Fame and Notoriety in Defamation Litigation

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Comments

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Since the landmark decision of *New York Times Co. v. Sullivan*\(^1\) abolished libel's "talismanic immunity from constitutional limitations,"\(^2\) the United States Supreme Court has struggled to develop an analytical structure that will properly protect each of the conflicting interests involved in all defamation cases. On one side is the individual's interest in maintaining his or her good reputation, the historical basis for the defamation action.\(^3\) On the other is the first amendment interest in the maintenance of freedom of expression and an active and unfettered press.\(^4\)

The decade following the *Times* case found the Court in disagreement as to the scope of first amendment protection in defamation cases. The protection granted in the *Times* case to criticism of official behavior was first extended to public figures.\(^5\) In 1971, a plurality decision extended protection to all comment pertaining to matters of public concern.\(^6\) In 1974, however, a majority of the Court rejected this position.

In *Gertz v. Robert Welch, Inc.*,\(^7\) the Court developed a test that focuses upon the status of the plaintiff, in an effort to assure that the state interest in protecting the reputation of the individual is given sufficient weight. Under the *Gertz* standard, a plaintiff who is a public figure must meet the burden of the *Times* standard.\(^8\)

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1. 376 U.S. 254 (1964). In the *Times* case, the Supreme Court held that the first amendment prohibits states from allowing public officials to recover damages for a defamatory statement relating to their official conduct unless they can prove that the statement was made with knowledge or reckless disregard of the statement's falsity. *Id.* at 279-80.
2. *Id.* at 269.
4. "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. 1.
8. *Id.* at 342. This Comment will refer to the standard enunciated in the *Times* case as the *Times* standard, rather than use the term "actual malice," a term that has caused confusion and threatens the proper application of the rule by juries. See Rosenbloom v. Me-
The *Gertz* opinion enumerated three categories of potential public figure plaintiffs: (1) those who achieve pervasive fame or notoriety and are therefore public figures for all purposes; (2) those who have thrust themselves into a public controversy and thereby become public figures for a limited range of issues connected with that controversy; and (3) those who have been involuntarily thrust into a public controversy and thereby become public figures.9

The *Gertz* case allows public figure status to be conferred on a plaintiff solely on the basis of his or her notoriety. The language of the opinion is unclear regarding the amount of fame required, whether the reasons for such fame must be related to the defamatory comment, and whether there is any limitation imposed by the privacy rights of such a plaintiff.

An analysis of the rationale offered by the *Gertz* Court as support for the adoption of a public figure standard reveals support only for a narrow application of the all-purpose public figure concept.10 In addition, Supreme Court cases after *Gertz* have interpreted the limited purpose category in such a manner as to cast further doubt upon the continuing vitality of a public figure based solely on fame.11 However, lower courts continue to apply such a standard.

Because of the lack of Supreme Court guidance regarding the scope of the all-purpose category, lower courts have not reached consistent results. Indeed, the decisions have been essentially ad hoc, a result *Gertz* was expressly intended to prevent.12

This Comment addresses the need for a more defined standard governing the role of fame or notoriety in defamation cases. It first examines the development of the public figure category and the Supreme Court decisions prior to *Gertz*, and then analyzes the *Gertz* decision in light of several leading first amendment theories, concluding that a broad all-purpose public figure category is not necessary to
protect first amendment interests. The post-Gertz Supreme Court interpretations of the limited-purpose category are examined, and it is concluded that the scope of that category has been narrowed by the Court’s increasing emphasis on voluntary action by the plaintiff.

The Comment concludes that a broadly interpreted all-purpose category poses a danger of unwarranted infringements of privacy rights and of inconsistent results. Because this area of law requires consistent and predictable adjudication, this Comment suggests that the determination of public figure status be made by focusing on the actual activities of the plaintiff. If the defamatory comment pertains to activities the plaintiff has placed before the public, such comment should receive first amendment protection. If the comment is not reasonably related to the voluntary activities of the plaintiff, recovery should be allowed under standards applicable to private figures. Such a test would provide more predictability and would effectively protect the state interests in defamation cases without any further infringement of first amendment interests.

Genesis—The Times Case and Its Progeny

New York Times Co. v. Sullivan, 13 decided in 1964, was the first case to hold that defamatory speech is included within the ambit of first amendment protection. The Supreme Court, in an opinion authored by Justice Brennan, held that the first amendment, as applied to the states by the fourteenth amendment, prohibits states from allowing public officials 14 to recover damages for defamatory falsehoods relating to their official conduct unless they can prove the statements were made with knowledge or reckless disregard of the statement’s falsity. 15

The case involved a suit brought by the police commissioner of Montgomery, Alabama, against the New York Times for the printing of allegedly defamatory statements in an advertisement protesting the denial of civil rights to blacks in the South. Considering the case “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-

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14. The term "public official" is not limited to elected officials. The "public official designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs." Rosenblatt v. Baer, 383 U.S. 75, 85 (1966). Candidates for public office are also included within the "public figure" designation. See Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971).
open . . . ,”\textsuperscript{16} the Court noted that “erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive’ . . . .”\textsuperscript{17} Analogizing the criticism of official conduct to seditious libel, the Court stated that it was the controversy over the Sedition Act of 1798\textsuperscript{18} that had first crystallized the nation’s awareness of the “central meaning of the First Amendment.”\textsuperscript{19} The fear of large damage awards would markedly inhibit such criticism.\textsuperscript{20} 

\textit{Curtis Publishing Co. v. Butts} and \textit{Walker v. Associated Press},\textsuperscript{21} decided together in 1967, extended constitutional protection to defamatory statements pertaining to “public figures.” \textit{Butts} involved a 	extit{Saturday Evening Post} article accusing Wally Butts, the athletic director of the University of Georgia, of conspiring to fix a football game.\textsuperscript{22} \textit{Walker} concerned a news dispatch describing Walker, a former Army general who had been involved in previous segregation confrontations, as personally having led a crowd in a charge against federal marshals in an attempt to block the enrollment of James Meredith in the University of Mississippi.\textsuperscript{23} 

The Court found both Butts and Walker to be public figures. Six Justices agreed that some form of protection should be afforded to defamatory statements when the plaintiff is a public figure, although they disagreed about the proper standard to be applied.\textsuperscript{24} Justice Harlan

\begin{itemize}
  \item \textsuperscript{16} \textit{id.} at 270.
  \item \textsuperscript{17} \textit{id.} at 271-72.
  \item \textsuperscript{18} Ch. 74, 1 Stat. 596 (1798). The Sedition Act made it a crime, punishable by a fine of $5,000 or five years imprisonment to utter defamatory comment about the government of the United States, either house of Congress, or the President. The defense of truth was allowed and the jury decided questions of both law and fact. New York Times Co. v. Sullivan, 376 U.S. at 273-74. The Act expired by its terms in 1801. Although never tested in the Court, it was widely regarded as inconsistent with the first amendment and therefore unconstitutional. \textit{See id.} at 276.
  \item \textsuperscript{19} New York Times Co. v. Sullivan, 376 U.S. at 273.
  \item \textsuperscript{20} \textit{id.} at 277. The Court noted that the damage awards allowed by the Alabama courts were one hundred times greater than the maximum fine provided by the Sedition Act, and one thousand times greater than that provided by the Alabama criminal libel statute. \textit{id.}
  \item \textsuperscript{21} 388 U.S. 130 (1967).
  \item \textsuperscript{22} \textit{id.} at 135 (Harlan, J.). Butts had been a popular head football coach at the university, and was in the process of negotiating for a position with a professional team. \textit{id.} at 135-36.
  \item \textsuperscript{23} \textit{id.} at 140. Walker was a private citizen at the time, but previously had commanded federal troops during the school desegregation confrontation in Little Rock, Arkansas, in 1957. He resigned his army position to engage in political activity, and made several well-publicized statements against federal intervention in desegregation efforts. \textit{id.}
  \item \textsuperscript{24} Four Justices in \textit{Butts} would have held that a public figure may recover upon a showing of “highly unreasonable conduct constituting an extreme departure from the stan-
felt that two similarities between public figures and public officials justified imposition of constitutional safeguards on state libel actions involving public figures: "[B]oth commanded sufficient public interest and had sufficient access to the means of counterargument to be able ‘to expose through discussion the falsehood and fallacies’ of the defamatory statements." Justice Harlan also noted that courts had examined the prior activities of defamation plaintiffs to determine if recovery was warranted. Justice Harlan concluded that Butts had attained public figure status on the basis of his position alone, while Walker attained it through a purposeful thrusting of his personality into a public controversy. Chief Justice Warren also concluded that both Walker and Butts were public figures. He focused on the pervasive involvement of private citizens in the resolution of important public questions, and declared that the press must be free to comment on the involvement of such figures in public issues and events.

