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WHITHER THE PRESS: THE FOURTH ESTATE AND THE JOURNALISM OF BLAME

Gerald G. Ashdown*

I. THE ROLE OF THE PRESS

As all who are familiar with the history of the media in this country realize, *New York Times Co. v. Sullivan*¹ marked the beginning of a new era of freedom for the press in the coverage of public events. *New York Times* and its progeny unshackled news stories from the chill of libel litigation. The American public was the primary beneficiary of the Supreme Court's 1960s foray into the law of defamation. The press was now able to publish virtually any story about public persons,² and for a time any story of public interest,³ without fear of a successful libel suit. Because of this new license, there was less need for restraint in reporting, and we can assume that as a result much information that formerly would have been censored was now filtered to readers and viewers. When I wrote about this phenomenon in the 1970s,⁴ I argued (and still maintain but with somewhat less enthusiasm) that the unshackling of the news media was healthy for participatory democracy. Not only is the flow of information to the public directly correlated with the effective exercise of choice by voters, but a vigilant and unintimidated press is also capable of affecting policy by exposing corruption, waste, and foolishness.⁵

These are the two dominant policies behind the Freedom of the Press Clause in the First Amendment—the press as critic and the press as educator.⁶ Unlike freedom of speech, which is partly concerned with the self-fulfillment and psychological and emotional growth of the individual speak-

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¹ 376 U.S. 254 (1964).

² See *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Walker v. Associated Press*, 191 So. 2d 727 (La. Ct. App. 1966), *rev'd*, 389 U.S. 28 (1967).

³ See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

⁴ Gerald G. Ashdown, *Gertz and Firestone: A Study In Constitutional Policy-Making*, 61 MINN. L. REV. 645 (1977) [hereinafter Ashdown, *Constitutional Policy-Making*]; Gerald G. Ashdown, *Media Reporting and Privacy Claims: Decline In Constitutional Protection for the Press*, 66 KY. L.J. 759 (1978) [hereinafter Ashdown, *Media Reporting and Privacy*].

⁵ Ashdown, *Media Reporting and Privacy*, *supra* note 4, at 760.

⁶ For a thorough discussion of the evolution of the Free Press Clause, see David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983).

er, the constitutional policy underlying freedom of the press is limited to its function in the marketplace of ideas and the corresponding facilitation of the democratic process.⁷ It is the job of the press to report, discuss, and evaluate events, ideas, and governmental activities. Its constitutional role is just as the term "reporter" describes—to report and create the mix and maw of the marketplace of ideas and information which can be utilized to make both informed political choices and decisions about daily life.

This role is not to be undervalued; it is an ominous responsibility. The days of the soapbox and getting information about the world from one's neighbors have long since passed. Our principle source of news and information is the modern media—newspapers, magazines, television, and radio. These sources select much of what we read, watch, and hear. Together, these sources program the collective public computer and ultimately form public opinion which is then reported back to us in a self-propelling helix. The function of a free press is to be uncontrolled by government, to act as a watchdog over government, and to provide us with the information that facilitates personal and political decision-making and fosters personal and professional growth. Whether the subject be a police commissioner,⁸ a retired general,⁹ an athletic director,¹⁰ or a real estate developer,¹¹ since 1964 when the Supreme Court decided *New York Times*, the press has been relatively unrestrained by the threat of libel litigation in performing its constitutional function.

II. THE PINNACLE OF PROTECTION

Constitutional insulation from libel awards reached its pinnacle in 1971 when the Supreme Court decided *Rosenbloom v. Metromedia, Inc.*¹² In *Rosenbloom*, the Court held that if the media defendant was reporting on any matter of public interest, the plaintiff, in order to recover, was required to prove that the story was published with knowledge of its falsity or with reckless disregard for the truth.¹³ Recklessness was clearly defined. The Court stated that reckless disregard for the truth was "not measured by whether a reasonably prudent man would have published, or would have investigated before publishing," but rather, by whether "[t]here [was] sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."¹⁴

⁷ See *Turner Broadcasting Sys., Inc. v. FCC*, 113 S. Ct. 1806, 1808 (1993).

⁸ See *New York Times*, 376 U.S. at 256.

⁹ See *Walker*, 191 So. 2d at 730.

¹⁰ See *Butts*, 388 U.S. at 135.

¹¹ See *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 7 (1970).

¹² 403 U.S. 29 (1971).

¹³ *Id.* at 44.

¹⁴ *Id.* at 56 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)).

Following *Rosenbloom*, members of the media were protected from virtually all libel suits.¹⁵ Whereas previous decisions had limited the constitutional shield to stories regarding public officials and public figures, now even libelous reports about private individuals were protected as long as they contained an element of public interest.¹⁶ This standard was essentially self-defining. The fact that a story was chosen for coverage *ipso facto* made it a matter of public interest. For who, if not the press, are experts in this field? Selecting a story for publication christens it as a subject of public interest. Although a later Supreme Court decision relaxed the standard to one of negligence when a private individual was involved,¹⁷ the news media continued to be virtually insulated from libel suits—by the *New York Times* actual malice standard when a public person was the plaintiff and by the *Gertz v. Robert Welch, Inc.* negligence standard when a private individual filed suit.

There have been some libel awards against media defendants, but since *New York Times* and its progeny, they have been infrequent and often have been reversed on appeal.¹⁸ The threat of a libel award no longer acts as a

¹⁵ For a discussion of the rapid rise in the use of the *New York Times* rule, see W. WAT HOPKINS, ACTUAL MALICE 30 (1989) (describing the brief period between *Rosenbloom* and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), as the “pinnacle” of the expansion of the actual malice rule).

¹⁶ *Rosenbloom*, 403 U.S. at 43-44.

¹⁷ See *Gertz*, 418 U.S. at 347 (permitting states to establish their own tests “so long as they do not impose liability without fault”).

¹⁸ One of the most publicized libel recoveries was that of Carol Burnett against the *National Enquirer*. Although the jury originally awarded Burnett \$300,000 in compensatory damages and \$1.3 million in punitive damages, the amount ultimately was reduced by the trial judge and again by the California appellate court to \$50,000 compensatory and \$150,000 punitive damages. *Burnett v. National Enquirer, Inc.*, 193 Cal. Rptr. 206, 219-20 (Ct. App. 1983), *appeal dismissed*, 465 U.S. 1014 (1984). Probably the most recent libel recovery to hold up on appeal is that of a West Virginia lawyer who sued a Charleston, West Virginia newspaper that had accused him of bilking clients. *Hinerman v. Daily Gazette Co.*, 423 S.E.2d 560 (W. Va. 1992), *cert. denied*, 113 S. Ct. 1384 (1993). *Hinerman* recovered \$75,000 actual and \$300,000 punitive damages. *Hinerman*, 423 S.E.2d at 571, 578-79.

