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FINDING THE LOST INVOLUNTARY PUBLIC FIGURE

Jeffrey Omar Usman*

Though their quarry is shrouded in mystery,¹ and indeed sometimes thought to be only a creature of myth or legend,² a number of judges, both those acting alone³ and those concentrated in groups,⁴ claim to have seen an involuntary public figure cross their paths. Descriptions have been offered, and those descriptions have been dutifully reported.⁵ It is not clear though that the judges saw either the same thing or the same thing from the same angle.⁶

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¹ See 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, 270 (2002) (recognizing “the confusion surrounding that near-mythical plaintiff, the ‘involuntary public figure’”); 3 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 23:4, at 23-69 (2014) (stating the U.S. Supreme Court’s reference in *Gertz v. Robert Welch, Inc.* to involuntary public figures “has generated much confusion”); J. Wilson Parker, *Free Expression and the Function of the Jury*, 65 B.U. L. REV. 483, 546 n.314 (1985) (“The Court’s confusion in *Gertz* became evident in its attempted application of the *Gertz* rule to other involuntary public figures.”); Nat Stern, *Unresolved Antitheses of the Limited Public Figure Doctrine*, 33 HOUS. L. REV. 1027, 1096 (1996) (indicating that “the potency of the involuntary public figure doctrine remain[s] uncertain”); see also *Rosanova v. Playboy Enters.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976) (observing that “[d]efining public figures is much like trying to nail a jellyfish to the wall”).

² See *Schultz v. Reader’s Digest Ass’n*, 468 F. Supp. 551, 559 (E.D. Mich. 1979) (indicating that the continuing vitality of the involuntary public figure has been called into question); LYRISSA BARNETT LIDSKY & R. GEORGE WRIGHT, FREEDOM OF THE PRESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 81 (2004) (noting that “the lower courts have split on how to define involuntary public figures and, indeed, whether the category even continues to exist”); 1 RODNEY A. SMOLLA, LAW OF DEFAMATION § 2:33 (2d ed. 2014) (expressing skepticism about the existence of involuntary public figures).

³ See, e.g., *Zupnik v. Associated Press, Inc.*, 31 F. Supp. 2d 70, 73 (D. Conn. 1998); *Foretich v. Advance Magazine Publishers, Inc.*, 765 F. Supp. 1099, 1108 (D.D.C. 1991); *Price v. Chi. Magazine*, No. 86 C 8161, 1988 WL 61170, at *4–5 (N.D. Ill. June 1, 1988).

⁴ See, e.g., *Dameron v. Wash. Magazine, Inc.*, 779 F.2d 736, 740–42 (D.C. Cir. 1985); *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175, 186 (Ga. Ct. App. 2001); *Daniel Goldreyer, Ltd. v. Dow Jones & Co.*, 687 N.Y.S.2d 64, 64 (App. Div. 1999); *Wilson v. Daily Gazette Co.*, 588 S.E.2d 197, 208–09 (W. Va. 2003).

⁵ See, e.g., *Dameron*, 779 F.2d at 742 (indicating that an otherwise private individual became an involuntary public figure by “assum[ing] special prominence in the resolution of [a] public question” by “bec[oming] embroiled, through no desire of his own, in [a] public

Standing at the intersection between defamation claims and the First Amendment to the United States Constitution, the United States Supreme Court has sought to balance the interests of the states in providing redress for the harm caused by defamation injuries arising from media coverage with the need for a robust and vigorous press. In structuring a constitutional framework for adjudication of defamation actions, the Supreme Court cryptically and fleetingly referenced a category of plaintiffs—involuntary public figures. Trying to understand and define the contours of the involuntary public figure category, or indeed to ascertain if it even exists, has been a source of tremendous confusion and uncertainty. The involuntary public figure has become lost. This Article seeks to find the lost involuntary public figure.

In seeking to do so, this Article follows Aristotle's guidance that "[i]f you would understand anything, observe its beginning and its development."⁷ That is

controversy . . . [and] thereby became well known to the public in this one very limited connection") (second alteration in original) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974)) (internal quotation marks omitted); *Marcone v. Penthouse Int'l Magazine For Men*, 754 F.2d 1072, 1084 n.9 (3d Cir. 1985) (suggesting that the only persons who would qualify as involuntary public figures are "relatives of famous people"); *Wells v. Liddy*, 186 F.3d 505, 540 (4th Cir. 1999) ("[A]n involuntary public figure has pursued a course of conduct from which it was reasonably foreseeable, at the time of the conduct, that public interest would arise. A public controversy must have actually arisen that is related to, although not necessarily causally linked, to the action. The involuntary public figure must be recognized as a central figure during debate over that matter. Further, we retain two elements of the five-part *Reuber* test, specifically: (1) the controversy existed prior to the publication of the defamatory statement; and (2) the plaintiff retained public-figure status at the time of the alleged defamation. Additionally, to the extent that an involuntary public figure attempts self-help, the *Foretich* rule must apply with equal strength." (citation omitted)); *Wilson*, 588 S.E.2d at 208–09 ("[T]o prove that a plaintiff is an involuntary public figure, the defendant must demonstrate by clear evidence that (1) the plaintiff has become a central figure in a significant public controversy, (2) that the allegedly defamatory statement has arisen in the course of discourse regarding the public matter, and (3) 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.").

⁶ See VINCENT R. JOHNSON, *ADVANCED TORT LAW: A PROBLEM APPROACH* 220 (2010) (noting that "[c]ourts have employed such a bewildering array of tests in grappling with the elusive idea of 'involuntary public figure' status that it is difficult to say anything about this category"); Joseph H. King, Jr., *Deus ex Machina and the Unfulfilled Promise of New York Times v. Sullivan: Applying the Times for All Seasons*, 95 KY. L.J. 649, 672 (2006–2007) (noting the "dizzying variety of approaches" "to the involuntary public figure subcategory [that] have been adopted by the courts").

⁷ Stephanie M. Reich et al., *An Introduction to the Diversity of Community Psychology Internationally*, in *INTERNATIONAL COMMUNITY PSYCHOLOGY: HISTORY AND THEORIES* 1, 5 (Stephanie M. Reich et al. eds., 2007). While differing with Aristotle with regard to the value of philosophy, Justice Oliver Wendell Holmes concurred with Aristotle in terms of valuing history: "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921). This wisdom is also reflected in the modern adage

precisely how the discussion in this Article begins in Part I, through observation of the beginning and development of the Supreme Court's jurisprudence on the constitutional limitations imposed upon defamation actions under the First Amendment to the United States Constitution. Part II of the Article then briefly sets forth the constitutional framework that the Supreme Court imposed in 1974 on defamation actions in *Gertz v. Robert Welch, Inc.*⁸ The Article then addresses in Part III how the pressures of the First Amendment have eroded the structure that *Gertz* built. In doing so, Part III specifically explores the expanding definition of who constitutes a public official and what qualifies as a matter of public controversy, the weakening of the underlying rationales for *Gertz*'s distinguishing between public and private figures both in terms of access to channels of communication and the definition of voluntariness, and the increasing force of Justice William Brennan's contention in *Gertz*, advanced in his dissenting opinion, that there is no such thing as a private person. Part IV seeks to demonstrate that, while First Amendment pressures have weakened the edifice created by the *Gertz* structure, there is continuing value and purpose to the *Gertz* framework. Having developed an understanding of the *Gertz* structure as it exists today, the constitutional pressures thereupon, and continuing value thereof, Part V defines the involuntary public figure. Part V also reflects the manner in which this understanding of who qualifies as an involuntary public figure relieves some of the First Amendment pressures on other categories within the *Gertz* framework, while still serving the enduring purposes of *Gertz*'s distinguishing public from private persons. Most notably the Article addresses how the disuse of the involuntary public figure category has resulted in distortion of the concept of voluntariness, which plays a critical role in classification of an individual as a public figure or private individual.

I. THE ROAD FROM *NEW YORK TIMES CO. v. SULLIVAN* TO *GERTZ v. ROBERT WELCH, INC.*

While there are certainly other significant decisions,⁹ there are four cases, each decided three to four years apart over the course of the decade between 1964 to 1974, that form the core of the Supreme Court's exploration of the constitutional constraints upon defamation actions: (1) *New York Times Co. v. Sullivan*,¹⁰ (2) *Curtis Publishing Co. v. Butts*,¹¹ (3) *Rosenbloom v. Metromedia, Inc.*,¹² and (4) *Gertz v. Robert Welch, Inc.*

that "[y]ou can't know where you're going unless you know where you've been." THE DICTIONARY OF MODERN PROVERBS 134 (Charles Clay Doyle et al. eds., 2012).

⁸ 418 U.S. 323 (1974).

⁹ See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

¹⁰ 376 U.S. 254 (1964).

¹¹ 388 U.S. 130 (1967).

¹² 403 U.S. 29 (1971).

A. New York Times Co. v. Sullivan

On March 29, 1960, the *New York Times* published a page-length editorial advertisement, which had been created by civil rights leaders A. Philip Randolph and Bayard Rustin,¹³ entitled *Heed Their Rising Voices*.¹⁴ The advertisement, which listed eighty prominent endorsers,¹⁵ was a successful appeal to raise money to assist Dr. Martin Luther King, Jr. with legal fees incurred during the civil rights struggle.¹⁶ The advertisement's focus on misconduct of police officials and the reasonable non-violent resistance of civil rights protestors was in accord with the broader civil rights movement strategy of appealing to people's consciences, especially in the North, by shining a light on the extreme racism then existent in the South.¹⁷

Iconoclastic Alabama journalist Ray Jenkins,¹⁸ who was one of a small number of regular readers of the *New York Times* in Montgomery,¹⁹ thought a story on the advertisement would provide insight for his readers into law enforcement's treatment of civil rights protestors.²⁰ In Jenkins' *Alabama Journal* story, which was published approximately a week after the advertisement in the

¹³ LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 304 (2000).

¹⁴ KENNETH C. CREECH, *ELECTRONIC MEDIA LAW AND REGULATION* 331 (5th ed. 2007).

¹⁵ The list of signatories and endorsers of the advertisement included ministers, musicians, athletes, and a wide variety of other well-known persons including former First Lady Eleanor Roosevelt. *Heed Their Rising Voices*, N.Y. TIMES, Mar. 29, 1960, at 25.

¹⁶ POWE, *supra* note 13, at 304–05.

¹⁷ Anthony Lewis, *The Press: Free but Not Exceptional*, in *REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE* 53, 54 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997); Anthony Lewis, *The Sullivan Decision*, 1 TENN. J.L. & POL'Y 135, 136–37 (2004). See generally Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 141–49 (1994) (explaining how civil rights leaders in the early 1960s directed their efforts to enlisting northern whites to the civil rights cause). “[C]ivil rights leaders made a virtue out of the necessity of raising money to defend King,” and they accomplished this by “bring[ing] attention to King’s plight through a full-page ad . . . that would also call attention to the sit-in movement generally and events in Montgomery specifically.” KERMIT L. HALL & MELVIN I. UROFSKY, *NEW YORK TIMES V. SULLIVAN: CIVIL RIGHTS, LIBEL LAW, AND THE FREE PRESS* 15–16 (2011).

¹⁸ Jenkins proved to be a source of irritation over the years to Alabama’s political establishment. See generally RICK PERLSTEIN, *NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA* 79 (2008) (describing Jenkins’s role in Alabama’s politics).

¹⁹ ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 9 (1991). At the time of the article’s publication, there were only 394 issues of the *New York Times* that were printed for individual subscribers or newsstands in the entire State of Alabama. *Id.*; KERMIT L. HALL & JOHN J. PATRICK, *THE PURSUIT OF JUSTICE: SUPREME COURT DECISIONS THAT SHAPED AMERICA* 143 (2006).

²⁰ See HALL & PATRICK, *supra* note 19, at 143. Jenkins also appreciated the interest that a story involving Dr. King, who was both revered and hated in Montgomery, would generate, as well as the interest attached to learning about the prominent signatories and endorsers. HALL & UROFSKY, *supra* note 17, at 23.

New York Times, he noted that a number of factual errors appeared in the advertisement, but that the errors were minor in nature.²¹ These minor errors would prove extremely problematic for the *New York Times* and the four Alabama ministers listed as endorsers of the advertisement: Reverends Ralph Abernathy, Joseph Lowery, S.S. Seay, Sr., and Fred Shuttlesworth.²²

Responding to Jenkins' story, *Montgomery Advertiser* editor Grover Hall, Jr. brought his editorial page to a full pitch fury against the *New York Times*.²³ The advertisement had struck a particularly sensitive cord with Hall, whose southern pride and irritation at what he perceived as hypocritical blindness of the press toward racial tensions in northern cities were pronounced.²⁴ In his bombastic editorial entitled *Lies, Lies, Lies*, Hall roared,

[t]here are voluntary liars, there are involuntary liars. Both kinds of liars contributed to the crude slanders against Montgomery . . . in a full-page advertisement in the *New York Times* . . . Lies, lies, lies . . . and possibly willful ones on the part of the fund-raising novelist who wrote those lines to prey on the credulity, self-righteousness and misinformation of northern citizens.²⁵

Taking offense against the advertisement on behalf of the entire State of Alabama, Hall "invited everyone in Alabama to sue the *New York Times*."²⁶

Montgomery Police Commissioner L.B. Sullivan did not need encouragement. He believed the advertisement maligned him personally and the Montgomery police officers he supervised.²⁷ The entire Alabama political establishment from the Governor downward also bristled at criticism from northern newspapers at their handling of civil rights protestors and had been looking for an opportunity to strike at the northern press.²⁸ The Attorney General of Alabama advised that the "proper public officials" should file multimillion-dollar lawsuits against the *New York Times*.²⁹ Sullivan, who was already irked by the press, even local media such as Hall,³⁰ struck back.³¹

²¹ SUSAN DUDLEY GOLD, *NEW YORK TIMES CO. V. SULLIVAN: FREEDOM OF THE PRESS OR LIBEL?* 19 (2007).

²² See FRED D. GRAY, *BUS RIDE TO JUSTICE: CHANGING THE SYSTEM BY THE SYSTEM* 156–59 (rev. ed. 2013).

²³ LEWIS, *supra* note 19, at 10–11.

²⁴ *Id.* at 11.

²⁵ *Id.*

²⁶ GOLD, *supra* note 21, at 19.

²⁷ *Id.* at 19–21.

²⁸ *Id.* at 22–24.

²⁹ LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA* 82 (1991).

³⁰ Sullivan was regularly engaged in struggles with the press and even Hall was too progressive for Sullivan's tastes. As an illustration, in 1960 a group of students from Alabama State College demanded to be seated and served in a state cafeteria that was open

Sullivan brought suit in the Circuit Court for Montgomery County, Alabama against the New York Times Company and the four Alabama ministers who had been endorsers.³² Alabama state courts, through both judges and juries, had long been complicit in the maintenance of white supremacy within the State of Alabama.³³ It was to those state courts that the Alabama political establishment turned to take action against their political adversaries.³⁴ *The New York Times* was easily perceived by white Alabamians of the era as among the “outside agitators” against whom their animus was directed.³⁵

The inclusion of the Alabama ministers tactically eliminated diversity jurisdiction as a route for removing the case to federal court, but their inclusion was not merely tactical.³⁶ The ministers were also a target of the white political establishment.³⁷ Having been locked in a social, political, and legal struggle with Alabama’s white supremacy power structure, Reverends Abernathy, Lowery, Seay,

to the public. STEPHAN LESHER, *GEORGE WALLACE: AMERICAN POPULIST* 145–46 (1994). On the basis of their race, the students were denied seating; they left peaceably. *Id.* Nevertheless, Governor John Patterson demanded College President H. Council Trenholm expel the students and threatened the loss of state funding for failure to do so. *Id.* Trenholm acceded to the demands. *Id.* at 146. Rumors of sit-ins to protest the Governor’s demand and Trenholm’s acquiescence spread throughout Montgomery. *Id.* While the rumored sit-ins did not materialize, violent white supremacists assaulted African Americans in Montgomery in response to the rumors. *Id.* In a particularly disturbing incident, an African American woman was beaten severely with a baseball bat. *Id.* A photograph of the attacker, who was identified in the newspaper, was published in the *Montgomery Advertiser*. *Id.* The story therein indicated that the police had witnessed the attack and done nothing. *Id.* Sullivan insisted the attacker, despite the *Montgomery Advertiser* story, could not be identified from the photograph and denounced the Alabama State College students for creating tensions and the newspaper for publishing the photograph. *Id.* Hall indicated that Sullivan’s problem is “‘not a photographer with a camera’ but a ‘white man with a baseball bat.’” *Id.*

³¹ HALL & PATRICK, *supra* note 19, at 143.

³² LEWIS, *supra* note 19, at 12.

³³ See generally Robert J. Norrell, *Law in a White Man’s Democracy: A History of the Alabama State Judiciary*, 32 CUMB. L. REV. 135 (2001) (exploring the long and troubling history of the Alabama judiciary’s involvement in maintaining white supremacy); HASAN KWAME JEFFRIES, *BLOODY LOWNDES: CIVIL RIGHTS AND BLACK POWER IN ALABAMA’S BLACK BELT* 133 (2009) (addressing racial prejudice in Alabama’s juries); Michael J. Klarman, *Is the Supreme Court Sometimes Irrelevant? Race and the Southern Criminal Justice System in the 1940s*, 89 J. AM. HIST. 119 (2002) (discussing the minimal effects of Supreme Court rulings on civil rights as result, in part, of resistance from Southern judges and juries).

³⁴ JAMES L. AUCOIN, *THE EVOLUTION OF AMERICAN INVESTIGATIVE JOURNALISM* 68 (2005); Garrett Epps, *The Other Sullivan Case*, 1 N.Y.U. J. L. & LIBERTY 783, 784–85 (2005).

³⁵ JIM NEWTON, *JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE* 429 (2006).

³⁶ See Epps, *supra* note 34, at 784–86.

³⁷ *Id.*

and Shuttlesworth were perceived as in-state agitators.³⁸ Sullivan sought \$500,000 in damages from each of the defendants.³⁹ This was not the first time Alabama's political apparatus had made active use of the legal system to attack the civil rights movement.⁴⁰ As a practical matter, legal costs had proven to be a persistent underlying problem for the movement and now Sullivan was seeking a judgment that would be impossible to pay.⁴¹ The defamation suit was an opportunity to deliver a crushing blow.

In terms of the legal theory and facts underlying his defamation action, Sullivan specifically raised objections to assertions advanced in the third and sixth paragraphs of the advertisement,⁴² which said,

In Montgomery, Alabama, after students sang "My Country, 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truck-loads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission. . . .

Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for "speeding," "loitering" and similar "offenses." And now they have charged him with "perjury" . . . under which they could imprison him for *ten years*. Obviously, their real purpose is to remove him physically as the leader to whom the students and millions of others—look for guidance and support, and thereby to intimidate *all* leaders who may rise in the South. Their strategy is to behead this affirmative movement, and thus to demoralize [African] Americans and weaken their will to struggle. The defense of Martin Luther King, spiritual leader of the student sit-in movement, clearly, therefore, is an integral part of the total struggle for freedom in the South.⁴³

As Jenkins's had noted in his *Alabama Journal* story, the advertisement was less than a work of precision.⁴⁴ Among the errors therein, the campus dining hall had not been padlocked on any occasion, the police had a significant presence near the campus but did not "ring" the campus and had not been called to the campus in response to the demonstration at the capitol steps, the students had sung a different

³⁸ *See id.*

³⁹ HALL & UROFSKY, *supra* note 17, at 31–32.

⁴⁰ *Id.* at 15.

⁴¹ PETER E. KANE, *ERRORS, LIES, AND LIBEL* 10 (1992).

⁴² LEWIS, *supra* note 19, at 12.

⁴³ *Heed Their Rising Voices*, *supra* note 15.

⁴⁴ GOLD, *supra* note 21, at 18–19.

song,⁴⁵ and the police had arrested Dr. King four not seven times.⁴⁶ Precious little attention was given to the connection between the advertisement's content and Sullivan or to the advertisement having injured his reputation.⁴⁷ Furthermore, the ministers testified without contradiction that they had not seen the advertisement much less authorized use of their names as endorsers.⁴⁸ In fact, the ministers only discovered their names were listed on the advertisement, their names having been added to the advertisement as endorsers without the ministers' knowledge or consent,⁴⁹ through Sullivan's filing of suit against them.⁵⁰ Nevertheless, the all-white Montgomery jury lashed out at the ministers and the *New York Times*, returning \$500,000 verdicts against each of the defendants.⁵¹ Moving forward with enforcement of the decision, Sullivan and the Alabama judiciary would prove particularly vindictive towards the ministers, seizing and levying their property for payment of the judgment without following standard procedures in awaiting resolution of the case on appeal.⁵²

The jury's decision shone a path for southern officials to bring the northern press to heel. In the eighteen months that immediately followed the verdict, southern political officials would file defamation actions seeking more than three hundred million dollars in damages related to news coverage of the civil rights movement.⁵³ The lawsuits targeted journalists who were reporting upon the civil rights movement.⁵⁴ While *New York Times, Co. v. Sullivan* was pending before the Supreme Court, the New York Times Company "pulled its reporters out of Alabama, achieving precisely what the state had hoped—an end to national attention to its racial policies, at least in the pages of the *Times*."⁵⁵ That the defamation lawsuits were curtailing reporting by the press on the civil rights movement in the South was far from a hidden consequence.⁵⁶ A headline in the *Montgomery Advertiser* boldly celebrated "State Finds Formidable Legal Club to

⁴⁵ The advertisement indicated the students were singing *My Country 'Tis of Thee*. *Id.* at 18. The students were actually singing *The Star-Spangled Banner*. *Id.*

⁴⁶ *New York Times Co. v. Sullivan*, 376 U.S. 254, 259 (1964).

