Boston College Law Review

Volume 57 | Issue 5 Article 3

11-30-2016

The Lawyer as Public Figure for First Amendment Purposes

Alex B. Long
University of Tennessee College of Law, along23@utk.edu

THE LAWYER AS PUBLIC FIGURE FOR FIRST AMENDMENT PURPOSES

ALEX B. LONG*

Abstract: Should lawyers be treated as public figures for purposes of defamation claims and, therefore, be subjected to a higher evidentiary standard of actual malice under the Supreme Court's decision in *New York Times Co. v. Sullivan*? The question of whether lawyers should be treated as public figures raises broad questions about the nature of defamation law and the legal profession. By examining the Supreme Court's defamation jurisprudence through the lens of cases involving lawyers as plaintiffs, one can see the deficiencies and inconsistencies in the Court's opinions more clearly. And by examining the Court's defamation cases through this lens, one can also see more clearly some of the complexities the legal profession now faces and its sometimes conflicting view of itself.

INTRODUCTION

> *"Reputation ought to be the perpetual subject of my thoughts, and aim of my behavior."*
>
> — John Adams[1]

In *New York Times Co. v. Sullivan*, the Supreme Court famously held that before a public official may recover damages in a defamation action, the public official must first prove actual malice on the part of the defendant.[2] Thus, to prevail, the public official must establish by clear and convincing evidence that the defendant knew the defamatory statement was false or acted with reckless disregard as to the truth or falsity of the statement.[3] In later decisions, the Court explained that this same rule applied, not just to public officials but to public figures as well.[4]

---

* Associate Dean of Academic Affairs & Doug Blaze Distinguished Professor of Law, University of Tennessee College of Law. Thanks to Paula Schaefer and Brannon Denning for their comments on an earlier draft and to Adam Duggan and Porter Durham for their research assistance.

[1] DAVID MCCULLOUGH, JOHN ADAMS 46 (2001).

[2] New York Times Co. v. Sullivan, 376 U.S. 254, 292 (1964).

[3] *Id.* at 279–80.

[4] *See* Gertz v. Robert Welch, Inc. 418 U.S. 323, 323 (1974); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 132, 162 (1967).

Although the basic rule from *New York Times* is well established, it is widely acknowledged that the focus on whether an individual qualifies as a public figure often yields unpredictable results.[5]

Consider the following hypothetical as an example of this problem:

> John is a relatively successful lawyer. He has been in practice for a few years, and, in that time, has tried several cases that generated significant publicity in his community. He is also active in state politics and community affairs. Not long ago, protestors were demonstrating against what they perceived to be abuse of power on the part of the executive branch when law enforcement arrived. Violence erupted, which led to the deaths of five of the original protestors. Several of the law enforcement officers were charged with murder. The trial judge appointed John as counsel for the officers because no other local lawyers were willing to take the case. As one might expect, the killings and the impending trial resulted in widespread publicity and public comment. John was attacked in the media for his representation of the officers. John eventually sued the local newspaper for defamation after it ran several stories containing false and defamatory statements about John's actions while representing the officers. The newspaper moved for summary judgment on the grounds that John was a public figure and had failed to prove that the defendants had acted with actual malice as required under the Supreme Court's decision in *New York Times*. John argues that he is not a public figure and is therefore not required to establish actual malice.

How should the court rule on the issue? On the one hand, John has achieved a certain amount of notoriety through his practice, seems to be a leader within his community and is involved in public affairs, and has agreed to represent clients in a high-profile case, knowing full well that his representation would invite public comment. On the other hand, one could argue that John is simply a lawyer doing his job and has not voluntarily thrust himself into the public spotlight. Should he be treated as a public figure for purposes of defamation analysis and thus have to meet the difficult burden of proving that the defendant acted with actual malice?

---

[5] *See* Marc A. Franklin, *Constitutional Libel Law: The Role of Content*, 34 UCLA L. REV. 1657, 1657 (1987) (stating that by making the standard of protection for speech dependent on the status of the plaintiff, the Court has produced "anomalous and unpredictable results"); *see also* Rosanova v. Playboy Enters., Inc., 411 F. Supp. 440, 443 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978) (stating that "[d]efining public figures is much like trying to nail a jellyfish to the wall").

"John" in this hypothetical is, of course, John Adams, and the scenario is based on Adams' representation of the British soldiers facing charges after the Boston Massacre. The tale of Adams' involvement in the case is one that members of the legal profession love to tell. Adams' actions represent the best of what the legal profession likes to believe about itself, and Adams himself is sometimes held up as the example of an important ideal: the lawyer as public citizen.[6]

The idea that lawyers occupy a special role in society is strong in the literature about the legal profession.[7] Lawyers are often described as leaders and public citizens who occupy special places of prominence within the community.[8] Even if all lawyers do not occupy such positions, a quick glance at television, movies, literature, and news stories about the legal process quickly confirms the reality that stories about lawyers and the legal

---

[6] *See* MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 1 (AM. BAR ASS'N 2014) (describing a lawyer as "a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice"); Stephen N. Limbaugh, Jr., Chief Justict of upreme Court of Missouir, Chief Justice's Address to Members of the Missouri Bar, September 13, 2001, *in* 57 J. MO. B. 222, 225 (2001) (referencing the Boston Massacre case and referring to Adams as "the consummate lawyer as public citizen").

[7] *See* Debra Lyn Bassett, *Redefining the "Public" Profession*, 36 RUTGERS L.J. 721, 721–22 (2005) (noting the repeated references in legal literature to the idea of the law as a "public" profession); Rick Hubbard, *Restoring Citizen Representation in Our Democratic Republic,* 40 VT. B.J. 20, 27 (2014) (referring to "the special role of the lawyer as a public servant"); Marcia S. Krieger, *A Twenty-First Century Ethos for the Legal Profession: Why Bother?*, 86 DENV. U.L. REV. 865, 867 (2009) (noting that "lawyers have a special role in the state as guardians of the legal order"); Deborah L. Rhode, *Lawyers as Citizens*, 50 WM. & MARY L. REV. 1323, 1323–24 (2009) (noting that "[a]lthough this nation may not have the world's most developed sense of attorneys' public responsibilities, it undoubtedly has the most extensive commentary on the subject"); Paula Schaefer, *A Primer on Professionalism for Doctrinal Professors*, 81 TENN. L. REV. 277, 292 (2014) (discussing the concept of the ideal lawyer as being one who "embraces the special role that lawyers play in the legal system and in society").

[8] *See* Office of Lawyer Regulation v. Brandt (*In re* Disciplinary Proceedings Against Brand), 766 N.W.2d 194, 202 (Wis. 2009) (noting that "[a]ttorneys are officers of the court and should be leaders in their communities and should set a good example for others"); ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 14–16 (1993) (discussing the idea of the "lawyer-statesman" who is a leader in the community); Kim M. Boyle, *LSBA's Role and Response in This Challenging Environment*, 57 LA. B.J. 80, 80 (2009) (explaining that the Preamble to the American Bar Association ("ABA") *Model Rules of Professional Conduct* provides an overview of professionalism for lawyers); Patrick G. Goetzinger & Robert L. Morris, *Project Rural Practice: Its People & Its Purpose*, 59 S.D. L. REV. 444, 445 (2014) (noting that "[r]ural attorneys were civic leaders regarded by their communities as much more than just another lawyer"); Curtis M. Jensen, *A Final Report and Farewell*, UTAH B.J., July/Aug. 2014, at 8, 9 (noting that "[a]s lawyers, we are the leaders in our communities"); Elizabeth Mary Kameen, *Rethinking Zeal: Is It Zealous Representation or Zealotry?*, MD. B.J., Mar. 2011, at 5, 6 (discussing the role of lawyers as public citizens); Alan J. Lefebvre, *Maybe Reparations Are Owed?,* 22 NEV. LAW. 4, 5 (2014) (referring to "[l]awyers' rightful place as community and political leaders"). *See generally* Susan Sturm, *Law Schools, Leadership, and Change*, 127 HARV. L. REV. F. 49 (2013), http://harvardlawreview.org/2013/12/law-schools-leadership-and-change/ [https://perma.cc/P4SC-ECPW] (discussing the leadership roles that lawyers play in their communities).

profession still attract considerable attention from members of the public.[9] The public is increasingly accustomed to seeing lawyers assume celebrity or quasi-celebrity status in the course of representing clients in high-profile cases or by serving as legal commentators in such cases.[10] Lawyers, by their nature, are sometimes litigious in their personal capacity and have frequently assumed the role of plaintiffs in numerous defamation cases against media defendants[11] as well as occasionally against former clients,[12] opposing counsel,[13] and others.[14]

Given these realities, it seems fair to ask whether the law should treat lawyers differently than other citizens when they bring defamation claims based on damage to their reputations. Should lawyers be treated as public figures for purposes of defamation claims and, therefore, be subjected to a higher evidentiary standard under the Supreme Court's decision in *New York Times*?

The question is not merely an academic one. As anyone who has studied defamation law knows, the resolution of the issue of whether a plaintiff qualifies as a public figure often can make or break the plaintiff's case. There are numerous decisions involving lawyers as plaintiffs in defamation cases, yet the decisions are inconsistent in their approach to and resolution of the question of whether the lawyers in question qualify as public figures. While the law is clear that one does not become a public figure simply by

---

[9] *See generally, e.g.*, JOHN GRISHAM, THE LITIGATORS (2011) (a legal thriller about an attorney involved in a class action lawsuit); *How to Get Away With Murder* (ABC Studios 2015) (a television series that follows a criminal law professor and five of her students who are involved in a homicide investigation); *Making a Murderer* (Netflix 2015) (a documentary television series that follows the story of a man who spent eighteen years in prison for a wrongful conviction).

[10] *See* Jessica Durando, *'Making a Murderer' Lawyers Dean Strang, Jerry Buting Are Internet Stars*, USA TODAY (Jan. 13, 2016), http://www.usatoday.com/story/life/nation-now/2016/01/10/making-a-murderer-lawyers-dean-strang-jerry-buting-internet-heartthrobs/78583710/ [https://perma.cc/6B3Y-UNAK].

[11] *E.g.*, Cochran v. NYP Holdings, Inc., 58 F. Supp. 2d 1113 (C.D.Cal. 1998), *aff'd* 210 F.3d 1036 (9th Cir. 2000) (involving an action in which criminal defense attorney Johnnie Cochran brought libel suit against the New York Post).

[12] *E.g.*, Tory v. Cochran, 544 U.S. 734 (2005) (involving an action in which criminal defense attorney Johnnie Cochran brought a state-law defamation suit against a former client).

[13] *E.g.*, Arneja v. Gildar, 541 A.2d 621 (D.C. 1988) (involving an action in which a tenant's attorney brought a slander suit against a landlord's attorney); Owen v. Carr, 478 N.E.2d 658, 660 (Ill. App. Ct. 1985), *aff'd*, 497 N.E.2d 1145 (Ill. 1986) (involving an action in which an attorney brought a defamation suit against opposing counsel).

[14] *E.g.*, Ratner v. Young, 465 F. Supp. 386 (D.V.I. 1979) (involving a lawsuit against, *inter alia*, a state trial court judge who had written a defamatory letter about lawyer that was published in newspaper).

applying for admission to the bar,[15] there are relatively few clear standards beyond that.[16]

The question of whether lawyers should be treated as public figures also raises broader questions about the nature of defamation law and the legal profession. By examining the Supreme Court's defamation jurisprudence through the lens of cases involving lawyers as plaintiffs, one can see the deficiencies and inconsistencies in the Court's opinions more clearly. Through this lens, one can also see more clearly some of the complexities the legal profession now faces and the sometimes uncertain nature of its role.

This article explores the extent to which lawyers should be treated as public figures for purposes of defamation claims. Along the way, it attempts to raise broader issues concerning conceptions of the legal profession and the Supreme Court's confusing approach to determining public figure status. Part I begins by reviewing the Supreme Court's defamation decisions and the evolution of the concept of a "public figure" beginning with *New York Times*.[17] Part II examines how lower courts have applied the Supreme Court's holdings involving public figures to defamation cases involving lawyers as plaintiffs.[18] Part III uses defamation cases involving lawyers to illustrate the shortcomings of the Court's approach.[19] Finally, Part IV concludes by offering some guidelines for courts to use when considering lawyer defamation cases that would advance the public's strong interest in discussing the legal process while remaining faithful to the principles that underlie the Supreme Court's defamation decisions.[20]

I. THE EVOLUTION OF THE PUBLIC/PRIVATE FIGURE DISTINCTION

The question of the extent to which lawyers are truly public figures may take on special relevance in the context of defamation lawsuits. As a matter of constitutional law, public officials and public figures must satisfy a more demanding standard than private figures in order to establish a prima facie case of defamation. Despite over fifty years of decisional law, however, it is often difficult to predict how a court will resolve the question of

---

[15] *See* Dodrill v. Ark. Democrat Co., 590 S.W.2d 840, 844 (Ark. 1979); *see also* Marchiondo v. Brown, 649 P.2d 462, 467 (N.M. 1982) ("Generally, lawyers, in pursuing their profession, are not public figures . . . .").

[16] According to one author, "courts more often than not have held that attorneys are public figures when they become defamation plaintiffs." RODNEY A. SMOLLA, THE LAW OF DEFAMATION § 2:75 (2d ed. 2015).

[17] *See infra* notes 21–88 and accompanying text.

[18] *See infra* notes 89–187 and accompanying text.

[19] *See infra* notes 188–333 and accompanying text.

[20] *See infra* notes 334–380 and accompanying text.

whether a defamation plaintiff qualifies as a public figure or a private figure. Nowhere is the outcome of that question more difficult to predict than in the case of lawyers.

A. Defamation Law's Treatment of Public Figures

In *New York Times Co. v. Sullivan*, the Supreme Court held that, as a matter of constitutional law, a public official pursuing a defamation claim must establish actual malice on the part of the defendant.[21] A defendant acts with "actual malice" in this context when the defendant knows the defamatory communication is false or acts with reckless disregard as to the statement's truth or falsity.[22] Eventually, the Supreme Court expanded its holding to public figures as well as public officials.[23]

As a result of the demanding proof structure that public figures face, defamation plaintiffs typically resist, when possible, defendants' attempts to classify them as public figures.[24] As explained by the Supreme Court, actual malice exists only where the defendant subjectively entertained serious doubts about the veracity of the defamatory statement.[25] In contrast, private-figure defamation plaintiffs are not required as a constitutional matter to establish actual malice on the part of a defendant. Instead, they ordinarily must only establish negligence on the part of a defendant and, in some states, can establish a prima facie case in the absence of any degree of fault on the part of the defendant.[26] Given the obvious proof problems a plaintiff faces in satisfying the actual malice standard, many defamation cases are won or lost on the question of whether a plaintiff qualifies as a public figure.

B. Gertz v. Robert Welch, Inc.: *The Distinction Between Public and Private Figures*

In 1974, in *Gertz v. Robert Welch, Inc.,* the U.S. Supreme Court famously explicated the concept of a public figure in defamation actions.[27] In *Gertz*, the Court explained the distinctions between public figures and private figures that it saw as justifying different proof structures in defamation actions.[28] The decision also famously drew distinctions between different

---

[21] New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

[22] *Id.*

[23] *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967).

[24] *But see* Cochran v. Tory, 2003 WL 22451378, at *4 (Cal. Ct. App. Oct. 29, 2003), *vacated*, 544 U.S. 734 (2005) (noting that attorney Johnnie Cochran "willingly conced[ed]" that he was a public figure for purposes of this defamation action).

[25] St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

[26] SMOLLA, *supra* note 16, § 3:30.

[27] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 323–24 (1974).

[28] *See id*. at 352.

types of public figures.[29] Thus, an understanding of *Gertz* is essential for purposes of understanding defamation law. Further, because *Gertz* involved a lawyer as the plaintiff, the decision is also essential for purposes of understanding how lawyers should be classified for defamation actions.

Elmer Gertz was a lawyer who had been retained by the family of a youth who had been shot and killed by a police officer to represent the family in a civil action against the police officer.[30] In addition to the civil lawsuit, the shooting resulted in criminal charges against the police officer.[31] As part of his representation of the family, Gertz attended the coroner's inquest into the death of the youth.[32] The defendant published a monthly magazine, which ran an article alleging a conspiracy by communists to frame the police officer.[33] The article alleged among things that Gertz was a Marxist who was one of the architects of the supposed conspiracy.[34]

Gertz sued for libel.[35] The main issue facing the Supreme Court was the applicability of the *New York Times* actual malice standard to the case.[36] This necessarily required a determination as to whether Gertz qualified as a public figure.[37] In considering the issue, the majority articulated two justifications for why public figures face the heightened burden of establishing actual malice.[38] First is the self-help rationale.[39] Public officials and public figures "usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy."[40] Because private figures usually lack such access, they are more susceptible to injury, and the state therefore has a greater interest in protecting them.[41] The second and "[m]ore important" justification involves assumption of risk principles.[42] By voluntarily "thrust[ing] themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved," public figures assume a risk of heightened attention and comment.[43]

---

[29] *See id.* at 342–48.
[30] *Id.* at 325.
[31] *Id.*
[32] *Id.* at 326.
[33] *Id.* at 325.
[34] *Id.* at 326.
[35] *Id.* at 323.
[36] *Id.* at 332–33.
[37] *See id.* at 323, 351–52.
[38] *Id.* at 344.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] Id.
[43] *Id.* at 345.

