

A FAMILY AFFAIR? DOMESTIC RELATIONS AND INVOLUNTARY PUBLIC FIGURE STATUS

by
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Public figures seeking defamation damages have a higher burden to meet than do private individuals. Because claims of defamation by public figures can raise free speech concerns, courts have developed constitutional limitations on defamation damages in certain situations. Over the past 50 years, the Supreme Court has neither agreed on a clear method by which to determine who counts as a public figure nor on how to apply those criteria that have been suggested. This lack of clarity has led to confusion and inconsistency in the lower courts. The concept of the involuntary public figure illustrates the problem.

This Article traces the development of the constitutional limitations on defamation, as well as the expansion of the classification of involuntary public figures. In some cases, limitations on defamation damages apply merely because an individual's familial status has temporarily placed him in the limelight. This Article concludes that the involuntary public figure status has been overextended in the lower courts and that the Supreme Court should clarify when and why that status should be conferred. Unless the Court offers some clear guidelines and applies those guidelines in an understandable way, the chaos in this area will undoubtedly continue.

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I. INTRODUCTION

The constitutional limitations on defamation damages have changed greatly over the past five decades. Initially, only statements about public officials triggered such limitations, but the class of individuals triggering the most demanding standard was subsequently expanded. Over the past half century, members of the Supreme Court could neither agree about the kinds of people nor the kinds of statements that should be afforded constitutional protection. Even when ostensibly agreeing about the criteria to be used in defamation cases, members of the Court disagreed greatly about how the announced criteria should be applied in practice. This has caused not only inconsistency within the lower courts but also an apparent divide between the Court and the courts below.

One of the most doctrinally confusing aspects of current defamation jurisprudence involves the notion of an involuntary public figure, which was initially described as a status that would rarely, if ever, be conferred. Nonetheless, several plaintiffs have been held involuntary public figures, sometimes merely because of their family connections, implicit Supreme Court views to the contrary notwithstanding.

Part II of this Article traces the development of the constitutional limitations on defamation. Part III focuses on several cases involving involuntary public figures, noting some of the cases that seem compatible with the Court's implicit view and other cases that seem to undermine it. This Article concludes that the involuntary public figure status has been overextended in the lower courts and that the Court should clarify when and why that status should be conferred to make defamation jurisprudence more coherent. Unless the Court offers some clear guidelines and applies those guidelines in an understandable way, the chaos in this area will undoubtedly continue, which will serve neither individuals' interests in protecting their reputations nor societal interests in having robust discussions on matters of public concern.

II. THE DEVELOPING DEFAMATION JURISPRUDENCE

Defamation plaintiffs have been subjected to varying rules over the past several decades. Both the class of individuals triggering the most demanding standard and the justifications for employing that standard have varied, making the jurisprudence difficult to understand. Further, the Court has sometimes applied the announced criteria in surprising ways, making the jurisprudence even more mysterious. The Court's inability to adopt a coherent rationale combined with its unwillingness to apply the criteria that it has announced have made this area of the law chaotic.

A. *The Actual Malice Test*

In *New York Times Co. v. Sullivan*,¹ the Supreme Court announced a new defamation test,² explaining that the Constitution “prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”³ While the defamation test discussed by the *New York Times* Court was only triggered when criticism of a “public official” was at issue, the class of individuals subject to the announced test was expanded from “public officials”⁴ to “public figures” in *Curtis Publishing Company v. Butts*.⁵

The *Butts* Court explained why it made sense to expand the class triggering the more burdensome test,⁶ noting that public figures were analogous to public officials in important respects, as the *Butts* plaintiffs illustrated. Both of the plaintiffs “commanded a substantial amount of independent public interest at the time of the [allegedly defamatory] publications.”⁷ Wallace Butts, who “had previously served as head football coach of the University [of Georgia] and was a well-known and respected figure in coaching ranks,”⁸ had “attained that [public figure] status by position alone,” and Edwin Walker had attained public figure status by virtue of “his purposeful activity amounting to a thrusting of his personality into the ‘vortex’ of an important public controversy.”⁹ Regardless of how each had attained his position in the public eye, the Court was confident that both plaintiffs “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 de-

¹ 376 U.S. 254 (1964).

² *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 765 (1985) (“Until *New York Times Co. v. Sullivan*, the law of defamation was almost exclusively the business of state courts and legislatures.” (White, J., concurring) (citation omitted)).

³ *N.Y. Times Co.*, 376 U.S. at 279–80.

⁴ The *Rosenblatt* Court discussed which public officials were subject to the *N.Y. Times* standard, explaining that “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.” *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

⁵ 388 U.S. 130, 134 (1967).

⁶ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335 (1974) (“Three years after *New York Times*, a majority of the Court agreed to extend the constitutional privilege to defamatory criticism of ‘public figures.’”); see also *Herbert v. Lando*, 441 U.S. 153, 159 (1979) (“*New York Times* and *Butts* effected major changes in the standards applicable to civil libel actions. Under these cases public officials and public figures who sue for defamation must prove knowing or reckless falsehood in order to establish liability.”).

⁷ *Butts*, 388 U.S. at 154.

⁸ *Id.* at 135–36.

⁹ *Id.* at 155.

famatory statements.”¹⁰ Thus, public figures were like public officials in that they had access to the media and could engage in self-help to defend their reputations.

When holding that public figures, like public officials, had to overcome a greater burden to be awarded defamation damages, the *Butts* Court was employing the rationale suggested in *Time, Inc. v. Hill*, where the Court explained that public figures should be treated differently than private individuals because of the difference between the “relative opportunities of the public official and the private individual to rebut defamatory charges.”¹¹ The Court also suggested that public figures sometimes waive state protections of reputation by voluntarily entering the limelight.¹² Thus, the Court reasoned such public figures not only have greater access to the media but they know that there is an increased risk that they will be discussed publicly in ways that may be inaccurate.

B. *Matters of Public Concern Take Center Stage*

In *Rosenbloom v. Metromedia*, the plurality questioned some of the assumptions underlying the jurisprudence distinguishing between public officials and public figures on the one hand and private individuals on the other.¹³ For example, “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 . . . to the nature of our society,” because “[v]oluntarily or not, we are all ‘public’ men to some degree.”¹⁴ Further, the claim that “certain ‘public’ figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view is . . . a legal fiction,”¹⁵ suffering from at least two defects. First, public figures do not volunteer to make all aspects of their lives subject to public scrutiny—“some aspects of the lives of even the most public men fall outside the area of matters of public or general concern.”¹⁶ Second, treating public figures so differently from private individuals “could easily produce the paradoxical result of dampening discussion of issues of public or general concern

¹⁰ *Id.* (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

¹¹ *Time, Inc. v. Hill*, 385 U.S. 374, 391 (1967).

¹² *Id.* (“Different considerations might arise concerning the degree of ‘waiver’ of the protection the State might afford. But the question whether the same standard should be applicable both to persons voluntarily and involuntarily thrust into the public limelight is not here before us.”).

¹³ *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 45–46 (1971), *abrogated by Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343–46 (1974)).

¹⁴ *Id.* at 47–48.

¹⁵ *Id.* at 48.

¹⁶ *Id.*; see also Matthew J. Coleman, *The “Ultimate Question”: A Limited Argument for Trafficking in Stolen Speech*, 55 OKLA. L. REV. 559, 603 (2002) (“[E]ven public figures generally expect to maintain some degree of privacy with respect to their personal lives.”).

because they happen to involve private citizens while extending constitutional encouragement to discussion of aspects of the lives of ‘public figures’ that are not in the area of public or general concern.”¹⁷ Thus, issues that affect the lives of many people might remain under-discussed while the purely personal aspects of the lives of public figures might be discussed ad nauseam,¹⁸ which is not in anyone’s interest.¹⁹

In addition, the *Rosenbloom* plurality was not confident that public figures as a general matter would have qualitatively better access to the media than would private individuals.²⁰ While very prominent people might have such access,²¹ many public figures would not. Further, even those who have access would likely be unable to refute the original charge,²² at least in part because “[d]enials, retractions, and corrections are not ‘hot’ news, and rarely receive the prominence of the original story.”²³ In short, with respect to “the vast majority of libels involving public officials or public figures, the ability to respond through the media will depend on the same complex factor on which the ability of a private individual depends: the unpredictable event of the media’s continuing interest in the story.”²⁴ But if there is much doubt about the ability of public figures to gain access to the media and about their ability to mount an effective campaign to refute false stories, then requiring them but not private individuals to establish actual malice is not justifiable.

The *Rosenbloom* plurality’s points cut both ways. If indeed the public figure and the private individual are in relevantly similar positions, then distinguishing on the basis of fame is not justifiable. But that might mean doing what the *Rosenbloom* plurality supported, namely, affording protection to publications on matters of public concern regardless of whether the allegedly defamed individual is a public figure or a private individu-

¹⁷ *Rosenbloom*, 403 U.S. at 48.

¹⁸ Cf. Robert W. Gordon, *Imprudence and Partisanship: Starr’s OIC and the Clinton–Lewinsky Affair*, 68 *FORDHAM L. REV.* 639, 684 (1999) (“[S]exual scandal tends to suck up all the available space for media coverage and public discussion of politics and to distract attention from issues of substance.”).

¹⁹ In addition, the very likelihood that public lives would be subject to intense scrutiny might affect who would be willing to engage in public service. See *id.* (“[T]he insistence on making public all aspects of private life, and especially sexual conduct of public figures, breeds incentives to political blackmail, discourages qualified candidates from entering public life, and thus drastically restricts the pool of political talent.”).

²⁰ *Rosenbloom*, 403 U.S. at 46–47 (discussing “the 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”).

²¹ See *id.* at 46.

²² *Id.* (“[I]t is the rare case where the denial overtakes the original charge.”).

²³ *Id.*

²⁴ *Id.*

al.²⁵ Or, it might simply be taken to undermine the persuasiveness of using the actual malice test for public figures. Thus, the *Rosenbloom* plurality's reasoning might be used to justify overruling *Butts* and only using the actual malice test when allegedly defamatory comments about public officials are at issue, or, perhaps, overruling both *Butts* and *New York Times* and refusing to employ the actual malice standard at all in the defamation context.

C. Reaffirming the Importance of Public Figure Status

The apparent rejection of the propriety of differentiating between public figures and private individuals did not last long. In *Gertz v. Robert Welch, Inc.*,²⁶ the Court emphasized the importance of that distinction. At issue were statements made about Elmer Gertz, an attorney who represented the Nelson family in a civil action against a Chicago policeman who had killed 17-year-old Ronald Nelson.²⁷ The magazine *American Opinion* printed a long article²⁸ that included the allegations that Gertz had been an "architect of the 'frame-up,'" and a "Communist-fronter."²⁹ A key issue was whether Gertz had to establish actual malice on the part of *American Opinion* before he could collect defamation damages.³⁰

The magazine had asserted that Gertz was a public figure and that the article had involved a matter of public interest.³¹ If Gertz were a public figure, then his defamation action could only be successful if he could establish that *American Opinion* had published the false statements with actual malice.³² Further, assuming that a wrongful killing by a policeman was a matter of public interest, *Rosenbloom* suggested that actual malice

²⁵ *Id.* at 52 ("We thus hold that a libel action, as here, by a private individual against a licensed radio station for a defamatory falsehood in a newscast relating to his involvement in an event of public or general concern may be sustained only upon clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not.").

²⁶ 418 U.S. 323 (1974).

²⁷ *Id.* at 326 (noting that in "his capacity as counsel for the Nelson family in the civil litigation, petitioner attended the coroner's inquest into the boy's death and initiated actions for damages"); see Eileen Carroll Prager, Note, *Public Figures, Private Figures and Public Interest*, 30 STAN. L. REV. 157, 167 (1977) ("The Nelson family had retained Elmer Gertz to represent them in civil litigation against a police officer convicted of murdering 17-year-old Ronald Nelson.").

²⁸ *Gertz v. Robert Welch, Inc.*, 471 F.2d 801, 803 (7th Cir. 1972), *rev'd*, 418 U.S. 323 (1974) ("The article is 18 pages long.").

²⁹ *Gertz*, 418 U.S. at 326.

³⁰ *Id.* at 327-28 (*American Opinion* asserted that it should "escape liability unless petitioner could prove publication of defamatory falsehood 'with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.'" (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964))).

³¹ *Id.* at 327.

³² *Id.* at 327-28.

would have to be established even if Gertz were not a public figure.³³ Indeed, the *Gertz* Court noted that one of the costs of adopting the *Rosenbloom* plurality position was that “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.”³⁴

The *Gertz* Court laid out some of the competing considerations to be weighed when establishing the constitutional limitations on defamation awards. First, because “punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press,” the Court explained that “a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship.”³⁵ Nevertheless, the “need to avoid self-censorship by the news media is . . . not the only societal value at issue.”³⁶ If there were no other values to weigh in the balance, the Court “would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation.”³⁷ A competing value is the state’s legitimate interest in assuring “compensation of individuals for the harm inflicted on them by defamatory falsehood.”³⁸

After noting these conflicting societal interests, the Court then justified the Constitution’s making it more difficult for public figures to be awarded defamation damages by focusing on the differing actions of the alleged victims. Public figures are to be differentiated from others “by reason of the notoriety of their achievements or the vigor and success with which they seek the public’s attention.”³⁹ By requiring actual malice in cases involving public figures, the Constitution “administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander.”⁴⁰ Thus, the media will feel much safer when discussing the actions of public figures, because actual malice will have to be established in cases in which media allegations about such individuals turn out to be false. By affording the media this added protection, there is a greater likelihood that the media will discuss important issues related to the qualifications of well-known individuals or, perhaps, analyses of how well those individuals are performing their tasks. However, affording the press such protections is not

³³ See *id.* at 330 (“The Court of Appeals read *Rosenbloom* to require application of the *New York Times* standard to any publication or broadcast about an issue of significant public interest, without regard to the position, fame, or anonymity of the person defamed . . .”).

