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Libel-- Wolston v. Reader's Digest Association, Inc.: The Definition of Public Figure Is Narrowed

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Libel—*Wolston v. Reader's Digest Association, Inc.*: The Definition of Public Figure Is Narrowed

Since a majority of the United States Supreme Court agreed to extend the actual malice standard of *New York Times Co. v. Sullivan*[1] to "public figures,"[2] the Court has had to wrestle with the definition of that concept. In *Wolston v. Reader's Digest Association*[3] the Court again faced the issue of who is a "public figure" within the context of its defamation cases and took the opportunity to elaborate on the definition that it has been developing over the past decade.[4] With its decision in *Wolston*, the Court continued its evolvement of a demanding three-pronged definition of "public figure," a definition that will encompass only those individuals who actively involve themselves in the decision making processes of society. It is now clear that before an individual will be classified as a public figure for a limited range of issues,[5] that individual must meet certain requirements. First, there must be a public controversy. Second, the individual must voluntarily inject himself into that controversy. Finally, the individual must engage the public's attention in an attempt to influence the resolution of the controversy.

As a result of a probe into Soviet espionage activities in the United States conducted by a special grand jury sitting in New York City during 1957 and 1958, Ilya Wolston's aunt and uncle were arrested and charged with espionage and subsequently pleaded guilty to the

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1. 376 U.S. 254 (1964). The *New York Times* Court stated:

> The constitutional guarantees require, we think, a federal rule that 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.

Id. at 279-80.

2. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130, 154-55 (1967); text accompanying notes 30-35 *infra*.

3. 443 U.S. 157 (1979).

4. The Court discussed the "public figure" concept in Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), and directly addressed the issue of who is a "public figure" in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), and Time, Inc. v. Firestone, 424 U.S. 448 (1976). *See* text accompanying notes 44-59 *infra*.

5. When the Court first attempted to define "public figure" in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), it divided the concept into two categories—those persons who are so famous or prominent in the affairs of society as to be fairly classified as public figures for all purposes and those persons who, while not public figures for all purposes, can be fairly deemed public figures for a limited range of issues. *See* text accompanying notes 45 & 46 *infra*. *Wolston*, and consequently this Note, is primarily concerned with the latter category of individuals.

charges.[6] Wolston was interviewed several times by agents of the Federal Bureau of Investigation in connection with the probe, and he traveled to New York on several occasions to testify under subpoena before the grand jury.[7] On one occasion in July of 1958, however, Wolston failed to respond to a grand jury subpoena. As a result he was charged with criminal contempt of court, to which he subsequently pled guilty.[8] These events attracted the attention of the Washington[9] and New York news media, and at least fifteen stories discussing the events appeared in newspapers in the two cities.[10] After Wolston's sentencing, however, the publicity faded, and he substantially succeeded in returning to the private life that he had enjoyed prior to his failure to appear before the grand jury. He was never indicted for espionage.[11]

Nevertheless, Wolston was identified as having been a Soviet agent in the United States in a book written by John Barron and published by Reader's Digest in 1974 entitled *KGB, The Secret Work of Soviet Agents* (KGB).[12] Wolston brought suit in federal district court against the author and publishers of the book, claiming that such identification was false and defamatory.[13] The trial court, however, granted

6. 443 U.S. at 161-63.

7. *Id.* at 162.

8. *Id.* at 162-63. Wolston previously had unsuccessfully attempted to persuade the authorities not to make him travel to New York again, citing his state of mental depression. When he failed to appear, a federal district judge issued an order to show cause why Wolston should not be held in contempt. Wolston appeared in court in response to the show cause order, and when his offer to testify before the grand jury was refused, a hearing was commenced on the contempt charge. Wolston's pregnant wife was called to testify at the hearing about her husband's mental state, but when she became hysterical on the stand he agreed to plead guilty to the contempt charge. He was given a one year suspended sentence and placed on three years probation. *Id.*

9. At the time of the grand jury's investigation, Wolston and his wife were living in Washington, D.C. *Id.* at 162 n.4.

10. *Id.* at 162-63.

11. *Id.* at 163.

