DEFAMATION: CONFLICT IN THE DEFINITION OF "PUBLIC FIGURE"

Competing interests, each of which society refuses to sacrifice, necessitate a compromise. In the area of defamation, society's interest in the freedoms of speech and of the press competes with society's interest in compensating individuals whose reputations have been injured by defamatory falsehoods. The question arises as to which standard of liability best accommodates both interests.

At common law, liability was imposed without fault on publishers of false and defamatory statements.[1] Such statements "constitut[ed] a class of speech wholly unprotected by the First Amendment."[2] Typically, a prima facie case of defamation was established by pleading and proving a defamatory publication.[3] Unless defeated by the narrow defenses of truth or privilege,[4] damages automatically attached as there existed a legal presumption that injury normally flows from the fact of publication.[5] Since juries exercised "largely uncontrolled discretion" in awarding presumed damages, the practical result was substantial jury awards "as compensation for supposed damage[s] to reputation without any proof that such harm actually occurred."[6]

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[1] Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974). Defamatory statements are those that injure reputation. Since defamation is comprised of the "twin torts of libel and slander," a defamatory statement can be either written or oral. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 111, at 737, 739 (4th ed. 1971).

[2] Gertz v. Robert Welch, Inc., 418 U.S. 323, 370 (1974) (White, J., dissenting). The freedom of speech, as protected by the first amendment, was never absolute. Ten of the fourteen states which by 1792 had ratified the Constitution did not accord absolute protection for all utterances. Of these states, thirteen provided for the prosecution of libelous statements. "In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance." Roth v. United States, 354 U.S. 476, 482–83 (1957). *See also* Konigsberg v. State Bar of California, 366 U.S. 36, 49–50 (1961); Beauharnais v. Illinois, 343 U.S. 250, 254–56 (1952); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

[3] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 370–75 (1974) (White, J., dissenting). *See* RESTATEMENT OF TORTS § 558 (1938). "Publication" is a term of art which requires that the "defamation be communicated to some one other than the person defamed." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 113, at 766 (4th ed. 1971).

[4] Gertz v. Robert Welch, Inc., 418 U.S. 323, 372 (1974) (White, J., dissenting).

[5] Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974). Defamatory statements were considered to be "inherently injurious" utterances, *id.* at 380 (White, J., dissenting), resulting in "subtle and indirect" injuries. *Id.* at 373 (White, J., dissenting). Thus, "damages were presumed because of the impossibility of affixing an exact monetary amount for present and future injury to the plaintiff's reputation, wounded feelings and humiliation, loss of business, and any consequential physical illness or pain." *Id.* at 373 n.4. (White, J., dissenting).

[6] Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974).

Punitive damages further exacerbated the potential for excessive judgments.[7]

Self-censorship was often the result of the common law of defamation for it compelled a publisher or broadcaster "to guarantee the truth of all his factual assertions" under the threat of "virtually unlimited" libel judgments.[8] Because the common law in many instances stifled to an unacceptable degree the first amendment freedoms of expression,[9] it was inevitable that the competing interests would strike a new balance. The case of *New York Times Co. v. Sullivan*[10] provided the setting.

In 1960, the New York Times (Times), published a paid advertisement that was critical of the Montgomery, Alabama, police department's conduct toward Negro students participating in civil rights demonstrations.[11] In an action for libel in the Circuit Court of Montgomery County, Sullivan, the commissioner of the police department, established that factual inaccuracies within the advertisement impliedly referred to him in his capacity as commissioner.[12] The jury awarded Sullivan $500,000 in damages, "the full amount claimed,"[13] which the Supreme Court of Alabama affirmed.[14]

Granting the Times' petition for certiorari,[15] the United States Supreme Court reversed the judgment of the Supreme Court of Alabama.[16] Delivering the opinion for the Court, Justice Brennan reviewed the history of the first amendment and found to exist a

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[7] *Id.* at 350.

[8] New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964). Rather than expose themselves to potential liability, a publisher or broadcaster might choose not to voice a factual assertion because, although they believed it or knew it to be true, they feared being unable to prove its truth in court. *Id.*

[9] *Id.*

[10] 376 U.S. 254 (1964).

[11] *Id.* at 256–58, 260. The advertisement stated falsely, *inter alia*, that " 'truckloads of police armed with shotguns and teargas ringed the Alabama State College Campus,' " that the " 'dining hall was padlocked in an attempt to starve [the students] into submission' " and that the " 'Southern violators [had] answered Dr. King's peaceful protests with intimidation and violence,' " had bombed Dr. King's home and had arrested him seven times. *Id.* at 257–59.

[12] *Id.* at 256, 258. Although the advertisement did not mention Sullivan by name, he contended that the use of "the word 'police' " and imputations to the police, such as " 'they' " and " 'Southern violators,' " referred to him as the commissioner who supervised the police department. *Id.* at 258–59. The trial court agreed with Sullivan's contention. *Id.* at 263.

[13] *Id.* at 256. Based on the same advertisement, four other libel suits were initiated against the New York Times Company by local and state officials; the damages claimed totalled $2,500,000. *Id.* at 278 n.18.

[14] New York Times Co. v. Sullivan, 273 Ala. 656, 144 So. 2d 25 (1962).

[15] New York Times Co. v. Sullivan, 371 U.S. 946 (1963).

[16] 376 U.S. at 292.

"profound national commitment" to uninhibited debate on public issues.[17] Included within the scope of such debate was criticism of government and its officials.[18] Therefore, the advertisement, critical of public officials and pertaining to the major public issue of civil rights, qualified for constitutional protection.[19] A question remained as to whether that protection was forfeited by its false statements or by its defamatory content.[20]

Finding that both erroneous statements and statements injurious to the reputations of public officials are inevitably included within the scope of uninhibited debate, Justice Brennan concluded that such statements "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.' "[21] Thus, if the Constitution protects both false statements and defamatory statements, the combination of the two, a false defamatory statement directed at a public official's conduct, must also be protected.[22] To buttress this conclusion, Justice Brennan drew an analogy to the Sedition Act of 1798.[23] This Act, designed to punish those who criticized or defamed public officials, was deemed to be inconsistent with the first amendment.[24] Accordingly, state libel laws punishing

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[17] *Id.* at 270.

[18] *Id.* at 270. *See* Terminiello v. Chicago, 337 U.S. 1 (1949); De Jonge v. Oregon, 299 U.S. 353 (1937).

[19] 376 U.S. at 271.

[20] *Id. See also* note 1 *supra* and accompanying text.

[21] 376 U.S. at 271–72. (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

[22] *Id.* at 273. This conclusion was significant because it had been "the consistent view of the Court" that the constitution did not protect defamatory falsehoods. Gertz v. Robert Welch, Inc., 418 U.S. 323, 370 (1974) (White, J., dissenting). Prior to *New York Times*, the protection of citizens' reputations "ha[d] been almost exclusively the business of [the] state courts and legislatures." *Id.* at 369–70 (White, J., dissenting). Thus, the Court had carved out a limited exception to the common law of defamation by according first amendment protection to defamatory falsehoods directed at the conduct of public officials. 376 U.S. at 273. *See* note 2 *supra* and accompanying text.

[23] 376 U.S. at 273–76. The Act made it a crime for a person to

> write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . or the President . . ., with intent to defame . . . or to bring them, or either of them, into contempt or disrespute; or to excite against them, or either or any of them, the hatred of the good people of the United States.

376 U.S. at 273-74 (quoting the Sedition Act of 1798, ch. 74 § 2, 1 Stat. 596 (1798)). Violations were punishable by a $5,000 fine and five years in prison. *Id.* at 273.

