A Family Affair? Domestic Relations and Involuntary Public Figure Status

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I. Introduction

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

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

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

II. The Developing Defamation Jurisprudence

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

A. The Actual Malice Test

In New York Times v. Sullivan, the Supreme Court announced a new defamation test, explaining that the Constitution “prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’ -that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”

While the defamation test discussed by the NYT Court was only triggered when criticism of a “public official” was at issue, the class of individuals subject to the

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1 376 U.S. 254 (1964).
3 NYT, 376 U.S. at 279-80.
announced test was expanded from “public officials” to “public figures” in Curtis Publishing Company v. Butts.

The Butts Court explained why it made sense to expand the class triggering the more burdensome test, noting that public figures were analogous to public officials in important respects, as the Butts plaintiffs illustrated. Both of the plaintiffs “commanded a substantial amount of independent public interest at the time of the [allegedly defamatory] publications.”

Wallace Butts, who had previously served as head football coach of the University [of Georgia] and was a well-known and respected figure in coaching ranks, had “attained that [public figure] status by position alone,” and Edwin Walker had attained public figure status by virtue of “his purposeful activity amounting to a thrusting of his personality into the ‘vortex’ of an important public controversy.”

Regardless of how each had attained his position in the public eye, the Court was confident that both plaintiffs “commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able ‘to expose through discussion the falsehood and fallacies' of the defamatory statements.” Thus, public figures were like public officials in that they had access to the media and could engage in self-help to defend their reputations.

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4 The Rosenblatt Court discussed which public officials were subject to the NYT standard, where the Court explained that “the ‘public official’ designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.” See Rosenblatt v. Baer, 383 U.S. 75, 85 (1966).
5 388 U.S. 130, 134 (1967).
7 Butts, 388 U.S. at 154.
8 Id. at 135-36.
9 Id. at 155.
10 Id.
11 Id. (quoting Whitney v. People of State of California, 274 U.S. 357, 377 (1927) (Brandeis, J., dissenting)).
When holding that public figures, like public officials, had to overcome a greater burden to be awarded defamation damages, the Butts Court was employing the rationale suggested in *Time, Incorporated v. Hill*, where the Court explained that public figures should be treated differently than private individuals because of the difference between the “relative opportunities of the public official and the private individual to rebut defamatory charges.” The Court also suggested that public figures sometimes waive state protections of reputation by voluntarily entering the limelight. Thus, the Court reasoned such public figures not only have greater access to the media but they know that there is an increased risk that they will be discussed publicly in ways that may be inaccurate.

B. Matters of Public Concern Take Center Stage

In *Rosenbloom v. Metromedia*, the plurality questioned some of the assumptions underlying the jurisprudence distinguishing between public officials and public figures on the one hand and private individuals on the other. For example, “the view of the ‘public official’ or ‘public figure’ as assuming the risk of defamation by voluntarily thrusting himself into the public eye bears little relationship … to the nature of our society,” because “[v]oluntarily or not, we are all ‘public’ men to some degree.” Further, the claim that “certain ‘public’ figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view is … a legal fiction,” suffering from at least two defects. First, public figures do not volunteer to make all aspects of their lives subject to public

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12 385 U.S. 374 (1967).
13 Id. at 391.
14 Id. (“Different considerations might arise concerning the degree of ‘waiver’ of the protection the State might afford. But the question whether the same standard should be applicable both to persons voluntarily and involuntarily thrust into the public limelight is not here before us.”).
16 Id. at 47.
17 Id. at 48.
18 Id.
scrutiny—"some aspects of the lives of even the most public men fall outside the area of matters of public or general concern." Second, treating public figures so differently from private individuals "could easily produce the paradoxical result of dampening discussion of issues of public or general concern because they happen to involve private citizens while extending constitutional encouragement to discussion of aspects of the lives of 'public figures' that are not in the area of public or general concern." Thus, issues that affect the lives of many people might remain under-discussed while the purely personal aspects of the lives of public figures might be discussed ad nauseum, which is not in anyone's interest.

In addition, the Rosenbloom plurality was not confident that public figures as a general matter would have qualitatively better access to the media than would private individuals. While very prominent people might have such access, many public figures would not. Further, even those who have access would likely be unable to refute the original charge, at least in part because "[d]enials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story." In short, with respect to "the vast majority of libels involving public officials or public figures, the ability to respond through the media will depend on the

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19 Id. See also Matthew J. Coleman, The “Ultimate Question”: A Limited Argument for Trafficking in Stolen Speech, 55 Okla. L. Rev. 559, 603 (2002) (“even public figures generally expect to maintain some degree of privacy with respect to their personal lives”).
20 Rosenbloom, 403 U.S. at 48.
22 In addition, the very likelihood that public lives would be subject to intense scrutiny might affect who would be willing to engage in public service. See id. (“the insistence on making public all aspects of private life, and especially sexual conduct of public figures, breeds incentives to political blackmail, discourages qualified candidates from entering public life, and thus drastically restricts the pool of political talent”).
23 Rosenbloom, 403 U.S. at 46-47 (discussing "the unproved, and highly improbable, generalization that an as yet undefined class of 'public figures' involved in matters of public concern will be better able to respond through the media than private individuals”).
24 See id. at 46.
25 Id. ("it is the rare case where the denial overtakes the original charge")
26 Id.
same complex factor on which the ability of a private individual depends: the unpredictable event of the media's continuing interest in the story.”

But if there is much doubt about the ability of public figures to gain access to the media and about their ability to mount an effective campaign to refute false stories, then requiring them but not private individuals to establish actual malice is not justifiable.

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

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

C. Reaffirming the Importance of Public Figure Status

The apparent rejection of the propriety of differentiating between public figures and private individuals did not last long. In Gertz v. Robert Welch, Incorporated, the Court emphasized the importance of that distinction. At issue were statements made about Elmer Gertz, an attorney

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27 Id.
28 Id. at 52 (“We thus hold that a libel action, as here, by a private individual against a licensed radio station for a defamatory falsehood in a newscast relating to his involvement in an event of public or general concern may be sustained only upon clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not.”).
who represented the Nelson family in a civil action\textsuperscript{30} against a Chicago policeman who had killed seventeen-year-old Ronald Nelson.\textsuperscript{31} The \textit{American Spectator} magazine printed a long article\textsuperscript{32} that included the allegations that Gertz had been an “architect of the ‘frame-up,’”\textsuperscript{33} and a “Communist-fronter.”\textsuperscript{34} A key issue was whether Gertz had to establish actual malice on the part of the \textit{American Spectator} before he could collect defamation damages.\textsuperscript{35}

The magazine had asserted that Gertz was a public figure and that the article had involved a matter of public interest.\textsuperscript{36} If Gertz were a public figure, then his defamation action could only be successful if he could establish that the \textit{American Spectator} had published the false statements with actual malice.\textsuperscript{37} Further, assuming that a wrongful killing by a policemen was a matter of public interest, \textit{Rosenbloom} suggested that actual malice would have to be established even if Gertz was not a public figure.\textsuperscript{38} Indeed, the \textit{Gertz} Court noted that one of the costs of adopting the \textit{Rosenbloom} plurality position was that “a private citizen involuntarily associated with a matter of general interest has no recourse for injury to his reputation unless he can satisfy the demanding requirements of the \textit{New York Times} test.”\textsuperscript{39}

\textsuperscript{30} See \textit{id.} at 326 (noting that in “his capacity as counsel for the Nelson family in the civil litigation, petitioner attended the coroner's inquest into the boy's death and initiated actions for damages”).


\textsuperscript{33} \textit{Gertz}, 418 U.S. at 326.

\textsuperscript{34} \textit{id.}

\textsuperscript{35} \textit{id.} at 327-28 (The \textit{Spectator} asserted that it should “escape liability unless petitioner could prove publication of defamatory falsehood 'with actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”) (citing \textit{NYT}, 376 U.S. at 279-80).

\textsuperscript{36} \textit{id.} at 327.

\textsuperscript{37} \textit{id.} at 327-28 (“Under this rule respondent would escape liability unless petitioner could prove publication of defamatory falsehood 'with actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”) (citing \textit{NYT}, 376 U.S. at 279-80).

\textsuperscript{38} See \textit{id.} at 330-31 (“The Court of Appeals read \textit{Rosenbloom} to require application of the \textit{New York Times} standard to any publication or broadcast about an issue of significant public interest, without regard to the position, fame, or anonymity of the person defamed.”).

\textsuperscript{39} \textit{id.} at 337.
The *Gertz* Court laid out some of the competing considerations to be weighed when establishing the constitutional limitations on defamation awards. First, because “punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press,” the Court explained that “a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship.” Nevertheless, the “need to avoid self-censorship by the news media is … not the only societal value at issue.” If there were no other values to weigh in the balance, the Court “would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation.” A competing value is the state’s legitimate interest in assuring “compensation of individuals for the harm inflicted on them by defamatory falsehood.”

After noting these conflicting societal interests, the Court then justified the Constitution’s making it more difficult for public figures to be awarded defamation damages by focusing on the differing actions of the alleged victims. Public figures are to be differentiated from others “by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention.” By requiring actual malice in cases involving public figures, the Constitution “administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander.” Thus, the media will feel much safer when discussing the actions of public figures, because actual malice will have to be established in cases in which media allegations about such individuals turn out to be false. By

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40 Id. at 340.
41 Id.
42 Id. at 341.
43 Id.
44 Id.
45 Id. at 342.
46 Id.
affording the media this added protection, there is a greater likelihood that the media will discuss
important issues related to the qualifications of well-known individuals or, perhaps, analyses of
how well those individuals are performing their tasks. However, affording the press such
protections is not without cost, because there will be “many deserving plaintiffs, including some
intentionally subjected to injury, [who] will be unable to surmount the barrier of the New York
Times test.” Thus, the media may intentionally or unwittingly make false allegations about
public figures, thereby injuring their reputations, but will not be held accountable because of the
difficulty in proving actual malice.

