automatically becomes at least a part-time public figure herself." The reasoning of this decision is clearly applicable to Mrs. Firestone who, as the wife of a prominent man, had achieved "general fame or notoriety in the community." As noted by the Florida Supreme Court, the respondent was "prominent among the '400' of Palm Beach society," and was an active member of the "sporting set." Her divorce was the "cause celebre" of social circles across the country, and consequently the trial received national news coverage. Moreover, it is logical to assume that Mrs. Firestone became a prominent member of Palm Beach society voluntarily. Her subscription to a press clipping service suggests that she had an interest in, or at least an awareness of, the publicity she received. As the Supreme Court held in *Gertz*, public figures invite attention and comment about themselves; therefore, the press is entitled to act

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73. 529 F.2d 206 (7th Cir. 1976).
74. The plaintiffs in this defamation suit were Johnny Carson, the nationally known television entertainer, and his wife, Joanna Holland. *Id.* at 209-10.
75. *Id.* at 210. Cf. Meeropol v. Nizer, 381 F. Supp. 29, 34 (S.D.N.Y. 1974), which held that the children of famous parents (Ethel and Julius Rosenberg) were public figures, even though they had changed their names and renounced the public spotlight.
78. *Id.*
79. *Id.*
on the assumption that such persons have chosen to assume the risk of injury from defamatory falsehood.\textsuperscript{82}

The Supreme Court in \textit{Firestone}, however, ignored the distinction between public figures and private individuals which it announced in \textit{Gertz}.\textsuperscript{83} The conclusion that Mrs. Firestone was a public figure, at least for the limited purpose of reports on the judicial proceedings which she initiated, seems inescapable.\textsuperscript{84} As Justice Marshall pointed out in his dissent: "Mrs. Firestone [was] hardly in a position to suggest that she lacked access to the media for purposes relating to her lawsuit."\textsuperscript{85} During the course of the lawsuit she held several press conferences. The remedy of self-help, which distinguished a public figure from a private individual under \textit{Gertz},\textsuperscript{86} was clearly available to Mrs. Firestone. Additionally, Mrs. Firestone's involvement in publicized social events and her self-initiated lawsuit demonstrated her voluntary exposure to the risk of defamatory falsehood.\textsuperscript{87} Justice Marshall further observed:

Having placed herself in a position in which her activities were of interest to a significant segment of the public, Mrs. Firestone chose to initiate a lawsuit for separate maintenance, and most significantly, held several press conferences in the course of that lawsuit. If these actions for some reason fail to establish as a certainty that Mrs. Firestone "voluntarily exposed [herself] to increased risk of injury from defamatory falsehood" surely they are sufficient to entitle the press to act on the assumption that she did.\textsuperscript{88}

\textsuperscript{82} \textit{Gertz v. Robert Welch, Inc.}, 418 U.S. 323, 345 (1974). This analysis was used recently by two district courts which classified the plaintiffs in defamation actions as public figures. In Rosanova v. Playboy Enterprises, Inc., 411 F. Supp. 440 (S.D. Ga. 1976), the plaintiff had extensive contacts with underworld figures and a longstanding relationship with Teamsters Union President Frank Fitzsimmons. \textit{Id.} at 444. The court held that the plaintiff was a public figure because he had "voluntarily engaged in a course that was bound to invite attention and comment." \textit{Id.} at 445. Similarly, in Buchanan v. Associated Press, 398 F. Supp. 1196 (D.D.C. 1975), the court held that an accountant whose firm had been retained to perform accounting services for the finance committee to reelect former President Richard Nixon was a public figure for purposes of the lawsuit. See text accompanying note 68 supra. The court based its holding on the plaintiff's extensive involvement with the finance committee, his willingness to participate and assist the committee in any way, and the intense public interest (of which the plaintiff was aware) in the precise activities in which he participated. \textit{Id.} at 1202-03.

\textsuperscript{83} See text accompanying notes 28-33 supra.

\textsuperscript{84} See note 68 supra and accompanying text.


\textsuperscript{87} \textit{Id.} at 345.

Therefore, as a public figure, Mrs. Firestone was less deserving of protection under Gertz, and the actual malice standard should have been applicable.

