

# THE INVOLUNTARY PUBLIC FIGURE: NOT SO DEAD AFTER ALL

BY  
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## INTRODUCTION

When, in the years following *New York Times Co. v. Sullivan*<sup>1</sup> and *Curtis Publishing Co. v. Butts*,<sup>2</sup> the Supreme Court of the United States went about the business of explicating the various types of plaintiffs requiring a heightened burden of proof in libel cases—public officials, all-purpose public figures, limited-purpose public figures—the Court was warned more than once that it might be plowing ground that needed to remain unfurrowed. “It strikes me,” wrote Justice Hugo Black, expressing a sentiment that would become common, “that the Court is getting itself in the same quagmire in the field of libel in which it is now helplessly struggling in the field of obscenity.”<sup>3</sup> And in *Rosenbloom v. Metromedia, Inc.*<sup>4</sup> Justice John Marshall Harlan suggested that the Court may have created too many litmus tests for one area of the law. He asserted that the Court should not embark on a case-by-case analysis to determine the status of plaintiffs in libel cases, but should resort to an abstract description and leave the minutiae to the lower courts.<sup>5</sup>

Courts were well on their way, however, to determining how far down the hierarchy of government service one might fall and yet remain a public official;<sup>6</sup> how widespread the fame and notoriety must be before one becomes an all-purposes public figure, or to what degree a libel plaintiff must charge into an ongoing public controversy before becoming a limited-purposes public figure;<sup>7</sup> and, indeed, exactly what constituted a public controversy.<sup>8</sup>

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<sup>1</sup> 376 U.S. 254 (1964).

<sup>2</sup> 388 U.S. 130 (1967).

<sup>3</sup> *Id.* at 171 (Black, J., concurring and dissenting).

<sup>4</sup> 403 U.S. 29 (1971).

<sup>5</sup> *Id.* at 63 (Harlan, J., dissenting).

<sup>6</sup> See, e.g., *Alioto v. Cowles Communications, Inc.*, 430 F. Supp. 1363 (N.D. Cal. 1977); *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809 (Tex. 1976); *Chase v. Daily Record, Inc.*, 515 P.2d 154 (Wash. 1973); *Starr v. Beckley Newspapers Corp.*, 210 S.E.2d 911 (W.Va. 1974).

<sup>7</sup> See *Price v. Viking Penguin*, 881 F.2d 1426, 1431 (8th Cir. 1989), and *Bandelin v. Pietsch*, 563 P.2d 395, 398 (Idaho 1977), for examples of how courts confuse and sometimes mix all-purpose and limited-purpose public figure status.

<sup>8</sup> See *Street v. National Broad. Co.*, 645 F.2d 1227, 1234 (6th Cir. 1981), for an example

These determinations are important, of course, because the outcome of a libel suit rides in great part on a determination of whether a person is public or private—public persons being required to prove actual malice in the publication of alleged defamations, and private persons often being required to prove only negligence.<sup>9</sup> And while there are widespread differences in how lower appellate courts have defined public officials, public figures, and public controversies, those definitions, at least, were based on relatively clear guidance from the Supreme Court.

Public officials, the Court said, are, at the very least, “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.”<sup>10</sup> An all-purpose public figure is a person with general fame or notoriety,<sup>11</sup> and a limited-purpose public figure is a person who has willingly entered an ongoing public controversy in order to affect the outcome of the controversy.<sup>12</sup> Finally, a public controversy has to do with the resolution of some important public question—at least as far as a libel case is concerned.<sup>13</sup>

Left out of the concordance of libel law, however, was yet another public figure—one that the Supreme Court had barely noticed. The involuntary public figure was mentioned in one sentence in *Gertz v. Robert Welch, Inc.*<sup>14</sup> Confusion over involuntary public figures was almost instantaneous. Some lower appellate courts held that the Supreme Court had created two categories of public figure status;<sup>15</sup> others said there were three.<sup>16</sup> Unfortunately, arguments can be made for either interpretation and, as a result, libel law is done a disservice by the absence of clear guidance. The involuntary public figure—in whatever form it takes—has become an important part of libel law, though courts are having a difficult time deciphering its form. Had the Supreme Court dealt more substantively with the idiom, it could have provided a significant additional piece in the libel puzzle. The time has come for the Court to do just that.<sup>17</sup>

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of an examination of an incident to determine whether it constitutes a public controversy or merely a newsworthy event.

<sup>9</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 327 (1974).

<sup>10</sup> *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

<sup>11</sup> See *Gertz*, 418 U.S. at 351.

<sup>12</sup> See *id.* at 345.

<sup>13</sup> See *Time, Inc. v. Firestone*, 424 U.S. 448, 453 (1976).

<sup>14</sup> 418 U.S. at 345.

<sup>15</sup> See *infra* notes 134-36 and accompanying text.

<sup>16</sup> See *infra* notes 137-40 and accompanying text.

<sup>17</sup> The Court will have an opportunity to refine or discard the involuntary public figure

## I. THE SUPREME COURT AND PUBLIC PERSONS

The Court's enunciation of its public person doctrine began in 1964 and ran until 1979. The involuntary public figure was generally overlooked during that period, however, except for one sentence in 1974.

### A. *Actual Malice and Public Officials*

The requirement that a public person have a more rigorous burden of proof than a private person was not new to libel law in 1964 when the Supreme Court constitutionalized the rule in *New York Times Co. v. Sullivan*.<sup>18</sup> What was revolutionary about *Times v. Sullivan* was not the rule, but that the rule became the law of the land.

The Court held that public officials, in order to win libel actions against critics of their official conduct, would be required to prove actual malice, that is, that the allegedly defamatory material was published with knowledge of falsity or with reckless disregard for whether the material was true or false.<sup>19</sup> Justice William J. Brennan, for the Court, constructed a rationale for the rule around the concept that the "central meaning" of the First Amendment was that seditious libel is unconstitutional.<sup>20</sup> "Although the Sedition Act was never tested in this Court," he wrote, "the attack upon its validity has carried the day in the court of history."<sup>21</sup> Indeed, Justice Brennan wrote, citizens have more than a right to criticize their governors; they have a duty to do so.<sup>22</sup> Because of that duty, the citizen critic is endowed with certain protections.

First, since exaggeration and, with it, false statements are inevitable in "uninhibited, robust, and wide-open" debate on public issues,<sup>23</sup> the citizen-critic may not be punished simply for making false statements.<sup>24</sup> To do so would deprive the debate of the "breathing space" it needs to survive.<sup>25</sup>

The actual malice rule, then, was established to ensure robust public debate about public issues in general and public officials in

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category if it so chooses. See *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175 (Ga. App. 2001), *petition for cert. filed*, 70 U.S.L.W. 3698 (U.S. May 2, 2002) (No. 01-1627); see also discussion at *infra* notes 96-98 and 216-23.

<sup>18</sup> 376 U.S. 254 (1964). See generally W. Wat Hopkins, *Actual Malice* 47-68 (1989).

<sup>19</sup> *Id.* at 279-80.

<sup>20</sup> *Id.* at 273.

<sup>21</sup> *Id.* at 276.

<sup>22</sup> *Id.* at 282-83.

<sup>23</sup> *Id.* at 270.

<sup>24</sup> *Id.* at 271-72.

<sup>25</sup> *Id.* at 279.

particular. The rule, Justice Brennan wrote, was analogous to protection afforded a public official when a private person sues that official for libel.<sup>26</sup> A public official is shrouded by absolute privilege if the utterances are made even within the outer perimeters of the official's duties. State laws vary, but "all hold that all officials are protected unless actual malice can be proved."<sup>27</sup> It would give public servants "an unjustified preference over the public they serve," Justice Brennan wrote, "if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves."<sup>28</sup>

What was important to the *Sullivan* Court was protecting the debate about public issues. The method for achieving that goal was to require public officials to prove the added element of either knowledge of falsity or reckless disregard for the truth.<sup>29</sup>

### B. *Actual Malice and Public Figures, Part I*

The Court expanded the burden to public figure libel plaintiffs three years later for much the same reason.<sup>30</sup> In *Curtis Publishing Co. v. Butts*,<sup>31</sup> the Court held that public figures, as well as public officials, are required to prove actual malice in order to win compensatory damages in libel actions.

In *Curtis Publishing Co.* the Court decided two cases. Wally Butts, athletic director at the University of Georgia, sued Curtis Publishing Co. for a story published in the *Saturday Evening Post* alleging that Butts and Paul "Bear" Bryant, head football coach at the University of Alabama, conspired to fix the outcome of the 1962 football game between the two schools.<sup>32</sup> The second case, *Associated Press v. Walker*, began when retired Army general Edwin Walker sued the Associated Press for its report on his involvement in civil unrest following the admission of James Meredith as the first black student to attend the University of Mississippi.<sup>33</sup>

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<sup>26</sup> *Id.* at 282.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 282-83.

<sup>29</sup> The rule didn't go far enough for Justices Black, William O. Douglas, and Arthur Goldberg, who wrote that citizens deserved absolute protection in their criticisms of public officials. Public officials, they wrote, should never be able to win libel actions based on criticisms of official conduct. See 376 U.S. at 293 (Black, J., concurring), and 376 U.S. at 297 (Goldberg, J., concurring in the result). Justice Douglas joined both opinions.

<sup>30</sup> Actually, the first expansion of the actual malice rule came only a few months after *Times v. Sullivan*, when the Court, in *Garrison v. Louisiana*, 379 U.S. 64 (1964), held that the rule also applied to criminal libel cases. The ruling had no effect on the public official-public figure distinction, however.

<sup>31</sup> 388 U.S. 130 (1967).

<sup>32</sup> *Id.* at 135-38.

<sup>33</sup> *Id.* at 140-42.

Neither Butts nor Walker was a public official, so the rule established in *Times v. Sullivan* did not automatically apply.<sup>34</sup> The Court found, however, that there was a constitutional interest in providing protection for criticism of public figures as well as public officials. Butts, for example, had important responsibilities as athletic director at a major university, and there was public interest in education in general and in athletic affairs in particular. Walker, on the other hand, thrust himself into the vortex of a controversy involving important events and personalities in a riot in Mississippi.<sup>35</sup> It was the intent of the framers of the First Amendment, the Court noted, to provide freedom of discussion that embraced all matters of public concern.<sup>36</sup> Therefore, “a rational distinction ‘cannot be founded on the assumption that criticism of private citizens who seek to lead in the determination of policy will be less important to the public interest than will criticism of government officials.’”<sup>37</sup>

In the *New York Times* case, which involved an area of the law close to seditious libel, the Court invoked the hypothesis “‘that speech can rebut speech, propaganda will answer propaganda, [and] free debate of ideas will result in the wisest governmental policies.’”<sup>38</sup> As a result, the Court granted greater protection for criticism of public officials. Though seditious libel was not part of *Curtis Publishing Co.*, the public interest in the matters at issue in the case was no less than that in *Times v. Sullivan*. In addition, both Butts and Walker commanded a substantial amount of independent public interest at the time of the publications.<sup>39</sup> Both men “commanded sufficient public interest and had sufficient access to means of counter-argument to be able ‘to expose through discussion the falsehood and fallacies’ of the defamatory statements.”<sup>40</sup> As a result, therefore, the Court held that public figures, like public officials, are required to prove actual malice in order to win damages.<sup>41</sup>

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<sup>34</sup> While Butts was athletic director at a public institution of higher education, his salary was paid by a private foundation established to support athletics at the University of Georgia, so he was not considered a public official. *See id.* at 146.

<sup>35</sup> *Curtis Publishing Co.*, 388 U.S. at 146.

<sup>36</sup> *Id.* at 147.

<sup>37</sup> *Id.* at 147-48 (quoting *Pauling v. Globe-Democrat Publishing Co.*, 362 F.2d 188, 196 (8th Cir. 1966)).

<sup>38</sup> *Id.* at 153 (quoting *Dennis v. United States*, 341 U.S. 494, 503 (1951)).

<sup>39</sup> *Id.* at 154.

<sup>40</sup> *Id.* at 155 (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., dissenting)).

<sup>41</sup> Justice John Marshall Harlan, writing for Justices Tom Clark, Potter Stewart, and Abe Fortas, would have established that public figures be required to prove, on the part of the defendant, “highly unreasonable conduct constituting an extreme departure from the

C. *Actual Malice and Matters of Public Concern*

The Court, then, in *Curtis Publishing Co.*, explained the rationale behind extending the actual malice rule to public figures. That rationale was carried to its logical conclusion in *Rosenbloom v. Metromedia, Inc.*,<sup>42</sup> a case that did not address public figure status, but had implications that would later impact issues surrounding involuntary public figures. In *Rosenbloom*, which spawned five opinions, a plurality of the Court, building upon the foundation laid in *Times v. Sullivan* and *Curtis Publishing Co.*, extended the protection of the actual malice rule to lawsuits based upon alleged defamations about private people, if those private people were involved in matters of “public or general concern.”<sup>43</sup> For Justice William J. Brennan, who wrote the plurality opinion, what became known as the “Rosenbloom Rule” was a logical extension. “‘Freedom of discussion, if it would fulfill its historic function in this nation,’” Justice Brennan wrote, “‘must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.’”<sup>44</sup>

In addition, Brennan wrote, “the view of the ‘public official’ or ‘public figure’ as assuming the risk of defamation by voluntarily thrusting himself into the public eye bears little relationship either to the values protected by the First Amendment or to the nature of our society.”<sup>45</sup> That’s because, Brennan noted, a civilized society requires some exposure by all individuals.<sup>46</sup> “Voluntarily or not,” he wrote, “we are all ‘public’ men to some degree. . . . Thus, the idea that certain ‘public’ figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view is, at best, a legal fiction.”<sup>47</sup>

Under such a scheme, protection should attach as much to

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standards of investigation and reporting ordinarily adhered to by reasonable publishers,” *id.* at 155. Chief Justice Earl Warren, however, found Justice Harlan’s test “unusual and uncertain” and wrote that a different test for public figures and public officials “has no basis in law, logic or First Amendment policy,” *id.* at 155 (Warren, C.J., concurring in judgment). He wrote that public figures, like public officials, should be required to prove actual malice, *id.* at 164 (Warren, C.J., concurring in judgment). Because Justices Black, Douglas, Brennan, and Byron White joined Chief Justice Warren, rather than Justice Harlan, the actual malice rule for public figures was established.

<sup>42</sup> 403 U.S. 29 (1971) (plurality).

<sup>43</sup> *Id.* at 52.

<sup>44</sup> *Id.* at 41 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940)).

<sup>45</sup> *Id.* at 47.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 48.

the discussion of the important issues of society as to the discussion of public officials and public figures.

If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not “voluntarily” choose to become involved. The public’s primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant’s prior anonymity or notoriety.<sup>48</sup>

Therefore, Justice Brennan wrote: “We honor 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 of general concern, without regard to whether the persons involved are famous or anonymous.”<sup>49</sup>

While public figure status was not discussed in *Rosenbloom*, therefore, issues that would find their way into a discussion of involuntary public figures were. Justice Brennan noted that all persons are public to some degree, and the basis of the ruling was the proposition that the discussion of public matters deserved special protection.

