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COMMENTS

DEFAMATION AND MEDIA DEFENDANTS IN TEXAS

by Bill Van Wagner

Since the drafting of the 1836 Constitution, Texas has recognized the guarantee to the press of the right to publish freely its ideas in order to promote the "search for truth [and to maintain this state's] democratic institutions."¹ The founders of the Republic and the authors of Texas constitutions have, however, consistently placed limits on this constitutional privilege by subjecting the press to liability when the privilege was abused. The most recognized abuse, the libel² of Texas citizens, has been the subject of considerable litigation since the early years of statehood.³ Because of the nature of the competing rights, severe tensions continue to exist between the Texas constitutional right of freedom of the press and the individual's right to protect his name from being libeled.

In 1964 the United States Supreme Court's decision in *New York Times Co. v. Sullivan*⁴ granted the press broad constitutional protection when publishing defamatory statements concerning public officials. Later Supreme Court decisions expanded this constitutional protection to include publications concerning public figures⁵ and publications addressing matters of public concern.⁶ *New York Times* and its progeny effectively altered over 100 years of Texas law that had clearly favored the individual's right to protect his reputation over the press's right freely to disseminate news.⁷ In a 1974 decision, *Gertz v. Robert Welch, Inc.*,⁸ the Supreme Court began a gradual retraction of the broad constitutional privilege

1. TEX. CONST. art. I, § 8, Comment (Vernon 1955). The 1836 Constitution of the Republic of Texas provided that every citizen "shall be at liberty to speak, write, or publish his opinions on any subject, being responsible for the abuse of that privilege." REPUBLIC OF TEX. CONST., DECLARATION OF RIGHTS (1836). The authors of the current constitution of Texas adopted identical language. See TEX. CONST. art. I, § 8.

2. Libel is defined in TEX. REV. CIV. STAT. ANN. art. 5430 (Vernon 1958), which provides:

A libel is a defamation expressed in printing or writing, or by signs and pictures, or drawings tending to blacken the memory of the dead, or tending to injure the reputation of one who is alive, and thereby expose him to public hatred, contempt or ridicule, or financial injury, or to impeach the honesty, integrity, or virtue, or reputation of any one, or to publish the natural defects of any one and thereby expose such person to public hatred, ridicule, or financial injury.

3. See, e.g., *Holt v. Parsons*, 23 Tex. 9 (1859); *Yarborough v. Tate*, 14 Tex. 483 (1855).

4. 376 U.S. 254 (1964).

5. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

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

7. See notes 16-76 *infra* and accompanying text.

8. 418 U.S. 323 (1974).

granted to the press. In *Gertz* the Court rejected a previous decision that had granted the press constitutional protection when publishing matters of public concern.⁹ More importantly, however, the Court returned a large area of defamation law to the states by holding that, so long as they did not impose strict liability, the states could define the appropriate standard of liability for publishers libeling private individuals.¹⁰

The Texas Supreme Court responded to this series of United States Supreme Court decisions in *Foster v. Laredo Newspapers, Inc.*,¹¹ which establishes the current limits in Texas of the media's federal constitutional protection when publishing defamatory statements. This Comment examines the Texas Supreme Court's historical approach to media defendants and discusses the development of the constitutional privilege accorded the press by the United States Supreme Court to provide both background and rationale for the results in *Foster*. After reviewing two recent Supreme Court decisions, *Wolston v. Reader's Digest Association*¹² and *Hutchinson v. Proxmire*,¹³ this Comment concludes that *Foster* is compatible with the present scope of the media's constitutional protection as defined by the United States Supreme Court.

I. THE DEVELOPMENT OF CIVIL LIBEL IN TEXAS

Every man has a clear and indisputable legal right to be secure not only in the enjoyment of his life, liberty, and property, but also in his reputation and good name; and for every invasion of this right he has a legal claim to redress by a civil action.¹⁴

With the recognition of the civil tort of defamation in Texas, the stage was set for the battle between the state constitutional right to freedom of the press and the individual's common law right to protect his reputation.

Historically, the press has had an absolute privilege to report on judicial

9. *Id.* at 346.

10. *Id.* at 348.

11. 541 S.W.2d 809 (Tex. 1976), cert. denied, 429 U.S. 1123 (1977).

12. 443 U.S. 157 (1979).

13. 443 U.S. 111 (1979).

14. *Yarborough v. Tate*, 14 Tex. 483, 486 (1855). In the presence of others, the defendant in *Yarborough* called plaintiff a "damned old cow-thief." *Id.* at 483. The evidence showed that the defendant had been drinking and appeared to be angry when he made the accusation. The trial court charged the jury that the defendant should be found guilty only if the evidence showed that he had intentionally imputed to plaintiff the crime of stealing cows. The jury found no such intention and returned a verdict in favor of the defendant. On appeal, the supreme court reversed, stating that "[i]t was proved indisputably that [the accusations] were uttered by the defendant of the plaintiff publicly, and not only in earnest, but in anger, constituting, unexplained, *prima facie*, a willful and malicious slander." *Id.* at 486. The defendant failed to rebut plaintiff's *prima facie* case and, accordingly, a new trial was ordered. Although *Yarborough* was a slander action, the Texas Supreme Court soon recognized the civil action for libel in *Holt v. Parsons*, 23 Tex. 9 (1859). In *Holt* the defendants, who were members of the board of trustees of a church, passed a resolution declaring that plaintiff improperly removed funds from the church coffers. The jury found that defendants acted with malicious intent and held them liable for their libelous statements. The supreme court affirmed, holding that the communication was neither privileged nor published without malice. *Id.* at 21-22.

and legislative proceedings.¹⁵ Despite the absolute nature of the privilege, the Texas Supreme Court, in its first review of the protection accorded to publications of statements made during a legislative committee meeting, held that the publications were not privileged. In *A.H. Belo & Co. v. Wren*¹⁶ the media defendant published a committee member's statements that accused an individual of being involved in illegal land transactions. The defendant claimed that the publication was a true reprint of legislative proceedings and therefore was privileged under the common law.¹⁷ The court held, however, that the publication was not privileged because the committee meeting was an ex parte proceeding convened after the adjournment of the legislative sessions.¹⁸ Even though the court recognized the need for quick dissemination of useful facts, it concluded that defamatory statements could not be protected by broadly construing the absolute privilege allowing publication of legislative proceedings. That privilege, the court reasoned, was adopted solely for the benefit of the public and thus should not be construed to benefit the press.¹⁹ Representative of the court's attitude toward the press is its statement that the press "cannot defeat the ends of justice, and the objects of the criminal law, for the purpose merely of satisfying the public craving for news and information."²⁰ The Texas Supreme Court maintained a similar position through 1950,²¹ and the attitude expressed in *Wren* may be present in the court today.²²

*Express Printing Co. v. Copeland*²³ appeared to be irreconcilable with *Wren* because it evidenced a judicial retreat from the imposition of restraint on publications of the press.²⁴ *Copeland* involved an attack by a

15. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS*, § 114, at 777-82 (4th ed. 1971).

16. 63 Tex. 686 (1884).

17. Common law recognized an absolute immunity for defamatory statements made in the course of legislative debates, voting, reports, and work in committee. See, e.g., W. PROSSER, *supra* note 15, § 116, at 800-01; Veeder, *Absolute Immunity in Defamation*, 10 COLUM. L. REV. 131, 134-35 (1910). The same immunity is accorded to Congressmen through the speech or debate clause. U.S. CONST. art. I, § 6, cl. 3. See, e.g., *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880) (the speech or debate clause exempts members of Congress from liability elsewhere for any vote, report, or action in their respective houses, as well as for oral debate); *Coffin v. Coffin*, 4 Mass. 1 (1808) (slandering language used in a conversation between certain members of the House, even though not delivered in an address or speech on the floor of the House, is accorded absolute immunity when the language relates to proceedings in the House). *But cf. Hutchinson v. Proxmire*, 443 U.S. 111 (1979) (the speech or debate clause does not provide immunity for Congressman's libelous statements transmitted by his newsletters).

18. 63 Tex. at 722.

19. *Id.* at 725-26.

20. *Id.* at 725.

21. See *Fitzjarrald v. Panhandle Pub. Co.*, 149 Tex. 87, 228 S.W.2d 499 (1950), *discussed at* notes 63-76 *infra* and accompanying text.

22. See *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809 (Tex. 1976), *cert. denied*, 429 U.S. 1123 (1976), *discussed at* notes 123-57 *infra* and accompanying text.

23. 64 Tex. 354 (1885).

24. One legal scholar was unable to reconcile *Wren* and *Copeland* because the *Wren* court had refused to balance the competing interests involved while the *Copeland* court arrived at its holding by just such a balance. See Hallen, *Fair Comment*, 8 TEXAS L. REV. 41, 91 (1929). The cases are reconcilable, however, because each represents the judiciary's attempt to define limitations on the media's right to freedom of the press in two distinct areas. *Wren* defined the limitations on the media's privilege to report on legislative proceedings

newspaper on a mayoral candidate who allegedly mishandled the funds of an estate for which he was the executor. The supreme court held that publications concerning the qualifications of a candidate for public office were not actionable as long as they were true, or upon probable cause, believed to be true.²⁵ With reasoning similar to that of *Wren*, the court in *Copeland* construed the right of the press to disseminate news on the basis of the benefit to be derived by the public. Contrary to *Wren*, however, the court concluded that any restrictions on the rights of the press beyond those that it had announced would unnecessarily interfere with the public's right to select officers for offices created by the public.²⁶

In 1901 the Texas legislature recognized the continuing conflict between the rights of the press and the rights of the individual and sought to remedy the situation by passing the first civil libel statute.²⁷ The statute specifically defined libel,²⁸ provided that truth was a defense,²⁹ and noted that other matters might be considered in mitigation of exemplary damages.³⁰ Of particular importance to the press, the statute codified the privileges of publishing: (1) a fair, true, and impartial account of judicial proceedings, (2) a fair, true, and impartial account of legislative proceedings including legislative debates and committee meetings, (3) a fair, true, and impartial account of public meetings held for public purposes, and (4) a reasonable and fair comment of matters of public concern and official acts of public

while *Copeland* defined limitations on the media's privilege to report on political candidates. The *Copeland* court apparently concluded that publications concerning the qualifications of candidates were not published for the purpose of "satisfying the public craving for news" (see text accompanying note 20 *supra*), but rather were published for the purpose of informing the citizens of the qualifications of candidates seeking to represent them. 64 Tex. at 358.

25. 64 Tex. at 358.

26. *Id.* Although never expressly overruled, *Copeland* was effectively rejected in later decisions. See, e.g., *Fitzjarrald v. Panhandle Pub. Co.*, 149 Tex. 87, 228 S.W.2d 499 (1950); *A.H. Belo & Co. v. Looney*, 112 Tex. 160, 245 S.W. 777 (1922).

27. 1901 Tex. Gen. Laws, ch. 26, at 30-31.