The largest libel damage award on record, \$1.5 million in actual damages and \$25 million in punitive damages (ranking as one of the largest jury verdicts of all time), was overturned by a 2-1 vote of a 10th Circuit Court of Appeals panel. *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438, 443 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983). In another celebrated libel case, William Tavoulaareas, President of Mobil Oil Corporation, sued the *Washington Post* for alleging that he had used his influence and Mobil assets to set up his son in business. The large damage award granted by the jury, \$250,000 compensatory damages and \$1.8 million punitive damages, was overturned by the trial judge, then reinstated by a 2-1 vote of a panel of the D.C. Circuit Court of Appeals. *Tavoulaareas v. Piro*, 759 F.2d 90 (D.C. Cir. 1985). The panel decision was reversed *en banc* in favor of the *Washington Post*. *Tavoulaareas v. Piro*, 817 F.2d 762, 798 (D.C.

real governor on publication decisions. Although the cost of defending a libel suit has the potential to discourage hasty publication of possibly libelous material, the realities of both the media and litigation markets diffuse this threat. The media is in a rush to get the story out—to scoop other publications. When this rush is coupled with the realization that a libel suit requires either a wealthy plaintiff willing to bear the costs of litigation or a lawyer willing to take a libel case on a contingent fee basis, future libel litigation costs seem remote.

Another important factor in reducing media fear of libel litigation is the unwillingness of defamed persons to sue.¹⁹ Those who feel they have been libeled are generally justifiably reluctant to sue. A libel suit resurrects a matter which has ended, makes the plaintiff's behavior and integrity a public issue again, and requires the plaintiff to prove that the story was false and that the media defendant published the story maliciously or at least negligently, while the defendant tries to show that it had the story right. This is not a pleasant thought for a prospective libel plaintiff. Thus, the realistic threat to the news media of libel suits and litigation costs is minimal.

Of course, this is precisely the policy behind the constitutional privilege. For nearly three decades the conflict between personal reputation and freedom of the press has been decided resoundingly in favor of the latter.²⁰ This is how it should be in an era of responsible journalism. The harm caused to an individual by a libelous publication is largely ephemeral. Although cherished historically (hence the development of the defamation cause of action), one's reputation has little tangible value.²¹ Occasionally, a job, an election, or a future opportunity might be lost due to the publication of a libelous story, but this is not the norm. More generally, the damage is psychological and emotional, and only infrequently are there any physical manifestations of such damage. Nevertheless, the personal trauma can be extreme.

The other side of the libel equation is on balance more profound, requiring vigilance and patronization. Freedom of speech and press are the very vibrancy of our culture. Curtailing these freedoms retards sociopolitical progression. Although reference to a "marketplace of ideas" has been over-used,²² the basic notion is sound. Better cultural choices and wiser political

Cir.) (en banc), *cert. denied*, 484 U.S. 870 (1987).

¹⁹ This is undoubtedly the reason that there are not more libel suits filed by public figures, politicians, and elected public officials.

²⁰ Ashdown, *Constitutional Policy-Making*, *supra* note 4, at 651.

²¹ *Id.* at 655; *see, e.g.*, *Paul v. Davis*, 424 U.S. 693, 701, 711-12 (1976) (holding that an interest in reputation is not constitutionally protected by the liberty or property guarantees of the Due Process Clause).

²² *See, e.g.*, *Leathers v. Medlock*, 499 U.S. 439, 458 (1991); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 3 (1990); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 782 (1986); *Red Lion*

assessments are likely to increase in direct proportion to the amount of information that is filtering and percolating through the public domain. This informational marketplace is the fuel that drives a culture. The uniqueness of the American culture and participatory democracy are made possible by freedom of expression.

Free expression has two components—the right to speak and the right to listen or receive information.²³ Freedom of the press primarily relates to the latter of these. It is the constitutional role of the American news media to collect, distill, and publish information about life, law, science, religion, and politics so that individually and collectively we can make decisions about how to govern our lives. Of course, these decisions could be made in a vacuum without knowledge about what is occurring in the world around us, but they would be uninformed and ignorant at best, and dangerous at worst. Without the modern media's service in the wholesale dissemination of information, we would be culturally and politically adrift. The world has become much too complex to rely on friends and neighbors, the pamphleteer, and the pony express for our daily diet of news. Even the nineteenth century newspaper would be an anachronism in the modern age. Like it or not, we need computers, laser printers, national distribution, satellites, and major networks to keep up with events.

But in addition to its distributional function, the press also plays a speaker's role. Part of the constitutional obligation of the news media is to evaluate governmental behavior and public events, and to expose corruption, waste, and foolishness.²⁴ Here, as in the role of disseminator of information, freedom of the press transcends the philosophy embodied in individual free speech. Although freedom of speech is intended, in part, to serve a similar goal, individual speakers, unless they have the financial wherewithal of a Ross Perot, simply do not have the impact and influence of the modern news media (unless, of course, they attract media coverage). To be influential, critiques and exposés must reach a wide audience. This is part of the policy underlying the constitutional imprimatur granted the press.

The dual functions of the press—disseminator of information to the public and guardian of the public trust—has led to both the rise and fall of the news media. Constitutional insulation from libel actions was granted due to a realization of the importance of these two functions. The availability of libel litigation resulting in large damage awards, with truthfulness as the only means of exoneration,²⁵ has tremendous potential to create a self-cen-

Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

²³ Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1376 n.5 (10th Cir. 1981).

²⁴ *Estes v. Texas*, 381 U.S. 532, 539 (1965).

²⁵ The well settled common law rule prior to decisions by the United States Supreme Court was that truth, the only defense to a defamation action, must be pleaded and proved by the defendant. *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE*

soring press, especially regarding critical or controversial stories. Material whose accuracy could not be absolutely verified beforehand simply would not be published. The result would be a substantial reduction in the amount of information and critical commentary available to the public. It was this phenomenon that *New York Times* and its progeny were designed to prevent by shielding the press from most libel actions.

III. THE JOURNALISM OF BLAME

The interplay between the constitutionally recognized prerogatives of the press both to report the "news" and to comment on public events has caused dissention. The watchdog service performed by the press has a major distributional component. Without the ability of the news media to reach a large public audience, this aspect of freedom of the press would be no more significant than individual free speech. In a sense, the Constitution protects the press because it is independent of government and, most importantly, can maintain a national pulpit. Thus, the reporting and critiquing functions blend together in a mire of mass production that tends to camouflage self-generated news from news created by the press through its commentary. The trouble lies at this juncture of reporting and commentary, where it appears that the constitutionally appointed wholesalers of news help to create that which they are supposed to merely report. With respect to public events or governmental actions, this can be like listening to a description by an art or music critic. Reporters and editors actually see their task as putting a slant or an explanation on the news, elevating their stature beyond mere objective purveyors of information to the public.