12. *Id.* at 159.

[T]he book contains the following statements relating to petitioner Ilya Wolston:

> "Among Soviet agents identified in the United States were Elizabeth T. Bentley, Edward Jospeh Fitzgerald, William Ludwig Ullmann, William Walter Remington, Franklin Victor Reno, Judith Coplon, Harry Gold, David Greenglass, Julius and Ethel Rosenberg, Morton Sobell, William Perl, Alfred Dean Slack, Jack Soble, *Ilya Wolston*, Alfred and Martha Stern.*
>
> "*No claim is made that this list is complete. It consists of Soviet agents who were convicted of espionage or falsifying information or perjury and/or contempt charges following espionage indictments or who fled to the Soviet bloc to avoid prosecution. . . ."

App. 28 (emphasis supplied). In addition, the index to KGB lists petitioner as follows: "Wolston, Ilya, Soviet agent in U.S."

Id. (quoting J. BARON, KGB 29 (1974)).

13. *Id.* at 159-60.

defendant's motion for summary judgment,[14] holding that Wolston was a "public figure,"[15] that he therefore had to prove "actual malice" on the part of Reader's Digest before he could recover,[16] and that the evidence raised no genuine issue of the existence of "actual malice."[17] The United States Court of Appeals for the District of Columbia Circuit affirmed the decision of the district court,[18] focusing, as had the lower court, on Wolston's voluntary failure to appear before the grand jury.[19]

The Supreme Court, clearly concerned with safeguarding an individual's "interest in the protection of his own name,"[20] reversed the decision of the court of appeals[21] and held that Wolston was not a public figure[22] and, therefore, was not required to prove "actual malice" on the part of the defendants. The Court based its ruling on two grounds. First, the Court disagreed with the lower courts' characterization of Wolston's presence in the controversy[23] as voluntary.[24] Second, it held that Wolston had not "engaged the attention of the public in an attempt to influence the resolution of the issues involved."[25]

Prior to its 1964 *New York Times* decision, the Supreme Court had clearly indicated that libelous utterances did not deserve constitutional

14. Wolston v. Reader's Digest Ass'n, 429 F. Supp. 167 (D.D.C. 1977).

15. *Id.* at 176. The district court agreed that Wolston did not qualify as a public figure for all purposes and in all contexts, but found that he satisfied what the court perceived to be a *two-part* requirement for limited purpose public figure status, namely that he was involved in a public controversy (Soviet espionage) and that his participation in the controversy was voluntary (he chose not to appear before the grand jury). *Id.* at 174-76.

16. *Id.* at 176-77.

17. *Id.* at 79-81.

18. Wolston v. Reader's Digest Ass'n, 578 F.2d 427 (D.C. Cir. 1978).

19. By failing to appear before the grand jury Wolston invited public attention and comment. Until that failure occurred he enjoyed obscurity in the wings, but by subjecting himself to a citation for contempt he voluntarily stepped center front into the spotlight focused on the investigation of Soviet espionage.

Id. at 431.

20. 443 U.S. at 168.

21. *Id.* at 161. Justice Rehnquist wrote the majority opinion in which Chief Justice Burger and Justices Stewart, White, Powell and Stevens joined. Justice Blackmun filed an opinion concurring in the result, in which Justice Marshall joined. Justice Brennan dissented.

22. *Id.*

23. The Court did not specify the "public controversy" into which Wolston was alleged to have voluntarily thrust himself. Because of its disposition of the case based on the other criteria for public figure status, the Court accepted for the sake of argument that, as defendants urged, the public controversy involved "the propriety of the actions of law enforcement officials in investigating and prosecuting suspected Soviet agents." *Id.* at 166 n.8.

24. *Id.* at 166-68.

25. *Id.* at 168.

protection.[26] In *New York Times*, however, the Court recognized that the first amendment requires that some measure of protection be afforded to such statements, at least when they relate to the official conduct of a public official,[27] and consequently formulated its "actual malice" test.[28] The Court reasoned that such statements must be considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[29]

Three years after its decision in *New York Times*, in the companion cases of *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*,[30] a majority of the Court agreed to extend the "actual malice" standard to "public figures."[31] Although the Court did not attempt to

26. Beauharnais v. Illinois, 343 U.S. 250, 266 (1952); *see* Roth v. United States, 354 U.S. 476, 482-83 (1957); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). *See generally* L. ELDREDGE, THE LAW OF DEFAMATION §§ 49-50 (1978).