[24] *Id.* at 273–76. The Sedition Act of 1798 was "a criminal libel act never tested in [the Supreme] Court and one which expired by its terms three years after enactment." Gertz v. Robert Welch, Inc., 418 U.S. 323, 356 (1974) (Douglas, J., dissenting). "The general concensus was that the Act constituted a regrettable legislative exercise plainly in violation of the First Amendment." *Id.* at 356–67 (Douglas, J., dissenting).

critics of official conduct who failed to prove the truth of their assertions were also inconsistent with the first amendment as applied to the states through the fourteenth amendment.[25] Because such laws induced an intolerable level of self-censorship,[26] it was essential that there exist "[a] defense for erroneous statement[s] honestly made" in addition to the defense of truth.[27]

Attempting to achieve the proper balance between the competing interests, the Court enunciated a "federal rule," required by the first and fourteenth amendments, which prohibits a state from awarding damages to a public official "for a defamatory falsehood relating to his official conduct unless he proves [with "convincing clarity"[28]] that the statement was made with 'actual malice.' "[29] Thus, in the absence of actual malice, a false and defamatory statement directed at a public official in his capacity as such was constitutionally privileged by the first amendment.[30] The Court defined "actual malice" as "knowledge that [the defamatory statement] was false or reckless disregard of whether it was false or not."[31]

Justice Brennan found that Sullivan, an elected city commissioner, was clearly a public official.[32] Consequently, to establish the

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[25] 376 U.S. at 278–79.

[26] *Id.*

[27] *Id.* at 278.

[28] *Id.* at 285–86.

[29] *Id.* at 279. The actual malice standard was made intentionally difficult to overcome to act as "an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander." It was clear that "many deserving plaintiffs, including some intentionally subjected to injury, [would] be unable to surmount the barrier of the *New York Times* test." Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974).

[30] *See generally* 376 U.S. at 279.

[31] *Id.* at 280. The Court clarified the meaning of the standard in *New York Times* and subsequent cases. In *New York Times*, the Court concluded that the Times' publication of the "advertisement without checking its accuracy against the news stories in the Times' own files" did not establish the requisite "recklessness" required for a showing of actual malice. Additionally, "[t]he mere presence of the stories in the files" did not establish that the Times " 'knew' " the advertisement was false. *Id.* at 286–88 (emphasis in original). In Garrison v. Louisiana, 379 U.S. 64 (1964), the Court held that the standard applied to criminal actions as well as civil actions and that a statement made with reckless disregard of whether it was false or not required that the statement be made with a "high degree of awareness of . . . probable falsity." *Id.* at 74. The Court, in St. Amant v. Thompson, 390 U.S. 727 (1968), held that for "reckless disregard" to exist, there must be "serious doubts as to the truth of [the] publication." Thus, the standard was a subjective one. *Id.* at 731. In Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967), the Court held that malice in the sense of ill will was not the same as the "actual malice" standard of *New York Times*. *Id.* at 82.

[32] 376 U.S. at 283 n.23. The Court defined the scope of the public official designation in subsequent cases. In Rosenblatt v. Baer, 383 U.S. 75 (1966), the Court held that public officials are also those "government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Id.* at 85. The Court, in

liability of the Times, Sullivan had the burden of proving with convincing clarity that the defamatory advertisement was published with actual malice and was related to his official conduct. The evidence did not sustain a finding of actual malice on the part of the Times[33] and, because the defamatory statement was an impersonal attack on a governmental operation rather than an attack on Sullivan as an individual public official, the evidence was insufficient to support a finding that the statements referred to Sullivan.[34] The judgment was reversed and the case remanded.[35]

The Court extended the actual malice standard to defamatory statements directed at public figures in the companion cases of *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*.[36] Chief Justice Warren, concurring in the result of the plurality decision, formed the basis of the majority thought to extend *New York Times*[37] when he concluded that because the public interest in public figures is often equal to that of the public interest in public officials, the first amendment required some limitations on state libel laws as applied to public figures.[38] The Chief Justice defined "public figures" as those individuals who are "intimately involved in the resolution of important public questions or, [who] by reason of their fame, shape events in areas of concern to society at large."[39] However, because public figures, unlike public officials, are not subject to the restraints of the political process, the Chief Justice reasoned that it was crucial that the press be free to debate the involvement of public figures in pub-

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Monitor Patriot Co. v. Roy, 401 U.S. 265 (1941), concluded that the standard applied to candidates for public office. *Id.* at 271. In Garrison v. Louisiana, 379 U.S. 64 (1964), the Court held that the standard applied to criticism concerning "anything which might touch on an official's fitness for office." *Id.* at 77.

[33] 376 U.S. at 286–88. The Court found a statement made by the Times' secretary that "he thought the advertisement was 'substantially correct' " to indicate an absence of malice at the time of publication. The secretary's opinion was determined to be "a reasonable one, and there was no evidence to impeach [his] good faith in holding it." *Id.* at 286. *See* note 30 *supra* and accompanying text.

[34] 376 U.S. at 292. The Court held that a state "may not constitutionally . . . establish . . . an otherwise impersonal attack on governmental operations [to be] a libel of an official responsible for those operations." *Id.*

[35] *Id.*

[36] 388 U.S. 130 (1967).

[37] *Id.* at 162. Four Justices, concurring in part in two separate opinions, agreed with the Chief Justice's "adher[ence] to the *New York Times* standard in the case of 'public figures' as well as 'public officials.' " *Id.* at 164 (Warren, C.J., concurring in result); *id.* at 170 (Black & Douglas, J.J., concurring in part, dissenting in part); *id.* at 172 (Brennan & White, J.J., concurring in part, dissenting in part).

[38] *Id.* at 162 (Warren, C.J., concurring).

[39] *Id.* at 163–64 (Warren, C.J., concurring).

lic issues and events since such debate might very well be the only means to influence their conduct.[40] Therefore, the Chief Justice adopted the *New York Times* actual malice standard in the case of public figures because it "afford[ed] the necessary insulation for the fundamental interests which the First Amendment was designed to protect."[41]

In *Rosenblatt v. Baer*,[42] a case concerning the scope of the public official designation, Justice Brennan stated that "[t]he thrust of *New York Times* [was] that when interests in public discussion are particularly strong, . . . the Constitution limits the protections afforded by the law of defamation."[43] This interpretation of *New York Times* proved sound because the Court, having extended the qualified constitutional privilege to defamatory falsehoods directed at public officials and public figures, next extended the privilege to defamatory falsehoods concerning those private individuals who had become involved in matters of "public or general interest."[44] The initiative to do so was provided by the case of *Rosenbloom v. Metromedia, Inc.*[45] in which a jury rendered a three-quarter-million dollar verdict for a private individual in a libel action against a radio station.[46]

Rosenbloom, a distributor of allegedly obscene magazines, was arrested while making a delivery to a retail newsstand in Philadel-

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[40] *Id.* at 164 (Warren, C.J., concurring).

[41] *Id.* at 164–65 (Warren, C.J., concurring). *Butts* involved a libel action arising from a false accusation by the Saturday Evening Post that Wally Butts, the athletic director of the University of Georgia, had conspired to fix a football game between the University of Georgia and the University of Alabama. Butts had previously been the University's head football coach and was "a well-known and respected figure in coaching ranks." *Id.* at 135–36. The Supreme Court found Butts to be a public figure, *id.* at 154, and affirmed the damage award of $460,000 which had been reduced by remittitur from $3,060,000. *Id.* at 138, 161. However, the standard applied was not actual malice but a "highly unreasonable conduct" test. *Id.* at 155.

Walker involved a news dispatch that Walker, a well-known retired Army general, had taken command of a violent crowd and personally led a charge against Federal Marshalls enforcing a Court decree ordering the enrollment of a Negro at the University of Mississippi. *Id.* at 140. In a libel action against Associated Press, a jury awarded Walker $800,000. *Id.* at 141. Finding no evidence of actual malice, the Supreme Court reversed. *Id.* at 158–59, 161–62.

[42] 383 U.S. 75 (1966). *Rosenbaltt* concerned a supervisor of a county recreation area who was allegedly libelled by a local newspaper column which implied that the supervisor had embezzled public monies. *Id.* at 77-78. The public official designation was held to include those government employees who have "such apparent importance that the public has an independent interest in the[ir] qualifications and performance." *Id.* at 86.

[43] *Id.* at 86.

[44] Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43–44 (1971).

[45] 403 U.S. 29 (1971).