³⁴ *Id.* at 337.

³⁵ *Id.* at 340.

³⁶ *Id.* at 341.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 342.

⁴⁰ *Id.*

without cost, because there will be “many deserving plaintiffs, including some intentionally subjected to injury, [who] will be unable to surmount the barrier of the *New York Times* test.”⁴¹ Thus, the media may intentionally or unwittingly make false allegations about public figures, thereby injuring their reputations, but will not be held accountable because of the difficulty in proving actual malice.

The Court understood that whenever lines are drawn, there is some likelihood that the chosen categories will be over- or under-inclusive.⁴² Because of the necessity of laying down “broad rules of general application” to avoid “unpredictable results and uncertain expectations,” the chosen categories will “necessarily treat alike various cases involving differences as well as similarities.”⁴³ By their very nature, generalizations are “nuance-suppressing,”⁴⁴ and may not capture subtle differences between cases. Further, when various factors are considered in fashioning a particular rule, it is to be expected that “not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority.”⁴⁵

The Court’s points about fashioning general rules are well-taken. However, those observations might be made whenever a generalization is employed, so they will not be especially useful when determining which defamation approach should be adopted. The *Rosenbloom* plurality’s position affords too much or too little protection in some cases,⁴⁶ but so does the position adopted in *Gertz*.⁴⁷

Some of the interesting issues raised in *Gertz* include why there is a “limited state interest . . . in the context of libel actions brought by public persons” and whether “the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them.”⁴⁸ Arguably, the state might be thought to have a greater interest in protecting the reputations of public figures if only to

⁴¹ *Id.*

⁴² *Cf. The Supreme Court, 2009 Term—Leading Cases*, 124 HARV. L. REV. 179, 310 (2010) (discussing “the Court justifying over- and under-inclusiveness at the margins as a necessary cost of doctrinal clarity”).

⁴³ *Gertz*, 418 U.S. at 343–44.

⁴⁴ See Toni M. Massaro & Robin Stryker, *Freedom of Speech, Liberal Democracy, and Emerging Evidence on Civility and Effective Democratic Engagement*, 54 ARIZ. L. REV. 375, 411 (2012).

⁴⁵ *Gertz*, 418 U.S. at 344.

⁴⁶ See *supra* note 34 and accompanying text (pointing out that under *Rosenbloom*, private figures may have to establish actual malice to be awarded compensation for reputational harms).

⁴⁷ See *supra* notes 20–24 and accompanying text (discussing the *Rosenbloom* plurality rejection of the claim that most public figures can protect their reputations because of their superior access to the media).

⁴⁸ *Gertz*, 418 U.S. at 343.

induce more individuals to serve the public interest,⁴⁹ so *Gertz* might be thought to be inaccurately representing state priorities.

The *Gertz* Court noted that 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.”⁵⁰ Because “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,”⁵¹ the state has less of a need to rely on the tort system to compensate public figures. On the other hand, because private individuals do not have similar access to public media, they “are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.”⁵²

Yet, even if the Court is correct about the likelihood that a particular individual will have access to the media, that does not justify requiring public figures, but not private individuals, to prove actual malice. Consider the Court’s admission that “an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood” and that “the truth rarely catches up with a lie.”⁵³ This means that having access to the media is not a sufficient remedy.

The *Gertz* Court admitted that its media access rationale was not particularly persuasive, but argued that “the fact that the self-help remedy of rebuttal, standing alone, is inadequate to its task does not mean that it is irrelevant to our inquiry.”⁵⁴ However, its being relevant to the inquiry is a far cry from its providing an adequate justification for employing the actual malice standard, especially because there are other ways to take into account an individual having greater access to the media without denying recovery to that individual absent a showing of actual malice. For example, plaintiffs have a duty to mitigate as a general matter,⁵⁵ and public figures who did not even try to defend themselves in the media might be held to have sacrificed some percentage of recovery.⁵⁶ But requiring

⁴⁹ See Gordon, *supra* note 18, at 683–84 (discussing why individuals might be deterred from being a public official).

⁵⁰ *Gertz*, 418 U.S. at 344.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 344 n.9.

⁵⁴ *Id.*

⁵⁵ See *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 n.15 (1982) (“Where one person has committed a tort, breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages.” (quoting CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 33, at 127 (1935))).

⁵⁶ A retraction of a statement might be relevant in considering whether damages had been mitigated, see *Weinstein v. Bullick*, 827 F. Supp. 1193, 1198 n.2 (E.D. Pa. 1993), and a failure to ask for a retraction might be considered when assessing whether a plaintiff had failed to mitigate, see *Desnick v. Am. Broad. Cos.*, No. 93 C

someone to mitigate harm is quite different from making it very difficult for that person to establish compensable reputational harm in the first place. The former speaks to how much the plaintiff might receive as compensation, whereas the latter speaks to whether the plaintiff suffered cognizable harm at all.

The *Gertz* Court did not solely rely on the public figure's ability to access the media as the justification for its position, noting in addition that an "individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs[, because] [h]e runs the risk of closer public scrutiny than might otherwise be the case."⁵⁷ Yet, there are many individuals who are public figures who are not public officials and who do not run for office.

The *Gertz* Court expressly noted that one need not run for office to attain public figure status, since many of "those who attain this status have assumed roles of especial prominence in the affairs of society."⁵⁸ Here, the emphasis is not on how individuals come to occupy particular positions but, rather, on the fact of their "occupy[ing] positions of such persuasive power and influence that they are deemed public figures for all purposes."⁵⁹

Most individuals do not have the general notoriety required to be a public figure for all purposes. Instead, "[m]ore 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."⁶⁰ The Court also discussed the possibility that an individual could be a public figure involuntarily, suggesting that "[h]ypothetically, it may be possible for someone to become a public figure through no purposeful action of his own," although the Court cautioned that "the instances of truly involuntary public figures must be exceedingly rare."⁶¹

The Court then shifted the focus of its argument from what an individual had done to what the media were entitled to assume—"the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to in-

6534, 1999 WL 51796, at *2 (N.D. Ill. Jan. 29, 1999) ("While Illinois does not require plaintiffs to request a retraction as a prerequisite to recovering damages in a defamation action, defendants are not precluded from offering the lack of a request for retraction as evidence of failure to mitigate damages."). Arguably, a trier of fact might consider a plaintiff's failure to defend her reputation (when she had ready access to the media) as a failure to mitigate. *Cf.* *Krivan v. Dickerman*, 305 A.2d 227, 229 (Md. Ct. Spec. App. 1973) (discussing tort defenses, including a defendant who asserts "truth in a defamation case, or in any case asserts the failure of the plaintiff to avail himself of an opportunity to mitigate or reduce his loss").

⁵⁷ *Gertz*, 418 U.S. at 344.

⁵⁸ *Id.* at 345.

⁵⁹ *Id.*

⁶⁰ *Id.* at 351.

⁶¹ *Id.* at 345.

creased risk of injury from defamatory falsehood concerning them.”⁶² In contrast, such an assumption is not “justified with respect to a private individual.”⁶³ Because the private individual “has relinquished no part of his interest in the protection of his own good name, and consequently . . . has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood,” the Court concluded that “private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.”⁶⁴

Where defamation of a private individual is at issue, the Constitution imposes fewer constraints on the states—the Court explained 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.”⁶⁵ That said, however, the states have this freedom only with respect to the standard to be employed for “compensation for actual injury.”⁶⁶ The Constitution prohibits the states from permitting “recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.”⁶⁷

The Court’s analysis makes it very important to determine whether an individual is a public figure or a private individual. Gertz had taken a high profile case and at least one question was whether, by doing so, he had accepted public figure status. He had “long been active in community and professional affairs [and had] . . . served as an officer of local civic groups and of various professional organizations.”⁶⁸ In addition, he had “published several books and articles on legal subjects [and] . . . was consequently well known in some circles.”⁶⁹ Nonetheless, Gertz “had achieved no general fame or notoriety in the community.”⁷⁰ For example, none of the prospective jurors had heard of him and there was no reason to think that their reaction was unrepresentative.⁷¹ The Court cautioned that courts should not “lightly assume that a citizen’s participation in

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 347.

⁶⁶ *Id.* at 349.

⁶⁷ *Id.* However, this limitation on presumed and punitive damages only applies if the issue involves a matter of public concern. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (“In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of ‘actual malice.’”).

⁶⁸ *Gertz*, 418 U.S. at 351.

⁶⁹ *Id.*

⁷⁰ *Id.* at 351–52.

⁷¹ *Id.* at 352 (“None of the prospective jurors called at the trial had ever heard of petitioner prior to this litigation, and respondent offered no proof that this response was atypical of the local population.”).

community and professional affairs rendered him a public figure for all purposes.”⁷² The relevant standard to meet is a daunting one, and “[a]bsent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life.”⁷³ Instead, it is “preferable to 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.”⁷⁴

Once able to dismiss that Gertz was a public figure as a general matter, the Court quickly dispensed with the possibility that Gertz was a limited-purpose public figure.

[I]t is plain that petitioner was not a public figure. He played a minimal role at the coroner’s inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution of Officer Nuccio. Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having done so. He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public’s attention in an attempt to influence its outcome.⁷⁵

Gertz is instructive in a number of respects. An individual is not “a public personality for all aspects of his life” unless he or she has “general fame or notoriety in the community.”⁷⁶ A separate issue unexplored by the Court is the degree to which someone with general fame or notoriety must in addition be “pervasive[ly] involve[d] in the affairs of society”⁷⁷ in order to be a general-purpose public figure. Presumably, a nationally known entertainer would not additionally have to be pervasively involved in societal affairs to be treated as a public figure for all purposes, and in a different passage the *Gertz* Court does not even mention involvement in societal affairs when noting that “an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts.”⁷⁸ In any event, lacking the requisite fame, Gertz did not qualify as a public figure for all purposes.

When analyzing whether Gertz was a limited-purpose public figure, the Court noted that he had had no discussions with the press and thus could not be accused of having sought publicity to further desired ends.⁷⁹ Because he was found not to have been a limited-purpose public figure, it was not necessary for him to establish actual malice to be awarded compensation for harms to his reputation.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 351.

⁷⁹ *Id.* at 352.

D. Further Refinement of Who Counts as a Public Figure

The Court was again asked to determine whether an individual was a public figure in *Time, Inc. v. Firestone*.⁸⁰ Mary Alice Firestone had married Russell Firestone, “the scion of one of America’s wealthier industrial families.”⁸¹ The trial court final judgment included the following language:

According to certain testimony in behalf of the defendant, extramarital escapades of the plaintiff were bizarre and of an amatory nature which would have made Dr. Freud’s hair curl. Other testimony, in plaintiff’s behalf, would indicate that defendant was guilty of bounding from one bedpartner to another with the erotic zest of a satyr.⁸²

After alluding to the content of some of the testimony, the trial court indicated that it was “inclined to discount much of this testimony as unreliable” and proceeded to dissolve the marriage because neither party was “domesticated,”⁸³ a ground not previously recognized in Florida law.⁸⁴ The Florida Supreme Court upheld the granting of the divorce, although on a different ground.⁸⁵

Rather than simply report the end of the Firestones’ marriage, *Time* reported that the “17-month intermittent trial produced enough testimony of extramarital adventures on both sides, said the judge, ‘to make Dr. Freud’s hair curl.’”⁸⁶ Mary Firestone sought a retraction and *Time* refused.⁸⁷

When Firestone sued, *Time* claimed that she was a public figure and so could not recover damages absent a showing of actual malice.⁸⁸ *Time* noted that because the Florida Supreme Court had characterized the break-up as a “cause célèbre,” the divorce “must have been a public controversy and respondent must be considered a public figure.”⁸⁹

The *Firestone* Court cautioned that it was error “to equate ‘public controversy’ with all controversies of interest to the public.”⁹⁰ Yet, if that

⁸⁰ 424 U.S. 448 (1976).

⁸¹ *Id.* at 450.

⁸² *Id.* at 450–51.

⁸³ *Id.* at 451.

⁸⁴ *See id.* at 492–93 (Marshall, J., dissenting) (“When the divorce case reached the Supreme Court of Florida, that court found that the divorce had been granted for lack of ‘domestication’ and pointed out that that was not one of the statutory grounds for divorce.” (citing *Firestone v. Firestone*, 263 So. 2d 223 (Fla. 1972))).

