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Wolston and Hutchinson: Changing Contours of the Public Figure Test

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WOLSTON AND *HUTCHINSON*: CHANGING CONTOURS OF THE PUBLIC FIGURE TEST

I. INTRODUCTION

The classification of a plaintiff as a public or private figure is crucial in a defamation action because each classification carries a significantly different standard of proof. In order to receive damages in a defamation suit, a public figure must prove "actual malice,"[1] whereas a private figure must show only the degree of fault required by state law.[2] The two standards of proof have evolved out of the United States Supreme Court's efforts to balance two mutually exclusive interests:[3] the individual's interest in his reputation and privacy[4] and the first amendment goal of ensuring unfettered debate on public issues.[5] The Court has pointed out that " '[w]hatever is added to the field of libel is taken from the field of free debate.' "[6]

In order to accommodate these competing interests, the Court has reasoned that constitutional protection is not appropriate for defamatory remarks about private persons because lack of protection does not significantly affect debate on public issues and the states have an interest in providing individuals redress from injurious attacks upon their reputations.[7] Recognizing that error occurs in any debate, however, the Court has established a constitutional protection for defamatory re-

1. *See* note 28 *infra* and accompanying text.

2. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (As long as states "do not impose liability without fault, [they] may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual"). See Frakt, *Defamation Since* Gertz v. Robert Welch, Inc.: *The Emerging Common Law*, 10 RUT.-CAM. L.J. 519 (1979) for a discussion of the various states' different standards [hereinafter cited as *Emerging Common Law*].

3. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 344-45 (1974).

4. *See, e.g.*, Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 48 (1971) (plurality opinion) (defamation law allows an individual to "preserve certain privacy around his personality"); Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) (law of defamation reflects the "basic concept of the essential dignity and worth of every human being").

5. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. For discussions of the scope of the speech and press clauses, see Lange, *The Speech and Press Clauses*, 23 U.C.L.A. L. REV. 77 (1975); Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975); Nimmer, *Speech and Press: A Brief Reply*, 23 U.C.L.A. L. REV. 120 (1975); Stewart, *Or Of the Press*, 26 HASTINGS L.J. 631 (1975).

6. New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964) (quoting Sweeney v. Patterson, 128 F.2d 457, 458 (D.C. Cir.), *cert. denied*, 317 U.S. 678 (1942)).

7. Gertz v. Robert Welch, Inc., 418 U.S. 323, 343 (1974).

marks about public officials and public figures, even though false, but only if they are not published recklessly or knowingly.[8]

Despite the importance of the public/private figure distinction, the Court has not yet offered a precise definition of public figure. Much of the difficulty in defining the term stems from disagreement among the Justices in two areas: first, the extent of constitutional protection necessary to achieve the first amendment guarantee of free debate on public issues and second, the question of when these considerations override the states' traditional role in providing redress for defamatory remarks. This disagreement has manifested itself in plurality opinions and in an inconsistent application of a series of varying standards.[9]

An examination of the Court's discussion of the public figure concept reveals a conflict between the inquiry the Court has used in the public figure analysis and the first amendment rationale for the public/private figure distinction. Thus far in public figure analysis the Court has considered whether a plaintiff had access to the media for reply and whether the person voluntarily assumed the risk of defamation through prior activities.[10] If neither of these criteria is satisfied, the Court has reasoned that the state has a legitimate interest in providing a forum for redress.[11] By basing the extent of the constitutional protection on a person's need in a particular situation, the Court has not adequately addressed the first amendment consideration of fostering free and open debate on public issues. Because its primary focus is on protecting individual interests in reputation, the Court neither distinguishes the type of speech to be protected nor explains why protection is required by the first amendment.[12]

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8. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). *See* note 28 *infra*.

9. One indication of disagreement is the variety of views expressed by the Justices in defamation cases. There was no clear majority in either Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), or Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). In *Curtis*, the Justices wrote four separate opinions. In *Rosenbloom*, eight Justices wrote five opinions, with three Justices joining the plurality, two concurring separately and three dissenting. *Gertz* and Time, Inc. v. Firestone, 424 U.S. 448 (1976), were carried by a majority of five. Four Justices dissented in *Gertz* and three dissented in *Firestone*.

For a discussion of some of the inconsistencies in defamation law, see Christie, *Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches*, 75 MICH. L. REV. 43 (1976) [hereinafter cited as Christie]; Eaton, *American Law of Defamation through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1419 (1975) [hereinafter cited as Eaton]. In his dissent in Time, Inc. v. Firestone, 424 U.S. at 484-93, Justice Marshall discussed some of the inconsistencies he perceived in the majority opinion.

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

11. *Id.* at 343.

12. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 364 (1974) (Brennan, J., dissenting) (quoting Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 48 (1971)) (" 'the idea that

This comment examines *Wolston v. Reader's Digest Association*[13] and *Hutchinson v. Proxmire*,[14] two recent cases in which the Supreme Court defined with more particularity the characteristics that distinguish private persons from public figures. These cases reveal that the Court is continuing to narrow the concept of public figure so that it now applies only to a very few. Considering the Court's implicit preference not to extend special privileges to the media,[15] a reversal of this limitation is unlikely. The Court cannot continue to narrow the class of public figures, however, without impinging upon the ability of the press to perform its informing function.[16] In order to avoid the temptation to

certain "public" figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view is, at best, a legal fiction' "); Ashdown, Gertz *and* Firestone: *A Study in Constitutional Policy-Making*, 61 MINN. L. REV. 645, 661-65 (1977) ("Viewed in the light of first amendment values, this distinction makes little sense.") [hereinafter cited as Ashdown]. *But see* Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 TEX. L. REV. 199 (1976) [hereinafter cited as Robertson].

13. 99 S. Ct. 2701 (1979). Justice Rehnquist wrote the majority opinion.

14. 99 S. Ct. 2675 (1979). Chief Justice Burger wrote the majority opinion. A major issue in this case was whether a member of Congress is protected by the Speech and Debate Clause of the United States Constitution, Art. I, § 6, when making allegedly defamatory remarks in newsletters or press releases. This comment deals only with the Court's determination of whether Hutchinson was a public figure for the purposes of defamation law.

15. Narrowing the class of public figures and thereby reducing the number of cases to which the actual malice standard applies is consistent with the Court's recent decisions not to extend specific constitutional privileges to the media. *See, e.g.*, Gannet Co. v. DePasquale, 99 S. Ct. 2898 (1979) (reporter does not have right of access to pretrial procedures in criminal case); Herbert v. Lando, 99 S. Ct. 1635 (1979) (press receives no absolute privilege for editorial processes); Houchins v. KQED, 438 U.S. 1 (1978) (media has no special constitutional right of access to county jails); Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (search warrants permitted to inspect newsrooms); Pell v. Procunier, 417 U.S. 817 (1974) (press not entitled to special access to information); Saxbe v. Washington Post Co., 417 U.S. 843 (1974), and Branzburg v. Hayes, 408 U.S. 665 (1972) (reporter does not have the right to conceal sources from a grand jury).

