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The Involuntary Public Figure Class of *Gertz v. Robert Welch*: Dead or Merely Dormant?

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THE INVOLUNTARY PUBLIC FIGURE CLASS OF *GERTZ V. ROBERT WELCH*: DEAD OR MERELY DORMANT?

In *Gertz v. Robert Welch, Inc.*,[1] the United States Supreme Court defined the term "public figure" for purposes of the "actual malice" standard in defamation actions.[2] The Court described three classes of individuals who fit the public figure mold: persons famous or notorious enough to be public figures for all purposes, persons not generally famous but who voluntarily inject themselves into particular public controversies, and persons who are involuntarily drawn into such controversies.[3] The Court noted that public figure status is justified for the "all-purpose" and "voluntary limited-purpose" categories primarily because such persons assume the risks of closer public scrutiny.[4] However, the Court's rationale for extending public figure status to the third category—involuntary public figures—was, and remains, a mystery. The *Gertz* Court made only two passing references to the involuntary class, and failed to define it adequately.[5] Furthermore, the very existence of such a class appeared inconsistent with the Court's emphasis on "voluntariness" throughout Justice Powell's discussion.[6]

These ambiguities in *Gertz* prompted an immediate flurry of conflicting interpretations as to the meaning of the involuntary class. Two years after *Gertz*, the Court's decision in *Time, Inc. v. Firestone*[7] sparked a new round of discussion, centering on whether *Firestone* restricted the scope of the involuntary public figure class hypothesized in *Gertz*. The Court's recent decisions in *Hutchinson v. Proxmire*[8] and *Wolston v. Reader's Digest As-*

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[1] 418 U.S. 323 (1974).

[2] *See* note 11 and accompanying text *infra*.

[3] Gertz v. Robert Welch, Inc., 418 U.S. 323, 345, 351 (1974).

[4] *Id.* at 344-45.

[5] *See* notes 33-35 and accompanying text *infra*.

[6] *See* notes 30-32 and accompanying text *infra*.

[7] 424 U.S. 448 (1976).

[8] 443 U.S. 111 (1979).

sociation, Inc.,[9] have engendered still more debate about the continued existence and meaning of involuntary public figure status.

This article does not resolve the debate over involuntary public figures but argues instead that in light of the Court's pronouncements in *Firestone, Hutchinson* and *Wolston,* the involuntary class should be abolished. Part I briefly traces the evolution and significance of public figure status in defamation law, and reviews various interpretations of the involuntary public figure references in *Gertz*. Part II examines the status of the involuntary class after *Firestone, Hutchinson* and *Wolston,* and discusses the extent to which future use of the class remains logically consistent with those decisions. Finally, the article considers the merits of such a category in defamation law, concluding that the class of involuntary public figures serves no useful purpose and should be abandoned.

I. DEVELOPMENT OF THE INVOLUNTARY PUBLIC FIGURE

A. Historical Overview

The history of the "public figure" concept starts with the landmark 1964 Supreme Court decision, *New York Times Co. v. Sullivan*.[10] The Court in *New York Times* held that constitutional freedoms of speech and press require defamation plaintiffs who are "public officials" to prove not only that a defendant's alleged defamatory statements were false, but also that such statements were made with "actual malice"—that is, either with knowledge that they were false or with reckless disregard for truth or falsity.[11] The Court emphasized America's commit-

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[9] 443 U.S. 157 (1979).

[10] 376 U.S. 254 (1964). On the law of defamation prior to *New York Times, see generally* W. PROSSER, LAW OF TORTS §§ 115, 118 (4th ed. 1971); Berney, *Libel and the First Amendment—A New Constitutional Privilege*, 51 VA. L. REV. 1 (1965); Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L.Q. 581 (1964).

[11] New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). Later cases refined the meaning of "actual malice." In Garrison v. Louisiana, 379 U.S. 64 (1964), the Court stated that "only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions." *Id.* at 74. In St. Amant v. Thompson, 390 U.S. 727 (1968), the Court defined "reckless disregard for the truth" to mean subjective awareness of probable falsity: "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* at 731. *See* Gertz

ment to the principle that debate on public issues should be "uninhibited, robust, and wide-open,"[12] and concluded that imposing an "actual malice" burden on public officials was necessary to provide a necessary "breathing space"[13] for freedom of expression.