The Court then outlined two categories of public figures.[44] The first is the all-purpose or general-purpose public figure.[45] These are individuals who have achieved "such pervasive fame or notoriety that [they] become[] a public figure for all purposes and in all contexts."[46] In subsequent cases, the Court would explain that this was a narrow category, reserved for a small group of individuals who had essentially become household names.[47] Turning to the facts of Gertz's case, the Court noted that Gertz had "long been active in community and professional affairs," had "served as an officer of local civic groups and of various professional organizations, and [had] published several books and articles on legal subjects."[48] While conceding that Gertz was "well known in some circles," the Court did not view Gertz as having attained "general fame or notoriety in the community," as evidenced by the fact that none of the prospective jurors in the case had ever heard of Gertz.[49] The Court expressed a hesitation to classify an individual as an all-purpose or general-purpose public figure based simply on the individual's participation in community and professional affairs.[50] Instead, the Court thought it preferable to focus on "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation."[51]

This more narrow focus effectively defines the second category of public figures, which includes one who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues."[52] The Court concluded that Gertz did not qualify as a public figure for purposes of the defamatory statements concerning his involvement in the supposed framing of the police officer in the underlying case. Gertz "played a minimal role at the coroner's inquest" and his involvement was simply that of a lawyer representing a private client,[53] not that of a "de facto public official."[54] Nor did Gertz ever discuss the criminal or civil litigation with the press.[55] In short, Gertz "plainly did not thrust himself into the vortex of this public issue, nor did he engage the

---

[44] *Id.* at 351.
[45] *See id.*
[46] *Id.*
[47] *See, e.g.*, Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 165 (1979) ("A libel defendant must show more than mere newsworthiness to justify the application of the demanding burden of *New York Times*.").
[48] *Gertz*, 418 U.S. at 351.
[49] *See id.* at 351–52.
[50] *See id.* at 352.
[51] *Id.*
[52] *Id.* at 351.
[53] *Id.* at 352.
[54] *Id.* at 351.
[55] *Id.* at 352.

public's attention in an attempt to influence its outcome."[56] As such, he was not a limited-purpose public figure and was instead best viewed as a private figure.[57]

Gertz also left open the possibility of a third category of public figures: the involuntary public figure.[58] The *Gertz* Court's conception of public officials and public figures is grounded in the notion that such individuals voluntarily enter the public fray.[59] The majority also recognized that "[h]ypothetically, it may be possible for someone to become a public figure through no purposeful action of his own."[60] The Court left open the possibility that some individuals might become public figures without voluntarily injecting themselves into the spotlight and perhaps through sheer bad luck, while also cautioning that "instances of truly involuntary public figures must be exceedingly rare."[61]

Although there remains considerable disagreement on the issues of how to define the concept of an involuntary public figure and the continuing viability of that category,[62] at least some courts have held that an involuntary public figure may be required to establish actual malice when pursuing defamation claims.[63] Relying on *Gertz*'s assumption of risk justification, most courts that have categorized an individual as an involuntary public figure have done so on the grounds that the individual, through his actions, assumed the risk of resulting publicity and became a central figure in a public controversy.[64] As explained by the U.S. Court of Appeals for the Fourth Circuit, to qualify as an involuntary public figure, the plaintiff must be a central figure in a public controversy and have "taken some action, or failed to act when action was required, in circumstances in which a reasonable person would understand that publicity would likely inhere."[65]

---

[56] *Id.*

[57] *See id.*

[58] *See id.* at 345.

[59] *See id.*

[60] *Id.*

[61] *Id.*; *see* Dameron v. Wash. Magazine, Inc., 779 F.2d 736, 742–43 (D.C. Cir. 1985) (concluding that plaintiff had become a public figure through "sheer bad luck" of becoming a prominent figure in a public controversy).

[62] *See* Joseph H. King, Jr., *Deus ex Machina and the Unfulfilled Promise of* New York Times v. Sullivan*: Applying the* Times *for All Seasons*, 95 KY. L.J. 649, 673–94 (2007) (noting that some "suggest that the involuntary public figure subcategory is becoming a dead letter or is heading in that direction" and discussing the different approaches to defining the category).

[63] *See, e.g.*, Atlanta Journal-Constitution v. Jewell, 555 S.E.2d 175, 186–87 (Ga. Ct. App. 2001).

[64] *See, e.g.*, Wells v. Liddy, 186 F.3d 505, 539–40 (4th Cir. 1999).

[65] *Id.* at 540.

C. Time, Inc. v. Firestone *and* Wolston v. Reader's Digest Ass'n, Inc.: *A Narrow View of the Public Figure*

In the two other cases to address the issue of whether a plaintiff was a public figure, the Supreme Court again took a narrow view of the public figure concept.[66]

In 1976, in *Time, Inc. v. Firestone*, the U.S. Supreme Court presided over a case in which the defendant published an inaccurate and defamatory account of the plaintiff's divorce proceedings.[67] When the plaintiff sued, the defendant argued that the plaintiff was a public figure and the *New York Times* actual malice standard should therefore apply.[68] The plaintiff, the wife of "the scion of one of America's wealthier industrial families," had filed the divorce action.[69] The defendant reasoned that since the case became a "cause célèbre," the matter was a public controversy and the plaintiff was, therefore, a limited-purpose public figure.[70] The Court resolved the issue on the grounds that the divorce action was not the type of public controversy envisioned by *Gertz* even though it may have been of interest to the public.[71] According to the Court, the fact that a controversy is of interest to the public does not mean that there is a "public controversy."[72]

Although ostensibly limited to the issue of whether a public controversy existed, this portion of the opinion also touches on issues relevant to the limited-public figure analysis. As in *Gertz*, the Court noted that the plaintiff had not publicized her position.[73] In addition, the Court questioned the voluntariness of her action in filing for divorce, noting that she "was compelled to go to court by the State in order to obtain legal release from the bonds of matrimony."[74]

In 1979, in *Wolston v. Reader's Digest Ass'n, Inc.*, the Supreme Court once again refused to classify an individual as a public figure.[75] The plaintiff in *Wolston* had pleaded guilty to contempt of court charges after failing to appear before a grand jury investigating espionage charges involving Soviet intelligence agents in the United States.[76] These events resulted in a certain amount of media coverage. Over fifteen years later, the defendant

---

[66] *See Wolston*, 443 U.S. at 158; Time, Inc. v. Firestone, 424 U.S. 448, 448 (1976).
[67] *Time, Inc.*, 424 U.S. at 448.
[68] *Id.* at 452–53.
[69] *Id.* at 450.
[70] *Id.* at 454.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *See Wolston*, 443 U.S. at 158.
[76] *Id.* at 162–63.

published a book discussing Soviet espionage activities and listed the plaintiff as a Soviet agent.[77] The plaintiff, Wolston, sued for defamation.

The main issue before the Court was Wolston's public figure status. The Court first rejected the idea that Wolston became a public figure simply because his actions attracted media attention: "A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention."[78] Next, the Court rejected the idea that Wolston had "engaged the attention of the public in an attempt to influence the resolution of the issues involved."[79] Here, the Court pointed to two factors. First, Wolston had not attained any "special prominence in the resolution of public questions."[80] Second, Wolston's "failure to respond to the grand jury's subpoena was in no way calculated to draw attention to himself in order to invite public comment or influence the public with respect to any issue."[81] The Court suggested it would have been a different matter if Wolston had invited the contempt citation "in order to use the contempt citation as a fulcrum to create public discussion about the methods being used in connection with an investigation or prosecution."[82] As it was, nothing about Wolston's actions suggested that he was seeking to arouse public sentiment in his favor on these issues.[83] Finally, the Court rejected the notion that Wolston should be classified as a public figure by virtue of having engaged in criminal conduct.[84] In so doing, the Court expressed a reluctance to classify participants in litigation as public figures. Although it acknowledged that some litigants might be public figures, the Court opined that the majority of litigants do not enter the public forum of trial voluntarily. Instead, they are brought into the forum involuntarily, either in an attempt to obtain the only legal remedies made available by the State or in order to defend themselves against charges.[85]

In a concurring opinion, Justice Blackmun, joined by Justice Marshall, criticized the majority for what they viewed as an overly-restrictive approach to the issue of public-figure status.[86] According to Justice Blackmun and Justice Marshall, the majority placed excessive emphasis on the need for the plaintiff to attempt to influence public discussion.[87] Thus, the major-

---

[77] *Id.* at 159.
[78] *Id.* at 167.
[79] *Id.* at 168.
[80] *Id.* (quoting *Gertz*, 418 U.S. at 351).
[81] *Wolston*, 443 U.S. at 168.
[82] *See id.*
[83] *See id.*
[84] *Id.*
[85] *Id.* at 168–69.
[86] *Id.* at 170 (Blackmun, J., concurring).
[87] *Id.* at 169.

ity had seemingly concluded that an individual becomes a limited-purpose public figure "only if he literally or figuratively 'mounts a rostrum' to advocate a particular view."[88]

II. LAWYERS AS PUBLIC FIGURES/PRIVATE FIGURES

Gertz and its progeny establish the framework for lower courts charged with determining the public-figure status of defamation plaintiffs. In the case of lawyers as defamation plaintiffs, at least, the framework has not produced consistent results. As the following section describes, lower courts have not only reached conflicting results in comparable cases on the issue, they have also been unable to agree as to the relevance of certain actions on the part of lawyers in making the determination.

A. Lawyers as General/All-Purpose Public Figures

Relatively few lawyers are likely to achieve the type of pervasive fame and notoriety necessary to qualify as all-purpose public figures.[89] Perhaps Clarence Darrow in his day[90] or Johnnie Cochran[91] from the more recent past might have met this threshold on a national level, but few lawyers ever become household names on a national level. One lawyer who did is famed radical lawyer William Kunstler.

Kunstler is one of the best examples of a cause lawyer, a lawyer who "choose[s] clients and cases in order to pursue their own ideological . . . projects."[92] Kunstler became famous over the course of his career for his representation of clients in some of the most high profile cases of the time, including Dr. Martin Luther King, Jr., the Chicago Seven, and Jack Ruby.[93] Kunstler garnered significant publicity for his representation of the Chicago

---

[88] *Id.*

[89] *See generally* Spence v. Flynt, 816 P.2d 771, 777 (Wyo. 1991) (opining that famed lawyer Gerry Spence might only be a public figure for some purposes despite his concession that he was a public figure).

[90] *See infra* note 275 and accompanying text.

[91] *See* Gerald F. Uelmen, *Who Is the Lawyer of the Century?*, 33 LOY. L.A. L. REV. 613, 625 (2000) (referring to Cochran in 2000 as "the most famous living lawyer in America"). In a defamation case in which he was the plaintiff, Cochran conceded that he was a public figure. Cochran v. Tory, 2003 WL 22451378, at *4 (Cal. Ct. App., Oct. 29, 2003), *vacated*, 544 U.S. 734 (2005).

[92] Thomas M. Hilbink, *You Know the Type . . . : Categories of Cause Lawyering*, 29 LAW & SOC. INQUIRY 657, 659 (2004); *see also* Judith A. McMorrow & Luke M. Scheuer, *The Moral Responsibility of the Corporate Lawyer*, 60 CATH. U.L. REV. 275, 298–99 (2011) (identifying Kunstler as a cause lawyer).

[93] David Stout, *William Kunstler, 76, Dies; Lawyer for Social Outcasts*, N.Y. TIMES (Sept. 5, 1995), http://www.nytimes.com/1995/09/05/obituaries/william-kunstler-76-dies-lawyer-for-social-outcasts.html [https://web.archive.org/web/20160307021401/http://www.nytimes.com/1995/09/05/obituaries/william-kunstler-76-dies-lawyer-for-social-outcasts.html].

Seven and his unorthodox trial demeanor.[94] Kunstler's fame was so substantial that during a riot, the rioters supposedly shouted, "Give us Kunstler! We want Kunstler!"[95] At the time of his death, the *London Times* referred to Kunstler as "the most celebrated and detested lawyer in America."[96]

In the early 1970s, Kunstler sued a state judge for making defamatory statements concerning Kunstler in a letter that was published in a newspaper.[97] Not surprisingly, Kunstler was held to be a general or all-purpose public figure.[98] In reaching its decision, the court referenced the fact that Kunstler "defended many of the leaders in the revolt of the 1960's and early 1970's seeking to get rid of the 'establishment,'" that Kunstler "was almost always on the unpopular side of controversial cases," and that "[h]is cases and trial tactics were widely publicized."[99] Indeed, Kunstler's own lawyer was forced to acknowledge during oral argument that Kunstler was "a controversial figure on a national scale."[100]

In some respects, William Kunstler and Elmer Gertz were quite similar. Both devoted significant energy to representing unpopular individuals and both achieved some acclaim in the process.[101] What distinguishes the two lawyers most clearly, however, is the notoriety they attained and how they attained it. Whereas Kunstler was "one of the leading lawyers in the country"[102] and was controversial on a national scale, Gertz "had achieved no general fame or notoriety within the community."[103] Although Kunstler

---

[94] *See* DAVID J. LANGUM, WILLIAM M. KUNSTLER: THE MOST HATED LAWYER IN AMERICA 84, 99, 216 (1999) (discussing media coverage in *Life* magazine, *New York Times*, and *Playboy*).

[95] *Id.* at 208.

[96] *Id.* at 1 (quoting *London Times*).

[97] Ratner v. Young, 465 F. Supp. 386, 388 (D.V.I. 1979).

[98] *Id.* at 399–400.

[99] *Id.* at 399.

[100] *Id.* at 400. One of the more interesting aspects of the *Ratner* decision is the almost palpable disdain the judge clearly has for Kunstler and the sense of satisfaction he seems to take in concluding that Kunstler is a public figure and therefore must satisfy the demanding actual malice standard.

[101] Arguably, Elmer Gertz met the definition of a cause lawyer. Throughout his career, Gertz represented parties associated with causes of the American left. These included his representation of the company that published Arthur Miller's *Tropic of Cancer*, which had allegedly been censored for being obscene. ELMER GERTZ, A HANDFUL OF CLIENTS 229 (1965). He represented murderer Nathan Leopold (of Leopold and Loeb fame), whose murder trial had been a cause célèbre of the American left. *Id.* at 3–6. He also had multiple clients in civil rights actions. According to his autobiography, Gertz "bec[a]me famous in his own right through his celebrated work for [his clients] and his struggles over the decades for civil liberties and personal rights." ELMER GERTZ, TO LIFE: THE STORY OF A CHICAGO LAWYER, at back cover (1974).

[102] *Ratner*, 465 F. Supp. at 399.

[103] Gertz v. Robert Welch, Inc., 418 U.S. 323, 351–52 (1974). This point is actually debatable. By his own admission, Gertz had "appeared frequently" on television and radio and stated at the time, "There has never been a period in my mature life when I haven't made public appearances of some kind." Brief of Respondent on Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit at 1–2, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1973) (No. 72-617), 1973 WL

denied that appearing in the public spotlight was his "whole raison d'être,"[104] he actively sought the spotlight to the point that he became one of the most famous and controversial lawyers of all time.[105]

While few lawyers attain the level of national notoriety enjoyed by William Kunstler, some may become general public figures on a more local level.[106] For example, Myron Steere was a court-appointed lawyer in a highly publicized murder trial in Kansas.[107] After a local radio station ran a defamatory story involving Steere's representation in the murder case, Steere sued.[108] From the court's description of him, Steere embodies the ideal of a lawyer as a public citizen.[109] Although the murder case generated significant publicity, Steere was already well known to the public prior to the trial.[110] He had practiced law in his local community for thirty-two years, had previously served eight years as county attorney, had "served as special counsel for the board of county commissioners in a controversial dispute over the construction of a new courthouse," and "was a prominent participant in numerous social activities and served as an officer and representative for many professional, fraternal and social activities."[111] To the court, Steere had assumed a role of such special prominence within his community that he qualified as an all-purpose public figure.[112]

B. Lawyers as Limited-Purpose Public Figures

Because few lawyers become household names, courts are more likely to classify lawyers as limited-purpose public figures than all-purpose public figures.[113] In some cases, courts have suggested that a lawyer might be a limited-purpose public figure with respect to controversies related to the

---

172732, at *1–2. Gertz also attained at least some level of fame through his representation of high-profile clients. *See supra* note 101 and accompanying text. In Gertz's brief, Gertz downplayed his involvement in public activities, stating "he had been involved in no public activities for a considerable period of time prior to the publication of the article in question." Reply Brief of Petitioner on Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit at 2, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1973) (No. 72-617), 1973 WL 172733, at *2.

[104] *See* Stout, *supra* note 93.

[105] *See supra* notes 92–100 and accompanying text.

[106] *See* DeCarvalho v. daSilva, 414 A.2d 806, 813 (R.I. 1980) (concluding that a lawyer was a pervasive public figure within the Portuguese community in Rhode Island); Biskupic v. Cicero, 756 N.W.2d 649, 655 (Wis. Ct. App. 2008) (concluding that a former district attorney who had become a public citizen was an all-purpose public figure within the community).

[107] *See* Steere v. Cupp, 602 P.2d 1267, 1271, 1273 (Kan. 1979).

[108] *See id.* at 1269.

[109] *See id.* at 1273.

[110] *See id.*

[111] *Id.*

[112] *Id.*

[113] *See* Della-Donna v. Gore Newspapers Co., 489 So. 2d 72, 77 (Fla. Dist. Ct. App. 1986); Griffin v. Delta Democrat Times Publ'g Co., 815 So. 2d 1246, 1248 (Miss. Ct. App. 2002).

lawyer's professional activities but not with respect to other controversies involving the lawyer.[114] In addition to the overall level of notoriety a lawyer has attained, courts may take into account the fact that the lawyer represents a high-profile client, the extent of the lawyer's interaction with the media, the lawyer's status as a community leader, and other relevant considerations in determining whether a lawyer qualifies as a public figure.

