FAMOUSLY ANONYMOUS: WHY ANONYMOUS NEWS SOURCES SHOULD NOT BE CONSIDERED PUBLIC FIGURES FOR PURPOSES OF THE ACTUAL MALICE PRIVILEGE

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INTRODUCTION

Given the negative (and sometimes dangerous) consequences that a person may face for providing information to a news organization, the reality is that many sources for important news reports require anonymity.[1] Indeed, "[a]nonymous sources are sometimes the only key to unlocking that big story, throwing back the curtain on corruption, fulfilling the journalistic missions of watchdog on the government and informant to the citizens."[2]

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[1] *See* Mike Snider, *The anonymous op-ed: Why would The New York Times run an unnamed tell-all article?*, USA TODAY (Sept. 6, 2018), https://www.usatoday.com/story/money/media/2018/09/06/new-york-times-op-ed-anonymous-why/1209880002/ [https://perma.cc/7FQN-58R5]; Paul Farhi, *Anonymous sources are increasing in news stories, along with rather curious explanations*, THE WASHINGTON POST (Dec. 15, 2013), https://www.washingtonpost.com/lifestyle/style/anonymous-sources-are-increasing-in-news-stories-along-with-rather-curious-explanations/2013/12/15/5049a11e-61ec-11e3-94ad-004fefa61ee6_story.html [https://perma.cc/7BYV-BSJ2].

[2] *Anonymous Sources*, SOCIETY OF PROFESSIONAL JOURNALISTS, https://www.spj.org/ethics-papers-anonymity.asp [https://perma.cc/9KQR-FEGW] (last visited Jan. 16, 2022).

Martin Baron, longtime executive editor for *The Washington Post,* has explained that "many companies, government agencies, and institutions of every type do their best to make sure people with knowledge won't speak publicly."[3] On top of direct consequences, such as the loss of a job, "people who speak openly can suffer recrimination."[4] As a result, "[a]nonymous sources are commonly used in news stories, especially in national and international political reporting."[5] "[V]ery often the alternative is no information whatsoever."[6]

As one might imagine, anonymous sources can lose their anonymity through no fault of their own, whether it be by mistake, separate investigation, subpoena/court order, or otherwise. This can embroil the anonymous source in the public issue or controversy at hand, and of course draw public attacks from those that might have been harmed by the information that the source provided to the news organization. Such attacks can come in the form of defamation. Assuming that the source had been a private person that requested anonymity for the purpose of keeping themself out of the public issue personally, how should the law treat the source's defamation claim? Specifically, should the formerly anonymous source have to prove "actual malice" in order to succeed on the defamation claim, as a limited purpose public figure might, because the source is now "involved" in the public issue?

The actual malice privilege protects (and encourages) public discussion and news reporting about government officials and public figures by providing a heightened burden of proof for damages in a defamation suit brought by such government officials and public figures.[7] In order for the government official or public figure to succeed on a defamation claim requesting damages, she or he must prove (by clear and convincing evidence) that the alleged defamation was carried out with actual malice; that is, "with 'knowledge that it was false or with reckless disregard of whether it was false or not.'"[8] "Mere negligence does not suffice. Rather, the

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[3] Farhi, *supra* note 1.

[4] *Id.*

[5] Snider, *supra* note 1.

[6] Farhi, *supra* note 1.

[7] *See* Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 510 (1991) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964)).

[8] *Id.* (quoting *Sullivan*, 376 U.S. at 279-80).

[government official or public figure] must demonstrate that the author 'in fact entertained serious doubts as to the truth of his publication' . . . or acted with a 'high degree of awareness of . . . probable falsity.'"[9]

"Actual malice, even by way of recklessness, is therefore a difficult standard to meet, and quite purposefully so."[10] The Supreme Court of the United States (the "Supreme Court") has concluded that the First Amendment requires government officials and public figures to bear this high evidentiary burden in order to avoid undue self-censorship by news organizations in fear of lawsuits, even if that means government officials and public figures are more likely to lose their defamation claims.[11] "[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."[12] The Supreme Court described such high stakes and costs in *Gertz v. Robert Welch, Inc.*, a pivotal case regarding the applicability of the actual malice privilege:

> [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 [actual malice privilege].[13]

In light of such a high evidentiary standard, the central issue in many cases is the applicability of the actual malice privilege itself, and the key case for such issue is *Gertz*. Following a series of conflicted opinions at the outset of the actual malice privilege jurisprudence regarding whether a public figure component should be required at all (as opposed to simply basing the privilege on the

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[9] *Id.* (second omission in original) (first quoting St. Amant v. Thompson, 390 U.S. 727, 731 (1968); and then quoting *Garrison v. Louisiana,* 379 U.S. 64, 74 (1964)).

[10] Biro v. Conde Nast, 963 F. Supp. 2d 255, 277 (S.D.N.Y. 2013).

[11] *Id.*

[12] *Id.* (quoting *St. Amant*, 390 U.S. at 731-32).

[13] 418 U.S. 323, 342 (1974).

presence of a public issue), the Supreme Court settled the two categories of applicable public figures (non-governmental officials) in *Gertz*: 1) the generally famous person – those that "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes" and 2) the limited purpose public figure – those persons that have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[14]

There are numerous published cases and pieces of scholarship analyzing whether or not a person has become a limited purpose public figure by virtue of *non-anonymous* actions leading to involvement in a public issue or controversy. However, despite the rather common use of anonymous news sources, there is virtually no published case law or scholarship that has significantly analyzed whether an anonymous source that provides information to a news organization should be considered a limited purpose public figure if the source later brings a defamation suit after losing anonymity. In 2020, the United States District Court for the District of Nevada addressed this issue and partially applied *Gertz's* rule in a problematic fashion.

In *Tesla, Inc. v. Tripp*, a lead process technician ("Tripp") at Tesla's Nevada manufacturing plant contacted several reporters and offered to provide information as an anonymous source regarding Tesla's production at the facility.[15] Tripp told reporters that the amount of scrap metal produced by the facility was much higher than what Tesla had reported and that Tesla was not close to hitting its public goal of manufacturing 5,000 Model 3 vehicles per week.[16] A reporter with *Business Insider* published two articles using information from Tripp as an anonymous source (the day before and the day after Tesla's annual shareholder meeting), entitled: 1) "Internal documents reveal Tesla is blowing through an insane amount of raw material and cash to make Model 3s, and production is still a nightmare" and 2) "Tesla's new Gigafactory robots that are supposed to help it ramp up Model 3 production aren't working yet[.]"[17]

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[14] *Id.* at 345.
[15] Tesla, Inc. v. Tripp, 487 F. Supp. 3d 953, 959 (D. Nev. 2020).
[16] *Id.* at 960.
[17] *Id.*