In *Curtis Publishing Co. v. Butts*[14] and *Associated Press v. Walker*,[15] a bare majority of the Court voted to extend the applicability of the *New York Times* "actual malice" standard to a new cast of characters—"public figures." Chief Justice Warren's opinion[16] in these companion cases pointed to the fading distinction between governmental and private sectors in this country and emphasized the influential role played by public figures in ordering society.[17] The opinion concluded that the public has "a legitimate and substantial interest" in the conduct of public figures and that freedom of the press to engage in uninhibited debate about the involvement of public figures in public issues and events is just as crucial as it is in the case of public officials.[18] Although seven members of the Court agreed that both Butts and Walker were public figures, no concrete tests for de-

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v. Robert Welch, Inc., 418 U.S. 323, 334 n.6 (1974); Annot., 20 A.L.R.3d 988 (1968).

[12] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[13] *Id.* at 271-72 (quoting N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963)).

[14] 388 U.S. 130 (1967). Wally Butts was the athletic director and former head football coach of the University of Georgia. He sued Curtis Publishing Co. for publishing an article in its Saturday Evening Post which accused him of conspiring to "fix" a football game between the University of Georgia and the University of Alabama. *Id.* at 135-40.

[15] 388 U.S. 130 (1967). Edwin Walker was a former Major General in the Army who had made a number of widely publicized statements opposing physical federal intervention to enforce school desegregation orders. An Associated Press news dispatch erroneously reported that Walker had taken command of a violent crowd on the University of Mississippi campus and had personally led a charge against federal marshals sent there to effectuate a court decree ordering the enrollment of a black person as a student in the University. *Id.* at 140-42.

[16] *Id.* at 130. (Warren, C.J., concurring). Although Justice Harlan announced the results in both cases, Chief Justice Warren's opinion formed the basis for the majority on the "actual malice" issue, concluding that "differentiation between 'public officials' and 'public figures' and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy." *Id.* at 163. Justices Brennan and White agreed with the Chief Justice on that question in a separate opinion. *Id.* at 172 (Brennan, J., concurring in part and dissenting in part). Justices Black and Douglas, in yet another opinion, reiterated their long-held view that publishers should have an absolute immunity from liability for defamation, but they acquiesced in the Chief Justice's reasoning in order to enable a majority of the Justices to agree on the question of the appropriate constitutional privilege for defamation of public figures. *Id.* at 170 (Black, J., concurring in part and dissenting in part). The minority (Justices Harlan, Clark, Stewart, and Fortas) would have applied to "public figures" a different standard requiring "a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.* at 155.

[17] *Id.* at 163-64.

[18] *Id.* at 164.

termining that status were advanced.[19]

In *Rosenbloom v. Metromedia, Inc.*,[20] the Court briefly extended the "actual malice" standard of *New York Times* to all "issues of public or general concern . . . ."[21] Justice Brennan, writing for the majority on this issue, said that the Court's decisions since *New York Times* had made it clear that the First Amendment's impact on state libel laws derives more from whether the allegedly defamatory publication concerns an issue of public or general interest than from any "public" or "private" label attached to the plaintiff.[22]

This issue-oriented focus was short-lived, however. In *Gertz v. Robert Welch, Inc.*,[23] Gertz, an attorney representing a family suing a police officer, was falsely charged with "engineering" the policeman's conviction of second degree murder in related criminal proceedings. The article also implied that Gertz had a criminal record and labeled him a "Leninist" and a "Communist-fronter."[24] In holding that Gertz was not a public figure, the Court repudiated *Rosenbloom* and returned to the *Butts/Walker* approach of focusing on the plaintiff, not the issue, in deciding public figure status.[25]

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[19] Chief Justice Warren described public figures simply as persons, other than public officials, who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Id.* (Warren, C.J., concurring). Justice Harlan's opinion offered somewhat more guidance, suggesting that "Butts may have attained [public figure] status by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy. . . ." *Id.* at 155. Justice Harlan stressed that both men were sufficiently well known and had sufficient access to the media to expose the falsity of the alleged defamatory statements. *Id.* Ultimately, however, he appeared to defer to the rules of common law tort as defining the limits of the "public figure" class. *Id.* at 154. Recognizing that unlike *New York Times*, the *Butts* and *Walker* actions could not be analogized to prosecutions for seditious libel, Justice Harlan sought guidance from established rules of liability with respect to compensation of persons injured by the improper performance of a legitimate activity by another. He concluded that both Butts and Walker would have been labeled "public figures" under common law tort rules. *Id.*

[20] 403 U.S. 29 (1971).