The Court however has provided protection for the press in limited areas. *See, e.g.*, Smith v. Daily Mail Publishing Co., 99 S. Ct. 2667 (1979) (criminal statute prohibiting publishing a juvenile's name invalid as an imposition of "subsequent punishment"); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (Court did not enforce judicial gag order in reporting about criminal proceedings); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (striking down mandatory right to reply statute for political candidates). Professor Ashdown distinguishes cases involving problems such as prior restraints because they involve "material of imminent political impact." Ashdown, *supra* note 12, at 677, 689. He perceives a subtle restriction of media protection to coverage of "matters of immediate political relevance." *Id.* at 646-47.

This does not indicate that the Court necessarily intends to limit the scope of first amendment expression in all respects. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (extending constitutional protection to commercial speech).

16. *See* Anderson, *A Response to Professor Robertson: The Issue is Control of Press Power*, 54 TEX. L. REV. 271 (1976) [hereinafter cited as *A Response*]; Anderson, *Libel and*

restrict further the public figure definition,[17] the Court must anchor it to a first amendment rationale. In *Wolston* and *Hutchinson* the Court has already subtly restructured the criteria it uses to determine public figure status.[18] These criteria suggest an appropriate rationale for the public figure test as it is presently fashioned, making it more responsive to first amendment considerations and less vulnerable to further limitation.

II. ANTECEDENTS OF THE PUBLIC/PRIVATE FIGURE DISTINCTION

A. Public Officials: New York Times Co. v. Sullivan[19]

Prior to the 1964 Supreme Court decision of *New York Times Co. v. Sullivan*, defamation was not considered to be within the province of speech or press protected by the first amendment.[20] Before *New York Times*, each state had complete autonomy in regulating defamation. This regulation generally followed the common law tradition with defendants held strictly liable for their defamatory publications.[21] The common law tradition recognized limited privileges for defendants, including the privilege of "fair comment."[22] While this privilege extended to matters of public or general concern, it was generally limited to opinions and did not extend to any false assertions of fact, unless

Press Self-Censorship, 53 TEX. L. REV. 422 (1975) [hereinafter cited as *Press Self-Censorship*]; Note, *The Editorial Function and the* Gertz *Public Figure Standard*, 87 YALE L.J. 1723 (1978) [hereinafter cited as *The Editorial Function*].

17. *See* Christie, *supra* note 9, at 64. Professor Christie anticipates that eventually the Court will adopt the *Gertz* requirement of fault for all types of defamation, regardless of whether public officials or public figures are involved.

18. The emphasis in this comment is on the public figure concept, although the Court's libel decisions encompass a variety of other issues. For a comprehensive history of defamation law, see Eaton, *supra* note 9. *See also Press Self-Censorship, supra* note 16; *A Response, supra* note 16; Brosnahan, *From* Times v. Sullivan *to* Gertz v. Welch: *Ten Years of Balancing Libel Law and the First Amendment*, 26 HASTINGS L.J. 777 (1975) [hereinafter cited as Brosnahan]; Frakt, *The Evolving Law of Defamation*: New York Times Co. v. Sullivan *to* Gertz v. Robert Welch, Inc. *and Beyond*, 6 RUT.-CAM. L.J. 471 (1975) [hereinafter cited as *Evolving Law*]; Robertson, *supra* note 12.

19. 376 U.S. 254 (1964).

20. W. PROSSER, LAW OF TORTS § 118, at 819 (4th ed. 1971) [hereinafter cited as PROSSER]. *See, e.g.*, Roth v. United States, 354 U.S. 476, 486-87 (1957) (dictum); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (libelous statements not a class of speech requiring constitutional protection); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (dictum). The Court has not changed the idea that "there is no constitutional value in false statements of fact." Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974). Rather, the Court has determined that the press requires "breathing space" when reporting about activities of certain persons and therefore has created a constitutional privilege for those engaged in that type of speech.

21. PROSSER §§ 111, 113, *supra* note 20, at 772-74.

22. *Id.* § 115 at 792.

made in good faith.[23]

The common law of defamation was radically altered in 1964 when the Supreme Court considered a defamation suit brought by the police commissioner of Montgomery, Alabama, against the New York Times. The defamatory statements appeared in a paid advertisement that included accounts of police actions during civil rights demonstrations in the South.[24] The Court determined that libel could no longer claim "talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the first amendment."[25] The Court rejected truth as the only defense because of the potential for self-censorship by the press: "erroneous statement is inevitable in free debate, and it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive'."[26] Critics of government might be stifled simply by the threat of having to prove the truth of their statements in court, which necessarily "dampens the vigor and limits the variety of public debate."[27] Therefore, the Court held that the first amendment limits a state's power to award damages to public officials for defamatory statements relating to their duties, unless the plaintiff proved that the statements had been made with "actual malice," defined as knowledge of falsity or reckless disregard for the truth.[28]

In its analysis, the Court found that state libel laws when applied

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23. *Id.*

24. New York Times Co. v. Sullivan, 376 U.S. at 256-58.

25. *Id.* at 269.

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

27. New York Times Co. v. Sullivan, 376 U.S. at 279.

28. *Id.* at 279-80. Actual malice is a term of art describing the situation in which a person publishes a defamatory falsehood "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280. In Garrison v. Louisiana, 379 U.S. 64, 74 (1964), the Court declared that a plaintiff must show that a false publication was made with a "high degree of awareness of [its] probable falsity." The Court clarified this standard in St. Amant v. Thompson, 390 U.S. 727 (1968); "reckless disregard" occurred when "the publisher was aware of the likelihood that he was circulating false information" or when the publisher "in fact entertained serious doubts as to the truth of his publication." *Id.* at 730-31. Actual malice is distinguished from common law malice, which involves ill-will or evil intent. Cantrell v. Forest City Publishing Co., 419 U.S. 245, 251-52 (1974); PROSSER §§ 113, 118, *supra* note 20.

The "actual malice" standard was conceived to be a strict standard designed to prevent libel suits and thus remove the threat of self-censorship by the press. In fact, very few plaintiffs have been able to meet this standard. *See Emerging Common Law, supra* note 2, at 549-50; Eaton, *supra* note 9, at 1375.

Justice Stewart, dissenting in Herbert v. Lando, 99 S. Ct. 1635, 1661 (1979), expressed concern that the Court is gradually returning to the common law malice standard by allowing inquiry into the editor's state of mind while writing an article.

to public officials, were similar to the Sedition Act of 1798, which prohibited criticism of the government.[29] The Court noted that the views of critics of that Act "reflect[ed] a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment."[30] The controversy about the Act provided an insight into the "central meaning of the first amendment."[31] One commentator has described this meaning as providing "a core of protection of speech without which a democracy cannot function, without which in Madison's phrase, 'the censorial power' would be in the Government over the people and not 'in the people over the government'."[32]

The thrust of the Court's entire discussion was the importance of free and open exchange of ideas in a self-governing society.[33] The Court noted a "profound national commitment to the principle that debate on *public issues* should be uninhibited, robust, and wide-open"[34] and acknowledged the long-settled "proposition that freedom of expression upon *public questions* is secured by the First Amendment."[35] Applying the *New York Times* standard later that year, the Court recognized that "speech concerning public affairs is more then self-expression; it is the essence of self-government."[36] Although the holding of *New York Times* only provided protection for defamatory statements

29. Sedition Act, ch. 74, § 2, 1 Stat. 596 (1798) (expired in 1801).

30. New York Times Co. v. Sullivan, 376 U.S. at 276.

31. *Id.* at 273. See Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 204-10 [hereinafter cited as *Central Meaning*], for a discussion on how the Court derived this meaning. The Court also relied on earlier precedents, emphasizing the importance of free speech. *See, e.g.*, Roth v. United States, 354 U.S. 476, 484 (1957) (first amendment was designed to promote discussion to bring about "political and social changes"); Stromberg v. California, 283 U.S. 359, 369 (1931) (first amendment was designed to maintain "free political discussion to the end that government may be responsive to the will of the people").