The press certainly has performed a valuable national service by exposing major political shenanigans such as Watergate and the Iran-Contra affair. The media, however, also has the capability to go beyond delivery of the news, justified criticism, and the exposé, to the actual creation of public attitudes and opinions. Naturally, public reaction to events is shaped by what is delivered to us through the news media. This dissemination of the news is the major constitutional function of a free press. Nevertheless, the choice of stories and the way they are presented have a major influence on the public response. If we hear about potential riots, riots become possible.²⁶ If we are told that President Clinton has been defeated in Congress,²⁷ then the

LAW OF TORTS § 116 (5th ed. 1984).

²⁶ See, e.g., Cary Darling et al., *Did T.V. Coverage Help Fuel Chaos?*, CHI. TRIB., Apr. 30, 1992, at 8 (discussing riots related to trial of Los Angeles police officers for the beating of Rodney King).

²⁷ See, e.g., John A. Farrell, *Clinton's Stimulus Plan Dies in Senate*, BOSTON GLOBE, Apr. 22, 1993, at 1 (discussing Senate Majority Leader George Mitchell's withdrawal of President Clinton's job stimulus package because of the failure of Senate

Clinton presidency is in trouble. Public reaction and opinion are formed by what we get through the news and the way we get it.

Lately, this has taken on somewhat of a new twist; something I have chosen to call the journalism of blame. The national media now must have a winner and a loser, and someone to blame for problematic events. This may be a product of our cultural craving for victory and defeat (the who's number one, fist-in-the-air, victory celebration phenomenon). More likely, the current journalistic edge flows directly from the efforts of the press to put too fine a point on a story (the bottom line, let's-get-to-the-bottom-of-this phenomenon).

This juristic drive to get at the truth or reduce every story to a victory or a loss ignores the complexity of events, discredits the appointed fallguy, and slants the story in the direction the finger is pointed. The public is the real loser. The journalism of blame exposes the target to public ridicule and prevents, or at least distracts, the reading and viewing public from judging affairs for themselves. To this extent, the news media has forsaken the role of conduit of the news with occasional commentary in favor of that of wholesale news critic. The only "straight" news available anymore is the tragically mundane—the missing child, the drive-by shooting, and the bus wreck. Even then, the mother's supervision was lax, law enforcement was inadequate, or the bus company carelessly employed the driver. If the story has any political content, the onslaught can be unrelenting.

The press consistently blamed President Bush for neglecting domestic affairs and consequently ushering in economic recession.²⁸ It cost him the presidency.²⁹ There is probably no better archetype of the journalism of blame than the Branch Davidian episode in Waco, Texas. From the beginning, when agents from the Department of Alcohol, Tobacco, and Firearms stormed the Davidian compound on February 28, 1993, leaving four federal agents and six cult members dead and a standoff in its wake,³⁰ the press had to have someone to blame. Interestingly, this blame was not cast on David Koresh and his followers, who fired the first deadly shots, but on the Government for undertaking the raid in the first place, or at least for the way in which it was conducted.³¹ Seven weeks later, when the standoff resulted in a fiery inferno leaving as many as eighty-five dead,³² the blame-laying was relentless. It was the FBI's fault for precipitously and carelessly

Democrats to end a Republican filibuster on April 21, 1993).

²⁸ See, e.g., Martin Woollacott, *Ninety Three: The World*, THE GUARDIAN, Jan. 2, 1993, at 83 ("In America, years of neglect of domestic problems and a willful refusal to face up to the real problems of the economy led to the defeat of George Bush.").

²⁹ See *id.*

³⁰ E.g., Howard Chua-Eoan, *Tripped Up by Lies*, TIME, Oct. 11, 1993, at 39.

³¹ See, e.g., Melinda Black et al., *Secrets of the Cult*, NEWSWEEK, Mar. 15, 1993, at 52.

³² Chua-Eoan, *supra* note 30.

using heavy military equipment to break holes in the walls of the compound in order to inject teargas.³³ It was Attorney General Janet Reno's fault for authorizing the plan.³⁴ It was FBI Director William Sessions' fault—he should have known better.³⁵ It was President Clinton's fault.³⁶ After all, he is the President, surely he must have been involved in orchestrating this event. Everything from inexperience to incompetence to ignorance was charged.³⁷ It became so absurd that one commentator questioned why the FBI had not consulted psychiatrists or psychologists familiar with cult behavior in order to determine the likely reaction of the Branch Davidians to the FBI's tactics.³⁸ Curiously, seldom in all the early fault-letting were David Koresh and his group ever blamed for their own demise.

Why this blame phenomenon? A story with a slant or a culprit piques the interest of readers in a way that a straightforward, objective explanation of events does not. Expository news stories sell papers and improve ratings. The news media has the constitutional imprimatur to satisfy the public thirst for knowing who is inept, who is foolish, and who is at fault.³⁹ The press is able to put this constitutional license to maximum use because of a collective national insecurity regarding government and power; an insecurity that began in the 1960s with the assassinations of John F. Kennedy, Robert Kennedy, and Martin Luther King, Jr.; an insecurity that was fueled by the Vietnam War, the counterculture movement, the Watergate scandal, and the Iran hostage crisis. These events occurred during the formative political years of much of today's adult population, leaving a current of distrust of government and suspicion of power that plays into the hands of a media bent on the exposé.⁴⁰

America's lust for the shyster and the fallguy, however, is only a facilitator of the journalism of blame. It has fueled an already existing self-importance on the part of a news media driven to "break a story"; a drive not

³³ E.g., Alan A. Stone, *How the FBI Helped Fuel the Waco Fire*, HARPER'S MAG., Feb. 1994, at 15.

³⁴ E.g., Alexander Cockburn, *Waco Revisited*, 257 NATION 414 (1993).

³⁵ E.g., Steve McGonigle, *Report Faults FBI on Cult*, DALLAS MORNING NEWS, Nov. 16, 1993, at 24A.

³⁶ E.g., Eric Alterman, *Thumbs Down: The Punditocracy Has All But Declared Clinton a Failure*, MOTHER JONES, July-Aug. 1993, at 52.

³⁷ E.g., Chua-Eoan, *supra* note 30.

³⁸ Stone, *supra* note 33, at 15.

³⁹ See *supra* note 24 and accompanying text.

⁴⁰ Ronald Reagan's so called "teflon presidency" escaped much of this blame-laying due to a combination of factors: Reagan's experience as an actor, his communications skills and those of his staff, the politics of tax cutting, and patriotism engendered by the assaults on Grenada and Libya. George Bush also was saved for a time by the wake of the Reagan mystique, the invasion of Panama, and then the Gulf War, but the media jumped on him at the first sign of economic trouble.

just to be first at reporting an item, but also to get to the essence of events, and to outdo each other in the process. Although it is of considerable constitutional significance, objective reporting and presentation of a story is mundane work. When coupled with explanation, analysis, and the fixing of responsibility, however, reporting takes on a certain grandiosity. Consequently, it is easy for the press to see these latter tasks as its constitutional role and its moral and ethical obligation.