Elon Musk ("Musk") and Tesla initiated an investigation into the source of the information for the articles, determined Tripp to be a potential source, and got Tripp to admit to being the source during an interview with security.[18] Tesla terminated Tripp's employment and brought suit against him.[19] Musk and Tripp thereafter exchanged "escalating emails" with one another, a portion of which Tripp later sent to a reporter at *The Guardian*.[20] Shortly thereafter, Tesla allegedly received a call at its call-center from a person claiming to be Tripp's friend, who said that Tripp was "extremely volatile" and "very well heavily armed."[21] Musk responded by email to an inquiry for comment from *The Guardian* (regarding the email string Tripp had forwarded), and said that he "was just told that we received a call at the Gigafactory that [Tripp] was going to come back and shoot people."[22] Tesla's communication team followed up on Musk's email to *The Guardian* later that evening and also stated that Tesla had received "a phone call from a friend of Mr[.] Tripp telling us that Mr[.] Tripp would be coming to the [facility] to 'shoot the place up.'"[23] Tripp brought counterclaims for defamation against Tesla in part regarding Musk and Tesla's characterization of the alleged "shoot the place up" call to the press.[24]

Tesla argued that Tripp must demonstrate actual malice for his defamation claim because "Tripp became a limited purpose public figure when he intentionally inserted himself into the public debate surrounding Model 3 production."[25] Tripp argued that "actual malice is not the correct standard because he initially tried to remain anonymous when he shared information with [the

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[18] *Id.*

[19] *Id.* at 961.

[20] *Id.*

[21] *Id.*

[22] *Id.* (alteration in original) (quoting Exhibits in Support of Tesla, Inc.'s Motion for Summary Judgment or, in the Alternative, for Partial Summary Judgment (Volume 3 of 3), Exhibit H at 2, Tesla, Inc. v. Tripp, 487 F. Supp. 3d 953 (D. Nev. 2020) (No. 3:18-cv-00296), ECF No. 160-19).

[23] *Id.* (first and second alterations in original) (quoting Exhibits in Support of Tesla, Inc.'s Motion for Summary Judgment or, in the Alternative, for Partial Summary Judgment (Volume 2 of 3), Exhibit 40 at 2, Tesla, Inc. v. Tripp, 487 F. Supp. 3d 953 (D. Nev. 2020) (No. 3:18-cv-00296), ECF No. 159-15).

[24] *Id.*

[25] *Id.* at 969-70.

reporter], but Musk and other Tesla employees dragged him into the public arena."[26] "Tesla replie[d] that Tripp can be a limited purpose public figure even though he initially told reporters he wanted to remain anonymous because he nonetheless *injected himself* into a public controversy."[27]

The district court agreed with Tesla.[28] Even though Tripp sought to provide information to reporters anonymously, and at least initially not bring himself personally into the public debate on Model 3 production, the district court found that Tripp was a limited purpose public figure because he had "injected himself" into the Model 3 production controversy by passing Tesla's information along to reporters on the issue.[29] Citing a Ninth Circuit opinion that only partially quoted the analysis in *Gertz*, the district court explained that the "test" is simply "whether [Tripp] voluntarily injected himself into a public controversy."[30] The district court found that Tripp knew about the public controversy surrounding Model 3 production and that providing information to the press (even contingent upon anonymity) was a "voluntary act" that had "injected" Tripp into the issue.[31] Tripp was therefore required to satisfy the actual malice privilege standard in order to succeed on his defamation claims.[32] The district court "[f]urther" noted that Tripp had "ratcheted up his entanglement in the public controversy . . . as time went on" by forwarding his back-and-forth emails with Musk to *The Guardian* (after Tesla had terminated and sued Tripp), though the district court's analysis had already declared Tripp a limited purpose public figure by providing information to reporters.[33]

The problem with the district court's conclusion is that the Supreme Court, through a hard-fought series of foundational cases working out the proper applicability of the actual malice privilege, emphasized that mere involvement in a public issue/controversy is not enough to qualify a person as a limited purpose public figure.

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[26] *Id.* at 970.
[27] *Id.* (emphasis added).
[28] *Id.* at 971-72.
[29] *Id.* at 971.
[30] *Id.* (citing Flowers v. Carville, 310 F.3d 1118, 1129 (9th Cir. 2002)).
[31] *Id.*
[32] *Id.* at 972.
[33] *Id.* at 971.

As will be explained in this article, the person's intended role in the public issue matters greatly. It is not enough to say that a person has adequately "injected" themself into a public issue because she or he provided information about the issue which may influence public opinion. Instead, a limited purpose public figure is a person who takes "voluntary action" to actually "thrust" themself—their very personality—to the forefront of the public issue in order to influence public opinion or resolution.[34] And importantly, such person is not a limited purpose public figure if she or he winds up at the forefront of the public discussion because they were "dragged" there involuntarily.[35]

In sum, an anonymous news source is not a limited purpose public figure simply because the source has provided information to a news organization that has published a report about a public issue. If the source loses anonymity and claims to have suffered defamation thereafter, the source should not be required to establish actual malice in order to succeed on a defamation claim. Given the common use of anonymous news sources, the importance that such persons have in the ability of news organizations to report many types of news, and the great risk of recrimination (including defamation) that such persons face if they lose their anonymity, the applicability of the actual malice privilege in this context is an important issue which promises to find its way before more and more courts in the future.

I. ANALYSIS

A. New York Times Co. v. Sullivan – Defamation, Damages, and Public Officials

The Supreme Court first adopted the actual malice privilege in the landmark case of *New York Times Co. v. Sullivan* in 1964.[36] In *Sullivan*, a Montgomery, Alabama jury awarded a city Commissioner of Public Affairs (who oversaw the police force) damages from libel claims brought against the New York Times

[34] Wolston v. Reader's Dig. Ass'n, 443 U.S. 157, 165 (1979); Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

[35] *Wolston*, 443 U.S. at 166.

[36] 376 U.S. 254, 279-83 (1964).

newspaper and four African American clergymen.[37] The Commissioner alleged that a full page advertisement printed in the paper falsely accused the police (and him) of answering Dr. Martin Luther King's protests "with 'intimidation and violence,' bombing [King's] home, assaulting [King's] person, and charging [King] with perjury."[38]

> The trial judge submitted the case to the jury under instructions that the statements in the advertisement were "libelous per se" and were not privileged, so that [the New York Times and clergymen] might be held liable if the jury found that they had published the advertisement and that the statements were made "of and concerning" [the Commissioner].[39]

Though "actual malice" was in theory required for punitive damages under Alabama law, the trial judge "refused" to instruct the jury that it "must be 'convinced' of malice, in the sense of 'actual intent' to harm or 'gross negligence and recklessness.'"[40] This otherwise important distinction made little difference in the outcome at trial however, as the judge "refused to" even "require that a verdict for [the Commissioner] differentiate between compensatory and punitive damages."[41]

At trial, the Commissioner "made no effort to prove that he suffered actual pecuniary loss as a result of the alleged libel."[42] The jury found in favor of the Commissioner and awarded him $500,000, "the full amount claimed . . . ."[43] The trial judge denied objections that such "rulings abridged the freedoms of speech and of the press that are guaranteed by the First and Fourteenth Amendments."[44] "[T]he Supreme Court of Alabama sustained the trial judge's rulings and instructions in all respects."[45]

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[37] *Id.* at 256.
[38] *Id.* at 258.
[39] *Id.* at 262.
[40] *Id.*
[41] *Id.*
[42] *Id.* at 260.
[43] *Id.* at 256.
[44] *Id.* at 262-63.
[45] *Id.* at 263 (citing New York Times Co. v. Sullivan 144 So. 2d 25, 50-52 (Ala. 1962)).