32. *Central Meaning, supra* note 31, at 208.

33. The Court was heavily influenced by Professor Alexander Meiklejohn's theory that the first amendment protects all speech of public concern. *See* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 14-15 (1965); *Central Meaning, supra* note 31, at 214-17. Professor Meiklejohn includes within the scope of the first amendment "the freedom to vote" and "many forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express." A. Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255-57. This includes education, philosophy, sciences, literature, the arts and public issues. If a subject had no "governing" or "social" importance, it would not receive first amendment protection.

34. New York Times Co. v. Sullivan, 376 U.S. at 270 (emphasis added).

35. *Id.* at 267.

36. Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

about public officials, the opinion was framed in broad first amendment terms. The Court's language indicated that constitutional protection could not be limited to statements about public officials.[37]

B. Public Figures: Curtis Publishing Co. v. Butts[38]

In the consolidated cases of *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*,[39] a divided Court extended the application of the *New York Times* standard from government officials to public figures.[40] In the first case, Butts, the athletic director at the University of Georgia, was accused by The Saturday Evening Post of trying to "fix" a football game.[41] The second plaintiff, Walker, a retired army general was reported by the wire service to have led a march against federal officers who were seeking to enforce a desegregation order.[42]

The Court made it clear that it did not consider the constitutional protection to be limited to explicitly political criticism; it explained that the purpose of a free press was to advance " 'truth, science, morality, and arts . . .' as well as responsible government."[43] Again emphasizing the need for open discussion on public issues, the Court noted that "the public interest in the circulation of the[se] materials . . . is not less than that involved in *New York Times*."[44]

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37. The public official classification was gradually expanded to include statements about "anything which might touch on an official's fitness for office." *Id.* at 77. It was further expanded in Rosenblatt v. Baer, 383 U.S. 75 (1966), to include the operator of a county-owned ski resort. The Court stated that the public official category includes all persons in a governmental position of such "apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it." *Id.* at 86. Professor Kalven anticipated the Court's direction: "the invitation to follow a dialectic progression from public official to government policy to public policy to matters in the public domain, like art, seems to me to be overwhelming." *Central Meaning, supra* note 31, at 221.

38. 388 U.S. 130 (1967).

39. *Id., reported sub nom.* Curtis Publishing Co. v. Butts.

40. Justice Harlan announced the opinion of the Court in which Justices Clark, Stewart, and Fortas joined. Chief Justice Warren concurred in the result, but for different reasons. Justices Black and Douglas concurred in part and dissented in part, espousing their view that the Court should adopt a "rule to the effect that the First Amendment was intended to leave the press free from the harrassment of libel judgments." *Id.* at 172 (Black, J., concurring). They had also advocated this view in New York Times Co. v. Sullivan, 376 U.S. at 293-97 (Black, J., concurring); Rosenblatt v. Baer, 383 U.S. 75, 90 (1966) (Douglas, J., concurring); Garrison v. Louisiana, 379 U.S. 64, 79-80 (1964) (Black, J., concurring). Justices Brennan and White concurred in part and dissented in part.

41. Curtis Publishing Co. v. Butts, 388 U.S. at 136.

42. *Id.* at 140.

43. *Id.* at 147 (quoting 1 JOURNALS OF CONTINENTAL CONG. 108).

44. *Id.* at 154.

The Court found both Butts and Walker to be public figures: "Butts . . . by position alone and Walker by . . . [the] thrusting of his personality into the 'vortex' of an important public controversy."[45] The Justices, however, did not agree on a rationale for the extension of the constitutional protection to defamatory remarks about public figures.[46] Justice Harlan, speaking for the plurality,[47] characterized *New York Times* as a case "close to seditious libel" and specifically rejected this rationale as a basis for extending the actual malice standard to public figures.[48] Instead, he focused on the status of the plaintiff and the states' interest in protecting individuals against attacks on their reputations. If a plaintiff deserved recovery, and the judgment did not compromise the "central meaning" of the first amendment, then Harlan would have allowed the states greater latitude to redress injury, even though debate might ultimately be affected in some way. In *Curtis* and *Walker*, however, Harlan determined that the states' interests did not outweigh first amendment considerations because both plaintiffs had willingly become objects of public attention and had access to the media for reply.[49]

Although he concurred in the result of the decision, Chief Justice Warren found no reason to distinguish between the treatment of public officials and public figures "in law, logic, or First Amendment policy."[50] He noted that the distinction between the public and private sectors had become increasingly blurred so that many individuals not in public office are "nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large."[51] They are, in effect, private counterparts of the public official. The Chief Justice pointed out that promoting discussion about public figures is particularly important be-

45. *Id.* at 155.

46. The Justices also could not agree on an appropriate standard of proof in cases involving public figures. The four members who joined Justice Harlan's opinion advocated a standard based on "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.* at 155. This resembles a gross negligence standard. Chief Justice Warren agreed with Harlan's result, but reasoned that the actual malice standard as defined in *New York Times* was the appropriate standard for public figure cases. *Id.* at 164 (Warren, C.J., concurring). Because Justices Brennan and White agreed with Warren, and Justices Black and Douglas restated their absolutist position, the actual malice standard was ultimately adopted as the standard of proof. *See* Kalven, *The Reasonable Man and the First Amendment*: Hill, Butts *and* Walker, 1967 SUP. CT. REV. 267, 275-78.

47. *See* note 40 *supra*.

48. Curtis Publishing Co. v. Butts, 388 U.S. at 154.

49. *Id.* at 155.

50. *Id.* at 163 (Warren, C.J., concurring).

51. *Id.* at 164.

cause public figures may exert as much influence as government officials even though their actions are not subject to the restraints of the political process. Therefore, criticism of public figures provides a means to influence their conduct and to counter their ideas.[52] For these reasons, Warren believed the extension of the constitutional privilege to defamatory remarks about public figures should logically follow from the rationale in *New York Times*, which established protection on the basis of the value of that speech in a free society. He would have extended constitutional protection to reports about those who are in a position to influence and to those who actually attempt to influence public policy or social values.[53] Contrary to Harlan, Warren rejected the balancing approach as an appropriate method to accommodate the competing interests in defamation actions when people have assumed roles analogous to public officials. Harlan, on the other hand, preferred to balance the competing interests and extend protection only to remarks made about a plaintiff who, because of sufficient access to the media or by virtue of having invited attention, did not deserve the state's protection. This approach minimizes first amendment considerations because it distinguishes between plaintiffs' attributes rather than considering the value of the particular type of speech to a self-governing society.

