General Public Figures Since Gertz v. Robert Welch, Inc.

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NOTE

GENERAL PUBLIC FIGURES SINCE
GERTZ V. ROBERT WELCH, INC.

Twenty years have passed since the Supreme Court handed down its decision in New York Times Co. v. Sullivan.\(^1\) In that landmark case, the Court held that state defamation laws are circumscribed by the guarantees of the first amendment.\(^2\) As a result of New York Times and its progeny, public officials and public figures are required to prove actual malice in order to obtain civil redress for reputational injury.

This Note will discuss the development of the law of defamation with an emphasis on the actual malice standard as applied to public figures. In particular, the Note will focus on the impact of Gertz v. Robert Welch, Inc.,\(^3\) in which the Court indicated that certain defamation plaintiffs may be considered general-purpose public figures—individuals who have become public figures for every aspect of their lives.\(^4\) After analyzing the general-purpose public figure concept, the Note concludes that courts could better promote the principles underlying Gertz by adopting the limited public figure analysis as the sole means by which defamation plaintiffs are designated public figures.

AN HISTORICAL PERSPECTIVE

The law of defamation, comprising the actions of libel and slander, developed by aggregation, and contains many anomalies and peculiarities.\(^5\) In early English jurisprudence, political speech

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\(^1\) 376 U.S. 254 (1964).
\(^2\) Id. at 265-66.
\(^3\) 418 U.S. 323 (1974).
\(^4\) Id. at 351-52.
\(^5\) W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 111, at 737-39 (4th ed. 1971); Veeder, The History and Theory of the Law of Defamation, 3 COLUM. L. REV. 546, 546 (1903). The law of defamation is not the product of any specific time period, and has come into existence in the absence of legislative direction. Veeder, supra, at 546. Veeder states that “perhaps no other branch of the law is as open to criticism for its doubts and difficulties . . . .”

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could be punished as seditious libel; truth was not recognized as a defense. Because American colonists attached great importance to the freedoms of speech and press, the English law of defamation underwent modification in the United States early in the post-independence period. Despite this trend toward liberalization, however, critics of the newly-formed Government could be prosecuted in federal courts in common-law criminal actions. Indeed, when federal prosecutions of common-law criminal actions were subsequently held unconstitutional, Congress promptly enacted the

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In English criminal libel prosecutions, truth was not a defense, and evidence of truth was inadmissible at trial. L. Eldredge, The Law of Defamation § 64, at 325 (1978). This rule was made clear in the case de Libellis Famosis, 77 Eng. Rep. 250 (1605), which held that truth is irrelevant in a libel action. Id. at 251. In 1843 the rule was changed by statute to allow the defense of truth, provided that the publication of the libel was shown to have been in the public interest. L. Eldredge, supra, § 64, at 326; F. Thayer, Legal Control of the Press § 45, at 266 (2d ed. 1950); Veede, The History and Theory of the Law of Defamation, 4 Colum. L. Rev. 33, 46-47 (1904). Similarly, by 1930, 35 states had enacted statutes establishing truth as a defense for defamatory statements “published with good motives and for justifiable ends.” Ray, Truth: A Defense to Libel, 16 Minn. L. Rev. 43, 47 (1931).


One commentator describes the post-independence period:

Many individuals of the time felt that in the new United States there could no longer be a libel against government, that the old English common law of seditious libel had ended with the Declaration of Independence. . . . Despite this, it soon became abundantly clear that the common law of seditious libel was not dead. Within fifteen years after independence, criticism of public officials in the United States became a crime.

C. Lawhorne, supra note 8, at 39-40 (footnotes omitted).

United States v. Worrall, 2 U.S. (2 Dall.) 384 (1798). In Worrall, the defendant was charged with attempting to bribe the Commissioner of the Revenue in order to secure a contract for the construction of a lighthouse. Id. at 384-85. Finding that the alleged crime
Sedition Act\(^\text{12}\) to restore the power of the Government to prosecute its critics.\(^\text{13}\) Although the punishments that the Act imposed on the exercise of speech never were subjected to constitutional scrutiny, the constitutionality of the Sedition Act has been questioned,\(^\text{14}\) and state courts frequently espoused the view that citizens were entitled freely to discuss matters which reflected on the character of their elected and appointed representatives.\(^\text{15}\) It was not until 1964, however, that the Supreme Court recognized the need to define, in first amendment terms, the protections afforded criticism of public officials.\(^\text{16}\) As a result of this recognition, restric-

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\(^\text{12}\) Ch. 74, 1 Stat. 596 (1798) (expired, by terms of statute, 1801).

\(^\text{13}\) The promulgation of the Sedition Act was a response to the vehement attacks on government policies that were circulating in various newspapers at the time. C. Lawhorne, supra note 8, at 44. The Act took effect less than 3 months after the Worrall decision was handed down, id., and contained descriptions of the particular expressions subject to prosecution, see Oakes, supra note 9, at 692-96. One commentator has suggested that the inclusion of the term “malicious” in the Act had at least a moderate impact on modern libel law. Oakes, supra note 9, at 692-96.


\(^\text{15}\) See C. Lawhorne, supra note 8, at 57, 68.

tions were imposed in actions by public officials to obtain defama-
tion judgments against critics of their official conduct or fitness for
public office.\textsuperscript{17}


\textit{New York Times Co. v. Sullivan} brought to the attention of
the Supreme Court the many ways in which unmonitored state libel
laws may pose threats to the liberties protected by the first amend-
ment.\textsuperscript{18} In \textit{New York Times}, the Court reversed a decision
by the Supreme Court of Alabama in which libel damages were
awarded to L. B. Sullivan, an elected city commissioner, who
claimed to have been defamed by a \textit{New York Times} advertise-

The view that the law of libel may not constitutionally coincide with the prohibitions
set forth in the first amendment, see infra note 18, has been advanced numerous times by
Justices Black and Douglas. See, e.g., Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 57
(1971) (Black, J., concurring) ("the First Amendment does not permit the recovery of libel
judgments against the news media even when statements are broadcast with knowledge they
are false"); Curtis Publishing Co. v. Butts, 388 U.S. 130, 172 (1967) (Black, J., concurring
and dissenting) ("the First Amendment was intended to leave the press free from the har-
assment of libel judgments"); Rosenblatt v. Baer, 383 U.S. 75, 94 (1966) (Black, J., concur-
ring in part and dissenting in part) ("a libel judgment . . . is forbidden by the First Amend-
ment"); Garrison v. Louisiana, 379 U.S. 64, 79 (1964) (Black, J., concurring) (first
amendment protects expression of personal opinion); id. at 80-83 (Douglas, J., concur-
ring) (speech protected by first amendment unless combined with an overt illegal act); New
York Times Co. v. Sullivan, 376 U.S. 254, 296 (1964) (Black, J., concurring) ("the First Amend-
ment . . . no more permits the States to impose damages for libel than it does the Federal
Government"). \textit{See generally} Cahn, \textit{Justice Black and First Amendment "Absolutes": A


\textsuperscript{18} The first amendment provides:

\begin{quote}
Congress shall make no law respecting an establishment of religion, or prohib-
iting the free exercise thereof; or abridging the freedom of speech, or of the press;
or the right of the people peaceably to assemble, and to petition the Government
for a redress of grievances.
\end{quote}

U.S. CONST. amend. I. First amendment liberties are protected from state impairment by
reason of the due process clause of the fourteenth amendment. Stromberg v. California, 283

The Court in \textit{New York Times Co. v. Sullivan}, 376 U.S. 254 (1964), stated that the civil
libel law enacted in Alabama would inhibit the freedoms protected by the first amendment
more than would prosecutions under criminal libel laws. \textit{See id.} at 277. Justice Brennan's
opinion emphasized that such laws impose a "pall of fear and timidity" which threatens the
existence of a free press. \textit{Id.} at 278. Since such laws may encourage "self-censorship," they
may affect the "variety of public debate" by stifling government critics. \textit{Id.} at 279; \textit{see}
are more likely to be gathered out of a multitude of tongues, than through any kind of
authoritative selection"), aff'd, 326 U.S. 1 (1945); accord \textit{Time}, Inc. v. Pape, 401 U.S. 279,
290 (1971) (errors of interpretation in free press are unavoidable).
ment supporting civil rights demonstrators in the South. Sullivan alleged that inaccuracies in the paid advertisement imputed misconduct to him in his capacity as supervisor of the Montgomery Police Department. Holding that a state's power to award damages in such situations is circumscribed by constitutional guarantees, the Court ruled that the first amendment disallows recovery by a public official for a falsehood relating to his official conduct, absent proof of "actual malice"—knowledge of the falsehood of a defamatory statement, or reckless disregard for its truth or falsity.