Justice Brennan delivered the opinion of the Supreme Court on appeal.[46] He would become a frequent author of opinions on the actual malice privilege during its formative development. Justice Brennan framed the Supreme Court's inquiry strictly within the context of a public official seeking damages from defamation: "The question before us is whether [the Alabama] rule of liability, as applied to an action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments."[47] The Court was, however, at least in part, guided by cases and sources which encouraged the Court to consider the *Sullivan* case generally "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[48] The Supreme Court also approved of the general principle that an "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"[49]

From these general principles, Justice Brennan's analysis eventually focused upon points of consideration involving speech about public officials,[50] which in turn resulted in an initial actual malice privilege being specific to speech involving public officials:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[51]

The Alabama defamation-damages rule was "constitutionally deficient for failure to provide the safeguards for freedom of speech

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[46] *Id.* at 256.

[47] *Id.* at 268.

[48] *Id.* at 270 (first citing Terminiello v. City of Chicago, 337 U.S. 1, 4 (1948); and then citing De Jonge v. Oregon, 299 U.S. 353, 365 (1937)).

[49] *Id.* at 271-72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)) (citing Sweeney v. Patterson, 128 F.2d 457, 458 (1942), *cert. denied*, 317 U.S. 678 (1943)).

[50] *Id.* at 264-79.

[51] *Id.* at 279-80.

and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct."[52]

B. The Road to Rosenbloom – The Court's First Applications of the Actual Malice Privilege to Claims Brought by Private Individuals.

Two years later, the Supreme Court briefly addressed the scope of government officials to which the actual malice privilege might apply in *Rosenblatt v. Baer*.[53] Justice Brennan, writing for the majority, noted that the Supreme Court had "no occasion [in *Sullivan*] 'to determine how far down into the lower ranks of government employees the "public official" designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included.'"[54]

Though Justice Brennan explained that "[n]o precise lines need be drawn for the purposes" of that case, it was "clear . . . that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[55] Justice Brennan emphasized that the actual malice privilege served a "twofold" interest of protecting "debate on public issues" and "debate about those persons who are in a position significantly to influence the resolution of those issues."[56] This two-prong rationale for the privilege at the outset of what would become its rapid evolution is key. Even before the actual malice privilege made its way to non-governmental officials, the basis for the privilege was not simply to provide a heightened protection to discuss public issues. Rather, the

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[52] *Id.* at 264. As for the state action requirement, the Supreme Court explained that "[a]lthough this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press." *Id.* at 265. "The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised." *Id.* Application of state libel/defamation law, whether it be common law rule or statute, constitutes state action. *Id.*

[53] 383 U.S. 75, 85 (1966).

[54] *Id.* (quoting *Sullivan*, 376 U.S. at 283 n.23).

[55] *Id.*

[56] *Id.*

privilege was established specifically in connection with speech about the actual *person* who had placed themselves at the forefront of such public issue.

The Supreme Court extended the actual malice requirement that very next year in 1967 to private individuals (non-governmental officials) in certain contexts through two cases. In another opinion authored by Justice Brennan, the Court held in *Time, Inc. v. Hill* that the actual malice privilege applied to a false light suit brought by a private individual (non-governmental official) if the subject of the false light claim involved a matter of "public interest."[57] In *Curtis Publishing Co. v. Butts,* the Supreme Court held that the actual malice standard also applied in libel cases involving a private individual that was a "public figure."[58] From these two initial cases involving the private person came a fundamental tension between whether the primary focus of the actual malice privilege should be the topic (public importance) or person (public fame/personality) at issue.

The various points set forth in the *Butts* opinions would become important later for the final framework of the privilege's application to speech about a private person. Justice Harlan's plurality opinion based the "public figure" threshold primarily upon two factors: whether such person "commanded" public interest at the time of the publication, and whether such person had "sufficient access" to the media to be able to address the alleged defamatory statements as a means of "self-defense."[59] Notably, Justice Harlan explained 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."[60] This second category of public figure would, in later opinions after the *Gertz* case, be described as the limited purpose public figure.[61] Again, from its genesis, the

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[57] 385 U.S. 374, 380-91 (1967).

[58] 388 U.S. 130, 154 (1967).

[59] *Id.* at 154-55.

[60] *Id.* at 155.

[61] *See e.g.,* Lluberes v. Uncommon Prods., LLC, 663 F.3d 6, 20 (1st Cir. 2011) ("*Gertz* defined a *limited*-purpose public figure not in terms of geography but in terms of the controversy that he has stepped into."); Wells v. Liddy, 186 F.3d 505, 535 (4th Cir. 1999) ("The Supreme Court stated in *Gertz* that the class of limited-purpose public figures included those individuals who 'thrust[ed] themselves to the forefront of particular

limited purpose public figure was defined not just by an individual making her or his ideas/information public in some way, but by "thrusting" her or his very "personality" into the public eye so as to influence the "public controversy."[62]

Chief Justice Warren also observed in his concurring opinion in *Butts* that the influence and power of famous private individuals with respect to public opinion had been rapidly growing in the era since the Great Depression and World War II.[63] "[I]t is plain that although they are not subject to the restraints of the political process, 'public figures,' like 'public officials,' often play an influential role in ordering society."[64] Chief Justice Warren further explained that "surely as a class these 'public figures' have as ready access as 'public officials' to mass media of communication, both to influence policy and to counter criticism of their views and activities."[65] As such, the public "has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.'"[66]

C. The Rosenbloom Detour: A Brief Push to Open the Reach of the Actual Malice Privilege to Cases Involving Any Matter of Public Interest, Regardless of the Individual's Public or Private Status.

Then came *Rosenbloom v. Metromedia, Inc.* in 1971, wherein a plurality opinion authored again by Justice Brennan attempted to steer the Supreme Court's actual malice jurisprudence onto a path which would emphasize the public interest in the subject matter of the speech entirely over the notoriety/influence of the individual

public controversies in order to influence the resolution of the issues involved,' or who 'voluntarily inject[ed] [themselves] . . . into a particular public controversy . . . [and] assume[d] special prominence in the resolution of public questions.'" (alterations in original) (citation omitted)).

[62] *Butts*, 388 U.S. at 155.

[63] *Id.* at 163 (Warren, C.J., concurring).

[64] *Id.* at 164 (Warren, C.J., concurring).