This would all be fine if press self-righteousness did not frequently digress into zealotry and outright ruthlessness. The word "break" has more definitions in the dictionary than most other words,⁴¹ and unfortunately the efforts of members of the news media to "break" a story sometimes result in a story being broken, not in the sense of "mak[ing] known,"⁴² but in the sense of "render[ing] useless or inoperative."⁴³ Although this characterization may be a little strong ("damage" is probably a more accurate term), maneuvering by the press to present a story with an angle can become problematic.

As a result of press zealotry and ruthlessness, reputations are tarnished, and public images and credibility are impaired with an already distrustful public. There is no doubt that the media helps to shape public opinion, and to the extent that a news item is overworked by the press, public opinion can be out of kilter with reality. In this sense, the journalism of blame can be costly. The attempt to assess responsibility—both for good deeds and bad ones—is the constitutional right of a free press. Currently, however, good performances tend to be neglected in favor of poor ones.⁴⁴

The news media makes dramatic investments in the identification and isolation of blameworthy parties. A number of public persons have maintained libel actions against members of the news media for just such efforts. General William Westmoreland sued CBS for \$120 million alleging that a documentary, entitled *The Uncounted Enemy: A Vietnam Deception*,⁴⁵ wrongly blamed him for the U.S. failure in Vietnam.⁴⁶ Ariel Sharon, former Defense Minister of Israel, commenced a \$50 million libel suit against *Time* magazine for suggesting that he was responsible for the massacre of Palestinians at refugee camps in West Beirut.⁴⁷ William P. Tavoulaareas,

⁴¹ See THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 233-34 (3d ed. 1992) (providing 74 definitions for the word "break" which take up over half a page).

⁴² *Id.* at 233.

⁴³ *Id.*

⁴⁴ For example, George Bush was given little credit in the 1992 campaign for his accomplishments in foreign affairs; Bill Clinton was given little credit in the first 100 days of his presidency for his handling of the crisis in Russia and Boris Yeltsin's plight.

⁴⁵ CBS television broadcast, Jan. 23, 1982.

⁴⁶ *Westmoreland v. CBS*, 596 F. Supp. 1170, 1171 (S.D.N.Y. 1984).

⁴⁷ *Sharon v. Time, Inc.*, 599 F. Supp. 538, 543 (S.D.N.Y. 1984).

President and CEO of Mobil Oil Corporation, sued the *Washington Post* for alleging that he used his influence and Mobil's assets to set up his son in the shipping business.⁴⁸ More recently, Michael Jordan of the National Basketball Association's Chicago Bulls threatened to sue the press following reports blaming his late night gambling for Chicago's loss to the New York Knicks in the second game of their 1993 playoff series.⁴⁹

Another feature of the current bottom line journalism is the win-lose mentality. If there is no one to blame, then the journalistic appetite for absolute demarcation necessitates a winner and a loser. There is no better example than President Clinton's early efforts in Congress. The President lost in his effort to get Congress to pass a jobs stimulus package,⁵⁰ resulting in a win for Senator Bob Dole and the filibustering Republicans, and squeaked out a narrow victory in Congress with respect to his budget bill.⁵¹ On the day that the North American Free Trade Agreement was narrowly passed, Peter Jennings began the ABC Evening News by saying: "We are going to begin tonight with winners and losers."⁵² President Clinton's efforts were played out as a dramatic contest between Congress and a new president.⁵³ Surprisingly, the news media paid much more attention to this angle than to the content of the job stimulus package or the substance of the President's budget proposal. Moreover, virtually no one mentioned the logic or fairness of the Senate's filibuster rules or the fact that the Republicans in both the Senate and the House of Representatives indignantly voted as a block against the job stimulus bill and the proposed budget. More recently, the President prevailed when Congress narrowly passed the Crime Bill,⁵⁴ and the Administration was dealt a blow when the health care reform initiative died in Congress.⁵⁵

The tragedy with this kind of journalistic display is that it neglects substantive analysis of policies and events and concomitantly facilitates the

⁴⁸ *Tavoulaareas v. Piro*, 759 F.2d 90, 98 (D.C. Cir. 1985), *rev'd*, 817 F.2d 90 (D.C. Cir.) (en banc), *cert. denied*, 484 U.S. 870 (1987). For a thorough discussion of the *Westmoreland*, *Sharon*, and *Tavoulaareas* cases, see RODNEY A. SMOLLA, *SUING THE PRESS* (1986).

⁴⁹ *E.g.*, Frank Luksa, *NBA Not Willing to Gamble When it Comes to Its Superstar*, DALLAS MORNING NEWS, June 6, 1993, at 4B.

⁵⁰ *See* Bill Rumbler, *Economy Sputters, New Report Shows*, CHI.-SUN TIMES, Apr. 24, 1993, at 30.

⁵¹ *See* Roger Mathews, *Gore Gives Clinton Victory in Senate on Budget Bill*, FIN. TIMES, Aug. 7, 1993, at 1.

⁵² *ABC World News Tonight: Clinton Seeking to Make Peace with Unions After NAFTA* (ABC television broadcast, Nov. 18, 1993).

⁵³ *Id.*

⁵⁴ *See, e.g.*, Kathleen Adams, *The Week*, TIME, Sept. 26, 1994, at 9.

⁵⁵ *See, e.g.*, Robin Toner, *Health Care Non-Starter*, THE GUARDIAN, Sept. 29, 1994, at 14.

formation of public opinion based largely on irrelevancies. It should come as no surprise that President Clinton's job approval rating dropped sharply following the Senate's "defeat" of his stimulus package⁵⁶ and improved after his "victory" on the budget and NAFTA.⁵⁷ Polls are an important part of American sociopolitical life, and the journalism of blame and the win-lose mentality is a wonderful catalyst for these devices. The slant placed on the news affects public reaction in the polls and public reaction in the polls accurately reflects voter reaction in an election. Of course, this literally means that the news media has an influence on national politics and policies by the twist it places on news events—by laying blame and by labeling winners and losers.

IV. THE HISTORY OF LIBEL PROTECTION FOR THE PRESS

I doubt that the United States Supreme Court was thinking in these terms when the Justices decided *New York Times* and extended that holding in *Curtis Publishing Co. v. Butts*⁵⁸ and *Associated Press v. Walker*.⁵⁹ As virtually all lawyers, law students, and journalists know, the combined effect of these decisions was to preclude libel liability unless a public official or public figure plaintiff⁶⁰ could establish that the story was false and that it was published with actual malice, defined to mean knowledge of falsity or

⁵⁶ Rupert Cornwell, *Play it in Another Key, Bill*, THE INDEP., Apr. 29, 1993, at 29.

⁵⁷ Carl P. Leubsdorf, *On-the-job Learning Marks Clinton's Year: Experts Say He Finished '93 on Upswing*, DALLAS MORNING NEWS, Jan. 16, 1994, at 1A.

⁵⁸ 388 U.S. 130 (1967).