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19 376 U.S. at 264. The $4,800 advertisement at issue in New York Times, entitled "Heed Their Rising Voices," appeared in the March 29, 1960 edition of the New York Times, and was intended to call attention to the large student civil rights demonstrations at southern college campuses. Id. at 256, 260. The ad was sponsored by the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South," and carried the names of 64 prominent individuals. Id. at 257.

20 Id. at 257-58. The third paragraph of the advertisement alleged that during one demonstration, "truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus," and that the school dining hall was "padlocked in an attempt to starve [the student demonstrators] into submission." Id. at 257. Sullivan, the commissioner of the Montgomery Police Department, claimed that these statements imputed misconduct to him, as the person whose duties included supervising the law enforcement unit allegedly responsible for the actions described in the ad. Id. at 257-58. Sullivan also claimed to have been libeled by the fifth paragraph of the ad, which stated: "They have arrested [Dr. Martin Luther King Jr.] seven times." Id. at 258. As supervisor of the Montgomery police, Sullivan believed that he was the target of the statement; he also believed that the word "They," as used to describe the people who arrested Dr. King, would be equated with the "They" who were described in the ad as responsible for acts of violence, including the bombing of Dr. King's home. Id. at 257-58.

21 Id. at 278-80. The Court's definition of actual malice is not that which had been adopted to describe the term at common law, namely, ill will or spite. L. Eldredge, supra note 7, § 51, at 254 & n.41. Rather, it is the same as that used to define the standard applicable in proving intentional misrepresentation in an action for deceit. Id. at 254 n.41; W. Prosser, supra note 5, § 118, at 821. This distinction has been a source of confusion in defamation law, as evidenced by various lower court decisions that have reached the Supreme Court. See, e.g., Greenbelt Coop. Publishing Ass'n, Inc. v. Bresler, 398 U.S. 6, 9-10 (1970); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82 (1967) (per curiam).

The New York Times decision marks the beginning of a federal policy of reviewing awards under state defamation laws in order to ensure their compatibility with first amendment liberties. Insofar as such laws extended causes of action to "public officials"—a term not defined by the Court—exclusive state authority to award damages for libel was preempted by the federally formulated actual malice standard.

The Expansion of the Affected Classes

Soon after New York Times was decided, it became clear that the reasoning of the Court might justify expanded applicability of

"[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." Saint Amant v. Thompson, 390 U.S. 727, 731 (1968). As the latter definition suggests, the actual malice test brings into question the state of mind of the defendant, and "does not readily lend itself to summary disposition." Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979). Thus, "unless liability is to be completely foreclosed, the thoughts and editorial processes of the alleged defamer would be open to examination." Herbert v. Lando, 441 U.S. 153, 160 (1979); cf. Goldwater v. Ginzburg, 414 F.2d 324, 342 (2d Cir. 1969) (defendant's recklessness or knowledge of falsity may be inferred by adduction of evidence of defendant's negligence, motive and intent), cert. denied, 396 U.S. 1049 (1970).

22 376 U.S. at 269. The New York Times Court stated: "we are compelled by neither precedent nor policy to give any more weight to the epithet 'libel' than we have to other 'mere labels' of state law. . . . [L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." Id.; see NAACP v. Button, 371 U.S. 415, 429 (1963) (state cannot foreclose constitutional protection merely by labeling conduct).

23 See Press, Inc. v. Verran, 569 S.W.2d 435, 438 (Tenn. 1978) ("the [New York Times Court] . . . did not define the term 'public official' nor determine how far down into the lower ranks of government employees the 'public official' designation would extend"). Despite the Court's failure to delineate its boundaries, it is clear that the public official concept does not include every public employee. Hutchinson v. Proxmire, 443 U.S. 111, 134-35 (1979). In Rosenblatt v. Baer, 383 U.S. 75 (1966), however, Justice Brennan stated that based upon the strong national interest in promoting the criticism of governmental bodies and officials, "the 'public official' designation applies at the very least to those among the hierarchy of 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 (footnote omitted). Moreover, the term "public official" may not be defined by reference to standards established by the states. Id. at 84.

24 376 U.S. at 283. Justice Brennan stated: "We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct." Id.; see Gertz v. Robert Welch, Inc., 418 U.S. 323, 370 (1974) (White, J., dissenting); see also Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967) (libel actions by "public figures" cannot be governed solely by state libel laws). The constitutionalization of the law of defamation has for the most part displaced the common-law privilege of fair comment on matters of public concern. Restatement (Second) of Torts § 580A comment a (1977); S. Metcalf, Rights and Liberties of Publishers, Broadcasters and Reporters § 1.07, at 1-21 (1982); W. Prosser, supra note 5, § 115, at 792.
the actual malice standard. Although the *New York Times* Court intended the qualified privilege to govern "actions brought by public officials against critics of their official conduct," the Court's concern for the protection of free debate suggested that the availability of the constitutional privilege could be enlarged. In the same year in which *New York Times* was decided, Judge Friendly noted that while the need for the privilege is strongest in the context of public officials, the extension might properly be made to "the participant in public debate on an issue of grave public concern."  

25 See infra note 31 and accompanying text.

26 376 U.S. at 283. The *New York Times* Court was satisfied that the allegedly libelous statements referred to Sullivan in his public capacity, and therefore did not delineate the parameters of the official conduct rule: "It is enough for the present case that respondent's position as an elected city commissioner clearly made him a public official . . . . [I]f these allegations can be read as referring to respondent at all, they must be as describing his performance of his official duties." Id. at 283 n.23.

27 Id. at 270. The Court's opinion was based on the belief that "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." Id. The public debate theme was emphasized by the *New York Times* Court's reiteration of the statement in *Bridges v. California*, 314 U.S. 252 (1941), that "it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions . . . ." 376 U.S. at 269 (quoting 314 U.S. at 270). See generally Veeder, *Freedom of Public Discussion*, 23 HARV. L. REV. 413, 413-16 (1910) (discussion of constitutional considerations involved in promoting public discussion of important issues).

28 *Pauling v. News Syndicate Co.*, 335 F.2d 659, 671 (2d Cir. 1964) (dictum), cert. denied, 379 U.S. 968 (1965); see L. Eldredge, *supra* note 7, § 52, at 274. The Pauling dictum proved to be persuasive, and was accepted by some courts even before the *New York Times* privilege was extended by the Supreme Court to statements concerning public figures. See, e.g., *Walker v. Courier Journal & Louisville Times Co.*, 368 F.2d 189, 190 (6th Cir. 1966); *Gilberg v. Goffi*, 21 App. Div. 2d 517, 520, 251 N.Y.S.2d 823, 826 (2d Dep't 1964), aff'd, 15 N.Y.2d 1023, 207 N.E.2d 620, 260 N.Y.S.2d 29 (1965); *see also Reaves v. Foster*, 200 So. 2d 453, 458 (Miss. 1967) (discussing the Court's extension of the *New York Times* rule).

Judge Friendly also considered it likely that the actual malice standard extended to candidates for political office:

A candidate for public office would seem an inevitable candidate for extension; if a newspaper cannot constitutionally be held for defamation when it states without malice, but cannot prove, that an incumbent seeking reelection has accepted a bribe, it seems hard to justify holding it liable for further stating that the bribe was offered by his opponent.

