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JOURNALISM POLICE

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The title of this piece is its own refutation—there are no journalism police, of any sort. Both the national and state governments have structural checks and balances. Public officials can be censored, impeached, and voted out of office. Service people, professionals, and businesses, as well as private individuals, are liable for their misdeeds. But due to *New York Times Co. v. Sullivan*¹ and the matrix of Supreme Court decisions that followed, the press is largely immune from any kind of accountability. There are no structural controls, review boards, elections, impeachments, or effective system of private litigation to serve as a check on media behavior. The *New York Times* line of decisions effectively eliminated the libel and privacy actions² as a form of media control. Because of media overreaching and this lack of responsibility, I suggested in a rather modest article in 1994 that the actual malice standard of *New York Times* be replaced with one based on negligence for all libel plaintiffs.³ Since this also has been obliquely suggested by another prominent commentator in the defamation/free speech area,⁴ it is worth reexamining.

I. "OR OF THE PRESS"

The Press Clause in the First Amendment⁵ serves a function beyond freedom of speech. Individual free expression has a communicative goal, but it also fosters personal autonomy and the self-fulfillment of the speaker. In contemporary America, however, individual speakers, unless they have developed a pulpit through financial independence or media attention, simply

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1. 376 U.S. 254 (1964).

2. *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977); see generally Gerald G. Ashdown, *Media Reporting and Privacy Claims: Decline in Constitutional Protection for the Press*, 66 KY. L.J. 759 (1977-78) [hereinafter Ashdown, *Media Reporting*].

3. Gerald G. Ashdown, *Whither the Press: The Fourth Estate and the Journalism of Blame*, 3 WM. & MARY BILL RTS. J. 681 (1994) [hereinafter Ashdown, *Whither the Press*].

4. See David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487 (1991) (Professor Anderson does not base any of his suggested reforms on media shortcomings.).

5. U.S. CONST. amend. I.

do not have the ability to make a serious impact on the marketplace of information. On the contrary, a free press facilitates the dissemination of information in our culture. Unlike free speech, freedom of the press does not serve any role in the development of the speaker; its justification is providing information to the public. It is the principal constitutional role of the American news media to collect, distill, and publish stories about life, religion, law, medicine, politics, etc. so that we can govern ourselves effectively in a participatory democracy. Freedom of expression incorporates the right to speak and the right to hear or receive information, and it is the media that largely fulfills the latter function. In addition to this distributional role, however, the news media also performs another constitutional task: guardian of the public trust. Under the First Amendment prerogative, it is the responsibility of the press to review and evaluate public officials, functions, and events in order to expose the good, the bad, and the ugly. It is the job of the media to investigate and comment on public people and institutions so all are aware of how well government is functioning.

Besides simply disseminating the news to foster participatory government and facilitate decisionmaking in a complex culture, it is the constitutional responsibility of the news media to take an active, watchdog role that goes beyond merely reporting on matters of public interest. It is this guardianship role that leads to investigative reporting, evaluation, and news commentary. These twin functions of a free press—distributing information and overseeing governmental operations—have led to strict constitutional protection for the media and concomitantly to media excesses.

Since the press has the constitutional imprimatur to do more than just collect and report the news, the public is provided a steady dose of evaluation and analysis, which results in an angle, or “spin,” being placed on every story of even tangential public interest. The news media view it as their role, if not obligation, to get to the bottom of every story, to determine who or what is responsible, and to decide who is to blame.⁶ The rush to perform this function, combined with ever increasing media outlets driven by the internet, cable news networks, and 24/7 news, has led to a media whirlwind to break the story, get the scoop, and expose the culprits. This self-indulgent diet of analysis of public persons and public affairs not only shapes public opinion, which is reflected back at the ballot box, but it also invades privacy, unfairly damages reputations, and misleads the public along the way. For example, take Congressman Gary Condit who evidently had nothing to do with the disappearance of the intern Chandra Levy, but leading up to the discovery of her body, the public was treated to a ruthless and persistent onslaught of

6. See generally Ashdown, *Whither the Press*, *supra* note 3.

media exposure of Condit's and Levy's private lives, including a not too oblique suggestion that Condit was responsible for Levy's plight.⁷ This is the stuff that libel is made of were it not for the necessity of satisfying the *New York Times* rule, which requires the proof of actual malice—defined as knowledge of falsity or reckless disregard for the truth.⁸

Other examples of high profile media attacks include wrongly blaming General William Westmoreland for the United States' failure in Vietnam,⁹ suggesting that former Israeli Defense Minister Ariel Sharon was responsible for the massacre of Palestinians at refugee camps in West Beirut,¹⁰ blaming Michael Jordan's gambling for a Chicago Bulls loss in an NBA playoff series,¹¹ and *The New Yorker* magazine writer Janet Malcolm allegedly fabricating ill-serving quotations by psychoanalyst Jeffrey Masson.¹² In 1993, a contract killer followed the twenty-seven steps in a book published by Paladin Press entitled *Hit Man: A Technical Manual for Independent Contractors*.¹³ Also in 1993, with an experienced police officer attempting to dissuade a suicidal man barricaded in his home from committing suicide, a reporter, without police permission, contacted the man, and then ran a taped interview on the six o'clock news. The man, Bruce Clift, killed himself minutes later while watching the telecast.¹⁴ On a more general note, the inclination to sensationalize, and simultaneously mislead, is depicted in the fact that homicide coverage on network news increased 473 percent from 1990 to 1998 while homicides actually decreased thirty-three percent during that time.¹⁵ No one needs to be reminded of how the rush to judgment led to the disastrously premature network prediction that presidential candidate Vice President Al Gore would prevail in the State of Florida in the 2000 presidential election.

7. See Petula Dvorak & Allan Lengel, *Levy Family Still Hoping for Answers*, WASH. POST, May 1, 2005, at A7.

8. *N.Y. Times*, 376 U.S. at 279-80.