⁴⁷ Reflecting on the case, Justice Hugo Black of Alabama quipped "that if any of Sullivan's friends in Montgomery believed he had ordered the repression of the civil rights movement described in the *New York Times* advertisement, his 'political, social and financial prestige has likely been enhanced.'" LEWIS, *supra* note 19, at 225.

⁴⁸ *Id.* at 12.

⁴⁹ HALL & UROFSKY, *supra* note 17, at 15–18 (discussing how the four ministers' names came to be included in the advertisement without their knowledge or consent).

⁵⁰ TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63*, at 289 (1988).

⁵¹ HALL & UROFSKY, *supra* note 17, at 31–33, 68.

⁵² *Id.* at 88; ALFRED H. KNIGHT, *THE LIFE OF THE LAW: THE PEOPLE AND CASES THAT HAVE SHAPED OUR SOCIETY, FROM KING ALFRED TO RODNEY KING* 228 (1996); Epps, *supra* note 34, at 785.

⁵³ KNIGHT, *supra* note 52, at 229.

⁵⁴ AUCCOIN, *supra* note 34, at 68.

⁵⁵ NEWTON, *supra* note 35, at 429.

⁵⁶ KNIGHT, *supra* note 52, at 229.

Swing at Out-of-State Press.”⁵⁷ The *Alabama Journal* observed that as a result of the verdict its northern press counterparts might “re-survey . . . their habit of permitting anything detrimental to the south and its people to appear in their columns.”⁵⁸ In their brief before the Supreme Court, the ministers perfectly described the use of libel suits as a political tool in support of white supremacy. Such suits are “part of a concerted, calculated program to carry out a policy of punishing, intimidating and silencing all who criticize and seek to change Alabama’s notorious political system of enforced segregation.”⁵⁹

While in retrospect the unconstitutionality of Alabama’s strict liability approach to defamation is clear,⁶⁰ it was far from that at the time.⁶¹ On appeal, the Alabama Supreme Court did not provide any succor to the *New York Times*.⁶² To the contrary, the Court noted that the crux of the lawsuit involved libelous portions of the advertisement and that “[t]he First Amendment of the U.S. Constitution does not protect libelous publications.”⁶³ The Alabama Supreme Court, not surprisingly, cited, among others cases, the U.S. Supreme Court’s decision in *Chaplinsky v. New Hampshire*.⁶⁴ Therein, the Court had indicated that

[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise

⁵⁷ *Id.*

⁵⁸ DOUGLAS M. FRALEIGH & JOSEPH S. TUMAN, FREEDOM OF EXPRESSION IN THE MARKETPLACE OF IDEAS 172 (2011).

⁵⁹ Brief for Petitioners at 29, *Abernathy v. Sullivan*, 376 U.S. 254 (1963) (No. 40), 1963 WL 105893, at *29.

⁶⁰ Judge Alex Kozinski has presented a rendering of the stark consequences of a different conclusion:

If successful, the lawsuits would effectively ring down the curtain on conditions of blacks in the South, for every story and every advertisement commenting on those conditions would expose the media sources to liability. Worse, if L. B. Sullivan—a small-town official from the heart of Dixie—could intimidate *The New York Times*, the media in this country would become as effective as a toothless guard dog.

Alex Kozinski, *The Bulwark Brennan Built*, COLUM. JOURNALISM REV., Nov./Dec. 1991, at 85, 85. Professor Norman Rosenberg has noted that the libel suits “seemed about to inhibit political discussion even more seriously than had the infamous Sedition Act of 1798.” NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETATIVE HISTORY OF THE LAW OF LIBEL 236 (1986).

⁶¹ See KNIGHT, *supra* note 52, at 229–30.

⁶² See *New York Times Co. v. Sullivan*, 144 So. 2d 25 (Ala. 1962).

⁶³ *Id.* at 40.

⁶⁴ *Id.* (citing *Konigsberg v. State Bar of Cal.*, 366 U.S. 36 (1961); *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961); *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931)).

any Constitutional problem. These include the lewd and obscene, the profane, *the libelous*, and the insulting or “fighting” words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.⁶⁵

Nor did this decision reflect a new approach to the intersection of a free press with libel. To the contrary, William Blackstone’s *Commentaries* had provided that “where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law . . . the liberty of the press, properly understood, is by no means infringed or violated.”⁶⁶ Though the legal revolution that the Warren Court was generating should have perhaps provided him with pause,⁶⁷ Sullivan’s attorney, M. Roland Nachman, Jr.,⁶⁸ was understandably confident of his chances of prevailing before the high court. He said, “[t]he only way the Court could decide against me was to change one hundred years or more of libel law.”⁶⁹

That is precisely what the U.S. Supreme Court would do. For the Court, the advertisement being libelous under state tort law was not controlling; rather, the Court glided past the heart of Sullivan’s argument, concluding that “libel can claim no talismanic immunity from constitutional limitations.”⁷⁰ Distinguishing prior precedents that suggested the opposite, the Court noted those prior cases did not involve application of libel suits “to impose sanctions upon expression critical of the official conduct of public officials.”⁷¹ The Court rejected the foundation of Sullivan’s argument that libelous speech was not subject to constitutional scrutiny and concluded instead that defamation actions would have to be “measured by standards that satisfy the First Amendment.”⁷²

In weighing Alabama’s state defamation law against First Amendment standards, neither the inclusion of false information in the advertisement nor the

⁶⁵ *Chaplinsky*, 315 U.S. at 571–72 (emphasis added) (citations omitted).

⁶⁶ 4 WILLIAM BLACKSTONE, COMMENTARIES *151 (emphasis omitted).

⁶⁷ See generally Jeffrey Omar Usman, *Constitutional Constraints on Retroactive Civil Legislation: The Hollow Promises of the Federal Constitution and Unrealized Potential of State Constitutions*, 14 NEV. L.J. 63, 80–81 (2013) (noting that the Warren Court fundamentally changed the legal landscape surrounding the United States Constitution through a “jurisprudential revolution” that “breathed [life] into the Federal Constitution” and “sucked [life] out of the state constitutions”).

⁶⁸ Nachman, a Montgomery attorney and a graduate of Harvard College and Harvard Law School, was one of the small numbers of Alabamians who subscribed to the *New York Times*. LEWIS, *supra* note 19, at 111.

⁶⁹ POWE, *supra* note 29, at 87.

⁷⁰ *New York Times Co., v. Sullivan*, 376 U.S. 254, 269 (1964).

⁷¹ *Id.* at 268.

⁷² *Id.* at 269.

availability of truth as a defense was sufficient to render the verdict sustainable.⁷³ The Court concluded that requiring critics of public officials to guarantee the truth of all their statements under the looming threat of a libel judgment would dampen the vigor and limit the variety of public debate.⁷⁴ In order to protect public discourse about the conduct of public officials, the Court determined that an error, even one resulting from negligence, should not be sufficient to recover tort damages.⁷⁵ The Court recognized 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.’”⁷⁶ Quoting John Stuart Mill, the Court observed that “[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about ‘the clearer perception and livelier impression of truth, produced by its collision with error.’”⁷⁷

To maintain the necessary breathing room for protecting public debate, the Court determined that a public official could not recover damages for a defamatory falsehood relating to his or her official conduct without proof that the statement was made with “actual malice.”⁷⁸ To demonstrate actual malice, claimants would henceforth need to show the statement was made “with knowledge that it was false or with reckless disregard of whether it was false or not.”⁷⁹

The Court’s holding in *New York Times* was expressly tied to First Amendment limits on defamation actions brought by public officials⁸⁰ regarding their official conduct, and the Court’s reasoning was intertwined with speech regarding governance.⁸¹ Nevertheless, expansion of this First Amendment protection seemed to be on the horizon. The Court’s declaration in *New York Times* that the constitutional safeguard of the First Amendment “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people” pointed to constitutional protections relating to defamation actions involving persons other than public officials.⁸²

⁷³ *Id.* at 268–69.

⁷⁴ *Id.* at 270–71, 279.

⁷⁵ *See id.* at 268–69.

⁷⁶ *Id.* at 271–72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

⁷⁷ *Id.* at 279 n.19 (quoting *JOHN STUART MILL, ON LIBERTY* 15 (R.B. McCallum ed., Oxford, B. Blackwell 1946) (1859)).

⁷⁸ *Id.* at 279–80.

⁷⁹ *Id.* at 280.

⁸⁰ Having determined that Sullivan, as the Montgomery County Commissioner in charge of the police, clearly qualified as a public official, the Court did not find it necessary to further address who qualifies as a public official. *Id.* at 283 n.23. The Court provided additional insight in *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). Therein, the Court indicated 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.” *Id.*

⁸¹ *New York Times*, 376 U.S. at 264, 268–78.

⁸² *Id.* at 269 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)) (internal quotation marks omitted).

B. Curtis Publishing Co. v. Butts

That extension of the actual malice standard beyond speech related to public officials occurred in *Curtis Publishing Co. v. Butts*, which addresses two consolidated cases—one involving a former University of Georgia football coach and the other a retired Army General.⁸³ As for the former, the tenure of James Wallace Butts, Jr., better known as Wally Butts, as the head football coach for the University of Georgia from 1939 to 1960 was so successful that it resulted in his posthumous enshrinement in the college football hall of fame.⁸⁴ As 1960 approached, however, Butts's teams started to have too many losing seasons on the field,⁸⁵ and Butts's character defects were increasingly causing off the field image problems for the university.⁸⁶ Though he was removed from the more visible position of head football coach, Butts retained his position as athletic director.⁸⁷ At the time, the Georgia athletic director was paid using private funds and was a private employee under Georgia law rather than a state employee.⁸⁸ Because the Supreme Court resolved the case on other grounds, it did not consider whether Butts was truly a private employee.⁸⁹

Butts was still the Georgia athletic director on September 13, 1962 when he telephonically crossed paths with Atlanta businessman George Burnett.⁹⁰ While making a phone call, a telephone operator mistakenly connected Burnett into a phone conversation between Butts and Alabama football coach Paul “Bear” Bryant.⁹¹ Burnett claimed the conversation involved Butts revealing insider information to an appreciative Bryant that would be helpful for Alabama in their upcoming game against Georgia.⁹² The following weekend, Alabama annihilated

⁸³ 388 U.S. 130, 135–42 (1967); see also Norman T. Deutsch, *Professor Nimmer Meets Professor Schauer (and Others): An Analysis of “Definitional Balancing” as a Methodology for Determining the “Visible Boundaries of the First Amendment,”* 39 AKRON L. REV. 483, 525 (2006) (noting the Supreme Court’s expansion of the actual malice standard to public figures in *Curtis Publishing Co. v. Butts*).

⁸⁴ See RICHARD SCOTT, SEC FOOTBALL: 75 YEARS OF PRIDE AND PASSION 126 (2008); TONY BARNHART, ALWAYS A BULLDOG: PLAYERS, COACHES, AND FANS SHARE THEIR PASSION FOR GEORGIA FOOTBALL 137–38 (2011).

⁸⁵ VINCE J. DOOLEY & TONY BARNHART, DOOLEY: MY 40 YEARS AT GEORGIA 125 (2005) (stating that five of Butts’s last eight seasons ended with losing records).

⁸⁶ RICHARD O. DAVIES & RICHARD G. ABRAM, BETTING THE LINE: SPORTS WAGERING IN AMERICAN LIFE 107–08 (2001); ALBERT J. FIGONE, CHEATING THE SPREAD: GAMBLERS, POINT SHAVERS, AND GAME FIXERS IN COLLEGE FOOTBALL AND BASKETBALL 75 (2012) (indicating that boosters pressured to have Butts fired in large part because of his personal financial problems, excessive drinking at nightclubs, and sexual indiscretions with young women, including on out-of-town trips financed at the university’s expense).

⁸⁷ FIGONE, *supra* note 86, at 75.

⁸⁸ *Curtis Publ’g Co.*, 388 U.S. at 135.

⁸⁹ See *id.* at 135 & n.2.

⁹⁰ FIGONE, *supra* note 86, at 75.

⁹¹ *Id.*

⁹² *Id.* at 76.

Georgia thirty-five to zero in the game—a margin of victory that was twice the betting line.⁹³ Burnett, who had taken notes on the conversation, waited several months before talking with University of Georgia officials.⁹⁴ When he finally did so, the University through the Georgia Attorney General’s Office conducted an investigation that found enough cause for concern to force Butts’s resignation in February of 1963.⁹⁵

Sportswriter Frank Graham, Jr. had gotten word from the *Saturday Evening Post* of a scandal involving Butts and was investigating the matter.⁹⁶ The reason for the resignation had not yet broken in the press.⁹⁷ Like Butts, by 1960 the *Saturday Evening Post* had seen better days.⁹⁸ What once had been a publishing powerhouse aimed at Middle America and adorned with Norman Rockwell’s artistry had grown stale and was losing market position.⁹⁹ To turn things around, Curtis Publishing hired an energetic editor-in-chief named Clay Blair, who planned to steer the magazine toward “sophisticated muck-racking” and “provoking people.”¹⁰⁰ The Butts/Bryant story fit perfectly with the new direction of the magazine,¹⁰¹ so the magazine purchased Burnett’s cooperation for \$5,000.¹⁰²

Fearing leaks from his own editors and concerned that a competitor might scoop the Butts/Bryant story, Blair created an ad hoc publishing process that lacked the magazine’s normal editorial oversight and review.¹⁰³ The March 23, 1963 edition of the *Saturday Evening Post* included the less-than-thoroughly vetted “The Story of a College Football Fix.”¹⁰⁴ Within days of release of the issue, Butts and Bryant filed suits seeking millions of dollars in damages.¹⁰⁵ Relying upon diversity jurisdiction, Butts filed suit in the United States District Court for the Northern District of Georgia.¹⁰⁶ Whatever the truth may be,¹⁰⁷ the

⁹³ *Id.*

⁹⁴ *Id.* at 77.

⁹⁵ *Id.* at 77–78.

⁹⁶ *Id.* at 78.

⁹⁷ FRANK GRAHAM, JR., A FAREWELL TO HEROES 284 (1981).

⁹⁸ KEITH DUNNAVANT, COACH: THE LIFE OF PAUL “BEAR” BRYANT 168 (rev. ed. 2005).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 168–69.

¹⁰¹ GRAHAM, *supra* note 97, at 284.

¹⁰² FIGONE, *supra* note 86, at 77–78.

¹⁰³ DUNNAVANT, *supra* note 98, at 169–70.

¹⁰⁴ FIGONE, *supra* note 86, at 79.

¹⁰⁵ DUNNAVANT, *supra* note 98, at 170.

¹⁰⁶ FIGONE, *supra* note 86, at 82.

¹⁰⁷ James Kirby, who had been the Dean of the Ohio State University College of Law, General Counsel of New York University, and a Professor at the University of Tennessee College of Law, was hired as an observer of the trial by the Southeastern Conference. *Id.* at 77. In a book he wrote on the scandal, Kirby concludes both Butts and Bryant acted with impropriety but that Alabama would have likely won and covered the betting line spread anyway. JAMES KIRBY, FUMBLE: BEAR BRYANT, WALLY BUTTS, AND THE GREAT COLLEGE

trial itself proved to be no less of a rout than Alabama's victory over Georgia had been in the allegedly fixed game.¹⁰⁸ The jury returned a \$3.6 million verdict for Butts, which was reduced by the trial court to \$460,000.¹⁰⁹ Shortly thereafter, the Supreme Court released its *New York Times Co. v. Sullivan* decision, and the publisher filed a motion for new trial based thereupon.¹¹⁰ The district court denied the publisher's motion because Butts was not a public official and because the jury could have concluded the publisher acted with reckless disregard as to whether the article was false or not.¹¹¹ The United States Court of Appeals for the Fifth Circuit affirmed the judgment in a divided vote.¹¹²

The companion case involved former Army General Edwin Walker and the Associated Press's reporting on his role in riots at the University of Mississippi in opposition to enforcement of court ordered integration.¹¹³ Denied admission to the all-white University of Mississippi on the basis of race, James Meredith successfully challenged the University's exclusionary policies in court.¹¹⁴ Mississippi state officials, however, repeatedly refused to honor court orders requiring his admission.¹¹⁵ The Kennedy administration sought an accommodation with Mississippi Governor Ross Barnett but was unable to reach an accord, or at least an accord that Barnett would honor.¹¹⁶ Lacking cooperation from state authorities, the Kennedy administration assembled a force of federal marshals and a hodgepodge of other federal officials composed of everyone from Department of Justice attorneys and border agents to federal prison guards to ensure Meredith was able to register and attend classes.¹¹⁷ On the day before Meredith was to register, federal officials set up a command center and camped out for the night at the Lyceum, a legendary building on the campus, to be prepared to help Meredith register the following morning.¹¹⁸ Mistakenly believing Meredith was in the

FOOTBALL SCANDAL 189–213 (1986). A number of Bryant biographers have disagreed. See, e.g., DUNNAVANT, *supra* note 98, at 170.

¹⁰⁸ See KIRBY, *supra* note 107, at 91–148.

¹⁰⁹ See FIGONE, *supra* note 86, at 84.

¹¹⁰ See *id.*; KIRBY, *supra* note 107, at 183–84.

¹¹¹ *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 138–39 (1967).

¹¹² *Id.* at 139.

¹¹³ *Id.* at 140.

¹¹⁴ CHARLES W. EAGLES, *THE PRICE OF DEFIANCE: JAMES MEREDITH AND THE INTEGRATION OF OLE MISS* 201–339 (2009) (discussing in detail the lengthy court battles preceding Meredith's admission).

¹¹⁵ RICHARD K. SCHER, *POLITICS IN THE NEW SOUTH: REPUBLICANISM, RACE AND LEADERSHIP IN THE TWENTIETH CENTURY* 215 (2d ed. 1997); EAGLES, *supra* note 114, at 276–77 (“Determined to keep Meredith out of Ole Miss, the state's leadership did not know what to do except to be obstructive.”).

¹¹⁶ SCHER, *supra* note 115, at 215; ARTHUR M. SCHLESINGER, JR., *ROBERT KENNEDY AND HIS TIMES* 337–39 (1978).

¹¹⁷ EVAN THOMAS, *ROBERT KENNEDY: HIS LIFE* 200 (2000).

¹¹⁸ *Id.* (“Unprepared and ignorant of local lore, the Kennedy team blundered in its choice of a place to stand. . . . The Lyceum and the Grove were sacred ground at Ole Miss.

Lyceum,¹¹⁹ a mob of more than two thousand five hundred persons attacked federal officials with Molotov cocktails, guns, and a bulldozer, which was turned into makeshift battering ram to break the federal line.¹²⁰ By the time military reinforcements arrived in the middle of the night, one hundred and sixty federal officials had been injured, twenty-eight of them by gunfire, and two persons, a reporter and a local resident, were dead.¹²¹ The morning after, Meredith, who was escorted by five thousand troops, registered for classes.¹²² Enduring constant threats and harassment,¹²³ Meredith lived with a federal marshal for the next two years until he graduated in 1963, becoming the first African American graduate from the University of Mississippi.¹²⁴

Van Savell, a young reporter who blended in well among the college students, had been part of a team of Associated Press (AP) reporters covering the integration of the University of Mississippi.¹²⁵ In reporting on the rioting for the AP, Savell

[Nicholas] Katzenbach later realized they might as well have decided to bivouac in Robert E. Lee's tomb.")

¹¹⁹ SCHLESINGER, *supra* note 116, at 322.

¹²⁰ See JONATHAN ROSENBERG & ZACHERY KARABELL, *KENNEDY, JOHNSON, AND THE QUEST FOR JUSTICE: THE CIVIL RIGHTS TAPES* 47 (2003); ROBERT DALLEK, *AN UNFINISHED LIFE: JOHN F. KENNEDY 1917–1963*, at 516–17 (2003); THOMAS, *supra* note 117, at 200–04.

¹²¹ THOMAS, *supra* note 117, at 200.

¹²² SCHER, *supra* note 115, at 215. When asked what was to be done after the rioting of the night before, Department of Justice attorney Nicholas Katzenbach stated, “we’re going to register Mr. Meredith at 8 o’clock.” SCHLESINGER, *supra* note 116, at 325. During the fall of 1962 at the height of the federal troops’ presence in Oxford, Mississippi (20,000 soldiers), the campus looked more like a military encampment than a university with soldiers outnumbering students by a 5 to 1 ratio. FRANK LAMBERT, *THE BATTLE OF OLE MISS: CIVIL RIGHTS V. STATES’ RIGHTS* 128 (2010).