*Pauling*, 335 F.2d at 671. This position was accepted by many courts. See, e.g., *Noonan v. Rousscelot*, 239 Cal. App. 2d 447, 451, 48 Cal. Rptr. 817, 821 (1969) ("any rule of law which would differentiate between the freedom of speech allowed to an incumbent running for reelection and that permitted to him who seeks his office, would run afoul of the . . . Fourteenth Amendment"); *Block v Benton*, 44 Misc. 2d 1053, 1054-55, 255 N.Y.S.2d 767, 768-69 (Sup. Ct. Sullivan County 1964) (rule applies "as well to candidates as to incumbents for public office"); see also W. Prosser, *supra* note 5, § 118, at 821 & n.17.
Three years after *New York Times*, in *Curtis Publishing Co. v. Butts*, and its companion case, *Associated Press v. Walker*, the Supreme Court ruled that defamatory statements concerning non-public officials may be protected by a qualified constitutional privilege if such statements relate to individuals who in some sense have become "public figures." Justice Harlan's plurality opinion in *Butts* stated that this undefined class should recover for reputational injury only "on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." This standard was fashioned to be less rigorous than that applicable in cases involving public officials, but it failed to gain acceptance by a majority of the Court. The effect of *Butts*, there-

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29 Id.
30 Id. at 155; see L. ELDREDGE, supra note 7, § 52, at 280. Although the plurality offered no definition of the term "public figure," the opinion indicated that "both Butts and Walker commanded a substantial amount of independent public interest at the time of the publications," and thus "would have been labeled 'public figures' under ordinary tort rules." 388 U.S. at 154 (citation omitted). Butts, the athletic director at the University of Georgia, was the subject of a Saturday Evening Post article in which he was alleged to have leaked team strategies to "Bear" Bryant, head coach of the University of Alabama football team, prior to a scheduled game between the two schools. Id. at 135-36. Walker, a retired general and a leading opponent of federal desegregation enforcement, was mentioned in an Associated Press dispatch stating that he had encouraged violence during a riot at the University of Mississippi. Id. at 140. The dispatch also alleged that Walker had led a charge against federal marshals in the course of the riot. Id.

The *Butts* plurality described the different ways in which an individual may achieve public figure status: "Butts may have attained that status by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy ...." Id. at 155. The opinion noted that "both commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements." Id. (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), overruled, *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam)).

31 388 U.S. at 155 (citation omitted).
32 See id. at 155; S. MERCALF, supra note 24, § 1.25, at 1-69. The plurality opinion distinguished defamation actions brought by public figures from those involving public officials and determined that a standard less stringent than actual malice should govern cases brought by the former. 388 U.S. at 154; see infra notes 72-86 and accompanying text. Thus, while the opinion acknowledged the need to subject state libel laws to constitutional scrutiny when actions are commenced by public figures, Justice Harlan concluded that "the rigorous federal requirements of *New York Times* are not the only appropriate accommodation of the conflicting interests at stake." 388 U.S. at 155.

33 In his concurring opinion, Chief Justice Warren found Justice Harlan's standard unacceptable: "I cannot believe that a standard which is based on such an unusual and uncertain formulation could either guide a jury of laymen or afford the protection for speech and debate that is fundamental to our society and guaranteed by the First Amendment." Id. at
fore, was to require application of the actual malice test to public officials and public figures alike.\(^5\)

The *New York Times* holding was extended dramatically in *Rosenbloom v. Metromedia, Inc.*,\(^6\) in which the doctrine was held applicable, regardless of the plaintiff's status, whenever defamatory falsehoods relate to an issue of "public or general concern."\(^3\)

The *Rosenbloom* plurality's approval of the imposition of the actual malice test in an action brought by a private plaintiff,\(^3\) repre-

\(^{163}\) (Warren, C.J., concurring). Rather, the Chief Justice argued that there should be no departure from the standard enunciated in *New York Times*, since "differentiation between 'public figures' and 'public officials' and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy." *Id.; see Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 336 n.7 (1974). This position was grounded on the belief that "'public figures' whose views and actions with respect to public issues and events are often of as much concern to the citizen as the attitudes and behavior of 'public officials' with respect to the same issues and events." 338 U.S. at 162 (emphasis added). Nonetheless, the Harlan formula had some influence on subsequent case law. See, e.g., *Cerrito v. Time, Inc.*, 302 F. Supp. 1071, 1073 (N.D. Cal. 1969).


\(^{26}\) 403 U.S. 29 (1971). *Rosenbloom* involved an allegedly defamatory radio broadcast stating that George Rosenbloom was arrested for possessing obscene books. *Id.* at 32-33. A state court subsequently acquitted Rosenbloom, finding that the confiscated materials were not obscene. *Id.* at 36. Rosenbloom was awarded damages in a diversity action against the radio station, but the Court of Appeals for the Third Circuit reversed, stating: "the fact that plaintiff was not a public figure cannot be accorded decisive importance if the recognized guarantees of the First Amendment are to be adequately implemented." *Rosenbloom v. Metromedia, Inc.*, 415 F.2d 892, 895-96 (3d Cir. 1969), *aff'd*, 403 U.S. 29 (1971).

\(^{27}\) 403 U.S. at 44, 52. The *Rosenbloom* plurality minimized the importance of the plaintiff's voluntary entry into the public eye when it extended the *New York Times* standard to suits involving private individuals: "the view of the 'public official' or 'public figure' as assuming the risk of defamation by voluntarily thrusting himself into the public eye bears little relationship either to the values protected by the First Amendment or to the nature of our society." *Id.* at 47; *accord Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967).

\(^{28}\) Justice Brennan stated that "the vital needs of freedom of the press and freedom of speech persuade us that allowing private citizens to obtain damage judgments on the basis of a jury determination that a publisher probably failed to use reasonable care would not provide adequate 'breathing space' for these great freedoms." 403 U.S. at 50; *cf. id.* at 60 (White, J., concurring) (plurality opinion unnecessarily displaced a large body of state defamation law). By proposing a test that extended the *New York Times* privilege to reports of general interest, the plurality left open the possibility that anything which the press deemed worthy of reporting would be privileged. *Id.* at 79 (Marshall, J., dissenting) ("all human events are arguably within the area of 'public or general concern'"). The plurality added a caveat to the opinion in order to preclude such an interpretation: "We are not to be understood as implying that no area of a person's activities falls outside the area of public or
sents the high tide of media protectionism over reputational interests. The three-justice plurality expressed particular dissatisfaction with a constitutional analysis based entirely upon generalizations concerning a plaintiff’s status. According to the Court, the fictitious assumption that public figures “have voluntarily exposed their entire lives to public inspection” may result in “extending constitutional encouragement to discussion of aspects of the lives of ‘public figures’ that are not in the area of public or general concern.”

39 See L. ELDREDGE, supra note 7, § 53, at 288 (“The opinion of Mr. Justice Brennan in Rosenbloom was a sweeping extension of New York Times and a drastic restriction on the common law of actionable defamation.”).

40 Justice Brennan wrote the plurality opinion, joined by Chief Justice Burger and Justice Blackmun. Justices Black and White wrote separate concurring opinions. Justice Harlan wrote his own dissenting opinion, and Justice Marshall wrote a dissenting opinion, in which Justice Stewart joined. Id. Justice Douglas took no part in the consideration or decision of the case. Justice White concurred on the ground that “the First Amendment gives the press and the broadcast media a privilege to report and comment upon the official actions of public servants in full detail.” 403 U.S. at 60 (White, J., concurring). He did not agree with the plurality’s extension of the New York Times privilege to reports concerning private individuals or newsworthy events. Id. at 59. This division led Justice Blackmun to observe that “[t]he Court was sadly fractioned in Rosenbloom.” Gertz v. Robert Welch, Inc., 418 U.S. 323, 354 (1974) (Blackmun, J., concurring).

41 403 U.S. at 41-48. The plurality stressed the “artificiality, in terms of the public’s interest,” in deciding the standard applicable to the petitioner on the basis of “a simple distinction.” Id. at 41. The Court stated: “Whether the person involved is a famous large-scale magazine distributor or a ‘private’ businessman running a corner newsstand has no relevance in ascertaining whether the public has an interest in the issue.” Id. at 43. The opinion also attacked the validity of the view taken by the Court in Butts, 388 U.S. at 155, that the ability to counteract defamatory statements through media access enjoyed by a plaintiff prior to the alleged defamation should play a role in determining whether the New York Times standard should apply: “[T]he unproved, and highly improbable, generalization that an as yet undefined class of ‘public figures’ involved in matters of public concern will be better able to respond through the media than private individuals also involved in such matters seems too insubstantial a reed on which to rest a constitutional distinction.” 403 U.S. at 46-47; see also Comment, Gertz v. Robert Welch, Inc.: New Contours on the Libel Landscape—a Pyrrhic Victory for Plaintiffs, 5 N.Y.U. REV. L. & SOC. CHANGE 89, 98 (1975) (public figures are no more likely to be in a position to defend themselves than private individuals).