⁵⁹ 389 U.S. 28 (1967). This view does not color my own earlier writings on the subject. See Ashdown, *Constitutional Policy-Making*, *supra* note 4; Ashdown, *Media Reporting and Privacy*, *supra* note 4; Gerald G. Ashdown, *Editorial Privilege and Freedom of the Press: Herbert v. Lando in Perspective*, 51 U. COLO. L. REV. 303 (1980) [hereinafter Ashdown, *Editorial Privilege*]; Gerald G. Ashdown, *Of Public Figures and Public Interest—the Libel Law Conundrum*, 25 WM. & MARY L. REV. 937 (1984).

⁶⁰ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The Court defined "public figure" in the following manner:

Th[e] [public figure] designation may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

Id. at 351. Although the Court narrowed the definition somewhat in later cases, see *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 167-69 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111, 134-35 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448, 453 (1976), the definition remains quite generous.

reckless disregard for the truth.⁶¹ Practically speaking, the press is immune from libel judgments in coverage of public persons, i.e., politicians or people involved in setting national, regional, or local policies. Further reduced, this means that there is no measure of control on the behavior of the news media.

In one sense *New York Times* and its progeny were designed to accomplish this result. At the time *New York Times* was decided, truth and the privilege of fair comment were the only defenses to a libel action.⁶² Believing these two defenses to be inadequate to protect a free press against self-censorship of true as well as marginal material, the Supreme Court developed the "actual malice" standard to prevent both internal and external restrictions on the media, and to remove the threat to the First Amendment that the facts in *New York Times* revealed.⁶³

The *New York Times* case arose during the height of the civil rights movement in the South. L.B. Sullivan, an elected commissioner of Montgomery, Alabama, sued the *New York Times* (and four black Alabama clergymen) for running a paid political advertisement which portrayed the plight of black leaders and civil rights workers involved in the civil rights struggle in Alabama.⁶⁴ Even though there were only minor inaccuracies in the ad, and the copy never referred to Sullivan and only occasionally referred to the police, an Alabama jury awarded Sullivan \$500,000, the full amount claimed, and the Alabama Supreme Court affirmed.⁶⁵

Against this backdrop, the Supreme Court interpreted the First Amendment's Free Press Clause to require a public official plaintiff to prove knowledge of falsity or reckless disregard for the truth in order to recover.⁶⁶ The need was apparent. Free discussion of public officials and public issues required this protection.

The development and implementation of this constitutional protection over the last thirty years, however, has left the press largely unregulated. Journalism is the only profession essentially not subject to some form of regulation. Elected officials can be censored, impeached, and voted out of office. Doctors, lawyers, and other professionals are vulnerable to malpractice lawsuits and suspension or expulsion from their professions. Law enforcement personnel are subject to claims of civil rights violations and the use of excessive force, and so on. As suggested above, the unrestrained news media has garnered tremendous influence over the formation of public

⁶¹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

⁶² *See id.* at 267 (discussing the defenses of truth and fair comment under Alabama law which applied to the case).

⁶³ *Id.* at 282-83.

⁶⁴ *Id.* at 256-57.

⁶⁵ *Id.*

⁶⁶ *Id.* at 280.

opinion and policy. This influence raises the question of whether rethinking the scope of the constitutional privilege is in order.

A. *The Development of a Negligence Standard for Private Individuals*

Although the Supreme Court has meandered somewhat through the libel field,⁶⁷ since the mid-1970s it has by-and-large withdrawn from an expansive view of the Constitutional privilege. The two most notable defamation cases of the 1970s were decided against the media.⁶⁸ In 1971, the Court applied the actual malice standard to libelous statements about private individuals involved in matters of public interest.⁶⁹ The Court reasoned that the policy behind the actual malice standard applied to the discussion of all issues of public interest irrespective of the characterization of the person involved.⁷⁰ Three years later, with two new justices joining a five-justice majority, the Court reversed itself.⁷¹ Justice Powell's majority opinion in *Gertz v. Robert Welch, Inc.* reasoned that a private individual, unlike a public person, did not have access to the channels of communication to rebut a defamatory falsehood and had not assumed the risk of publicity by voluntarily entering the public limelight.⁷² The Court held that the state's interest in compensating private individuals for harm inflicted by defamatory statements was therefore correspondingly greater.⁷³ Consequently, the states were free to impose a negligence standard in the case of a private plaintiff

⁶⁷ Compare *Herbert v. Lando*, 441 U.S. 153 (1979) and *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (deciding against media defendants) with *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) and *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485 (1984) (deciding in favor of media defendant) and *with Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991) and *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) and *Calder v. Jones*, 465 U.S. 783 (1984) and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) (deciding against media defendants).

⁶⁸ *Herbert*, 441 U.S. at 153; *Gertz*, 418 U.S. at 323.

⁶⁹ *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). Although Justice Brennan's opinion in *Rosenbloom* spoke only for a plurality of three, the reasoning of Justices Black and Douglas that the First Amendment provides the media with absolute immunity from liability for defamation would also support the holding. See *id.* at 57 (Black, J., concurring); see also *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 170-72 (1967) (Black, J., joined by Douglas, J., concurring and dissenting); *New York Times Co. v. Sullivan*, 376 U.S. 254, 293-97 (1964) (Black, J., joined by Douglas, J., concurring).

⁷⁰ *Rosenbloom*, 403 U.S. at 43-44.

⁷¹ *Gertz*, 418 U.S. at 323.

⁷² *Id.* at 344.

⁷³ *Id.* at 343-47.

libel suit.⁷⁴

The Court distinguished public persons from private persons, defining "public figure" in the following manner: a person could either "achieve such pervasive fame or notoriety that he becomes a public figure . . . in all contexts" or he could "voluntarily inject[] himself or [be] drawn into a particular public controversy and thereby become[] a public figure for a limited range of issues."⁷⁵ The latter aspect of this definition was narrowed by later cases which concluded that in order to become a public figure on a limited range of issues, a person had to voluntarily inject himself into a public debate in an effort to influence the resolution of a matter of public concern.⁷⁶ Thus, the definition of public figure became more circumscribed, excluding persons who are simply involved in a matter of public interest. Had the Court not placed this limitation on the definition of public figure, it would in effect have reverted back to the earlier *Rosenbloom* rule.

B. *Refusal to Recognize an Editorial Privilege*

Five years after the Court drew the dichotomy between public and private persons, it refused to provide the press with an editorial privilege in libel litigation.⁷⁷ Barry Lando, a producer for the CBS program "60 Minutes," claimed that a discovery request and order asking him to answer questions concerning his conversations, conclusions, deductions, intent, and state of mind in researching and preparing a program would have an intolerable effect on the editorial process contrary to the First Amendment.⁷⁸ The Court rejected this argument and held that such protection would constitute a substantial interference with the ability of defamation plaintiffs to establish the subjective element of reckless disregard for the truth by direct inquiry into the publisher's thoughts, opinions, and conclusions.⁷⁹ Given the burden faced by a public figure plaintiff in a libel suit, this decision seems sensible. I have always viewed *Lando*, however, as more of a troublemaker for freedom of the press than any other decision since *New York Times*.⁸⁰ Following *New York Times*, the greatest threat to press freedom was not actual damage awards in defamation cases. Rather, it was the financial and journalistic burden imposed by extended discovery into the editorial process, and the demands of actual litigation.⁸¹ When the Supreme Court lent its

⁷⁴ *Id.* at 347-48.

