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Public Figures And The Passage Of Time

NOTES

PUBLIC FIGURES AND THE PASSAGE OF TIME

The first amendment of the United States Constitution guarantees the right of freedom of expression.[1] The privilege of free speech and press, however, frequently conflicts with the right of a private individual to protect his reputation.[2] The United States Supreme Court has attempted to reconcile the conflict between the first amendment and the law of defamation by distinguishing between public and private figures.[3] The Supreme Court has held that once an individual enters the public limelight, he becomes a public figure and forfeits his right to remain free from certain defamatory statements.[4] In recent years, the question has arisen whether such a forfeiture is an irrevocable act, or

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[1] U.S. CONST. amend. I. The first amendment of the United States Constitution provides that Congress shall make no law abridging the freedom of the press. *Id.*

[2] Curtis Publishing Co. v. Butts, 388 U.S. 130, 151 (1967). The Supreme Court stated that the tension between the law of defamation and the first amendment arises over the opposing values at stake. *Id.* The Court recognized that the interest in preserving one's good name and sense of self-esteem frequently, and often unavoidably, comes into conflict with the need to keep the public informed. *Id.* at 149. According to one commentator, three separate theories have developed to deal with the conflict between the law of libel and freedom of speech. Brosnahan, *From* Times v. Sullivan *to* Gertz v. Welch: *Ten Years of Balancing Libel Law and The First Amendment*, 26 HASTINGS L.J. 777, 779 (1975). The first interpretation is Justice Black's "absolute" theory. *Id.* The Justice advocates a literal approach to the first amendment. *Id.* In a concurring opinion to *New York Times Co. v. Sullivan*, Justice Black applied the "absolute" theory, stating that all speech should be protected regardless of whether it was maliciously published. *Id.* at 780; *see* text accompanying notes 15-19 *infra*. The second theory is Professor Emerson's balancing theory. Brosnahan, *supra*, at 780. Under this method the court would weigh the interest in freedom of expression against the benefits received by restricting such expression. *Id.* The third is Professor Meiklejohn's theory of absolute privilege in matters of "governing importance." *Id.* at 779. This theory emanates from the principle of self government. *Id.* at 780. Under Meiklejohn's theory, a defamatory remark which relates to an issue dealing with government is absolutely privileged. *Id.* A strictly private matter, however, is subject to legislative restrictions. *Id.*

[3] Gertz v. Robert Welch, Inc., 418 U.S. 323, 325 (1974). The Court has attempted to accomodate the competing interests by basing the distinction between public and private figures on the rationale that public figures not only have access to the media, which private citizens lack, but also that public figures are presumed to have assumed the risk of defamation upon entering the public eye. *Id.* at 325; *see* text accompanying notes 45-49 *infra*. One commentator has described the public figure theory as an amorphous concept which has rendered application of the doctrine difficult. *See* Bamberger, *Public Figures and the Law of Libel: A Concept in Search of a Definition*, 33 BUS. LAW. 709, 709 (1978).

[4] *See* Wolston v. Reader's Digest Association, 443 U.S. 157, 164 (1979); Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974); Curtis Publishing Co. v. Butts, 388 U.S. 130, 154-55 (1967). A public figure is protected only from false statements or statements made in reckless disregard of the truth. *See* text accompanying notes 15-48 *infra*.

whether the passage of time serves to reinvest the public figure with the right to protect his reputation.[5]

At common law, defamation was a part of the tort law of strict liability.[6] The courts regarded certain classes of falsehoods to be defamatory per se,[7] whereupon the court presumed that the mere act of publication caused damage to the plaintiff.[8] The only defenses recognized were truth, consent, and certain absolute and conditional privileges.[9] One such privilege was the qualified right of "fair comment."[10] The "fair comment" privilege

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[5] *See, e.g.*, Wolston v. Reader's Digest Association, 443 U.S. 157, 170 (1979) (Blackmun, J., concurring opinion); Street v. National Broadcasting Co., 645 F.2d 1227, 1235 (6th Cir.), *cert. dismissed*, 50 U.S.L.W. 3477 (December 15, 1981); Brewer v. Memphis Publishing Co., 626 F.2d 1238, 1241 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 3112 (1981); Time, Inc. v. Johnston, 448 F.2d 378, 380 (4th Cir. 1971).

[6] L. ELDREDGE, THE LAW OF DEFAMATION § 3, at 4 n.12 (1978) [hereinafter cited as L. ELDREDGE]. As early as the reign of Alfred the Great, in 880 A.D., courts in Anglo Saxon England recognized an action for defamation at common law. *Id.* Dooms from the reign of Alfred the Great set the penalty for uttering a defamatory statement at the loss of one's tongue. *Id.* The English and American common law systems followed the principle that whenever a man publishes he does so at his peril. *Id.* at 15. In 1974, however, the Supreme Court held in *Gertz* that the first amendment prohibits the imposition of "liability without fault" on a publisher or broadcaster of defamatory falsehood injurious to a private individual. *Id.* at 25. In modern tort law, a defamatory communication is one which tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. RESTATEMENT (SECOND) OF TORTS § 559 (1977).

[7] *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 762-63 (4th ed. 1971) [hereinafter cited as W. PROSSER]. A majority of states have held that any publication whose defamatory effect is clear on its face is defamatory per se, and thus actionable without proof of damages. *Id.* In some states the courts have drawn a distinction between publications libelous per se and libelous per quod. *Id.* The courts did not view the latter category as inherently defamatory. *Id.* The plaintiff was required to demonstrate a defamatory meaning, whether through interpretation, or proof of reference to plaintiff. *Id.* at 746-51. Even in states adhering to the per se-per quod distinction, the law has considered certain imputations to be invariably defamatory per se. *Id.* These imputations include any allegation that plaintiff has committed a crime of moral turpitude; contracted a loathesome disease; improperly or illegally conducted his trade, business or profession; or behaved in an unchaste manner. *Id.* at 754-62.

[8] *Id.* at 766. "Publication" is defined as the communication of defamatory material to a third party, whether oral, in print, or conveyed through electronic means or gestures. *Id.*

[9] *See* 1 A. HANSON, LIBEL AND RELATED TORTS § 96, at 79 (1979) [hereinafter cited as 1 A. HANSON]. A rebuttable presumption exists in defamation cases that the statements complained of were false and that plaintiff did not consent to their utterance. *Id.* The defendant may defeat the action by proving either that the statement was true or that plaintiff consented to its publication. *Id.* The defendant, however, may advance the defense of privilege even though the plaintiff has proven every element of the tort. *Id.* The absoluteness or contingency of the immunity depends on the degree of interest society has in certain situations. *Id.* An absolute privilege exists for judicial and legislative proceedings, political broadcasts, executive communications, and certain relationships such as between husband and wife. *Id.* at 85-93. In certain cases the privilege is conditional, and is predicated on whether the publication is done for a proper purpose and in a reasonable manner. *Id.* at 95.

[10] *Id.* at 103. The conditional right of fair comment protects expression of opinion on matters of public concern. 1 A. HANSON, *supra* note 9, § 137, at 102. Persons, institutions, or

protected comment upon matters of public concern, including the conduct and qualifications of public officials and employees.[11] Traditionally, courts limited the privilege to opinion, criticism, and comment, declining to extend protection to false assertions of fact.[12] A minority of courts, however, held that the "fair comment" privilege protected even false statements of fact as long as the declarant made them in the interest of the public and with an honest belief in their truth.[13] In 1964, the Supreme

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groups who have voluntarily thrust themselves into public issues or affect the community welfare are subject to the privilege. *Id.* A minority of courts have applied the privilege of fair comment to cases involving mere curiosity rather than issues of public concern. *Id.* The general rule does not approve of such an extension of the fair comment privilege. *Id.* Some commentators have stated that in a strict sense the fair comment privilege does not encompass instances of defamation. *See* M. NEWELL, SLANDER & LIBEL § 480, at 519 (4th ed. 1924) [hereinafter cited as M. NEWELL]; C. GATLEY, LIBEL & SLANDER § 581, at 322 (5th ed. 1960). The argument is that as long as the defendant restricts the criticism to an individual's work and does not impinge on his moral or professional integrity, there is no libel because there is no defamation of the man himself. M. NEWELL, *supra*, § 580, at 519. When the comment on the individual's work becomes an attack on his private character, however, the element of malice transforms the language into libel. *Id.*

[11] 1 A. HANSON, *supra* note 9, at 104; *see* RESTATEMENT (SECOND) OF TORTS § 607-10 (1977). The privilege of fair comment applies to public officials, political candidates, community leaders from the private sector, private entities which are involved with the public welfare, persons taking a public position on a matter of community concern, and those such as artists, performers and athletes who display their talents to the public. 1 A. HANSON, *supra* note 9, § 137, at 102.