C. Public Interest: Rosenbloom v. Metromedia, Inc.[54]

The public figure concept was not clarified immediately because the Court embraced an even broader application of the constitutional protection in *Rosenbloom v. Metromedia, Inc.* In this case, a radio station had characterized a person who was ultimately acquitted of obscenity charges as a "girlie-book peddler."[55] In a plurality opinion,[56] the Court pursued the emphasis on free debate in *New York Times* and *Curtis* by requiring constitutional protection for "all discussion and

52. *Id.* at 163-64.

53. *Id.* at 164.

54. 403 U.S. 29 (1971) (plurality opinion).

55. *Id.* at 34-36.

56. Justice Brennan wrote the plurality opinion, in which Chief Justice Burger and Justice Blackmun joined. They believed the *New York Times* rule should apply to a libel suit brought by a private individual that involved an issue of public interest because the "public's primary interest is in the event." *Id.* at 43-44. Justice White agreed with the plurality's reasoning but believed that its application should have been limited to the facts presented in the case. *Id.* at 62 (White, J., concurring). Justice Black advocated the position that all libel actions against the press are unconstitutional. *Id.* at 57 (Black, J., concurring). Justices Harlan, Marshall and Stewart dissented. Justice Douglas took no part in the consideration or decision of the case.

communication involving matters of *public* or *general* concern," regardless of the type of person involved.[57] The Court emphasized that the *New York Times* standard was designed to preserve the free and open discussion required by the first amendment, not to preserve a public official's interest in protecting his reputation. Therefore, the Court rejected Harlan's rationale because "assuming the risk of defamation by voluntarily thrusting [one]self into the public eye bears little relationship . . . to the values protected by the First Amendment."[58]

Rosenbloom represents the culmination of the Court's expansive interpretation of first amendment protection in defamation law. In each case dealing with the problem, the Court emphasized the essential importance of freedom of expression when compared with the interests protected by defamation law. In *Rosenbloom*, however, the Court did not distinguish the types of speech that must be protected to preserve first amendment values. This distinction was implicit in Warren's rationale, because he would have extended the *New York Times* standard by analogy to its seditious libel rationale. Under Warren's rationale, public figures are defined by the amount of influence they intentionally exert on issues that affect society. Under *Rosenbloom*, however, any person involved even to a minor extent in a matter of general interest loses the protection of state defamation law unless "actual malice" is shown. The Court did not articulate a distinction between speech requiring constitutional protection and that beyond its reach. This failure to discriminate and the ease with which lower courts found plaintiffs to be involved in issues of public interest accounts for the rejection of *Rosenbloom* three years later.[59]

III. PUBLIC/PRIVATE FIGURE DISTINCTION

A. Gertz v. Robert Welch, Inc.[60]

In *Gertz v. Robert Welch, Inc.*, an attorney sued the publishers of

57. *Id.* at 43-44 (emphasis added).

58. *Id.* at 47.

59. Very few courts had found defamatory material to be outside the sphere of public interest. *See Evolving Law, supra* note 18, at 478-81 and cases cited therein.

60. 418 U.S. 323 (1974). Justice Powell delivered the opinion of the Court, in which Justices Stewart, Marshall, Blackmun and Rehnquist joined. Justice Blackmun concurred separately, stating his preference for the rationale of the three-member plurality in *Rosenbloom*. He said, "If my vote were not needed to create a majority, I would adhere to my prior view." *Id.* at 354 (Blackmun, J., concurring). Chief Justice Burger and Justice White disagreed with the majority's modification of the common law of defamation. *Id.* at 354-55 (Burger, C.J., dissenting); *id.* at 369-70 (White, J., dissenting). Justice Brennan reiterated the position he had taken in *Rosenbloom*. *Id.* at 361-69 (Brennan, J., dissenting).

an article in which he had been described as a communist and an architect of a plot to convict a policeman of murder. A prominent Chicago attorney and author of several books, Gertz had represented the family of the victim in a civil suit but had not been involved in the criminal prosecution of the officer.[61] Because the defamatory statements in *Gertz* related to a national conspiracy to undermine the police, the fact that the Court did not find Gertz to be a public figure indicates a departure from the *Rosenbloom* public interest approach.

The Court was dissatisfied with the public interest standard because it forced lower courts "to decide on an *ad hoc* basis which publications address issues of 'general or public interest'."[62] In its place, the *Gertz* Court adopted Harlan's balancing approach, which used varying degrees of constitutional protection, the standard the *Rosenbloom* Court had said lacked constitutional dimensions.[63] Essentially, the Court in *Gertz* characterized public figures as those who had access to the media to "contradict the lie or correct the error"[64] or those who had invited attention and comment, thereby assuming the risk of defamatory remarks.[65] Private figures, on the other hand, are "more vulnerable to injury" and "more deserving of recovery."[66]

By using Harlan's rationale for the public figure determination, the Court shifted its primary focus away from the first amendment consideration of protecting free discussion on public issues toward a consideration of the states' legitimate concern for protecting individuals' interests in reputation and privacy.[67] The Court's suggestion that it is helpful to consider "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation"[68] adds another dimension to Harlan's criteria. In *Curtis*, the Court had said that Butts was a public figure because of his prominence as a university athletic director.[69] Although Gertz was a prominent attorney involved

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Justice Douglas stated his familiar view that no libel law is constitutional. *Id.* at 355-60 (Douglas, J., dissenting).

61. *Id.* at 352.

62. *Id.* at 346.

63. *See* text accompanying note 58 *supra*. "[T]he Court's abandonment of 'public issues' as a judicial criterion of the *New York Times* privilege may be construed as a repudiation of the justification for First Amendment limitations on state libel laws articulated in *New York Times* and its progeny." Brosnahan, *supra* note 18, at 791.

64. 418 U.S. at 344.

65. *Id.* at 344-45.

66. *Id.* at 345.

67. *See* text accompanying notes 47-49 *supra*.

68. 418 U.S. at 352.

69. 388 U.S. at 154-55.

in many civic affairs, the Court held that he was not a public figure because the controversy involving the defamatory remark was not directly related to his notoriety.[70] Although the Court stated that a connection was necessary, the extent of the required connection was not made clear. This additional criterion, however, indicates that the Court intended to narrow the class of people to be considered public figures. By substituting the word "controversy" for public interest, the Court avoided the broad public interest determinations utilized in the *Rosenbloom* analysis.[71]

The Court blended certain elements of Warren's distinction when it recognized two ways in which one becomes a public figure for constitutional purposes. Public figures are those who "have assumed roles of especial prominence in the affairs of society" or who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[72] The Court did not follow, however, the underlying basis for that distinction, which was the analogy to public officials. The reason for granting protection when reporting about public officials, as the *Rosenbloom* Court acknowledged, was not that a particular plaintiff had compromised his interest in his reputation, but rather because the first amendment requires protection of certain types of speech.[73]

B. Time, Inc. v. Firestone[74]

Time Magazine erroneously reported that Mr. Firestone had been granted a divorce on grounds of extreme cruelty and adultery. In a libel suit, the Court found that Mrs. Firestone was not a public figure because she had not assumed a role of public prominence, even though she was well-known in local society and subscribed to a press clipping service.[75] The Court also determined that she had not thrust herself to the forefront of a controversy, although she had called several press conferences to defend her reputation after Time published the article.[76]

70. 418 U.S. at 352.