9. *Westmoreland v. CBS*, 596 F. Supp. 1170 (S.D.N.Y. 1984).

10. *Sharon v. Time, Inc.*, 599 F. Supp. 538 (S.D.N.Y. 1984).

11. Frank Luksa, *NBA Not Willing to Gamble When It Comes to Its Superstar*, DALLAS MORNING NEWS, June 6, 1993, at 4B.

12. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991).

13. See *Rice v. Paladin Enters., Inc.*, 940 F. Supp. 836, 839 (S.D. Md. 1996) (granting defendant's motion for summary judgment in the face of an admission that in "publishing, marketing, advertising and distributing *Hit Man* . . . , [defendants] intended and had knowledge that their publication would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire, in the manner set forth in the publications").

14. See *Clift v. Narragansett Television*, 688 A.2d 805, 807 (R.I. 1996).

15. Lori Dorfman & Vincent Schiraldi, *Off Balance: Youth, Race & Crime in the News*, BUILDING BLOCKS FOR YOUTH (Apr. 2001), <http://www.buildingblocksforyouth.org/media/media.-html>.

The contemporary news media see their primary role as one of policing sociopolitical processes. This role requires much more than just reporting. As in the case of all police work, investigation and analysis are necessary, with the ultimate goals being detection and exposure. Contrary to customary police work, however, speed of discovery to outdo the competition is the key. Although there is some inter-agency squabbling between offices and departments with overlapping jurisdiction, the normal police investigatory process is careful and deliberate in an attempt to discover the identity of the true offender and not wrongly accuse the innocent. But in addition to their civic responsibility, the police are liable for false arrest, excessive force, and violation of constitutional rights. In comparison, the press is virtually immune from liability and not subject to any recourse whatsoever for those harmed by incomplete investigations and premature reporting. Members of the news media, of course, are aware of this; the lack of responsibility has created a self-propelled symbiosis between an unsanctionable press and sloppiness, sensationalism, and exaggeration. It is the public, and concomitantly the democratic process, which has suffered from this phenomenon, both in the form of distortion of events and the development of distrust of the news media.¹⁶ The latter is as problematic as the former because when the public does receive reliable guidance from the press it is often viewed with skepticism, the "crying wolf" phenomenon—undermining the sound functioning of the Press Clause in the First Amendment.

Things are not well inside freedom of the press when a system is in place that encourages, or at least does not discourage, the reporting of inaccuracies, and simultaneously the public is reluctant to credit the solid and accurate reporting it does receive. If this is the legacy that *New York Times* has left, it is time for its holding and the body of law flowing from it to be reexamined. This can be viewed as heresy, but a regime that has undermined the philosophy for its own existence should not be viewed as sacrosanct, especially in the realm of constitutional principle. Nowhere is the doctrinal trap more dangerous. A critical eye must be kept on even the First Amendment.¹⁷

16. See Anderson, *supra* note 4, at 534-35.

17. See Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 (1961) (Those who subscribe to the absolutist view believe that the First Amendment unqualifiedly protects speech, press, assembly, or petition whenever those activities are used for the governing of the nation, and this extends beyond public discussion of public issues and the dissemination of information and opinion on those issues, to the dissemination of information about education, philosophy, art, and science as well.).

II. MEDIA LIABILITY

A. *The Early Cases*

In 1964, when the United States Supreme Court decided *New York Times*,¹⁸ the media was largely unprotected from libel litigation. The defendant had the burden of proving the story true, and there was no excuse for reasonable care—liability attached absolutely to the publication of a falsehood.¹⁹ Although a defense of fair comment had developed,²⁰ it did not protect a media defendant from liability for the publication of inaccurate factual information.²¹ *New York Times* dramatically changed all this, and it came at a time and in a case that screamed for protection of the press. The case arose during the height of the civil rights movement in the South. L.B. Sullivan, an elected commissioner of Montgomery, Alabama, charged with supervising the police, sued *The New York Times* and four black Alabama clergymen for running a paid political advertisement that portrayed the plight of black leaders and civil rights workers involved in the civil rights struggle in Alabama.²² Even though there were only minor inaccuracies in the advertisement, and the copy never referred to Sullivan and only occasionally referred to the police, an Alabama jury awarded Sullivan \$500,000, the maximum requested, and the Alabama Supreme Court affirmed that award.²³

In this context, recognizing the inadequacy of the defenses of truth and fair comment to protect a free press from the self-censorship of both true and marginal material, the Supreme Court interpreted the First Amendment's Free Press Clause to require that, in order to recover, a public official plaintiff must prove "actual malice," defined as publishing with knowledge of falsity or in reckless disregard of the truth.²⁴ From the timing and facts of the case, there was a clear need to protect the press from internal and external controls on the discussion of both public officials and public issues.

The Court in fact viewed the issue this broadly, for in relatively short order it extended the actual malice protection to suits by public figures²⁵ as

18. 376 U.S. 254 (1964).

19. 1 FOWLER HARPER ET AL., *THE LAW OF TORTS* § 5.5 (1956); DAN B. DOBBS, *THE LAW OF TORTS* § 401 (2000).

20. DOBBS, *supra* note 19, § 420.

21. A small number of jurisdictions also protected factual inaccuracies if the misstatement was not malicious. See, e.g., *Coleman v. MacLennan*, 98 P. 281, 287 (Kan. 1908).

22. *N.Y. Times*, 376 U.S. at 256-57.

23. *Id.*

24. *Id.* at 279-80.

25. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967); *Associated Press v. Walker*, 389 U.S. 28

well as public officials, and then for a time to all defamation actions involving a matter of public interest regardless of the character of the person defamed.²⁶ Although a few years later the Court returned to the public/private plaintiff dichotomy, permitting private persons to recover based on a negligence standard,²⁷ the media continued to be insulated from libel actions by the broad conception of who was a public official,²⁸ by the application of the public figure label to private persons involved in public events,²⁹ and by the requirement that even truly private plaintiffs prove falsity³⁰ and negligence. Also during this time, the Supreme Court eliminated the action for invasion of privacy against media defendants if the story exposed was of public interest³¹ or was a matter of public record.³²

In addition to the legal rules, there are a number of pragmatic factors that undermine any legitimate threat of libel litigation. First, there is the reluctance of defamed persons to sue. A libel suit resurrects the negative publicity causing further harm and subjects the plaintiff's life to the discovery process as the defendant attempts to show that the story was accurate (or at least not malicious) or that the plaintiff suffered no damages, all while the plaintiff must prove the story both false and reckless (or at least negligent). "The truth rarely catches up with a lie."³³ Second, all lawsuits are expensive, requiring either a very well healed plaintiff or a contingency fee arrangement with a lawyer. In the latter case, the lawyer is likely to be willing to proceed only if he or she can seek presumed or punitive damages, which require proof of actual malice.³⁴ Third, a libel suit against a media defendant is likely to be unsuccessful. Eighty percent are disposed of through summary judgment in favor of the defendant;³⁵ of the remainder, around twenty-five percent fail to

(1967).

26. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 41-42 (1971).

27. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

28. For example, the courts have consistently classified police officers, regardless of rank, as public officials. See, e.g., *Roche v. Egan*, 433 A.2d 757, 762 (Me. 1981) (stating that all courts treat law enforcement officers as public officials as a matter of federal constitutional law). For cases classifying plaintiffs as public officials, see John B. McCrory et al., *Constitutional Privilege in Libel Law*, 1 COMMUNICATIONS LAW 1989, at 516-27 (Practicing Law Institute ed., 1989).

29. *Gertz*, 418 U.S. at 351; *Time, Inc. v. Firestone*, 424 U.S. 448, 453 (1976).

30. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775-76 (1986).

31. *Time, Inc. v. Hill*, 385 U.S. 374 (1967); Ashdown, *Media Reporting*, *supra* note 2, at 766-68.

32. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

33. *Gertz*, 418 U.S. at 344 n.9.

34. *Id.* at 349-50.

35. See David A. Logan, *Libel Law in the Trenches: Reflections on Current Data on Libel Litigation*, 87 VA. L. REV. 503, 509-10 (2001).

survive defendant's post-trial motions;³⁶ and an actual plaintiff's judgment is more likely than not to be reversed on appeal.³⁷ This is not a pretty sight for a person contemplating vindication in court. Lastly, there is the availability of libel insurance for prospective media defendants, covering both judgments and litigation costs³⁸ for the infrequent cases where the plaintiff prevails.

Of course, reporters, editors, and publishers are aware of the current libel law regime. This works in combination with a couple of additional factors: first, the news media's view of their role, and, second, competition to create a press corps whose self-indulgence is matched only by its collective ruthlessness. Members of the media see their duty as not just the purveyors of news and information (the dissemination function), but more importantly as watchdog and investigator of sociopolitical and cultural life (a speaker's function). Although the First Amendment clearly accommodates both of these functions, the press has aggrandized and elevated the latter into predominance. This requires more than just reporting; every story must be given a twist, a spin, or an angle, blame laid, and those responsible exposed. Added to this is the mass competition between news sources that technology has made possible. The drive to beat one another with a story has naturally led to much precipitous reporting before a lead can be adequately checked out. When the aggrandizement of the investigator's role and the need for speed are combined with the lack of any accountability for erroneous reporting, the result can be sensationalism at best, and, at worst, inaccuracy and misinformation, libel, and invasion of privacy. If my perception of the contemporary press is accurate, and I think it is, then the press needs some policing. First Amendment values are not served by sensationalism and misinformation. The free market of ideas, like a free market economy, simply cannot tolerate unregulated power.

B. Trends

After the Warren Court cases of the '60s and early '70s, the Court's media libel decisions meandered somewhat, indicating differing doctrinal views.³⁹ Somewhat of a plaintiff's trend, however, is discernable. In 1974, in *Gertz v. Robert Welch, Inc.*,⁴⁰ the Court reversed its position that the *New York Times* actual malice standard applied to libelous statements about private individuals

36. *Id.* at 515.

37. *Id.* at 515-16.

38. *Id.* at 518-19.

39. See generally LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §12-12 (2d ed. 1988).

40. 418 U.S. 323 (1974).

involved in matters of public interest,⁴¹ and held that the states were free to apply a negligence standard in the case of private plaintiffs. Although public figure status was not limited to someone with general fame or notoriety with especial persuasive power or influence, neither was involvement in public events enough to make one a public figure. *Gertz and Time, Inc. v. Firestone*⁴² require that in order to become a public figure for a limited range of issues, the plaintiff had to thrust himself into a public controversy "in order to influence the resolution of the issues involved."⁴³ Thus, the public figure category was restricted to matters at the core of self-government and freedom of expression, assimilating it to that of public officials. The Court could have continued to take a broader view of the First Amendment, retaining the public interest standard of its earlier *Rosenbloom* decision, but it refused, ostensibly to offer more protection to the reputations of private individuals.⁴⁴ In reality, however, the Court took a narrower view of freedom of the press, limiting the protection of the actual malice standard to the discussion of public officials and those with potential impact on public issues. Restricting the *New York Times* rule to coverage of those with political influence signaled somewhat less solicitude for the news media.⁴⁵

Not too long after the Court drew the distinction between public and private plaintiffs, the press was refused an editorial privilege in libel litigation. In *Herbert v. Lando*,⁴⁶ a producer for the CBS program "60 Minutes" claimed that a discovery request and order calling on him to answer questions concerning his conversations, conclusions, deductions, intent, and state of mind in researching and preparing a program would have an intolerable chilling effect on the editorial process violating the First Amendment.⁴⁷ Defendant argued that open discussion between reporters and editors would be dampened and editorial judgment impaired.⁴⁸ Justice White's majority opinion concluded that the real inhibition resulted from fear of publishing knowing or reckless falsehoods and that this was consistent with prior cases.⁴⁹ The majority ultimately felt that an editorial privilege available to the

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

42. 424 U.S. 448 (1976).

