The Burger Court Opinion Writing Database

Gertz v. Robert Welch, Inc.

418 U.S. 323 (1974)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 3, 1974

PERSONAL

Re: 72-617 - Gertz v. Welch

Dear Lewis:

As of now I could not join you. Indeed, unless I misread you, I doubt that the conference vote is really reflected in your opinion. However, a closer study than I have been able to give it may still some of my concern. I write you now, without copy to the conference, to let you know my concern.

Regards,

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 22, 1974

Re: No. 72-617 - Gertz v. Welch

Dear Lewis:

I will await further developments in this case before acting.

Regards,

Mr. Justice Powell

Copies to the Conference.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 22, 1974

Re: No. 72-617 - Gertz v. Welch

Dear Lewis:

I will await further developments in this case before acting.

Regards,

Mr. Justice Powell

Copies to the Conference.

(Personal)

Dear Harry:

I would like to discuss this with you on return. There are problems with Byron's view but it might lead Lewis to clarify his proof-of-damage concept. Lewis is treating this too much like an ordinary negligence case.

Mr. Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 5, 1974

PERSONAL

Re: 72-617 - Gertz v. Welch

Dear Lewis:

As you know, I have deferred action on your case until I had the Miami Herald problems sorted out, and that process is just about complete.

Bill Brennan has sent me a personal memo indicating he will join my Miami Herald opinion provided I state that we do not reach nor decide the question of the validity or constitutionality of right-to-reply laws generally. I am a little puzzled by his request since it seems to me that as it now stands the Miami Herald opinion (revised copy circulated today) does not leave much room for right-to-reply statutes which are mandatory.

What I have had in mind is that Gertz, on its face at least, eliminates punitive damages which leaves some elbow room for a jury as to malice. I am not at all certain about the whole problem yet, but I would appreciate your giving some thought to the idea of saying -- if you agree with it -- that nothing in the holding impairs the right of the states to have statutes (such as Minnesota and the other states decided by Byron's opinion) allowing a newspaper to avoid all but compensatory damages by publishing a retraction. This may present some difficulties in light of your treatment of the punitive damage-compensatory damage standard.

When you have had a chance to think about this, I would like to discuss it with you as Gertz should probably be coming down quite soon.

Regards,

WEB

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

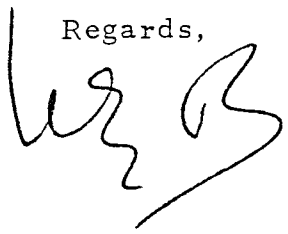
June 20, 1974

Re: 72-617 - Gertz v. Welch

MEMORANDUM TO THE CONFERENCE:

Enclosed is proposed dissent in the above.

Regards,



P. S. -- This is very "ragged" but no substantive change will be made. -WEB

No. 72-617 - Gertz v. Welch

MR. CHIEF JUSTICE BURGER, dissenting.

The doctrines of the law of defamation have had a gradual evolution primarily in the state courts. In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and its progeny this Court entered this field.

Agreement or disagreement with the law as it has evolved to this time does not alter the fact that it has been orderly development with a consistent basic rationale. In today's opinion the Court abandons the traditional thread so far as the ordinary private citizen is concerned and introduces the concept that the media will be liable for negligence in publishing defamatory statements with respect to such persons. Although I agree with much of what Mr. Justice White states, I do not read the Court's new doctrinal approach in quite the way he does. I am frank to say I do not know the parameters of a

file
Dai
1-24-74

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-617

Elmer Gertz, Petitioner, v. Robert Welch, Inc. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[February —, 1974]

MR. JUSTICE DOUGLAS, dissenting.

The Court describes this case as a return to the struggle of "defin[ing] the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." It is indeed a struggle, once described by Mr. Justice Black as "the same quagmire" in which the Court "is helplessly struggling in the field of obscenity." *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 171 (concurring). I would suggest that the struggle is a quite hopeless one, for, in light of the command of the First Amendment, no "accommodation" of its freedoms can be "proper" except those made by the Framers themselves.