¹²³ MEREDITH COLEMAN MCGEE, *JAMES MEREDITH: WARRIOR AND THE AMERICA THAT CREATED HIM* 71–73 (2013). Describing his experience, Meredith, who had previously served in the military, stated, “I was not a student. I was a soldier in a war. . . . Students threw rocks and firecrackers at me. They insulted me, but I never allowed anyone to get close to me. . . . I considered myself engaged in a War from day one.” *Id.* at 72–73 (citations omitted) (internal quotation marks omitted).

¹²⁴ *Id.* at 71–74. Reflecting upon the entirety of the experience, Meredith wrote to Robert Kennedy in 1963:

I am a graduate of the University of Mississippi. For this I am proud of my Country The question always arises—was it worth the cost? . . . I believe that I echo the feelings of most Americans when I say that “no price is too high to pay for freedom of person, equality of opportunity, and human dignity.”

Letter from J. H. Meredith to Robert F. Kennedy, Attorney General, United States of America (Sept. 5, 1963), *available at* <http://rfkcenter.org/james-meredith-17>, *archived at* <http://perma.cc/86H7-NQXH>.

¹²⁵ Nancy Benac, *A Fight Is What This Is*, in *BREAKING NEWS: HOW THE ASSOCIATED PRESS HAS COVERED WAR, PEACE, AND EVERYTHING ELSE* 90, 95 (2007).

indicated that Walker, who was among the rioters, had “assumed command” of the crowd and “led a charge of students against federal marshals.”¹²⁶ He added that Walker had climbed on a monument, exhorting the rioting crowd with the admonition “[d]on’t let up now. . . . You must be prepared for possible death. If you are not, go home now.”¹²⁷ After the rioting, Walker was arrested and charged with, among other offenses, insurrection against the United States—these charges were later dropped.¹²⁸

Walker was not new to the spotlight. His military career had ended in controversy over his attempts to indoctrinate soldiers under his command using controversial voter-rating guides and materials from the John Birch Society.¹²⁹ Even before the rioting, Walker had assumed a leadership position in the opposition to integration of the University of Mississippi.¹³⁰ In radio addresses, he called upon southerners to draw the line, saying “[i]t is time to move. We have talked, listened and been pushed around far too much for the anti-Christ Supreme Court. Bring your flags, your tents, and your skillets.”¹³¹

Walker filed fifteen libel suits against the AP, specifically selecting southern towns in which newspapers carried the story and in which he thought a sympathetic jury pool could be found.¹³² He sought more than \$33 million in damages.¹³³ Walker conceded that he had been present and spoken to the students, but he insisted he counseled restraint, did not exercise any control over the crowd,

¹²⁶ *Id.* at 95–96 (citation omitted) (internal quotation marks omitted).

¹²⁷ *Id.* at 95 (omission in original) (citation omitted) (internal quotation marks omitted).

¹²⁸ *Id.* at 96.

¹²⁹ STEVEN E. ATKINS, *ENCYCLOPEDIA OF RIGHT-WING EXTREMISM IN MODERN AMERICAN HISTORY* 186 (2011). Walker, who had served with distinction in World War II and the Korean War, had also been assigned by President Eisenhower as the commanding officer to direct the military in aiding the integration of Central High School in Little Rock, Arkansas. *Id.* Walker only performed the latter function after his Commander-in-Chief refused to allow him to resign his commission. *Id.* The beginning of the end of Walker’s military career occurred with the publication of a 1961 article in *Overseas Weekly* that noted that Walker was using John Birch Society materials as anti-communist indoctrination material. SARA DIAMOND, *ROADS TO DOMINION: RIGHT-WING MOVEMENTS AND POLITICAL POWER IN THE UNITED STATES* 57 (1995). While the Pentagon did have an anti-communist indoctrination education initiative, the John Birch Society materials confused the American Left with Soviet Communists. *Id.* The removal of Walker would become a major point of confrontation between the American right and left. *Id.* at 57–58; *see also* DONALD T. CRITCHLOW, *PHYLLIS SCHLAFLY AND GRASSROOTS CONSERVATISM: A WOMAN’S CRUSADE* 101–02 (2005); DAVID TALBOT, *BROTHERS: THE HIDDEN HISTORY OF THE KENNEDY YEARS* 71–72 (2007); Editorial, *Fair Play for Gen. Walker*, *LIFE*, Oct. 6, 1961, at 4.

¹³⁰ Benac, *supra* note 125, at 96.

¹³¹ *Id.* (citation omitted) (internal quotation marks omitted).

¹³² *Id.*

¹³³ *Id.*

and did not lead a charge against federal marshals.¹³⁴ The AP lost the defamation case Walker filed in Fort Worth, Texas, and the jury returned a verdict for \$800,000, which was reduced to \$500,000 by the trial court.¹³⁵ The trial court explicitly declined to apply the *New York Times Co. v. Sullivan* standard; however, the court noted that if the actual malice standard had been applicable, it would have entered a directed verdict for the AP.¹³⁶ The Texas Court of Appeals affirmed, and the Texas Supreme Court declined to review the decision.¹³⁷

Addressing Butts's and Walker's appeals, the primary issue before the Court was whether the constitutional safeguards afforded speech regarding public officials would be extended to those who did not work for the government. For reasons addressed in more detail in Part III.B below, the U.S. Supreme Court extended the actual malice standard to public figures.¹³⁸ Though the Court concluded Butts had made a sufficient showing of wanton and reckless indifference to support a finding of actual malice, the Court's application of the heightened standard required that the judgment for Walker be set aside.¹³⁹ None of the justices, however, provided bright line rules for determining when a person is a public figure.¹⁴⁰ In fact, the Court did not even define the term public figure.¹⁴¹

C. Rosenbloom v. Metromedia Inc.

The U.S. Supreme Court continued to expand constitutional restrictions on defamation actions in *Rosenbloom v. Metromedia, Inc.*, though the Court's focus, or at least the focus of the controlling plurality opinion, shifted from the status of the person defamed (public official/public figure) to considering whether the

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 142 (1967).

¹³⁷ *Id.*

¹³⁸ *See id.* at 155. In his plurality opinion, Justice Harlan did not impose the actual malice standard applicable to public officials but instead a less demanding gross negligence standard for public figures. *Id.* at 160, 166–67; Edward T. Fenno, *Public Figure Libel: The Premium on Ignorance and the Race to the Bottom*, 4 S. CAL. INTERDISC. L.J. 253, 279–80 (1995); Frederick Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905, 932 (1984). However, five justices supported the application of the actual malice standard to public figures, though Justices Black and Douglas further maintained that absolute protection should be afforded to the press against defamation suits. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 336 & n.7 (1974); *see also* Catherine Hancock, *Origins of the Public Figure Doctrine in First Amendment Defamation Law*, 50 N.Y.L. SCH. L. REV. 81, 83 & n.11 (2005–2006).

¹³⁹ *Curtis Publ'g Co.*, 388 U.S. at 156–59.

¹⁴⁰ Lee Levine & Stephen Wermiel, *The Landmark That Wasn't: A First Amendment Play in Five Acts*, 88 WASH. L. REV. 1, 4 n.10 (2013).

¹⁴¹ *See* Jay Barth, *Is False Imputation of Being Gay, Lesbian, or Bisexual Still Defamatory? The Arkansas Case*, 34 U. ARK. LITTLE ROCK L. REV. 527, 529–30 (2012) (noting that “public figure” was only defined later in *Gertz*).

subject matter reported on constituted a matter of public concern.¹⁴² The case brought before the Court involved George Rosenbloom, a distributor of “nudist magazines” in Metropolitan Philadelphia.¹⁴³ While the police had not been trying to arrest Rosenbloom, he had the misfortune of delivering magazines to a newsstand at the same time Philadelphia police were conducting an anti-obscenity raid, resulting in his arrest.¹⁴⁴ With Rosenbloom in custody, police officers conducted a search of his home and a barn he used as a warehouse.¹⁴⁵ During their search, officers found a copious amount of pornography.¹⁴⁶ With this discovery, a captain with the Philadelphia Police Department Special Investigations Squad contacted multiple media outlets including Metromedia’s WIP Radio to report their find.¹⁴⁷

As part of its newscast on October 3, 1963, WIP Radio informed its listeners that

City Cracks Down on Smut Merchants. The Special Investigations Squad raided the home of George Rosenbloom . . . this afternoon. Police confiscated 1,000 allegedly obscene books at Rosenbloom’s home and arrested him on charges of possession of obscene literature. The . . . Squad also raided a barn . . . and confiscated 3,000 obscene books. Captain Ferguson says he believes they have hit the supply of a main distributor of obscene material in Philadelphia.¹⁴⁸

Rosenbloom, who argued the materials were not obscene, filed suit, seeking an injunction to prevent the police from interfering with his business and an action against a number of the media outlets that had referred to the materials as obscene.¹⁴⁹ WIP Radio, which was not part of Rosenbloom’s original suit, covered court proceedings in these cases.¹⁵⁰ Though it did not mention Rosenbloom by name, the radio station informed its listeners that a distributor of pornography was litigating in an attempt to get a local television station and newspaper to “lay off the smut literature racket” and that “[t]he girlie-book peddler[] say[s] the police crackdown and continued reference to [his] borderline literature as smut or filth is hurting [his] business.”¹⁵¹

¹⁴² King, *supra* note 6, at 662–63.

¹⁴³ FRALEIGH & TUMAN, *supra* note 58, at 180.

¹⁴⁴ RICHARD LABUNSKI, *LIBEL AND THE FIRST AMENDMENT: LEGAL HISTORY AND PRACTICE IN PRINT AND BROADCASTING* 134 (1987).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 134–35.

¹⁴⁷ *Id.* at 135.

¹⁴⁸ *Id.* (quoting *Rosenbloom v. Metromedia*, 403 U.S. 29, 33 (1971)).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* (quoting *Rosenbloom*, 403 U.S. at 34–35).

After learning about WIP's broadcasts, Rosenbloom contacted the station, asserting that his materials were not obscene.¹⁵² The radio station informed Rosenbloom that the District Attorney's Office had indicated the materials were obscene.¹⁵³ The District Attorney's Office was wrong; the trial court ordered entry of an acquittal on the criminal obscenity charges.¹⁵⁴ Following his acquittal, Rosenbloom brought a defamation suit in federal court against WIP Radio.¹⁵⁵ The jury returned a \$775,000 verdict for Rosenbloom, but the trial court judge reduced the amount of the verdict to \$275,000.¹⁵⁶ The United States Court of Appeals for the Third Circuit reversed the trial court, concluding that the actual malice standard applied even though Rosenbloom was not a public figure because the broadcasts were about matters of public concern and Rosenbloom had not shown actual malice.¹⁵⁷

A fractured Supreme Court applied the actual malice standard to Rosenbloom's defamation claim but could not agree on a reason for doing so.¹⁵⁸ The three-justice plurality authored by Justice Brennan reasoned that "[i]f 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."¹⁵⁹ Brennan added that "[t]he 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."¹⁶⁰ Thus, the plurality viewed its standard as honoring "the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending 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."¹⁶¹

The *Rosenbloom* plurality did not ignore arguments in favor of retaining the distinction between public figures and private persons.¹⁶² However, the members of the plurality concluded such an approach would improperly result in "dampening discussion of issues of public or general concern because they happen to involve private citizens," thus a heightened standard needed to be applied.¹⁶³ In the plurality's view, "[v]oluntarily or not, we are all 'public' men to some

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 155–56.

¹⁵⁵ *POWE*, *supra* note 29, at 92.

¹⁵⁶ *See id.*

¹⁵⁷ *Rosenbloom v. Metromedia, Inc.*, 415 F.2d 892, 896–98 (3d Cir. 1969), *aff'd*, 403 U.S. 29 (1971).

¹⁵⁸ *See Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52, 55–57, 62 (1971).

¹⁵⁹ *Id.* at 43.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 43–44.

¹⁶² *Id.* at 45–47.

¹⁶³ *Id.* at 48.

degree.”¹⁶⁴ Thus, the controlling question after *Rosenbloom* in determining whether the actual malice standard applies was whether the defamatory statement related to a matter of public concern.¹⁶⁵ This approach, which would be the high-water mark for media protection against defamation suits, would be jurisprudentially short-lived, but scholarly attachment thereto endures.

D. *Gertz v. Robert Welch, Inc.*

In *Gertz v. Robert Welch, Inc.*, the Supreme Court redirected its focus to the status of the defamed plaintiff in determining whether the actual malice standard applied, and in doing so the Court created a new structural framework for analyzing defamation cases.¹⁶⁶ The events that gave rise to *Gertz* began with an extended period of harassment of a youth by a police officer.¹⁶⁷ Chicago police officer Richard Nuccio regarded Robert Nelson, a nineteen-year-old in the neighborhood he patrolled, as a hoodlum.¹⁶⁸ Nuccio stopped and patted down Nelson sixty to one hundred times over the course of eighteen months and never found a weapon or contraband.¹⁶⁹ On June 4, 1968, Nelson either ran from or was already running (he had been a runner on his high school track and field team) when he encountered Nuccio.¹⁷⁰ The officer directed him to stop; Nelson did not.¹⁷¹ Without warning, Nuccio shot and killed Nelson.¹⁷² The Chicago District Attorney’s Office prosecuted Nuccio for murder.¹⁷³ At trial, Nuccio claimed self-defense arguing that Nelson had lunged at him with a knife; however, no knife was recovered.¹⁷⁴ Furthermore, the medical evidence established that Nelson had been shot in the back at a distance of approximately eighty feet.¹⁷⁵ A jury convicted Nuccio of second-degree murder.¹⁷⁶

Nelson’s parents pursued civil monetary damages.¹⁷⁷ Another attorney referred the Nelsons to Elmer Gertz.¹⁷⁸ On behalf of the Nelsons, Gertz pursued a

¹⁶⁴ *Id.*

¹⁶⁵ David W. Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199, 227 n.175 (1976); Marin Roger Scordato, *The International Legal Environment for Serious Political Reporting Has Fundamentally Changed: Understanding the Revolutionary New Era of English Defamation Law*, 40 CONN. L. REV. 165, 191–92 (2007).

¹⁶⁶ See King, *supra* note 6, at 663–65.

¹⁶⁷ See ELMER GERTZ, *GERTZ V. ROBERT WELCH, INC.: THE STORY OF A LANDMARK LIBEL CASE* 15–16 (1992).

¹⁶⁸ *Id.* at 15.

¹⁶⁹ *Id.* at 16.

¹⁷⁰ *Id.* at 19.

¹⁷¹ See *id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 11–16.

¹⁷⁴ *Id.* at 12, 15–16.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 18–19.

strategy of filing actions in both state and federal courts, naming as defendants Nuccio and the City of Chicago in the state court action but naming only Nuccio in federal court, where liability and immunity issues were more likely to bar recovery against the city given the willful and illegal nature of Nuccio's conduct.¹⁷⁹

Little did Gertz know at the time, he was about to find himself in the crosshairs of the John Birch Society. Created in the 1950s and rising to the height of its influence in the 1960s, the John Birch Society was an ultraconservative anticommunist organization.¹⁸⁰ The organization was focused on safeguarding the nation against communist conspiracies. Its "message centered around the idea that there was a vast left-wing conspiracy of American liberals, international communists, and moderate American Republicans who worked together to undermine the Christian values and individual liberties of Americans."¹⁸¹ By 1968 the John Birch Society had become convinced that communists were trying to undermine local law enforcement by discrediting police officers.¹⁸² Robert Welch, the founder of the John Birch Society and the publisher of its monthly magazine *American Opinion*, articulated that the end game of the conspiracy was to create public pressure to replace local police with a national police force, which could later be used to support a communist dictatorship.¹⁸³ The March 1969 issue of *American Opinion* contained an article entitled *FRAME-UP: Richard Nuccio and the War on Police*.¹⁸⁴ The article alleged that Nuccio's prosecution had been part of the communist campaign against local police.¹⁸⁵ The article, among other errors, accused Gertz of being a Communist, framing Nuccio, assisting in planning the 1968 demonstrations at the Democratic National Convention, and having a criminal record.¹⁸⁶

Prior to the Supreme Court's decision in *Rosenbloom*, Gertz filed a defamation action in the United States District Court for Northern District of Illinois against Robert Welch, Inc., the publisher of *American Opinion*.¹⁸⁷ Drawing upon the *Curtis Publishing Co. v. Butts* decision, the publisher argued that Gertz was a public official and/or public figure and that the article was related to a matter

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Thomas Lansford, *John Birch Society*, in *ENCYCLOPEDIA OF AMERICAN RELIGION AND POLITICS* 233, 233–34 (2003).

¹⁸¹ Thomas Lansford, *John Birch Society*, in *2 GUNS IN AMERICAN SOCIETY: AN ENCYCLOPEDIA OF HISTORY, POLITICS, CULTURE, AND THE LAW* 322, 322 (Gregg Lee Carter ed., 2002).

¹⁸² Diane L. Borden, *Cyberlibel: Time to Flame the Times Standard*, in *THE ELECTRONIC GRAPEVINE: RUMOR, REPUTATION, AND REPORTING IN THE NEW ON-LINE ENVIRONMENT* 91, 96 (Diane L. Borden & Kerric Harvey eds., 1998).

¹⁸³ LABUNSKI, *supra* note 144, at 148.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 149; KENNETH C. CREECH, *ELECTRONIC MEDIA LAW AND REGULATION* 338–40 (5th ed. 2007).

¹⁸⁷ *See Gertz v. Robert Welch, Inc.*, 322 F. Supp. 997, 998 (N.D. Ill. 1970).

of public concern.¹⁸⁸ Gertz countered that the actual malice standard did not apply to him because he was neither a public official nor a public figure.¹⁸⁹ The trial court, which suffered from confusion throughout the case regarding the applicable constitutional defamation standard, allowed the case to proceed to a jury verdict on a less restrictive standard than actual malice, which resulted in a \$50,000 judgment for Gertz.¹⁹⁰ However, after the trial, the trial court set aside the verdict, having determined the actual malice standard applied and that Gertz had not shown actual malice.¹⁹¹ Applying *Rosenbloom*, the Seventh Circuit Court of Appeals affirmed.¹⁹² The Supreme Court granted certiorari in the case¹⁹³ and subsequently concluded that the actual malice standard did not apply to Gertz, thereby reframing the constitutional constraints on defamation claims.¹⁹⁴

II. THE *GERTZ* CATEGORIZATION STRUCTURE¹⁹⁵

The *Gertz* Court structured an approach to defamation suits designed to address the inherent tension between states' interest in redressing injuries arising from defamation and the constitutional safeguards necessary for a vigorous and uninhibited press.¹⁹⁶ While theoretically "the balance between the needs of the press and the individual's claim to compensation for wrongful injury might be struck on a case-by-case basis," the *Gertz* Court recognized the impracticability and substantive undesirability of such an approach.¹⁹⁷ Instead, the Court balanced the competing interests by creating categorical groupings, assigning different types of defamation plaintiffs to different categories, and setting forth rules to govern those categories.

Pursuant to *Gertz*, plaintiffs in defamation cases can be classified into one of five categories: (1) public officials, (2) all-purpose public figures, (3) limited-purpose public figures, (4) involuntary public figures, and (5) private individuals.¹⁹⁸ 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

¹⁸⁸ *See id.* at 998–1000.

¹⁸⁹ *See* LABUNSKI, *supra* note 144, at 149.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 149–50.

¹⁹² *Gertz v. Robert Welch, Inc.*, 471 F.2d 801, 808 (7th Cir. 1972).

¹⁹³ *Gertz v. Robert Welch, Inc.*, 410 U.S. 925, 925 (1973).

¹⁹⁴ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332 (1974).

¹⁹⁵ Not all of the contours set forth below are contained in *Gertz* itself or its predecessors. Some aspects of the structure have been clarified by post-*Gertz* decisions, but the foundation upon which those subsequent Supreme Court decisions have been placed is *Gertz* itself.

¹⁹⁶ *Gertz*, 418 U.S. at 342.

¹⁹⁷ *Id.* at 343.

¹⁹⁸ *See* JAMES SAMMATARO, *FILM AND MULTIMEDIA AND THE LAW* § 5:19, at 469–71 (2013).

affairs.”¹⁹⁹ For the heightened protections of the actual malice test to apply to a public official,²⁰⁰ the allegedly defamatory speech must be related to official conduct²⁰¹ or fitness for office.²⁰² The constitutional protection afforded by the actual malice standard does not apply to people simply because they are public employees.²⁰³

As for the second category, the *Gertz* Court described all-purpose public figures as persons who “occupy positions of such persuasive power and influence that they are deemed public figures for all purposes.”²⁰⁴ All-purpose public figures, a category into which a relatively small number of persons will fall,²⁰⁵ are individuals with significant fame and notoriety, i.e., “household names.”²⁰⁶ There is a societal expectation that such persons are fodder for public discussion.²⁰⁷ Because of the impact of being categorized as such, the *Gertz* Court established a

¹⁹⁹ *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

²⁰⁰ See SMOLLA, *supra* note 2, § 3:23, at 3-60.