42 403 U.S. at 48. The plurality also recognized that the unconditional availability of state-established standards to private plaintiffs would result in “dampening discussion of issues of public or general concern because they happen to involve private citizens . . . .” Id. This problem, it is suggested, was settled in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), which recognized that private individuals may receive the treatment accorded public figures for the purpose of specific issues or controversies. See id. at 345, 351.
The Supreme Court, in *Gertz v. Robert Welch, Inc.*, rejected the *Rosenbloom* opinion, under which “a private citizen involuntarily associated with a matter of general interest has no recourse for injury to his reputation unless he can satisfy the demanding requirements of the *New York Times* test.” Reasoning that the federal standard would prove insurmountable to those plaintiffs who lack non-judicial means of reputational redress, the majority held

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44 *Id.* at 337. The *Gertz* case involved an allegedly defamatory article published by the John Birch Society in its periodical, *American Opinion*. *Id.* at 325, 327. The article, entitled *FRAME-UP: Richard Nuccio And The War On Police*, alleged a nationwide Communist conspiracy to undermine local police forces, and focused on a civil action brought against Chicago police officer Richard Nuccio by the family of a youth he had been convicted of killing. *Id.* at 325-26. Gertz, the plaintiff's attorney in the action, was accused in the article of being a “Leninist,” a “Communist-fronter” and a member of numerous Communist organizations. *Id.* at 326. The allegations were later proved to be inaccurate. *Id.* at 326-27. Gertz instituted a libel action against the publisher in federal district court, and was awarded a $50,000 verdict after the court ruled that Gertz was neither a public official nor a public figure. *Id.* at 328-29. However, the district court reconsidered the governing standard, and granted judgment n.o.v. on the ground that the *New York Times* standard applies whenever public issues are concerned. *Id.* at 329. The United States Court of Appeals for the Seventh Circuit affirmed, holding that Gertz had failed to demonstrate actual malice by clear and convincing evidence. *Gertz v. Robert Welch, Inc.*, 471 F.2d 801, 806-08 (7th Cir. 1972), rev’d 418 U.S. 323 (1974). The Supreme Court reversed and remanded, 418 U.S. at 352, finding that “the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them,” *id.* at 343.

45 418 U.S. at 344. The *Gertz* Court emphasized that extra-legal remedies should play a role in vindicating reputational interests, but that these means are not generally available to private plaintiffs:

> The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.

*Id.* (footnote omitted). Several Court opinions decided subsequently to *Gertz* have recognized media access as a factor to be weighed in determining whether a plaintiff should be deemed a public figure. *See*, e.g., *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 164 (1979) (greater access to media affords defamed party effective means of redress) (dictum); *Hutchinson v. Proxmire*, 443 U.S. 111, 136 (1979) (“regular and continuing access to the media . . . is one of the accouterments of having become a public figure”); *cf.* *Time, Inc. v. Firestone*, 424 U.S. 448, 466 (1976) (Marshall, J., dissenting) (“the availability of the self-help remedy [is] . . . a minor consideration in determining whether an individual is a public figure”). But see Note, *An Analysis of the Distinction Between Public Figures and Private Defamation Plaintiffs Applied to Relatives of Public Persons*, 49 S. Cal. L. Rev. 1131, 1189-90 (1976) (difficulty of determining whether a defamation plaintiff will have media access and whether rebuttal will provide adequate remedy weakens media access argument).
the standard inapplicable to private individuals.\textsuperscript{46} The Court, however, declined to hold that actions by private individuals were not subject to constitutional scrutiny;\textsuperscript{47} indeed, new federal requirements contained in the opinion effectively reshaped the law respecting private defamation plaintiffs.\textsuperscript{48}

The \textit{Gertz} opinion precludes an award of damages to a plaintiff upon proof of a defamatory publication unless the plaintiff

\begin{footnotes}
46 418 U.S. at 344-45. The \textit{Gertz} opinion espoused the view that a private individual normally should not be required to prove \textit{New York Times} malice unless such an individual has voluntarily assumed a special role in society. \textit{Id.} at 345; \textit{see} H. NELSON \& D. TESTER, \textit{supra} note 6, § 24, at 141 (\textit{Gertz} “returned to the states much of the jurisdiction in libel cases that had been lost to them through the sweep of \textit{Times v. Sullivan} and the temporary sway of \textit{Rosenbloom v. Metromedia}”). Justice Blackmun recognized in his concurrence in \textit{Gertz} that the majority had moved in favor of a narrower applicability of the actual malice standard:

\begin{quote}
The Court today refuses to apply \textit{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-\textit{Rosenbloom} cases. It thereby fixes the outer boundary of the \textit{New York Times} doctrine and says that beyond that boundary, a State is free to define for itself the appropriate standard of media liability so long as it does not impose liability without fault.
\end{quote}


The Court further noted, however, that a private individual may hypothetically “become a public figure through no purposeful action of his own,” but cautioned that “the instances of truly involuntary public figures must be exceedingly rare.” 418 U.S. at 345. In \textit{Wolston v. Reader's Digest Ass'n}, 443 U.S. 157 (1979), the Court found that the “petitioner was dragged unwillingly into the controversy,” and therefore was not a public figure, \textit{id.} at 166. Similarly, in \textit{Time, Inc. v. Firestone}, 424 U.S. 448 (1976), the petitioner, a prominent Palm Beach socialite, was deemed not to have attained public figure status, despite her notoriety in her community and the publicity surrounding her divorce. \textit{Id.} at 453-54. The Court stated: “Respondent did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society, and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it.” \textit{Id.} at 453. As to the possibility that Mrs. Firestone might have achieved public figure standing as a result of the publicity that accompanied her divorce proceedings, Justice Rehnquist stated that since “[s]he was compelled to go to court by the State in order to obtain legal release from the bonds of matrimony . . . , [r]esort to the judicial process [was] no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court.” \textit{Id.} at 454 (quoting \textit{Boddie v. Connecticut}, 401 U.S. 371, 376-77 (1971)); \textit{see also} L. ELDREDGE, \textit{supra} note 7, § 52, at 280-81 (\textit{Firestone} apparently narrowed term “public figure”). It appears that in light of \textit{Firestone}, the Court has closed the door on the possibility that a private individual involuntarily may assume public figure status. \textit{See S. METCALF, \textit{supra} note 24, § 1.68, at 1-127. \textit{See generally} Rosen, \textit{Media Lament—The Rise and Fall of Involuntary Public Figures}, 54 St. John's L. Rev. 487, 502-05 (1980) (discussion of cases rejecting possibility of “involuntary” public figure).

47 418 U.S. at 348-49.