[46] *Id.* at 40.

phia.[47] Three days later, the police obtained a warrant and seized Rosenbloom's entire inventory of books and magazines from his residence and his warehouse.[48] He was subsequently acquitted of criminal obscenity charges because his materials were found not to be obscene as a matter of law.[49] Following his acquittal, he instituted an action for libel against a radio station which, in reporting on the arrest and judicial proceedings, had referred to him and his associates as " 'smut distributors' " and " 'girlie-book peddlers' " and had unqualifiedly stated that the seized books and magazines were obscene.[50] Under Pennsylvania state law, these statements were false and defamatory and, accordingly, the jury returned a verdict for Rosenbloom.[51] The Court of Appeals for the Third Circuit held that the actual malice standard was applicable and reversed.[52] The Supreme Court of the United States granted certiorari.[53]

The Court, in a plurality opinion, noted that common to *New York Times* and its progeny was a defamatory falsehood contained in a newsmedia report of an event of " 'public or general interest.' "[54] Accordingly, the plurality focused not on the public or private status of the individual defamed as prior opinions had done, but on the public's interest in certain events and the participants in those events.[55] Accepting the *New York Times* conclusion that there exists a " 'profound national commitment' " to uninhibited debate on " *'public issues,'* " the plurality reasoned that a matter of "public or general interest . . . cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved."[56] Therefore, the

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[47] *Id.* at 32. Rosenbloom distributed nudist magazines throughout the Philadelphia metropolitan area. *Id.* His arrest was the result of "a series of enforcement actions under the city's obscenity laws" directed at those newsstand operators who sold such materials. *Id.*

[48] *Id.* at 33.

[49] *Id.* at 36.

[50] *Id.*

[51] *Id.* at 37–40. On remittitur, the district court reduced the jury award from $750,000 to $275,000. *Id.* at 40.

[52] Rosenbloom v. Metromedia, Inc., 415 F.2d 892, 898 (3d Cir. 1969), *aff'd*, 403 U.S. 29 (1971).

[53] Rosenbloom v. Metromedia, Inc., 397 U.S. 904 (1970).

[54] 403 U.S. at 30–31 (footnote omitted). The eight participating judges announced their views in five separate opinions, none of which commanded more than three votes. *Id.* at 30, 57, 62, 78.

[55] *Id.* at 44.

[56] *Id.* at 43. (Court's emphasis) (quoting *New York Times*, 376 U.S. at 270). The plurality used the term "public issues" set forth in *New York Times* to justify the applicability of the actual malice standard turning on "matters of general or public interest." *Id.*

Court held that the *New York Times* privilege should extend "to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."[57] If a defamatory statement stemmed from an event that was not of public interest, an individual would still recover under the common law standard of liability without fault.[58] Thus, under the public interest analysis, whether or not a defamatory statement was constitutionally privileged depended on the Court's determination that the event giving rise to the defamation was or was not an event of public or general concern.[59]

Turning to the facts, the plurality found the proper enforcement of criminal obscenity laws to be of vital community interest.[60] To establish the liability of Metromedia, Inc., Rosenbloom had to prove with "clear and convincing" evidence that the defamatory statements were made with actual malice.[61] There was no evidence in the record to sustain this burden.[62]

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[57] *Id.* at 43–44. Thus, the plurality ceased analyzing the status of the plaintiff, that is, the use of the public official, public figure and private individual designations developed in *New York Times* and *Butts*, in favor of a "public interest" analysis which did not consider the status of the plaintiff. *Id.*

[58] *Id.* at 44 n.12. The common law standard of strict liability was viewed as the controlling standard for libels and slanders from which *New York Times* and *Butts* carved out narrow exceptions, that is, privileges, for defamatory falsehoods concerning public officials and public figures. *See* notes 28–41 *supra* and accompanying text. The effect of the *Rosenbloom* "public interest" analysis was to carve out an extremely broad privilege for defamatory falsehoods concerning those individuals who became involved in matters of public interest. *See* note 57 *supra*.

[59] Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974). The following are lower court decisions which have defined the breadth of the *Rosenbloom* "public interest" privilege: Post v. Oregonian Publishing Co., 268 Or. 214, 519 P.2d 1258 (1974) (plaintiff incorrectly named by police as drug smuggling suspect to be involved in matter of public interest); Mistrot v. True Detective Publishing Corp., 467 F.2d 122, 123–24 (5th Cir. 1972) (story concerning double murder which stated plaintiff to be present was story involving matter of public interest); Schwartz v. Time, Inc., 71 Misc. 2d 769, 337 N.Y.S.2d 125, 127, 129 (Sup. Ct. N.Y. County 1972) (article on organized crime which characterized plaintiff as being gambler and unsavory to be matter of public interest).

[60] 403 U.S. at 43.

[61] *Id.* at 52. In contrast, the Court in *New York Times* required that actual malice be proven with convincing clarity. 376 U.S. at 285–86. It is reasonable to assume that the convincing clarity and clear and convincing standards are one and the same since the plurality in *Rosenbloom* used the terms interchangeably. *See* 403 U.S. at 52, 55. The standards fall between " 'preponderance of the evidence' " and " 'beyond a reasonable doubt' " because, historically, the clear and convincing standard required a plaintiff in a civil case to bear more of a burden than a " 'preponderance.' " J. NOWAK, HANDBOOK ON CONSTITUTIONAL LAW, ch. 18, at 782-83 (1st ed. 1978) (emphasis in original).

[62] 403 U.S. at 55.

The plurality's decision to abandon the analysis of the status of the person defamed in favor of a public interest analysis deprived an individual, whether public or private, whether voluntarily or involuntarily involved in a matter of public interest, of recourse for injury to his reputation unless he could satisfy the demanding requirements of the actual malice standard.[63] The analysis, formulated by a fragmented Court, proved too extreme to endure as it inadequately balanced the competing interests at stake.

Within three years, in *Gertz v. Robert Welch, Inc.*,[64] the Court chose to adopt a less extreme position that was more protective of the reputations of private individuals than was the position taken by the *Rosenbloom* plurality. Following a Chicago policeman's conviction for murder, the victim's family retained Elmer Gertz, an attorney, to represent them in civil litigation against the policeman.[65] Gertz had no connection with the criminal trial other than having attended the coroner's inquest into the youth's death.[66] The American Opinion, a monthly publication expressing the views of the John Birch Society, published an article stating that the convicted officer had been "framed" at the criminal trial and that the prosecution was part of a communist conspiracy to discredit local law enforcement agencies.[67] In addition, the article contained allegedly false and defamatory statements;[68] it accused Gertz of engineering the "frame-up"; implied that he had a criminal record; and labelled him "a 'Leninist' and a 'Communist-fronter' " and a member of a socialist society.[69]

Gertz filed an action for libel in a United States district court which ruled that the *New York Times* standard was not applicable as Gertz was neither a public official nor a public figure.[70] After the jury rendered a verdict for Gertz, the court, on further reflection, entered a judgment notwithstanding the verdict. The court concluded

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[63] *Id.* at 43–44.

[64] 418 U.S. 323 (1974).

[65] *Id.* at 325. The policeman had been prosecuted for homicide and was subsequently convicted for murder in the second degree. *Id.*

[66] *Id.* at 326.

[67] *Id.* at 325–26.

[68] *Id.* at 327.

[69] *Id.* at 326.