28. *Id.* § 1, at 30. The 1901 statutory definition for libel has survived the years and is now embodied in TEX. REV. CIV. STAT. ANN. art. 5430 (Vernon 1958). See note 2 *supra*. In *Guisti v. Galveston Tribune*, 105 Tex. 497, 504-06, 150 S.W. 874, 876-77 (1912), the court construed the libel definition as altering the common law in two ways. First, the court concluded that a defamatory publication need not impute a penal offense to be libel per se. Secondly, the statutory definition permitted an action for a libelous publication whether or not the publication was libel per se. Significantly, however, the statute did not alter the common law rule that a publication, if true, had to be a cause for an official's removal from office before it would be considered libel per se. See, e.g., *Cotulla v. Kerr*, 74 Tex. 89, 11 S.W. 1058 (1889). In Texas libel per se is defined as words that are "so obviously hurtful to the person aggrieved by them that they require no proof of their injurious character to make them actionable." *Rawlins v. McKee*, 327 S.W.2d 633, 635 (Tex. Civ. App.—Texarkana 1959, writ ref'd n.r.e.).

29. 1901 Tex. Gen. Laws, ch. 26, § 2, at 30. This provision reaffirmed Texas common law. See, e.g., *Patten v. A.H. Belo & Co.*, 79 Tex. 41, 46, 14 S.W. 1037, 1039 (1890).

30. The statute provided:

In any action for libel the defendant may give in evidence, if specifically pleaded, in mitigation of exemplary or punitive damages, the circumstances and intentions under which the libelous publication was made, and any public apology, correction or retraction made and published by him of the libel complained of. The truth of the statement or statements in such publication shall be a defense to such action.

1901 Tex. Gen. Laws, ch. 26, § 2, at 30.

officials.³¹

The privileges concerning fair, true, and impartial accounts of judicial proceedings and public meetings and the privilege involving fair comment merely affirmed common law.³² The privilege applying to legislative proceedings, however, raised a question about the validity of *Wren*. In 1919 the legislature eliminated many doubts as to the intent of the privilege by amending the statute to eliminate the requirement that the legislative meeting be a matter of record.³³ The scope of the privilege and the 1919 amendment clearly could bring *ex parte* legislative proceedings, like those in *Wren*, conducted after adjournment of the legislature, within the protection of the statutory privilege. The codification of the privilege was therefore a significant success for the press. Nevertheless, the codification of civil libel laws also placed several burdens on the press. For example, the press could be held liable for truthful but defamatory statements if the plaintiff were able to prove that the statements were published with actual

31. *Id.* § 3, at 30. The text of the privileges provided:

The publication of the following matters by any newspaper or periodical, as defined in Section 1, shall be deemed privileged, and shall not be made the basis of any action for libel without proof of actual malice.

1. A fair, true and impartial account of the proceedings in a court of justice, unless the court prohibits the publication of the same, when in the judgment of the court the ends of justice demand that the same should not be published, and the court so orders; or any other official proceedings authorized by law in the administration of the law.

2. A fair, true and impartial account of all executive and legislative proceedings that are made a matter of record, including reports of legislative committees, and of any debate in the Legislature and in its committees.

3. A fair, true and impartial account of public meetings, organized and conducted for public purposes only.

4. A reasonable and fair comment or criticism of the official acts of public officials and of other matters of public concern published for general information.

Id.

32. See W. PROSSER, *supra* note 15, §§ 14-15.

33. 1919 Tex. Gen. Laws, ch. 25, § 1, at 34. The legislature amended the statute so that the privilege included:

2. A fair, true and impartial account of all executive and legislative proceedings, including all reports of and proceedings in or before legislative committees, and of any debate or statement in or before the Legislature or in or before any of its committees, and including also, all reports of and proceedings in or before the managing boards of educational and eleemosynary institutions supported from the public revenue, of city councils or other governing bodies of cities or towns, of the commissioners' court of any county, and of the board of trustees of the public schools of any district or city, and of any debate or statement in or before any such body.

Id.

The legislature left little doubt as to its intentions in amending the statute:

The fact that there is doubt with respect to the right of newspapers and other periodicals to publish a fair, true and impartial account of reports of proceedings in and before legislative committees, or of any debate or statement in or before the Legislature, or in or before any of its committees, and the fact that proceedings are now pending before legislative committees with respect to which it is of importance that the public be fully advised, creates an emergency

Id. § 2, at 34-35.

malice.³⁴

The codification of the fair comment privilege was perhaps the most important aspect of the 1901 legislation for the press because the privilege required only that the publication be a fair and reasonable comment rather than a true and impartial account of the information contained in the publication. Additionally, because judges and legislative members could be considered public officials and many public meetings could be classified as matters of public concern, numerous publications that might be in violation of the other three privileges had the potential of being protected under the fair comment privilege. In *Galveston Tribune v. Johnson*,³⁵ however, the court strictly interpreted the fair comment privilege. *Johnson* involved a publication of defamatory statements allegedly made by a state representative in front of the legislative body. Holding for the plaintiff, the court concluded that the fair comment privilege protected only comment, which is the opinion of the writer, as distinguished from fact.³⁶ The *Johnson* decision, in effect, mandated the press to determine prior to publication whether its statement was comment rather than fact.³⁷ The court's holding placed the press in a precarious position because the courts themselves found it difficult to determine the nature of a particular statement.³⁸

The *Johnson* court's construction of the fair comment privilege was adopted by the Texas Supreme Court in *A. H. Belo & Co. v. Looney*.³⁹ In *Looney* the defendant presented a fair comment defense to a libel action brought by the Texas attorney general in his private capacity. The attorney general alleged that editorials in the *Galveston Daily News* and *Dallas Morning News* contained defamatory statements concerning his motives in prosecuting two oil companies and a railroad under Texas antitrust laws. The publisher attempted to establish that the publication was in the form

34. 1901 Tex. Gen. Laws, ch. 26, § 3, at 30. Although the term "actual malice" was not consistently defined at common law, Texas courts generally defined it as intending to cause ill will to the injured party. See Hallen, *The Texas Libel Laws*, 5 TEXAS L. REV. 335, 355 (1927). When a libelous publication was actionable per se, a rebuttable presumption arose that the libel was published with ill will. See, e.g., *Holt v. Parsons*, 23 Tex. 9, 21 (1859); *Forke v. Homann*, 39 S.W. 210, 213 (Tex. Civ. App. 1896, writ ref'd). In 1927, however, the legislature eliminated this qualification by removing from the statute the phrase "without actual malice." Whether this purposeful omission has any significance is left in doubt by the Texas Supreme Court's conclusion in *Fitzjarrald v. Panhandle Pub. Co.*, 149 Tex. 87, 228 S.W.2d 499 (1950), that the fair comment privilege could be overcome by a finding of actual malice. *Id.* at 98, 228 S.W.2d at 505. See notes 74-76 *infra* and accompanying text.

35. 141 S.W. 302 (Tex. Civ. App. 1911, writ ref'd). In *Johnson* the defendant published an article stating that the plaintiff, a state legislator, resorted to misrepresentations, slander, and profanity during a legislative hearing. The legislator filed a libel action, claiming that the publication was false. The plaintiff argued that the publication was privileged because it was a fair and reasonable comment on a public official. The court of civil appeals rejected plaintiff's claim, holding that the publication was fact as distinguished from comment. *Id.* at 304. Accordingly, the court concluded that the fair comment privilege was not applicable. *Id.*

36. *Id.* at 304; see text accompanying and following notes 45-49 *infra*.

37. In a dictum the *Johnson* court implied that it would have been sufficient for the press to have shown that its publication was substantially true. 141 S.W. at 306. Significantly, this requirement would be less rigorous than the plain meaning of the statute.

38. See Hallen, *supra* note 24, at 53-74.

39. 112 Tex. 160, 246 S.W. 777 (1922).

of fair comment and could not be libelous unless it was unfair or unreasonable. The court of civil appeals agreed with the publisher's position,⁴⁰ but the supreme court rejected the publisher's construction of the statute.⁴¹ To determine what was a fair and reasonable comment of a public official, the supreme court looked to the common law rule that a publication was libel per se if it imputed corrupt motives to a public official.⁴² The court, in reasoning that a libelous comment could not be fair and reasonable, concluded that publication of such a comment was not privileged and could only be defended by proof that the comment was true.⁴³ The court's mechanical analysis failed to recognize that, theoretically, the fairness or reasonableness of comment, a statement of opinion, does not depend on its truth.⁴⁴ As a result, the press was effectively placed in a position of strict liability when commenting on the moral deficiencies of a public official.

One publication complained of in *Looney* was a reprint of proceedings that took place in a chamber of commerce meeting. For purposes of construing the statutory privilege concerning public meetings, the court assumed that the meeting was public but held that the publication was not entitled to the protection of the statutory privilege.⁴⁵ The court reasoned that the statements made by the persons attending the meeting imputed bad motives to the plaintiff, and therefore were not entitled to a defense of fair comment.⁴⁶ The court further reasoned that because the actual statements made at the meeting were not fair comment, the publisher could not be released from liability merely because it was acting as a purveyor of the news.⁴⁷

The *Looney* court's construction of the public meeting privilege was improper because the court confused that privilege with the fair comment privilege. The public meeting privilege did not require the press to establish the reasonableness of the information published about the meeting, but required the publication to be a true, fair, and impartial account of the meeting.⁴⁸ The court concluded that to consider the press free from liability when acting as a purveyor of the news would be inconsistent with holding it liable when editorializing.⁴⁹ Under the facts in *Looney*, both logic and consistency demand that these two functions of the press be distinguished. When a publisher editorializes, he analyzes a particular issue and then reports his opinion concerning the issue. When a publisher acts as a purveyor of the news, he attempts to gather factual information and report

40. *A.H. Belo & Co. v. Looney*, 246 S.W. 762 (Tex. Civ. App.—Texarkana 1916), *rev'd*, 112 Tex. 160, 246 S.W. 777 (1922).

41. 112 Tex. at 175-76, 246 S.W. at 783.

42. *Id.* at 178, 246 S.W. at 784.

43. *Id.* at 178-79, 246 S.W. at 784.

44. *See Galveston Tribune v. Johnson*, 141 S.W. 302, 304 (Tex. Civ. App. 1911, writ *ref'd*). *See also* text accompanying note 36 *supra*.

45. 112 Tex. at 179, 246 S.W. at 784.

46. *Id.* at 178-79, 246 S.W. at 784.

47. *Id.*

48. 1901 Tex. Gen. Laws, ch. 26, § 3, at 30; *see* note 31 *supra* and accompanying text.

49. 112 Tex. at 179, 246 S.W. at 784.

the facts as he discovers them. Editorializing and purveying are two distinct functions of the press and the legislature reasonably provided two different standards for each to determine whether a defamatory publication is privileged.