48 \textit{Id.} at 347-50; \textit{see infra} notes 49-60 and accompanying text.
proves some degree of fault on the part of the defendant.\textsuperscript{19} By eliminating all notions of strict liability in defamation law,\textsuperscript{60} \textit{Gertz} mandates that state standards be grounded, at a minimum, on a negligence theory.\textsuperscript{61} The fault requirement bars presumptive awards of general or nominal damages\textsuperscript{52} even though the statements may have constituted facially actionable libel or slander per se at common law.\textsuperscript{63}

In addition, the \textit{Gertz} decision has rendered unsettled the common-law rule that the presumptive falsity of defamatory statements places on the defendant the burden of proving the defense of truth.\textsuperscript{54} Although the Supreme Court has not stated definitively that plaintiffs must bear the burden of proving falsity, other courts, including one circuit court of appeals, have recognized fal-
sity to be "an element of fault under the First Amendment that should be proved and not presumed."\(^{65}\)

Finally, in ruling that a defamatory falsehood does not entitle the victim to damages absent proof of "actual injury,"\(^{56}\) the Gertz decision precludes plaintiffs from obtaining presumptive damage awards upon seeking recovery for falsehoods previously deemed inherently injurious.\(^{67}\) The Court has also substantially limited the availability of punitive damages in defamation cases.\(^{68}\) Under post-

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\(^{65}\) Wilson v. Scripps-Howard Broadcasting Co., 642 F.2d 371, 376 (6th Cir.), cert. dismissed, 454 U.S. 1130 (1981). The Wilson court concluded that the questions of fault and falsity and the facts on which they are based are inextricably bound in the minds of the jurors, and therefore must be weighed together: "Fairness and coherent consideration of the issue lead us to the conclusion that the party with the burden of proving carelessness must also carry the burden of proving falsity as a part of the concept of fault." Id. at 375. Other courts have likewise recognized the difficulty of separating the issue of falsity from that of fault and have concluded that the burden to prove the former is on the plaintiff. E.g., Goodrich v. Waterbury Republican-American, Inc., 188 Conn. 107, 111 n.6, 448 A.2d 1317, 1322 n.6 (1982); Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 379-80, 306 N.E.2d 1299, 1305, 397 N.Y.S.2d 943, 950 (1977), cert. denied, 454 U.S. 969 (1981). See generally Constitutional Law—Freedom of Speech—Freedom of the Press—Libel and Slander—Burden of Proof—As a Matter of First Amendment Law, a Private Plaintiff has the Burden of Proving the Falsity of an Alleged Defamatory Statement—Wilson v. Scripps-Howard Broadcasting Co., 60 U. CIN. L. Rev. 807, 814-16 (1981).

\(^{66}\) 418 U.S. at 349. Justice Powell indicated that actual injury may include more than just "out-of-pocket loss." Id. at 350. If proven, plaintiffs may recover for injury to reputation, personal humiliation, and mental anguish. Id.; see Time, Inc. v. Firestone, 424 U.S. 448, 460 (1976). The Justice cautioned, however, that "juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury." 418 U.S. at 350. Commentators have differed as to the ramifications of the actual damages rule. Compare Ashdown, Gertz and Firestone: A Study in Constitutional Policy-Making, 61 MINN. L. Rev. 645, 670 (1977) (allowance of recovery for intangible harm has "left the presumed damages rule essentially intact") with Note, State Tort Actions for Libel After Gertz v. Robert Welch, Inc.: Is the Balance of Interest Leaning in Favor of the News Media?, 36 OHIO ST. L.J. 697, 716-20 (1975) (requirement of proving actual damages unnecessarily compromises libel victim's ability to recover for "subtle" injuries).

\(^{67}\) 348 U.S. at 349. The Gertz Court adopted the rule against presumptive damages in order to prevent gratuitous jury awards bearing no relation to the harm actually sustained. Id. The Court recognized the far-reaching effect of its decision, but held that awards in excess of actual injury serve no legitimate state interest and unnecessarily exacerbate the tension between state libel laws and first amendment freedoms. Id. For a discussion of the historical basis for the requirement of proof of actual injury in a tort action for defamation, see Note, Developments in the Law of Defamation, 69 HARV. L. Rev. 875, 891-92 (1956).

\(^{68}\) 418 U.S. at 350. Many of the arguments advanced in support of the restrictions on punitive damages reflected Justice Marshall's earlier position that they should be eliminated. E.g., Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 82-84 (1971) (Marshall, J., dissenting). In Rosenbloom, Justice Marshall likened punitive damage awards in defamation cases to "windfalls" and "private fines," id. at 82, and stated that the discretion with which they may be assessed "allows juries to penalize heavily the unorthodox and the unpopular and exact little from others," id. at 84 (Marshall, J., dissenting). This theme was reiterated
Gertz law, no plaintiff, whether public or private, may obtain a punitive award on any theory less than actual malice. The Gertz Court left open the question of whether such damages may be assessed when the New York Times standard is met.

LIMITED PURPOSE AND GENERAL PURPOSE PUBLIC FIGURES

In the final paragraphs of Gertz, Justice Powell addressed the respondent's contention that for the purpose of his action, petitioner Elmer Gertz should be deemed a public official or a public figure. The Court analyzed Gertz with respect to each category, determined that Gertz qualified under neither designation, and remanded the case for a new trial to be governed in accordance with the Court's new guidelines.

In his discussion of the public figure designation, however, Justice Powell observed how individuals can become public figures in varying degrees. Individuals who are renowned for public activity must be deemed public figures for a range of issues commensurate with their notoriety. At one end of the spectrum is the public figure for a specific, limited area, while at the opposite end is the individual whose activities are so all-encompassing that he may become a public figure "for all purposes and in all contexts."

by Justice Powell's majority opinion in Gertz, in which Justice Marshall joined. See 418 U.S. at 350. The Powell opinion endorsed the analogy to "private fines" and stated that punitive damages may punish unpopular views and may be unpredictable in amount. Id. By permitting punitive damage awards in some instances, however, the Powell position fell short of the outright prohibition advocated by Justice Marshall in Rosenbloom. Id.; see 403 U.S. at 82-85; infra text accompanying note 59.

See id.; Restatement (Second) of Torts § 621 comment d (1977).

See infra notes 66-67 and accompanying text.

See 418 U.S. at 351. The Court stated that the extent to which a plaintiff may be designated a public figure is dependent upon the degree of notoriety attained by that individual:

In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.
Justice Powell indicated that since the latter status is seldom achieved, courts should "reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual’s participation in the particular controversy giving rise to the defamation."\(^6\)

As a result of Justice Powell’s opinion, the concepts of limited-purpose public figures and general-purpose public figures have emerged. Courts faced with the decision whether to afford a plaintiff public figure treatment have adopted a two-fold inquiry in response to the Powell language: 1) is the plaintiff a general-purpose public figure; 2) if not, is the plaintiff nonetheless a public figure for the range of issues implicated in the controversy giving rise to the defamation?\(^6\) A survey of defamation cases brought in federal courts since \textit{Gertz}, however, reveals few instances in which the federal bench has relied on the general-purpose public figure theory to justify an application of the \textit{New York Times} standard.

The general-purpose public figure analysis was first employed by the United States District Court for the Southern District of...
New York in *Meeropol v. Nizer.* In *Meeropol,* the two sons of Julius and Ethel Rosenberg were deemed public figures in their action for libel based on the book, *The Implosion Conspiracy.* In invoking the federal standard, the court relied exclusively on the plaintiffs' "general fame or notoriety in the community" and their "especial prominence in the affairs of society." Despite the plaintiffs' desire to avoid public attention, as evidenced by their change of surname, the court declared them to be public figures by reference to the general public figure phraseology of *Gertz.*

The general public figure designation was also utilized in an action for libel brought by the entertainer, Johnny Carson. Finding that the international reputation of the plaintiff was acknowledged in the pleadings of both parties, the Seventh Circuit Court of Appeals stated that "Carson is an all-purpose public figure."
While there are few other instances in which federal judges have held plaintiffs to be general-purpose public figures, the classification has been invoked against plaintiffs in several state court decisions. For example, the Supreme Court of Montana has ruled the appellation appropriate on the grounds that the plaintiff had published various works and been featured in two articles, run unsuccessfully for office, attended a political convention and an economic conference, and participated in committees and organizations. The court ruled, over a strident dissent, that general public figure status may rest upon mere "local notoriety," and that the plaintiff's involvement in Montana affairs satisfied this criterion.

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74 See, e.g., Buckley v. Littell, 539 F.2d 882, 889-90 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977); Ratner v. Young, 465 F. Supp. 386, 399 (D.V.I. 1979). Ratner involved a libel suit brought by William Kunstler and other attorneys who had acted as defense counsel in a celebrated murder trial. 465 F. Supp. at 388. The court ruled that Kunstler was a general-purpose public figure. Id. at 399. In Buckley, the court noted that the appellant, William F. Buckley, Jr., "has spent a life in politics as a principal spokesman for a controversial political position and is eminently prominent." 539 F.2d at 893. Having reviewed Buckley's public activity, the court determined that Buckley was an all-purpose public figure "in the classic sense of the Supreme Court cases." Id. at 896.