Unlike the right of privacy which, by the terms of the Fourth Amendment, must be accommodated with reasonable searches and seizures and warrants issued by magistrates, the rights of free speech and of a free press were protected by the Framers in verbiage whose prescription seems clear. I have stated before my view that the First Amendment would bar Congress from passing any libel law.[1] This was the view held by Thomas Jefferson[2] and it is one Congress has

[1] See, *e. g.*, *Rosenblatt* v. *Baer*, 383 U. S. 75, 90 (concurring).

[2] In 1798 Jefferson stated:

"[The First Amendment] thereby guard[s] in the same sentence, and under the same words, the freedom of religion, of speech and of

To : The

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72–617

Elmer Gertz, Petitioner, v. Robert Welch, Inc. } On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 10, 1974

MEMORANDUM TO THE CONFERENCE

RE: No. 72-617 - Gertz v. Welch

I shall undertake a dissent in this case in due course.

W.J.B.Jr.

Circulated
1-17-74

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-617

Elmer Gertz, Petitioner, v. Robert Welch, Inc.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[January —, 1974]

MR. JUSTICE BRENNAN, dissenting.

I agree with the conclusion, expressed in Part V of the Court's opinion, that, at the time of publication of respondent's article, petitioner could not properly have been viewed as either a "public official" or "public figure"; instead, respondent's article, dealing with an alleged conspiracy to discredit local police forces, concerned petitioner's purported involvement in "an event of public or general interest." *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29, 31–32 (1971); see pp. 5–6 n. 2, *ante*. I cannot agree, however, that free and robust debate—so essential to the proper functioning of our system of government— is permitted adequate "breathing space," *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 433 (1963), when, as the Court holds, the States may impose all but strict liability for defamation if the defamed party is a private person and "the substance of the defamatory statement 'makes substantial danger to reputation apparent.'" *Ante*, p. 23.[1] I adhere to my view expressed in *Rosenbloom* v. *Metromedia, Inc., supra*, that we strike the proper accommodation between avoidance of media self-censorship and protection of individual reputations only

[1] *A fortiori* I disagree with my Brother WHITE's view that the States have free rein to impose strict liability for defamation in cases not involving public persons.

Circulated 4-17-74

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-617

Elmer Gertz, Petitioner, v. Robert Welch, Inc. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[January --, 1974]

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-617

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[January —, 1974]

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 14, 1974

Re: No. 72-617, Gertz v. Welch

Dear Lewis,

Please add my name to your fine opinion in this case. It is possible that I may write a short concurrence, depending largely on what is said in dissent. But, in any event, you may count on my joining your opinion.

Sincerely yours,

P. S.

Mr. Justice Powell

Copies to the Conference

72-617

Supreme Court of the United States

Memorandum

________________, 19____

Lewis –

Many thanks. I'm both convinced and satisfied.

P.S.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 10, 1974

Re: No. 72-617 - Gertz v. Robert Welch, Inc.

Dear Lewis:

I agree with you that the plaintiff in this case should not be required to prove knowing falsehood or reckless disregard. But neither would I interpose a federal negligence standard that he must satisfy before he can recover under state libel law. Aside from situations involving public officials or public figures, I would leave libelous speech in its historic legal position--that is, unprotected by the First Amendment, along with obscenity, fighting words and other speech that is sufficiently violence prone. Beauharnais, 343 U.S. 250, 256-257 (1952); Chaplinsky, 315 U.S. 568, 571-572 (1942); Cantwell, 310 U.S. 296, 309-310 (1940). As was the case in Metromedia, I am unaware of any satisfactory evidence or basis for further restricting state court power to protect private persons against reputation-damaging falsehoods published by the press or others.

On the other hand, I would not care to suggest as a general proposition that speech, negligently uttered and some way damaging to another, is unprotected.

I thus will be in dissent from your remand for a new trial.

