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Protecting “No Surprises” Journalism: Why Courts Should Preserve the Actual Malice Privilege for News Media that Include the Subject’s Response to Allegations of Misconduct

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PROTECTING “NO SURPRISES” JOURNALISM: WHY COURTS SHOULD PRESERVE THE ACTUAL MALICE PRIVILEGE FOR NEWS MEDIA THAT INCLUDE THE SUBJECT’S RESPONSE TO ALLEGATIONS OF MISCONDUCT

Zachary R. Cormier*

ABSTRACT

The recent onset of the “fake news” era has brought with it a wave of public discussion about the importance of ethical journalism. The sheer volume of misinformation from non-traditional online sources has had the corollary effect of also reducing the trust of many in traditional news sources. This is especially the case when the report involves alleged misconduct or scandal, which stands to potentially benefit opponents of the subject person or organization. Traditional news sources have fought vigorously to both differentiate “fake news” and reinstate public trust in sources committed to ethical journalism. But what exactly is “ethical journalism”? Do recognized legal protections relating to free speech and free press rights at all encourage ethical journalism over tactics used by those peddling fake news?

The Society of Professional Journalists summarizes the concept well in providing simply that: “Ethical journalism should be accurate and fair.” A key tenet in ensuring both accuracy and fairness is the principle that a journalist should “diligently seek” out the person or organization that is the “subject” of a developing news report “to allow them to respond to criticism or allegations of wrongdoing.” This principle is referred to by many as the “no surprises rule” because it gives the subject a “fair chance to refute the facts” for publication. The Washington Post goes so far as to say in its current Policies and Standards that “[n]o story is fair if it covers individuals or organizations that have not been given the opportunity to address assertions or claims about them made by others.” It is this fundamental “discipline of verification” that “separates journalism from other forms of communication such as propaganda, advertising, fiction, or entertainment.”

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* First Amendment Fellow at the Arizona State University, Sandra Day O’Connor College of Law. I want to thank the colleagues, friends, and family that helped in talking through the research and ideas that led to this Article. I am especially grateful for the excellent work that the editors of the *SMU Law Review* did in editing the Article.

According to core principles established by the United States Supreme Court in a line of relevant cases, the free speech and free press rights guaranteed by the First Amendment should incentivize the “no surprises rule” and most often protect news media that include the subject person’s response to allegations of misconduct in the published report. Specifically, in most reports involving a public controversy, the news media defendant should be protected by the “actual malice privilege” in a subsequent libel lawsuit brought by the subject person because such person qualifies as a “limited purpose public figure.” However, a lingering dicta observation made in one Supreme Court opinion in this relevant line of cases has created the potential for confusion on this point. Perhaps even more problematic are two artificial self-defense-based exceptions to the actual malice privilege that have been established in two federal circuits, which remove protection of the news media in many relevant circumstances. These exceptions have only become more confused and conflated as they have spread.

Given the increasing need to protect and encourage ethical journalism in the online age, and the recent interest from some members of the Supreme Court in reevaluating the scope of the actual malice privilege itself, consideration of the issue is critical at this time. This Article demonstrates that, in most circumstances involving a public controversy, a news media defendant should be protected by the actual malice privilege in a subsequent lawsuit brought by a libel plaintiff that responded to the alleged false statements in a published report. In sum, this Article shows why such a libel plaintiff should be considered a limited purpose public figure.

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I. INTRODUCTION

THE recent onset of the “fake news” era has brought with it a wave of public discussion about the importance of ethical journalism.¹ The sheer volume of misinformation from non-traditional online sources

1. See Richard L. Hasen, *How to Keep the Rising Tide of Fake News from Drowning Our Democracy*, N.Y. TIMES (Mar. 7, 2022), <https://www.nytimes.com/2022/03/07/opinion/>

has had the corollary effect of also reducing the trust of many in traditional news sources.² This is especially the case when the report involves alleged misconduct or scandal, which stands to potentially benefit opponents of the subject person or organization. Traditional news sources have fought vigorously to both differentiate “fake news” and reinstate public trust in sources committed to ethical journalism.³ But, what exactly is “ethical journalism”? Do recognized legal protections relating to free speech and free press rights at all encourage ethical journalism over tactics used by those peddling fake news?

The Society of Professional Journalists summarizes the concept well in providing simply that, “Ethical journalism should be accurate and fair.”⁴ A key tenet in ensuring both accuracy and fairness is the principle that a journalist should “[d]iligently seek” out the person or organization that is the “subject” of a developing news report “to allow them to respond to criticism or allegations of wrongdoing.”⁵ This principle is referred to by many as the “no surprises rule” because it gives the subject a “fair chance to refute the facts” for publication.⁶ The *Washington Post* goes so far as to say in its current “Policies and Standards” that “[n]o story is fair if it covers individuals or organizations that have not been given the opportunity to address assertions or claims about them made by others.”⁷ It is this fundamental “discipline of verification” that “separates journalism from other forms of communication such as propaganda, advertising, fiction, or entertainment.”⁸

cheap-speech-fake-news-democracy.html [https://perma.cc/KR4Q-9448]; Darrell M. West, *How to Combat Fake News and Disinformation*, BROOKINGS INST. (Dec. 18, 2017), <https://www.brookings.edu/articles/how-to-combat-fake-news-and-disinformation> [https://perma.cc/VA4A-DEK7]; Steve Inskip, *A Finder's Guide to Facts*, NPR (Dec. 11, 2016, 8:25 AM), <https://www.npr.org/2016/12/11/505154631/a-finders-guide-to-facts> [https://perma.cc/EZ7W-HRKY]; see also *A Brief History of Fake News*, U.C. SANTA BARBARA CTR. FOR INFO. TECH. & SOC'Y, <https://www.cits.ucsb.edu/fake-news/brief-history> [https://perma.cc/JW26-MNZR] (explaining the historic context of the recent rise in “fake news” commentary).

2. See Megan Schumann, “Fake News” Lowers Trust in Mainstream Media Across Party Lines, *Study Finds*, RUTGERS (June 18, 2020), <https://www.rutgers.edu/news/fake-news-lowers-trust-mainstream-media-across-party-lines-study-finds> [https://perma.cc/7MYF-NUWD]; Marlis Stubenvoll, Raffael Heiss & Jörg Matthes, *Media Trust Under Threat: Antecedents and Consequences of Misinformation Perceptions on Social Media*, 15 INT'L J. COMM'N 2765, 2765–66 (2021).

3. See, e.g., Hasen, *supra* note 1; West, *supra* note 1; Inskip, *supra* note 1.

4. *SPJ Code of Ethics*, SOC'Y PRO. JOURNALISTS, <https://www.spj.org/ethicscode.asp> [https://perma.cc/BQ7F-SX7V].

5. See *id.*

6. Adam L. Penenberg, *NYU Journalism Handbook for Students: Ethics, Law and Good Practice*, CARTER JOURNALISM INST. (2020), <https://journalism.nyu.edu/about-us/resources/ethics-handbook-for-students/nyu-journalism-handbook-for-students> [https://perma.cc/V62F-FBM4]; see also *Newsroom Standards and Ethics*, WALL ST. J., <https://news-literacy.wsj.com/standards-and-ethics> [https://perma.cc/2SL6-KH9N] (“Our commitment to due diligence is part of The Wall Street Journal’s long legacy of ‘no surprises’ journalism. That means assessing the credibility of our sources and providing an opportunity for full and fair comment before a piece is published.”).

7. *Policies and Standards*, WASH. POST, <https://www.washingtonpost.com/policies-and-standards> [https://perma.cc/FH3H-5DHH].

8. *The Elements of Journalism*, AM. PRESS INST., <https://americanpressinstitute.org/journalism-essentials/what-is-journalism/elements-journalism> [https://perma.cc/Y8HK-BN85].

Is “no surprises” journalism incentivized by free speech or free press protections? This depends on whether the First Amendment “actual malice privilege” applies to the news media members that employ such principle.⁹ In the interest of securing free speech and free press rights guaranteed by the First Amendment, the Supreme Court established the actual malice privilege to protect public discussion and reporting about government officials and public figures.¹⁰ The actual malice privilege accomplishes this by requiring a heightened burden of proof for damages in a defamation or libel claim brought by a government official or public figure.¹¹ Under the common law of most jurisdictions, a defamation or libel claim requires only that the plaintiff establish by a preponderance of the evidence that the defendant acted negligently in publishing the false statement.¹² However, under this privilege, the First Amendment requires that a government official or public figure prove by clear and convincing evidence that the alleged defamation or libel was published with “actual malice.”¹³

“Actual malice” means that the defendant published the defamatory statement either with: (1) knowledge that the defamatory statement was false; or (2) reckless disregard as to whether the statement was false.¹⁴ “Mere negligence does not suffice.”¹⁵ The government official or public figure must demonstrate that the defendant “in fact entertained serious doubts as to the truth of his publication”¹⁶ or otherwise acted with a “high degree of awareness” of “probable falsity.”¹⁷

The actual malice standard is therefore “quite purposefully” a “difficult standard to meet.”¹⁸ The First Amendment requires this high evidentiary burden so that news organizations do not self-censor reporting about government officials or public figures in fear of a lawsuit.¹⁹ Indeed, since its beginnings in *New York Times v. Sullivan*,²⁰ the Supreme Court’s actual malice privilege jurisprudence has “emphasized that the stake of the people in public business and the conduct of public officials is so great that

(citing BILL KOVACH & TOM ROSENSTIEL, *THE ELEMENTS OF JOURNALISM: WHAT NEWSPEOPLE SHOULD KNOW AND THE PUBLIC SHOULD EXPECT* (2d ed. 2007)) (explaining that “asking various sides for comment” is one of the key signals of an “objective” journalistic method).

9. See *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 510 (1991) (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964)).

10. See *id.*

11. See *id.*

12. See *Pendleton v. City of Haverhill*, 156 F.3d 57, 66 (1st Cir. 1998) (“Under the taxonomy developed by the Supreme Court, private plaintiffs can succeed in defamation actions on a state-set standard of proof (typically, negligence), whereas the Constitution imposes a higher hurdle for public figures and requires them to prove actual malice.”); *Brown v. Kelly Broad. Co.*, 771 P.2d 406, 424–25 (Cal. 1989) (providing survey of defamation requirements amongst the states and determining that the “near unanimous” rule is that a private figure only needs to prove negligence in support of a defamation claim).

13. *Masson*, 501 U.S. at 510.

14. *Id.*

15. *Id.*

16. *Id.* (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)).

17. *Id.* (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)).

18. *Biro v. Condé Nast*, 963 F. Supp. 2d 255, 277 (S.D.N.Y. 2013).

19. *Id.*

20. See generally *N.Y. Times v. Sullivan*, 376 U.S. 254, 279–83 (1964).

neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies.”²¹ The accepted cost of this protection is that government officials and public figures are much more likely to lose defamation and libel claims, even when the statements turned out to be false and damaging.²² As the Supreme Court emphasized in the pivotal case of *Gertz v. Robert Welch, Inc.*,

[The actual malice privilege] administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander. And it exacts a correspondingly high price from the victims of defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the [privilege].²³

Following a series of conflicted opinions in the early development of the Supreme Court’s actual malice privilege jurisprudence, the Supreme Court established the fundamental rule in *Gertz* that public interest alone does not dictate the applicability of the privilege.²⁴ Rather, the Supreme Court established four categories of “figures” in *Gertz*, and held that the applicability of the privilege will depend upon which of these categories the plaintiff fits within: (1) government officials; (2) generally famous public figures; (3) limited purpose public figures; or (4) private figures.²⁵ The actual malice privilege will almost always apply to statements about government officials and public figures (both generally famous and limited purpose),²⁶ and will almost never apply to statements about truly private figures.²⁷ The challenging analysis in future cases would involve the third category: who qualifies as a limited purpose public figure?

A limited purpose public figure is defined in *Gertz* as a person who, though not generally famous or influential, has achieved some public notoriety in relation to a particular public controversy because she has “thrust” herself “to the forefront” of the controversy “in order to influence the resolution of the issues involved.”²⁸ The Supreme Court justified application of the actual malice privilege to the limited purpose public figure in *Gertz* because her choice to “thrust” herself to the “forefront” of a particular controversy in order to influence public opinion established two points: (1) sufficient access to the news media as a measure of “self-help” against defamation or libel; and (2) a demonstrated acceptance of an “assumed

21. *St. Amant*, 390 U.S. at 731–32.

22. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *St. Amant*, 390 U.S. at 731–32.

23. *Gertz*, 418 U.S. at 342.

24. *See id.* at 345–47.

25. *See id.* at 343–48, 351–52.

26. *See id.* at 343–45, 351–52.

27. *See id.* at 345–48; *see also, e.g.*, *Talley v. Time, Inc.*, 923 F.3d 878, 898 n.20 (10th Cir. 2019) (“In *Gertz*, the Court held that the actual malice standard applies to public figures but does not apply in cases brought by private-figure plaintiffs.” (citing *Gertz*, 418 U.S. at 345–48)).

28. *Gertz*, 418 U.S. at 345.

role” in the controversy which invites public comment.²⁹ The actual malice privilege does not apply to “all aspects” of a limited purpose public figure’s “life,” but rather only to statements that are germane to her participation in the controversy at issue.³⁰

The Supreme Court cases that have confirmed the enduring framework to determine who qualifies as a limited purpose public figure were all decided in a five-year span: *Gertz v. Robert Welsh, Inc.* (1974);³¹ *Time, Inc. v. Firestone* (1976);³² *Wolston v. Reader’s Digest Ass’n* (1979)³³ and *Hutchinson v. Proxmire* (1979).³⁴ These opinions stand as a close-knit grouping of guidelines from the Supreme Court on the limited purpose public figure determination. As such, courts should rightly consider principles from all four cases when determining an appropriate comprehensive analysis—with *Gertz* being the bedrock.

The Supreme Court’s analysis in *Gertz* and *Wolston* clearly established that the primary action which qualifies a libel plaintiff as a limited purpose public figure is engagement with the news media to comment on the public controversy at issue.³⁵ This makes sense in the very definition of the limited purpose public figure provided by *Gertz* because, at least before the dawn of social media, the only conceivable public “vortex” was the reporting of the news media, and the only way that someone could “thrust” herself into such “vortex” was by engaging with the news media for comment.³⁶ Moreover, engagement with the news media confirmed both that the libel plaintiff had the opportunity to pursue “self-help” against any false statements and had “assumed” a public “role” which invited public comment.³⁷ However, a dicta observation made by Chief Justice Burger in *Hutchinson* has provided the opportunity for confusion amongst courts when the public controversy that the libel plaintiff is commenting upon through the news media is her own alleged misconduct.³⁸

Citing *Wolston*, Chief Justice Burger observed rather flatly that “those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.”³⁹ This observation

29. *See id.* at 344–45.