⁸⁵ After noting that “‘lack of domestication’ was not one of the nine (9) grounds for divorce under . . . the Florida divorce law governing this suit,” the Florida Supreme Court explained that “‘extreme cruelty’ was a ground for divorce,” and subsequently upheld the divorce “on the ground of ‘extreme cruelty.’” *Firestone*, 263 So. 2d at 225.

⁸⁶ *Firestone*, 424 U.S. at 452.

⁸⁷ *Id.*

⁸⁸ *Id.* at 452–53.

⁸⁹ *Id.* at 454.

⁹⁰ *Id.*

was error, then there must be some criterion in light of which courts will be able to distinguish the two. Regrettably, the Court did not announce what that criterion was, instead saying that if the Court were to accept the equivalence between a controversy of interest to the public and a public controversy, the Court “would reinstate the doctrine advanced in the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, which concluded that the *New York Times* privilege should be extended to falsehoods defamatory of private persons whenever the statements concern matters of general or public interest.”⁹¹

The *Firestone* response is unfortunate for a few reasons. First, the Court implies that there is an undisclosed test used to distinguish between public controversies and controversies of interest to the public, and that only some of the latter will be included among the former. But implying that there is a test to distinguish among controversies of interest but refusing to divulge that test will almost certainly result in lower courts deciding relevantly similar cases differently.

Second, by even mentioning the distinction, the Court implies that the difference between a public controversy and a controversy of interest to the public has constitutional significance, which was a message that the Court did not want to send. The *Gertz* Court had criticized the *Rosenbloom* plurality position because it allegedly would allow “a publisher or broadcaster of a defamatory error which a court deems unrelated to an issue of public or general interest [to] be held liable in damages even if it took every reasonable precaution to ensure the accuracy of its assertions.”⁹² The *Firestone* Court was echoing the suggestion that publishers were at increased risk when publishing about matters that were not of public or general interest, although this time the Court was making matters even more confusing by implying that there is a test differentiating among issues of interest to the public but that publishers will not be informed of the content of that test.

Third, the *Firestone* solution ignores the difficulty that *Rosenbloom* purportedly created in cases involving alleged defamation of private plaintiffs—too much protection was given to matters of public interest and too little to matters not of public interest.⁹³ But if that is so, the difficulty is not in where the line is drawn determining which matters are of public interest and which are not, but in how much or how little extra protection is given to these differing topics.⁹⁴

⁹¹ *Id.* (citation omitted).

⁹² *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974).

⁹³ *See id.* (“On the one hand, a private individual whose reputation is injured by defamatory falsehood that does concern an issue of public or general interest has no recourse unless he can meet the rigorous requirements of *New York Times*. . . . On the other hand, a publisher or broadcaster of a defamatory error which a court deems unrelated to an issue of public or general interest may be held liable in damages even if it took every reasonable precaution to ensure the accuracy of its assertions.”).

⁹⁴ It is not as if whether a matter was of public rather than merely private interest was of no consequence after *Firestone*. *See, e.g.*, *Phila. Newspapers, Inc. v. Hepps*, 475

Firestone may have been trying to cabin what counts as a matter of public interest—it clearly wanted to reject the *Rosenbloom* doctrine which extended “constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.”⁹⁵ But one can reject the *Rosenbloom* doctrine without rejecting which matters are of public or general concern and which are not.

Indeed, there is another reason that the *Firestone* criticism seems misdirected. *Rosenbloom* involved an individual who had sold nudist magazines,⁹⁶ who had been described in a newscast as having been in possession of “obscene” books.⁹⁷ But those books were found as a matter of law not to have been obscene.⁹⁸ When discussing the case, the *Rosenbloom* plurality did not characterize the matter of public interest as whether *Rosenbloom* was selling obscene books rather than nudist literature, but instead suggested that “the police campaign to enforce the obscenity laws was an issue of public interest.”⁹⁹ Thus, the plurality increased the level of generality to the enforcement of obscenity laws more generally rather than in how particular publications should be characterized. But using that mode of analysis would suggest that the issue of interest in *Firestone* was the issue of divorce more generally or, perhaps, issues implicated when the wealthy divorce.¹⁰⁰

When dismissing the public controversy argument because it allegedly would have involved a return to *Rosenbloom*, the *Firestone* Court implicitly mischaracterized Time’s argument. Basically, Time was suggesting that the divorce was such a public spectacle that *Firestone* had achieved a sufficient level of notoriety and she was therefore a public figure for all purposes. But one can become a general-purpose public figure based on

U.S. 767, 776–77 (1986) (“To ensure that true speech on matters of public concern is not deterred, we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern.”).

⁹⁵ *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 43–44 (1971).

⁹⁶ *Id.* at 32 (“In 1963, petitioner was a distributor of nudist magazines in the Philadelphia metropolitan area.”).

⁹⁷ *Id.* at 33.

⁹⁸ *Id.* at 36 (“In May 1964 a jury acquitted petitioner in state court of the criminal obscenity charges under instructions of the trial judge that, as a matter of law, the nudist magazines distributed by petitioner were not obscene.”).

⁹⁹ *Id.* at 40.

¹⁰⁰ An analogous disagreement was at issue in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). The majority said that erroneous credit report was not a matter of public interest, because it “was speech solely in the individual interest of the speaker and its specific business audience.” *Id.* at 762. In contrast, Justice Brennan characterized the speech at issue as “[s]peech about commercial or economic matters, . . . [which] is an important part of our public discourse.” *Id.* at 787 (Brennan, J., dissenting).

notoriety alone, whether or not one has achieved that status by virtue of having been associated with a public controversy.¹⁰¹

In addition, Time suggested that Firestone was a limited-purpose public figure for purposes of the divorce, arguing not only that she had been “drawn into a particular public controversy,”¹⁰² but also that she had “initiated it.”¹⁰³ Finally, Time suggested that Firestone “commanded a substantial amount of independent public interest”¹⁰⁴ and had sufficient notoriety within the community that it was “absolutely clear that respondent was a public figure under any relevant test with respect to reports of the divorce.”¹⁰⁵

When assessing whether Mary Firestone was a public figure, the Court noted that she had not assumed “any role of especial prominence in the affairs of society, other than perhaps Palm Beach society,” and that she had not “thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it.”¹⁰⁶ Yet, she had certainly been drawn into the controversy.

The Court argued that Firestone did not “freely choose to publicize issues as to the propriety of her married life”¹⁰⁷ and, further, had “assumed no ‘special prominence in the resolution of public questions.’”¹⁰⁸ The Court admitted that Firestone “may have held a few press conferences during the divorce proceedings in an attempt to satisfy inquiring reporters,” but rejected that having had such conferences “converts her into a ‘public figure.’”¹⁰⁹ After all, those “interviews should have had no effect upon the merits of the legal dispute between respondent and her husband or the outcome of that trial.”¹¹⁰ Furthermore, it was implausible that she had “sought to use the press conferences as a vehicle by which to thrust herself to the forefront of some unrelated controversy in order to influence its resolution.”¹¹¹ The Court explained:

[W]hile participants in some litigation may be legitimate ‘public figures,’ either generally or for the limited purpose of that litigation, the majority will more likely resemble respondent, drawn into a public forum largely against their will in order to attempt to ob-

¹⁰¹ See Brief for Petitioner at 31–32, *Time, Inc., v. Firestone*, 424 U.S. 448 (1976) (No. 74-944)).

¹⁰² *Id.* at 31 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974)) (internal quotation marks omitted).

¹⁰³ *Id.*

¹⁰⁴ *Id.* (quoting *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 154 (1967)) (internal quotation marks omitted).

¹⁰⁵ *Id.* at 32.

¹⁰⁶ *Firestone*, 424 U.S. at 453.

¹⁰⁷ *Id.* at 454.

¹⁰⁸ *Id.* at 454–55 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974)).

¹⁰⁹ *Id.* at 454 n.3.

¹¹⁰ *Id.*

¹¹¹ *Id.* (citing *Gertz*, 418 U.S. at 345).

tain the only redress available to them or to defend themselves against actions brought by the State or by others.¹¹²

Yet, the Court confounds the analysis when pointing out that Firestone was “drawn into a public forum largely against [her] will”¹¹³ and claiming that this was a reason militating against her being a public figure, because *Gertz* had noted that “[m]ore commonly, an individual . . . is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.”¹¹⁴ Whether or not Firestone had willingly been drawn into the public forum, she had been drawn into it.

The *Firestone* analysis is confusing for two distinct reasons. First, one might understand why the Court would be tempted to refuse to declare someone a public figure who had been drawn into court against her will and had done nothing to make herself a household name. But that is simply to reject the *Gertz* criterion whereby being drawn into a controversy may suffice to make one a public figure. Second, as Justice Marshall notes in dissent, Firestone was not first brought to public attention because of the lawsuit.¹¹⁵ On the contrary, she was someone “whose activities predictably attracted the attention of a sizable portion of the public,” and whose “appearances in the press were evidently frequent enough to warrant her subscribing to a press-clipping service.”¹¹⁶ Not only did the trial attract “national news coverage” and numerous articles in the local press, but she had “held several press conferences in the course of the proceedings.”¹¹⁷

Noting that public figures “have less need for judicial protection because of their greater ability to resort to self-help,” Justice Marshall stated the obvious when suggesting that Firestone was “hardly in a position to suggest that she lacked access to the media for purposes relating to her lawsuit.”¹¹⁸ Further, there was another respect in which Firestone seemed to qualify as a public figure, since it was presumably “by choice that Mrs. Firestone became an active member of the ‘sporting set’ . . . whose lives receive constant media attention.”¹¹⁹ It bears noting, however, that not even Justice Marshall believed that Firestone was a public figure simply by virtue of her having married someone well-known.

¹¹² *Id.* at 457.

¹¹³ *Id.*

¹¹⁴ *Gertz*, 418 U.S. at 351.

¹¹⁵ *Firestone*, 424 U.S. at 484 (Marshall, J., dissenting) (“Mary Alice Firestone was not a person ‘first brought to public attention by the defamation that is the subject of the lawsuit.’” (quoting *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 86 (1971) (Marshall, J., dissenting))).

¹¹⁶ *Id.* at 485.

¹¹⁷ *Id.* (“The 17-month trial and related events attracted national news coverage, and elicited no fewer than 43 articles in the *Miami Herald* and 45 articles in the *Palm Beach Post* and *Palm Beach Times*.”).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 486.

Justice Marshall would have found that Firestone was a public figure.¹²⁰ On his understanding of the jurisprudence, “the focus of analysis must be on the actions of the individual, and the degree of public attention that had already developed, or that could have been anticipated, before the [allegedly defamatory] report in question.”¹²¹

The point here is not to argue about whether “public figure,” properly categorized, would include someone like Firestone but, instead, to try to figure out who qualifies as a public figure in light of the announced factors as they have been applied. After *Firestone*, it is difficult to say whether or not someone drawn into the public eye should count as a limited-purpose public figure. To make matters more confusing, there are too few cases in which there is an extended discussion of who qualifies as a public figure, and no help is provided by cases in which the plaintiff either admits that he or she is a public figure¹²² or the Court simply announces that the individual is a public figure.¹²³

Not only is there some difficulty in determining who is a public figure, but there is also some question about whether that status, once acquired, is permanent.¹²⁴ Consider *Wolston v. Reader's Digest Ass'n*, which involved a defamation claim against Reader's Digest for having alleged that Ilya Wolston “had been indicted for espionage and had been a Soviet agent.”¹²⁵ The courts below had held that Wolston was a public figure, and the United States Supreme Court reversed.¹²⁶

Wolston's aunt and uncle had pled guilty to espionage charges, and Wolston had been questioned several times. On one occasion, he failed

¹²⁰ *Id.* at 484 (“I consider the respondent, Mary Alice Firestone, to be a ‘public figure’ within the meaning of our prior decisions.”).

¹²¹ *Id.* at 489; *see also* *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 756 (1985) (“In libel actions brought by private persons we found the competing interests different. Largely because private persons have not voluntarily exposed themselves to increased risk of injury from defamatory statements and because they generally lack effective opportunities for rebutting such statements, we found that the State possessed a ‘strong and legitimate . . . interest in compensating private individuals for injury to reputation.’” (citation omitted) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348–49 (1974))).

¹²² *See, e.g.*, *Herbert v. Lando*, 441 U.S. 153, 155–56 (1979) (“Petitioner, Anthony Herbert, is a retired Army officer who had extended wartime service in Vietnam and who received widespread media attention in 1969–1970 when he accused his superior officers of covering up reports of atrocities and other war crimes. . . . Herbert conceded that . . . he was a ‘public figure.’”).

¹²³ *See, e.g.*, *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 499 (1991) (“In this libel case, a public figure claims he was defamed by an author who, with full knowledge of the inaccuracy, used quotation marks to attribute to him comments he had not made.”).

¹²⁴ *See generally*, Alan Kaminsky, Note, *Defamation Law: Once a Public Figure Always a Public Figure?*, 10 HOFSTRA L. REV. 803 (1982).

¹²⁵ *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 160 (1979).