[21] *Id.* at 44. Rosenbloom, a distributor of nudist magazines, was arrested for selling allegedly obscene material. He sued a local radio station for failing to note in two of its braodcasts that the items of his inventory seized in a police raid were only "allegedly" obscene, and for making references to "the smut literature racket" and "girlie-book peddlers" in its coverage of the subsequent court proceedings. Although Rosenbloom was neither a "public official" nor a "public figure" within the meaning of the Court's previous decisions, a plurality nonetheless found the stricter *New York Times* "actual malice" standard applied to him.

[22] *Id.*

[23] 418 U.S. 323 (1974).

[24] *Id.* at 326.

[25] *Id.* at 343, 346. *But see* notes 44-45 and accompanying text *infra* for an argument that the *Gertz* "involuntary public figure" class was a partial retention of the *Rosen-*

The Court's discussion of public figures in *Gertz* proceeded in three steps. First, the Court distinguished private and public defamation plaintiffs so as to justify the imposition of a greater burden of proof on the latter group. The Court focused on the enhanced ability of public figures to counteract false statements because of their superior media access,[26] and, more importantly, their assumption of the risk of closer public scrutiny by involvement in public affairs.[27] Next, the Court distinguished between individuals whose pervasive fame or notoriety makes them public figures "for all purposes," and those who become public figures for a limited range of issues.[28] Finally, the Court analyzed Gertz' status and held that he was not a public figure.[29]

Throughout its analysis, the Court in *Gertz* emphasized the importance of "voluntariness" in the public figure equation. The Court, in justifying an "actual malice" standard for public figures, stressed that such persons generally have "voluntarily exposed themselves" to the risk of increased media exposure.[30] In addition, the Court pointed to Gertz' lack of voluntary conduct as a primary reason for refusing to label him a public figure, finding Gertz not to be an "all-purpose" public figure because clear evidence that he had pervasively involved himself in the affairs of society was lacking,[31] and not to be a "limited-purpose" public figure because he neither "thrust himself into the vortex" of the public issue nor "engaged the public's attention in an attempt to influence its outcome."[32] The words "expose," "involve," "thrust," and "engage" all point to the importance of "voluntariness" in making public figure determinations.

B. The Ambiguous Language of Gertz

Given the *Gertz* opinion's emphasis on voluntariness, the suggestion of an *involuntary* class of public figures seems out of place. Yet two passages in *Gertz* indicate that the Court contem-

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bloom issue-oriented approach. A second major holding of *Gertz* was that use of a strict liability standard against defendants who defame non-"public" individuals is unconstitutional. The Court held that the states are free to decide for themselves the appropriate standard of liability to be applied to media defamation defendants—provided that liability without fault is not imposed. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).

[26] Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974).

[27] *Id.*

[28] *Id.* at 345, 351.

[29] *Id.* at 352.

[30] *Id.* at 344.

[31] *Id.* at 352.

[32] *Id.*

plated just such a category. First, the Court stated that "[h]ypothetically, it may be possible for someone to become a public figure through no purposeful action of his own,"[33] cautioning, however, that "instances of truly involuntary public figures must be exceedingly rare."[34] Second, the Court stated later in the opinion that the category of limited-purpose public figures includes, in addition to those who voluntarily inject themselves into particular public controversies, individuals who are "drawn into" such controversies.[35] This "drawn into" language suggests a broader involuntary public figure class than does the Court's earlier "lack of purposeful action" language. Nowhere else in *Gertz* was an involuntary public figure class mentioned or explained.

Since *Gertz*, commentators and courts have expressed views about the meaning of the involuntary public figure references in that decision. These views have been widely divergent, reflecting both the ambiguity of the Court's choice of words in the "involuntary" passages and the difficulty of reconciling those passages with the general tenor of the *Gertz* decision. One view of the *Gertz* involuntary public figure is that the Court was not positing the existence of a third public figure class. Rather, the Court was acknowledging that not all individuals who attain public figure status make conscious decisions to accept the risk of increased media exposure. Some individuals might become public figures without *purposeful* action—they might not realize that by their positions or conduct they are running the risk of closer public scrutiny.[36] This interpretation, however, is seriously flawed. The words "purposeful action" more naturally refer to an individual's decision either to *occupy* a particular position or *engage* in conduct which will transform him into a public figure[37] than to the deliberateness of his assumption of risk. Under such a more natural reading the Court's "lack of purposeful action" passage indeed contemplates a new, "involun-

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[33] *Id.* at 345.

[34] *Id.*

[35] *Id.* at 351.