71. *See* text accompanying note 57 *supra*. "Controversy" refers to a matter involving actual differences of opinion rather than simply a matter that arouses the interest of the public. *See, e.g.*, WEBSTER'S NEW COLLEGIATE DICTIONARY 245 (1979) ("a discussion marked especially by the expression of opposing views").

72. 418 U.S. at 345.

73. 403 U.S. at 47.

74. 424 U.S. 448 (1976). Justice Rehnquist delivered the opinion of the Court. He was joined by Chief Justice Burger and Justices Stewart, Blackmun and Powell. Justice Powell filed a separate concurrence. Justices Marshall, White, and Brennan dissented.

75. *Id.* at 453-55.

76. *Id.* at 454-55 n.3.

Implying that it had not entirely abandoned the *Rosenbloom* public interest test, the Court stated that "[d]issolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in *Gertz*."[77] Because of the emphasis on the type of controversy, the application of the *Gertz* formula in *Firestone* was more confusing than helpful in deciphering the Court's public/private figure distinction.[78]

Firestone revealed the inadequacy of the Harlan rationale adopted in *Gertz*. If the Court had simply focused on whether Mrs. Firestone had access to the media or had voluntarily sought public attention, it would have found her to be a public figure. That the Court labeled her a private figure shows a recognition of the need to consider the value of a particular type of speech in society, a concern not specifically addressed in *Gertz*. Using the Warren rationale, Mrs. Firestone did not attempt to influence, nor was she in a position to influence, governmental actions or public opinion, and therefore first amendment considerations were not applicable.

IV. *WOLSTON* AND *HUTCHINSON*

In both *Wolston* and *Hutchinson*, the lower courts attributed public figure status to both plaintiffs, largely because the respective controversies were characterized as matters of public interest.[79] These cases provided the Supreme Court with an opportunity to clarify the criteria to be used for public figure determinations.[80]

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77. *Id.* at 454. Justice Marshall noted this. *Id.* at 487-88 (dissenting opinion).

78. *See* authorities cited in note 9 *supra*.

79. The language the courts used is reminiscent of the *Rosenbloom* public interest analysis: the district court in *Wolston* determined that Wolston was a public figure because he "became involved in a controversy of a decidedly public nature in a way that invited attention and comment, and thereby created in the public an interest in knowing about his connection with espionage." Wolston v. Reader's Digest Ass'n, 429 F. Supp. 167, 177 n.33 (D.D.C. 1977). The court of appeals affirmed on the basis that "by his voluntary action he invited attention and comment in connection with the public questions involved in the investigation of espionage." 578 F.2d 427, 431 (D.C. Cir. 1978). In *Hutchinson*, the district court stated:

> Given Dr. Hutchinson's long involvement with publicly-funded research, his active solicitation of federal and state grants, the local press coverage of his research, and the public interest in the expenditure of public funds on the precise activities in which he voluntarily participated, the court concludes that he is a public figure for the purposes of this suit.

431 F. Supp. 1311, 1327 (W.D. Wis. 1977).

These cases deal only with "limited purpose public figures"; the Supreme Court did not discuss the category of "all-purpose" public figures. Although the Court in *Gertz* had said that there might be such a thing as an "involuntary public figure," the Court's narrowing of the class of public figures in *Wolston* and *Hutchinson* makes this even less likely.

80. *Hutchinson* and *Wolston* are notable for the issues the Court did not address. For example, the Court did not deal with the point raised by the concurring Justices in *Wolston*

A. Wolston v. Reader's Digest Association[81]

Ilya Wolston, nephew of a convicted Soviet spy, was charged with criminal contempt in 1958 for failing to appear at a grand jury hearing on Soviet espionage. Although Wolston had cooperated in several investigations, he had missed one session because of poor health. Stories about the investigations and his contempt citation appeared in New York and Washington newspapers. In 1974, Reader's Digest published a book that incorrectly listed Wolston as a convicted Soviet spy. In the resulting libel suit, the district court determined that Wolston was a public figure because he "became involved in a controversy of a decidely public nature" and the court of appeals affirmed.[82]

Reversing the decision in *Wolston*,[83] the Supreme Court repeated the *Gertz* rationale, that public figures are less vulnerable to injury be-

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that lapse of time between the controversy generating the defamation and the publication of the libelous statement might make a difference in a defamation suit. The lower courts had rejected this argument and it was not brought up on appeal. 99 S. Ct. at 2707 n.7. Justice Blackmun, however, stated that the "passage of time" was not foreclosed as a ratio decidendi. *Id.* at 2709 n.* (Blackmun, J., concurring). *See* Bamberger, *Public Figures and the Law of Libel; A Concept in Search of a Definition*, 33 BUS. LAW. 709, 723 (1976) [hereinafter cited as Bamberger]. Another question implicit in *Wolston, Hutchinson* and *Firestone* is whether the fact that the libelous publication reaches a substantially greater audience than that in which plaintiff is well-known should have an impact on the defamation suit. *See id.* at 719. The *Wolston* Court also did not consider a distinction between so-called hot news and works that require a great deal of time and research. Justice Blackmun suggested that this distinction was significant. 99 S. Ct. at 2709-10 (Blackmun, J., concurring). The *Hutchinson* Court did not consider whether the *New York Times* standard should apply to nonmedia defendants. The finding that plaintiff was not a public figure made it unnecessary to decide this question. Hutchinson v. Proxmire, 99 S. Ct. at 2687 n.16. *See generally*, Eaton, *supra* note 9, at 1403-08; *Evolving Law, supra* note 18, at 507-12. The Court specifically declined to rule on the propriety of summary judgment in "actual malice" cases. Summary judgment has been mentioned as a possible means to alleviate potential self-censorship by the press. *Press Self-Censorship, supra* note 16, at 454-58, 468-69. The trial court in *Hutchinson* had said that in determining "actual malice" summary judgment might be the rule rather than the exception. 431 F. Supp. at 1330. Chief Justice Burger expressed "some doubt about the so-called rule" because "[t]he proof of 'actual malice' calls a defendant's state of mind into question . . . and does not readily lend itself to summary disposition." Hutchinson v. Proxmire, 99 S. Ct. at 2680 n.9 (citations omitted).

81. 99 S. Ct. 2701 (1979).

82. 429 F. Supp. 167, 177 n.33 (D.D.C. 1977), *aff'd*, 578 F.2d 427 (D.C. Cir. 1978).