27. 376 U.S. at 279-80. The Court elaborated on the concept of "public official" in Rosenblatt v. Baer, 383 U.S. 75 (1966), in which it stated 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.
>
> . . . Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, . . . the *New York Times* malice standards apply.

Id. at 85, 86 (footnotes omitted). *See generally* L. ELDREDGE, *supra* note 26, § 51, at 260-66.

28. *See* note 1 *supra*. The phrase "reckless disregard" used by the *New York Times* Court in its formulation of the "actual malice" test was expounded on by the Court in Garrison v. Louisiana, 379 U.S. 64 (1964), in which it stated that "only those false statements made with a high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions." *Id.* at 74. Later, in St. Amant v. Thompson, 390 U.S. 727 (1968), the Court said that

> reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity.

Id. at 731.

29. 376 U.S. at 270.

30. 388 U.S. 130 (1967).

31. Four members of the Court agreed with Chief Justice Warren, who stated in his opinion, concurring in the result, that he would "adhere to the *New York Times* standard in the case of 'public figures' as well as 'public officials,'" *id.* at 164; however, Justice Harlan, writing for the Court and joined by three other Justices, declined to extend the "actual malice" standard to public figures. He instead suggested that "a 'public figure' who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.* at 155. The Court has since assumed, however, that Chief Justice Warren's conclusion—that the

define the concept of "public figure," Justice Harlan noted that "both Butts and Walker commanded a substantial amount of independent public interest at the time of the publications,"[32] and that "Butts may have attained that status [of public figure] by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy."[33] Chief Justice Warren, in his concurring opinion, stated that " 'public figures,' like 'public officials,' often play an influential role in ordering society,"[34] and that they are often "intimately involved in the resolution of important public questions."[35] Then, in *Rosenbloom v. Metromedia, Inc.*,[36] a seriously divided Court,[37] with Justice Brennan speaking for a plurality of three, took the *New York Times* "actual malice" standard still further and held that it applied even to a defamation action brought by a private individual if the individual was involved in an event of public or general concern.[38]

The Court retreated from this "public interest" test, however, in *Gertz v. Robert Welch, Inc.*[39] Elmer Gertz was a prominent Chicago attorney who was retained to conduct a civil action brought against a Chicago policeman by the family of a young man who had been shot and killed by the officer.[40] Gertz initiated a civil suit for damages against the policeman, but neither discussed the officer with the news media nor played any part in his murder trial. Nevertheless, an article published by defendant portrayed Gertz as being instrumental in the criminal prosecution of the officer and contained various other misstatements concerning Gertz's alleged criminal record and Communist ties.[41] In determining whether to apply the "actual malice" standard, the Court specifically rejected the "public interest" test[42] and held that

New York Times standard applies to both public figures and public officials—is the principle for which *Butts* and *Walker* stand. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 336 n.7 (1974).

32. 388 U.S. at 154.

33. *Id.* at 155.

34. *Id.* at 164.

35. *Id.*

36. 403 U.S. 29 (1971).

37. Among the eight justices (Justice Douglas did not participate), there were five opinions, none of which was joined in by more than two other justices.

38. 403 U.S. at 52.

39. 418 U.S. 323 (1974).

40. *Id.* at 325.

41. *Id.* at 325-26.

42. The Court stated:

> The extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge this legitimate state interest [in compensating private individuals for injuries caused by defamatory falsehood] to a degree that we find unacceptable. And it would

"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."[43] Significantly, the Court in *Gertz* for the first time attempted to define "public figure" and in fact offered several variations of its definition. The Court first indicated that individuals could become public figures "by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention."[44] It then stated that there are two classes of public figures:

> For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.[45]

Later in the opinion, the Court offered a broader variation of this definition:

> In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself *or is drawn* into a particular controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.[46]

Finally, in declaring that Gertz was not a public figure, the Court reasoned that "[h]e 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."[47]

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occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of "general or public interest" . . . .