The public figure concept was but vaguely outlined in Butts and Walker; there was no definition more specific than a statement that both Butts and Walker would be considered public figures under ordinary tort rules. For this proposition Justice Harlan cited Spahn v. Julian Messner, Inc., a privacy case. Thus the "ordinary tort rules" to which he referred apparently were those governing a qualified privilege in privacy actions. Two closely related privileges available to defendants in such actions are the privileges to give further publicity to public figures and to give publicity to matters of public interest. "The one primarily concerns the person to whom the publicity was given; the other the event, fact or subject matter in which he was involved. They

dards of investigation and reporting ordinarily adhered to by responsible publishers." Id. at 155.

Chief Justice Warren, on the other hand, saw no reason in "law, logic, or First Amendment policy" to differentiate between public figures and public officials, and would have applied the Times standard to both. Id. at 163-64 (Warren, C.J., concurring). His opinion was joined in both cases by Justices White and Brennan, and in Walker by Justices Black and Douglas. Thus, in Walker, a majority of the Court voted in favor of applying the Times standard to public figures. See Kalven, The Reasonable Man and the First Amendment, 1967 Sup. Ct. Rev. 267, 277-78.

26. Id. at 154.
27. Id. at 155.
28. Id. at 163-64 (Warren, C.J., concurring).
29. Id. at 154.
31. W. PROSSER, supra note 3, at 823.
are, however, obviously only different phases of the same thing, and in practice frequently became so merged as to be inseparable."

The stress placed by both Chief Justice Warren and Justice Harlan upon the involvement of matters of public interest and Justice Harlan's reference to "ordinary tort rules" shed some light both on the scope of protection intended to be offered to critics of public figures and on the Court's view of the interests involved. The use of a privacy standard strongly suggests that the Court had no intention of extending constitutional protection to comment on the private aspects of life. In addition, Chief Justice Warren's concern that the press be free to comment upon the involvement of public figures in public issues and events indicates a primary concern with the rights of the press to inform the public, and of the public to be informed. The concern of the Court at the time of Butts and Walker was with the requirements of the first amendment rather than the interests of the parties.

During the eight years following Butts the Court continued to struggle with the problem of first amendment application in defamation cases. In Rosenbloom v. Metromedia, Inc., a plurality opinion by Justice Brennan extended protection to all utterances involving matters of public interest or concern. The plurality rejected the notion that the Times standard should apply only to public officials and public figures:

"Drawing a distinction between 'public' and 'private' figures makes no sense in terms of First Amendment guarantees. The New York Times standard was applied to libel of a public official or public figure to give effect to the Amendment's function to encourage ventilation of public issues, not because the public official has any less interest in protecting his reputation than an individual in private"

32. Id.
33. See Eaton, The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer, 61 VA. L. REV. 1349, 1393 (1975) (Butts expanded the privilege to protect communications about public personalities "with respect to public issues and events"); see also id. at 1393 n.184.
35. 403 U.S. 29 (1971). Rosenbloom, a private citizen not previously in the public eye, was arrested for selling allegedly obscene books. A local radio station broadcast a news account linking his name with a "smut literature racket" and with "girlie-book peddlers." Id. at 34-35.
36. Id. at 43 ("If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety."). The opinion by Justice Brennan was joined only by Chief Justice Burger and Justice Blackmun.
This extension of protection, however, was shortlived. Three years later a majority of the Court held that the Rosenbloom standard inadequately balanced the competing values at stake in defamation cases by abridging the state interest in protecting reputation to an unacceptable degree.

The Gertz Decision and the Public Figure

In Gertz v. Robert Welch, Inc. the Court, by a 5-4 majority, rejected the Rosenbloom standard in favor of a test focusing on the status of the plaintiff. Gertz, an attorney, had been retained by the family of a murder victim to represent them in a civil suit against a Chicago police officer who was later convicted of the murder. American Opinion, a John Birch Society publication, accused Gertz of arranging a frame-up and of being a "Communist fronter." The article also falsely implied that Gertz had a criminal record.

The Court expressly repudiated the Rosenbloom standard, concluding that imposition of the stringent Times standard upon private plaintiffs would seriously abridge the legitimate state interest in compensating individuals who have been harmed by defamatory comment. While adhering to the application of the Times standard in cases involving public officials and public figures, the Court concluded that application of the Times standard was not required when the plaintiff is a private individual. The Court did not declare what rule should be used, but held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory false-

37. Id. at 45-46.
39. Justice Blackmun, who joined Justice Brennan's opinion in Rosenbloom, nevertheless concurred in the majority opinion in Gertz, stating that though he sensed some illogic in the opinion it was necessary to decide the issue raised in Gertz by a majority opinion to eliminate the ongoing confusion caused by the many plurality opinions. Id. at 353-54.
40. Id. at 325-26.
41. Id. at 346.
42. Id. That the application of the Times standard has a decided effect on the outcome of litigation is shown by a study of defamation cases decided between 1976 and mid-1979. Of 66 appeals in which the court applied the Times standard, 47 (71%) were resolved in favor of the defendant and only 5 (8%) were resolved in favor of the plaintiffs. In cases involving media defendants, the defendants won 34 of 44 cases. When the Gertz standard was applied to media defendants, however, 11 of 14 cases were resolved in favor of the plaintiff. Franklin, Winners and Losers and Why: A Study of Defamation Litigation, 1980 AM. B. FOUND. RESEARCH J. 455, 492-93.
hood injurious to a private individual.”

Justice Powell’s opinion set forth three categories of public figures:

Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

The scope of the all-purpose category is not clearly defined in the Gertz opinion. There is language that suggests the category may be quite broad. From parts of the opinion it appears that a person can become an all-purpose public figure on the basis of “pervasive fame,” with no actual, voluntary attempt to influence the resolution of public controversies. The opinion also appears to allow comment upon all aspects of such a figure’s life; protection is not limited to comment pertaining to activities for which the plaintiff is famous.

44. Id. at 347.
45. Id. at 345.
46. Although there is language in Gertz that appears to require “persuasive power and influence,” id., some lower courts have interpreted Gertz to allow a finding of public figure status based solely on fame. See, e.g., Brewer v. Memphis Pub. Co., 626 F.2d 1238, 1255 (5th Cir. 1980) (former “girlfriend” of Elvis Presley a public figure at least to the extent of her involvement with Presley on the basis of fame); Carson v. Allied News, 529 F.2d 206, 209-10 (7th Cir. 1976) (Johnny Carson and his second wife public figures based on his fame in television); Steere v. Cupp, 226 Kan. 566, 602 P.2d 1267 (1979) (local attorney held to be an all-purpose public figure on basis of country-wide fame). Cf. Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265, 1280 (3d Cir. 1979) (court appears to use pervasive fame as basis for concluding plaintiff was limited-purpose public figure).

47. “In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts.” Gertz v. Robert Welch, Inc., 418 U.S. at 351 (emphasis added). Lower courts have at times found a plaintiff’s fame enough to justify affording protection to comment referring to areas of life traditionally protected by privacy rights or to areas unrelated to the cause of plaintiff’s fame. See infra text accompanying notes 146-58.