[65] *Id.*

[66] *Id.*

involved when determining the privilege's applicability.[67] In *Rosenbloom*, a special investigations unit of the Philadelphia Police Department raided plaintiff George Rosenbloom's house and barn in relation to the unit's efforts to crack down on the distribution of illegal pornographic material in the city.[68] The unit found thousands of potentially illegal "books" during the raid.[69] The captain of the police department took it upon himself to "telephone[]" several local media outlets, which led to the following report being broadcast multiple times by a local radio station:

> City Cracks Down on Smut Merchants
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> The Special Investigations Squad raided the home of George Rosenbloom in the 1800 block of Vesta Street this afternoon. Police confiscated 1,000 allegedly obscene books at Rosenbloom's home and arrested him on charges of possession of obscene literature. The Special Investigations Squad also raided a barn in the 20 Hundred block of Welsh Road near Bustleton Avenue and confiscated 3,000 obscene books. Capt. Ferguson says he believes they have hit the supply of a main distributor of obscene material in Philadelphia.[70]

Mr. Rosenbloom denied that his materials were "obscene" and filed suit requesting an injunction in part against the media to stop reporting on the raid and his initial arrests.[71] The local radio station made several reports about the lawsuit, which did not mention Mr. Rosenbloom by name, but still made references in its reporting about Mr. Rosenbloom's lawsuit to "girlie-book peddlers" and a distributor of "smut or filth."[72] Mr. Rosenbloom was thereafter acquitted of the criminal obscenity charges and filed a

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[67] 403 U.S. 29, 43-44 (1971), *abrogated 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)] 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 31-32.

[68] *Id.* at 32-33.

[69] *Id.* at 33.

[70] *Id.*

[71] *Id.* at 34.

[72] *Id.* at 34-35.

defamation claim against the radio station.[73] Mr. Rosenbloom conceded that "the police campaign to enforce the obscenity laws was an issue of public interest," but argued because he was a "private individual," and not a "'public official' or 'public figure,'" he should not have to meet the burden of proof required by the actual malice privilege in order to succeed on his claim.[74]

Justice Brennan, writing for a plurality, began his analysis with the observation that the Court's opinions in the seven years since *Sullivan* "disclosed the artificiality, in terms of the public's interest, of a simple distinction between 'public' and 'private' individuals or institutions."[75] Rather, according to Justice Brennan, the core determinative issue for the heightened protection/deference afforded to speech was the public's interest in the topic or subject of the speech.[76] Justice Brennan would "extend[] constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."[77] "If 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."[78] According to Justice Brennan, "[t]he public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety."[79] "Whether the person involved is a famous large-scale magazine distributor or a 'private' businessman running a corner newsstand has no relevance in ascertaining whether the public has an interest in the issue."[80]

As such, Justice Brennan believed that "[d]rawing a distinction between 'public' and 'private' figures makes no sense in terms of the First Amendment guarantees."[81] "[T]he view of the

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[73] *Id.* at 36.
[74] *Id.* at 40-41.
[75] *Id.* at 41.
[76] *See id.* at 42-44.
[77] *Id.* at 44.
[78] *Id.* at 43.
[79] *Id.*
[80] *Id.*
[81] *Id.* at 45-46.

'public official' or 'public figure' as assuming the risk of defamation by voluntarily thrusting himself into the public eye bears little relationship either to the values protected by the First Amendment or to the nature of our society."[82] "Voluntarily or not, we are all 'public' [persons] to some degree."[83] "[T]he idea that certain 'public' figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view is, at best, a legal fiction."[84] Justice Brennan's plurality concluded that a libel action "by a private individual against a licensed radio station for a defamatory falsehood in a newscast relating to his involvement in an event of public or general concern may be sustained only upon clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not [(by satisfying the actual malice privilege)]."[85]

D. Out With the Rosenbloom, in With the Gertz — The Court Reestablishes the Public/Private Figure Distinction and Recognizes That Those Who Actually "Thrust Themselves" Into the Public Realm to Affect a Particular Issue are Limited-Purpose Public Figures.

1. The *Gertz* Opinion

Justice Brennan's conclusion that the "public" versus "private" person distinction was immaterial to the interests involved in the actual malice privilege was upended only three years later in *Gertz v. Robert Welch, Inc.*[86] Justice Powell, writing now for a majority of the Court, began the opinion by stating that the Court was fundamentally reconsidering how it viewed the private person's place within the doctrine:

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[82] *Id.* at 47.
[83] *Id.* at 48.
[84] *Id.*
[85] *Id.* at 52.
[86] 418 U.S. 323, 337-48 (1974).

> [The] Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment. With this decision we return to that effort. We granted certiorari to reconsider the extent of a publisher's constitutional privilege against liability for defamation of a private citizen.[87]

Elmer Gertz was an attorney retained by the family of a young man that had been shot and killed by a Chicago police officer.[88] Gertz represented the family in the prosecution of a civil lawsuit against the police officer, who had been convicted of murder for the shooting.[89] Gertz did not play a role in the criminal proceedings and did not discuss neither the criminal nor civil proceedings with the press.[90]

Defendant Robert Welsh, Inc. ("RWI") published a monthly magazine entitled the "American Opinion."[91] At that time, RWI published articles that warned of a "nationwide conspiracy to discredit local law enforcement agencies and create in their stead a national police force capable of supporting a Communist dictatorship."[92] RWI published such an article about the police officer's conviction, and made a number of statements about Gertz, including that Gertz: 1) had a lengthy criminal record; 2) "had been an official of the 'Marxist League for Industrial Democracy,'" which had advocated for a violent seizure of the government; 3) was a "'Leninist' and a 'Communist-fronter'"; and 4) had been an officer of the "National Lawyers Guild," which was described as a

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[87] *Id.* at 325. Justice Powell explained how disjointed the *Rosenbloom* decision had been:

> The eight Justices who participated in *Rosenbloom* announced their views in five separate opinions, none of which commanded more than three votes. The several statements not only reveal disagreement about the appropriate result in that case, they also reflect divergent traditions of thought about the general problem of reconciling the law of defamation with the First Amendment.

Id. at 333.

[88] *Id.* at 325.

[89] *Id.*

[90] *Id.* at 326.

[91] *Id.* at 325.

[92] *Id.*

"Communist organization" that planned a "Communist attack on the Chicago police."[93]

The published statements "contained serious inaccuracies."[94] Gertz filed suit against RWI for libel.[95] The litigation unfolded throughout the year just before the Brennan plurality in *Rosenbloom* was published.[96] The district court struggled throughout the case about whether the actual malice privilege applied to Gertz.[97] At the end of the presentation of evidence at trial, the district court ruled that the actual malice privilege did not apply to Gertz's claim because he was neither a public official nor a public figure.[98] However, after the jury issued a verdict and award in favor of Gertz, the district court reconsidered the issue and determined that the actual malice privilege should have applied to Gertz regardless of Gertz's status as a public figure because the article concerned a "public issue."[99] The district court issued a judgment in favor of RWI notwithstanding the jury's verdict.[100] On appeal, the Seventh Circuit Court affirmed the "public issue" basis of the district court's application of the actual malice requirement, citing the "intervening decision" in *Rosenbloom*.[101] The Seventh Circuit "read *Rosenbloom* to require application of [the actual malice] standard to any publication or broadcast about an issue of significant public interest, without regard to the position, fame, *or anonymity* of the person defamed, and it concluded that respondent's statements concerned such an issue."[102]

On appeal to the Supreme Court, Justice Powell and the majority reversed the lower courts and overturned *Rosenbloom*.[103] Justice Powell noted that the Brennan plurality in *Rosenbloom* had "abjured the suggested distinction between public officials and public figures on the one hand and private individuals on the

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93 *Id.* at 325-26.
94 *Id.* at 326.
95 *Id.* at 327.
96 *Id.* at 327-29.
97 *See id.*
98 *Id.* at 328.
99 *Id.* at 329.
100 *Id.*
101 *Id.* at 329-31.
102 *Id.* at 330-31 (emphasis added).
103 *Id.* at 345-46, 352.

other."[104] According to such 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."[105] The Supreme Court's then-current rule which applied the actual malice privilege to "public persons" and "public officials" was affirmed.[106] However, "the state interest in compensating injury to the reputation of private individuals" required a "different rule."[107] Justice Powell provided two primary explanations for such "interest," both rooted in principles of fairness.