83. 99 S. Ct. 2701 (1979). In a striking departure from previous defamation decisions, *see* note 9 *supra*, only one dissenting opinion was filed. Justice Brennan dissented, agreeing with the court of appeals, which had stated: " 'The issue of Soviet espionage in 1958 and of Wolston's involvement in that operation continues to be a legitimate topic of debate today . . . .' " *Id.* at 2710 (dissenting opinion) (quoting 578 F.2d at 431). Justices Blackmun and Marshall concurred in the determination that Wolston was not a public figure. They believed the Court should have decided the issue on the basis of lapse of time; even if Wolston had been a public figure in 1958, he had lost this status by 1974. *Id.* at 2709-10 (Blackmun, J., concurring).

cause they have access to means of reply and, of more importance, are less deserving of protection because of their voluntary exposure to the risk of defamation.[84] Interestingly, the Court did not elaborate on the application of either of these factors in *Wolston*. Instead, it restated the two ways in which one becomes a public figure—either by possessing persuasive power and influence or by thrusting oneself to the forefront of a particular controversy in order to resolve the issues.[85] The Court denied that Wolston had become a public figure by receiving a contempt citation. Even though Wolston could have expected public attention by choosing not to appear at the hearing, he had not used the contempt citation to take a stand on the propriety of the government's investigations.[86]

B. Hutchinson v. Proxmire[87]

Ronald Hutchinson filed a libel suit after federal agencies, which had funded his behavorial research, received Senator Proxmire's "Golden Fleece Award" for wasteful government spending. The district court and court of appeals agreed that Hutchinson was a public figure for the limited purpose of comment on his receipt of federal funds for research.[88] The lower courts based their determination on Hutchinson's successful applications, local newspaper reports about the grants, and the wire service report of his response to Proxmire's award.[89]

The Supreme Court reversed, pointing out that Hutchinson only became a public figure as a result of the publicity generated by the award.[90] His access to the media was stimulated by the award and was not the "regular and continuing access to the media that is one of the accoutrements of having become a public figure."[91] The Court would not allow Proxmire to create a defense by making Hutchinson the object of public attention.[92] The Court noted that Hutchinson's prior publicity did not involve the public spending issue and that, through his actions, he had not sought to influence policy or invite comment

84. *Id.* at 2706.
85. *Id.*
86. *Id.* at 2707.
87. 99 S. Ct. 2675 (1979). No dissenting opinions were filed with respect to the Court's determination that Hutchinson was not a public figure.
88. 431 F. Supp. 1311 (W.D. Wis. 1977), *aff'd*, 579 F.2d 1027 (7th Cir. 1978).
89. 431 F. Supp. at 1327, 579 F.2d at 1035.
90. 99 S. Ct. at 2688.
91. *Id.*
92. *Id.*

about government spending.[93]

V. CONTOURS OF THE PRESENT PUBLIC FIGURE TEST

At first, it appears that the Court simply reaffirmed and applied the *Gertz* formula in *Wolston* and *Hutchinson*, as though it hoped repetition would adequately clarify the public figure standard. When compared with previous cases, however, the focus of the Court's inquiry has changed. The primary means emphasized in *Wolston* and *Hutchinson* for determining public figure status is not to establish whether the plaintiff had access to the media or voluntarily became the object of public attention, but rather to determine whether the individual attempted to use his position to influence public understanding or the resolution of the issues involved in the controversy.[94]

The test the Court has outlined for public figure determination consists of essentially four parts. First, the Court examines the subject matter of the defamation, implicitly deciding a threshold question of whether it is of sufficient legitimate public interest.[95] Second, the Court determines whether it is indeed a controversy as distinguished from a matter of general public concern.[96] Third, the Court considers the plaintiff's actions in relation to the identified controversy to determine whether the plaintiff was involved in the controversy prior to the defendant's defamatory remarks.[97] Finally, the Court determines whether the plaintiff actually took a stand in the controversy or merely engaged in activities incidental to employment, legal process and so forth.[98] Although the Court previously stated that public figures are those who thrust themselves to the forefront of public controversies to influence the resolution of the issues involved, it provided few guidelines for measuring these criteria. The Court's recent decisions add substance to the meanings of "controversy" and "thrusting oneself" and show how these terms will be construed.

A. Controversy

In *Firestone*, the Court acknowledged that the type of controversy was important without establishing specific guidelines for the courts, although it implicitly recognized that certain areas of one's private life

93. *Id.*
94. *See* text accompanying notes 122-127 *infra*.
95. *See* text accompanying notes 99 & 100 *infra*.
96. *See* text accompanying notes 101-110 *infra*.
97. *See* text accompanying notes 111-113 *infra*.
98. *See* text accompanying notes 114-121 *infra*.

are not legitimate subjects of public concern.[99] This indicates that the subject matter of a defamatory remark must reach a certain level of importance before the Court will consider it appropriate to apply the stricter constitutional standard. In *Wolston* and *Hutchinson*, the Court has provided few clues to answering this threshold question and perhaps will continue this posture because of its fear that lower courts will assume the task of determining " 'what information is relevant to self-government.' "[100]

Even though the subject matters involved in *Wolston* and *Hutchinson*—Soviet espionage and government spending—were matters of legitimate public concern, no matter how compelling the subject matter of a particular controversy may seem, other factors must be satisfied before a plaintiff will become a public figure merely by being associated with the controversy. First, the nature of the controversy must be precisely defined. In *Hutchinson*, the Court pointed out that the defendants had "not identified such a particular controversy; at most, they point[ed] to concern about general public expenditures."[101] The Court noted that this was a concern shared by most people and, therefore, it did not qualify as a true "controversy."

In determining public controversy, the Court contemplates an issue that sparks dialogue and compels people to take sides. This was confirmed in *Wolston*. The Court indicated that it was "difficult to determine with precision the 'public controversy' into which [Wolston allegedly] . . . thrust himself."[102] The Court concluded, however, that it could not have been Soviet espionage because, "[c]ertainly, there was no public controversy or debate in 1958 about the desirability of permitting Soviet espionage in the United States [because] all responsible United States citizens understandably were and are opposed to it."[103] The Court then accepted, arguendo, the categorization of the controversy as the "propriety of the actions of law-enforcement officials in investigating and prosecuting suspected Soviet agents."[104] The Court perceives a controversy as an issue that actually arouses debate and

99. " 'Public controversy' is not the same as controversies of interest to the public." 424 U.S. at 454. Even in *Rosenbloom*, which extended the actual malice standard to encompass any matter involving public interest, the Court still recognized that certain subject matter should be excluded because of its relevance only to private aspects of a person's life. 403 U.S. at 48.

100. Gertz v. Robert Welch, Inc., 418 U.S. at 346 (quoting Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 79 (1970) (Marshall, J., dissenting)).

101. 99 S. Ct. at 2688.

102. 99 S. Ct. at 2707 n.8.

103. *Id.*

104. *Id.*

upon which people disagree and take sides.[105]

By requiring that the controversy be adversarial in nature, the Court has narrowed the class of potential public figures. It was aware of this in *Hutchinson* when it pointed out that if it had accepted a generalized "concern about general public expenditures" as sufficient to constitute a controversy, "everyone who received or benefited from the myriad public grants for research could be classified as a public figure."[106] The Court labeled this a "subject matter classification,"[107] which was rejected in every case since *Gertz* as being akin to the broad public interest test of *Rosenbloom*.[108] Similarly, the Court rejected the contention in *Wolston* that "any person who engages in criminal conduct automatically becomes a public figure for purposes of comment on a limited range of issues relating to his conviction,"[109] because accepting this argument "would create an 'open season' for all who sought to defame persons convicted of a crime."[110]

B. Plaintiff's Involvement in the Controversy

In *Wolston* and *Hutchinson*, the Court clarified the extent of the required connection between the plaintiff and the controversy to which it had alluded in *Gertz*.[111] Once an actual controversy exists, the Court examines the plaintiff's actions in relation to it. The Court then seeks to determine whether the plaintiff played a prominent role in that controversy *prior* to the defamatory remarks. A person must have sought public attention prior to the defendant's remarks, and these remarks, to be protected, must be limited to the specific subject matter of plaintiff's previously aired ideas or beliefs. Hutchinson defended his receipt of

105. Contrast this with the statement by Justice Brennan that he agreed with the court of appeals when it said: " 'The issue of Soviet espionage in 1958 and of Wolston's involvement in that operation continues to be a legitimate topic of debate today, for that matter concerns the security of the United States.' " 99 S. Ct. at 2710 (dissenting opinion) (quoting 578 F.2d 427, 431).