48. This possibility was noted by Justice Brennan in Rosenbloom. In arguing that the proper focus of a constitutional standard should be the event rather than the people involved, Justice Brennan referred to Walker: “Walker also illustrates another anomaly of focusing analysis on the public “figure” or “official” status of the individual involved. General Walker’s fame stemmed from events completely unconnected with the episode in Mississippi. It seems particularly unsatisfactory to determine the extent of First Amendment protection on the basis of factors completely unrelated to the newsworthy events being reported.” Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43 n.11. The plurality opinion in Rosenbloom, which extended protection to all speech pertinent to matters of public interest, noted that some aspects of the lives of even the most public of men were outside the realm of
The Court noted two major characteristics that justify the distinction between private and public figures. First, public figures usually have a greater ability to rebut the defamatory publication because of their "greater access to the channels of effective communication." Second, the Court reasoned, one who is a public figure has assumed the risks that are associated with that status, entitling one "to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them."

Under the logic of *Rosenbloom*, protection of comment upon matters of public interest was required in order that the first amendment may properly function. The *Gertz* Court rejected any test of public interest as a proper determinant of when protection was needed, preferring to examine the actions of the plaintiff. In defining the nature of the public figure concept, however, the Court retained a public interest test for the all-purpose category. The use of fame as a basis for applying the *Times* standard requires an examination of the amount of interest the public has in the activities of the plaintiff, but it does not require analysis of the extent to which the plaintiff, through voluntary action, has actually invited such interest. It may be that the Court felt a need to retain some of the *Rosenbloom* standard, but in a more limited form. The Court did not articulate such a need, however, and a careful examination of first amendment theory indicates that a broad standard based on the fame of the plaintiff is not required to protect first amendment interests.

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50. *Id.* at 344.
52. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 345-46. The rejection of the *Rosenbloom* public interest standard has been repeated in most of the Supreme Court's public figure cases since *Gertz*. *See infra* notes 101, 118 & accompanying text.
53. The allowance by the Court that one might become a public figure, in rare circumstances, through no purposeful action leaves open the possibility that involvement with an event of great public interest may result in public figure status. This possibility seems to have been foreclosed by later decisions, however. *See infra* notes 106-19 & accompanying text. The only other circumstances under which one might become an involuntary public figure would seem to be when the plaintiff is famous for reasons unrelated to any purposeful activities of the plaintiff, a situation also covered by the all-purpose category. In either situation, the finding of public figure status will be a function of the amount of interest the public has in the event or the plaintiff's activities.
Libel and the First Amendment

The Supreme Court has never adopted a single, uniform theory of the first amendment. Different values have been emphasized, and different standards applied, in different types of cases. The lack of a consistent theoretical basis for decision has been apparent in the libel cases, which are remarkable for the number of plurality decisions, concurring opinions and dissents.

The *New York Times* decision led some observers to conclude that a consistent first amendment approach was being developed, but the decisions following *Times* showed that the Court was not in agreement regarding the proper interpretation of the *Times* case. A split developed between those Justices who saw the key to the *Times* decision in its emphasis on protection of speech on public issues, and those who thought the key was the analogy to seditious libel, and thus protection of criticism of official conduct.

The fragmentation of the court in *Rosenbloom* resulted from these differing perceptions of the proper role of the first amendment in libel cases. Justice Brennan, the author of the *Times* opinion, viewed the *Times* standard as essential to the functioning of the first amendment. Freedom of discussion on public issues is necessary to ensure that the


55. The tests that have been utilized in freedom of speech cases have not been given across-the-board application. Each has been primarily utilized in a specific area: the “redeeming social value” test has been applied primarily in obscenity cases; the “clear and present danger” test in regulation of subversive activity; and the “balancing” test primarily in regulation that does not directly condemn the content of speech, but incidentally inhibits it. Brennan, *supra* note 54, at 11.

56. *Butts, Walker, and Rosenbloom* were plurality decisions. The *Gertz* opinion commanded a full majority only because of Justice Blackmun’s view that a majority was required to eliminate the uncertainty caused by these decisions. *See* Gertz v. Robert Welch, Inc., 418 U.S. at 353-54 (Blackmun, J., concurring).


public has access to information needed to make informed decisions.\textsuperscript{60} In Justice Brennan's view, the press can adequately provide this information only if it is free of the fear of damage awards whenever comment is directed at issues of public concern.\textsuperscript{61}

Justices Harlan and Marshall, on the other hand, viewed the \textit{Times} case in a different light. In their opinion, the \textit{Times} standard is appropriate as an accommodation of two conflicting, but important, interests only when the comment involved is analogous to criticism of official conduct.\textsuperscript{62} Thus, the \textit{Times} standard is proper when public figures are involved because such individuals, like public officials, have surrendered some of their interest in not being defamed.\textsuperscript{63} While Justice Brennan's standard looks to the interest that the standard is intended to protect, Justices Harlan and Marshall look to the conduct of the plaintiff to determine whether he or she has to some extent waived the personal interest in reputation.

Whether the protected value is speech on public issues or speech which is critical of government, it does not appear that the all-purpose public figure category would be an effective vehicle for insuring that protection. If speech on public issues is protected, the focus would naturally be on the subject of the speech, not on the status of the plaintiff. If criticism of government is the crux of the issue, the focus would logically be on whether the plaintiff has been involved in the resolution of political and governmental issues. The question, then, is whether \textit{Gertz} identifies any further first amendment values that the all-purpose category protects.

It is unclear from the \textit{Gertz} opinion what values played a part in the majority holding. The first amendment interest is characterized only as "[t]he need to avoid self-censorship by the news media."\textsuperscript{64} No attempt was made to explain the majority's conclusions in terms of a theory of the first amendment.

The fact that the Court did not expressly articulate a new theoretical basis for the decision, however, may not be conclusive. "To all but the most casual observer it is obvious that, in first amendment cases, courts have tended to change their rationales more slowly than their

\textsuperscript{60} See Rosenbloom v. Metromedia, Inc., 403 U.S. at 41-44.
\textsuperscript{62} See Rosenbloom v. Metromedia, Inc., 403 U.S. at 62-72 (Harlan, J., dissenting); \textit{id.} at 78-81 (Marshall, J., dissenting).
\textsuperscript{63} \textit{Id.} at 70-71 (Harlan, J., dissenting).
\textsuperscript{64} Gertz v. Robert Welch, Inc., 418 U.S. at 341.
conduct." The all-purpose public figure may serve to protect a first amendment interest that was not articulated in *Gertz*. Such an interest, however, is not apparent from an examination of leading first amendment theories.

Self-Government

One first amendment theory which has particular application to the libel area was developed by the late Professor Alexander Meiklejohn. The premise of this theory is that the first amendment protects those activities of thought and communication that enable us to govern ourselves. Such activities include political activities, education, philosophy, the sciences, literature, the arts, and public discussion of all public issues. These activities are absolutely protected by the first amendment.

Professor Meiklejohn applied his theory to the problem of defamatory speech:

The principle here at stake can be seen in our libel laws. In cases of private defamation, one individual does damage to another by tongue or pen; the person so injured in reputation or property may sue for damages. But, in that case, the First Amendment gives no protection to the person sued. His verbal attack has no relation to the business of governing. If, however, the same verbal attack is made in order to show the unfitness of a candidate for governmental office, the act is properly regarded as a citizen's participation in government. It is, therefore, protected by the First Amendment...

Though private libel is subject to legislative control, political or seditious libel is not.

It is not surprising that many saw the influence of Professor Meiklejohn in the *Times* case, with its emphasis on protection of speech on public

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66. The extent to which *Gertz* can be said to reflect a change in the Court's perception of the first amendment is a matter of some debate. Compare Blasi, *supra* note 54, at 573 ("the lengthy, careful majority opinion in *Gertz* is most distinctive for its failure to make any contribution to First Amendment thinking; its lines are drawn almost exclusively in terms of perceived differences in the strengths of the various regulatory interests.") and Bevier, *supra* note 54, at 352 with Eaton, *supra* note 33, at 1415 ("Although the majority never expressly reinterpreted the meaning of the first amendment and, in fact, purported merely to balance the competing interests within the framework of the *New York Times* theory of coverage of the amendment, the result of remaking state defamation law in the area of speech which is of no public interest is necessarily a reinterpretation of the first amendment.").