Id. at 346.

43. *Id.* at 347 (footnote omitted). In response to the *Gertz* ruling, the *Restatement (Second) of Torts* now offers three possible standards of liability for defamation:

> One who publishes a false and defamatory communication concerning a private person, or concerning a public official or public figure in relation to a purely private matter not affecting his conduct, fitness or role in his public capacity, is subject to liability, if, but only if, he
>
> (a) knows that the statement is false and that it defames the other,
>
> (b) acts in reckless disregard of these matters, or
>
> (c) acts negligently in failing to ascertain them.

RESTATEMENT (SECOND) OF TORTS § 580B (1977).

44. 418 U.S. at 342.

45. *Id.* at 345.

46. *Id.* at 351 (emphasis added).

47. *Id.* at 352. The basis of the Court's determination that Gertz was not a public figure is not entirely clear. On one hand, the Court seemed to indicate that the public controversy involved

Depending on which of the definitions articulated in *Gertz* is applied, the concept of "public figure" could arguably be quite broad, encompassing not only voluntary participants in public controversies, but also involuntary participants,[48] and possibly even individuals who vigorously seek the public's attention regardless of whether they are involved in a public controversy.[49] On the other hand, the concept could arguably be quite narrow, encompassing only those individuals who voluntarily thrust themselves into a public controversy and engage the attention of the public in an attempt to influence the resolution of the issues involved.[50]

The uncertainty created by these varying definitions and the myriad of reasonable interpretations following from them was at least partially diminished by the Court's decision in *Time, Inc. v. Firestone*.[51] By specifically discussing the "public controversy" requirement, emphasizing the individual's voluntary participation in the controversy, and reinforcing the implication of *Curtis* and *Gertz* in suggesting the presence of a third requirement of seeking the public's attention in order to influence the resolution of the controversy,[52] the *Firestone* Court clearly indicated the concept of "public figure" to be a narrow one. The possibility arguably left open by *Gertz* that an individual might become a public figure regardless of whether he was involved in a public controversy was thus rejected in *Firestone*. The *Firestone* Court, however, made no attempt to define "public controversy," except to indicate that the divorce proceeding involved in that case did not qualify.[53]

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was the criminal trial of the Chicago police officer, *id.*, and that Gertz did not thrust himself into that controversy. It is certainly true that Gertz did not thrust himself into the criminal proceedings, but it is questionable whether the public controversy should have been defined so narrowly. Indeed, the Court in the next breath indicated that the public controversy might be the whole of the legal proceedings surrounding the officer, both criminal and civil. *Id.* If the Court did intend to include the civil and criminal proceedings within the scope of the public controversy, its refusal to classify Gertz as a public figure must have been based not on the voluntary/involuntary issue, because Gertz's presence in the civil litigation was clearly voluntary, but on the absence of any conduct on the part of Gertz that amounted to an attempt to engage the attention of the public in an effort to influence the resolution of the controversy. This latter interpretation of the Court's ruling is in line with Chief Justice Warren's concurring opinion in *Curtis*, which commented on the public figure's role in the resolution of public questions. 388 U.S. at 164. The lack of clarity in the Court's analysis stems primarily from the mysterious concept of "public controversy." *See also* text accompanying notes 70-73 *infra*.

48. *See* text accompanying note 46 *supra*. The Court specifically noted, however, that instances of involuntary public figures would be rare. 418 U.S. at 345.

49. *See* text accompanying note 44 *supra*.

50. *See* text accompanying notes 45 & 47 *supra*.

51. 424 U.S. 448 (1976).

52. *See* text accompanying notes 53-59 *infra*.