30. *See id.* at 352; *see also* Waldbaum v. Fairchild Publ’ns, Inc., 627 F.2d 1287, 1298 (D.C. Cir. 1980).

31. *Gertz*, 418 U.S. at 352.

32. *Time, Inc. v. Firestone*, 424 U.S. 448, 453 (1976).

33. *Wolston v. Reader’s Dig. Ass’n*, 443 U.S. 157, 161, 164 (1979).

34. *Hutchinson v. Proxmire*, 443 U.S. 111, 134 (1979). *See also* *Biro v. Condé Nast*, 963 F. Supp. 2d. 255, 270 (S.D.N.Y. 2013) (explaining that “*Gertz* remains the leading Supreme Court case on the contours of the public figure designation”); *Anaya v. CBS Broad. Inc.*, 626 F. Supp. 2d 1158, 1191 (D.N.M. 2009) (“*Hutchinson v. Proxmire* and *Wolston v. Reader’s Digest Association* represent the most recent Supreme Court pronouncements on what constitutes a public figure. The Supreme Court issued those opinions in 1979. In other words, the Supreme Court has not elaborated further on the public-figure question in nearly thirty years.”).

35. *See infra* Section II.D.3; *Gertz*, 418 U.S. at 352; *Wolston*, 443 U.S. at 167.

36. *See Gertz*, 418 U.S. at 352.

37. *Id.* at 344–45.

38. *See infra* Section II.D.2; *Hutchinson*, 443 U.S. at 135–36.

39. *Hutchinson*, 443 U.S. at 135 (citing *Wolston*, 443 U.S. at 167–68).

communicated his apparent concern for a situation where the public’s interest in the libel plaintiff had risen through reporting of the alleged false statements about the libel plaintiff herself.⁴⁰ If strictly applied, Chief Justice Burger’s observation would discount or remove a libel plaintiff’s response to such alleged false statements through the news media from the determination of whether she qualifies as a limited purpose public figure. This observation, however, did not actually decide the *Hutchinson* case—a separate *Gertz* analysis did.⁴¹

Chief Justice Burger’s observation is concerning because, unlike *Gertz*, *Firestone*, or *Wolston*, it would focus upon the actions of the libel defendant with respect to the potential controversy at issue rather than the actions of the libel plaintiff in choosing to inject her own statements into the debate about the controversy. Such focus would ignore the very purpose of the actual malice privilege and its substantive justifications in *Gertz* as applied to limited purpose public figures. The observation would also contradict, or at least miss, a number of other important holdings and factual considerations from *Gertz*, *Firestone*, and *Wolston*.⁴² The most problematic consequence however is that the generalized phrasing of the observation creates the potential to deny a news media defendant protection under the actual malice privilege even though the alleged false statements were provided by a third-party source. The *Hutchinson* case did not involve any news media defendants, but rather an overzealous U.S. Senator that engaged in extensive tactics to stir up attention so as to ridicule a publicly funded researcher (in a particularly mean-spirited fashion).⁴³

Though a misguided emphasis or application of Chief Justice Burger’s dicta observation from *Hutchinson* remains an issue, even more problematic is that the D.C. Circuit and Fourth Circuit have created two self-defense-based exceptions to the limited purpose public figure category without any real substantive basis in the *Gertz* line of cases.⁴⁴ Contrary to the core definition of the limited purpose public figure in *Gertz*, these exceptions provide that a libel plaintiff may engage news media (even extensively) in response to alleged false statements without qualifying as a limited purpose public figure in the name of reputational self-defense.⁴⁵ These exceptions incorrectly elevate individual reputational interests over free speech and free press rights that are inherent in the protection of public discourse. And again, these exceptions remove the actual malice privilege from a news media defendant in the same fashion as the third-party that actually provided the alleged false statements. Compounding matters is the fact that the First Circuit and other courts have noted or discussed

40. *See id.*

41. *See id.* at 134–36.

42. *See infra* Section II.D.3.

43. *See Hutchinson*, 443 U.S. at 114–18.

44. *See infra* Sections II.F.1–2; *Foretich v. Cap. Cities/ABC, Inc.*, 37 F.3d 1541, 1558–59 (4th Cir. 1994); *Clyburn v. News World Commc’ns, Inc.*, 903 F.2d 29, 32 (D.C. Cir. 1990).

45. *See supra* note 44 and accompanying text.

these exceptions in a manner which confuses their initial limitations and otherwise conflates their potential application.⁴⁶

Given the increasing need to protect and encourage ethical journalism in the online age, and the recent interest from some members of the Supreme Court in reevaluating the scope of the actual malice privilege itself, consideration of the issue is critical at this time.⁴⁷ This Article will demonstrate that, in most circumstances involving a public controversy, a news media defendant should be protected by the actual malice privilege in a subsequent lawsuit brought by a libel plaintiff that responded to the alleged false statements in a published report. In sum, this Article will show why such libel plaintiff should be considered a limited purpose public figure.⁴⁸ This Article will: (1) discuss the relevant principles and holdings from the *Gertz* line of cases; (2) explain how a comprehensive consideration of the *Gertz* line of cases should lead courts to determine that a libel plaintiff qualifies as a limited purpose public figure in most cases if she chooses to respond to alleged false statements through the news media; (3) provide four specific factual distinctions which should further prevent courts from applying *Hutchinson's* dicta observation to news media defendants; (4) challenge the two problematic self-defense-based exceptions that have developed amongst a minority of the circuits; and (5) provide a brief conclusion.

46. See *infra* Section II.F.3; *Llubes v. Uncommon Prods., LLC*, 663 F.3d 6, 19 (1st Cir. 2011); *Pendleton v. City of Haverhill*, 156 F.3d 57, 68 (1st Cir. 1998); *Franchini v. Bangor Publ'g Co.*, 560 F. Supp. 3d 312, 330–31 (D. Me. 2021) (quoting *Llubes*, 663 F.3d at 18; *Clyburn*, 903 F.2d at 32; *Pendleton*, 156 F.3d at 68) (recognizing, but not applying, the “limited” self-defense privilege rule from *Llubes*, while also quoting the truthful-response allowance from *Clyburn* and basic approval of a self-defense privilege concept from *Pendleton*); *Am. Fam. Mut. Ins. Co. v. Edgar*, No. 92-cv-779, 1995 WL 370221, at *6 (Wis. Cir. Ct. Jan. 25, 1995) (referencing the plaintiff’s citations to both the *Clyburn* truthful-response allowance and *Foretich* self-defense privilege before generally rejecting the plaintiff’s qualification as a limited purpose public figure). *But see* *Barbash v. STX Fin., LLC*, No. 20-cv-123, 2020 WL 6586155, at *6 (S.D.N.Y. Nov. 10, 2020) (citing *Wolston*, 443 U.S. at 167) (rejecting the plaintiff’s reliance upon *Wolston* in large part because the plaintiff consciously discussed the controversy with the news media after initial articles and her court case).

47. See *Coral Ridge Ministries Media, Inc. v. S. Poverty L. Ctr.*, 142 S. Ct. 2453, 2454–55 (2022) (Thomas, J., dissenting from denial of certiorari) (encouraging reconsideration of the actual malice privilege); *Berisha v. Lawson*, 141 S. Ct. 2424, 2424–26 (2021) (Thomas & Gorsuch, JJ., dissenting from denial of certiorari) (encouraging reconsideration of the actual malice privilege); *McKee v. Cosby*, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in the denial of certiorari) (encouraging reconsideration of the actual malice privilege in a case with more “appropriate” factual circumstances).

48. This Article’s analysis will assume that the libel plaintiff at issue is *not* a government official or generally famous public figure, as such a plaintiff would already be required to prove actual malice regardless of whether she had responded to allegations through news media. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344–45 (1974). This Article will also assume for purposes of analysis that the alleged misconduct or scandal at issue would be considered a “public controversy.” See, e.g., *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1296–97 (D.C. Cir. 1980) (discussing what type of issues might be considered to be a “public controversy” for purposes of the limited purpose public figure category).

II. ANALYSIS

A. FOUNDATION AND DEVELOPMENT OF THE ACTUAL MALICE PRIVILEGE

When the Supreme Court first adopted the actual malice privilege in 1964 within the landmark case of *New York Times, Co. v. Sullivan*, the privilege extended only to protection of statements made about government officials.⁴⁹ Specifically, the Supreme Court held that the First Amendment’s “guarantees” of free speech and a free press “require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”⁵⁰

The Supreme Court however quickly extended the actual malice privilege in 1967 to non-government officials by way of two cases. In *Time, Inc. v. Hill*, the Supreme Court held that the actual malice privilege applied to a false light claim brought by a private figure when the subject of the false light claim involved a matter of “public interest.”⁵¹ In *Curtis Publishing Co. v. Butts*, the Supreme Court held that the privilege also applied in libel cases when the non-governmental plaintiff was as a “public figure.”⁵² The plurality opinions in *Butts* explored the potential types of “public figures” that might qualify for application of the privilege.⁵³ Justice Harlan’s opinion noted two components which comprised the essence of a “public figure” for purposes of the privilege: (1) the person “commanded” public interest at the time of the publication; and (2) the person had “sufficient access” to the media to be able to address the alleged defamatory statements as a means of “self-defense.”⁵⁴ Justice Harlan also identified two potential paths to becoming a “public figure” in that one of the plaintiffs “may have attained that status by position alone,” whereas the other “by his purposeful activity amounting to a thrusting of his personality into the ‘vortex’ of an important public controversy.”⁵⁵ These potential categories of public figures would become important to the eventual framework established in *Gertz*.

The evolution of the Supreme Court’s actual malice privilege jurisprudence then briefly stalled in conflict in the 1971 case of *Rosenbloom v. Metromedia*, wherein a plurality opinion authored by Justice Brennan attempted to make the public versus private figure libel plaintiff distinction irrelevant by redefining the privilege’s application to include any statements that pertained to a matter of public interest.⁵⁶ Justice Brennan

49. *N.Y. Times, Co. v. Sullivan*, 376 U.S. 254, 279–83 (1964).

50. *Id.* at 279–80.

51. *Time Inc. v. Hill*, 385 U.S. 374, 380–91 (1967).

52. *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 154–55 (1967).

53. *See id.* at 154–55, 163–65.

54. *See id.* at 155 (citation omitted).

55. *See id.* (citation omitted).

56. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 34–35, 43–44 (1971), *overruled by Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). “[T]he question” presented in *Rosenbloom* was whether the *Sullivan* “knowing-or-reckless-falsity standard [(the actual malice privilege)]

believed that the Supreme Court's opinions since *Sullivan* "disclosed the artificiality, in terms of the public's interest, of a simple distinction between 'public' and 'private' individuals or institutions."⁵⁷ He argued that "[i]f a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved."⁵⁸

B. *GERTZ V. ROBERT WELCH, INC.* – CONFIRMATION OF THE
PERSON-BASED PRIVILEGE

Justice Brennan's *Rosenbloom* plurality holding that the public versus private figure distinction should be irrelevant to the actual malice privilege was overturned three years later in *Gertz v. Robert Welch, Inc.*⁵⁹ Elmer Gertz was a lawyer that represented a family in their civil lawsuit against the Chicago police officer that had shot and killed their son in 1968.⁶⁰ Separate criminal charges were also pending against the police officer.⁶¹ Though the civil lawsuit and criminal case against the police officer garnered attention from the news media, Gertz did not discuss either case with reporters.⁶² Gertz was simply a lawyer working a high-profile civil case.⁶³

The police officer was eventually convicted of second-degree homicide in the criminal case.⁶⁴ Robert Welsh, Inc. (RWI) published a monthly magazine titled the "American Opinion."⁶⁵ RWI released a series of articles that warned of a "nationwide conspiracy" to discredit law enforcement in support of an eventual Communist takeover of the United States.⁶⁶ In 1969, RWI published an article in this series which falsely claimed that Gertz had been the "architect" behind a plot to "frame[]" the police officer for the shooting as "part of the Communist campaign against the police."⁶⁷ The article also falsely stated that Gertz had a lengthy criminal record and had several "Leninist" and "Communist" affiliations.⁶⁸

Gertz filed suit against RWI for libel.⁶⁹ The jury returned a verdict in favor of Gertz which did not include an application of the actual malice privilege because Gertz had not been considered a public figure.⁷⁰ The district court, however, issued a judgment in favor of RWI notwithstanding

applies in a state civil libel action brought not by a 'public official' or a 'public figure' but by a private individual for a defamatory falsehood uttered in a news broadcast by a radio station about the individual's involvement in an event of public or general interest." *Id.* at 31.

57. *Id.* at 41.

58. *Id.* at 43.

59. *Gertz*, 418 U.S. at 345–47.

60. *Id.* at 325.

61. *Id.*

62. *Id.* at 326.

63. *See id.*

64. *Id.* at 325.

65. *Id.*

66. *Id.*

67. *Id.* at 325–26.

68. *Id.* at 326.

69. *Id.* at 327.

70. *Id.* at 328–29.

the verdict, holding that the actual malice privilege should have applied to Gertz regardless of his status as a public figure because RWI’s article concerned a public issue.⁷¹ The Seventh Circuit Court affirmed, citing the “intervening decision” in *Rosenbloom*.⁷²

On appeal, Justice Powell wrote for a majority of the Supreme Court in finding that the *Rosenbloom* plurality had incorrectly “abjured” the “distinction between public officials and public figures on the one hand and private individuals on the other.”⁷³ Specifically, he took issue with the necessary result of the *Rosenbloom* rule: “[A] private citizen involuntarily associated with a matter of general interest has no recourse for injury to his reputation unless he can satisfy the demanding requirements of the [*Sullivan*] test.”⁷⁴ Justice Powell and the majority affirmed the established application of the actual malice privilege to “public officials” and “public persons.”⁷⁵ However, “the state interest in compensating injury to the reputation of private individuals” required a “different rule” for at least two fundamental reasons.⁷⁶

First, government officials and public figures have a realistic chance at “self-help” since they “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” (referred to at times hereafter as the “self-help consideration”).⁷⁷ Second, “there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs” in that government officials and most all public figures have voluntarily “assumed roles of especial prominence in the affairs of society” which invite public comment, whereas private persons have not (referred to at times hereafter as the “assumed role consideration”).⁷⁸ Justice Powell held that “so long as [States] do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.”⁷⁹ In sum, “the actual malice standard” established under the First Amendment “applies to public figures but does not apply in cases brought by private-figure plaintiffs.”⁸⁰

Justice Powell’s opinion in *Gertz* also analyzed the remaining three categories of persons to which the actual malice privilege would apply: (1) the government official; (2) the generally famous public figure; and (3) the limited purpose public figure.⁸¹ The privilege applies broadly to government

71. *Id.* at 329.