68. *Id.* at 256-57.

69. *Id.* at 256.

70. *Id.* at 259.

issues and the analogy to seditious libel.

There is room in Professor Meiklejohn's model for the concept of a public figure, but such a figure would have to be "someone the public has an unlimited right to hear about . . . as a necessity of their informed consent as governors."\textsuperscript{72} A famous person who is involved in public affairs would be the subject of protected speech. In Professor Meiklejohn's model, however, it is not the fame of the plaintiff that is the key, but the public's need for the information, and the protection extended is limited to areas of public concern.\textsuperscript{73}

The Speech/Action Dichotomy

Professor Thomas I. Emerson has developed a theory of freedom of expression in which a fundamental distinction is made between conduct constituting "expression" and conduct constituting "action."\textsuperscript{74} The root purpose of the first amendment is to assure that expression is effectively protected, and any rules of law must be based upon this function. Expression is, therefore, absolutely protected. Action may be controlled by the government, but not by the control of expression.\textsuperscript{75} The government may advance other social interests through regulation of action, but may not balance the interest in freedom of expression against such social interests.\textsuperscript{76}

Professor Emerson views libel laws as being, for the most part, fatally antagonistic to freedom of expression. He would allow protection of reputation from expression only when it impinges upon privacy rights protected by the Constitution. Emerson would draw the boundaries of this right narrowly, and freedom of expression would be limited only where the communication discloses information that touches the inner core of personality.\textsuperscript{77}

The design of Professor Emerson's system precludes the need to examine the status of the plaintiff. If the speech involved is directed at any aspect of life except for the narrow area protected by the right of privacy, it is absolutely protected. If it is directed at matters which are

\textsuperscript{72} Bloustein, \textit{supra} note 57, at 56.

\textsuperscript{73} \textit{Id.} A good example of this distinction is found in the publicity surrounding the involvement of Senator Kennedy in the Chappaquiddick incident. Speech regarding that incident would be protected because it relates to Senator Kennedy's ability to perform his functions as a Senator. Speech regarding the private life of Jacqueline Kennedy Onassis would not be protected, though she is equally well-known.

\textsuperscript{74} T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 17 (1970).

\textsuperscript{75} \textit{Id.} at 19.

\textsuperscript{76} \textit{Id.} at 529.

\textsuperscript{77} \textit{Id.} at 562.
wholly personal and intimate in nature, the status of the plaintiff does not affect the protection given by the constitutional right of privacy.\textsuperscript{78}

The Marketplace of Ideas

The view that diversity of ideas is a central value protected by the first amendment is apparent in many first amendment cases.\textsuperscript{79} The notion that the clash of ideas is essentially a self-correcting process had perhaps its most powerful exposition in Justice Holmes' dissent in Abrams v. United States:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.\textsuperscript{80}

It is possible that the emphasis placed on access to the press by the Gertz Court is based on a desire to encourage such competition of ideas.\textsuperscript{81} It may be that the Court wishes to prevent self-censorship by the press because of the adverse effect that self-censorship would have on the marketplace of ideas. But it is not clear that focusing upon the fame of the plaintiff will further such a value.

Access to the press may be a more important factor in the case of a well-known plaintiff than in the case of a limited-purpose public figure, since the well-known person is likely to command more press interest, and because there is less of a voluntary assumption of the risk of defamation where the plaintiff has not thrust himself or herself to the forefront of a public controversy.

It has been suggested that the “general notoriety” test for the all-purpose public figure approximates the Butts test of whether the plaintiff has access to the press, “since general notoriety in modern society results almost exclusively from past media access and exposure.”\textsuperscript{82} In Butts, access to the press was viewed as important because it enabled the defamed plaintiff “to expose through discussion the falsehood and

\textsuperscript{78} Id.
\textsuperscript{79} See Blasi, \textit{supra} note 54, at 548-54.
\textsuperscript{80} 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). \textit{See also} Whitney v. California, 274 U.S. 357, 377 (1926) (Brandeis, J., concurring).
\textsuperscript{81} See Blasi, \textit{supra} note 54, at 569-70.
fallacies of the defamatory statement.  

Perhaps the Gertz Court believed that a person of renown, with ready access to the press, has enough ability to remedy evil portrayals with good ones so that the need for the protection of the state is not as compelling. While such an argument would be consistent with the idea that exposure of fallacies and falsehoods by speech is preferable to the remedy of punishing speech, it necessarily assumes that a plaintiff with the ability to respond is somehow less damaged by the defamatory statement. The Gertz opinion itself, however, acknowledged that rebuttal is not a sufficient remedy in defamation cases. In any event, the slight consideration given to access to the press in subsequent libel decisions by the Court indicates that a marketplace theory of the first amendment plays little part in the Court’s current libel theory.

Whether or not Gertz marked a change in first amendment thinking, it would appear that first amendment interests are not advanced by a broad all-purpose category. If predicating imposition of the Times standard on the fame or notoriety of the plaintiff is to be justified, it must be justified on the basis of the state interests involved. Close examination, however, shows that the all-purpose category does nothing to further the reputational interests that so concerned the Gertz Court, and in some cases may serve to abridge the state interest in protecting privacy rights.

The Post-Gertz Cases and the Nature of the State Interests

The Gertz Court attempted to develop “broad rules of general application” that would properly balance the competing interests at stake. As the Court saw it, two factors distinguish a private individ-

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86. See, e.g., Time, Inc. v. Firestone, 424 U.S. 448 (1976). Mrs. Firestone held several press conferences concerning the subject of the alleged defamatory comments (her divorce), but the Court gave no weight to this factor. Id. at 454-55 n.3.
88. The type of balancing done in Gertz has been called “definitional balancing.” The balancing by the Court was transformed into a general rule that can be employed in future cases without the need for ad hoc weighing of interests by lower courts. The status of the plaintiff, determined by an examination of the two factors discussed in Gertz, determines which of the competing interests will be deemed more weighty. See Nimmer, supra note 54, at 942-45 (defining definitional balancing and comparing ad hoc balancing); see also Philips, Defamation, Invasion of Privacy, and the Constitutional Standard of Care, 16 SANTA CLARA L. REV. 77, 79-80 (1976).
ual from both public officials and public figures. The first is the greater access to the media that is available to public officials and public figures, which allows them to rebut the defamatory statement. Because private individuals lack this remedy of self-help, the Court thought that they are more vulnerable to injury and that the state interest in providing them a remedy must be correspondingly greater. The second and more important factor is that public figures and public officials have "voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them."

Although access to the press for purposes of rebuttal may at times provide some vindication for a defamed plaintiff, the general effectiveness of rebuttal in a defamation case was questioned by the Gertz Court itself, and this factor was viewed by the Court as the less important of the two. The primary rationale of the decision was the conclusion that public figures have assumed an increased risk of defamatory comment. This conclusion, which was not explained by the Court, is by no means self-evident. Justice Brennan characterized it as "at best, a legal fiction."

Such a conclusion is justified in the context of the limited-purpose category. An individual must have voluntarily entered into a controversy, and the protection offered his or her critics extends only to speech pertaining to that controversy. This rationale also supports giving protection to critics of famous or notorious people, as long as the criticism pertains to activities voluntarily placed in the public eye. If an individual is well known as a result of success in his or her profession, especially if that profession is one in which success regularly generates publicity, a strong argument can be made that the added risk of defamation is an occupational hazard that has been assumed along with the benefits. To extend the argument further, however, stretches the concept of voluntary exposure beyond its logical limits.