Nevertheless, the majority rejected petitioner's contention that respondent was a public figure because "[d]issolution of a marriage through judicial proceedings [was] not the sort of 'public controversy' referred to in Gertz, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public." This reasoning implies that the subject matter of the alleged defamation was somehow not relevant to the "affairs of society," or did not create the kind of public interest that was worthy of judicial protection.

By analyzing the nature of the public controversy in which Mrs. Firestone was involved, the Court engaged in exactly that kind of subject-matter analysis which Gertz sought to avoid. As Justice Marshall wrote in dissent:

If there is one thing that is clear from Gertz, it is that we explicitly rejected the position of the plurality in Rosenbloom v. Metromedia, Inc., that the applicability of the New York Times standard depends upon whether the subject matter of a report is a matter of "public or general concern." . . . Having thus rejected the appropriateness of judicial inquiry into "the legitimacy of interest in a particular event or subject," Gertz obviously did not intend to sanction any such inquiry by its use of the term "public controversy."

In Firestone the majority did in fact inquire into the nature of the subject matter of the alleged defamation, but it did so by inquiring into the nature of the public controversy in which the plaintiff was involved.

It is here that the illogic of Gertz becomes most evident. Under Gertz the focus of analysis must be on the degree of public attention already enjoyed by the individual plaintiff, not on a judicial characterization of the subject matter of the alleged defa-

89. Id. at 454. In its first opinion, the Florida Supreme Court held that divorce proceedings were not of "real" public or general concern: "[W]e perceive a clear distinction between mere curiosity, or the undeniably prevalent morbid or prurient intrigue with scandal or with the potentially humorous misfortune of others, on the one hand and real public or general concern on the other." Firestone v. Time, Inc., 271 So. 2d 745, 748 (Fla. 1972). But see Berg v. Minneapolis Star & Tribune Co., 79 F. Supp. 957 (D. Minn. 1948); and Aquino v. Bulletin Co., 190 Pa. 528, 154 A.2d 422 (1959), which held that divorce actions were newsworthy events of public or general interest.
91. Id. (citations omitted).
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mation as relevant or worthy of public interest and debate. If, however, the subject matter is not relevant to or worthy of public interest and debate, then speech which focuses on such subject matter has no first amendment component and is not deserving of a constitutional privilege. Firestone seems to indicate that subject-matter analysis, although rejected in Gertz, will reappear under the guise of determining whether one is a public figure. It is illogical for the Court to say it will not use this method of analysis when in fact it will—albeit without explicit recognition—in another setting.

While Justice Rehnquist was wrong—under either a Butts or a Gertz analysis—in concluding that Mrs. Firestone was not a public figure, he might have been correct in concluding, at least impliedly, that there was little first amendment value in Time's report of her divorce. Arguably, discussion of Mrs. Firestone's divorce in the public press was not the kind of public debate essential to the preservation of democratic government that New York Times sought to protect. The problem is that the method of analysis employed by the Court in Gertz, even if correctly applied in Firestone, would not have led to the right result. If it is agreed that under Gertz Mrs. Firestone is a public figure, then whether the speech comprising the alleged defamation is necessary for uninhibited political debate, and therefore deserving of first amendment protection, is irrelevant. If the subject matter of the speech (which determines its first amendment value) is irrelevant, then the foundation for the constitutional privilege in the law of libel recognized by the Court in New York Times no longer exists. Such an approach is unprincipled as well as illogical.

After determining that Mrs. Firestone was not a public figure, the next question which the Supreme Court confronted was whether there was any evidence of fault on the part of Time to support the verdict reached in the trial court. At the outset, the majority stated that if it were satisfied that one of the Florida courts which reviewed this case had made a supportable finding of fault, it would be "required to affirm the judgment below."

92. See note 61 supra and accompanying text.

The failure to submit the question of fault to the jury does not, of itself establish noncompliance with the constitutional requirements established in Gertz . . . . Nothing in the Constitution requires that assessment of fault in a civil case tried in a state court be made by a jury, nor is there any prohibition against such a
The question of fault had not been submitted to the jury at the trial. The Florida District Court of Appeal, acknowledging the "elaborate procedures" undertaken by Time to ensure the accuracy of the article, noted that "[n]owhere was there proof Time was even negligent, much less intentionally false or in reckless disregard of the truth." On the other hand, the Florida Supreme Court, in a passage of its opinion which cited Gertz, held that Time's account of the Firestone divorce was "a flagrant example of 'journalistic negligence.'" The absence of a finding of fault in the lower state courts indicates that the Florida Supreme Court was not affirming a finding of fault, but was making such a finding in the first instance.