72. *Id.* at 330.

73. *Id.* at 337.

74. *Id.*

75. *See id.* at 342–43.

76. *Id.* at 343.

77. *Id.* at 344.

78. *Id.* at 344–45.

79. *Id.* at 347.

80. *Talley v. Time, Inc.*, 923 F.3d 878, 898 n.20 (10th Cir. 2019) (citing *Gertz*, 418 U.S. at 345–48).

81. *See Gertz*, 418 U.S. at 343–45, 351–52.

officials.⁸² Those who decide “to seek governmental office must accept certain necessary consequences of that involvement in public affairs.”⁸³ One such “consequence[]” is that the government official “runs the risk of closer public scrutiny than might otherwise be the case.”⁸⁴ This “is not strictly limited to the formal discharge of official duties.”⁸⁵ “[T]he public’s interest extends to ‘anything which might touch on an official’s fitness for office. . . .’”⁸⁶

Justice Powell then observed that “[t]hose classed as public figures stand in a similar position.”⁸⁷ There are, however, two different kinds of public figures.⁸⁸ “Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes.”⁸⁹ These are generally famous public figures.⁹⁰ “More commonly,” however, “those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.”⁹¹ These are limited purpose public figures.⁹² Both of these types of public figures “invite attention and comment,” just to a different extent, and as such, require a different application of the privilege to their public and private lives.⁹³ A generally famous public figure is a public figure “for all purposes and in all contexts,”⁹⁴ whereas limited purpose public figures “become[] a public figure for a limited range of issues” related to the “particular public controversy” into which she has “voluntarily inject[ed]” herself.⁹⁵

Justice Powell and the majority found that Gertz was not a public figure for purposes of the actual malice privilege.⁹⁶ Though Gertz had published articles and books on legal subjects, and had otherwise served in positions in local civil service and professional groups, Gertz “had achieved no general fame or notoriety in the community.”⁹⁷ Indeed, “[n]one of the prospective jurors called at the trial had ever heard of [Gertz] prior to this litigation, and [RWI] offered no proof that this response was atypical of the local population.”⁹⁸ Gertz was not a generally famous public figure.⁹⁹

Justice Powell’s only substantive point within the limited purpose public figure analysis was to say that Gertz “never discussed either the criminal or

82. *See id.* at 344–45.

83. *Id.* at 344.

84. *Id.*

85. *Id.*

86. *Id.* at 344–45.

87. *Id.* at 345.

88. *See id.*

89. *Id.*

90. *See id.*

91. *Id.*

92. *See id.*

93. *See id.*

94. *Id.* at 351.

95. *Id.*

96. *Id.* at 352.

97. *Id.* at 351–52.

98. *Id.* at 352.

99. *Id.*

civil litigation with the press and was never quoted as having done so.”¹⁰⁰ Though Gertz was involved in a matter that was newsworthy, “[h]e plainly did not thrust himself into the vortex of this public issue” and did not “engage the public’s attention in an attempt to influence its outcome.”¹⁰¹ As such, Gertz was not a limited purpose public figure.¹⁰² Since Gertz was a private figure, the actual malice privilege did not apply to his libel claim against RWI.¹⁰³

C. FIRESTONE, WOLSTON, AND HUTCHINSON – WHO IS NOT A LIMITED PURPOSE PUBLIC FIGURE UNDER GERTZ

I. Time, Inc. v. Firestone—*Required Participation in a Newsworthy Legal Proceeding to Obtain Legal Relief Does Not Make Someone a Limited Purpose Public Figure*

After what appears to have been a rather tumultuous three-year marriage, Mary Firestone and Russell Firestone (heir to the Firestone tire fortune) separated in 1964.¹⁰⁴ Mary Firestone filed a complaint in a Florida state court for alimony (unconnected with divorce, at least initially) against Russell Firestone, to which Russell Firestone counterclaimed for divorce based upon Mary Firestone’s alleged “extreme cruelty and adultery.”¹⁰⁵ Given the notoriety of the Firestone family and the salacious nature of the allegations involved, the stage was set for a rather high-profile divorce proceeding, which the Supreme Court of Florida would later describe as a “veritable cause celebre in social circles across the country.”¹⁰⁶

By the trial court’s own recounting of the proceedings in its final order, testimony was offered against Mary Firestone, which accused her of “extramarital escapades” that were “bizarre” and of such “an amatory nature” that they would “have made Dr. Freud’s hair curl.”¹⁰⁷ Similar testimony was offered against Russell Firestone, alleging that he “was guilty of bounding from one bedpartner to another with the erotic zest of a satyr.”¹⁰⁸ Though the trial court discounted much of this testimony as “unreliable,” it held “that the marriage should be dissolved” because neither party had shown “the least susceptibility to domestication.”¹⁰⁹ The trial court also granted alimony for Mary Firestone.¹¹⁰

100. *See id.*

101. *Id.*

102. *See id.*

103. *Id.*

104. *See* Time, Inc. v. Firestone, 424 U.S. 448, 450 (1976).

105. *Id.*

106. *Id.* at 485 (Marshall, J., dissenting) (quoting Firestone v. Time, Inc., 271 So.2d 745, 751 (Fla. 1972)).

107. *Id.* at 450.

108. *Id.* at 450–51.

109. *Id.* at 451.

110. *Id.*

Mary Firestone held “a few press conferences” in an “attempt to satisfy inquiring reporters” during the alimony/divorce proceedings.¹¹¹ The Supreme Court of Florida described the press conferences as follows:

Unlike an actress who might grant interviews relating to the opening of her new play, (Mrs. Firestone) was not seeking public patronage. Publicity, or sympathy, perhaps, but not patronage. Irrespective of her subjective motives, objectively she was merely satiating the appetites of a curious press.¹¹²

Defendant Time, Inc., (Time) published a short report in the ““Milestones”” section of its magazine one week after the trial court’s order:

DIVORCED. By Russell A. Firestone Jr., 41, heir to the tire fortune: Mary Alice Sullivan Firestone, 32, his third wife; a onetime Palm Beach schoolteacher; on grounds of extreme cruelty and adultery; after six years of marriage, one son; in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extramarital adventures on both sides, said the judge, “to make Dr. Freud’s hair curl.”¹¹³

Mary Firestone took issue with the report’s description of the final grounds for the divorce order since the trial judge did not accept the “extreme cruelty” or “adultery” claims made by Russell Firestone.¹¹⁴ She filed a libel action against Time after it refused to retract the report.¹¹⁵ The jury returned a verdict in her favor in the amount of \$100,000, which was affirmed on appeal by both the Court of Appeals of Florida and the Supreme Court of Florida.¹¹⁶ A central holding by each of these courts was that Mary Firestone was not a public figure who was required to prove actual malice in support of her libel claim.¹¹⁷

The Supreme Court affirmed in an opinion authored by Justice Rehnquist.¹¹⁸ It was agreed that Mary Firestone was not a generally famous public figure because she had not herself “assume[d] any role of especial prominence in the affairs of society.”¹¹⁹ Time, however, argued that she had become a limited purpose public figure because the divorce proceeding that she had initiated became a “cause celebre.”¹²⁰ Justice Rehnquist rejected this argument for two reasons.¹²¹

First, the public notoriety of the proceeding itself could not determine whether the actual malice privilege applied, as *Gertz* had rejected a rule

111. *Id.* at 454 n.3.

112. *Id.* at 488 n.1 (Marshall, J., dissenting) (quoting *Firestone v. Time, Inc.*, 271 So. 2d 745, 752 (Fla. 1972)).

113. *Id.* at 451–52.

114. *See id.* at 458.

115. *Id.* at 452.

116. *Id.*

117. *See id.* at 454–55; *see also id.* at 484–85 (Marshall, J., dissenting).

118. *Id.* at 455.

119. *Id.* at 453.

120. *Id.* at 454.

121. *See id.* at 454–55.

requiring actual malice solely based upon the public’s interest in the issue.¹²² Second, Justice Rehnquist found that Mary Firestone’s act of seeking legal relief through the court did not equate to her “freely choos[ing] to publicize issues as to the propriety of her married life” as a limited purpose public figure might.¹²³ “She was compelled to go to court by the State in order to obtain legal release from the bonds of matrimony.”¹²⁴ Since she could only obtain her legal relief by initiating a judicial proceeding, her decision to initiate such proceeding was “no more voluntary in a realistic sense than that of the defendant called upon to defend [her] interests in court.”¹²⁵ She was, therefore, not a limited purpose public figure because her legal complaint was not an attempt to “thrust herself to the forefront of any public controversy in order to influence the [controversy’s] resolution.”¹²⁶

Since communications with the press were the only factor for the *Gertz* court in evaluating whether a person qualified as a limited purpose public figure,¹²⁷ it is curious upon first review that Justice Rehnquist only addressed the potential effect of Mary Firestone’s multiple press conferences in a single footnote.¹²⁸ In this footnote, Justice Rehnquist explained that he did not “think the fact that [she] may have held a few press conferences during the divorce proceedings in an attempt to satisfy inquiring reporters converts her into a ‘public figure.’”¹²⁹ He justified this conclusion by specifically finding that “[s]uch interviews should have had no effect upon the merits of the legal dispute between [Mary Firestone] and [Russell Firestone] or the outcome of that trial, and we do not think it can be assumed that any such purpose was intended.”¹³⁰ He also did not find that such press conferences were used by her to influence some other separate public issue or controversy.¹³¹

Justice Rehnquist’s treatment of Mary Firestone’s press conferences could only be interpreted as a commitment to limiting the public controversy at stake in his actual malice analysis to the adjudication of the formal legal claims themselves—regardless of the fact that the news media and public were very interested in the conduct of the Firestones beyond how the divorce proceeding was decided.¹³² He also at least separately suggested in the body of the opinion that a celebrity divorce proceeding was not the type of “public controversy” that the Supreme Court was prepared to acknowledge under the new *Gertz* rule (at least at that time).¹³³

122. *Id.* at 454. Justice Rehnquist also at least suggested that a celebrity divorce was not the type of “public controversy” contemplated by the new *Gertz* rule, though such suggestion did not appear to carry great weight in his final conclusions. *See id.*

123. *Id.*

124. *Id.*

125. *Id.* (quoting *Boddie v. Connecticut*, 401 U.S. 371, 376–77 (1971)).

126. *See id.* at 453.

127. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974).

128. *See Firestone*, 424 U.S. at 454 n.3.

129. *Id.*

130. *Id.*

131. *Id.*

132. *See id.* at 454–55.

133. *Id.* at 454.

Importantly, Justice Rehnquist and the majority did not analyze whether Mary Firestone's motivations to gain "[p]ublicity" or "sympathy"¹³⁴ in defense of her own reputation at stake in the divorce proceeding could render her a limited purpose public figure.¹³⁵

2. *Wolston v. Reader's Digest Ass'n—A Person Who is "Dragged" into Participating in a Required Legal Proceeding Has Not Become a Limited Purpose Public Figure*

Reader's Digest Association, Inc., (Reader's Digest) published a book in 1974 titled "KGB, the Secret Work of Soviet Agents" (the KGB Book), which claimed to chronicle the Soviet KGB's espionage "activities" since World War II.¹³⁶ The KGB Book included Ilya Wolston (Wolston) in a list of "Soviet agents identified in the United States."¹³⁷ The KGB Book's index also separately categorized Wolston as a "Soviet agent in the U.S."¹³⁸

Wolston's inclusion in the KGB Book related to his prior involvement in a special federal grand jury investigation in the late 1950s where the grand jury engaged in a "major investigation into the activities of Soviet intelligence agents in the United States."¹³⁹ As a result of the investigation, Wolston's aunt and uncle were arrested in 1957 on espionage charges and pled guilty shortly thereafter.¹⁴⁰ The grand jury continued to investigate other suspects in a potential espionage ring and eventually issued a subpoena for Wolston to appear before the grand jury in 1958.¹⁴¹ Wolston failed to appear before the grand jury (he said due to mental depression), prompting the district court to issue an order to show cause as to why Wolston should not be held in contempt of court.¹⁴² Wolston's failure to appear and the resulting order to show cause attracted the immediate "interest of the news media," including the publication of "at least seven news stories."¹⁴³

Wolston did attend the hearing set by the district court's order to show cause.¹⁴⁴ Wolston's offer to testify before the grand jury, however, was refused, which resulted in a hearing for a contempt charge against Wolston.¹⁴⁵ Wolston's pregnant wife was called to testify regarding Wolston's mental condition during the timeframe of the grand jury's subpoena.¹⁴⁶ She "became hysterical on the witness stand," which prompted Wolston to "plead guilty to the contempt charge" and end the hearing.¹⁴⁷ Wolston

134. *Id.* at 488 n.1 (Marshall, J., dissenting).

135. *See id.* at 454 n.3.

136. *Wolston v. Reader's Dig. Ass'n*, 443 U.S. 157, 159 (1979).

137. *Id.*

138. *Id.*

139. *Id.* at 161.

140. *Id.*

141. *Id.* at 161–62.

142. *Id.* at 162.

143. *Id.*

144. *Id.* at 162–63.

145. *Id.*

146. *Id.* at 163.