[12] Owens v. Scott Pub. Co., 46 Wash.2d 666, ____, 284 P.2d 296, 304 (1955) (court refused to recede from majority rule which offers public officials protection from the infliction of irreparable harm caused by false statements), *cert. denied*, 350 U.S. 968 (1956); A.S. Abell Co. v. Kirby, 227 Md. 267, ____, 176 A.2d 340, 342-43 (1961) (court followed majority rule and held defamatory misstatement of fact cannot be defended successfully as fair comment); Mencher v. Chesley, 297 N.Y. 94, ____, 75 N.E.2d 257, 260 (1947) (no question of fair comment involved where defendant's statement about plaintiff consists of comment or criticism based on false facts); Westropp v. E.W. Scripps Co., 148 Ohio St. 365, ____, 74 N.E.2d 340, 346 (1947) (court held untruth cannot be basis of fair criticism); Murphy v. Farmers Ed. & Coop. Union of America, North Dakota Division, 72 N.E.2d 636, 647-48 (1955) (statements purporting to be facts cannot be said to be fair comment of public official when such statements are not based on factual foundation). The courts' refusal to extend protection to false assertions of facts was based on the rationale that people in the public spotlight would be deterred from seeking public office if made victims of misstatements of fact, thereby harming the public welfare. W. PROSSER, *supra* note 7, at 819.

[13] W. PROSSER, *supra* note 7, at 819. The minority position held that public interest demanded that those who are in a position to furnish information about public servants should not be deterred by fear of having to prove the truth of what they say in court. *Id.* at 820; 1 A. HANSON, *supra* note 9, at 106. The leading case holding that false statements of facts were privileged was *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908). In *Coleman*, the publisher of a newspaper circulated an article reciting facts relating to the character of a state officer who was running for reelection. *Id.* at 286-88. While the statements made in the article were untrue in fact and derogatory, the defendant's actions were held to be privileged since he had acted in good faith. *Id. See also* Snively v. Record Pub. Co., 185 Cal. 565, ____, 198 P. 1, 3-5 (1921) (statement made in honest belief and without malice that public official committed crime privileged); Charles Parker Co. v. Silver City Crystal Co., 142 Conn. 605, ____, 116 A.2d 440, 445 (1955) (privilege of fair comment extends to libelous

Court adopted this minority position in *New York Times v. Sullivan*.[14]

In the seminal *New York Times* decision, the Supreme Court raised the common law privilege of "fair comment" regarding public officials to constitutional stature.[16] The Court held that a public official must prove "actual malice" before the law would impose liability in situations involving erroneous factual statements.[17] The actual malice standard, as set forth by the Court, requires a showing by the plaintiff that the declarant knew the allegedly defamatory statement was false or that the defendant made such statement with reckless disregard of the truth or falsity of the statement.[18] The rationale behind the Court's adoption of the

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misstatements of fact, if made in good faith, without malice and with honest belief that they are true); Clancy v. Daily News Corp., 202 Minn. 1, ____, 277 N.W. 264, 268 (1938) (plaintiff must prove not only that statements were false, but that they were also published maliciously); Lafferty v. Houlihan, 81 N.H. 67, ____, 121 A. 92, 96 (1923) (false statements held to be privileged if made with reasonable belief in truth of statements).

[14] 376 U.S. 254, 279-83 (1964).

[15] *Id.* at 254. In *New York Times Co. v. Sullivan*, the plaintiff was one of three elected commissioners of the city of Montgomery, Alabama. *Id.* at 256. Sullivan brought an action against the *New York Times* for publishing allegedly defamatory statements in an advertisement which attacked the actions of police in Montgomery during a civil rights demonstration. *Id.* The Supreme Court held that the first amendment prohibits states from allowing public officials to recover damages for defamatory falsehoods relating to their official conduct unless the plaintiffs prove the statements were made with "actual malice." *Id.*

[16] *See* Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 TEX. L. REV. 199, 201 (1976) [hereinafter cited as Robertson]; Comment, Gertz *and the Public Figure Doctrine Revisited*, 54 TUL. L. REV. 1053, 1054 (1980) [hereinafter cited as Gertz *and the Public Figure Doctrine*]. The Restatement (Second) of Torts describes the impact of the Constitution upon defamation actions in two ways. RESTATEMENT (SECOND) OF TORTS § 580A, comment e (1977). One approach is to hold that the Constitution limits the plaintiff by requiring him to show the statement does not come within the limitation. *Id.* The other method is to refer to the Constitution as establishing a privilege for the defendant. *Id.* The defendant would not be liable if he fell within the boundaries of the privilege. *Id.* The Restatement recognizes that the usage of the word privilege may be misleading. *Id.* One commentator has stated that the Supreme Court's identification of the privilege as constitutional is a misnomer. L. ELDREDGE, *supra* note 6, § 53, at 293. Eldredge maintains that ordinarily defendant, not plaintiff, carries the burden of asserting affirmative defenses. *Id.* In defamation actions, however, the plaintiff is burdened with pleading and proving the existence of facts establishing defendant's violation of the applicable standard of liability. *Id.*

[17] 376 U.S. at 279. In affording protection to false assertions of fact, the *New York Times* decision succeeded in expanding the privilege of fair comment far beyond its common law bounds. L. ELDREDGE, *supra* note 6, at 254. Not only did the Supreme Court alter the common law by extending protection to erroneous statements of fact, but the Court also changed the common law by requiring that the defamed public official prove "actual malice" with convincing clarity and not simply by a preponderance of the evidence. *Id.*

[18] Robertson, *supra* note 16, at 203. The *New York Times* standard of "actual malice" is very different from the common law meanings of either "malice" or "recklessness." *Id.* "Actual malice" is a shorthand expression for knowing or reckless falsity, and is not equivalent to the common law's "actual malice," which is usually defined as a bad or corrupt motive, personal spite, ill will, or a desire to injure. *Id.* Proving common law "actual malice" will not satisfy the *New York Times* standard. *Id.* In *St. Amant v. Thompson*, the Supreme Court defined reckless disregard for the truth as requiring sufficient evidence to permit the

malice standard was that freedom of expression is a fundamental and essential element of any democracy and must therefore be accorded due breathing space.[19]

The Supreme Court extended the "actual malice" rule formulated in *New York Times* to embrace defamatory actions involving "public figures" in *Curtis Publishing Co. v. Butts*[20] and *Associated Press v. Walker*.[21] In weighing the competing interests of the first amendment and the law of defamation, the Court found in favor of freedom of expression.[22] The Court reasoned that public figures, like public officials, are often major forces in the ordering of society and, thus, should be held to the same standard as public officials.[23] The Court stated that since public figures are not accountable to a political system, public scrutiny of their conduct is perhaps the only available means by which society can monitor their activities.[24] In determining whether a plaintiff qualifies as a public figure, the Supreme Court examined the means of self-defense available to a plaintiff and his conduct in relation to the controversy.[25] The Court alluded to the ability of public figures to command access to channels of communication and thereby expose false and fallacious statements.[26] The Supreme Court also considered whether the plaintiff's activities were purposeful and thus amounted to a voluntary thrusting of himself into the controversy.[27]

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conclusion that the defendant, in fact, entertained serious doubts as to the truth of his publication. St. Amant v. Thompson, 309 U.S. 727, 730 (1968); *see* L. ELDREDGE, *supra* note 6, at 254.