#### D. *Actual Malice and Public Figures, Part II*

Three years later, however, the Court overruled the *Rosenbloom* Rule,<sup>50</sup> even as it attempted to clarify the *New York Times* rule as it applied to public figures.

In *Gertz v. Robert Welch, Inc.*, the Court reaffirmed its desire to find an accommodation between the necessary “breathing space” for discussion of matters of public interest and the legitimate state interest in protecting reputations.<sup>51</sup> That accommodation for public officials and public figures, the Court noted, had been determined to be the actual malice rule, even though “many deserving plaintiffs” would be unable to surmount that barrier.<sup>52</sup> The Court then defined, once again, public figures:

Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have as-

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<sup>48</sup> *Id.* at 43.

<sup>49</sup> *Id.* at 43-44.

<sup>50</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974).

<sup>51</sup> *Id.* at 341-42.

<sup>52</sup> *Id.* at 342.

sumed roles of especial prominence in the affairs of society. Some occupy positions of such pervasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.<sup>53</sup>

Even if a libel plaintiff is not a public figure by virtue of inviting attention and comment, the Court added, the media

[A]re entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual. He has not accepted public office or assumed an 'influential role in ordering society.'<sup>54</sup>

A second rationale for extending the actual malice protection to public figures, the Court noted, was that, like public officials, they have access to the media.<sup>55</sup> The first recourse of public figures, as with public officials, is "using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation."<sup>56</sup>

The Court repeated its public figure language a few pages later in the opinion, but apparently with a limitation. In resolving the specific question as to whether attorney Elmer Gertz was a public figure, the Court said public figure status:

[R]ests on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.<sup>57</sup>

Elmer Gertz, the Court held, demonstrating the high threshold of public figure status, had not assumed such prominence. He had long been active in community and professional affairs, had been an officer in civic groups and professional organizations, had

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<sup>53</sup> *Id.* at 345.

<sup>54</sup> *Id.* (quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in result)).

<sup>55</sup> *Id.* at 344.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 351.



published books and articles on legal subjects and was, therefore, “well known in some circles.” But, the Court noted, “he had achieved no general fame or notoriety in the community.”<sup>58</sup> The Court explained:

Absent 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. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual’s participation in the particular controversy giving rise to the defamation.<sup>59</sup>

The Court, however, also found that Gertz was not a limited-purpose public figure, even though he represented a plaintiff in a controversial lawsuit against the city of Chicago.<sup>60</sup> Gertz, the Court said, played a minimal role in the criminal case that had sparked the civil litigation with which he was involved. In addition, “he never discussed either the criminal or civil litigation with the press and was never quoted as having done so. He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public’s attention in an attempt to influence its outcome.”<sup>61</sup>

Indeed, during the discussion of the case at conference, at least four justices said specifically that Gertz was not a public figure.<sup>62</sup> Chief Justice Warren Burger said specifically that a lawyer who takes a case “does not become a public figure because his client was one.” Gertz, he said, “is only another lawyer.”<sup>63</sup>

The *Gertz* holding raised some significant questions, the two most obvious being, why wasn’t Elmer Gertz a public figure, and how many categories of public figure status are there. The Court said public figures deserve less protection in libel litigation because they can more effectively use the remedy of self-help and because they have assumed a greater risk of criticism. And, the Court said a limited-purpose public figure is a person who voluntarily enters a public controversy in an effort to affect the outcome. Elmer Gertz appeared to have access to the media. He appeared to enter a public controversy—the issue was whether police who had shot and killed a black man had done so justifiably—in an attempt to affect

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<sup>58</sup> *Id.* at 351-52.

<sup>59</sup> *Id.* at 352.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> The justices were Warren Burger, Potter Stewart, Harry Blackmun, and Byron White. William O. Douglas Papers, Box 1641, Library of Congress.

<sup>63</sup> *Id.*

the outcome, by winning compensation for the family of the dead man. Because he did not use his access to the media in an effort to affect the outcome of the controversy, however, he was not a public figure.

It appeared, then, that to the *Gertz* Court using the media was a key element in public figure status. Indeed, it seemed to be a more important to the Court than either voluntary injection into a controversy or attempts to affect the outcome of the controversy. That left the question, however, of what kind of public figure Elmer Gertz was *not*. The Court had indicated that a libel plaintiff could become a public figure by being drawn into a controversy.<sup>64</sup> That language, coupled with the language that, “the instances of truly involuntary public figures must be exceedingly rare,” prompted many commentators to conclude that the Court had created three categories of public figure status: all-purpose, limited-purpose, and involuntary. Six pages later in the opinion, however, Justice Powell seemed to qualify the earlier language. He noted that public figure status “rests on either of *two* alternative bases”: a public figure “for all purposes and in all contexts” or “a public figure for a limited range of issues.”<sup>65</sup> As a result, a libel plaintiff could become a limited-purpose public figure—not an involuntary public figure—by being *drawn into* a public controversy.

So, then, did the Court delineate two or three categories of public figure status? If three, how do involuntary public figures and limited-purpose public figures drawn into public controversies differ? And does it make any difference? The questions became more difficult to answer following three libel cases that came on the heels of *Gertz*.

E. *Actual Malice and Public Figures Refined: Firestone, Hutchinson & Wolston*

Two years later, the Court ruled that Mary Alice Firestone, the wife of the heir to the Firestone tire dynasty, was a private person.<sup>66</sup> This, even though Mrs. Firestone was involved in a highly publicized and sensational divorce trial, was a member of a social register in Palm Beach, where she lived, had her own clipping service, and held regular press conferences during the trial.<sup>67</sup> Mrs. Firestone had sued her husband for divorce. He countersued on grounds of adultery and mental cruelty. A long, contentious trial

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<sup>64</sup> 418 U.S. at 351.

<sup>65</sup> *Id.* (emphasis added).

<sup>66</sup> *Time, Inc. v. Firestone*, 424 U.S. 448, 455 (1976).

<sup>67</sup> *Id.* at 484-85 (Marshall, J., dissenting).

followed, and interest was piqued in large part because of the “Firestone” name.

In granting Firestone’s divorce on grounds that “neither party is domesticated,” the judge in the case said he found much of the testimony unbelievable:

According to certain testimony in behalf of the defendant, extramarital escapades of the plaintiff were bizarre and of an amatory nature which would have made Dr. Freud’s hair curl. Other testimony, in plaintiff’s behalf, would indicate that defendant was guilty of bounding from one bed partner to another with the erotic zest of a satyr. The court is inclined to discount much of this testimony as unreliable.<sup>68</sup>

*Time* magazine, however, reported that the divorce was granted on the grounds of adultery and mental cruelty, and Mrs. Firestone sued the magazine for libel.<sup>69</sup>

Justice Thurgood Marshall dissented in *Time, Inc. v. Firestone*, noting that Mrs. Firestone had not shunned publicity and that she had access to the media so she could respond to the charges. If, Justice Marshall wrote, the actions Mrs. Firestone took in becoming a member of the “sporting set,” subscribing to a clipping service, initiating a lawsuit, and holding press conferences, failed to establish her as a public figure, “surely [those actions] are sufficient to entitle the press to act on the assumption that she did.”<sup>70</sup>

The Court, however, held that Mrs. Firestone “did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society, and she did not thrust herself to the forefront of any particular public controversy in order to influence the issues involved in it.”<sup>71</sup> In addition, the Court held, the “public controversy” was not the kind of controversy the Court intended when it used that term. “Public controversy,” wrote Justice William Rehnquist for the Court, does not mean any controversy of interest to the public: “Dissolution of a marriage through judicial proceedings is not the sort of ‘public controversy’ referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public.”<sup>72</sup>

While participants in some litigations may be legitimate public figures, the Court added, “[T]he majority will more likely resemble respondent, drawn into a public forum largely against their will in

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<sup>68</sup> *Id.* at 450-51 (quoting trial court’s final judgment).

<sup>69</sup> *Id.* at 452.

<sup>70</sup> *Id.* at 486-87 (Marshall, J., dissenting).

<sup>71</sup> *Id.* at 453.

<sup>72</sup> *Id.* at 454.

order to attempt to obtain the only redress available to them or to defend themselves against actions brought by the State or by others.”<sup>73</sup>

Three years later, the Court held that a researcher who had received federal funding was not a public figure. In *Hutchinson v. Proxmire*,<sup>74</sup> the Court found that Ronald Hutchinson, a behavioral scientist who had received more than \$500,000 in federal grants,<sup>75</sup> was just like “countless members of his profession,” publishing research to small groups of people interested in the discipline.<sup>76</sup> Any controversy about his research came about as a result of the “Golden Fleece” award presented to him by Senator William Proxmire. Proxmire periodically presented the award to groups or individuals he believed to be wasting public monies. The award to Hutchinson was accompanied by several public statements poking fun at Hutchinson’s publicly funded research. “Clearly,” the Court held, “those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.”<sup>77</sup> Hutchinson, the Court held, did not thrust himself into any public controversy and never assumed any role of public prominence, even in the broad question over the expenditure of public funds.<sup>78</sup>

The same day it decided *Hutchinson*, the Court decided *Wolston v. Reader’s Digest Association*,<sup>79</sup> holding that a private person called to testify in an investigation into Communist agents in the United States was not a public figure. Ilya Wolston was incorrectly identified in a book published by the Reader’s Digest Association as being among a group of Soviet agents in the United States convicted of espionage or who fled to avoid prosecution. In fact, Wolston’s aunt and uncle were charged with being spies. Wolston was called to New York City on various occasions to testify before a special federal grand jury and, on one occasion, did not show up. He was charged with contempt but eventually testified.<sup>80</sup>

The Court reiterated its *Gertz* rationale for extending the actual malice rule to public figures: They have a greater ability to respond through the media, and they have voluntarily exposed themselves to increased risk of injury from defamation. And the

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<sup>73</sup> *Id.* at 457.

<sup>74</sup> 443 U.S. 111 (1979).

<sup>75</sup> *Id.* at 114 n.1.

<sup>76</sup> *Id.* at 135.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> 443 U.S. 157 (1979).

<sup>80</sup> *Id.* at 159-63.

Court reiterated the two ways a person could become a public figure: by occupying a position of pervasive power and influence or by voluntarily entering a public controversy to affect the outcome of the controversy.<sup>81</sup>

Neither party claimed Wolston was an all-purposes public figure, and the Court held that he was not a limited-purposes public figure simply because he failed to appear before a grand jury and was cited for contempt.<sup>82</sup> He did not voluntarily enter the controversy, Chief Justice Warren Burger wrote for the majority. Indeed, "It would be more accurate to say that [he] was dragged unwillingly into the controversy."<sup>83</sup> Wolston failed to appear, Burger wrote, and that failure caused media attention, "[b]ut the mere fact that petitioner voluntarily chose not to appear before the grand jury, knowing that his action might be attended by publicity, is not decisive on the question of public figure status."<sup>84</sup> The failure to appear was newsworthy, but that's not enough, Chief Justice Burger wrote.<sup>85</sup> "A libel defendant must show more than mere newsworthiness to justify application of the demanding burden of *New York Times*."<sup>86</sup> In addition, the Chief Justice wrote, "This reasoning leads us to reject the further contention . . . that any person who engages in criminal conduct automatically becomes a public figure for purposes of comment on a limited range of issues relating to his conviction."<sup>87</sup>

Justices Harry Blackmun and Thurgood Marshall agreed that Wolston was not a public figure in 1974, when the book was published. They disagreed with Chief Justice Burger's contention that Wolston was not a public figure at the time of his citation for contempt, however. "At the height of the publicity surrounding the espionage controversy here, petitioner may have had sufficient access to the media effectively to rebut a charge that he was a Soviet spy," Justice Blackmun wrote.<sup>88</sup>

#### F. *Actual Malice and Involuntary Public Figures—Or Not*

The Court, then, within five years of *Gertz*, had the opportunity in three cases to apply an involuntary public figure doctrine, if not expand its definition of the term, but chose to do neither. It ap-

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<sup>81</sup> *Id.* at 164.

<sup>82</sup> *Id.* at 165.

<sup>83</sup> *Id.* at 166.

<sup>84</sup> *Id.* at 167.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 167-68.

<sup>87</sup> *Id.* at 168.

<sup>88</sup> *Id.* at 170-71 (Blackmun, J., concurring in the result).

peared as if the Court was abandoning the concept of the involuntary public figure. And, indeed, both appellate courts and scholars, in the limited commentary on the involuntary public figure doctrine, have reached just that conclusion.

The federal court for the Eastern District of Michigan, for example, wrote that “the continued vitality” of the involuntary public figure “is called into serious question by the opinion in *Firestone*.” The court continued: “[I]t appears to this court that the *Firestone* opinion forecloses the possibility of one becoming an involuntary public figure.”<sup>89</sup> The California Court of Appeals seemed to agree. In *Franklin v. Lodge 1108, Benevolent and Protective Order of Elks*, the court ruled that a high school teacher who was targeted for criticism by the Elks organization because she used a book the organization didn’t like was a private person, in part, it seems, because the Supreme Court seemed to retreat from involuntary public status in *Firestone*.<sup>90</sup>

Scholars have similarly questioned the continued vitality of the involuntary public figure. After examining the Court’s decisions in *Firestone*, *Wolston* and *Hutchinson*, for example, one commentator reported in 1980 that “Attempting to reconcile the uncertainties of the post-*Gertz* decisions by analyzing the Court’s definitions of the *Gertz* terminology can leave one bewildered.”<sup>91</sup> The commentator concluded that “the concept of an involuntary public figure is hypothetical at best.”<sup>92</sup> The same year, a second commentator wrote that language from *Gertz* indicating that a person could become a public figure by being “drawn into” a controversy and with “lack of purposeful action” was “conspicuously omitted” from the Court’s recap of the *Gertz* public figure definition. That was, the commentator concluded, “evidence that the involuntary class is not a central part of the Court’s conception of public figures.”<sup>93</sup> Indeed, the commentator concluded, *Firestone* “destroyed the involuntary public figure class,”<sup>94</sup> and if the Court had not done so, it should.<sup>95</sup>

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<sup>89</sup> *Schultz v. Reader’s Digest Ass’n*, 468 F. Supp. 551, 559 (E.D. Mich. 1979). See also *Wells v. Liddy*, 186 F.3d 505, 538 (4th Cir. 1999).

<sup>90</sup> 159 Cal. Rptr. 131 (1979). Later, however, the same court and the California Supreme Court both recognized the existence of involuntary public figures. See *Khawar v. Globe Int’l, Inc.*, 54 Cal. Rptr. 2d 92 (1996) and *Khawar v. Globe Int’l, Inc.*, 965 P.2d 696 (Cal. 1998).

<sup>91</sup> Mark L. Rosen, *Media Lament—The Rise and Fall of Involuntary Public Figures*, 54 ST. JOHN’S L. REV. 487, 508 (1980).

<sup>92</sup> *Id.* at 507.