Sincerely,

Mr. Justice Powell

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 17, 1974

Re: No. 72-617 - Gertz v. Welch

Dear Lewis:

I am still unable to agree with your suggested opinion in this case. Although you do not say what showing of fault may be required, by way of negligence or otherwise, you still require fault beyond the damaging circulation of falsehoods. This pretty well forces the States to revise their libel laws substantially. Likewise, requiring that the private plaintiff prove actual injury to reputation imposes a substantial federal limitation on state libel laws, and pretty well scuttles the ingrained idea that there are certain statements that are per se libellous. I would dissent from the remand for a new trial.

Sincerely,

Mr. Justice Powell

Copies to Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: White, J.

Circulated: 4-1-74

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 72-617

Elmer Gertz, Petitioner, v. Robert Welch, Inc. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April —, 1974]

MR. JUSTICE WHITE, dissenting.

For some 200 years—from the very founding of the Nation—the law of defamation and right of the ordinary citizen to recover for false publication injurious to his reputation has been almost exclusively the business of state courts and legislatures. Under typical state defamation law, the defamed private citizen had to prove only a false publication that would subject him to hatred, contempt or ridicule. Given such publication, general damages to reputation were presumed while punitive damages required proof of additional facts. The law governing the defamation of private citizens remained untouched by the First Amendment because until relatively recently the consistent view of this Court was that libelous words constitute a class of speech wholly unprotected by the First Amendment. The few exceptions to that view, carved out since 1964, are limited to libels of public officials and public figures.

But now, using that amendment as the chosen instrument, the Court, in a few printed pages has federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 States. That result is accomplished by requiring the plaintiff in each and every defamation action to prove not only the defendant's culpability beyond his act of publishing defamatory ma-

pp 1, 2, 5, 6, 8, 9, 10, 17, 18, 22, 26

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Circulated: _____

Recirculated: 4-18-74

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72–617

Elmer Gertz, Petitioner, v. Robert Welch, Inc. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April —, 1974]

MR. JUSTICE WHITE, dissenting

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To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Circulated: _____

Recirculated: 3-22-

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-617

Elmer Gertz, Petitioner, v. Robert Welch, Inc. } On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April —, 1974]

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pp 32-33

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

4th DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 72-617

Recirculated: 6-13-74

Elmer Gertz, Petitioner, v. Robert Welch, Inc. } On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April —, 1974]

MR. JUSTICE WHITE, dissenting.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 14, 1974

Re: No. 72-617 -- Gertz v. Welch, Inc.

Dear Lewis:

Please join me in your opinion in this case.

Sincerely,

T.M.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 24, 1974

Dear Lewis:

Re: No. 72-617 - Gertz v. Robert Welch, Inc.

This is what I have in mind. I shall not circulate it until I have your reaction.

Sincerely,

Harry

Mr. Justice Powell

April 25, 1974

Re: No. 72-617 - Gertz v. Robert Welch, Inc.

Dear Chief:

You and I are the holdouts on this. You will recall that at a conference some three or four weeks ago I outlined my attitude and what I proposed to do in the event you did not join Lewis.

I have now reduced this to writing and am circulating it. Perhaps this will prompt discussion of the case so that some decision on it will be made. This case, I believe, is holding up disposition of No. 72-1180, Old Dominion Branch v. Austin.

Sincerely,

HAB

The Chief Justice

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

From: Blackmun, J.

Circulated: 4/25/74

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-617

Elmer Gertz, Petitioner, v. Robert Welch, Inc. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April —, 1974]

MR. JUSTICE BLACKMUN, concurring

I joined MR. JUSTICE BRENNAN's opinion for the plurality in *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971). I did so because I concluded that, given *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), and its progeny (noted by the Court, *ante*, 10–12 n. 6), as well as *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967), and *Associated Press* v. *Walker*, *ibid.*, the step taken in *Rosenbloom*, extending the *New York Times* doctrine to an event of public or general interest, was logical and inevitable. A majority of the Court evidently thought otherwise, as is particularly evidenced by MR. JUSTICE WHITE's separate concurring opinion there and by the respective dissenting opinions of Mr. Justice Harlan and of MR. JUSTICE MARSHALL joined by MR. JUSTICE STEWART.