[19] 376 U.S. at 269-70. The Supreme Court stated that freedom of debate on public issues is not only a privilege but a duty of citizens. *Id.* The Court emphasized the need for unfettered public debate and reiterated the principle set forth by James Madison that "some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." *Id.* at 271.

[20] 388 U.S. 130 (1967). *Curtis* involved a *Saturday Evening Post* article which accused Butts, the athletic director of the University of Georgia, of conspiring to fix a football game. *Id.* at 135. Since a private alumni association, and not the state, was responsible for the hiring and salary of Butts, the Court stated that Butts could not be labeled a public official. *Id.* at 154-55. The Court, however, held that public interest in education in general, and in the conduct of the athletic affairs of educational institutions in particular, justifies the discussion of persons involved in controversies related to education. *Id.* at 146.

[21] 388 U.S. 130 (1967). In *Walker*, the plaintiff brought suit against the Associated Press for the issuance of an erroneous news dispatch which stated that plaintiff personally led a demonstration against federal marshals in an attempt to block the desegregation of the University of Mississippi. *Id.* at 141. Walker was a former major general who, since he had resigned from the army, was no longer a public official. *Id.* at 146. The Court, however, held that the public had a strong interest in being informed about the events and personalities involved in the Mississippi rioting and held that discussion of such a matter was protected by the *New York Times* standard of actual malice. *Id.*

[22] *Id.* at 162-64 (Warren, J., concurring opinion); *see* Note, *Public Figures, Private Figures and Public Interest*, 30 STAN. L. REV. 157, 187 (1977).

[23] 388 U.S. at 164.

[24] *Id.*

[25] *Id.* at 154.

[26] *Id.* at 155; text accompanying notes 39-45 *infra*.

[27] 388 U.S. at 155; text accompanying notes 45-48 *infra*.

The next step in the evolution of the public figure doctrine occurred in *Rosenbloom v. Metromedia, Inc.*[28] In *Rosenbloom*, the Supreme Court shifted the focus of the public figure doctrine, thereby giving rise to the "public interest" test.[29] Declining to concentrate on the plaintiff's status as a private or public figure, the Court emphasized the nature of the controversy involved.[30] The Court stated that the public's interest lies in the event itself, not in the individual's station in society.[31] In holding that the presence of an issue of public interest is a sufficient condition for the imposition of the actual malice standard, the Court disregarded the distinction between public and private individuals.[32]

In *Gertz v. Robert Welch, Inc.*,[33] protection of the media received a

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[28] 403 U.S. 29 (1971). In *Rosenbloom*, the police charged the plaintiff, a private individual, with selling obscene literature. *Id.* at 32. A local radio station owned by Metromedia, Inc., broadcast stories concerning Rosenbloom's arrest. *Id.* at 33. Rosenbloom brought suit against Metromedia, Inc. for linking his name with a "smut literature racket" and with "girlie-book peddlers." *Id.* at 36. Holding that the controversy over obscenity laws was an issue of legitimate public concern, the Supreme Court applied the *New York Times* standard of knowing or reckless falsity, even though plaintiff was a private individual. *Id.* at 40.

[29] *Id.* at 29. There was no majority opinion in *Rosenbloom*. Justice Brennan, joined by Chief Justice Burger and Justice Blackmun, wrote the plurality opinion. *Id.* Justice Brennan stated that the actual malice standard applied in defamation actions brought by private individuals in cases involving public interest. *Id.* at 31-32. Justice White concurred in the holding that the focus is on whether the issue is of general concern, but would have limited the holding to the facts of the case. *Id.* at 62. Justice Black agreed on the broader ground that all defamation actions against the media are unconstitutional, regardless of the plaintiff's status. *Id.* at 57. Justices Harlan, Marshall, and Stewart dissented. *Id.* at 30. Justice Douglas did not take part in either the consideration or decision of the case. *Id.*

[30] *Id.* at 43. Justice Brennan stated that the scope of the first amendment included not only political discussion, but also matters of social and economic concern, artistic endeavors, and in general anything tending to improve the public's understanding of contemporary society. *Id.*

[31] *Id.*

[32] *Id.* The Court's decision offered almost no guidance to lower federal courts in applying the public interest test. Gertz v. Robert Welch Inc., 418 U.S. at 354. In *Gertz*, Justice Blackmun specifically stated that he was joining the majority opinion solely in the effort to eliminate the uncertainty engendered by the *Rosenbloom* decision. *Id.*

While prior to *Rosenbloom* publishers had to decide whether an individual was a public figure, after *Rosenbloom* publishers had to determine whether a story was a matter of public interest. Robertson, *supra* note 16, at 206-09. In practice, courts equated public interest with newsworthiness, which in effect allowed the media to determine the limits of the law of defamation. *Id.* Some commentators saw the Supreme Court as moving toward an absolute protection of the news media. Ashdown, Gertz *and* Firestone: *A Study in Constitutional Policy Making*, 61 MINN. L. REV. 645, 667 (1977); Kalven, *The Reasonable Man and the First Amendment*: Hill, Butts *and* Walker, 1967 SUP. CT. REV. 267, 283-84; *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 38, 222 (1971).

[33] 418 U.S. 323 (1974). Subsequent to the conviction of a Chicago policeman for the murder of a 17-year old youth, the victim's family retained Gertz as an attorney to represent them in a civil action against the officer. *Id.* at 326. *American Opinion*, a magazine owned and published by the John Birch Society, characterized the policeman's conviction as part of a communist plot to undermine law enforcement agencies. *Id.* While Gertz had not participated in the criminal prosecution, *American Opinion* nevertheless included Gertz in the

severe setback.[34] In *Gertz*, the Supreme Court reconsidered the question whether the actual malice standard should apply to private plaintiffs in defamation actions.[35] Focusing on the tension existing between the need to avoid self-censorship and the fundamental concern with preserving one's dignity,[36] the Court rejected the *Rosenbloom* public interest test.[37] The Court held that the public interest test failed to achieve a fair balance between the competing interests of the first amendment and the law of defamation and retreated to the public figure test enunciated in *Curtis*.[38]

Seeking to clarify the reasoning set forth in *Curtis*,[39] the *Gertz* Court further developed its discussion of the underlying factors involved in

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story. *Id.* The magazine labeled Gertz a "Leninist" and a "communist fronter" and stated that Gertz once had been an official in the "Marxist League for Industrial Democracy." *Id.* Gertz brought a defamation suit against the magazine following publication of the article. *Id.* The Supreme Court held Gertz did not qualify as a public figure. *Id.* Rejecting the *Rosenbloom* public interest test, the Court awarded damages without requiring Gertz to show actual malice. *Id.* at 352.

[34] *See* Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 451 (1975).

[35] 418 U.S. at 322.

[36] *Id.* at 341. In *Gertz*, the Supreme Court stated that the interest in freedom of expression is not the only value at stake. *Id.* The Court quoted Justice Stewart concerning the importance of protecting an individual's interest in his good name for it "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." *Id.*

[37] *Id.* at 346. *Gertz* was reversed and remanded in a four-one-four decision. *Id.* at 324. Justices Powell, Stewart, Marshall, and Rhenquist comprised the plurality, with Justice Blackmun concurring specially. *Id.* Justice Blackmun had joined the plurality in *Rosenbloom* because he had seen the decision as a natural extension of the *New York Times* doctrine. *Id.* at 353. Justice Blackmun, however, recognized the need for definiteness in the area of defamation and therefore added his vote to create a majority in *Gertz*. *Id.* at 354. Justice Blackmun was able to consent to the *Gertz* approach because he believed the *Gertz* decision still allowed the press sufficient breathing space to carry out their duties vigorously. *Id.*

[38] *Id.* at 346. Writing for the Court, Justice Powell offered two reasons for the Court's rejection of the *Rosenbloom* test. *Id.* First, the Justice stated that the *Rosenbloom* decision did not establish a fair accomodation between the law of defamation and freedom of expression. *Id.* Justice Powell noted that under the public interest test a private individual who is injured by defamatory falsehood concerning a public issue must meet the stringent standard of "actual malice" before he may recover damages. *Id.* At the same time, a publisher of a defamatory error not related to a public issue may be held liable under a state statute imposing liability without fault, even if the publisher had made every reasonable attempt to prevent such an error. *Id.* Concerned over such results, Justice Powell condemned the public interest test and held that states may not establish strict liability statutes. *Id.* at 347.