[70] *Id.* at 327–28. Had Gertz been found to be a public official or public figure, a directed verdict would have been required because the evidence did not sustain a finding of actual malice. *Id.* at 328. The editor of the American Opinion "denied any knowledge of the falsity of the statements concerning [Gertz]" and stated that he relied on the reputation of the article's author, "a regular contributor to the magazine," and on the accuracy and authenticity of the author's prior contributions to the American Opinion. *Id.* at 325, 328.

that the *New York Times* standard was applicable due to the presence of a public issue, the discussion of which was privileged without regard to the status of the person defamed.[71] After granting certiorari,[72] the Supreme Court of the United States reversed.[73]

Rejecting the extension of the actual malice standard proposed by the *Rosenbloom* plurality,[74] and approving of the extension of the standard to public officials and public figures,[75] the *Gertz* Court concluded that the state interest in redressing wrongful injury to the reputations required that a different standard should apply to private individuals.[76] In contrast to the plurality in *Rosenbloom*, Justice Powell, writing for the Court in *Gertz*, had "no difficulty in distinguishing among defamation plaintiffs," that is, categorizing plaintiffs as public officials, public figures or private individuals.[77] Two justifications were advanced for these distinctions: self-help and voluntary exposure to increased risk of injury from defamatory falsehood.[78] Self-help was defined as a defamation plaintiff's ability to use "available opportunities" to rebut a defamatory statement, thereby minimizing its adverse effect on the plaintiff's reputation.[79] Because public persons usually possess sufficient access to the media, they have effective opportunities to rebut injurious statements.[80] Private persons, lacking such opportunities because they enjoy little or no media access, are more vulnerable to injury, and are therefore more deserving of protection.[81] The more important distinction enunciated by the Court was that public persons, unlike private persons, voluntarily expose themselves to public scrutiny, thereby increasing the risk of injury from defamatory comments.[82] Even if a public person has not voluntarily run this risk, the media is entitled to assume otherwise, whereas "[n]o such assumption is justified with respect to a private

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[71] *Id.* at 329. *See* notes 54–58 *supra* and accompanying text.

[72] Gertz v. Robert Welch, Inc., 410 U.S. 925 (1973).

[73] 418 U.S. at 352.

[74] *Id.* at 346. *See* notes 54–58 *supra* and accompanying text.

[75] 418 U.S. at 343. The Court found *New York Times* and *Butts* to be "correct." *Id.*

[76] *Id.*

[77] *Id.* at 344. The plurality in *Rosenbloom* abandoned these distinctions, reasoning that "the First Amendment's impact upon state libel laws . . . derives from the question whether the allegedly defamatory publication concerns a matter of public or general interest." 403 U.S. at 44. *See* notes 54–58 *supra* and accompanying text.

[78] 418 U.S. at 344–45.

[79] *Id.* at 344.

[80] *Id.*

[81] *Id.*

[82] *Id.* at 344–45.

individual" since "[h]e has relinquished no part of his interest in the protection of his own good name."[83]

Since private individuals are therefore more vulnerable to injury and more deserving of recovery than are public officials and public figures, the Court determined that "the state interest in protecting them is correspondingly greater."[84] Because the *Rosenbloom* extension of the actual malice standard abridged this legitimate state interest to an unacceptable degree, the *Gertz* Court rejected that extension holding that private defamation plaintiffs were no longer required to prove actual malice to establish a defendant's liability.[85] Additionally, the public interest analysis announced in *Rosenbloom* forced judges on all levels to determine on an ad hoc basis which events or issues are of public interest and which are not.[86] "[D]oubt[ing] the wisdom of committing this task to the conscience of [the] judges," the Court in *Gertz* found such judicial determinations to be inappropriate.[87]

Concluding that both liability without fault and actual malice failed to adequately balance the competing interests, the Court 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."[88] Under this rule, to establish the liability of the media defendant, the private plaintiff "must prove not only the defamatory statement but also some degree of fault accompanying it."[89]

Having removed the standard that shielded the media from liability to private defamation plaintiffs, the *Gertz* Court was once again confronted with the possibility of self-censorship stemming from jury awards of presumed and punitive damages. To temper this potential chilling effect, the Court held that such plaintiffs, absent a showing of actual malice, could recover damages for actual injury only.[90] Thus, the states were no longer permitted to allow recovery of presumed or punitive damages unless the plaintiff proved that the statements were made with actual malice.[91]

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[83] *Id.* at 345.

[84] *Id.* at 344.

[85] *Id.* at 346–47.

[86] *Id.* at 346. *See* note 59 *supra*.

[87] 418 U.S. at 346.

[88] *Id.* at 346–47. The Court stated that its holding obtains where "the substance of the defamatory statement 'makes substantial danger to reputation apparent.' " *Id.* at 348 (quoting Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967)).

[89] 418 U.S. at 392 (White, J., dissenting).

[90] *Id.* at 349–50. These damages had to be supported by "competent evidence." *Id.*

[91] *Id.* at 349.

Since different standards applied to public persons and private individuals, the Court had to determine the public or private status of Gertz for the purpose of establishing whether he was subject to the actual malice standard or to a state-defined standard.[92] Because there was no basis to conclude that he was a public official,[93] Gertz was either a public figure or a private individual. To distinguish between these two designations, the Court defined the public figure as an individual who "achieve[s] such pervasive fame or notoriety that he becomes a public figure for all purposes" or an individual who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case, such persons assume special prominence in the resolution of public questions."[94] Although Gertz had been "active in community and professional affairs," the Court felt he could not be classified as an "all purpose" public figure since he had not achieved general fame or notoriety in the community.[95] Noting that when determining an individual's status it was preferable to focus on "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation," the Court concluded that Gertz had taken no part in the criminal trial, had never discussed with the press either the criminal or civil trial, and had limited his role at the coroner's inquest to the representation of his private client.[96] While Gertz did involve himself in a matter certain to receive extensive publicity, "[h]e plainly did not thrust himself into the vortex of [the] public issue, nor did he engage the public's attention in an attempt to influence its outcome."[97] Therefore, in the opinion of the Court, Gertz was not a voluntary public figure but a private individual and the actual malice standard was not applicable.[98]

By requiring a private individual to make a showing of fault to establish the media defendant's liability, and by limiting his recovery to actual injury absent a showing of actual malice, *Gertz* shielded the

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[92] *See id.* at 343–46, 351.

[93] *Id.* at 351. Appointed by the Mayor of Chicago, Gertz had served on housing committees but did not hold a government position at the time of the defamatory publication. *Id.* The Court rejected the contention that Gertz, due to his presence at the coroner's inquest, was rendered a " 'de facto public official.' " *Id.*

[94] *Id.* The Court noted that the instance of the involuntary public figure, those drawn into a public controversy "through no purposeful action of [their] own," "must be exceedingly rare." *Id.* at 345, 351.

[95] *Id.* at 351–52.

[96] *Id.* at 352.

[97] *Id.*

[98] *Id.* at 352.

media from the common law rigors of liability without fault and punitive and presumed damages.[99] The Court's decision to use the defamed person's status rather than the *Rosenbloom* public interest analysis as the vehicle for determining the applicability of the actual malice standard recognized, unlike the plurality in *Rosenbloom*, the strength of the state interest in protecting the reputations of private individuals.[100]

The soundness of the Court's position in *Gertz* was tested for the first time in *Time, Inc. v. Firestone*[101] which involved an inaccurate report on the outcome of a divorce proceeding. Mrs. Firestone had filed a complaint for separate maintenance from her husband, Russell Firestone,[102] "an heir to the immense Firestone rubber fortune,"[103] who counterclaimed for a divorce.[104] After a seventeen-month trial, Mr. Firestone was granted a divorce on the sole ground of extreme cruelty and Mrs. Firestone was awarded $3,000 per month in alimony.[105] Describing the outcome of the litigation, Time magazine (Time) published an article stating that Mrs. Firestone had been divorced by her husband on the ground of extreme cruelty and adultery[106] when, in fact, the divorce had not been granted on the ground of adultery.[107] Upon the denial of her request for a retraction of the defamatory publication, Mrs. Firestone instituted a libel action against Time in the Florida Circuit Court.[108] A jury verdict was rendered for Mrs. Firestone and judgment was entered against Time for $100,000.[109] The Supreme Court of Florida affirmed the

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[99] *Id.* at 346–49.

[100] *Id.* at 346–48. After "struggl[ing] for nearly a decade," the Court believed it had arrived at an equitable accommodation between the law of defamation and the freedoms of expression. *Id.* at 325, 347–48. The Supreme Court handed down as a guide to all lower courts a definitive ruling to bring consistency and stability to this area of the law.

[101] 424 U.S. 448 (1976).

[102] *Id.* at 450.

[103] Time, Inc. v. Firestone, 271 So. 2d 745, 747 (Fla. 1972).

[104] 424 U.S. at 450.

[105] *Id.* at 451, 458–59.

[106] *Id.* at 451-52. The following article, as quoted by the Court, appeared in Time magazines's Milestone section:

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

Id. at 452.

