> **"[E]recting the *New York Times*** barrier against all plaintiffs seeking to recover for injuries for defamatory falsehoods published in what are alleged to be reports of judicial proceedings would effect substantial depreciation of the individual's interest in protection from such harm, without any convincing assurance that such a sacrifice is required under the First Amendment."

**TIME, INC. v. FIRESTONE**

424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976).

In 1966, Mary Alice Firestone asked a Florida court to grant her separate maintenance from her husband, Russell A. Firestone, Jr., scion of one of the nation's wealthiest families. He filed a counterclaim for divorce, charging her with extreme mental cruelty and adultery. The court granted the divorce, assigning an alimony of $3,000 a month and saying in an opaque opinion, "it is the conclusion and finding of the court that neither party is domesticated ...." *Time Magazine* received information about the divorce from several sources, including the Associated Press. After some checking, the editors ran the following story in the "Milestones" section of the magazine:

> DIVORCED: By Russell A. Firestone, Jr., 41, heir to the tire fortune: Mary Alice Sullivan Firestone, 32, his third wife; a one time Palm Beach schoolteacher; on grounds of extreme cruelty and adultery.... The 17-month intermittent trial produced enough testimony of extramarital adventures on both sides, the judge said, "to make Dr. Freud's hair curl."

After *Time* refused to print a retraction, Mary Alice Firestone sued for libel in a Florida court and won a judgment of $100,000, sustained on appeal by the state supreme court. *Time* sought and obtained certiorari from the U.S. Supreme Court.

Mr. Justice **REHNQUIST** delivered the opinion of the Court ....

II

Petitioner initially contends that it cannot be liable for publishing any falsehood defaming respondent unless it is established that the publication was made "with actual malice," as that term is defined in New York Times Co. v. Sullivan (1964). Petitioner advances two arguments ...: that respondent is a "public figure" within this Court's decisions extending *New York Times* to defamation suits brought by such individuals, see, e.g., Curtis Publishing Co. v. Butts (1967); and that the *Time* item constituted a report of a judicial proceeding, a class of subject matter which petitioner claims deserves the protection of the "actual malice" standard even if the story is proved to be defamatorily false or inaccurate. We reject both arguments.

In Gertz v. Robert Welch, Inc. (1974), we have recently further defined the meaning of "public figure" for the purposes of the First and Fourteenth Amendments:

> For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.

Respondent did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society, and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it.

Petitioner contends that because the Firestone divorce was characterized by the Florida Supreme Court as a "cause cel`ebre," it must have been a public controversy and respondent must be considered a public figure. But in so doing petitioner seeks to equate "public controversy" with all controversies of interest to the public. Were we to accept this reasoning, we would reinstate the doctrine advanced in the plurality opinion in Rosenbloom v. Metromedia, Inc. (1971), which concluded that the *New York Times* privilege should be extended to falsehoods defamatory of private persons whenever the statements concern matters of general or public interest. In *Gertz*, however, the Court repudiated this position, stating that "extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge [a] legitimate state interest to a degree that we find unacceptable."

Dissolution of a marriage through judicial proceedings is not the sort of "public controversy" referred to in *Gertz*, even though the marital difficulties may be of interest to some portion of the reading public. Nor did respondent freely choose to publicize issues as to the propriety of her married life. She was compelled to go to court by the State in order to obtain legal release from the bonds of matrimony. We have said that in such an instance "resort to the judicial process ... is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court." Boddie v. Connecticut (1971) .... She assumed no "special prominence in the resolution of public questions". *Gertz*. We hold respondent was not a "public figure" for the purpose of determining the constitutional protection afforded petitioner's report of the factual and legal basis for her divorce.

For similar reasons we likewise reject petitioner's claim for automatic extension of the *New York Times* privilege to all reports of judicial proceedings. It is argued that information concerning proceedings in our Nation's courts have such importance to all citizens as to justify extending special First Amendment protection to the press when reporting on such events. We have recently accepted a significantly more confined version of this argument by holding that the Constitution precludes States from imposing civil liability based upon the publication of truthful information contained in official court records open to public inspection. Cox Broadcasting Corp. v. Cohn (1975).