53. 424 U.S. at 454. Justice Marshall, in his dissent, appeared puzzled by the majority's dis-

Even more significant was the Court's treatment of the voluntary/involuntary aspect of the *Gertz* definition because, as evidenced by several factors, the Court completely shifted its emphasis to volition. First, Justice Rehnquist, in defining "public figure" for the majority, selected what is arguably the most narrow of the definitions of "public figure" offered in *Gertz*[54] and completely ignored language elsewhere in the opinion suggesting that an individual might become a public figure involuntarily. In addition, Justice Rehnquist emphasized that Mrs. Firestone's presence in the divorce proceeding was not voluntary in that she was "compelled to go to court by the State in order to obtain legal release from the bonds of matrimony."[55] The final indication that an individual's participation in the public controversy must be voluntary is reflected in language later in the opinion stating that "[t]here appears little reason why these individuals should substantially forfeit that degree of protection which the law of defamation would otherwise afford them *simply by virtue of their being drawn* into a courtroom."[56] Therefore, while the Court did not explicitly close the "public figure" door on involuntary public controversy participants, a fair reading of *Firestone* suggests that the Court implicitly did just that.

The Court in *Firestone* once again indicated that the definition of public figure might indeed include the further requirement that the individual who voluntarily injects himself into a public controversy must also engage the attention of the public in an attempt to influence the resolution of the controversy. In addition to using the language "in order to influence the resolution of the issues involved" in its selected

position of the "public controversy" issue, commenting that "[t]he only explanation I can discern from the Court's opinion is that the controversy was not of the sort deemed relevant to the 'affairs of society,' *ante*, at 453, and the public's interest not of the sort deemed 'legitimate' or worthy of judicial recognition." *Id.* at 487.

The *Firestone* case arose in the context of a divorce proceeding between plaintiff Mary Alice Firestone and her husband Russell Firestone, a member of a wealthy industrial family. After Mr. and Mrs. Firestone became separated, Mrs. Firestone filed a suit for separate maintenance, whereupon Mr. Firestone counterclaimed for divorce on the grounds of extreme cruelty and adultery. After a lengthy trial, the trial judge granted the divorce requested by Mr. Firestone on the ground that neither party was domesticated. Defendant, however, erroneously reported in its weekly magazine that the divorce had been granted on the grounds of extreme cruelty and adultery. Upon defendant's refusal to retract its false statement concerning the grounds of the divorce, Mrs. Firestone brought this libel action in a Florida court. *Id.* at 450-52.

54. *Id.* at 453.

55. *Id.* at 454.

56. *Id.* at 457 (emphasis added).

definition of "public figure,"[57] the Court made the following observation concerning certain press conferences held by Mrs. Firestone:

> Such interviews should have had no effect upon the merits of the legal dispute between respondent and her husband or the outcome of that trial, and we do not think it can be assumed that any such purpose was intended. Moreover, there is no indication that she sought to use the press conference as a vehicle by which to thrust herself to the forefront of some unrelated controversy in order to influence its resolution.[58]

It can certainly be argued from the language used by the Court, especially when it is considered against the background provided by *Curtis* and *Gertz*, that the Court regarded the notion of "engaging the public's attention in an attempt to influence the resolution of the issues involved" as a third requirement for public figure status.[59]

The Court's opinion in *Wolston* is an important refinement of the definition of "public figure" in at least two respects. First, in light of *Wolston*, it is now unquestionable that one cannot become a public figure unless he voluntarily injects himself into a public controversy. The Court repeated in *Wolston* the definition of "public figure" it used in *Firestone* that emphasizes volition.[60] Moreover, one of the two expressed bases for holding Wolston not to be a public figure was that "the undisputed facts do not justify the conclusion of the District Court and Court of Appeals that petitioner 'voluntarily thrust' or 'injected' himself into the forefront of the public controversy . . . . It would be more accurate to say that petitioner was dragged unwillingly into the controversy."[61] Without doubt, volition is now an essential prerequisite for finding a person to be a public figure.

More significantly, *Wolston* clearly establishes what *Curtis*, *Gertz*, and *Firestone* only foreshadowed—a third requirement for public figure status, that once an individual has voluntarily injected himself into the controversy, he must have "engaged the attention of the public in an attempt to influence the resolution of the issues involved,"[62] or to use the words of Justice Blackmun in his opinion concurring in the

57. *Id.* at 453.