[107] *Id.* at 458–59; Time, Inc. v. Firestone, 271 So. 2d 745, 746 (Fla. 1972).

[108] 424 U.S. at 452.

[109] *Id.*

judgment of the Florida Circuit Court[110] and, on petition by Time, the United States Supreme Court granted certiorari.[111]

Time contended that, because Mrs. Firestone was a public figure, its liability could only be established by a showing that the defamatory statements concerning Mrs. Firestone were published with actual malice.[112] Responding to this contention, the Court, after quoting in part the definition of "public figure" as formulated in *Gertz*, held Mrs. Firestone not to be included in that classification.[113] The Court found that Mrs. Firestone had not assumed a "role of especial prominence in the affairs of society other than perhaps Palm Beach society" and had not thrust herself into a public controversy to influence the issues involved.[114]

Attempting to buttress its conclusion that Mrs. Firestone was not a public figure, the Court, analyzing the nature of the event from which the defamatory statements stemmed, noted that divorce through judicial proceedings was not a "public controversy" as that term was used in *Gertz*.[115] The Court reasoned that the public controversy that did arise from the litigation instituted by Mrs. Firestone

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[110] *Id.*

[111] 421 U.S. 909 (1975).

[112] 424 U.S. at 452–53.

[113] *Id.* at 453–55.

[114] *Id.* at 453, 454 n.3. The Court, failing to offer a supporting rationale, discussed the determination as to Mrs. Firestone's status by simply repeating the *Gertz* public figure definition in the form of a conclusion. *Id.* Arguably, the Court's conclusion as to the private status of Mrs. Firestone was incorrect. Mrs. Firestone was "well-known" to the public prior to the defamatory publication. Time, Inc. v. Firestone, 271 So.2d 745, 751 (Fla. 1972). She had been the wife of Russell Firestone, "the scion of one of America's wealthier industrial families." 424 U.S. at 450. As an active member of the "sporting set" and "prominent among the '400' of Palm Beach society," Time, Inc. v. Firestone, 271 So.2d 745, 751 (Fla. 1972), Mrs. Firestone attracted media protection sufficient "to warrant her subscribing to a press-clipping service." 424 U.S. at 485 (Marshall, J., dissenting). Because of her social prominence, the seventeen-month divorce trial was a " 'veritable *cause celebre* in social circles across the country' " which received national publicity and generated no fewer than eighty-eight newspaper articles in the Palm Beach area alone. *Id.* (Marshall, J., dissenting). These facts go beyond revealing the divorce to be an event of public interest to establish that Mrs. Firestone possessed the characteristics of an all purpose public figure including fame and notoriety. Mrs. Firestone might also have qualified as a voluntary public figure for purposes of limited discussion in relation to her divorce proceedings. She instituted litigation that was sure to attract public attention and voluntarily thrust herself into the public eye by holding several press conferences during the divorce trial. *Id.* at 450, 454 n.3. Her ability to hold press conferences shows that she possessed the attributes of a public figure as described in *Gertz*: self-help and willingness to voluntarily expose oneself to public scrutiny. 418 U.S. at 344–45. *See* text accompanying notes 76–80 *supra*. If these actions failed to establish that Mrs. Firestone "voluntarily exposed [herself] to increased risk of injury from defamatory falsehood," they were sufficient to justify the media's assumption that such exposure did exist. 418 U.S. at 345.

[115] 424 U.S. at 454.

was not a result of her voluntarily choosing to publicize her divorce, but was a result of the necessity to resort to a public forum, the courtroom, in order to dissolve her marriage.[116] Mrs. Firestone was "drawn into a public forum largely against [her] will in order to attempt to obtain the only redress available" to her.[117] "[I]n such an instance '[r]esort to the judicial process . . . is no more voluntary in a realistic sense than that of the defendant called upon to defend [her] interests in court.' "[118] Thus, because Mrs. Firestone was involuntarily "drawn into" a public controversy not of the nature referred to in *Gertz*, she was not a public figure and, therefore, did not have to prove actual malice to establish liability.[119]

The Supreme Court next addressed the subject of the limited-issue public figure three years later in *Hutchinson v. Proxmire*[120] and *Wolston v. Reader's Digest Association*,[121] both of which were decided on the same day.

In *Hutchinson v. Proxmire*, plaintiff Dr. Ronald Hutchinson was a behavioral research scientist studying causes of animal and human aggression whose research was funded by grants from various governmental agencies.[122] Defendant William Proxmire, a United States Senator from Wisconsin, served on subcommittees of the Senate Committee on Appropriations.[123] He reviewed governmental spending and made recommendations on the desirability of appropriations to the same agencies which funded Hutchinson's studies.[124] In 1975, Senator Proxmire established the " 'Golden Fleece of the Month Award,' " a sarcastic award aimed at discouraging wasteful government spending through adverse publicity.[125] He assigned his legisla-

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[116] *Id.*

[117] *Id.* at 457.

[118] *Id.* at 454 (quoting Boddie v. Connecticut, 401 U.S. 371, 376–77 (1971)).

[119] *Id.* at 454–55, 457. In addition, Time contended that the *New York Times* privilege should be automatically extended to reports of judicial proceedings, including false and defamatory reports. *Id.* at 455. Finding no such blanket privilege in the Constitution, the Court rejected the contention. *Id.* at 455–56. The Court, however, did cite with approval Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), which held "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." 424 U.S. at 455 (emphasis added).

[120] 99 S. Ct. 2675 (1979).

[121] 99 S. Ct. 2701 (1979).

[122] 99 S. Ct. at 2677–78. His research was funded by government grants obtained from the National Science Foundation (NSF), the National Aeronautics and Space Administration (NASA), the Office of Naval Research (ONR) and other government agencies. *Id.*

[123] Hutchinson v. Proxmire, 431 F. Supp. 1311, 1316 (W.D. Wis. 1977).

[124] *Id.*

[125] *Id.*

tive assistant, Schwartz, to investigate potential "Fleece" candidates and to provide him with one example each month.[126] Selected by Schwartz for a "Fleece" award were the government agencies which, over a seven year period, had spent over a half-million dollars to fund Hutchinson's aggression studies.[127] The award was the subject of a speech on the Senate floor, a press release which was in essence a text of the speech, and a newsletter mailed to Proxmire's constituents; all criticized Hutchinson and questioned the value of his research.[128] Hutchinson, claiming eight million dollars in damages,[129] brought suit in the United States District Court for the Western District of Wisconsin against Senator Proxmire and Schwartz, alleging, *inter alia*, defamation.[130] The defendants moved for summary judgment claiming immunity under the speech or debate clause.[131] In addition, they claimed their statements concerning Hutchinson were privileged under the first amendment because Hutchinson was a public figure.[132] Relying on both these grounds, the district court granted the motion,[133] and the court of appeals affirmed.[134] On a grant of *certiorari*,[135] the United States Supreme Court reversed.[136]

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[126] *Id.*

[127] 99 S. Ct. at 2677–78.

[128] *Id.* at 2678–79. In addition, Schwartz made follow up phone calls to the government agencies to discuss their reactions to the award and Senator Proxmire commented on Hutchinson's award during radio and television interviews. *Id.* at 2679. Senator Proxmire was not certain if he delivered the speech on the Senate floor or inserted it into the Congressional record. *Id.* at 2678 n.3.

[129] Hutchinson v. Proxmire, 431 F. Supp. 1311, 1315 (W.D. Wis. 1977).

[130] 99 S. Ct. at 2677, 2679.

[131] *Id.* at 2679.

[132] *Id.* at 2679–80.

[133] 431 F. Supp. 1311 (W.D. Wis. 1977).