106. 99 S. Ct. at 2688.

107. *Id.*

108. *Id. See also* Wolston v. Reader's Digest Ass'n, 99 S. Ct. at 2708 (discussing repudiation of the *Rosenbloom* test).

109. 99 S. Ct. at 2708.

110. *Id.* at 2708-09. The Court stated that "[t]he public interest in accurate reports of judicial proceedings is substantially protected by *Cox Broadcasting Co.*" *Id.* at 2708 (citing Time, Inc. v. Firestone, 424 U.S. 448, 457 (1976)). The Court's determination in *Wolston* is difficult to rationalize with the language of *Cox*. In *Cox*, the Court emphasized its belief that broad press coverage of *government functions, particularly judicial functions*, is necessary to vote intelligently and to convey opinions on the administration of government in general. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-92 (1974).

111. *See* 418 U.S. at 345.

government funds *after* Proxmire's remarks. Therefore, the Court found that he had not been involved in a controversy about public spending prior to Proxmire's defamatory remarks.[112] If Hutchinson had made similar statements prior to Proxmire's award, he would probably have been classified as a public figure for purposes of response. The result would have been similar in *Firestone* had Mrs. Firestone publicized the details of her marital problems prior to the divorce proceedings. In *Hutchinson*, the Court adamantly rejected the idea that one charged with defamation could cause a person to become a public figure by focusing public attention on him.[113]

Once the Court has determined that the plaintiff was involved in the controversy prior to the defamatory remarks, it examines the plaintiff's actions to see whether they were designed to influence others to accept a particular idea or position. This appears to be the essence of the "thrusting oneself" requirement.[114] The requisite involvement in the controversy may not be present if the plaintiff's actions occurred in the normal course of employment or other activity.

Even though Gertz was a well-known attorney involved in a highly publicized trial, the Court was influenced by the fact that he had limited his activities to actions necessary to represent his client. Similarly, in *Wolston*, the Court said the plaintiff had "limited his involve-

112. 99 S. Ct. at 2688.

113. *Id.*

114. *See* Gertz v. Robert Welch, Inc., 418 U.S. at 345. Recently a California Court of Appeal applied the test as formulated in *Wolston* and *Hutchinson* in a libel action by a high school teacher against a fraternal organization.

> We conclude, in light of the decisions of the United States Supreme Court, that appellant was not a public figure. In the course of her teaching duties she simply made a selection of teaching materials which, for all that appears, was in good faith and for the purpose of discharging her teaching duties. There is no showing that appellant ordered the book for the purpose of inciting controversy. She declares without contradiction that she did not anticipate controversy. It is not clear that, but for the vigorous reaction of Lodge 1108, there would ever have been a controversy. At the public meeting at which the Elks' complaint was first discussed appellant offered to withdraw the book and to use, instead, copied excerpts of the type she had used during the preceding school term without complaint or controversy. The record contains no indication that any of appellant's subsequent activities in connection with the controversy extended beyond what was required of her by school district regulations or to respond to inquiries initiated by the media. Appellant did not call press conferences, take her case to the public in an attempt to influence resolution of the issues, or in any other sense assume "special prominence" beyond that which Lodge 1108 thrust upon her. For all that appears of record appellant simply maintained her aplomb and waited for the issue raised by Lodge 1108 to be resolved. The evolution of the "public figure" rules from *Butts* through *Wolston* makes clear that appellant did not relinquish her interest in the protection of her own name.

Franklin v. Benevolent Order of Elks, 97 Cal. App. 3d 915, 930-31, 159 Cal. Rptr. 131, 140-41 (1979).

ment to that necessary to defend himself of the contempt charge."[115] He did not attempt to influence the government's actions or public opinion. Although the lower courts found Wolston's actions in receiving the contempt citation to be voluntary, the Supreme Court described him as having been "dragged unwillingly" into the controversy, because the government had pursued him in its investigation.[116] This resembles Mrs. Firestone's predicament. The Court found her actions to be involuntary because she was required to initiate judicial proceedings in order to obtain support payments.[117] She had not attempted to use the media to publicize her case or to sway sympathy in her favor but rather sought attention only to respond to specific allegations. Hutchinson also resorted to the media only to respond to specific allegations. There was no evidence that he had ever used the media to gain special consideration in receiving grants or to generate public support for his work. The lower courts based their finding that Hutchinson was a public figure partially on his successful grant applications and publications.[118] As in *Gertz*, however, these were merely activities incident to his career. The Court determined he had not invited the degree of public attention and comment necessary to make him a public figure through these activities. Instead, his "activities and public profile are much like those of countless members of his profession. His published writings reach a relatively small category of professionals . . . ."[119]

The Court's discussion of the facts in *Wolston* and *Hutchinson* makes it clear that a plaintiff can be associated with a matter of public interest and not be a public figure for purposes of defamation law. In order to become a public figure, one's actions must be outside the normal response to everyday situations or activities in which one engages. A person must be intentionally involved in the controversy specifically for the purpose of influencing the issues. The person's actions must be calculated to draw attention to particular ideas, values or beliefs. According to the concurring Justices's interpretation of the majority opinion in *Wolston*, the Court requires that a person "mount a rostrum to advocate a particular view"[120] in order to become a public figure for discussion of a particular issue. This is a more stringent formulation of the requirement that public figures are those who have "thrust themselves to the forefront of particular public controversies in order to in-

115. 99 S. Ct. at 2707.
116. *Id.*
117. 424 U.S. at 454.
118. 431 F. Supp. at 1327.
119. 99 S. Ct. at 2688.
120. 99 S. Ct. at 2709 (Blackmun & Marshall, JJ., concurring).

fluence the resolution of the issues involved."[121]

VI. UNDERLYING RATIONALE

The criteria the Court used in *Wolston* and *Hutchinson* to determine public figure status—defining the controversy and then considering the plaintiff's involvement in it—are not consistent with the rationale for adopting the public/private figure distinction advanced by the Court in *Gertz*. According to that rationale, those who had access to the media for rebuttal and those who had voluntarily sought public attention were to be given less protection, because the state's interest in providing a forum for redress was correspondingly reduced. In the recent cases, in which the Court has not found a plaintiff to be a public figure, the Court has repeatedly explained away factors that would result in a public figure determination under the *Gertz* rationale.

A. Media Access

Mrs. Firestone and Mr. Hutchinson both had access to the media for countering public criticism, but in each case, the Court discounted this in determining they were private figures. The Court implied that media access is more than a means of self-help to restore one's good name as it was described in *Gertz*.[122] It is, rather, an indicator of a person's notoriety. When the Court considers a person's access to the media it uses it to gauge the degree of influence that the person could exert on society. This is apparent in *Hutchinson*; the Court described media access as one of the "accoutrements of having become a public figure."[123]

B. Assuming the Risk of Defamation

The *Firestone* and *Hutchinson* cases demonstrate that one can receive public attention for achievements or status and not be classed as a public figure. The Court's requirement that a person receive public attention in the course of advocating a particular view in an identified controversy limits privileged criticism to a very narrow area: that in

121. Gertz v. Robert Welch, Inc., 418 U.S. at 345.

122. *Id.* at 344. This aspect of the Harlan rationale seems incongruent when juxtaposed with Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), decided the same day as *Gertz*. The Court held that Florida's "right to reply" statute was unconstitutional because it violated the first amendment. *Id.* at 258. In *Gertz*, the Court recognized that "[a]n opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie." 418 U.S. at 344 n.9.