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

The Court’s points about fashioning general rules are well-taken. However, those
observations might be made whenever a generalization is employed, so they will not be
especially useful when determining which defamation approach should be adopted. The

47 Id.
48 Cf. Corporate Citizenship, 124 Harv. L. Rev. 309, 310 (2010) (discussing “the Court justifying over- and
underinclusiveness at the margins as a necessary cost of doctrinal clarity”).
49 Gertz, 418 U.S. at 343-44.
50 Id. at 343.
51 Id. at 344.
52 See Toni M. Massaro & Robin Stryker, Freedom of Speech, Liberal Democracy, and Emerging Evidence on
53 Gertz, 418 U.S. at 344.
Rosenbloom plurality’s position affords too much or too little protection in some cases, but so does the position adopted in Gertz.

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

The Gertz Court noted that the “first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation.” Because “public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy,” the state has less of a need to rely on the tort system to compensate public figures. On the other hand, because private individuals do not have similar access to public media, they “are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.”

Yet, even if the Court is correct about the likelihood that a particular individual will have access to the media, that does not justify requiring public figures, but not private individuals, to

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54 See supra note 39 and accompanying text (pointing out that under Rosenbloom, private figures may have to establish actual malice to be awarded compensation for reputational harms).
55 See supra notes 23-27 and accompanying text (discussing the Rosenbloom plurality rejection of the claim that most public figures can protect their reputations because of their superior access to the media).
56 Gertz, 418 U.S. at 343.
57 Id.
58 See Gordon, supra note 21, at 684 (discussing why individuals might be deterred from being a public official).
59 Gertz, 418 U.S. at 344.
60 Id.
61 Id.
prove actual malice. Consider the Court’s admission that “an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood”62 and that “the truth rarely catches up with a lie.”63 This means that having access to the media is not a sufficient remedy.

The Gertz Court admitted that its media access rationale was not particularly persuasive, but argued that “the fact that the self-help remedy of rebuttal, standing alone, is inadequate to its task does not mean that it is irrelevant to our inquiry.”64 However, its being relevant to the inquiry is a far cry from its providing an adequate justification for employing the actual malice standard, especially because there are other ways to take into account an individual’s having greater access to the media without denying recovery to that individual absent a showing of actual malice. For example, plaintiffs have a duty to mitigate as a general matter,65 and a public figure who did not even try to defend himself or herself in the media might be held to have sacrificed some percentage of recovery.66 But requiring someone to mitigate harm is quite different from making it very difficult for that person to establish compensable reputational harm in the first place. The former speaks to how much the plaintiff might receive as compensation, whereas the latter speaks to whether the plaintiff suffered cognizable harm at all.

62 Id. at 344 n.9.
63 Id. at 344 n.9.
64 Id. at 344 n.9.
65 See Ford Motor Co. v. E. E. O. C., 458 U.S. 219, 231 n.15 (1982) (“Where one person has committed a tort, breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages.”) (citing C. McCormick, Law of Damages 127-58 (1935)).
66 A retraction of a statement might be relevant in considering whether damages had been mitigated, see Weinstein v. Bullick, 827 F. Supp. 1193, 1198 n.15 (E.D. Pa. 1993), and a failure to ask for a retraction might be considered when assessing whether a plaintiff had failed to mitigate. See Desnick v. American Broadcasting Companies, Inc., 1999 WL 51796, *2 (N.D. Ill. 1999) (“While Illinois does not require plaintiffs to request a retraction as a prerequisite to recovering damages in a defamation action, defendants are not precluded from offering the lack of a request for retraction as evidence of failure to mitigate damages.”) Arguably, a trier-of-fact might consider a plaintiff’s failure to defend her reputation (when she had ready access to the media) as a failure to mitigate. Cf. Kruvant v. Dickerman, 305 A.2d 227, 229 (Md. App. 1973) (discussing tort defenses, including a defendant who asserts “truth in a defamation case, or in any case asserts the failure of the plaintiff to avail himself of an opportunity to mitigate or reduce his loss”).
The Gertz Court did not solely rely on the public figure’s ability to access the media as the justification for its position, noting in addition that an “individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs, [because] [h]e runs the risk of closer public scrutiny than might otherwise be the case.”\textsuperscript{67} Yet, there are many individuals who are public figures who are not public officials and who do not run for office.

The Gertz Court expressly noted that one need not run for office to attain public figure status, since many of “those who attain this status have assumed roles of especial prominence in the affairs of society.”\textsuperscript{68} Here, the emphasis is not on how individuals come to occupy particular positions but, rather, on the fact of their “occupy[ing] positions of such persuasive power and influence that they are deemed public figures for all purposes.”\textsuperscript{69}

Most individuals do not have the general notoriety required to be a public figure for all purposes. Instead, “[m]ore commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.”\textsuperscript{70} The Court also discussed the possibility that an individual could be a public figure involuntarily, suggesting that “[h]ypothetically, it may be possible for someone to become a public figure through no purposeful action of his own,”\textsuperscript{71} although the Court cautioned that “the instances of truly involuntary public figures must be exceedingly rare.”\textsuperscript{72}

The Court then shifted the focus of its argument from what an individual had done to what the media were entitled to assume—“the communications media are entitled to act on the

\begin{thebibliography}{9}
\bibitem{Gertz} Gertz, 418 U.S. at 344.
\bibitem{Id} Id. at 345.
\bibitem{Id} Id.
\bibitem{Id} Id. at 351.
\bibitem{Id} Id. at 345.
\bibitem{Id} Id.
\end{thebibliography}
assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.”

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

Where defamation of a private individual is at issue, the Constitution imposes fewer constraints on the states—the Court explained that “so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.” That said, however, the states have this freedom only with respect to the standard to be employed for “compensation for actual injury.” The Constitution prohibits the states from permitting “recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.”

The Court’s analysis makes it very important to determine whether an individual is a public figure or a private individual. Gertz had taken a high profile case and at least one question was

72 Id.
73 Id.
74 Id.
75 Id.
76 Id.
77 Id. at 347.
78 Id. at 349.
79 Id. However, this limitation on presumed and punitive damages only applies if the issue involves a matter of public concern. See Dun & Bradstreet, 472 U.S. at 761 (“In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of ‘actual malice.’”).
whether his doing so would be viewed as sufficing for purposes of whether he had accepted public figure status. He had “long been active in community and professional affairs [and had] … served as an officer of local civic groups and of various professional organizations.”

In addition, he had “published several books and articles on legal subjects, [and so was] … well known in some circles.” Nonetheless, Gertz “had achieved no general fame or notoriety in the community.” For example, none of the prospective jurors had heard of him and there was no reason to think that their reaction was unrepresentative.

The Court cautioned that courts should not “lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes.” The relevant standard to meet is a daunting one, and “[a]bsent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life.” Instead, it is “preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.”

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

[I]t is plain that petitioner was not a public figure. He played a minimal role at the coroner's inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution of Officer Nuccio.

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80 Gertz, 418 at 351.
81 Id.
82 Id. at 351-52.
83 Id. at 352 (“None of the prospective jurors called at the trial had ever heard of petitioner prior to this litigation, and respondent offered no proof that this response was atypical of the local population.”).
84 Id.
85 Id.
86 Id.
Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having done so. He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome.\(^{87}\)

*Gertz* is instructive in a number of respects. An individual is not “a public personality for all aspects of his life”\(^{88}\) unless having “general fame or notoriety in the community.”\(^{89}\) A separate issue unexplored by the Court is the degree to which someone with general fame or notoriety must in addition be “pervasive[ly] involve[d] in the affairs of society”\(^{90}\) in order to be a general purpose public figure. Presumably, a nationally known entertainer would not in addition have to be pervasively involved in societal affairs to be treated as a public figure for all purposes, and in a different passage the *Gertz* Court does not even mention involvement in societal affairs when noting that “an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts.”\(^{91}\) In any event, lacking the requisite fame, Gertz did not qualify as a public figure for all purposes.

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

**D. Further Refinement of Who Counts as a Public Figure**

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\(^{87}\) *Id.*

\(^{88}\) *Id.*

\(^{89}\) *Id.*

\(^{90}\) *Id.*

\(^{91}\) *Id.* at 351.
The Court was again asked to determine whether an individual was a public figure in *Time, Incorporated v. Firestone*. Mary Alice Firestone had married Russell Firestone, “the scion of one of America's wealthier industrial families.” The trial court final judgment had included the following language:

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

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

Rather than simply report the end of the Firestones’ marriage, Time reported that the “17-month intermittent trial produced enough testimony of extramarital adventures on both sides,

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93 Id. at 450.
94 Id. at 450-51.
95 Id. at 451.
96 Id. at 450-51.
97 See id. at 492-93 (Marshall, J., dissenting) (“When the divorce case reached the Supreme Court of Florida, that court found that the divorce had been granted for lack of ‘domestication’ and pointed out that that was not one of the statutory grounds for divorce.”) (citing Firestone v. Firestone, 263 So.2d 223 (1972)).
98 After noting that “lack of domestication’ was not one of the nine (9) grounds for divorce under Section 65.04, Florida Statutes, 1963, (the Florida divorce law governing this suit),” see Firestone v. Firestone, 263 So.2d 223, 225 ( Fla. 1972), the Florida Supreme Court explained that “‘extreme cruelty’ was a ground for divorce.” See id. The state supreme court then upheld the divorce “on the ground of ‘extreme cruelty.’” See id.
said the judge, ‘to make Dr. Freud's hair curl.’”99 Firestone sought a retraction and Time refused.100

When Firestone sued, Time claimed that she was a public figure and so could not recover damages absent a showing of actual malice.101 Time noted that because the Florida Supreme Court had characterized the break-up as a “cause célèbre,”102 the divorce “must have been a public controversy and respondent must be considered a public figure.”103

The Firestone Court cautioned that it was error “to equate ‘public controversy’ with all controversies of interest to the public.”104 Yet, if that was error, then there must be some criterion in light of which courts will be able to distinguish the two. Regrettably, the Court did not announce what that criterion was, instead saying that if the Court were to accept the equivalence between controversies of interest to the public and a public controversy, the Court “would reinstate the doctrine advanced in the plurality opinion in Rosenbloom … , which concluded that the New York Times privilege should be extended to falsehoods defamatory of private persons whenever the statements concern matters of general or public interest.”105

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

99 Firestone, 424 U.S. at 452.
100 Id.
101 Id. at 452-53.
102 Id. at 454.
103 Id.
104 Id.
105 Id.
Second, by even mentioning the distinction, the Court implies that the difference between a public controversy and a controversy of interest to the public has constitutional significance, which was a message that the Court did not want to send. The Gertz Court had criticized the Rosenbloom plurality position because it allegedly would allow “a publisher or broadcaster of a defamatory error which a court deems unrelated to an issue of public or general interest [to] … be held liable in damages even if it took every reasonable precaution to ensure the accuracy of its assertions.”106 The Firestone Court was echoing the suggestion that publishers were at increased risk when publishing about matters that were not of public or general interest, although this time the Court was making matters even more confusing by implying that there is a test differentiating among issues of interest to the public but that publishers will not be informed of the content of that test.