²⁰¹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964).

²⁰² The Supreme Court in *Garrison v. Louisiana*, 379 U.S. 64 (1964), expressly concluded that the heightened actual malice standard reached beyond official conduct to fitness for office, including considerations of private character:

The *New York Times* rule is not rendered inapplicable merely because an official’s private reputation, as well as his public reputation, is harmed. The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official’s fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official’s private character.

Id. at 77. Utilizing even starker language, the Supreme Court observed in *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971), that

[g]iven the realities of our political life, it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks. The clash of reputations is the staple of election campaigns, and damage to reputation is, of course, the essence of libel.

Id. at 275.

²⁰³ See *Hutchinson v. Proxmire*, 443 U.S. 111, 119 n.8 (1979).

²⁰⁴ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

²⁰⁵ DAVID A. ELDER, DEFAMATION: A LAWYER’S GUIDE § 5:6, at 5-52 (2003); Dennise Mulvihill, Irving v. Penguin: *Historians on Trial and the Determination of Truth Under English Libel Law*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 217, 247 (2000).

²⁰⁶ 1A ALEXANDER LINDEY & MICHAEL LANDAU, LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS § 4:8, at 4-23 (3d ed. 2014); Gilles, *supra* note 1, at 251 n.118.

²⁰⁷ Elynn M. Angelotti, *Twibel Law: What Defamation and its Remedies Look Like in the Age of Twitter*, 13 J. HIGH TECH. L. 430, 446 (2013) (noting that “[s]ociety expects the public to discuss and critique these people”).

presumption in favor of finding a person to be a limited-purpose as opposed to an all-purpose public figure. The Court declared that “[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.”²⁰⁸ If the plaintiff in a defamation suit is an all-purpose public figure, the constitutional protections of the actual malice standard apply.²⁰⁹ By definition, at least for purposes of defamation suits, there are no matters of private concern for all-purpose public figures.²¹⁰ They are deemed a public figure for “all purposes and in all contexts.”²¹¹

Addressing the third category, the *Gertz* Court described limited-purpose public figures as persons who have “thrust themselves to the forefront of particular public controversies” or “the vortex of [a] public issue,” “in order to influence the resolution of the issues involved” and in doing so “have assumed roles of especial prominence in the affairs of society.”²¹² Such persons are public figures in connection with matters upon which they have assumed such a role, “but in all other aspects of their lives they remain private figures.”²¹³ Accordingly, they are public figures “for a limited range of issues.”²¹⁴ Because the categorization of a person as a limited-purpose public figure inherently involves a determination of whether the speech at issue addresses a “public controversy” or a “public issue,” if the plaintiff is classified as a limited-purpose public figure, a matter of public concern necessarily will be implicated, and the actual malice standard will apply.²¹⁵

Describing the fourth category, the involuntary public figure category (a classification into which the *Gertz* Court anticipated few would fall), the Court defined involuntary public figures as persons who are “drawn into a particular public controversy” and “become a public figure through no purposeful action of [their] own.”²¹⁶ As with limited-purpose public figures, because categorization as an involuntary public figure requires a finding of a “public controversy” into which the person has been drawn, invariably a matter of public concern will be implicated, and the actual malice standard will apply.²¹⁷

Finally, persons who are not public officials, all-purpose public figures, limited-purpose public figures, or involuntary public figures are categorized as

²⁰⁸ *Gertz*, 418 U.S. at 352.

²⁰⁹ SMOLLA, *supra* note 2, § 3:23, at 3-60.

²¹⁰ Dale D. Goble, *Of Defamation and Decisionmaking: Wiemer v. Rankin and the Abdication of Appellate Responsibility*, 28 IDAHO L. REV. 1, 18 n.76 (1991-1992).

²¹¹ *Gertz*, 418 U.S. at 351.

²¹² *Id.* at 345, 352.

²¹³ RODNEY A. SMOLLA, RIGHTS AND LIABILITIES IN MEDIA CONTENT: INTERNET, BROADCAST, AND PRINT § 6:38, at 6-331 (2d ed. 2011).

²¹⁴ *Gertz*, 418 U.S. at 351.

²¹⁵ SMOLLA, *supra* note 2, § 3:23, at 3-60.

²¹⁶ *Gertz*, 418 U.S. at 345, 351.

²¹⁷ See W. Wat Hopkins, *The Involuntary Public Figure: Not So Dead After All*, 21 CARDOZO ARTS & ENT. L.J. 1, 27, 30 (2003).

private individuals. As part of balancing the competing needs for a vigorous and uninhibited press with the ability of the states to protect private individuals from defamation, the *Gertz* Court, reversing *Rosenbloom*, removed the constitutional mandate that the actual malice standard apply in cases in which the aggrieved plaintiff is a private individual where the matter involved is one of public concern.²¹⁸ However, the *Gertz* Court prohibited states from setting strict liability standards in defamation suits but otherwise enabled states to set their own standards for private individuals.²¹⁹

III. THE EROSION OF THE *GERTZ* STRUCTURE

Like a beautifully crafted sandcastle built too close to the shore, these categorical distinctions have been hit by successive waves of First Amendment pressure that have taken a toll on the edifice. The categorical lines and rationales advanced in *Gertz* are worn and rounded. Rather than becoming clearer over time through courts' application of the *Gertz* framework, the categories have become more confused, unsettled, and variant.²²⁰

The *Gertz* framework has been eroded in at least five significant respects, each of which is discussed below. First pressure from the First Amendment has resulted in state and lower-federal courts expanding the category of persons who

²¹⁸ *Gertz*, 418 U.S. at 346–48.

²¹⁹ *Id.* at 346–48 & n.10. Commentators addressing the Supreme Court's decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), have argued that if the defamatory statements regarding a private person are not addressed to a matter of public concern, then strict liability could apply:

The United States Supreme Court, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, held that when a private person who is neither a public official nor a public figure sues for defamation arising from publication of matters that are *not* of public concern, she need not prove actual damages as required in the private person, public concern cases. Thus the common law rule of presumed damages can be applied by the states to cases in this category if the states are so minded.

Several decisions have said or assumed that the *Dun & Bradstreet* case means that *all* of the common law rules remain intact, not merely the damages rule. That would mean that in the private person case where the issue is not of public concern, the states would also be free to presume falsehood as well as damages, and possibly even to presume that the defendant was at fault; courts could go back to the old common law of prima facie strict liability in this class of cases. If the rules develop along these lines, courts in private person cases will be required to determine what counts as an issue of public concern.

3 DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 557 (2d ed. 2011 & Supp. 2013) (citations omitted).

²²⁰ See King, *supra* note 6, at 650 (referring generally to the post-*New York Times Co. v. Sullivan* defamation jurisprudence).

constitute public officials, bringing that category into conflict with the rationale underpinning *Gertz*'s distinguishing of private individuals from public figures.²²¹ Second, the definition of what constitutes a matter of public controversy has also significantly expanded to incorporate a significantly broadened scope of persons who will qualify as a public figure.²²² Third, private individuals' lack of access to channels of communications provided one of the two critical reasons for the *Gertz* Court to distinguish public figures from private individuals. Forty years of revolutionary technological change has dramatically reduced the force of this rationale for distinguishing public figures from private persons.²²³ Fourth, the *Gertz* Court's second reason for distinguishing public figures from private individuals turned upon the Court's view that public figures had voluntarily accepted such scrutiny through their actions whereas private individuals had not. Responding to First Amendment pressures, state and lower-federal courts, however, have been expanding the concept of voluntariness into forms that reduce the persuasiveness of the Court's reasoning in distinguishing public figures from private individuals on this basis.²²⁴ Fifth, Justice William Brennan's contention advanced in his dissenting opinion in *Gertz* that there is no such thing as a private person resonates significantly more today than it would or should have in 1974.²²⁵

A. *Erosion of the Narrow Understanding of Who Constitutes a Public Official*

Writing for the Court, Chief Justice Warren Burger, noted in dicta in *Hutchinson v. Proxmire*²²⁶ that while the Supreme Court "has not provided precise boundaries for the category of 'public official'; it cannot be thought to include all public employees."²²⁷ Contextualizing low-level public employees within the broader scope of *Gertz*'s analysis, venerable defamation scholar Professor David Elder has convincingly argued that imposition of the actual malice standard to low-level public employees is antithetical to the general reasoning behind the *Gertz* framework.²²⁸ He notes that "[l]ow-ranking or 'garden variety' public employees do not in any realistic sense assume the risk of enhanced press scrutiny and they generally have little access to the media for rebuttal on a 'regular and continuing' or other basis."²²⁹ Accordingly, Elder concludes that such low-level employees have not forfeited their status as private individuals and need not meet the heightened actual malice requirement; relatedly, Elder champions courts adhering to "the thoughtful analysis of Justice Brennan in *Rosenblatt v. Baer*."²³⁰ As

²²¹ See *infra* Part III.A.

²²² See *infra* Part III.B.

²²³ See *infra* Part III.C.

²²⁴ See *infra* Part III.D.

²²⁵ See *infra* Part III.E.

²²⁶ 443 U.S. 111 (1979).

²²⁷ *Id.* at 119 n.8.

²²⁸ See ELDER, *supra* note 205, § 5:1.

²²⁹ *Id.* § 5:1, at 5-10 to -11.

²³⁰ *Id.* § 5:1, at 5-11.

addressed above, Justice Brennan indicated 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.”²³¹ Elder would strictly hold the line “at the very least” level and maintain a restrictive interpretation thereof.²³² This would maintain continuity with the broader *Gertz* analysis and avoid application of the actual malice test to low-level government employees such as, in Elder’s view, non-command level police officers and public school teachers.²³³

That aspiration has not, however, matched reality in terms of how many state and federal courts have approached the classification of public employees. While there are a significant number of decisions in which courts have drawn lines in a manner akin to what Elder suggests,²³⁴ the dam has been breached, and actual application has moved far afield. Drawing a contrast with the narrow high-level official understanding advanced by some courts and scholars, the First Circuit Court of Appeals, referencing police officers as an example, observed that “[i]n practice, the term [public official] is now used more broadly and includes many government employees.”²³⁵ Professor Laurence Tribe has declared that irrespective of the dicta in *Hutchinson v. Proxmire*, a narrow and restrictive understanding of what constitutes a public official “has never been applied by the Supreme Court, and lower courts have tended to disregard it as well, with the net effect that the term ‘public official’ now embraces virtually all persons affiliated with the government, such as most ordinary civil servants, including public school teachers and policemen.”²³⁶ Elder has observed that state and lower-federal courts in his view “often ‘grossly interpret[], flagrantly misappl[y], or blatantly ignore[]’” the restrictive and narrow understanding of what constitutes a public official.²³⁷ Furthermore, he adds that in doing so, these courts “recognize the anomaly of simultaneously adopting generally restrictive criteria for the public figure status and open-ended criteria for the public official status.”²³⁸

Nor is it apparent that state and lower-federal courts are proceeding in a manner contrary to the Supreme Court’s analysis in *Rosenblatt v. Baer* by adopting a more expansive understanding of who qualifies as a public official. Justice Brennan certainly thought the broader understanding reflected in state and lower-

²³¹ *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). The language was evidently added to the opinion to appease Justice Harlan, who did not want to extend the actual malice standard to low-level government employees “without a great deal more thought.” LEWIS, *supra* note 19, at 172.

²³² ELDER, *supra* note 205, § 5:1, at 5:10 to -11.

²³³ *Id.* § 5:1, at 5-19.

²³⁴ *See id.* § 5:1, at 5-24 to 5-31.

²³⁵ *Mangual v. Rotger-Sabat*, 317 F.3d 45, 65 (1st Cir. 2003).

²³⁶ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 866 (2d ed. 1988).

²³⁷ ELDER, *supra* note 205, § 5:1, at 5-11 to -12 (quoting David Elder, *Defamation, Public Officialdom and the Rosenblatt v. Baer Criteria—A Proposal for Revivification: Two Decades After New York Times Co. v. Sullivan*, 33 *BUFF. L. REV.* 579, 667 (1984)).

²³⁸ *Id.* § 5:1, at 5-12 (citation omitted).

federal court decisions was the correct reading of his opinion.²³⁹ Writing post-*Rosenblatt* and *Gertz*, he observed,

We recognized [in *Rosenblatt v. Baer*], however, that First Amendment protection cannot turn on formalistic tests of how “high” up the ladder a particular government employee stands. Rather, we determined, the focus must be on the nature of the public employee’s function and the public’s particular concern with his work. Accordingly, we held:

Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, . . . the *New York Times* malice standards apply.

In *Rosenblatt* itself, we found this standard satisfied with respect to Baer, a supervisor of a county ski resort employed by and responsible to county commissioners.²⁴⁰

Addressing an Ohio Supreme Court decision that had, in his view, adopted an excessively narrow understanding of what constitutes a public official for purpose of application of the actual malice standard, Justice Brennan stated,

The Ohio court apparently read the language in *Rosenblatt* referring to government employees having “substantial responsibility for or control over the conduct of government affairs” as restricting the public official designation to officials who set governmental policy. This interpretation led it to conclude that finding a public employee like Milkovich²⁴¹ to be a “public official” for purposes of defamation law “would unduly exaggerate the ‘public official’ designation beyond its original intentment.”

The Ohio court has seriously misapprehended our decision in *Rosenblatt*. Indeed, the status of a public school teacher as a “public official” for purposes of applying the *New York Times* rule follows *a fortiori* from the reasoning of the Court in *Rosenblatt*

. . . [I]t is self-evident that “the public has an independent interest in the qualifications and performance” of those who teach in the public high schools that goes “beyond the general public interest in the qualifications

²³⁹ *Lorain Journal Co. v. Milkovich*, 474 U.S. 953, 957–60 (1985) (Brennan, J., dissenting).

²⁴⁰ *Id.* at 957–58 (emphasis omitted) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966)).

²⁴¹ Michael Milkovich was a high school wrestling coach and a teacher. *Id.* at 955.

and performance of all government employees[.]” Public school teachers thus fall squarely within the rationale of *New York Times* and *Rosenblatt*. Moreover, Diadiun’s column challenged Milkovich’s qualifications to teach young students in light of his conduct in connection with the Maple Heights/Mentor High School incident. It is precisely this type of discussion that *New York Times* and its progeny seek to protect.²⁴²

The more expansive rendering of the public-official category by many state courts and lower-federal courts arose neither from happenstance nor inattention. The broader understanding of the public official category is consistent with honoring the core purpose of the First Amendment, enabling self-governance, a purpose that is discussed in more detail in Part III.B below. In an article that offers a strong defense of application of the actual malice standard to public school teachers, Richard Johnson noted,

[m]ost parents take an acute interest in the “qualifications and performance” of any stranger who has . . . power over their children for six or seven hours per day. This interest is likely to exist even for people who are mostly indifferent to or ignorant of the “qualifications and performance” of senators, governors, and the secretary of agriculture—all of whom are unquestionably public officials.²⁴³

This vital role for teachers has not gone unnoticed by courts. For instance, an Illinois appeals court noted that “[p]ublic school teachers and coaches, and the conduct of such teachers and coaches and their policies, are of as much concern to the community as are other ‘public officials’ and ‘public figures.’”²⁴⁴ For similar reasons, courts have regularly concluded that even low-ranking police officers are public officials; for example, the Connecticut Supreme Court concluded that

²⁴² *Id.* at 958–60 (citations omitted). Ted Diadiun, a sports columnist for a local newspaper, wrote a column criticizing Milkovich not only for his actions related to a melee that broke-out at a wrestling match, resulting in multiple injuries requiring treatment in a hospital, but also misrepresentation of the surrounding events at a hearing thereupon to the Ohio High School Athletic Association. *Id.* at 955–57.

²⁴³ Richard E. Johnson, *No More Teachers’ Dirty Looks—Now They Sue: An Analysis of Plaintiff Status Determinations in Defamation Actions by Public Educators*, 17 FLA. ST. U. L. REV. 761, 791 (1990); see also Peter S. Cane, Note, *Defamation of Teachers: Behind the Times?*, 56 FORDHAM L. REV. 1191, 1206–07 (1988) (“Education is undeniably an area of intense concern to the public, and educators are the most appropriate focus of that concern.”).

²⁴⁴ *Basarich v. Rodeghero*, 321 N.E.2d 739, 742 (Ill. App. Ct. 1974); see, e.g., *Kelley v. Bonney*, 606 A.2d 693, 710 (Conn. 1992) (“Unquestionably, members of society are profoundly interested in the qualifications and performance of the teachers who are responsible for educating and caring for the children in their classrooms.”); *Johnston v. Corinthian Television Corp.*, 583 P.2d 1101, 1103 (Okla. 1978) (“[W]e can think of no higher community involvement touching more families and carrying more public interest than the public school system.”).

“[a]lthough a comparably low-ranking government official, a patrolman’s office, if abused, has great potential for social harm and thus invites independent interest in the qualifications and performance of the person who holds the position.”²⁴⁵ Accordingly, courts almost invariably classify police officers as public officials.²⁴⁶ Reflecting the self-government rationale in support of this categorization of police officers, Professor Rodney Smolla has observed that “[i]t is hard to conceive of speech more vital to a free and democratic society than speech concerning police officials, for the police are the embodiment of the government’s maintenance of social order.”²⁴⁷ Professor Smolla’s observation provides an accurate and telling indication of why state and lower-federal courts have adopted a more expansive understanding of the category of public officials and the First Amendment values served thereby. It does not, however, lessen Professor Elder’s observation, that this approach, understandable and warranted as it is, puts public official classification at odds with the rationale underlying the *Gertz* categorization framework distinguishing public figures from private individuals.²⁴⁸

B. Erosion of the Narrow Understanding of What Constitutes a Public Controversy

Chief Justice Warren articulated the reason for extending the actual malice constitutional safeguard to include speech related to public figures upon matters of public concern in his concurring opinion in *Curtis Publishing Co. v. Butts*:

To me, differentiation between “public figures” and “public officials” and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy. Increasingly in this country, the distinctions between governmental and private sectors are blurred. Since the depression of the 1930’s and World War II there has been a rapid fusion of economic and political power, a merging of science, industry, and government, and a high degree of interaction between the intellectual, governmental, and business worlds. Depression, war, international tensions, national and international markets, and the surging growth of science and technology have precipitated national and international problems that demand national and international solutions.

²⁴⁵ *Moriarty v. Lippe*, 294 A.2d 326, 330–31 (Conn. 1972); *see also* *Rotkiewicz v. Sadowsky*, 730 N.E.2d 282, 287 (Mass. 2000) (noting that “because of the broad powers vested in police officers and the great potential for abuse of those powers, as well as police officers’ high visibility within and impact on a community, that police officers, even patrol-level police officers such as the plaintiff, are ‘public officials’ for purposes of defamation”).

²⁴⁶ SMOLLA, *supra* note 2, § 2:104, at 2-176; David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 527 (1991) (noting that “police officers are almost invariably classed as public officials, no matter how low their rank”).

²⁴⁷ SMOLLA, *supra* note 2, § 2:104, at 2-176 to -177.

²⁴⁸ *See* ELDER, *supra* note 205, § 5:1, at 5-9 to -12.

While these trends and events have occasioned a consolidation of governmental power, power has also become much more organized in what we have commonly considered to be the private sector. In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.²⁴⁹

Chief Justice's Warren's portrait of the public figure, which provided the foundation for the *Gertz* Court's embrace and structuring of the public-figure category,²⁵⁰ is plainly the image of "a nominally private person [who] exercises as much, if not more, influence on the determination of public policy issues as do many public officials."²⁵¹ In that sense, the public figure doctrine "is heavily grounded in the public policy of facilitating free social discourse—those who voluntarily seek to influence events and issues may appropriately be forced to accept as part of the bargain a greater risk of defamation."²⁵²

In adopting such an approach, the Court honors the core self-governance purpose of the First Amendment.²⁵³ Protections for freedom of speech are naturally deduced from principles of self-government, which require the electorate to be able to gain sufficient knowledge to fulfill its responsibilities.²⁵⁴ Simply stated, "speech concerning public affairs . . . is the essence of self-government."²⁵⁵ In absence of the information derived from such speech, "citizens cannot play their assigned roles in choosing and instructing their representatives and in participating in the formation of public policy."²⁵⁶ Even where the role of the electorate is viewed as

²⁴⁹ *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 163–64 (1967) (Warren, C.J., concurring).

²⁵⁰ *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974); *see also* Schauer, *supra* note 138, at 914.

²⁵¹ Schauer, *supra* note 138, at 916.

²⁵² SMOLLA, *supra* note 2, § 2:35.50, at 2-64.35.

²⁵³ *See, e.g.,* Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 1024 (2011) (noting the "core self-governance goals of the First Amendment"); Lyriisa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 839 (stating that "[i]t is generally agreed that a core purpose of the First Amendment is to foster the ideal of democratic self-governance").

²⁵⁴ *See* ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 27 (1948); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255.

²⁵⁵ *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964).