76 See id. at 218 (Haswell, C.J., dissenting). The dissent centered on the majority's designation of the appellant, Larry Williams, as a general-purpose public figure. Id. at 217-19 (Haswell, C.J., dissenting). Chief Justice Haswell, dissenting, argued that Williams' activities fell far short of those that would warrant his treatment as an all-purpose public figure within the meaning of Gertz, id. at 218 (Haswell, C.J., dissenting), and noted that according to the United States Court of Appeals for the District of Columbia Circuit, "a person can be a general public figure only if he is a 'celebrity'—his name is a 'household word'—whose ideas and actions the public in fact follows with great interest," id. (Haswell, C.J., dissenting) (quoting Waldhaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1292 (D.C. Cir.), cert. denied, 449 U.S. 898 (1980)). Since Williams achieved no celebrity status, and there was "no evidence that the general public is even aware of his many publications and activities," the dissent posited that Williams should not be classified among such personalities as Johnny Carson and William F. Buckley, Jr. 656 P.2d at 218 (Haswell, C.J., dissenting) (citing Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977), and Carson v. Allied News, Co., 529 F.2d 206 (7th Cir. 1976)).

77 656 P.2d at 216. The Montana Supreme Court took issue with the view that general purpose public figure designations must be based upon evidence that the plaintiff has attained national notoriety. Id. The court focused its attention on the phrase "general fame or notoriety in the community" found in Gertz, 418 U.S. at 352, and declared that the reference to the "community" indicated that only local notoriety was needed. 656 P.2d at 216. The court did not, however, weigh the import of the Gertz opinion as a whole with respect to the all-purpose public figure category, nor did it cite in its discussion the Firestone decision, which has been read to require a showing of national notoriety in order for a plaintiff to be classified as an all-purpose public figure. See 656 P.2d at 216. See generally, Comment, The Evolution of the Public Figure Doctrine in Defamation Actions, 41 Ohio St. L.J.
Similarly, the Supreme Court of Wyoming held a plaintiff to be a general-purpose public figure in a case in which the plaintiff, who was associated with a fundraising project, was mentioned in a defamatory manner on a radio call-in talk show. The court noted that the plaintiff had mixed success in political endeavors, but concluded that “[n]owhere is it said that the status of a public figure hinges upon success in the endeavors which lead to that status.”

A case decided by the Supreme Court of Kansas provides yet another instance in which a state court held a defamation plaintiff to be a public figure for all purposes. In *Steere v. Cupp*, the plaintiff, a local attorney, was censured publicly for having entered into a contingent fee contract with a defendant in a murder trial. The attorney, Myron Steere, alleged that a certain news report concerning his censure was defamatory. Since the plaintiff was a former county attorney, a participant in many social activities, and

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1009, 1021 & n.100 (1980) (*Firestone appears to require that general public figures be individuals of national stature*).

78 Adams v. Frontier Broadcasting Co., 555 P.2d 556, 562 (Wyo. 1976). In *Adams*, appellant Bob Adams sued a radio broadcasting company for defamation resulting from a caller’s broadcasted remark that Adams had been discharged as Insurance Commissioner on the basis of dishonesty. *Id.* at 557-58. The Supreme Court of Wyoming stated that while Adams was a public figure for the purposes of fundraising for the Crow Creek Project, which had been the subject of the radio discussion at the time of the defamatory broadcast, it was “[q]uite likely he is a public figure for all purposes and all contexts.” *Id.* at 562.

79 *Id.* at 559-60, 562. The court took note that Adams had run for various city and state offices twelve times between 1950 and 1970, and had been defeated in nine of those instances. *Id.* at 559. In addition, Adams had been appointed Insurance Commissioner of Wyoming in 1959, and had served as a member of the Laramie County Library Board. *Id.* He was also a promoter of the “Casper Troopers,” a respected drum and bugle corps. *Id.* at 560. Adams had stated in a deposition “that he would like to be a public figure.” *Id.* at 559. The court recognized that Adams had been frustrated in his political ambitions many times, but stated: “[I]logic compels the conclusion that one might be a public figure although the endeavors which lead to that status uniformly were unsuccessful.” *Id.* at 560-62.


81 *Id.* at 568, 602 P.2d at 1269-70. The written contingent fee contract provided that if the defendant were acquitted of the murder of her husband, the attorney would receive the entire inheritance to which the defendant would be entitled, less $10,000.00. *Id.* at 567, 602 P.2d at 1269. The contract was made after the attorney had become the defendant’s court appointed counsel, and its existence was intended to be kept secret. *Id.* After the defendant was convicted, the attorney was compensated by the court, but new counsel revealed the existence of the contingent fee arrangement, and public censure was imposed upon the original counsel by the Kansas State Board of Law Examiners. *Id.* at 568, 602 P.2d at 1270; see *In re Steere*, 217 Kan. 271, 276, 536 P.2d 54, 54 (1975).

82 226 Kan. at 568, 602 P.2d at 1271. Steere’s complaint centered upon portions of an Associated Press dispatch that alleged that he had been censured “for his conduct of the defense” and that he had “required” that the defendant enter into the contingent fee contract. *Id.* at 568, 602 P.2d at 1270-71.
former counsel to a board of commissioners in a dispute over the construction of a courthouse, the court found that "the totality of his experience in Franklin County gave Myron Steere the requisite fame and notoriety in his community to be declared a public figure for all purposes." The court then addressed the question of whether Steere was a limited-purpose public figure, and determined that he was not a public figure with respect to the controversy giving rise to the alleged defamation. Yet despite this specific finding, the plaintiff, as a general public figure, was considered under the stringent New York Times test.

A CRITICAL ANALYSIS

It is submitted that the apparent incongruity of caselaw stemming from general public figure designations underscores the failure of the theoretical underpinnings upon which such classifications are based. The general-purpose public figure concept is grounded on the premise that by virtue of one's "pervasive fame or notoriety," the defamed individual incurs a forfeiture of defamation remedies under state-established standards "for all purposes and in all contexts." Unlike the vast majority of cases involving public figures, in which courts employ the limited-purpose public figure analysis, courts that designate plaintiffs as general-purpose public figures impose the New York Times standard without considering the content of the defamatory publication or the subject area for which the plaintiff has achieved public figure status. In-

83 Id. at 570, 602 P.2d at 1273. The court considered the warning of Gertz that participation in community affairs should not of itself justify general public figure designation, but noted that Gertz had "achieved no general fame or notoriety in the community." Id. The court distinguished Gertz from Steere, claiming that "Steere's active involvement in important community affairs has made him well known to the public." Id.

84 Id. at 571, 602 P.2d at 1273-74. The court stated that "an attorney who actively represents a client does not become a public figure for limited purposes without additional evidence of an attempt to gain public attention to influence the outcome of the controversy. We hold therefore, Myron Steere was not a public figure for a limited purpose." Id. at 572, 602 P.2d at 1274.

85 Id. Although the Kansas court found that Steere was not a public figure for the purposes of the controversy giving rise to the defamation, the court held that "[t]he classification of appellant as a public figure for general purposes changes his burden from that of proving simple negligence to proving actual malice." Id. Since there was no evidence that the news reports were issued with knowing falsity or reckless disregard for their truth, the court held that the trial court properly properly granted summary judgment in favor of the defendant. Id.

86 Gertz, 418 U.S. at 351.

87 Since an all-purpose public figure designation is based on a plaintiff's fame and noto-
stead, a plaintiff classified as a general-purpose public figure is
deemed to have waived all state-established avenues of reputa-
tional redress, and may in no event succeed upon satisfaction of a
standard less than actual malice, despite the very real possibility
that the defamations may reflect on matters not related to the ac-
tivities through which the public figure's status was achieved.\textsuperscript{68} It
is submitted that the characterization of an individual as a public
figure for all aspects of his life may yield rational results only if the
plaintiff so designated has, in fact, sacrificed every aspect of his life
to the attention of the public. Yet, Justice Brennan, the author of
the \textit{New York Times} decision, has stated that "some aspects of the
lives of even the most public men fall outside the area of matters
of public or general concern."\textsuperscript{88}

The \textit{Gertz} opinion established a strong presumption against
the designation of a plaintiff as an all-purpose public figure.\textsuperscript{69} Still,
however, it is submitted that the need for a general public figure
designation is questionable when considered in light of the treat-
ment accorded defamation plaintiffs who qualify as public officials.