Third, the Firestone solution ignores the difficulty that Rosenbloom purportedly created in cases involving alleged defamation of private plaintiffs—too much protection was given to matters of public interest and too little to matters not of public interest.107 But if that is so, the difficulty is not in where the line is drawn determining which matters are of public interest and which are not, but in how much or how little extra protection is given to these differing topics.108

Firestone may have been trying to cabin what counts as a matter of public interest—it clearly wanted to reject the Rosenbloom doctrine which extended “constitutional protection to all

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106 Gertz, 418 U.S. at 346.
107 Id. (“On the one hand, a private individual whose reputation is injured by defamatory falsehood that does concern an issue of public or general interest has no recourse unless he can meet the rigorous requirements of New York Times. … On the other hand, a publisher or broadcaster of a defamatory error which a court deems unrelated to an issue of public or general interest may be held liable in damages even if it took every reasonable precaution to ensure the accuracy of its assertions.”).
108 It is not as if whether a matter was of public rather than merely private interest was of no consequence after Firestone. See, for example, Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776-77 (1986) (“To ensure that true speech on matters of public concern is not deterred, we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern.”).
discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.\textsuperscript{109} But one can reject the Rosenbloom doctrine without rejecting which matters are of public or general concern.

Indeed, there is another reason that the Firestone criticism seems misdirected. Rosenbloom involved an individual who had sold nudist magazines,\textsuperscript{110} who had been described in a newscast as having been in possession of “obscene” books.\textsuperscript{111} But those books were found as a matter of law not to have been obscene.\textsuperscript{112} When discussing the case, the Rosenbloom plurality did not characterize the matter of public interest as whether Rosenbloom was selling obscene books rather than nudist literature, but instead suggested that “the police campaign to enforce the obscenity laws was an issue of public interest.”\textsuperscript{113} Thus, the plurality increased the level of generality to the enforcement of obscenity laws more generally rather than in how particular publications should be characterized. But using that mode of analysis would suggest that the issue of interest in Firestone was the issue of divorce more generally or, perhaps, issues implicated when the wealthy divorce.\textsuperscript{114}

When dismissing the public controversy argument because it allegedly would have involved a return to Rosenbloom, the Firestone Court’s implicitly mischaracterized Time’s argument. Basically, Time was suggesting that the divorce was such a public spectacle that Firestone had

\textsuperscript{109} Rosenbloom, 403 U.S. at 43-44.
\textsuperscript{110} Id. at 32 (“In 1963, petitioner was a distributor of nudist magazines in the Philadelphia metropolitan area.”).
\textsuperscript{111} See id. at 33.
\textsuperscript{112} Id. at 36 (“In May 1964 a jury acquitted petitioner in state court of the criminal obscenity charges under instructions of the trial judge that, as a matter of law, the nudist magazines distributed by petitioner were not obscene.”).
\textsuperscript{113} Id. at 40.
\textsuperscript{114} An analogous disagreement was at issue in Dunn & Bradstreet Inc. v. Greenmoss Builders, 472 U.S. 749 (1985). The majority said that erroneous credit report as not a matter of public interest, because it “was speech solely in the individual interest of the speaker and its specific business audience.” Id. at 762. In contrast, Justice Brennan characterized the speech at issue as “[s]peech about commercial or economic matters, … [which] is an important part of our public discourse.” See id. at 787 (Brennan, J., dissenting).
achieved a sufficient level of notoriety that she was a public figure for all purposes. But one can become a general purpose public figure based on notoriety alone whether or not one has achieved that status by virtue of having been associated with a public controversy.\textsuperscript{115}

In addition, Time suggested that Firestone was a limited purpose public figure for purposes of the divorce, arguing not only that she had been “drawn into a particular public controversy,”\textsuperscript{116} but also that she had “initiated it.”\textsuperscript{117} Finally, Time suggested that Firestone “commanded a substantial amount of independent public interest”\textsuperscript{118} and had sufficient notoriety within the community that it was “absolutely clear that respondent was a public figure under any relevant test with respect to reports of the divorce.”\textsuperscript{119}

When assessing whether Mary Firestone was a public figure, the Court noted that she had not assumed “any role of especial prominence in the affairs of society, other than perhaps Palm Beach society,”\textsuperscript{120} and that she had not “thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it.”\textsuperscript{121} Yet, she had certainly been drawn into the controversy.

The Court argued that Firestone did not “freely choose to publicize issues as to the propriety of her married life”\textsuperscript{122} and, further, had “assumed no ‘special prominence in the resolution of public questions.’”\textsuperscript{123} The Court admitted that Firestone “may have held a few press conferences during the divorce proceedings in an attempt to satisfy inquiring reporters,”\textsuperscript{124} but rejected that

\textsuperscript{116} Id. at *31 (citing Gertz, 418 U.S. at 351).
\textsuperscript{117} Id.
\textsuperscript{118} Id. (citing Butts, 388 U.S. at 154).
\textsuperscript{119} Id. at *32
\textsuperscript{120} Firestone, 424 U.S. at 453.
\textsuperscript{121} Id. at 454.
\textsuperscript{122} Id. at 455 (citing Gertz, 418 U.S. at 351).
\textsuperscript{123} Id. at 454 n.3.
having had such conferences “converts her into a ‘public figure.’”125 After all, those “‘interviews should have had no effect upon the merits of the legal dispute between respondent and her husband or the outcome of that trial.”126 Furthermore, it was implausible that she had “sought to use the press conferences as a vehicle by which to thrust herself to the forefront of some unrelated controversy in order to influence its resolution.”127 The Court explained that “while participants in some litigation may be legitimate ‘public figures,’ either generally or for the limited purpose of that litigation, the majority will more likely resemble respondent, drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them or to defend themselves against actions brought by the State or by others.”128

Yet, the Court confounds the analysis when pointing out that Firestone was “drawn into a public forum largely against [her] will”129 and claiming that this was a reason militating against her being a public figure, because Gertz had noted that “[m]ore commonly, an individual … is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.”130 Whether or not Firestone had willingly been drawn into the public forum, she had been drawn into it.

The Firestone analysis is confusing for two distinct reasons. First, one might understand why the Court would be tempted to refuse to declare someone a public figure who had been drawn into court against her will and had done nothing to make herself a household name. But that is simply to reject the Gertz criterion whereby being drawn into a controversy may suffice to make one a public figure. Second, as Justice Marshall notes in dissent, Firestone was not first brought

125 Id. at 454 n.3.
126 Id. at 454 n.3.
127 Id. at 454 n.3 (citing Gertz, 418 U.S. at 345).
128 Id. at 457.
129 Id.
130 Gertz, 418 U.S. at 351.
to public attention because of the lawsuit. On the contrary, she was someone “whose activities predictably attracted the attention of a sizable portion of the public,” and whose “appearances in the press were evidently frequent enough to warrant her subscribing to a press-clipping service.” Not only did the trial attract “national news coverage” and numerous articles in the local press, but she had “held several press conferences in the course of the proceedings.”

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

Justice Marshall would have found that Firestone was a public figure. On his understanding of the jurisprudence, “the focus of analysis must be on the actions of the

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131 See Firestone, 424 U.S. at 484 (Marshall, J., dissenting) (“Mary Alice Firestone was not a person ‘first brought to public attention by the defamation that is the subject of the lawsuit.’”) (citing Rosenbloom, 403 U.S. at 78, 86 (Marshall, J., dissenting)).
132 Id. at 485 (Marshall, J., dissenting).
133 Id. (Marshall, J., dissenting).
134 Id. (Marshall, J., dissenting).
135 Id. (Marshall, J., dissenting) (“The 17-month trial and related events attracted national news coverage, and elicited no fewer than 43 articles in the Miami Herald and 45 articles in the Palm Beach Post and Palm Beach Times.”).
136 Id. (Marshall, J., dissenting).
137 Id. (Marshall, J., dissenting).
138 Id. (Marshall, J., dissenting).
139 Id. at 486 (Marshall, J., dissenting).
140 Id. at 484 (Marshall, J., dissenting) (“I consider the respondent, Mary Alice Firestone, to be a ‘public figure’ within the meaning of our prior decisions.”).
individual, and the degree of public attention that had already developed, or that could have been anticipated, before the [allegedly defamatory] report in question.]

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

Not only is there some difficulty in determining who is a public figure, but there is also some question about whether that status, once acquired, is permanent. Consider Wolston v. Reader’s Digest Association, Incorporated, which involved a defamation claim against Reader’s Digest for having alleged that Ilya Wolston “had been indicted for espionage and had been a Soviet

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141 Id. at 489 (Marshall, J., dissenting). See also Dun & Bradstreet, 472 U.S. at 756 (“In libel actions brought by private persons we found the competing interests different. Largely because private persons have not voluntarily exposed themselves to increased risk of injury from defamatory statements and because they generally lack effective opportunities for rebutting such statements, [citing Gertz, 481 U.S. at 345], we found that the State possessed a “strong and legitimate ... interest in compensating private individuals for injury to reputation.”) (citing Gertz, 481 U.S. at 348-49)

142 See, for example, Herbert v. Lando, 441 U.S. 153, 155-56 (1979) (“Petitioner, Anthony Herbert, is a retired Army officer who had extended wartime service in Vietnam and who received widespread media attention in 1969-1970 when he accused his superior officers of covering up reports of atrocities and other war crimes.”) and id. at 156 (“Herbert conceded that ...he was a ‘public figure.’”)