<sup>93</sup> Dale K. Nichols, *The Involuntary Public Figure Class of Gertz v. Robert Welch: Dead or Merely Dormant?* 14 U. MICH. J.L. REFORM 71, 81 (1980).

<sup>94</sup> *Id.* at 80. See also, David L. Wallis, Note, *The Revival of Involuntary Limited-Purpose Public Figures—Dameron v. Washington Magazine, Inc.*, 1987 BYU L. REV. 313, 318-19.

<sup>95</sup> *Id.* at 84.

Attorneys for Richard Jewell, the security guard who was first a hero, then a suspect, in the bombing in Atlanta's Centennial Olympic Park in 1996, agree. Jewell sued the *Atlanta Journal-Constitution* for its coverage of the bombing and the investigation into Jewell's alleged involvement.<sup>96</sup> The Georgia Court of Appeals found Jewell to be an involuntary public figure,<sup>97</sup> and he appealed to the Georgia Supreme Court, which denied certiorari. Jewell subsequently filed a petition for certiorari to the U.S. Supreme Court, asking that the Court "unequivocally reject[ ] the existence and viability of the category."<sup>98</sup>

The possibility exists, of course, that Firestone, Hutchinson, and Wolston were not identified by the Court as involuntary public figures because the Court did not consider involuntary public figure status to exist. The Court could have been taking the position that there are two types of public figures—all-purpose and limited-purpose—and the three plaintiffs fit neither category. If that were the case, then, based on the Court's language recognizing "two alternative bases" for achieving public figure status, there are two ways a person can become a limited-purposes public figure—by injection into a controversy and by being drawing unwillingly into that controversy. Involuntariness, under such a scheme, is one means by which a person can become a public figure, but is not a separate category of public figure status. At least one lower court has adopted just that approach,<sup>99</sup> while a number of others took the approach that a person could be drawn into a controversy and become a limited-purpose public figure through no willful effort.<sup>100</sup>

These approaches, however, would seem to ignore that portion of the *Gertz* opinion in which the Court noted that there was a third class of public figure status—at least hypothetically—and that third class was the involuntary public figure. The Court went so far as to say that plaintiffs who fit that category would be "exceedingly rare."<sup>101</sup>

To complicate matters, it can be argued that in each of the three public figure cases—*Firestone*, *Hutchinson*, and *Wolston*—the Court focused on issues it obviously believed trumped involuntary

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<sup>96</sup> *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175 (Ga. App. 2001), *cert. denied* (Feb. 11, 2002) (No. A01A1564, A01A1565, A01A1566).

<sup>97</sup> *Id.* at 186.

<sup>98</sup> *Atlanta Journal-Constitution v. Jewell*, *petition for cert.* at 17 (filed May 2, 2002) (No. 01-1627).

<sup>99</sup> See *infra* note 148 and accompanying text.

<sup>100</sup> See *infra* notes 151-57 and accompanying text.

<sup>101</sup> 318 U.S. 323, 345 (1974).

public figure status.<sup>102</sup> In *Firestone*, the Court held that the divorce proceedings from which the controversy grew did not fall into the definition of “matters of public concern.”<sup>103</sup> Since the Court had specifically held that the purpose of the actual malice rule was to protect discussion of matters of public concern,<sup>104</sup> if the matters at issue were not of “public concern,” the status of the libel plaintiff became irrelevant.

In *Hutchinson*, the Court focused on what has come to be known as the “bootstrapping” issue.<sup>105</sup> It was significant that a majority of the Court held that there was no controversy until Proxmire had awarded Hutchinson the Golden Fleece Award. “Clearly,” the Court held, “those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.”<sup>106</sup> The Court did not explicitly consider whether Hutchinson might have been an involuntary public figure, apparently because, by settling the case on bootstrapping, it did not need to reach that issue.<sup>107</sup>

Possibly the Court’s best opportunity to explicate an involuntary public figure doctrine came in *Wolston*. After all, the case involved Communism, an issue that could certainly be defined as a “matter of public concern.” It involved legislative hearings—events that occurred in the public eye. And the Court specifically noted that *Wolston* was “dragged unwillingly into the controversy,”<sup>108</sup> language that tracked the *Gertz* dictum that an involuntary public figure was a private person who became public “through no purposeful action of his own.”<sup>109</sup> When the Court ruled, then, that *Wolston* was a private person, a logical conclusion might be that it had rejected the *Gertz* dictum, and the involuntary public figure doctrine was dead.

The Court, however, did not reach the question of whether *Wolston* was an involuntary public figure because it found that *Wolston* “played only a minor role” in a public controversy. “We decline to hold,” Chief Justice Burger wrote, that the “mere citation for contempt rendered him a public figure for purposes of

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<sup>102</sup> See, Aureliano Sanchez-Arango, Casenote, *The Elusive “Involuntary Limited Purpose Public Figure”: Why the Fourth Circuit Got it Wrong in Wells v. Liddy*, 9 GEO. MASON L. REV. 211, 221-227 (2000).

<sup>103</sup> 424 U.S. 448, 454 (1976).

<sup>104</sup> See discussion accompanying *supra* notes 29, 36-37 and 71-72.

<sup>105</sup> See, e.g., Joseph A. Russomanno, *Libel: Defense Issues and Strategies*, in COMMUNICATION AND THE LAW 108-09 (W. Wat Hopkins ed., 2002).

<sup>106</sup> 443 U.S. 111, 134 (1979).

<sup>107</sup> See Sanchez-Arango, *supra* note 102, at 225.

<sup>108</sup> 443 U.S. 157, 166 (1979).

<sup>109</sup> 418 U.S. 323, 345 (1974).



comment on the investigation of Soviet espionage."<sup>110</sup> The clear implication was that even involuntary public figures must be more than tangentially involved in public controversies; their involvement must be central or certainly significant, the Court seemed to be saying. And, as the Minnesota Supreme Court put it, that was not the case in *Gertz* and the cases that followed it: "The plaintiffs in *Gertz*, *Firestone*, *Hutchinson* and *Wolston* had this in common: all were private individuals enmeshed in personal lives or work which had momentarily caught the attention of the press and public, largely as illustrative of some perceived social ill."<sup>111</sup>

The U.S. Court of Appeals for the Fifth Circuit seemed to agree. "Exposure of the self to others in varying degrees is a concomitant of life in a civilized community," the court held. "The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press."<sup>112</sup> The question in determining public figure status, therefore, must focus on actions by the plaintiff that involved an increased risk of exposure.<sup>113</sup>

Legal scholar Barbara L. Stocker agrees. "[S]omething in addition to apparent prominence would seem to be required," she writes. "Perhaps the Court intends that plaintiffs become involuntary public figures only if they have attained widespread prominence, albeit involuntary, prior to the publication of defamatory statements."<sup>114</sup> In addition, involuntary public figure status was not an issue raised in the lower courts or to the Supreme Court. In *Hutchinson*, for example, the issue of public figure status was nearly overlooked. Only after writing an opinion in which the issue was not mentioned, did Chief Justice Burger send a memo to other members of the Court indicating that he had overlooked the public figure issue and suggesting that his notes from the conference discussion indicated that there was likely agreement that *Hutchinson* was not a public figure.<sup>115</sup>

While the Court, then, in the cases following *Gertz* seemed to ignore an involuntary public figure doctrine, it did not explicitly

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<sup>110</sup> 443 U.S. at 167.

<sup>111</sup> *Jadwin v. Minneapolis Star and Tribune Co.*, 367 N.W.2d 476, 485 (Minn. 1985).

<sup>112</sup> *Brewer v. Memphis Pub. Co.*, 626 F.2d 1238, 1251 (5th Cir. 1980) (citing *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967)).

<sup>113</sup> *Id.* at 1254.

<sup>114</sup> Barbara L. Stocker, Note, *An Analysis of the Distinction Between Public Figures and Private Defamation Plaintiffs Applied to Relatives of Public Persons*, 49 S. CAL. L. REV. 1131, 1206 (1976).

<sup>115</sup> William J. Brennan Papers, Box 508, Library of Congress, Washington, D.C. In addition, attorneys for *Time* magazine argued that Mary Alice Firestone was a public figure because she had been married to a public figure. See Stocker, *supra* note 114, at 1133-34.

retreat from the concept; it merely held to its pronouncement that such public figures are “exceedingly rare.”<sup>116</sup> As legal scholar Aureliano Sanchez-Arango pointed out, “[F]ar from killing the involuntary public figure doctrine, this line of cases merely illustrates that voluntariness is merely the principal route to public figure status. And this is still quite consistent with Justice Powell’s observation in *Gertz* that the involuntary public figure would be ‘exceedingly rare,’”<sup>117</sup> though one commentator pointed out that “rare” appeared to be a euphemism for “nonexistent.”<sup>118</sup>

The other possibility, of course, is that the Court did not identify Firestone, Hutchinson, and Wolston as involuntary public figures because the Court had not recognized that category as a third type of public figure. The Court could have been strictly adhering to its holding that public figure status is achieved by only “two alternative bases,” and, while libel plaintiffs could become limited-purpose public figures by being dragged unwillingly into public controversies, such *circumstances* are exceedingly rare—so rare that the Court has yet to consider a case in which those circumstances have been met. In such cases, the Court would be required to consider “the nature and extent of an individual’s participation in the particular controversy” rather than whether the individual purposely entered the controversy in an attempt to affect the outcome.<sup>119</sup>

As lower appellate courts began to explore the reach of the involuntary public figure doctrine, they had little guidance from the Supreme Court. As a result, they cut multiple paths.

## II. DEFINING THE INVOLUNTARY PUBLIC FIGURE

The task of demarcating the differences between public and private persons has never been easy. “The line between limited purpose public figure status and private individual status,” one court complained, “has proved difficult to draw.”<sup>120</sup> That’s because, another court opined, “[T]he Supreme Court has not fleshed out the skeletal descriptions of public figures and private persons enunciated in *Gertz*.”<sup>121</sup> Noted another: “The public figure concept has eluded a truly working definition and falls within that

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<sup>116</sup> 418 U.S. 323, 345 (1974).

<sup>117</sup> Sanchez-Arango, *supra* note 102, at 221.

<sup>118</sup> Nat Stern, *Unresolved Antitheses of the Limited Public Figure Doctrine*, 33 Hous. L. Rev. 1027, 1092 (1996).

<sup>119</sup> *Gertz*, 418 U.S. at 352.

<sup>120</sup> *Jadwin v. Minneapolis Star and Tribune, Co.*, 367 N.W.2d 476, 484 (Minn. 1985); *see also Seegmiller v. KSL, Inc.*, 626 P.2d 968, 972 (Utah 1981).

<sup>121</sup> *Waldbaum v. Fairchild Publ’ns, Inc.*, 627 F.2d 1287, 1292 (D.C. Cir. 1980).

class of legal abstractions where 'I know it when I see it,' in Mr. Justice Stewart's words."<sup>122</sup> It appears, however, that some courts don't "know it" when they "see it"—they seem to mix and match the various categories of public persons.<sup>123</sup> The United States Court of Appeals for the Third Circuit was one of several courts to complain:

The Supreme Court has not provided a detailed chart of the contours of the public and private figure categories. In an attempt to avoid "unpredictable results and uncertain expectations," the Court elected to paint with a broad brush rather than to adopt a case by case approach. Without a precise diagram for guidance, courts and commentators have had considerable difficulty in determining the proper scope of the public figure doctrine.<sup>124</sup>

The federal court for the Southern District of Georgia was more succinct in describing the problem: "Defining public figures is much like trying to nail a jellyfish to the wall."<sup>125</sup> And Judge Robert Sack, who is also an expert on libel law, wrote that the law in determining "who is and who is not a 'public figure' . . . is chaotic."<sup>126</sup>

#### A. *Voluntariness, Part I*

The criticisms are accurate—much confusion has grown from the public figure doctrine. It would appear, however, that on one point the Court was clear in *Gertz v. Welch*: Voluntariness is at the center of the attempt to clarify the "vague classifications" of all-purpose and limited-purpose public figure status.<sup>127</sup> The limited-purpose public figure must voluntarily enter an ongoing public controversy in order to affect the outcome; all-purpose public figures have voluntarily entered the public eye in a much larger way, through their choices of professions or other activities. Indeed, voluntariness seemed to be the key element in determining whether a libel plaintiff is a public figure. At least, that was the

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<sup>122</sup> *Rosanov v. Playboy*, 580 F.2d 859, 861 (5th Cir. 1978) (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

<sup>123</sup> See, e.g., *Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1431 (8th Cir. 1989) (the court seems to confuse public figure status and public official status); *Bandelin v. Peitsch*, 563 P.2d 395, 398 (Idaho 1977) (plaintiff's history of activity in politics and local affairs used as part of consideration as to limited public figure status).

<sup>124</sup> *Marcone v. Penthouse*, 754 F.2d 1072, 1082 (3d Cir. 1985) (citations omitted).

<sup>125</sup> *Rosanov v. Playboy*, 411 F. Supp. 440, 443 (S.D. Ga. 1976), *aff'd* 580 F.2d 859 (5th Cir. 1978).

<sup>126</sup> ROBERT SACK, *SACK ON DEFAMATION: LIBEL, SLANDER AND RELATED PROBLEMS*, § 5.3.1 (3d ed. 2001).

<sup>127</sup> *Naantaanbuu v. Abernathy*, 816 F.Supp. 218, 222 (S.D.N.Y. 1993).

route lower appellate courts seemed to take. The Arizona Court of Appeals noted, for example, that the language throughout *Gertz* emphasizes voluntariness in the acquisition of public figure status. Wrote the court:

One *assumes* a role of special prominence in the resolution of a public issue, *relinquishes* a degree of privacy, *invites* attention and comment, and *runs the risk* of closer public scrutiny; in consequence, he *exposes* his reputation to the harmful inaccuracies he must tolerate as a member of a society which accords constitutional 'breathing space' to a free press.<sup>128</sup>

A California appellate court was more succinct. It held, simply, that relinquishing private person status must be "voluntarily and actively sought."<sup>129</sup> Otherwise, the United States Court of Appeals for the Fourth Circuit held, there is a threat of a return to the rule that private persons involved in matters of public events are required to prove actual malice,<sup>130</sup> a rule rejected by the Supreme Court.<sup>131</sup>

Lower appellate courts, then, seemed to follow what appeared to be the rule established by *Gertz* that voluntary entry into the public eye was a prerequisite for public figure status. But even that issue is not so clear-cut. The Supreme Court, after all, also indicated in *Gertz* that a person could be "drawn into a particular public controversy and thereby become[ ] a public figure for a limited range of issues."<sup>132</sup> Determination of public figure status would be by examining "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation."<sup>133</sup> Under this configuration, a libel plaintiff could become a limited-purpose public figure by voluntarily entering an ongoing public controversy in an effort to affect the outcome of the controversy, or by being *drawn into* such a controversy; public figure status could attach depending upon the nature and extent of the person's participation once immersed in the controversy.