The second reason for the majority's displeasure with the *Rosenbloom* decision arose from the Court's concern over allowing judges to determine whether an issue is one of public interest. *Id.* at 346. Justice Powell stated that such a task was an inappropriate one for judges. *Id. See generally* Robertson, *supra* note 16, at 213, 236; Brosnahan, *supra* note 2, at 788-91. One writer has drawn attention to the *Time, Inc. v. Firestone* opinion in which the Supreme Court made the type of ad hoc decision the Court had disapproved of in *Gertz*. Gertz *and the Public Figure Doctrine, supra* note 16, at 1071. In *Firestone*, the Court held that divorce is not a matter of public interest. *Id.* The Court, however, could have avoided making such a determination if it had focused on the plaintiff's behavior, for Mary Firestone was not attempting to influence the public, but only avail herself of court procedures. *Id.*

[39] *See* text accompanying notes 20-27 *supra*.

determining whether an individual is a public figure.[40] The Supreme Court identified the elements of self-help and assumption of the risk as the operative principles behind the public figure doctrine.[41] The Court stressed the fact that public figures generally enjoy a substantial degree of access to the media, and therefore, are able to minimize effectively the impact of adverse statements on their reputations.[42] Private individuals, however, are unable to avail themselves of the remedy of counter-argument and thus are more deserving of the Court's protection.[43]

In discussing the theory of assumption of the risk, the Supreme Court emphasized the fact that public officials and public figures open themselves up to public inspection in pursuing governmental offices and the public spotlight.[44] The Court held that while the media may assume that public officials and public figures have exposed themselves voluntarily to the increased risk of defamation, such a presumption is inappropriate in relation to a private citizen because he has neither sought a public office nor become a major force in the ordering of society.[45]

The Supreme Court stated that the proper focus of the public figure test should be on the nature and extent of the individual's participation in the controversy, not on the controversy itself.[46] The Supreme Court emphasized three factors involved in analyzing a plaintiff's

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[40] 418 U.S. at 344-46.

[41] *Id.*

[42] *Id.* The Court noted, however, that often the opportunity to rebut a falsehood is an inadequate remedy. *Id.* at 344 n.9. Critics have questioned the viability to access to the press as a remedy. *See* Shapo, *Media Injuries to Personality: An Essay on Legal Regulation of Public Communication*, 47 TEX. L. REV. 650, 654-55 (1968); Gertz *and the Public Figure Doctrine, supra* note 16, at 1082-83. The number of people who can "command" access to the media is small. Gertz *and the Public Figure Doctrine, supra* note 16, at 1082. Nor is there certainty that a person will be afforded as much attention in countering the statement as was devoted to the initial statement. *Id.* This is especially true in the case of radio and television broadcasting. Shapo, *supra*, at 654. The impact of the defamatory material is immediate and pervasive. *Id.* Retractions will be ineffective in situations where listeners leave the room or where programs are not presented regularly. *Id.* at 655. Thus, as Justice Powell recognized, "the truth rarely catches up with a lie." Gertz v. Robert Welch, Inc., 418 U.S. at 344.

[43] 418 U.S. at 344.

[44] *Id.* Justice Powell maintained that the public has a legitimate interest not only in the formal duties of an officer, but also in his fitness for the office. *Id.* The Court held that the personal attributes of honesty or malfeasance are particularly germane to the issue of whether a person is a responsible candidate. *Id.* at 345.

[45] *Id.* The Court left open the possiblity that a person could become a public figure involuntarily, but stated that such an occurrence would be rare. *Id.* Commentators have interpreted the Supreme Court's decision in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), as impliedly abandoning the involuntary public figure category. *See* Ashdown, Gertz *and* Firestone: *A Study in Constitutional Policy-Making*, 61 MINN. L. REV. 645, 660 (1977); Comment, *The Evolution of the Public Figure Doctrine in Defamation Actions*, 41 OHIO ST. L. REV. 1009, 1021 (1980); Casenote, *The Supreme Court Places Further Limitations on Designation as a "Public Figure" in Libel Actions*, 1980 B.Y. U. L. REV. 450, 468.

[46] 418 U.S. at 352. In an attempt to further refine the public figure doctrine, the Court grouped public figures into two categories. *Id.* Recognizing a difference between all purpose and limited purpose public figures, the Court stated that all purpose figures are those who

involvement.[47] The elements include ascertaining the plaintiff's role in the dispute, determining whether the plaintiff has access to effective channels of communication, and focusing on the voluntariness of plaintiff's participation in the controversy.[48]

In *Wolston v. Reader's Digest Association*,[49] the Supreme Court recently was confronted with the issue of whether the lapse of time between a public controversy and a defamatory statement affects the status of a public figure. Expressly reserving opinion on this issue,[50] the Supreme Court failed to resolve the question of whether the passage of time dissipates the status of a public figure.[51] While the majority declined to address the issue, Justices Blackmun and Brennan expressed their views in separate opinions on the effect of the passage of time.[52]

In a concurring opinion joined by Justice Marshall, Justice Blackmun contended that the passage of time is a relevant factor in determining whether a person retains his status as a public figure.[53] Focusing on the two underlying principles involved in the public figure doctrine,[54] Justice

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have attained pervasive fame or notoriety. *Id.* Limited purpose figures are those who have voluntarily injected themselves into a particular controversy. *Id.* The Court stated in either situation such persons have assumed a special role in the resolution of public issues. *Id.*

[47] *Id.*

[48] *Id.*

[49] 443 U.S. 157 (1979). In *Wolston*, the defendant had published a book entitled *KGB: The Secret Work of Soviet Agents*, which falsely identified Ilya Wolston as a Soviet agent in the United States. *Id.* at 159-60. While Wolston had been convicted on contempt charges for failing to testify before a federal grand jury investigating Soviet activities in the United States, he had never been indicted or tried on espionage charges. *Id.* Since Wolston had not entered the controversy voluntarily, nor ever spoken to the media regarding the grand jury proceedings, the Supreme Court held that Wolston did not qualify as a public figure. *Id.* at 167. In the appellate trial of Wolston, the Court of Appeals for the District of Columbia had arrived at a contrary finding. 578 F.2d 427, 431 (D.C. Cir. 1978). The court held that Wolston was a public figure. *Id.* Focusing on Wolston's failure to appear before the grand jury, the court stated that such an action amounted to a voluntary entrance into the public spotlight. *Id.*

[50] 443 U.S. at 166 n.7. Prior to *Wolston*, the Supreme Court had considered the issue of time only once before. Rosenblatt v. Baer, 383 U.S. 75, 87 n.14 (1966). In *Rosenblatt*, the Supreme Court dealt with an issue related to the question of the passage of time. *Id.* The Court noted that there may be cases where a person is so far removed from a former position of authority that comment on the manner in which he performed his office may no longer command the interest required to justify the application of the *New York Times* rule. *Id.*

[51] 443 U.S. at 170. Justice Blackmun noted that the plaintiff at oral argument had abandoned the contention that the passage of time had eradicated his status as a public figure. *Id.* Justice Blackmun stated that the plaintiff's decision to forgo the assertion was based on the fact that both the district court and the D.C. Court of Appeals had considered the issue expressly and found that the intervening sixteen years had not erased the plaintiff's status as a public figure. *Id.* The Justice stated that since the plaintiff's abandonment of the issue of the passage of time was merely a strategic decision, consideration of the issue was not precluded by the failure of the plaintiff to argue it. *Id.*

[52] *Id.* at 169-72.

[53] *Id.* at 170.