1. Attaining Public Figure Status Through the Representation of High-Profile Clients

Perhaps the most common type of case involving lawyers as defamation plaintiffs involves the lawyer who represents a notorious client or a client in a high-profile case.[115] Here, *Gertz* obviously casts a long shadow.[116] Indeed, one could argue that *Gertz* actually fits this fact pattern.[117] As the lead lawyer for the victim's family in a controversial civil suit designed to establish fault on the part of the police, Elmer Gertz could easily have been deemed to have thrust himself to the forefront of a public controversy in order to influence the resolution of the issues involved.[118] Indeed, defense counsel in *Gertz* argued that Gertz had "voluntarily entered the fray of public discussion on a controversial issue when he undertook to be counsel for the Nelsons at the coroner's inquest" in an attempt to guide public policy.[119] Nonetheless, the Court concluded that Gertz "plainly did not thrust himself into the vortex of this public issue."[120] Thus, *Gertz* potentially poses a problem for defamation defendants seeking to classify a lawyer who has represented a client in a high-profile case as a public figure.[121]

Relying upon *Gertz*, a number of courts have since adopted a general rule that a lawyer's representation of a notorious client or a client in a high-profile matter does not, by itself, render the lawyer a public figure.[122] This

---

[114] Durham v. Cannan Commc'ns, Inc., 645 S.W.2d 845, 851 (Tex. App. 1982).

[115] *See* Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072, 1085–86 (3d Cir. 1985); *Spence*, 816 P.2d at 777.

[116] *See Gertz*, 418 U.S. at 352.

[117] *See id.*

[118] *See id.* at 345 (defining limited-purpose public figures as those who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved").

[119] Brief of Respondent, *supra* note 103, at 9.

[120] *Gertz*, 418 U.S. at 352.

[121] *See id.*

[122] *Marcone*, 754 F.2d at 1085-86; *Steere*, 602 P.2d at 1274; *Spence*, 816 P.2d at 777; *see also* Doe No. 1. v. Burke, 91 A.3d 1031, 1043 (D.C. Ct. App. 2014); Peisner v. Detroit Free Press, Inc., 266 N.W.2d 693, 696 (Mich. Ct. App. 1978) (concluding that being appointed counsel in a criminal case "is an insufficient basis for holding plaintiff to be a 'public figure'"); Kurth v. Great Falls Tribune Co., 804 P.2d 393, 395 (Mont. 1991) (citing *Gertz* in support of the rule); O'Neil v. Peekskill Faculty Ass'n, 507 N.Y.S.2d 173, 179 (N.Y. App. Div. 1986) ("Mere representation of a

is true even if the lawyer in question had achieved some measure of fame prior to the representation.[123] Thus, for example, mere representation of a public entity does not transform a lawyer into a limited-purpose public figure under the general approach.[124] The rule applies to appointed counsel as well as lawyers who voluntarily represent high-profile clients.[125] Indeed, in one case, the court actually likened the plaintiff-attorney to Elmer Gertz, stating that the plaintiff was "a well-known attorney, although certainly not a celebrity" and "the trial court's sole basis for holding that he was a public figure was the fact that he was appointed to handle a criminal appeal."[126] This fact, however, was insufficient to confer limited-public figure status.[127]

Aside from referencing *Gertz*, courts that have adopted the general rule have often done so on the grounds of ensuring access to justice. As explained by the Wyoming Supreme Court: "To hold otherwise would have a chilling effect upon attorneys who undertake to represent clients in difficult, unpopular, high profile, or sensational types of cases."[128] This, in turn, might make it more difficult for such clients to obtain skilled counsel.[129]

Despite this commonly-stated rule, there are perhaps an equal number of decisions finding individual lawyers to be limited purpose public figures based, solely or at least in substantial part, on their representation of a notorious client or a client in a high-profile matter.[130] For example, *Schwartz v.*

---

public entity such as a school district, without more, does not render an attorney a limited purpose public figure."); ZYZY Corp. v. Hernandez, 345 S.W.3d 452, 458 (Tex. App. 2011) (quoting *Spence* in support of rule); *see also* SMOLLA, *supra* note 16, § 2:75 ("If an attorney does no more than represent a client in a strictly legal context, he or she will not through that representation alone become a public figure . . . .").

[123] *See Spence*, 816 P.2d at 776 (stating that "professional person, who may be a 'public figure' for some purposes, should be free to offer his services to a client as a private professional without being subjected to public figure defamation").

[124] *See O'Neil*, 507 N.Y.S.2 at 179.

[125] *See Peisner*, 266 N.W.2d at 696.

[126] *Id.*

[127] *Id.*

[128] *Spence*, 816 P.2d at 776–77; *see also Marcone*, 754 F.2d at 1085–86 (explaining that a contrary rule "would place an undue burden on attorneys who represent famous or notorious clients").

[129] *See Gertz*, 418 U.S. at 355 (Burger, C.J., dissenting) ("The important public policy which underlies [the tradition of performing a professional representative role as an advocate]—the right to counsel—would be gravely jeopardized if every lawyer who takes an 'unpopular' case, civil or criminal, would automatically become fair game for irresponsible reporters and editors who might, for example, describe the lawyer as a 'mob mouthpiece' for representing a client with a serious prior criminal record, or as an 'ambulance chaser' for representing a claimant in a personal injury action."); *Spence*, 816 P.2d at 777 ("We can foresee also detriment to these potential clients being unable to employ skilled, capable, specialist lawyers who have achieved some fame and reputation because of their legal and trial abilities and are claimed to have achieved public figure status.").

[130] *See infra* notes 131–138 and accompanying text; *see also Ratner*, 465 F. Supp. at 400 (relying heavily on the fact that plaintiff volunteered to represent criminal defendant for free in concluding that she was a limited-purpose public figure); Weingarten v. Block, 162 Cal. Rptr.

Worrall Publications, Inc., a case from New Jersey, involved an attorney, Schwartz, who had previously served as the attorney for a local school district and as president of the New Jersey School Boards Association.[131] He then served as attorney for the Association as part of a government inquiry into the Association's finances.[132] During the representation, a local newspaper falsely reported that Schwartz was himself the focus of the investigation.[133] A New Jersey appellate court concluded that Schwartz was a public figure for purposes of his defamation claim against the paper.[134] In reaching its conclusion, the court noted Schwartz's long involvement with the state education system and stated that, as the attorney for the Association, "Schwartz voluntarily assumed a particularly visible position in the forefront of a very public issue. In that position, he invited and received comment and attention."[135]

Schwartz is not an outlier. In one case, the only reason given for the conclusion that a lawyer was a limited-purpose public figure was that the lawyer represented a county board of supervisors.[136] In another, a lawyer who volunteered to represent a group of white supremacists was found to be a public figure because, by virtue of his representation, he had voluntarily injected himself into public controversies concerning the group.[137] In another, the court concluded that a lawyer qualified as a limited-purpose public figure when he voluntarily injected himself into the matter of public controversy when he "initiated a series of purposeful, considered actions, igniting a public controversy in which he continued to play a prominent role."[138] The only "purposeful, considered actions" identified in the decision, however, were the attorney's acts of serving as a trustee for a client and negotiating and litigating on behalf of that client against an adverse party in a case that attracted significant local media attention.[139] In other words, the sole basis for the court's conclusion appears to have been the fact that the lawyer

---

701, 710–11 (Ct. App. 1980) (basing the decision that a lawyer was a public figure in large part on the fact that lawyer continued to represent clients in high-profile matters); Bandelin v. Pietsch, 563 P.2d 395, 398 (Idaho 1977) (basing public figure decision on the grounds that the lawyer was "a pivotal figure in the controversy regarding the accounting of the estate" of which lawyer was guardian).

[131] Schwartz v. Worrall Publ'ns, Inc., 610 A.2d 425, 426 (N.J. Super. Ct. App. Div. 1992).

[132] *Id.*

[133] *Id.*

[134] *Id.* at 428.

[135] *Id.* at 428–29; *see also Weingarten*, 162 Cal. Rptr. at 707 (finding that a lawyer was a public figure, in part, on the basis that he represented a governmental agency that had received significant public attention).

[136] *Griffin,* 815 So. 2d at 1248.

[137] Steele v. Spokesman-Review, 61 P.3d 606, 609 (Idaho 2002).

[138] *Della-Donna*, 489 So. 2d at 77.

[139] *Id.*

did his job on behalf of a notorious client.[140] The fact that the lawyer "was motivated by fiduciary obligations or ethical responsibilities" was irrelevant to the question of whether he was a public figure.[141]

Although courts have generally refrained from classifying a lawyer who represents a notorious client as an *involuntary* public figure, in at least one case, this seems like the most apt description of the lawyer in question. *Bandelin v. Pietsch*, a 1977 Idaho case, involved a lawyer who had been appointed by a court to serve as guardian for an incompetent individual and her estate.[142] Thus, as a court-appointed attorney, the lawyer did not even voluntarily assume a prominent role in the matter in the same way that a lawyer who seeks out or willingly agrees to represent a notorious client. As a result of his alleged mishandling of the case, the judge ordered the lawyer to be held in contempt.[143] The local newspaper ran multiple stories about the matter, two of which contained defamatory statements about the lawyer.[144]

In classifying the lawyer as a limited-purpose public figure, the Idaho Supreme Court made note of the fact that the lawyer had previously achieved notoriety within the county based on his civic and professional activities. The court, however, was explicit that this was not the exclusive reason for its conclusion that the lawyer was a public figure and instead chose to make the determination by examining the nature of the lawyer's involvement in the matter that led to the defamatory publications.[145] The court relied upon *Gertz*'s observation that that the limited-purpose public figure determination should focus on "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation."[146] According to the court, as the court-appointed guardian of the estate, the lawyer "was the center of the controversy that gave rise to the [defamatory] publications" and was "a pivotal figure in the controversy regarding the accounting of the estate that gave rise to the defamation."[147] As such, the court concluded he was a public figure who had to establish actual malice on the part of the newspaper.[148] In the court's view, the fact that the lawyer did not seek the limelight was not determinative insofar as the actual malice standard "is based upon a value judgment that debate on public is-

---

[140] *See id.*
[141] *Id.*
[142] *Bandelin*, 563 P.2d at 395.
[143] *Id.* at 396–97.
[144] *Id.*
[145] *Id.* at 398.
[146] *Id.* (citing *Gertz*, 418 U.S. at 352).
[147] *Id.*
[148] *Id.*

sues should be uninhibited."[149] The court stated, "[t]hat judgment is applicable to both the individual who becomes embroiled in a public controversy through no effort of his own and the individual who actively generates controversy—both abdicate their anonymity."[150]

In some respects, these decisions are in tension with *Gertz*. The *Gertz* Court was unwilling to conclude that voluntary representation in a high-profile matter justifies conferring public-figure status upon a lawyer. Yet, decisions like *Schwartz* seem to be premised in large part on such action. *Bandelin* takes a step further in this regard and concludes that public-figure status may result from court-appointed representation in a case that results in public attention. At the same time, the decisions are consistent with the notion that one becomes a limited-purpose public figure when one voluntarily thrusts himself to the center of a public controversy in order to influence the resolution of that controversy. That is, after all, what a litigator gets paid to do. Assuming that there is some way that these conflicting decisions can be reconciled, there remains a broader normative question: should a lawyer who represents a client in a high-profile case and who is then subsequently defamed be treated as a public figure for purposes of a resulting defamation claim?

2. Attaining Public Figure Status Through Participation in Community Affairs

Another potentially relevant consideration in the public figure analysis is the extent of a lawyer's participation in community affairs. In *Gertz*, Elmer Gertz had "long been active in community and professional affairs" and had "served as an officer of local civic groups."[151] Yet, this was insufficient to confer public-figure status upon Gertz. Other courts have followed *Gertz*'s lead in this respect. For example, in *Bandelin*, the court-appointed lawyer had been actively involved in the political and social affairs of his community, but, referencing *Gertz*, the Idaho Supreme Court declined to base its decision as to the lawyer's public figure status exclusively on this fact.[152] In other cases, however, the fact that a lawyer has attained notoriety by being a civic leader or actively involved in politics has played a strong role in the courts' analysis.[153]

---

[149] *Id.*
[150] *Id.*
[151] *Gertz*, 418 U.S. at 351.
[152] *Bandelin*, 563 P.2d at 398.
[153] *See* Tate v. Bradley, 679 F. Supp. 608, 612 (W.D. La. 1987) (finding lawyer had assumed public, leadership role in promoting Cajun culture), *aff'd on other grounds*, 837 F.2d 206 (5th Cir. 1988); Crowe Deegan LLP v. Schmitt, No. 447/04, 2006 WL 1320617, at *6 (N.Y. App. Div. Apr. 12, 2006); Pace v. Rebore, 107 A.D.2d 30, 32 (N.Y. App. Div. 1985) (noting lawyer was chairman of local Republican Committee). *But see* Marchiondo v. Brown, 649 P.2d 462, 467 (N.M. 1982)

In many of the decisions to hold that the plaintiffs were public figures, the lawyers in question had previously held public office or been political candidates.[154] This is generally consistent with the courts' treatment of similarly-situated individuals who were formerly public officials but retired to private life.[155] Not all decisions fit this description, however. In one case, the plaintiff-lawyer was a Town Alderman.[156] Rather than finding him to be a public official, however, the court found the lawyer to be a public figure based on his other community activities. Specifically, the lawyer was "a leader of the movement for the preservation of the Cajun culture and heritage in Louisiana, and he has acted as a spokesman for that cause on various occasions."[157] Therefore, he was a public figure for the limited purpose of a defamatory newspaper article involving him and Cajun culture.[158]

3. Attaining Public Figure Status Through Media Interactions

Although *Gertz* expressed reluctance about classifying a lawyer as a public figure based solely on the lawyer's performance of his or her duties as a lawyer, the decision also suggests that a lawyer's interactions with the media might lead to public figure status. In concluding that Gertz was not a limited-purpose public figure, the Court noted the fact that Gertz "never discussed either the criminal or civil litigation with the press and was never quoted as having done so."[159] The implication then is that a lawyer's inter-

(concluding that although plaintiff was "well known as an attorney and well known as a member of the Democratic Party, this is not sufficient to depict him as a public figure"); Hinerman v. Daily Gazette Co. 423 S.E.2d 560, 582 (W. Va. 1992) (holding lawyer who was a member of Board of Governors of state bar was not a public figure or a public official).

[154] *Crowe Deegan LLP*, 2006 WL 1320617, at *6; Cohn v. Nat'l Broad. Co., 67 A.D.2d 140, 145 (N.Y. App. Div. 1979) (concluding that a lawyer who had served as chief counsel to the Investigations Subcommittee of the Senate Government Operations Committee, chaired by Senator McCarthy, was a public figure); Boyce & Isley, PLLC v. Cooper, 568 S.E.2d 893, 901 (N.C. Ct. App. 2002) (concluding that a lawyer who had been the Republican nominee for Attorney General was a public figure); Schulman v. E.W. Scripps Co., No. 35539, 1977 WL 201196, at *5–7 (Ohio Ct. App. June 16, 1977) (holding that a lawyer was a public figure locally, *inter alia*, because he had been a political candidate and had been involved in prior lawsuits against government officials); *DeCarvalho*, 414 A.2d at 813 (concluding that lawyer who was appointed as Portuguese Consul in Rhode Island for the country of Portugal and was a "giant" in the Portuguese legal community was a pervasive public figure within the Portuguese community); *Biskupic*, 756 N.W.2d at 655 (concluding that a lawyer who had been a public official remained an all-purpose public figure after leaving office).

[155] *See* Joseph H. King, *Whither the "Paths of Glory": The Scope of the* New York Times *Rule in Defamation Claims by Former Public Officials and Candidates*, 38 VT. L. REV. 275, 302–03 (2013) (stating that some courts classify former public officials who are defamed after leaving office as public figures based on their past offices).

[156] *Tate*, 679 F. Supp. at 609.

[157] *Id.*

[158] *Id.* at 612.

[159] *Gertz*, 418 U.S. at 352.

action with the media may be a relevant factor in determining whether the lawyer thrust himself or herself to the forefront of the public controversy surrounding a client's case in order to influence the resolution of the issues involved.

Since *Gertz*, the courts have been less than clear as to how much media contact is enough to push a lawyer into the world of public figure status for purposes of defamatory statements concerning the lawyer's involvement in a client matter. For example, in a decision from the United States District Court for the District of Hawaii, the court concluded that a court-appointed lawyer in a high-profile murder case was a limited-purpose public figure based on the fact that he had "actively sought exposure to the media and voluntarily maintained a high profile throughout the trial."[160] Notably, the court drew a line between media contact that is "necessary for the vigorous defense of [a] client" and media contact that is not and found the lawyer on the wrong side of that line.[161] This, of course, begs an important question: when is contact with the media "necessary for the vigorous defense of [a] client?"[162] Unfortunately, the court is less than precise in answering the question. The court provided no concrete examples. Instead, all the court tells us is that the lawyer "actively sought exposure to the media and voluntarily maintained a high profile throughout the trial" and that he "voluntarily engaged in a course of action with respect to the trial that was bound to invite attention and comment."[163]

Unfortunately, no clear standard emerges from the decisions as to when a lawyer's contact with the media transforms the lawyer into a public figure. Consenting to television and newspaper interviews during the course of representation has been held sufficient to render a lawyer a limited-purpose public figure in some instances,[164] but not others.[165] In other cases, issuing press releases[166] or responding to scattered requests for comment from the media related to a lawyer's representation of a client[167] was insuf-

---

[160] Partington v. Bugliosi, 825 F. Supp. 906, 918 (D. Haw. 1993), *aff'd*, 56 F.3d 1147 (9th Cir. 1995).