Justice Rehnquist refused to read the Florida Supreme Court's language as a "conscious determination" of fault despite the citation to Gertz, and was unwilling to review the evidence of alleged fault himself. As a result, the judgment of the Supreme Court of Florida was vacated, and the case was remanded for further proceedings. Justice Marshall observed that this result was "baffling." Even assuming that the language of the Florida Supreme Court was unclear, the citation to Gertz obviously indicated an intention either to find fault or to affirm a finding of fault. Otherwise, the citation would have no meaning. The prior history of this case reveals that the Florida Supreme Court could not have intended to affirm a finding of fault because there was no finding of fault below to affirm. The question was not submitted to the jury at trial, and the district court of appeal expressly held that there had been no evidence of negligence on Time's part. The only possible reading of the Florida Supreme Court's language then is that that court was itself making a find-

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94. Id. Under Florida law liability is established when it has been determined that the publication was defamatory, that it was false, and that it caused the harm.
96. Id. at 390.
98. Id.
100. "[W]e are not inclined to canvass the record . . . ." Id. at 464.
102. Id. at 491 (Marshall, J., dissenting).
103. Id. at 492 (Marshall, J., dissenting).
ing of fault. Even assuming that there was no clear finding of fault below, the Supreme Court arguably had a duty to "canvass the record" to make such a determination itself.\textsuperscript{105} By remanding the case to the state court, the \textit{Firestone} majority avoided this task.\textsuperscript{106}

\textit{Gertz} held that a finding of fault on some standard other than strict liability was constitutionally required for recovery of damages by a private individual in a defamation action.\textsuperscript{107} If negligence is now a constitutional standard,\textsuperscript{108} then the Supreme Court must review the evidence to ensure compliance by the states. As Justice Brennan pointed out in \textit{New York Times}: "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied."\textsuperscript{109} The Court refused to do so in \textit{Firestone}, thus allowing the state to determine not only the standard of fault, but the standard of proof as well. In effect, this negatived the possibility of applying a constitutional standard and reopened the door to the imposition of strict liability in another form. If the Court in \textit{Gertz} intended to eliminate strict liability in defamation actions, it was illogical to construct a test lacking the necessary safeguards to ensure the application of a constitutional standard.

\begin{itemize}
  \item \textsuperscript{106} In a concurring opinion, Justice Powell extensively reviewed the evidence of fault in this case and concluded that "unless there exists some basis for a finding of fault other than that given by the Supreme Court of Florida there can be no liability." \textit{Time, Inc. v. Firestone}, 424 U.S. 448, 470 n.9 (1976) (Powell, J., concurring).
\end{itemize}
Conversely, if the majority had found, as had Justices White and Marshall,\textsuperscript{110} that there was a "conscious determination" of fault below, such a finding would have been "wholly unsupportable."\textsuperscript{111} The sole basis for the Florida Supreme Court's apparent finding of negligence was that \textit{Time} had erroneously reported that Mrs. Firestone was divorced on the ground of adultery.\textsuperscript{112} The court reasoned that \textit{Time} should have realized that a divorce decree granting alimony could not have been based on adultery under Florida law. By reasoning in this manner, the Florida Supreme Court assumed that \textit{Time} either knew what the law was or that it had a duty to determine what the law required. In effect, the court held \textit{Time} liable for accurately reporting what the divorce decree actually specified.\textsuperscript{113} As Justice Marshall stated: "\textit{Time}'s responsibility was to report accurately what the trial court did, not what it should have done."\textsuperscript{114}

Both the Florida Supreme Court and the majority of the Supreme Court of the United States ignored the fact that the Florida Supreme Court did not announce the exact basis for the divorce decree until five years after \textit{Time} had published its account.\textsuperscript{115} As the Florida District Court of Appeal observed, the wording of the divorce decree was ambiguous and "would lead a

