Louisiana Law Review

Volume 80
Number 2 *Winter 2020*

Article 14

4-22-2020

An Unforeseen Problem: How Gertz Failed to Account for Modern Media and What to Do Now

Delery H. Perret

An Unforeseen Problem: How *Gertz* Failed to Account for Modern Media and What to Do Now

Delery H. Perret[*]

TABLE OF CONTENTS

---

* I cannot express my gratitude enough to the *Louisiana Law Review* Board of Editors and my advisors, Professor John Church and LSU Law Center Dean Thomas Galligan, for their continued support, editing, guidance, and encouragement. This Comment is dedicated to my parents, Keith & Raquel Perret and Amy Renn, my grandparents, Ken & Ellie Perret and Dan & Lori Renn, and all of my loving aunts and uncles. Without each of them, my dreams of attending law school and ultimately publishing this Comment would have never come true.

INTRODUCTION

"Wait a minute, that's the guy from *The Cosby Show*," a man muttered, directing his wife's attention to a middle-aged man bagging groceries and donning a stained Trader Joe's uniform shirt.[1] The couple recognized an older, heavier Geoffrey Owens, most well-known for playing Elvin Tibideaux on *The Cosby Show*.[2] After spending more than 15 years on *The Cosby Show*, Geoffrey's fame wore off.[3] Days after this couple spotted Geoffrey at the grocery store, however, the Daily Mail published an online article featuring pictures of Geoffrey in his work clothes.[4] The title exclaimed, "From Learning Lines to Serving the Long Line!"[5] Geoffrey's life as a "has-been celebrity" disappeared in an instant.[6]

Although he currently leads the life of a private individual, if a reporter published dishonest headlines, it is unlikely that Geoffrey would find relief in court due to his history as a public figure.[7] Geoffrey would face the burden of proving that the alleged defamation was made with knowledge of or reckless disregard for the truth—also known as actual malice—under the United States Supreme Court's 1969 ruling in *New York Times Co. v. Sullivan*.[8]

Courts still apply the defamation standard created in *New York Times Co. v. Sullivan*[9] and *Gertz v. Robert Welch*.[10] Through these landmark

---

1. *From Learning Lines to Serving the Long Line!* The Cosby Show *Star Geoffrey Owens Is Spotted Working as a Cashier at Trader Joe's in New Jersey*, DAILY MAIL (Aug. 30, 2018), https://www.dailymail.co.uk/news/article-6116357/The-Cosby-star-Geoffrey-Owens-spotted-working-cashier-Trader-Joes-New-Jersey.html [https://perma.cc/X7U2-NPX9].

2. Geoffrey was a cast member of *The Cosby Show* from 1985 to 1992. *Id*.

3. *Id.*

4. *Id.*

5. *Id.*

6. Erin Clements, *Geoffrey Owens Reveals What His 'Bizarre' Year Taught Him*, TODAY (Dec. 7, 2018), https://www.today.com/popculture/geoffrey-owens-reveals-what-bizarre-year-taught-him-t144697 [https://perma.cc/P35U-TUR7].

7. This is a hypothetical situation—Geoffrey was not actually subject to defamation, nor did he pursue a lawsuit.

8. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

9. *Id.*

10. 418 U.S. 323 (1974).

cases, the United States Supreme Court reformed defamation law by requiring that public officials and public figures[11] prove the defendant—the speaker of the defamatory statements—acted with actual malice.[12] The consequence of this requirement is two-fold. First, the Supreme Court aimed to safeguard the balance between private individuals' interest in privacy and the press's freedom of speech.[13] Additionally, the Supreme Court narrowed the scope of defamation plaintiffs that will prevail due to the heightened requirement of proving actual malice.[14]

The digital revolution, however, has transformed the media landscape in a way the Supreme Court could not have foreseen.[15] Reporters, who could potentially become defamation defendants, no longer rely on the morning newspaper or broadcast networks to publish articles; instead, they turn to online sources and social media.[16] Reporters now have instant access to sources from around the world for research before publication, rather than their traditional limitation to locally based print sources.[17] Furthermore, public officials and public figures can bypass the media and respond to false allegations directly to the public through social media platforms.[18] The consequences of the digital revolution beckon the

11. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), officially applied actual malice to public figures, but *Gertz v. Robert Welch*, 418 U.S. 323 (1974), articulated the distinctions between private individuals and public figures.

12. *New York Times Co.*, 376 U.S. 254.

13. *Id.* at 270–72.