¹²⁶ *Id.* at 161 (“[T]he District Court and the Court of Appeals were wrong in concluding that petitioner was a public figure within the meaning of this Court's defamation cases.”).

to appear before a grand jury, allegedly because of his mental depression. A federal court issued an order to show cause why Wolston should not be held in contempt. Wolston appeared in court and offered to testify before the grand jury, but that offer was rejected. Wolston's pregnant wife testified during the contempt hearing but became hysterical. At that point, Wolston agreed to plead guilty to the contempt charge. He received a one-year suspended sentence and was placed on probation for three years, contingent on his cooperating with any future grand jury espionage inquiries.¹²⁷ During the period between his failure to appear and his sentencing, there were several stories about him in New York and Washington papers, although he was then able for the most part to return to private life.¹²⁸

The Court examined whether Wolston was a public figure for all purposes, rejecting that he "occupied a position of such 'persuasive power and influence' that he could be deemed one of that small group of individuals who are public figures for all purposes."¹²⁹ The Court noted that he had neither "achieved . . . general fame or notoriety" nor had he "assumed [a] role of special prominence in the affairs of society."¹³⁰ Then, the Court focused on whether Wolston was "a public figure for the limited purpose of comment on his connection with, or involvement in, Soviet espionage."¹³¹

First, the Court noted that it was incorrect to believe that Wolston had "'voluntarily thrust' or 'injected' himself into the forefront of the public controversy surrounding the investigation of Soviet espionage in the United States," since it "would be more accurate to say that petitioner was dragged unwillingly into the controversy."¹³² While noting that he "did fail to respond to a grand jury subpoena, and this failure, as well as his subsequent citation for contempt, did attract media attention," the Court reasoned that "the mere fact that petitioner voluntarily chose not to appear before the grand jury, knowing that his action might be attended by publicity, is not decisive on the question of public-figure status."¹³³ After all, Gertz was not a public figure, "even though he voluntarily associated himself with a case that was certain to receive extensive media exposure."¹³⁴ The proper analysis requires a court to "focus on the 'nature and extent of an individual's participation in the particu-

¹²⁷ *Id.* at 161–63.

¹²⁸ *Id.* at 163 ("This flurry of publicity subsided following petitioner's sentencing, however, and, thereafter, he succeeded for the most part in returning to the private life he had led prior to issuance of the grand jury subpoena.").

¹²⁹ *Id.* at 165.

¹³⁰ *Id.* (citing *Time, Inc. v. Firestone*, 424 U.S. 448, 453 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974)).

¹³¹ *Id.*

¹³² *Id.* at 166.

¹³³ *Id.* at 166–67.

¹³⁴ *Id.* at 167 (citing *Gertz*, 418 U.S. at 352).

lar controversy giving rise to the defamation.”¹³⁵ Wolston had “never discussed this matter with the press and [had] limited his involvement to that necessary to defend himself against the contempt charge.”¹³⁶

Admittedly, failure to appear before the grand jury and his contempt citation were “newsworthy,” although that itself did not make him a public figure.¹³⁷ “A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention.”¹³⁸ Further, Wolston had not “engaged the attention of the public in an attempt to influence the resolution of the issues involved [and had] . . . assumed no ‘special prominence in the resolution of public questions.’”¹³⁹ His actions were “in no way calculated to draw attention to himself in order to invite public comment or influence the public with respect to any issue[, and h]e did not in any way seek to arouse public sentiment in his favor and against the investigation.”¹⁴⁰ The Court held Wolston to be a private figure.¹⁴¹

In his concurrence in the result, Justice Blackmun noted that even if Wolston had “gained public-figure status when he became involved in the espionage controversy in 1958, he clearly had lost that distinction by the time respondents published KGB in 1974.”¹⁴² Even if Wolston had had ready access to the media at the time of the initial controversy, he likely would have lost that access when these allegations were made years later.¹⁴³ Finally, with respect to the risk of publicity, Wolston might have anticipated that his actions in 1958 would receive coverage, but would not reasonably have anticipated coverage over a decade later, especially given his great efforts to avoid the limelight.¹⁴⁴ Thus, *Wolston* might be thought to represent two views held by members of the Court: (1) it is relatively difficult to be held a limited-purpose public figure even when one has garnered public attention, and (2) even if one becomes a limited-

¹³⁵ *Id.* (quoting *Gertz*, 418 U.S. at 352).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 168 (quoting *Gertz*, 418 U.S. at 351).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* (“In short, we find no basis whatsoever for concluding that petitioner relinquished, to any degree, his interest in the protection of his own name.”).

¹⁴² *Id.* at 170 (Blackmun, J., concurring in the result).

¹⁴³ *See id.* at 170–71 (“At the height of the publicity surrounding the espionage controversy here, petitioner may well have had sufficient access to the media effectively to rebut a charge that he was a Soviet spy. It would strain credulity to suggest that petitioner could have commanded such media interest when respondents published their book in 1974.”).

¹⁴⁴ *Id.* at 171 (“In ignoring the grand jury subpoena in 1958, petitioner may have anticipated that his conduct would invite critical commentary from the press. . . . [However, a]ny inference that petitioner ‘assumed the risk’ of public scrutiny in 1958 assuredly is negated by his conscious efforts to regain anonymity during the succeeding 16 years.”).

purpose public figure, one does not permanently retain that status. However, many lower courts seem not to have taken these views to heart.¹⁴⁵

*Hutchinson v. Proxmire*¹⁴⁶ provides further analysis of who does not qualify as a public figure. Senator Proxmire had begun a campaign to combat wasteful government spending by awarding a “‘Golden Fleece of the Month Award’ to publicize what he perceived to be the most egregious examples of wasteful governmental spending.”¹⁴⁷ The second award went to the National Science Foundation, the National Aeronautics and Space Administration, and the Office of Naval Research for funding the research of Ronald Hutchinson.¹⁴⁸ The focus of Hutchinson’s research involved “the behavior patterns of certain animals, such as the clenching of jaws when they were exposed to various aggravating stressful stimuli.”¹⁴⁹ When informed ahead of time that he would be an award recipient, Hutchinson had responded that the press release at issue “contained an inaccurate and incomplete summary of his research.”¹⁵⁰ The funding stopped after Proxmire publicized the award, although there was some dispute about why.¹⁵¹

Hutchinson sued Proxmire for defamation, among other causes of action.¹⁵² Proxmire argued that Hutchinson was both a public figure and a public official, and thus that actual malice would have to be established.¹⁵³ Some of the facts that might be thought to support Hutchinson’s having triggered the actual malice standard included that he had a long history of publicly-funded research, he actively solicited state and federal grants, his research received local press coverage, and he voluntarily participated in programs awarding him public funds, a matter of great public interest.¹⁵⁴

Hutchinson was not claimed to be a public figure for all purposes, but instead “a public figure for the limited purpose of comment on his receipt of federal funds for research projects.”¹⁵⁵ Two factors were

¹⁴⁵ See, e.g., *Milsap v. Journal/Sentinel, Inc.*, 100 F.3d 1265, 1269 (7th Cir. 1996) (“The circuits addressing the issue have indicated that an individual who was once a public figure with respect to a controversy remains a public figure for latter commentary on that controversy.”).

¹⁴⁶ 443 U.S. 111 (1979).

¹⁴⁷ *Id.* at 114.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 115.

¹⁵⁰ *Id.* at 116.

¹⁵¹ *Id.* at 117 (“After the award was announced, Schwartz, acting on behalf of Proxmire, contacted a number of the federal agencies that had sponsored the research. In his deposition he stated that he did not attempt to dissuade them from continuing to fund the research but merely discussed the subject. Hutchinson, by contrast, contends that these calls were intended to persuade the agencies to terminate his grants and contracts.” (footnote omitted)).

¹⁵² *Id.* at 118.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 119 (discussing the district court opinion).

¹⁵⁵ *Id.* at 134.

thought to support such a conclusion. “[F]irst, Hutchinson’s successful application for federal funds and the reports in local newspapers of the federal grants; second, Hutchinson’s access to the media, as demonstrated by the fact that some newspapers and wire services reported his response to the announcement of the Golden Fleece Award.”¹⁵⁶ However, the Court noted, “Neither of those factors demonstrates that Hutchinson was a public figure prior to the controversy engendered by the Golden Fleece Award; his access, such as it was, came after the alleged libel.”¹⁵⁷

The Court reasoned that Hutchinson’s profile mirrored that of many academics.¹⁵⁸ His writings did not reach a large audience, and he and his work only became controversial as a result of his receiving the Golden Fleece Award.¹⁵⁹ The Court concluded its analysis by noting that “those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.”¹⁶⁰

Hutchinson had not “thrust himself or his views into public controversy to influence others.”¹⁶¹ While it was true that the public was concerned about “general public expenditures,” that alone did not make Hutchinson a public figure; else, it might seem that “everyone who received or benefited from the myriad public grants for research could be classified as a public figure,” a position that the Court did not accept.¹⁶²

While Hutchinson had benefited from government largesse, he had never “assumed any role of public prominence in the broad question of concern about expenditures.”¹⁶³ Nor could it reasonably be said that his grant-writing or publications had “invited that degree of public attention and comment on his receipt of federal grants essential to meet the public figure level.”¹⁶⁴ Finally, while he had had some access to public media prior to his receipt of the award, he “did not have the regular and continuing access to the media that is one of the accouterments of having become a public figure.”¹⁶⁵ Further, his access was local rather than national.¹⁶⁶

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 134–35.

¹⁵⁸ *Id.* at 135 (“Hutchinson’s activities and public profile are much like those of countless members of his profession.”).

¹⁵⁹ *Id.* (“His published writings reach a relatively small category of professionals concerned with research in human behavior. To the extent the subject of his published writings became a matter of controversy, it was a consequence of the Golden Fleece Award.”).

¹⁶⁰ *Id.* (citing *Wolston v. Reader’s Digest Ass’n*, 443 U.S. 157, 167–68 (1979)).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 136.

¹⁶⁶ *Cf.* Susan M. Gilles, *From Baseball Parks to the Public Arena: Assumption of the Risk in Tort Law and Constitutional Libel Law*, 75 TEMP. L. REV. 231, 250 (2002) (“[T]he test

Hutchinson set a rather high bar to a finding that an individual was even a limited-purpose public figure. Consider the case of Michael Milkovich, Sr., who had been a high school wrestling coach.¹⁶⁷ During one of the meets, a fight broke out involving spectators and team members.¹⁶⁸ As a result, the Ohio High School Athletic Association (OHSAA) sanctioned Milkovich's team, "including a disqualification from the state tournament, a one-year probationary status, and a censuring of appellant."¹⁶⁹ The sanction was challenged in court by "concerned parents and involved wrestlers."¹⁷⁰ Milkovich was called to testify at that hearing.¹⁷¹ The day after the court ruled that OHSAA had violated due process in imposing the sanction, Theodore Daidiun wrote and published a newspaper article suggested that Milkovich had lied at the hearing, notwithstanding his promise to tell the truth.¹⁷² Milkovich sued, claiming that he had been defamed.¹⁷³ An important issue at trial was whether Milkovich was a public figure. Both the trial court and the appellate court held that he was, but the Ohio Supreme Court disagreed.¹⁷⁴ The Court noted that while Milkovich may have been "recognized and admired in his community for his coaching achievements, he d[id] not occupy a position of persuasive power and influence by virtue of those achievements."¹⁷⁵ Nor did his position in the community "put him at the forefront of public controversies where he would attempt to exert influence over the resolution of those controversies."¹⁷⁶ While the Court admitted that Milkovich "did become involved in a controversy surrounding the events during and subsequent to his team's wrestling match with Mentor High School," the Court reasoned that he "never thrust himself to the forefront of that controversy in order to influence its decision."¹⁷⁷ The Ohio Supreme Court thought that Milkovich's status was "akin to the status of the plaintiff in *Firestone*, rather than the status of the athletic director in *Butts*."¹⁷⁸

for whether an individual was an all-purpose public figure focused on national prominence . . .").

¹⁶⁷ *Milkovich v. News-Herald*, 473 N.E.2d 1191, 1191–92 (Ohio 1984) ("Michael Milkovich, Sr., is the former head wrestling coach of Maple Heights High School in Cuyahoga County."), *overruled on other grounds by* *Scott v. News-Herald*, 496 N.E.2d 699, 701 (Ohio 1986).

¹⁶⁸ *Id.* at 1191–92 ("On February 9, 1974, appellant's wrestling team had a meet with Mentor High School. A fight broke out involving spectators and team members from both squads after a Maple Heights wrestler was disqualified by the referee.").

¹⁶⁹ *Id.* at 1192.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 1192–93, 1195.

¹⁷⁵ *Id.* at 1195.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* (citations omitted).