²⁵⁶ Lidsky, *supra* note 253, at 810.

more responsive to than generative of public policy, political speech protections still serve a “checking value,” allowing for “checking the abuse of power by public officials” through voters’ use of an electoral “veto power to be employed when the decisions of officials pass certain bounds.”²⁵⁷ Whatever disagreements the Supreme Court has had over the exact applications of the First Amendment, there has been consensus that the constitutional guarantee protecting freedom of speech safeguards discussions of governmental action and inaction.²⁵⁸ With nominally private persons exercising considerable influence in guiding and directing public policy questions, it is readily apparent that such persons have entered the arena of public policy determination.²⁵⁹

However, Professor Frederick Schauer has properly observed that the Court’s archetype of the public figure as a political actor engaged in influencing and directing political affairs “is only a part, and perhaps only comparatively small part, of the domain of public figures. The universe of public figures includes many people whose involvement in or influence on public policy matters is either attenuated or nonexistent.”²⁶⁰ For example, the Supreme Court’s recognition of Butts as a public figure has given rise “to a substantial amount of case law according public figure status to sports figures with little or no specific, reasoned discussion of the rationale for such a designation.”²⁶¹ Professor Smolla does not make the mistake of failing to provide reasoned articulation in arguing for athletes as public figures. To the contrary, he argues for doing so in straightforward and cogent terms:

Professional athletes voluntarily enter the “arena,” quite literally the “sports arena,” and issues germane to their performance or fitness, including issues relating to mental and physical health, but also to their character and position in society as role models, justify treating professional athletes as public figures and also justifies a reasonably broad understanding of the range of issues concerning the professional athlete’s life that falls within the perimeter of that public figure status.²⁶²

While Professor Smolla’s defense of the view of athletes as public figures is a strong one, it is also significantly removed from the underlying rationale for imposing the same heightened constitutional protections to speech regarding public

²⁵⁷ Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. B. FOUND. RES. J. 521, 527, 542 (1977).

²⁵⁸ *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966); Margaret Tarkington, *A First Amendment Theory for Protecting Attorney Speech*, 45 U.C. DAVIS L. REV. 27, 60 (2011) (noting that “the Court carefully protects political speech, considering it at the ‘core’ of the First Amendment”).

²⁵⁹ See *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 163–64 (1967) (Warren, C.J., concurring).

²⁶⁰ Schauer, *supra* note 138, at 917.

²⁶¹ ELDER, *supra* note 205, § 5:20, at 5-161 (citation omitted).

²⁶² SMOLLA, *supra* note 213, § 6:40, at 6-361.

figures as public officials.²⁶³ Athletes are not thrusting themselves into issues of public policy seeking to impact the resolution thereof; rather, they are engaging in an occupation that attracts public attention. It is not necessary that the latest gossip about an athlete's injury be discussed for the citizenry to participate in democratic self-governance.

While weakening the citadel walls of the underlying justifications for the categorical structure devised by *Gertz*, state and lower-federal courts' embracing of an understanding of public controversy that extends beyond the political sphere is not errant. To the contrary, such an approach accurately reflects the broader non-self-governance constitutional purposes served by the speech and press protections of the First Amendment. As noted by Alexis de Tocqueville in discussing the importance of a free press in America, "[i]t is not political opinions only, but all the views of men which are influenced by freedom of the press. It modifies mores as well as laws."²⁶⁴ In accordance therewith, the U.S. Supreme Court has not limited the protections of freedom of speech to purely political speech.²⁶⁵ To the contrary, the Court has recognized that "guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government."²⁶⁶ Protected speech could also, for example, be related to economic, religious, or cultural matters²⁶⁷ because First Amendment protections embrace a "right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences."²⁶⁸ In fact, in recent years the non-political entertainment-related speech issues that have been before the Supreme Court have been so pronounced in terms of their "sheer volume, [that] . . . media entertainment speech seems to be subtly changing the cultural backdrop of the First Amendment, relegating political speech to a subordinate level within the general cultural awareness," though the actual importance of political speech is undiminished.²⁶⁹

In addition to its role in democratic self-governance, free speech is also critical for (1) ascertaining truth, (2) realizing individual self-fulfillment, (3) enabling participation from members of society in decision-making on non-

²⁶³ Compare *id.* (contending that it is justified to treat professional athletes as public figures), with Schauer, *supra* note 138, at 917 (arguing that, for the most part, athletes are not public figures because they have "little, if any, effect on questions of politics, public policy, or the organization or determination of societal affairs"); see also *Curtis Publ'g Co.*, 388 U.S. at 162–64 (Warren, C.J., concurring) (outlining the rationales for applying the same standard to public figures and public officials).

²⁶⁴ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 180 (J. P. Mayer ed., George Lawrence trans., 1969).

²⁶⁵ See *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967).

²⁶⁶ *Id.*

²⁶⁷ *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

²⁶⁸ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

²⁶⁹ Patrick M. Garry, *The First Amendment and Non-Political Speech: Exploring a Constitutional Model That Focuses on the Existence of Alternative Channels of Communication*, 72 MO. L. REV. 477, 478 (2007).

political societal questions, and (4) maintaining a balance between societal stability and change.²⁷⁰ First, addressing the role of free speech in the ascertainment of truth, Justice Oliver Wendell Holmes offered an indelible image of the marketplace of ideas in which purchase of truth is to be found through a Darwinian struggle.²⁷¹ Justice Holmes wrote,

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when 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. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.²⁷²

Freedom of speech in the marketplace of ideas creates a “proving ground,”²⁷³ in which a “constant competitive interplay of ideas moves society more quickly toward a truthful understanding of the world.”²⁷⁴

The other three primary rationales for safeguarding freedom of speech also serve an important role outside the sphere of public policy. The second rationale, safeguarding free speech for the purpose of realizing individual self-fulfillment,

²⁷⁰ Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 878–79 (1963).

²⁷¹ See generally JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* 89–90, 113–14 (2006) (addressing Holmes attachment to a Social Darwinist view of the political process but opposition to constitutionalizing such an approach in economic liberties cases).

²⁷² *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

²⁷³ David Horton, *Testation and Speech*, 101 *GEO. L.J.* 61, 91 (2012).

²⁷⁴ Marin R. Scordato & Paula A. Monopoli, *Free Speech Rationales After September 11th: The First Amendment in Post-World Trade Center America*, 13 *STAN. L. & POL’Y REV.* 185, 194 (2002).

provides an essential method of self-expression.²⁷⁵ As noted by Justice Thurgood Marshall, “[t]he First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression.”²⁷⁶ Under this approach, “truth of expression is irrelevant and secondary to the legal capability of [persons] to express [themselves]”²⁷⁷

Third, in terms of the role of free speech in societal decision making, free speech enables communication of one’s judgments and creation of a culture and community, whether that is in the area of arts and literature, the sciences, or any other area of knowledge or communal association.²⁷⁸ In this vein, free speech plays a vital role in “decisionmaking on all social values.”²⁷⁹

Finally, safeguarding free speech serves the purpose of balancing societal stability with change by providing a safety-valve release for those holding heterodox views.²⁸⁰ The safety-valve concept reflects a sense that freedom of speech takes the lid off the boiling pot, allowing steam to be released and avoiding more serious social unrest and violence that may follow from not having that release.²⁸¹ In addition, this balancing of stability with change through avoiding suppression of heterodoxy maintains societal vitality against the tendency toward stagnation and rigidity that in the absence of such freedom threatens to ossify a society.²⁸²

While political speech is at the core of the First Amendment,²⁸³ the protection of freedom of speech also serves other critical purposes as addressed above. Chief Justice Warren’s justification for the extension of the constitutional safeguards of *New York Times Co. v. Sullivan* to speech regarding public figures rested on the core self-governance purpose of the First Amendment. The extension of the actual malice standard to persons who are not engaged in influencing political questions but who are public figures with regard to other matters of public concern honors the broader purposes served by the First Amendment.²⁸⁴ This consistent application beyond the political realm constituted a necessary expansion in the understanding of what constitutes a public controversy. However, in embracing this broader understanding in state and lower-federal courts, the categorization structure created by *Gertz* has been further eroded. If public controversy is

²⁷⁵ See C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 993–94 (1978).

²⁷⁶ *Procunier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring).

²⁷⁷ Hilary Schronce Blackwood, *Regulating Student Cyberbullying*, 40 RUTGERS L. REC. 153, 175 (2012–2013).

²⁷⁸ Emerson, *supra* note 270, at 882–83.

²⁷⁹ Lee C. Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J. 438, 471 (1983).

²⁸⁰ Emerson, *supra* note 270, at 884–86.

²⁸¹ See Scordato & Monopoli, *supra* note 274, at 199.

²⁸² Emerson, *supra* note 270, at 884–86.

²⁸³ See Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 208.

²⁸⁴ See Schauer, *supra* note 138, at 931.

understood in terms of matters of public policy, it is much easier to understand whether a person has thrust herself into that arena. Where nonpolitical cultural, religious, sporting, and scientific matters, among others, can constitute a basis for a public controversy, it becomes exceedingly more difficult to discern when someone has thrust herself into that arena and thereby made herself a public figure because the multiplicity and variety thereof is extraordinary.

C. Erosion of the Lack of Media Access Rationale

The chasm between private and public persons' access to media and means for counteracting defamatory comments stood as one of the two central reasons the *Gertz* Court distinguished defamation plaintiffs into the categories of public and private persons and applied varying constitutional standards to these different types of plaintiffs.²⁸⁵ The *Gertz* Court reasoned,

[t]he first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.²⁸⁶

The change in access to channels of effective communication for an ordinary citizen from 1974 to 2014 has been extraordinary.²⁸⁷ While the enormity of the societal revolution that has occurred over the last four decades is difficult to fully comprehend, it can be gleaned that “the ability for self-help has spread to the masses.”²⁸⁸ Reflecting on the rapid advance of technologically-driven societal changes, Thomas Friedman observed that when he wrote *The World is Flat*, “Facebook didn’t exist for most people, ‘Twitter’ was still a sound, the ‘cloud’ was something in the sky, ‘3G’ was a parking space, ‘applications’ were what you sent

²⁸⁵ SMOLLA, *supra* note 2, § 2:13, at 2-30 (“The *Gertz* compromise was grounded in two rationales reflecting the Supreme Court’s perceptions about the differences between public and private figures. The first of these rationales is the ‘access to the media’ argument.”).

²⁸⁶ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).

²⁸⁷ See BRUCE A. SHUMAN, ISSUES FOR LIBRARIES AND INFORMATION SCIENCE IN THE INTERNET AGE, at x (2001) (asserting that the “rise of the Internet is one of the most astonishing developments of this or any other century, compared by some writers in importance to the capture of fire and to Gutenberg’s printing press”).

²⁸⁸ Jeff Kosseff, *Private or Public? Eliminating the Gertz Defamation Test*, 2011 U. ILL. J.L. TECH. & POL’Y 249, 266.

to college, and ‘Skype’ was a typo.”²⁸⁹ Friedman wrote *The World Is Flat* in 2005;²⁹⁰ *Gertz* was decided in 1974. In “the mid-1970s, the media landscape was much more sparsely populated than it is today and consumers had far fewer choices.”²⁹¹ In 1974, computers were still for governments, large corporations, and a few hobbyists.²⁹² The internet was an unknown domain reserved for high science and the military.²⁹³ Steve Jobs and Steve Wozniak would not develop their first mainstream computer, the Macintosh, for another ten years.²⁹⁴ Netscape would not offer the first non-techie Internet interface for another seventeen years.²⁹⁵ The first blog was twenty years away, and widespread blogging would not appear for twenty-five years.²⁹⁶

In 1974 channels of communication were essentially confined to local newspapers, commercial radio stations, the big-three television networks, and national newsmagazines.²⁹⁷ The limited number and narrowness of control of

²⁸⁹ THOMAS L. FRIEDMAN & MICHAEL MANDELBAUM, *THAT USED TO BE US: HOW AMERICA FELL BEHIND IN THE WORLD IT INVENTED AND HOW WE CAN COME BACK* 59 (2011).

²⁹⁰ THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (2005).

²⁹¹ DAVID CROTEAU & WILLIAM HOYNES, *THE BUSINESS OF MEDIA: CORPORATE MEDIA AND THE PUBLIC INTEREST* 111 (2d ed. 2006).

²⁹² See JANNA QUITNEY ANDERSON, *IMAGINING THE INTERNET: PERSONALITIES, PREDICTIONS, PERSPECTIVES* 39–42 (2005) (noting that computers were extremely expensive, most were so large they could fill an entire room, and many organizations “shared” time on a single computer).

²⁹³ See MARY LOU ROBERTS & DEBRA ZAHAY, *INTERNET MARKETING: INTEGRATING ONLINE & OFFLINE STRATEGIES* 3–4 (3d ed. 2013).

²⁹⁴ ROBERT J. CARBAUGH, *CONTEMPORARY ECONOMICS: AN APPLICATIONS APPROACH* 103 (7th ed. 2014).

²⁹⁵ Pamela Samuelson & Hal R. Varian, *The “New Economy” and Information Technology Policy*, in *AMERICAN ECONOMIC POLICY IN THE 1990S* 361, 365–66 (Jeffrey A. Frankel & Peter R. Orszag eds., 2002).

²⁹⁶ ROB BROWN, *PUBLIC RELATIONS AND THE SOCIAL WEB: HOW TO USE SOCIAL MEDIA AND WEB 2.0 IN COMMUNICATIONS* 26 (2009). As Brown explains,

[t]he first bloggers were . . . effectively online diarists, who would keep a running account of their lives. These blogs began well before the term was coined and the authors referred to themselves usually as diarists or online journalists. Perhaps the first of these and therefore the original blogger was Justin Hall, who began blogging in 1994.

Id. Public participation in blogging started to significantly increase in 1999 with the appearance of Blogger, which was purchased by Google four years later. *Id.*

²⁹⁷ See, e.g., RICHARD CAMPBELL ET AL., *MEDIA & CULTURE: AN INTRODUCTION TO MASS COMMUNICATION G-8* (8th ed. 2013) (describing the mid-1950s through the late-1970s as the network era for the dominance of the big three television networks: ABC, CBS, and NBC); Kevin Drum, *A Blogger Says: Save The MSM!*, *Mother Jones*, March/April 2007, available at <http://www.motherjones.com/politics/2007/03/blogger-says>

media outlets “effectively thwart[ed] any popular participation in the press and commercial radio and television.”²⁹⁸ Things have changed dramatically. There has been a “wave of media democratization . . . with the popularization of the Internet, especially Web 2.0. . . . In contrast to [earlier] participation *through* the Internet . . . , [more recent] participation *in* the Internet focuses on the opportunities provided to non-media professionals to []produce media content themselves and to []organize the structures that allow for this media production.”²⁹⁹ While Web 2.0, which roughly dates to the year 2000, “is a slippery character to pin down,” the core thereof is technological services including “blogs, wikis, podcasts, Really Simple Syndication (RSS) feeds etc., which facilitate a more socially connected Web where everyone is able to add to and edit the information space.”³⁰⁰

From young to old, rich to poor, this technological revolution has been embraced.³⁰¹ As of December 2013, the Pew Research Internet Project found that 73% of adults use social media, 71% use Facebook, 22% use LinkedIn, 21% use Pinterest, 18% use Twitter, and 17% use Instagram.³⁰² People use social media as a “key source [of] news and information,”³⁰³ and an important forum for debate and discussion of public issues.³⁰⁴ While social media is ascending, traditional media is in sharp decline.³⁰⁵ In 1964, the year *New York Times Co. v. Sullivan* was decided,

-save-msm, archived at <http://perma.cc/E343-H5JY> (stating that in the early- to mid-1970s “most people still had pretty limited access to news . . . one or two newspapers, three TV networks, and a few national newsmagazines”).

²⁹⁸ Nico Carpentier et al., *Waves of Media Democratization: A Brief History of Contemporary Participatory Practices in the Media Sphere*, 19 CONVERGENCE: INT’L J. RES. INTO NEW MEDIA TECHS. 287, 291 (2013).

²⁹⁹ *Id.* at 292; see also David Lat & Zach Shemtob, *Public Figurehood in the Digital Age*, 9 J. TELECOMM. & HIGH TECH. L. 403, 410 (2011) (noting that in the mid-1970s “false charges could only be countered through access to a printing press, radio station, or television network—modes of communication that ordinary citizens generally could not tap into”).

³⁰⁰ PAUL ANDERSON, *WEB 2.0 AND BEYOND: PRINCIPLES AND TECHNOLOGIES* 1 (2012).

³⁰¹ See *Social Networking Fact Sheet*, PEW RESEARCH INTERNET PROJECT, <http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/>, archived at <http://perma.cc/M2R-ENCX> (last visited Sept. 27, 2014). The study found that 65% of persons fifty to sixty-four years of age used social media—that number is even higher for younger age groups—and social media usage only had minor fluctuation by household income level with slightly higher use at the lowest income level. *Id.*

³⁰² See MAEVE DUGGAN & AARON SMITH, PEW RESEARCH CTR., *SOCIAL MEDIA UPDATE 2013*, at 1 (2013), available at http://www.pewinternet.org/files/2013/12/PIP_Social-Networking-2013.pdf, archived at <http://perma.cc/7KFE-WVHK>.

³⁰³ Alan B. Albarran, *Preface* to *THE SOCIAL MEDIA INDUSTRIES*, at xix (Alan B. Albarran ed., 2013).

³⁰⁴ Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 2003–04 (2011).

³⁰⁵ *THE CONCISE PRINCETON ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY* 58 (Michael Kazin et al. eds., 2011).

81% of Americans read a daily print newspaper.³⁰⁶ As of 2012, only 23% of Americans did so.³⁰⁷ The Internet has now become the main source for news for those under the age of fifty and is only second behind television for all Americans, well ahead of newspaper and radio usage.³⁰⁸ Seeking to survive the onslaught, traditional media outlets are adapting.³⁰⁹ Newspapers and magazines have opened news stories to comments from the public³¹⁰ and created forums for citizen journalism.³¹¹ With editorial controls loosening, newspapers and magazines have also adopted more accommodating approaches to corrections, which have become a more effective mechanism for obtaining self-help.³¹² Some websites have even created formal right-of-reply features allowing aggrieved parties to set the record straight.³¹³

³⁰⁶ HERMANN SIMON, *BEAT THE CRISIS: 33 QUICK SOLUTIONS FOR YOUR COMPANY* 13 (2010).

³⁰⁷ *Number of Americans Who Read Print Newspapers Continues Decline*, PEW RESEARCH CTR. (Oct. 11, 2012), <http://www.pewresearch.org/daily-number/number-of-americans-who-read-print-newspapers-continues-decline/>, archived at <http://perma.cc/5DAZ-AB97>.

³⁰⁸ PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, *AMID CRITICISM, SUPPORT FOR MEDIA'S 'WATCHDOG' ROLE STANDS OUT* 10–11 (2013), available at <http://www.people-press.org/files/legacy-pdf/8-8-2013%20Media%20Attitudes%20Release.pdf>, archived at <http://perma.cc/TJ4W-LSQF>.

³⁰⁹ See Dina A. Ibrahim, *Broadcasting and Cable Networks*, in 1 *ENCYCLOPEDIA OF SOCIAL NETWORKS* 89, 90–92 (George A. Barnett ed., 2011).

³¹⁰ See Paul Grabowicz, *The Transition to Digital Journalism*, KDMCBERKELEY (July 23, 2014), <http://multimedia.journalism.berkeley.edu/tutorials/digital-transform/comments-on-news-stories/>, archived at <http://perma.cc/5VPB-C9CW> (noting that “[o]ne of the most basic ways that a news organization can engage people is to provide a way for them to comment on and discuss news stories on the website and postings to staff weblogs”).

³¹¹ See, e.g., *Citizen Journalism, Mediashift*, PBS, <http://www.pbs.org/mediashift/social-media/citizen-journalism/>, archived at <http://perma.cc/57QG-ZQL7> (last visited July 10, 2014) (providing internet links for individuals to act as citizen journalists regarding current national and international topics).

³¹² See Kosseff, *supra* note 288, at 266–67.

³¹³ See Jamie Lund, *Managing Your Online Identity*, *J. INTERNET L.*, May 2012, at 3, 5 (“A good example of this type of ‘right of reply’ is found on RateMyProfessors.com. The content from RateMyProfessors.com is generated by students commenting on the performance of their professors based on various criteria, including easiness, clarity, and helpfulness. The purpose of the site is to allow students to vent or to make endorsements to would-be students about various professors. The site is consequently a receptacle for both insults and praise. To promote an open dialogue, the site allows professors to rebut any particular statement posted about them, with those rebuttals then published in conjunction with the original student comments. In this way, RateMyProfessors.com allows for correction of misinformation with minimum administrative oversight. Right-of-reply websites are models for other sites in that they have managed to allow for uninhibited freedom of expression while also providing a meaningful means of correcting false statements without requiring costly administrative expenditures by the site owners.” (citations omitted)).