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

144 See generally, Alan Kaminsky, Note, Defamation Law: Once a Public Figure Always a Public Figure? 10 Hofstra L. Rev. 803 (1982).

agent.” ¹⁴⁶ The courts below had held that Wolston was a public figure, and the United States Supreme Court reversed. ¹⁴⁷

Wolston’s aunt and uncle had pled guilty to espionage charges, ¹⁴⁸ and Wolston had been questioned several times. ¹⁴⁹ On one occasion, he failed to appear before a grand jury, ¹⁵⁰ allegedly because of his mental depression. ¹⁵¹ A federal court issued an order to show cause why Wolston should not be held in contempt. ¹⁵² Wolston appeared in court and offered to testify before the grand jury, but that offer was rejected. ¹⁵³ Wolston’s pregnant wife testified during the contempt hearing but became hysterical. ¹⁵⁴ At that point, Wolston agreed to plead guilty to the contempt charge. ¹⁵⁵ He received a one-year suspended sentence and was placed on probation for three years, contingent on his cooperating with any future grand jury espionage inquiries. ¹⁵⁶ During the period between his failure to appear and his sentencing, there were several stories about him in New York and Washington papers, ¹⁵⁷ although he was then able for the most part to return to private life. ¹⁵⁸

The Court examined whether Wolston was a public figure for all purposes, rejecting that he “occupied a position of such ‘persuasive power and influence’ that he could be deemed one of

¹⁴⁶ *Id.* at 160.
¹⁴⁷ *See id.* at 161 (“the District Court and the Court of Appeals were wrong in concluding that petitioner was a public figure within the meaning of this Court's defamation cases”).
¹⁴⁸ *Id.*
¹⁴⁹ *Id.* at 162.
¹⁵⁰ *Id.*
¹⁵¹ *Id.*
¹⁵² *Id.*
¹⁵³ *Id.* at 163.
¹⁵⁴ *Id.*
¹⁵⁵ *Id.*
¹⁵⁶ *Id.*
¹⁵⁷ *Id.*
¹⁵⁸ *Id.* (“This flurry of publicity subsided following petitioner's sentencing, however, and, thereafter, he succeeded for the most part in returning to the private life he had led prior to issuance of the grand jury subpoena.”).
that small group of individuals who are public figures for all purposes.”159 The Court noted that he had neither “achieved … general fame or notoriety”160 nor had “assumed … [a] role of special prominence in the affairs of society.”161 Then, the Court focused on whether Wolston was “a public figure for the limited purpose of comment on his connection with, or involvement in, Soviet espionage.”162

First, the Court noted that it was incorrect to believe that Wolston had “‘voluntarily thrust’ or ‘injected’ himself into the forefront of the public controversy surrounding the investigation of Soviet espionage in the United States,”163 since it would be more accurate to say that petitioner was dragged unwillingly into the controversy.”164 While noting that he “did fail to respond to a grand jury subpoena, and this failure, as well as his subsequent citation for contempt, did attract media attention,”165 the Court reasoned that “the mere fact that petitioner voluntarily chose not to appear before the grand jury, knowing that his action might be attended by publicity, is not decisive on the question of public-figure status.”166 After all, Gertz was not a public figure, “even though he voluntarily associated himself with a case that was certain to receive extensive media exposure.”167 The proper analysis requires a court to “focus on the ‘nature and extent of an individual's participation in the particular controversy giving rise to the defamation.’”168 Wolston

159 Id. at 165.
160 Id.
161 Id. (citing Firestone, 424 U.S. at 453 and Gertz, 418 U.S. at 352)
162 Id.
163 Id. at 166.
164 Id.
165 Id. at 166-67.
166 Id. at 167.
167 Id. (citing Gertz, 418 U.S. at 352).
168 Id. (citing Gertz, 418 U.S. at 352).
had “never discussed this matter with the press and [had] limited his involvement to that necessary to defend himself against the contempt charge.”

Admittedly, failure to appear before the grand jury and his contempt citation were “newsworthy,” although that itself did not make him a public figure. “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.” Further, Wolston had not “engaged the attention of the public in an attempt to influence the resolution of the issues involved [and had] … assumed no ‘special prominence in the resolution of public questions.’” His actions were “in no way calculated to draw attention to himself in order to invite public comment or influence the public with respect to any issue … [and he] did not in any way seek to arouse public sentiment in his favor and against the investigation.” Wolston was held to be a private figure.

In his concurrence in the result, Justice Blackmun noted that even if Wolston had “gained public-figure status when he became involved in the espionage controversy in 1958, he clearly had lost that distinction by the time respondents published KGB in 1974.” Even if Wolston had had ready access to the media at the time of the initial controversy, he likely would have lost that access when these allegations were made years later. Finally, with respect to the risk

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169 Id.
170 Id.
171 Id.
172 Id. at 168 (citing Gertz, 418 U.S. at 351).
173 Id.
174 See id. (“In short, we find no basis whatsoever for concluding that petitioner relinquished, to any degree, his interest in the protection of his own name.”).
175 Id. at 170 (Blackmun, J., concurring in the result).
176 Id. at 170-71 (Blackmun, J., concurring in the result) (“At the height of the publicity surrounding the espionage controversy here, petitioner may well have had sufficient access to the media effectively to rebut a charge that he was a Soviet spy.”)
177 Id. at 171 (Blackmun, J., concurring in the result) (“It would strain credulity to suggest that petitioner could have commanded such media interest when respondents published their book in 1974.”).
of publicity, Wolston might have anticipated that his actions in 1958 would receive coverage, but would not reasonably have anticipated coverage over a decade later, especially given his great efforts to avoid the limelight. Thus, Wolston might be thought to represent two views held by members of the Court: (1) it is relatively difficult to be held a limited purpose public figure even when one has garnered public attention, and (2) even if one becomes a limited purpose public figure, one does not permanently retain that status. However, many lower courts seem not to have taken these views to heart.

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

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178 Id. (Blackmun, J., concurring in the result) (“In ignoring the grand jury subpoena in 1958, petitioner may have anticipated that his conduct would invite critical commentary from the press.”).
179 Id. (Blackmun, J., concurring in the result) (“Any inference that petitioner ‘assumed the risk’ of public scrutiny in 1958 assuredly is negated by his conscious efforts to regain anonymity during the succeeding 16 years.”).
180 See Milsap v. Journal/Sentinel, Inc., 100 F.3d 1265, 1269 (7th Cir. 1996) (“The circuits addressing the issue have indicated that an individual who was once a public figure with respect to a controversy remains a public figure for latter commentary on that controversy.”).
182 Id. at 114.
183 Id.
184 Id.
185 Id. at 115.
“contained an inaccurate and incomplete summary of his research.”186 The funding stopped after Proxmire’s publicizing the award, although there was some dispute about why.187

Hutchinson sued Proxmire for defamation, among other causes of action.188 Proxmire argued that Hutchinson was both a public figure and a public official,189 and thus that actual malice would have to be established. Some of the facts that might be thought to support Hutchinson’s having triggered the actual malice standard included that he had a long history of publicly-funded research, he actively solicited state and federal grants, his research received local press coverage, and he voluntarily participated in programs awarding him public funds, a matter of great public interest.190

Hutchinson was not claimed to be a public figure for all purposes, but instead “a public figure for the limited purpose of comment on his receipt of federal funds for research projects.”191 Two factors were thought to support such a conclusion. First, “Hutchinson's successful application for federal funds and the reports in local newspapers of the federal grants;”192 second, “Hutchinson's access to the media, as demonstrated by the fact that some newspapers and wire services reported his response to the announcement of the Golden Fleece Award.”193 However, the Court noted, “Neither of those factors demonstrates that Hutchinson

186 Id. at 116.
187 Id. at 117 (“After the award was announced, Schwartz, acting on behalf of Proxmire, contacted a number of the federal agencies that had sponsored the research. In his deposition he stated that he did not attempt to dissuade them from continuing to fund the research but merely discussed the subject. Hutchinson, by contrast, contends that these calls were intended to persuade the agencies to terminate his grants and contracts.”).
188 See id. at 118.
189 Id.
190 See id. at 119 (discussing the district court opinion).
191 Id. at 134.
192 Id.
193 Id.
was a public figure prior to the controversy engendered by the Golden Fleece Award; his access, such as it was, came after the alleged libel.”\textsuperscript{194}

The Court reasoned that Hutchinson’s profile mirrored that of many academics.\textsuperscript{195} His writings did not reach a large audience,\textsuperscript{196} and he and his work only became controversial as a result of his receiving the Golden Fleece Award.\textsuperscript{197} The Court concluded its analysis by noting that “those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.”\textsuperscript{198}

Hutchinson had not “thrust himself or his views into public controversy to influence others.”\textsuperscript{199} While it was true that the public was concerned about “general public expenditures,”\textsuperscript{200} that alone did not make Hutchinson a public figure; else, it might seem that “everyone who received or benefited from the myriad public grants for research could be classified as a public figure,”\textsuperscript{201} a position that the Court did not accept.\textsuperscript{202}

While Hutchinson had benefited from government largesse, he had never “assumed any role of public prominence in the broad question of concern about expenditures.”\textsuperscript{203} Nor could it reasonably be said that his grant-writing or publications had “invited that degree of public attention and comment on his receipt of federal grants essential to meet the public figure

\textsuperscript{194} \textit{Id.} at 134-35.
\textsuperscript{195} \textit{Id.} at 135 ("Hutchinson's activities and public profile are much like those of countless members of his profession.").
\textsuperscript{196} \textit{Id.} ("His published writings reach a relatively small category of professionals concerned with research in human behavior.").
\textsuperscript{197} \textit{Id.} ("To the extent the subject of his published writings became a matter of controversy, it was a consequence of the Golden Fleece Award.").
\textsuperscript{198} \textit{Id.} (citing Wolston, 443 U.S. at 167-68).
\textsuperscript{199} \textit{Id.}
\textsuperscript{200} \textit{Id.}
\textsuperscript{201} \textit{Id.}
\textsuperscript{202} \textit{Id.}
\textsuperscript{203} \textit{Id.}
Finally, while he had had some access to public media prior to his receipt of the Award, he “did not have the regular and continuing access to the media that is one of the accouterments of having become a public figure.” Further, his access was local rather than national.