123. 99 S. Ct. at 2688.

which a person attempts to influence or actually does influence public opinion.

In *Hutchinson*, the Court emphasized that the plaintiff had "not thrust himself or his views into public controversy to *influence* others."[124] Similarly, in *Wolston*, the Court used language indicating that its primary consideration is not that a person voluntarily assumed the risk of defamation but rather that a person is likely to exert a level of influence on society. It spoke of engaging the "attention of the public in an attempt to *influence* the resolution of the issues involved."[125] The Court noted that Wolston did not "seek to arouse public sentiment in his favor and against the investigation."[126] And, most importantly, there was no evidence that his failure to appear at the grand jury hearing "was intended to have, or *did in fact have*, any effect on any issue of public concern."[127]

This inquiry does not respond to the notion advanced in *Gertz* that by voluntarily seeking public attention a person diminishes the state's interest in protecting him. One can attract public attention but, if that attention is not the consequence of advocating a particular position in a controversy, one does not become a public figure. As with access to the media, the Court seems to use this inquiry not to determine whether a plaintiff deserves the protection of the state but rather to estimate that person's level of influence in the resolution of public issues.

C. Proposal

One senses an inconsistency when comparing the criteria the Court used to determine public figure status in *Hutchinson* and *Wolston* with the rationale for the public/private figure distinction. The factors prominent in the factual analysis of these cases indicate that the Court's emphasis is shifting away from Harlan's rationale and the inquiry into whether the plaintiff had media access or had voluntarily assumed the risk of defamation. This inquiry does not adequately address the first amendment consideration of providing constitutional protection for speech that is important in the discussion of public issues.[128] The criteria the Court examines in the public figure analysis in *Wolston* and *Hutchinson*, the nature of the controversy and the plain-

124. *Id.* (emphasis added).

125. 99 S. Ct. at 2708 (emphasis added).

126. *Id.*

127. *Id.* (emphasis added). This would involve a situation in which a person invites a contempt citation to use it as a "fulcrum to create public discussion about the methods being used in connection with an investigation or prosecution." *Id.*

128. *See* notes 58 & 63 *supra* and accompanying text.

tiff's involvement in it, are designed to protect the media when reporting about those who attempt to shape public opinion or policy on issues that may affect the entire population.

These criteria embody Chief Justice Warren's extension of the seditious libel rationale into the private sphere. They reflect his concern that the media should have constitutional protection when discussing persons who assume positions of influence or power analogous to public officials.[129] Speech about these people is particularly valuable because of their potential impact on political life in general. First amendment protection is necessary to protect reports about those who have prominently espoused their views because these views are often directed toward utilizing the political processes. This type of speech is important to an informed electorate because it may ultimately influence societal values and public policy. For these reasons, and not because of the speaker's access to the media or prior activities, the press should receive protection when reporting about those who publicly express their views.

The rationale for the public figure distinction must reflect the particular value of the speech it protects. Because the criteria the Court uses are designed to identify those persons who are in a position to influence public policy, an appropriate rationale is one that protects the media when reporting about these influential persons within a broadly defined range of activities.[130] Although this is largely a semantic difference and produces no change in the results of previous cases, it provides a rationale responsive to the first amendment. The Court could acknowledge that, instead of determining the level of protection a person deserves in a particular situation, the focus of inquiry should be the influence that person exerts on societal affairs. Speech about such persons is relevant to self-government and therefore deserves first amendment protection because these people "play an influential role in ordering society."[131]

This rationale does not require the Court to state explicitly which

129. *See* text accompanying notes 50-53 *supra*.

130. "A theory conceiving first amendment freedoms as assuring a flow of information essential to self-government may be called a public speech theory." D. Meiklejohn, *Public Speech in the Supreme Court Since* New York Times v. Sullivan, 26 SYRACUSE L. REV. 819, 819 (1975). The definition of what is "public" "requires distinguishing between events the knowledge of which contribute to the formation of public opinion necessary to effective self-government" and those which are unrelated to this end. *Id.* at 827. The rationale for protecting public speech is that "American government is directed by American public opinion, [for] the freedoms worth affirming are those essential to the formation of that opinion." *Id.* at 820.

131. Curtis Publishing Co. v. Butts, 388 U.S. at 164 (Warren, C.J., concurring).

subject matters will be protected; it avoids forcing lower courts to make *ad hoc* determinations of what constitutes "general interest" and leaves those who choose to "take sides" on issues to determine the subjects receiving constitutional protection. The issues on which people are likely to take a public stand will generally coincide with those necessary to maintain an informed electorate. The requirement that a public figure speak out on an issue first ensures that privileged remarks will be limited to the scope of the person's involvement in the controversy. Interests in privacy and reputation would be protected because it is unlikely that a person will initiate a public debate on a purely private matter.

This rationale is consistent with the *New York Times* standard because it extends protection to comments about private persons who have assumed a role in determining the course of public affairs. Two other standards that have been proposed—prior media coverage and access to the media for rebuttal—[132]are less predictable and, in some situations, allow the media to create its own public figures. In addition, they do not place adequate emphasis on first amendment considerations. Extending the protection only to purely political speech excludes a great deal of speech necessary to develop an informed electorate[133] and creates the problem of separating explicitly political speech from speech concerning other issues about which the public must make decisions. Retaining only the public official category, as Warren pointed out, inhibits press coverage of many who exert equal influence on public affairs.[134]

VII. CONCLUSION

The continued vitality of the public figure concept requires that the Court's rationale for the public/private figure distinction be consistent with the criteria used to make that determination and the first amendment. The criteria and rationale that emerge from *Wolston* and *Hutchinson* represent a compromise between the repudiated *Rosenbloom* public interest standard, which ignored interests in privacy and reputation, and the *Gertz* formula, which subordinated first amendment considerations to interests in privacy and reputation.

If the Court were to recognize the first amendment rationale implicit in the criteria it uses to make the public figure determination, the

132. *See The Editorial Function, supra* note 16, at 1745-50.

133. *See* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 25-27 (1971).

134. Curtis Publishing Co. v. Butts, 388 U.S. at 163-64 (Warren, C.J., concurring).

concept would be less vulnerable to further narrowing by the Court. Presumably, the first amendment value in speech about those who seek to use their influence to affect public policy would outweigh interests in reputation. By clearly enunciating a rationale consistent with the criteria used in the public figure analysis in these cases, the Court could clarify the scope of the intended protection and assist lower courts and the press in classifying a particular person as a public or private figure. This is particularly important, because confusion about the standard encourages litigation[135] leading to the self-censorship that the actual malice standard was originally adopted to prevent.[136]

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135. *Press Self-Censorship, supra* note 16, at 430-34.
136. New York Times Co. v. Sullivan, 376 U.S. at 279.