The cumulative effect of the advances in technology and social media is extraordinary and would have been unthinkable to the members of the Supreme Court in 1974. In 2014, “ordinary people can now publish their thoughts on Twitter . . . attack those in power on Blogger . . . and report on events excluded from other mainstream media by sending their own news stories and photos to citizen journalism sites like Demotix.”³¹⁴ Through their online engagement, ordinary people have “the opportunity to share their experiences (good and bad), air their views and opinions, and vent their frustrations.”³¹⁵ Not only can ordinary people communicate, but they are also able to do so with a vast potential audience³¹⁶ and at an extremely low cost.³¹⁷ Professors Andrea Press and Bruce Williams have observed that “new media . . . challenges elites . . . by providing communication channels for ordinary citizens to directly produce and access information about political, social, and economic life.”³¹⁸ Technological changes

³¹⁴ KEN BROWNE, AN INTRODUCTION TO SOCIOLOGY 324 (4th ed. 2011).

³¹⁵ TERRY NICKLIN, CAMBRIDGE MARKETING HANDBOOK: STAKEHOLDER 58 (2013).

³¹⁶ See BROWNE, *supra* note 314, at 324; Michelle Sherman, *The Anatomy of a Trial with Social Media and the Internet*, J. INTERNET L., May 2011, at 1, 1 (stating that “[s]ocial media is connection. It is communication, a rather unlimited form of it with people speaking to a large audience.”); Aaron Perzanowski, Comment, *Relative Access to Corrective Speech: A New Test for Requiring Actual Malice*, 94 CAL. L. REV. 833, 835 (2006) (noting that “[t]he average citizen—previously confined to the one-to-one methods of distributing information—enjoys a potential global audience on the internet”).

³¹⁷ See Geoffrey W.G. Leane, *Deliberative Democracy and the Internet: New Possibilities for Legitimising Law Through Public Discourse?*, 23 CAN. J.L. & JURIS. 373, 379–80 (2010); Stephen C. Jacques, Comment, *Reno v. ACLU: Insulating the Internet, the First Amendment, and the Marketplace of Ideas*, 46 AM. U. L. REV. 1945, 1989 (1997) (observing that “[t]he Internet . . . breaks down . . . barriers, offering an egalitarian form of communication where the cost is little or nothing and an opinion is instantaneously distributed worldwide”). In contrast, media of the *Gertz* era required enormous capital investment; for example, printing and distributing newspapers required substantial expenditures including printing presses, delivery trucks and delivery persons, reporters, editors, assistants, etc. See SHANNON E. MARTIN & KATHLEEN A. HANSEN, *NEWSPAPERS OF RECORD IN A DIGITAL AGE: FROM HOT TYPE TO HOT LINK* 44 (1998).

³¹⁸ ANDREA L. PRESS & BRUCE A. WILLIAMS, *THE NEW MEDIA ENVIRONMENT: AN INTRODUCTION* 20 (2010); see also Dan Gillmor, *Bloggers Breaking Ground in Communication*, EJOURNAL USA GLOBAL ISSUES, March 2006, at 24, 24 (“Software technology that allows writers to easily post their own essays on the World Wide Web has challenged the traditional role of media organizations as gatekeepers to a mass audience. At a steadily increasing pace over the last several years, ordinary citizens have made themselves into reporters and commentators on the social scene. They have made a remarkably rapid ascent onto their own platform in the realm of social and political debate.”). Conservative political commentator Hugh Hewitt has argued that “[t]he power of elites to determine what [is] news via a tightly controlled dissemination system [has been] shattered. The ability and authority to distribute text are now truly democratized.” HUGH HEWITT, *BLOG: UNDERSTANDING THE INFORMATION REFORMATION THAT’S CHANGING YOUR WORLD* 70–71 (2005); cf. David Gauntlett, *Creativity and Digital Innovation, in DIGITAL WORLD: CONNECTIVITY, CREATIVITY AND RIGHTS* 77, 80 (Gillian Youngs ed.,

have given rise to a democratization of the means of media production and the manner in which information is obtained, and this has greatly empowered the ordinary person.³¹⁹ New-media bloggers are in fact now holding the traditional institutional news media accountable for errors.³²⁰

This new reality has not gone entirely unnoticed by courts. For example, the Delaware Supreme Court observed that ordinary persons now have available

a very powerful form of extrajudicial relief. The internet provides a means of communication where a person wronged by statements of an anonymous poster can respond instantly, can respond to the allegedly defamatory statements on the same site or blog, and thus, can, almost contemporaneously, respond to the same audience that initially read the allegedly defamatory statements. The [person] can thereby easily correct any misstatements or falsehoods, respond to character attacks, and generally set the record straight. This unique feature of internet communications allows a potential plaintiff ready access to mitigate the harm, if any, he has suffered to his reputation as a result of an anonymous defendant's allegedly defamatory statements made on an internet blog or in a chat room.³²¹

Similarly, the Georgia Supreme Court, in adopting a broad interpretation for statutory protection for online speech, observed a policy of encouraging "defamation victims to seek self-help, their first remedy, by 'using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation.'"³²² In doing so, the Georgia Supreme Court indicated that it was "strik[ing] a balance in favor of 'uninhibited, robust, and wide-open' debate in an age of communications when 'anyone, anywhere in the world, with access to the Internet' can address a worldwide audience of readers in cyberspace."³²³

2013) (addressing the shift in perception of media as wholly separate and above the masses with the empowerment of the ordinary person to reach mass audiences through technology).

³¹⁹ DAVID TAYLOR & DAVID MILES, *FUSION: THE NEW WAY OF MARKETING* 11 (2011); cf. CARNE ROSS, *THE LEADERLESS REVOLUTION: HOW ORDINARY PEOPLE WILL TAKE POWER AND CHANGE POLITICS IN THE TWENTY-FIRST CENTURY*, at xvii (2011) (declaring that "in an increasingly interconnected system, such as the world emerging in the twenty-first century, the action of one individual or a small group can affect the whole system very rapidly").

³²⁰ S. Robert Lichter, *The Media*, in *UNDERSTANDING AMERICA: THE ANATOMY OF AN EXCEPTIONAL NATION* 181, 215 (Peter H. Schuck & James Q. Wilson eds., 2008).

³²¹ *Doe v. Cahill*, 884 A.2d 451, 464 (Del. 2005).

³²² *Mathis v. Cannon*, 573 S.E.2d 376, 385 (Ga. 2002) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974)).

³²³ *Id.* at 386 (citations omitted).

Congress has similarly looked to self-help as an appropriate remedy. In enacting the Communications Decency Act of 1996 (CDA), Congress found that “[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”³²⁴ Congress also found “[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.”³²⁵ Among other objectives of the CDA, Congress sought “to promote the continued development of the Internet and other interactive computer services and other interactive media [and] to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”³²⁶ To serve these ends, Congress passed a measure ensuring that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”³²⁷ As a practical consequence, this leaves available the remedy of online self-help, a remedy that Congress has found appropriate.³²⁸

Extra-legal solutions are also available through the emergence of private companies offering online reputation management tools. For example, Reputation.com, also known as Reputation Defender, has embraced facilitating control for individuals and businesses over their online appearance as its corporate mission.³²⁹ To achieve this end, such entities can monitor online commentary, boost positive comments in search engine ranking returns while lowering negative comments, and scrub negative comments by having them removed.³³⁰ This approach offers certain advantages over defamation suits including eliminating defamatory statements and avoiding drawing additional attention to the defamatory material.³³¹

³²⁴ 47 U.S.C. § 230(a)(3) (2012).

³²⁵ *Id.* § 230(a)(4).

³²⁶ *Id.* § 230(b)(1), (2).

³²⁷ *Id.* § 230(c)(1).

³²⁸ See Angelotti, *supra* note 207, at 485; Allison E. Horton, Note, *Beyond Control?: The Rise and Fall of Defamation Regulation on the Internet*, 43 VAL. U. L. REV. 1265, 1305–06 (2009).

³²⁹ Search Results, REPUTATION.COM, <http://www.reputation.com/reputationdefender>, archived at <http://perma.cc/D4W8-L5NG> (last visited Aug. 14, 2014).

³³⁰ See Lyrrisa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn from John Doe?*, 50 B.C. L. REV. 1373, 1390 (2009). See generally Angelotti, *supra* note 207, at 495 (describing some of the means by which such companies accomplish their objectives on behalf of their clients).

³³¹ See Lidsky, *supra* note 330, at 1390. Professor Jacqueline Lipton also notes,

These services provide a number of advantages over legal solutions to online abuses, including the fact that several of them now have many years of experience with reputation management and have established solid working relationships with websites that host harmful communications. The use of private commercial services does not raise the specter of a First Amendment

Though the Supreme Court has not addressed the availability of technological tools in the context of defamation, the availability of self-help technology services, as opposed to legally imposed restrictions on speech, has proven relevant to the Court's analysis of other free speech issues. For example, addressing decency-related restrictions, the Court expressly indicated "the mere possibility that user-based Internet screening software would 'soon be widely available' was relevant to our rejection of an overbroad restriction of indecent cyberspeech."³³² The litigation strategy from those aiming to invalidate restrictions imposed by the CDA was squarely focused on the availability of self-help remedies provided by technological services and, thus, on the reduced need for governmentally imposed speech restrictions.³³³ As Professor Ann Bartow observed, that was precisely where the Justices turned in analyzing the constitutionality of the decency restrictions imposed by Congress, noting

a remedy was available for parents who did not want their children exposed to pornography or "indecent" on the Internet. They could purchase filtering software (a.k.a. "censorware") and subscribe to related content filtering services to keep undesired words and images away from their computers. In this way they could accomplish with their private purchasing power what the government would not do for them in terms of providing tools to regulate the information that was accessible to their children.³³⁴

Addressing a free speech issue, though not defamation, nearly two decades ago when internet usage was at a stage of comparative infancy, the U.S. Supreme Court observed that "[t]hrough the use of chat rooms, any person with a phone line

challenge. . . . [M]any laws directed at curtailing online speech may raise First Amendment concerns and may be open to constitutional challenge. Reputation management services also avoid many of the practical problems associated with litigation including jurisdictional challenges and difficulties identifying a defendant in the first place. A commercial service does not need to identify or locate a potential defendant in order to engage in astroturfing or search engine optimization. Resort to a reputation management service also avoids drawing public attention to the damaging content. Harmful content can simply be unobtrusively de-prioritized in search engine results.

Jacqueline D. Lipton, *Combating Cyber-Victimization*, 26 BERKELEY TECH. L.J. 1103, 1147 (2011) (citations omitted).

³³² *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 814 (2000) (quoting *Reno v. ACLU*, 521 U.S. 844, 876–77 (1997)).

³³³ See generally Tom W. Bell, *Pornography, Privacy, and Digital Self Help*, 19 J. MARSHALL J. COMPUTER & INFO. L. 133, 138–42 (2000) (describing how self-help remedies have made certain legislative restrictions on speech that is indecent or harmful to minors unnecessary and unconstitutional).

³³⁴ Ann Bartow, *Internet Defamation as Profit Center: The Monetization of Online Harassment*, 32 HARV. J.L. & GENDER 383, 422 (2009) (citations omitted).

can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.”³³⁵ The empowerment of ordinary citizens has grown exponentially in the last two decades, fundamentally undermining the *Gertz* notion that private persons do not have meaningful access to channels of communication for redressing attacks on their reputations.

D. Erosion of the Voluntariness Rationale

While the lack of access to channels of communication in 1974 influenced the Supreme Court’s reasoning in distinguishing public and private persons, the heart of the *Gertz* Court’s division of limited-purpose public figures from private individuals was voluntariness.³³⁶ The *Gertz* Court envisioned public figures as persons “thrust[ing] themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved” and in doing so “assum[ing] roles of especial prominence in the affairs of society.”³³⁷ Such a person “voluntarily injects himself . . . into a particular public controversy.”³³⁸ The concept of an involuntary public figure stands in sharp contradistinction with “[w]ords and phrases such as ‘thrust’ . . . and ‘in order to influence the resolution of the issues.’”³³⁹

However, “[w]hat is and is not voluntary is by no means self-evident.”³⁴⁰ And what is declared by courts to be voluntary looks increasingly less limited to persons thrusting themselves into matters of public controversies in order to influence the resolution thereof. Professor Smolla’s explanation of the application of public figure status to athletes is revealing on this point:

Professional athletes voluntarily enter the “arena,” quite literally the “sports arena,” and issues germane to their performance or fitness, including issues relating to mental and physical health, but also to their character and position in society as role models, justify treating professional athletes as public figures and also justifies a reasonably broad understanding of the range of issues concerning the professional athlete’s life that falls within the perimeter of that public figure status.³⁴¹

³³⁵ *Reno*, 521 U.S. at 870.

³³⁶ Hopkins, *supra* note 217, at 19 (noting that “voluntariness seemed to be the key element in determining whether a libel plaintiff is a public figure”). Questions have been raised, however, about the soundness of the voluntariness rationale. *See, e.g.*, Anderson, *supra* note 246, at 527–30 (listing a number of reasons why public figures may not have voluntarily thrust themselves into the public eye, thereby undermining the voluntariness rationale).

³³⁷ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

³³⁸ *Id.* at 351.

³³⁹ SMOLLA, *supra* note 2, § 2:33, at 2-64.12 (quoting *Gertz*, 418 U.S. at 345).

³⁴⁰ *Schiavone Constr. Co. v. Time, Inc.*, 619 F. Supp. 684, 703 (D.N.J. 1985).

³⁴¹ SMOLLA, *supra* note 213, § 6:40, at 6-361.

Professional athletes have entered an arena that attracts considerable public attention, but professional athletes have not “thrust” themselves to “the forefront of particular public controversies in order to influence the resolution of the issues involved.”³⁴² Instead, the voluntariness aspect derives from entering into a profession that “command[s] the attention of sports fans.”³⁴³ With this transition, even the voice shifts in a number of judicial opinions from active to passive. For example, in determining whether a plaintiff, a professional football player, was a public figure, the Third Circuit Court of Appeals concluded, “Chuy *had been thrust* into public prominence.”³⁴⁴

The concept even extends to individuals who scrupulously endeavor to maintain their anonymity and privacy and to avoid the public sphere. While noting that the Mafioso figure in the case before it “yearns for [the] shadow,” the Fifth Circuit Court of Appeals, nevertheless, found him to be a public figure because, by being a Mafioso, he “voluntarily engaged in a course that was bound to invite attention and comment.”³⁴⁵ The Third Circuit Court of Appeals embraced the same understanding, concluding that “[w]hen an individual undertakes a course of conduct that invites attention, even though such attention is neither sought nor desired, he may be deemed a public figure.”³⁴⁶ In other words, “[v]oluntariness,” for purposes of public figure status, could be involuntary.³⁴⁷ The underlying analysis of this less demanding form of voluntariness emphasizes “‘run[ning] the risks’ and ‘rais[ing] the chances’ of becoming a news item.”³⁴⁸ Pursuant to such an approach, as noted by the Third Circuit Court of Appeals, “courts have classified some people as limited purpose public figures because of their status, position or associations.”³⁴⁹ Such an approach is readily susceptible to the criticism that “[t]he premise that public figures have voluntarily accepted the risk of defamation, or that it goes with the territory, is nothing more than a handy fiction.”³⁵⁰

Changes in technology and media make utilizing this form of analysis, which lowers the bar for voluntariness, especially problematic. Professor Gerald Ashdown has observed,

[i]n our highly mobile, visible, and interactive society, the risk of attracting the attention of the press is as apparent as it is unpredictable.

³⁴² *Gertz*, 418 U.S. at 345.

³⁴³ *Chuy v. Phila. Eagles Football Club*, 595 F.2d 1265, 1280 (3d Cir. 1979).

³⁴⁴ *Id.* (emphasis added).

³⁴⁵ *Rosanova v. Playboy Enters.*, 580 F.2d 859, 861 (5th Cir. 1978) (quoting *Rosanova v. Playboy Enters.*, 411 F. Supp. 440, 445 (S.D. Ga. 1976)) (internal quotation marks omitted).

³⁴⁶ *McDowell v. Paiewonsky*, 769 F.2d 942, 949 (3d Cir. 1985).

³⁴⁷ *Hopkins*, *supra* note 217, at 24.

³⁴⁸ *King*, *supra* note 6, at 692 (alterations in original) (quoting *Clyburn v. News World Commc'ns, Inc.*, 903 F.2d 29, 33 (D.C. Cir. 1990)).

³⁴⁹ *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1083 (3d Cir. 1985).

³⁵⁰ *King*, *supra* note 6, at 698.

Becoming involved in any number of events, whether voluntarily or involuntarily, e.g., from an accident, natural disaster to a winning lottery ticket (i.e., good luck or bad), makes us vulnerable to media exposure.³⁵¹

Accordingly, voluntariness is no longer confined to individuals who thrust themselves into the vortex of a public controversy to try to influence the resolution of the matter in controversy.³⁵² Instead voluntariness can be satisfied by a less

³⁵¹ Gerald G. Ashdown, *Journalism Police*, 89 MARQ. L. REV. 739, 757 (2006).

³⁵² See, e.g., *McDowell v. Paiewonsky*, 769 F.2d 942, 949 (3d Cir. 1985); *Marcone*, 754 F.2d at 1083; *Chuy v. Phila. Eagles Football Club*, 595 F.2d 1265, 1280 (3d Cir. 1979); *Rosanova v. Playboy Enters.*, 580 F.2d 859, 861 (5th Cir. 1978); see also, e.g., *Lohrenz v. Donnelly*, 350 F.3d 1272, 1274 (D.C. Cir. 2003) (“Because Lohrenz’s evidence shows that she chose the F-14 combat jet while well aware of the public controversy over women in combat roles, her challenge to the ruling that she was a voluntary limited-purpose public figure once the Navy assigned her to the F-14 combat aircraft rings hollow: she chose combat training in the F-14 and when, as a result of that choice, she became one of the first two women combat pilots, a central role in the public controversy came with the territory. Having assumed the risk when she chose combat jets that she would in fact receive a combat assignment, Lt. Lohrenz attained a position of special prominence in the controversy when she ‘suited up’ as an F-14 combat pilot.”); *Clyburn v. News World Commc’ns, Inc.*, 903 F.2d 29, 33 (D.C. Cir. 1990) (“Clyburn’s acts *before* any controversy arose put him at its center. His consulting firm had numerous contracts with the District government, he had many social contacts with administration officials, and Medina, at least as one may judge from attendance at her funeral, also enjoyed such ties. Clyburn also spent the night of Medina’s collapse in her company. 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. Clyburn engaged in conduct that he knew markedly raised the chances that he would become embroiled in a public controversy. This conduct, together with his false statements at the controversy’s outset, disable him from claiming the protections of a purely ‘private’ person.”); *Dombey v. Phoenix Newspapers, Inc.*, 724 P.2d 562, 570–71 (Ariz. 1986) (“Dombey sought, received, accepted and struggled to keep appointments as the designated insurance agent of record for a large county and administrator of deferred compensation programs for its employees. While he was not employed by and received no direct benefits from the public body, he did receive significant and valuable benefits because of his position. He did more than compile and transmit research results or publish arcana in obscure learned journals; he made recommendations resulting in substantial expenditures from the public fisc for health and life insurance programs and of private funds obtained by payroll deductions from public employees for the deferred compensation program. By assuming the position that he held, Dombey invited public scrutiny and should have expected that the manner in which he performed his duties would be a legitimate matter of public concern, exposing him to public and media attention. This is not to say that every provider of goods and services to the government becomes a public figure. We believe that no bright line can be drawn. A person who sells legal pads to the judicial department may legitimately expect to retain almost complete anonymity. Those responsible for providing rockets for the space program may not legitimately enjoy the same expectations. Dombey is at neither pole, but we believe that by assuming the positions of agent of record and administrator for the deferred compensation plans, he

demanding showing that plaintiffs willingly engaged in activity that foreseeably put them at risk of public attention. Part of the pressure resulting in lowering the bar of what constitutes voluntariness arises from courts avoiding the involuntary public figure category.³⁵³ Instead of developing the involuntary public figure category, courts have repeatedly stretched their understanding of what constitutes voluntariness to such an extent that they create what Professor Joseph King has termed “stealth involuntary public figure[s].”³⁵⁴

E. Devolving of the Private Individual

First in his plurality opinion in *Rosenbloom* and subsequently in his dissenting opinion in *Gertz*, Justice Brennan observed that “[v]oluntarily or not, we are all ‘public’ men to some degree.”³⁵⁵ Justice Brennan did not find agreement from a sufficient number of his colleagues to form a majority around this conclusion. David Lat, founder of the website Above the Law, and Professor Zach Shemtob have argued that “Justice Brennan’s words ring even more true in the digital age.”³⁵⁶

Private individuals are certainly less private today than they were in 1974. And for that, as Cassius proclaims to Brutus in William Shakespeare’s *Julius Caesar*, “[t]he fault, dear Brutus, is not in our stars. But in ourselves.”³⁵⁷ Judge Alex Kozinski has raised a steady drumbeat for the proposition that the ordinary person’s love affair with technology is killing privacy.³⁵⁸

It started with the supermarket loyalty programs. They seemed innocuous enough—you just scribble down your name, number and address in exchange for a plastic card and a discount on Oreos. . . .

. . . Letting stores track our purchases may not appear to be permitting an intensely personal revelation but, as the saying goes, you

surrendered any legitimate expectation of anonymity with regard to the manner in which he performed in his positions, his relationship with executives of the governmental agencies and the other matters with which the articles were concerned. . . . Whatever requirement there might be to ‘thrust’ oneself into a public controversy was satisfied by his voluntary participation in activity calculated to lead to public scrutiny.” (citations omitted).