Hutchinson set a rather high bar to a finding that an individual was even a limited purpose public figure. Consider the case of Michael Milkovich, Senior, who had been a high school wrestling coach. During one of the meets, a fight broke out involving spectators and team members. As a result, the Ohio High School Athletic Association (OHSAA) sanctioned the Maple Heights team, “including a disqualification from the state tournament, a one-year probationary status, and a censuring of appellant.” The sanction was challenged in court by “concerned parents and involved wrestlers.” Milkovich was called to testify at that hearing. The day after the court ruled that OHSAA had violated due process in imposing the sanction, Thomas Daidiun wrote and published a newspaper article suggested that Milkovich had lied at the hearing, notwithstanding his promise to tell the truth. Milkovich sued, claiming that he had been defamed. An important issue at trial was whether Milkovich was a public figure. Both the

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204 Id. at 135-36.
205 Id. at 136.
206 Cf. Susan M. Gilles, From Baseball Parks to the Public Arena: Assumption of the Risk in Tort Law and Constitutional Libel Law, 75 Temp. L. Rev. 231, 250 (2002) (“the test for whether an individual was an all-purpose public figure focused on national prominence”).
208 Id. at 1191-92 (“On February 9, 1974, appellant's wrestling team had a meet with Mentor High School. A fight broke out involving spectators and team members from both squads after a Maple Heights wrestler was disqualified by the referee.”)
209 Id. at 1192.
210 Id.
211 Id.
212 See id.
213 Id.
trial court and the appellate court held that he was, but the Ohio Supreme Court disagreed. The state supreme court noted that while Milkovich may have been “recognized and admired in his community for his coaching achievement,” he did “not occupy a position of persuasive power and influence by virtue of those achievements.” Nor did his position in the community “put him at the forefront of public controversies where he would attempt to exert influence over the resolution of those controversies.” While the court admitted that Milkovich “did become involved in a controversy surrounding the events during and subsequent to his team’s wrestling match with Mentor High School,” the court reasoned that he “never thrust himself to the forefront of that controversy in order to influence its decision.” The Ohio Supreme Court thought that Milkovich’s status was “akin to the status of the plaintiff in Firestone rather than the status of the athletic director in Butts.

The Ohio Supreme Court decision was appealed to the United States Supreme Court, but the Court denied certiorari. In his dissent with respect to the denial of certiorari, Justice Brennan suggested that “the Ohio Supreme Court read the ‘public official’ and ‘public figure’ doctrines in an exceptionally narrow way that is sure to restrict expression by the press in Ohio.” According to Brennan, Milkovich was a limited purpose public figure who had

214 See id. at 1194-95.
215 See id. at 1195.
216 Id.
217 Id.
218 Id.
219 Id.
220 Id.
221 Id.
223 Id. at 955 (Brennan, J., dissenting from the denial of cert.) (“I therefore dissent and would grant certiorari in order to review this important constitutional question.”).
224 Id. at 954 (Brennan, J., dissenting from the denial of cert.)
allegedly “incited the fracas by egging on the crowd.” Further, Milkovich was well-known, both locally and in wrestling circles.

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

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

Justice Brennan distinguished this case from Hutchinson—in the latter, Proxmire had argued that Hutchinson had become a limited purpose public figure by virtue of his having received a Golden Fleece Award. The Court had “rejected this argument on the ground that ‘those charged with defamation cannot, by their own conduct, create their own defense by making the claimant.

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225 Id. at 963 (Brennan, J., dissenting from the denial of cert.).
226 See id. at 962 n.7 (Brennan, J., dissenting from the denial of cert.) ("To be sure, as a general matter collegiate athletics obtains wider exposure than high school athletics. But with the exception of a few rather flamboyant figures who gain national exposure, most coaches-like Butts-are unknown outside sports' circles and the local community. Milkovich is probably as well known both locally and in the wrestling community as was Butts in his respective circles.").
227 Id. at 963 (Brennan, J., dissenting from the denial of cert.).
228 Id. (Brennan, J., dissenting from the denial of cert.) (citing Wolfson, 443 U.S. at 167 and Gertz, 418 U.S. at 351).
229 Id. at 964 (Brennan, J., dissenting from the denial of cert.)
a public figure."' Here, however, the controversy was not created by the allegedly defamatory article. Rather, the “event itself created a stir, leading to a hearing, censure of Milkovich, and disqualification of his team.”

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

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

Public figures for all purposes,

Public figures for limited purposes,

230 Id. (Brennan, J., dissenting from the denial of cert.) (citing Hutchinson, 443 U.S. at 135).
231 Id. (Brennan, J., dissenting from the denial of cert.)
232 See Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 525 U.S. 943 (1998) (Stevens, J., respecting the denial of the petition for a writ of certiorari). ("[T]he denial of a petition for a writ of certiorari is not a ruling on the merits. Sometimes such an order reflects nothing more than a conclusion that a particular case may not constitute an appropriate forum in which to decide a significant issue."); Sumner v. Mata, 446 U.S. 1302, 1305 (1980) (Rehnquist, J.,) (discussing the hazards of reading any meaning into this Court's denials of certiorari"); Sheppard v. State of Ohio, 352 U.S. 910, 911 (1956) (Frankfurter, J.) (“Such denial of his petition in no wise implies that this Court approves the decision of the Supreme Court of Ohio. It means and means only that for one reason or another this case did not commend itself to at least four members of the Court as falling within those considerations which should lead this Court to exercise its discretion in reviewing a lower court's decision.”); U.S. v. Carver, 260 U.S. 482, 490 (1923) (“The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.”)
233 See Milkovich v. Lorain Journal Co., 497 U.S. 1, 10 n.5 (1990) (“Respondents rely on the following statements made by the Ohio Supreme Court in its discussion of Scott’s status as a public official: “To say that Milkovich nevertheless was not a public figure for purposes of discussion about the controversy is simply nonsense,”” 496 N.E.2d at 704 (quoting Milkovich v. Lorain Journal Co., 474 U.S. 953, 964 (1985) (Brennan, J., dissenting from denial of certiorari))).
Involuntary public figures, and
Private individuals.

While the Court has announced these categories, it has suggested that the first category is reserved for those who have achieved great fame or notoriety in the community, a standard that is quite difficult to meet for most people. An individual will not be considered a public figure for limited purposes unless the person had acquired some notoriety prior to the allegedly defamatory publication. Further, the Court has sent mixed signals about the degree to which the individual must have purposely availed himself of herself of media opportunities before that person can be considered a limited purpose public figure. Finally, the Court has hypothesized that there can be involuntary public figures but has neither offered helpful criteria for determining whether someone has acquired that status nor for determining the conditions under which such a status, once acquired, will be retained. Instead, the Court has forced lower courts to read between the lines to determine how to apply the existing criteria, resulting in inconsistent holdings and a jurisprudence that at least seems to contradict the messages that members of the Court have attempted to send. This disconnect seems most apparent in some of the cases involving individuals held to be involuntary public figures.

III. Involuntary Public Figures in the Lower Courts

Lower courts have attempted to apply the Court’s defamation jurisprudence but have had some difficulty in fashioning an account that is coherent, much less one that is in accord with the

234 See supra notes 82-84 and accompanying text (explaining that Gertz could not be considered a public figure for all purposes because he had no general fame or notoriety in the community).
235 See supra note 230 and accompanying text (discussing Justice Brennan’s explanation that Proxmire could not be made into a limited purpose public figure by the very publication that was allegedly defamatory).
236 See supra notes 124-28 and 131-36 (discussing the degree to which Firestone had access to and used the public media and whether that made her a limited purpose public figure).
237 See supra notes 71-72 (discussing Gertz’s hypothetical, exceedingly rare, involuntary public figure).
Court’s hints about which individuals should be considered public figures. The difficulties in constructing the jurisprudence have been especially clear in cases where the courts are attempting to decide the conditions, if any, under which an individual may be deemed an involuntary public figure.

A. Individuals Thrown into the Limelight when Performing Their Jobs

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

The D.C. Circuit discussed involuntary public figure status in *Dameron v. Washington Magazine, Incorporated,* which involved Merle Dameron, who had been the sole air traffic controller on duty on the day of a fatal crash. An article in the Washingtonian magazine had implied that he was partially at fault for the crash, whereas Dameron contended that “he was not in fact to blame for the accident, that he was never found blameworthy, and that he was wholly exonerated by a federal district court, which dismissed tort claims brought against the government on the theory of controller negligence.” The court noted that Dameron was “an ordinary citizen who was completely unknown to the public before the Mt. Weather crash, never sought to capitalize on the fame he achieved through the Mt. Weather crash, and never acquired any notoriety apart from the crash.” Thus, Dameron was not “a general-purpose public

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238 779 F.2d 736 (D.C. 1985).
239 *Id.* at 738 (“Plaintiff Merle Dameron was the sole air traffic controller on duty at Dulles on the day the TWA plane crashed into Mt. Weather in 1974.”).
240 See *id.*
241 *Id.*
242 *Id.* at 741.
figure.”\(^{243}\) However, the court continued, “the public-figure doctrine, fairly applied to the facts of this case, encompasses Mr. Dameron and raises him, involuntarily, to the status of limited-purpose public figure.”\(^{244}\)

The *Dameron* court cited D.C. circuit precedent for use of a “three-part framework for analyzing whether someone has become a limited-purpose public figure. Under this test the court must determine that there is a public controversy; ascertain that the plaintiff played a sufficiently central role in that controversy; and find that the alleged defamation was germane to the plaintiff’s involvement in the controversy.”\(^{245}\) The D. C. court correctly noted that *Gertz* had recognized that “it is ‘possible to become a public figure through no purposeful action of [one's] own’ although it added that ‘the instances of truly involuntary public figures must be exceedingly rare,’”\(^{246}\) and reasoned that Dameron was the kind of individual envisioned in *Gertz*.

By sheer bad luck, Dameron happened to be the controller on duty at the time of the Mt. Weather crash. … He became embroiled, through no desire of his own, in the ensuing controversy over the causes of the accident. He thereby became well known to the public in this one very limited connection.\(^{247}\)

The Dameron court distinguished what was at issue in that case from what was at issue both in *Firestone* and in *Wolston*. *Firestone* was distinguishable because “public interest in a controversy does not make a public controversy.”\(^{248}\) The court explained that “the measuring
stick for identifying public controversy” is neither the “newsworthiness of an event” nor “a voyeuristic interest in someone's private affairs.” In contrast to Firestone, this case involved a crash where there was much loss of life and at “issue was the management of a program administered by the FAA.” The court further noted that the National Transportation Safety Board “conducted an extensive, public investigation into the events surrounding the Mt. Weather Crash” and that Damerton had “appeared at these hearings and testified for many hours about his role in the crash.”