Petitioner would have us extend the reasoning of *Cox Broadcasting* to safeguard even inaccurate and false statements, at least where "actual malice" has not been established. But its argument proves too much. It may be that all reports of judicial proceedings contain some informational value implicating the First Amendment, but recognizing this is little different from

labeling all judicial proceedings matters of "public or general interest".... Whatever their general validity, 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. ... By confining inquiry to whether a plaintiff is a public officer or a public figure ... we sought a more appropriate accommodation between the public's interest in an uninhibited press and its equally compelling need for judicial redress of libelous utterances. Cf. Chaplinsky v. New Hampshire (1942).

Presumptively erecting the *New York Times* barrier against all plaintiffs seeking to recover for injuries from defamatory falsehoods published in what are alleged to be reports of judicial proceedings would effect substantial depreciation of the individual's interest in protection from such harm, without any convincing assurance that such a sacrifice is required under the First Amendment. And in some instances such an undiscriminating approach might achieve results directly at odds with the constitutional balance intended....

It may be argued that there is still room for application of the *New York Times* protections to more narrowly focused reports of what actually transpires in the courtroom. But even so narrowed, the suggested privilege is simply too broad. Imposing upon the law of private defamation the rather drastic limitations worked by *New York Times* cannot be justified by generalized references to the public interest in reports of judicial proceedings. The details of many, if not most, courtroom battles would add almost nothing toward advancing the uninhibited debate on public issues thought to provide principal support for the decision in *New York Times*. And while participants in some litigation may be legitimate "public figures," either generally or for the limited purpose of that litigation, the majority will more likely resemble respondent, drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them or to defend themselves against actions brought by the State or by others. There appears little reason why these individuals should substantially forfeit that degree of protection which the law of defamation would otherwise afford them simply by virtue of their being drawn into a courtroom. The public interest in accurate reports of judicial proceedings is substantially protected by *Cox Broadcasting*. As to inaccurate and defamatory reports of facts, matters deserving no First Amendment protection ... we think *Gertz* provides an adequate safeguard for the constitutionally protected interests of the press and affords it a tolerable margin for error by requiring some type of fault.

III

Petitioner has urged ... that it could not be held liable for publication of the "Milestones" item because its report of respondent's divorce was factually correct. ... But this issue was submitted to the jury .... By returning a verdict for respondent the jury necessarily found that the identity of meaning which petitioner claims does not exist even for laymen. The Supreme Court of Florida upheld this finding on appeal .... Because demonstration that an article was true would seem to preclude finding the publisher at fault ... we have examined the predicate for petitioner's contention. We believe the Florida courts properly could have found the "Milestones" item to be false.

For petitioner's report to have been accurate, the divorce granted Russell Firestone must

have been based on a finding by the divorce court that his wife had committed extreme cruelty toward him *and* that she had been guilty of adultery. This is indisputably what petitioner reported in its "Milestones" item, but it is equally indisputable that these were not the facts. Russell Firestone alleged in his counterclaim that respondent had been guilty of adultery, but the divorce court never made any such finding. Its judgment ... did not specify that the basis for the judgment was either of the two grounds alleged in the counterclaim. The Supreme Court of Florida on appeal concluded that the ground actually relied upon by the divorce court was "lack of domestication of the parties" .... Petitioner may well argue that the meaning of the trial court's decree was unclear, but this does not license it to choose from among several conceivable interpretations the one most damaging to respondent .... We believe there is ample support for the jury's conclusion, affirmed by the Supreme Court of Florida ....

IV

*Gertz* established, however, that not only must there be evidence to support an award of compensatory damages, there must also be evidence of some fault on the part of a defendant charged with publishing defamatory material. No question of fault was submitted to the jury in this case because under Florida law the only findings required for determination of liability were whether the article was defamatory, whether it was true and whether the defamation, if any, caused respondent harm.

The failure to submit the question of fault to the jury does not, of itself establish noncompliance with the constitutional requirements established in *Gertz*, however. Nothing in the Constitution requires that assessment of fault in a civil case tried in a state court be made by a jury, nor is there any prohibition against such a finding being made in the first instance by an appellate, rather than a trial, court .... If we were satisfied that one of the Florida courts which considered this case had supportably ascertained petitioner was at fault, we would be required to affirm the judgment below.