The Gertz majority believed that the Rosenbloom standard gave more protection to defendants than was actually required to protect the first amendment interests involved in libel cases, with the result that

90. Id.
91. Id. at 344-45.
92. "Of course, an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie." Id. at 344 n.9.
93. Id. at 364. (Brennan, J., dissenting) (quoting Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 48 (1971)).
legitimate state interests were unjustifiably restricted.\textsuperscript{95} Under the \textit{Gertz} analysis, it is the strength of the state interest, reflected by the status of the plaintiff, that determines the level of protection appropriate in a given case. Thus, even though a purposive view of the first amendment would not require protection merely because of the plaintiff’s fame, the Court believed that fame was “a compelling normative consideration” indicating that the plaintiff had relinquished some of the state interest in reputation, and that imposing the burden of the \textit{Times} standard was justified.\textsuperscript{96}

To assess the validity of this assumption underlying the category, it is necessary to examine the scope of the more common limited-purpose public figure category. An examination of the Supreme Court cases interpreting that category reveals that its scope has been increasingly narrowed. The Court has placed increasing emphasis on actual, voluntary participation by the plaintiff in a public controversy.

\textit{Time, Inc. v. Firestone},\textsuperscript{97} the first public figure case decided by the Court after \textit{Gertz}, involved an erroneous report that a court had granted plaintiff’s husband a divorce on grounds of extreme cruelty and adultery. In fact, the divorce was granted on grounds of “lack of domestication,” and no finding of adultery was made by the court.\textsuperscript{98}

Mrs. Firestone was a prominent member of society in Palm Beach, Florida, and had called several press conferences to discuss the divorce proceedings. The Court, in a 5-3 decision, rejected the argument that Mrs. Firestone was a public figure.

The Court first dismissed any claim that Mrs. Firestone was a public figure for all purposes, saying she “did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society . . . .”\textsuperscript{99} Second, she was not a public figure for a limited purpose, since she had not thrust herself to the forefront of a public controversy in order to influence its resolution.\textsuperscript{100} The Court refused to equate “public controversies” with all controversies of interest to the public, saying that to do so would be to return to the \textit{Rosenbloom} public interest test.\textsuperscript{101} The Court also stressed that Mrs. Firestone’s participation in the divorce proceedings was not voluntary in any realistic

\begin{itemize}
  \item \textsuperscript{95} See \textit{id.} at 346.
  \item \textsuperscript{96} See \textit{id.} at 344; see also Note, \textit{Defamation and the First Amendment: Protecting Speech on Public Issues}, 56 WASH. L. REV. 75, 84 (1980).
  \item \textsuperscript{97} 424 U.S. 448 (1976).
  \item \textsuperscript{98} \textit{Id.} at 450-51.
  \item \textsuperscript{99} \textit{Id.} at 453.
  \item \textsuperscript{100} \textit{Id.} at 453-55.
  \item \textsuperscript{101} \textit{Id.} at 454.
\end{itemize}
The _Firestone_ decision narrowed the scope of the public figure test. The all-purpose category was largely unaffected, except for the implication that the plaintiff's fame must be more than local in magnitude to justify imposition of such status. Two requirements were added to the limited-purpose category. First, the controversy must be significant, and second, the plaintiff must have voluntarily attempted to influence the outcome of the controversy. In addition, these requirements may have implicitly abolished the concept of an involuntary public figure. This narrowing trend was continued in cases sub-

102. _Id._

103. Mrs. Firestone was a prominent and active member of Palm Beach's "sporting set," _id._ at 485 (Marshall, J., dissenting) (quoting _Firestone v. Time_, Inc., 271 So.2d 745, 751 (Fla. 1972)), and the Court conceded that she may have been especially prominent in Palm Beach society. Yet the Court held she did not occupy a role of especial prominence that would make her a public figure for all purposes. _Id._ at 453-55.

It may be that the Court based this holding not on the amount of fame possessed by Mrs. Firestone but on the lack of power and influence that she possessed. The Court used the portion of the _Gertz_ opinion that referred to persons occupying a position of "persuasive power and influence," _id._ at 453 (quoting _Gertz v. Robert Welch_, Inc., 418 U.S. 323, 345 (1974)), rather than the reference to those having achieved "pervasive fame or notoriety," _Gertz v. Robert Welch_, Inc., 418 U.S. at 351. If this is the case, the all-purpose category is perceived by the Court as being more narrow than some lower courts have viewed it. See _infra_ notes 144-58 & accompanying text.

104. The Court's interpretation of the _Gertz_ public controversy requirement raises some interesting issues. The Court refused to equate "public controversies" with "all controversies of interest to the public," saying that _Gertz_ had rejected such a subject-matter test. _Time, Inc. v. Firestone_, 424 U.S. at 454. Divorce proceedings were not the sort of public controversy _Gertz_ was referring to. "The details of many, if not most, courtroom battles would add almost nothing toward advancing the uninhibited debate on public issues thought to provide principal support for the decision in _New York Times._" _Id._ at 457.

In _Gertz_ the majority repudiated the _Rosenbloom_ standard because it did not believe that judicial inquiry into the legitimacy of interest in a subject or event was appropriate. _Gertz v. Robert Welch_, Inc., 418 U.S. at 346. The Court's interpretation of "public controversy" in _Firestone_, however, requires the same inquiry, a fact which was noted by Justice Marshall. "The meaning that the Court attributes to the term 'public controversy' used in _Gertz_ resurrects the precise difficulties that I thought _Gertz_ was designed to avoid." _Time, Inc. v. Firestone_, 424 U.S. at 487 (Marshall, J., dissenting).

It would seem that as hard as the Court has tried to avoid the use of a public interest test, it is unable to formulate a standard that does not to some extent employ such a test. After _Firestone_, each of the categories of public figure defined in _Gertz_ involves to some extent a public interest test. In the case of the all-purpose public figure, the interest is in the plaintiff; in the case of the limited-purpose figure, there must be involvement in a controversy of legitimate interest to the public. By purporting to reject such a test while simultaneously employing it, the Court is causing confusion in an area of law that desperately needs consistency of adjudication. See _infra_ notes 146-57 & accompanying text.

105. See _Ashdown, Gertz and Firestone: A Study in Constitutional Policy Making_, 61 MINN. L. REV. 645, 662-63 (1977); _Comment, The Evolution of the Public Figure Doctrine in Defamation Actions_, 41 OHIO ST. L.J. 1009, 1021 (1980).
sequently decided by the Court.

_Hutchinson v. Proxmire_106 involved an award by Senator William Proxmire of his “Golden Fleece of the Month Award” to several government agencies that had funded Dr. Hutchinson’s study of emotional behavior. Dr. Hutchinson sued Senator Proxmire, alleging that the press releases which accompanied the award had damaged his professional and academic reputation.107

Defendants argued that Dr. Hutchinson was a public figure because he had actively sought funding from the federal government, was a widely known author in his field, and had been employed at various public institutions. They argued that he had voluntarily participated in a general public controversy concerning wasteful or potentially wasteful government spending.108

The Court, in an opinion by Chief Justice Burger, held that Dr. Hutchinson was not a public figure. The Court found that Dr. Hutchinson had not thrust himself or his views into a public controversy in order to influence others, noting that no particular controversy had been identified by the respondent.109 The Court stressed that Dr. Hutchinson’s activities did not amount to an invitation of public attention and comment.110 In addition, the only controversy involved was the result of the libelous statement, and the Court rejected the idea that “those charged with defamation [may] . . . , by their own conduct, create their own defense by making the claimant a public figure.”111

In _Wolston v. Reader’s Digest Association_,112 decided with _Hutchinson_, the plaintiff had been involved in an investigation of Soviet espionage in the United States that took place during the 1950’s. In January of 1957 Wolston received a subpoena directing him to appear before a federal grand jury in New York City. Wolston responded to several such subpoenas, but failed to appear at one hearing, claiming mental depression made it impossible for him to make the trip. He pled guilty to a citation for contempt receiving a one-year suspended sentence and

107. Id. at 114.
108. Id. at 134-35.
109. “Respondents have not identified such a particular controversy; at most they point to concern about general public expenditures. But that concern is shared by most and relates to most public expenditures; it is not sufficient to make Hutchinson a public figure.” Id. at 135.
110. Id. at 135.
111. Id.
three years of probation.\textsuperscript{113} These events were reported in fifteen newspaper stories in New York and Washington, D.C., but the publicity soon died down and Wolston returned to his normal, private life. Wolston was never indicted for espionage.