Looney made several propositions clear. First, the decision reaffirmed *Johnson*, which held that the fair comment privilege was not applicable to publications dealing with facts.⁵⁰ Moreover, if the publication were comment or criticism, the fair comment privilege could be claimed by the press only when it could prove the comment to be fair and reasonable.⁵¹ Finally, similar to the *Wren* court's strict construction of the common law privilege relating to legislative proceedings, the *Looney* court strictly construed the statutory privileges relating to fair comment and public meetings. Arguably, the court essentially ignored the statutory privileges, stating that with respect to libelous publications, "publishers of newspapers were placed on the same plane as other members of the community."⁵²

The court in *Looney* concluded that any radical departure from the common law of libel would have to be accomplished by the legislature using statutory language that unmistakably departed from the common law and suggested no other reasonable interpretation.⁵³ In 1927 the legislature responded by enacting significant amendments to the civil libel statutes.⁵⁴ The major revisions concerned article 5432, which was amended to eliminate the words "without actual malice," to expand the public meeting privilege to include all statements made at a public meeting, and to add a provision providing that subsequent publications of statements that were privileged under the statute were not actionable as long as they addressed matters of public concern and were not published with actual malice.⁵⁵ The expansion of the public meeting privilege appeared to be a direct attack on that portion of the *Looney* opinion construing that privilege. The addition that sanctioned certain republications was important to the press because plaintiffs now carried the burden of proving not only that a republication was no longer of public concern but also that the newspaper acted with actual malice in reprinting the article.

Even after the enactment of the 1927 amendments, Texas courts continued to construe narrowly the fair comment privilege. In *Bell Pub. Co. v.*

50. *Id.* at 176, 246 S.W. at 782.

51. *Id.*, 246 S.W. at 783.

52. *Id.*

53. *Id.* at 177, 246 S.W. at 783.

54. 1927 Tex. Gen. Laws, ch. 80, at 121-22.

55. *Id.* § 2, at 121-22. To give added emphasis to the intent of, and necessity for, the amendments, the legislature stated:

The fact that there is now no law in this State adequately providing defenses for libel or adequately defining privileged matters, and that in consequence of this condition, the people are denied adequate and proper information concerning their government, candidates for public office and other matters affecting their welfare creates an emergency

Id. § 3, at 122.

*Garrett Engineering Co.*⁵⁶ the city of Temple was embroiled in a hotly contested public issue concerning the construction of a municipal power plant. The city had contracted with Garrett to act as a consultant and supervising engineer in the construction of the new plant. The defendant's newspaper, relying on statements made by a local citizen, had published certain defamatory statements concerning Garrett.⁵⁷ Garrett sued and upon a jury finding that the publication was false the court held the publisher liable for damages.⁵⁸ On appeal the defendant contended that the publication represented a fair comment on a matter of public concern. Because prior case law had not dealt with the fair comment defense as applied to publications concerning private parties, the commission of appeals relied on cases interpreting the defense only as applied to public officials.⁵⁹ Based on these decisions, the court concluded that when the fair comment defense was raised in an action between private parties, the availability of the privilege depended on whether the publication consisted of comment or fact.⁶⁰ Finding that the defendant's publication was based on fact that was misstated, the appellate court affirmed.⁶¹ Although the court strictly construed the fair comment privilege, its interpretation of the privilege was less restrictive than that displayed in *Looney*.⁶²

Seven years after *Garrett Engineering*, the Texas Supreme Court decided *Fitzjarrald v. Panhandle Pub. Co.*⁶³ In *Fitzjarrald* the plaintiff was a county attorney who, at the time of the publication, was running for reelection. After the defendant's newspaper had published a reprint of a circular distributed by a candidate running for county sheriff, the plaintiff sued, claiming that the publication was defamatory. The trial court found the publication to be libel per se,⁶⁴ but the court of appeals reversed, holding that the entire publication was privileged as fair comment.⁶⁵ On appeal, the Texas Supreme Court reversed and remanded, holding that some statements were libelous per se but others were not.⁶⁶ Although recogniz-

56. 170 S.W.2d 197 (Tex. Comm'n App. 1943, judgment adopted).

57. The newspaper had published an article stating that Garrett had no persons on its staff who were either practical or degreed engineers. The article further claimed that Garrett had never performed work similar to that which it had contracted to undertake for the city. *Id.* at 201.

58. *Id.* at 202.

59. *Id.* at 204.

60. *Id.*

61. *Id.* at 204-05.

62. *Id.* at 205. *Garrett Engineering* refused to adopt the liberal construction given to the privilege in *Express Printing Co. v. Copeland*, 64 Tex. 354 (1885). Instead, it accepted the part of the *Looney* holding that any misstatement of fact by the press was not entitled to the protection of the fair comment privilege. 170 S.W.2d at 205. The court made no reference, however, to the implication in *Looney* that comment, if untrue, was not entitled to the protection of the fair comment privilege.

63. 149 Tex. 87, 228 S.W.2d 499 (1950).

64. *Id.* at 90-91, 228 S.W.2d at 501-02.

65. *Panhandle Publishing Co. v. Fitzjarrald*, 223 S.W.2d 635 (Tex. Civ. App.—Amarillo 1949), *rev'd*, 149 Tex. 87, 228 S.W.2d 499 (1950).

66. 149 Tex. at 98, 228 S.W.2d at 506. The *Fitzjarrald* court agreed that a political candidate's fitness to hold office was a matter of public concern that was a proper subject for discussion and fair and reasonable comment (*id.* at 96, 228 S.W.2d at 504), but that if an

ing that the purpose of the fair comment privilege was to protect the press when publishing matters of public concern,⁶⁷ the court again narrowly construed the statutory privilege. As in *Looney*, the *Fitzjarrald* court stated that the media's privilege existed because the public needed to know about their elected officials and other matters of public concern and not because the media had a right to freely disseminate the news.⁶⁸ Although the distinction is academic, it is pertinent to an understanding of the court's imposition of restrictions on the press. The court had committed itself to zealously guarding the right of a citizen to defend his reputation,⁶⁹ but it also had recognized a newspaper's privilege to make "[a] reasonable and fair comment . . . of the official acts of public officials . . . published for general information."⁷⁰ If the fair comment privilege existed because of the constitutional right to freedom of the press, judicial limitations on that right would be difficult to justify.⁷¹ In comparison, if the fair comment privilege existed because of the public's interest in knowing the qualifications of their elected officials, judicial limitations placed upon that interest could be explained more easily.

The *Fitzjarrald* court construed the fair comment privilege in a manner similar to that in *Looney*, holding that the fair comment privilege did not apply to false publications that would subject a public official to removal from office⁷² and that therefore, under certain circumstances, the privilege would not attach until the publisher could prove the truth of its publication.⁷³ This conclusion is not acceptable, however, because the validity of comment does not depend on its truthfulness. The court's position can be explained only on the basis of its strong interest in protecting an individual's right to preserve his reputation.

Fitzjarrald's strict construction of the statutory privilege was further evidenced by the apparent holding that even if a publication were entitled to the protection of the fair comment privilege, the privilege could be over-

untrue publication could be grounds for removing the official from office, the publication was libelous per se. *Id.* at 97, 228 S.W.2d at 505.

67. The court stated: "Article 5432 was enacted to soften the harsh rule that had subjected newspapers to damages for publishing certain matters . . ." *Id.* at 97, 228 S.W.2d at 505.

68. *Id.* at 94-95, 228 S.W.2d at 503-04.

69. *Id.* at 94, 228 S.W.2d at 503.

70. *Id.*

71. In *Express Printing Co. v. Copeland*, 64 Tex. 354 (1885), the court approached the fringes of a constitutional argument, stating:

The tendency in the English courts is more liberal in protecting the freedom of the press, and the holding there is in accord with the conclusions announced in this opinion, and which we believe to be well founded in reason and more nearly in accord with the spirit of constitutional liberty, and free republican institutions.

Id. at 359.

72. 149 Tex. at 97, 228 S.W.2d at 505.

73. The court's approach is similar to that suggested in *Hallen*, *supra* note 24, at 98. *But cf.* *Galveston Tribune v. Johnson*, 141 S.W. 302, 304 (Tex. Civ. App. 1911, writ ref'd) (stating that a standard of truth could not be applied to the fair comment privilege because comment is based on opinion rather than fact).

come by a jury's finding that the publisher acted with actual malice.⁷⁴ The court's holding is contrary to the 1927 statutory amendment that eliminated the provision that the privileges could be defeated by a showing of actual malice on the part of the publisher.⁷⁵ Arguably, the amendment changed the status of the statutory privileges from conditional to absolute, but the court ignored this possibility.⁷⁶

The position of the *Fitzjarrald* court is significant because it represents the state of pre-1964 Texas libel law as applied to media publications concerning public officials and other matters of public concern. The *Fitzjarrald* decision illustrates the court's restrictive position concerning media rights first evidenced in *Wren*. In 1964, however, the United States Supreme Court's landmark decision in *New York Times Co. v. Sullivan* appeared to mandate a change in the Texas judiciary's approach to media defendants.

II. THE CONSTITUTIONAL PRIVILEGE

In *New York Times Co. v. Sullivan*⁷⁷ the United States Supreme Court radically changed the direction of defamation law. Prior to *New York Times* the Supreme Court had consistently rejected all suggestions that the first amendment⁷⁸ protected defamatory statements made by the press.⁷⁹ The facts of *New York Times* gave the Court an opportunity to reconsider the tensions that existed between the first amendment right of freedom of the press and a public official's right to protect his reputation. The *New York Times* had run a full page advertisement, paid for by sixty-four persons who were not associated with the newspaper, that falsely accused the Montgomery, Alabama, police department of acts of violence and harassment against students of the Alabama State College and Dr. Martin Luther King. The state courts, finding that the publication was libel per se and that it was published with actual malice, held that it was not privileged

74. See 149 Tex. at 98, 228 S.W.2d at 505. Hallen, *supra* note 24, at 98, suggested that such a finding would not be unreasonable because a malicious comment would not be fair, and therefore the comment would not be within the protection of the privilege.

75. 1927 Tex. Gen. Laws, ch. 80, § 2, at 122.

76. See Hallen, *supra* note 34, at 358. In a subsequent article, Hallen retreated from his original position, stating that the legislature's elimination of the words "without proof of actual malice" had no change on the effect of the fair comment privilege. See Hallen, *supra* note 24, at 98.

77. 376 U.S. 254 (1964).

78. The first amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I. In *Gitlow v. New York*, 268 U.S. 652 (1925), the Supreme Court first suggested that the states were bound by the first amendment. The Court stated that "[f]or present purposes we may and do assume that freedom of . . . the press—which [is] protected by the First Amendment from abridgment by Congress—[is] among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Id.* at 66. Until 1964, however, the court failed to accord constitutional protection to the press when publishing defamatory statements. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

79. See, e.g., *Beauharnais v. Illinois*, 343 U.S. 250, 293 n.7 (1952) (Jackson, J., dissenting); *Chaplinsky v. New Hampshire*, 315 U.S. 68 (1942); *Near v. Minnesota*, 283 U.S. 697, 715 (1931); *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897).

as fair comment and that the newspaper was liable for both actual and punitive damages.⁸⁰ Reversing the state courts, the United States Supreme Court held that the constitution "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."⁸¹ The Court reasoned that even though open debate may cause vehement and caustic attacks on individuals, "debate on public issues should be uninhibited, robust, and wide-open . . ."⁸² Further strengthening the position of the media defendant, the Court held that the public official must show with "convincing clarity" that the publisher acted with actual malice.⁸³

The *New York Times* Court declined to make a definitive statement on who could be considered a public official or what constituted official conduct.⁸⁴ In subsequent decisions, however, the category of public officials came to include judges,⁸⁵ court clerks,⁸⁶ chiefs of police,⁸⁷ deputy chiefs of police,⁸⁸ mayors and candidates for public office,⁸⁹ deputy sheriffs,⁹⁰ and former government employees being attacked for their past official conduct.⁹¹ Moreover, by 1971 the Court had stated that the "official conduct" requirement had become substantially diluted, and that the requirement might be of little significance when the action involved either a public official or candidate for public office.⁹²

Deciding that the public official concept did not afford the media enough first amendment protection, the Supreme Court expanded that protection in *Curtis Publishing Co. v. Butts*⁹³ when it applied the *New York Times* rule to public figures.⁹⁴ The Court's zeal did not end with *Butts*,

80. *New York Times Co. v. Sullivan*, 273 Ala. 656, 144 So. 2d 25 (1962), *rev'd*, 376 U.S. 254, 262-63 (1964).