[36] This view was articulated in Schultz v. Reader's Digest Ass'n, 468 F. Supp. 551, 560 (E.D. Mich. 1979), where the court said:

> [A] qualitative distinction must be made regarding types of involuntariness. On the one hand, a person who engages in conduct that unintentionally or unknowingly attracts public attention might be classed as an involuntary public figure because in some sense he can be said to have assumed the risk of his own conduct. On the other hand, a person who becomes the object of public attention through no action of his own cannot be said in any real sense to have assumed the increased risk of defamation and would not therefore become a public figure.

[37] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345, 352 (1974).

tary" public figure class of defamation plaintiffs.

A second view treats the involuntary class as composed of celebrities who attempt to return to anonymity, but who are unable to because of persistent press attention.[38] This view finds it appropriate that such persons *remain* public figures because their power and influence may continue despite their efforts to renounce publicity.[39] The problem with this interpretation is its requirement of *past* public figure status. *Gertz* described the involuntary public figure as one who *"become[s]* a public figure through no purposeful action of his own"[40] —not as one who *remains* a public figure despite wishes to the contrary.

A third interpretation suggests that individuals may become public figures by merely having associated with persons in certain defined groups. This interpretation has been advanced in two forms. The first form contemplates a class of public figures comprised of individuals involved in or affected by the actions of public officials.[41] The second form is more expansive, encompassing associations with public *figures* as well as public officials.[42] The problem with both forms is the apparent absence of

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[38] *See* Waldbaum v. Fairchild Publications, 627 F.2d 1287 (D.C. Cir. 1980); Note, *An Analysis of the Distinction Between Public Figures and Private Defamation Plaintiffs Applied to Relatives of Public Persons*, 49 S. CAL. L. REV. 1131, 1206, 1218 (1976).

[39] Waldbaum v. Fairchild Publications, 627 F.2d 1287, 1295 n.18 (D.C. Cir. 1980) (ousted president of major consumer cooperative, in action against trade publication, held a voluntary public figure for the limited purpose of comment on his trade innovation policies).

[40] Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

[41] For adherents to this view see L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-13, at 643-44 (1978); Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 450-51 (1975). This interpretation derives from statements by Justice White in his concurring opinion in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 61-62 (1971) (White, J., concurring). Justice White felt that failure to extend the *New York Times* privilege to such individuals would often deprive the public of full information about official actions because the press would be reluctant to divulge the names of private individuals involved in an episode with officials whenever the publicity would be unfavorable. He concluded, "it is rarely informative for a newspaper or broadcaster to state merely that officials acted unless he also states the reasons for their action and the persons whom their action affected." *Id.* at 61.

[42] *See* Bamberger, *Public Figures and the Law of Libel: A Concept in Search of a Definition*, 33 BUS. LAW. 709, 722 (1978). The author states that otherwise private individuals may attain public figure status by "proximity, close relationship or involvement with those who command the public eye." *Id.* at 722. Bamberger suggests that this category would seem most closely related to the involuntary public figure class referred to by the Supreme Court in *Gertz*.

The most famous court decision supporting this view is Meeropol v. Nizer, 381 F. Supp. 29 (S.D.N.Y. 1974), *aff'd in relevant part*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978). The court held in that case that the children of Julius and Ethel Rosenberg were public figures, basing its conclusion on the "spotlight" shed on the children by reason of their parents' fame. The court said of the Meeropols, "As children of famous parents, they achieved 'general fame or notoriety in the community.' " [Citing

any principled limitation restricting the size of the resulting involuntary class. Without such limitation, the "associations" interpretation, in any form, is inconsistent with the Court's statement in *Gertz* that "involuntary public figures must be exceedingly rare."[43]

Finally, a fourth explanation of the debated *Gertz* passages is that the Court was hesitant to sever all ties to the issue-oriented *Rosenbloom* approach.[44] According to this theory, the Court inserted the "lack of purposeful action" and "drawn into" passages so that it could apply the actual malice standard to otherwise "private" defamation plaintiffs when necessary to protect media investigation into public issues of overriding importance.[45] The difficulty with this approach is that it requires the courts to make *ad hoc* determinations as to when an issue is so important that the public's interest in its discussion outweighs the concern for protection of a defamation victim who has in no

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Gertz.] Notwithstanding the fact that plaintiffs later may have renounced the public spotlight by changing their name to Meeropol, as children they were the subjects of considerable public attention." 381 F. Supp. at 34. It is clear that the Rosenberg children neither occupied positions of persuasive power and influence nor thrust themselves to the forefront on any public controversy. It would appear, therefore, that to be consistent with *Gertz*, the *Meeropol* decision must be read as holding that the plaintiffs were themselves members of the Supreme Court's hypothetical class of involuntary public figures.