[134] Hutchinson v. Proxmire, 579 F.2d 627 (7th Cir. 1978). Concerning the first amendment issue, both lower courts found Hutchinson to be a public figure for the limited purpose of comment on his receipt of federal funds for research projects. 579 F.2d at 1034–35; 431 F. Supp. at 1327. This finding was based on Hutchinson's active solicitation of grants, his publication of "numerous articles" regarding his research and "local press coverage" of his research and receipt of federal grants. 579 F.2d at 1034–35; 431 F. Supp. at 1327. Additionally, because Hutchinson responded to Proxmire's press release with his own press release, the court of appeals found Hutchinson possessed sufficient access to the media to be designated a public figure. 579 F.2d at 1035. However, the Supreme Court found that these factors failed to demonstrate "that Hutchinson was a public figure *prior* to the controversy engendered by the Golden Fleece Award." 99 S. Ct. at 2688 (emphasis added). The district court also found Hutchinson to be a public official. 431 F. Supp. at 1327. However, because the court of appeals did not determine the validity of that finding, the Supreme Court did not address the issue. 99 S. Ct. at 2680 n.8.

[135] Hutchinson v. Proxmire, 99 S. Ct. 832 (1978).

[136] 99 S. Ct. at 2688.

After concluding that the speech, press release and the newsletter were not within the legislative process and, therefore, not protected by the speech or debate clause, the Court turned to the first amendment issue.[137] Writing for the Court, Chief Justice Burger found Hutchinson to be no different from the other "countless members of his profession."[138] His articles in professional journals were not directed at the public, but at a small category of professionals.[139] The Chief Justice noted that if the effect of the "Fleece" award was to make the subject of the articles a matter of controversy, such a controversy was not determinative of the public figure question because a defamation defendant cannot draw attention to a private person through defamatory statements, thereby transforming him into a public figure, and then base his defense on the public figure status of the person defamed.[140] Similarly, because Hutchinson's media access was created by the award, he did not enjoy "the regular and continuing access to the media that is one of the accoutrements of having become a public figure."[141]

Hutchinson had not thrust himself or his views into a public controversy by applying for and receiving government funds as there was no identifiable controversy.[142] There existed only a broad concern about government spending which Hutchinson had not attempted to influence.[143] Thus, because he had not "invited that degree of public attention and comment on his receipt of federal grants essential to meet the public figure level," Hutchinson was found to have retained his private status.[144]

Wolston v. Reader's Digest Association involved a libel action against the author and the publishers of a book which was alleged to have incorrectly identified the plaintiff as a Soviet spy indicted for espionage.[145] In January of 1957, as a result of a major investigation

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[137] *Id.* at 2681 n.10, 2687. The Court concluded that newsletters and press releases were "primarily means of informing those outside the legislative forum." *Id.* at 2687. From this conclusion, it followed that the follow-up telephone calls and interviews were not protected. *Id.* at 2681 n.10. *See also* United States v. Brewster, 408 U.S. 501, 512–13 (1972); United States v. Johnson, 383 U.S. 169, 172 (1966).

[138] 99 S. Ct. at 2688.

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id. Hutchinson v. Proxmire* posed a question never before decided by the Court — "whether the [actual malice] standard can apply to an individual defendant rather than to a media defendant." The Court's conclusion that Hutchinson was not a public figure made it unnecessary to decide the question. *Id.* at 2687 n.16.

[145] 99 S. Ct. at 2703–04.

by a federal grand jury into the activities of Soviet intelligence agents in the United States, Myra and Jack Soble were arrested for, and pleaded guilty to, espionage.[146] The Sobles' nephew, Ilya Wolston, testified on various occasions before the grand jury.[147] He failed, however, to respond to a subpoena requiring him to appear on July 1, 1958, and was charged with contempt.[148] After pleading guilty, Wolston received a one-year suspended sentence and was placed on probation for three years.[149] Reports of the contempt charge and subsequent sentencing appeared in fifteen articles in various newspapers.[150] Thereafter, Wolston resumed "the private life he had led prior to [the] issuance of the grand jury subpoena."[151] Sixteen years later, in 1974, the book *KGB, The Secret Work of Soviet Agents,* authored by John Barron and published by Reader's Digest, identified Wolston as a Soviet spy and contained an ambiguous passage that could have been read as implying that Wolston's contempt conviction followed his indictment for espionage.[152] No such indictment was in fact handed down.[153]

In a diversity action brought against John Barron, Reader's Digest, and subsequent publishers of *KGB, The Secret Work of Soviet Agents* in the United States District Court for the District of Colum-

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[146] *Id.* at 2704–05.

[147] *Id.* at 2705.

[148] *Id.*

[149] *Id.* Wolston's sentence was "conditioned on his cooperation with the grand jury in any further inquiries regarding Soviet espionage." *Id.*

[150] *Id.* The articles appeared in Washington, D.C. and New York newspapers "during the six-week period between [Wolston's] failure to appear before the grand jury and his sentencing." *Id.*

[151] *Id.*

[152] *Id.* at 2703. The passage read as follows:

> Among Soviet agents identified in the United States were Elizabeth T. Bentley, Edward Joseph Fitzgerald, William Ludwig Ullman, William Walter Remington, Franklin Victor Reno, Judith Coplon, Harry Gold, David Greenglass, Julius and Ethel Rosenberg, Morton Sobell, William Perl, Alfred Dean Slack, Jack Soble, *Ilya Wolston,* Alfred and Martha Stern.*
>
> * No claim is made that this list is complete. It consists of Soviet agents who were convicted of espionage or falsifying information or perjury and/or contempt charges following espionage indictments or who fled to the Soviet bloc to avoid prosecution . . . .
>
> In addition, the index to KGB lists petitioner as follows: "Wolston, Ilya, Soviet agent in U.S."

Id. (Court's emphasis) (citation omitted). The passage can be read as stating falsely that Wolston had been convicted of contempt following his conviction for espionage or, as its author suggests, that Wolston had been convicted of contempt following the conviction for espionage of others.

[153] *Id.* at 2705.

bia,[154] Wolston sought damages claiming that the passages were false and defamatory.[155] The court declared him to be "a public figure for the limited purpose of comment on his connection with, or involvement in, espionage in the 1940s and 1950s."[156] Though the court agreed that the passage "appear[ed] to state falsely that [Wolston] was indicted for espionage," it concluded that the evidence raised no genuine issue of fact as to the question of actual malice and, accordingly, granted the defendants' motions for summary judgment.[157] The Court of Appeals for the District of Columbia affirmed.[158] The United States Supreme Court granted certiorari[159] and subsequently reversed, holding that the lower courts had incorrectly determined Wolston to be a public figure.[160]

Though it was not at issue, Justice Rehnquist, writing for the majority, found Wolston not to be a public figure for all purposes.[161] In contrast to those who possess " 'fame or notoriety' " or " 'persuasive power or influence,' "[162] Wolston had "led a thoroughly private existence prior to the grand jury inquiry and [had] returned to a position of relative obscurity after his sentencing."[163]

The lower courts had found that by failing to comply with the grand jury subpoena and thereby subjecting himself to a contempt citation, Wolston had thrust himself into the public controversy surrounding the espionage investigation in a way that "invited [public] attention and comment" and thereby had become a public figure for a limited purpose.[164] Disagreeing, Justice Rehnquist concluded that it was "more accurate to say that [Wolston] was dragged unwillingly into the controversy" by the government pursuant to its investigation.[165] The Justice explained that *Gertz*, in rejecting *Rosenbloom*,

[154] Wolston v. Reader's Digest Ass'n, 429 F. Supp. 167, 168 (D.D.C. 1977). Reader's Digest was the initial publisher. The Book-of-the-Month Club, Inc., MacMillan Book Clubs, Inc. and Bantam Books, Inc. were also named as defendants because they, under contract with Reader's Digest, subsequently published the books containing the defamatory falsehoods. 99 S. Ct. at 2703 n.1.

[155] 99 S. Ct. at 2703–04.

[156] 429 F. Supp. at 176 (footnote omitted).

[157] *Id.* at 180–81. There was no evidence to support a finding of actual malice because the author's explanation of the ambiguous passage was "plausible and, in the court's opinion, offered in good faith." *Id.* at 180.

[158] Wolston v. Reader's Digest Ass'n, 578 F.2d 427 (D.C. Cir. 1978).

[159] Wolston v. Reader's Digest Ass'n, 99 S. Ct. 832 (1979).

[160] 99 S. Ct. at 2704.