81. 376 U.S. at 279-80.

82. *Id.* at 270-71. The Court's reasoning parallels that found in an early Texas decision, *Express Printing Co. v. Copeland*, 64 Tex. 354 (1885). See notes 23-26 *supra* and accompanying text.

83. 376 U.S. at 285-86. For discussions of the impact of *New York Times*, see Berney, *Libel and the First Amendment—A New Constitutional Privilege*, 51 VA. L. REV. 1 (1965); Hanson, *Developments in the Law of Libel: Impact of the New York Times Rule*, 7 WM. & MARY L. REV. 215 (1966); Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L.Q. 581 (1964).

84. 376 U.S. at 283 n.23.

85. *Garrison v. Louisiana*, 379 U.S. 64 (1964).

86. *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967).

87. *Henry v. Collins*, 380 U.S. 356 (1965).

88. *Time, Inc. v. Pape*, 401 U.S. 279 (1971).

89. *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295 (1971).

90. *St. Amant v. Thompson*, 390 U.S. 727 (1968).

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

92. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 274 (1971); see note 137 *infra*.

93. 388 U.S. 130 (1967).

94. In *Butts* the plaintiff was the athletic director at the University of Georgia. He had previously served as head football coach at the University and was well-known in athletic circles. Defendant's magazine published an article that accused Butts of having given the University of Georgia's detailed game plan to an opposing coach. Butts brought a common law libel action and was awarded \$460,000 in damages. On appeal to the Fifth Circuit,

however, because in 1971 the Court held in *Rosenbloom v. Metromedia, Inc.*⁹⁵ that the *New York Times* rule would apply to all media defamatory publications concerning general or public interest.⁹⁶ *Rosenbloom* thus effectively eliminated the need for the public figure concept.⁹⁷

In *Gertz v. Robert Welch, Inc.*⁹⁸ the Court retreated from the "overextension" of the constitutional protection granted to the media by *Rosenbloom*.⁹⁹ In *Gertz* an attorney sued a publisher who provided a monthly

Curtis asserted that the trial court should be reversed because Curtis was a media defendant and thus entitled to the constitutional protection announced in *New York Times*. The court of appeals affirmed the trial court, holding that Curtis had waived its constitutional claims by not raising them at the trial level. *Curtis Publishing Co. v. Butts*, 351 F.2d 702, 713 (5th Cir. 1965), *rev'd*, 388 U.S. 130 (1967). The Supreme Court reversed, holding that *New York Times* did not give fair warning to Curtis that it might have a constitutional claim. 388 U.S. at 144. The Court then addressed the merits of Curtis' constitutional claims. Noting that the defamatory publications concerning Butts were similar to those in *New York Times*, the Court held that defamatory publications concerning public figures were entitled to constitutional protection. *Id.* at 154-55. The Court recognized that a private individual can become a public figure either by the status of his position or by thrusting himself into the vortex of an important public controversy. *Id.* at 155. Although the plurality opinion adopted a standard different from that announced in *New York Times*, *id.* at 155, a majority of the Court held that, at a minimum, the *New York Times* standard of actual malice was applicable to defamed public figures bringing libel actions against media defendants. *Id.* at 162 (Warren, C.J., concurring) (adopted *New York Times* standard); *id.* at 170 (Black & Douglas, JJ., concurring in part and dissenting in part) (advocated abandoning *New York Times* rule and granting press absolute privilege); *id.* at 172 (Brennan & White, JJ., concurring in part and dissenting in part) (advocated adopting *New York Times* standard). For detailed discussions on *Butts*, see Note, *The Constitutional Law of Defamation and Privacy: Butts and Walker*, 53 CORNELL L. REV. 649 (1968); Note, *Constitutional Law—Defamation Under the First Amendment—The Actual Malice Test and "Public Figures,"* 46 N.C.L. REV. 392 (1968); Note, *Constitutional Law—Free Speech and Press: Press Comments About College Coach Within Libel Protection of Associated Press v. Walker*, 44 WASH. L. REV. 461 (1969).

95. 403 U.S. 29 (1971).

96. *Id.* at 43-44. In *Rosenbloom* a radio station broadcaster's reports implicating Rosenbloom as a large distributor of obscene materials resulted in his arrest and prosecution for selling obscene materials. Following acquittal, Rosenbloom sued the broadcaster for libel. The jury found for Rosenbloom, but the court of appeals reversed. *Rosenbloom v. Metromedia, Inc.*, 415 F.2d 892 (3d Cir. 1969). In affirming the appellate court's judgment, a plurality of the Supreme Court stated that "[w]e honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous." 403 U.S. at 43-44. The Court concluded that the arrest of a person for distribution of obscene materials was a matter of public concern and, accordingly, found that the *New York Times* rule was applicable. *Id.* at 45.

97. The *Rosenbloom* decision also accorded constitutional dimension to the Texas statutory fair comment privilege that permits the media to publish "reasonable and fair comment or criticism of the official acts of public officials and of other matters of public concern published for general information." TEX. REV. CIV. STAT. ANN. art. 5432, § 4 (Vernon 1958). The impact of *Rosenbloom* is understood best when considered in light of the fact that prior to 1964, the media enjoyed no constitutional protection when publishing defamatory statements. See note 79 *supra* and accompanying text. For detailed discussions of *Rosenbloom*, see Comment, *The Expanding Constitutional Protection for the News Media From Liability for Defamation: Predictability and the New Synthesis*, 70 MICH. L. REV. 1547 (1972); Note, *Constitutional Law—Libel—Expansion of the New York Times Co. v. Sullivan Standard to Include State Civil Libel Action Brought by a Private Individual Involved in an Event of General or Public Interest*, 40 FORDHAM L. REV. 651 (1972).

98. 418 U.S. 323 (1974).

99. *Id.* at 326.

outlet for the John Birch Society. Gertz had represented parents in a civil action brought against a Chicago policeman who had been convicted of second degree murder in the killing of the parents' son. Even though Gertz was not involved in the criminal proceeding, the publication accused him of instigating a Communist frameup against the policeman. The article also falsely implied that Gertz had a criminal record, that he was a devout Communist, and that he was the main force behind the attack on the police during the 1968 Democratic Convention. The district court found that the plaintiff was neither a public official nor a public figure, but nevertheless applied the *New York Times* standard of actual malice.¹⁰⁰ Holding that Gertz had failed to prove that the defendant had acted with actual malice, the district court entered judgment for the defendant.¹⁰¹ The Seventh Circuit affirmed, stating that the defendant could assert the constitutional privilege because the article concerned a matter of public interest as defined in *Rosenbloom*.¹⁰²

Reversing the court of appeals, the Supreme Court rejected *Rosenbloom* and held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."¹⁰³ The Court recognized, however, that its retreat from the public interest test of *Rosenbloom* and the return of control to the states over private defamation actions would make the press vulnerable to liability for defamatory statements concerning a broad range of issues.¹⁰⁴ To avoid any chilling effect on the press resulting from large jury awards based on a relaxed state standard of liability,¹⁰⁵ the Court provided that a private individual who establishes liability under a less demanding standard than *New York Times* would be limited to a recovery of actual damages.¹⁰⁶

100. *Gertz v. Robert Welch, Inc.*, 322 F. Supp. 997, 1000 (N.D. Ill. 1970), *aff'd*, 471 F.2d 801 (7th Cir. 1972), *rev'd*, 418 U.S. 323 (1974).

101. The jury had found in favor of Gertz, but the trial court entered its judgment notwithstanding the verdict. 322 F. Supp. at 1000.

102. 471 F.2d 801, 805 (7th Cir. 1972), *rev'd*, 418 U.S. 323 (1974).

103. 418 U.S. 323, 347 (1974). The Court did state, however, that their "inquiry would involve considerations somewhat different . . . if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential." *Id.* at 348. The Court's statement appears to indicate that the minimum standard of liability that would be constitutionally permissible is negligence. Significantly, the Court by implication surpassed the level of simple negligence because the content must warn a reasonably prudent editor or broadcaster rather than the average reasonable man.

104. 418 U.S. at 346-49.

105. The Court observed that the uncontrolled discretion of juries to award damages would compound the media's potential liability for defamatory falsehoods, and thus limit the robust exercise of public debate. *Id.* at 349.

106. *Id.* The Court declined to define actual injury, but it did imply that the term includes a broad range of injury claims. Those claims that the Court found acceptable, but not exclusive, include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. *Id.* at 350. The Court further provided that states could not permit recovery of presumed or punitive damages against media defendants unless the plaintiff could prove actual malice as defined in *New York Times*. *Id.* at 349.

Finally, the Court answered the question of who was a public figure. The Court held that an individual could become a public figure in one of two ways. First, individuals who have achieved pervasive fame and notoriety may become public figures for all purposes and in all contexts.¹⁰⁷ Secondly, individuals who voluntarily "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved" are considered public figures in relation to the issues surrounding that particular controversy.¹⁰⁸ Gertz was active in community affairs, had published several books and articles, and was well-known in legal circles. The Court concluded, however, that these personal characteristics were insufficient to support a finding that Gertz was a public figure.¹⁰⁹

107. *Id.* at 351.