First, the typical private person does not have the ability to utilize the "first remedy" of a defamation victim – "self-help" to "contradict the lie or correct the error and thereby to minimize its adverse impact on reputation."[108]

"Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy."[109]

Second, and more "compelling" to the Court, was the "normative consideration" that the public official or public person in most cases seeks an office or status which will come with public notoriety and interest, whereas the private person does not.[110] "An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs."[111] This includes a public interest in the individual's private

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[104] *Id.* at 337.

[105] *Id.*

[106] *Id.* at 342-43. As Justice Powell summarized:

> Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth.

Id. at 342.

[107] *Id.* at 343.

[108] *Id.* at 344.

[109] *Id.*

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

[111] *Id.* at 344.

life and anything which might "touch on an official's fitness for office[,]" such as "dishonesty, malfeasance, or improper motivation."[112]

The same was true for public figures.[113] "For the most part[,] those who attain this status have assumed roles of especial prominence in the affairs of society."[114] "Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes."[115] But "[m]ore commonly," those individuals who qualify as "public figures" have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[116] This is the limited purpose public figure.[117] Whether by obtaining substantial widespread notoriety, or through focused action to gain notoriety so as to affect a particular issue, such public figures "invite attention and comment."[118] As such, "media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them."[119]

"No such assumption is justified with respect to a private individual."[120] The private person "has not accepted public office or assumed an 'influential role in ordering society.'"[121] Such person has not "relinquished" any part of his or her "interest in the protection of his own good name."[122] In sum, "private individuals

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[112] *Id.* at 344-45 (quoting Garrison v. Louisiana, 379 U.S. 64, 77 (1964)).

[113] *Id.* at 345.

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *See* Lluberes v. Uncommon Prods., LLC, 663 F.3d 6, 20 (1st Cir. 2011) ("*Gertz* defined a *limited*-purpose public figure not in terms of geography but in terms of the controversy that he has stepped into."); Wells v. Liddy, 186 F.3d 505, 535 (4th Cir. 1999) ("The Supreme Court stated in *Gertz* that the class of limited-purpose public figures included those individuals who 'thrust[ed] themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved,' or who 'voluntarily inject[ed] [themselves] . . . into a particular public controversy . . . [and] assume[d] special prominence in the resolution of public questions.'" (alterations in original) (citation omitted)).

[118] *Gertz*, 418 U.S. at 345.

[119] *Id.*

[120] *Id.*

[121] *Id.* (citing Curtis Publ'g Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring)).

[122] *Id.*

are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery" and "consequently [have] a more compelling call on the courts for redress of injury inflicted by defamatory falsehood."[123]

The "extension" of the actual malice privilege "proposed" by Justice Brennan's plurality in *Rosenbloom* to the private individual "would abridge this legitimate state interest to a degree that [the Court finds] unacceptable."[124] "[T]he States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual."[125] Justice Powell and the Supreme Court 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."[126]

Based upon this framework, Justice Powell and the Supreme Court found Gertz was not a public figure or limited purpose public figure for purposes of the actual malice requirement.[127] Gertz's only role in the matter was to represent his clients in the civil lawsuit,[128] and he did not engage the press.[129] Though Gertz was surely 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."[130]

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[123] *Id.*
[124] *Id.* at 346.
[125] *Id.* at 345-46.
[126] *Id.* at 347.
[127] *Id.* at 352.
[128] Gertz v. Robert Welch, Inc., 418 U.S. 323, 352 (1974).
[129] *Id.*
[130] *Id.* (emphasis added).

2. Application to the Anonymous Source Context.

a. What Does "Injecting Himself" Mean?: Justice Powell Described a Limited Purpose Public Figure at Least Three Times as One Who Intentionally and Forcefully Creates a Center-Stage Role for Their (Non-Anonymous) Personality in the Public Controversy.

Gertz cannot be understood to support a conclusion that the anonymous news source should be deemed a limited purpose public figure simply because the source has provided information to a news organization about a public issue. In the *Tesla, Inc. v. Tripp* case, the district court held that an anonymous news source qualified as a limited purpose public figure by citing to a Ninth Circuit opinion that only partially quoted *Gertz*: the "test" is simply "whether [Tripp] voluntarily injected himself into a public controversy."[131] Justice Powell did use the phrase "injects himself" when describing the limited purpose public figure category, but certainly not in a way which could be interpreted to mean the mere act of passing information along to a new organization transforms a private person into a public figure:

> Respondent's characterization of petitioner as a public figure raises a different question. That designation may rest on either of two alternative bases. In some instances[,] an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual *voluntarily injects himself* or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case[,] such persons assume special prominence in the resolution of public questions.[132]

On its face, the phrase "voluntarily injects *himself* . . . into a particular public controversy" speaks clearly of an individual that has pressed their very personality into the controversy.[133] An

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[131] 487 F. Supp. 3d 953, 971 (D. Nev. 2020) (citing Flowers v. Carville, 310 F.3d 1118, 1129 (9th Cir. 2002).

[132] *Gertz*, 418 U.S. at 351 (emphasis added).

[133] *Id.*

anonymous source, by definition, seeks to keep "himself" out of the public controversy by providing only information, with the understanding that the source's identity will not become a part of the controversy. This point is perhaps even more clear in Justice Powell's synonymous description of this same limited purpose public figure category beforehand in the opinion:

> Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures *have thrust themselves to the forefront* of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.[134]

And again, at the conclusion of Justice Powell's opinion (just after the "injects himself" language was used), Justice Powell specifically finds that Gertz was not a limited purpose public figure because "[h]e plainly did not *thrust himself into the vortex of this public issue*, nor did he *engage the public's attention* in an attempt to influence its outcome."[135]

In context, Justice Powell described a limited purpose public figure at least three times as one who intentionally and forcefully creates a center-stage role for themself in the public controversy.[136] Mere involvement with the news about the public issue is not enough. A limited purpose public figure is someone who forces "themselves," into the height of the public controversy so that such person's role influences the resolution of the public issue.[137] Anonymously passing information to a news organization does not "equate" to "thrusting" oneself to the forefront of the controversy and therefore cannot establish such source as a public figure.

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

[135] *Id.* at 351-52 (emphasis added).

[136] *Id.*

[137] *Id.* at 352.

b. An Anonymous Source is Only "Drawn Into" a Public Controversy When She or He Willingly Decides to Set Aside Anonymity to Enter the Controversy and Influence Its Outcome.