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\item \textsuperscript{110} \textit{Time, Inc. v. Firestone}, 424 U.S. 448, 492 (1976) (Marshall, J., dissenting). See also id. at 470 n.9 (Powell, J., concurring).
\item \textsuperscript{111} Id. at 492 (Marshall, J., dissenting).
\item \textsuperscript{112} Id. at 462-83.
\item \textsuperscript{113} \textit{Cf.} \textit{Wilson v. Capital City Press}}, 315 So. 2d 393 (La. Ct. of App. 1975), in which the defendant published an article in which the plaintiff was listed as having been arrested in a major drug raid. In fact, the plaintiff had not been arrested. Defendant obtained plaintiff's name from a list furnished to its reporter by the public relations director of the Louisiana State Police. No error was made by the paper which accurately reproduced the names as they appeared on the list. The error was in the list itself, which had been prepared by the State Police. The trial judge noted that the newspaper could have easily discovered the error by checking public records kept by the authorities who actually made the arrests. Id. at 398. The appellate court, however, held that the newspaper was under no duty to verify the information because its source was "reliable" and in a "proper position of authority." \textit{Id. See also Gobin v. Globe Publishing Co.}, 216 Kan. 223, 531 P.2d 76 (1975).
\item \textsuperscript{114} \textit{Time, Inc. v. Firestone}, 424 U.S. 448, 493 (1976) (Marshall, J., dissenting). The Florida District Court of Appeal noted: "If the press were charged with correctly analyzing the legal intricacies of each news item, their pages would remain empty of substance." \textit{Time, Inc. v. Firestone}, 254 So. 2d 386, 390 (Fla. Dist. Ct. App. 1971).
\item \textsuperscript{115} The technical basis for the original divorce decree was "lack of domestication." The Florida Supreme Court pointed out that that was not one of the statutory grounds for divorce, but nevertheless affirmed the decree because the record supported a finding of extreme cruelty, which was a proper statutory ground for divorce. \textit{Firestone v. Firestone}, 263 So. 2d 223, 225 (Fla. 1972).
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reasonable person to conclude that adultery had been committed . . . ."116 The Supreme Court held earlier in Time, Inc. v. Pape117 that a rational interpretation of an ambiguous document was not enough to support a finding of actual malice.118 While the application of Pape to Firestone was rejected by the majority,119 Justice Marshall suggested that

the Court's evident concern [in Pape] that publishers be accorded the leeway to offer rational interpretations of ambiguous documents was not restricted to cases in which the New York Times standard [was] applicable. That concern requires that protection for rational interpretations be accorded under the fault standard contemplated by Gertz.120

While the trial court technically could not have granted the divorce based on adultery, the language of its opinion certainly raised a reasonable inference that it had; therefore, Time should not have been held liable for reasonably interpreting an ambiguous document and accurately reporting that interpretation.121 "No amount of after the fact explanation by the Florida Supreme Court of what the divorce decree meant or should have meant can deprive petitioner of . . . constitutional protection, particularly since . . . that would impose liability without fault contrary to the repeated holdings of [the Supreme] Court."122 The Supreme Court of the United States should have reversed the judgment of the Florida Supreme Court because there was no evidence of fault, negligent or otherwise, on which liability could be predicated.

The conclusion is inescapable that Firestone was wrongly decided. The Firestone opinion raises exactly those problems which the Gertz analysis sought to avoid: ad hoc judicial scrutiny of the subject matter of the defamatory falsehood and imposition of liability by a state court without a constitutional fault stan-

118. Id. at 290.
120. Id. at 491 (Marshall, J., dissenting). See also concurring opinion by Justice Powell, joined by Justice Stewart at 464-70.
dard. But more importantly, Firestone raises the question whether the Rosenbloom subject-matter analysis was really rejected in Gertz, or whether such an analysis will reappear through the back door whenever the Court must decide who is a public figure and who is not.123

Almost ten years after the Court's ruling in Butts, how and where the line is drawn between public figures and private individuals is still unclear. As one federal district court observed: “[D]efining public figures is much like trying to nail a jellyfish to the wall.”124 Firestone suggests that a court base its decision on the nature of the subject matter of the alleged defamation. Mrs. Firestone was classified as a private citizen rather than as a public figure because her divorce was not a “public controversy” worthy of first amendment protection.125 Yet under Gertz, public figures are identified by scrutinizing the degree of public attention already surrounding the plaintiff. If Gertz had been applied correctly in Firestone, Mrs. Firestone would have been held to be a public figure because of her general fame and notoriety in Palm Beach society and because of the national news coverage of her divorce proceeding.