147. *Id.*

was given a one-year suspended sentence and three years of probation on the condition that he cooperate with the grand jury.¹⁴⁸ The news media also reported on the order to show cause hearing, resulting in at least fifteen reports published in newspapers in Washington and New York.¹⁴⁹ Wolston was, however, never “indicted for espionage.”¹⁵⁰

Wolston sued Reader’s Digest and the KGB Book author for libel related to the KGB Book’s identification of him as a Soviet spy.¹⁵¹ The dispositive issue in the case became the potential application of the actual malice privilege to Wolston as a public figure.¹⁵² It had not been contended that Wolston qualified as a generally famous public figure, as he had not “achieved” a “general fame or notoriety,” and had not otherwise “assumed” a “role of special prominence in the affairs of society as a result of his contempt citation or because of his involvement in the investigation of Soviet espionage in 1958.”¹⁵³ Wolston had led a “thoroughly private existence prior to the grand jury inquiry” and returned to such “obscurity” after his contempt sentencing.¹⁵⁴

The district court, however, held that Wolston qualified as a limited purpose public figure and granted summary judgment in favor of the defendants because Wolston failed to provide evidence to raise a genuine dispute of fact on the existence of actual malice.¹⁵⁵ The district court found that Wolston “became involved” in the public controversy regarding Soviet espionage because his decision to not appear before the grand jury “created in the public an interest in knowing about his connection with espionage.”¹⁵⁶ The D.C. Court of Appeals affirmed, similarly finding that Wolston’s decision not to appear before the grand jury was a “step[] center front into the spotlight,” which “invited attention and comment in connection with the public questions involved in the investigation of espionage.”¹⁵⁷

The Supreme Court reversed in an opinion authored by Justice Rehnquist.¹⁵⁸ Justice Rehnquist rejected the notion that Wolston had become a limited purpose public figure with respect to “Soviet espionage in the 1940’s and 1950’s” merely because he had decided to not appear before the grand jury.¹⁵⁹ Justice Rehnquist emphasized that a primary lesson from *Gertz* was that “a court must focus on the ‘nature and extent of an individual’s participation in the particular controversy.’”¹⁶⁰ Wolston had not “‘thrust’ or ‘injected’ himself into the forefront of the public controversy

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 159–60.

152. *See id.* at 164–65.

153. *Id.* at 165.

154. *Id.*

155. *Id.* at 160.

156. *Id.* at 165 (quoting *Wolston v. Reader’s Dig. Ass’n*, 429 F. Supp. 167, 177 n.33 (D.D.C. 1977)).

157. *Id.* (quoting *Wolston v. Reader’s Dig. Ass’n*, 578 F.2d 427, 431 (D.C. Cir. 1978)).

158. *Id.* at 161.

159. *Id.* at 165–67.

160. *Id.* at 167 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974)).

surrounding the investigation of Soviet espionage” as was required by the limited purpose public figure category established by *Gertz*.¹⁶¹ To the contrary, Justice Rehnquist found that “[i]t would be more accurate to say that [Wolston] was dragged unwillingly into the controversy.”¹⁶² He became involved only because “[t]he Government pursued him in [the] investigation.”¹⁶³ And though Wolston may have known that his decision not to appear before the grand jury would attract “media attention,” the mere fact that media attention may result from a particular act “is not decisive on the question of public-figure status.”¹⁶⁴

Rather, the key determination was whether Wolston took such action specifically to influence the public’s opinion with respect to the controversy.¹⁶⁵ Just as the *Gertz* court held that an attorney does not become a limited purpose public figure simply by representing clients in a newsworthy case (so long as she or he does not take additional efforts to engage the news media to influence the related public controversy),¹⁶⁶ Wolston did not become a public figure by failing to appear before the grand jury in a newsworthy investigation.¹⁶⁷ Unlike his limited footnote-analysis in *Firestone* regarding Mary Firestone’s press conferences, Justice Rehnquist emphasized here that Wolston “never discussed this matter with the press” and “limited his involvement to that necessary to defend himself against the contempt charge.”¹⁶⁸ In sum, Wolston’s actions did not make him a “public figure for purposes of comment on the investigation of Soviet espionage.”¹⁶⁹

As support for this conclusion, Justice Rehnquist emphasized the specific point made by his recent opinion in *Firestone* that a person does not become a limited purpose public figure by being drawn into a *formal legal proceeding*—either by required participation in order to defend against an asserted claim or to seek “the only redress available” under the law.¹⁷⁰ Justice Rehnquist (quoting his prior opinion in *Firestone*) reiterated that “[t]here appears little reason why these individuals should substantially forfeit that degree of protection which the law of defamation would otherwise afford them simply by virtue of their being drawn into a courtroom.”¹⁷¹

161. *Id.* at 166 (citing *Time, Inc. v. Firestone*, 424 U.S. 448, 453–54 (1976); *Gertz*, 418 U.S. at 352; *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 155 (1976)).

162. *Id.*

163. *Id.*

164. *Id.* at 167.

165. *See id.* at 167–68.

166. *See id.* at 167 (citing *Gertz*, 418 U.S. at 352).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 168–69 (quoting *Time, Inc. v. Firestone*, 424 U.S. 488, 457 (1976)).

171. *Id.* at 169 (quoting *Firestone*, 424 U.S. at 457).

3. *Hutchinson v. Proxmire—A Limited Holding Because of an Overly Generalized Public Controversy*

Dr. Ronald Hutchinson worked as a behavioral scientist in the early 1970s, performing research on “emotional behavior.”¹⁷² In relevant part, Dr. Hutchinson studied patterns in animals to determine an “objective measure of aggression,” for example, monitoring “the clenching of jaws when [animals] were exposed to various aggravating stressful stimuli.”¹⁷³ Several federal and state agencies funded Dr. Hutchinson’s research because they were interested in how such findings might relate to persons placed in high-stress situations or environments.¹⁷⁴

U.S. Senator William Proxmire initiated his “Golden Fleece of the Month Award” (the Golden Fleece Award) in March of 1975 to publicly highlight (or rather mock) “what he perceived to be the most egregious examples of wasteful governmental spending.”¹⁷⁵ Morton Schwartz, an “administrative assistant” for Senator Proxmire “in legislative matters,”¹⁷⁶ performed research in support of Senator Proxmire’s Golden Fleece Award.¹⁷⁷ Schwartz identified Dr. Hutchinson’s research (and the public funding it had secured) and “prepare[d] a speech for [Senator] Proxmire to present in the Senate on April 18, 1975,” which awarded Dr. Hutchinson with the dubious honor of the Golden Fleece Award.¹⁷⁸ The text of the speech was used to prepare an “advance press release” that was mailed to “275 members of the news media throughout the United States and abroad.”¹⁷⁹ Among several disparaging comments, Senator Proxmire’s press release and speech degraded Dr. Hutchinson’s research as a “worthless[] . . . study of jaw-grinding and biting by angry or hard-drinking monkeys.”¹⁸⁰ The press release was not short of “monkey business” puns, and ultimately called for the end of public funding for Dr. Hutchinson’s research.¹⁸¹ In May of 1975, Senator Proxmire distributed a newsletter to “about 100,000 people” which “repeated the essence of the speech and the press release.”¹⁸²

Not amused by the repeated “monkey business” references or widespread attempts to end his public funding, Dr. Hutchinson filed a lawsuit against Senator Proxmire and Schwartz in federal district court, which included claims for defamation and libel.¹⁸³ The district court granted summary judgment in favor of Senator Proxmire and Schwartz based upon immunity under the Speech or Debate Clause of Article I, Section 6 of the

172. *Hutchinson v. Proxmire*, 443 U.S. 111, 114–15 (1979).

173. *Id.* at 115.

174. *Id.*

175. *Id.* at 114.

176. *Hutchinson v. Proxmire*, 431 F. Supp. 1311, 1316 (D. Wis. 1977), *rev’d*, 443 U.S. 111 (1979).

177. *Hutchinson*, 443 U.S. at 115.

178. *Id.* at 115–16.

179. *Id.*

180. *Id.* at 116.

181. *See id.*

182. *Id.* at 117.

183. *Id.* at 114, 118.

U.S. Constitution.¹⁸⁴ The district court additionally/alternatively found that Dr. Hutchinson was a limited purpose public figure and granted summary judgment in favor of Senator Proxmire and Schwartz because there was insufficient evidence of actual malice.¹⁸⁵ The Seventh Circuit affirmed.¹⁸⁶ Importantly, the Seventh Circuit found specifically that Dr. Hutchinson qualified as a limited purpose public figure in part because he had “sufficient access to the media to rebut any defamatory falsehood” since “Dr. Hutchinson’s answering press release was quoted in detail in the same stories which *initially* reported the Golden Fleece Award.”¹⁸⁷

The Supreme Court reversed in an opinion delivered by Chief Justice Burger issued the same day as the opinion in *Wolston*.¹⁸⁸ For context, it is important to note that unlike *Wolston*, Chief Justice Burger’s opinion was largely dominated by analysis of the Speech and Debate Clause issue, with much less analysis committed to the actual malice issue at the end of the opinion.¹⁸⁹ Moreover, the lone concurrence of Justice Stewart and the dissent of Justice Brennan only provided points related to the Speech and Debate Clause issue.¹⁹⁰

As with the plaintiffs in *Gertz*, *Firestone*, and *Wolston*, it was not contended that Dr. Hutchinson qualified as a generally famous public figure.¹⁹¹ Chief Justice Burger summarized the lower courts’ limited purpose public figure holding as having been premised upon two “factors”: (1) Dr. Hutchinson’s “successful application for federal funds and the reports in local newspapers of the federal grants”; and (2) Dr. Hutchinson’s “access to the media, as demonstrated by the fact that *some* newspapers and wire services reported his response to the announcement of the Golden Fleece Award.”¹⁹² This brief summary (and the remainder of the opinion) did not mention the Seventh Circuit’s particular reliance upon the inclusion of Dr. Hutchinson’s responding press release in the initial reporting to the public.¹⁹³

Chief Justice Burger began by expressing concern about the timing of Dr. Hutchinson’s rise in public notoriety and whether such timing was adequately addressed by the lower courts (at least in his summary of their findings): “[n]either of those factors demonstrates that Hutchinson was a public figure prior to the controversy engendered by the Golden Fleece Award; his access, such as it was, came after the alleged libel.”¹⁹⁴ He observed that Dr. Hutchinson’s “activities and public profile” were

184. *Id.* at 118–19.

185. *Id.* at 119–20.

186. *Id.* at 120–21.

187. *Hutchinson v. Proxmire*, 579 F.2d 1027, 1035 (7th Cir. 1978) (emphasis added), *rev’d*, 443 U.S. 111 (1979).

188. *Hutchinson*, 443 U.S. at 134–36.

189. *Compare id.* at 122–33 (section of opinion relating to Speech or Debate Clause analysis), *with id.* at 133–36 (section of opinion analyzing actual malice privilege).

190. *See id.* at 136 (Stewart, J., concurring); *id.* (Brennan, J., dissenting).

191. *Id.* at 134.

192. *Id.* (emphasis added).

193. *See id.* at 134–36.

194. *Id.* at 134–35.

previously limited to a “small category of professionals concerned with research in human behavior.”¹⁹⁵ “To the extent the subject of his published writings became a matter of controversy, it was a consequence of the Golden Fleece Award.”¹⁹⁶ Citing *Wolston*, Chief Justice Burger observed that “[c]learly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure” (referred to at times hereafter as the “defendant-manufactured privilege observation”).¹⁹⁷ Though Chief Justice Burger was leery of the timing, he did not definitively hold that such timing precluded Dr. Hutchinson’s qualification as a limited purpose public figure, as he then analyzed Dr. Hutchinson under the actual *Gertz* framework.¹⁹⁸ Critically, though the defendant-manufactured privilege observation introduced Chief Justice Burger’s analysis, it would remain dicta.¹⁹⁹

In applying the *Gertz* limited purpose public figure rule, Chief Justice Burger held that Dr. Hutchinson had not “thrust himself or his views into public controversy to influence others.”²⁰⁰ This conclusion was entirely based upon the potential “public controversy” at issue being framed as public funding in general—not the particular controversy that had arisen regarding the public funding of Dr. Hutchinson’s research specifically.²⁰¹ Chief Justice Burger blamed Senator Proxmire and Schwartz for such a generalized framing of the potential controversy, saying that they had not defined a “particular controversy.”²⁰² “[A]t most, they point to concern about general public expenditures.”²⁰³ Dr. Hutchinson had of course not publicly spoken about policy related to public funding in such a general manner.²⁰⁴ As such, Chief Justice Burger found that Dr. Hutchinson had not “assumed any role of public prominence in the broad question of concern about expenditures” by virtue of applying for federal grants, or through any other effort, and therefore had not thrust himself to the forefront of the proffered public controversy so as to qualify as a limited purpose public figure.²⁰⁵

Chief Justice Burger was also not convinced “that Hutchinson had such access to the media that he should be classified as a public figure.”²⁰⁶ This point of analysis was also entirely driven by framing the potential controversy as a generalized concern about public funding, as he rejected

195. *Id.* at 135.

196. *Id.*

197. *Id.* (citing *Wolston v. Reader’s Dig. Ass’n*, 443 U.S. 157, 167–68 (1979)).

198. *See id.* at 134–36.

199. *See id.* at 135–36.

200. *Id.* at 135.

201. *See id.*

202. *Id.*

203. *Id.*

204. *See id.*

205. *Id.* Justice Burger also explained that the overgeneralized “controversy” proffered by Senator Proxmire and Schwartz was impermissibly vague, as he thought such a category could render “everyone who received or benefited from the myriad public grants for research . . . a public figure.” *Id.*

206. *Id.* at 136.

the notion that Dr. Hutchinson had adequate access by finding that such “access was limited to responding to the announcement of the Golden Fleece Award.”²⁰⁷ Chief Justice Burger otherwise ruled Dr. Hutchinson out from being considered a generally famous public figure by virtue of the amount of access that Dr. Hutchinson had received on this limited subject matter in holding that Dr. Hutchinson did not have the “regular and continuing access to the media that is one of the accouterments of having become a public figure.”²⁰⁸

D. A COMPREHENSIVE CONSIDERATION OF *GERTZ*, *FIRESTONE*,
WOLSTON, AND *HUTCHINSON* SHOULD LEAD COURTS TO DETERMINE
THAT A LIBEL PLAINTIFF QUALIFIES AS A LIMITED PURPOSE PUBLIC
FIGURE IN MOST CASES IF SHE CHOOSES TO RESPOND TO ALLEGED
FALSE STATEMENTS THROUGH THE NEWS MEDIA

1. *Courts Should Apply the Full Body of Principles from Gertz, Firestone, Wolston, and Hutchinson*

Gertz, Firestone, Wolston, and Hutchinson were decided within five years of one another.²⁰⁹ *Wolston* and *Hutchinson* shared oral argument and later had their respective opinions issued on the same day.²¹⁰ *Firestone, Wolston, and Hutchinson* all acknowledged *Gertz* as the controlling case for purposes of the fundamental principles that define the limited purpose public figure and did not otherwise attempt to alter or refine *Gertz*.²¹¹ Justice Rehnquist authored the opinions in both *Firestone* and *Wolston*, and relied several times upon his findings from *Firestone* in his *Wolston* opinion.²¹² Chief Justice Burger joined in Justice Rehnquist’s opinions in *Firestone* and *Wolston*²¹³ (with Justice Rehnquist joining in Chief Justice Burger’s opinion in *Hutchinson*),²¹⁴ and similarly relied upon *Wolston* within his brief analysis of the actual malice privilege issue in *Hutchinson*.²¹⁵

All this is to say that *Gertz, Firestone, Wolston, and Hutchinson* stand as a close-knit body of guidelines from the Supreme Court on how courts should determine who qualifies as a limited purpose public figure. Though *Hutchinson* was the only case to briefly analyze whether a libel plaintiff qualified as a limited purpose public figure by virtue of responding to the alleged false statements at issue through the news media, courts must consider the principles from all four cases when determining an appropriate comprehensive analysis—with *Gertz* being the bedrock. At a minimum,

207. *Id.*

208. *Id.*

209. *See id.* at 111; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 323 (1974); *Time, Inc. v. Firestone*, 424 U.S. 448, 448 (1976); *Wolston v. Reader’s Dig. Ass’n*, 443 U.S. 157, 157 (1979).