43. *Id.* at 453 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974)).

44. *Gertz*, 418 U.S. at 344-46 (arguing that private individuals, unlike public figures, neither had access to the media to counteract false statements nor had assumed the risk of publicity, and thus the state's interest in compensating them for defamation was correspondingly greater).

45. See generally Gerald G. Ashdown, *Gertz and Firestone: A Study in Constitutional Policy-Making*, 61 MINN. L. REV. 645 (1977) [hereinafter Ashdown, *Gertz and Firestone*].

46. 441 U.S. 153 (1979).

47. *Id.* at 171.

48. *Id.* at 173.

49. *Id.* at 171.

publisher of an alleged libel would constitute a substantial interference with the ability of plaintiffs to establish the critical subjective element of reckless disregard for the truth by direct inquiry into the publisher's thoughts, opinions, and conclusions.⁵⁰

Although the Court is right that inquiry into the editorial process is necessary to facilitate proof of *New York Times* malice,⁵¹ not much attention was paid to the other side of the balance. Both Justices Brennan and Marshall were correct, in separate dissents, to distinguish between an editor's "thought processes," which would be chilled only if journalists stopped working altogether, and discovery requests involving communications in the newsroom between reporters and editors.⁵² With respect to the latter, both felt that an editorial privilege was necessary to protect editorial judgment and decisionmaking from inhibition and harassment.⁵³ It is this aspect of the *Herbert* decision that exhibits insensitivity to the publication process and freedom of the press. With the availability of the actual malice rule, the greatest threat to press freedom was not actual damage awards, but the financial and temporal burdens of litigation and discovery. Plaintiffs bent on revenge and lawyers set on deep discovery into journalistic judgment to earn a contingent fee could not help but impact the editorial process, either through harassment, delay, and the diversion of energy or, more profoundly, by discouraging communication between reporters and editors, counterproductively diminishing the thoroughness and accuracy of reporting. Viewed in this light, *Herbert* can be seen as procedurally reinstituting some of the restraint eliminated by the adoption of the substantive standard of recovery in *New York Times*. Fifteen years after *New York Times*, the Court was already realigning the interests.

Although in the decade of the 80s, media defendants did enjoy some success in the Supreme Court,⁵⁴ two relatively recent decisions again suggest less deference to media interests.⁵⁵ Of the two, *Milkovich v. Lorain Journal Co.*⁵⁶ is the more significant because it marked the end of the opinion rule, which had developed from the following often-cited passage from *Gertz*:

Under the First Amendment there is no such thing as a false

50. *Id.* at 170.

51. *Id.*

52. *Id.* at 193 (Brennan, J., dissenting); *id.* at 207 (Marshall, J., dissenting).

53. *Id.* at 194-95 (Brennan, J., dissenting); *id.* at 209 (Marshall, J., dissenting).

54. Ashdown, *Whither the Press*, *supra* note 3, at 689.

55. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991).

56. 497 U.S. 1 (1990).

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.⁵⁷

As other defendants successfully had done previously,⁵⁸ the *Lorain Journal* relied on this language to defend itself against Milkovich's libel action. A reporter for defendant's newspaper had suggested that the plaintiff, a high school wrestling coach, had lied under oath at a proceeding before the state athletic association.⁵⁹ Although the Ohio state courts held that the plaintiff was not required to establish actual malice, they concluded that the assertions amounted to "constitutionally protected opinion."⁶⁰ Chief Justice Rehnquist's opinion for the Supreme Court rejected the notion that a "separate constitutional privilege for 'opinion' is required to ensure the freedom of expression guaranteed by the First Amendment."⁶¹ He concluded that the word "opinion" in the second sentence quoted from *Gertz* referred to the word "idea" in the first sentence.⁶² Ideas are protected but statements in the form of opinion are not when they contain provably false assertions of fact.⁶³ The Court concluded that free expression was adequately protected by the requirement that the plaintiff prove both falsity and fault,⁶⁴ as well as by the line of cases providing "protection for 'statements that cannot 'reasonably [be] interpreted as stating actual facts' about the individual.'"⁶⁵ The Court explicitly refused to adopt a separate constitutional privilege for opinion.⁶⁶ It is now clear after *Lorain Journal* that statements in the form of opinion that contain provable false assertions of fact, and are not loose hyperbole, subject the author and publisher to liability.⁶⁷

When *Lorain Journal* is read along with *Masson v. New Yorker Magazine*,⁶⁸ the other media libel case decided by the Supreme Court in the 90s, it appears the Court has recognized the potential media abuse of the insulation provided to them by the *New York Times* cases. *Masson* involved

57. 418 U.S. 323, 339-40 (1974).

58. See Anderson, *supra* note 4, at 505-06.

59. *Lorain Journal*, 497 U.S. at 3.

60. *Id.* at 7-8 (quoting *Scott v. News-Herald*, 496 N.E.2d 699, 709 (Ohio 1986)).

61. *Id.* at 21.

62. *Id.* at 18.

63. *Id.* at 18.

64. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986).

65. Anderson, *supra* note 4, at 508-09 (quoting *Lorain Journal*, 497 U.S. at 20).

66. *Lorain Journal*, 497 U.S. at 21.