Other decisions arguably supporting this interpretation of the involuntary class include: Carson v. Allied News Co., 529 F.2d 206, 210 (7th Cir. 1976) (wife of famous entertainer held to "more or less automatically [become] at least a part-time public figure herself"); Rosanova v. Playboy Enterprises, Inc., 411 F. Supp. 440, 444-45 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978) (plaintiff held a public figure because of his "voluntary contacts and involvements" with underworld figures and the Teamsters Union); Buchanan v. Associated Press, 398 F. Supp. 1196, 1202-03 (D.D.C. 1975) (plaintiff held a public figure because of his relationship with the finance committee to reelect the president, which committee itself "was surely the legitimate object of searching public scrutiny").

For examples of pre-*Gertz* decisions finding public figures "by association," see Bamberger, *supra*, at 722.

[43] Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974). The Court in *Gertz* considered extending public figure status to "individuals involved in or affected by the actions of public officials," *see* note 41 and accompanying text *supra*, but said that doing so would "significantly," and thus, presumably, unduly, extend the *New York Times* privilege. 418 U.S. at 347 n.10. Since the broader "public figure by association" concept discussed by Bamberger, *see* note 42 and accompanying text *supra*, would extend the privilege even futher, it is unlikely that the Court envisioned this as the basis of involuntary public figure status either.

[44] Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). *See* notes 20-22 and accompanying text *supra*.

[45] Note, *Public Figures, Private Figures and Public Interest*, 30 STAN. L. REV. 157, 170 n.93 (1977). *See* Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1215 (1976). Professor Hill concludes that although the Court in *Gertz* indicated that involuntary public figure status would be accorded very sparingly, "it is difficult to see how the necessary determination can be made at all except in terms of relative public interest." *Id.*

way invited attention or comment.

In sum, this variety of views illustrates the difficulty of discerning the Court's original theory about the involuntary class mentioned in *Gertz*. The meaning of the word "involuntary" in the "lack of purposeful action" passage is peculiarly elusive. It has been interpreted to mean everything from unknowing assumption of risk, to unwilling retention of risk due to past fame, to undesired or unintentional assumption of risk occasioned either by association with "public" persons or by involvement in important public issues. Furthermore, except for the interpretation viewing involuntary public figures as persons seeking to renounce past fame, none of the explanations admitting the existence of a distinct, involuntary class is subject to any principled limitation which brings it within the terms of the Court's "exceedingly rare" language in *Gertz*. These factors suggest that whatever the Court meant by the involuntary public figure references in *Gertz*, the concept was not well formulated and its boundaries were not adequately defined.

II. THE EFFECT OF THE POST-GERTZ CASES: IS THE INVOLUNTARY PUBLIC FIGURE STILL VIABLE?

A. *The Post-*Gertz *Cases*

Since the *Gertz* decision in 1974, the Supreme Court has decided three cases dealing with public figure issues, all of them denying public figure status to the plaintiffs involved. In *Time, Inc. v. Firestone*,[46] the former wife of the heir to the Firestone tire fortune sued *Time* magazine for misstating details of her divorce proceedings, and was held not to be a public figure.[47] In *Hutchinson v. Proxmire*,[48] the Court similarly refused to impose public figure status on a professor whose work was publicized as

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[46] 424 U.S. 448 (1976).

[47] Mrs. Firestone brought a lawsuit against *Time* magazine for its publication of and refusal to retract an article falsely reporting that her divorce was granted on grounds of extreme cruelty and adultery. The jury found for Mrs. Firestone, and the judgment was affirmed by the Florida appellate courts. Although the United States Supreme Court vacated and remanded the case for further proceedings, a majority of the Justices found that Mrs. Firestone was not a public figure. Relying on *Gertz*, they held in an opinion by Justice Rehnquist that Mrs. Firestone neither "assume[d] any role of especial prominence in the affairs of society" nor "thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it." *Id.* at 453.

[48] 443 U.S. 111 (1979).

an example of wasteful governmental spending.[49] Finally, in the companion case to *Hutchinson, Wolston v. Reader's Digest Association*,[50] an individual falsely named as a Soviet spy in a book written and published by the defendants was also deemed not to be a public figure.[51] This Part analyzes the effects of *Firestone, Hutchinson* and *Wolston* on the involuntary public figure class, examining to what extent lower courts may hold that a person is a member of the class consistent with these decisions.