The Gertz test would eliminate the problem of permitting lower court judges to decide what matters are of public interest; the test would thereby prevent judges from “exercis[ing] moral judgments in individual cases, determining that a medium’s news report is not the public’s business even though the public may be interested and even though the event is unquestionably newsworthy.”126 But by ignoring subject matter, the test destroys the distinction between defamation about a person’s public conduct and defamation about the private facts of one’s life. This distinction may have little meaning for public officials because any discus-

125. The Court also based its decision that Mrs. Firestone was not a public figure on its belief that she had not assumed a role of “especial prominence” in society, and that she had not “thrust herself to the forefront of any particular public controversy.” Time, Inc. v. Firestone, 424 U.S. 448, 453 (1976).
sion about them which touches on their fitness for office is a matter of public interest and is therefore constitutionally protected.\textsuperscript{127} But prior to \textit{Gertz} the distinction might have had some meaning for public figures whose private lives were irrelevant to their involvement in issues of public interest.\textsuperscript{128} Arguably, then, even if Mrs. Firestone were to be classified as a public figure, her divorce might not be a matter of public interest and concern worthy of first amendment protection.\textsuperscript{129}

In an attempt to set down broad rules of general application, the \textit{Gertz} test ignored the first amendment interest in democratic debate which necessarily encompasses potentially defamatory statements; yet it is certainly that interest which enabled the Court to apply constitutional principles to the law of libel in the first place. In \textit{New York Times} the Supreme Court held that the central meaning of the first amendment is that speech concerning matters of public interest and concern be "uninhibited, robust and wide-open." Therefore, as Justice Brennan suggested in \textit{Rosenbloom}: "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved."\textsuperscript{130} Furthermore, the evil of defamation is not lessened because a libelous statement concerns a public figure rather than a private person. Nor does a public figure have any less interest in his or her "good name." The law has made a distinction between the two because the state has a greater interest in protecting the private person; it is assumed that private individuals cannot help themselves by countering the defamation and have not voluntarily assumed the risk of public exposure.

There may be some merit in giving greater protection to pri-

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\item \textsuperscript{127} Garrison v. Louisiana, 379 U.S. 64, 77 (1964).
\item \textsuperscript{128} See Eaton, supra note 22, at 1444. Under \textit{Gertz} all-purpose public figures have, in effect, no private lives because they are public figures for "all purposes," in other words, all subjects. Limited public figures, however, are only public figures for a limited range of issues. They can shield from the press those aspects of their lives not relevant to the particular public controversy in which they are involved. See notes 67-68 supra and accompanying text.
\item \textsuperscript{129} The \textit{Gertz} test posed a dilemma for the Supreme Court in \textit{Firestone}. If the Court found that Mrs. Firestone was an all-purpose public figure, all aspects of her life, including her divorce, would be open to comment by the press. If the Court characterized her as a limited public figure, her divorce was the particular public controversy in which she was involved, and therefore would still be open to comment. Thus, if the Court believed that the subject matter of the alleged defamation concerning Mrs. Firestone was not a matter of public interest, it necessarily had to find that she was not a public figure.
\item \textsuperscript{130} Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43 (1971).
\end{itemize}
vate individuals by making the standard for defeasance of the constitutional privilege less than actual malice. But in order to achieve principled results, the two-tiered privilege set forth in Gertz must not ignore the rationale for the constitutional privilege. To do so would give the press more leeway in discussing public figures than is constitutionally permissible, while allowing less freedom when writing about private individuals.

The purpose of the Court in Gertz was to hand down a definitive ruling. As Justice Blackmun observed in his concurring opinion, it was of "profound importance for the Court to come to rest in the defamation area and to have a clearly defined majority position that eliminate[d] the unsureness engendered by Rosenbloom's diversity." The effort which the Court made in Gertz to simplify the constitutional aspects of the law of defamation was laudable. But the appearance of simplicity at the expense of shunting aside the central meaning of the first amendment is too prohibitive. Moreover, the result in Firestone clearly demonstrates that this sought-for simplicity and certainty cannot easily be attained. Until the Supreme Court develops a rule which is both logical and easy to apply, the constitutional aspects of defamation law will remain muddled and complex.

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