108. *Id.* at 345. Near the end of its opinion, the Court again defined the limited purpose public figure, omitting the language "in order to influence the resolution of the issues involved," *id.* at 351, but the *Gertz* Court's holding determined that the plaintiff was not a public figure because "[h]e plainly did not thrust himself into the vortex of [a] public issue, nor did he engage the public's attention in an attempt to influence its outcome." *Id.* at 352. Under *Gertz*, therefore, the Court did not clarify whether the limited purpose public figure merely had to thrust himself into the vortex of a public controversy or whether he also had to attempt to influence the outcome of the issues involved. In *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), the Court apparently attempted to clarify this confusion by declaring that in *Gertz* it had "defined the meaning of [limited purpose] public figure" to include those who have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.* at 453 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974)) [hereinafter called the *Gertz-Firestone* definition]. In a recent opinion addressing the public figure issue, *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979), the Court cited the *Gertz-Firestone* definition as the proper definition for the limited purpose public figure. *Id.* at 164. The *Wolston* opinion is bothersome, however, because, similar to *Gertz*, it separately addresses the issues of whether the plaintiff voluntarily thrust himself into a public controversy and whether the plaintiff attempted to influence the resolution of the issues involved. *Id.* at 165-69. If the *Gertz-Firestone* definition had controlled, the Court could have stopped its analysis after it had concluded that *Wolston* had not voluntarily thrust himself into a particular public controversy. The concurrence in *Wolston* concluded that the majority had held that a prospective public figure "must enter a controversy in an attempt to influence the resolution of the issues involved." *Id.* at 169 (Blackmun & Marshall, JJ., concurring). In *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), decided the same day as *Wolston*, the Court, although citing the *Gertz-Firestone* definition at one point in its opinion, *id.* at 134, held that the plaintiff was not a public figure because he "did not thrust himself or his views into public controversy to influence others." *Id.* at 135. Arguably, *Hutchinson's* requirement of influencing others is even more restrictive than the *Gertz-Firestone* requirement of influencing issues because although an attempt to influence the outcome of issues generally would include an attempt to influence persons with regard to those issues, a person could influence a particular issue's outcome without influencing other persons. *Hutchinson's* requirement may be no more than imprecise language, however, because the Court cites the *Gertz-Firestone* definition and makes no mention of its change in language from that definition.

The *Gertz* Court observed that, under exceptional circumstances, it might recognize a third category of public figures, those who become public figures through no voluntary action of their own. 418 U.S. at 345. The involuntary public figure concept appears, however, to have little, if any viability today. See *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979) (plaintiff did not become a public figure when subpoenaed to appear before a grand jury investigating Soviet spy activity in the United States); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) (plaintiff did not become a public figure as a result of her highly publicized divorce proceeding).

109. 418 U.S. at 352. The plurality opinion's decisive vote came from Justice Blackmun, who had previously joined the plurality in *Rosenbloom*. The strength of *Gertz* was uncer-

The journey from *New York Times* to *Gertz* is the most significant period of development in the history of defamation law. This brief review of Supreme Court involvement in the law of defamation, though by no means complete, serves as a basis for understanding the radical changes that took place over a short period of time. Prior to the *New York Times* decision in 1964, the press had no constitutional protection when publishing defamatory statements. By 1971 the media enjoyed constitutional protection when publishing any matter of public interest, and states such as Texas were mandated to redevelop their defamation law. In *Gertz*, however, the Court recognized that its broad application of the *New York Times* test impinged upon legitimate state interests. To alleviate this infringement, the Court reinstated the public figure concept and relinquished to the states control over defamation actions brought by private individuals. The real test would come when states such as Texas, that had consistently given the individual's reputation priority over the newspaper's right to disseminate news, began to interpret the constitutional law of defamation as applied to media defendants. The states could proceed along one of two alternative paths. They could either restrictively apply the concepts of public official, public figure, and public controversy, thereby increasing the class of private individuals, or they could balance the competing interests involved to generate robust debate on legitimate public issues.

III. THE TEXAS REACTION TO THE CONSTITUTIONAL PRIVILEGE

The first Texas Supreme Court response to *New York Times* came in *El*

tain, and matters were complicated by Justice Blackmun's comment that "[i]f my vote were not needed to create a majority, I would adhere to my prior view." *Id.* at 354 (Blackmun, J., concurring). Although *Gertz* was the product of a divided Court, it was strongly affirmed by five members of the Court in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976). In *Firestone* the defendant had published defamatory statements concerning a divorce award that was granted to the plaintiff's husband, the son of a wealthy industrialist. The jury verdict for the plaintiff was affirmed by the Florida Supreme Court. *Time, Inc. v. Firestone*, 305 So. 2d 72 (Fla. 1974). Before the United States Supreme Court, the defendant contended that Mrs. Firestone was a public figure because she had a famous name, was well-known in social circles, had access to the media as evidenced by her ability to call press conferences, and was a central party in a divorce proceeding that was a public controversy. The Court rejected the defendant's claims and held that Mrs. Firestone did not become a public figure by participating in a divorce proceeding. 424 U.S. at 454-55. The Court also held that a divorce proceeding was not the type of public controversy contemplated by *Gertz*. *Id.* at 454. This portion of *Firestone* was used by the Court in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), to further narrow the public controversy requirement. See notes 169-71 *infra* and accompanying text. For additional discussions on the effects and implications of *Gertz*, see Anderson, *A Response to Professor Robertson: The Issue Is Control of Press Power*, 54 TEXAS L. REV. 271 (1976); Ashdown, *Gertz and Firestone: A Study in Constitutional Policy-Making*, 61 MINN. L. REV. 645 (1977); Brosnahan, *From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and the First Amendment*, 26 HASTINGS L.J. 777 (1975); Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc., and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975); Frakt, *The Evolving Law of Defamation: New York Times Co. v. Sullivan to Gertz v. Robert Welch, Inc. and Beyond*, 6 RUT.-CAM. L.J. 47 (1975); Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEXAS L. REV. 199 (1976).

Paso Times, Inc. v. Trexler.¹¹⁰ In *Trexler* a university professor led an anti-Viet Nam War demonstration that aroused a considerable amount of interest and comment in the city of El Paso. The defendant published several editorials stating that it did not agree with the professor's views but that it did uphold his right to stage a peaceful anti-war demonstration. To further public discussion, the newspaper received and published certain letters to the editor that commented on the professor's activities. A publication accusing the professor of treason formed the basis of his complaint. The trial court found the professor to be a public figure and, pursuant to a jury finding that the defendant had not acted with actual malice, rendered a take nothing judgment against the professor.¹¹¹ The court of civil appeals reversed,¹¹² holding that the trial court's definition of actual malice placed a greater burden on the plaintiff than that required by law.¹¹³ Without deciding whether the trial court's definition of actual malice was correct, the Texas Supreme Court assumed that it was incorrect because the *New York Times* definition was not followed.¹¹⁴ The court held, however, that because the plaintiff had failed to prove actual malice under the *New York Times* standard the trial court should be affirmed.¹¹⁵ Although the court did not take a definitive position on what action or inaction would support a finding of actual malice, it did acknowledge that neither the failure to investigate the truth of a statement nor the failure to act as a reasonably prudent man would be sufficient to show that the defendant published the statements with actual malice.¹¹⁶ The Texas court may have displayed its real attitude toward the *New York Times* rule when it observed that the rule "puts a premium on ignorance [and] encourages the irresponsible publisher not to inquire."¹¹⁷

In 1970 the Texas Supreme Court decided *Dun & Bradstreet, Inc. v. O'Neil*.¹¹⁸ Even though the case did not involve a public official or a public figure, and the defamatory statements did not pertain to a matter of public concern, the court nonetheless found that *Dun & Bradstreet*, as a credit information service, had characteristics similar to the newspapers in *New York Times* and *Trexler* and therefore was entitled to the protection given in *New York Times*.¹¹⁹ The motivations that led to *New York Times* did not warrant the conclusion reached in *Dun & Bradstreet*. In *New York*

110. 447 S.W.2d 403 (Tex. 1969).

111. *Id.* at 404.

112. 439 S.W.2d 883 (Tex. Civ. App.—El Paso), *rev'd*, 447 S.W.2d 403 (Tex. 1969).

113. The trial court had defined actual malice to mean "a desire or intent to injure a person through a deliberate falsehood or with actual knowledge of its probable falsity." 447 S.W.2d at 405.

114. *Id.*

115. *Id.* at 406.

116. *Id.*

117. *Id.* (quoting *St. Amant v. Thompson*, 390 U.S. 727 (1968)).

118. 456 S.W.2d 896 (Tex. 1970). *Dun & Bradstreet* provided a credit information service but erroneously issued a special notice that the plaintiff had filed a voluntary bankruptcy petition. The notice was sent to 14 subscribers who had previously requested information concerning the plaintiff's credit status. Plaintiff sued for libel, and the defendant pleaded a defense of common law conditional privilege. See note 121 *infra*.

119. 456 S.W.2d at 900-01.

Times the Court based its holding on the need for robust and open debate on public issues,¹²⁰ but no comparable need existed in *Dun & Bradstreet*.¹²¹ The decision is even more perplexing when considered in light of the Texas court's tendency to uphold the private individual's right to protect his reputation.¹²²

*Foster v. Laredo Newspapers, Inc.*¹²³ provided the Texas Supreme Court with an opportunity to interpret and apply the line of United States Supreme Court cases beginning with *New York Times* and culminating with *Gertz*.¹²⁴ Foster was an established engineer in Laredo, Texas and the elected county surveyor of Webb County. Over the previous ten years, Webb County also had employed Foster as a private consultant on a large majority of the county's engineering projects. Foster did not have a permanent position with the county, however. When a flooding problem arose in a local subdivision, the commissioners' court employed Foster to investigate the drainage problem in the subdivision and to determine the availability of federal grants to correct the problem. After Foster had completed these activities, the defendant's newspaper published an article stating that "the flooded area in question was platted by Jack Foster, who doubles as a consultant engineer for Webb County."¹²⁵ Foster subsequently sued the newspaper, alleging that the article was libelous because it had implied that he was directly responsible for the flooding problem and that he was unethical in accepting employment with Webb County when a direct conflict of interest existed. Both parties agreed that the portion of the article stating that Foster had platted the flooded area was false.

The trial court granted the defendant's motion for summary judgment,¹²⁶ and the court of civil appeals affirmed, holding that Foster was both a public figure and a public official.¹²⁷ The court further held that the summary judgment proof had not established as a matter of law that the newspaper had acted with actual malice.¹²⁸ Reversing the court of civil appeals, the Texas Supreme Court held that Foster was not a public figure,

120. 376 U.S. at 270.

121. The court appears to have made a serious error in applying *New York Times* in *Dun & Bradstreet*. Although each case involved privileges, *Dun & Bradstreet* had invoked a common law conditional privilege recognizing that a credit reporting service publication may be privileged if the publication is made without actual malice. See W. PROSSER, *supra* note 15, § 115, at 790, 794. Based on the reasoning of the United States Supreme Court in *New York Times*, the qualified common law privilege applicable to credit reporting services should not be accorded the same reverence as the media's constitutional privilege.

122. The *Dun & Bradstreet* case continues to be a source of confusion in libel actions that do not involve media defendants. At least one court of civil appeals has expressed concern over the supreme court's classification of *Dun & Bradstreet* as a media defendant. See *Southwestern Bell Tel. Co. v. Dixon*, 575 S.W.2d 596 (Tex. Civ. App.—San Antonio 1978, no writ); *Roegelien Provision Co. v. Mayen*, 566 S.W.2d 1 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.).

123. 541 S.W.2d 809 (Tex.), *cert. denied*, 429 U.S. 1123 (1976).

124. *Trexler* and *Dun & Bradstreet* were decided in the interim between *New York Times* and *Gertz*.

125. 541 S.W.2d at 811.

126. *Id.*

127. 530 S.W.2d 611, 616 (Tex. Civ. App.—El Paso), *rev'd*, 541 S.W.2d 809 (Tex. 1976).