### B. *Two or Three Public Figure Categories?*

So, rather than clarifying the "vague classifications," *Gertz* com-

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<sup>128</sup> *Scottsdale Publ'g v. Superior Court*, 764 P.2d 1113, 1138 (Ariz. Ct. App. 1988) (emphasis in original) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974)).

<sup>129</sup> *Franklin v. Lodge 1108, Order of Elks*, 159 Cal. Rptr. 131, 140 (Cal. Ct. App. 1979); see also *Schultz v. Reader's Digest Ass'n*, 468 F. Supp. 551, 558-59 (E.D. Mich. 1979); *Scottsdale*, 764 P.2d at 1140.

<sup>130</sup> *Wells v. Liddy*, 186 F.3d 505, 540 (4th Cir. 1999).

<sup>131</sup> See discussion of the Rosenbloom Rule at *supra* notes 42-50.

<sup>132</sup> 418 U.S. 323, 351 (1974).

<sup>133</sup> *Id.*

plicated them. Lower courts, as a result, have demonstrated predictable confusion in dealing with the so-called involuntary public figure. To begin with, unsurprisingly, there is disagreement as to whether the Supreme Court identified two or three categories of public figure status. On one hand, many courts that have wrestled with issues related to public figure status and involuntariness have held that the Supreme Court identified only two categories of public figures.<sup>134</sup> The basis for the rulings was often the language from *Gertz* indicating that public figure status could be achieved by “either of two alternative bases”<sup>135</sup> and the Court’s apparent abandonment of the involuntary public figure in *Firestone*, *Hutchinson*, and *Wolston*.<sup>136</sup>

On the other hand, a number of courts have recognized—either explicitly or implicitly—that the involuntary public figure is one of three types of public figures identified by the *Gertz* Court. Indeed, over the quarter-century following *Gertz*, some twenty-three courts have struggled with the involuntary public figure doctrine in more than thirty cases, identifying plaintiffs as involuntary public figures nine times<sup>137</sup> and applying an involuntary public figure examination, but ruling that libel plaintiffs were private persons rather than involuntary public figures, another nine times.<sup>138</sup> In

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<sup>134</sup> *Marcone v. Penthouse*, 754 F.2d 1072, 1082 (3d Cir. 1985); *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1292 (D.C. Cir. 1980); *Sculimbrene v. Reno*, 158 F. Supp. 2d 8, 10 (D.D.C. 2001); *Harris v. Quadracci*, 856 F. Supp. 513, 516 (E.D. Wis. 1994); *Foretich v. Advance Magazine Publishers*, 765 F. Supp. 1099, 1107 (D.D.C. 1991); *Schiavone Constr. Co. v. Time, Inc.*, 619 F. Supp. 684, 701-02 (D.N.J. 1985); *Schultz v. Reader's Digest Ass'n*, 468 F. Supp. 551, 555 (E.D. Mich. 1979); *Rosanova v. Playboy*, 411 F. Supp. 440, 455 (S.D. Ga. 1976) (implied); *Scottsdale Publ'g, Inc. v. Superior Court*, 764 P.2d 1131, 1138 (Ariz. Ct. App. 1988); *Khawar v. Globe Int'l, Inc.*, 965 P.2d 696, 701 (Cal. 1988); *Swate v. Schifers*, 975 S.W.2d 70, 76 (Tex. Ct. App. 1998); *Wiegel v. Capital Times Co.*, 426 N.W.2d 43, 48 (Wis. Ct. App. 1988).

<sup>135</sup> 418 U.S. at 351. See discussion accompanying *supra* notes 57-58 and 65.

<sup>136</sup> See *supra* notes 89-90 and accompanying text.

<sup>137</sup> *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736 (D.C. Cir. 1985); *Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977); *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976); *Wells v. Liddy*, 1 F. Supp. 2d 532 (D. Md. 1998), *rev'd* 186 F.3d 505 (4th Cir. 1999) (the district court holding the plaintiff to be an involuntary public figure, but the circuit court reversing); *Zupnik v. Associated Press, Inc.*, 31 F. Supp. 2d 70 (D. Conn. 1998); *Foretich v. Advance Magazine Publishers, Inc.*, 765 F. Supp. 1099 (D.D.C. 1991); *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175 (Ga. App. 2001) (holding that plaintiff is a limited-purpose public figure, but if not that, also an involuntary public figure); *Daniel Goldreyer, Ltd. v. Dow Jones & Co.*, 687 N.Y.S. 2d 64 (N.Y. App. Div. 1999); *Bay View Packing Co. v. Taff*, 543 N.W.2d 522 (Wis. Ct. App. 1995).

<sup>138</sup> *Wells v. Liddy*, 186 F.3d 505 (4th Cir. 1999), *rev'g* 1 F. Supp. 2d 532 (D. Md. 1998); *Naantaanbuu v. Abernathy*, 816 F. Supp. 218 (S.D.N.Y. 1993); *Grossman v. Smart*, 807 F. Supp. 1404 (C.D. Ill. 1992); *Tomson v. Stephan*, 699 F. Supp. 860 (D. Kan. 1988); *Dresbach v. Doubleday & Co.*, 518 F. Supp. 1285 (D.D.C. 1981); *Khawar v. Globe Int'l, Inc.*, 965 P.2d 696 (Cal. 1988); *Khawar v. Globe Int'l, Inc.*, 54 Cal. Rptr. 2d 92 (Cal. Ct. App. 1996); *Jones v. Taibbi*, 512 N.E.2d 260 (Mass. 1987); *Jacobson v. Rochester Communications*, 410 N.W.2d 830 (Minn. 1987).

yet another nine cases, courts have recognized the viability of involuntary public figure status, but held that the category of public figure status did not apply to the facts in the cases at bar.<sup>139</sup> Two other courts have acknowledged that involuntary public figures may have once existed, at least hypothetically, but indicated that the Supreme Court, in effect, abandoned that category in its *Firestone*, *Wolston*, and *Hutchinson* rulings.<sup>140</sup>

But this case counting, rather than elucidating public figure status, highlights the confusion surrounding the doctrine. Sometimes the confusion went beyond whether there were two or three categories of public figure status. Indeed, some courts seemed to want it both ways. The New York Court of Appeals, for example, noted that “there are, generally, two categories of public figures recognized in the cases,” but that, “a third category, ‘involuntary public figures,’ who are ‘involved in or directly affected by the actions of officials’ because of an arrest or some other similar event, is described in the literature, . . . and has some recognition in the cases.”<sup>141</sup> There are two categories of public figure status, therefore, except when there are three.

Similarly, the U.S. Circuit Court for the District of Columbia noted that the Supreme Court, in *Gertz*, created two classifications of public figure status,<sup>142</sup> but the court also recognized the existence of the third category—involuntary public figures.<sup>143</sup> “Unfortunately,” the court noted, “the Supreme Court has not yet fleshed out the skeletal descriptions of public figures and private persons enunciated in *Gertz*.”<sup>144</sup> Similar contradictions arise in the federal

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<sup>139</sup> *Marcone v. Penthouse*, 754 F.2d 1072 (3d Cir. 1985); *Brewer v. Memphis Pub’g Co.*, 626 F.2d 1238 (5th Cir. 1980); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980); *Waldbaum v. Fairchild Publ’ns, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980); *Sculimbrene v. Reno*, 158 F. Supp. 2d 8 (D.D.C. 2001); *Harris v. Quadracci*, 856 F. Supp. 513 (E.D. Wis. 1994); *Schiavone Constr. Co. v. Time, Inc.*, 619 F. Supp. 684 (D.N.J. 1985); *Jadwin v. Minneapolis Star and Tribune Co.*, 367 N.W.2d 476 (Minn. 1985); *Lee v. Rochester*, 663 N.Y.S.2d 738 (N.Y.S. 1997); *Erdmann v. SF Broad. of Green Bay*, 599 N.W.2d 1 (Wis. Ct. App. 1999).

<sup>140</sup> *Schultz v. Reader’s Digest Ass’n*, 468 F. Supp. 551, 559 (E.D. Mich. 1979) (finding that the continued vitality of the involuntary public figure was “called into serious question” by *Firestone*: “It appears to this court that the *Firestone* opinion forecloses the possibility of one becoming an involuntary public figure.”); *Franklin v. Lodge 1108, Benevolent and Protective Order of Elks*, 159 Cal. Rptr. 131, 138 (Cal. Ct. App. 1979) (holding that, hypothetically, it may be possible for there to be an involuntary public figure, but that the Supreme Court seemed to retreat from that suggestion in *Firestone*).

<sup>141</sup> *Lee v. Rochester*, 663 N.Y.S. 2d 738, 743 (N.Y.S. 1997) (quoting L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 12-13, at 880 (2d ed. 1988), and citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) and *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1551-52 (4th Cir. 1994)).

<sup>142</sup> *Waldbaum v. Fairchild Publ’ns, Inc.*, 627 F.2d 1287, 1292 (D.C. Cir. 1980).

<sup>143</sup> *Id.* at 1292 n.18 and 1293.

<sup>144</sup> *Id.* at 1292.

district courts for the District of Columbia,<sup>145</sup> the Eastern District of Wisconsin,<sup>146</sup> and the District of New Jersey.<sup>147</sup>

The U.S. Court of Appeals for the Third Circuit took a somewhat different approach. The court held that there are not three categories of public figure status, but that “involuntariness” is merely one means through which a libel plaintiff becomes a public figure. “In general,” the court noted in *Marcone v. Penthouse*, “rather than creating a separate class of public figures, we view such a description as merely one way an individual may come to be considered a general or limited purpose public figure.”<sup>148</sup> The federal district court for the Central District of Illinois made a similar observation. That court held that the *Gertz* Court created two categories of public figure status, but “subcategorized limited public figures” into voluntary and involuntary public figures.<sup>149</sup>

Such a scheme, however, ignores the Supreme Court’s holding in *Gertz* that, hypothetically at least, involuntary public figures exist even though they are exceedingly rare. If “involuntariness” is merely a means of achieving public figure status, there would be no need to refer to a “hypothetical” public figure whose existence is “exceedingly rare.” It seems clear, therefore, that the Supreme Court recognized the existence of involuntary public figures, but gave little guidance into how such persons are identified.

The Fifth Circuit said as much. The court voiced some skepticism as to whether a former girlfriend of Elvis Presley and a former college football star were public figures, but noted that “the Court in *Gertz* did not define all subcategories of the public figure classification.”<sup>150</sup>

### C. *Voluntariness, Part II*

Those courts recognizing only two categories of public figure status often hold that *Gertz* established two grounds for distinguishing public figures from private persons: access to the media and, more importantly, the assumption of the risk of media commentary related to a public controversy.<sup>151</sup> The “assumption of the risk of media commentary,” of course, means entry into the public eye, that is, “voluntariness.” Indeed, the requirement that a libel plain-

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<sup>145</sup> See *Sculimbrene v. Reno*, 158 F. Supp. 2d 8, 22 (D.D.C. 2001).

<sup>146</sup> See *Harris v. Quadracci*, 856 F. Supp. 513, 516-17 (E.D. Wis. 1994).

<sup>147</sup> See *Schiavone Constr. Co. v. Time, Inc.*, 619 F. Supp. 684, 701-02 (D.N.J. 1985).

<sup>148</sup> 754 F.2d 1072, 1084 n.9 (3d Cir. 1985); see also *Schiavone*, 619 F. Supp. at 704.

<sup>149</sup> *Grossman v. Smart*, 807 F. Supp. 1404, 1409 (C.D. Ill. 1992).

<sup>150</sup> *Brewer v. Memphis Publishing Co.*, 626 F.2d 1238, 1254 (5th Cir. 1980).

<sup>151</sup> See, e.g., *Marcone v. Penthouse*, 754 F.2d 1072, 1081 (3d Cir. 1985).

tiff assume the risk of media commentary has sometimes been interpreted as equivalent to—or as a substitute for—the requirement that a plaintiff voluntarily enter a controversy. One court held, for example, that while voluntariness is important to public figure status, “what is and is not voluntary is by no means self-evident.”<sup>152</sup> Similarly, the U.S. Court of Appeals for the District of Columbia Circuit noted that while voluntary injection into a public controversy is important, it is not “the be-all and end-all of public figure status.”<sup>153</sup> The voluntariness requirement may be satisfied, the Third Circuit noted, “even though an individual does not intend to attract attention by his actions. When 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.”<sup>154</sup> The Fourth Circuit agreed. “Even ‘involuntary’ participants can be public figures when they choose a course of conduct which invites public attention,” the court held.<sup>155</sup> Public figure status, the Iowa Supreme Court added, applies “to both the individual who becomes embroiled in a public controversy through no effort of his own and the individual who actively generates controversy.”<sup>156</sup> Therefore, a libel plaintiff could “voluntarily” enter the public eye by being “drawn into” an ongoing public controversy or by assuming a risk of exposure to criticism and potential defamation. The issue is not necessarily the voluntary injection into a controversy, but is acting in a way that would allow the media to assume that the libel plaintiff has accepted the increased risk as a result of exposure. “Voluntariness,” for purposes of public figure status, could be involuntary.<sup>157</sup>

The rationale for such rulings, the Fifth Circuit indicated, is that public exposure is inevitable when one lives in a free society. “Exposure of the self to others in varying degrees is a concomitant of life in a civilized community,” the court held. “The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and press.”<sup>158</sup> And, added the Court of Appeals for the District of Columbia Circuit, “When someone steps into the public spotlight, or when he remains there once

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<sup>152</sup> *Schiavone Constr. Co. v. Time, Inc.*, 619 F. Supp. 684, 703 (D.N.J. 1985).

<sup>153</sup> *Dameron v. Washington Magazine, Inc.*, 799 F.2d 736, 741 (D.C. Cir. 1981).

<sup>154</sup> *McDowell v. Paiewonsky*, 769 F.2d 942, 949 (3d Cir. 1985).

<sup>155</sup> *Reuber v. Food Chemical News, Inc.*, 925 F.2d 703, 709 (4th Cir. 1991).

<sup>156</sup> *Bandelin v. Pietsch*, 563 P.2d 395, 340 (Idaho 1977).

<sup>157</sup> *See, e.g.*, *Zupnik v. Associated Press*, 31 F. Supp. 2d 70, 72-73 (D. Conn. 1998); *Foretich v. Advance Magazine Publishers*, 765 F. Supp. 1099, 1108 (D.D.C. 1991); *ELM Medical Lab v. RKO General, Inc.*, 532 N.E.2d 675, 680 (Mass. 1989).