The newspaper petitioned the United States Supreme Court for a writ of certiorari to the Ohio Supreme Court, but the Court denied the petition.¹⁷⁹ In his dissent with respect to the denial of certiorari, Justice Brennan suggested that “the Ohio Supreme Court read the ‘public official’ and ‘public figure’ doctrines in an exceptionally narrow way that is sure to restrict expression by the press in Ohio.”¹⁸⁰ According to Brennan, Milkovich was a limited-purpose public figure who had allegedly “incited the fracas by egging on the crowd.”¹⁸¹ Further, Milkovich was well-known, both locally and in wrestling circles.¹⁸²

Justice Brennan expressly denied that the *New York Times* standard was “limited to discussion of individuals who deliberately seek to involve themselves in public issues to influence their outcome,”¹⁸³ if only because “the *New York Times* protections do, and necessarily must, encompass the major figures around which a controversy rages.”¹⁸⁴ Justice Brennan summed up his analysis this way:

A large fight between the students of two rival schools quite legitimately raises serious concerns for the entire community, particularly when, as here, it results in injury to students. The present controversy centered primarily around the conduct of one man—Milkovich—in encouraging the fight; that conduct allegedly resulted in an OHSAA hearing, his censure by that association, and the disqualification of his team from eligibility in the state wrestling tournament. To say that Milkovich nevertheless was not a public figure for purposes of discussion about the controversy is simply nonsense.¹⁸⁵

Justice Brennan distinguished this case from *Hutchinson*. In that case, Proxmire had argued that Hutchinson had become a limited-purpose public figure by virtue of his having received a Golden Fleece Award. The Court had “rejected this argument on the ground that ‘those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.’”¹⁸⁶ Here, however, the controversy was not created by the allegedly defamatory article. Rather, the “event

¹⁷⁹ *Lorain Journal Co. v. Milkovich*, 474 U.S. 953 (1985).

¹⁸⁰ *Id.* at 954–55 (Brennan, J., dissenting from the denial of cert.) (“I therefore dissent and would grant certiorari in order to review this important constitutional question.”).

¹⁸¹ *Id.* at 963.

¹⁸² *See id.* at 962 n.7 (“To be sure, as a general matter collegiate athletics obtains wider exposure than high school athletics. But with the exception of a few rather flamboyant figures who gain national exposure, most coaches—like Butts—are unknown outside sports’ circles and the local community. Milkovich is probably as well known both locally and in the wrestling community as was Butts in his respective circles.”).

¹⁸³ *Id.* at 963.

¹⁸⁴ *Id.* (citing *Wolston v. Reader’s Digest Ass’n*, 443 U.S. 157, 167 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974)).

¹⁸⁵ *Id.* at 964 (footnotes omitted).

¹⁸⁶ *Id.* at 964 n.10 (quoting *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979)).

itself created a stir, leading to a hearing, censure of Milkovich, and disqualification of his team.”¹⁸⁷

It is never clear why the Court denies a petition of certiorari in a particular case, and members of the Court have cautioned against reading too much into such denials.¹⁸⁸ One cannot tell whether the Court disagreed with Justice Brennan’s assessment of who counted as a public figure or, instead, denied certiorari for reasons having nothing to do with the merits. Further, in a later case involving the same parties, the Supreme Court referred to Justice Brennan’s dissent, but gave no indication whether he had accurately reflected the jurisprudence.¹⁸⁹ By mentioning Brennan’s dissent but saying nothing about it, the Court leaves the correct interpretation of the jurisprudence open, which has resulted in widely varying views in the lower courts.

The current public figure/private individual jurisprudence contemplates several types of individuals:

- Public figures for all purposes,
- Public figures for limited purposes,
- Involuntary public figures, and
- Private individuals.

While the Court has announced these categories, it has suggested that the first category is reserved for those who have achieved great fame or notoriety in the community, a standard that is quite difficult to meet

¹⁸⁷ *Id.*

¹⁸⁸ *See, e.g.,* Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 525 U.S. 943, 943 (1998) (Stevens, J., respecting the denial of the petition for a writ of certiorari) (“[T]he denial of a petition for a writ of certiorari is not a ruling on the merits. Sometimes such an order reflects nothing more than a conclusion that a particular case may not constitute an appropriate forum in which to decide a significant issue.” (footnote omitted)); Sumner v. Mata, 446 U.S. 1302, 1305 (Rehnquist, Circuit Justice 1980) (discussing “the hazards of reading any meaning into this Court’s denials of certiorari”); Sheppard v. Ohio, 352 U.S. 910, 911 (1956) (memorandum of Frankfurter, J.) (“Such denial of his petition in no wise implies that this Court approves the decision of the Supreme Court of Ohio. It means and means only that for one reason or another this case did not commend itself to at least four members of the Court as falling within those considerations which should lead this Court to exercise its discretion in reviewing a lower court’s decision.”); United States v. Carver, 260 U.S. 482, 490 (1923) (“The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.”).

¹⁸⁹ *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 10 n.5 (1990) (“Respondents rely on the following statements made by the Ohio Supreme Court in its discussion of Scott’s status as a public official: “To say that Milkovich nevertheless was not a public figure for purposes of discussion about the controversy is simply nonsense,” [Scott v. News-Herald,] 496 N.E.2d [699,]704 [(Ohio 1986)] (quoting Milkovich v. Lorain Journal Co., 474 U.S. 953, 964 (1985) (Brennan, J., dissenting from denial of certiorari)) . . .”).

for most people.¹⁹⁰ An individual will not be considered a public figure for limited purposes unless the person had acquired some notoriety prior to the allegedly defamatory publication.¹⁹¹ Further, the Court has sent mixed signals about the degree to which the individual must have purposely availed himself or herself of media opportunities before that person can be considered a limited-purpose public figure.¹⁹² Finally, the Court has hypothesized that there can be involuntary public figures, but it has failed to offer helpful criteria for determining whether someone has acquired that status or for determining the conditions under which such a status, once acquired, will be retained.¹⁹³ Instead, the Court has forced lower courts to read between the lines to determine how to apply the existing criteria, resulting in inconsistent holdings and a jurisprudence that seems to contradict the messages that at least some members of the Court have attempted to send. This disconnect seems most apparent in some of the cases involving individuals held to be involuntary public figures.

III. INVOLUNTARY PUBLIC FIGURES IN THE LOWER COURTS

Lower courts have attempted to apply the Court's defamation jurisprudence but have had some difficulty in fashioning an account that is coherent, much less one that is in accord with the Court's hints about which individuals should be considered public figures. The difficulties in constructing the jurisprudence have been especially clear in cases where the courts are attempting to decide the conditions, if any, under which an individual may be deemed an involuntary public figure.

A. *Individuals Thrown into the Limelight When Performing Their Jobs*

Some individuals have acquired involuntary public figure status when performing their jobs. These individuals were the subject of great media exposure and were perhaps what the Court had in mind when discussing involuntary public figures, although that of course is somewhat difficult to discern given the Court's cryptic comments about that status.

The D.C. Circuit discussed involuntary public figure status in *Dameron v. Washington Magazine, Inc.*, which involved Merle Dameron, who had

¹⁹⁰ See *supra* text accompanying notes 70–72 (explaining that Gertz could not be considered a public figure for all purposes because he had no general fame or notoriety in the community).

¹⁹¹ See *supra* text accompanying note 186 (discussing Justice Brennan's explanation that Hutchinson could not be made into a limited-purpose public figure by the very publication that was allegedly defamatory).

¹⁹² See *supra* notes 109–12, 115–17 (discussing the degree to which Firestone had access to and used the public media and whether that made her a limited-purpose public figure).

¹⁹³ See *supra* text accompanying note 61 (discussing Gertz's hypothetical, exceedingly rare, involuntary public figure).

been the sole air traffic controller on duty on the day of a fatal crash.¹⁹⁴ An article in *The Washingtonian* magazine had implied that he was partially at fault for the crash, whereas Dameron contended that “he was not in fact to blame for the accident, that he was never found blameworthy, and that he was wholly exonerated by a federal district court, which dismissed tort claims brought against the government on the theory of controller negligence.”¹⁹⁵ The court noted that Dameron was “an ordinary citizen who was completely unknown to the public before the Mt. Weather crash, never sought to capitalize on the fame he achieved through the Mt. Weather crash, and never acquired any notoriety apart from the crash.”¹⁹⁶ Thus, Dameron was not “a general-purpose public figure.”¹⁹⁷ However, the court continued, “the public-figure doctrine, fairly applied to the facts of this case, encompasses Mr. Dameron and raises him, involuntarily, to the status of limited-purpose public figure.”¹⁹⁸

The *Dameron* court cited D.C. Circuit precedent for use of

a three-part framework for analyzing whether someone has become a limited-purpose public figure. Under this test the court must determine that there is a public controversy; ascertain that the plaintiff played a sufficiently central role in that controversy; and find that the alleged defamation was germane to the plaintiff’s involvement in the controversy.¹⁹⁹

The D. C. court correctly noted that *Gertz* had recognized that it is possible “‘to become a public figure through no purposeful action of [one’s] own’ although it added that ‘the instances of *truly* involuntary public figures must be exceedingly rare,’” and reasoned that Dameron was the kind of individual envisioned in *Gertz*.²⁰⁰

By sheer bad luck, Dameron happened to be the controller on duty at the time of the Mt. Weather crash. . . . He became embroiled, through no desire of his own, in the ensuing controversy over the causes of the accident. He thereby became well known to the public in this one very limited connection.²⁰¹

The *Dameron* court distinguished what was at issue in that case from what was at issue both in *Firestone* and in *Wolston*. *Firestone* was distinguish-

¹⁹⁴ *Dameron v. Wash. Magazine, Inc.*, 779 F.2d 736, 738 (D.C. Cir. 1985) (“Plaintiff Merle Dameron was the sole air traffic controller on duty at Dulles on the day the TWA plane crashed into Mt. Weather in 1974.”).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 741.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*; see also *Tillman v. Freedom of Info. Comm’n*, No. CV074044748S, 2008 WL 4150289, at *10 (Conn. Super. Ct. Aug. 15, 2008) (finding that a wrongfully incarcerated individual released after 18 years based on new DNA tests was an involuntary public figure).

¹⁹⁹ *Dameron*, 779 F.2d at 741 (citing *Waldbaum v. Fairchild Publ’ns, Inc.*, 627 F.2d 1287, 1296–98 (D.C. Cir. 1980)).

²⁰⁰ *Id.* at 742 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974)).

²⁰¹ *Id.*

able because “public interest in a controversy does not make a public controversy.”²⁰² The court explained that “the measuring stick for identifying public controversy” is neither the “newsworthiness of an event” nor “a voyeuristic interest in someone’s private affairs.”²⁰³ In contrast to *Firestone*, this case involved a crash where there was much loss of life and at “issue was the management of a program administered by the FAA.”²⁰⁴ The court further noted that the National Transportation Safety Board “conducted an extensive, public investigation into the events surrounding the Mt. Weather Crash” and that Dameron had “appeared at these hearings and testified for many hours about his role in the crash.”²⁰⁵

It goes without saying that an airplane crash is newsworthy, although one of the main points of *Gertz* and *Firestone* was to sever the connection between newsworthiness and whether or not one was a public figure.²⁰⁶ That Dameron had appeared and testified should not have counted against him as long as he had not voluntarily sought out the press. Indeed, his having never voluntarily made use of the press²⁰⁷ would make him less appropriately thought a limited-purpose public figure than someone like *Firestone*, who had held numerous press conferences.²⁰⁸ The D.C. court did not try to assess whether Dameron had greater notoriety in the relevant community than *Firestone*, which presumably would have been important to establish for involuntary public figure status. An additional difficulty is that finding Dameron an involuntary public figure because he was a central figure in an important event does very little to limit the category of involuntary public figures—if that is all that needs to be shown, then the *Gertz* assurance that a finding of involuntary public figure status will be exceedingly rare is quite hollow.

Suppose that, lack of voluntariness and possible lack of notoriety notwithstanding, Dameron was rightly viewed as a limited-purpose public figure at the time of the crash and investigation. A separate issue was whether he continued to be such a figure years later.²⁰⁹ The court considered whether *Wolston* required a finding that Dameron was no longer an

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ David L. Wallis, Note, *The Revival of Involuntary Limited-Purpose Public Figures—Dameron v. Washington Magazine, Inc.*, 1987 BYU L. REV. 313, 321 (“The public interest approach of *Rosenbloom* and *Dameron* was discredited in *Gertz*.”).

²⁰⁷ Jacquelyn S. Shaia, *The Controversy Requirement in Defamation Cases and Its Misapplication*, 28 AM. J. TRIAL ADVOC. 387, 399–400 (2004) (“Dameron never gave any interviews to the media nor was he involved, other than as a witness, in the investigation.”).

²⁰⁸ Cf. David A. Elder, *A Libel Law Analysis of Media Abuses in Reporting on the Duke Lacrosse Fabricated Rape Charges*, 11 VAND. J. ENT. & TECH. L. 99, 109 (2008) (“Dameron’s cryptic *Firestone*/*Wolston* discussions were shallow and unpersuasive.”).