67. See *id.*

68. 501 U.S. 496 (1991).

the alleged fabrication or embellishment by author Janet Malcolm of quotes attributed to psychoanalyst Jeffrey Masson.⁶⁹ The plaintiff claimed that he never made the statements placed in quotation marks.⁷⁰ The Supreme Court reversed the grant of summary judgment for the defendant provided by the lower courts, holding that this journalistic action could satisfy the actual malice standard if “the alteration result[ed] in a material change in the meaning conveyed by the statement.”⁷¹ Due to the realities of converting a speaker’s words into print, Justice Kennedy’s majority opinion rejected the contention that any change beyond the correction of grammar and syntax represents actual malice, concluding that “[i]f an author alters a speaker’s words but effects no material change in meaning, including any meaning conveyed by the manner or fact of expression, the speaker suffers no injury to reputation that is compensable as a defamation.”⁷² Nevertheless, the Court rejected the “rational interpretation” standard employed by the court of appeals.⁷³ This approach protected an altered quotation as long as it is a rational interpretation of what was actually said.⁷⁴ Justice Kennedy rejected this test where the author is not relying on ambiguous sources, but is purporting to convey an actual statement of the speaker.⁷⁵

Were we to assess quotations under a rational interpretation standard, we would give journalists the freedom to place statements in their subjects’ mouths without fear of liability. By eliminating any method of distinguishing between the statements of the subject and the interpretation of the author, we would diminish to a great degree the trustworthiness of the printed word and would eliminate the real meaning of quotations.⁷⁶

Although the Court in *Masson* consistently refers to quotes and quotation marks, it cannot be that a reporter could circumvent the holding by simply reporting what a speaker said without placing the language in quotation marks. Such a result would “essentially emasculate the holding.”⁷⁷ Rather, any misrepresentation of a speaker’s remarks that “results in a material change in the meaning” amounts to actual malice under *New York Times*.⁷⁸ What this means for the news media is that misquoting or mischaracterizing a

69. *Id.* at 500-01.

70. *Id.*

71. *Id.* at 517.

72. *Id.* at 516.

73. *Id.* at 520.

74. *Masson v. New Yorker Magazine, Inc.*, 895 F.2d 1535, 1539 (9th Cir. 1989), *rev’d*, 501 U.S. 496 (1991).

75. *Masson*, 501 U.S. at 519.

76. *Id.* at 520.

77. Ashdown, *Whither The Press*, *supra* note 3, at 697.

78. *Id.* at 695.

source's statements, if it can be proven, will result in liability.⁷⁹

Milkovich and *Masson* taken together establish that the Supreme Court has been careful to prevent members of the news media from overstepping their roles as investigators or analysts. Analysis or conclusions, which embellish a story by putting a cast or spin on it, or which contain provably false assertions of fact, or misrepresent, or mischaracterize a source's remarks are not constitutionally protected. This seems to be a message from the Court telling the press that it will not be allowed to abuse the protection of its First Amendment role provided by the *New York Times* cases. It is fair to say that *Gertz*, *Firestone*, *Herbert*, and finally *Lorain Journal Co.* and *Masson* represent a leavening of the Supreme Court's deference to the press in the wake of *New York Times*. *Milkovich* and *Masson* are the clearest examples of the Court's unwillingness to tolerate damage to reputations and the marketplace of information caused by the media venturing from good faith efforts at accuracy.

Unfortunately, this recasting of the constitutional law of libel has had little effect on the media. Examples include the frenzies over the O.J. Simpson trial, Bill Clinton's private life, the Elian Gonzalez affair, Congressman Gary Condit and the disappearance of Chandra Levy,⁸⁰ and, most recently, disappearing white women in the summer of 2005.⁸¹ No system of internal self-control has developed for the press because of mass competition, and, as importantly, because there is no mechanism of external control. In reality, libel law is dead as a means of accountability. The actual malice standard of *New York Times* and its implementation have done a very effective job of preventing press self-censorship. The concern at the time of the *New York Times* decision was avoiding the self-censorship of true as well as false information, which the fear of libel litigation and judgments was thought to create. In the 1960s and 1970s, we were right to be concerned about this threat to freedom of the press. The facts of *New York Times* itself indicate as much. However, the impact of the constitutional malice standard not only has been to remove the threat of self-censorship of true and accurate information, but also to discourage internal constraints concerning the publication of falsehoods, misrepresentations, exaggeration, and sensationalism. This has

79. *Id.*

80. Levy's body was found in Rock Creek Park in Washington, D.C., apparently the victim of a homeless assailant. See Dvorak & Lengel, *supra* note 7.

81. Charles Molineaux et al., *Runaway Bride: Wedding 'Postponed,' Not Off*, CNN, May 1, 2005, <http://www.cnn.com/2005/us/04/30/wilbanks.found>; Ken Penhaul, *Teen's Disappearance A Criminal Case*, CNN, June 5, 2005, <http://www.CNN.com/2005/world/americas/06/04/missing.teen-/index.html>.

reached the point where the public no longer trusts the news media.⁸² The twin constitutional functions of the press—facilitating the marketplace of information and acting as caretaker of good government and civic responsibility—are dependent on the dissemination of reliable, trustworthy information on which we all can rely. When this breaks down, either in reality or appearance, freedom of the press is no longer operating as designed.

Libel law is currently failing to accomplish anything, except to completely insulate the media from any incentive to ensure that they are effectively performing its constitutional role; reputations are damaged, misinformation is distributed, media hysteria is encouraged, and the press is immune from any recourse. Libel law is no threat to the press for a number of reasons, the most significant of which is the virtual impossibility of a plaintiff recovering. For the past twenty years, the Libel Defense Resource Center studied libel and related claims against media defendants, releasing two reports in 2000 containing statistics on litigation.⁸³ These reports reveal that nearly eighty percent of the time media defendants won pretrial dismissals.⁸⁴ Although, of the cases that actually went to trial, plaintiffs prevailed well over half of the time,⁸⁵ trial judges reversed roughly a quarter of these,⁸⁶ and of the remainder, only a third completely survived appeal.⁸⁷ Another revealing statistic is that nationwide the media had to defend only an average of 21.9 libel trials a year during the 1980s and 1990s.⁸⁸ Given the number of media outlets, the potential for defamation is striking, and when compared to the total number of tort cases filed each year,⁸⁹ the results are startling. This is not a pretty picture for libel victims contemplating the financial and emotional expense of libel litigation, or for plaintiff's lawyers weighing the chances of recovering a contingent fee. It is, however, a very pretty scenario for potential news media defendants who realize that they do not have to fear libel suits. The constitutional requirements afford the press a virtual absolute privilege to publish and broadcast false stories.