The Court today refuses to apply *New York Times* to the private individual, as contrasted with the public official and the public figure. It thus withdraws to the factual limits of the pre-*Rosenbloom* cases. It thereby fixes the outer boundary of the *New York Times* doctrine and says that beyond that boundary, a State is free to define for itself the appropriate standard of a media's liability so long as it does not impose liability without fault. As my joinder in *Rosenbloom's* plurality opinion would intimate, I sense some illogic in this.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

2nd DRAFT

From: Powell, J.

Circulated: 1/23/73

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 72–617

Elmer Gertz, Petitioner, v. Robert Welch, Inc. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[January —, 1974]

MR. JUSTICE POWELL delivered the opinion of the Court.

This Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment. With this decision we return to that effort. We granted certiorari to reconsider the extent of a publisher's constitutional privilege against liability for defamation of a private citizen. — U. S. — (1973).

I

In 1968 a Chicago policeman named Nuccio shot and killed a youth named Nelson. The state authorities prosecuted Nuccio for the homicide and ultimately obtained a conviction for murder in the second degree. The Nelson family retained petitioner Elmer Gertz, a reputable attorney, to represent them in civil litigation against Nuccio.

Respondent publishes American Opinion, a monthly outlet for the views of the John Birch Society. Early in the 1960's the magazine began to warn of a nationwide conspiracy to discredit local law enforcement agencies and create in their stead a national police force capable of supporting a communist dictatorship. As part of the

January 4, 1974

No. 72-617 Gertz v. Welch

Dear Chief:

Thank you for your note concerning Gertz v. Welch. I am disappointed that you were not initially taken with my circulation, as I had hoped and believed it was in accord with your general thinking as to how best to work the Court out of its present dilemma. I realize, however, that the complexity and importance of the task of reconciling the law of defamation to the First Amendment provide ample opportunities for disagreement. I particularly appreciate the wisdom of your suggestion that reflection and discussion may yet lead to common ground.

Your thought that my circulation does not follow the vote at Conference could be right although I attempted to identify and follow a consensus. I did find it difficult to reconcile all views and to judge how far a majority of the Court would be willing to go in reversing the strong tide toward near-total abrogation of the individual's opportunity to recover for libel in favor of the stringent demands of the New York Times rule.

My notes indicate that only Bill Douglas voted to affirm. You were clear that Gertz was not a public figure, and you expressed doubt whether his connection with any matter of public or general interest was close enough to be meaningful. Potter, Thurgood, and I agreed that Gertz was not a public figure, although I understood that Potter and Thurgood thought that the Rosenbloom plurality opinion could not be avoided on the ground of the remoteness of Gertz's connection with the controversy. Bill Rehnquist voted to reverse without fully articulating his reasons. Byron, while indicating that he thought Gertz might be a public figure, expressed his "total disagreement" with Rosenbloom and stated that he would reverse the holding below. Harry Blackmun expressed a tentative view that Rosenbloom was indistinguishable in principle. He joined Bill Brennan

in thinking that the case should be reversed, but only because of the trial court's failure to give the jury an opportunity to find knowledge of falsity or reckless disregard of the truth. (After inspecting the record, I believe that there was no basis for such an instruction, and I rather suspect that Bill Brennan will ultimately vote to affirm.)