[161] *Id.*

[162] *See id.*

[163] *Id.*

[164] *See* Hayes v. Booth Newspapers, Inc., 295 N.W.2d 858, 866 (Mich. Ct. App. 1980); *see also* Martin v. Widener Univ. Sch. of Law, No. 91C-03-255, 1992 WL 153540, at *10 (Del. Super. Ct. June 17, 1992) (concluding that an applicant for the bar was a limited-purpose public figure through his actions of filing a lawsuit and granting an interview to reporters about the case).

[165] *See Steere*, 602 P.2d at 1273–74.

[166] *See* Gilbert v. WNIR 100 FM, 756 N.E.2d 1263, 1271–72 (Ohio Ct. App. 2001).

[167] *See ZYZY Corp.*, 345 S.W.3d at 462 (concluding that lawyer who responded to several interview requests related to a matter was not a public figure). *But see Doe No. 1*, 91 A.3d at 1043 (concluding that an attorney "sought substantial publicity for [the] case by putting out press releases and giving interviews" and was therefore a public figure).

ficient to render the lawyers in question public figures. To the extent it is possible to discern any kind of meaningful standard from the decisions, a lawyer is likely to be classified as a public figure when the lawyer utilizes the media for, in the words of one court, "personal aggrandizement."[168]

4. Attaining Public Figure Status Through Courtroom Behavior or Misconduct

There are a handful of decisions in which lawyers attained public figure status primarily by engaging in behavior in court that essentially invites media attention.[169] For example, in a Michigan case, a court-appointed lawyer in a criminal case had "excoriated the court repeatedly, and barraged the prosecutor and many witnesses with a steady stream of vitriol and invective."[170] He accused the judge and the prosecutor of collusion, called the prosecutor to the stand as a defense witness, "threatened to investigate all participants in the trial and subpoena their criminal records in response to what he deemed traducement by the court of his investigator," and threatened to put the judge on the stand and examine him about his "prior record."[171] Eventually, the judge in the case questioned the lawyer's sanity and appointed a psychiatrist to observe the lawyer.[172] The local paper ran an editorial criticizing the lawyer's behavior, which prompted the lawyer to sue for defamation.[173] Relying upon *Gertz*'s assumption of risk rationale for classifying an individual as a limited-purpose public figure, the court concluded that the lawyer, "by the manner in which he conducted himself in a public judicial proceeding, invited attention and comment."[174]

In contrast, other courts insist that a lawyer must have thrust themselves into a public controversy *in an effort* to influence its resolution before public figure status is appropriate; mere misconduct is insufficient.[175] In *Littlefield v. Fort Dodge Messenger*, a case from the U.S. Court of Appeals for the Eight Circuit, the attorney engaged in the practice of law while his license was suspended.[176] A newspaper reported on the matter but misstated some of the facts of the case.[177] According to the Eighth Circuit

---

[168] *Gilbert*, 756 N.E.2d at 1272.

[169] Fisher v. Detroit Free Press, Inc., 404 N.W.2d 765, 768 n.1 (Mich. Ct. App. 1987); *Hayes*, 295 N.W.2d at 865–66; *see also Bandelin*, 563 P.2d at 397 (noting that press coverage began when the press "became aware of the trial judge's criticism of" the lawyer).

[170] *Hayes*, 295 N.W.2d at 862.

[171] *Id.* at 862–63.

[172] *Id.* at 860.

[173] *Id.* at 859–60.

[174] *Id.* at 865–66.

[175] *See* Littlefield v. Fort Dodge Messenger, 614 F.2d 581, 582, 585 (8th Cir. 1980).

[176] *Id.* at 582.

[177] *Id.*

Court of Appeals, the lawyer may have engaged in the unauthorized practice of law, but "there is no indication that he did so out of a desire to influence any public controversy."[178] As such, he could not be a public figure.[179]

5. Totality of the Circumstances

In many cases—indeed, perhaps in most—courts do not base their decisions as to an individual's public-figure status solely on any one factor. Even in cases in which a lawyer's representation of a high-profile client, media interactions, or some other factor influenced a court's decision, there are often other factors that helped lead a court to the conclusion that a lawyer was a public figure.[180] Thus, many cases involve a totality of the circumstance analysis.

For example, in a decision from the Third Circuit Court of Appeals, *Marcone v. Penthouse International Magazine for Men*, the plaintiff-lawyer was defamed by an article stating that the lawyer was guilty of illegal drug activity when, in fact, he had only been *charged* with the crime and those charges had been dropped.[181] Thus, one basis for concluding that the lawyer was a public figure was the fact that he had been charged with a crime.[182] Another was the fact that the lawyer frequently represented members of notorious motorcycle gangs who had been accused of illegal drug activities.[183] A third was the fact that the lawyer associated with the members of one of those gangs outside of his professional duties.[184] The Third Circuit Court of Appeals restated the general rule that legal representation of a client, by itself, does not establish an individual as a public figure.[185] Moreover, "if each element of the equation is taken separately it may be argued that no one aspect may be sufficient to create public figure status."[186] By considering all of the factors "in context and as a whole," however, the court concluded that the lawyer had "crossed the line from private to limited purpose public figure."[187] Thus, the categories identified may combine in any number of ways—with each other or with other factors—to help lead to the determination that an individual qualifies as a public figure.

---

[178] *Id.* at 584.
[179] *See id.*
[180] *See, e.g.*, *Hayes*, 295 N.W.2d at 865–66 (basing the conclusion on a lawyer's courtroom behavior in addition to media interaction).
[181] *Marcone*, 754 F.2d at 1077.
[182] *See id.* at 1085.
[183] *Id.*
[184] *Id.* at 1086.
[185] *Id.* at 1085.
[186] *Id.* at 1086.
[187] *Id.*

III. THE SHORTCOMINGS OF THE SUPREME COURT'S DEFAMATION JURISPRUDENCE AS ILLUSTRATED BY CASES INVOLVING LAWYERS AS PLAINTIFFS

To some extent, the uncertainty surrounding the classification of lawyers as public figures is representative of the broader uncertainty surrounding the test for determining the classification of individuals as public figures more generally. The considerations identified in the U.S. Supreme Court's decision in *Gertz v. Robert Welch, Inc.* and its progeny have failed to produce consistent results on the issue of whether an individual qualifies as a public figure. Part of the uncertainty has to do with the fact that the Court has simply never articulated a clear test for determining public figure status.[188] The result is that courts often apply *Gertz* in unpredictable ways, sometimes leading to disparate results.[189]

This article is certainly not the first piece of legal scholarship to point out the shortcomings of the Supreme Court's defamation jurisprudence.[190] In order to fully appreciate why the lawyer-as-defamation-plaintiff cases have proven to be so difficult for courts, however, some further examination of the shortcomings of the *Gertz* line of cases is in order. Courts have interpreted *Gertz* in different ways, with some placing greater emphasis on particular facets of the decision than others.[191] In any case involving the question of whether an individual is a limited-purpose public figure, courts must consider two major issues: (1) whether a public controversy or public issue existed prior to the defamatory publication, and (2) the nature and extent of the plaintiff's participation in the controversy or issue. *Gertz* and its progeny have provided lower courts with sometimes confusing guidance on these issues.

A. The Unclear Notion of "Public Controversies"

One shortcoming of the U.S. Supreme Court's *New York Times Co. v. Sullivan* line of cases is the unclear meaning of the concepts of public issues

---

[188] *See* Nat Stern, *Unresolved Antitheses of the Limited Public Figure Doctrine*, 33 HOUS. L. REV. 1027, 1042 (1996).

[189] *See* Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072, 1082 (3d Cir. 1985) (stating that "[w]ithout a precise diagram for guidance, courts and commentators have had considerable difficulty in determining the proper scope of the public figure doctrine").

[190] *See* Sheldon W. Halpern, *Of Libel, Language, and Law:* New York Times v. Sullivan *at Twenty-Five*, 68 N.C. L. REV. 273, 276 (1990) (referring to the Court's decisions as involving a "fragmented, confusing and unsatisfying array of criteria and requirements"); King, *supra* note 62, at 661 (stating that "[f]rom the start, *New York Times* sequelae have come in tentative and uncertain steps, and increasingly appear as chaotic groping for direction beset by increasing legal complexity").

[191] Stern, *supra* note 188, at 1040–42; *see* SMOLLA, *supra* note 16, § 2:22 (stating "the methodology employed by lower courts in defining the public figure concept has varied considerably").

and public controversies. *Gertz* explains that, before one can be a limited-purpose public figure, there must first be a public controversy into which the plaintiff entered.[192] The Court, however, has not clearly defined this phrase.[193] The result is uncertainty about how this threshold question will be resolved in any given case.

1. Public Controversies and Matters of Public Concern

a. Public Controversies

In *New York Times*, the Court first spoke of the need to establish actual malice in the context of discussion of "public issues."[194] In subsequent cases, however, the Court made clear that one did not become a public figure simply by being associated with a "public" or "newsworthy" issue.[195] Instead, beginning with *Gertz* and continuing through the Court's 1979 decision in *Wolston v. Readers Digest Association, Inc.*, the Court gradually moved from the term "public issue" to the phrase "public controversy" to describe the relevant concept, resulting in terminology that suggests one becomes a limited-purpose public figure by thrusting oneself into the vortex of a "public controversy."[196]

Unfortunately, the Court failed to define the term in any meaningful way.[197] The *Wolston* decision suggests that the Court originally viewed the term in an extremely narrow fashion.[198] In *Wolston*, the Court questioned whether the plaintiff had thrust himself into any existing public controversy when he failed to respond to a subpoena for a hearing investigating Soviet espionage.[199] In a footnote, the Court noted "there was no public controversy or debate in 1958 *about the desirability of permitting Soviet espionage in the United States*; all responsible United States citizens understandably were and are opposed to it."[200] Because the Court decided the case on other

---

[192] Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974); *see* Trotter v. Jack Anderson Enters., Inc., 818 F.2d 431, 433 (5th Cir. 1987) (quoting *Gertz*, 418 U.S. at 354).

[193] *See* Street v. Nat'l Broad. Co., 645 F.2d 1227, 1234 (6th Cir. 1981) (stating that "[t]he Supreme Court has not clearly defined the elements of a 'public controversy'").

[194] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270–71 (1964).

[195] *See supra* notes 67–88 and accompanying text (discussing the Supreme Court's decisions in *Time, Inc. v. Firestone* and *Wolston v. Reader's Digest Ass'n, Inc.*).

[196] *Gertz* used the phrases "public controversy" and "public issue" seemingly interchangeably. *Compare Gertz*, 418 U.S. at 345 (using the phrase "public controversies"), *with id.* at 352 (using the phrase "public issue"). *Time Inc. v. Firestone* used the term "public controversy" almost exclusively. 424 U.S. 448, 453–54 (1976). *Wolston v. Reader's Digest Ass'n* eventually used the term "public controversy" exclusively. 443 U.S. 157, 164–66 (1979).

[197] *See Marcone*, 754 F.2d at 1082 (stating that "[t]he Supreme Court has not provided a detailed chart of the contours of the public and private figure categories").

[198] *See Wolston*, 443 U.S. at 166–69.

[199] *See id.* at 166.

[200] *Id.* at 166 n.8 (emphasis added).

grounds, it never definitively decided what the public controversy in the case entailed.[201] This passage, however, suggests a highly literal and restrictive view of the word "controversy"; a controversy exists only where there is an actual, ongoing debate among substantial portions of the public concerning a specific issue.[202] This footnote also hints at the Court's desire to limit the scope of the public controversy concept.[203] Surely, given the McCarthy hearings and the rise of the Cold War, there was "public controversy or debate" over the extent and potential consequences of Soviet espionage in 1958.[204] Instead, the Court somewhat comically limited the consideration to one of whether there was public controversy or debate concerning the *desirability* of Soviet espionage and—not surprisingly—discerned little public controversy over the issue.[205]

As a result of the Court's less-than-clear guidance, lower courts have struggled in applying this portion of the Court's jurisprudence. Some lower courts have taken a similarly restrictive approach, focusing on the existence of an actual, live public dispute over a specific issue.[206] For example, the Kentucky Supreme Court has held that the "'nationwide controversy regarding recruitment of college athletes' is too general a statement of a public controversy."[207] Other courts have taken a more general approach, focusing more on the existence of differing views on a general subject.[208]

Courts have also struggled over the meaning of the word "public" in this context. There are several ways one could view the idea of a "public" controversy. A controversy could be "public" because large segments of the

---

[201] *Id.* at 166–69.

[202] *See id.* at 166 n.8.

[203] *See id.*

[204] *See id.*

[205] *See id.* at 166–69.

[206] *See* Avins v. White, 627 F.2d 637, 647 (3d Cir. 1980) (stating that to qualify as a controversy, there "must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way"); Warford v. Lexington Herald-Leader Co., 789 S.W.2d 758, 769 (Ky. 1990) (requiring instead the existence of a "particular and identifiable" controversy).

[207] *Warford*, 789 S.W.2d at 767.

[208] *See* Lerman v. Flynt Distrib. Co., 745 F.2d 123, 138 (2d Cir. 1984) ("A public 'controversy' is any topic upon which sizeable segments of society have different, strongly held views."); *Street*, 645 F.2d at 1234 (concluding that infamous rape trials qualified as a public controversy because they "were the focus of major public debate over the ability of our courts to render even-handed justice").

public actually disagree about the issue.[209] Alternatively, a controversy could be "public" insofar as it actually affects the public at large.[210]

As a result of the Supreme Court's lack of clarity, courts frequently differ in their articulation of the meaning of a "public controversy."[211]

b. Matters of Public Concern

Complicating matters somewhat was the Supreme Court's introduction of the concept of a "matter of public concern" into the defamation framework. In the Court's 1985 decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the last case in which the Court has spoken at length on the public figure concept in defamation law, the Court did not analyze whether the speech in question concerned a public controversy.[212] Instead, the Court chose to use the term "matter of public concern" in explaining why a private-figure plaintiff who was defamed concerning a private matter did not, as a constitutional matter, have to establish even negligence, let alone actual malice, to prevail.[213] In deciding the matter, the Court drew upon a long line of public employee free speech cases.[214]

In its public employee free speech decisions, the Court has consistently spoken in terms of speech on matters of *public concern*.[215] To be entitled to

---

[209] *See Lerman*, 745 F.2d at 138 (defining a "pubic controversy" as "any topic upon which sizeable segments of society have different, strongly held views"); *Street*, 645 F.2d at 1234 (concluding that an issue was a "public controversy" because there was "major public debate" on the matter).

[210] *See Marcone*, 754 F.2d at 1083 ("To be 'public,' the dispute must affect more than its immediate participants."); Klentzman v. Brady, 312 S.W.3d 886, 905 (Tex. App. 2009) (explaining that to qualify a "public controversy," people must be discussing "'a real question,' 'the resolution of which was likely to impact persons other than those involved in the controversy'").

[211] Perhaps the most common test has two parts. First, there must be a dispute, the resolution of which would impact the public or segments of the public. Courts adopting this approach sometimes emphasize that the foreseeable impact on others must be "substantial." *See* Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287, 1292 (D.C. Cir. 1980). In addition, under this approach, the dispute must result in significant public attention. *See* Lluberes v. Uncommon Prods., LLC, 663 F.3d 6, 13 (1st Cir. 2011) (stating that "public controversy" requires a showing that a controversy is "more than a 'cause célèbre,' or 'a matter that attracts public attention,'" but instead that people "'actually were discussing some specific question . . . [and] a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution" (citations omitted)); *Trotter*, 818 F.2d at 433 ("The controversy at issue must be public both in the sense that people are discussing it and people other than the immediate participants in the controversy are likely to feel the impact of its resolution . . . ."); *Waldbaum*, 627 F.2d at 1296 ("[A] public controversy is a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants.").

[212] *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 755–62 (1985).

[213] *See id.*

[214] *Id.* at 759–61.

[215] *See* Garcetti v. Ceballos, 547 U.S. 410, 417, 420 (2006); *Dun & Bradstreet, Inc.*, 472 U.S. at 758.

First Amendment protection, a public employee must have spoken "as a citizen on a matter of public concern."[216] According to the Court, "[s]peech involves matters of public concern 'when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'"[217] By the Court's own admission, it has proven difficult to define precisely the concept of a matter of public concern.[218] The Court's decisions make clear that there need not be a public controversy before the matter is one of public concern. Instead, the focus is more on the importance or newsworthiness of the matter. This is significant insofar as years earlier, the Court had rejected the notion that the fact that a defendant's speech involved newsworthy issues was sufficient to justify the use of the actual malice standard.[219]

The fact that the Court in *Dun & Bradstreet, Inc.* chose to incorporate its public employee speech jurisprudence and omit any reference to public controversies could be read as an attempt to settle on the public concern concept and to abandon the requirement of a public controversy.[220] Indeed, in its subsequent defamation cases, the Court eschewed any mention of the public controversy concept and instead spoke of matters of public concern.[221] In line with this reading, some lower have focused on the question of whether the defamatory speech involved a matter of public concern.[222] Indeed, as recently as 2012, the Supreme Court has discussed the actual malice standard in terms of defamatory statements involving "matters of public concern."[223]

Some have argued that the Court's defamation decisions should be read to suggest that the terms "public controversy" and "matter of public concern"

---

[216] *Garcetti*, 547 U.S. at 418.