In addition to the unlikelihood of recovery, members of the press realize the reluctance of a libeled person to sue. The financial and emotional expense, the additional exposure brought about through discovery, and the

82. See Anderson, *supra* note 4, at 534-35.

83. Logan, *supra* note 35, at 509 (analyzing contents of 2000 Reports on Appellate Results and Trials and Damages Performed by the Libel Defense Resource Center, available at <http://www.medialaw.org>).

84. *Id.* at 510.

85. *Id.* at 513.

86. *Id.* at 515-16.

87. *Id.* at 516.

88. *Id.* at 512.

89. *Id.* at 513.

additional publicity resulting from the libel action are all natural and strong deterrents.⁹⁰ Recently, a prominent plaintiff's libel lawyer stated publicly that he "caution[s] against bringing a libel action" because "the decks are about as stacked against a plaintiff as they possibly could ever be."⁹¹

C. Current Libel Law

The most obvious result of the current libel regime is that personal reputations are left unprotected. When an individual is defamed—when damaging lies about him or her are spread publicly in the media—there is largely no recourse. Although it is possible to underplay this by arguing that it is only psychological damage that occurs, similar injury is recoverable on no more than a showing of negligence,⁹² and in reality, we have to intuit that a good deal of actual economic damage results from disfavor, diminished appeal, and electability. The actual malice rule prevents public officials and public figures—and this includes lower level public servants⁹³ and private persons involved in public events,⁹⁴ as well as more prominent individuals—from recovering for whatever harm is caused by the publication of falsehoods about them. Those classified as private individuals must also establish actual malice in order to recover presumed or punitive damages,⁹⁵ and securing a lawyer to sue on a contingency basis generally requires such an allegation.⁹⁶ Thus, protecting personal reputation and compensating its injury is the first and most obvious casualty of constitutional actual malice rules.

There is, however, a more serious public and sociopolitical harm left by the legacy of *New York Times Co. v. Sullivan*—and that is the search for truth. Regardless of talk about the marketplace of ideas and truth prevailing over falsity, the primary function of the Press Clause in the First Amendment is the dissemination of accurate factual information and the presentation of conscientious analysis to the public. In fact, that is what the actual malice rule was designed to accomplish.⁹⁷ The theory was that much accurate, reliable information, as well falsehoods, would be suppressed by fear of liability for

90. See, e.g., *Burnett v. Nat'l Enquirer, Inc.*, 193 Cal. Rptr. 206 (Cal. Ct. App. 1983).

91. See Roundtable, *First Amendment on Trial—The Libel Lawyer's Perspective*, 23 SEATTLE U. L. REV. 849, 855-56 (2000) (statement of John Shaeffer, one of founding partners in O'Donnell & Shaeffer in Los Angeles).

92. Anderson, *supra* note 4, at 501.

93. *Id.* at 524.

94. *Id.*

95. *Id.* at 525.

96. *Id.*

97. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 282-83 (1964).

defamation—the dreaded self-censorship effect.⁹⁸ It can be argued that somewhat the opposite has occurred. The media, relieved of the danger of libel liability, no longer is concerned about the publication of false, libelous stories. Instead of libel law that discourages the censorship of reliable material, we have a constitutional law of libel that encourages the dissemination of falsity. These conflicting sides of the coin—discouraging self-censorship of accurate information on the one side and encouraging the publication of inaccuracy on the other—depend for domination on the dynamics of press behavior. It was the potential for the predominance of the latter that the Supreme Court did not foresee or appreciate when it decided the early *New York Times* line of cases. Now, whatever self-censorship is avoided is surely overcompensated by the distribution of falsehoods, exaggeration, and sensationalism. The reading and listening public in a participatory democracy is no better off for this. The social cost of the *New York Times* rule has been a dramatic impact on the marketplace of information by polluting it with misinformation. When this is combined with press fixation on marginally relevant issues and sensationalism, real news and analysis suffer. This is not healthy for a system of freedom of expression, which depends on truth prevailing over falsity to facilitate self-government and personal decisionmaking. A news media that is undeterred by any form of accountability ill serves the public and participatory democracy.

The current news climate is essentially one of scandal, sensationalism, and blame, typified by media coverage in the summer of 2001 of the Chandra Levy disappearance. Bill Press, co-host of CNN's "Crossfire" had this to say:

The summer of 2001 . . . will be remembered as the time when the American media, once and for all, destroyed its own reputation for objectivity and integrity. It will be remembered as the "Summer of Chandra Levy" and a textbook case of media overkill. Both in print and on television, the press managed to turn the Levy case into a sleazy summer novel—with just as many cheap thrills, and just as few actual facts.⁹⁹

Press went on to point out the media hysteria and inaccuracies, that over 800,000 persons were missing in 2001 alone, how the media continued to

98. See *id.*

99. Bill Press, Editorial, *Chandra Sends Media Into Insanity*, THE CHARLESTON GAZETTE (W. Va.), Aug. 8, 2001, at 4A.

allow Chandra Levy's family to defame Gary Condit,¹⁰⁰ and concluded "[w]ithout the facts, it is not fair to destroy any person's reputation—not even a politician's. It is not honest to devote hours to chewing, discussing, and speculating about sensational 'new' developments without first determining their accuracy."¹⁰¹ This is but one example of a news media driven by competition to exalt scandal and sensationalism over substantive coverage of issues.

This kind of reporting is self-propelling and self-fulfilling. From both the perspectives of the public and the press, it is easier to focus on and exaggerate scandal and lay blame than it is to investigate, analyze, and report on hard news.¹⁰² The latter takes more effort and is less appealing to much of the public, if for no other reason than this is the diet it has come to expect. Competition from technology and the proliferation of news outlets have also placed a premium on quick and easy coverage, in which careful investigation and accuracy are dispensable. Of course, it is the actual malice standard that makes this all possible, allowing an emphasis on scandal and blame without concern for the truth. The public and press are both losers. The public misses the hard news it deserves, and the press loses the confidence of the public because of the circus atmosphere and lack of substantive coverage.