58. *Id.* at 454 n.3.

59. Mr. Justice Marshall recognized the majority's emphasis on "issue resolution" and was clearly distressed with what he viewed as a misconstruction of *Gertz*. *Id.* at 489 n.2 (Marshall, J., dissenting). Professor Eledredge also believed that the Court's language in the footnote indicated that the Court was contemplating a third requirement for public figure status. L. ELDREDGE, *supra* note 26, at 283.

60. 443 U.S. at 164.

61. *Id.* at 166.

62. *Id.* at 168.

result, an individual is not a public figure unless he "literally or figuratively 'mounts a rostrum' to advocate a particular view."[63] More specifically, the individual's conduct must be "calculated to draw attention to himself in order to invite public comment or influence the public . . . ."[64] He must "seek to arouse public sentiment in his favor,"[65] or attempt to "create public discussion"[66] about an issue. This elaboration on the language that first appeared in *Gertz* and was repeated in *Firestone*—"attempt to influence the resolution of the issues involved"—is important because without such elaboration the language appears to have little significance. It is difficult to imagine a situation in which an individual would voluntarily thrust himself to the forefront of a particular controversy without attempting to influence the resolution of that controversy in some manner. Thus, before the Court's elaboration in *Wolston*, it seemed that the only time an individual could have met the first two requirements but not the third was when the individual voluntarily entered the controversy and then became silent. The opinion in *Wolston*, however, gives substance to the third requirement by focusing on the *manner* in which the individual attempts to influence the resolution of the issues involved. The crucial inquiry is not whether an individual who has injected himself into a controversy has attempted to influence the resolution of that controversy because the answer to such an inquiry will invariably be "yes." Rather, the crucial inquiry is *how* did he attempt to influence the resolution of the issues—that is, has he engaged in any of the types of conduct set out by the Court in *Wolston*.[67] It is this latter inquiry that will make the difference in the determination of who is a public figure once the first two requirements have been met. In fact, the Court's decision in *Gertz* that Gertz was not a public figure is more readily understood when this analysis is used. Gertz was an individual who could be said to have voluntarily thrust himself into a public controversy, but while he unquestionably attempted to influence the resolution of the controversy, he did not engage the attention of the public in order to do so.[68]

The import of the Court's elaboration on *Gertz* and *Firestone* can

63. *Id.* at 169 (concurring opinion). Justice Blackmun agreed that Wolston was not a public figure but based his determination on other grounds. *See* text accompanying note 74 *infra*. He objected to the Court's adoption of what he termed a "restrictive" definition of "public figure." 443 U.S. at 170.

64. 433 U.S. at 168.

65. *Id.*

66. *Id.*

67. *See* text accompanying notes 62-66 *supra*.

68. *See* note 47 *supra*.

also be seen when this analysis is applied to the facts of *Chuy v. Philadelphia Eagles Football Club*[69]—a lower court decision handed down shortly before *Wolston* involving a contractual dispute of a professional athlete. In *Chuy*, plaintiff was deemed a public figure, and it is at least arguable that he passed the first two requirements of the public figure test—that there was a public controversy and that plaintiff voluntarily injected himself into it. It seems clear, however, that he would not be a "public figure" under the *Wolston* analysis because, although Chuy obviously attempted to influence the resolution of the controversy in some manner, he, like Gertz, in no way sought to "engage the attention of the public" or do anything to "arouse public sentiment in his favor."

Although *Wolston* succeeded in clarifying part of the "public figure" definition, it leaves a very important question unanswered—precisely what is a "public controversy"?[70] The Court admittedly did not have to deal with the issue in *Wolston*,[71] but it is, nevertheless, clear that the existence of a "public controversy" is a requirement for public figure status. That the Court continues to insist on this "public controversy" requirement is puzzling and seemingly in direct conflict with one of the Court's rationales in *Gertz* for its repudiation of the *Rosenbloom* "public interest" test. In repudiating the *Rosenbloom* test, the Court criticized it for requiring *ad hoc* determinations by the nation's judges about what was and was not a matter of public interest,[72] yet the public controversy requirement will necessarily require the same type of *ad hoc* determinations.[73]

Wolston also leaves unanswered the important question whether an individual[74] who was once a public figure can lose that status by the

69. 595 F.2d 1265 (3d Cir. 1979).