[161] *Id.* at 2706. The respondents did not contend that Wolston was an all-purpose public figure. *Id.*

[162] *Id.* (quoting *Gertz*, 418 U.S. at 345).

[163] *Id.*

[164] *See* 578 F.2d at 431; 429 F. Supp. at 177 n.33.

[165] 99 S. Ct. at 2707.

had clearly established the principle that a person's private status cannot be forfeited by his voluntary association with an issue certain to receive media exposure.[166] Accordingly, by choosing not to respond to the grand jury subpoena, a choice likely to invite commentary by the press, Wolston did not lose his private status.[167] Once ensnared in the controversy, the private nature and limited extent of his participation was consistent with that of a private individual rather than a public figure.[168] Wolston did not discuss his involvement with the press and limited his participation "to that necessary to defend himself [against] the contempt charge" and accepted his punishment passively.[169] Because Wolston had been dragged into a controversy in which he attempted to remain a private man, Justice Rehnquist "declin[ed] to hold that his mere citation for contempt rendered him a public figure for purposes of comment on the investigation of Soviet espionage."[170]

In accordance with *Gertz*, the Court defined the voluntary public figure as one who not only thrusts himself into the public eye, but does so as an attempt "to influence the resolution of the issues involved."[171] Having found that Wolston did not inject himself into the controversy, Justice Rehnquist also found no indication that his non-compliance with the subpoena was "calculated to draw attention to himself in order to invite public comment or [to] influence the public with respect to any issue."[172] Rather, the evidence indicated that Wolston's failure to obey the subpoena was the "result of his poor health."[173] Since there existed "no basis whatsoever for concluding that [he had] relinquished, to any degree, his interest in the protection of his own name," Wolston had not waived his status as a private individual.[174]

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[166] *Id.* To hold otherwise would be to permit "mere newsworthiness" to be determinative of the public figure issue, a proposition repudiated in *Gertz*. *Id.* at 2708. Elmer Gertz, an attorney, retained his private status despite his voluntary representation of a client in litigation certain to receive extensive publicity. *Gertz*, 418 U.S. at 352. *See* text accompanying notes 95–98 *supra*.

[167] 99 S. Ct. at 2707.

[168] *Id.*

[169] *Id.* at 2707–08.

[170] *Id.* at 2707.

[171] 418 U.S. at 345.

[172] 99 S. Ct. at 2708.

[173] *Id.* Wolston lived in Washington, D.C., and because the federal grand jury conducting the investigation sat in New York City, Wolston, when subpoenaed "on various occasions," was forced to travel to New York. *Id.* at 2705. Wolston claimed that he was unable to travel to New York to testify on July 1, 1958, "because of his state of mental depression." *Id.*

[174] *Id.* at 2708.

Additionally, Justice Rehnquist rejected the second contention advanced by the respondents "that any person who engages in criminal conduct automatically becomes a public figure for purposes of comment on a limited range of issues relating to his conviction."[175] The Justice found no apparent reason why those "drawn into" a courtroom "largely against their will," whether to defend themselves or to obtain redress, should "forfeit that degree of protection which the law of defamation would otherwise afford them."[176] To hold otherwise would have been to establish the unacceptable proposition that all those engaging in crime are susceptible to unlimited defamatory criticism with no recourse for injury to their reputations unless they satisfy the demanding burden of the actual malice standard.[177]

Gertz stands today as the leading authority on the issue of public figures. However, flaws inherent in the definition of the limited-issue public figure prevent *Gertz* from functioning as the definitive ruling it was intended to be. The definition established three criteria: there must exist a public controversy, into which an individual has become voluntarily or involuntarily involved, for the purpose of assuming special prominence in the resolution of the issues within the controversy.[178] The effect of the Court's inclusion of the term "public controversy" within the definition, and its acknowledgment that an individual may become a public figure through involuntary involvement in a public controversy was to breathe new life into the *Rosenbloom* plurality opinion.

Rosenbloom stood for the proposition that the *New York Times* privilege extended "to all discussion and communication involving matters of public or general concern."[179] The Court in *Gertz* repudiated the *Rosenbloom* public interest analysis not only because it inadequately balanced the competing interests, but also on the basis

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[175] *Id.*

[176] *Id.*

[177] *See id.* at 2708–09. Concurring only in the result, Justice Blackmun observed that the "passage of time" will often be relevant to the public figure issue since it may diminish a defamation plaintiff's access to the media, "the means of counterargument," and "the 'risk of public scrutiny' that a putative public figure may fairly be said to have assumed." *Id.* at 2709 (Blackmun, J., concurring). The Justice concluded that a "lapse of 16 years between [Wolston's] participation in the espionage controversy and [the] defamatory reference to it was sufficient to erase whatever public-figure attributes [Wolston] once may have possessed." *Id.* at 2710 (Blackmun, J., concurring). Thus, because Wolston was a private individual at the time he was defamed in 1974, Justice Blackmun found no need to consider whether he was a public figure in 1958. *Id.* (Blackmun, J., concurring).

[178] 418 U.S. at 345, 351.

[179] 403 U.S. at 44. *See* notes 54–57 *supra* and accompanying text.

that it "occasion[ed] the additional difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address[ed] issues of 'general or public interest' and which [did] not."[180] *Gertz* determined such judicial inquiry into the public or non-public nature of the event which gave rise to the defamation to be improper.[181] Thus, *Gertz* abandoned the term matters of "general or public interest" as the mechanism for determining the applicability of the actual malice standard in favor of an analysis focusing on the public or private status of the defamation plaintiff.[182] The public figure definition was central to the *Gertz* status analysis in that it functioned to aid in distinguishing between public figures and private individuals and thereby determined the applicability of the actual malice standard.[183] However, the effect of the Court's inclusion of the term "public controversy" in the public figure analysis was to force judicial inquiry into the character of the event into which the potential public figure had thrust himself, or had been drawn, for the purpose of determining whether or not the matter was a public controversy.[184] Thus, the Court in *Gertz* had resurrected the very difficulties that it had sought to avoid, as evidenced by the *Firestone*, *Hutchinson* and *Wolston* opinions.[185]

As the result of such an inquiry, the Court in *Firestone* concluded that a divorce proceeding was "not the sort of 'public controversy' referred to in *Gertz*."[186] This statement is clearly a reference to the nature of the event giving rise to the defamation as opposed to a reference to Mrs. Firestone's status. The Court's conclusion appears to direct that two judicial inquiries are required by *Gertz*. First, there must be a judicial determination as to the existence or non-existence of a public controversy. If a public controversy is found to exist, there must be an additional determination as to whether or not that particular controversy is the sort of public controversy contemplated by the Court in *Gertz*. In *Hutchinson*, no identifiable public controversy was found to exist; "at most," there existed a "concern about general public expenditures."[187] The Court in *Wolston* found it "difficult to determine with precision the 'public controversy' into

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[180] 418 U.S. at 346.

[181] *Id.* at 346. *See* text accompanying notes 85–86 *supra*.

[182] 418 U.S. at 346 (quoting *Rosenbloom*, 403 U.S. at 44).

[183] *See* 418 U.S. at 343–46, 351. *See* text accompanying notes 25–89 *supra*.

[184] 418 U.S. at 345, 351.

[185] *See Firestone*, 424 U.S. at 487 (Marshall, J., dissenting).

[186] *Id.* at 454.

[187] 99 S. Ct. at 2688.

which [Wolston was] alleged to have thrust himself."[188] However, since Wolston failed to meet the other criteria established for public figure status, the Court accepted, *arguendo*, the existence of a public controversy.[189]

Having found judicial inquiry into the nature of the event to be inappropriate, the *Gertz* Court could not have intended to approve of such inquiry by its use of the term "public controversy."[190] However, because the decisions subsequent to *Gertz* have made no attempt to redefine the public figure without including language compelling judges to decide which defamatory statements address public controversies and which do not, there is an indication that the Supreme Court, if not approving of such inquiries, at least acquiesces in their use.