There is one further, more subtle deleterious effect produced by the actual malice rule, and the cost here might be the highest. With open season on public officials and public figures, it must be assumed that many good and talented people are discouraged from seeking public life.¹⁰³ We are not only speaking of those who might achieve national prominence or elected office, but also of low ranking public employees and those who might become involved in local affairs for they are also considered public persons under the constitutional malice rules. Surely those who are inclined to seek public office or otherwise aspire to public prominence are aware that their lives will become an open book at the hands of the press, but with respect to other less prominent people the media is also immune from any kind of conscience for decency. This surely has the effect of discouraging capable folks from seeking public office, public attention, or in any way dealing with or attracting the attention of the press. Thus, the actual malice standard deters qualified and capable people from participating in political or public life.

100. On the August 2, 2001, airing of CNN's Wolf Blitzer Reports, Chandra Levy's aunt was allowed to state that Condit's marriage to his present wife was a "marriage of convenience."

101. Press, *supra* note 99.

102. See Anderson, *supra* note 4, at 533-34.

103. *Id.*

III. JOURNALISM POLICE

This all suggests that some control on media behavior is needed for the sake of the First Amendment's marketplace of information as well as common decency and the protection of personal reputation. The only kind of press accountability, however, the common law of libel, was virtually eliminated by the *New York Times* line of cases. It seems that the actual malice rule of *New York Times* has not withstood the test of time and has outlived its usefulness. At the time *New York Times* was decided, the press was subject to a very lenient standard of liability—strict liability unless the defense could prove the story true. There is no need now to return to that regime, but the negligence standard of *Gertz v. Robert Welch, Inc.* has considerable appeal. Combining the negligence standard with other developments in the constitutional law of libel would leave the news media with substantial protection.

The Supreme Court has a ready means available to conform the actual malice rule of *New York Times* to the negligence standard of *Gertz*. The distinctions the Court drew in *Gertz* between public and private plaintiffs were never persuasive, and they were effectively dismantled by the arguments of those who favored application of the actual malice rule to all plaintiffs.¹⁰⁴ Given the changed nature of the modern news media and the lessons of history, these same arguments against a public/private person distinction now could be used to adopt a negligence standard in the case of all plaintiffs. In so doing, a modicum of responsibility would be placed on the press. The distinction between public persons—public officials and public figures—and private individuals never made sense. The focus of constitutional significance in terms of the policy underlying freedom of the press should be on whether the publication involved a matter of public interest; that is what justifies press coverage in terms of both the role of the press as disseminator of information and as public watchdog.¹⁰⁵ Determining whether a story is of public interest is also an easier standard to apply than the slippery definition of "public official"¹⁰⁶ and the rather arcane definition of "public figure."¹⁰⁷ Thus as both a matter of policy and practicality, the much more sensible standard was the "public interest" focus of *Rosenbloom v. Metromedia, Inc.*¹⁰⁸ Nevertheless, the Supreme Court in *Gertz* determined that the reputations of private individuals were more deserving of protection for two reasons: since

104. See Anderson, *supra* note 4, at 500.

105. See Gerald G. Ashdown, *Of Public Figures and Public Interest—The Libel Law Conundrum*, 25 WM. & MARY L. REV. 937 (1984).

106. *Rosenblatt v. Baer*, 383 U.S. 75, 84 (1966).

107. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974).

108. 403 U.S. 29, 31-32 (1971).

private individuals lacked access to the channels of communication to rebut false statements, they were more vulnerable to injury than public figures and, unlike public persons, they had not assumed the risk of publicity.¹⁰⁹

Justice Brennan effectively debunked the access to the channel of communication argument in his plurality opinion in *Rosenbloom*¹¹⁰ and his dissenting opinion in *Gertz*.¹¹¹ He pointed out that access to the media exists only for very prominent people, and for all others, whether public or private, access depends on the unpredictable and uncontrollable event of continuing media interest.¹¹² He also noted that even where access to the media is available, denial rarely overtakes the original charge.¹¹³ "Denials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story."¹¹⁴ In other words, as the majority itself in *Gertz* admitted, "the truth rarely catches up with a lie."¹¹⁵ Pragmatically speaking, even where a story receives substantial media attention, both the initial source and competitors have a natural, professional disinclination to challenge the original story. Justice Brennan was surely correct when he stated that the self-help dichotomy "seems too insubstantial a reed on which to rest a constitutional distinction."¹¹⁶

The assumption of the risk argument, on which the Court relied more heavily, is equally unpersuasive. There are any number of things wrong with this part of Justice Powell's majority opinion in *Gertz*. First, it largely depends on the definitions of public official and public figure. With respect to public officials, to the extent that Justice Powell was relying on "[a]n individual who decides to seek governmental office,"¹¹⁷ it ignores a whole score of lower-level public servants, like police officers, who are classified as public officials by the courts.¹¹⁸ To the extent that those who seek elective office might recognize the concomitant risk of publicity and exposure, the assumption of risk argument has little application to a person who is classified as a "public official" simply because he holds some minor government position.¹¹⁹

109. *Gertz*, 418 U.S. at 344-45.

110. 403 U.S. at 46.

111. 418 U.S. at 363 (Brennan, J., dissenting).

112. *Rosenbloom*, 403 U.S. at 45-46.

113. *Id.*

114. *Id.* at 46.

115. 418 U.S. at 344 n.9.

116. *Rosenbloom*, 403 U.S. at 47.

117. *Gertz*, 418 U.S. at 344.