⁷⁵ *Id.* at 351.

⁷⁶ See *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 164-65 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979); *Firestone*, 424 U.S. at 453-55.

⁷⁷ *Herbert v. Lando*, 441 U.S. 153, 175 (1979).

⁷⁸ *Id.* at 169-70.

⁷⁹ *Id.* at 175-77.

⁸⁰ See Ashdown, *Editorial Privilege*, *supra* note 59.

⁸¹ In *Herbert*, defendant Barry Lando's deposition was taken in twenty-six sessions

imprimatur to unrestrained discovery in libel cases, it undid much of what had been accomplished in *New York Times* because the rigor of the "actual malice" standard permits more extensive discovery than in pre-*New York Times* cases.⁸²

C. Pendulum Swings Towards Plaintiffs?

Although in the 1980s the Court vacillated in media libel cases, indicating uncertain direction and fragmented viewpoints,⁸³ the latest two decisions signal a subtle plaintiff's bent. The most recent decision is the somewhat notorious case of the psychoanalyst Jeffrey Masson versus Janet Malcolm and *The New Yorker* magazine.⁸⁴ *Masson* involved the alleged manufacture, or at least substantial embellishment, of statements placed in quotation marks and attributed to the plaintiff.⁸⁵ Masson claimed that Malcolm's articles and book essentially fabricated ill-serving quotations that Masson never made.⁸⁶ It should come as no surprise that the Supreme Court reversed the grant of summary judgment by the lower courts in favor of the defendants, and held that this journalistic behavior could satisfy the *New York Times* actual malice standard if "the alteration result[ed] in a material change in the meaning conveyed by the statement."⁸⁷

At the same time, however, Justice Kennedy's majority opinion appeared to finely balance the interests of defamation plaintiffs and freedom of the press by rejecting the contention that any change beyond the correction of grammar and syntax demonstrates actual malice.⁸⁸ Recognizing the journalistic realities of converting a speaker's statements to print, Justice Kennedy concluded 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 com-

and lasted for over a year. It comprised 2903 pages and 240 exhibits. *Herbert v. Lando*, 568 F.2d 974, 982 (2d Cir. 1977), *rev'd*, 441 U.S. 153 (1979). See SMOLLA, *supra* note 48, at 71 (describing the extensive discovery in *Herbert v. Lando*).

⁸² Justice White's majority opinion in *Herbert* conceded that "it would not be surprising" if the "actual malice" standard led to more discovery than in pre-*New York Times* cases, and "it would follow that the costs and other burdens of this kind of litigation would escalate and become much more troublesome for both plaintiffs and defendants." *Herbert*, 441 U.S. at 176.

⁸³ See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-12 (2d ed. 1988).

⁸⁴ *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991).

⁸⁵ *Id.* at 499.

⁸⁶ *Id.* at 500-02.

⁸⁷ *Id.* at 517.

⁸⁸ *Id.* at 514.

pensable as a defamation.”⁸⁹

Nevertheless, the ephemeral nature of this apparent license was revealed by the Court’s rejection of the court of appeals’ “rational interpretation” test.⁹⁰ The Ninth Circuit had held that an altered quotation was protected so long as it was a “rational interpretation” of an actual statement.⁹¹ Justice Kennedy rather quickly rejected the application of this standard to the use of quotation marks.⁹² His majority opinion concluded that such an interpretive license was available only when the author was relying on ambiguous sources.⁹³ To the contrary, the use of quotations indicates that the writer is not interpreting ambiguities, but is attempting to convey what the speaker actually said.⁹⁴ Justice Kennedy stated:

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 eliminate the real meaning of quotations.⁹⁵

Masson raises a couple of interesting questions, the resolution of which has the potential to profoundly impact the work of journalists. First, what is the essential difference between a permissible alteration of a speaker’s words which “makes no material change in meaning” and an impermissible “rational interpretation” of the speaker’s remarks, i.e., when does a rational interpretation become a material alteration? The dilemma stems from the fact that an alteration of comments—paraphrasing—even when placed in quotes, is evidently all right as long as there is no material change in meaning. Such a practice, however, could be described as a rational interpretation. The difficulty lies in delineating the difference between a rational interpretation that makes no material change and one that does. This dichot-

⁸⁹ *Id.* at 516.

⁹⁰ *Id.* at 518.

⁹¹ *Masson v. New Yorker Magazine, Inc.*, 895 F.2d 1535, 1539 (9th Cir. 1989), *rev’d*, 501 U.S. 496 (1991).

⁹² *Masson*, 501 U.S. at 518.

⁹³ *Id.* at 519.

⁹⁴ *Id.*

⁹⁵ *Id.* at 520. The Court concluded that even the press would be ill served by such a standard because of the reluctance of newsworthy figures to talk with them given the realization that their words could be transformed to some extent as long as the bounds of rational interpretation were satisfied. *Id.*

omy creates confusion for lawyers, judges, and juries, and is bound to deter the journalistic use of quotations.

The result may well be the attribution of statements to speakers without the use of quotation marks. This raises the second serious question left by *Masson*—does the holding apply only when the speaker's remarks are placed in quotes? In other words, are rational interpretations that might amount to material alterations permissible as long as quotation marks are not used? Despite the consistent reference to "quotations" in Justice Kennedy's majority opinion,⁹⁶ one would think not, because that would essentially emasculate the holding. Thus, it is only logical that *Masson* liability would apply to any material misrepresentation of a speaker's remarks, regardless of whether quotation marks are used. It is here that writers and reporters will have to be careful. We are all familiar with the often made claim by a source that he or she was misquoted or that his or her remarks were misrepresented by the press. If the misrepresentation is material, then it would seem also to be in reckless disregard of the truth for it is generally the reporter himself who takes the statement and then is accused of mischaracterizing it.

The other recent libel decision is *Milkovich v. Lorain Journal Co.*⁹⁷ In *Milkovich*, a sports reporter for defendant's newspaper suggested that the plaintiff, a high school wrestling coach, had lied under oath.⁹⁸ These allegations stemmed from an altercation at a wrestling meet which resulted in Milkovich being disciplined and his team being suspended from competition in the state tournament.⁹⁹ Several parents and wrestlers successfully sought a restraining order against the state athletic association.¹⁰⁰ Milkovich allegedly lied at this proceeding.¹⁰¹ After protracted litigation, the Ohio state courts ultimately held that although the plaintiff was not a public official or figure, the reporter's assertions amounted to "constitutionally protected opinion."¹⁰²

In the United States Supreme Court the respondent Lorain Journal relied on the following often-cited passage from *Gertz v. Robert Welch, Inc.*:

Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend

⁹⁶ There is a reference to quotation marks, quotations, quotes, or punctuation on virtually every page of Justice Kennedy's analysis for the majority. See *id.* at 499-504, 507-25.