It goes without saying that an airplane crash is newsworthy, although one of the main points of Gertz and Firestone was to sever the connection between newsworthiness and whether or not one was a public figure. That Damerton had appeared and testified should not have counted against him as long as he had not voluntarily sought out the press. Indeed, his having never voluntarily made use of the press would make him less appropriately thought a limited purpose public figure than someone like Firestone, who had held numerous press conferences. The D. C. court did not seek to assess whether Damerton had greater notoriety in the relevant community than Firestone had had, which presumably would have been important to establish for involuntary public figure status. An additional difficulty is that finding Damerton an

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249 Id.
250 Id.
251 Id.
252 Id.
253 Id.
254 Id.
255 Id.
257 Jacquelyn S. Shaia, The Controversy Requirement in Defamation Cases and Its Misapplication, 28 Am. J. Trial Advoc. 387, 399–400 (2004) (“Dameron never gave any interviews to the media nor was he involved, other than as a witness, in the investigation.”).

involuntary public figure because he was a central figure in an important event does very little to limit the category of involuntary public figures—if that is all that needs to be shown, then the Gertz assurance that a finding of involuntary public figure status will be exceedingly rare is quite hollow.

Suppose that lack of voluntariness and possible lack of notoriety notwithstanding, Dameron was rightly viewed as a limited purpose public figure at the time of the crash and investigation. A separate issue was whether he continued to be such a figure years later.259

The court considered whether Wolston required a finding that Dameron was no longer an involuntary public figure, concluding that it did not.260 The Dameron court reasoned:

Dameron was a central figure, however involuntarily, in the discrete and specific public controversy with respect to which he was allegedly defamed—the controversy over the cause of the Mt. Weather crash. Wolston, by contrast, was not defamed with respect to the controversy in which he played a central role—his refusal to testify before a grand jury—but rather with respect to a controversy in which he played a role that was at most tangential—the investigation of Soviet espionage in general.261

The court’s characterization of Wolston is too fast. While the individual writing about Wolston might simply have misunderstood the basis of the contempt conviction,262 he might also have made an assumption about why Wolston had failed to appear—the writer might have assumed that Wolston did not appear because he was a spy rather than because he was suffering

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259 The accident occurred in 1974, see Dameron, 779 F.2d at 738, and the Washintonian article appeared in 1982. See id. at 737.
260 Id. at 742 (“Nor does Wolston … compel a different conclusion.”).
261 Id. at 742-43.
262 The author said that his list “consists of Soviet agents who were convicted of espionage or falsifying information or perjury and/or contempt charges following espionage indictments.” See Wolston, 443 U.S. at 159.
from depression. But if the author had erroneously assumed that Wolston was refusing to testify because he really was Soviet spy, then the defamation was not as tangential as the Dameron court implied. In any event, there is a more serious difficulty with the Dameron analysis. Dameron implies that the proper way to understand Wolston is that Wolston was a limited purpose public figure but that the defamation at issue was too far afield to fall within the relevant purpose. But that is not correct. Wolston was held not to have been a limited purpose public figure. Consideration of Justice Blackmun’s concurrence in the result makes the Dameron analysis even less persuasive. Justice Blackmun suggested that even if Wolston was a public figure at the time of the relevant event, the intervening years “render[ed] consideration of this petitioner's original public-figure status unnecessary.” Arguably, the length of time between the newsworthy series of events and “The Washingtonian's brief and oblique reference to him, [which] surfaced years later,” rendered Dameron’s initial limited purpose public figure status irrelevant.

In Wells v. Liddy, the Fourth Circuit considered the Dameron involuntary public figure analysis, but noted that it based “involuntary public figure status upon ‘sheer bad luck.’” Basing involuntary public figure status on misfortune does not take into account the Gertz warning that “involuntary public figures ‘must be exceedingly rare,’” because, unfortunately,

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263 See id. at 162.
264 Id. at 166 (“We do not agree with respondents and the lower courts that petitioner can be classed as such a limited-purpose public figure.”).
265 Id. at 170.
266 Dameron, 779 F.2d at 742.
267 186 F.3d 505 (4th Cir. 1999).
268 Id. at 538-39.
269 Id. at 538 (citing Gertz, 418 U.S. at 345).
bad luck is relatively common.  

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

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270 Id. at 539.
271 Id. at 539-40.
272 Id. at 540.
273 Id.
274 Id.
preclude anyone from ever being found an involuntary public figure. (Or, in the alternative, it
might be so watered down that it would not do any work at all.)

At issue in Wells was whether Ida Wells was a limited purpose public figure. Wells had been
employed as a secretary at the Democratic National Committee at the time of Watergate break-
in. The court listed some of her contacts with the media including her having written a letter-
to-the-editor of the New York Times, her having given an interview with a Washington Post
reporter, her having interviewed with the BBC, and her having had discussions with an
historian. These were mentioned because they apparently did not qualify as actions which a
reasonable person would believe might expose her to unwanted publicity. Further, the court
implicitly assumed that being a secretary for one of the two largest political parties in the country
would not itself be something that a reasonable person would understand might lead to even
unwanted publicity.

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

Richard Jewell, the security guard who had “spotted a suspicious and unattended package” helped move park patrons away from the package to safety.

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275 See infra note 304 and accompanying text (discussing whether failing to divorce one’s public figure spouse would suffice for a plaintiff to be on notice that he or she would be subject to discussions in the media).
276 See Wells, 186 F.3d at 512.
277 See id. at 537.
278 Id.
279 Id.
280 Id.
281 555 S.E.2d 175 (Ga. App. 2002).
282 See id. at 182.
Jewell had some contacts with the press and was found by the trial court to have been a voluntary limited purpose public figure. However, on appeal, Jewell had argued that he was not a voluntary limited purpose public figure, “because he did not assume a role of special prominence in the controversy over the safety of Olympic Park, he did not voluntarily thrust himself to the forefront of the controversy of the safety of Olympic Park, and he did not intentionally seek to influence the resolution or outcome of any public controversy surrounding the safety of Olympic Park.” He explained that “his media role was limited to that of an eyewitness and that he did not attempt to shape the resolution of any controversy,” although the Georgia appellate court did not accept that assessment of his role.

While refusing to reverse the trial court finding that he was a voluntary public figure, the court also noted that Jewell’s position was analogous to Dameron’s. Jewell was an involuntary public figure, because he “had the misfortune to have a tragedy occur on his watch.” Jewell “became embroiled in the ensuing discussion and controversy over park safety and became well known to the public in this one very limited connection.” Whether willingly or unwillingly, “Jewell became a central figure in the specific public controversy with respect to which he was

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283 See id. at 178.
284 Id. at 182.
285 Id. at 183.
286 Id.
287 Id. at 184.
288 Id. (“Jewell’s participation in interviews and the information he related about the controversy was not so circumscribed. In fact, the extensive media coverage Jewell received as the individual who discovered the bomb and helped evacuate the public led one federal judge to describe him as a ‘media hero.’”) citing In re Four Search Warrants, 945 F. Supp. 1563, 1564 (N.D. Ga.1996)).
289 Id. at 185 (“This evidence was sufficient to support the trial court's determination that Jewell was a voluntary limited-purpose public figure.”).
290 Id. at 186 (“The same considerations that led the Dameron court to find the plaintiff in that case was an involuntary public figure require the same conclusion in this case.”).
291 Id.
292 Id.
allegedly defamed: the controversy over park safety.” Of course, the Georgia appellate court’s analysis does not rely on Jewell’s having done something, e.g., having chosen to be a guard at the Olympics, that might reasonably have been expected to expose him to some publicity, but instead relies on Jewell’s having occupied central stage in such a momentous event.

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

293 Id.
295 See Wallis, supra note 256, at 317 (“The Dameron court … adopted an approach that examines the public’s interest in a controversy.”)
B. Involuntary Public Figure Status Based on Familial Relationship

Several cases suggest that family status alone may be enough to make one an involuntary public figure. In *Carson v. Allied News Company*, the Seventh Circuit summed up existing doctrine when explaining that public figures are “those who command a substantial amount of independent public interest at the time of the publication of the defamatory statements, attained through position alone or through purposeful activity amounting to a thrusting of one's personality into the vortex of an important public controversy.” Certain individuals “occupy positions of such pervasive power and influence that they are deemed public figures for all purposes and in all contexts.” Others who do not have such power and influence may nonetheless have “thrust or inject[ed] themselves to the forefront of particular public controversies, inviting attention and comment, or are drawn into public controversies.” These latter individuals “become public figures for a limited range of issues or for a limited time.”

The difficulty with the *Carson* analysis was not in how the court described the jurisprudence but in how the court applied it in a particular case.

This case involved Johnny Carson, “a preeminent entertainer and show business personality,” and his second wife, Joanna Holland. The court commented that “the wife of a public figure such as Carson more or less automatically becomes at least a part-time [i.e.,

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296 529 F.2d 206 (7th Cir. 1976).
297 Id. at 209.
298 Id.
299 Id.
300 Id.
301 Id. at 209 n.9.
302 Id. at 211 (“Carson had been divorced from his former wife on September 5, 1972 and married Holland on September 30, 1972.”).
limited purpose] public figure herself.” Regrettably, the court did not offer a rationale for such a holding.

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

The Seventh Circuit’s suggested position is over-inclusive. Sometimes, a spouse of a public figure takes on a very public task, e.g., when helping the spouse campaign for a public position. However, other spouses maintain an extremely low profile and the Carson court seems to ignore an essential element of public figure status—whether the spouse has some degree of fame or notoriety. Thus, certain spouses of public figures receive media attention because of their famous spouses and are themselves recognizable. If that were the test, then spouses who were successful in avoiding the limelight would not be limited purpose public figures even if a spouse who was

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303 Id. at 210.
304 But cf. Clyburn v. News World Communications, Inc., 903 F.2d 29, 33, (D.C. Cir. 1990) (“One may hobnob with high officials without becoming a public figure, but one who does so runs the risk that personal tragedies that for less well-connected people would pass unnoticed may place him at the heart of a public controversy.”).
305 See supra note 174 and accompanying text.
part of a martial partner’s comedic monologue\textsuperscript{306} or who received much media attention for some other reason might nonetheless be considered a limited purpose public figure.