The involuntary public figure had its origin in the *Rosenbloom* plurality opinion which permitted the *New York Times* privilege to arise from the presence of a public issue without regard to the status of a person defamed therein.[191] The effect of this extension was to deprive a private individual involuntarily associated with a matter of public interest of compensation for injury to his reputation, unless he satisfied the requirements of the actual malice standard.[192]

A private individual, one who "has relinquished no part of his interest in the protection of his own good name,"[193] was nevertheless stripped of this protection afforded him by the laws of defamation through his involuntary involvement in an event of public interest.[194] It was precisely this inequitable result of the *Rosenbloom* public interest analysis that the Court in *Gertz* sought to prevent by holding voluntary exposure to increased risk of injury from defamatory statements to be the "compelling normative consideration underlying the distinction between public and private defamation plaintiffs."[195] In so holding, the Court sought a more appropriate accommodation of the competing interests than that provided by the *Rosenbloom* plurality.[196]

The Court reasoned that public figures, like public officials, are less deserving of protection than are private individuals because they

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[188] 99 S. Ct. at 2707 n.8.

[189] *Id.*

[190] 424 U.S. at 488 (Marshall, J., dissenting).

[191] 403 U.S. at 43–44. *See* notes 54–57 *supra* and accompanying text.

[192] 403 U.S. at 43–44. *See* 418 U.S. at 337; *see* text accompanying note 63 *supra*.

[193] 418 U.S. at 345.

[194] 403 U.S. at 43–44. *See* notes 54–57 *supra* and accompanying text.

[195] *See* 418 U.S. at 344–45; text accompanying notes 74–83 *supra*.

[196] 418 U.S. at 346.

have chosen to become involved in the affairs of society.[197] Therefore, they run "the risk of closer public scrutiny than might otherwise be the case" and "must accept [the] necessary consequences."[198] In short, persons who "invite attention and comment" increase their susceptibility to injury from defamatory criticism and, absent evidence of actual malice, should not be heard to complain when pained by the sting of defamatory falsehoods.[199] In sharp contrast, the private person who becomes involuntarily involved in a public controversy has not assumed the risk of defamatory statements.[200] He has not chosen to become involved in the affairs of society, nor has he sought or invited public attention and comment.[201] Such an individual has not forfeited, to any degree, his interest in the protection of his reputation and is consequently "more deserving of recovery" for injury inflicted by defamatory falsehoods than is a public person.[202]

Having designated voluntary exposure to public criticism as the underlying distinction between private individuals and public persons, the *Gertz* Court proceeded to recognize that the public figure status could arise *either* voluntarily or involuntarily. That is, if a private individual either "voluntarily injects himself or is drawn into a particular public controversy," he "thereby becomes a public figure."[203] By providing for the existence of an involuntary public figure, the Court reinstated a concept, grounded in *Rosenbloom*, that it had previously repudiated as unacceptable, a concept diametrically opposed to the spirit of *Gertz*.[204]

It is against this background that the impact of the *Firestone* and *Wolston* decisions on *Gertz* must be viewed. The Court's determinations that Firestone and Wolston were private individuals turned in part on a lack of voluntary involvement in a public controversy; Firestone had been "drawn into" a public controversy "largely against [her] will" and Wolston had been "dragged unwillingly into a [public] controversy."[205] In light of the Court's observation in *Gertz* that a private individual, through no voluntary action of his own, may

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[197] *Id.* at 344–45.
[198] *Id.* at 344.
[199] *Id.* at 345.
[200] *Id.*
[201] *Id.*
[202] *Id.*
[203] *Id.* at 345, 351.
[204] *See* notes 74–85 *supra* and accompanying text.
[205] 99 S. Ct. at 2707; 424 U.S. at 454–55, 457.

nevertheless become a public figure by being "drawn into a particular public controversy,"[206] the Court appears to have been required to consider the possibility of Firestone and Wolston qualifying as involuntary public figures. Instead, it chose to ignore the definition of the involuntary public figure set forth in *Gertz* and, consequently, the possibility was not considered.[207]

The underlying but unexpressed rationale for the Court's refusal to acknowledge the apparent involuntary public figure status of Firestone and Wolston is the same rationale underlying the rejection of *Rosenbloom* in *Gertz*: those who have not "voluntarily exposed themselves to increased risk of injury from defamatory falsehood" have not relinquished their interests in the protection of their reputations and, accordingly, are not properly subjected to the rigors of the actual malice standard.[208] The Supreme Court, true to the express word of *Gertz*, might have chosen to classify Firestone and Wolston as involuntary public figures, which would have reinstated the inequity inherent in the *Rosenbloom* public interest analysis. Instead, consistent with the *spirit* of *Gertz*, the Court chose to ignore the definition and consequently determined Firestone and Wolston to be private individuals based, in part, on their lack of voluntary involvement in a public controversy.[209]

Given that the concept of an involuntary public figure is utterly inconsistent with the spirit of *Gertz*, coupled with the fact that, since *Gertz*, the Court, when twice confronted with plaintiffs who had the potential to qualify as involuntary public figures, has twice classified those plaintiffs as private individuals, it is apparent that the Court has rejected *sub silentio* the possibility that a private individual may be drawn into a public controversy, thereby becoming an involuntary public figure. The Court appears to hold that an individual can be transformed into a limited-issue public figure *only* if he voluntarily thrusts himself into a public controversy. By so limiting the public figure definition in subsequent cases, the Court has established the accommodation of the competing interests it intended to establish in *Gertz*.

Rather than defying the definition of the involuntary public figure, the Court could have determined Firestone and Wolston to be private individuals on a more narrow ground consistent with both the language and spirit of *Gertz*. In addition to requiring voluntary or involuntary involvement in a public controversy, the definition mandates that "such persons assume special prominence in the resolution

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[206] 418 U.S. at 345, 351. *See* text accompanying note 94 *supra*.

[207] *Wolston*, 99 S. Ct. at 2706; *Gertz*, 418 U.S. at 345, 351; *Firestone*, 424 U.S. at 453.

[208] 418 U.S. at 345, 344–47.

[209] *Wolston*, 99 S. Ct. at 2707; *Firestone*, 424 U.S. at 454–55, 457.

of [the] public questions" involved in the controversy.[210] Thus, a person who becomes voluntarily or involuntarily involved in a public controversy is a private individual with the potential to become a public figure. It is not until he attempts to influence the public issues involved that the potential public figure becomes, in fact, a public figure.

Since the Court found Firestone and Wolston "assumed no 'special prominence in the resolution of public questions,' " neither could be raised to the level of a public figure.[211] Thus, it was unnecessary for the Court to establish the private status of Firestone and Wolston based on their involuntary involvement in a public controversy. The failure to use the more narrow ground as the basis for determining the private status of Firestone and Wolston supports the conclusion that the Court has ruled out the possibility of an involuntary public figure.

The present state of the law appears to be that a person becomes a limited-issue public figure only if he voluntarily involves himself in a controversy in an attempt to influence the resolution of the issues involved. As stated by Justice Blackmun in his concurring opinion in *Wolston*, "[t]he Court seems to hold . . . that a person becomes a limited-issue public figure *only* if he literally or figuratively 'mounts a rostrum' to advocate a particular view."[212] Accordingly, the limited-issue public figure must be redefined to exclude both the term "public controversy" and the involuntary public figure. To do so would lend clarity and consistency to a confused area of the law and would ensure that effect is given to the "equitable boundary between the competing concerns" that the Court in *Gertz* sought to provide.[213]

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[210] *Gertz*, 418 U.S. at 351.

[211] *Wolston*, 99 S. Ct. at 2708 (quoting *Gertz*, 418 U.S. at 351); *Firestone*, 424 U.S. at 454–55 (quoting *Gertz*, 418 U.S. at 351).

[212] 99 S. Ct. at 2709 (emphasis added). Justice Blackmun's statement accurately reflects the majority's position. In addition to Wolston's involuntary involvement, the majority found no evidence that his failure to appear before the grand jury was in any way "calculated to draw attention to himself in order to invite public comment or influence the public with respect to any issue." *Id.* at 2708. However, the Court suggested that if Wolston had "intended" to invite a contempt citation as a method of "arous[ing] public sentiment in his favor and against the investigation," he would have been deemed a public figure. *Id.*

[213] 418 U.S. at 347–48.