Furthermore, *Gertz* does not suggest that the anonymous source somehow becomes a public figure for purposes of the actual malice privilege when the source loses anonymity and is defamed by the third party. The potentially relevant phrase from *Gertz* again is as follows: "[m]ore commonly, an individual voluntarily injects himself or *is drawn into* a particular public controversy and thereby becomes a public figure for a limited range of issues."[138]

There is a substantive difference between a person that is "drawn into" a public controversy and a person who is involuntarily "dragged into" a public controversy. Being "drawn into" a situation speaks of a willingness to enter the situation. Moreover, being "drawn into" a situation still speaks of the action of the potential public figure, not the forceful action of a third-party. As Justice Powell explained, "[h]ypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare."[139]

Whether it be by a sense of duty, pride, pressure, or whatever it may be, the circumstances of the situation "draw" the person to willingly enter the controversy and put themselves at the forefront of the public debate so as to influence its resolution. This cannot be accomplished when an anonymous source has involuntarily lost anonymity and is thereafter defamed by the third-party at the center of the controversy. This would be the action of the third-party, not the source. Justice Powell's "drawn into" language would at most describe a situation where the anonymous source is convinced by the circumstances at hand that she or he should willingly set aside anonymity to personally speak to the public controversy and influence its outcome.

This is again exemplified by the Supreme Court's conclusion that Gertz himself did not become a limited purpose public figure. Though Gertz was involved in a newsworthy issue, he was not "drawn into" any action to place the public's attention on himself,

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[138] *Id.* at 351 (emphasis added).

[139] *Id.* at 345.

whether it be by engaging the press (without anonymity), making a personal statement, or providing some kind of quote.[140] Gertz was not "drawn into" taking some action whereby he "thrust himself" into the public controversy.[141] Thus, Gertz was not a limited purpose public figure.[142] Similarly, an anonymous news source is not "drawn into" a public controversy until she or he decides to willingly set aside their anonymity to "thrust themself" into the debate.

c. Gertz Overruled Rosenbloom's Lack of Care for Whether the Potential Public Figure was Famous or Anonymous.

The core principle from *Rosenbloom* overruled by *Gertz* was the idea that the notoriety, or anonymity, of the person at issue for the actual malice privilege did not matter. Justice Brennan explained in *Rosenbloom*: "[t]he public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety."[143] "Whether the person involved is a famous large-scale magazine distributor or a 'private' businessman running a corner newsstand has no relevance in ascertaining whether the public has an interest in the issue."[144] As such, the Seventh Circuit in *Gertz* "read *Rosenbloom* to require application of [the actual malice] standard to any publication or broadcast about an issue of significant public interest, without regard to the position, fame, *or anonymity* of the person defamed, and it concluded that respondent's statements concerned such an issue."[145]

Gertz did away with this principle entirely, emphasizing that the "more important" of the "normative" principles that establish the justification for the actual malice privilege for public figures is that they "attain this status" by "assum[ing] roles of especial prominence in the affairs of society[,]" whether it be by general fame or by "thrust[ing] themselves" into such role within a particular

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[140] *Id.* at 352.
[141] *Id.*
[142] *Id.*
[143] Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43 (1971).
[144] *Id.*
[145] *Gertz*, 418 U.S. at 330-31 (emphasis added).

issue.[146] It is precisely because the public figure decides to assume this public role that it is fair to conclude that she or he must prove actual malice in a related defamation suit.[147] As such, the anonymity of the person at issue matters greatly. Anonymity renders application of the actual malice privilege to such person unjust. Anonymity means such person is not a public figure. Accordingly, the anonymous news source cannot, and should not, be deemed a limited purpose public figure.

E. Keeping the Limited Purpose Public Figure Limited: Time, Inc. v. Firestone[148] and Wolston v. Reader's Digest Ass'n.[149] [R10.2.1(h) – top of page 101]

The *Gertz* Court's exclusion of the private person from the actual malice privilege would only keep its significance in situations involving a matter of potential public interest if the Supreme Court prevented the limited purpose public figure category from expanding in future cases. The Supreme Court stayed firm on the boundaries (and core principles) of *Gertz* in the midst of two significant challenges within the next five years, with majority opinions in both cases authored by then Associate Justice Rehnquist.[150]

1. *Firestone*: Interaction With the Press Does Not Convert a Private Individual Into a Limited Purpose Public Figure if the Individual is Not Putting Themself Forward to Influence a Truly Public Issue.

In *Time, Inc. v Firestone*,[151] the ex-Mrs. Firestone filed a libel suit against *Time* magazine regarding a short report the magazine published about the alimony and divorce proceedings between her

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[146] *Id.* at 345.

[147] *See id.*

[148] 424 U.S. 448 (1976).

[149] 443 U.S. 157 (1979).

[150] Justice Rehnquist would later become Chief Justice of the Supreme Court in 1986. *Justices 1789 to Present*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/EBQ3-AUTS] (last visited Oct. 21, 2021). Wolston v. Readers Dig. Ass'n, 443 U.S. 157 (1979); Time, Inc. v. Firestone, 424 U.S. 448 (1976).

[151] *Firestone*, 424 U.S. 448.

and her ex-husband, an heir to the Firestone tire company.[152] These proceedings involved evidence of extramarital "adventures" on both sides of the relationship, creating something of a public stir.[153] *Time* magazine primarily argued that ex-Mrs. Firestone was a public figure (and should have to prove actual malice) because the trial court had declared the divorce a "'cause célèbre'" given the fame of the Firestone family and the relatively scandalous evidence from the case.[154]

Justice Rehnquist and the majority rejected applicability of the actual malice requirement because a private divorce proceeding was not the kind of "public controversy" contemplated by *Gertz*.[155] Additionally, Justice Rehnquist stressed that Mrs. Firestone was not a limited purpose public figure because she did not assume "'special prominence in the resolution of public questions'" and "did not thrust herself to the forefront of any particular public controvers[ies] in order to influence the resolution of the issues involved in it."[156] Moreover, even if her divorce proceeding had some public newsworthiness, Mrs. Firestone did not "freely choose to publicize issues as to the propriety of her married life."[157] She was instead "compelled to go to court" to pursue her divorce and alimony claims.[158]

Justice Rehnquist mentioned in a footnote that Mrs. Firestone held "a few press conferences during the divorce proceedings in an attempt to satisfy inquiring reporters."[159] However, this did not "convert[]" Mrs. Firestone into a limited purpose public figure because such "interviews should have had no effect upon the merits of the legal dispute between [her] and her husband or the outcome of that trial."[160] Justice Rehnquist did not believe it could be "assumed" such press conferences were "intended" to influence the trial, and otherwise found there was "no indication that she sought to use the press conferences as a vehicle by which to thrust herself

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[152] *Id.* at 450-52.
[153] *Id.* at 452.
[154] *Id.* at 453-54.
[155] *Id.* at 454.
[156] *Id.* at 453, 454-55.
[157] *Id.* at 454.
[158] *Id.*
[159] *Id.* at 454 n.3.
[160] *Id.*

to the forefront of some unrelated controversy in order to influence its resolution."[161]