But the only alternative source of such a finding, given that the issue was not submitted to the jury, is the opinion of the Supreme Court of Florida. That opinion appears to proceed generally on the assumption that a showing of fault was not required ....

In the absence of a finding in some element of the state court system that there was fault, we are not inclined to canvass the record to make such a determination .... Accordingly, the judgment of the Supreme Court of Florida is vacated and the case remanded for further proceedings not inconsistent with this opinion.

*So Ordered*.

Mr. Justice **STEVENS** took no part in the consideration or decision of this case.

Mr. Justice **POWELL,** with whom Mr. Justice **STEWART** joins, concurring.

A clear majority of the Court adheres to the principles of *Gertz* .... But it is evident from the variety of views expressed that perceptions differ as to the proper application of such

principles to this bizarre case. In order to avoid the appearance of fragmentation of the Court on the basic principles involved, I join the opinion of the Court. I add this concurrence to state my reaction to the record ....

In *Gertz* we 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." Thus, while a State may elect to hold a publisher to a lesser duty of care, there is no First Amendment constraint against allowing recovery upon proof of negligence. The applicability of such a fault standard was expressly limited to circumstances where, as here, "the substance of the defamatory statement 'makes substantial danger to reputation apparent.' " By requiring a showing of fault the Court in *Gertz* sought to shield the press and broadcast media from a rule of strict liability that could lead to intolerable self-censorship and at the same time recognize the legitimate state interest in compensating private individuals for wrongful injury from defamatory falsehoods.

In one paragraph near the end of its opinion, the Supreme Court of Florida cited *Gertz* in concluding that *Time* was guilty of "journalistic negligence." But ... it is not evident ... that any type of fault standard was in fact applied .... [T]he ultimate question here is ...: did *Time* exercise the reasonably prudent care that a State may constitutionally demand of a publisher or broadcaster prior to a publication whose content reveals its defamatory potential?

The answer to this question depends upon a careful consideration of all the relevant evidence concerning *Time'* actions prior to the publication of the "Milestones" article ....

... My point in writing is to emphasize that, against the background of a notorious divorce case and a decree that invited misunderstanding, there *was* substantial evidence supportive of *Time's* defense that it was not guilty of actionable negligence. At the very least the jury or court assessing liability in this case should have weighed these factors and this evidence before reaching a judgment. There is no indication in the record before us that this was done in accordance with *Gertz*.

Mr. Justice **BRENNAN,** dissenting ....

I

In a series of cases beginning with *New York Times*, this Court has held that the laws of libel and defamation, no less than other legal modes of restraint on the freedoms of speech and press, are subject to constitutional scrutiny under the First Amendment. The Court has emphasized that the central meaning of the free expression guarantee is that the body politic of this Nation shall be entitled to the communications necessary for self-goverance, and that to place restraints on the exercise of expression is to deny the instrumental means required in order that the citizenry exercise that ultimate sovereignty reposed in its collective judgment by the constitution. Accordingly, we have held that laws governing harm incurred by individuals through defamation or invasion of privacy, although directed to the worthy objective of ensuring the "essential dignity and worth of every human being" necessary to a civilized society, Rosenblatt v. Baer (1966) (Stewart, J., concurring), must be measured and limited by

constitutional constraints assuring the maintenance and well-being of the system of free expression. Although "calculated falsehood" is no part of the expression protected by the central meaning of the First Amendment, Garrison v. Louisiana (1964), error and misstatement is recognized as inevitable in any scheme of truly free expression and debate .... Therefore, in order to avoid the self-censorship that would necessarily accompany strict or simple fault liability for erroneous statements, rules governing liability for injury to reputation are required to allow an adequate margin for error– protecting some misstatements so that the "freedoms of expression ... have the 'breathing space' that they 'need ... to survive.' " *New York Times*. "To insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones." St. Amant v. Thompson (1968). For this reason, *New York Times* held that liability for defamation of a public official may not be imposed in the absence of proof of actual malice on the part of the person making the erroneous statement.