<sup>158</sup> *Brewer v. Memphis Pub. Co.*, 626 F.2d 1238, 1251 (5th Cir. 1980) (citing *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967)).



cast into it; he must take the bad with the good.”<sup>159</sup> It was language that could have come from Justice Brennan in *Rosenbloom*.<sup>160</sup>

Courts recognizing the involuntary public figure as a third category of public figure status had a similar rationale for finding libel plaintiffs to be public figures, but took a different approach in making their determinations. They also held that libel plaintiffs could be public figures by “being drawn into the center of the public debate without any deliberate action.”<sup>161</sup> Those courts recognizing three categories of public figures, however, often made use of the third category, ruling that persons drawn unwillingly into public controversies were involuntary public figures rather than limited-purpose public figures. Courts sometimes developed specific tests to determine whether a libel plaintiff fit into the category. The simplest test, first enunciated by the United States Court of Appeals for the District of Columbia Circuit in *Waldbaum v. Fairchild Publications, Inc.*, was to define the public controversy and then determine the plaintiff’s role in that controversy,<sup>162</sup> just as the *Gertz* Court suggested.<sup>163</sup> “The plaintiff,” the court held, “either must have been purposely trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to have an impact on its resolution.”<sup>164</sup> Other courts added a criterion: that the defamation be germane to the controversy.<sup>165</sup> The Fourth Circuit went even further. It required a showing that a libel plaintiff assumed the risk of publicity, even if the plaintiff didn’t seek publicity, before the plaintiff could be designated an involuntary public figure.<sup>166</sup>

The risk of publicity was important to other courts as well. Assumption of risk, the federal court for the Eastern District of Michigan held, was made essential by the Supreme Court in *Gertz*. Wrote the court:

On the one hand, a person who engages in conduct that unintentionally or unknowingly attracts public attention might be classed as an involuntary public figure because in some sense he can be said to have assumed the risk of his own conduct. On the other hand, a person who becomes the object of public at-

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<sup>159</sup> *Waldbaum v. Fairchild Publ’ns, Inc.*, 627 F.2d 1287, 1294-95 (D.C. Cir. 1980).

<sup>160</sup> See text accompanying *supra* footnotes 45-48.

<sup>161</sup> *Foretich v. Advance Magazine Publishers*, 765 F. Supp. 1099, 1108 (D.D.C. 1991). See also *Wells v. Liddy*, 1 F. Supp. 2d 532, 540 (D. Md. 1998), *rev’d* 186 F.3d 505 (4th Cir. 1999).

<sup>162</sup> 627 F.2d 1287, 1294-97 (D.C. Cir. 1980).

<sup>163</sup> 418 U.S. 323, 352 (1974).

<sup>164</sup> 627 F.2d at 1297.

<sup>165</sup> See *Bay View Packing Co. v. Taff*, 543 N.W.2d 552, 531 (Wis. Ct. App. 1995).

<sup>166</sup> *Wells v. Liddy*, 186 F.3d 505, 540 (4th Cir. 1999).

tention through no action of his own cannot be said in any real sense to have assumed the increased risk of defamation and would not therefore become a public figure.<sup>167</sup>

And, again, “assumption of risk” was sometimes seen as the equivalent of “voluntariness.” Courts held that “a high degree of public activity”<sup>168</sup> or a “high degree of affirmative conduct”<sup>169</sup> on the part of libel plaintiffs was important to being designated as involuntary public figures because a plaintiff taking some action resulting in public attention is different from a plaintiff who received attention without any action.

Even those courts recognizing the involuntary public figure category sometimes have trouble distinguishing between types of involuntary public figures. Some involuntary public figures seemed to be public figures for all purposes, while others seemed to be involuntary limited-purpose public figures. That is as it should be, the California Supreme Court indicated. That court held that either public activity or public prominence is necessary for public figure status. The Supreme Court would reserve involuntary public figure status, the court held in *Khawar v. Globe International, Inc.*, for an individual who, “despite never having voluntarily engaged the public’s attention in an attempt to influence the outcome of a public controversy, nonetheless has acquired such public prominence in relation to the controversy as to permit media access sufficient to effectively counter media-published defamatory statements.”<sup>170</sup>

Legal scholar Barbara L. Stocker agrees. “If the involuntary public figure concept is to be made consistent with the first amendment theory of *Gertz*,” she writes, “then only people who are apparently prominent in a particular controversy are involuntary public figures. Only prominent people are likely to have access to public forums for rebuttal and may appear at first glance to have invited publicity.”<sup>171</sup>

If, then, a libel plaintiff can become a limited-purpose public figure by entering an ongoing controversy voluntarily or involuntarily, how is a limited-purpose public figure who is drawn into an ongoing public controversy different from an involuntary public figure, that is, a libel plaintiff who becomes a public figure

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<sup>167</sup> *Schultz v. Reader’s Digest Ass’n*, 468 F. Supp. 551, 560 (E.D. Mich. 1979).

<sup>168</sup> *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 589 (1st Cir. 1980).

<sup>169</sup> *Naantaanbuu v. Abernathy*, 816 F. Supp. 218, 225 (S.D.N.Y. 1993).

<sup>170</sup> 965 P.2d 696, 702 (1998).

<sup>171</sup> Stocker, *supra* note 114, at 1217-18.

“through no purposeful action of his own”?<sup>172</sup> On one level, these distinctions do not matter. Both the limited-purpose public figure and the involuntary public figure are required to prove actual malice in order to win damages in libel actions, so the fact that one label attaches to one plaintiff and another label attaches to a second plaintiff is irrelevant. On another level, however, courts have made and continue to make distinctions between libel plaintiffs, based on the limited guidance from the Supreme Court. It is important, therefore, that distinctions between types of libel plaintiffs be clear. The Circuit Court for the District of Columbia has made just that point. Society, the court has said, “must provide the individual with clear rules that govern the potential consequences of his participation in public life.”<sup>173</sup>

### III. CATEGORIZING INVOLUNTARY PUBLIC FIGURES

As previously indicated, those courts recognizing the existence of involuntary public figures as a third category of public figure status under *Gertz*, often demarcated two types of involuntary public figures: those for all purposes and those for limited purposes.

#### A. *Involuntary Public Figures for All Purposes*

The *Gertz* Court emphasized that a libel plaintiff can become an involuntary public figure “through no purposeful action of his own,” but that such instances are “exceedingly rare.”<sup>174</sup> The ink was barely dry on the *Gertz* opinion, however, when a federal district court in New York ruled that Michael and Robert Meeropol, the sons of Julius and Ethel Rosenberg, who were executed as spies, were involuntary public figures.<sup>175</sup> The district court for the Southern District of New York did not use that term, but clearly applied the doctrine, since the Meeropols had done nothing to enter the public eye. Indeed, they had changed their names from “Rosenberg” to “Meeropol” to avoid publicity.<sup>176</sup>

The Meeropols, and people like them, that is, people whose fame exists only in relation to others, may be the archetypal involuntary public figures—they are thrust into the public eye through no action of their own and purely because of familial relationships. Indeed, one court suggested that “[t]he one group of individuals

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<sup>172</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

<sup>173</sup> *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1292 (D.C. Cir. 1980).

<sup>174</sup> 418 U.S. at 345.

<sup>175</sup> *Meeropol v. Nizer*, 381 F. Supp. 29 (S.D.N.Y. 1974).

<sup>176</sup> *Id.* at 34. The appellate court apparently ruled that the Meeropols were all-purpose public figures, *Meeropol v. Nizer*, 560 F.2d 1061, 1066 (2d Cir. 1977).

that might truly be considered involuntary public figures are relatives of famous people,<sup>177</sup> like the Meeropols or the wife of entertainer Johnny Carson.<sup>178</sup>

When Carson and his wife, Joanna Holland, sued a tabloid newspaper for libel, they did not contest the fact that they were public figures. Again, the court did not use the term “involuntary public figure,” but noted that “one can assume that the wife of a public figure such as Carson more or less automatically becomes at least a part-time public figure herself.”<sup>179</sup> It is unclear at what times Joanna Holland, and people like her, are public figures and at what times they are not.

Another of the “exceedingly rare” cases came out of a federal district court in Connecticut. The court held that the wife of a physician charged with multiple counts of overbilling health care insurers was an involuntary public figure.<sup>180</sup> “Despite the fact that the plaintiff has not sought a public role,” the court ruled, “she has been thrust into the role of a public figure by virtue of her marriage.”<sup>181</sup> The notoriety of her husband, the court noted, “spilled over upon the plaintiff and drew her into the public spotlight.”<sup>182</sup> Such notoriety doesn’t extend to all family members, however. The brother of a man accused of killing their parents was not a public figure, the federal court for the District of Columbia ruled,<sup>183</sup> because he neither achieved special access to the media, nor exposed himself to the risk of defamatory falsehoods. Indeed, the Supreme Court has specifically rejected the contention “that any person who engages in criminal conduct automatically becomes a public figure for purposes of comment on a limited range of issues relating to his conviction.”<sup>184</sup>

These cases, of course, involved public controversies, so public figure status attached to the physician and the murder suspect for the limited purpose of discussing the criminal cases involved. One would presume that the family members were also public figures only in relation to the impact of the controversies on the criminal suspects, but the courts did not make that distinction clear. What is clear is that they are public figures only because of those family relationships. The *Meeropol* case is instructive. The courts in that

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<sup>177</sup> *Marcone v. Penthouse*, 754 F.2d 1972, 1084 n.9 (3d Cir. 1985).

<sup>178</sup> *Carson v. Allied News Co.*, 529 F.2d 206, 210 (7th Cir. 1976).

<sup>179</sup> *Id.* at 210.

<sup>180</sup> *Zupnik v. Associated Press*, 31 F. Supp. 2d 70 (D. Conn. 1998).

<sup>181</sup> *Id.* at 72.

<sup>182</sup> *Id.* at 73.

<sup>183</sup> *Dresbach v. Doubleday & Co.*, 518 F. Supp. 1285, 1294-95 (D.D.C. 1981).

<sup>184</sup> *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 168 (1979).

case recognized the public controversy, but indicated that the Meeropol brothers were public figures because of their relationship with the Rosenbergs, not because of the controversy: "In the course of extensive public debate revolving about the Rosenberg trial, appellants were cast into the limelight and became 'public figures' under the *Gertz* standards."<sup>185</sup> The Meeropols were not involved in the public controversy, but were pulled into it because it swirled around their parents.

These all-purposes involuntary public figures, as the Supreme Court commanded, are, indeed, exceedingly rare. They have access to the media, as the Court has required of public figures, but they did not willingly assume a risk to their reputations. It could be, therefore, that persons who fit into this category are the only libel plaintiffs the Supreme Court would identify as "involuntary public figures." On the other hand, the Supreme Court has never specifically recognized such a plaintiff as an involuntary public figure. Again, Stocker argued: "If *Gertz* is to be a meaningful decision, then, something more than prominence in a public controversy must be required to make a plaintiff an involuntary public figure."<sup>186</sup>

Indeed, much more common among the lower appellate courts are involuntary public figures for limited purposes.

#### B. *Involuntary Public Figures for Limited Purposes*

It is possible that the Supreme Court intended involuntary public figure status to attach only to people like the Meeropols or Joanna Holland—that is, to people whose public figure status derives primarily from others or a class of people set upon by events that elevate them into the public eye, though they have taken no action to get there and do as little as possible to participate in the public events once involved in those events. Some courts have also suggested that involuntary public figures might be celebrities who no longer seek to be in the public eye<sup>187</sup> or private people who have been directly affected by public officials.<sup>188</sup> Lower courts have not stopped there, however. As previously indicated, a number of those courts have tied involuntary public figure status directly to

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<sup>185</sup> *Meeropol v. Nizer*, 560 F.2d 1061, 1066 (2d Cir. 1977). See also *Meeropol v. Nizer*, 381 F. Supp. 29, 34 (S.D.N.Y. 1974).

<sup>186</sup> Stocker, *supra* note 114, at 1218-19.

<sup>187</sup> See *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1295 n.8 (D.C. Cir. 1980).

<sup>188</sup> See *Harris v. Quadracci*, 856 F. Supp. 513, 517 (E.D. Wis. 1994); *Wiegel v. Capital Times Co.*, 426 N.W.2d 43, 49-50 (Wis. Ct. App. 1988) (quoting *TRIBE, AMERICAN CONSTITUTIONAL LAW* 880 (2d ed. 1988)).

involvement with public controversies. Some courts refer to these public figures specifically as “involuntary limited purpose public figures.”<sup>189</sup> Other courts have not used the specific term, but have made it clear that public figure status—even involuntary public figure status—must be tied directly to the involvement of a libel plaintiff in a public controversy. And, of course, the Supreme Court has indicated that a public controversy is integral to the finding of public figure status.<sup>190</sup>

In at least six cases, courts have identified plaintiffs as involuntary public figures after examining the roles those plaintiffs played in public controversies.<sup>191</sup> Courts in nine other cases have recognized that public controversies are essential to involuntary public figure status, even though libel plaintiffs were not identified as involuntary public figures.<sup>192</sup> In general, the courts in these cases examined two factors to determine whether libel plaintiffs were public figures: (1) the nature of the controversy and (2) the role of the libel plaintiff in the controversy.<sup>193</sup>

Many courts have been clear that absent a public controversy, there can be no involuntary public figure. The controversy at issue must be a genuine public controversy; that is, it must involve an issue of significant importance to society, rather than an issue that is simply interesting. As the appeals court for the District of Columbia Circuit noted:

A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way. . . . [E]ssentially private concerns or disagreements do not become public controversies simply because they attract atten-

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<sup>189</sup> See, e.g., *Bay View Packing Co. v. Taff*, 543 N.W.2d 522, 525 (Wis. Ct. App. 1995); *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 737 (D.C. Cir. 1985); *Wells v. Liddy*, 1 F. Supp. 2d 532, 536 (D. Md. 1998).

<sup>190</sup> See *supra* notes 71-72 and accompanying text.

<sup>191</sup> See *Dameron v. Washington Magazine, Inc.*, 779 F. Supp. 736, 737 (D.C. Cir. 1985); *Wells*, 1 F. Supp. 2d at 536; *Foretich v. Advance Magazine Publishers*, 765 F. Supp. 1099, 1108 (D.D.C. 1991); *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175, 185-86 (Ga. App. 2001), *petition for cert. filed*, 70 U.S.L.W. 3698 (May 2, 2002) (No. 01-1627); *Daniel Goldreyer, Ltd. v. Dow Jones & Co.*, 787 N.Y.S.2d 64, 65 (N.Y. App. Div. 1999); *Bay View*, 543 N.W.2d at 525.

<sup>192</sup> See *Wells v. Liddy*, 186 F.3d 505, 539-40 (4th Cir. 1999); *Bruno & Stillman, Inc. v. Globe Newspaper Co.* 633 F.2d 583, 591 (1st Cir. 1980); *Naantaanbuu v. Abernathy*, 816 F. Supp. 218, 223 (S.D.N.Y. 1993); *Grossman v. Smart*, 807 F. Supp. 1404, 1409 (C.D. Ill. 1992); *Tomson v. Stephan*, 699 F. Supp. 860, 865-66 (D. Kan. 1988); *Dresbach v. Doubleday & Co.*, 518 F. Supp. 1285, 1295 (D.D.C. 1981); *Khawar v. Globe Int'l, Inc.*, 54 Cal. Rptr. 2d 92, 101-02 (Cal. Ct. App. 1996); *Jones v. Taibbi*, 512 N.E.2d 260, 268 (Mass. 1987); *Jacobson v. Rochester Communications*, 410 N.W.2d 830, 836 (Minn. 1987).