⁹⁷ 497 U.S. 1 (1990).

⁹⁸ *Id.* at 3.

⁹⁹ *Id.* at 4.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 7-8.

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.¹⁰³

Chief Justice Rehnquist's opinion for the Court concluded that the word "opinion" in the second sentence referred to the word "idea" in the first sentence so that ideas are protected but statements in the form of opinion which contain provably false assertions of fact are not.¹⁰⁴ The majority determined that free expression was adequately secured by the requirement of *Philadelphia Newspapers, Inc. v. Hepps*¹⁰⁵ that "the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages,"¹⁰⁶ and the line of cases providing protection for statements that cannot "reasonably [be] interpreted as stating actual facts" about the individual.¹⁰⁷ No separate constitutional privilege for "opinion" was available. The majority then concluded that the statements in the reporter's column were actionable because a reasonable factfinder could conclude that they implied that the petitioner Milkovich had committed perjury in a judicial proceeding.¹⁰⁸

Following *Milkovich*, it is clear that statements that contain provably false assertions and are not loose hyperbole, although in the form of opinion, subject reporters and the news media to liability for libel.¹⁰⁹ When *Milkovich* is considered along with *Masson*, which placed potential liability on the fabrication or embellishment of statements attributable to a particular source,¹¹⁰ it is apparent that the Supreme Court has moved in the direction of circumscribing the flexibility and maneuverability of the media in putting a certain bent or "spin" on a story. No longer can statements be carelessly and unfairly attributed to a particular person; nor can opinions about an individual's involvement in an event be protected when they contain provably false assertions of fact.

¹⁰³ *Id.* at 18 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974)).

¹⁰⁴ *Id.*

¹⁰⁵ 475 U.S. 767 (1986).

¹⁰⁶ *Id.* at 776.

¹⁰⁷ *Milkovich*, 497 U.S. at 20 (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) and also referring to *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974); *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970)) (alteration in original).

¹⁰⁸ *Id.* at 21.

¹⁰⁹ For example, the mayor is a thief; Carol Burnett is a lesbian; ATF ignored clear warnings that the Branch Davidians knew that ATF was about to raid the Davidian compound; NASA officials ignored sound warnings that the Challenger Space Shuttle would explode; Kurt Waldheim was a Nazi officer. The latter two examples are from Justice Brennan's dissenting opinion in *Milkovich*, 497 U.S. at 34-35 (Brennan, J., joined by Marshall, J., dissenting).

¹¹⁰ See *supra* notes 84-96 and accompanying text.

These two recent libel decisions, however, do not seem to have slowed the media much. Stories are pressed to the breaking point, blame is laid, winners and losers are established, and public opinion is created. *New York Times* and its progeny, irrespective of any current anti-defendant trend, have truly eliminated press self-censorship, or, put another way, have prevented the formation of any governor or self-control on media behavior. Contemporary examples of this trend continue to emerge, including the media's hounding of Michael Jackson,¹¹¹ and its coverage of the amorous adventures and infidelity of Bill Clinton.¹¹² Regardless of the harm done to Clinton and his family, his presidency is likely to survive; Michael Jackson's career, regardless of his guilt or innocence, will not.

Even as this essay is written, the O.J. Simpson media debacle is spinning like an unrelenting whirlwind around a gullible, titillated public. The Simpson trial is, of course, a classic example of the journalism of blame, the determination of fault, and the win-lose mentality, at its best. Who is to blame? O.J. Simpson or the criminal justice system? Who is winning (or losing) at each step of the process? The prosecution or the defense team?¹¹³ In this onslaught, the possibility of someone being libeled is absolutely irrelevant.

V. RE-EXAMINING THE *NEW YORK TIMES* STANDARD

To my mind the current state of affairs raises the question of re-examining the constitutional privilege available to the press in the case of public officials and public figures. Although *New York Times* was wonderfully conceived and born out of the civil rights era of the 1960s, it may have outlived its usefulness or, in the language of the Supreme Court when referring to outdated precedent, it may not have withstood the test of time.¹¹⁴ The requirement that a public figure plaintiff in a defamation action prove actual malice, defined as knowledge of falsity or reckless disregard for the truth on the part of the defendant, is virtually an insurmountable barrier to liability. Even though some public figure plaintiffs have forced media defendants to incur substantial litigation costs¹¹⁵ and a few plaintiffs have actually recov-

¹¹¹ E.g., Jeff Wilson, *Jackson Proclaims Innocence, Tells of Body Search 'Ordeal'*, DET. FREE PRESS, Dec. 23, 1993, at 4A; *Boy Files Suit Accusing Michael Jackson of Sexual Abuse*, WASH. POST, Sept. 15, 1993, at B1.

¹¹² E.g., Gary Blonston & Aaron Epstein, *To Many Americans Honesty is Only Real Issue*, DET. FREE PRESS, Dec. 22, 1993, at 10A; Howard Kurtz, *News Organizations Differ on Relevance of Clinton Allegations*, WASH. POST, Dec. 22, 1993, at A16.

¹¹³ *Hard Knock; Simpson's Defense Team Takes a Hammering*, TIME, Sept. 5, 1994, at 45.

¹¹⁴ E.g., *United States v. Leon*, 468 U.S. 897, 906 (1984).

¹¹⁵ See SMOLLA, *supra* note 48, at 73-79. For example, although CBS has not disclosed its legal costs in the *Westmoreland* case, reports place them between \$5 and \$10

ered damages,¹¹⁶ the media by and large remains uninfluenced by the threat of libel judgments. Blame laying and vilification continues undeterred.

One possible means of dealing with uncontrolled press power would be to reconsider the balance between freedom of the press and the protection of personal reputation. The media at the end of the twentieth century is much more powerful than it was thirty years ago when *New York Times* was decided. Although the press has historically stressed the scoop, scandal, corruption, and wrongdoing, it is only in the last ten years that such exposés have been spread around the country and world at the speed of light through satellite and computer communication. The term mass communication is now truly self-describing. The modern media has tremendous ability to influence public opinion. Where stories are embroidered, embellished, or erroneous, there is little chance that some altruistic media member will be forthcoming to facilitate the market's self-correction.

On the other hand, despite Chief Justice Rehnquist's ode to personal reputation in *Milkovich*,¹¹⁷ personal reputation is probably no more valuable now than it ever has been. Nevertheless, we have witnessed the damage and recognized the potential devastation that the modern media can create in this realm. The urge to harm a person's reputation and credibility, and the relative ease with which the press is able to do so are contemporaneously quite potent. Advancement in mass communication is directly proportional to the ability to destroy individual reputations. When this is coupled with the other elements of press power—precipitously undermining confidence in public officials, creating public opinion, and fostering a win-lose mentality—placing additional weight on the individual side of the free press/personal reputation balance seems worth investigating.