³⁵³ See King, *supra* note 6, at 688–93.

³⁵⁴ *Id.* at 688.

³⁵⁵ *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 48 (1971); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 364 (1974).

³⁵⁶ Lat & Shemtob, *supra* note 299, at 413.

³⁵⁷ WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 1, sc. 2, ll. 141–42, at 172 (David Daniell ed., 1998).

³⁵⁸ See, e.g., Alex Kozinski & Eric S. Nguyen, *Has Technology Killed the Fourth Amendment?*, 2011–2012 CATO SUP. CT. REV. 15, 15; Alex Kozinski & Stephanie Grace, *Pulling Plug on Privacy: How Technology Helped Make the 4th Amendment Obsolete*, THE DAILY (June 22, 2011), available at <http://www.law.utah.edu/wp-content/uploads/Week Twelve-Pulling.pdf>, archived at <http://perma.cc/4NKT-GDK4>.

are what you eat, and we inevitably reveal more than we thought. Have diapers in your cart? You probably have a baby. Tofu? Probably a vegetarian. A case of Muscatel a week? An alcoholic (with poor taste, at that). The cards also track the “where” and “when” of our shopping expeditions. Making a late-night run to a convenience store near your ex-girlfriend’s house? Buying posters and markers the day before a political rally? If you swiped your card, all that information is now public. . . .

. . . These cards were just the beginning. Fast Track passes quickly followed—with their lure of a shorter commute for a little privacy. Then came eBay and Amazon, which save us from retyping our billing and shipping information, if only we create an account. Before long, convenience became paramount, and electronic tracking became the norm. Nowadays, Google not only collects data on what websites we visit but uses its satellites to take pictures of our homes.³⁵⁹

Additionally, much of what was formerly squirreled away in a government records office is now readily available online.³⁶⁰ For instance, a nosy neighbor can discover how much one paid for their home in only a moment on Zillow.³⁶¹ A little more work and arrest records, professional licenses, property liens, trademarks, patents, driver’s license information, and bankruptcy history, among other things, are all readily available.³⁶²

Social media reduces the private sphere even further. In 2008, the editors of Webster’s New World Dictionary chose “overshare,” which they defined as “to divulge excessive personal information,” as their word of the year.³⁶³ There exists a common and pronounced tendency to overshare on social media.³⁶⁴ Professor Bruce Boyden has observed that “[t]oo many people, confronted with the ability to share information with others via social networks, readily avail themselves of that opportunity, causing personal information to be shared from Facebook or Twitter

³⁵⁹ Kozinski & Grace, *supra* note 358, at 15.

³⁶⁰ HERMAN T. TAVANI, *ETHICS AND TECHNOLOGY: ETHICAL ISSUES IN AN AGE OF INFORMATION AND COMMUNICATION TECHNOLOGY* 138 (2004).

³⁶¹ David Carlson, *How Zillow Fueled My Real Estate Obsession*, *YOUNG ADULT MONEY* (Oct. 15, 2012), <http://www.youngadultmoney.com/2012/10/15/how-zillow-fueled-my-real-estate-obsession/>, archived at <http://perma.cc/AY66-P62A> (noting that “[m]uch to the shock of some people that the price they paid for their home is on public record, Zillow aggregates this public record data and makes it easy to see what a home was sold for in the past.”).

³⁶² *How to Find Free Public Records Online*, ABOUT.COM, <http://websearch.about.com/od/governmentpubliclegal/>, archived at <http://perma.cc/42SS-T44U> (last visited Aug. 15, 2014).

³⁶³ *Word of the Year 2008: Overshare*, WEBSTER’S NEW WORLD WORD OF THE YEAR (Dec. 1, 2008, 6:31 AM), <http://wordoftheyear.wordpress.com/2008/12/01/2008-word-of-the-year-overshare/>, archived at <http://perma.cc/GDQ7-NY8P>.

³⁶⁴ See Jennifer Rowsell, *My Life on Facebook: Assessing the Art of Online Social Networking*, in *ASSESSING NEW LITERACIES: PERSPECTIVES FROM THE CLASSROOM* 95, 97–98 (Anne Burke & Roberta F. Hammett eds., 2009).

accounts with little care as to its relevance or privacy.”³⁶⁵ Through social media, ordinary individuals increasingly document almost every aspect of their lives.³⁶⁶ Neuroscience analysis helps to explain some of this oversharing, suggesting that disclosure itself, especially personal self-disclosure, functions as an intrinsic reward, stimulating regions of the brain associated therewith.³⁶⁷ Communications and media studies scholars also have observed that computer-mediated communication eliminates social and biological cues that would signal restraint and instead make the Internet not “feel public to its users” thereby fostering less restricted communication.³⁶⁸ Seeking to restrain this epidemic of oversharing, a cottage industry of writers caution against oversharing³⁶⁹ and offer advice on where to draw the line.³⁷⁰

Nevertheless, oversharing has arguably become a new socially accepted norm in which the non-over-sharer is the outlier.³⁷¹ Facebook CEO Mark Zuckerberg has argued that open sharing of information, not preservation of traditional privacy, is the new social norm.³⁷² It is difficult to argue with the conclusion that there has been a radical redefinition of social norms at least insofar as people “are freely giving up some of their privacy to strangers, as they willingly friend strangers and

³⁶⁵ Bruce E. Boyden, *Oversharing: Facebook Discovery and the Unbearable Sameness of Internet Law*, 65 ARK. L. REV. 39, 39 (2012).

³⁶⁶ *Id.* at 40.

³⁶⁷ See Diana I. Tamir & Jason P. Mitchell, *Disclosing Information about the Self is Intrinsically Rewarding*, PROC. NAT’L ACAD. SCI. U.S. AM., May 22, 2012, at 8038, 8038.

³⁶⁸ Malin Sveningsson Elm et al., *Question 3: How Do Various Notions of Privacy Influence Decisions in Qualitative Internet Research?*, in INTERNET INQUIRY: CONVERSATIONS ABOUT METHOD 69, 77 (Annette N. Markham & Nancy K. Baym eds., 2009) (emphasis omitted).

³⁶⁹ See, e.g., Andy O’Donnell, *The Dangers of Facebook Oversharing*, ABOUT.COM <http://netsecurity.about.com/od/securityadvisorie1/a/The-Dangers-Of-Facebook-Oversharing.htm>, archived at <http://perma.cc/H3U8-8746> (last visited Aug. 15, 2014) (noting the value of oversharing to stalkers and lawyers); Robert Siciliano, *Oversharing on Social Media Common Amongst 50+*, MCAFEE BLOG CENTRAL (Oct. 23, 2013), <http://blogs.mcafee.com/consumer/50plus-tech-savvy-but-still-at-risk>, archived at <http://perma.cc/UT4F-PJRD>.

³⁷⁰ See, e.g., Amy Guth, *Social Media and Oversharing: How to Check Yourself Before You Wreck Yourself (Online)*, CHI. TRIB. (Jan. 31, 2013), http://articles.chicagotribune.com/2013-01-31/features/ct-tribu-social-media-oversharing-20130131_1_social-media-tweet-or-post-online-boundaries, archived at <http://perma.cc/5ZDP-5VWJ>; Mary Dell Harrington & Lisa Endlich Heffernan, *Oversharing: Why Do We Do It and How Do We Stop?*, HUFFINGTON POST (Dec. 4, 2013, 1:07 PM), http://www.huffingtonpost.com/grown-and-flown/oversharing-why-do-we-do-it-and-how-do-we-stop_b_4378997.html, archived at <http://perma.cc/DEF2-3LWM>.

³⁷¹ See Natalie J. Ferrall, Comment, *Concerted Activity and Social Media: Why Facebook is Nothing Like the Proverbial Water Cooler*, 40 PEPP. L. REV. 1001, 1026–27 (2013).

³⁷² Bobbie Johnson, *Privacy No Longer a Social Norm, Says Facebook Founder*, GUARDIAN.COM (Jan. 10, 2010, 10:58 PM), <http://www.theguardian.com/technology/2010/jan/11/facebook-privacy>, archived at <http://perma.cc/E378-7C7F>.

post information and images they would never have shared so publicly before.”³⁷³ In selecting “overshare” as their word of the year, Websters’s editors were quite conscious of this duality:

It’s also a word that is rather slip-slippy, chameleon-like. Some people use it disparagingly; they don’t like oversharing. Others think oversharing is good and that one must give full disclosure of one’s inner life. Sometimes there is a generational shift in the way people look at this practice and therefore view the word.³⁷⁴

Even if an individual is cautious about sharing information online, a friend, a parent, an acquaintance, a neighbor, or any other person one interacts with may be far less hesitant about sharing or oversharing what formerly would have been private information about another person.³⁷⁵ And in this new era of social media, “friend” is a far more expansive concept and less-known commodity, a problem only magnified by unfathomable expansion online of the concept of a “friend of a friend.”³⁷⁶

Furthermore, even among the most active and adept users of technology, there is little understanding of what is being made publicly available through their online activities.³⁷⁷ Such lack of knowledge, or at least full appreciation thereof, can result in even classically private information such as what one is reading becoming exposed through Internet connectivity programs such as Facebook’s social reader.³⁷⁸

Technology poses an even greater threat by taking pieces of information and enabling aggregation of massive amounts of data about formerly private individuals that can then be made readily accessible.³⁷⁹ “[W]ith the advent of more

³⁷³ Laurie Thomas Lee, *Privacy and Social Media*, in *THE SOCIAL MEDIA INDUSTRIES* 146, 150 (Alan B. Albarran ed., 2013).

³⁷⁴ *Word of the Year 2008: Overshare*, *supra* note 363.

³⁷⁵ FREDERICK S. LANE, *AMERICAN PRIVACY: THE 400-YEAR HISTORY OF OUR MOST CONTESTED RIGHT* 255–61 (2009).

³⁷⁶ See generally DOUGLAS JACOBSON & JOSEPH IDZIOREK, *COMPUTER SECURITY LITERACY: STAYING SAFE IN A DIGITAL WORLD* 214–17 (2012) (discussing the concept of “friend” in the digital world as it relates to varying levels of access to private information).

³⁷⁷ See JOHN PALFREY & URS GASSER, *BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES* 66–68 (2008).

³⁷⁸ Margot Kaminski, *Reading Over Your Shoulder: Social Readers and Privacy Law*, 2 *WAKE FOREST L. REV. ONLINE* 13, 13 (2012). “Websites are adopting techniques to glean information about visitors to their sites, in real time, and then deliver different versions of the Web to different people.” Jennifer Valentino-DeVries et al., *Websites Vary Prices, Deals Based on Users’ Information*, *WALL ST. J.* (Dec. 24, 2012), <http://online.wsj.com/news/articles/SB1000142412788732377204578189391813881534>, *archived at* <http://perma.cc/4NKQ-D367>. Websites’ prices and text displays vary to respond to the customer’s IP address, search history, and means of accessing the site. *Id.*

³⁷⁹ LORI ANDREWS, *I KNOW WHO YOU ARE AND I SAW WHAT YOU DID: SOCIAL NETWORKS AND THE DEATH OF PRIVACY* 118–19 (2012); Craig Blakeley & Jeff Matsuura,

powerful data mining techniques, the aggregation of seemingly innocuous personal data across a range of social media makes it fairly straightforward to put together a disturbingly detailed profile of the data's originator."³⁸⁰ The access to information through aggregation and data mining is fundamentally undermining what was formerly the private sphere.³⁸¹ Sun Microsystems Chief Executive Officer Scott McNealy indelicately declared: "You have zero privacy. Get over it."³⁸² At the very least, technology and people's use of that technology has resulted in private individuals in 2014 being significantly less private than they were in 1974.

IV. GERTZ'S ENDURING PURPOSES

While the sandcastle of *Gertz* has been battered by waves of First Amendment pressures and technological changes, it still stands, not yet having been subsumed back into the earth. While the edifice may someday be fully washed away, that day has not yet arrived. *Gertz* still serves important purposes, especially with regard to protecting the interests of private individuals harmed by media coverage.

Welcome to the World of Information Aggregation, LEGAL SOLUTIONS BLOG (Feb. 13, 2012), <http://blog.legalsolutions.thomsonreuters.com/law-and-techology/welcome-to-the-world-of-information-aggregation/>, archived at <http://perma.cc/EC3G-N6AL>; Andre Oboler et al., *The Danger of Big Data: Social Media as Computational Social Science*, FIRST MONDAY (July 2, 2012), <http://firstmonday.org/ojs/index.php/fm/article/view/3993/3269>, archived at <http://perma.cc/P9JS-K6UD>.

³⁸⁰ Lynne Y. Williams, *Who is the 'Virtual' You and Do You Know Who is Watching You?*, in *SOCIAL MEDIA FOR ACADEMICS: A PRACTICAL GUIDE* 175, 177–78 (Diane Rasmussen Neal ed., 2012).

³⁸¹ See Saby Ghoshray, *The Emerging Reality of Social Media: Erosion of Individual Privacy Through Cyber-Vetting and Law's Inability to Catch Up*, 12 J. MARSHALL REV. INTEL. PROP. L. 551, 556–65 (2013). Reflecting upon the new realities, a New York state court observed:

[W]hen Plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings. Indeed, that is the very nature and purpose of these social networking sites else they would cease to exist. Since Plaintiff knew that her information may become publicly available, she cannot now claim that she had a reasonable expectation of privacy. As recently set forth by commentators regarding privacy and social networking sites, given the millions of users, "[i]n this environment, privacy is no longer grounded in reasonable expectations, but rather in some theoretical protocol better known as wishful thinking."

Romano v. Steelcase Inc., 907 N.Y.S.2d 650, 657 (Sup. Ct. 2010) (citation omitted).

³⁸² Deborah Radcliff, *A Cry for Privacy: As E-Commerce Grows, Businesses Must Avoid Intruding on the Lives of Customers — Or Risk Losing Them*, COMPUTERWORLD, May 17, 1999, at 46.

Under First Amendment pressure, it becomes easy to think a plaintiff simply needs to “toughen up” or have “thicker skin.”³⁸³ Thinking this way can inappropriately diminish appreciation for the seriousness of the injury.³⁸⁴ As observed by Justice Stewart, “[t]he right of a [person] to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being.”³⁸⁵ Nor is this some transitory right of recent vintage:

There is no doubt about the historical fact that the interest in one’s good name was considered an important interest requiring legal protection more than a thousand years ago; and that so far as Anglo-Saxon history is concerned this interest became a legally protected interest comparatively soon after the interest in bodily integrity was given legal protection.³⁸⁶

Though there are variances in legal schemes for addressing injury from defamation, there is a cross-cultural recognition of the injury and need for redress.³⁸⁷ As Professor Anita Bernstein observed, “[m]any belief systems and ideologies that otherwise clash with one another—religious doctrines, secular humanism, and psychological, philosophical, sociological, and anthropological understandings—unite around dignity as central to human life in a society. Dignity encompasses reputation, the center of defamation.”³⁸⁸ Simply stated, “publication of untruths about people can hurt those people, often quite severely.”³⁸⁹ Tort damages arising from defamation include compensation for out-of-pocket financial losses incurred by the plaintiff, harm suffered to plaintiff’s reputation and standing in the community, personal humiliation, and mental anguish.³⁹⁰ Redress of defamation injuries is in accord with traditional and broadly accepted principles undergirding tort law.³⁹¹

³⁸³ See, e.g., *Shulman v. Hunderfund*, 905 N.E.2d 1159, 1163 (N.Y. 2009) (noting the need for a public figure defamation plaintiff “to develop a thicker skin”).

³⁸⁴ See Amy Kristin Sanders & Natalie Christine Olsen, *Re-Defining Defamation: Psychological Sense of Community in the Age of the Internet*, 17 COMM. L. & POL’Y 355, 363 (2012).

³⁸⁵ *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966).

³⁸⁶ LAURENCE H. ELDRIDGE, *THE LAW OF DEFAMATION* § 53, at 293–94 (1978).

³⁸⁷ See DIANE ROWLAND & ELIZABETH MACDONALD, *INFORMATION TECHNOLOGY LAW* 393–94 (3d ed. 2005).

³⁸⁸ Anita Bernstein, *Real Remedies for Virtual Injuries*, 90 N.C. L. REV. 1457, 1462 (2012).

³⁸⁹ Schauer, *supra* note 138, at 912.

³⁹⁰ Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J.L. & TECH. 569, 584 (2001).

³⁹¹ Stanley Ingber, *Defamation: A Conflict Between Reason and Decency*, 65 VA. L. REV. 785, 791–92 (1979).

Injury prevention by restraining speakers who make statements that may injure the reputation of others also stands as one of the core purposes of defamation actions.³⁹² The purpose of the actual malice standard is to loosen restraints to allow for a robust flow of debate and discussion. Loosening restraints is not, however, always a good thing for the individual or the broader society. “[U]nfortunately for those defamed, you cannot unring a bell.”³⁹³ Where injury has been done to a person’s reputation, the person cannot be returned to the same place of good standing within the community.³⁹⁴ The internet only magnifies the problem by bringing into effect a propagandist’s vision of telling a lie enough times to make it indelibly fixed as the truth.³⁹⁵ Even professional service companies, like Reputation.com, discussed above, have limits on their capacity for removing harmful untruthful information from the internet,³⁹⁶ and accessing the services of these companies is “expensive and beyond the means of many victims.”³⁹⁷

Furthermore, lesser restraint through the application of the actual malice standard threatens to lead to increased media errors, which reduce public confidence and injure the media’s role as a watchdog.³⁹⁸ The proliferation of untrue statements, which is generally deemed low-value speech,³⁹⁹ not only floods

³⁹² *Id.* at 792.

³⁹³ Salil K. Mehra, *Post a Message and Go to Jail: Criminalizing Internet Libel in Japan and the United States*, 78 U. COLO. L. REV. 767, 801 (2007).

³⁹⁴ *See, e.g.*, Connor v. Scroggs, 821 So. 2d 542, 552 (La. Ct. App. 2002) (stating that “[a]ccusing a person of [sexual molestation of a child] without cause is equally horrendous [as the actual crime] in light of the public humiliation such an allegation would cause the accused person”); *Blatnik v. Avery Dennison Corp.*, 774 N.E.2d 282, 293 (Ohio Ct. App. 2002) (upholding a defamation jury award because “[a] man’s reputation is ruined when he is publicly labeled as one who cannot be trusted around women in the workplace”).

³⁹⁵ *See generally* THOMAS PRESTON, *PANDORA’S TRAP: PRESIDENTIAL DECISION MAKING AND BLAME AVOIDANCE IN VIETNAM AND IRAQ* 84 (2011) (describing the political tactic of “staying on message and repeating a charge (regardless of the evidence) [as] an age old tactic” that when “[r]epeated enough times . . . becomes engrained in the public mind, easily recalled and difficult to remove”).

³⁹⁶ *See* Michael L. Rustad, *Twenty-First-Century Tort Theories: The Internalist/Externalist Debate*, 88 IND. L.J. 419, 430 (2013) (“Even with the help of companies . . . that will attempt to expunge tortious postings, you cannot really ‘unring the bell’ once information is posted, copied, and forwarded around the globe.”).

³⁹⁷ Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 105 (2009).

³⁹⁸ *See* ROY L. MOORE & MICHAEL D. MURRAY, *MEDIA LAW AND ETHICS* 112–19 (3d ed. 2008) (describing the media’s important role as a “watchdog” in society, government, and democracy); WYNFORD HICKS, *WRITING FOR JOURNALISTS* 14 (1999); Joseph Jerome, *Media Behavior Erodes Public Confidence, Undermines Press Clause Purpose*, AM. CONST. SOC’Y BLOG (July 26, 2012), <http://www.acslaw.org/acsblog/media-behavior-erode-s-public-confidence-undermines-press-clause-purpose>, archived at <http://perma.cc/6D2K-DKA3>.

³⁹⁹ *See, e.g.*, GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 271 (2004) (observing that “false statements of fact are not the sort of expression the First Amendment was meant to promote”).

the marketplace of ideas with inaccurate information but also undermines public confidence in ascertaining truth.⁴⁰⁰ Journalist Farhad Manjoo has addressed this latter point in an intriguing book that explores the extraordinary divide over facts, not policy, that have become broken down as a point of consensus and are simply treated as another perspective or rejected as untrue, despite their validity.⁴⁰¹

Additionally, while ordinary people are now empowered to communicate with mass audiences in a manner that would have been inconceivable for members of the *Gertz* Court four decades ago, there remains a divide between the “private individual” and the “public figure” in the extent of their access to audiences.⁴⁰² Simply stated, “traditional political, economic, cultural, and media elites are also using—and in many ways still dominating—the Internet.”⁴⁰³ While the communication reach of private individuals has increased extraordinarily, there are serious questions about the breadth of the audience an ordinary person can reach.⁴⁰⁴ As David Lat and Zach Shemtob have asserted, “even in the digital age, famous celebrities still have greater access to communication channels than ordinary citizens.”⁴⁰⁵ Accordingly, a substantial divide remains between the extent to which private individuals and public figures can effectively rely on self-help to remedy injuries to their reputations.