In 1974, Reader's Digest Association, Inc. published \textit{KGB, The Secret Works of Soviet Agents}, which described Soviet espionage activities since World War II.\textsuperscript{114} Wolston was identified in the book as a Soviet agent.\textsuperscript{115} Both the district court\textsuperscript{116} and the court of appeals\textsuperscript{117} found Wolston to be a public figure for the limited purpose of comment on Soviet activities in the United States. The Supreme Court reversed.

Justice Rehnquist's opinion focused primarily upon the lack of a voluntary role played in the controversy by the plaintiff. "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."\textsuperscript{118} Once again, the \textit{Rosenbloom} test was expressly rejected: "A libel defendant must show more than mere newsworthiness to justify application of the demanding burden of \textit{New York Times}.”\textsuperscript{119}

These cases have developed a more restrictive test for the limited-purpose public figure than \textit{Gertz} outlined. This test consists of four parts. First, the Court examines the subject matter of the defamatory statement and decides the threshold question of whether it involves a matter of legitimate public concern.\textsuperscript{120} Second, the Court determines whether it is actually a controversy, i.e. a matter of debate and disagreement.\textsuperscript{121} Third, the Court considers the plaintiff's actions in relation to the identified controversy to determine whether the plaintiff was involved in the controversy prior to the defamatory publication.\textsuperscript{122} Finally, the Court considers whether the plaintiff actually took a stand in the controversy or was only associated with it involuntarily.\textsuperscript{123}

Each of the public figure categories set forth in \textit{Gertz} rested on the

\begin{itemize}
\item \textsuperscript{113} \textit{Id.} at 162-63.
\item \textsuperscript{114} \textit{Id.} at 159.
\item \textsuperscript{115} \textit{Id.}
\item \textsuperscript{116} 429 F. Supp. 167 (D.D.C. 1977).
\item \textsuperscript{117} 578 F.2d 427 (D.C. Cir. 1978).
\item \textsuperscript{118} Wolston v. Reader's Digest Ass'n, 443 U.S. at 167.
\item \textsuperscript{119} \textit{Id.} at 167-68 (citation omitted).
\item \textsuperscript{120} See supra note 104 & accompanying text; see also Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1296 (D.C. Cir. 1980); Note, \textit{Wolston and Hutchinson: Changing Contours of the Public Figure Test}, 13 LOY. L.A.L. REV. 179, 194-95 (1979) [hereinafter cited as Note, \textit{Changing Contours}]; Note, supra note 48, at 175.
\item \textsuperscript{121} See, Waldbaum v. Fairchild Publications, 627 F.2d 1287, 1296-97 (D.C. Cir. 1980).
\item \textsuperscript{122} \textit{Id.} at 1296.
\item \textsuperscript{123} \textit{Id.} at 1297. See Note, \textit{Changing Contours}, supra note 120, at 194.
\end{itemize}
same distinctions: assumption of the risk of defamation and access to
the press. The tendency of the Court in subsequent cases to require
evidence of voluntary, purposeful action on the part of the plaintiff
seems to indicate that the Court is unwilling to automatically equate
involvement in an event of interest to the public with a relinquishment
of reputational interests.

This interpretation of the limited-purpose category may signal that
the all-purpose category should be narrowly applied. In most in-
cstances, any connection between the fame of the plaintiff and an actual
relinquishment of the interest in an unsullied reputation is tenuous at
best. The Court's insistence on voluntary, purposeful action in the lim-
ited-purpose context should be viewed as implying a similar limitation
on the all-purpose context. Comment relating to areas not voluntarily
placed in the public eye logically should not be afforded first amend-
ment protection under the Gertz rationales. One court has reached a
similar conclusion, holding that "under the principles now applied by
the United States Supreme Court, one does not become a public figure
simply because of general public interest in one's lifestyle and personal
activities or because one's job happens to be one in which widespread
publicity is given to outstanding performers." The logic of the ration-
ales underlying the Gertz public figures categories requires that the
fame of the plaintiff give rise to public figure status only when that
fame results from voluntary, purposeful activity on the part of the
plaintiff, and then only in cases where the defamatory comment was
directed at that activity.

Comment directed to the private life of a famous plaintiff should
not receive protection under the logic of Gertz. Not only is such com-
ment unrelated to any voluntary assumption of the risk of defamation,
but the primary motivation of the Gertz opinion argues against such
protection. The majority in Gertz rejected Rosenbloom because Rosen-
bloom failed to give sufficient consideration to the state interests in-
volved in defamation cases. In a case involving the plaintiff's private
life, the legitimate state interest in protection of privacy rights, as well
as reputational interests, is involved.

124. See supra notes 49-50 & accompanying text.
125. Wheeler v. Green, 286 Or. 99, 116, 593 P.2d 777, 787 (1979). See also Brief for
Respondent Wheeler at 17, Time, Inc. v. Firestone, 424 U.S. 448 (1976) (stressing lack of
voluntary assumption of the risk of defamation).
126. See supra notes 95-96 & accompanying text.
The Right of Privacy

Although the idea that an individual has a right to retain control over certain parts of his or her life is quite old, privacy as a legal concept is a comparatively recent phenomenon in American law. Some protection of privacy was provided by pre-nineteenth century libel law, but the origin of a viable legal theory of privacy is generally attributed to an article written in 1890 by Samuel Warren and Louis Brandeis. In recent years the right of privacy has attained constitutional status and, in a variety of forms, has become entrenched in the tort law of most states.

The concept of privacy as a constitutionally protected right has been limited to protection of the most intimate areas of life from governmental intrusion. Federal courts generally have rejected attempts to expand constitutional protection to include the wider areas protected by tort law. The extent to which the constitutional right of privacy will develop remains unclear, but a strong argument can be made that when defamatory comment pertains to an area of life that is protected from governmental intrusion, the involvement of such an interest should have an effect on the balance struck in Gertz.

The first recognition of a state cause of action based solely on invasion of privacy occurred in 1905. Since then it has been adopted as a common law right in a majority of states. Among the rights typically protected by state privacy law are the right of freedom from public disclosure of information about one's private affairs, and the right of freedom from publication of false, nondefamatory statements.

132. "If there is anything 'obvious' about the constitutional right to privacy at the present time, it is that its limits remain to be worked out in future cases." Roe v. Ingraham, 480 F.2d 102, 108 (2d Cir. 1973) (Friendly, J.).
133. See infra text accompanying notes 120-26.
135. There is a common law right of privacy in at least 37 states. Only three states have rejected the right. See R. Phelps & E. Hamilton, Libel, Rights, Risks, Responsibilities 382-83 (1978).
publication of which would be offensive to a reasonable person. It is not uncommon to find both a privacy claim and a defamation claim arising from the same utterance.

Privacy in the Balance

The right of privacy and freedom of expression must at times clash. The right to determine what information about one's self will become public is often antithetical to the public's need for information. When these rights collide, the right of free expression generally prevails. But the interests in a free press and free speech may at times be outweighed by other societal interests. The right of privacy and reputational interests are both such societal interests.