[217] Lane v. Franks, 134 S. Ct. 2369, 2380 (2014) (quoting Snyder v. Phelps, 562 U.S. 443, 453 (2011)) (internal quotation marks omitted).

[218] *See Garcetti*, 547 U.S. at 418.

[219] *See Wolston*, 443 U.S. at 167–68; *Time, Inc.*, 424 U.S. at 454; *see also supra* notes 67–88 and accompanying text (discussing the Court's decisions in *Time, Inc.* and *Wolston*).

[220] *See* Don Lewis, Dun and Bradstreet, Inc. v. Greenmoss Builders, Inc.*,* Philadelphia Newspapers, Inc. v. Hepps*, and Speech on Matters of Public Concern: New Directions in First Amendment Defamation Law*, 20 IND. L. REV. 767, 768 (1987) (stating that with its *Dun & Bradstreet, Inc.* decision, the Court "returned to first amendment defamation law a consideration seemingly discarded in *Gertz*: whether the speech at issue is 'of public concern'").

[221] *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990); Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 768–69 (1986).

[222] *See* TMJ Implants, Inc. v. Aetna, Inc., 498 F.3d 1175, 1186 (10th Cir. 2007) (omitting any reference to public controversies and instead focusing on the existence of a matter of public concern in the sense of whether a matter is of general interest); Ferguson v. Watkins, 448 So. 2d 271, 278 (Miss. 1984) (stating there must be a matter of public interest and emphasizing that the matter need not result in actual controversy).

[223] United States v. Alvarez, 132 S. Ct. 2537, 2563 (2012).

are intended to be kept separate and are terms of art.[224] To the extent that a distinction exists between public controversies and matters of public concern, however, the distinction has sometimes been lost in practice as lower courts sometimes use the terms interchangeably.[225] In fact, some courts have used the term "public controversy" but appear to define it in terms of newsworthiness, such as the case in which a federal court stated the "public controversy" involved a contract dispute between a professional baseball player and his team.[226] Others continue to utilize the public controversy nomenclature.[227]

The fact that there is still uncertainty regarding a fundamental concept in the actual malice standard over fifty years after the Supreme Court first articulated that standard is fairly remarkable. If the public controversy and matter of public concern concepts are truly distinct concepts that serve independent functions, the Court has adopted an astonishingly convoluted rule in an already complex area of law with little, if any, attendant benefit. What seems more likely is that the Court has never fully settled on one standard, thus leaving lower courts to navigate an uncertain course in this area.

2. Public Controversies and Matters of Public Concern Involving Lawyers

Cases involving lawyers and the legal process illustrate some of the confusion over the public controversy/matter of public concern issue. The Supreme Court's 1976 holding in *Time, Inc. v. Firestone* that a high-profile divorce proceeding is not a public controversy under *Gertz* leaves open the question of what types of legal actions would qualify as public controversies.[228] It might be possible to justify the holding in *Time, Inc.* on the grounds that the public typically has only a limited and mostly prurient interest in divorce proceedings. As one heads down the slippery slope away from divorce actions and toward other types of legal proceedings, however, it becomes virtually impossible to draw any kind of meaningful line as to what should qualify as a public controversy.

---

[224] *See* SMOLLA, *supra* note 16, § 3:20 (stating that "[i]t is extremely important to keep the 'matters of public concern' standard articulated in *Dun & Bradstreet* separate from the term of art 'public controversy' used as part of the vortex public figure test in *Gertz*"); King, *supra* note 62, at 667 (acknowledging that the Court has "attempted to keep separate the ideas of a public controversy for the purposes of public figures and matters of public concern more generally"). *But see* King, *supra* note 62, at 703 (stating the two terms are "inextricably intertwined").

[225] King, *supra* note 62, at 703.

[226] Woy v. Turner, 573 F. Supp. 35, 38 (N.D. Ga. 1983).

[227] *See Lerman*, 745 F.2d at 138; *Warford*, 789 S.W.2d at 767; *see also supra* notes 207–208 and accompanying text.

[228] *See Time, Inc.*, 424 U.S. at 454 ("Dissolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public.").

If part of the analysis involves consideration of whether members of the public will be affected by the resolution of a controversy, there are relatively few legal proceedings that satisfy those criteria. The outcome of a legal proceeding involving the constitutionality of a health care law would certainly qualify, as might a court's review of an agency's regulations concerning food labeling. Most legal proceedings, however, have little tangible impact on those beyond the immediate participants. To take an extreme example, a high-profile murder trial may involve an actual dispute that captures public interest, but its resolution is unlikely to have ramifications in any significant sense on anyone beyond the immediate participants and their families. Yet, it seems inconceivable that a murder trial (or any felony case for that matter) that attracts public attention is not a public controversy. The fact that the judicial process is being utilized to enforce criminal law gives the public at least some interest in judicial proceedings. Any attempt to draw lines on the basis of whether other members of the public would feel the impact of the resolution of a particular proceeding ignores the reality that the public has a strong interest in knowing whether the legal system is operating in a fair and efficient manner.

For example, in *Marcone v. Penthouse International Magazine for Men*, the defamatory statement involved a lawyer's involvement in "the largest drug smuggling operation ever uncovered in the United States" at the time, an operation that ended up producing multiple indictments.[229] In deciding whether the case involved a matter of public controversy, the Third Circuit focused on whether resolution of the drug trafficking criminal charges would affect the general public or some segment of it.[230] Based on the fact that the drug trafficking ring was of "mammoth proportions," the court had little difficulty concluding that the matter satisfied this standard.[231] What if, however, the drug trafficking ring had operated on a more modest scale—would there still have been a public controversy? Life would go on as before for nearly every member of the public, regardless of the outcome of the case. Should that mean that the matter was still not of importance to the public? Arguably, the more relevant consideration is the strength of the public's interest in the enforcement of drug trafficking laws.

This is perhaps why some courts take a broader view of the "public controversy" concept in the case of legal proceedings than Supreme Court precedent would suggest. For example, *Street v. National Broadcasting Co.*, a case from the Sixth Circuit Court of Appeals, involved a defamatory statement concerning the main witness in an infamous rape case from forty

---

[229] *Marcone*, 754 F.2d at 1083.
[230] *See id*.
[231] *Id.*

years earlier.[232] Few people outside the immediate participants in the rape trial could be expected to feel any effect as a result of the resolution of the controversy. Instead, the court held that the trials qualified as a public controversy because they "were the focus of major public debate over the ability of our courts to render even-handed justice."[233]

In cases involving legal disputes and lawyers as plaintiffs, courts tend to take a similarly broad approach. In some cases, the legal dispute in question could be expected to have an impact on the public at large or segments within a society and thus easily qualify as public controversies.[234] At least as often, courts have focused more on the fact that the legal dispute raised important civics issues of general interest to the public. Thus, courts have routinely held that murder trials qualify as public controversies.[235] In a case from the Supreme Court of Idaho, the "controversy" in which the lawyer became involved was a seemingly non-descript estate proceeding.[236] The Michigan Court of Appeals has held that "a trial attorney is a public figure for purposes of comment on his conduct at trial," thus necessarily implying that a trial—any trial—is a public controversy.[237]

As is the case with defamation law more generally, some courts inquire not whether a public controversy existed but whether the plaintiff was involved in a matter of public concern.[238] For example, in case from the Court of Appeals of Mississippi, a newspaper published an article regarding private accusations of unethical conduct on the part of a judge and identified the plaintiff-lawyer as having accused the judge of being a racist.[239] It might have been difficult for the court to conclude that a public controversy existed regarding the alleged misconduct since the matter was only being discussed privately by municipal employees.[240] Instead, the court stated that the question of whether the judge was unethical "was a matter of public concern" for the residents of the community.[241] In other cases, courts have

---

[232] *See Street*, 645 F.2d at 1229.

[233] *Id.* at 1234.

[234] *See* ZYZY Corp. v. Hernandez, 345 S.W.3d 452, 459 (Tex. App. 2011) (concluding public controversy existed where the resolution of a hearing "affected not only the individual parties to the suit, but the entire Kickapoo Traditional Tribe of Texas, and determined who would control vast sums of casino revenues").

[235] *See* Partington v. Bugliosi, 825 F. Supp. 906, 918 (D. Haw. 1993), *aff'd*, 56 F.3d 1147 (9th Cir. 1995); Ratner v. Young, 465 F. Supp. 386, 400 (D.V.I. 1979); Hayes v. Booth Newspapers, Inc., 295 N.W.2d 858, 866–67 (Mich. Ct. App. 1980).

[236] *See* Bandelin v. Pietsch, 563 P.2d 395, 397–98 (Idaho 1977).

[237] *See* Fisher v. Detroit Free Press, Inc., 404 N.W.2d 765, 768 n.1 (Mich. Ct. App. 1987).

[238] *See, e.g.*, Steele v. Spokesman-Review, 61 P.3d 606, 609 (Idaho 2002).

[239] Griffin v. Delta Democrat Times Publ'g Co., 815 So. 2d 1246, 1248 (Miss. Ct. App. 2002).

[240] *Id.* at 1255 (Irving, J., concurring in part and dissenting in part).

[241] *Id.* at 1249 (Lee, J., majority opinion)

similarly focused on the fact that the dispute or the lawyer's involvement in a matter captured the public's attention.[242]

B. The Increasingly Outdated Nature of the Supreme Court's Self-Help Rationale

Part of the Supreme Court's justification for requiring public figures to demonstrate actual malice is that public figures have "greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy."[243] This portion of the Court's opinion from *Gertz* was written at a different time in American history. In 1974, most Americans received their news from one of three (maybe four) channels available on their television sets, local paper, or local radio stations.[244] There was no such thing as social media, and personal home computers were still years away.[245] If the average private individual was defamed in 1974, they had no realistic means to effectively state their own case and publicize the truth.[246] Thus, the Court's self-help rationale for public figure status was conceived at a time when most individuals lacked the ability to effectively counteract the sting of defamatory statements.

As one author has observed, however, "[f]orty years of revolutionary technological change has dramatically reduced the force of this rationale for distinguishing public figures from private persons."[247] For example, according to one estimate, 81% of Americans read a daily print newspaper at the time of the Court's decision in *New York Times Co. v. Sullivan* in 1964; today, less than 25% of Americans do.[248] Instead, many individuals now rely upon the Internet and social media as their primary sources of news and information.[249] More importantly, these tools have greatly increased the abil-

---

[242] *See* Schwartz v. Worrall Publ'ns, Inc., 610 A.2d 425, 428–29 (N.J. Super. Ct. App. Div. 1992) (focusing on the fact that the client's "insurance problems generated widespread and justifiable media attention").

[243] *Gertz*, 418 U.S. at 344.

[244] *See* Jeffrey Omar Usman, *Finding the Lost Involuntary Public Figure*, 2014 UTAH L. REV. 951, 987 (noting limited sources of news at the time).

[245] *See id.* (discussing ensuing technological changes).

[246] Douglas B. McKechnie, *The Death of the Public Figure Doctrine: How the Internet and the Westboro Baptist Church Spawned a Killer*, 64 HASTINGS L.J. 469, 485 (2013).

[247] Usman, *supra* note 244, at 976.

[248] *See id.* at 988–89 (citing statistics, including statistics showing that in 2012 only 23% of Americans read newspapers).

[249] *See id.* at 989 (noting that "[t]he Internet has now become the main source for news for those under the age of fifty").

ity of individuals to communicate their *own* views with others.[250] According to one estimate, 73% of adults use social media in some form.[251] Facebook, Twitter, and other social media platforms enable ordinary people to express themselves in ways and to a range of people that would have been inconceivable to the members of the Court who decided *Gertz* in 1974.[252]

To be sure, there are limits on the ability of a defamation victim to effectively counter the sting of defamation through the use of technological innovations. For one, the sheer amount of information Americans are routinely bombarded with may make it difficult for a defamation victim to cut through the clutter.[253] For another, a blog post or Tweet from a non-celebrity is unlikely to command the type of attention that a traditional news conference or media interview with a celebrity might. Finally, there are still millions of Americans who do not have Internet access and who effectively lack channels of effective communication.[254]

The reality, however, is that the majority of Americans have means of rebuttal that, while perhaps not as effective as those enjoyed by a true celebrity, may still be effective in addressing defamation. At a minimum, most individuals have means of self-help that were simply unavailable to the average citizen in 1974. As such, technological advances have significantly undermined one of *Gertz*'s primary justifications for distinguishing between public and private figures in defamation cases.[255]

C. Unclear Guidance as to the Voluntary Nature of the Plaintiff's Conduct

The Court has also provided unclear guidance regarding its voluntary-assumption-of-risk justification for requiring public figures to establish actual malice on the part of defendants. In evaluating the nature and extent of an individual's participation in a controversy, the *Gertz* Court emphasized the importance of the voluntariness of the plaintiff's conduct. *Gertz* spoke of voluntariness in at least two different ways. In some passages, the Court speaks

---

[250] *See* McKechnie, *supra* note 246, at 486 ("[A]ny person with an Internet connection has virtually equal access to the most effective means of mass communications the world has ever known.").

[251] *See* Usman, *supra* note 244, at 988 (citing results from the Pew Research Internet Project).

[252] *See* McKechnie, *supra* note 246, at 487 (stating that the Internet "has an interactive capacity unattainable for even the most effective means of communication from the *Gertz* era").

[253] *See id.* at 488 (stating that most of the content on the Internet is "lost in a sea of information").

[254] *See* Monica Anderson & Andrew Perrin, *13% of Americans Don't Use the Internet. Who Are They?*, PEW RES. CTR. (Sept. 7, 2016), http://www.pewresearch.org/fact-tank/2016/09/07/some-americans-dont-use-the-internet-who-are-they/ [https://perma.cc/UG7X-4VKR] (noting that 13% of Americans do not use the Internet).

[255] Aaron Perzanowski, Comment, *Relative Access to Corrective Speech: A New Test for Requiring Actual Malice*, 94 CALIF. L. REV. 833, 833 (2006) (stating that in light of *Gertz*'s antiquated view of the media, "[t]he public figure doctrine has become an anachronism").

of voluntariness in terms of voluntarily thrusting oneself into the spotlight for the purpose of influencing resolution of the existing controversy.[256] In other passages, the Court focuses more on whether the defendant voluntarily engaged in activity that increased the foreseeable risk of injury from a defamatory publication.[257] This inconsistency has led to lower courts sometimes taking inconsistent approaches in general and in cases involving lawyers.

1. Mounting the Rostrum vs. Assuming the Risk of Publicity

For some courts, the primary focus is on whether the plaintiff (a) invited public attention to his or her views (b) in an effort to influence others on an issue.[258] To these courts, a limited-purpose public figure is one who, in the words of *Wolston*, tries to "draw attention to himself in order to . . . influence the public with respect to any issue."[259] Under this view, the surest indication that an individual has invited public attention is when the individual seeks the limelight or "mounts a rostrum" in an effort to persuade others.[260] This is perhaps the paradigmatic public-figure scenario.[261] Courts adopting this interpretation of *Gertz* tend to place great weight on the plaintiff's interactions with the media; the more the plaintiff seeks publicity for his or her views, the more likely it is the individual will be classified as a public figure.[262] Some courts that follow this general approach place less emphasis on the plaintiff's attempts to seek publicity and greater emphasis on the fact that the plaintiff was trying to influence the outcome of a matter.[263] Such individuals have invited public comment on their actions.[264]

Other courts view the concept of voluntary assumption of risk in a different manner. These courts are willing to assign public figure status even in the absence of voluntary attempts to grab the spotlight or occupy positions of special prominence. For these courts, the key question is whether the plaintiff voluntarily assumed a position that made it foreseeable that public attention would result. One who "voluntarily assumed a role of special prominence in the public controversy" could realistically expect that to have

---

[256] *Gertz*, 418 U.S. at 339, 344.

[257] *Id.* at 344–45.

[258] *See Lerman*, 745 F.2d at 136.

[259] *Wolston*, 443 U.S. at 168.

[260] *Id.* at 169 (Blackmun, J., concurring).

[261] *See Marcone*, 754 F.2d at 1083 ("In the typical limited purpose public figure case, the plaintiff actively participates in the public issue in a manner intended to obtain attention.").

[262] *See Lerman*, 745 F.2d at 137 (focusing on plaintiff's attempts to seek publicity for herself and her books); Clark v. Am. Broad. Cos., 684 F.2d 1208, 1218 (6th Cir.1982) (stating that a plaintiff who voluntarily seeks publicity satisfies the requirement that the plaintiff's participation in the controversy be voluntary).

[263] *See Waldbaum*, 627 F.2d at 1297.

[264] *Id.*

an impact on the resolution of the matter.[265] An individual may also assume the risk of attention and defamatory comment through other forms of voluntary conduct where they could reasonably foresee that such conduct would result in public attention.[266] Thus, as the Third Circuit Court of Appeals has explained, "the plaintiff's action may itself invite comment and attention, and even though he does not directly try or even want to attract the public's attention, he is deemed to have assumed the risk of such attention."[267] In the court's words, such an individual must "accept the consequences of his decision."[268]

2. Lawyers and Voluntary Conduct

One can see these competing conceptions of *Gertz*'s voluntariness consideration play out in the cases involving lawyers as plaintiffs. For some courts, the lawyer must "mount the rostrum" and attempt to shape the views of the public at large, typically through the use of the media, in order to qualify as a public figure.[269] For other courts, however, the focus is on whether the lawyer voluntarily assumed a particularly visible position in the forefront of a public issue. If so, the lawyer impliedly invited comment and attention.[270] For example, the fact that a lawyer agreed to represent a client in the face of existing or likely publicity concerning a legal matter might potentially lead to the conclusion that the lawyer "voluntarily" thrust herself into the vortex of a public issue.[271]

Lawyers might also be said to voluntarily assume some risk of publicity in another manner. By serving as the advocate for a client, a lawyer is quite literally "purposely trying to influence the outcome" of a controversy. To the extent the lawyer plays a major role in the matter and the matter is

---

[265] *See* Wells v. Liddy, 186 F.3d 505, 539 (4th Cir. 1999); *see also Marcone*, 754 F.2d at 1084 (citing cases in which "others have been classified as limited purpose public figures by virtue of their associations or positions").