If my notes and recollections are substantially accurate, the principal line of division at Conference turned on the Rosenbloom plurality's doctrine that the New York Times rule applies not merely to public officials and public figures but to anyone, even the most private citizen, who is involved in the discussion of a matter of public or general interest. I counted Potter, Thurgood, Bill Rehnquist, and myself as four reasonably sure votes in favor of disavowing the Rosenbloom extension of New York Times. I also counted you in our "camp," perhaps presumptuously, because of the difficulty of considering this case as outside the broad principle stated by the Rosenbloom plurality opinion and because so little would be accomplished by trying to distinguish Rosenbloom on its facts. The doctrine would remain intact and, in effect, would destroy entirely the law of libel, for anything a newspaper thinks important enough to print is arguably a matter of public or general interest. I also thought that Byron, who expressed his firm opposition to the Rosenbloom doctrine, could probably be counted as with us.

I therefore addressed as the central issue in the case whether the Court should withdraw from the "issue of public or general interest" test of the Rosenbloom plurality. Answering this affirmatively, I then had to confront the question of what constitutional limitations, if any, are applicable where a private citizen is libelled. On this issue, I had little guidance from the discussion at Conference. I adopted the familiar standard of negligence as a constitutional minimum (as suggested by Justice Harlan) rather than attempting to resuscitate the common law rule of strict liability, so emphatically condemned by a unanimous Court in New York Times and disapproved even by the dissenters in Rosenbloom.

When I finally reached the damage question, I was confronted with the strongly held views of two of our colleagues (Potter and Thurgood) that there should be no presumed or punitive damages where the standard for recovery is negligence - although my personal views have been generally to the contrary. Accordingly, I again sought the middle ground and proposed a rule of "actual damages" but broadly defined them to

include "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." (p. 24)

As you will see from the foregoing, I approached the writing of the opinion with a view to what seemed possible in obtaining agreement among five Justices on a coherent theory of the law of libel and the First Amendment. In taking this approach I compromised somewhat my own views in the interest of obtaining a majority opinion rather than continuing the fragmentation of the Court. In that respect we have a problem here somewhat analogous to the obscenity law situation prior to last Term.

I add one additional comment. Harry has volunteered the statement that, if his vote were necessary to a majority position for the Court, he would seriously consider joining my circulation in Gertz. He was careful to add, however, that he had not studied my circulation and was expressing a highly tentative view rather than anything like a firm intention. Consequently, I think it too speculative to count Harry as part of a majority for this case.

I shall be happy to discuss this further at your convenience.

Sincerely,

The Chief Justice

lfp/ss

pp 15, 22, 23, 24, 25, 27

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr.
Mr.
Mr.

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-617

Elmer Gertz, Petitioner, v. Robert Welch, Inc. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Circulated: 1/11/74

[January —, 1974]

MR. JUSTICE POWELL delivered the opinion of the Court.

This Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment. With this decision we return to that effort. We granted certiorari to reconsider the extent of a publisher's constitutional privilege against liability for defamation of a private citizen. — U. S. — (1973).

I

In 1968 a Chicago policeman named Nuccio shot and killed a youth named Nelson. The state authorities prosecuted Nuccio for the homicide and ultimately obtained a conviction for murder in the second degree. The Nelson family retained petitioner Elmer Gertz, a reputable attorney, to represent them in civil litigation against Nuccio.

Respondent publishes American Opinion, a monthly outlet for the views of the John Birch Society. Early in the 1960's the magazine began to warn of a nationwide conspiracy to discredit local law enforcement agencies and create in their stead a national police force capable of supporting a communist dictatorship. As part of the

February 22, 1974

No. 72-617 Gertz v. Welch

Dear Bill:

I ever so much appreciate your letter of February 20, and say without hesitation that the change which you suggest is entirely agreeable to me.

I will include it in the next circulation of my opinion.

In an accidental conversation with Harry yesterday afternoon, and in response to his inquiry as to where matters stood on Gertz, I advised Harry of your letter. He expressed satisfaction and reiterated his present intention to join the four of us if necessary for a Court. But Harry is still troubled by the inconsistency with his vote in Rosenbloom and will await all circulations before voting here.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

p. 25

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

4th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Powell, J.