²⁰⁹ The accident occurred in 1974 and *The Washingtonian* article appeared in 1982. *Dameron*, 779 F.2d at 737–38.

involuntary public figure and concluded that it did not.²¹⁰ The *Dameron* court reasoned:

Dameron was a central figure, however involuntarily, in the discrete and specific public controversy with respect to which he was allegedly defamed—the controversy over the cause of the Mt. Weather crash. Wolston, by contrast, was not defamed with respect to the controversy in which he played a central role—his refusal to testify before a grand jury—but rather with respect to a controversy in which he played a role that was at most tangential—the investigation of Soviet espionage in general.²¹¹

The court's characterization of *Wolston* is too fast. While the individual writing about Wolston might simply have misunderstood the basis of the contempt conviction,²¹² he might also have made an assumption about why Wolston had failed to appear—the writer might have assumed that Wolston did not appear because he was a spy rather than because he was suffering from depression.²¹³ But if the author had erroneously assumed that Wolston was refusing to testify because he really was a Soviet spy, then the defamation was not as tangential as the *Dameron* court implied. In any event, there is a more serious difficulty with the *Dameron* analysis. *Dameron* implies that the proper way to understand *Wolston* is that Wolston was a limited-purpose public figure but that the defamation at issue was too far afield to fall within the relevant purpose. But that is not correct. Wolston was held not to have been a limited-purpose public figure.²¹⁴ Consideration of Justice Blackmun's concurrence in the result makes the *Dameron* analysis even less persuasive. Justice Blackmun suggested that even if Wolston was a public figure at the time of the relevant event, the intervening years "render[ed] consideration of this petitioner's original public-figure status unnecessary."²¹⁵ Arguably, the length of time between the newsworthy series of events and "*The Washingtonian's* brief and oblique reference to him, [which] surfaced years later,"²¹⁶ rendered *Dameron's* initial limited-purpose public figure status irrelevant.

In *Wells v. Liddy*, the Fourth Circuit considered the *Dameron* involuntary public figure analysis, but noted that it based "involuntary public figure status upon 'sheer bad luck.'"²¹⁷ Basing involuntary public figure status on misfortune does not take into account the *Gertz* warning that

²¹⁰ *Id.* at 742 ("Nor does *Wolston* compel a different conclusion." (citation omitted)).

²¹¹ *Id.* at 742–43.

²¹² The author said that his list "consists of Soviet agents who were convicted of espionage or falsifying information or perjury and/or contempt charges following espionage indictments." *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 159 (1979).

²¹³ *Id.* at 162.

²¹⁴ *Id.* at 166 ("We do not agree with respondents and the lower courts that petitioner can be classed as such a limited-purpose public figure.")

²¹⁵ *Id.* at 170 (Blackmun, J., concurring in the result).

²¹⁶ *Dameron*, 779 F.2d at 742.

²¹⁷ *Wells v. Liddy*, 186 F.3d 505, 538–39 (4th Cir. 1999).

“involuntary public figures ‘must be exceedingly rare,’”²¹⁸ because, “unfortunately, bad luck is relatively common.”²¹⁹ Without some way to cabin who might count as an involuntary public figure, the Fourth Circuit feared that too many people would qualify.

While the *Wells* court’s point was well-taken, the test proposed by the Fourth Circuit would seem to do away with the involuntary public figure. That court offered two criteria. First, it suggested that “to prove that a plaintiff is an involuntary public figure the defendant must demonstrate to the court that the plaintiff has become a central figure in a significant public controversy and that the allegedly defamatory statement has arisen in the course of discourse regarding the public matter.”²²⁰ Establishing that someone was a central figure could be accomplished by showing that the individual in question “has been the regular focus of media reports on the controversy.”²²¹ Such a requirement seems fair in that someone who was peripherally connected to a matter of public concern would not be a good candidate for involuntary public figure status. However, the court suggested in addition that while “an involuntary public figure need not have sought to publicize her views on the relevant controversy, she must have nonetheless assumed the risk of publicity.”²²² This latter criterion was not adequately explained. The court simply commented that “the defendant must demonstrate that the plaintiff has taken some action, or failed to act when action was required, in circumstances in which a reasonable person would understand that publicity would likely inhere.”²²³ But without further explanation, this latter explanation might be so restrictive as to preclude anyone from ever being found an involuntary public figure. (Or, in the alternative, it might be so watered down that it would not do any work at all.²²⁴)

At issue in *Wells* was whether Ida Wells was a limited-purpose public figure. Wells had been employed as a secretary at the Democratic National Committee at the time of Watergate break-in.²²⁵ The court listed some of her contacts with the media including a letter-to-the-editor of the *New York Times*, an interview with a *Washington Post* reporter, an interview with the BBC, and discussions with an historian.²²⁶ These were mentioned because they apparently did not qualify as actions that a reasonable person would believe might expose her to unwanted publicity. Further, the

²¹⁸ *Id.* at 538 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974)).

²¹⁹ *Id.* at 539.

²²⁰ *Id.* at 539–40.

²²¹ *Id.* at 540.

²²² *Id.*

²²³ *Id.*

²²⁴ See *infra* note 246 and accompanying text (discussing whether failing to divorce one’s public figure spouse would suffice for a plaintiff to be on notice that he or she would be subject to discussions in the media).

²²⁵ *Wells*, 186 F.3d at 512.

²²⁶ *Id.* at 537.

court implicitly assumed that being a secretary for one of the two largest political parties in the country would not itself be something that a reasonable person would understand might lead to even unwanted publicity.

Some events like Watergate or, perhaps, the explosion during the Olympic Games in Atlanta might be thought to be so singular that an individual might rightly be thought an involuntary public figure, even though the person would not have reasonably foreseen that his or her job would make them subject to much publicity. Involuntary public figure status was discussed in connection with the Atlanta bombing in *Atlanta Journal-Constitution v. Jewell*.²²⁷

Richard Jewell, the security guard who had “spotted a suspicious and unattended package” in Centennial Olympic Park, helped move park patrons away from the package to safety.²²⁸ Jewell had some contacts with the press and was found by the trial court to have been a voluntary limited-purpose public figure.²²⁹ However, on appeal, Jewell had argued that he was not a voluntary, limited-purpose public figure,

because he did not assume a role of special prominence in the controversy over the safety of Olympic Park, he did not voluntarily thrust himself to the forefront of the controversy of the safety of Olympic Park, and he did not intentionally seek to influence the resolution or outcome of any public controversy surrounding the safety of Olympic Park.²³⁰

He explained that “his media role was limited to that of an eyewitness and that he did not attempt to shape the resolution of any controversy,” although the Georgia appellate court did not accept that assessment of his role.²³¹

While refusing to reverse the trial court finding that he was a voluntary public figure,²³² the court also noted that Jewell’s position was analogous to Dameron’s.²³³ Jewell was an involuntary public figure, because he “had the misfortune to have a tragedy occur on his watch.”²³⁴ Jewell “became embroiled in the ensuing discussion and controversy over park safety and became well known to the public in this one very limited con-

²²⁷ 555 S.E.2d 175, 186 (Ga. Ct. App. 2001).

²²⁸ *Id.* at 178, 182.

²²⁹ *Id.* at 183.

²³⁰ *Id.*

²³¹ *Id.* at 184 (“Jewell’s participation in interviews and the information he related about the controversy was not so circumscribed. In fact, the extensive media coverage Jewell received as the individual who discovered the bomb and helped evacuate the public led one federal judge to describe him as a ‘media hero.’” (quoting *In re Four Search Warrants*, 945 F. Supp. 1563, 1564 (N.D. Ga. 1996))).

²³² *Id.* at 185 (“This evidence was sufficient to support the trial court’s determination that Jewell was a voluntary limited-purpose public figure.”).

²³³ *Id.* at 186 (“The same considerations that led the *Dameron* court to find the plaintiff in that case was an involuntary public figure require the same conclusion in this case.”).

²³⁴ *Id.*

nection.”²³⁵ Whether willingly or unwillingly, “Jewell became a central figure in the specific public controversy with respect to which he was allegedly defamed: the controversy over park safety.”²³⁶ Of course, the Georgia appellate court’s analysis does not rely on Jewell’s having done something, e.g., having chosen to be a guard at the Olympics, that might reasonably have been expected to expose him to some publicity, but instead relies on Jewell’s having occupied central stage in such a momentous event.

Arguably, the individuals at issue in *Dameron*, *Wells*, and *Jewell* might each be thought to have been involuntary public figures, although *not* because these individuals should have foreseen that they might be exposed to much publicity as a result of their jobs. Certainly, Watergate and the Atlanta bombing received widespread national coverage, and airplane disasters always trigger great interest. Yet, a few points might be made. First, with respect to the singularity and perhaps notoriety of the events, Watergate and the Atlanta bombing would seem to be of a different order of magnitude than an airplane disaster which, while having horrible results, seems less unique.²³⁷ Secondly, the focus should not be on the public interest in the disaster per se,²³⁸ but rather on the individual’s connection to it or, perhaps, on the individual’s notoriety. That *Dameron*, *Wells*, and *Jewell* were not all decided in the same way with respect to involuntary public figure status may well give reason for pause, if only as an indicator that lower courts do not know when to accord involuntary public figure status or how to cabin the use of that status. Regrettably, the way that involuntary public figure status has been invoked based on the defamation plaintiff’s relationship to someone else underscores that worry.

B. *Involuntary Public Figure Status Based on Familial Relationship*

Several cases suggest that family status alone may be enough to make one an involuntary public figure. In *Carson v. Allied News Co.*, the Seventh Circuit summed up existing doctrine when explaining that public figures are “those who command a substantial amount of independent public interest at the time of the publication of the defamatory statements, at-

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ See Clay Calvert & Robert D. Richards, *Journalism, Libel Law and a Reputation Tarnished: A Dialogue with Richard Jewell and His Attorney*, *L. Lin Wood*, 35 MCGEORGE L. REV. 1, 42 (2004) (discussing “significant public events like the bombing at Centennial Olympic Park”); Haochen Sun, *Can Louis Vuitton Dance with HiPhone? Rethinking the Idea of Social Justice in Intellectual Property Law*, 15 U. PA. J.L. & SOC. CHANGE 389, 415 (2012) (discussing “the Watergate scandal, a significant historical event of public interest”). But see *Murnane v. Am. Airlines, Inc.*, 667 F.2d 98, 101 (D.C. Cir. 1981) (discussing the “staggering death tolls and resulting human suffering which have followed some of our nation’s horrible air disasters”).

²³⁸ See Wallis, *supra* note 206, at 317 (“The *Dameron* court . . . adopted an approach that examines the public’s interest in a controversy.”).

tained through position alone or through purposeful activity amounting to a thrusting of one's personality into the vortex of an important public controversy."²³⁹ Certain individuals "occupy positions of such pervasive power and influence that they are deemed public figures for all purposes and in all contexts."²⁴⁰ Others who do not have such power and influence may nonetheless have "thrust or inject[ed] themselves to the forefront of particular public controversies, inviting attention and comment, or [been] drawn into public controversies."²⁴¹ These latter individuals "become public figures for a limited range of issues or for a limited time."²⁴² The difficulty with the *Carson* analysis was not in how the court described the jurisprudence but in how the court applied it in a particular case.

This case involved Johnny Carson, "a preeminent entertainer and show business personality,"²⁴³ and his second wife, Joanna Holland.²⁴⁴ The court commented that "the wife of a public figure such as Carson more or less automatically becomes at least a part-time [i.e., limited-purpose] public figure herself."²⁴⁵ Regrettably, the court did not offer a rationale for such a holding.

Perhaps being married to a well-known personality should be viewed as an individual's thrusting herself into a public controversy or, at least, as assuming the risk that she would be drawn into public controversies, although that might well depend upon when the couple had married. (Presumably, one would not be required to divorce a spouse merely because that spouse had become well-known during the marriage.²⁴⁶) However, one would assume that being married to a famous person would not alone suffice to make one a limited-purpose public figure. Suppose, for example, that an individual studiously and successfully avoids the limelight, famous spouse notwithstanding. That person should thereby be able to avoid public figure status, just as Wolston was able to do.²⁴⁷

The Seventh Circuit's suggested position is over-inclusive. Sometimes, a spouse of a public figure takes on a very public task, e.g., when helping the spouse campaign for a public position. However, other spouses maintain an extremely low profile, and the *Carson* court seems to ignore an essential element of public figure status—whether the spouse has some degree of fame or notoriety. Thus, certain spouses of public

²³⁹ *Carson v. Allied News Co.*, 529 F.2d 206, 209 (7th Cir. 1976).

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.* at 209 n.9.

²⁴⁴ *Id.* at 211 ("Carson had been divorced from his former wife on September 5, 1972 and married Holland on September 30, 1972.").

²⁴⁵ *Id.* at 210.

²⁴⁶ *But cf.* *Clyburn v. News World Commc'ns, Inc.*, 903 F.2d 29, 33 (D.C. Cir. 1990) ("One may hobnob with high officials without becoming a public figure, but one who does so runs the risk that personal tragedies that for less well-connected people would pass unnoticed may place him at the heart of a public controversy.").

²⁴⁷ *See supra* note 141 and accompanying text.

figures receive media attention because of their famous spouses and are themselves recognizable. If that were the test, then spouses who were successful in avoiding the limelight would not be limited-purpose public figures even if a spouse who was part of a martial partner's comedic monologue²⁴⁸ or who received much media attention for some other reason might nonetheless be considered a limited-purpose public figure.