Also, the *Gertz* assumption of the risk voluntariness rationale has lingering resonance. Professor Susan Gilles has drawn a set of intriguing comparisons between the *Gertz* Court’s voluntariness analysis and traditional tort law concepts of primary and secondary assumption of the risk. Primary assumption of the risk, as distinct from secondary assumption of the risk, “does not require proof of either subjective knowledge and appreciation of the risk by the plaintiff or actual consent

⁴⁰⁰ See Karl S. Coplan, *Climate Change, Political Truth, and the Marketplace of Ideas*, 2012 UTAH L. REV. 545, 545–46, 550, 559. See generally CATECHISM OF THE CATHOLIC CHURCH § 2486 (2d ed. 2011) (“Lying is destructive of society; it undermines trust among men and tears apart the fabric of social relationships.”).

⁴⁰¹ See generally FARHAD MANJOO, TRUE ENOUGH: LEARNING TO LIVE IN A POST-FACT SOCIETY 1–2, 19–23 (2008) (discussing the complexities that underlie the counterintuitive paradox that for many people, facts matter less in the digital age).

⁴⁰² See generally MATTHEW HINDMAN, THE MYTH OF DIGITAL DEMOCRACY 38–40, 54–57 (2009) (noting that “communities of Web sites on different political topics are each dominated by a small set of highly successful sites,” which limits the public’s access to information).

⁴⁰³ ANDREA L. PRESS & BRUCE A. WILLIAMS, THE NEW MEDIA ENVIRONMENT: AN INTRODUCTION 21 (2010).

⁴⁰⁴ See generally HINDMAN, *supra* note 402, at 54–57 (highlighting that “blogs almost immediately replicated the winners-take-all distribution of links and traffic that we see in the Web as a whole”).

⁴⁰⁵ Lat & Shemtob, *supra* note 299, at 411; Patrick H. Hunt, Comment, *Tortious Tweets: A Practical Guide to Applying Traditional Defamation Law to Twibel Claims*, 73 LA. L. REV. 559, 582 (2013) (“To say that all Twitter users do not have an equal voice on the website is an understatement. . . . An average user would likely be hard-pressed to effectively rebut a defamatory statement posted by a user with a larger than average number of followers.” (citation omitted)).

to that risk; merely engaging in the activity is sufficient to trigger assumption.”⁴⁰⁶ With regard to primary assumption of the risk, even in the absence of individualized knowledge of the risk, persons engaging in certain activities accept certain risks, such as a spectator or ticketholder being hit by a foul ball at a baseball game.⁴⁰⁷ Alternatively, secondary assumption of the risk is focused upon the individual’s knowledge of and voluntary agreement to submit to the risk.⁴⁰⁸ For example, a person accepting a ride from a driver the person knows to be heavily intoxicated.⁴⁰⁹

Inssofar as voluntariness intersects with the primary assumption of the risk category, “[t]he Supreme Court seems to suggest that just as baseball has inherent dangers [that should be] apparent to all, so does public life. Those who seek a role of prominence in society can be deemed to agree to the inherent risks of that ‘sport,’ the danger of false reports.”⁴¹⁰ As for the secondary assumption of the risk category, Professor Gilles contends that the Court’s understanding of limited-purpose public figure that places herself in the vortex of a public controversy draws a close, though not exact fit, with a subjectively knowledgeable plaintiff who embraces a known risk.⁴¹¹ The private individual, however, has neither taken a position that is inherently subject to media attention (primary assumption of the risk) nor entered into a particular controversy knowing the specific attendant dangers of attention (secondary assumption of the risk). To the contrary, under neither formulation has a private individual assumed the risk. Instead she is having the imposition thrust upon her. Similarly, Professor Smolla has observed that “[t]he public figure doctrine is heavily grounded in cultural and moral equity—if you can’t stand the heat of the fire, stay out of the kitchen.”⁴¹² The private individual neither intended to go into the kitchen nor knew that she was even there.

V. THE LOST INVOLUNTARY PUBLIC FIGURE

While a number of commentators have argued for a restoration of Justice Brennan’s *Rosenbloom* plurality test as the proper constitutional rubric for defamation cases,⁴¹³ there are compromises short of that approach that can strike a

⁴⁰⁶ Gilles, *supra* note 1, at 236.

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.* at 235.

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.* at 247.

⁴¹¹ *Id.* at 260–62.

⁴¹² SMOLLA, *supra* note 213, § 6:40, at 6-370.

⁴¹³ Strong arguments have been offered in support of this position. See, e.g., Peter J. Hageman, *Rosenbloom: Its Time Has Come Again*, 17 COMM. L. 9, 9–13 (1999); Lat & Shemtob, *supra* note 299, at 404; Douglas B. McKechnie, *The Death of the Public Figure Doctrine: How the Internet and the Westboro Baptist Church Spawned a Killer*, 64 HASTINGS L.J. 469, 490–97 (2013); Howard M. Wasserman, *Two Degrees of Speech Protection: Free Speech Through the Prism of Agricultural Disparagement Laws*, 8 WM. & MARY BILL RTS. J. 323, 349 (2000).

more equitable balance between the enduring purposes served by *Gertz* and the First Amendment pressures that are pushing on the *Gertz* classification structure. A significant component of properly accommodating these competing pressures is found by clarifying the mysterious involuntary public figure category. To define this category, it is useful to draw upon principles from an opinion in *Rosenbloom*, though one considerably less heralded than Justice Brennan's opinion: Justice White's concurrence.

Justice White offered a narrower expansion of constitutional constraints on defamation actions than the plurality in *Rosenbloom*. Addressing WIP Radio's coverage of Philadelphia pornography distributor George Rosenbloom and his interactions with law enforcement, Justice White advanced the following understanding of why the media coverage should be protected by the actual malice standard:

New York Times Co. v. Sullivan itself made clear that discussion of the official actions of public servants such as the police is constitutionally privileged. "The right of free public discussion of the stewardship of public officials" is, in the language of that case, "a fundamental principle of the American form of government." Discussion of the conduct of public officials cannot, however, be subjected to artificial limitations designed to protect others involved in an episode with officials from unfavorable publicity. Such limitations would deprive the public of full information about the official action that took place. In the present case, for example, the public would learn nothing if publication only of the fact that the police made an arrest were permitted; it is also necessary that the grounds for the arrest and, in many circumstances, the identity of the person arrested be stated. In short, it is rarely informative for newspapers or broadcasters to state merely that officials acted unless they also state the reasons for their action and the persons whom their action affected.

Nor can *New York Times* be read as permitting publications that invade the privacy or injure the reputations of officials, but forbidding those that invade the privacy or injure the reputations of private citizens against whom official action is directed. *New York Times* gives the broadcasting media and the press the right not only to censure and criticize officials but also to praise them and the concomitant right to censure and criticize their adversaries. To extend constitutional protection to criticism only of officials would be to authorize precisely that sort of thought control that the First Amendment forbids government to exercise.

I would accordingly hold that in defamation actions, absent actual malice as defined in *New York Times Co. v. Sullivan*, the First Amendment gives the press and the broadcast media a privilege to report and comment upon the official actions of public servants in full detail, with no requirement that the reputation or the privacy of an individual

involved in or affected by the official action be spared from public view.⁴¹⁴

Professors David Anderson and Laurence Tribe argue the *Gertz* Court's cryptic discussion of involuntary public figures is intended to encapsulate those individuals qualifying under the rubric set forth in Justice White's concurring opinion in *Rosenbloom*.⁴¹⁵ Professor Anderson concluded that *Gertz*'s involuntary public figure "is not much broader than the one suggested by Justice White in his concurring opinion in *Rosenbloom*: 'individual[s] involved in or affected by . . . official action.'"⁴¹⁶ Similarly, Professor Tribe has observed that the involuntary public figure category "appears to include persons who are involved in or directly affected by the actions of public officials."⁴¹⁷ Professor Tribe argued that accordingly "the magazine distributor in the *Rosenbloom* case arrested by the police for distributing obscene literature would be an involuntary public figure with respect to reports or comments about the arrest."⁴¹⁸ Not only does Justice White's concurrence present a viable contender for bringing meaning to the *Gertz* Court's fleeting and cryptic reference to involuntary public figures, it also provides a useful cornerstone for constructing this category in light of four decades of post-*Gertz* societal and jurisprudential evolution.

Drawing on Justice White's concurrence and considering the issue from a normative perspective, courts should distinguish an involuntary public figure from a private individual using the following rubric. An otherwise private individual will be treated as an involuntary public figure to the extent that the individual is integrally intertwined with addressing the following:

- (1) the official conduct or qualifications for office of a public official,
- (2) the actions of a public figure with regard to a matter of public concern, or
- (3) a matter of public concern itself.

The Merriam-Webster's definition of integral—"important and necessary" or "essential to completeness"⁴¹⁹—is incorporated herein.

As for the first species of involuntary public figures—those who are integrally intertwined with addressing the official conduct or qualifications for office of a public official—Justice White quite properly observed that "[d]iscussion of the

⁴¹⁴ *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 61–62 (1971) (White, J., concurring) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964)).

⁴¹⁵ TRIBE, *supra* note 236, at 880; David A. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 450–451 (1975).

⁴¹⁶ Anderson, *supra* note 415, at 451 (quoting *Rosenbloom*, 403 U.S. at 62 (White, J., concurring)).

⁴¹⁷ TRIBE, *supra* note 236, at 880.

⁴¹⁸ *Id.* (citation omitted).

⁴¹⁹ *Integral*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/integral>, archived at <http://perma.cc/F6A2-UGTM> (last visited Aug. 18, 2014).

conduct of public officials cannot . . . be subjected to artificial limitations designed to protect others involved in an episode with officials from unfavorable publicity. Such limitations would deprive the public of full information about the official action that took place.”⁴²⁰ A contrary resolution would undermine the fundamental animating principle that launched the Supreme Court’s recognition of constitutional limitations upon defamation actions in *New York Times Co. v. Sullivan*. At its core, the *New York Times* decision serves to protect the ability of the people and press to discuss the actions of public officials so as to engage in self-governance. The entwinement of a private person in the official conduct of a public official cannot function as a shield for reports about the conduct of a public official.⁴²¹ Because enabling democratic self-governance stands as the core

⁴²⁰ *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 61 (1971) (White, J., concurring).

⁴²¹ A Tennessee Court of Appeals decision in *Lewis v. NewsChannel 5 Network, L.P.*, 238 S.W.3d 270 (Tenn. Ct. App. 2007), is illustrative of this approach:

The undisputed facts in this case establish as a matter of law that Brad Lewis should be deemed to be a public figure for the purpose of NewsChannel 5’s report regarding Major Dollarhide’s official misconduct. He is, to be sure, an involuntary public figure because he did not purposely inject himself into the forefront of the controversy surrounding Major Dollarhide. However, 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 duties. This right necessarily included reporting on the circumstances surrounding Major Dollarhide’s intervention to prevent Brad Lewis from being arrested on December 27, 1998. Without these facts, the public would not have been fully and appropriately informed of the seriousness of Major Dollarhide’s misconduct.

Had the facts that Brad Lewis believes to be libelous been removed from the NewsChannel 5 story, the public would have been left to speculate about the reasons for the Chief of Police’s actions. 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. Based on this information alone, 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. Even if the public had assumed that Major Dollarhide had acted improperly in some way, it would have no way of ascertaining how serious his misconduct was.

The fact that Brad Lewis was the person involved in the incident that led to Major Dollarhide’s disempowerment sheds significant light on Major Dollarhide’s conduct. The fact that Brad Lewis allegedly had firearms, betting slips, and a large amount of cash in his possession when he was detained dramatically emphasizes the seriousness of Major Dollarhide’s misconduct. These facts removed ambiguity from the story. They informed the public that Major Dollarhide had intervened to prevent a family member from being arrested for serious criminal offenses. By reporting these facts, the NewsChannel 5 defendants enabled the public to better understand Major

purpose for protecting freedom of speech, the weight on *Gertz*'s balancing between the state's interests in protecting a private individual against injury from defamation and the need of a robust and vigorous press are most pronounced in favor of application of the actual malice standard with regard to the species of involuntary public figures who have become intertwined with public officials. Involuntary public figures are not, however, limited to this variety.

First Amendment purposes extending beyond self-governance point toward recognition of a second species of involuntary public figures, those who are integrally intertwined with addressing the actions of a public figure regarding a matter of public concern. The entwinement of a private person with a public figure on a matter of public concern cannot function as a shield for reports about a public figure as to matters of public concern any more than it can as to a public official.⁴²² As a practical matter, litigation in such cases appears to regularly involve closely related family members or those involved in romantic relationships with all-purpose public figures.⁴²³ There is, however, conceptually no reason to limit this species of involuntary public figure to family members of or those involved in romantic relationships with all-purpose public figures. While strong arguments can be made for distinguishing public officials from public figures,⁴²⁴ the important First Amendment purposes served beyond the political sphere point toward embracing this application. Failure to apply the actual malice standard in cases wherein private individuals are integrally intertwined with addressing the actions of a public figure regarding a matter of public concern would inhibit the press in reporting on the actions of public figures with regard to matters of public concern. The First Amendment importance of reporting the matter is not diminished by the entwinement of the private person with the public figure and, as reflected in the discussion above, the rationale for dividing private persons from public figures has been diminished. Accordingly, the scale tips, though the question is a closer one

Dollarhide's corrupt motivation, as well as the seriousness of his breach of his official duty.

Id. at 299–300.

⁴²² The Fifth Circuit's decision in *Brewer v. Memphis Publishing Co.*, 626 F.2d 1238 (5th Cir. 1980), is illustrative of this approach. Therein, Anita Brewer, who was at one time Elvis Presley's "number one girlfriend," and her husband, Joe Brewer, were referenced in media reports about Elvis Presley following the dissolution of his marriage to Priscilla Presley. *Id.* at 1257–58. The references involved Brewer's earlier relationship with Elvis. *Id.* The Court concluded that Brewer had actually become a limited-purpose public figure for purposes of her connection with Elvis and that neither she nor her husband would be treated as private individuals. *Id.*

⁴²³ See generally Mark P. Strasser, *A Family Affair? Domestic Relations and Involuntary Public Figure Status*, 17 LEWIS & CLARK L. REV. 69, 100 (2013) (noting that "[s]everal cases suggest that family status alone may be enough to make one an involuntary public figure").

⁴²⁴ See generally Schauer, *supra* note 138, at 905–35 (arguing important differences exist between public officials and public figures that warrant applying a higher level of constitutional protection to speech regarding public officials than public figures).

than with public officials, in favor of application of the actual malice standard in cases involving otherwise private individuals who are integrally intertwined with addressing the actions of a public figure regarding a matter of public concern.

The third species of involuntary public figures, those integrally intertwined with addressing a matter of public concern itself, is the application in which there is the greatest susceptibility of the *Gertz* structure collapsing and an implicit restoration of the *Rosenbloom* test occurring. However, that result need not follow, and in fact an appropriate recognition of this variety of involuntary public figure will reduce First Amendment pressures upon courts to define voluntariness in a questionable manner. In other words, instead of expanding the definition of voluntariness until it becomes almost unrecognizable, courts can instead return voluntariness to a more reasonable interpretation of the concept while developing the involuntary public figure category.

Three cases are particularly helpful in illustrating this species of involuntary public figure: (1) *Wiegel v. Capital Times Co.*,⁴²⁵ (2) *Dameron v. Washington Magazine, Inc.*,⁴²⁶ and (3) *Atlanta Journal-Constitution v. Jewell*.⁴²⁷ In *Wiegel*, the plaintiff, Joseph Wiegel, declined to exercise soil-erosion-prevention measures that had been recommended but not required by government officials, resulting in more than \$100,000 in cleanup costs for taxpayers to rehabilitate waterways bordering his farm.⁴²⁸ A local newspaper, *The Capital Times*, covered Wiegel's disinclination to put into place a soil erosion plan and the adverse consequences thereof.⁴²⁹ *The Capital Times* advocated for increased restrictions to be imposed upon Wiegel to prevent this continuing injury to the public coffers and the environment.⁴³⁰

The plaintiff in *Dameron*, Merle Dameron, worked as an air traffic controller and had been the only air traffic controller on duty when a plane crashed coming into Dulles Airport in 1974.⁴³¹ Following a plane crash at Dulles in 1982, the *Washingtonian* magazine ran a story about the accident and addressed airline safety issues, especially those related to Dulles.⁴³² Relying upon a National Transportation Safety Board report, the author of the story observed that significant strides had been made in improving airline safety including air traffic control improvements, but that more should be done, noting three accidents that were partly attributable to air traffic controllers.⁴³³ The author did not list the controllers by name but did list the three accidents.⁴³⁴

The last case, *Atlanta Journal-Constitution*, involved Centennial Olympic Park security guard Richard Jewell and media reports regarding the Federal Bureau

⁴²⁵ 426 N.W.2d 43 (Wis. Ct. App. 1988).

⁴²⁶ 779 F.2d 736 (D.C. Cir. 1985).

⁴²⁷ 555 S.E.2d 175 (Ga. Ct. App. 2001).

⁴²⁸ *Wiegel*, 426 N.W.2d at 45.

⁴²⁹ *Id.*

⁴³⁰ *Id.*

⁴³¹ *Dameron*, 779 F.2d at 737–38.

⁴³² *Id.*

⁴³³ *Id.* at 738.

⁴³⁴ *Id.*

of Investigation's turning the focus of its investigation to Jewell as a suspected bomber in an act of domestic terrorism perpetrated at the 1996 Atlanta Olympics.⁴³⁵ In each of these cases, a private individual was integrally intertwined with addressing a matter of public concern.

Caution in application of this category is, however, warranted. Courts should not apply the involuntary public figure designation where the private individual's involvement in the matter of public concern was only tangential or trivial⁴³⁶ or where the private individual is simply someone who is "illustrative of some perceived social ill."⁴³⁷ Under such circumstances, the would-be involuntary public figure is not integral to addressing a matter of public concern. Instead, private individuals remain primarily undifferentiated from other private individuals, and the matter can be addressed meaningfully without their inclusion. Exclusion of reference to such persons is an inconvenience rather than a disabling limitation on the media in addressing a matter of public concern where the private individual is merely tangential, trivial, or simply being used in a representative capacity. That inconvenience does not override the continuing value served by the *Gertz* framework.

VI. CONCLUSION

Professor John C. P. Goldberg astutely observed that *New York Times Co. v. Sullivan* "was about as easy to resolve as a landmark decision could be. But easy cases are not easy in all respects. Precisely because their outcomes are overdetermined, they pose the problem of how to decide subsequent cases, in which all signs are not pointing toward one resolution."⁴³⁸ L. B. Sullivan and the Alabama political establishment's aggressive use of defamation law as a tool to support the maintenance of white supremacy by striking at political adversaries in the press and the civil rights movement brought to the surface the dangers posed by defamation suits to democratic self-governance. It was, despite the dramatic change in the centuries of precedent, as noted by Professor Goldberg, an easy case. The Court in *Curtis Publishing Co. v. Butts* extended constitutional safeguards to speech addressing public figures, which the Court conceived of in political terms. In doing so though, the Supreme Court opened a door that state and lower-federal courts walked through to employ the constitutional safeguards of the actual malice standard to serve First Amendment purposes beyond the sphere of debate and discussion regarding public policy. The Court, however, went too far in *Rosenbloom*, not on the facts of the case but in terms of the legal standard adopted by the plurality. The balance between safeguarding the press and safeguarding an

⁴³⁵ *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175, 178, 182 (Ga. Ct. App. 2001).

⁴³⁶ See, e.g., *Hopkins*, *supra* note 217, at 32 (stating that "[i]f [the plaintiff's] role is tangential or trivial, the plaintiff is often held to be a private person").

⁴³⁷ *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 485 (Minn. 1985).

⁴³⁸ John C. P. Goldberg, *Judging Reputation: Realism and Common Law in Justice White's Defamation Jurisprudence*, 74 U. COLO. L. REV. 1471, 1478 (2003).

injured private individual had become overly protective of the media and insufficiently so of private individuals. The *Gertz* decision was a response to these excesses of *Rosenbloom*. *Gertz* would prove, at least in the high court's application and understanding of its standards, to be an overcorrection.

Four decades of jurisprudential and societal change have brought enormous pressure to bear on the *Gertz* framework. That pressure is being released in a number of ways including a dramatically expanded notion of what constitutes voluntariness. The structure itself is potentially in danger of collapse. That is problematic insofar as there are important values that are served by *Gertz* in safeguarding private individuals against the substantial harm that can be caused by defamation.

The involuntary public figure category provides a release valve for some of the pressures that have built up. Justice White perceived the *Rosenbloom* plurality as over-reaching. Instead of the plurality's giant leap, he offered in his concurrence a more modest step forward. A workable framework for constructing an involuntary public figure can be reestablished on the more modest step forward identified by Justice White with some alterations to reflect jurisprudential and societal changes. By finding the lost involuntary public figure, courts take a small step forward to restoring doctrinal clarity with less danger of again swinging the pendulum too far.