When the Court in \textit{New York Times} offered a qualified privi-
lege to falsehoods relating to the official conduct of public officials,
it acted in accordance with the long-established principle that
"public men, are, as it were, public property."\textsuperscript{91} This privilege was
deemed essential in order to insure "a free flow of information to
the people concerning public officials, their servants."\textsuperscript{92} Yet, even

\textsuperscript{68} Since the all-purpose public figure generalization as enunciated in \textit{Gertz} creates a
presumption that the plaintiff has thrust his personality into the public domain for all pur-
poses and in all contexts, the plaintiff's recovery for any defamatory statement depends on
his meeting the actual malice burden. \textit{See supra} notes 72-87 and accompanying text.

\textsuperscript{69} \textit{Rosenbloom v. Metromedia, Inc.}, 403 U.S. 29, 48 (1971); \textit{see Warshawsky, \textit{Libel, the
Media, and Public Figures and Officials}}, 86 \textit{Case \\& Com.} 44, 47 (No. 1 1981).

\textsuperscript{70} \textit{See supra} notes 65-66.

n.18 (1952)).

\textsuperscript{91} \textit{Garrison v. Louisiana}, 379 U.S. 64, 77 (1964); \textit{see New York Times Co. v. Sullivan,
376 U.S. 254, 297 (1964) (Black, J., concurring) \("[a]n unconditional right to say what one
pleases about public affairs is what I consider to be the minimum guarantee of the First
Amendment")}; \textit{see also Roth v. United States}, 354 U.S. 476, 484 (1957); \textit{Stromberg v. Cali-
though the Court has recognized that a broad range of speech concerning public officials is entitled to constitutional protection, the *New York Times* standard has not been held applicable to all aspects of these individuals' lives. Indeed, the Court has referred to the existence of an undelineated "exiguous area of defamation against which a candidate may have full recourse."

A two-fold inquiry must precede a determination to apply the *New York Times* standard to a public official. The court must determine first whether the plaintiff is, in fact, a public official, and, second, whether the alleged defamation relates to the plaintiff in an official capacity. Only if both criteria are met may the public official's recovery be conditioned upon proof that the defamatory statements were made with actual malice. A public official may be afforded redress under less stringent standards if the falsehoods do not bear on his official conduct. Falsehoods concerning...
general public figures thus receive greater constitutional protection than those relating to officials in positions of public trust. It is submitted that no sufficient justification has been articulated for extending such a degree of constitutional protection to defamatory falsehoods relating to public figures.

It is noteworthy that the New York Times privilege was derived not only from the sacrosanctity accorded political speech under the Federal Constitution, but also in response to the absolute immunity that public officials enjoy from defamation suits based on statements made within their line of duty. The Court was cognizant of the need to afford a reciprocal privilege to statements relating to public officeholders when it stated that "a privilege for criticism of official conduct is appropriately analogous to the protection accorded a public official when he is sued for libel by a private citizen." Justice Brennan stated: "It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves." For this and other reasons, the Court unanimously imposed on public officials the burden of proving knowing falsity or reckless disregard for the truth of a publication—a rule which already had been adopted by the highest courts of many states.

The qualified privilege that protects defamatory speech about public figures was based on no such reasoning. It came about in

285 N.Y.S.2d 456, 457-58 (Sup. Ct. N.Y. County 1967), aff'd, 32 App. Div. 2d 520, 299 N.Y.S.2d 564 (1st Dept 1969), or a nationally prominent United States Senator and presidential candidate, see Goldwater v. Ginzburg, 414 F.2d 324, 327 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970). It is submitted, therefore, that the official conduct limitation to the public official rule has obviated the need for separate "general purpose public official" and "limited purpose public official" classifications.


376 U.S. at 282 (emphasis in original) (footnote omitted).

Id. at 282-83.

The requirement that public officials prove malice in order to recover in a defamation suit existed long before the Supreme Court constitutionalized the law of libel with respect to public officials in New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Such a rule was recognized early in this century in Coleman v. MacLennan, 78 Kan. 711, 721, 98 P. 281, 291-92 (1908), and in other decisions pre-dating New York Times, as well, e.g., Snively v. Record Publishing Co., 185 Cal. 565, 569, 198 P. 1, 5-6 (1921); Lawrence v. Fox, 357 Mich. 134, 146, 97 N.W.2d 719, 725 (1959).

The Court recognized that little of the reasoning that supported the New York Times decision was present when it extended a qualified privilege to defamation actions involving public figures:
Butts as the result of the effort, first undertaken by the Court in New York Times, "to resolve the antithesis between civil libel actions and the freedom of speech and press."\textsuperscript{102} Later, in Gertz, a bare majority of five justices suggested that individuals might be considered public figures for all aspects of their lives.\textsuperscript{103} Justice Brennan has concluded that "the idea that certain public figures have voluntarily exposed their entire lives to public inspection . . . is, at best, a legal fiction."\textsuperscript{104} Yet, courts have employed this fiction to impose on plaintiffs the burden of proving actual malice—a requirement which will usually frustrate a plaintiff's claim.\textsuperscript{105}

The determination of whether a plaintiff is a public figure is one of great difficulty for a court. While a public official may readily be identified,\textsuperscript{106} one federal judge has stated that defining public figures "is much like trying to nail a jellyfish to the wall."\textsuperscript{107}

In the cases we decide today none of the particular considerations involved in New York Times is present. These actions cannot be analogized to prosecutions for seditious libel. Neither plaintiff has any position in government which would permit a recovery by him to be viewed as a vindication of governmental policy. Neither was entitled to a special privilege protecting his utterances against accountability in libel.

Curtis Publishing Co. v. Butts, 388 U.S. 130, 154 (1967); see also Stewart, supra note 8, at 13 ("the court has never suggested that the constitutional right of free speech gives an individual any immunity from liability for either libel or slander") (emphasis omitted).

\textsuperscript{102} Butts, 388 U.S. at 153.

\textsuperscript{103} See supra notes 65-66 and accompanying text.


\textsuperscript{105} See supra notes 74-92 and accompanying text. The Gertz Court recognized that requiring a plaintiff to show actual malice "exacts a . . . high price from the victims of defamatory falsehood." Gertz, 418 U.S. at 342; see also Time, Inc. v. Firestone, 424 U.S. 448, 457 (1976) (New York Times standard imposes drastic limitation on the law of defamation); cf. Tilton v. Cowles Publishing Co., 76 Wash. 2d 707, 712, 459 P.2d 8, 13 (1969), cert. denied, 399 U.S. 297 (1970) (designation of a plaintiff as a public figure "should not be made lightly" since such classification "results in a decrease of the protections against invasions of privacy and defamation of character provided by law").

\textsuperscript{106} Belli v. Orlando Daily Newspapers, Inc., 389 F.2d 579, 588 (5th Cir. 1967) ("In most cases it is a relatively simple matter to determine whether the plaintiff is a public official and whether the defamatory comment is directed toward his official capacity") (emphasis in original), cert. denied, 393 U.S. 825 (1968); see Harris v. Tomczak, 94 F.R.D. 687, 692 (E.D. Cal. 1982) ("the question raised . . . regarding the role which contested issues of fact play in the ultimate determination may not arise in cases where 'public officialdom' is at issue").

\textsuperscript{107} Rosanova v. Playboy Entera., 411 F. Supp. 440, 443 (S.D. Ga. 1976), aff'd, 580 F.2d 859 (5th Cir. 1978). One court has remarked: "[I]n the case of a public figure there is substantially more room for the interplay of facts concerning his entry into the public arena and the nature of the issue in which he has become embroiled." Belli v. Orlando Daily Newspapers, Inc., 389 F.2d 579, 588 (5th Cir. 1967) (emphasis in original), cert. denied, 393 U.S. 825 (1968); see also Christie, Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches, 75 Mich. L. Rev. 43, 63-64 (1976).
Differentiating between limited-purpose public figures and general-purpose public figures presents an even more arduous task. It is suggested that the difficulty involved in making this distinction militates strongly against finding any plaintiff to be part of a class whose members are deemed to have waived defamation remedies based on theories less stringent than the federal standard. Moreover, mindful that the number of individuals who have become public figures for all purposes are, according to Gertz, exceedingly few, it is submitted that judicial time would be conserved by eliminating subclasses of public figures which necessitate multiple inquiries as to a plaintiff's status.