A strong case can be made that *Time, Inc. v. Firestone*[52] destroyed the involuntary public figure class.[53] The *Firestone*

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[49] The professor alleged that he was injured by Senator Proxmire's references in a press release and in newsletters to constituents to his studies as an example of wasteful government spending, and by the award of Proxmire's "Golden Fleece of the Month Award" to the federal agencies which provided the funding for his studies. Both the district court and the Court of Appeals agreed that Hutchinson was a public figure for the limited purpose of comment on his receipt of federal funds for research projects. The Supreme Court reversed, however, holding that neither Hutchinson's successful application for federal funds nor his access to the media, as demonstrated by the fact that his response to the announcement of the Golden Fleece Award was reported by some newspapers and wire services, established that he was a public figure prior to the controversy engendered by the Golden Fleece Award. *Id.* at 134-36. The Court stated that to the extent Hutchinson's writings became a matter of controversy, it was a consequence of the Golden Fleece Award, and concluded that "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Id.* at 135. The Court found Hutchinson's access to the media insufficient to make him a public figure because that access "was limited to responding to the announcement of the Golden Fleece Award." *Id.* at 136.

In a related holding, the Court said that neither the Senator's newsletters nor his press release was protected by the speech or debate clause of the Constitution, because neither was essential to the deliberations of the Senate nor a part of the deliberative process. *Id.* at 133.

[50] 443 U.S. 157 (1979).

[51] Both courts below held that Wolston was a public figure, basing their decisions on Wolston's failure to appear before a grand jury investigating into the activities of Soviet intelligence agents in the United States, which, by way of subsequent contempt proceedings, had attracted substantial media attention. The lower courts concluded that by failing to appear, Wolston "voluntarily thrust" or "injected" himself to the forefront of the public controversy surrounding the investigation of Soviet espionage in the United States, and thereby became a "public figure" under *Gertz*. 443 U.S. at 165. The Supreme Court disagreed. It held that the mere fact that Wolston voluntarily chose not to appear before the grand jury, knowing that his action might be attended by publicity, was not decisive on the question of public figure status.

First, the Court found it difficult to characterize Wolston's conduct as voluntary. "It would be more accurate to say that he was dragged unwillingly into the controversy." *Id.* at 166. Second, it held that Wolston's role in whatever public controversy there may have been concerning the investigation of Soviet espionage was only minor. *Id.* at 167. Third, the Court rejected the contention that the "newsworthiness" of the events was sufficient in itself to make Wolston a public figure. *Id.* Finally, the Court stated that Wolston's conduct did not constitute "an attempt to influence the resolution of the issues involved." *Id.* at 168.

[52] 424 U.S. 448 (1976).

[53] For commentators espousing this view, *see, e.g.*, Ashdown, *Gertz and Firestone: A*

Court conspicuously omitted the "lack of purposeful action" and "drawn into" passages from its recap of the *Gertz* "public figure" definition,[54] evidence that the involuntary class is not a central part of the Court's conception of public figures. Additionally, the Court stated that although participants in some litigation may be legitimate public figures, "the majority will more likely resemble [Mrs. Firestone], *drawn into* a public forum largely against their will. . . ."[55] Use of the phrase "drawn into" in this passage conflicts with the Court's earlier statement in *Gertz* that a person could become a public figure by being "drawn into" a public controversy. Furthermore, defendant Time magazine advanced the argument that Mrs. Firestone achieved public figure status by becoming "embroiled in a public controversy because of her relationship to Russell Firestone,"[56] who, the magazine asserted, was himself a public figure "beyond any possible doubt."[57] Time thus sought to bring Mrs. Firestone within the "public figure by association" interpretation of the involuntary class.[58] Significantly, the Court made no mention of this argument in its decision.

Despite the above evidence, the involuntary public figure class suggested in *Gertz* may have nonetheless survived the *Firestone* decision. *Gertz* restricted limited-purpose public figure status to individuals who either voluntarily inject themselves or are drawn into "a particular public controversy."[59] Since the Court expressly found no "public controversy" in *Firestone*,[60] it was therefore not obligated to rule on the involuntary public figure

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Study in Constitutional Policy-Making, 61 MINN. L. REV. 645, 681-82 n.175 (1977); Note, *Developing Standards of Care After Time, Inc. v. Firestone: Experimentation is Needed*, 29 MERCER L. REV. 841, 849 (1978).