Firestone was decided just a few months after Carson. If the Carson court were correct that mere marriage to a well-known figure might make one a limited purpose public figure, then one might have expected Firestone to have been decided differently, especially given all of the publicity that Firestone had received in her own right. That said, the finding that Holland was a limited purpose public figure did not preclude the imposition of liability, given the court’s finding that actual malice might be shown on remand.\textsuperscript{307}

Nonetheless, the Carson court’s suggestion that a public figure’s spouse might himself or herself be a public figure by virtue of being that person’s spouse did not provide the necessary cabining. After all, the spouse of a public figure might not have fame or notoriety in his or her own right and also might not have ejected himself or herself into particular controversies, which would mean that the spouse would have to be deemed an involuntary public figure. However, if one takes the Gertz admonition seriously that “the instances of truly involuntary public figures must be exceedingly rare,”\textsuperscript{308} one would expect courts to carefully delimit the conditions under which an individual might become a limited purpose public figure simply by virtue of being a

\textsuperscript{306} See, for example, Susan Yerkes, Rights, Wrongs and Real Power: Can We Talk? San Antonio Express-News, at 01G, 8/26/98, 1998 WLNR 7605092 (“As Joan Rivers would say: Can we talk? When Rivers uttered that famous phrase, she was usually about to launch into one of her acid monologues about her husband, Edgar.”). Cf. Jonathan Chancellor ed., Today’s People, Sydney Morning Herald (Austl.) at 16, 12/23/86, 1986 WLNR 1861507 (“The extrovert comic [Johnny Carson], who has hosted the Tonight Show on NBC for 24 years, has been through some expensive divorces, and anecdotes about them have often been part of his opening monologues.”).

\textsuperscript{307} Carson, 529 F.2d at 213 (“Because of both the completely fabricated marriage-breaker accusations and the wholly imagined but supposedly precisely quoted conversations regarding the purported struggle preceding the westward move of the Tonight Show, the plaintiffs are entitled to a jury’s determination of whether actual malice existed.”) Rehearing and rehearing en banc of the case were denied on March 8, 1976. See id. at 206. Firestone had already been decided on March 2, 1976. See Firestone, 424 U.S. 448. It may be that the Seventh Circuit decided not to rehear Carson, at least in part, because the actual malice standard might well have been met anyway so that it would not have mattered whether or not Joanna Holland was a public figure.

\textsuperscript{308} Gertz, 418 U.S. at 351.
family member of someone who was well known. Otherwise, the finding that someone was an involuntary public figure would not be rare at all.

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

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

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

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

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310 See id. at 71.
311 Id.
312 Id. at 73
313 Id.
314 Id.
315 Id.
The court concludes that the plaintiff is a public figure for purposes of the
defamation analysis here. In the present case, the plaintiff has “become a public
figure through no purposeful action of [her] own.” Despite the fact that the
plaintiff has not sought a public role, she has been thrust into the role of a public
figure by virtue of her marriage to Dr. Zupnik.\[316\]

It is somewhat difficult to assess the court’s holding. The court noted that James Zupnik had
received extensive publicity,\[317\] and that Karen had been accused of “conspiring with her husband
in a fraudulent conveyance of property for the purpose of hiding assets from potential judgment
creditors.”\[318\] But one cannot tell whether Karen Zupnik had received extensive or even any
publicity when her husband was “the subject [of] intense debate, discussion and scrutiny within
the media.”\[319\] If she had not also received media attention, it is difficult to see how one
allegation involving the fraudulent transfer of properties might make one an involuntary public
figure. Further, the allegation itself would not have made Karen Zupnik an involuntary public
figure but the reporting of it, and if that reporting was the very publication making the allegedly
defamatory allegation, then the newspaper would have created the involuntary public figure
status at the very time of its alleged defamation, which is exactly what Proxmire precludes.\[320\] In
any event, Zupnik suggests that involuntary public figure status may be conferred relatively
routinely.

\[316\] Id. at 72 (citing Gertz, 418 U.S. at 345).
\[317\] See id. at 72-73.
\[318\] Id. at 73.
\[319\] Id.
\[320\] See supra note 230 and accompanying text (noting Brenna’s explanation of Proxmire that defendants cannot
create their own defense by making the plaintiff a public figure in the very publication that is allegedly defamatory).
In support of its holding, the Zupnik court cited to Brewer v. Memphis Publishing Company. At issue in Brewer was whether John and Anita Brewer were public figures. Anita had “testified that she dated Elvis Presley and that their relationship lasted for five or six years, until approximately 1960 or 1961.” Further, she had been a well-known entertainer, and part of her fame had been due to her relationship with Presley. Finally, “her name continued to appear in articles and books about Presley.” Thus, in Anita Brewer’s case, her public figure status was not merely due to her once having had a romantic relationship with Elvis Presley, but to her having used it to her own advantage to promote her own career.

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

For purposes here, the more interesting and difficult analysis involved whether John, Anita’s husband, was an involuntary public figure. John Brewer had been a member of the University of Mississippi football team when it had had a number one national ranking and, further, he had

321 626 F.2d 1238 (5th Circuit 1980).
322 Id. at 1248.
323 Id.
324 Id. (“[P]ress coverage of her career was tied to coverage of her relationship with Presley. In fact, according to the articles, her success was due in large part to the relationship.”).
325 Id. at 1257.
326 Id. at 1245 (“Whether or not it indicated that Anita Brewer was having an affair with a married man as she argues, it is susceptible to the interpretation that her encounter with a married man was romantic.”).
327 See id. at 1257 (“Anita Wood Brewer who had gained media exposure and fame through her career and her romantic relationship with Presley, an extremely well-known entertainer, and whose name continued to appear in stories about Presley after her retirement, was required to prove malice in this suit based on an article that dealt primarily with that romantic relationship.”)
328 See id. at 1248.
played professional football for both the Cleveland Browns and the New Orleans Saints.\textsuperscript{329} However, the Fifth Circuit did not find John Brewer a public figure because of his former sports career but, instead, because of his marriage to Anita.\textsuperscript{330} But finding someone to be a public figure simply because of their familial relationship to someone else who is a limited purpose public figure certainly contradicts the spirit if not the letter of Firestone. If Firestone could not be deemed a public figure notwithstanding her own well-known marriage and her own engagements with the press, then one might expect the same treatment for those who do not engage the press at all but who are simply drawn into the public eye because of their relatives.\textsuperscript{331}

In \textit{Lewis v. Newschannel 5 Network},\textsuperscript{332} a Tennessee appellate court found that the brother-in-law of a high ranking police official was an involuntary public figure.\textsuperscript{333} Major Carl Dollarhide, the subject of a Newschannel investigation,\textsuperscript{334} was accused of interfering with the arrest of his brother-in-law, Brad Lewis,\textsuperscript{335} who allegedly had been found with a “sawed-off shotgun, a bag containing money, and what appeared to be gambling paraphernalia.”\textsuperscript{336} Lewis was described in the broadcast as “the son of a convicted gambler.”\textsuperscript{337} The newscast did not expressly include the information that the convicted gambler, Jimmy Lewis, was the major’s father-in-law.\textsuperscript{338}

\begin{itemize}
\item \textsuperscript{329} Id.  
\item \textsuperscript{330} See id. at 1257-58. 
\item \textsuperscript{331} See, for example, Meerpol v. Nizer, 560 F.2d 1061, 1066 (2nd Cir. 1977) (“[T]he Rosenberg sons are public figures. … In the course of extensive public debate revolving about the Rosenberg trial appellants were cast into the limelight and became ‘public figures’ under the \textit{Gertz} standards.”). 
\item \textsuperscript{332} 238 S.W.3d 270 (Tenn. Ct. App. 2007). 
\item \textsuperscript{333} Id. at 288 (“We have determined Brad Lewis is an involuntary public figure for the purpose of the reports regarding Major Dollarhide’s disempowerment.”). 
\item \textsuperscript{334} See \textit{id.} at 275 
\item \textsuperscript{335} \textit{id.} at 279. 
\item \textsuperscript{336} \textit{id.} at 280-81. 
\item \textsuperscript{337} \textit{id.} at 279. 
\item \textsuperscript{338} \textit{id.} at 276 (“Major Dollarhide was married to Jimmy Lewis's daughter.”) 
\end{itemize}
The trial court had held that although Lewis was a private person, the major’s intervention and the subsequent punishment inflicted on the major by the police chief made this all a matter of public concern.\(^{339}\) The appellate court agreed that “officials using or attempting to use their position to keep friends from receiving tickets or citations, and certainly from being arrested, constitutes a matter of public concern.”\(^{340}\) However, that court held that Lewis’s status was itself modified because he was connected to this important issue.

The appellate court reasoned that “the NewsChannel 5 defendants had the right to report on Major Dollarhide's disempowerment and on the reasons why the Chief of Police decided to relieve him of his duties.”\(^{341}\) But that report would have been incomplete unless the defendant had explained the circumstances in which Dollarhide had attempted to prevent Lewis’s arrest.\(^{342}\) Without a full account, the public would not have understood the seriousness of the major’s misconduct.\(^{343}\)

The court feared that if the allegedly libelous information had not been included in the report, the public would not have had a good understanding of why the Chief of Police had punished the major.\(^{344}\) Basically, the “public would only have been informed that Major Dollarhide had gone to the scene of an incident where a person was being detained and that he had secured the release of that individual, … [but] the public would have no way of assessing what Major Dollarhide's

\(^{339}\) See id. at 282. See also id. at 287 (“The August 9, 2000 story did more than broadcast to the members of the public what they would have read or heard had they been provided with a copy of the Chief of Police's press release. Instead, it reported the details of a story about a high ranking police official preventing the arrest of his brother-in-law after his brother-in-law had been caught possessing weapons, gambling paraphernalia, and a large amount of cash.”)

\(^{340}\) Id. at 298 (citing O’Donnell v. Yanchulis, 875 F.2d 1059, 1061 (3d Cir.1989)).

\(^{341}\) Id. at 299.

\(^{342}\) See id.

\(^{343}\) See id.