Identical considerations led the Court last Term in *Cox Broadcasting*, to hold that the First Amendment commands an absolute privilege to truthfully report the contents of public records reflecting the subject matter of judicial proceedings. Recognizing the possibility of injury to legitimate privacy interests of persons affected by such proceedings, the Court was nevertheless constrained in light of the strong First Amendment values involved to conclude that no liability whatever could be imposed by the State for reports damaging to those concerns ....

> Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business....

II

It is true, of course, that the Court in *Gertz* cut back on the scope of application of the *New York Times* privilege as it had evolved through the plurality opinion in *Rosenbloom. Rosenbloom* had held the *New York Times* privilege applicable to "all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous." But in light of the Court's perception of an altered balance between the conflicting values at stake where the person defamed is in some sense a "private individual" *Gertz* held First Amendment interests adequately protected in such circumstances so long as defamation liability is restricted to a requirement of "fault" and proof of "actual injury" resulting from the claimed defamation. However, the extension of the relaxed standard of Gertz to news reporting of events transpiring in and decisions arising out of public judicial proceedings is unwarranted by the terms of *Gertz* itself, is contrary to other well-established precedents of this Court and, most importantly, savages the cherished values encased in the First Amendment ....

At stake in the present case is the ability of the press to report to the citizenry the events transpiring in the Nation's judicial systems. There is simply no meaningful or constitutionally

adequate way to report such events without reference to those persons and transactions that form the subject matter in controversy. ... The Court has recognized that with regard to the judiciary, no less than other areas of government, the press performs an indispensable role by "subjecting the ... judicial processes to extensive public scrutiny and criticism." Sheppard v. Maxwell (1966). And it is critical that the judicial processes be open to such scrutiny and criticism, for, as the Court has noted in the specific context of labor disputes, the more acute public controversies are, "the more likely it is that in some aspect they get into court." Bridges v. California (1941). Indeed, slight reflection is needed to observe the insistent and complex interaction between controversial judicial proceedings and popular impressions thereof and fundamental legal and political changes in the Nation throughout the 200 years of evolution of our political system. With the judiciary as with all other aspects of government, the First Amendment guarantees to the people of this Nation that they shall retain the necessary means of control over their institutions that might in the alternative grow remote, insensitive, and finally acquisitive of those attributes of sovereignty not delegated by the Constitution.

Also no less true than in other areas of government, error in reporting and debate concerning the judicial process is inevitable. Indeed, in view of the complexities of that process and its unfamiliarity to the laymen who report it, the probability of inadvertent error may be substantially greater ....

Mr. Justice **WHITE,** dissenting ....

Mr. Justice **MARSHALL,** dissenting ....

## Editors' Notes

(1) **Query:** Rehnquist asserted that "labeling all judicial proceedings [as] matters of 'public or general interest' ... may too often result in an improper balance between competing interests in this area." Did Rehnquist himself use balancing as a technique of constitutional interpretation? Did Brennan in his dissent here or in his opinion for the Court in *New York Times*? How would one describe the *approaches, modes*, and *techniques* of the two justices in these cases? (For an argument that Brennan used a particular form of balancing in *New York Times*, see Melville B. Nimmer, "The Right to Speak from *Times* to *Time*," 56 *Calif.L.Rev*. 935 (1968).

(2) **Query:** To return to a perennial question: Would constitutionalism offer a different response to Time v. Firestone from that which democratic theory would put forth?

(3) The Court's apparent emphasis on Mrs. Firestone's right to reputation made its ruling three weeks later in Paul v. Davis (1976; reprinted below, p. 1161) all the more puzzling. In an opinion also written by Rehnquist, the Court held, by the same 53 division as in *Time*, with Stevens again taking no part, that there was no right to a good name protected by the federal Constitution. As Brennan pointed out in his dissent:

> It is strange that the Court should hold that the interest in one's good name and reputation is not embraced within the concept of "liberty" or "property" under the Fourteenth Amendment, and yet hold that the same interest, when recognized under state law, is sufficient to overcome the specific protections of the First Amendment.

Is it possible to construct a coherent theory of constitutional interpretation that would simultaneously produce Time v. Firestone and Paul v. Davis?