[54] Time, Inc. v. Firestone, 424 U.S. 448, 453 (1976).

[55] *Id.* at 457 (emphasis added).

[56] Brief for Petitioner at 35, Time, Inc. v. Firestone, 424 U.S. 448 (1976).

[57] *Id.*

[58] *See* note 42 and accompanying text *supra*. The magazine cited Meeropol v. Nizer, 381 F. Supp. 29 (S.D.N.Y. 1974), *aff'd in relevant part*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978), *see* note 42 *supra*, in support of this argument and appeared to analogize the position of Mrs. Firestone to that of the Rosenberg sons in that case. Brief for Petitioner at 35, Time, Inc. v. Firestone, 424 U.S. 448 (1976).

[59] Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974).

[60] The Court said:

> Petitioner contends that because the Firestone divorce was characterized by the Florida Supreme Court as a "cause célèbre," it must have been a public controversy and respondent must be considered a public figure. But in so doing petitioner seeks to equate "public controversy" with all controversies of interest to the public. Were we to accept this reasoning, we would reinstate the doctrine advanced in the plurality opinion in *Rosenbloom* . . . .

Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976).

issue before it. The absence of discussion on that issue does not necessarily mean a repudiation of the involuntary class; and *Firestone* contains no language expressly precluding future defamation plaintiffs from being deemed involuntary public figures.

The second of the Supreme Court's most recent public figure cases, *Hutchinson v. Proxmire*,[61] adds support to the argument that the involuntary public figure class has been abandoned. As in *Firestone*, the Court made no reference to the class, construing *Gertz* as establishing only two categories of public figures.[62] Furthermore, although the issue of Dr. Hutchinson's possible involuntary public figure status was not raised in the litigation, the professor would seem to have been a likely candidate for that status insofar as he was drawn out of the laboratory and into the public spotlight by Senator Proxmire's statements; the Court's failure to discuss the issue weighs against the involuntary category's continued viability. Nevertheless, the involuntary public figure class arguably may have survived the *Hutchinson* decision. As in *Firestone*, the Court found no "public controversy" in which the plaintiff had become involved,[63] and could therefore sidestep the "involuntary" issue without necessarily repudiating the class.

Finally, the Court's decision in *Wolston v. Reader's Digest Association*[64] further bolsters the argument that the involuntary public figure class has been abolished *sub silentio*. Once again, the Court made no mention in its decision of the involuntary class, referring only to the "all-purpose" and "voluntary limited-purpose" categories.[65] As in its *Firestone* decision, the Court ignored the defendant's argument that *Gertz* recognized both voluntary and involuntary public figure status.[66] The defendants argued that Wolston could be viewed as an involuntary public figure because of his involvement in the grand jury's investigation of Soviet espionage and his identification as a Soviet agent in a report prepared by the FBI.[67] The defendants thus sought to bring Wolston within the "involvement in important issues" interpretation of the involuntary class.[68] The Supreme Court,

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[61] 443 U.S. 111 (1979).

[62] *Id.* at 134.

[63] *Id.* at 135.

[64] 443 U.S. 157 (1979).

[65] *Id.* at 164.

[66] Brief for Respondent at 30-31, Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979).

[67] *Id.* at 32 n.7.

[68] *See* notes 44-45 and accompanying text *supra*. The American Society of Newspaper Editors and the National Newspaper Association raised the involuntary public figure is-

however, made no mention of this argument, casting the public figure issue solely in terms of " 'thrust[ing] . . . to the forefront of particular public controversies.' "[69] The Court never considered whether Wolston might have become a limited-purpose public figure by being "drawn into" the alleged public controversy involved in that case.

Although the evidence that the Court has abandoned the involuntary public figure class is significant, it remains inconclusive. As in both *Firestone* and *Hutchinson* the Court in *Wolston* avoided meeting the involuntariness issue head-on, this time by holding that the plaintiff failed to meet the "*other criteria* established in *Gertz* for public figure status."[70] Perhaps the other criterion Wolston failed to meet was "playing a major role" in the alleged public controversy, investigation of Soviet espionage in the United States. *Gertz* requires the focus of the limited-purpose public figure inquiry to be on the "nature and extent of an individual's participation in the particular controversy giving rise to the defamation."[71] This language can be read to permit involuntary status only where the plaintiff plays a *major* role in a public controversy. Defamation plaintiffs who play but a minor role in public controversies will not be deemed public figures —voluntary or involuntary. Since the Court in *Wolston* did refer to the plaintiff's minor role in the investigation of Soviet espionage, this element of the case arguably was the key factor in denying involuntary public figure status to him.