Justice Rehnquist contrasted Mrs. Firestone and her press conferences with the efforts of General Walker, one of the plaintiffs in the consolidated *Butts* case.[162] General Walker was a former General in the United States Army who retired "to engage in political activity."[163] General Walker formerly commanded federal soldiers during "the school segregation confrontation at Little Rock, Arkansas[] in 1957" and "was acutely interested in the issue of physical federal intervention" in the enforcement of desegregation efforts.[164] General Walker "had made a number of strong statements against [federal intervention] which had received wide publicity[,] . . . had his own following, the 'Friends of Walker,' and could fairly be deemed a man of some political prominence."[165]

The case involved a report that General Walker was involved in a "massive riot" at the University of Mississippi in 1962 when federal officers enforced a court order which protected the enrollment of an African American student.[166] Justice Harlan's plurality found General Walker was a public figure "by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy."[167]

Justice Rehnquist's point in *Firestone* was that, unlike General Walker's efforts to put himself at the forefront of the federal intervention issue in order to attract attention to his role in the issue and to influence public opinion about the issue, Mrs. Firestone did not interact with the press to put *herself* forward in order to influence any public issue.[168] The *Firestone* case supports the conclusion that an anonymous news source is not a limited purpose public figure simply because the source provides information to, or otherwise interacts with, a news organization. Like Mrs. Firestone, and unlike General Walker, by intentionally providing information to news organization anonymously, the

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[161] *Id.*
[162] *Id.* at 454 (citing Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967)).
[163] *Butts*, 388 U.S. at 140.
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.* at 155.
[168] Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976).

source does not attract attention to themself personally in order to influence the outcome of a public issue.

2. *Wolston*: Limited Purpose Public Figures are Those Individuals That Take Calculated Action to Draw Attention to Themself in Order to Invite Public Comment or Influence the Public.

The *Gertz* framework faced another significant test three years later in *Wolston v. Reader's Digest Ass'n*,[169] as the United States District Court of the District of Columbia and the District of Columbia Circuit both deemed the actual malice privilege applicable to the private person (non-governmental official) bringing suit.[170]

Wolston involved the highly newsworthy issue of domestic Soviet spy activity in the late 1950s.[171] Ilya Wolston's aunt and uncle pled guilty to espionage charges resulting from a "major investigation" conducted by a special federal grand jury.[172] Upon securing the pleas, the grand jury focused upon other potential participants in the "suspected Soviet espionage ring," including Wolston.[173] Wolston, a resident of Washington D.C., initially cooperated in questioning by the authorities and grand jury, including trips to New York in response to subpoenas from the grand jury.[174] Wolston, however, failed to appear in New York in response to a July 1, 1958 subpoena from the grand jury because of the state of his "mental depression."[175] The district court issued an order to show cause for why Wolston should not be held in criminal contempt for failure to appear.[176] This drew significant attention from the press, as "at least seven news stories focusing on [Wolston's] failure to respond . . . appeared in New York and Washington newspapers."[177]

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169 443 U.S. 157 (1979).
170 *Id.* at 160-61.
171 *Id.* at 161.
172 *Id.*
173 *Id.* at 161-62.
174 *Id.* at 162.
175 *Id.*
176 *Id.*
177 *Id.*

Wolston appeared in court on the order to show cause, and initially opposed the contempt charge on the basis of his mental condition at the time of the subpoena.[178] Wolston, however, agreed to plead guilty to the contempt charge during the hearing after his pregnant wife "became hysterical on the witness stand."[179] Newspapers similarly reported on the contempt hearing.[180] In total, fifteen stories were published in newspapers in Washington and New York regarding Wolston's contempt issue.[181] The "flurry of publicity subsided" shortly after Wolston's sentencing, and he thereafter, "for the most part[,]" returned to "the private life he had led prior to [the] issuance of the grand jury subpoena."[182] Importantly, Wolston was never indicted by the grand jury for espionage.[183]

Sixteen years later, Reader's Digest Association, Inc. ("Reader's Digest") published a book entitled "KGB, the Secret Work of Soviet Agents."[184] The book explicitly listed a number of "identified" Soviet Agents, which included Wolston.[185] A footnote to this list qualified the list as consisting of "Soviet agents who were convicted of espionage or falsifying information or perjury and/or contempt charges following espionage indictments, or who fled to the Soviet bloc to avoid prosecution."[186]

Wolston sued Reader's Digest and the book's author for defamation.[187] The district court granted summary judgment in favor of Reader's Digest and the author.[188] The district court found the book "appeared to state falsely" that Wolston "had been indicted for espionage."[189] However, the district court held Wolston was a "'public figure[,]'" which required Wolston to satisfy the actual malice requirement.[190] The district court granted summary

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178 *Id.* at 162-63.
179 *Id.* at 163.
180 *Id.*
181 *Id.*
182 *Id.*
183 *Id.*
184 *Id.* at 159.
185 *Id.*
186 *Id.*
187 *Id.*
188 *Id.* at 160.
189 *Id.*
190 *Id.*

judgment because it found the evidence "raised no genuine issue with respect to the existence of 'actual malice.'"[191]

Justice Rehnquist again authored the opinion of the Supreme Court.[192] Justice Rehnquist framed the Court's analysis from the outset upon the conclusion that the lower courts "were wrong" in finding that Wolston was a "public figure within the meaning of this Court's defamation cases."[193] Though the actual malice requirement was extended from public officials to private persons that were public figures, the *Gertz* case represented the Court's refusal to "expand" the actual malice requirement into defamation cases "brought by private individuals."[194] Justice Rehnquist summarized, with emphasis, both the "twofold" rationale provided by the *Gertz* Court for extension of the actual malice requirement to public figures,[195] as well as the public figure and limited purpose public figure categories established by *Gertz*.[196] The more important rationale for the privilege's application to public figures was that they voluntarily exposed themselves to public discussion.[197] The more common category of public figures was the limited purpose public figure: those individuals that "have thrust

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[191] *Id.*

[192] *Id.* at 158.

[193] *Id.* at 161.

[194] *Id.* at 164 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 344-47 (1974)).