AN ALTERNATIVE APPROACH

It is submitted that the principles underlying the Gertz decision will best be served if plaintiffs are subjected to a single public figure analysis under which the New York Times standard will be imposed only if the falsehoods relate to the public conduct of the defamed individual. The limited-purpose public figure analysis

The designation of an individual as a limited purpose public figure may be based upon a finding that a plaintiff willingly took part in activity from which a partial waiver of reputational protections is inferred. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974). The Court, however, has held that "the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." Id. (emphasis added). Since a general purpose public figure is deemed to be a public figure "for all aspects of his life," id. at 352, it is clear that a general purpose public figure loses all opportunity to obtain reputational redress under state-established standards. It is submitted that such designations may infringe upon the rule that courts should "indulge every reasonable presumption against waiver," Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937), and should "not presume acquiescence in the loss of fundamental rights," Ohio Bell Tel. Co. v. Public Utilities Comm'n, 301 U.S. 292, 307 (1937). See Barker v. Wingo, 407 U.S. 514, 525-26 (1972); see also Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (waiver is "an intentional relinquishment or abandonment of a known right").


A public figure analysis involving a two-step analysis had been employed by courts prior to the establishment of the two separate categories of public figures in Gertz. See, e.g., Bell v. Orlando Daily Newspapers, Inc., 389 F.2d 579, 587-88 (5th Cir. 1967), cert. denied, 393 U.S. 825 (1968) ("a court confronted with a defamation suit in which the defendant asserts the New York Times privilege is compelled to make the dual inquiry (1) whether the plaintiff is a public figure and (2) whether the alleged defamatory publication is directed towards his public conduct"). It is suggested that the "public conduct" limitation would permit courts to employ a single analysis to all public figures for the purpose of imposing the New York Times test, just as courts presently do with respect to public officials by virtue of the official conduct limitation. See supra note 96.
has proven workable in cases where a plaintiff is highly prominent and frequently involved in public affairs as well as in cases in which the plaintiff has achieved public notoriety infrequently, involuntarily, or under unique or short-lived circumstances.\(^\text{112}\) Limited public figure analysis involves an identification of a specific public controversy to which a defamatory falsehood relates, and a determination as to the extent of the plaintiff’s participation in the delineated controversy.\(^\text{113}\) Because the public controversy concept is a flexible one, it may be defined in broad or narrow terms, depending on the nature of the controversy giving rise to the defamation and the character of the plaintiff involved in the dispute.\(^\text{114}\) Because the plaintiff is burdened with proving that the defamation was propagated with actual malice, the court must make an informed decision, based on all pertinent factual considerations, that the plaintiff has become a public figure with respect to the relevant controversy.\(^\text{115}\) Such an approach would prevent a result similar to


\(^\text{114}\) Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1297 n.27 (D.C. Cir.), cert. denied, 449 U.S. 898 (1980). The Waldbaum court stated: “A narrow controversy will have fewer participants overall and thus fewer who meet the required level of involvement. A broad controversy will have more participants, but few can have the necessary impact.” Id. In addition, there may be instances in which a plaintiff, while somewhat involved in a particular controversy, may not independently be able to impact on its resolution. “Indeed, a narrow controversy may be a phase of another, broader one, and a person playing a major role in the ‘subcontroversy’ may have little influence on the larger questions or on other subcontroversies.” Id. Under such circumstances, “the plaintiff would be a public figure if the defamation pertains to the subcontroversy in which he is involved but would remain a private person for the overall controversy and its other phases.” Id.

that in *Steere v. Cupp*, in which the party required to prove *New York Times* malice was found not to be a public figure for the purposes of the defamation then before the court.\(^{116}\)

General public figure designations apparently have been made by courts based upon a perception that the aggregate public activity of an individual has exceeded some unspecified threshold. The extent of such a designation reaches to every aspect of the individual's life. Since the designation of a plaintiff as a general public figure may potentially influence later actions involving the same plaintiff,\(^ {117}\) particularly in jurisdictions which hold a plaintiff's status unaffected by the passage of time,\(^ {118}\) it is submitted that such a

\(^{116}\) See supra notes 80-85 and accompanying text.

\(^{117}\) A finding that a plaintiff is a public figure for all purposes and in all contexts may carry significant weight when another court is called upon to determine the same plaintiff's status in a subsequent defamation suit. Indeed, the doctrine of collateral estoppel applies to prevent parties from relitigating any issue that has already been adjudicated. 1B J. Moore, *J. Lucas & T. Currier, Moore's Federal Practice* § 0.443[1], at 758 (2d ed. 1983); see Paine & Williams Co. v. Baldwin Rubber Co., 113 F.2d 840, 843 (6th Cir. 1940).

A plaintiff previously adjudicated to be a public figure subsequently has been held collaterally estopped from relitigating his status in a separate defamation action involving a different defendant. In *Mount v. Sadik*, No. 78 Civ. 2279, slip op. at 4 (S.D.N.Y. 1980), plaintiff, an art expert, challenged the contention that he was a public figure for a controversy surrounding paintings by John Singer Sargent. Id., slip op. at 5. The court found that 

"[t]he issue of whether Mount is a public figure for purposes of the 1967 controversy has already been decided against Mount by two other courts and it is questionable whether Mount can seek to attack those decisions collaterally in this proceeding." Id., slip op. at 7; see *Mount v. The Boston Athenaeum*, No. 74-4837-T, slip op. at 5 (D. Mass. July 25, 1975), aff'd mem., 530 F.2d 961 (1st Cir. 1976), cert. denied, 431 U.S. 916 (1977); *Mount v. The Viking Press*, Inc., No. 7036/74, slip op. at 6 (N.Y. Sup. Ct. Dec. 16, 1974). The court in *Mount v. The Boston Athenaeum* also recognized that the designation of Mount as a public figure in *Mount v. The Viking Press* was binding in subsequent litigation: "[T]hat determination has a collateral estoppel effect in the present proceeding." *Mount v. The Boston Athenaeum*, slip op. at ___ Since a public figure designation will be binding prospectively for the range of issues identified by a court, it is suggested that the designation of a plaintiff as a public figure for all purposes may unduly prejudice that party in subsequent actions. Because general purpose public figure categorization renders an individual a public figure for every aspect of his life, it appears that a plaintiff so classed may effectively be precluded from challenging the application of the *New York Times* standard, even in later actions that bear no relation to the issues previously implicated.

\(^{118}\) Some jurisdictions require that individuals meet the *New York Times* standard even though the events which gave rise to their designation as public figures occurred many years before the alleged defamatory statements were made. For example, in *Street v. National Broadcasting Co.*, 645 F.2d 1227 (6th Cir. 1981), the United States Court of Appeals for the Sixth Circuit held that Victoria Price Street, the complainant in the Scottsboro rape cases, *see Powell v. Alabama*, 287 U.S. 45 (1932), was a public figure for the controversy surrounding the Scottsboro trials, despite their occurrence 40 years before. 645 F.2d at 1233-36. Finding that "[c]onsiderations that underlie the public figure doctrine in the context of contemporaneous reporting also apply to later historical or dramatic treatment of the same events,"
broad judicial determination should not be based on so vague a standard.

CONCLUSION

The limited public figure approach has served as a basis for determining the applicability of the *New York Times* standard to public figures in nearly all defamation cases since *Gertz*. In addition, this test restricts the availability of state defamation standards to plaintiffs only to the extent that such plaintiffs' lives have become part of the public realm. It is submitted that if all plaintiffs were examined under this analysis, unnecessary nomenclature would be eliminated, and all defamation plaintiffs would be afforded treatment under a uniform test that offers procedural structure and predictable results. We are reminded by Warren and Brandeis that: "The general object in view is to protect the privacy of private life, and to whatever degree and in whatever connection a man's life has ceased to be private, before the publication under consideration has been made, to that extent the protection is to be withdrawn."119

Michael J. Gunnison

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