One possible consideration would be to adopt the *Gertz* approach in the case of all plaintiffs, public as well as private.¹¹⁸ This, of course, would have the effect of tempering a public plaintiff's burden to proof of falsity and fault (presumably negligence) instead of the more demanding *New York Times* standard—knowledge of falsity or reckless disregard for the truth.¹¹⁹ In *Gertz*, the Court accorded preferential treatment to the reputations of private individuals on two grounds: (1) private persons were more vulnerable to injury than public figures because they did not have access to the channels of communication to counteract false statements; and (2) private persons were more deserving of protection because they had not assumed the

million. *Id.* at 75.

¹¹⁶ See *supra* note 18.

¹¹⁷ *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 12 (1990) (quoting WILLIAM SHAKESPEARE, *OTHELLO* act 3, sc. 3).

¹¹⁸ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

¹¹⁹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

risk of publicity.¹²⁰

The Court's distinction in *Gertz* between public and private individuals was never very convincing. The argument that public figures usually enjoy significantly greater access to the channels of communication, and hence have a better opportunity to rebut false statements, is little more than an empty generalization. As Justice Brennan pointed out in his dissent in *Gertz*, access to the media is available only to very prominent people who command media attention,¹²¹ e.g., Bill Clinton, Michael Jackson, and now the lawyers in the O.J. Simpson case. For all other people, whether public or private, access depends on continued media interest and the unlikely willingness to contradict the original story. More importantly, even where a rebuttal is published, it is generally discounted as self-serving.¹²²

The Court in *Gertz* relied more heavily on the rationale that private citizens, unlike public figures, do not assume the risk of public scrutiny and therefore deserve more protection from defamation.¹²³ Although the validity of this argument depends largely on the definition of public figure,¹²⁴ it does not address the policy question of why an individual who more or less willingly enters public life or public debate must expose his personal life to the threat of being laid to waste by the news media. Being subject to false accusations or stories of marginal accuracy resulting from incursions into personal privacy must be a profound deterrent to entering the public arena. It is questionable whether legal rules should encourage, or at least fail to discourage, this phenomenon. Additionally, this assumption of risk theory simply does not apply to most individuals classified as public figures. For the most part, these people do not choose to be talented, and in any event, the actor, musician, or professional athlete no more invites public attention to his private life than does a private individual unexpectedly involved in a public event. Finally, assumption of the risk has generally been discarded in tort law in favor of contributory or comparative negligence.¹²⁵ These latter concepts depend on a finding of unreasonable behavior in order to limit a defendant's obligation (duty) to a plaintiff. Since voluntarily entering the public realm—and thereby exposing oneself to media attention—cannot be viewed as unreasonable, it seems unfair for libel law to make it more difficult for this class of plaintiffs to recover based on the notion of assumption of the risk.

¹²⁰ *Gertz*, 418 U.S. at 344.

¹²¹ *Id.* at 363 (Brennan, J., dissenting).

¹²² The *Gertz* majority itself recognized the weakness of the self-help rationale. *See id.* at 344 n.9.

¹²³ *Id.* at 344-46.

¹²⁴ Both the public personality and a person who voluntarily injects himself into a public controversy fall within the current definition. *See Time, Inc. v. Firestone*, 424 U.S. 448, 453-54 (1976); *Gertz*, 418 U.S. at 345.

¹²⁵ KEETON ET AL., *supra* note 25, § 68, at 495-96.

Applying the *Gertz* standard to all libel plaintiffs would not expose the press to wholesale liability. First, *Philadelphia Newspapers* requires that a plaintiff prove that the material published about him is false.¹²⁶ Second, the Court in *Gertz* held that the plaintiff, in that case a private individual, could not recover without some proof of fault, i.e., negligence, and then only actual damages were available.¹²⁷ Presumed or punitive damages were recoverable only on satisfaction of the *New York Times* actual malice standard.¹²⁸ Thus, with the extension of *Gertz* to public officials and figures, plaintiffs would still have to prove falsity and fault (negligence) and their awards would be limited to actual damages if they could not satisfy the current actual malice standard. In other words, there would be no extension of potential liability for large debilitating punitive awards.

The real question is whether this new balance would both temper press power, ameliorating its abuses, and avoid dangerous self-censorship. To the extent that the *New York Times* actual malice standard essentially immunizes media defendants from liability, a negligence standard should make them more circumspect, especially with respect to scandalous stories or exposés with only marginal substantiation. The threat of increased litigation costs alone should encourage greater care before certain material is published.

On the contrary, there is no reason to suspect self-censorship of hard news that can be substantially documented, regardless of whether the reputations of public persons are tarnished. The media would have nothing to fear from a negligence standard; summary judgment would continue to be available to protect against litigation costs. Similarly, the exposure of political blunder and corruption is not likely to be restrained where reporters have solid reasons to believe a story is true; in such a case, there is simply no negligence. For example, coverage of Bill Clinton's alleged infidelity and Michael Jackson's alleged pedophilia would clearly still be protected. Consequently, the public would continue to get what it needs from the First Amendment—information to facilitate participatory democracy, self-fulfillment, and personal development. England has no special privilege for the media in libel litigation¹²⁹ and it continues to have a vibrant and robust

¹²⁶ See *supra* notes 105-06 and accompanying text.

¹²⁷ *Gertz*, 418 U.S. at 347-48.

¹²⁸ *Id.* at 348-49.

¹²⁹ See Sarah O. Kambour, Note, *A Local Authority Is Not Entitled to Maintain an Action for Damages in Libel Against a Publication Where the Publication Addressed the Propriety of Actions Taken by the Authority in the Course of Its Governmental and Administrative Function—Derbyshire County Council v. Times Newspapers, Ltd.*, 1993 App. Cas. 534., 24 SETON HALL L. REV. 1549, 1550-51 (1994). In *Derbyshire*, however, the English House of Lords did conclude for the first time that a local governmental entity could not maintain a libel action for damages. *Id.* at 1556, 1577. Although a step in the direction of the American First Amendment privilege, the holding appears limited. *Id.* at 1577; see also Anthony Lewis, *Lawyers, Libel and Liberty*, THE TIMES (Lon-

press.

In the seventies and early eighties, I wrote a series of articles defending the news media.¹³⁰ The development of media power in the last decade, however, has left me troubled. Journalism is the only profession or activity not subject to liability for negligence or otherwise subject to some form of legal control. Maybe it is time for it to be brought in line.

don), Feb. 24, 1993, at A16.

The High Court of Australia, the equivalent of the United States Supreme Court, recently placed constitutional limits for the first time on libel suits by political figures, but in doing so adopted a negligence oriented standard of liability. See Anthony Lewis, *Abroad at Home: A Widening Freedom*, N.Y. TIMES, Oct. 21, 1994, at A31.

¹³⁰ See *supra* notes 4, 59.