128. 530 S.W.2d at 618.

and although he was a public official, the actual malice test of *New York Times* was not applicable because the publication did not refer to his conduct in an official capacity.¹²⁹

A. *Public Official*

To support the contention that Foster was a public official in his capacity as a private engineering consultant for the county, the newspaper cited the holding in *Rosenblatt v. Baer*¹³⁰ that a government employee who "has such apparent importance that the public has an independent interest in [his] qualifications and performance beyond the general public interest in the qualifications and performance of all government employees" is within the *New York Times* rule.¹³¹ The court rejected the newspaper's contention that Foster was the type of government employee identified in *Rosenblatt*, because: (1) Foster's consultant activities resulted in no significant public interest; (2) Foster had little, if any, authority to exercise on behalf of the county; (3) Foster could not personally authorize the expenditure of public funds to solve the flooding problem; (4) evidence showed that Foster did not supervise any other county employees; and (5) evidence indicated that Foster had very little public contact.¹³² Although the factors that the court considered important clearly related to Foster's lack of responsibility and authority within the county government, the *Rosenblatt* Court did not hold that a government employee must possess actual authority to come within the *New York Times* rule. Rather, the Court held that the *New York Times* standard applied to government employees "who have, or appear to the public to have, substantial responsibility for . . . the conduct of governmental affairs."¹³³ Contrary to the Texas Supreme Court's opinion, Foster could have appeared to the public to have had substantial responsibility within the county government. The county presented Foster to the public as a person who had been employed to solve the area's flooding problem and to determine if a federal grant was available to provide the necessary funds to correct the problem. Arguably, an employee presented to the public in this fashion would appear to have substantial responsibilities within the county government.

The media's constitutional privilege recognized in *New York Times* re-

129. 541 S.W.2d at 814, 817.

130. 383 U.S. 75 (1966).

131. *Id.* at 86.

132. 541 S.W.2d at 813-14.

133. 383 U.S. at 85 (emphasis added). The Court has recently made clear, however, that the reach of *Rosenblatt* is not unlimited. In *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), the Court stated that although it "has not provided precise boundaries for the category of 'public official,' it cannot be thought to include all public employees." *Id.* at 119 n.8. As to this second category of public officials, the key question is how far the Supreme Court will go in restricting the concept espoused in *Rosenblatt*. The Court has not recently addressed this issue, but it might be willing to allow the state courts to determine which government officials have, or appear to have, substantial responsibility within the government. Therefore, states such as Texas may effectively limit the scope of the public official concept by merely determining that the government official did not have, or appear to have, substantial responsibility for the conduct of government affairs.

quires that the defamatory statements refer to the official conduct of the official being defamed.¹³⁴ While the Texas Supreme Court had little difficulty finding that Foster was a public official in his elected capacity,¹³⁵ the court concluded that because the publication did not relate to Foster's official conduct, the newspaper was not entitled to the protection of the *New York Times* standard of actual malice.¹³⁶ This determination presents several difficulties. Before the *Foster* decision, the official conduct concept had been interpreted liberally by the United States Supreme Court to bring libel actions within the *New York Times* rule.¹³⁷ Disregarding these interpretations, the *Foster* court concluded that the article defaming Foster neither expressly nor impliedly referred to Foster's fitness for public office.¹³⁸ The court's conclusion is not well-founded because the defamatory publication does impliedly refer to Foster's fitness for office. The article stated that a portion of Del Mar Hills "was platted by Jack Foster, who doubles as a consultant engineer for Webb County."¹³⁹ The article's reference to Foster by name referred to Foster's status as the elected county surveyor. This portion of the publication could have been interpreted to imply that a conflict existed between Foster's private employment with the county and his position as an elected county official. Indeed, Foster believed that reasonable readers could make such an inference, as evidenced by his complaint alleging that such an implication did exist and that he was entitled to compensation for his injuries.¹⁴⁰

134. 376 U.S. at 280.

135. 541 S.W.2d at 814.

136. *Id.* at 814-15. To support its conclusion, the court stated that the publication "made no express reference to Foster's fitness for the office . . . , nor was it concerned with Foster's performance of his official duties." *Id.* at 815. The *Foster* court appears to have ignored the United States Supreme Court's statement in *Gertz* that "society's interest in the officers of government is not strictly limited to the formal discharge of official duties." 418 U.S. 323, 344 (1974).

137. For example, in *Garrison v. Louisiana*, 379 U.S. 64 (1964), the Court held that the official conduct rule included all conduct that touched upon an official's fitness for office and applied with special force to elected officials. *Id.* at 77. *Garrison* was followed by *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971) and *Ocala Star-Banner v. Damron*, 401 U.S. 295 (1971). In *Roy* the Court stated that the official conduct concept had been diluted substantially and strongly implied that the concept may be of little significance in future cases involving public officials and candidates for public office. 401 U.S. at 274. The action in *Damron* was brought by the mayor of a small town. Even though the defamatory publication did not refer specifically to the mayor's public office, the Court held that the *New York Times* rule was applicable. 401 U.S. at 300. These cases strongly suggest that the official conduct concept had little vitality at the time of *Foster*. The *Foster* court treated these decisions in footnotes but distinguished them on questionable grounds. *Garrison* was avoided by the court's conclusion that the article did not expressly or impliedly relate to Foster's fitness for office. 541 S.W.2d at 814, 815 n.7. *Roy* was distinguished on the basis that the publication did not refer to Foster's position as county surveyor. *Id.* The *Foster* court concluded that *Damron* was questionable authority for the proposition that the publication need not refer to the plaintiff's elected office to be constitutionally protected. *Id.* at 815 n.8.

138. 541 S.W.2d at 815.

139. *Id.* at 811.

140. *Id.* For a similar analysis of the *Foster* court's treatment of the official conduct issue, see Note, *Libel*, 55 TEXAS L. REV. 525 (1977).

B. *Public Figure*

The court held that Foster was not a public figure¹⁴¹ under either of the two categories defined in *Gertz*.¹⁴² The court was correct in holding that Foster was not a public figure for all purposes, but was incorrect in concluding that Foster had failed to voluntarily enter a particular public controversy. To support its latter conclusion, the court observed: (1) Foster had not assumed a special role in the resolution of the controversy; (2) Foster had no personal interest in the resolution of the controversy; and (3) Foster did not attempt to influence the outcome of the flooding controversy through the media.¹⁴³ These factors are valid considerations in determining whether an individual has assumed the role of a public figure in a particular controversy,¹⁴⁴ but two of the three factors may have been applied improperly by the *Foster* court. Arguably, Foster voluntarily involved himself in a public issue by accepting employment to resolve the flooding problem. Because of the nature of his employment and his assigned responsibilities, Foster may have assumed special prominence in resolving the controversy. Another reasonable conclusion is that Foster had a special interest in the outcome of the controversy. Had Foster been successful in resolving the flooding problem, his professional reputation probably would have improved, thereby leading to additional employment opportunities in both public and private sectors.

The court analogized Foster to the plaintiff in *Gertz*, but the two are distinguishable on several grounds. In *Gertz* the controversy centered on a criminal prosecution in which the plaintiff had no direct involvement.¹⁴⁵ Moreover, the closest connection that the plaintiff had with the criminal controversy was an appearance at the coroner's inquest concerning the boy who was killed.¹⁴⁶ In comparison, Foster voluntarily accepted employment to aid the resolution of a public controversy and represented himself to the public as a person capable of doing so. The *Foster* court's questionable analogy may have led to an improper conclusion.

C. *Standard of Care*

According to *Gertz*, as long as states do not impose strict liability, they may define the appropriate standard of liability in defamation actions brought against media defendants by private individuals.¹⁴⁷ In *Foster*, the

141. 541 S.W.2d at 817.

142. See text accompanying notes 107-08 *supra*.

143. 541 S.W.2d at 817.

144. *Gertz* directed the courts to look at the nature and extent of the plaintiff's involvement in the controversy when determining whether the plaintiff is a public figure. 418 U.S. at 352.

145. *Id.* at 325-26.

146. A holding that every attorney who involves himself in a highly publicized criminal prosecution becomes a public figure for the duration of the controversy could cause attorneys to avoid such cases. This result could, in effect, infringe upon an accused's constitutional right to counsel. The sixth amendment provides: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

147. 418 U.S. at 348. The state responses to *Gertz* have resulted in three standards for

Texas Supreme Court adopted negligence as the proper standard.¹⁴⁸ This standard is consistent with *Gertz*, which recognized that states have a greater interest in protecting the reputations of private citizens than they have in protecting the reputations of public officials and public figures.¹⁴⁹ State decisions requiring the same quantum of evidence to prove a media defendant's liability when defaming private individuals as when defaming public officials and public figures are conceptually inconsistent with *Gertz*.

D. *Foster Rationalized*

The *Foster* decision is the product of two major forces. First, the Texas Supreme Court relied heavily on *Gertz*, which represents a major retreat by the United States Supreme Court in its application of constitutional protection for the media when it publishes defamatory statements concerning matters of public interest. Secondly, although the court's decision may not fall in line with *New York Times* and its progeny, its deviation is understandable when considered in light of the Texas Supreme Court's traditional treatment of media defendants that have libeled Texas citizens.

Although *Gertz* returned to the states control over media defamation actions involving private citizens, that control appears to be quite limited. The states may not impose strict liability on media defendants;¹⁵⁰ the plaintiff must prove actual damages before benefiting from a relaxed standard of liability;¹⁵¹ and the plaintiff is required to prove actual malice to

determining the liability of a media defendant defaming a private individual. *New York Times v. Sullivan*, 376 U.S. 253 (1964). New York has adopted a standard based on grossly irresponsible conduct. *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975). A minority of states has retained the *New York Times* actual malice standard. *Walker v. Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450, *cert. denied*, 423 U.S. 1025 (1975); *Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 321 N.E.2d 580 (1974), *cert. denied*, 424 U.S. 913 (1976). A large majority of states has adopted a negligence standard of liability. *Peagler v. Phoenix Newspapers, Inc.*, 114 Ariz. 309, 560 P.2d 1216 (1977); *Cahill v. Hawaiian Paradise Park Corp.*, 56 Hawaii 522, 543 P.2d 1356 (1975); *Troman v. Wood*, 62 Ill. 2d 184, 340 N.E.2d 292 (1976); *Gobin v. Globe Publishing Co.*, 216 Kan. 223, 531 P.2d 76 (1975); *Wilson v. Capitol City Press*, 315 So. 2d 393 (La. Ct. App.), *writ ref'd per curiam*, 320 So. 2d 203 (La. 1975); *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 330 N.E.2d 161 (1975); *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976); *Walters v. Sanford Herald, Inc.*, 31 N.C. App. 233, 228 S.E.2d 766 (1976); *Thomas H. Maloney & Sons v. E.W. Scripps Co.*, 43 Ohio App. 2d 105, 334 N.E.2d 494 (1974), *cert. denied*, 423 U.S. 883 (1975); *Martin v. Griffin Television, Inc.*, 549 P.2d 85 (Okla. 1976); *Taskett v. King Broadcasting Co.*, 86 Wash. 2d 439, 546 P.2d 81 (1976).

148. 541 S.W.2d at 820. The court stated that "[t]he negligence standard of liability coupled with the 'actual injury' requirement established in *Gertz* provides a useful beginning point for the development of constitutional defamation law and has the capability of achieving a fair balance between the competing interests at stake." *Id.*

149. The *Gertz* Court emphasized:

[The private individual] has not accepted public office or assumed an "influential role in ordering society." . . . He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.