[266] *See* Chuy v. Phila. Eagles Football Club, 431 F. Supp. 254, 267 (E.D. Pa. 1977), *aff'd*, 595 F.2d 1265 (3d Cir. 1979) (holding that an individual who has "chosen to engage in a profession which draws him regularly into regional and national view and leads to 'fame and notoriety in the community'" is a public figure); Sisler v. Gannett Co., 516 A.2d 1083, 1095 (N.J. 1986) (holding that the actual malice standard applies "when a private person with sufficient experience, understanding and knowledge enters into a personal transaction or conducts his personal affairs in a manner that one in his position would reasonably expect implicates a legitimate public interest with an attendant risk of publicity"); Great Lakes Capital Partners Ltd. v. Plain Dealer Publ'g Co., 2008 WL 5182819, at *4 (Ohio Ct. App. Dec. 11, 2008) (holding that individuals who enter into certain lines of work may become public figures).

[267] *Marcone*, 754 F.2d at 1083.

[268] McDowell v. Paiewonsky, 769 F.2d 942, 950 (3d Cir. 1985).

[269] *See supra* notes 258–264 and accompanying text.

[270] *See supra* notes 131–138 and accompanying text.

[271] *See supra* notes 131–138 and accompanying text.

truly a public one, the lawyer could perhaps be said to have voluntarily engaged in activity that increased the foreseeable risk of injury from a defamatory publication.

D. The Evolving Conception of Lawyer Interactions with the Media

1. *Gertz* and Traditional Conceptions of Lawyer Interactions with the Media

Gertz's specific holding that Elmer Gertz was not a limited-purpose public figure was also based in part on the fact that Gertz never discussed the underlying case with the press nor was he quoted as having done so.[272] This, in the majority's view, was evidence that Gertz had not thrust himself into the vortex of a public issue or engaged the public's attention in an attempt to influence the outcome of the issue.[273] This portion of the Court's holding suggests a narrow view of the proper role of a lawyer when it comes to communication with the public at large: the lawyer who represents a client in a controversial matter and who does not seek to communicate with the public concerning the matter is merely going about the business of being a lawyer and should not be deemed a public figure. In contrast, the lawyer who communicates with the public concerning the matter may have gone beyond the normal role of a lawyer and may be treated as a public figure. Since *Gertz*, lower courts have seized on this aspect of the decision and classified lawyers who disseminated information to the public concerning a particular matter as public figures.[274]

Gertz was decided at a time when the legal profession took a dimmer view of publicity than it does today.[275] When *Gertz* was decided, there were still states that prohibited lawyers from engaging in *any* type of advertising.[276] At the time *Gertz* was decided, the American Bar Association's ("ABA") *Model Code of Professional Responsibility* permitted lawyers to advertise their services but placed significant limitations on the content of

---

[272] *Gertz*, 418 U.S. at 352.

[273] *See id.*

[274] *See supra* notes 258–264 and accompanying text.

[275] Of course, there have always been lawyers who sought the spotlight. For instance, the Scopes evolution trial was originally conceived by the American Civil Liberties Union as a means of generating publicity for the cause of civil liberties and academic freedom. Noah Feldman, *Division, Design, and the Divine: Church and State in Today's America*, 30 OKLA. CITY U.L. REV. 845, 851 (2005). Famed lawyer for that case Clarence Darrow was noted for seeking publicity more generally. M.H. Hoeflich, *Clarence Darrow and His Ties to Kansas*, 57 U. KAN. L. REV. 1177, 1181 (2009). Indeed, by the end of his career, Darrow had attained the level of folk hero, and when he gave his closing argument in a case involving the United Mine Workers, hundreds of interested spectators had to be turned away. ARTHUR WEINBERG & LILA WEINBERG, CLARENCE DARROW: A SENTIMENTAL REBEL 102, 374 (1980).

[276] *See generally* Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (considering constitutionality of Arizona's blanket ban on lawyer advertisements).

those advertisements.[277] The Model Code permitted lawyers to present twenty-five types of fairly mundane pieces of information, such as a lawyer's date and place of birth, schools attended, and bank references.[278] This information could be publicized but with the important qualification that the information be presented "in a dignified manner."[279] Reflecting the age in which the Model Code was written, the advertising rules also spoke specifically only in terms of information "in print media" or television or radio broadcast and only permitted lawyers to advertise in the geographic area in which the lawyer or the lawyer's clients were located.[280]

2. Evolving Conceptions of Lawyer Interactions with the Media

In 1977, the Supreme Court struck down on constitutional grounds a blanket ban on lawyer advertising in *Bates v. State Bar of Arizona*.[281] In defense of the restriction, the Arizona Bar offered several justifications, including the argument that lawyer advertising would have an adverse impact on professionalism by bringing about "commercialization," which would "adversely affect the profession's service orientation."[282] While commending "the spirit of public service with which the profession of law is practiced," the Court opined that "the belief that lawyers are somehow 'above' trade has become an anachronism."[283]

Nearly forty years after *Bates*, law firms employ increasingly sophisticated marketing techniques in an effort to increase name recognition, ranging from increased social media presence to offering Groupon deals for legal services.[284] To be sure, there is still considerable disagreement regarding the desirability of advertising for legal services, but the legal profession is increasingly coming to the view that marketing legal services is a necessity in today's marketplace.[285]

---

[277] MODEL CODE OF PROF'L RESPONSIBILITY DR 2-101(B) (AM. BAR ASS'N 1969).
[278] *Id.* DR 2-101(B)(3)(5)(15).
[279] *Id.* DR 2-101(B).
[280] *Id.*
[281] *Bates*, 433 U.S. at 382.
[282] *Id.* at 368.
[283] *Id.* at 368, 371–72.
[284] *See* Elizabeth Colvin, *The Dangers of Using Social Media in the Legal Profession: An Ethical Examination in Professional Responsibility*, 92 U. DET. MERCY L. REV. 1, 4, 13 (2015) (citing results of a 2012 poll reporting that "nearly 85% of U.S. law firms use social media for marketing purposes," and discussing conflicting state opinions on the ability of lawyers to offer legal services through Groupon).
[285] *See* Karl D. Shehu, *"You Had Me at Hello" or "Let Them Go?": Law Firm Selection, Retention, and Defection in the Investment Banking Industry*, 4 J. BUS. ENTREPRENEURSHIP & L. 385, 422 (2011) (pointing out that "[t]hough traditionally shunned by the legal community, law firm marketing is becoming ever more imperative as the industry rebounds from the Great Recession"); Mark J. Fucile, *Risk Management in Law Firm Marketing*, OR. ST. B. BULL., Feb./Mar.

At the same time, the profession's attitudes toward trial publicity have grown more liberal since *Gertz*. Throughout much of the twentieth century, the legal profession took a dim view of trial publicity. One of the earliest legal ethics codes advised that, as a general matter, "[n]ewspaper publications by a lawyer as to pending or anticipated litigation . . . are to be condemned."[286] By the time of *Gertz*, the attitude of the profession toward publicity had liberalized to some extent but remained extremely conservative. The ABA's *Model Code of Professional Responsibility*) at the time prohibited lawyers associated with a civil action from making certain kinds of statements (such as the lawyer's opinion as to the merits of a claim or defense) that a reasonable person would expect to be disseminated by means of public communication.[287] Thus, the fact that the Court in *Gertz* considered Elmer Gertz's avoidance of the media as a significant factor in its determination of his public figure status was, to some extent, a product of the time.

Gertz was decided at a time when trials generated significantly less public attention than they do today. To be sure, there have always been high-profile legal matters that have captured the public's attention. But in today's world courtroom proceedings have now become their own entertainment genre. The *Gertz* Court could not have predicted that less than twenty years after its decision that an entire network, Court TV (now called TruTV), would spring up on cable television to provide nonstop and live coverage of trials.[288] As a result, millions of viewers were able not just to read about, but to watch in real time, courtroom dramas such as the O.J. Simpson and Menendez Brothers trials.[289] The public fascination with reality television that occurred soon thereafter only increased the tendency for traditional media to focus on court cases, and the explosion of the Internet and social media made it possible for millions of people to have access to the courtroom in a way they never had before.

As Dean Erwin Chemerinsky has noted, with this increased public attention on the legal system came "an increased demand for attorneys to talk

---

2009, https://www.osbar.org/publications/bulletin/09febmar/practice.html [https://perma.cc/NL3U-8SR6] (stating that "marketing has become a necessary element of business plans for law firms big and small").

[286] CANONS OF PROFESSIONAL ETHICS Canon 20 (AM. BAR ASS'N 1908).

[287] MODEL CODE OF PROF'L RESPONSIBILITY DR 7-107(G) (AM. BAR ASS'N 1969).

[288] *See* David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 786 (1993).

[289] Mary Flood, *Windows Opening and Doors Closing—How the Internet Is Changing Courtrooms and Media Coverage of Criminal Trials*, 59 SYRACUSE L. REV. 429, 434 (2009); Nancy S. Marder, *The Conundrum of Cameras in the Courtroom*, 44 ARIZ. ST. L.J. 1489, 1515, 1551 (2012).

to the press."[290] The transformation in the public's attention to legal matters necessarily has led the legal profession to reconsider its past hardline approach toward pretrial publicity. In 1991, the Supreme Court rejected the view that attorney communication with the press "somehow is inimical to the attorney's proper role" and noted that attorneys may be valuable and reliable sources of information for the public in its understanding of the legal process.[291] ABA Model Rule of Professional Conduct 3.6, which deals with trial publicity, now takes a more permissive approach to lawyer interactions with the media than did the older Model Code of Professional Responsibility in effect at the time of *Gertz*.[292] While the legal profession remains somewhat divided on the subject of pretrial publicity, it cannot be disputed that there has at least been a thawing with respect to the older view.

One school of thought continues to reflect the older view that lawyer speech on pending matters is pernicious and serves no purpose other than self-promotion.[293] Professor Fred Zacharias summed up this view of lawyer speech on pending matters when he observed that lawyers "need not say anything to the press to represent their clients effectively."[294] On the other side of the divide are those who argue that effective representation may sometimes require contact with the media or, at a minimum, other efforts to help control public perceptions concerning a matter.[295] For example, Professor Margaret Tarkington has argued that in criminal cases, the prosecution has a natural advantage in terms of shaping pretrial publicity; simply by bringing charges against a defendant, a prosecutor is representing to the public that probable cause exists to believe the defendant committed the crime.[296] Therefore, defense counsel should have greater latitude in terms of

---

[290] Erwin Chemerinsky, *Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859, 860 (1998).

[291] Gentile v. State Bar of Nev., 501 U.S. 1030, 1056–57 (1991).

[292] MODEL RULES OF PROFESSIONAL CONDUCT R. 3.6 (AM. BAR ASS'N 2014). In contrast to the older Model Code, Model Rule 3.6(a) permits a lawyer to make an extrajudicial statement to the media unless the lawyer knows or should know that the communication "will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."

[293] Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169, 181–82 (1997).

[294] *Id.* at 182.

[295] *See* Michele DeStefano Beardslee, *Advocacy in the Court of Public Opinion, Installment Two: How Far Should Corporate Attorneys Go?*, 23 GEO. J. LEGAL ETHICS 1119, 1128 (2010) (discussing the role of corporate counsel in shaping public opinion and stating "behind almost every legal news-story lurks a lawyer—somewhere").

[296] *See* Margaret Tarkington, *Lost in the Compromise: Free Speech, Criminal Justice, and Attorney Pretrial Publicity*, 66 FLA. L. REV. 1873, 1892 (2014).

pretrial publicity in order to offset this advantage and further the interest in justice.[297]

Perhaps the most common argument in favor of permitting lawyers to speak more freely about legal matters is that such speech is sometimes necessary to protect a client's interests.[298] One clear example of this view involved the efforts of George Zimmerman's legal team to influence public opinion during the investigation of and trial involving Zimmerman's shooting of Trayvon Martin. Zimmerman's lawyers took the unusual step of creating a website—George Zimmerman Legal Case[299]—prior to trial. In establishing the site, Zimmerman's lawyers explained that social media is now "an unavoidable part of high-profile legal cases" and that "it would be irresponsible to ignore the robust online conversation."[300] Citing the widespread public discussion surrounding the case, the defense team explained that establishing an online presence was necessary in order to address the misinformation that was being spread about Zimmerman and the case.[301] Zimmerman's lawyers used the site to post public documents related to the case.[302] Zimmerman's lawyers also went beyond establishing the website. Mark O'Meara, one of Zimmerman's attorneys, became a familiar figure leading up to trial as he frequently appeared on television talk shows and held news conferences in which he discussed the case and his client's state of mind.[303]

---

[297] *See id.* at 1934. Interestingly, prosecutors are increasingly using social media to communicate with the public. *See* Emily Ann Vance, Note, *Should Prosecutors Blog, Post, or Tweet?: The Need for New Restraints in Light of Social Media*, 84 FORDHAM L. REV. 367, 384–85 (2015).

[298] *See* Chemerinsky, *supra* note 290, at 868–69 (citing the need for attorneys to speak out in order to address leaks of information); Gerald F. Uelmen, *Leaks, Gags and Shields: Taking Responsibility*, 37 SANTA CLARA L. REV. 943, 951–52 (1997) (citing the need to protect a client's reputation).

[299] *See* Wesley M. Oliver & Rebecca L. Silinski, *George Zimmerman, Jerry Sandusky, and the Ethics of Counsel's Use of the Media*, 68 OKLA. L. REV. 297, 311–14 (2016) (discussing the website created by Zimmerman's lawyers and their other social media efforts related to the Trayvon Martin case).

[300] THADDEUS A. HOFFMEISTER, SOCIAL MEDIA IN THE COURTROOM: A NEW ERA FOR CRIMINAL JUSTICE? 107 (2014) (quoting website created by Zimmerman's legal team).

[301] *See* Oliver & Silinski, *supra* note 299, at 311–14 (describing defense counsel's social media strategy).

[302] Nicola A. Boothe-Perry, *Friends of Justice: Does Social Media Impact Public Perception of the Justice System?,* 35 PACE L. REV. 72, 102 (2014) (discussing defense counsel's use of social media).

[303] *See Zimmerman Attorney: Concerned About Client's Safety; He Is Stressed, Tired*, CNN: CNN PRESS ROOM (Apr. 12, 2012), http://cnnpressroom.blogs.cnn.com/2012/04/12/zimmerman-attorney-concerned-about-clients-safety-he-is-stressed-tired/?iref=allsearch [https://perma.cc/7G5C-3K2D]; *Video: Mark O'Mara, George Zimmerman's Attorney, Tells Reporters His Client 'Is Frightened,'* FOX NEWS (Apr. 12, 2012), http://video.foxnews.com/v/1558979595001/video-mark-omara-george-zimmermans-attorney-tells-reporters-his-client-is-frightened/?#sp=show-clips [https://perma.cc/Y3E4-FA9H] (video showing O'Mara discussing Zimmerman's mental state with reporters); *Web Exclusive: Mark O'Mara on Upcoming Trial*, YAHOO! NEWS (July 20,

The Zimmerman case is perhaps an extreme example in terms of cases generating public discussion and a lawyer's use of social media. But as the public's ability to follow legal cases in real time increases, the arguments in favor of permitting lawyers to speak out publicly on behalf of their clients at least resonate more strongly than they did when *Gertz* was decided. Although it is perhaps a stretch to suggest that it is common and often necessary for lawyers to speak to the press or make use of social media in the course of representing a client, it has certainly become more common to do so. Thus, the Court's suggestion in *Gertz* that speaking to the media is not part of a lawyer's normal duties seemed perfectly reasonable at the time, but the force of that suggestion has been weakened in the ensuing four decades.

E. The Failure of the Supreme Court to Recognize the Special Role of Lawyers

Perhaps the most noteworthy shortcoming of the *Gertz* decision as it applies specifically to lawyers is the short shrift the Court gave to the fact that Elmer Gertz was a lawyer. The Court's entire *New York Times* line of cases is inconsistent in its treatment of how an individual's status or chosen profession impacts the public official/public figure analysis. The decisions to classify the plaintiffs in *Gertz* and *Wolston* as private figures are premised mainly on the fact that neither party voluntarily thrust himself into the public spotlight in an attempt to shape public discussion. Simply attaining notoriety in connection with a public controversy was insufficient to confer public figure status.[304] In other decisions, the Court and lower courts have attached considerably more weight to a plaintiff's status alone or the nature of the plaintiff's profession in considering public figure status.

1. The Public Official Cases

In its decisions addressing whether an individual qualifies as a public *official*, the Court has focused almost exclusively on the nature of the plaintiff's job. The Court's decision in *New York Times* devoted little attention to the self-help and assumption of risk justifications that later appeared in *Gertz* to justify requiring public officials to establish actual malice on the plaintiff's part. Instead, the Court rested its decision largely on the fact that the roles that public officials occupy are sufficiently important to society

---

2012), https://www.yahoo.com/news/video/exclusive-mark-omara-upcoming-trial-234018570.html?ref=gs [https://perma.cc/2AG5-A42B] (video of O'Mara discussing the Zimmerman trial with a reporter).