Gertz balanced the interest in reputation against the right of free expression without differentiating between speech pertaining to a plaintiff's public affairs and speech pertaining to his or her private affairs. Yet comment upon one's own intimate affairs intrudes upon a right so important in our society that it has been afforded constitutional protection from governmental intrusion. When a right is deemed so fun-

136. See W. Prosser, supra note 3, at 809-14.
137. See, e.g., Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977); Hotchner v. Castillo-Puche, 551 F.2d 910 (2d Cir. 1977); see also Wade, supra note 128, at 1121. It has been suggested that a public figure who has been defamed as to a private area of life may be left to remedies available under the law of privacy. Note, supra note 48, at 175 n.123. An attempt to vindicate privacy rights in an action for invasion of privacy that arises from facts that would also give rise to a defamation action will generally meet many of the same obstacles as would a defamation suit. If the plaintiff alleges a "false light" invasion of privacy, see generally W. Prosser, supra note 3, at 812-14, he or she must prove that the false statement was made knowingly or recklessly if a matter of public interest is involved. Time, Inc. v. Hill, 385 U.S. 374 (1967). In addition, it has been held that the California retraction statute applies to false light as well as defamation actions. See Werner v. Times-Mirror Co., 193 Cal. App. 2d 111, 14 Cal. Rptr. 208 (1961); see also Kapellas v. Kaufman, 1 Cal.3d 20, 459 P.2d 912, 81 Cal. Rptr. 360 (1969). Another California Court of Appeal case, Grimes v. Carter, 241 Cal. App. 694, 50 Cal. Rptr 808 (1966), dismissed a plaintiff's intentional infliction of emotional distress and privacy claims for failure to post a bond required in defamation claims. The court held that plaintiff could not escape the bond requirement when the classic elements of slander were present. Id. at 702, 50 Cal. Rptr. at 813 (citing Werner).
139. "In its societal impact a system of privacy is vital to the working of the democratic process. Democracy assumes that the individual citizen will actively and independently participate in making decisions and in operating the institutions of the society. An individual is capable of such a role only if he can at some point separate himself from the pressures and conformities of collective life." T. Emerson, supra note 74, at 546. Reputational interests arguably rise to an even higher level. "Certainly the enjoyment of one's good name and reputation has been recognized repeatedly in our cases as being among the most cherished of rights enjoyed by a free people, and therefore as falling within the concept of personal `liberty.'" Paul v. Davis, 424 U.S. 693, 712 (1976).
140. See supra note 131.
damental as to gain constitutional protection, it would seem that the state has a valid interest in protecting its citizens from private abrogations of that right. This interest, which is more broadly manifested by the common law of most states, was not considered by the Gertz Court. The addition of such a factor to the Gertz scales, however, could require a different result.141

When a defamatory publication refers either to areas of life intimate enough to be given constitutional protection or to the broader areas of private life protected by state tort law, the factors deemed controlling in Gertz have less applicability than in situations involving comment on public matters. Equating fame with an assumption of the risk of defamation is highly implausible when the defamatory comment pertains to personal matters that the plaintiff has not in fact offered for public scrutiny. Such a tenuous equation is a weak justification forSubjecting a plaintiff to the burden of the Times standard.

The second factor mentioned in Gertz, access to the press, is also an inadequate justification in such a situation. In addition to the dubious effectiveness of rebuttal as a remedy for defamation,142 it is plain that further publicity would only add to the harm caused by the invasion of privacy rather than remedy it.143

In the case of a defamatory invasion of privacy, then, the interests which should be balanced are different than those considered by the Gertz Court. On one side of the scale, the factors that were relied upon in Gertz are less weighty. On the other side is not only the legitimate state interest in protecting reputation, but an equally legitimate state interest in protecting the plaintiff's privacy. With the balance thus altered, there is strong justification for allowing the plaintiff recovery without requiring a showing of recklessness.

Unguided Decisionmaking in the Lower Courts

Because of the nature of the Gertz opinion, with its "broad rules of general application," the lower courts have not been provided with adequate conceptual guidelines in public figure cases. The Gertz case re-

141. The Court has recognized that privacy interests might outweigh first amendment rights in a case where otherwise private information that was false, even though not defamatory, was published. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 489 (1975). Such a result would seem even more likely when both privacy and reputational interests are added to the scales.
142. See supra note 88.
stated the concept created in \textit{Butts} and \textit{Walker}, discussing it only briefly. The Court has not, in \textit{Butts}, \textit{Walker}, or \textit{Gertz}, explained clearly who is a public figure and why. The two characteristics of the public figure, access to the media and voluntary assumption of the risk of comment, do not furnish concrete guidelines applicable to specific fact situations.\footnote{144} This is especially true in cases involving the all-purpose public figure, since no Supreme Court case has held a plaintiff to be such a figure. Lower courts thus are provided only minimal guidance and are not able to compensate by analogizing the facts in their cases to those of a Supreme Court case.

Lower courts have interpreted the scope of the all-purpose category as being quite wide, generally not requiring a famous plaintiff to have either power or influence. Some courts have held that public figures include “artists, athletes, business people, dilettantes, anyone who is famous or infamous because of who he is or what he has done.”\footnote{145} Others have rejected the notion that fame or publicity alone can make one a public figure.\footnote{146}

Courts that have found public figure status based on fame alone have generally not required a relationship between the source of that fame and the defamatory comment at issue. For example, in \textit{Cochran v. Indianapolis Newspapers},\footnote{147} the publication at issue described plaintiff, appearing as a witness in an investigation of policy corruption, as wearing “provocative attire.” This description was preceded and followed by references to a grand jury investigation of illegal sex activities, leaving the implication that plaintiff was involved in that investigation as well. Plaintiff had been a \textit{Playboy} “Playmate” and had won a beauty contest at the Indianapolis “500.” The court, in dicta, found plaintiff to be a public figure under \textit{Butts}, with no examination of whether she realistically could be said to have invited comment such as that involved in the case.\footnote{148}
In cases involving publication of defamatory statements pertaining to private areas of life such as the marital relations or health of the plaintiff, courts have found public figure status without any consideration of the additional state interest in protecting privacy rights. A good example of such a case is Brewer v. Memphis Publishing Co.\textsuperscript{149} Mrs. Brewer had been an entertainer and singer from the early 1950's until her marriage in 1964. Her career was confined largely to the Memphis area. For a period of five or six years, ending around 1960, Mrs. Brewer had been involved in a romantic relationship with Elvis Presley. In 1957, he had referred to her as his "number one girl," a remark which generated some nationwide publicity, including articles in \textit{Time} and \textit{Life} magazines.\textsuperscript{150} After her marriage, Mrs. Brewer retired and did not seek media attention.\textsuperscript{151}

In 1972, the defendant published an article which stated that Mrs. Brewer had visited Presley in Las Vegas, referred to their earlier relationship, and described the meeting as a "reunion."\textsuperscript{152} The article said that the plaintiffs were divorced, and the tone of the article suggested that the reunion was a romantic one.\textsuperscript{153} The Brewers, in fact, remained happily married, and Mrs. Brewer had not been in Las Vegas.

The Fifth Circuit reversed a district court judgment for the Brewers, holding them to be public figures because of Mrs. Brewer's fame. Because the press had covered both her career and her romance with Presley, "thereby advancing her career,"\textsuperscript{154} and because her name continued to appear in stories about Presley,\textsuperscript{155} the press was entitled to protection in commenting on her career and her relations with Presley. Because he was married to Mrs. Brewer, Mr. Brewer had to meet the burden of the \textit{Times} standard as well.\textsuperscript{156}

Although the Brewer case did involve comment on Mrs. Brewer's

\begin{thebibliography}{99}
\bibitem{149} 626 F.2d 1238 (5th Cir. 1980).
\bibitem{150} \textit{Id.} at 1248.
\bibitem{151} \textit{Id.}
\bibitem{152} \textit{Id.} at 1240.
\bibitem{153} \textit{Id.}
\bibitem{154} \textit{Id.} at 1257-58.
\bibitem{155} \textit{Id.}
\bibitem{156} \textit{Id.}
\end{thebibliography}
relationship with Elvis Presley, it also involved comment on the Brewer's marital relationship. Marital relations were characterized by the Fifth Circuit in another case as "activities of an essentially private nature in which the public has no, or at most marginal, legitimate interest."¹⁵⁷ This is particularly true with reference to Mr. Brewer's suit, for it can hardly be said that one invites comment upon the intimate details of one's marital relationship by marrying one's spouse. Yet the court did not consider what effect, if any, the involvement of such a private area of life should have had on the outcome of the case.¹⁵⁸

It is not suggested that the outcome of such cases would necessarily be different if factors such as privacy interests and the relationship of the source of plaintiff's fame to the defamatory comment were taken into account by the courts. It is important, however, that the courts do not appear to be considering such factors. The lack of careful analysis and consistent decisionmaking is particularly troubling in these cases because the very nature of the interests involved demand such consistency. A public figure standard can do little to prevent a chill on freedom of expression if the press cannot be reasonably certain of who will be considered a public figure.