[54] *See* text accompanying notes 41-45 *supra*.

Blackmun stated that the elements of access to the media and assumption of the risk are affected directly by the lapse of time.[55]

Justice Blackmun maintained that an individual's access to the press is dependent on the media's interest in the controversy.[56] The Justice suggested that since the passage of time frequently operates to diminish the public's interest in a controversy, the effect of time may be to hinder substantially an individual's opportunity to rebut defamatory statements.[57]

Justice Blackmun also discussed the notion of assumption of the risk.[58] In determining how much weight should be accorded to the element of time, the Justice looked to the anticipations of the plaintiff as the time of his involvement in the controversy.[59] Justice Blackmun suggested that a plaintiff's efforts to regain his anonymity are also to be considered in determining whether a person retains his public figure status after the passage of years.[60] In fact, the Justice stated that in certain instances a plaintiff's return to private life may be held to negate any risks the individual may be said to have originally assumed.[61]

Justice Blackmun focused his analysis of the issue of the passage of time on a distinction between historical and contemporaneous reporting, maintaining that the need for the public figure doctrine is not as urgent in cases involving historical commentary.[62] Justice Blackmun stated that historians have more of an opportunity to search for and examine the ac-

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[55] 443 U.S. at 170-71.

[56] *Id.* at 170.

[57] *Id.* at 170. One commentator has suggested that the principle of counterargument is a weak link in the public figure doctrine. *See* Gertz *and the Public Figure Doctrine, supra* note 16, at 1082; note 42 *supra*. Justice Powell in *Gertz v. Robert Welch Inc.* stated that while the self-help remedy of rebuttal may be inadequate to counter the harm of defamation, rebuttal is nevertheless a relevant factor. 318 U.S. at 345 n.9. In *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), the Supreme Court held that to constitute a public figure, an individual's access to the media must be "regular and continuing." *Id.* at 136. The holding in *Proxmire* indicates that the Court continues to consider the theory of access to the media as a viable method of counter-balancing defamatory statements. *See* Gertz *and the Public Figure Doctrine, supra* note 16, at 1082.

[58] 443 U.S. at 171.

[59] *Id.* The evaluation of a plaintiff's anticipations will differ according to the plaintiff's position in society. Obviously, a spy will be less interested in public exposure than a candidate running for office.

[60] *Id.*

[61] *Id.* For example, Justice Blackmun recognized that in *Wolston* the plaintiff may be said to have assumed the risk of public scrutiny by ignoring the grand jury subpoena in 1958. *Id.* The Justice stated, however, that Wolston's successful attempt to return to private life negated any assumption that he had accepted the risk of public exposure sixteen years later. *Id.*

[62] *Id.* Justice Blackmun argued that while historical writing is not less important than contemporaneous writing, the conditions under which the two professions work are different. *Id.* The Justice emphasized the fact that contemporaneous reporters, unlike historians are faced with deadlines and have limited time to exploit investigative opportunities. *Id.*

curacy of their sources than reporters who are faced with the immediate and pressing time constraints of deadlines.[63] Thus, Justice Blackmun contended that the addition of the factor of time to the public figure doctrine does not endanger the right to freedom of expression since historical reporting does not require the same degree of protection as contemporaneous reporting.[64]

Justice Brennan, in a dissenting opinion, advocated the view that as long as the controversy involved is one of legitimate public concern, the issue of the passage of time will not be a determinative factor.[65] Reminiscent of his opinion in *Rosenbloom*,[66] Justice Brennan's dissent focused on the public's interest in the controversy rather than on the plaintiff's role.[67] While Justice Brennan appears to have conceded that the passage of time may be a relevant factor, he nevertheless minimized its importance to the public figure doctrine by emphasizing the public interest aspect of the controversy.[68]

In a recent Sixth Circuit decision, the court addressed the issue of whether the passage of time affects the status of a public figure.[69] In *Street v. National Broadcasting Co.*,[70] the Sixth Circuit held that the plaintiff retained her public figure status for the purpose of discussing the controversy forty years after its occurrence.[71] On April 22, 1976, and on January 3, 1977, the National Broadcasting Co. (NBC), televised an historical drama entitled "Judge Horton and the Scottsboro Boys."[72] The

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[63] *Id.* The Justice conceded that one may be a public figure for purposes of contemporaneous reporting of a controversial event, yet not be a public figure for purposes of historical commentary on the same occurrence. *Id.*

[64] *Id.* Justice Blackmun alluded to the Court's ever present concern over the balance between the first amendment and the law of defamation. *See* text accompanying notes 2-3 *supra*.

[65] 443 U.S. at 172. Justice Brennan agreed with the appellate court's finding that a legitimate public interest was at issue. *Id.* The appellate court held that the security of the United States is always an issue of importance to the public. 578 F.2d at 431.

[66] *See* text accompanying notes 28-32 *supra*.

[67] 443 U.S. at 172. While Justice Brennan contended that Wolston was a public figure, he would have reversed and remanded the decision on the issue of whether evidence of actual malice was present. *Id.*

[68] *Id.* In *Rosenbloom*, Justice Brennan recognized the fact that a public figure's ability to respond through the media depends on the media's interest in the story. 403 U.S. at 46. Since continued interest in an event is an unpredictable factor, the Justice considered the opportunity for rebuttal to be an ineffective remedy. *Id.*; *see* note 44 *supra*. Justice Brennan suggested that the way to rectify such a weakness is to ensure the ability of plaintiffs to respond to defamatory statements. 403 U.S. at 46.

[69] Street v. National Broadcasting Co., 645 F.2d 1227 (6th Cir.), *cert. dismissed*, 50 U.S.L.W. 3477 (December 15, 1981).

[70] *Id.*

[71] *Id.* at 1235.

[72] Brief for Appellee at 2, Street v. National Broadcasting Co., 645 F.2d 1227 (6th Cir. 1981). The movie was based on a chapter from a book entitled *Scottsboro: A Tragedy of the American South*. 645 F.2d at 1230. The author, Dr. Daniel Carter, relied heavily on Judge Horton's findings during the 1933 trial, the transcript of the trial, newspaper articles and interviews with Judge Horton and others. *Id.*

television presentation was based upon an incident involving nine black youths accused of raping two white women in 1931.[73] The production emphasized the role of the presiding judge, James E. Horton, in the 1933 trial of the State of Alabama versus Haywood Patterson. Victoria Price Street, then known as Victoria Price, was the principal prosecution witness in the rape trials of the nine blacks.[74] Judge Horton's findings during the 1933 trial provided the basis for the portrayal of the plaintiff.[75] The movie presents Mrs. Street in an unfavorable light, as a promiscuous woman intent on sending nine innocent blacks to the electric chair for a crime they did not commit.[76]

Subsequent to the production's airing, Mrs. Street brought charges against NBC for invasion of privacy and defamation of character.[77] The district court found that Mrs. Street was not a public figure, but directed a verdict for defendant on the grounds that there was no negligence involved in publishing the defamatory matter.[78] On appeal, the Sixth Circuit held that Mrs. Street qualified as a public figure.[79] Finding in favor of the defendant, the court stated that the action for defamation could not stand because the plaintiff had failed to meet the *New York Times* standard of actual malice.[80]

The Sixth Circuit considered the defendant's first amendment defenses, looking specifically at the constitutional issue of whether the plaintiff should be characterized as a public figure.[81] In determining

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[73] 645 F.2d at 1229-30.

[74] *Id.* Immediately after the alleged rape the nine blacks were tried and convicted. *Id.* The Supreme Court reversed the conviction because the defendants had been denied counsel. *Id.* Patterson was the first defendant retried. *Id.* He was convicted by a jury and sentenced to death. *Id.* at 1230. Finding that the evidence was insufficient, Judge Horton set aside the verdict. *Id.* Patterson was retried on substantially the same evidence before another judge who allowed the jury's verdict of guilty to stand. *Id.* Patterson's conviction was affirmed by the Alabama Supreme Court. *Id.* The United States Supreme Court reversed the conviction because blacks had been excluded from the juries. *Id.* At Pattersons's fourth retrial, he was convicted and sentenced to 75 years in prison. *Id.*

[75] *Id.* at 1237 app. (Judge Horton's unreported opinion of the 1933 trial). The Sixth Circuit held that while many of the scenes contain actual quotations from the trial manuscripts, the movie is not an entirely accurate account of the trial. *Id.* at 1233.