210. *See Wolston*, 443 U.S. at 157; *Hutchinson*, 443 U.S. at 111.

211. *See Firestone*, 424 U.S. at 453–57; *Wolston*, 443 U.S. at 164–68; *Hutchinson*, 443 U.S. at 133–34.

212. *See Wolston*, 443 U.S. at 159, 165–69; *Firestone*, 424 U.S. at 449.

213. *See Wolston*, 443 U.S. at 159; *Firestone*, 424 U.S. at 449.

214. *See Hutchinson*, 443 U.S. at 113.

215. *See id.* at 135.

courts should look carefully for ways in which *Hutchinson* should be distinguished if it would be important to consistently apply core principles from *Gertz*, *Firestone*, and *Wolston*.

2. *Most importantly, Courts Should Distinguish Hutchinson from Cases That Define the Public Controversy at Issue as the Particular Controversy Relating to the Alleged False Statements About the Libel Plaintiff*

The fundamental point that led Chief Justice Burger to conclude that Dr. Hutchinson was not a limited purpose public figure under the *Gertz* framework was that the potential controversy at issue had been framed as “general public expenditures”—not the actual (or “particular”) controversy that had arisen regarding the merits of the public funding for Dr. Hutchinson’s own research.²¹⁶ Again, Chief Justice Burger explained that this overly generalized framing of the controversy was provided by Senator Proxmire and Schwartz themselves.²¹⁷ And he held them to it.²¹⁸ In keeping the potential controversy framed in this manner, Chief Justice Burger’s analysis avoided the fact that Dr. Hutchinson had “thrust” himself into the quickly rising “vortex” of controversy about the public funding of his own research by responding through the news media.²¹⁹ Such framing also led Chief Justice Burger to find that the *amount* of Dr. Hutchinson’s access to the news media regarding the public funding of his own research was irrelevant.²²⁰ As such, Chief Justice Burger was able to rather easily find that Dr. Hutchinson had never played a significant role in the vastly generalized debate about public funding in a broader sense, and was therefore not a limited purpose public figure.²²¹

This is a critical point that should be distinguished by courts, as *Gertz*, *Firestone*, and *Wolston* each considered the libel plaintiff’s conduct related to his own particular controversy. For *Gertz*, it was his own representation of the family in their lawsuit against the police officer.²²² For *Mary Firestone*, it was the adjudication of her own divorce proceeding.²²³ For *Wolston*, it was his own involvement in the grand jury investigation on Soviet espionage and initial decision not to appear for questioning before the grand jury.²²⁴

The public controversy in *Hutchinson* could have been defined as the particular controversy surrounding the public funding provided for Hutchinson’s own research. Since such a misstep or omission was made

216. *See id.*

217. *See id.*

218. *See id.* at 135–36.

219. *See id.*

220. *See id.* at 136.

221. *See id.* at 135–36.

222. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974) (“Moreover, [Gertz] never discussed either the criminal or civil litigation with the press and was never quoted as having done so.”).

223. *See Time, Inc. v. Firestone*, 424 U.S. 448, 453–54 (1976).

224. *See Wolston v. Reader’s Dig. Ass’n*, 443 U.S. 157, 166–67 (1979).

by the libel defendants' own argument, *Hutchinson* does not limit current courts from an entirely different analysis as to whether the libel plaintiff had thrust herself into the vortex of her own particular controversy by responding to the alleged false statements through the news media.

3. *A Libel Plaintiff's Decision to Respond to the Alleged False Statements Through the News Media Should Still be a Critical Factor in Finding That the Person Qualifies as a Limited Purpose Public Figure*

What action does a person take to “thrust” herself into the “vortex” of a particular public controversy so as to try to influence public opinion? In *Gertz*, the only analysis on this point was that Gertz had not spoken with the news media about the police officer's case.²²⁵ Similarly, in *Wolston*, it was important to Justice Rehnquist that Wolston had not spoken with the news media about the rising public controversy surrounding his refusal to appear for testimony before the grand jury.²²⁶ And the only reason that Mary Firestone had not qualified as a limited purpose public figure by virtue of her press conferences in *Firestone* was that Justice Rehnquist limited the particular controversy to the adjudication of the divorce proceeding and found that Mary Firestone was not trying to influence the formal adjudication of the claims (and indeed could not influence such adjudication).²²⁷

The primary way that a libel plaintiff thrusts herself into the public vortex to influence opinion about a particular controversy is by speaking with the news media about the controversy. This makes sense in the very definition of the limited purpose public figure provided by *Gertz* because, at least before the dawn of social media, the only conceivable public “vortex” was the reporting of the news media, and the only way that someone could “thrust” herself into such vortex was by engaging with the news media for comment.²²⁸

The primary importance of distinguishing the generalized framing of the controversy in *Hutchinson* is that it cautions courts against ignoring this principle simply because the libel plaintiff's engagement with the news media related to the alleged false statements at issue in the lawsuit. Certainly, Chief Justice Burger's defendant-manufactured privilege observation is noteworthy. However, such concern did not decide the limited purpose public figure issue in *Hutchinson*—the subsequent *Gertz* analysis relying upon a more generalized controversy did.²²⁹

As such, courts must look more carefully at whether *Gertz*, *Firestone*, *Wolston*, and *Hutchinson*, when considered comprehensively, would categorically allow for a libel plaintiff to respond to alleged false statements through the news media without qualifying as a limited purpose public

225. See *Gertz*, 418 U.S. at 352.

226. See *Wolston*, 443 U.S. at 167.

227. See *Firestone*, 424 U.S. at 454, 454 n.3.

228. See *Gertz*, 418 U.S. at 345, 352.

229. See *Hutchinson v. Proxmire*, 443 U.S. 111, 134–36 (1979).

figure. There are at least three significant problems that should prevent courts from *strictly* applying the defendant-manufactured privilege observation in this context: (1) *Wolston* and *Firestone* only fashioned a rule specifically pertaining to a libel plaintiff that had been required to participate in a legal proceeding; (2) a person that is dragged into a public controversy may still become a limited purpose public figure under *Wolston* if she engages with the news media about the particular controversy; and (3) it is well established that a limited purpose public figure’s meaningful access to the news media may result from the particular controversy itself.

a. *Wolston* and *Firestone* Fashioned a Rule Specifically Pertaining to a Libel Plaintiff That Had Been Required to Participate in a Formal Legal Proceeding

Again, in citing *Wolston* specifically, Chief Justice Burger observed that “those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.”²³⁰ Unlike *Gertz*, *Firestone*, or *Wolston*, this observation focused upon the actions of the libel defendant with respect to the potential controversy at issue rather than the actions of the libel plaintiff in choosing to inject her own message, argument, or position into the debate about the controversy.²³¹

It is difficult to find clear or consistent support for Chief Justice Burger’s observation in *Gertz*, *Firestone*, or *Wolston*. The passage from *Wolston* that was cited by Chief Justice Burger strictly dealt with the grand jury’s subpoena (and the district court’s subsequent order to show cause) as having “dragged” *Wolston* into the case and public spotlight—not the defendants’ later publication of the KGB Book.²³² It was important to Justice Rehnquist that *Wolston* was pulled into a formal legal proceeding specifically, as Justice Rehnquist premised his conclusion in *Wolston* on a reaffirmation of his rule from *Firestone* that a person’s required participation in a newsworthy legal proceeding does not qualify such person as a limited purpose public figure (wherein Mary Firestone had to seek legal relief in court for alimony/divorce).²³³

The *Wolston/Firestone* legal proceeding rule does not expressly support, much less require, a rule that allows a libel plaintiff to respond to alleged false statements through the news media without qualifying as a limited purpose public figure. Whereas the *Wolston/Firestone*-type libel plaintiff is involuntarily required to participate in the formal legal proceeding by law, a libel plaintiff that chooses to join the public debate about her own controversy by responding through the news media has voluntarily thrust herself into the spotlight to influence public opinion.

230. *Id.* at 135 (citing *Wolston*, 443 U.S. at 167–68).

231. *See id.*

232. *See Wolston*, 443 U.S. at 166–68.

233. *Id.* at 168–69 (citing *Time, Inc. v. Firestone*, 424 U.S. 448, 457 (1976)).

- b. A Person That is “Dragged” Into a Public Controversy May Still Become a Limited Purpose Public Figure Under *Wolston* if She Engages with the News Media About the Particular Controversy

In *Wolston*, Justice Rehnquist strongly indicated that *Wolston*’s reaction to being “dragged” into the grand jury investigation could still have qualified him as a limited purpose public figure:

In *Gertz*, the attorney took no part in the criminal prosecution, never discussed the litigation with the press, and limited his participation in the civil litigation solely to his representation of a private client. Similarly, [*Wolston*] never discussed this matter with the press and limited his involvement to that necessary to defend himself against the contempt charge.²³⁴

So, even in a case where the libel plaintiff is required to participate in a legal proceeding, a libel plaintiff may still qualify as a limited purpose public figure by choosing to engage with the news media about the controversy rather than simply participating in the proceeding.²³⁵ For the libel plaintiff that has, or may, suffer harm from the alleged false statements to the news media, this would mean a choice between engaging with the news media to join public debate about the alleged false statements or focusing only upon participation in a required legal proceeding to obtain relief for libel to maintain her private figure status. A libel plaintiff may certainly choose both routes, but in such a case, she would be required to prove actual malice in her libel case since she would qualify as a limited purpose public figure.

- c. It is Well Established That a Limited Purpose Public Figure’s Meaningful Access to the News Media May Result from the Particular Controversy Itself

Chief Justice Burger’s defendant-manufactured privilege observation also placed importance on his finding that Dr. Hutchinson’s meaningful access to the news media only came about by virtue of Senator Proxmire and Schwartz’s introduction of the controversy to the news media.²³⁶ He did not explain how this was materially different from the circumstances in *Gertz*, as *Gertz*’s meaningful access to the news media would have only come about in connection with the news media first learning of his involvement in the civil lawsuit against the police officer.²³⁷ Similarly, *Wolston* was a private person whose only meaningful access to the news media would have come about because of the news media first learning of his involvement in the grand jury investigation and contempt proceedings.²³⁸ The genesis of the person’s access to the news media coming from the news media learning about the particular controversy itself was not at all a disqualifier

234. *Id.* at 167 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974)).

235. *See id.*

236. *See Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979).

237. *See Gertz*, 418 U.S. at 352.

238. *See Wolston*, 443 U.S. at 162–63.

in *Gertz* or *Wolston*.²³⁹ Instead, the determinative factor was whether the libel plaintiff made the decision to accept such access to the news media by commenting on the controversy.²⁴⁰

This is consistent with the fundamental self-help and assumed-role considerations described by *Gertz* that justify application of actual malice privilege itself to public officials and public figures.²⁴¹ First, the self-help consideration component is based purely upon news media access itself as an ability to engage in self-help against defamation.²⁴² There is no aspect of the self-help consideration that is dependent upon a “fair” basis for such access.²⁴³ Fairness comes with the access itself.²⁴⁴

The notion of fairness in relation to the choice of the public official or public figure is found instead in the second assumed-role consideration regarding the person’s decision to accept a role that invites public comment or scrutiny.²⁴⁵ For the limited purpose public figure, this is satisfied by the decision to engage with the news media to impact public opinion about the controversy.²⁴⁶ In the context of the libel plaintiff that responds to alleged false statements through the news media, it does not matter if access to the news media arose in a “fair” manner for purposes of the actual malice privilege, but rather only that it is fair to apply the privilege because the libel plaintiff has accepted a role in the debate by engaging in the reporting.

E. FOUR ADDITIONAL FACTUAL DISTINCTIONS THAT SHOULD ALSO PREVENT COURTS FROM APPLYING *HUTCHINSON’S* DEFENDANT-MANUFACTURED PRIVILEGE OBSERVATION TO NEWS MEDIA DEFENDANTS WHEN THE LIBEL PLAINTIFF HAS RESPONDED TO THE ALLEGED FALSE STATEMENTS THROUGH THE NEWS MEDIA

Regardless of whether the libel defendant is a news media member or third-party source, the above analysis of Chief Justice Burger’s defendant-manufactured privilege observation should caution courts against its strict application in cases where the libel plaintiff has responded to the alleged false statements through the news media. At a minimum, a careful bit of nuance is required in the observation’s potential application. Even so, some courts may still be wary to distinguish *Hutchinson* based upon the generalized scope of the controversy at issue, or explain the non-binding effect of Chief Burger’s defendant-manufactured privilege observation as dicta, or describe how such an observation does not align with fundamental principles from *Gertz*, *Firestone*, and *Wolston*. In such case, there are also at least four additional factual distinctions that should be considered by courts to prevent application of *Hutchinson’s* defendant-manufactured privilege

239. See *Gertz*, 418 U.S. at 352; *Wolston*, 443 U.S. at 166–67.

240. See *Gertz*, 418 U.S. at 352; *Wolston*, 443 U.S. at 167.

241. See *Gertz*, 418 U.S. at 345.

242. *Id.* at 344–45.

243. See *id.* at 344.

244. See *id.*

245. See *id.* at 345.

246. See *id.*

observation to news media defendants specifically when the libel plaintiff has responded to the alleged false statements through the news media.