[304] *See supra* note 196 and accompanying text.

that permitting liability to attach for merely negligent criticisms of the performance of their duties would deter discussion of vital public concern.[305]

Two years later in 1966, in *Rosenblatt v. Baer*, the Court again focused on the importance of a public employee's position in deciding whether they qualified as a public official. To qualify as a public official for *New York Times* actual malice purposes, according to the Court, the employee's position must have "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."[306] Public officials include "those persons who are in a position significantly to influence the resolution of . . . [public] issues."[307]

To a limited extent, these decisions are rooted in the assumption of risk justification explicated in *Gertz*. *Rosenblatt* explained that to qualify as a public official for purposes of *New York Times* actual malice analysis, "[t]he employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy."[308] Thus, one who voluntarily assumes certain public positions also assumes the risk of public scrutiny and discussion. But the opinions are also rooted in the simple idea that the nature of a public official's job invites and is a legitimate topic of public discussion.

2. The Public Figure Cases

There is more than a hint of this same approach in the Court's public *figure* cases as well. *Gertz* indicates that a limited-purpose public figure is almost always one who actively seeks to engage the public's attention.[309] But this is not necessarily true for the all-purpose or general-purpose public figure. The all-purpose public figure may not have been trying to engage the public's attention, let alone trying to influence resolution of any kind of public controversy. As *Gertz* explains, it is enough that one, through "notoriety of their achievements," has attained "pervasive fame or notoriety."[310] Lower courts have followed this approach. In short, status alone is sufficient to render one an all-purpose public figure.

This same theme appears in the Court's first decision extending the actual malice standard to public figures as well as public officials. In 1967, in *Curtis Publishing Co. v. Butts,* the Court decided a public figure issue in-

[305] *See New York Times Co.*, 376 U.S. at 279.
[306] Rosenblatt v. Baer, 383 U.S. 75, 85–86 (1966).
[307] *Id.* at 85.
[308] *Id.* at 87 n.13.
[309] *See Gertz*, 418 U.S. at 345.
[310] *Id.* at 342, 351.

volving two separate plaintiffs: Edwin A. Walker, a private individual, who had been outspoken and had received public attention on the issue of federal intervention in civil rights matters, and Wallace Butts, the athletic director at the University of Georgia, who was accused of having helped fix a college football game.[311] Foreshadowing the concept of a limited-purpose public figure, the Court observed that Walker qualified as a public figure "by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy."[312] Butts, in contrast, attained public figure status "*by position alone*."[313] In this respect, the Court's treatment of this type of public figure in *Butts* is quite similar to its treatment of public officials in *New York Times*.

Although the Court's subsequent decisions in *Gertz* and *Wolston* shied away from the idea that one can become a limited-purpose public figure by notoriety alone,[314] lower courts have often been willing to classify an individual as a limited-purpose public figure based on notoriety attained by engaging in an occupation or profession that invites public attention and comment.[315] The clearest example of this is in cases involving athletes. For example, in *Barry v. Time, Inc.*, a federal court in California articulated the view that by accepting certain jobs, an individual invites attention and comment.[316] If attention and comment then follow that individual, they may be treated as a public figure.[317] In *Barry*, the plaintiff was a college basketball coach who accepted the job at a time when there was an ongoing controversy as to alleged recruiting violations at the college.[318] In the court's view, the decision to accept the job under these circumstances amounted to

---

[311] *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 135–36, 140 (1967).

[312] *See id.* at 155.

[313] *See id.* (emphasis added).

[314] *See Wolston*, 443 U.S. at 165–66; *Gertz*, 418 U.S. at 351–52.

[315] *See Waldbaum*, 627 F.2d at 1299 n.36 (stating that "[s]ometimes position alone can make one a public figure"); *see also* Milsap v. Journal/Sentinel, Inc., 100 F.3d 1265, 1269 (7th Cir. 1996) (concluding that individual who had been appointed as director of a prominent anti-poverty program "put himself into the public eye" and attained the notoriety necessary to render him a public figure); Price v. Viking Penguin, Inc., 881 F.2d 1426, 1431 (8th Cir. 1989) (concluding that FBI agent who "occupied a prominent role in public affairs within" an Indian reservation and who "played a substantial role in the investigation of crimes on the Reservation" was a public figure, despite any indication that he sought publicity); White v. Mobile Press Register, Inc., 514 So. 2d 902, 904 (Ala. 1987) (holding that an individual's "choice of a career as a high level executive in an industry that is the subject of much public interest and concern" rendered him a public figure); *Great Lakes Capital Partners Ltd.*, 2008 WL 5182819, at *4 (holding that individuals who enter into certain lines of work may become public figures).

[316] *See* Barry v. Time, Inc., 584 F. Supp. 1110, 1119 (N.D. Cal. 1984) (explaining that one who decides to pursue a career in sports assumes the risk of attention and comment with respect to his performance).

[317] *See id.*

[318] *See id.* at 1118.

sufficient "thrusting" under *Gertz* to justify public figure status.[319] The court went further and noted that there was a "long line" of cases, dating back to *Butts*, finding professional and college athletes and coaches to be public figures.[320] From these cases, the court observed a common thread: "one's voluntary decision to pursue a career in sports, whether as an athlete or a coach, 'invites attention and comment' regarding his job performance and thus constitutes an assumption of the risk of negative publicity."[321]

Indeed, the *Barry* court is correct in its observation. For example, in a post-*Gertz* decision, a Pennsylvania federal court made the following observation in a case involving a professional athlete:

> Where a person has, however, *chosen* to engage in a profession which draws him regularly into regional and national view and leads to 'fame and notoriety in the community,' even if he has no ideological thesis to promulgate, he invites general public discussion . . . . If society chooses to direct massive public attention to a particular sphere of activity, those who enter that sphere inviting such attention must overcome the *Times* standard.[322]

The Third Circuit later affirmed, concluding that "[p]rofessional athletes, at least as to their playing careers, generally assume a position of public prominence" and that the plaintiff, a professional football player, was a public figure.[323]

The U.S. Court of Appeals for the D.C. Circuit has advanced a similar theme. In *Waldbaum v. Fairchild Publications, Inc.,* the D.C. Circuit Court observed that "[s]ometimes position alone can make one a public figure."[324] There may also be situations, however, in which the responsibilities of an individual's position are sufficiently important that the individual becomes a public figure. The court in *Waldbaum* pointed out that an individual may be a limited public figure if their position requires them to make decisions that will have a significant impact on public controversies.[325]

The idea that one may become a public figure just on the basis of one's status rather than any attempt to court fame has also been applied to lawyers. In one federal district court case from Maryland, a lawyer had held

---

[319] *Id.*

[320] *Id.* at 1119 (citing Brewer v. Memphis Publ'g Co., 626 F.2d 1238, 1254–55 (5th Cir.1980)); *see* Time, Inc. v. Johnston, 448 F.2d 378, 380 (4th Cir. 1971); Vandenburg v. Newsweek, Inc., 441 F.2d 378, 379 (5th Cir. 1971); Cepeda v. Cowles Magazines and Broad., Inc., 392 F.2d 417, 419 (9th Cir. 1968); *Chuy*, 431 F. Supp. at 267.

[321] *Barry*, 584 F. Supp. at 1119.

[322] *Chuy*, 431 F. Supp. at 267 (emphasis added).

[323] Chuy v. Phila. Eagles Football Club, 595 F.2d 1265, 1280 (3d Cir. 1979).

[324] *Waldbaum*, 627 F.2d at 1299 n.36.

[325] *Id.*

"high-profile positions, including serving as counsel to the World Bank and to the Government of Nigeria in several high profile cases" and had competed "at the highest echelon of the legal profession worldwide."[326] Based on these facts, the court concluded that the lawyer was a public figure despite the lack of any evidence that he had thrust himself into the spotlight for the purpose of influencing resolution of any existing controversy.[327]

3. The Public Nature of the Legal Profession

Ample authority existed at the time of *Gertz* for the Supreme Court to have factored into its analysis the fact that Elmer Gertz was a lawyer, a position that at least in some instances invites public attention and comment.[328] Moreover, the fact that Gertz was a lawyer who had voluntarily accepted employment in connection with an ongoing public controversy might also have been a relevant consideration for the Court. Finally, the fact that Gertz had decision-making responsibility for the representation of the family in its wrongful death suit and thus could potentially influence the resolution of the matter would also seem to have been a relevant consideration in deciding whether Gertz had assumed the risk of resulting publicity. For whatever reason, however, the Court did not overtly take these realities into account.

This failure represents an odd omission from the Court's opinion. The legal profession has long viewed its members as occupying a special role within society. At the time *Gertz* was decided, the Preamble to the ABA's *Model Code of Professional Responsibility*) boldly proclaimed, "Lawyers, as guardians of the law, play a vital role in the preservation of society."[329] The Preamble to the ABA's current *Model Rules of Professional Conduct* observes that "[a] lawyer . . . is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."[330] The job of a lawyer is often a public one. By choosing to become a lawyer, a person has chosen to engage in a profession that may sometimes draw the lawyer into the public arena and which, by definition, often involves disputes in which the public has a strong interest. This is more likely to be true in the case of litigators, whose job requires them to enter public courtrooms in order to help influence the resolution of disputes, than transactional lawyers. But even transactional lawyers, however, are

[326] Ugwuonye v. Rotimi, Civil No. PJM 09–658, 2012 WL 5928647, at *2 (D. Md. Nov. 26, 2012).

[327] *See id.* at *3.

[328] *See generally New York Times Co.*, 376 U.S. 254 (emphasizing status and position in determining public figure status).

[329] MODEL CODE OF PROF'L RESPONSIBILITY pmbl. (AM. BAR ASS'N 1969).

[330] MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 1 (AM. BAR ASS'N 2014).

"public citizens" who use the machinery of the law to advance their client's interests.

As public citizens with special obligations with respect to the quality of justice, lawyers may have special obligations more generally with respect to the legal system. As explained by the Supreme Court of Michigan, "the law has reposed special stewardship duties on lawyers on the basis of the venerable notion that lawyers are more than merely advocates who happen to carry out their duties in a courtroom environment, they are also officers of the court."[331] Given the public's strong interest in the efficient operation of the justice system, the public has a greater interest in being informed of and regulating the behavior of members of the legal profession than it does with other professions. For instance, courts are generally more willing in the case of lawyers than other occupations to invalidate contracts that violate rules of professional conduct on the grounds that such contracts offend public policy.[332] Further, in upholding special restrictions on the ability of lawyers to criticize judges, some courts have expressed the view that such restrictions are justified because lawyers occupy a special role as officers of the court and their views regarding the legal system are afforded greater credibility by the public.[333] In short, the law sometimes treats lawyers differently because of the public function lawyers serve.

Therefore, it is somewhat surprising, given the Court's earlier emphasis on status and position in *New York Times* and *Butts*, that Gertz's status as a lawyer played no obvious role in the Court's decision-making process in *Gertz* on the question of public figure status.

IV. LAWYERS AS PUBLIC FIGURES

Cases involving lawyers as defamation plaintiffs illustrate the numerous shortcomings of the Supreme Court's *New York Times Co. v. Sullivan* line of cases. The lack of clarity and shifting focus in the decision has resulted in confusion and misclassification in some instances. In a perfect world, the Court would start from scratch and adopt a uniform standard that

---

[331] Grievance Adm'r v. Fieger, 719 N.W.2d 123, 133 (Mich. 2006).

[332] *See* Benjamin P. Cooper, *Taking Rules Seriously: The Rise of Lawyer Rules as Substantive Law and the Public Policy Exception in Contract Law*, 35 CARDOZO L. REV. 267, 271 (2013) (stating that courts have increasingly relied upon lawyers' rules of professional conduct "as a source of substantive law in deciding the enforceability of the prohibited agreements"); Alex B. Long, *Attorney-Client Fee Agreements That Offend Public Policy*, 61 S.C. L. REV. 287, 301 (2009) (noting most courts "have generally refused, on policy grounds, to enforce fee agreements that run afoul of the ethical rules governing attorneys").

[333] The Fla. Bar v. Ray, 797 So. 2d 556, 559 (Fla. 2001) (stating that "[b]ecause members of the Bar are viewed by the public as having unique insights into the judicial system, the state's compelling interest in preserving public confidence in the judiciary supports applying a different standard than that applicable in defamation cases").

does not rely on arguably unworkable distinctions between public and private figures.[334] Assuming this is unlikely to happen, lower courts could still provide some much needed clarification and revision to the law in the area in a manner that is consistent with the spirit of Supreme Court decisions. Cases involving lawyers as defamation plaintiffs provide a useful tool for doing so. In the process, lower courts could also provide some much needed guidance for future litigants in defamation cases involving lawyers as plaintiffs.

A. Loosening the Restrictions of the Gertz *Categories*

Currently, many courts view *Gertz v. Robert Welch, Inc.* as establishing only two categories of public figures: all-purpose public figures who have attained extensive fame and notoriety and limited-purpose public figures who have thrust themselves into the vortex of a pre-existing public controversy in order to influence resolution of that controversy. Some are at least willing to recognize the possibility that the "rare" individual might qualify as a public figure through no purposeful action of her own. But the result is that courts sometimes fail to classify individuals as public figures who logically should qualify.

All too often, lower courts' engagement in an excessively formalistic reading of *Gertz* and its progeny has detracted from the central message of *New York Times* that debate on public issues should be uninhibited.[335] This has resulted in such pointless semantic discussions as whether a matter of ongoing public debate is a "public controversy" or merely a public issue or matter of public concern. Nowhere is this more evident than in the decision of many courts to establish two (or at best three) rigid categories of public figures. The *Gertz* Court was clear, however, that it was not announcing a rigid set of public figure categories but was instead "lay[ing] down broad rules of general application."[336] As one author has noted, "the *Gertz* prototypes do not freeze the law; they are useful examples, stimulants to thought . . . ."[337] In fact, *New York Times*, *Butts*, and *Gertz* all provide sufficient authority for the recognition of at least one other type of public figure: those whose occupations or professions necessarily create a foreseeable likelihood of resulting notoriety.[338] This category would often include athletes, entertainers, and—notably—lawyers.[339]

---

[334] *See* King, *supra* note 62, at 698 (suggesting that all defamation plaintiffs should be required to establish actual malice).

[335] To be clear, this is due in no small part to the Supreme Court's own statements in *Gertz* and subsequent decisions.

[336] Gertz v. Robert Welch, Inc., 418 U.S. 323, 343–44 (1974).

[337] BRUCE W. SANFORD, LIBEL AND PRIVACY 7-85 to 7-86 (2d ed. Supp. 2008).

[338] *See id.* at 7-85 to 7-115 (arguing for such a standard); *see also* Chapman v. Journal Concepts, Inc., 528 F. Supp. 2d 1081, 1093 (D. Haw. 2007) (stating that an individual may be a public

New York Times and *Butts* both provide support for the position that some individuals occupy positions that may foreseeably lead to notoriety and public comment.[340] *Gertz* justifies imposing the burden on public figures to establish actual malice largely on assumption of risk grounds. While *Gertz*'s "access to channels of effective communication" rationale has been substantially weakened over time, the assumption of risk rationale—the "more important" of the two rationales—still retains some force.[341] Logically, then, it stands to reason that some individuals can be said to have assumed the risk of notoriety and public comment by virtue of the occupation or profession they have chosen to enter and should therefore be required to establish actual malice.

If a court were inclined to define this category of individuals narrowly, it could be defined so that it largely tracks the public official category. At a minimum, an individual may be a public figure where the individual's chosen field places the individual in a position to significantly influence the resolution of public issues.[342] The category would also include those whose chosen fields place them in a position of such apparent importance that the public has an independent interest in the qualifications and performance of the people who hold them.[343]

Admittedly, this standard has its own ambiguity issues.[344] However, there are meaningful markers to guide a court's analysis. Where a court's focus is on the existence of a matter of public concern (as opposed to a public controversy), the question is often about whether the public has a special interest in the plaintiff's activities that are the subject of the defamatory statement. For example, restaurants and other places of public accommodations are often classified as public figures for purposes of statements concerning the services they provide because restaurants actively seek public patrons and offer services to the public at large.[345] In support of this conclu-

---

figure by assuming risk of publicity resulting from his or her position); Susan M. Gilles, *From Baseball Parks to the Public Arena: Assumption of the Risk in Tort Law and Constitutional Libel Law*, 75 TEMP. L. REV. 231, 244–45 (2002) (discussing the Court's use of assumption of risk principles in its defamation cases).

[339] *See* SANFORD, *supra* note 337, at 7-87 (stating that celebrities and athletes would fit this category).

[340] *See supra* notes 311–313 and accompanying text.

[341] *See Gertz*, 418 U.S. at 338, 344.

[342] *Cf. supra* note 43 and accompanying text.

[343] *Cf. supra* note 306 and accompanying text.

[344] *See* Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1097–98 (2000) (stating "that the theoretical criticisms of the public concern / private concern distinction are sound" and citing examples of courts classifying as speech on matters of private concern matters "speech that clearly seems to be of public concern under any normal definition of the term").

[345] *See* Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, 272–73 (3d Cir. 1980) (concluding restaurant was a public figure based, in part, on its extensive advertising); Journal–Gazette Co. v.

sion, courts have cited the strong interest the public has in consumer reporting on the services provided by entities that provide goods and services to the public.[346] As explained by one court, "by its nature, consumer reporting involves matters of particular interest to the public."[347]

Some courts have also cited the fact that a business is subject to extensive government regulation in support of the conclusion that the public has a particular interest in the affairs of the business, and the business is, therefore, a public figure for defamation purposes.[348] Under this approach, the fact that an entity, such as an insurance company, is subject to close regulation by the state is evidence that that the entity invites public attention and comment.[349]

Along those same lines, numerous state statutes declare it to be a matter of public concern that only qualified individuals be permitted to engage in various professions and practices. These professions and practices include optometry, dentistry, pharmacy, architecture, and cosmetology.[350] These statutes also frequently explain that it is a matter of public concern that these practices and professions enjoy the confidence of the public.[351]

Of course, unlike the legal profession, these are all professions and practices that are heavily regulated by state legislatures. As the next section discusses in more detail, however, the analogies to the legal profession are still hard to avoid.