Circulated:

Recirculated: FEB 26 1974

No. 72-617

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[January — 1974]

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 1, 1974

No. 72-617 Gertz v. Welch

MEMORANDUM TO THE CONFERENCE:

I intend to make some response, briefly I hope, to the dissenting opinion circulated today by Byron.

I will try to give this some priority.

L.F.P., Jr.

ss

pp. 8, 15, 21, 23-25

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

5th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Powell, J.

Circulated: _____

Recirculated APR 12 1974

No. 72-617

Elmer Gertz, Petitioner, v. Robert Welch, Inc. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[January —, 1974]

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8.24

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

6th DRAFT

From: Powell, J.

Circulated: _____

Recirculated: APR 23 1974

SUPREME COURT OF THE UNITED STATES

No. 72-617

Elmer Gertz, Petitioner, v. Robert Welch, Inc. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

January — 1974

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p. 23

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

7th DRAFT

SUPREME COURT OF THE UNITED STATES

Mr. Justice Powell, J.

No. 72-617

Circulated: _____

Recirculated: APR 30 1974

Elmer Gertz, Petitioner, v. Robert Welch, Inc. } On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[January —, 1974]

MR. JUSTICE POWELL delivered the opinion of the Court.

This Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment. With this decision we return to that effort. We granted certiorari to reconsider the extent of a publisher's constitutional privilege against liability for defamation of a private citizen — U. S. — (1973).

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In 1968 a Chicago policeman named Nuccio shot and killed a youth named Nelson. The state authorities prosecuted Nuccio for the homicide and ultimately obtained a conviction for murder in the second degree. The Nelson family retained petitioner Elmer Gertz, a reputable attorney, to represent them in civil litigation against Nuccio.

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June 6, 1974

No. 72-617 Gertz v. Welch

Dear Chief:

Thank you for your note about a possible relationship between Miami Herald and Gertz on the point you mentioned.

Gertz, as written, does not eliminate punitive damages in a libel action against a newspaper where malice is proved in conformity with the New York Times standard. But Gertz would not impair the validity of a state statute, such as you suggest, which allows a newspaper to avoid punitive damages by publishing a retraction.

As you will recall, Gertz draws a distinction (and in this respect retreats from the prevailing understanding of Metromedia) between public officials and public figures, on the one hand, and all other persons who are defamed by the media. A mere showing that the defamation occurred in connection with a matter of public interest would no longer be sufficient to invoke the harsh New York Times rule.

But as to public officials and public figures, the New York Times rule - consistently followed by the Court for the past decade - would remain in effect requiring a plaintiff to show publication of the defamation with knowledge of falsity or with reckless disregard of the truth. If this type of malice were shown, punitive damages could be recovered in the absence of a state statute to the contrary.

In all other cases (not involving public officials or figures) Gertz would significantly relax the New York Times standard of liability by allowing each state to prescribe its own standard short of liability without fault.

Returning to the question raised in your letter, it would seem to me appropriate to add a note to your opinion along the

lines you suggest, namely, that nothing in the holding impairs the right of the states to proscribe pumitive damages where the newspaper publishes a retraction. As Gertz does not get into this area at all, it would be awkward and gratuitous - it seems to me - to make a reference to retraction statutes in that case.

I think your Miami Herald opinion is excellent and am sending you a join note.

Sincerely,

The Chief Justice

lfp/ss

Gertz 6/18/74

Harry —

As you may recall, Byron has fired away at the Court opinion in Gerty since I added present Note 10 (p 23 of 7th Draft).

It seems to me that some addition to Note 10, by way of reply, is warranted. Here is what I have in mind. It is substantially like present Note 10, except for the last paragraph — which is new and, I think, a rather gentle repose to Byron.

I hesitate to add to your burdens, but I would like to know — before I add it — whether the changes are acceptable to you.

Lewis.