[76] *Id.* at 1232. In the movie, NBC inaccurately stated that Mrs. Street was dead. *Id.* at 1230. Plaintiff informed NBC that she was living subsequent to the first broadcast of "Judge Horton and the Scottsboro Boys." *Id.* NBC then deleted the statement that plaintiff was no longer living when the movie was reaired. *Id.*

[77] *Id.* at 1229. Mrs. Street based her libel and invasion of privacy claims on nine scenes in the movie. *Id.* at 1230. The Sixth Circuit agreed with plaintiff that the play presented her in a very unfavorable manner. *Id.*

[78] Street v. National Broadcasting Co., No. Civ-4-76-31 (E.D. Tenn., August 11, 1977).

[79] 645 F.2d at 1229.

[80] *Id.*

[81] *Id.* at 1232. The Sixth Circuit discussed the common law defenses asserted by the defendant of fair comment, truth, and fair reporting of judicial proceedings. *Id.* at 1232-33. The court stated that the defense of fair comment failed because the characterization of Victoria Price was not expressed as a matter of opinion, but as a fact. *Id.* at 1233. The Sixth Cir-

whether Mrs. Street was a public figure, the Sixth Circuit applied the *Gertz* test.[82] The *Street* court interpreted the *Gertz* decision as establishing a two-part test.[83] The first step of the analysis involves examining whether a public controversy exists, while the second step focuses on the nature and extent of the plaintiff's involvement in the public controversy.[84] The court identified three elements as involved in examining the plaintiff's participation in the dispute.[85] The elements include ascertaining whether the plaintiff played a prominent role in the controversy, whether the plaintiff had access to the media, and whether the plaintiff voluntarily entered into the dispute.[86]

Executing the first step, the *Street* court held that the Scottsboro trials were of nationwide significance and therefore qualified as a public controversy.[87] The Sixth Circuit stated that the Scottsboro trials not only drew the attention of millions, but also were instrumental in shaping the development of the black citizens' right to equal treatment in the judicial system.[88] In applying the second step of the test, the Sixth Circuit found that Mrs. Street fulfilled all three requirements.[89] The court held that as the main prosecutrix Mrs. Street played a prominent role in the proceedings.[90] The court viewed the fact that Mrs. Street actively interviewed with the press in an attempt to influence the outcome of the trial as evidence that she had sufficient access to channels of communication.[91] Furthermore, the *Street* court held that Mrs. Street's encouragement of public interest in her plight exemplified her voluntary participation in the controversy.[92]

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cuit also held that the findings of Judge Horton do not establish immutably the truthfulness of Victoria Price Street's testimony. *Id.* Rather, the issue of truth remains an open question, and cannot be asserted as a defense. *Id.* In relation to the common law defense of fair reporting of judicial proceedings, the Sixth Circuit held that since the movie focused only on Judge Horton's perspective, the necessary elements of balance and neutrality were missing and, therefore, the defense could not be maintained successfully. *Id.*

[82] *Id.*; *see* text accompanying notes 39-48 *supra.*

[83] 645 F.2d at 1234. The Sixth Circuit's interpretation of *Gertz* appears to be consistent with the Supreme Court's position on the public figure doctrine. *See* Time, Inc. v. Firestone, 424 U.S. 448 (1976); Note, *Public Figures, Private Figures & Public Interest*, 30 STAN. L. REV. 157, 175 (1977).

[84] 645 F.2d at 1234.

[85] *Id.*

[86] *Id.*

[87] *Id.* The Sixth Circuit stated that the elements constituting a public controversy have not yet been defined clearly. *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.* at 1234-35. The Sixth Circuit confessed to having some difficulty with the question of whether Mrs. Street's participation was voluntary. *Id.* The court found the issue of voluntariness related to the question of truth. *Id.* If Mrs. Street had been raped, the court stated her involvement in the trial would have been involuntary. *Id.* However, if she falsely

Finding that Mrs. Street was a public figure in 1933, the issue then became whether she retained her status after the passage of forty years. The Sixth Circuit rejected the argument that Mrs. Street lost her public figure status over the intervening time.[93] The *Street* court based its discussion on an interpretation of case law and on an analysis of the malice standard.[94] In looking to previous case law, the Sixth Circuit cited a recent Fifth Circuit opinion in support of its holding.[95] The Sixth Circuit reiterated the Fifth Circuit's contention set forth in *Brewer v. Memphis Publishing Co.* that while the passage of time may not erase an individual's status as a public figure, time may operate to reduce the range of topics protected by the malice standard.[96]

Seeking to corroborate its stance further, the Sixth Circuit referred to *Meeropol v. Nizer*,[97] a Second Circuit decision. The Sixth Circuit interpreted the Second Circuit as operating on the silent assumption that public figures retained their status regardless of the passage of time.[98] The Sixth Circuit found such a presumption to be implicit support for the ruling that the passage of forty years did not affect Mrs. Street's status as a public figure.[99]

The Sixth Circuit also cited two pre-*Gertz* decisions as authority for the court's holding in *Street*.[100] In *Sidis v. F-R Publishing Corporation*[101]

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accused the black youths, her participation could be said to have been voluntary. *Id.* Holding that the operation of the law of libel should not depend on the media's conjecture as to a woman's virtue, the Sixth Circuit looked to other factors, such as her pursuit of publicity, as evidence of Mrs. Street's voluntary involvement. *Id.*

[93] *Id.* at 1235.

[94] *Id.*

[95] *Id.* In *Brewer v. Memphis Publishing Co.*, 626 F.2d 1238 (5th Cir. 1980), *cert. denied*, 101 S.Ct. 3112 (1981), the plaintiff, Anita Wood Brewer, sued a newspaper for publishing an article intimating that plaintiff was reviving a romantic relationship with Elvis Presley. *Id.* at 1240. The plaintiff was a nationally known entertainer who attained her fame through her relationship with Elvis Presley during the 1950's. *Id.* at 1248. Plaintiff claimed that since her marriage in 1964, and her subsequent retreat from the public spotlight, her status as a public figure had dissipated. *Id.* at 1249. The Fifth Circuit held that because Mrs. Brewer's name had continued to appear in stories about Presley after her retirement, and since the subject of the article related to one of the causes of the plaintiff's fame, plaintiff retained her status as a public figure for purposes of the article. *Id.* at 1257.

[96] 645 F.2d at 1235.

[97] Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978). In *Meeropol*, the plaintiffs sued defendants for defamation arising out of an account of the Rosenberg trial entitled *The Implosion Conspiracy* published in 1974. *Id.* at 1064. The plaintiffs, the natural children of Julius and Ethel Rosenberg, were held to be public figures by virtue of their parentage. *Id.* The court held that even if some of the statements in *The Implosion Conspiracy* were found to be defamatory, plaintiffs, as public figures, were required to meet the malice standard to recover damages. *Id.* at 1066.

[98] 645 F.2d at 1235.