14. *Id.*

15. *New York Times Co.*, 376 U.S. 254; *see* Elisa Shearer & Jeffrey Gottfried, *News Use Across Social Media Platforms 2017*, PEW RES. CTR.: JOURNALISM & MEDIA (Sept. 7, 2017), http://www.journalism.org/2017/09/07/news-use-across-social-media-platforms-2017/ [https://perma.cc/4DQJ-A7KK] ("As of August 2017, two-thirds (67%) of Americans report that they get at least some of their news on social media . . . . For the first time[,] . . . more than half (55%) of Americans ages 50 or older report getting news on social media sites."); Newspapers Fact Sheet, PEW RESEARCH CTR. JOURNALISM & MEDIA (July 9, 2019), http://www.journalism.org/fact-sheet/newspapers/ [https://perma.cc/S6S5-E9E7] (last visited on Oct. 15, 2019) (noting that declines were highest in print circulation: "Weekday print circulation decreased 12% and Sunday circulation decreased 13%" from 2017 to 2018) (demonstrating that circulation of weekday newspapers has decreased by 51% from 1964 to 2017); *State of the News Media*, PEW RES. CTR., http://www.pewresearch.org/topics/state-of-the-news-media/ [https://perma.cc/2478-72T8] (last visited Sept. 6, 2018) (stating that the approach to studying data has "evolved along with the industry").

16. *See* Shearer & Gottfried, *supra* note 15.

17. *See* discussion *infra* Section II.A.

18. *See* discussion *infra* Section IV.B.2.

Supreme Court to modernize defamation law and rebalance the interests at stake by creating a new class of defamation plaintiffs.

Two major problems have come to light. First, the courts struggle to distinguish between active public figures who enjoy the benefits of self-help and inactive public figures who do not. Second, applying the *New York Times* standard in the digital world promulgates an imbalance between the rights of the press and the rights of individuals. The appropriate way to remedy these problems is to apply a three-question, two-factor test ("3-2 Test") to determine which plaintiffs need to prove actual malice. This test first considers whether the plaintiff is a private citizen or a public figure. If the plaintiff is a public figure, or was a public figure at any point during the plaintiff's lifetime, the court will determine whether the plaintiff is active or inactive.[19] Active public figures are those who seek media attention and are able to use their public notoriety to refute false claims, while inactive public figures cannot.[20] Thus, the court will examine whether the plaintiff has access to traditional channels of communication or modern methods of rebuttal to classify the plaintiff as active or inactive. If the plaintiff is inactive, the court will then determine whether the controversy surrounding the alleged defamation is the same as or different from the controversy that gave rise to the plaintiff's original public figure status.[21]

The analysis will result in three possible burdens of proof. First, active public figures will be responsible for proving that the defendant acted with actual malice. Second, private parties and inactive public figures with unrelated controversies will not need to meet the actual malice standard. Third, in cases of inactive public figures with related controversies, the burden will shift to the defendant to prove by clear and convincing evidence that he was not negligent. The 3-2 Test creates an intermediate category that allows a just result for public figures who are no longer in the public eye in the digital age.

---

19. The Fifth Circuit briefly discussed the term "active" public figure in *Brewer v. Memphis Publishing Co.*, 626 F.2d 1238, 1257 (5th Cir. 1980). The Fifth Circuit did not, however, find that reversing public status was appropriate. The Fifth Circuit referred to a distinction in the "active" period of a public figure's fame. This Comment derives the term "active" from *Brewer* but argues that distinguishing between "active" and "inactive" requires more than an analysis of the breadth of current media coverage.

20. *See infra* Part IV.

21. Distinguishing the types of controversy involved will allow the court to determine if a plaintiff should be treated as a private individual or public figure. Controversies related to the status of the plaintiff are more likely to be subject to public comment and debate.

Part I of this Comment analyzes the background of the public figure designation. Part I also details the evolution of the actual malice standard and investigates the process of categorizing plaintiffs as public figures. Part II briefly summarizes the relevant history of mass media, including the impact of the digital revolution in the early 2000s. Additionally, Part II discusses how the internet and social media have altered the traditional methods of plaintiff categorization. Part III presents the problem new media has created for public figure status retention. Finally, Part IV argues for distinguishing public figures into two new subcategories, provides factors to assist courts in categorizing, and describes a method for applying the actual malice standard going forward.[22]