1. *The Defendant-Manufactured Privilege Observation Was Not Intended for News Media Defendants*

- a. At Most, the Defendant-Manufactured Privilege Observation Was a Bad Actor Prohibition for *Non-News Media Persons* That Had Disseminated Inflammatory Characterizations to Generate a Public Stir

Again, Chief Justice Burger's defendant-manufactured privilege observation is materially different from the analysis established in *Gertz*, *Firestone*, and *Wolston* because it focused upon the libel defendant's conduct instead of the libel plaintiff's conduct in determining whether the libel plaintiff should qualify as a limited purpose public figure: "Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure."²⁴⁷ At its heart, this observation is a bad actor prohibition. Chief Justice Burger was considering libel defendants—Senator Proxmire and Schwartz—that had gone to great lengths to ridicule Dr. Hutchinson's research in a particularly mean-spirited fashion through extensive efforts of publication by way of: (1) an advanced press release to 275 members of national and international news media; (2) a speech in front of the United States Senate; and (3) a newsletter distributed to 100,000 people.²⁴⁸ Importantly, none of the news media sources that reported Senator Proxmire and Schwartz's statements were defendants in the case.²⁴⁹

Given the facts and parties at issue in *Hutchinson*, and the language of Chief Justice Burger's observation itself, courts should consider such observation to be directed at third-party sources of the alleged false statements and not the journalist or news organization that publishes the report. Indeed, it would not make a great deal of sense to say that a journalist or new media organization has engaged in "conduct" that has "ma[de]" the libel plaintiff "a public figure" by simply reporting the information provided by the third-party source.²⁵⁰ It is the third-party source who is alleged to have created the false narrative and to have invited public attention by providing it to the news media.

The Supreme Court of Minnesota noted such a distinction in the case of *Chafoulias v. Peterson*.²⁵¹ Gus Chafoulias owned a hotel near the "internationally recognized Mayo Clinic."²⁵² Five female employees complained to hotel management that they had been subjected to "sexual harassment

247. *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979) (citing *Wolston v. Reader's Dig. Ass'n*, 443 U.S. 157, 167–68 (1979)).

248. *See id.* at 115–17.

249. *See id.* at 111.

250. *See Hutchinson*, 443 U.S. at 135.

251. *See Chafoulias v. Peterson*, 668 N.W.2d 642, 653 (Minn. 2003).

252. *Id.* at 645.

and aggression” by certain international “Arab” hotel guests.²⁵³ These complaints were initially ignored.²⁵⁴ The female employees retained an attorney, who after some efforts to resolve the matter with Chafoulias, filed lawsuits based upon the unresolved harassment claims and took to local news media to publicize the controversy.²⁵⁵

Television producers at the American Broadcasting Company (ABC) learned of the dispute and contacted the employees’ attorney for more information.²⁵⁶ After interviewing the employees and their attorney, ABC requested comment from Chafoulias.²⁵⁷ ABC eventually encountered Chafoulias on the street and engaged him in a “street interview” regarding the allegations from the employees and their attorney.²⁵⁸ ABC thereafter broadcasted a story on its program *PrimeTime Live*, which included parts of the interviews of both the employees’ attorney and Chafoulias.²⁵⁹ Chafoulias eventually sued both the employees’ attorney and ABC for defamation based upon one of the attorney’s statements included in the broadcast: “Chafoulias knew. Chafoulias has known for years that these women were being attacked, harassed, raped.”²⁶⁰

Justice Hansen, delivering the opinion of the Supreme Court of Minnesota, generally accepted Chief Justice Burger’s defendant-manufactured privilege observation from *Hutchinson*.²⁶¹ However, he distinguished between the employees’ attorney (who provided the information to ABC) and ABC (who only published the alleged libelous statement).²⁶² Justice Hansen explained that though Chafoulias’s argument that he was “dragged unwillingly” into the controversy may have conceivably applied to the employees’ attorney, such arguments were “not relevant to ABC, which [was] entitled to rely on the circumstances as it found them, including the actions of Chafoulias that were induced by [the employees’ attorney] but not by ABC.”²⁶³

b. The News Media Does Not *Create* the Public Controversy, it *Reveals* the Controversy to the Public

The Fifth Circuit has also made an important substantive distinction for news media defendants when generally considering Chief Justice Burger’s

253. *Id.*

254. *See id.*

255. *See id.* at 645–46.

256. *See id.* at 647.

257. *See id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *See id.* at 656 (“This evidence is relevant because defamation law recognizes that a defamation defendant cannot take advantage of the limited purpose public figure privilege with respect to a public controversy that she caused.” (citing *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979))); *see also id.* (“Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.” (quoting *Hutchinson*, 443 U.S. at 135)).

262. *See id.* at 653, 656.

263. *Id.* at 653.

defendant-manufactured privilege observation from *Hutchinson*.²⁶⁴ In *Trotter v. Jack Anderson Enterprises*, the libel plaintiff relied upon *Hutchinson's* defendant-manufactured privilege observation in arguing that he should not be considered a limited purpose public figure because widespread news media attention of his company's alleged misbehavior (labor violence) did not arise until after the defendant columnist's articles were published.²⁶⁵ The libel plaintiff argued that the news media defendants "cannot invoke the public-figure defense if the allegedly defamatory articles themselves turned him into a public figure."²⁶⁶

Judge Rubin, delivering the opinion of the Fifth Circuit, rejected such application.²⁶⁷ He explained that "[c]reating a public issue . . . is not the same as revealing one."²⁶⁸ Importantly, "[t]he purpose of investigative reporting is to uncover matters of public concern previously hidden from the public view."²⁶⁹ Judge Rubin adopted the principle that "the first newspaper to report on a pre-existing public dispute should not be held to a stricter standard of liability than those who follow."²⁷⁰ "To hold otherwise would undermine the purpose of the public-figure doctrine—encouraging debate on issues of public concern."²⁷¹ In sum, the news media defendants' "articles did not cause the later press coverage of the labor violence; the labor violence itself did."²⁷² At least two other federal district courts have embraced Judge Rubin's created versus revealed distinction regarding news media defendants.²⁷³

264. See *Trotter v. Jack Anderson Enters.*, 818 F.2d 431, 434 (5th Cir. 1987).

265. See *id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.* (citing *Tavoulaareas v. Piro*, 817 F.2d 762, 775 n.13 (D.C. Cir. 1987) (en banc)). Judge Rubin's observation was premised upon the rationale stemming from a footnote holding in the recent D.C. Circuit case of *Tavoulaareas v. Piro*:

Admittedly, the [*Washington Post*] was the first general circulation publication to discuss the most controversial aspect of the [controversy at issue]. We recognize that publications cannot "create their own defense by making the claimant a public figure," *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979), and that everything that is "newsworthy" is not necessarily a public controversy, *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 167 (1979)). But no precedent requires that the first newspaper to report on a *pre-existing public dispute* be held more strictly liable than less resourceful periodicals that hold back and follow its lead. We decline to create such a precedent, which has nothing in law or logic to commend it.

Tavoulaareas, 817 F.2d at 775 n.13 (emphasis in original).

271. *Trotter*, 818 F.2d at 434.

272. *Id.*

273. See *Norris v. Bangor Publ'g Co.*, 53 F. Supp. 2d 495, 505 (D. Me. 1999) (citing *Trotter*, 818 F.2d at 434) (relying expressly upon the revealed versus created public controversy distinction from *Trotter* and explaining that the "fact that Plaintiff's name may have been unfamiliar to the public until Defendants published the articles in question does not defeat his limited purpose public figure status"); *Nicholson v. Promoters on Listings*, 159 F.R.D. 343, 345 (D. Mass. 1994) (citing and quoting *Trotter*, 818 F.2d at 434) ("The fact that plaintiff was not well known to the general public until the controversy . . . was reported in the [newspaper] is likewise not dispositive of plaintiff's limited 'public figure' status Here, the [newspaper defendant] uncovered a matter of public concern, it did not create it.").

2. *Courts May Further Distinguish Cases Where the Libel Plaintiff's Response Was Included in the Initial Reporting of the Alleged False Statements*

Chief Justice Burger summarized the reporting of Dr. Hutchinson's response to the Golden Fleece Award only by saying that it had been included by “*some* newspapers and wire services,” and that such access “*came after* the alleged libel.”²⁷⁴ Importantly, Chief Justice Burger did not mention, analyze, or otherwise accept/refute the Seventh Circuit's finding that Dr. Hutchinson's “*answering press release was quoted in detail in the same stories which initially reported the Golden Fleece Award.*”²⁷⁵ As written, Chief Justice Burger and the majority did not base their holding upon consideration of a scenario where both the alleged false statements, and the libel plaintiff's response to such statements, were introduced to the public in the same reporting.

The omission of such analysis must leave open the distinction for a case where the libel plaintiff's response also appears in the initial reporting of the alleged false statements. In such a case, the public's substantive introduction to the particular controversy would occur within a more comprehensive report that includes the libel plaintiff's response. Furthermore, the libel plaintiff would have voluntarily injected herself into the controversy's vortex at its *outset* in order to influence public opinion. Under such circumstances, it would not be fair to say that the news media defendant has manufactured the potential privilege defense, but rather that the libel plaintiff jointly engaged in the public's introduction to the controversy.

3. *Courts May Distinguish Cases Where the Libel Plaintiff's Response to the Alleged False Statements Appears to a Meaningful Extent in the Subsequent Reporting*

Again, Chief Justice Burger summarized the reporting of Dr. Hutchinson's response to the Golden Fleece Award only by saying that it had been included by “*some* newspapers and wire services.”²⁷⁶ He otherwise noted in a later comment (more directed to potential consideration of Dr. Hutchinson as a generally famous public figure) that Dr. Hutchinson did not have the “*regular and continuing access to the media that is one of the accouterments of having become a public figure.*”²⁷⁷ Chief Justice Burger did not cite any of the cases that he might have had in mind as examples of such access.²⁷⁸

There is a strong argument to distinguish *Hutchinson* from a case where the court finds that the libel plaintiff's response to the alleged false statements has appeared to a meaningful extent in the subsequent reporting as

274. *Hutchinson*, 443 U.S. at 134–35 (emphases added).

275. *Hutchinson v. Proxmire*, 579 F.2d 1027, 1035 (7th Cir. 1978) (emphasis added), *rev'd*, 443 U.S. 111 (1979).

276. *Hutchinson*, 443 U.S. at 134 (emphasis added).

277. *Id.* at 136.

278. *See id.*

well. This could either be by virtue of the *amount* of subsequent reports that provide the libel plaintiff's response or the *prominence* of the news media source(s) that has provided the libel plaintiff's response. A libel plaintiff that has achieved a high volume of publication for her response could more readily be considered to have meaningfully thrust herself into the vortex of the particular controversy pertaining to the alleged false statements so as to affect public opinion. The same argument can be made for the libel plaintiff that has achieved publication of her response in one or more prominent news media sources. In both scenarios, the self-help (access to news media) and assumed-role considerations have been satisfied, setting the libel plaintiff apart from the usual private figure.²⁷⁹

4. *Courts May Further Consider Limiting Hutchinson's Defendant-Manufactured Privilege Observation to Government Official Defendants*

Though there is less express support in the wording of Chief Justice Burger's defendant-manufactured privilege observation, courts may also consider distinguishing news media defendants from libel defendants that are public officials. Again, Chief Justice Burger cited exclusively to *Wolston* in observing that "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure."²⁸⁰ As was explained above, the cited passage from *Wolston* strictly dealt with the government having "dragged" *Wolston* into the grand jury investigation.²⁸¹ And again, Chief Justice Rehnquist's conclusion that *Wolston* did not qualify as a limited purpose public figure in such a circumstance was but a reiteration of his holding in *Firestone* that Mary Firestone's required participation in the divorce proceeding to obtain alimony did not make her a limited purpose public figure.²⁸²

A court that is attempting to keep *Firestone*, *Wolston*, and *Hutchinson* in alignment might conclude that the aim of Chief Justice Burger's defendant-manufactured privilege observation was really to say that Senator Proxmire and Schwartz, both government officials, should not benefit from dragging Dr. Hutchinson into a governmental process that would have required him to defend his continued public funding. Though government officials were not libel defendants in *Wolston* or *Firestone*, the government was the only entity that could be said to have made *Wolston* or Mary Firestone potential public figures by requiring them to participate in legal proceedings. *Wolston* and Mary Firestone were already the subjects of much reporting before defendants Reader's Digest and Time published the alleged false statements about them respectively.²⁸³ As such, Chief Justice Burger's defendant-manufactured privilege observation would not make

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

280. *Hutchinson*, 443 U.S. at 135 (citing *Wolston v. Reader's Dig. Ass'n*, 443 U.S. 157, 167–68 (1979)).

281. See *Wolston*, 443 U.S. at 166–68.

282. See *id.* at 168 (citing *Time, Inc. v. Firestone*, 424 U.S. 448, 457 (1976)).

283. See *id.* at 160–63; *Firestone*, 424 U.S. at 459–63.

sense if he were referring to the private news media defendants in those cases. Accordingly, it would not be an unreasonable interpretation to limit Chief Justice Burger’s defendant-manufactured privilege observation to libel defendants that are government officials.

F. CHALLENGING TWO PROBLEMATIC SELF-DEFENSE-BASED
EXCEPTIONS THAT HAVE DEVELOPED AMONGST A MINORITY OF THE
CIRCUITS THAT WOULD ALLOW A LIBEL PLAINTIFF TO RESPOND
THROUGH THE NEWS MEDIA WITHOUT BECOMING A LIMITED
PURPOSE PUBLIC FIGURE

Though a misguided emphasis or application of Chief Justice Burger’s defendant-manufactured privilege observation from *Hutchinson* to news media defendants remains an issue, a more problematic trend has arisen in two secondary exceptions established by a minority of circuits.²⁸⁴ Contrary to the core definition of the limited purpose public figure in *Gertz*, these exceptions provide that a libel plaintiff may engage news media (even extensively) in response to alleged false statements without qualifying as a limited purpose public figure in the name of reputational self-defense.²⁸⁵ These exceptions elevate individual reputational interests over free speech interests that are inherent in the protection of public discourse. Adding to the problematic aim of these exceptions is the fact that some subsequent courts have noted or discussed these exceptions in a manner that confuses their initial limitations and otherwise conflates their potential application. Analysis of these exceptions under the principles established by the *Gertz* line of cases should lead current courts to reject further adoption or application of such exceptions, and otherwise persuade the Supreme Court to strike down such exceptions as unconstitutional.