418 U.S. at 345 (citations omitted).

150. *Id.* at 347.

151. *Id.* at 348-49.

recover punitive damages.¹⁵² A close look at *Gertz* indicates, however, that the amount of control returned to the states is not as limited as it first appears. For example, although *Gertz* does not define actual injury, it states that the term does include such injuries as "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."¹⁵³ These injuries are subjective, and, when asserted by the plaintiff, will not be easily discredited by the media defendant.¹⁵⁴ Moreover, *Gertz* implies that the Supreme Court will classify plaintiffs as private individuals when the evidence does not clearly show that the plaintiff is a public figure.¹⁵⁵ This portion of *Gertz* strengthens state positions that narrowly apply the public figure concept. Finally, *Gertz* allows the states to reestablish their dominant position in shaping the development of defamation actions brought against media defendants by private individuals. The Texas Supreme Court readily accepted the return of control, and the results in *Foster* indicate that the court chose a restrictive application of the public official and public figure concepts.

The second major factor contributing to the results in *Foster* is the Texas Supreme Court's return to its pre-*New York Times* position of favoring an individual's right to protect his reputation over the media's right to publish freely matters of public concern. *Foster's* treatment of the public figure issue clearly evidences the court's intention to expand this protection of private individuals by limiting the concept of the public figure. The court's adoption of negligence as the standard of liability for media defendants publishing defamatory statements concerning private individuals is further evidence of its intention to protect fully the individual's reputation.

Unlike the public figure issue, little support exists in pre-1976 United States Supreme Court decisions for *Foster's* treatment of public officials who have been defamed by the media.¹⁵⁶ Prior to 1964 the media had relied principally on Texas's statutory privilege of fair comment when confronted with a libel action. From the time the fair comment privilege was enacted,¹⁵⁷ the Texas Supreme Court consistently limited the statute's reach in order to uphold the individual's right to protect his reputation. Similarly, the *Foster* court effectively limited the constitutional protection granted by *New York Times* by restricting the extent of the public official concept. The ultimate effect of this restrictive interpretation broadens the class of private individuals who may benefit from the negligence standard of liability placed on media defendants libeling such persons. The Texas court clearly has taken a restrictive approach in applying the media's con-

152. *Id.* at 349.

153. *Id.* at 350.

154. Common arguments against awards based on subjective injury are that they cannot be measured in terms of money, that they promote litigation, and that the physical consequences of such injuries are too remote. See W. PROSSER, *supra* note 15, § 54, at 327. Prior to *Gertz*, however, the courts consistently rejected these objections and routinely awarded damages for subjective injuries. *Id.* § 112, at 761.

155. 418 U.S. at 352.

156. See notes 130-40 *supra* and accompanying text.

157. 1901 Tex. Gen. Laws, ch. 26, § 3, at 30.

stitutional protection. The relevant inquiry, however, is whether the *Foster* decision, which continues to be the leading Texas case in defamation actions brought against media defendants, is compatible with the United States Supreme Court's views as expressed in its two most recent decisions concerning defamatory publications.

IV. CURRENT POSITION OF THE UNITED STATES SUPREME COURT

Following the Supreme Court's decision in *Gertz*, some legal commentators expressed the view that the Court had begun a retreat from its previous broad application of constitutional protection to the press¹⁵⁸ when publishing defamatory statements. On June 26, 1979, the Court confirmed that view when it announced its two most recent defamation decisions, *Hutchinson v. Proxmire*¹⁵⁹ and *Wolston v. Reader's Digest Association*.¹⁶⁰

A. *Hutchinson v. Proxmire*

In *Hutchinson* the plaintiff sued for damages resulting from libelous statements made by Proxmire, a United States Senator. When the statements were made, the plaintiff was the director of research at a state mental hospital, and was performing governmental research under state and federal grants to measure aggression levels in animals under specific conditions. The National Aeronautics and Space Agency was particularly interested in the results of the research to help resolve problems associated with human confinement in close quarters for extended periods of time. Through the use of his "Golden Fleece of the Month Award,"¹⁶¹ Proxmire published statements that accused Hutchinson and the funded governmental agencies of misusing taxpayer dollars. At the trial level, the district court concluded that Hutchinson was a public figure because he actively solicited federal money, received press coverage of his research, and voluntarily made expenditures for research in which the public had an interest.¹⁶² Finding that the evidence could not support a finding of actual malice, the court granted Proxmire's motion for summary judgment.¹⁶³ The court of appeals affirmed, reasoning that Hutchinson was a public figure for the limited purpose of commenting on his receipt of funds for research projects.¹⁶⁴ To support its conclusion, the court of appeals noted that Hutchinson's receipt of research funds had been published in local newspapers and that Hutchinson had had access to the press as evidenced by the newspaper and wire service reports on his response to the Golden

158. See Ashdown, *supra* note 109, at 646, 657, 672-73; Brosnahan, *supra* note 109, at 778, 790; Robertson, *supra* note 109, at 199.

159. 443 U.S. 111 (1979).

160. 443 U.S. 157 (1979).

161. Proxmire initiated the Golden Fleece Award to publicize his examples of wasteful governmental spending. *Id.*

162. *Hutchinson v. Proxmire*, 431 F. Supp. 1311, 1327 (W.D. Wis. 1977), *aff'd*, 579 F.2d 1027 (7th Cir. 1978), *rev'd and remanded*, 443 U.S. 111 (1979).

163. 431 F. Supp. at 1330.

164. *Hutchinson v. Proxmire*, 579 F.2d 1027, 1034-35 (7th Cir. 1978), *rev'd and remanded*, 443 U.S. 111 (1979).

Fleece Award.¹⁶⁵ The Supreme Court reversed, holding that Hutchinson was not a public figure.¹⁶⁶ Although the Court agreed that Hutchinson was well-known to a small category of professionals and that he had limited access to the media, it concluded that these characteristics were insufficient to make Hutchinson a public figure.¹⁶⁷ In light of the Court's determinations on the public figure issue in *Gertz*, its failure to classify Hutchinson as a public figure is not surprising.¹⁶⁸

The Court also rejected the court of appeals finding with respect to the public controversy issue, concluding that Hutchinson had not thrust himself into a "particular public controversy."¹⁶⁹ Reasoning that Proxmire's concern over misuse of taxpayer dollars was of general concern to all tax-paying citizens, the Court concluded that Hutchinson was not a public figure for a limited purpose because the particular controversy requirement had not been met.¹⁷⁰ Although the distinction between a particular public controversy and a controversy of general concern is not clear, the Court appears to have concluded that controversies that are of interest to all citizens do not meet the particular public controversy requirement of the limited public figure concept.¹⁷¹ At the very least, the Court significantly restricted the range of issues that qualify as a particular controversy. Moreover, the Court appeared to require that a limited purpose public figure must "thrust himself or his views into public controversy to influence others."¹⁷² This requirement that the prospective public figure at-

165. 579 F.2d at 1034-35.

166. 443 U.S. at 136.

167. *Id.* at 134-35. The Court decided that Hutchinson's activities exposed him to the public no more than other members of his profession. The Court stated that to the extent Hutchinson's activities became a controversy, they became so only as a result of Proxmire's award. *Id.* Relying on *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979), the Court held that a private individual cannot be made a public figure by the media's own conduct. 443 U.S. at 135. See notes 182-97 *infra* and accompanying text.

168. See notes 107-08 *supra* and accompanying text.

169. 443 U.S. at 134-35.

170. *Id.* at 135.

171. The Court's rejection of controversies of general concern was based on its statement in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), that the "use of such subject-matter classifications to determine the extent of constitutional protection afforded defamatory falsehoods may too often result in an improper balance between the competing interests in this area." *Id.* at 456. The Court may reasonably conclude that the particular controversy requirement eases the Court's burden of determining if a private individual has become a public figure. The Court is, however, shirking its self-imposed obligation of properly protecting the competing interests (see *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342-43 (1974)), by attempting to ease the difficulty of its decision. Certainly, questions of general interest may become raging public controversies. This nation's recent involvement in the Vietnam War and the controversies created by our continual engagement in that war are illustrative. The Court would find it difficult to maintain that a leader of a large pro-war or anti-war movement could not become a public figure merely because the war was of national concern. The *Hutchinson* Court did not provide definitive guidelines for those public issues that will constitute controversies of general concern. A reasonable assumption, therefore, would be that the Court will make its determination on the facts presented by each case. See *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 166 n.8 (1979). This observation supports the conclusion that state courts will have the same discretion as the Court provided for itself. This result represents yet another way in which states such as Texas have been given the opportunity to apply the constitutional privilege restrictively.

172. 443 U.S. at 135.

tempt to influence others is a significant change from the *Gertz* requirement of attempting "to influence the resolution of the issues involved."¹⁷³ These limitations are yet further indications of the Court's present trend toward retracting the broad constitutional protection afforded the media by pre-*Gertz* cases.

A more troublesome aspect of *Hutchinson* is the Court's implication that persons who become public figures for a particular public controversy must have free access to the media *prior* to the publication of the defamatory statements.¹⁷⁴ According to *Gertz*, a person becomes a public figure when he is a public figure in all contexts or when he becomes a public figure by thrusting himself into the vortex of a public controversy.¹⁷⁵ A person who is a public figure in all contexts probably has access to the press at all times because of the very nature of his pervasive fame. This conclusion does not necessarily apply, however, to those individuals who become public figures for a particular public controversy. In *Curtis Publishing Co. v. Butts*¹⁷⁶ the Court recognized that a public figure in a particular controversy must have "sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and fallacies of the defamatory statements.'"¹⁷⁷ *Butts* supports the proposition that to be a public figure a person must only have access to the press to refute defamatory publications that concern him. The *Butts* decision does not, however, dictate a conclusion that a public figure must have access to the media prior to the publication of the defamatory statements. To this extent, *Hutchinson* is in conflict with *Butts*. Because a person may be a public figure for limited purposes even though he does not have access to the press until after the defamatory statement is published, *Butts* is the more reasonable approach to the question of media access.¹⁷⁸

173. 418 U.S. 323, 345 (1974). *Hutchinson's* use of the phrase "to influence others" may be imprecise language in light of the Court's citation to *Gertz* and its language requiring the public figure to attempt to influence the outcome of issues. In a companion case, *Wolston v. Reader's Digest Ass'n*, 443 U.S. 165 (1979), the majority used the *Gertz* language in concluding that the plaintiff was not a limited purpose public figure. See note 108 *supra* for a discussion of the confusion surrounding the Court's definition of a limited purpose public figure.

174. 443 U.S. at 134-35. Rejecting Proxmire's assertion that *Hutchinson* had access to the media sufficient to qualify him as a public figure, the Court stated that *Hutchinson's* "access, such as it was, came *after* the alleged libel." *Id.* (emphasis added).

175. 418 U.S. at 345.

176. 388 U.S. 130 (1967).

177. *Id.* at 155 (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., dissenting)). Similar language was used in *Gertz*, 418 U.S. at 344.