\(^{344}\) Id. (“the public would have been left to speculate about the reasons for the Chief of Police's actions”).
motivation had been or whether Major Dollarhide was being disempowered for an adequate or inadequate reason.”

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

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

345 Id.
346 Id. at 281.
347 Id. at 299.
348 Id. at 299 -300.
349 Id. at 300.
350 Id.
breathing space to be free from the chilling effect of civil litigation and damage awards arising from inevitable errors and mistakes.”

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

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

The appellate court stated that a “person may be deemed to be an involuntary public figure when his or her conduct is related in an integral and meaningful way to the conduct of a public official.” But this makes matters more confusing, because it does not help to explain why Lewis was a public figure. Not only was it true that “he did not purposely inject himself into the

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351 Id.
352 Id. at 282.
353 Id. at 298.
forefront of the controversy surrounding Major Dollarhide,” but he had engaged in no conduct whatsoever to trigger involuntary status, unless Lewis’s allegedly having possessed items that he should not have possessed somehow counts as an action whereby he can acquire involuntary public figure status. But if that is so, then the barrier preventing individuals from being deemed public figures is set so low that we might expect many individuals to qualify as involuntary public figures.

The court’s attempt to smuggle in family status was even less convincing. The court claimed that including the family connection would give the public a better understanding of what had happened. But anything about Lewis that helped to explain why Dollarhide was motivated to intervene would have given the public a fuller story. Suppose, for example, that Dollarhide and Lewis had not been related but instead had been roommates at college or, perhaps, had been members of the same fraternity, even though they had attended school at different times. One infers that any of these reasons would have made Lewis a limited purpose public figure, because any of those factors might have shed light of the major’s actions. But if the court is saying that the actions of public officials are so important to examine that they trigger the actual malice standard, then the court should not pretend to make use of involuntary public figure status to reach that result. Basically, the court proposed a new standard:

To promote vigorous discussion and debate regarding matters of important public concern and the conduct of public officials we would add … that for a private person to become an involuntary public figure, his or her appearance in the story

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354 Id. at 299.
355 See id. at 300.
must be an integral and meaningful part of addressing the conduct of the public official with regard to a matter of public concern.\textsuperscript{356}

But the difficulty posed by this standard is suggested in the very case. The reason that Dollarhide was punished was that he had allegedly improperly interfered in a suspect’s apprehension. The non-apprehended individual’s identity was secondary. Indeed, one of the ironic aspects of the court’s analysis was that the allegedly defamatory report did not say at the outset that Dollarhide had attempted to assist a family member, but that Dollarhide had attempted to protect the son of a convicted gambler.\textsuperscript{357} It was only later in the broadcast that the public learned that Lewis was Dollarhide’s brother-in-law.\textsuperscript{358} Arguably, the inclusion of that fact did not make Dollarhide look more corrupt as the court implied.\textsuperscript{359} On the contrary, if the public had been left to guess why Dollarhide was helping a convicted gambler’s son, many equally or more unflattering motivations might have been inferred, e.g., that Dollarhide might have been hoping that the gambler would reward Dollarhide for the interference.

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

\textsuperscript{356}Id. at 299.
\textsuperscript{357}See id. at 279.
\textsuperscript{358}See id.
\textsuperscript{359}See id. at 300 (“By reporting these facts, the NewsChannel 5 defendants enabled the public to better understand Major Dollarhide’s corrupt motivation, as well as the seriousness of his breach of his official duty.”).
Yet, it should not be thought that all courts are jumping onto the involuntary public figure bandwagon. Consider *Foretich v. Capital Cities/ABC, Incorporated*,\(^{360}\) which involved “one of the most notorious child-custody battles in American history.”\(^{361}\) Elizabeth Morgan came to believe that her child, Hilary, was being sexually abused while visiting with her father, Eric Foretich, and his parents, Vincent and Doris Foretich.\(^{362}\)

None of the Foretichs had either been indicted for or convicted of child abuse.\(^{363}\) Nonetheless, Elizabeth Morgan hid Hilary from them, and Morgan was eventually held in civil contempt for twenty-five months for failing to reveal Hilary’s whereabouts.\(^{364}\) The *Foretich* court noted:

> Hundreds of newspaper and magazine articles were published about virtually every aspect of the controversy. The broadcast media devoted extensive coverage to the dispute and to the various public policy debates that it inspired.\(^{365}\)

Even Congress entered the fray, passing the District of Columbia Civil Contempt Imprisonment Limitation Act of 1989,\(^{366}\) which “stated that no person could be imprisoned for civil contempt by the D.C. Superior Court for more than twelve months in connection with a child-custody case.”\(^{367}\)

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\(^{360}\) 37 F.3d 1541 (4th Cir. 1994).
\(^{361}\) *Id.* at 1543.
\(^{362}\) *Id.*
\(^{363}\) *Id.* at 1544.
\(^{364}\) *See id.*
\(^{365}\) *Id.*
\(^{367}\) *Foretich*, 37 F.3d at 1544.
At issue in this case was whether Hilary’s paternal grandparents were limited purpose public figures (either voluntarily or involuntarily). Although suggesting that the grandparents never actively sought out the media,\(^{368}\) the Fourth Circuit noted:

\[\text{[O]ver a period of a few years, and most intensively during and immediately after Dr. Morgan’s twenty-five months in jail, they [the grandparents] did accede to requests for several newspaper and magazine interviews, attend at least three press conferences or rallies organized by or on behalf of their son, and appear on at least two television shows. The grandparents did not simply confine their remarks to denying Dr. Morgan’s allegations. They also described the positive environment that they had provided for Hilary, the negative influence that Dr. Morgan had on the girl, their belief that Dr. Morgan was mentally unstable, and the distress that they had suffered as a result of Dr. Morgan’s allegations.}\(^{369}\)

The Foretichs were in the public eye in several ways. They not only attended a news conference with their son,\(^{370}\) but they appeared on The Phil Donahue Show, which was nationally broadcast,\(^{371}\) as well as in a documentary titled “Hilary in Hiding.”\(^{372}\) In addition, they were quoted in different newspapers.\(^{373}\) The court never mentions how famous or notorious the grandparents were, but one infers that they were the subjects of various stories and would have had ready access to the media if they had needed to refute particular allegations.

There was some question whether the Foretichs had been drawn into this continuing controversy or whether they were injecting themselves into the controversy. The court expressly

\(^{368}\) See id. at 1545.

\(^{369}\) Id.

\(^{370}\) See id. at 1546.

\(^{371}\) See id. at 1548.

\(^{372}\) See id. at 1549.

\(^{373}\) Id. at 1545-47.
noted that the grandparents sometimes “did not simply confine their remarks to denying Dr. Morgan's allegations,” although the court reasoned that the grandparents’ replies were “not excessive,” because their “public statements were made only to reporters from media outlets that had already aired, or were planning soon to air, Dr. Morgan's accusations against them and their son.” By way of explanation as to why this was important, the court noted that the “Foretich grandparents did not reach out to additional media outlets, and thereby to new audiences, in an effort to expand the circle of persons familiar with the controversy. Rather, they targeted their message toward those persons in whose eyes their reputations already had been (or soon would be) sullied.”

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

374 See id. at 1545.
375 Id. at 1563.
376 Id.
377 Id.
378 See id. (noting that the “Foretich grandparents did not reach out to additional media outlets, and thereby to new audiences, in an effort to expand the circle of persons familiar with the controversy, [but] … targeted their message toward those persons in whose eyes their reputations already had been (or soon would be) sullied”).
In 1992, the American Broadcasting Company aired a docudrama entitled “A Mother's Right: The Elizabeth Morgan Story.” The Foretich court explained: “Being a ‘docudrama,’ the made-for-TV movie presented a dramatized and perhaps somewhat fictionalized account, with actors and actresses playing the roles of Dr. Morgan, Dr. Foretich, Hilary, et al.”

In one scene, Hilary was depicted as visiting her father and grandparents in the office of a court-appointed psychiatrist. Hilary was “initially agitated, [but] gradually warm[ed] to her grandparents.” When that scene was later described to the character playing Elizabeth Morgan, she responds, “It's just like the therapist said... Classic response. She's being kind to her abusers so she won't be hurt again.”

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

The Fourth Circuit held that the Foretich’s frequent ventures into the public eye were defensive in nature. While admitting that “some of their public statements were probably intended (at least in part) to influence the outcome of the custody dispute or of the legislative debate in Congress,” the court reasoned that “in the circumstances of this particular case, it is almost impossible to extricate statements made in self-defense from statements intended to

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379 Id. at 1549
380 Id.
381 Id. at 1549-50.
382 Id. at 1550.
383 Id. (emphasis in original).
384 Id.
385 Id. at 1563 (“the Foretiches' primary motive was to defend their own good names against Dr. Morgan's accusations and that their public statements can most fairly be characterized as measured defensive replies to her attacks”).
386 Id.
influence the outcome of the controversy." In part because of the seriousness of Elizabeth Morgan’s charges, the Foretichs were held to be private figures.

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

In any event, the Forth Circuit view of what must be shown to establish voluntary or involuntary public figure status is in clear conflict with that of some of the other lower courts, which is no surprise given the Court’s unwillingness to be clear about the conditions under which one will have acquired some form of public figure status. Part of the difficulty in determining where the proper line should be drawn is in figuring out whether to use the Court’s announced criteria as the basis upon which to decide or, instead, the way that the Court applied those criteria. For example, suppose that the proper application of the relevant criteria yields the result that Gertz, Wolston, Firestone, and Milkovich were all private individuals. If that is so, then perhaps the Foretichs were, too. However, one must then wonder whether Butts and Walker

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387 Id.
388 See id. at 1558-59 (“[W]e hold that a person who has been publicly accused of committing an act of serious sexual misconduct that … would be punishable by imprisonment cannot be deemed a ‘limited-purpose public figure’ merely because he or she makes reasonable public replies to those accusations.”).
389 Id. at 1564 (“both Vincent and Doris Foretich were private individuals, not public figures”).
were properly characterized as limited purpose public figures. Regrettably, there is no way to know whether there is some way to reconcile all of these findings or if, instead, some were incorrect. Further, even assuming that some of these findings of public figure/private figure status were incorrect, the Court has not offered a way to figure out which accurately represented the jurisprudence and which did not.

IV. Conclusion

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

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

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