Firestone was decided just a few months after *Carson*. If the *Carson* court were correct that mere marriage to a well-known figure might make one a limited-purpose public figure, then one would have expected *Firestone* to have been decided differently, especially given all of the publicity that *Firestone* had received in her own right. That said, the finding that *Holland* was a limited-purpose public figure did not preclude the imposition of liability, given the court's finding that actual malice might be shown on remand.²⁴⁹

Nonetheless, the *Carson* court's suggestion that a public figure's spouse might himself or herself be a public figure by virtue of being that person's spouse did not provide the necessary cabining. After all, the spouse of a public figure might not have fame or notoriety in his or her own right and also might not have injected himself or herself into particular controversies, which would mean that the spouse would have to be deemed an involuntary public figure. However, if one takes the *Gertz* admonition seriously that "the instances of truly involuntary public figures must be exceedingly rare,"²⁵⁰ one would expect courts to carefully delimit the conditions under which an individual might become a limited-purpose public figure simply by virtue of being a family member of someone who was well known. Otherwise, the finding that someone was an involuntary public figure would not be rare at all.

²⁴⁸ See, e.g., Susan Yerkes, *Rights, Wrongs and Real Power; Can We Talk?*, SAN ANTONIO EXPRESS-NEWS, Aug. 26, 1998, at G1 ("As Joan Rivers would say: Can we talk? When Rivers uttered that famous phrase, she was usually about to launch into one of her acid monologues about her husband, Edgar."); Jonathan Chancellor, *Today's People*, SYDNEY MORNING HERALD (Austl.), Dec. 23, 1986, at 16 ("The extrovert comic [Johnny Carson], who has hosted the Tonight Show on NBC for 24 years, has been through some expensive divorces, and anecdotes about them have often been part of his opening monologues.").

²⁴⁹ *Carson*, 529 F.2d at 213 ("Because of both the completely fabricated marriage-breaker accusations and the wholly imagined but supposedly precisely quoted conversations regarding the purported struggle preceding the westward move of the Tonight Show, the plaintiffs are entitled to a jury's determination of whether actual malice existed."). Rehearing and rehearing en banc of the case were denied on March 8, 1976. *Id.* at 206. *Firestone* had already been decided on March 2, 1976. *Time, Inc. v. Firestone*, 424 U.S. 448, 448 (1976). It may be that the Seventh Circuit decided not to rehear *Carson*, at least in part, because the actual malice standard might well have been met anyway so that it would not have mattered whether or not *Joanna Holland* was a public figure.

²⁵⁰ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

Consider *Zupnik v. Associated Press, Inc.*²⁵¹ Karen Zupnik was married to Dr. James Zupnik, who was cited for negligence and incompetence by the Connecticut Department of Health Services Division of Medical Quality Assurance.²⁵² James Zupnik received intense media coverage.²⁵³

A newspaper reported that a particular individual, Brenda Brautigam, had claimed that James and Karen Zupnik “are to blame for [Brautigam’s] losing her word processing job and that they jeopardized her marriage and hurt her ability to properly care for her child because she became addicted to the drug percodan.”²⁵⁴ But the newspaper reporting was inaccurate. Brautigam had never asserted that Karen Zupnik “was responsible for [Brautigam’s] drug addiction,” but merely that Karen Zupnik had “defrauded the plaintiff by helping her husband to fraudulently transfer five properties from his name to her name.”²⁵⁵

At issue in this case was not whether Zupnik had been libeled because, for example, she had falsely been charged with conspiring with her husband to transfer title to certain properties to escape creditors. Rather, what was at issue here was the newspaper’s inaccurate suggestion that Karen was being blamed for the addiction and everything that followed from that addiction.

The federal district court held that Zupnik had to establish that the newspaper’s mistake was made with actual malice.

The court concludes that the plaintiff is a public figure for purposes of the defamation analysis here. In the present case, the plaintiff has “become a public figure through no purposeful action of [her] own.” Despite the fact that the plaintiff has not sought a public role, she has been thrust into the role of a public figure by virtue of her marriage to Dr. Zupnik.²⁵⁶

It is somewhat difficult to assess the court’s holding. The court noted that James Zupnik had received extensive publicity, and that Karen had been accused of “conspiring with her husband in a fraudulent conveyance of property for the purpose of hiding assets from potential judgment creditors.”²⁵⁷ But one cannot tell whether Karen Zupnik had received extensive or even any publicity when her husband was “the subject [of] intense debate, discussion and scrutiny within the media.”²⁵⁸ If she had not also received media attention, it is difficult to see how one allegation involving the fraudulent transfer of properties might make one an involuntary public figure. Further, the allegation itself would not have

²⁵¹ 31 F. Supp. 2d 70 (D. Conn. 1998).

²⁵² *Id.* at 71.

²⁵³ *Id.* at 73.

²⁵⁴ *Id.* at 71.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 72 (alteration in original) (citations omitted) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974)).

²⁵⁷ *Id.* at 72–73.

²⁵⁸ *Id.*

made Karen Zupnik an involuntary public figure but for the reporting of it, and if that reporting was the very publication making the allegedly defamatory allegation, then the newspaper would have created the involuntary public figure status at the very time of its alleged defamation, which is exactly what *Proxmire* precludes.²⁵⁹ In any event, *Zupnik* suggests that involuntary public figure status may be conferred relatively routinely.

In support of its holding, the *Zupnik* court cited to *Brewer v. Memphis Publishing Co.*²⁶⁰ At issue in *Brewer* was whether John and Anita Brewer were public figures. Anita had “testified that she dated Elvis Presley and that their relationship lasted for five or six years, until approximately 1960 or 1961.”²⁶¹ Further, she had been a well-known entertainer, and part of her fame had been due to her relationship with Presley.²⁶² Finally, “her name continued to appear in articles and books about Presley.”²⁶³ Thus, in Anita Brewer’s case, her public figure status was not merely due to her once having had a romantic relationship with Elvis Presley, but to her having used it to her own advantage to promote her own career.

The allegedly defamatory article falsely suggested both that Anita Brewer was no longer married to John Brewer and that she was having an affair with Elvis Presley while Presley was still married.²⁶⁴ Because the allegedly defamatory comment was directly related to why she was a limited-purpose public figure, namely, her relationship with Presley, the Fifth Circuit held that Brewer had to establish actual malice in order to collect damages for reputational harms.²⁶⁵

For purposes here, the more interesting and difficult analysis involved whether John, Anita’s husband, was an involuntary public figure. John Brewer had been a member of the University of Mississippi football team while it had a number-one national ranking, and, further, he had played professional football for both the Cleveland Browns and the New Orleans Saints.²⁶⁶ However, the Fifth Circuit did not find John Brewer to

²⁵⁹ See *supra* note 186 and accompanying text (noting Justice Brennan’s explanation of *Proxmire* that defendants cannot create their own defense by making the plaintiff a public figure in the very publication that is allegedly defamatory).

²⁶⁰ *Zupnik*, 31 F. Supp. 2d at 73 (citing *Brewer v. Memphis Publ’g Co.*, 626 F.2d 1238, 1257 (5th Cir. 1980)).

²⁶¹ *Brewer*, 626 F.2d at 1248.

²⁶² *Id.* (“[P]ress coverage of her career was tied to coverage of her relationship with Presley. In fact, according to the articles, her success was due in large part to the relationship.”).

²⁶³ *Id.* at 1257.

²⁶⁴ *Id.* at 1243, 1245 (“Whether or not it indicated that Anita Brewer was having an affair with a married man as she argues, it is susceptible to the interpretation that her encounter with a married man was romantic.”).

²⁶⁵ *Id.* at 1257 (“Anita Wood Brewer[,], who had gained media exposure and fame through her career and her romantic relationship with Presley, an extremely well-known entertainer, and whose name continued to appear in stories about Presley after her retirement, was required to prove malice in this suit based on an article that dealt primarily with that romantic relationship.”).

²⁶⁶ *Id.* at 1248.

be a public figure because of his former sports career but, instead, because of his marriage to Anita.²⁶⁷ But finding someone to be a public figure simply because of their familial relationship to someone else who is a limited-purpose public figure certainly contradicts the spirit if not the letter of *Firestone*. If Firestone could not be deemed a public figure notwithstanding her own well-known marriage and her own engagements with the press, then one might expect the same treatment for those who do not engage the press at all but who are simply drawn into the public eye because of their relatives.²⁶⁸

In *Lewis v. NewsChannel 5 Network*, a Tennessee appellate court found that the brother-in-law of a high ranking police official was an involuntary public figure.²⁶⁹ Major Carl Dollarhide, the subject of a NewsChannel investigation, was accused of interfering with the arrest of his brother-in-law, Brad Lewis, who allegedly had been found with a “sawed-off shotgun, a bag containing money, and what appeared to be gambling paraphernalia.”²⁷⁰ Lewis was described in the broadcast as “the son of a convicted gambler.”²⁷¹ The newscast did not expressly include the information that the convicted gambler, Jimmy Lewis, was the major’s father-in-law.²⁷²

The trial court had held that although Brad Lewis was a private person, the major’s intervention and the subsequent punishment inflicted on the major by the police chief made this all a matter of public concern.²⁷³ The appellate court agreed that “officials using or attempting to use their position to keep friends from receiving tickets or citations, and certainly from being arrested, constitutes a matter of public concern.”²⁷⁴ However, that court held that Lewis’s status was itself modified because he was connected to this important issue.

The appellate court reasoned that “the NewsChannel 5 defendants had the right to report on Major Dollarhide’s disempowerment and on the reasons why the Chief of Police decided to relieve him of his du-

²⁶⁷ See *id.* at 1257–58.

²⁶⁸ See, e.g., *Meeropol v. Nizer*, 560 F.2d 1061, 1066 (2d Cir. 1977) (“[T]he Rosenberg sons are public figures. . . . In the course of extensive public debate revolving about the Rosenberg trial appellants were cast into the limelight and became ‘public figures’ under the *Gertz* standards.”).

²⁶⁹ *Lewis v. NewsChannel 5 Network*, 238 S.W.3d 270, 288 (Tenn. Ct. App. 2007) (“We have determined Brad Lewis is an involuntary public figure for the purpose of the reports regarding Major Dollarhide’s disempowerment. . . .”).

²⁷⁰ *Id.* at 275–81.

²⁷¹ *Id.* at 279.

²⁷² *Id.* at 276 (“Major Dollarhide was married to Jimmy Lewis’s daughter.”).

²⁷³ *Id.* at 282; see also *id.* at 287 (“The August 9, 2000 story did more than broadcast to the members of the public what they would have read or heard had they been provided with a copy of the Chief of Police’s press release. Instead, it reported the details of a story about a high ranking police official preventing the arrest of his brother-in-law after his brother-in-law had been caught possessing weapons, gambling paraphernalia, and a large amount of cash.”).

²⁷⁴ *Id.* at 298.

ties.”²⁷⁵ But that report would have been incomplete unless the defendant had explained the circumstances in which Dollarhide had attempted to prevent Lewis’s arrest.²⁷⁶ Without a full account, the public would not have understood the seriousness of the major’s misconduct.²⁷⁷

The court feared that if the allegedly libelous information had not been included in the report, the public would not have had a good understanding of why the Chief of Police had punished the major.²⁷⁸ Basically, the “public would only have been informed that Major Dollarhide had gone to the scene of an incident where a person was being detained and that he had secured the release of that individual. . . . [But] the public would have no way of assessing what Major Dollarhide’s motivation had been or whether Major Dollarhide was being disempowered for an adequate or inadequate reason.”²⁷⁹

What was the allegedly libelous information? That Lewis had (allegedly) “possess[ed] an illegal firearm, gambling paraphernalia, and a large amount of cash when he was detained at the roadblock.”²⁸⁰ The court reasoned that the allegation that Lewis had these items “when he was detained dramatically emphasizes the seriousness of Major Dollarhide’s misconduct.”²⁸¹ Why would Dollarhide have committed such a serious violation? That is where the relationship factor comes in—“Major Dollarhide had intervened to prevent a family member from being arrested for serious criminal offenses.”²⁸²

The appellate court’s motivation was clear—it worried that if Lewis were held to be a private individual, then the media might be too hesitant in the future to report on important matters of public concern—“to have the presence of a private person shield a public official from reports about his or her official misconduct would begin to rot the underlying foundation of the freedoms of speech and of the press.”²⁸³ The failure to “create the breathing space for necessary reporting on the misconduct of public officials on matters of public concern where a private person is integrally and meaningfully intertwined would be to miss the proverbial forest for the proverbial trees.”²⁸⁴ The court noted that the “malice standard is rooted in the ability of the media and the citizens to discuss and debate improper actions of public officials with sufficient breathing space

²⁷⁵ *Id.* at 299.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.* (“[T]he public would have been left to speculate about the reasons for the Chief of Police’s actions.”).

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 281.

²⁸¹ *Id.* at 299.

²⁸² *Id.* at 300.

²⁸³ *Id.*

²⁸⁴ *Id.*

to be free from the chilling effect of civil litigation and damage awards arising from inevitable errors and mistakes.”²⁸⁵

First, it is not at all clear that the news station was negligent in this case—“the trial court determined that Brad Lewis could not prevail on his libel claim because ‘[n]o reasonable juror could find negligence given the investigation undertaken by the reporter and the action taken by the Police Department, all of which occurred *prior* to the story being reported.’”²⁸⁶ Presumably, NewsChannel 5 might well act in the same way if confronted with similar circumstances in the future even if Lewis were not found to be a public figure, because they had taken reasonable care before broadcasting the story. Ironically, the *Lewis* court’s holding might make the media feel less of a need to take care before making possibly defamatory statements about people who would be classified as private individuals but for their connection to the actions of a public official.