I. *Clyburn and the D.C. Circuit’s Injection of a Truthful-Response
Exception into the Limited Purpose Public Figure Determination*

a. The Truthful-Response Exception

Joann Medina collapsed at a party in Washington, D.C. in December of 1983, slipped into a coma, and died four days later.²⁸⁶ There were “barbiturates, cocaine, and alcohol” in her system at the time of her collapse.²⁸⁷ Medina’s boyfriend, John Clyburn, was with Medina at the party when she collapsed.²⁸⁸ The Drug Enforcement Agency (DEA) questioned Clyburn about whether Medina had obtained drugs from a friend of the D.C. mayor and whether any high-ranking city officials had been at the party the night Medina collapsed.²⁸⁹ Clyburn also spoke with a reporter from the

284. See *Foretich v. Cap. Cities/ABC, Inc.*, 37 F.3d 1541, 1558–59 (4th Cir. 1994); *Clyburn v. News World Commc’ns, Inc.*, 903 F.2d 29, 32 (D.C. Cir. 1990).

285. See *Foretich*, 37 F.3d at 1558–59; *Clyburn*, 903 F.2d at 32.

286. *Clyburn*, 903 F.2d at 30–31.

287. *Id.* at 31.

288. *Id.* at 30.

289. See *id.* at 31.

Washington Post about the incident.²⁹⁰ Clyburn told both the DEA and *Washington Post* that he had been the one to call 911 and that he was alone with Medina the night she collapsed.²⁹¹ Both statements from Clyburn were false.²⁹²

Washington newspapers published six articles surrounding Medina's death in 1984 that explained that the D.C. Police Department, DEA, and U.S. Attorney's Office were investigating Medina's death and were inquiring into whether any high-ranking members of the D.C. mayor's administration had been at the party.²⁹³ Four of these articles mentioned Clyburn's presence at the party and his consulting firm's contracts with the D.C. government.²⁹⁴ In 1986, the *Washington Times* published an article that stated that Clyburn and others at the party had waited "several critical hours' after Medina's collapse before calling an ambulance so that those present could clear out before the police arrived."²⁹⁵ Clyburn brought a lawsuit for libel against the *Washington Times* for this particular article.²⁹⁶

In determining whether Clyburn qualified as a limited purpose public figure under *Gertz*, Judge Williams of the D.C. Circuit found that a particular public controversy had arisen with respect to whether there was any connection between Medina's drug use/death and the D.C. mayor's administration.²⁹⁷ Clyburn, however, denied that he had injected himself into such controversy.²⁹⁸

Citing *Wolston*, Judge Williams explained that courts "have placed weight on a plaintiff's" attempt to "'influence the outcome' of a controversy."²⁹⁹ This much tracks with the *Gertz* line of cases. However, without discussing the facts or analysis of *Wolston* in any detail, Judge Williams rather quickly turned to providing a modified summary of Chief Justice Burger's defendant-manufactured privilege observation from *Hutchinson*: "Of course, this cannot include statements that merely answer the alleged libel itself; if it did, libellers could 'create their own defense by making the claimant a public figure.'"³⁰⁰ Judge Williams did not stop at a mere application of the defendant-manufactured privilege observation, however. He went further in establishing an apparent truthful-response exception for libel plaintiffs:

[W]e have doubts about placing much weight on purely defensive, truthful statements made when an individual finds himself at the center of a public controversy but before any libel occurs; it is not clear why someone dragged into a controversy should be able to speak

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. *See id.* at 32.

298. *Id.*

299. *Id.* (quoting *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1297 (D.C. Cir. 1980)) (citing *Wolston v. Reader's Dig. Ass'n*, 443 U.S. 157, 168 (1979)).

300. *Id.* (quoting *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979)).

publicly only at the expense of foregoing a private person’s protection from defamation.³⁰¹

Citing *Firestone* and *Wolston*, Judge Williams believed that,

Indeed, the cases have suggested that ordinarily something more than a plaintiff’s short simple statement of his view of the story is required; he renders himself a public figure only if he voluntarily “draw[s] attention to himself” or uses his position in the controversy “as a fulcrum to create public discussion.”³⁰²

Judge Williams held that Clyburn qualified as a limited purpose public figure in large part because he had “*falsely* told the Washington Post that he had been alone with Medina and had called 911” at the outset of the public’s introduction to the controversy.³⁰³ Judge Williams “view[ed] this cover-up attempt as going beyond an ordinary citizen’s response to the eruption of a public fray around him.”³⁰⁴

b. Problems with the Truthful-Response Exception

Judge Williams’s truthful-response exception—apparently based in large part upon *Wolston* and *Firestone*—missed the fact that *Wolston* never actually spoke with the news media, and further that Justice Rehnquist (while specifically relying upon *Gertz*) emphasized that such a decision to *not* speak with the news media is largely what kept *Wolston* from becoming a limited purpose public figure.³⁰⁵ Judge Williams also missed the point that Mary Firestone’s press conferences did not qualify her as a limited purpose public figure specifically because she could not influence the actual adjudication of her alimony/divorce case.³⁰⁶ In short, Judge Williams failed to substantively demonstrate how *Gertz*, *Wolston*, or *Firestone* supports a rule that would allow a libel plaintiff to respond to the alleged false statements in the news media without becoming a limited purpose public figure.

The “truthful” component of Judge Williams’s exception rule is particularly troubling. Nothing in *Gertz*, *Firestone*, or *Wolston* (or even *Hutchinson*) distinguishes the limited purpose public figure’s attempt to influence the public’s opinion of the controversy at issue based upon whether such attempt was right or wrong, or otherwise accurate or false.³⁰⁷ The interest protected by the actual malice privilege in this context is open discourse regarding a public figure involved in a public controversy.³⁰⁸ This interest is

301. *Id.*

302. *Id.* at 32 (alteration in original) (quoting *Wolston*, 443 U.S. at 168) (citing *Time, Inc. v. Firestone*, 424 U.S. 448, 454 n.3 (1976)).

303. *Id.* at 33 (emphasis in original).

304. *Id.*

305. *See Wolston*, 443 U.S. at 167.

306. *See Firestone*, 424 U.S. at 454 n.3.

307. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345, 352 (1974); *Firestone*, 424 U.S. at 453–54, 454 n.3; *Wolston*, 443 U.S. at 164–65, 168; *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979).

308. *See Gertz*, 418 U.S. at 344–45, 352; *Firestone*, 424 U.S. at 453–54, 454 n.3; *Wolston*, 443 U.S. at 164–65, 168.

detached from any judgment about the value of the public figure's contribution to the public's consideration of the controversy.³⁰⁹

Moreover, the substantive basis for the "attempt-to-influence" principle of the limited purpose public figure category is the assumed-role component justifying the actual malice privilege itself—that the person had accepted a role that invited public comment or scrutiny.³¹⁰ This is accomplished whether the libel plaintiff has thrust herself into the vortex of the controversy with truthful or false information. There is absolutely no indication in *Gertz*, *Firestone*, *Wolston*, or *Hutchinson* that a court could rightly distinguish the person's attempt to influence public opinion about the controversy based upon whether it was supported by the truth. To do so would in fact wrongly take the actual malice privilege's focus away from its only intended interest—open public discourse.

2. *Foretich and the Fourth Circuit's Injection of the Common Law Self-Defense Privilege into the Limited Purpose Figure Determination Analysis*

a. The Common Law Self-Defense Privilege as an Exception to Qualification as a Limited Purpose Public Figure

The Fourth Circuit established a different exception four years later in *Foretich v. Capital Cities/ABC, Inc.*³¹¹ Vincent and Doris Foretich (the Foretichs) sued Capital Cities/ABC, Inc. and its producers and broadcasters (collectively, ABC) for defamation in relation to a made-for-television docudrama that ABC had produced and broadcast wherein a character referred to the Foretichs as "abusers" of their granddaughter.³¹² The docudrama told the story of a "highly publicized child-custody dispute" involving the Foretichs' granddaughter from years before.³¹³

In the midst of a child custody dispute between the Foretichs' son and his ex-wife regarding the Foretichs' infant granddaughter, the ex-wife accused both the Foretichs and their son of heinous acts of sexual abuse of the granddaughter.³¹⁴ The ex-wife also filed a separate lawsuit against the Foretichs and their son for damages, again alleging that the Foretichs and their son had engaged in heinous acts of sexual abuse of the infant granddaughter.³¹⁵ The Foretichs and their son filed counterclaims for defamation against the ex-wife.³¹⁶ The ex-wife eventually hid the granddaughter with her own parents in New Zealand and was jailed for over two years for refusing to disclose the location of the granddaughter to the family court.³¹⁷

309. See *Gertz*, 418 U.S. at 344–45, 352; *Firestone*, 424 U.S. at 453–54, 454 n.3; *Wolston*, 443 U.S. at 164–65, 168.

310. See *Gertz*, 418 U.S. at 345.

311. See *Foretich v. Cap. Cities/ABC, Inc.*, 37 F.3d 1541, 1543 (4th Cir. 1994).

312. *Id.* at 1543, 1549.

313. *Id.* at 1543.

314. See *id.* at 1543–44.

315. See *id.*

316. See *id.* at 1544.

317. See *id.*

These legal proceedings garnered national media attention, including hundreds of articles and “extensive” broadcast coverage.³¹⁸ The Foretichs’ son and the ex-wife each hired public relations firms.³¹⁹

Judge Murnaghan, delivering the opinion of the Fourth Circuit (with respect to the Foretichs’ libel claim against ABC), found that the record did not indicate that the Foretichs “ever actively sought out press interviews” during the custody battle and prior lawsuit against the ex-wife.³²⁰ However, the Foretichs did “accede to requests for several newspaper and magazine interviews, attend at least three press conferences or rallies organized by or on behalf of their son, and appear on at least two television shows.”³²¹ Throughout these interviews, the Foretichs “did not simply confine their remarks to denying [the ex-wife’s] allegations,” but also went on in many instances to describe “the positive environment that they had provided for [the granddaughter], the negative influence that [the ex-wife] had on the [granddaughter], their belief that [the ex-wife] was mentally unstable, and the distress that they had suffered as a result of [the ex-wife’s] allegations.”³²²

Judge Murnaghan provided an extensive and thoughtful summary of the development of the limited purpose public figure determination from *Gertz*, *Firestone*, *Wolston*, and *Hutchinson* as an introduction to a lengthy analysis of whether the Foretichs qualified as limited purpose public figures.³²³ The issue for Judge Murnaghan became whether the Foretichs satisfied the *Gertz* limited purpose public figure definition as persons who had “thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.”³²⁴

ABC argued that the Foretichs had “voluntarily participated in the public controversy when they chose to support their son by publicly criticizing [the ex-wife], by speaking with news reporters, and by appearing on television, at press conferences, and at public gatherings.”³²⁵ ABC emphasized that, in addition to “answering [the ex-wife’s] charges against them,” the Foretichs’ participation was also “aimed at swaying public opinion in favor of their son and against his former wife,” with a particular effort to “improve their son’s image and to convince the public of [the ex-wife’s] instability, irrationality, and, ultimately, unfitness to retain custody of [the granddaughter].”³²⁶

Judge Murnaghan did not identify a basis from *Gertz*, *Firestone*, *Wolston*, or even *Hutchinson* to reject ABC’s application of *Gertz* to find that the Foretichs qualified as limited purpose public figures.³²⁷ He was, however,

318. *Id.*

319. *Id.*

320. *Id.* at 1545.

321. *Id.*

322. *Id.*

323. *See id.* at 1551–54, 1556–67.

324. *Id.* at 1556 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974)).

325. *Id.* at 1557.

326. *Id.* at 1557–58.

327. *See id.* at 1558.

clearly troubled by how heinous the ex-wife's allegations against the Foretichs had been and was sympathetic to the Foretichs' natural desire to defend themselves (and their son) in the widespread media coverage of the controversy.³²⁸ Such concern led to the adoption of an entirely new basis to reject the Foretichs' qualification as limited purpose public figures outside of the *Gertz* framework.³²⁹ In at least a limited context, Judge Murnaghan grafted the common law "conditional (or qualified) privilege of reply, also known as the privilege to speak in self-defense," onto the constitutional limited purpose public figure determination analysis:

[W]e hold that a person who has been publicly accused of committing an act of serious sexual misconduct that (if committed in the place of publication and proved beyond a reasonable doubt) would be punishable by imprisonment cannot be deemed a "limited-purpose public figure" merely because he or she makes reasonable public replies to those accusations.³³⁰

Judge Murnaghan explained that one can lose such a privilege if it was either: (1) not responsive to the public attack; (2) disproportionate to the attack; or (3) excessively published.³³¹ He emphasized, however, "that a public response to a public attack may be 'uninhibited, robust, and wide-open,' without stepping over the line into abuse."³³² Judge Murnaghan continued, stating,

Together, those three inquiries will determine whether the Foretich[s]' public comments and appearances were predominantly, on the one hand, reasonable replies to [the ex-wife's] accusations of child sexual abuse, or, on the other hand, efforts to assume special roles of prominence in the [Foretich] controversy in order to affect its outcome.³³³

Judge Murnaghan did not attempt to disguise his application of the self-defense privilege here as a principle that was inherent in the *Gertz* line of cases, but readily acknowledged that he was "borrowing" such principles from the "common law" and "import[ing]" them into a "relatively recent constitutional doctrine."³³⁴ He found that the Foretichs were not limited purpose public figures because their numerous public responses in news articles and television appearances were "responsive, proportionate, and not excessively published."³³⁵

Judge Murnaghan believed that courts had "struggled" in the "three decades" since *Sullivan* to "find the proper balance" between the protection of "reputational interests" and "free expression."³³⁶ He "acknowledge[d]"

328. *See id.*

329. *See id.* at 1558–59.

330. *Id.*

331. *See id.* at 1560.

332. *Id.* (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)) (notably, the quoted statement took place outside of the *Sullivan* court's actual malice application).

333. *Id.*

334. *Id.*

335. *Id.* at 1563.