Bandido's, Inc., 712 N.E.2d 446, 454 (Ind. 1999); Pegasus v. Reno Newspapers, Inc., 57 P.3d 82, 92 (Nev. 2002); Steak Bit of Westbury, Inc. v. Newsday, Inc., 334 N.Y.S.2d 325, 331 (Sup. Ct. 1972); SMOLLA, *supra* note 16, § 2:98.50.

[346] *See Steaks Unlimited*, 623 F.2d at 280; Quantum Elecs. Corp. v. Consumers Union of U.S., Inc., 881 F. Supp. 753, 764 (D. R.I. 1995); Bose Corp. v. Consumers Union of U.S., Inc., 508 F. Supp. 1249, 1270–71 (D. Mass. 1981), *rev'd*, 692 F.2d 189 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984).

[347] *Quantum Elecs. Corp.*, 881 F. Supp. at 764.

[348] *See* Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341, 1348 (S.D.N.Y. 1977); Am. Benefit Life Ins. Co. v. McIntyre, 375 So. 2d 239, 242 (Ala. 1979); Coronado Credit Union v. KOAT Television, Inc., 656 P.2d 896, 904 (N.M. Ct. App. 1982); *Steak Bit of Westbury, Inc.*, 334 N.Y.S.2d at 331; SMOLLA, *supra* note 16, § 2:98; *see also* ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 5-46 (4th ed. 2013) (concluding that "when a corporation 'goes public' by publicly offering its securities, it has taken a specific, voluntary action, the known result of which will be mandatory, increased public scrutiny" and should be treated as a public figure). *But see* Blue Ridge Bank v. Veribanc, Inc., 866 F.2d 681, 688 (4th Cir. 1989) ("We cannot accept the proposition, tacitly adopted in some jurisdictions, that a business enterprise loses much of the protection afforded by the traditional law of defamation simply as a result of being subject to pervasive governmental regulation.").

[349] *See Am. Benefit Life Ins. Co.*, 375 So. 2d at 242. *See generally* Rebecca Tushnet, *Fighting Freestyle: The First Amendment, Fairness, and Corporate Reputation*, 50 B.C. L. REV. 1457 (2009) (discussing defamation claims involving corporations).

[350] *See* ALA. CODE § 34-22-2 (optometry), -23-2 (pharmacy), -2-31 (architecture) (1975); LA. STAT. ANN. § 37:562 (2001) (cosmetology); N.C. GEN. STAT. § 90-22(a) (2013) (dentistry).

[351] *See, e.g.*, ALA. CODE § 34-2-31.

Alternatively, a court could choose to define the category in a slightly more expansive manner to include those whose chosen occupations or professions make it foreseeable that publicity and public comment may result, such as the Athletic Director at the University of Georgia in *Butts*.[352] To the extent there needs to be a limiting principle, individuals could be classified as public figures only for purposes of defamatory statements having some clear connection or relevance to their occupations or position, à la the athletic director being accused of fixing a game. Regardless of the precise formulation, the result would be a more meaningful way of resolving the public figure question.

B. Lawyers as Public Figures

Lawyers provide a clear example of the benefits of and justifications for such an approach. Some lawyers should be classified as limited-purpose public figures with little difficulty even under *Gertz*'s restrictive category. The most obvious examples are cause lawyers. For some lawyers, engaging in a legal dispute is a means of political expression.[353] For these lawyers, litigation is undertaken for the purpose of advancing their particular causes.[354] Therefore, cause lawyers, lawyers for whom the legal process is a means of advancing a particular cause, mount the rostrum in a public manner and should ordinarily be classified as public figures to the extent they play a significant role in a public controversy.[355]

But even the average lawyer who becomes the subject of significant public attention through the performance of their duties or in their professional capacity should ordinarily be treated as a public figure. The legal profession routinely posits that lawyers are public citizens "having special responsibility for the quality of justice."[356] Indeed, the notion of the "citizen-lawyer" or "lawyer-statesman" has deep roots in American history.

As Dean Davison Douglas has detailed, when Thomas Jefferson conceived of the first legal education curriculum in the United States, his goal was "to educate a group of 'public citizens'—those who would place public interest ahead of private interest and exercise leadership in preserving re-

---

[352] *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 135 (1967); *see also supra* notes 310–313 and accompanying text.

[353] *See In re* Primus, 436 U.S. 412, 428 (1978).

[354] *Id.* at 431.

[355] *See* Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 169 (1979) (Blackmun, J., concurring) (characterizing the Court's holding in *Wolston* as requiring an individual to "mount[] a rostrum to advocate a particular" to be considered a limited-purpose public figure).

[356] MODEL CODE OF PROF'L RESPONSIBILITY pmbl. ¶ 1 (AM. BAR ASS'N 1969).

publicanism."[357] Jefferson believed it was necessary to instill in aspiring lawyers "public virtue," defined as "[t]he sacrifice of individual interests to the greater good of the whole."[358] Jefferson's vision was widely adopted at the time, as evidenced, in part, by the large number of lawyers who served as elected officials during the first half of the nineteenth century.[359]

It would obviously be a gross oversimplification to argue that the U.S. legal profession has always and forever consisted of an army of public citizens seeking to serve broader societal needs. The idea of the lawyer as occupying a public rolelooms large in the history of the legal profession, however. For much of the twentieth century, the dominant conception of the lawyer was as one who was "simultaneously a zealous representative of clients and a guardian of the public good."[360] As described by Professor Russell G. Pearce, this "Professionalism Paradigm" was based "on a purported bargain between the profession and society in which the profession agreed to act for the good of clients and society in exchange for autonomy."[361] Under this conception of what it means to be a lawyer, "lawyers altruistically place the good of their clients and the good of society above their own self-interest."[362]

This conception of lawyers as "guardians of the public good"[363] might manifest itself in a number of ways. Lawyers might fulfill their obligations as public citizens by assuming leadership roles within the community and at large.[364] For example, Professor Deborah Rhode and others have written extensively about the concept of lawyers as leaders and the various ways in which lawyers serve as leaders in society.[365] Lawyers might also take on a public role by engaging in public service. According to Woodrow Wilson,

---

[357] Davison M. Douglas, *The Jeffersonian Vision of Legal Education*, 51 J. LEGAL EDUC. 185, 193–94 (2001).

[358] *Id.* (quoting GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 53 (1969)).

[359] *Id.* at 211.

[360] Russell G. Pearce & Eli Wald, *The Obligation of Lawyers to Heal Civic Culture: Confronting the Ordeal of Incivility in the Practice of Law*, 34 U. ARK. LITTLE ROCK L. REV. 1, 26 (2011).

[361] Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1231 (1995).

[362] *Id.*

[363] Pearce & Wald, *supra* note 360, at 26.

[364] *See* Dean Stacy Leeds, *Increasing Diversity in Arkansas's Law Schools and Our Profession*, 49 ARK. LAW. 16, 17 (2014) (referencing "community leaders who have been the perfect models of 'lawyer as community leader'").

[365] *See* Deborah L. Rhode, *Lawyers as Leaders*, 2010 MICH. ST. L. REV. 413, 413 (discussing the many leadership roles that lawyers play); *see also* David C. Hardesty Jr., *Leading Lawyers—Lawyers in Leadership Roles—Implications for the Profession*, W. VA. LAW., Oct.–Dec. 2009, at 37 (noting the historical leadership role that lawyers have played.

"public life was a lawyer's forum" and the practice of law imposed upon a lawyer an obligation to "shape matters of public concern."[366] Thus, "It was not uncommon for elite lawyers in the first half of the twentieth century to shuttle between high-level government positions in Washington, D.C. and private law practice in Wall Street's large firms."[367]

Lawyers may also fulfill their end of the bargain as part of the professionalism paradigm by helping to ensure that members of the public are not denied access to justice. In exchange for the freedom from external regulation and its monopoly on the practice of law, lawyers may satisfy their obligations to the public by being willing to help ensure access to justice.[368] This obviously could entail providing pro bono services, but it might also involve being willing to represent unpopular clients.[369] The *Model Rules of Professional Conduct* advise that a lawyer has an ethical obligation to accept "a fair share of unpopular matters or indigent or unpopular clients."[370] Summing up the idea of a lawyer as public citizen, John Adams famously observed that his representation of the British soldiers involved in the Boston Massacre was "one of the best Pieces of Service I ever rendered my Country."[371] In short, if lawyers insist on calling themselves public citizens and claiming the benefits of that title, they should also be willing to accept the burdens that go along with that title.

Even those lawyers who view the practice of law more as a business than a calling or who do not accept the professionalism paradigm must concede that the public has a strong interest in the qualifications and integrity of lawyers. The public unquestionably also has a particular interest in being informed of judicial proceedings and a legitimate interest in being informed about how the state-sanctioned legal process operates.[372] This is a theme that runs throughout the unauthorized practice of law and professional dis-

---

[366] Rhode, *supra* note 7, at 1325 (quoting WOODROW WILSON, *The Lawyer and the Community*, *in* 21 THE PAPERS OF WOODROW WILSON 64, 67, 70 (Arthur Link ed., 1976)); *see also* Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 3 (1988) (quoting Wilson's views on the role of lawyers in shaping politics and public policy).

[367] Pearce & Wald, *supra* note 360, at 27.

[368] *See* Soha F. Turfler, Note, *A Model Definition of the Practice of Law: If Not Now, When? An Alternative Approach to Defining the Practice of Law*, 61 WASH. & LEE L. REV. 1903, 1925–27 (2004) (discussing the professional paradigm in connection with access to justice).

[369] *See* Margaret Tarkington, *Freedom of Attorney-Client Association*, 2012 UTAH L. REV. 1071, 1116 (arguing that the representation of the accused and unpopular is a way for lawyers to promote the legitimacy of the justice system).

[370] MODEL RULES OF PROF'L CONDUCT R. 6.2 cmt. 1 (AM. BAR ASS'N 2014).

[371] MCCULLOUGH, *supra* note 1, at 68.

[372] *See generally* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 492 (1975) ("With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.").

cipline cases involving lawyers.[373] Additionally, the public has an equally strong interest in the effective administration of justice.[374] As public citizens with special obligations with respect to the quality of justice, lawyers obviously play a vital role in that process. Classifying lawyers as public figures where the performance of their duties results in public attention and comment would be consistent both with furthering the public interest in keeping informed about the legal system as well as the legal profession's view of itself and its proffered justifications for self-regulation.

The assumption of risk justification offered in *Gertz* for requiring public figures to prove actual malice further supports classifying lawyers as public figures. Given the realities of modern society and law practice, lawyers can reasonably foresee that their professional endeavors may result in significant public attention and comment. Sometimes, the attention and comment might result from a lawyer's successes or failures. Other times, it might result from a lawyer's involvement in a high-profile matter. Modern lawyers can also be expected to foresee that their representation of a client may require them to interact with the public in a manner inconceivable to lawyers fifty years ago. Gone also are the days when the average lawyer could develop a client base simply by doing a good job. Marketing is now seen as a necessity for many law firms, and, through their advertisements and social media marketing, more and more lawyers have willingly sought to engage the public's attention.

Even lawyers who are appointed in a matter could be argued to have assumed the risk of resulting publicity stemming from the matter. Courts have long claimed the inherent authority to appoint lawyers in court matters.[375] Rule 6.2 of the ABA's *Model Rules of Professional Conduct* prohibits a lawyer from seeking to avoid a court appointment without good cause.[376] Therefore, the nature of an attorney's role creates at least some

---

[373] *See* Cleveland Bar Ass'n v. CompManagement, Inc., 818 N.E.2d 1181, 1189 (Ohio 2004) (explaining that the purpose of that regulation is to "protect the public against incompetence, divided loyalties, and other attendant evils that are often associated with unskilled representation"); *In re* Conduct of Jans, 666 P.2d 830, 833 (Or. 1983) (stating that the appearance of impropriety, while not a basis for professional discipline, "adversely affects public confidence in the legal profession"); Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U.L. REV. 1, 5–6 (1998) (identifying two of the basic goals of the lawyer disciplinary system as the protection of the public and preservation of confidence in the legal profession).

[374] Lawyer Disciplinary Bd. v. Artimez, 540 S.E.2d 156, 164–65 (W. Va. 2000) (explaining that the purpose of the lawyer professional discipline system is to protect the public's interest in the administration of justice); Levin, *supra* note 373, at 5–6 (identifying one of the basic goals of the lawyer disciplinary system as protection of the administration of justice).

[375] *See* Pruitt v. Mote, 503 F.3d 647, 653–54 (7th Cir. 2007); *In re* Elrich S., 5 A.3d 27, 40 (Md. 2010).

[376] MODEL RULES OF PROF'L CONDUCT R. 6.2 (AM. BAR ASS'N 2014).

potential for an attorney to make their way into court and into the public eye.

Moreover, the state has an especially strong interest in establishing defamation rules that do not deter discussion of the legal system and those who play crucial roles within that system. The public has an undeniably strong interest in information pertaining to the legal system.[377] This also clearly includes an interest in discussing the qualifications and performance of those charged with special responsibility for the quality of justice.[378] These are matters of considerable importance to the public, as evidenced by the elaborative set of professional conduct rules and enforcement procedures designed to protect the public from incompetent and unethical lawyers.

The state has a particularly strong interest in the free flow of information relating to a lawyer's qualifications or performance in an age in which such information is routinely disseminated. Law offices are places of public accommodation that offer legal services to the public.[379] Lawyers also now routinely market their services to the public, and there are any number of online lawyer rating services through which clients can provide and learn information about a lawyer's services. Extending the protection afforded by the actual malice test to consumer information concerning lawyers furthers the state's strong interest in the dissemination of information relating to services provided by places of public accommodation. Given the public's strong interest in making informed decisions with respect to choice of counsel, there is no compelling justification for allowing the determination of what legal standard should apply to hinge on the inconsequential consideration of whether there was an ongoing "public controversy" when the defamatory statement was made.

There remains the concern raised by some courts that increasing the number of instances in which lawyers are subject to the actual malice standard might dissuade lawyers from agreeing to represent clients in difficult, unpopular, high profile, or sensational types of cases.[380] The realities of modern communication methods and modern law practice undermine the

---

[377] *See* Encyclopedia Brown Prods., Ltd. v. Home Box Office, Inc., 26 F. Supp. 2d 606, 612 (S.D.N.Y. 1998) (stating that "[t]here is a particularly strong presumption of public access to [judicial] decisions as well as to the briefs and documents submitted in relation thereto"); *see also* Renee Newman Knake, *Legal Information, the Consumer Law Market, and the First Amendment*, 82 FORDHAM L. REV. 2843, 2845 (2014) (arguing "that the creation and dissemination of legal information by lawyers warrant heightened protection in certain instances").

[378] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 281 (1964) ("It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages."); Margaret Tarkington, *The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation*, 97 GEO. L.J. 1567, 1585–87 (2009) (describing speech concerning judges as core First Amendment speech).

[379] Americans with Disabilities Act, 42 U.S.C. § 12181(7)(F) (2012).

[380] *See supra* note 128 and accompanying text.

strength of this concern. The Internet, social media, and other forms of media now make it possible for even seemingly trivial matters to "go viral" and produce unwanted public attention. As a logical matter, the risk of unwanted attention and publicity would seem to be a greater deterrent to a lawyer taking on an unpopular client than the hypothetical and, frankly, remote possibility that the representation will produce a defamation claim that would be worth pursuing. In addition, the arguments underlying the professionalism paradigm and the assumption of risk arguments advanced in this Article also undermine the concerns over extending the actual malice standard. Lawyers who enter the profession today do so knowing that providing access to justice is a part of their professional responsibilities and that the public has a strong interest in the fair administration of justice. Having to establish that a defendant knew a statement was false or acted in reckless disregard of the truth or falsity of a statement seems a small burden to endure in exchange for the benefits and freedom from external regulation that lawyers enjoy.

Ultimately, classifying lawyers as public figures for purposes of defamatory statements having some clear connection or relevance to their profession would be consistent with the goal of encouraging public discussion of the legal process and the legal profession's own public statements about the profession.

CONCLUSION

The Supreme Court's line of defamation cases beginning with *New York Times v. Sullivan* have left lower courts with a confusing and sometimes contradictory set of standards to follow. At the same time, courts have long struggled with the question of whether ordinary legal principles should apply to lawyers or whether special lawyer-specific standards should apply.[381] These two realities have collided in defamation cases involving lawyers as plaintiffs, and the results have been about what one might expect. But by reviving the Supreme Court's early pronouncements on the subject of defamation law and giving full recognition to the legal profession's professed views of itself and the realities of modern practice, courts can develop more consistent and logical principles, both in general and in the special case of lawyers as plaintiffs.

---

[381] *See generally* BENJAMIN H. BARTON, THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM (2010) (advancing the thesis that when faced with a choice of possible legal rules, judges will select the one that favors the legal profession); Joseph M. Perillo, *The Law of Lawyers' Contracts Is Different*, 67 FORDHAM L. REV. 443, 443 (1998) ("The common law of contracts frequently treats lawyers differently from lay persons and even from other professionals.").