<sup>193</sup> See, e.g., *Dresbach v. Doubleday & Co.*, 518 F. Supp. 1285, 1295 (D.D.C. 1981); *Bay View Packing Co. v. Taff*, 543 N.W.2d 522, 531 (Wis. Ct. App. 1995); see also *Denny v. Mertz*, 318 N.W.2d 141, 147 (Wis. 1974).

tion. . . . Rather, a public controversy is a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants.<sup>194</sup>

A public controversy, therefore, involves the loss of many lives,<sup>195</sup> involves significant policy issues,<sup>196</sup> affects public health,<sup>197</sup> or involves similar concerns. Often drawing upon language from *Wolston*, courts have held that a private person does not become public because of involvement or association with a matter that simply attracts public attention.<sup>198</sup> Therefore, neither newsworthiness<sup>199</sup> nor “mere potential public interest”<sup>200</sup> nor “voyeuristic interest in someone’s private affairs”<sup>201</sup> is enough. And publicity “does not by itself elevate” libel plaintiffs to public figure status, “even if they could anticipate the publicity.”<sup>202</sup> The reason for the requirement, the Fourth Circuit noted, is that “Designating someone as a public figure in a sense makes her name and her reputation public property.”<sup>203</sup>

The brother of a man accused of killing their parents was not a public figure, therefore, the District Court for the District of Columbia ruled, simply because of the relationship and because the murder trial caused public notice.<sup>204</sup> A private person does not become public because of involvement or association with a matter that attracts public attention, the court held.<sup>205</sup> Similarly, an assistant attorney general did not become an involuntary public figure when she brought a sexual harassment suit against her boss,<sup>206</sup> and a business was not a public figure simply because it attempted to

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<sup>194</sup> *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1296 (D.C. Cir. 1980).

<sup>195</sup> *See Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 742 (D.C. Cir. 1985).

<sup>196</sup> *See Foretich v. Advance Magazine Publishers*, 765 F. Supp. 1099, 1107 (D.D.C. 1991).

<sup>197</sup> *See ELM Medical Laboratory v. RKO General, Inc.*, 532 N.E.2d 675, 680 (Mass. 1989).

<sup>198</sup> *See, e.g., Dresbach v. Doubleday & Co.*, 518 F. Supp. 1285, 1295 (D.D.C. 1981) (quoting *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 167-68 (1979)). *See also Jones v. Taibbi*, 512 N.E.2d 260, 268 (Mass. 1987). The Supreme Court, in *Wolston*, noted that

A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention. To accept such reasoning would in effect re-establish the doctrine advanced by the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, . . . We repudiated this proposition in *Gertz* and in *Firestone*, however, and we reject it again today. A libel defendant must show more than mere newsworthiness to justify application of the demanding burden of *New York Times*.

443 U.S. at 167-68.

<sup>199</sup> *Waldbaum*, 627 F.2d at 1297.

<sup>200</sup> *Wells v. Liddy*, 186 F.3d 505, 541 (4th Cir. 1999).

<sup>201</sup> *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 742 (4th Cir. 1985).

<sup>202</sup> *Waldbaum*, 627 F.2d at 1297.

<sup>203</sup> *Wells*, 186 F.3d at 541.

<sup>204</sup> *Dresbach v. Doubleday & Co.*, 518 F. Supp. 1285, 1295 (D.D.C. 1981).

<sup>205</sup> *Id.* (quoting *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 167-68 (1979)).

<sup>206</sup> *Tomson v. Stephan*, 699 F. Supp. 860, 865-66 (D. Kan. 1988).

sell its products and initiated an advertising campaign to do so.<sup>207</sup> Neither criminal activity nor litigation is enough to elevate a newsworthy event to the status of a public controversy. "Such an approach," one court held, "would allow the media to unilaterally create a public figure through excessive coverage of a private person," a route contrary to *Gertz* and its progeny.<sup>208</sup> This approach, of course, was in line with that taken by the Supreme Court.<sup>209</sup>

The second key to the determination of involuntary public figure status is the libel plaintiff's role in the public controversy. If that role is tangential or trivial, the plaintiff is often held to be a private person.<sup>210</sup> A plaintiff could be drawn into a controversy through no willful action, but once embroiled in the controversy, the plaintiff's role must be significant for involuntary public figure status to attach.<sup>211</sup>

That's what happened to Doris Foretich, the mother of Eric Foretich, an oral surgeon who became embroiled in a sensational custody dispute with his ex-wife over their daughter. The ex-wife, Elizabeth Morgan, was jailed for twenty-five months for refusing to produce the daughter, Hilary, as ordered by the Superior Court of the District of Columbia.<sup>212</sup> Morgan claimed that Foretich and his parents had sexually abused Hilary, a charge they vigorously denied.<sup>213</sup> All three Foretiches sued the publishers of *Glamour* magazine for an article it published about the dispute. Cases brought by Foretich and his father were dismissed, but the federal district court for the District of Columbia allowed the case brought by Doris Foretich to go to trial. The court ruled that she was an involuntary public figure required to prove actual malice.<sup>214</sup>

The court found Foretich to be "a central figure in the dispute," in part because her statements to the press "went beyond flat denials, incorporating discussions of her background and personal philosophy and criticisms of Elizabeth Morgan." In addition, more than simply defending herself in a suit brought against her by Morgan, she brought counterclaims for defamation and intentional infliction of emotional distress. "In short," the court held, "her reaction to the controversy was to engage in a course of conduct

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<sup>207</sup> *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 598 (1st Cir. 1980).

<sup>208</sup> *Jacobson v. Rochester Communications*, 410 N.W.2d 830, 836 (Minn. 1987).

<sup>209</sup> *See Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 167-68 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448, 453-54 (1976).

<sup>210</sup> *See, e.g., Khawar v. Globe Int'l, Inc.*, 965 P.2d 696, 703 (Cal. 1998).

<sup>211</sup> *See, e.g., Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 741 (D.C. Cir. 1985).

<sup>212</sup> *Foretich v. Advance Magazine Publishers*, 765 F. Supp. 1099, 1103 (D.D.C. 1991).

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 1108. *But see* discussion accompanying notes 235-43, *infra*.



that was likely to attract substantial attention. At the very least, she became an involuntary public figure, drawn centrally into the controversy, whether she intended to or not.”<sup>215</sup>

Similarly, the Georgia Court of Appeals ruled that Richard Jewell was a limited-purpose public figure, even though Jewell was drawn into the public controversy surrounding the bombing of the Olympic Park in Atlanta in 1996. Rather than attempting to extricate himself from the controversy, the court held, Jewell remained embroiled in it, even to the point of advancing an agenda.<sup>216</sup> Jewell was the security guard who discovered a bomb at the park, notified authorities, and evacuated bystanders, obviously saving lives.<sup>217</sup> He was later identified by authorities as a possible suspect in the bombing, but was eventually exonerated. Jewell, the court held, “had the misfortune to have a tragedy occur on his watch,”<sup>218</sup> but didn’t reject the role in the controversy that surrounded the bombing, and the resulting investigation. He was interviewed a number of times, often commenting on the adequacy of the law enforcement preparation, the appropriateness of the response to the bombing, and the safety of those returning to the park. “The evidence in this case,” the court held, “at the very least, supports the finding that Jewell was initially drawn into the controversy unwillingly and thereafter assumed a prominent position as to its outcome.”<sup>219</sup>

Therefore, the court held, Jewell was a limited-purpose public figure. Even if he could not be considered a limited-purpose public figure, the court held, “the record contains clear and convincing evidence that, at the very least, Jewell was an involuntary limited-purpose public figure.”<sup>220</sup>

Jewell’s attorneys vigorously deny the characterization. In their petition for certiorari, they argue to the Supreme Court that Jewell never sought out the interviews and that the interviews focused on eyewitness information.<sup>221</sup> Jewell never sought to influence or advocate a particular outcome to a public controversy, they argued.<sup>222</sup> Some scholars agreed. Clay Calvert and Robert D. Richards argue that the designation of Jewell as a public figure will chill

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<sup>215</sup> *Id.*

<sup>216</sup> *Atlanta Journal-Constitution v. Jewel*, 555 S.E.2d 175, 185 (Ga. App. 2001), *petition for cert. filed*, 70 U.S.L.W. 3698 (May 2, 2002) (No. 01-1627).

<sup>217</sup> *Id.* at 178.

<sup>218</sup> *Id.* at 186.

<sup>219</sup> *Id.* at 185.

<sup>220</sup> *Id.* at 186.

<sup>221</sup> *Atlanta Journal-Constitution v. Jewell*, *petition for cert.* at 17 (filed May 2, 2002) (No. 01-1627).28.

<sup>222</sup> *Id.* at 27.

speech because it will inhibit sources from telling the media what they know about important public events.<sup>223</sup>

Courts in other cases have similarly held that a person's conduct can lead to public figure status, even if the libel plaintiff did not intend to become a public figure. Working on a biography to advance one side of a controversy, for example, raises one to public figure status. Lynette Harris and her twin sister were convicted of tax fraud in connection with money they had received from an elderly, wealthy widower. Harris sued several authors and publishers of material about the case.<sup>224</sup> The federal court for the Eastern District of Wisconsin ruled that Harris was a limited-purpose public figure, even though she argued that she was a private person.<sup>225</sup> Involuntary public figures may exist, the court noted, when a private person is directly affected by the actions of public officials, but Harris's actions, which almost inevitably put her into the vortex of a public controversy, made her a limited-purposes public figure rather than an involuntary public figure.<sup>226</sup> She had access to the media, the court held, and was working on a biography designed to advance her side of the story.<sup>227</sup>

Victoria Price Street was also a limited-purpose public figure because she attempted to promote her side of a controversial story. Like Harris, Street looked like an involuntary public figure. Street was the government's primary witness against nine men accused of rape in 1931. In 1981, she sued the National Broadcasting Co. for the way she was portrayed in a television movie about the case called *Judge Horton and the Scottsboro Boys*.<sup>228</sup> Like Harris, Street did not seek publicity<sup>229</sup> and argued that, at the time the movie was broadcast, she was a private person.<sup>230</sup>

The court, however, held that she "was the pivotal character in the most famous rape case of the twentieth century. It became a political controversy as well as a legal dispute."<sup>231</sup> In addition, she played a major role in the controversy, had effective access to the media and encouraged public interest in herself. She gave interviews and aggressively promoted her version of the case outside of

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<sup>223</sup> Clay Calvert & Robert D. Richards, *A Pyrrhic Press Victory: Why Holding Richard Jewell as a Public Figure is Wrong and Harms Journalism*, 22 *LOV. L.A. ENT. L. REV.* 293, 296 (2002).

<sup>224</sup> *Harris v. Quadracci*, 856 F. Supp. 513, 515-16 (E.D. Wis. 1994).

<sup>225</sup> *Id.* at 518.

<sup>226</sup> *Id.* at 517-18.

<sup>227</sup> *Id.* at 518.

<sup>228</sup> *Street v. National Broadcasting Co.*, 645 F.2d 1227, 1229-30 (6th Cir. 1981).

<sup>229</sup> *Id.* at 1230.

<sup>230</sup> *Id.* at 1235.

<sup>231</sup> *Id.* at 1236.

her courtroom testimony.<sup>232</sup>

It is important to note that both Harris and Street were designated limited-purpose public figures rather than involuntary public figures. The facts of the two cases, however, demonstrate that they could easily have been designated involuntary public figures—both plaintiffs argued that they were private persons and did not voluntarily enter public controversies. And, indeed, the courts in the two cases agreed that the plaintiffs were not willing participants. The plaintiffs, however, once involved in the controversies played significant roles in those controversies, raising them to the level of public figures. Even though the courts found that they had attempted to affect the outcomes of the controversies, arguments could be made that both Harris and Street were involuntary public figures—just as Richard Jewell was both a limited-purpose *and* involuntary public figure. The courts involved, however, had not recognized the involuntary public figure as an independent category of public figures. *Harris* was from the federal court for the Eastern District of Wisconsin. Though the court suggested that an involuntary public figure might be an individual who is directly affected by the actions of public officials,<sup>233</sup> it also held that the *Gertz* Court had created only two classes of public figures.<sup>234</sup> Similarly, the Sixth Circuit, which decided *Street*, has not recognized involuntary public figures as a separate category of libel plaintiff.

Other libel plaintiffs who became embroiled in public controversies, but who merely rebutted charges against them rather than “purposely trying to influence the outcome” of the controversies have generally been held to be private people.<sup>235</sup> We return to Doris Foretich as an example. While the federal court for the District of Columbia found Doris Foretich to be an involuntary public figure,<sup>236</sup> the federal court of appeals for the Fourth Circuit found her and her husband to be private persons, examining basically the same set of facts.<sup>237</sup> The Fourth Circuit, in a detailed examination of the Foretiches’ activity in the controversy surrounding their son and his ex-wife, did not mention the involuntary public figure question that had been central to the case involving *Glamour* magazine three years earlier. Indeed, it appeared that the Fourth Circuit, which would dive into the involuntary public figure issue five

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<sup>232</sup> *Id.* at 1235.

<sup>233</sup> *Harris v. Quadracci*, 856 F. Supp. 513, 517 (E.D. Wis. 1994).

<sup>234</sup> *Id.* at 516.

<sup>235</sup> *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1297 (D.C. Cir. 1980).

<sup>236</sup> *See supra* notes 212-15 and accompanying text.

<sup>237</sup> *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541 (4th Cir. 1994)

years later in *Wells v. Liddy*,<sup>238</sup> was purposely ignoring the issue, even though the court recognized that the Supreme Court, in *Gertz*, had established involuntary public figures as one three categories of public figure status.<sup>239</sup>

The Fourth Circuit held that the dispute in the Foretich case was, indeed, a public controversy,<sup>240</sup> but also held that neither Vincent nor Doris Foretich voluntarily assumed a role of special prominence in that controversy.<sup>241</sup> The court held that the Foretiches had done little more than respond to the charges against them, and that a person could not be deemed a limited-purpose public figure “merely because he or she makes reasonable public replies” to allegations.<sup>242</sup> “[W]e hold,” the court reported, “that a person who has been publicly accused of committing an act of serious sexual misconduct that . . . would be punishable by imprisonment cannot be deemed a ‘limited-purpose public figure’ merely because he or she makes reasonable public replies to those accusations.”<sup>243</sup>

Other courts have ruled similarly. The owner of a bar who was convicted of arson and insurance fraud in connection with a fire at his bar was ruled to be a private person, for example, because he did not engage in the type of activity that would support a finding of public figure status.<sup>244</sup> Donald Jacobson, the court said, did nothing more than respond to the charges against him.<sup>245</sup> Similarly, a man who was photographed with Robert F. Kennedy shortly before Kennedy’s assassination and who was later identified in a tabloid newspaper as being Kennedy’s assassin, was not a public figure.<sup>246</sup> Khalid Khawar merely attempted to rebut the charges made against him, a California Appellate Court ruled,<sup>247</sup> and his role in the controversy over the Kennedy assassination was tangential, the California Supreme Court added.<sup>248</sup>

In addition, not all persons who are “dragged unwillingly” into controversies, in the words of the *Wolston* court,<sup>249</sup> are involuntary public figures because their roles do not rise to the level of significant activity related to the controversies. Criminal conduct is one

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<sup>238</sup> See *infra* notes 284-89 and accompanying text.