LFP

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

Supreme Court of the United States
Washington, D. C. 20543

June 19, 1974

MEMORANDUM TO THE CONFERENCE:

No. 72-1509, Porter v. Guam Publications, Inc., et al
No. 73-467, Berry v. Natl. Broadcasting Co.
No. 73-1366, Weston v. Arkansas
No. 73-5520, Cantrell v. Forest City Publishing Co., et al

These cases appear on Page 5 of the June 21st Conference List. They have been held for No. 72-617, Gertz v. Robt. Welch, Inc.

No. 72-1509, Porter v. Guam Publications, Inc., et al.

This is a fairly ordinary libel case involving respondents' newspaper article concerning petitioner's arrest for auto theft. Petitioner asserts that the article misdescribed the offense as theft of a cash box and that it implied his guilt. The DC entered summary judgment for respondents on the ground that the article was based on the public record and did not imply petitioner's guilt and that it was therefore privileged under Guam law. The CA 9 affirmed on the ground that petitioner's complaint failed to allege that any inaccuracy was published with knowledge of its falsity or in reckless disregard of the truth. Since the CA decided this case under the authority of the plurality opinion in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), I will vote to vacate and remand for reconsideration in light of Gertz.

pp 23-24
stylistic changes throughout

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

8th DRAFT

From: Powell, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 72-617

Recirculated: JUN 20 1974

Elmer Gertz, Petitioner, v. Robert Welch, Inc. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[January —, 1974]

MR. JUSTICE POWELL delivered the opinion of the Court.

This Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment. With this decision we return to that effort. We granted certiorari to reconsider the extent of a publisher's constitutional privilege against liability for defamation of a private citizen. 410 U. S. 925 (1973).

I

In 1968 a Chicago policeman named Nuccio shot and killed a youth named Nelson. The state authorities prosecuted Nuccio for the homicide and ultimately obtained a conviction for murder in the second degree. The Nelson family retained petitioner Elmer Gertz, a reputable attorney, to represent them in civil litigation against Nuccio.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

July 10, 1974

MEMORANDUM

Messrs. Stewart, Marshall, Blackmun and Rehnquist:

In view of our "long winter of discontent" with the issues in the above case, perhaps those of us who joined - with varying degrees of reluctance - in the Court's opinion in Gertz, will derive some satisfaction from Professor Wade's enclosed letter.

He is the Reporter for the Restatement of Torts, and a recognized authority in this area.

Sincerely,

Lewis

LFP/gg

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 2, 1974

Re: No. 72-617 - Gertz v. Welch

Dear Lewis:

Please join me.

Sincerely,

WHR

Mr. Justice Powell

Copies to the Conference

February 20, 1974

Re: No. 72-617 - Gertz v. Welch

Dear Lewis:

I have already orally burdened you with my misgivings about this case, and this letter is an effort on my part to fish or cut bait. As a naked proposition of constitutional law, I think I agree with Byron's position, but I also feel quite strongly that as an institutional matter it is very desirable that there be a Court opinion in the case. I am willing to surrender my view as to the requirement, presently stated in your opinion, that in this type of case the plaintiff may not recover on a basis of absolute liability, if in turn you will make a change on page 25 that will make it clear that the standard of proof as to damages is a liberal one. One possible solution that would satisfy me on this score, though by no means the only one, would be the changing of the first full sentence on page 25 to read as follows:

> "Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury."

I gather from our conversations that this is agreeable to you, and that it is consistent with what the opinion

says elsewhere. If you can see your way clear to make that change, and if your opinion becomes the opinion of the Court, I will stay put. If not, I will in any event do nothing until Byron circulates, and do not know exactly what I will do after that.

Sincerely,

WHR

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 25, 1974

Re: No. 72-617 - Gertz v. Welch

Dear Lewis:

I have given some extended thought to the footnote 10 in this opinion, which you added in your circulation of April 12th. I feel it reaffirms New York Times more emphatically than the body of the opinion does, and much more emphatically than I would be willing to do. I feel, therefore, that if it remains in the opinion, I cannot continue to be with you.

Sincerely,

WHR

Mr. Justice Powell