[99] *Id.*

[100] *Id.*

[101] 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940). In *Sidis*, the plaintiff was a famous child prodigy who had excited a great deal of attention in 1910. *Id.* at 807. Sidis sought to conceal his identity in later life by moving to a shabby part of Boston and taking

and *Time, Inc. v. Johnston*,[102] the Second and Fourth Circuits focused on the public interest aspect of the cases. The courts held that the public's concern in the controversy outweighed the plaintiff's right to protect his reputation.[103] Thus, the Sixth Circuit stated that deference to the public's interest in a controversy supports a finding that the passage of time does not affect the public figure doctrine.[104]

In analyzing the issue of the passage of time, the Sixth Circuit examined the policy behind the public figure doctrine.[105] The court stated that the Supreme Court established the malice standard to protect the first amendment's right of freedom of expression.[106] The Sixth Circuit also referred to the nation's commitment to unfettered debate and focused on the need of the press to remain free from threats of liability.[107]

Refusing to recognize a distinction between historians and contemporaneous reporters, the Sixth Circuit held that while an historian may not operate under pressing time constraints, he nevertheless is faced with similar impediments.[108] The court advanced the contention that the accuracy and verifiability of sources available to a historian are not necessarily enhanced by the passage of time.[109] The *Street* court referred to instances in which memories fade, witnesses forget, and sources disappear.[110] The court, therefore, perceived the extension of the malice

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on a position as an insignificant clerk. *Id.* In 1937, Sidis was the subject of a brief biographical sketch in *The New Yorker. Id.* The article described, in merciless detail, the early accomplishments of Sidis and his later attempts to avoid public scrutiny. *Id.* The article discussed the plaintiff's personal habits in depth, remarking on his "curious" laugh, his manner of speech, and untidy room. *Id.* Sidis subsequently sued *The New Yorker* for invasion of privacy. *Id.* The Second Circuit held that while Sidis was a public figure who had since sought and attained anonymity, the public interest in his career outweighed his desire for privacy. *Id.*

[102] 448 F.2d 378 (4th Cir. 1971). In *Time*, a former professional basketball player brought a libel action against the publisher of *Sports Illustrated. Id.* at 379. The plaintiff, an assistant basketball coach at Wake Forest University, had been retired from professional basketball for nine years at the time of the publication of the article. *Id.* The article discussed the career of Bill Russell, a basketball star of the Boston Celtics, and referred to an incident during which Russell was said to have "destroyed" Johnston on the basketball court. *Id.* Johnston maintained that his reputation as a coach was damaged by the article. *Id.* Johnston argued that the *New York Times* rule did not apply because he had shed his public figure status over the intervening years. *Id.* at 380. The court held that since the event between Russell and Johnston remained a matter of public interest, plaintiff was required to prove malice regardless of the passage of time. *Id.* at 381. Furthermore, the court stated that Johnston's contention that he had shed his public figure status was patently inconsistent with his claim for damages to his reputation as a coach. *Id.* at 381.

[103] 113 F.2d at 809; 448 F.2d at 381.

[104] 645 F.2d at 1235.

[105] *Id.* at 1236; *see* text accompanying note 19 *supra.*

[106] 645 F.2d at 1236.

[107] *Id.* The Sixth Circuit stated that the public figure doctrine enables the media to make information accessible to the public unencumbered by the threat of liability. *Id.*

[108] *Id.; see* text accompanying notes 62-64 *supra.*

[109] 645 F.2d at 1236.

[110] *Id.*

standard to encompass historical reporting as a natural and logical development of the public figure doctrine.[111]

Examining only one of the two underpinnings of the public figure doctrine, the Sixth Circuit held that a public figure does not lose access to the media simply because of the passage of time.[112] The court stated that the importance of an event and society's need for information are not diminished with the passage of time.[113] The Sixth Circuit held that as long as the controversy remains alive, as in the present case, a public figure must prove actual malice to recover under a defamation action regardless of the intervention of time.[114]

The Sixth Circuit's treatment of the issue of the passage of time is cursory and evasive. Relying on case law which is unsupportive and an anlysis of the public figure doctrine which is unsound, the *Street* court failed to present a well reasoned decision. Citing *Brewer v. Memphis Co.*[115] for support, the Sixth Circuit failed to examine fully the holding of the Fifth Circuit's decision. In *Brewer*, the plaintiff sought to prove that her status as a public figure had dissipated with the passage of years.[116] Reiterating Justice Blackmun's discussion of whether the passage of time affects the public figure doctrine,[117] the Fifth Circuit nevertheless held that based on the facts in the *Brewer* case such an analysis was inapposite.[118]

One of the reasons for the Fifth Circuit's determination that Justice Blackmun's analysis did not apply was the fact that *Brewer* involved an incident of contemporaneous reporting, not historical commentary.[119] In addition, the Fifth Circuit's suggestion that time may narrow the range of topics, presupposes, not undermines, the theory that time affects a plaintiff's status as a public figure.[120] Therefore, the Sixth Circuit incorrectly cited to *Brewer* for the proposition that time does not operate to diminish a public figure's status.

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[111] *Id.*

[112] *Id.* The two underlying principles of the public figure doctrine are access to the media and assumption of the risk. *See* text accompanying notes 39-45 *supra.*

[113] 645 F.2d at 1236.

[114] Brief for Appellee at 6, Street v. National Broadcasting Co., 645 F.2d 1227 (6th Cir. 1981). In the brief for appellee, the defendant presented extensive evidence as to the newsworthiness of the topic. *Id.*

[115] 646 F.2d 1238 (5th Cir. 1980); text accompanying notes 95-96 *supra.*

[116] 646 F.2d at 1257.

[117] *Id.; see* text accompanying notes 54-61 *supra.*

[118] 626 F.2d at 1257.

[119] *Id.* The Fifth Circuit offered two other reasons for the applicability of Justice Blackmun's analysis. *Id.* The court referred to the fact that *Brewer v. Memphis Co.* involved a question where the plaintiff's public figure status was not tied to a particular public controversy. *Id.* Second, the Fifth Circuit stated that while Anita Brewer may have sought anonymity eight years before the publication of the article, her name had continued to appear in connection with books and articles about Elvis Presley even after her retreat from the limelight. *Id.*

[120] *Id.*

The Sixth Circuit mistakenly cited *Meeropol v. Nizer*[121] for the proposition that the passage of time does not diminish a public figure's status. In *Meeropol*, the sons of Julius and Ethel Rosenberg were held to be public figures for purposes of subsequent commentary on the Rosenberg trials.[122] The Sixth Circuit contended that implicit in the decision is the holding that the passage of time does not affect the status of a public figure.[123] The issue of the passage of time, however, was never presented to the court. Nor did the *Meeropol* court ever address the issue in its opinion. Since the Second Circuit did not analyze the issue of the passage of time, the *Meeropol* decision fails to provide support for the Sixth Circuit's holding that Mrs. Street retained her status as a public figure regardless of the intervention of forty years.

The Sixth Circuit's reliance on *Sidis v. F-R Publishing Corp.*[124] and *Time, Inc. v. Johnston*,[125] was misplaced. The flaw inherent in the two cases arises from the fact that the cases are grounded in a public interest perspective. In *Gertz*, the Supreme Court specifically rejected the *Rosenbloom* public interest test and held that the focus of the public figure doctrine should be on the nature and extent of the individual's involvement in the controversy and not on the controversy itself.[126]

Furthermore, in *Time, Inc. v. Johnston* the Fifth Circuit resolved the issue of the passage of time by relying heavily on an analogy between invasion of privacy and the law of defamation.[127] The Fifth Circuit deferred to a principle established in *Cohen v. Marx*,[128] a 1949 invasion of privacy case, which held that once a plaintiff seeks publicity, he relinquishes his right to privacy and cannot later rescind his waiver.[129] The waiver theory enunciated in *Cohen v. Marx*, however, loses force in light of the Restatement of Torts position on the issue.[130] The Restatement (Second)

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[121] 560 F.2d 1061 (2d Cir. 1977); text accompanying notes 97-99 *supra*.

[122] 560 F.2d at 1066.

[123] 645 F.2d at 1235.

[124] 113 F.2d 806 (2d Cir. 1940); text accompanying notes 101-03 *supra*.

[125] 448 F.2d 378 (4th Cir. 1971); text accompanying notes 102-04 *supra*.

[126] 418 U.S. at 346; text accompanying notes 33-48 *supra*.

[127] 448 F.2d at 381.