B. Viability of the Involuntary Public Figure Category

Although the Supreme Court has chosen in its three post-*Gertz* public figure cases not to abort the involuntary public figure class in explicit terms, the category's viability is fast fail-

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sue even more strongly in their *amicus curiae* brief. After quoting the "drawn into" passage from *Gertz*, the *amici* stated that a small but recognized class of persons exist who are limited public figures through their involuntary involvement in significant contemporary issues. Brief of the American Society of Newspaper Editors and the National Newspaper Association, *Amici Curiae*, In Support of Affirmance at 5, Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979). The *amici* argued that Wolston was a member of that class. Apparently attempting to distinguish *Firestone*, they emphasized that the instant case did not involve "activities of a personal or private nature;" rather, *Wolston* involved a legitimate "public controversy" surrounding "the most publicly discussed issue of the day," namely, "the congressional and grand jury investigation in the 1950's into the activities and identities of Soviet agents in the United States." *Id.* at 6.

[69] Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 165 (1979).

[70] *Id.* at 166 n.8.

[71] *Id.* at 352.

ing. The Court has consistently and conspicuously deleted involuntary public figure references from its opinions. It has avoided discussing involuntary public figure issues properly before it. In such a hostile environment, the involuntary public figure cannot long survive. Though the Court seems unwilling to deal the class a death blow, the continuation of its present course will undoubtedly have the same ultimate effect.

Given the present status of the *Gertz* involuntary public figure class in defamation law, a single question remains: does the class serve to further an accommodation of the competing interests involved in this area, or should it be abolished? The imposition of a higher, "actual malice" burden of proof on certain defamation plaintiffs is justified primarily by society's interest in assuring "uninhibited, robust, and wide-open" debate on public issues.[72] It is difficult to see how the existence of an involuntary public figure class furthers this interest. As long as there is no clear test for involuntary public figure status, the media will have no meaningful standard by which to gauge its conduct. Use of the class would therefore result only in the rare denial of liability to otherwise liable defamation defendants and do little to decrease harmful self-censorship. It does little good to provide the media an additional measure of protection if the media cannot determine when it is being protected.

Even if the Court were to develop a workable test for involuntary public figures—such as imposing a requirement of previous fame[73]—strong arguments weigh against the category's future use. The involuntary class was only tenuously suggested in *Gertz*; the Court has made no mention of it in more recent cases. It might therefore be unprincipled for the Court now to declare someone to be an involuntary public figure. If only to remain consistent with the trend of the cases, the Court ought to administer the *coup de grace* and expressly abolish the class. An even more important policy consideration is that the Court has itself weighed the equities and found "voluntariness" to be a vital requisite for public figure status. This was made clear in *Wolston* where, in the face of strong involuntary public figure arguments in the defendants' brief, the Court relied heavily on the lack of voluntariness in Wolston's conduct in deciding that he was not a public figure.[74] With such heavy stress on volun-

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[72] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[73] *See* notes 38-40 and accompanying text *supra*.

[74] The Court went so far as to justify its refusal to deem Wolston a public figure partly on the ground that he was "dragged unwillingly into the controversy" surrounding the investigation of Soviet espionage in the United States. Wolston v. Reader's Digest Ass'n,

tariness in *Gertz* and its progeny, the Court could not now consistently determine that an individual is a public figure where that voluntariness is lacking.[75]

CONCLUSION

The Court attempted in *Gertz* to define and classify "public figures," who, in order that the press would discuss their actions freely, would bear an especially high burden of proof in defamation suits. In so doing, the Court hypothesized a class of involuntary public figures which was and continues to be inconsistent with the rest of its analysis. This inconsistency has been highlighted by the Court's failure even to mention involuntary public figures in any of its more recent cases, and has increasingly shifted the focus of debate to whether the class continues to exist. The "involuntary public figure" cannot be pronounced legally dead until the Supreme Court expressly declares it so. Nevertheless, the trend of the cases, the lack of a concrete and workable test, and the Court's own resolution of the value choices in this area bode ill for the probability and propriety of the category's future use.

—*Dale K. Nichols*

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443 U.S. 157, 166 (1979).

[75] Finally, it should be noted that elimination of the involuntary class would not leave the press defenseless. Even where a plaintiff is not a public figure, he must, at a minimum, prove "fault" in order to comply with the constitutional requirements set forth in *Gertz*. *See* note 25 *supra*.