The *Lewis* case is of interest here because of the implicit basis used by the court to elevate an individual into involuntary public figure status. The court pointed to two aspects of the case: the seriousness of the charge against a public official and the family connection. If the seriousness of the charge suffices, then many individuals with some connection to a public official might be classified as public figures.

The appellate court stated that a “person may be deemed to be an involuntary public figure when his or her conduct is related in an integral and meaningful way to the conduct of a public official.”²⁸⁷ But this makes matters more confusing, because it does not help to explain why Lewis was a public figure. Not only was it true that “he did not purposely inject himself into the forefront of the controversy surrounding Major Dollarhide,”²⁸⁸ but he had engaged in *no* conduct whatsoever to trigger involuntary status, unless Lewis’s allegedly having possessed items that he should not have possessed somehow counts as an action whereby he can acquire involuntary public figure status. But if that is so, then the barrier preventing individuals from being deemed public figures is set so low that we might expect many individuals to qualify as involuntary public figures.

The court’s attempt to smuggle in family status was even less convincing. The court claimed that including the family connection would give the public a better understanding of what had happened. But anything about Lewis that helped to explain why Dollarhide was motivated to intervene would have given the public a fuller story. Suppose, for example, that Dollarhide and Lewis had not been related but instead had been roommates at college or, perhaps, had been members of the same fraternity, even though they had attended school at different times. One infers that any of these reasons would have made Lewis a limited-purpose

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 282 (alteration in original).

²⁸⁷ *Id.* at 298.

²⁸⁸ *Id.* at 299.

public figure, because any of those factors might have shed light on Dollarhide's actions. But if the court is saying that the actions of public officials are so important to examine that they trigger the actual malice standard, then the court should not pretend to make use of involuntary public figure status to reach that result.²⁸⁹ Basically, the court proposed a new standard:

To promote vigorous discussion and debate regarding matters of important public concern and the conduct of public officials we would add . . . that for a private person to become an involuntary public figure, his or her appearance in the story must be an integral and meaningful part of addressing the conduct of the public official with regard to a matter of public concern.²⁹⁰

But the difficulty posed by this standard is suggested in the very case. The reason that Dollarhide was punished was that he had allegedly improperly interfered in a suspect's apprehension. The non-apprehended individual's identity was secondary. Indeed, one of the ironic aspects of the court's analysis was that the allegedly defamatory report did not say at the outset that Dollarhide had attempted to assist a family member, but that Dollarhide had attempted to protect the son of a convicted gambler.²⁹¹ It was only later in the broadcast that the public learned that Lewis was Dollarhide's brother-in-law.²⁹² Arguably, the inclusion of that fact did not make Dollarhide look more corrupt as the court implied.²⁹³ On the contrary, if the public had been left to guess why Dollarhide was helping a convicted gambler's son, many equally or more unflattering motivations might have been inferred, e.g., that Dollarhide might have been hoping that the gambler would reward Dollarhide for the interference.

The *Lewis* court should be commended for realizing the importance of bringing the actions of public officials to the public's attention. However, involuntary public figure status should not be hijacked to achieve that goal. Indeed, the implicit understanding of involuntary public figure status shared by many courts creates the potential that this status will be conferred freely rather than extremely rarely.

Yet, it should not be thought that all courts are jumping onto the involuntary-public-figure bandwagon. Consider *Foretich v. Capital Cities/ABC, Inc.*, which involved "one of the most notorious child-custody battles in American history."²⁹⁴ Elizabeth Morgan came to believe that her

²⁸⁹ See *id.* at 300.

²⁹⁰ *Id.* at 299.

²⁹¹ See *id.* at 279.

²⁹² *Id.*

²⁹³ See *id.* at 300 ("By reporting these facts, the NewsChannel 5 defendants enabled the public to better understand Major Dollarhide's corrupt motivation, as well as the seriousness of his breach of his official duty.")

²⁹⁴ *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1543 (4th Cir. 1994).

child, Hilary, was being sexually abused while visiting with her father, Eric Foretich, and his parents, Vincent and Doris Foretich.²⁹⁵

None of the Foretiches had either been indicted for or convicted of child abuse.²⁹⁶ Nonetheless, Elizabeth Morgan hid Hilary from them, and Morgan was eventually held in civil contempt for 25 months for failing to reveal Hilary's whereabouts.²⁹⁷ The *Foretich* court noted: "Hundreds of newspaper and magazine articles were published about virtually every aspect of the controversy. The broadcast media devoted extensive coverage to the dispute and to the various public policy debates that it inspired."²⁹⁸

Even Congress entered the fray, passing the District of Columbia Civil Contempt Imprisonment Limitation Act of 1989,²⁹⁹ which "stated that no person could be imprisoned for civil contempt by the D.C. Superior Court for more than twelve months in connection with a child-custody case."³⁰⁰

At issue in this case was whether Hilary's paternal grandparents were limited-purpose public figures (either voluntarily or involuntarily). Although suggesting that the grandparents never actively sought out the media, the Fourth Circuit noted:

[O]ver a period of a few years, and most intensively during and immediately after Dr. Morgan's twenty-five months in jail, [the grandparents] did accede to requests for several newspaper and magazine interviews, attend at least three press conferences or rallies organized by or on behalf of their son, and appear on at least two television shows. The grandparents did not simply confine their remarks to denying Dr. Morgan's allegations. They also described the positive environment that they had provided for Hilary, the negative influence that Dr. Morgan had on the girl, their belief that Dr. Morgan was mentally unstable, and the distress that they had suffered as a result of Dr. Morgan's allegations.³⁰¹

The Foretiches were in the public eye in several ways. They not only attended a news conference with their son, but they appeared on *The Phil Donahue Show*, which was nationally broadcast, as well as in a documentary titled "Hilary in Hiding."³⁰² In addition, they were quoted in different newspapers.³⁰³ The court never mentions how famous or notorious the grandparents were, but one infers that they were the subjects of various

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 1544.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ Pub. L. No. 101-97, 103 Stat. 633. The *Foretich* court discusses this statute. See *Foretich*, 37 F.3d at 1544.

³⁰⁰ *Foretich*, 37 F.3d at 1544.

³⁰¹ *Id.* at 1545 (footnote omitted).

³⁰² See *id.* at 1546-49.

³⁰³ *Id.* at 1545-47.

stories and would have had ready access to the media if they had needed to refute particular allegations.

There was some question whether the Foretiches had been drawn into this continuing controversy or whether they were injecting themselves into the controversy. The court expressly noted that the grandparents sometimes “did not simply confine their remarks to denying Dr. Morgan’s allegations,” although the court reasoned that the grandparents’ replies were “not excessive,” because their “public statements were made only to reporters from media outlets that had already aired, or were planning soon to air, Dr. Morgan’s accusations against them and their son.”³⁰⁴ By way of explanation as to why this was important, the court noted that “[t]he Foretich grandparents did not reach out to additional media outlets, and thereby to new audiences, in an effort to expand the circle of persons familiar with the controversy. Rather, they targeted their message toward those persons in whose eyes their reputations already had been (or soon would be) sullied.”³⁰⁵

Yet, the court’s description here may be quite telling, because the Foretiches were sometimes able to mount a defense even before the accusations had been leveled. Perhaps this was because the reporters had contacted them knowing that terrible accusations would soon be aired, although the Fourth Circuit’s characterization implies otherwise. Basically, the court implies that the Foretiches were able to choose the media markets where their message would be heard,³⁰⁶ which suggests that the Foretiches had great media access and were able to pinpoint which markets would hear their viewpoints. But this is exactly the kind of individual who should be viewed as a voluntary public figure—someone who is a center of a controversy, willingly or unwillingly, and who has access to the media to counter damaging assertions made by others.

In 1992, the American Broadcasting Company aired a docudrama entitled “A Mother’s Right: The Elizabeth Morgan Story.”³⁰⁷ The *Foretich* court explained: “Being a ‘docudrama,’ the made-for-TV movie presented a dramatized and perhaps somewhat fictionalized account, with actors and actresses playing the roles of Dr. Morgan, Dr. Foretich, Hilary, et al.”³⁰⁸

In one scene, Hilary was depicted as visiting her father and grandparents in the office of a court-appointed psychiatrist.³⁰⁹ Hilary was “initially agitated, [but] gradually warm[ed] to her grandparents.”³¹⁰ When that scene was later described to the character playing Elizabeth Morgan,

³⁰⁴ *Id.* at 1545, 1563.

³⁰⁵ *Id.* at 1563.

³⁰⁶ *See id.*

³⁰⁷ *Id.* at 1549.

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 1549–50.

³¹⁰ *Id.* at 1550.

she responds, “It’s just like the therapist said Classic response. *She’s being kind to her abusers so she won’t be hurt again.*”³¹¹

The Foretiches sued for defamation. Because the Morgan character had said “abusers,” the docudrama “indicated that Hilary was being abused not only by her father but also by one or both of her paternal grandparents.”³¹²

The Fourth Circuit held that the Foretiches’ frequent ventures into the public eye were defensive in nature.³¹³ While admitting that “some of their public statements were probably intended (at least in part) to influence the outcome of the custody dispute or of the legislative debate in Congress,” the court reasoned that “in the circumstances of this particular case, it is almost impossible to extricate statements made in self-defense from statements intended to influence the outcome of the controversy.”³¹⁴ In part because of the seriousness of Elizabeth Morgan’s charges,³¹⁵ the Foretiches were held to be private figures.³¹⁶

While it is not clear whether the Foretiches had been drawn into the controversy or instead had jumped into it to change the outcome, the Fourth Circuit’s holding is surprising. The Foretiches were already at the center of a controversy before the ABC docudrama had aired. Whether or not the grandparents’ responses to Elizabeth Morgan’s charges were reasonable defenses or instead aggressive counterattacks, they apparently had ready access to the media and were either drawn into the fray or, perhaps, voluntarily injecting themselves into the existing controversy. The docudrama aired after the controversy was raging, and the Foretiches would seem to meet the requirement for being limited-purpose public figures if anyone would.

In any event, the Fourth Circuit view of what must be shown to establish voluntary or involuntary public figure status is in clear conflict with that of some of the other lower courts, which is no surprise given the Supreme Court’s unwillingness to be clear about the conditions under which one will have acquired some form of public figure status. Part of the difficulty in determining where the proper line should be drawn is in figuring out whether to use the Court’s announced criteria as the basis upon which to decide or, instead, the way that the Court applied those

³¹¹ *Id.* (omission in original).

³¹² *Id.*

³¹³ *Id.* at 1563 (“[W]e conclude that the Foretiches’ primary motive was to defend their own good names against Dr. Morgan’s accusations and that their public statements can most fairly be characterized as measured defensive replies to her attacks . . .”).

³¹⁴ *Id.*

³¹⁵ *See id.* at 1558–59 (“[W]e hold that a person who has been publicly accused of committing an act of serious sexual misconduct that . . . would be punishable by imprisonment cannot be deemed a ‘limited-purpose public figure’ merely because he or she makes reasonable public replies to those accusations.”).

³¹⁶ *Id.* at 1564 (“[B]oth Vincent and Doris Foretich were private individuals, not public figures . . .”).

criteria. For example, suppose that the proper application of the relevant criteria yields the result that Gertz, Wolston, Firestone, and Milkovich were all private individuals. If that is so, then perhaps the Foretiches were, too. However, one must then wonder whether Butts and Walker were properly characterized as limited-purpose public figures. Regrettably, there is no way to know whether there is a way to reconcile all of these findings or if, instead, some were incorrect. Further, even assuming that some of these findings of public figure or private figure status were incorrect, the Court has not offered a way to figure out which accurately represented the jurisprudence and which did not.

IV. CONCLUSION

The United State Supreme Court has distinguished between public figures and private individuals and, further, has distinguished among types of public figures. Regrettably, the Court has never made sufficiently clear which criteria should be used to determine whether someone is in a particular classification or how to apply those criteria that have been mentioned. The Court's apparent disregard or misapplication of its own criteria has led to foreseeable inconsistency in the lower courts.

One area that illustrates the difficulties in the current jurisprudence involves the conditions under which an individual will be deemed an involuntary public figure. That category was initially reserved for the exceedingly rare figures who were somehow placed center stage before the public eye through no fault of their own, but has now become a category into which individuals might be placed because of their family relations or, perhaps, for any of several other reasons that are not particularly uncommon.

Currently, the lower courts cannot agree about the conditions under which an individual should be considered an involuntary public figure, especially when one considers how announced criteria have been applied in practice. Not only does this mean that there is inconsistency so that on a particular set of facts an individual might be found to be an involuntary public figure in one jurisdiction and a private figure in another, but no court has developed criteria that would both permit the recognition of involuntary figures and cabin that status so that it will not be overused. In an age when many people flit in and out of the public eye, the Court must clearly set out who counts as a public figure and in what circumstances. Otherwise, we will simply continue to have the chaos that currently exists in the lower courts, and neither the private interests in protecting individuals' reputations nor the societal interests in having robust debate about issues of public concern will be adequately protected.