<sup>239</sup> *Foretich*, 37 F.3d at 1551.

<sup>240</sup> *Id.* at 1555.

<sup>241</sup> *Id.* at 1556.

<sup>242</sup> *Id.* at 1558.

<sup>243</sup> *Id.*

<sup>244</sup> *Jacobson v. Rochester Communications*, 410 N.W.2d 830, 835 (Minn. 1987).

<sup>245</sup> *Id.*

<sup>246</sup> *Khawar v. Globe Int'l, Inc.*, 965 P.2d 696, 703 (Cal. 1998).

<sup>247</sup> *Khawar v. Globe Int'l, Inc.*, 54 Cal. Rptr. 2d 92, 101-02 (Cal. Ct. App. 1996).

<sup>248</sup> 965 P.2d at 703.

<sup>249</sup> 443 U.S. 157, 166 (1979).

example. A number of courts have ruled that being involved in criminal activity is insufficient, standing alone, to elevate a libel plaintiff to public figure status.<sup>250</sup> That is true, even if the crime involved is serious, if the plaintiff's involvement is not significant. Lee Jones, for example, was arrested and questioned in connection with the so-called "Hillside stranglings" in Boston, but was determined to be a private person when he sued a television station over accounts of his arrest and release.<sup>251</sup> He was "dragged unwillingly" into the controversy, the court held, quoting *Wolston*.<sup>252</sup>

The case of Leonard Schultz is another example. Schultz was linked to the disappearance of Teamster boss Jimmy Hoffa in an article published by *Reader's Digest* in December 1976.<sup>253</sup> The article suggested that Schultz may have been one of three men Hoffa could have met shortly before his disappearance, and that the three men may have been implicated in the disappearance. Schultz sued for defamation, and attorneys for the magazine suggested that he was an involuntary public figure.<sup>254</sup> The federal court for the Eastern District of Michigan disagreed.

The court first questioned the viability of the involuntary public figure doctrine after the Supreme Court's ruling in *Firestone*, but then held that, even if the category continued to exist, it did not fit Schultz. An involuntary public figure, the court held, must have taken some action demonstrating that the plaintiff "assumed the risk of his own conduct." A person who did not take action that would have risked public attention, could not become a public figure.<sup>255</sup> The court explained:

Thus, when a person voluntarily acts in a way that unwittingly attracts publicity, the press is free to assume that his voluntary action indicates a voluntary assumption of an increased risk of defamation, and the person could be classed as a public figure. However, a person who does nothing, but nevertheless becomes the subject of attention, clearly has not assumed such a risk and there is no justification for the press assuming that he has.<sup>256</sup>

Schultz had responded to the publicity he received as a result

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<sup>250</sup> See, e.g., *Marcone v. Penthouse*, 754 F.2d 1072, 1085 (3d Cir. 1985); *Jacobson v. Rochester Communications*, 410 N.W.2d 830, 835 (Minn. 1987); *Seegmiller v. KSL, Inc.*, 626 P.2d 968, 972 (Utah 1981).

<sup>251</sup> *Jones v. Taibbi*, 512 N.E.2d 260, 262-64 (Mass. 1987).

<sup>252</sup> *Id.* at 268 (quoting *Wolston*, 443 U.S. at 166).

<sup>253</sup> *Schultz v. Reader's Digest Ass'n*, 468 F. Supp. 551, 553 (E.D. Mich. 1979).

<sup>254</sup> *Id.* at 559.

<sup>255</sup> *Id.* at 560.

<sup>256</sup> *Id.*

of the *Reader's Digest* article, but had gone no further, the court held, and, since he had done nothing to create the publicity, he was not a public figure, not even involuntarily.<sup>257</sup>

On the other hand, the alleged criminal activity attributed to Louis F. Rosanova clearly elevated him to public figure status, the United States Court of Appeals for the Fifth Circuit ruled. Rosanova sued *Playboy* magazine for publishing an article in which he was referred to as a "mobster."<sup>258</sup> He argued that he could not be a public figure because he did not have sufficient access to the media and because he did not voluntarily thrust himself into the vortex of any public issue. The court, however, held that he was a public figure because he "voluntarily engaged in a course of conduct that was bound to invite attention and comment."<sup>259</sup>

The Third Circuit used that very language to find another so-called mobster, Frank Marcone, to be a limited-purpose public figure. Marcone sued *Penthouse* magazine for an article connecting him to organized crime. The Third Circuit, noting that the *Gertz* Court did not establish the involuntary public figure as a third category of public figures, but that involuntariness is one way a person comes to be a public figure, found Marcone to be a limited-purpose public figure. Marcone fit the category, the court ruled, quoting *Rosanova*, because he voluntarily "engaged in a course of conduct that was bound to attract attention and comment."<sup>260</sup>

The Arizona Court of Appeals followed the *Marcone* line of reasoning in a libel case involving yet another mobster, finding Roy Romano to be a limited-purpose public figure rather than an involuntary public figure.<sup>261</sup> The court held that voluntarily entering a life of crime, a choice which eventually resulted in Romano being granted immunity for his crimes and testifying in a criminal matter, put the mobster at the center of a public controversy, helping establish him as a public figure.<sup>262</sup> The language throughout *Gertz*, the court noted, emphasizes the element of voluntary self-exposure in the acquisition of public figure status.<sup>263</sup> The court distinguished *Firestone* and *Wolston*, holding that neither plaintiff took a prominent position in the resolution of a public controversy. On the other hand, Romano "knowledgeably detailed the operations

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<sup>257</sup> *Id.*

<sup>258</sup> *Rosanova v. Playboy*, 411 F. Supp. 440, 442 (S.D. Ga. 1976).

<sup>259</sup> *Id.* at 445.

<sup>260</sup> *Marcone v. Penthouse*, 754 F.2d 1072, 1086 (3d Cir. 1985) (quoting *Rosanova*, 411 F. Supp. at 442).

<sup>261</sup> *Scottsdale Publ'g, Inc. v. Superior Court*, 764 P.2d 1131 (Ariz. Ct. App. 1988).

<sup>262</sup> *Id.* at 1139.

<sup>263</sup> *Id.* at 1138.

of an organized crime syndicate in Arizona. His testimony was more than merely newsworthy. . . . It was central to a matter of great public concern.”<sup>264</sup>

It matters not that none of these libel plaintiffs wanted to be in the public eye, much less public figures. The level of a plaintiff’s activity in the public controversy, rather than the plaintiff’s desire, is paramount to the determination of public figure status. The *Rosanova* court was one of a number of courts holding that a libel plaintiff’s desires on public figure status are irrelevant:

Comment upon people and activities of legitimate public concern often illuminates that which yearns for shadow. It is no answer to the assertion that one is a public figure to say, truthfully, that one doesn’t choose to be. It is sufficient that ‘[the plaintiff] voluntarily engaged in a course that was bound to invite attention and comment.’<sup>265</sup>

The focus in such a determination, the Wisconsin Court of Appeals held, for example, “should be on the plaintiff’s role in the public controversy rather than on any desire for publicity or other voluntary act on his or her part.”<sup>266</sup> A person, the court continued, becomes a limited-purpose public figure—voluntarily or involuntarily—“if his activities ‘almost inevitably put him into the vortex of a public controversy.’”<sup>267</sup> The Idaho Supreme Court agreed. “The judgment is applicable to both the individual who becomes embroiled in a public controversy through no effort of his own,” the court held, “and the individual who actively generates controversy—both abdicate their anonymity.”<sup>268</sup>

The case of Todd Erdmann illustrates the point and also highlights the continuing confusion swirling around the voluntariness or involuntariness of the limited-purpose public figure category. Erdmann became the focus of a police investigation after a bizarre story a boy told about being shot by a masked man.<sup>269</sup> The boy’s father named Erdmann as a suspect because Erdmann had apparently been stalking the boy’s sister. A television station reported the story and Erdmann’s arrest, but, in fact, the boy had shot him-

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<sup>264</sup> *Id.* at 1139.

<sup>265</sup> *Rosanova v. Playboy*, 580 F.2d 859, 861 (quoting *Rosanova v. Playboy*, 411 F. Supp. 440, 445 (S.D. Ga. 1976)). See also *Marcone v. Penthouse*, 754 F.2d 1072 (3d Cir. 1985); *Waldbaum v. Fairchild Publ’ns, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980); *Harris v. Quadracci*, 856 F. Supp. 513 (E.D. Wis. 1994); *Bandelin v. Pietsch*, 563 P.2d 395 (Idaho 1977); *Bay View Packing Co. v. Taff*, 543 N.W.2d 522 (Wis. 1995).

<sup>266</sup> *Wiegel v. Capital Times Co.*, 426 N.W.2d 43, 49-50 (Wis. Ct. App. 1988).

<sup>267</sup> *Id.* at 50 (quoting *McDowell v. Paiewonsky*, 769 F.2d 942, 950 (3d Cir. 1985)).

<sup>268</sup> *Bandelin v. Pietsch*, 563 P.2d 395, 398 (Idaho 1977).

<sup>269</sup> *Erdmann v. SF Broad. of Green Bay*, 599 N.W.2d 1, 3 (Wis. Ct. App. 1999).

self. When the boy confessed, Erdmann was released.<sup>270</sup> The Wisconsin Court of Appeals determined that the investigation and arrest involved a public controversy and that “Erdmann was the central figure in the controversy” even before the television broadcast and, therefore, was a limited public figure.<sup>271</sup> The police, as it turned out, concluded that Erdmann was involved and dangerous to the community, in part, because he owned several automatic weapons, was a survivalist, and had a history of stalking. “Although police formulated these conclusions without any conduct or action by Erdmann,” the court held, “it is clear that ‘it may be possible for someone to become a public figure through no purposeful action of his own.’”<sup>272</sup> Ironically, the court quoted the *Gertz* language often used to support the argument that the Supreme Court established involuntary public figures as a category of public persons, but used that language to find Erdmann a limited public figure rather than an involuntary public figure. The Wisconsin court, in fact, recognized the existence of involuntary public figures,<sup>273</sup> but did not discuss Erdmann within the context of that category of public persons.

The Marcone, Romano, and Erdmann cases demonstrate the complex problem of public figure status. Though the tests applied are virtually identical to tests other courts use to deal with involuntary public figure status—like the *Schultz* and *Rosanova* cases, for example—the courts in these cases ruled on whether the libel plaintiffs were limited-purpose public figures, ignoring involuntary public figure status.

The cases are not unique, as another pair of cases demonstrates. The Wisconsin Court of Appeals held that Bay View Packing Co. was an involuntary public figure because of company’s inaction: It refused to recall food products it distributed on the suggestion of the state department of consumer safety.<sup>274</sup> The company’s “voluntary inaction in not immediately complying with the state’s advisory recommendation and the federal government’s recall notice ‘inevitably put [the company] into the vortex of a public controversy,’” the court held.<sup>275</sup> Therefore, the company “fit the ‘exceedingly rare’ status of being an involuntary limited public figure” for the narrow public controversy surrounding the

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<sup>270</sup> *Id.* at 3-4.

<sup>271</sup> *Id.* at 7.

<sup>272</sup> *Id.* at 7 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974)).

<sup>273</sup> *Id.* at 6 n.1.

<sup>274</sup> *Bay View Packing Co. v. Taff*, 543 N.W.2d 522 (Wis. Ct. App. 1995).

<sup>275</sup> *Id.* at 533 (quoting *Wiegel v. Capital Times Co.*, 426 N.W.2d 43, 50 (Wis. Ct. App. 1988)).



potential distribution of contaminated food products.<sup>276</sup>

The Massachusetts Supreme Judicial Court, however, in a case with similar facts, found that a medical laboratory was a limited-purpose public figure—not an involuntary public figure—because it was drawn into a public controversy.<sup>277</sup> ELM Medical Laboratory sued a television station for reporting that the U.S. Department of Health and Human Services and the Massachusetts Department of Public Health issued an alert that the laboratory might have improperly screened or misread a large number of pap smear examinations.<sup>278</sup> ELM was a limited-purposes public figure, even though it easily could have been designated an involuntary public figure, just as Marcone and Romano could have been designated involuntary public figures, and just as Bay View Packing Co. was so designated.

As previously indicated, part of the rationale is based on whether the courts recognize two or three classes of public figures. Those courts that recognize three categories of public figure status as coming out of *Gertz* identify some plaintiffs as involuntary public figures. Those courts holding that *Gertz* established only two categories of public figures will not identify plaintiffs as “involuntary public figures”; instead, they are limited-purpose public figures involuntarily “drawn into” public controversies. And those courts often place a greater emphasis on identifying the public controversies.

The contradictions between courts wrestling with involuntary public figure status go even further, however, as cases out of the Circuit Court for the District of Columbia and the Fourth Circuit demonstrate.

Merle W. Dameron is an example of an involuntary public figure who neither entered a public controversy nor sought publicity. Indeed, the only thing Dameron did to become a public figure was go to work. The *Dameron* case, sometimes considered the leading involuntary public figure case, is often looked to for guidance by other courts.<sup>279</sup> Dameron was the only air traffic controller on duty in 1974 when a TWA 727 crashed into Mt. Weather in Virginia near Dulles Airport. In 1982, in a story about another airplane crash, that of Florida Flight 90 near National Airport, *The Washingtonian* magazine reported that the earlier crash was one of few considered

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<sup>276</sup> *Id.*

<sup>277</sup> ELM Medical Laboratory v. RKO General, Inc., 532 N.E.2d 675, 680 (Mass. 1989).

<sup>278</sup> *Id.* at 677.