178. For example, assume that a corporate executive who has no pervasive fame pays a million-dollar bribe to a federal official to convince the official to purchase the corporation's product. At the time of the bribe the executive has no independent access to the media. At a later date a newspaper discovers that the bribe has been made and prints what it believes to be an accurate account of the executive's bribe. In an effort to clear his name, the executive approaches the news media to refute all charges made against him, and because of the newsworthiness of the event, the media accommodates the executive's request. Subsequent to the executive's public response, he is tried on criminal charges for making the bribe. The executive is ultimately acquitted because the prosecution is unable to produce its key witness. To fully vindicate his name, the executive brings an action for libel against the media for its previous account of the bribe. Although the proposed hypothetical appears to involve a

The implied requirement of prior media access may have a disastrous effect on the limited public figure concept, as there are numerous situations in which a person may voluntarily enter the vortex of a particular public controversy before he has access to the press. The *Hutchinson* Court concluded, however, that although the press might allow later access, "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure."¹⁷⁹ Clearly, the Court's concern is valid, but it should not control the determination of whether an individual is a public figure. The Court appears to have forgotten its previous teachings that a public figure who enters the vortex of a particular public controversy also subjects himself to the public's scrutiny with regard to his involvement in that controversy.¹⁸⁰ The importance of media access by such individuals is not that they have access to the press prior to an alleged defamation, but that the channels of communication remain open to refute the defamatory publication. When, following the alleged defamation, the channels of communication are closed, patent unfairness would result if the individual who had prior access were subjected to the higher burden required of defamed public figures. If the channels of communication are open to an individual that has subjected himself to public scrutiny, however, the media should not be subject to a relaxed standard of liability.¹⁸¹

B. *Wolston v. Reader's Digest Association*¹⁸²

In *Wolston* the plaintiff sued Reader's Digest Association for publishing a book that asserted that Wolston was a Soviet spy, when in fact Wolston had never been convicted of such a crime. Fifteen years before the publication, Wolston had failed to respond to a grand jury subpoena issued for the purpose of aiding an investigation of Soviet intelligence activities in the United States. A federal judge then ordered Wolston to show cause

legitimate and particular public controversy, *Hutchinson*, unlike prior decisions, may defeat the media's claim that the executive was a public figure because the executive had no media access prior to the defamatory publication. In the hypothetical, the corporate executive voluntarily thrust himself into a particular public controversy, but the nature of the controversy would have postponed public awareness until after the defamatory statements were published. To foreclose a media defendant's public figure claim in such a situation merely because the individual gained access to the press after the publication is unreasonable.

179. 443 U.S. at 134.

180. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). In *Gertz* the Court stated that "communications media are entitled to act on the assumption that . . . public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." *Id.* The *Hutchinson* Court's holdings concerning the particular controversy requirement and the prior media access requirement place the press in the precarious position of making these determinations prior to publication. These aspects of *Hutchinson*, for all practical purposes, eliminate the media's right to assume that a public figure has exposed himself to public scrutiny.

181. This conclusion does not suggest that a mere interview with the defamer should be sufficient to establish access to the media. As the Court observed, the media cannot create its own public figure. The media access requirement of *Butts* and *Gertz* would appear to be satisfied, however, when the defamed individual has the press at his disposal following the alleged defamation.

182. 443 U.S. 137 (1979).

why he should not be held in criminal contempt of court for failing to respond to the grand jury subpoena.¹⁸³ Wolston pled guilty to the contempt charge. During the six-week period between Wolston's failure to appear and his sentencing, several news stories were published discussing these events. Following the sentencing, the news coverage subsided, and Wolston was able to return to a normal life. In Wolston's defamation action against Reader's Digest, the district court granted the Association's motion for summary judgment, holding that Wolston was a public figure and that the evidence did not support a finding of actual malice.¹⁸⁴ The court of appeals agreed,¹⁸⁵ but the Supreme Court reversed, deciding that Wolston was not made a public figure by his failure to respond to the grand jury subpoena.¹⁸⁶

Citing *Curtis Publishing Co. v. Butts*,¹⁸⁷ the Court stated that private individuals deserved protection more than public figures because they do not expose themselves voluntarily to increased risk of injury from defamatory falsehoods.¹⁸⁸ The Court held that Wolston was entitled to the protection afforded to private individuals because he was an unwilling participant in a government espionage investigation rather than a person who had voluntarily thrust himself into a public controversy.¹⁸⁹ To support its holding, the Court observed that Wolston's participation was limited to that necessary for his defense on the contempt charge, and that he had declined to discuss with the press his refusal to honor the grand jury's subpoena.¹⁹⁰ Moreover, Wolston did not attempt to utilize the citation of contempt "as a fulcrum to create public discussion about the methods being used in connection with [the] investigation or prosecution."¹⁹¹ Because Wolston did not purposefully assume special prominence in the resolution of a public question, the Court held that he was not a public figure.¹⁹²

183. The evidence suggested that Wolston's ill health was the reason for his failure to appear. *Id.* at 166, 169.

184. *Wolston v. Reader's Digest Ass'n*, 429 F. Supp. 167, 176, 179-81 (D.D.C. 1977), *aff'd*, 578 F.2d 427 (D.C. Cir. 1978), *rev'd*, 443 U.S. 157 (1979).

185. *Wolston v. Reader's Digest Ass'n*, 578 F.2d 427 (D.C. Cir. 1978), *rev'd*, 443 U.S. 157 (1979). The court of appeals held that the espionage investigation was a public controversy and that Wolston had voluntarily entered that controversy by refusing to appear in front of the grand jury. 578 F.2d at 431.

186. 443 U.S. at 165, 168.

187. 388 U.S. 130 (1967).

188. 443 U.S. at 164; *accord*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

189. 443 U.S. at 166.

190. *Id.* at 167.

191. *Id.* at 168.

192. *Id.* The Association also argued that Wolston became a public figure for a limited purpose solely by reason of his criminal conduct. *Id.* Relying on *Time, Inc. v. Firestone*, 424 U.S. 448, 457 (1976), the Court concluded that a person who engages in criminal conduct does not automatically become a public figure for the limited purpose of comment on his criminal conduct. 443 U.S. at 168-69. *Firestone* recognized that in some instances a person could become a public figure through participation in litigation, but the Court concluded that in the normal situation an individual is drawn into the litigation involuntarily rather than by purposefully assuming a particular role in the litigation. 424 U.S. at 457. The *Firestone* Court supported its decision by concluding that the media's interest in judicial proceedings was protected by *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), which recognized that the media have an absolute privilege to publish an accurate account of pub-

Even though Justices Marshall and Blackmun disagreed with the majority's definition of the limited purpose public figure,¹⁹³ they did agree that Wolston was not a public figure at the time the libel took place.¹⁹⁴ The concurring opinion concluded that a determination of whether Wolston was a public figure at the time of his contempt conviction was unnecessary because he had lost that status, if ever attained, by the time the libel was published.¹⁹⁵ According to the concurring opinion, once a person becomes a public figure, he does not remain so for all time.¹⁹⁶ To Justices Marshall and Blackmun the passage of time is critically relevant to whether an injured party continues to enjoy effective media access and whether he knowingly chooses to run the continual risk of public scrutiny. Unfortunately, the majority opinion does not clarify whether the Court at a future date may accept this position.¹⁹⁷ Because of the Court's recent trend toward reducing the scope of the public figure concept, however, the position of the concurrence probably will be adopted.

V. CONCLUSION

Texas Supreme Court decisions prior to 1964 had favored the rights of a

lic records concerning a judicial proceeding. *Id.* at 495. Significantly, *Wolston* appears to expand the *Firestone* doctrine of protecting conduct in a civil action in progress to include an individual's criminal conduct prior to prosecution. This expansion has little support from either *Firestone* or *Cox* because each relates to publications concerning the records of the judicial proceedings. In comparison, *Wolston* expands this concept to criminal conduct that took place prior to the judicial proceeding. The *Wolston* holding does, however, appear to be limited to the principle that an individual's criminal conduct does not automatically make him a public figure. 443 U.S. at 168-69. Future decisions should not utilize *Wolston* to defeat a claim that an individual is a public figure when the conduct involved is similar to that proposed by the hypothetical in this Comment. See note 173 *supra*. The courts may reasonably weigh a number of factors, including the severity of the crime, the nature of the crime, and the purpose for which the crime was committed.

193. 443 U.S. at 169-70. Justices Marshall and Blackmun declared that the majority unnecessarily restricted the limited purpose public figure concept by defining that concept to include only those persons who "enter a controversy in an attempt to influence the resolution of the issues involved." *Id.* at 169. Such a definition, the Justices stated, apparently means that a person is a limited purpose public figure only if he "mounts a rostrum" advocating a particular view. *Id.* Justices Marshall and Blackmun concluded that the Court, on the facts as presented, should have relied on *Gertz*, which in their opinion "held that a person may become a public figure for a limited range of issues if he 'voluntarily injects himself or is drawn into a particular public controversy.'" *Id.* at 170 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974)). The concurring opinion's quotation from *Gertz* exemplifies the confusion that exists as to the proper definition of the limited purpose public figure. In *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), decided the same day as *Wolston*, Justices Blackmun and Marshall, without complaint, joined the majority opinion wherein the Court used language identical to that used in *Wolston*. See note 108 *supra*.

194. 443 U.S. at 170.

195. *Id.* Justices Blackmun and Marshall observed that their conclusion would place a greater risk of liability upon authors recounting historical events than upon journalists reporting current events. *Id.* at 171. The Justices' conclusion is warranted because historians have the opportunity to fully research facts prior to publication while reporters must make immediate decisions as to whether to publish daily news events. *Id.*

196. *Id.* at 170.

197. Because the parties had not asserted the question before the Supreme Court, the majority declined to decide whether an individual who is once a public figure may lose that status through the passage of time. *Id.* at 166 n.7.

libel plaintiff over the rights of a media defendant. *Foster v. Laredo Newspapers, Inc.* adopts this general pre-1964 approach and suggests that the Texas Supreme Court will continue to support the defamed individual. Significantly, two recent United States Supreme Court decisions, *Hutchinson v. Proxmire* and *Wolston v. Reader's Digest Association*, confirm the *Foster* court's analysis. Both decisions suggest that the Supreme Court currently favors a position of restricting, and possibly redefining, the constitutional privilege provided by *New York Times* and its progeny. These recent Supreme Court decisions effectively reduce the boundaries of the public figure concept, indicating that a similar approach may be taken toward the public official concept. The ultimate effect of the recent Supreme Court decisions is to expand the class of private individuals, thus returning much of the defamation arena to the states. Although these decisions make clear that the *Foster* analysis is consistent with the position of the United States Supreme Court, Texas courts are not likely to be permitted to return to the same level of restrictions that they placed on the press prior to 1964. How far the Texas courts can go to avoid the *New York Times* standard cannot be determined readily from existing Supreme Court case law. The Supreme Court clearly is willing, however, to recognize the state's interests in defamation cases when the state exercises its rights without obvious abuse. The important point to be recognized by the Texas media is that they will continue to experience close judicial scrutiny when sued for defaming a private citizen.