118. Anderson, *supra* note 4, at 527-28.

119. *Id.*

The waiver argument is particularly inapt with respect to public figures. According to the majority in *Gertz*, the more common type of public figure are those that “have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.”¹²⁰ But those who are civic-minded enough, or who are interested enough to voluntarily become involved in public issues or events, have not accepted, nor should they have to accept, the same risk of scrutiny of their lives as those who seek public office. It is at this juncture that the waiver argument for those becoming involved in public issues (as well as those seeking office) has an unfortunate deterrent impact. Additionally, the otherwise private person who becomes a limited public figure because of involvement in public affairs assumes the risk of media attention to a degree only slightly different from those who would otherwise be classified as private individuals. In our highly mobile, visible, and interactive society, the risk of attracting the attention of the press is as apparent as it is unpredictable. Becoming involved in any number of events, whether voluntarily or involuntarily, e.g., from an accident, natural disaster to a winning lottery ticket (i.e., good luck or bad), makes us vulnerable to media exposure. Again, it is the nature of the event—whether it is of public interest—rather than the status of the participant that creates the risk.

Even those labeled “public figures” because they “achieve such pervasive fame or notoriety that [they] become[] . . . public figure[s] for all purposes and in all contexts”¹²¹ are not like Justice Powell’s paradigmatic public official who, through seeking public office, invites inquiry into his or her public and private life, both being relevant to fitness for public service. A person who gains fame and notoriety because of success or a particular talent, such as an actor, athlete, or musician, certainly has not voluntarily exposed his or her private life to public discussion and ridicule at the hands of the media. The private lives of such persons are largely irrelevant to their status. Nor do most persons with general fame use their prominence in an attempt to persuade others or influence the resolution of public controversies. Some do,¹²² but most do not.

Consequently, assumption of the risk is not a sound rationale on which to distinguish the reputations of most public persons. At best, the waiver theory might apply to those who seek elective office, and even here we would probably be better off if it were not so. As Professor David Anderson points

120. *Gertz*, 418 U.S. at 345.

121. *Id.* at 351.

122. Some persons who use their prominence as public figures in an attempt to influence others become public officials, e.g., Arnold Schwarzenegger, Fred Thompson, and Jesse Ventura.

out, the waiver theory is circular.¹²³ If public officials and figures sacrifice their reputations, it is only because the Supreme Court has so declared. The Court has not provided a satisfactory explanation of why this should be so. The access to the channels of communication to reply and assumption of the risk arguments are illogical and fallacious. In reality, these unpersuasive notions may have been employed in *Gertz* not simply to provide some protection to the reputations of private individuals, but also to establish a measure of media accountability.¹²⁴ If the reputations of private persons deserve an accounting, there is no good reason not to provide the same remedy to all plaintiffs, for the same policy reasons. Recognition of the flawed analysis in *Gertz* leaves the Court with two choices. The Court can return to *Rosenbloom*, applying the actual malice standard to all persons involved in matters of public interest, or the Court can hold the negligence standard applicable to all plaintiffs in all cases. Given the fiascos of the modern media, the choice seems clear.

The response to the concern over self-censorship and freedom of the press is straightforward. There certainly would be no return to the pre-*New York Times* regime. First, plaintiffs would have to establish both falsity and fault, in the form of negligence, to recover.¹²⁵ Even when these hurdles are surmounted, presumed and punitive damages would be unavailable in the absence of proof of actual malice.¹²⁶ Although the Court did state that actual injury was not confined to out-of-pocket loss and could include harm to reputation, personal humiliation, and emotional injury,¹²⁷ this does not seem remarkable once the plaintiff has established that the defendant negligently published falsehoods about him or her. In any event, media defendants will remain protected by judicial deference to freedom of the press. As indicated earlier, dismissal, summary judgments, overturning jury verdicts, and reversals on appeal following de novo review of the facts continue to provide sufficient vigilance over First Amendment interests.

IV. CONCLUSION

On the other side of the equation, vigilance on the part of the news media, beholden to liability for negligence, is not a bad thing. At least the appearance of the potential for redress might encourage some investigation or

123. Anderson, *supra* note 4, at 528.

124. 418 U.S. 323 (1974).

125. Anderson, *supra* note 4, at 501.

126. *Id.* at 525.

127. *Gertz*, 418 U.S. at 393 n.29.

inquiry before every tip, leak, or piece of gossip is published. The need to break a story fueled by competition and followed by the herd mentality results in the widespread publication of much misinformation. Again, the Gary Condit/Chandra Levy story provides excellent examples: before her disappearance, Levy was reported to have made a number of last minute phone calls to Condit, but her phone records indicated there were none; it was widely reported that Condit had an affair with an eighteen-year-old girl in California, but the FBI later said the girl's father was lying; and the last rumor circulated by the news media that Levy's body was buried under a parking lot being constructed at Fort Lee, Virginia, had been received by the FBI a week earlier and was determined to be a hoax.¹²⁸

If a negligence standard causes the press to withhold some stories for verification or prevents publication altogether, the contemporary record suggests that this censors the publication of more inaccurate, defamatory material than useful, accurate, and conscientious reporting. A negligence standard surrounded by all the other built-in protections for the media mentioned above—plaintiffs required to prove falsity and fault, limitation of damages, and careful judicial supervision—suggests that only stories at the margins will be suppressed. This kind of tempering of the unrestrained power of the twenty-first century press is healthy for the First Amendment. Freedom of the press does not require an untamed news media, no matter what the cost. Madison and Jefferson foresaw in freedom of expression the ability to criticize government and disseminate information to the public so that they could govern themselves effectively.¹²⁹ This is still true, but it is a theory based largely on accurate and honest reporting. Our system of freedom of expression needs adjustment over time. It certainly is not benefited by a powerful, uncontrolled press with no mechanism available to filter out misinformation. The time for the journalism police may have arrived.

128. Bob Dart, *Levy Tip Merely A Hoax, Says FBI*, Atlanta J. Const., Aug. 3, 2001, at A6.

129. Margaret A. Blanchard, *Why Can't We Ever Learn? Cycles of Stability, Stress and Freedom of Expression in United States History*, 7 COMM. L. & POL'Y 347, 352-54 (2002).