<sup>279</sup> See, e.g., Wells v. Liddy, 186 F.3d 505, 538 (4th Cir. 1999); Wells v. Liddy, 1 F. Supp. 2d 532, 540 (D. Md. 1998); Moss v. Stockard, 580 A.2d 1011, 1031-32 (D.C. 1990).

caused, in part, by controller errors.<sup>280</sup> Dameron sued for libel. The U.S. Circuit Court for the District of Columbia held that the facts of the case raised Dameron “involuntarily to the status of limited-purpose public figure.”<sup>281</sup> The court found “no doubt that Dameron played a central, albeit involuntary, role in this controversy.”<sup>282</sup> He became a public figure, therefore, because “by sheer bad luck” he was on duty at the time of the Mt. Weather crash.<sup>283</sup>

It was the “sheer bad luck” language, in part, that caused the Fourth U.S. Circuit Court of Appeals some consternation in a case that grew out of the Watergate break-in and its aftermath. “We are hesitant,” that court ruled in *Wells v. Liddy*, “to rest involuntary public figure status upon ‘sheer bad luck.’”<sup>284</sup> There must be, the court held, some degree of voluntariness: “[T]he defendant must demonstrate that the plaintiff has taken some action, or failed to act when action was required, in circumstances in which a reasonable person would understand that publicity would likely inhere.”<sup>285</sup> The rule was part of a two-part test established by the court for determining involuntary public figure status. The other part of the test required the defendant to show that the plaintiff had become a central figure in a significant public controversy.<sup>286</sup> Ida Maxwell Wells, the court held, did not do so. The court reversed a district court’s holding that Wells, a secretary in the Watergate complex at the time of the infamous break-in, was an involuntary public figure.<sup>287</sup> The case began when she sued Watergate figure G. Gordon Liddy for libel after he gave a series of speeches suggesting that the break-in was planned to destroy evidence of a prostitution ring in which he said Wells was involved.<sup>288</sup> Wells did not become a central figure in the Watergate case, the court held, and did not take any action that she could reasonably expect would propel her into the public’s eye. “In the great wealth of materials on Watergate,” the court held, “Wells is, at most, a footnote.”<sup>289</sup>

At least one commentator has recognized that the Fourth Circuit misinterpreted facts or misapplied the doctrine or both.<sup>290</sup> The controversy at issue was not the Watergate break-in and its af-

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<sup>280</sup> *Dameron v. Washington Magazine*, 779 F.2d 736, 738 (D.C. Cir. 1985).

<sup>281</sup> *Id.* at 741.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* 742.

<sup>284</sup> 186 F.3d. 505, 538 (4th Cir. 1999).

<sup>285</sup> *Id.* at 540.

<sup>286</sup> *Id.* at 539.

<sup>287</sup> *Id.* at 544.

<sup>288</sup> *Id.* at 516-17.

<sup>289</sup> *Id.* at 541.

<sup>290</sup> See generally Sanchez-Arango, *supra* note 102.

termath, but was the suggestion that the purpose of that break-in was related to a prostitution ring operating out of the Democratic National Committee. And, while Wells was a peripheral figure in the Watergate controversy, she would have been central to the issue raised by Liddy. But that is typical of the kinds of misapplication or misunderstanding that accompanies involuntary public figure jurisprudence, as is the general Dameron-Wells juxtaposition.

Merle Dameron and Ida Maxwell Wells had much in common. Both were thrust into the public eye through no purposeful action, particularly if the charges that Wells was involved with a prostitution ring were baseless. If Wells *did* keep the books on a prostitution ring, however, her participation in a public controversy was certainly more voluntary than that of Dameron, who, as the court rightly noted, became a public figure in a controversy through "sheer bad luck." Dameron, however, was ruled to be an involuntary public figure while Wells was ruled to be a private person. The Fourth Circuit seemed, not only to greatly limit the involuntary public figure class, but also to shun the Fifth Circuit's opinion in *Dameron*.<sup>291</sup>

The role of the plaintiff in a public controversy, to some extent, has become a substitute for the element of voluntariness that was important to the *Gertz* Court, allowing, therefore, a libel plaintiff to become a limited-purpose public figure by being drawn into a controversy as well as entering the controversy voluntarily. Injection into a controversy, the *Dameron* court said, is not the "be-all and end-all of public figure status." Persons can become involved in public controversies the court said, without their consent or will.<sup>292</sup> And, while voluntariness is important to the Supreme Court, the federal court for the District of New Jersey added, "What is and is not voluntary is by no means self-evident."<sup>293</sup> That court has rejected arguments that there's no such as the involuntary public figure and held that, in addition to actively participating in a public controversy in a manner intended to obtain attention, a libel plaintiff could become a public figure by taking action that invited comment and attention "even though he does not directly try or even want to attract attention." By taking such action, the plaintiff "is deemed to have assumed the risk of such attention," the

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<sup>291</sup> See *id.* at 228-29; see also *Wells v. Liddy*, 135 F. Supp. 2d 668, 670 n.3 (D. Md. 2001) (the district court continuing to hold to the position that Wells was an involuntary public figure).

<sup>292</sup> *Dameron v. Washington Magazine*, 779 F.2d 736, 741 (D.C. Cir. 1985).

<sup>293</sup> *Schiavone Constr. Co. v. Time, Inc.*, 619 F. Supp. 684, 703 (D.N.J. 1985).

court said.<sup>294</sup>

#### IV. A SOLUTION TO A CONUNDRUM

Despite the predictions and evaluations of some courts and commentators, the involuntary public figure in libel law is not dead, though its status is certainly in disarray. While the Supreme Court has provided at least some guidance for lower courts attempting to identify public officials, all-purpose public figures, and limited-purpose public figures, the Court has provided little guidance in defining involuntary public figures. Indeed, some lower appellate courts have held that the Supreme Court has only established two categories of public figure status—all purpose and limited purpose—ignoring the language in *Gertz* to the contrary.<sup>295</sup>

Other courts have fleshed out working definitions of the involuntary public figure. The rarest of these libel plaintiffs is the person who has achieved some fame or notoriety simply because of a familial relationship—the sons of a couple executed for espionage, for example, or the wife of a famous entertainer.<sup>296</sup>

Indeed, this category might be specifically what the Court was referring to in the *Gertz* dictum indicating the existence of involuntary public figures. The *Gertz* Court, by emphasizing that a libel plaintiff can become an involuntary public figure “through no purposeful action of his own,” by emphasizing that instances of such public figures are “exceedingly rare,”<sup>297</sup> and by noting that a plaintiff can become a limited purposes public figure by being drawn—apparently unwillingly—into a public controversy,<sup>298</sup> may have been demarcating the boundaries of involuntary public figure status. That could be one reason the Court did not find Mary Alice Firestone, Ilya Wolston, or Ronald Hutchinson—or, indeed, Elmer Gertz—involuntary public figures.

Lower courts, however, did not stop with so-called all-purpose involuntary public figures. Many courts established tests for demarcating involuntary public figures for limited purposes. Those tests, for the most part, focused on the involvement—though involuntary—of libel plaintiffs in public controversies.<sup>299</sup>

At the same time, other courts, using language from *Gertz* indicating that a person can become a limited-purpose public figure by

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<sup>294</sup> *Id.*

<sup>295</sup> See *supra* notes 134-36 and accompanying text.

<sup>296</sup> See *supra* notes 175-79 and accompanying text.

<sup>297</sup> 418 U.S. 323, 345 (1974). •

<sup>298</sup> *Id.* at 351.

<sup>299</sup> See *supra* notes 190-220 and accompanying text.

being “drawn into” a public controversy, have expanded the involuntary public figure doctrine. Involuntary public figures, they have held, are persons who have become central figures in significant public controversies and who have taken some action that would inevitably place them in the public eye. The test is not whether the libel plaintiff willingly entered the controversy, but whether the plaintiff became embroiled in the controversy—voluntarily or not—and whether publicity was likely to accompany that involvement. The difference between an involuntary public figure and a limited-purpose public figure is often based only on whether the court ruling in the case has recognized the existence of involuntary public figures.

There is a fine line between the limited-purpose public figure, therefore, and the involuntary public figure. The involuntary public figure doctrine, however, provides important protection for the press. There are individuals who become embroiled in public events through no will of their own and, because of their involvement, become targets of public interest and, therefore, of the media. The media deserve protection in reporting on these involuntary public figures, and that protection should be equivalent to the protection media receive in reporting on public officials, all-purpose public figures, or limited-purpose public figures.

While the Supreme Court has not provided clear guidance in the parameters for such protection, it has provided some hints. For example, the Court has indicated that several criteria exist for determining public figure—and, therefore, involuntary public figure—status:

whether the plaintiff had, at the time of the alleged defamation, access to the media in order to reply;<sup>300</sup>

whether the plaintiff had assumed some voluntary exposure to the risk of possible defamation;<sup>301</sup>

the nature and extent of the plaintiff's participation in a public controversy;<sup>302</sup>

attempts by the plaintiff to use the media in order to engage the public's attention in order to influence the outcome of the controversy.<sup>303</sup>

It's clear, however, that these criteria have caused as much

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<sup>300</sup> See *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).

<sup>301</sup> See *Gertz*, 418 U.S. at 345.

<sup>302</sup> See *id.* at 352.

<sup>303</sup> See *id.*

confusion as guidance. Merle Dameron was found to be an involuntary public figure, but Ida Maxwell Wells was not; Todd Erdmann and Roy Romano were found to be public figures while Louis Rosanova was not; Doris Foreteich was held to be a public figure by one court, but a private person by another. The Supreme Court, in an appropriate case—like that of Richard Jewell—should clarify the involuntary public figure doctrine. Legal scholar Nat Stern has noted that “[T]he Court should rule either that Gertz meant what it said, or that the Court’s post-Gertz trilogy revoked that category of public figures.”<sup>304</sup>

Actually, there is another route that would work to accomplish the Court’s goal of attempting to balance the rights of individuals to their reputations with society’s right to have information about matters of public concern. The Court, in *Atlanta Journal-Constitution v. Jewell*,<sup>305</sup> should eliminate both the involuntary public figure and the limited purpose public figure categories and revive the Rosenbloom Rule in a more restrictive form. Under this scheme, those persons who are identified as public officials or all-purpose public figures would be required to prove actual malice. In addition, all persons who are actively involved in matters of general or public concern, and who bring libel actions based on discussion of their involvement in those matters, would be required to prove actual malice in order to win compensatory damages. These libel plaintiffs would encompass both limited-purpose public figures and involuntary public figures. Courts would make two determinations: (1) whether the issues in which the libel plaintiff was involved are matters of general or public concern, and (2) the nature and extent of the plaintiff’s involvement in those issues. Courts make these determinations now, but then become bogged down in various tests to determine the public figure status of the plaintiffs. The focus would be not on the status of the libel plaintiff, but on the actions taken by that plaintiff as a participant in some matter of public or general interest.

This proposal is based on the proposition that the plurality had it right in *Rosenbloom v. Metromedia, Inc.* Justice Brennan advanced the argument that the discussion of individuals is peripheral to the discussion, in a free society, of issues of importance to the society. “Freedom of discussion,” he wrote, if it would fulfill its historic function in this nation, “‘must embrace all issues about

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<sup>304</sup> Nat Stern, *Unresolved Antitheses of the Limited Public Figure Doctrine*, 33 HOUS. L. REV. 1027, 1101 (1996).

<sup>305</sup> 555 S.E.2d 175 (Ga. App. 2001), *petition for cert. filed*, 70 U.S.L.W. 3698 (May 2, 2002) (No. 01-1627).

which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.’”<sup>306</sup> The argument was a logical extension of *New York Times Co. v. Sullivan*, in which the Court held that the actual malice rule was necessary to protect debate on public issues,<sup>307</sup> and *Curtis Publishing Co. v. Butts*, in which the Court indicated that protection of such debate was the reason for extending the actual malice rule to public figures.<sup>308</sup>

Justice Brennan made a second powerful argument in *Rosenbloom*. “Voluntarily or not,” he wrote, “we are all ‘public’ men to some degree,” and the notion that certain “public figures” have voluntarily exposed their lives to public inspection while private people have not “is, at best, a legal fiction.”<sup>309</sup> The public is primarily interested in an event or controversy, not in the participants, Justice Brennan noted.<sup>310</sup> The protection for discussion of the participants is a result of the protection for discussion of the controversy.

Discussion of public officials and public figures should continue to require the actual malice rule because of their roles in society in general and in self-government in particular. They command substantial public attention above and beyond involvement in matters of public concern. Beyond that, however, persons who are significantly involved in matters of public concern likewise are open for criticism. As Justice Brennan noted in *Rosenbloom*, the issues do not become less important simply because private persons are key to the discussion or resolution of those issues.<sup>311</sup> A rule, then, protecting discussion of such issues and the people significantly involved in such issues is mandated by the commitment of the First Amendment to self-government.

The *Rosenbloom* Rule, of course, was repudiated by the Supreme Court in *Gertz*<sup>312</sup> and then again in *Wolston*.<sup>313</sup> In addition, scholars have criticized the rule because, they argue, it allows the media to turn a private person into a public one through coverage.<sup>314</sup> Following some of the parameters the Court has already established, however, would eliminate these concerns. Under the rule, for example, lower appellate courts would examine the na-

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<sup>306</sup> 403 U.S. 29, 41 (1971) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940)) (plurality).

<sup>307</sup> 376 U.S. 254, 270 (1970).

<sup>308</sup> 388 U.S. 130, 147-48 (1967).

<sup>309</sup> 403 U.S. at 48 (plurality).

<sup>310</sup> *Id.* at 43.

<sup>311</sup> *Id.*

<sup>312</sup> 418 U.S. 323, 346 (1974)

<sup>313</sup> 443 U.S. 157, 167-68 (1979).

<sup>314</sup> See, e.g., Calvert and Richards, *supra* note 223, at 312.

ture and extent of a libel plaintiff's involvement in a matter of public concern to determine whether the plaintiff was sufficiently involved with the issue for the actual malice rule to attach. Taking action, knowing the action might cause publicity, would not be decisive on the question of public figure status, as *Wolston* demands, and more than "mere newsworthiness" would be required.<sup>315</sup> However, choosing a course of conduct that would inevitably place someone in the public eye,<sup>316</sup> or taking action to remain in the public eye once there,<sup>317</sup> would invoke the actual malice rule, even if the libel plaintiff did attempt to seek the attention of the media or, indeed, did not want that attention.<sup>318</sup> Many criminal suspects, therefore, would not be required to prove actual malice. It would be insufficient to merely be a suspect in a criminal case. Others, however, would face the requirement. A career criminal, who had taken a specific course of action that would inevitably lead to some matter of public concern, would be required to prove actual malice.

Key to such a determination would be whether the plaintiff assumed an increased risk of criticism by taking some action. As required by *Gertz*, libel plaintiffs would have had to, in some way, "voluntarily exposed themselves to increased risk of injury from defamatory falsehoods."<sup>319</sup> The voluntary action, however, need not be prompted by an intent to gain publicity. It could be prompted by an intent to affect the outcome of a public controversy—as with limited-purpose public figures—or by an intent simply to become part of a controversy or public issue without a desire for publicity, as with continued criminal activity.

Another indicator that the actual malice rule should be invoked would be access to the media. Often, the nature of a matter of public concern causes such a stir that many of the individuals involved in the issue would have access to the media. Responding to requests for interviews would not be enough to raise a participant to the level of having to prove actual malice. If the controversy is long-lasting, however, and the participant continues to enjoy access to the media, or if the participant uses the media to advance an agenda, that participant would be required to prove actual malice.

For the sake of a shorthand method of dealing with this third

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<sup>315</sup> 443 U.S. 157, 168 (1979)

<sup>316</sup> See *supra* notes 266-68 and accompanying text.

<sup>317</sup> See *supra* notes 218-220 and accompanying text.

<sup>318</sup> See *supra* note 265 and accompanying text.

<sup>319</sup> 418 U.S. at 345.



category of public persons, members of the category could be called limited-purpose public figures. The definition of the category, however, would be expanded to include persons now identified as involuntary public figures. Such a scheme would serve to both resolve the complex issues involving involuntary public figures and balance the rights of individuals with the rights of society.