336. *Id.* at 1564.

that the self-defense privilege’s application to the Foretichs’ case was not without concern, as he recognized “that some of their public statements were probably intended (at least in part) to influence the outcome of the custody dispute or of the legislative debate in Congress,” and that “it is almost impossible to extricate statements made in self-defense from statements intended to influence the outcome of the controversy.”³³⁷

Judge Murnaghan further recognized that some might “characterize” the opinion in this case as “favoring” reputational interests over free expression.³³⁸ Judge Murnaghan argued that the result justified such concern, as he concluded that extending the actual malice privilege to the Foretichs in this case would only serve to “muzzle persons who stand falsely accused of heinous acts and to undermine the very freedom of speech in whose name the extension is demanded.”³³⁹

By freely permitting the Foretich[s] to respond to [the ex-wife’s] charges against them—charges that have never been proved in any court of law—we foster both the individual interest in self-expression and the social interest in the discovery and dissemination of truth—the very goals that animate our First Amendment jurisprudence.³⁴⁰

The Fourth Circuit would later reaffirm and apply the self-defense privilege exception to the limited purpose public figure determination in *Wells v. Liddy*.³⁴¹ However, in *Wells*, the Fourth Circuit did not limit the application of the *Foretich* rule to heinous criminal allegations, but rather described it as applying to any statement replying to defamation that would qualify as defamation per se.³⁴² The *Wells* court applied the *Foretich* self-defense privilege exception to a libel plaintiff that had engaged the news media in response to a book that accused her of arranging dates for politicians with prostitutes.³⁴³

b. Problems with Application of the Common Law Self-Defense Privilege as an Exception to the Limited Purpose Public Figure Determination

There are at least four problems with the self-defense privilege (even in its limited description in *Foretich* and *Wells*) that should cause courts to reject its adoption or further application. First, similar to *Clyburn*’s truthful-response exception, the self-defense privilege is irreconcilable with the actual malice privilege and *Gertz*. The sole purpose of the actual malice privilege is to protect open discourse about public officials and public

337. *Id.* at 1563.

338. *Id.* at 1564.

339. *Id.*

340. *Id.*

341. *See Wells v. Liddy*, 186 F.3d 505, 534, 537 (4th Cir. 1999) (citing *Foretich*, 37 F.3d at 1556).

342. *See id.* at 534.

343. *See id.* at 537.

figures.³⁴⁴ The specific purpose of the limited purpose public figure category in *Gertz* is to protect open discourse about a person that has accepted a public role in attempting to influence the public's consideration of a particular controversy.³⁴⁵ As such, the only relevant question in *Gertz* is whether the libel plaintiff is a public figure such that the actual malice privilege should protect open discourse about such person in relation to the controversy.³⁴⁶ Whether the limited purpose public figure's attempted influence over the controversy was just or unjust is entirely irrelevant to the value of protecting open public discourse about the person.

Indeed, in adopting and maintaining the actual malice privilege, the Supreme Court already carefully weighed the value of protecting open public discourse about a limited purpose public figure against the cost inherent in the difficulty of establishing actual malice:

[The actual malice privilege] administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander. And it exacts a correspondingly high price from the victims of defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the [privilege].³⁴⁷

In *St. Amant*, the Supreme Court made this point abundantly clear yet again: “[T]he stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies.”³⁴⁸ This calculus does not change because the alleged false statements pertain to heinous conduct about the person. If anything, the importance of protecting public discourse would only increase if the heinous conduct of the person were at issue. Simply put, a limited purpose public figure does not become less public because she is trying to defend her reputation. To provide a self-defense privilege exception requires that the purpose of the actual malice privilege (along with the costs already accepted by the Supreme Court) be set aside. There is no basis for this in any of the *Gertz* line of cases.

Second, Judge Murnaghan's proposed free speech basis in support of the self-defense privilege exception is flawed. Judge Murnaghan essentially concluded in *Foretich* that the self-defense privilege would actually support public discourse because the libel plaintiff would feel better about providing news media with a response to the alleged misconduct if she did not have to worry about being deemed a limited purpose public figure.³⁴⁹ As such, Judge Murnaghan assumes that public discourse would benefit

344. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269–71 (1964) (“Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . .” (citations omitted)).

345. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344–45, 352 (1974).

346. See *id.* at 343–47.

347. *Id.* at 342.

348. *St. Amant v. Thompson*, 390 U.S. 727, 731–32 (1968).

349. See *Foretich v. Cap. Cities/ABC, Inc.*, 37 F.3d 1541, 1564 (4th Cir. 1994).

from more information from the potential libel plaintiff. Judge Murnaghan, however, misses the glaring problem the self-defense privilege exception creates—the news media would be dissuaded from publishing a report at all. Under the self-defense privilege exception, the journalist or news organization is not protected by the actual malice privilege for publishing a report that includes *both* the allegations against the libel plaintiff and the libel plaintiff’s response. Without such protection, news organizations would elect to self-censor and not publish in many instances, even though the news organization was attempting to publish a complete report that includes multiple perspectives for the public’s consideration (the “no surprises” rule). The likely result would not be more information for public discourse, but rather no information. If the self-defense privilege exception has any theoretical benefit for the interests of public discourse, which is doubtful, it is entirely outweighed by the likely self-censorship of the news media.

Third, Judge Murnaghan’s assumption that application of the actual malice privilege would necessarily “muzzle” a person accused of heinous conduct from speaking with the news media is debatable.³⁵⁰ A person does not lose their right to bring a libel claim against the third-party source, or even the news media entity, by virtue of responding to the allegations of misconduct through the news media. Rather, such person only takes on a higher standard of proof—actual malice—in the subsequent case in becoming a limited purpose public figure.

Though the actual malice standard is high, it is entirely conceivable that the libel plaintiff would still choose to respond through the news media in circumstances where she is accused of heinous conduct. In the case of alleged heinous conduct or defamation per se, many potential libel plaintiffs may feel more confident in their ability to prove reckless disregard for the truth by the accused libeler and would therefore more likely accept the actual malice standard to also benefit from a response through the news media. Those benefits could be impactful, as qualification as a limited purpose public figure requires that the libel plaintiff has access to the media so as to engage in sufficient self-help if desired.³⁵¹

Fourth, the self-defense privilege, at least as proposed in *Foretich*, relies upon the libel plaintiff’s engagement with the news media in defense of her reputation and not an effort to influence the public regarding the particular controversy at issue.³⁵² However, as was conceded by Judge Murnaghan, if the particular controversy is the alleged heinous conduct of the libel plaintiff, there is little to no conceivable way in which the libel plaintiff can actually distinguish her engagement of the news media between the two purposes.³⁵³ As such, there is likewise little to no value in trying to support the self-defense privilege in the abstract as having some theoretical existence outside of the libel plaintiff’s attempt to influence public opinion

350. *See id.*

351. *See Gertz*, 418 U.S. at 344–45.

352. *See Foretich*, 37 F.3d at 1564.

353. *See id.* at 1563.

about the controversy at hand. As was explained above, such a problem strikes at the heart of the actual malice privilege in the limited purpose public figure context and cannot be brushed aside.

3. *Vague and Confusing Approval from the First Circuit and Other Courts*

While not expressly adopting either the truthful-response exception from *Clyburn* or the constitutional self-defense privilege exception from *Foretich*, the First Circuit appeared to approve of the idea of permitting a libel plaintiff to respond through the news media without becoming a limited purpose public figure in *Pendleton v. City of Haverhill*.³⁵⁴ However, in *Pendleton*, Judge Selya of the First Circuit found the former criminal defendant turned libel plaintiff was not a limited purpose public figure primarily by way of the *Wolston* rule that a libel plaintiff does not qualify as a limited purpose public figure simply because he had been involved in a newsworthy criminal proceeding.³⁵⁵ Judge Selya only secondarily provided in a one-line statement, without any accompanying analysis, that “[b]y like token, one does not become a public figure merely by defending oneself publicly against accusations.”³⁵⁶ Judge Selya vaguely cited both *Firestone* and *Foretich* in support, but did not provide any explanation (in parentheses or otherwise) about the supportive holdings from these cases, or the limits/scope of the approved rule.³⁵⁷

The First Circuit more expressly adopted the Fourth Circuit’s self-defense privilege exception (at least to some extent) a little over a decade later in *Lluberres v. Uncommon Productions, LLC*.³⁵⁸ Judge Howard of the First Circuit provided that “[w]e agree with *Foretich* in this limited sense: an individual should not risk being branded with an unfavorable status determination merely because he defends himself publicly against accusations, especially those of a heinous character.”³⁵⁹ It is not altogether clear from this statement whether Judge Howard contemplated application of the self-defense privilege exception outside of the limited “heinous” sex-crime category that was expressed in *Foretich*, though his final phrase, “especially those of a heinous character,” seems to indicate that he was open to a broader application.³⁶⁰

To potentially confuse or conflate the First Circuit rule further, Judge Howard also included a citation to *Clyburn* in accord with this rule and parenthetically quoted *Clyburn*’s truthful-response exception:

354. See *Pendleton v. City of Haverhill*, 156 F.3d 57, 68 (1st Cir. 1998).

355. See *id.* (citing *Wolston v. Reader’s Dig. Ass’n*, 443 U.S. 157, 168 (1979)).

356. *Id.* (citing *Time, Inc. v. Firestone*, 424 U.S. 448, 454 n.3 (1976); *Foretich*, 37 F.3d at 1558).

357. See *id.*

358. See *Lluberres v. Uncommon Prods., LLC*, 663 F.3d 6, 19 (1st Cir. 2011).

359. *Id.* (citations omitted) (citing *Foretich*, 37 F.3d at 1557–58, 1563, in the preceding paragraph).

360. See *id.*

[W]e have doubts about placing much weight on purely defensive, truthful statements made when an individual finds himself at the center of a public controversy but before any libel occurs; it is not clear why someone dragged into a controversy should be able to speak publicly only at the expense of foregoing a private person’s protection from defamation.³⁶¹

Judge Howard did not speak specifically to any requirement that the libel plaintiff’s response had to be truthful in order to shield her from limited purpose public figure status.³⁶² However, Judge Howard did not have to apply the details of whatever rule that had been adopted, as he found that the libel plaintiffs in that case were not acting in response to the alleged libel, and otherwise that their conduct “went well beyond any reasonable measure of self-defense.”³⁶³

Some federal district courts, especially in the First Circuit, have applied the rule vaguely described in *Llubes* in a number of cases since, without any greater elaboration.³⁶⁴ Other federal district courts and state courts have cited to both *Clyburn* and *Foretich* without much (if any) distinction as to the inherent differences between *Clyburn*’s truthful-response exception (limited to accurate responses) and *Foretich*’s self-defense privilege exception (limited to heinous criminal allegations or per se defamation).³⁶⁵

361. *Id.* (quoting *Clyburn v. News World Commc’ns, Inc.*, 903 F.2d 29, 32 (D.C. Cir. 1990)).

362. *See id.* at 20.

363. *Id.*

364. *See* *Coleman v. Grand*, 523 F. Supp. 3d 244, 257 (E.D.N.Y. 2021) (“[A]n individual should not risk being branded with an unfavorable status determination merely because he defends himself publicly against accusations.” (alteration in original) (quoting *Llubes*, 663 F.3d at 19)); *Alharbi v. Theblaze, Inc.*, 199 F. Supp. 3d 334, 357 (D. Mass. 2016) (applying *Llubes*’s rule that “an individual should not risk being branded with an unfavorable status determination merely because he defends himself against accusations, especially those of a heinous character,” in finding that the libel plaintiff was not a limited purpose public figure because he had “defended himself against public accusations in at most five interviews over the course of several weeks.” (quoting *Llubes*, 663 F.3d at 19)); *Alharbi v. Beck*, 62 F. Supp. 3d 202, 210 n.2 (D. Mass. 2014):

[T]he Court need not determine whether plaintiff’s interviews with the press inserted him into the controversy so as to make him a limited purpose public figure or, on the contrary, render his conduct protected because “an individual should not risk being branded with an unfavorable status determination merely because he defends himself publicly against accusations, especially those of a heinous character.”

(citation omitted) (quoting *Llubes*, 663 F.3d at 19); *see also* *Noyes v. Moccia*, No. 98-19, 1999 WL 814376, at *11 (D.N.H. June 24, 1999) (recognizing and applying *Pendleton*’s general approval: “[O]ne does not become a public figure merely by defending oneself publicly against accusations.” (alteration in original) (quoting *Pendleton v. City of Haverhill*, 156 F.2d 57, 68 (1st Cir. 1998))).

365. *See* *Franchini v. Bangor Publ’g Co.*, 560 F. Supp. 3d 312, 330–31 (D. Me. 2021) (citing *Llubes*, 663 F.3d at 18; *Clyburn*, 903 F.2d at 32; *Pendleton*, 156 F.3d at 68) (recognizing, but not applying, the “limited” self-defense privilege rule from *Llubes*, while also quoting the truthful-response allowance from *Clyburn* and basic approval of a self-defense privilege concept from *Pendleton*); *Am. Fam. Mut. Ins. Co. v. Edgar*, No. 92-cv-779, 1995 WL 370221, at *6 (Wis. Cir. Ct. Jan. 25, 1995) (referencing the plaintiff’s citations to both the *Clyburn* truthful-response allowance and *Foretich* self-defense privilege before generally rejecting the plaintiff’s qualification as a limited purpose public figure). *But see* *Barbash v. STX Fin., LLC*, No. 20-cv-123, 2020 WL 6586155, at *6 (S.D.N.Y. Nov. 10, 2020) (citing *Wolston v. Reader’s Dig. Ass’n*, 443 U.S. 157, 167 (1979)) (rejecting the plaintiff’s reliance upon *Wolston* in large part

As such, growth in the adoption of these two exceptions in the minority of jurisdictions has come with much confusion and potential for further expansion (of scope) at the cost of the free speech interest protected by the actual malice privilege.

III. CONCLUSION

In summary, the *Gertz* line of cases provide that the free speech and free press rights guaranteed by the First Amendment should incentivize the “no surprises rule” and most often protect news media that include the subject person’s response to allegations of misconduct in the published report. Specifically, in most reports involving a public controversy, the news media defendant should be protected by the actual malice privilege in a subsequent libel lawsuit brought by the subject person because such person qualifies as a limited purpose public figure. The prevailing principles from *Gertz*, *Firestone*, *Wolston*, and even *Hutchinson* demonstrate that Chief Justice Burger’s defendant-manufactured privilege observation in *Hutchinson* should not prevent courts from reaching this conclusion. Moreover, as discussed, there are at least four additional factual points that courts can rely upon to specifically distinguish news media defendants from potential applicability of the defendant-manufactured privilege observation in *Hutchinson*.

Furthermore, the *Clyburn* truthful-response exception and *Foretich* self-defense privilege exception (along with whatever hybrid exception eventually solidifies in the First Circuit) should be rejected by future courts primarily because they contradict *Sullivan* and the *Gertz* line of cases by incorrectly elevating individual reputational interests over free speech and free press rights that are inherent in the protection of public discourse. Such exceptions are so fundamentally at odds with the purposes of the actual malice privilege that they simply cannot reasonably exist while the privilege is still required by the First Amendment. This is especially the case when such exceptions apply to news media defendants in the same manner as they would apply to a third-party source of information.

because the plaintiff consciously discussed the controversy with the news media after initial articles and her court case).