70. The Court did shed a light, albeit a dim one, on the "public controversy" issue in Hutchinson v. Proxmire, 433 U.S. 111 (1979), decided the same day as *Wolston*. In *Proxmire*, the Court simply indicated, much as it had in *Firestone*, *see* text accompanying note 52 *supra*, that the controversy in question failed to meet the "public controversy" requirement. 433 U.S. at 134.

71. *See* note 23 *supra*.

72. 418 U.S. at 346, *quoted at* note 42 *supra*.

73. "The meaning that the Court attributes to the term 'public controversy' used in *Gertz* resurrects the precise difficulties that I thought *Gertz* was designed to avoid." Time, Inc. v. Firestone, 424 U.S. 448, 487 (1976) (Marshall, J., dissenting).

74. There is some question whether the analysis of *Gertz*, *Firestone* and *Wolston* applies to corporate defamation plaintiffs as well as to individuals. *See, e.g.*, Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947 954-56 (D.D.C. 1976) (arguing that it does not apply); Trans World Accounts, Inc. v. Associated Press, 425 F. Supp. 814, 818 (N.D. Cal. 1977) (applying *Gertz*); Reliance Ins. Co. v. Barrons, 442 F. Supp. 1341, 1348 (S.D.N.Y. 1977) (applying *Gertz*); Comment, *The First Amendment and the Basis of Liability in Actions for Corporate Libel and Product Disparagement*, 27 EMORY L.J. 755 (1978); Note, *In Search of the Corporate Private Figure: Defamation of the Corporation*, 6 HOFSTRA L. REV. 339 (1978).

passage of time. Justice Blackmun, concurring in the result, obviously felt such a lapse of time could be significant, and argued that "[a]ssuming . . . petitioner 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."[75] The majority, however, did not reach the lapse of time issue since it determined that Wolston was not even a public figure in 1958.[76]

The definition of "public figure" as it now stands after *Gertz*, *Firestone*, and *Wolston* is a very narrow one within whose ambit very few individuals will fall. This is unfortunate because, although the definition provides substantial protection for a state's interest in compensating defamed individuals, it does so only at the expense of the protection afforded members of the media and others[77] by the first amendment. While there will still be instances in which an individual will be classified as a "limited-issue public figure" and thus be required to meet the *New York Times* "actual malice" standard, those instances will likely be rare, and as a practical matter the members of the news media can expect to enjoy the protection of the *New York Times* standard only when reporting on "public officials" and "all-purpose public figures." Although a certain amount of protection is still afforded by the Court's restriction on punitive damages[78] and its prohibition against liability without fault,[79] that protection will no doubt be perceived by the media as insufficient, with the inevitable consequence that the media, faced with the specter of a proliferation of defamation suits brought by private individuals, will be discouraged from reporting on any individual who is not a public official or clearly a public figure, regardless of the significance to the public of the issues in which that individual is involved. As Justice Brennan stated in *Rosenbloom*, "Fear of guessing wrong must inevitably cause self-censorship and thus create the danger that the legitimate utterance will be deterred."[80] Such self-censorship

75. 443 U.S. at 170 (opinion concurring in result).

76. *Id.* at 166 n.7.

77. It is not altogether clear whether the constitutional rules developed in *Gertz*, *Firestone*, and *Wolston* apply to defamation actions brought by public figures against *nonmedia* defendants. *See, e.g.*, Wheeler v. Green, 286 Or. 99, —, 593 P.2d 777, 782-85 (1979) (holding nonmedia party to Sullivan standard); Shiffron, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 U.C.L.A. L. REV. 915 (1978).

78. "[W]e hold that the States may not permit 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." Gertz v. Robert Welch, Inc., 418 U.S. at 349.

79. *Id.* at 347. *See* text accompanying note 43 *supra*.

80. 403 U.S. at 50.

by the media may now unfortunately become the rule rather than the exception.

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