Conclusion

The all-purpose public figure concept, nebulous in scope and unsupported in any realistic way by the rationales advanced to justify it, reflects a basic problem inherent in the Supreme Court's libel decisions. The disagreement over the proper role of the first amendment in libel cases, and over the meaning of New York Times Co. v. Sullivan, has led to the development of a constitutional standard that contains internal contradictions. The Gertz case purported to focus on the activities of the plaintiff, and to reject the Rosenbloom test of public interest. The standards developed in Gertz, however, include a category of public figure which is based essentially on the amount of interest shown by the public in the plaintiff's activities and is so broad in scope that no actual voluntary action on the part of the plaintiff is necessary. While this apparent contradiction can be explained on the ground that focusing on the plaintiff's fame does not require judges to decide what issues are

¹⁵⁷. Resanova v. Playboy Enter., 580 F.2d 859, 861 n.3 (5th Cir. 1978).
¹⁵⁸. See also Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977). In Meeropol, the court found the children of Julius and Ethel Rosenberg to be public figures "for all purposes and in all contexts." Id. at 1006. The court also dismissed a privacy claim on statutory grounds. Id. at 1068. The court did not consider whether the privacy interests involved should affect the public figure analysis.
of public interest, but only to decide if the public has in fact shown interest in the plaintiff, the focus on the fame of the plaintiff tends to provide overbroad protection to defendants while furthering no important first amendment interests. In addition, in some cases the use of the Gertz all-purpose category will result in the improper infringement of the plaintiff's privacy interests.

Similar problems have been apparent in the Supreme Court decisions following Gertz, which have interpreted the nature and scope of the limited-purpose public figure. While purporting to reject the subject-matter analysis of Rosenbloom, these cases have focused on the nature of the controversy involved and whether it was sufficiently "legitimate" to justify protection. These cases have led some commentators to conclude that the test for the limited-purpose public figure now includes a threshold requirement that the matter be of public interest.159

Because the right of free expression has been interpreted to include not only the individual's right to speak but also the public's right to receive information,160 it would seem a difficult task to develop a standard intended to preserve such freedoms without including some form of public interest analysis. It may be that the all-purpose category was intended to preserve, in a restricted form, the beneficial aspects of Rosenbloom. As a vehicle for such a purpose, however, it is ill-suited and, more importantly, offers the potential for the undermining of a primary purpose of New York Times and Gertz: the protection of speech.

As presently interpreted by some lower courts, the all-purpose category has the potential to be used as a catch-all for courts that feel a defendant should receive first amendment protection but cannot justify giving that protection on the basis of the plaintiff's activities.161 Such a decision would essentially be ad hoc, thus undermining the Gertz Court's attempt to lay down broad rules of general application. Because the deciding court in such a situation would be restricted to manipulating the Gertz factors to justify its decision, however, the factors unmentioned in Gertz would not be considered and the advantages of ad hoc decisionmaking would be lost as well.

A rule of decision is inadequate if a court applying it is faced with a choice between sacrificing theoretical consistency to obtain what it

159. See supra note 120.
161. For the view that legal rules often serve only to justify a decision based on factors such as emotional responses, see J. FRANK, COURTS ON TRIAL 55-57 (1949). Obviously, a rule that is broad in scope and of uncertain limits more readily lends itself to such use.
views as a just result (thereby creating dangerous precedent) or sacrificing a just result by mechanical application of the rule. The possibility of such a situation arising in the area of defamation law is particularly unacceptable. "The very purpose of the rule announced in New York Times. . . requires courts to articulate clear standards that can guide both the press and the public." 162 The Supreme Court should accept for review a case that raises some of the issues discussed, for the purpose of clarifying the law.

If the use of a public figure standard is to continue in defamation cases, the involvement of the public interest should be clarified, perhaps by openly requiring that the matter at issue be of public interest as a threshold requirement. The distinction between types of public figures should be eliminated, and the determination of the status of a plaintiff should be made by focusing on the actual activities of the plaintiff. Rather than attempting to decide whether the plaintiff is "pervasively famous" or merely "locally famous," 163 courts should con-


163. The standard for determining whether an individual is a public figure for all purposes requires clear evidence that he or she possesses general fame or notoriety in the community and is pervasively involved in the affairs of society. Gertz v. Robert Welch, Inc., 418 U.S. 323, 352 (1974). In discussing Gertz's status, the Court noted that none of the prospective jurors knew who Gertz was, and that no proof was offered that this was atypical of the local population. Id. Other than this the Court offered no guidelines as to the requisite amount of fame or the community involvement.

In Firestone, the Court noted that Mrs. Firestone did not assume a role of prominence in society, "other than perhaps Palm Beach society . . ." Time, Inc. v. Firestone, 424 U.S. 448, 453 (1976). This would seem to suggest that more than merely local fame or notoriety is required for all-purpose public figure status. No further guidance has been given by the Court, however.

Fame of a truly national scope, such as Johnny Carson's, has not posed much of a problem for the courts. Such plaintiffs tend not to litigate the issue of public figure status. See, e.g., Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976); Buckley v. Littell, 394 F. Supp. 918 (S.D.N.Y. 1975). Fame such as Mrs. Brewer possessed, characterized as national in scope by the court, Brewer v. Memphis Publishing Co., 626 F.2d 1238, 1248 (5th Cir. 1980), but perhaps more realistically confined to Elvis Presley fans and Mrs. Brewer's own local following, poses more of a problem.

In Mobile Press Register, Inc. v. Faulkner, 372 So.2d 1282 (Ala. 1979), the Supreme Court of Alabama found an extremely active member of the Democratic Party, who was a former member of the state senate and twice a candidate for governor, to be a public figure for all purposes, defining the relevant community as the state of Alabama. Id. at 1285. DeCarvalho v. daSilva, 414 A.2d 806 (R.I. 1980), involved a lawyer who was the Portuguese Consul to Rhode Island for ten years, later appointed Honorary Consul, and was in general very active in the Portuguese community in Rhode Island. The Supreme Court of Rhode Island found that the plaintiff was a "pervasive public figure" in the Portuguese community in Rhode Island, id. at 813, a community of from 70,000 to 100,000 persons. Both Faulkner and DeCarvalho arguably are inconsistent with the holding that Mrs. Firestone was not a public figure for all purposes, even though she may have achieved especial prominence in
centrate on determining whether the defamatory comment pertains to an area of life placed by the plaintiff in the public eye. If the plaintiff has sought to attract the public interest, whether in connection with a profession, business venture, or in an attempt to influence public opinion on an issue, he or she can legitimately be said to have assumed the risk of resulting comment. In addition, the plaintiff has, by placing the matter in the public eye, given up any claims to privacy as to the particular matter. Conversely, even a famous plaintiff will retain any rights of privacy she or he may have in regard to matters not placed before the public.

The proposed solution would, in Justice Powell’s words, “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.” The resulting test not only logically relates to the primary rationale of Gertz, but also gives recognition to the legitimate state interest in protecting privacy. In addition, it would provide guidance to lower courts and reduce the potential for inconsistent adjudication in an area where consistency is of paramount importance.

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Palm Beach society. See also Steere v. Cupp, 226 Kan. 566, 602 P.2d 1267 (1979) (attorney active in county political and social life held to be a public figure for all purposes).


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