[128] 94 Cal.App.2d 704, 211 P.2d 320 (1949). In *Cohen*, the plaintiff was a retired professional boxer who brought an action against Groucho Marx for invasion of privacy. *Id.* at 321. On the program "You Bet Your Life," Marx stated: "I once managed a prizefighter, Canvasback Cohen, I brought him out here, he got knocked out, and I made him walk back to Cleveland." *Id.* The court denied the plaintiff relief, holding that when a person voluntarily exposes himself to the public eye, he has waived his right of privacy and cannot rescind his waiver at some later date. *Id.*

[129] *Id.*

[130] RESTATEMENT (SECOND) OF TORTS § 652 D, Comment k (1976). The Restatement maintains that while the lapse of time is not a determinative factor, courts should take into consideration the element of time in determining whether a public figure's privacy has been invaded. *Id.; see* Johnson v. Harcourt, Brace, Jovanovich, Inc., 43 Cal.App.3d 880, 891, 118 Cal.Rptr. 370, 378-79 (1974) (court held that mere lapse of time may provide basis for invasion of privacy suit); Howard v. Des Moines Register & Tribune Company, 283 N.W.2d 289,

of Torts suggests that a modern trend is developing in favor of considering the passage of time as a relevant factor in the law of invasion of privacy.[131] Therefore, the Sixth Circuit's reliance on *Time, Inc. v. Johnston* is misplaced not only because the *Time* decision is based on a newsworthiness standard expressly rejected by the Supreme Court, but also because the decision draws an analogy to a principle of the law of invasion of privacy which is currently undergoing revision.[132]

Not only does the Sixth Circuit rely on case law which is unsupportive of the court's holding, but the court's analysis of the public figure doctrine is poorly reasoned. In dealing with the principles underlying the public figure doctrine,[133] the Sixth Circuit dismissed the contention that an individual's access to the press is affected by the passage of time, even if that individual presently leads a reclusive life.[134] The Sixth Circuit failed to present an analysis of the relationship between a plaintiff's opportunity to counter defamatory remarks and the lapse of time. The court neglected to discuss the facts of the case, apparently assuming that Mrs. Street's acces to the media was unaffected by the intervention of forty years. Such an assumption strikes at the heart of the public figure doctrine, especially since the theory of access to the press is an important component of the malice standard.[135] Furthermore, the Sixth Circuit failed to consider the concept of assumption of the risk, an intrinsic and fundamental aspect of the public figure doctrine.[136] If the passage of time operates to restrict a public figure's access to the media, or acts to negate one's assumption of the risks involved in being a public figure, then such a factor is necessary in determining the plaintiff's status.

In dealing with the concept of the passage of time, the Sixth Circuit appears to have adopted the approach Justice Brennan advocated in his *Wolston* dissent.[137] Emphasizing the public interest aspect of the case, the *Street* court relied heavily on the finding that the Scottsboro controversy over the right of black citizens to a fair trial remains a legitimate public concern.[138] In light of the Supreme Court's rejection of the public interest test in *Gertz*, the Sixth Circuit's endorsement of Justice Brennan's approach appears to be unsound.

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302 (Sup. Ct. Iowa 1979) (court cited to Restatement and held that passage of time is relevant factor in determining whether publicity involves matter of legitimate public concern).

[131] *See* Wagner v. Fawcett Publication, 307 F.2d 409, 411 (5th Cir. 1962), *cert. denied*, 372 U.S. 909 (1963); Conklin v. Sloss, 86 Cal.App.3d 241, 244-45, 150 Cal.Rptr. 121, 123 (1978); Briscoe v. Reader's Digest Ass'n, 4 Cal.3d 529, 538-39, 93 Cal.Rptr. 866, 872-73, 483 P.2d 34, 40-41 (1971); Swan, *Publicity Invasion of Privacy: Constitutional and Doctrinal Difficulities With a Developing Tort*, 58 ORE. L. REV. 483, 483-87 (1980).

[132] Johnson v. Harcourt, Brace, Jovanovich, Inc., 43 Cal.App.3d 880, 891, 118 Cal.Rptr. 370, 378-79 (1974).

[133] *See* text accompanying notes 39-45 *supra*.

[134] 645 F.2d at 1236.

[135] *See* text accompanying notes 39-45 *supra*.

[136] 645 F.2d at 1236.

[137] *See* text accompanying notes 66-68 *supra*.

[138] 645 F.2d at 1236.

The Sixth Circuit's extension of the malice standard to cover instances of historical commentary appears to conflict with recent Supreme Court developments signaling a retreat from protection of the first amendment.[139] Rejecting the distinction between historical and contemporary reporting, the *Street* court contended that the distance of years does not make information more readily available or credible.[140] The focus of the distinction as suggested by Justice Blackmun, however, is on the fact that reporters are faced with pressing deadlines and thus are not always able to take advantage of certain investigative opportunities.[141] In establishing the malice standard, the Court was concerned with time restraints, not with the quantity or quality of information possessed by the reporter.[142] Therefore, proof of the availability or credibility of sources should go to the issue of whether the historian was negligent, or reckless, not whether the plaintiff should retain her public figure status.[143]

The function of the public figure doctrine is to accommodate the competing interests of the law of defamation and the right to freedom of expression.[144] In seeking a balance between these interests, the law is not concerned solely with the media's first amendment rights.[145] Justification for an extension of the doctrine must be grounded in a careful examination of the effects of the passage of time on one's ability to rebut defamatory statements and one's assumption of the risks concomitant with the status of a public figure.[146]

The *Street* court neglected to consider the facts of the case in arriving at a decision, and failed to evaluate what effect the lapse of time had on Mrs. Street's access to effective channels of communication or whether she had assumed the risk that forty years later she would be branded a "whore." While the first amendment provides less protection for those labeled public figures because they are more readily able to rebut misstatements of fact,[147] to suggest that Mrs. Street would be able to counter effectively a nationwide presentation of her involvement in

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[139] *See* text accompanying notes 33-38 *supra*. In *Gertz*, Justice Blackmun stated that the rejection of the *Rosenbloom* test evidenced a withdrawal from increased protection of the first amendment in favor of the law of defamation. 418 U.S. at 353. *See generally* L. ELDREDGE, *supra* note 6, § 53, at 288; Robertson, *supra* note 16, at 199; Comment, *The Evolution of the Public Figure Doctrine in Defamation Actions*, 41 OHIO ST. L. J. 1009, 1009 (1980).

[140] 645 F.2d at 1236.

[141] *See* text accompanying notes 62-64 *supra*.

[142] 443 U.S. at 171.

[143] In *Gertz*, the Supreme Court left the responsibility of defining standards of liability involving private individuals up to the states. 418 U.S. at 347; *see* text accompanying note 18 *supra*.

[144] 418 U.S. at 325.

[145] *Id.* at 341.

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

[147] *See* Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 164 (1979); Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974).

the Scottsboro trials is untenable. Furthermore, the Sixth Circuit should have examined whether Mrs. Street assumed the risk of having personal aspects of her life presented to the nation as a source of entertainment. Considering that Mrs. Street was held to have assumed the risk of defamation in 1933 due to her participation in an unknown number of interviews, the need to reevaluate her status as a public figure after the passage of forty years becomes even more crucial.[148]

Appearing to disregard the Supreme Court's recent rejection of the public interest test in *Gertz*, Justice Brennan and the Sixth Circuit continue to emphasize the public interest aspect of the public figure doctrine. In view of the fact that the public figure doctrine rests on the principles of access to the media and assumption of the risk, Justice Blackmun maintained in *Wolston* that the passage of time may often be a significant and important factor in determining whether an individual is presently a public figure. While the Justice did not state that the passage of time is a decisive factor, he nevertheless held such a factor to be relevant in applying the principles of the public figure doctrine. Therefore, Justice Blackmun's view appears to offer a more accurate and incisive analysis of the effect of the passage of time on the public figure doctrine than either Justice Brennan or the Sixth Circuit have proposed.

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[148] Street v. National Broadcasting Co., 645 F.2d at 1246-50 (dissenting opinion); Wilson v. Scripps-Howard Broadcasting Company, 642 F.2d 371, 374 (6th Cir. 1981) (Sixth Circuit stated that access to the media must be "regular and continuing" to constitute effective access to media); text accompanying note 57 *supra*.