[195] First, "public figures are less vulnerable to injury from defamatory statements because of their ability to resort to effective 'self-help.'" *Id.* "They usually enjoy significantly greater access than private individuals to channels of effective communication, which enable them through discussion to counter criticism and expose the falsehood and fallacies of defamatory statements." *Id.* (first citing *Gertz*, 418 U.S. at 344; and then citing Curtis Publ'g Co. v. Butts, 388 U.S. 130, 164 (1967)). Justice Rehnquist further cited similar observations made by Justice Harlan and Chief Justice Warren on this point in their opinions in the *Butts* case described above. *Id.*

[196] Second, and "more importantly" according to Justice Rehnquist, was the "normative consideration that public figures are less deserving of protection than private persons because public figures, like public officials, have 'voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.'" *Id.* (citing *Gertz*, 418 U.S. at 345). Justice Rehnquist quoted *Gertz* in listing the "two ways in which a person may become a public figure for purposes of the First Amendment:" 1) individuals who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes" or 2) "More commonly," those individuals that "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.*

[197] *Id.*

themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[198]

There was no contention that Wolston could be categorized in "that small group of individuals who are public figures for all purposes."[199] Wolston led a "thoroughly private existence" otherwise and "achieved no general fame or notoriety."[200] Wolston was not a general "public figure" in the broad sense.[201]

The lower courts, however, found Wolston to be a limited purpose public figure under the second category. He was someone who had "thrust themsel[f] to the forefront of particular public controversies in order to influence the resolution of the issues involved."[202] The lower courts found that Wolston's decision to not appear before the grand jury in New York in the espionage investigation caused the contempt citation and "invited attention and comment" regarding "his connection with espionage."[203] As the District of Columbia Circuit put it, Wolston "stepped center front into the spotlight focused on the investigation."[204]

The Supreme Court disagreed that Wolston had "'voluntarily thrust' or 'injected' himself into the forefront of the public controversy surrounding the investigation."[205] Justice Rehnquist found it "more accurate to say" Wolston had been "dragged unwillingly into the controversy."[206] The government "pursued" Wolston with the investigation and grand jury subpoena,[207] and though Wolston "voluntarily chose" to not appear before the grand jury while knowing that such decision might result in public attention, such decision did not place him within the limited purpose public figure category intended by *Gertz*.[208]

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198 *Id.* (citing *Gertz*, 418 U.S. at 345).

199 *Id.* at 165.

200 *Id.*

201 *Id.* at 161.

202 *Id.* at 158 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974)).

203 *Id.* at 165.

204 *Id.* (quoting Wolston v. Reader's Digest Ass'n, 578 F.2d 427, 431 (1978)).

205 *Id.* at 166 (first citing *Gertz*, 418 U.S. at 352; then citing Curtis Publ'g Co. v. Butts, 388 U.S. 130, 154-55 (1967); and then citing Time, Inc. v. Firestone, 424 U.S. 448, 453 (1976)).

206 *Id.*

207 *Id.*

208 *Id.* at 167.

The critical distinction was Wolston's "failure to respond to the grand jury's subpoena was in no way calculated *to draw attention to himself* in order to invite public comment or influence the public with respect to any issue."[209] Wolston did not himself "engage[] the attention of the public in an attempt to influence the resolution of the issues involved."[210] Wolston did not attempt to assume a "special prominence in the resolution of public questions."[211] Justice Rehnquist emphasized the fundamental principle at issue perhaps even more clearly than was expressed in *Gertz*: "[a] private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention."[212] "[A] court must focus on the 'nature and extent of an *individual's participation* in the particular controversy giving rise to the defamation."[213] Wolston "never discussed this matter with the press" and otherwise limited his involvement to defending against the contempt order.[214] Wolston was not a limited purpose public figure—he was a private person involved in a matter of public interest.[215] As such, Wolston was not required to prove actual malice in support of his defamation claims.[216]

Justice Rehnquist made a specific note that the Supreme Court was not allowing a veiled *Rosenbloom*-like rationale to creep into the limited purpose public figure rule.[217] To hold that Wolston became a limited purpose public figure simply because he became involved in a matter of public attention would be to "re-establish the doctrine advanced by the plurality opinion in *Rosenbloom* . . . which concluded that the [actual malice requirement] should extend to defamatory falsehoods relating to private persons if the statements involved matters of public or general concern."[218] To leave no doubt, Justice Rehnquist reiterated that the Supreme

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[209] *Id.* at 168 (emphasis added).
[210] *Id.*
[211] *Id.* (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974)).
[212] *Id.* at 167.
[213] *Id.* (emphasis added) (quoting *Gertz*, 418 U.S. at 352).
[214] *Id.*
[215] *See id.* at 161, 165-69.
[216] *Id.* at 161.
[217] *Id.* at 167.
[218] *Id.* (citing Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44 (1971)).

Court "repudiated this proposition in *Gertz* and in *Firestone*" and "reject it again today."[219]

Wolston strongly and clearly solidifies the principles which prevent a conclusion that an anonymous news source is a limited purpose public figure. The act of an anonymous source providing information to a news organization itself does not make the source a public figure because a person is not "transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention."[220] By providing information under the term of anonymity, the source's provision of information is "in no way calculated *to draw attention to himself* in order to invite public comment or influence the public with respect to any issue."[221] Furthermore, a person cannot be made into a public figure by being "dragged unwillingly into the controversy."[222] As such, the subsequent loss of anonymity (by no fault of the source), and the resulting defamation of the source by the third-party within the public controversy, cannot make the source a public figure. To hold otherwise would be to reestablish the overruled principles of *Rosenbloom*.

CONCLUSION

Though *Gertz*, *Firestone*, and *Wolston* were decided over forty years ago, they remain the Supreme Court's leading cases on whether a person qualifies as a limited purpose public figure for applicability of the actual malice privilege.[223] In these cases, the Supreme Court firmly overruled *Rosenbloom* and emphasized that mere involvement in a public issue or controversy is not enough to

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[219] *Id.*

[220] *Id.* at 167.

[221] *Id.* at 168 (emphasis added).

[222] *Id.* at 166.

[223] *See* Biro v. Conde Nast, 963 F. Supp. 2d 255, 270 (S.D.N.Y. 2013) (noting that "*Gertz* remains the leading Supreme Court case on the contours of the public figure designation"); Obsidian Fin. Grp., LLC v. Cox, No. CV-11-57-HZ 2011 WL 5999334, at *3 (D. Or. Nov. 30, 2011) (explaining the holdings from *Gertz* and *Firestone* in analyzing the "leading cases" on whether a plaintiff may be seen as a "'limited' public figure"); 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." (emphasis in original)).

qualify a person as a limited purpose public figure. The person's intended role in the public issue is critical to the determination. As explained, a person does not sufficiently "inject" themself into a public issue because she or he provided information about the public issue, even if such information could influence public opinion. As these cases make clear, a limited purpose public figure is someone who takes calculated action to actually thrust themself—their very personality—to the forefront of the public issue in order to influence public opinion or resolution. A person cannot be transformed into a public figure by being dragged unwillingly into the public controversy.

Therefore, an anonymous news source is not a limited purpose public figure simply because the source has provided information to a news organization that published a report about a public issue. If the source loses anonymity, and claims to have suffered defamation thereafter, the source should not generally be required to establish actual malice in order to succeed on a defamation claim. To do so would be to ignore the all-important normative consideration from *Gertz* that it is only fair to require that a limited purpose public figure prove actual malice because such person has assumed the risk of public recrimination by placing themselves at the center of a public issue or controversy. This would in effect reinstate *Rosenbloom*'s lack of care for the notoriety or anonymity of the person involved for purposes of actual malice.

In conclusion, an anonymous news source does not become a limited purpose public figure when the source provides information to a news organization about a public issue. The source does not become a public figure if the news organization runs a story with such information. The source does not even become a public figure if the source loses anonymity (by no fault of their own) and is publicly attacked by a third party on center stage for the controversy. The source becomes a public figure only when the source willingly decides to set aside anonymity and place her or his personality at the forefront of the issue, as would be the case for the usual non-anonymous news source who thrusts themself into the public controversy.