I. A POLICE COMMISSIONER, AN ATHLETIC DIRECTOR, AND A LAWYER ALLEGE DEFAMATION . . .

Prior to 1964, courts treated defamation as a type of strict liability under state tort law.[23] In its pioneering *New York Times Co. v. Sullivan* decision, however, the Supreme Court reformed defamation law by applying a heightened burden of proof—actual malice—to plaintiffs who were public officials.[24] In subsequent cases, the Court expanded the scope of *New York Times* to include public figures and distinguished public figures from private citizens.[25]

A. New York Times Co. v. Sullivan *and Actual Malice*

In *New York Times Co. v. Sullivan*, the Court aimed to balance the privacy interests of individuals with the press's interest in free speech.[26] The landmark case guarantees that public figures bear a higher burden for proving defamatory statements.[27] *New York Times Co. v. Sullivan* and its

22. For purposes of this solution, designation as a general public figure, limited-purpose public figure, or public official is not necessary. The solution only requires that the plaintiff was at one time a public figure or a public official.

23. Elsa Ransom, *The Ex-Public Figure: A Libel Plaintiff Without a Class*, 5 SETON HALL J. SPORT L. 389, 392 (1995).

24. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

25. Curtis Publ'g. Co. v. Butts, 388 U.S. 130 (1967); Gertz v. Robert Welch, 418 U.S. 323 (1974).

26. *New York Times Co.*, 376 U.S. 254 at 272.

27. *New York Times Co.*, 376 U.S. 254. The *New York Times* standard is not limited to media defendants. *See* RESTATEMENT (SECOND) OF TORTS § 580A, cmt. h (AM. L. INST. 1976). Further, this Comment and the solution it presents are limited to media defendants. For a discussion on whether the *New York Times* standard applies to non-media defendants, see Erik Walker, *Defamation Law:*

progeny provide the guiding principles courts use to determine the plaintiff's burden of proof.[28]

In *New York Times Co. v. Sullivan*, the *New York Times* printed alleged false statements regarding L.B. Sullivan, one of three elected Commissioners of the City of Montgomery, Alabama.[29] The advertisement included statements dictating that members of the Civil Rights Movement faced an alleged "wave of terror" in Montgomery.[30] Although the advertisement did not mention him by name, Sullivan argued that readers would easily infer that the statements were written about him.[31] Specifically, Sullivan argued that due to the writer's use of vague pronouns in the statements, the readers of the article would presume that he participated in acts of violence toward Dr. Martin Luther King, Jr.[32]

The Court found that the Alabama law requiring a mere showing of injury to a person's "reputation, profession, trade, or business"[33] could potentially deter free speech surrounding public officials and their duties.[34] The Court held that the burden of proof in cases involving public officials who allege defamation in regard to their official conduct, fitness, or roles must be more stringent.[35] The Court reasoned that this heightened burden of proof, actual malice, is necessary to protect the freedom of speech and freedom of the press within the Constitution—specifically in the First Amendment and the Fourteenth Amendment.[36] Under the actual malice standard, the plaintiff has the burden of proving the defendant had knowledge of falsity or acted in reckless disregard of the truth.[37] The Court recognized that such a high burden on the plaintiff may allow defendants to make some false statements without repercussions, but the Court

---

Public Figures—Who Are They, 45 BAYLOR L. REV. 955, 957 n.14 (1993); Ransom, *supra* note 23, at 395.

28. *Id. See also* Gertz v. Robert Welch, 418 U.S. 323 (1974); Curtis Publ'g. Co. v. Butts, 388 U.S. 130 (1967); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).

29. *Id.* at 256.

30. *Id*.

31. *Id.* at 259.

32. *Id.* at 256.

33. *Id.* at 263.

34. *Id.* at 279.

35. *Id.* at 265.

36. *Id.* (holding that the restriction is based on "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."); RESTATEMENT (SECOND) OF TORTS § 580A, cmt. a (AM. L. INST. 1976).

37. RESTATEMENT (SECOND) OF TORTS § 580A, cmt. e.

reasoned that the protection of free debate outweighed the potential harm.[38]

Only three years later, in *Curtis Publishing Co. v. Butts*, the Court broadened the actual malice standard.[39] The Court found that the heightened standard applied to public figures, arguing that the similarities between public officials and public figures were plentiful and the distinctions were increasingly blurred.[40] *Curtis Publishing Co. v. Butts* consolidated two separate libel cases.[41] First, *Curtis Publishing Co. v. Butts* began with a published article that accused Wally Butts, University of Georgia's ("UGA") Athletic Director, of "fixing" a football game against the University of Alabama.[42] At the time, Butts was well-known for his coaching and had considered coaching football at the professional level.[43] The article alleged that Butts revealed UGA's tactics, plays, and football secrets to Paul Bryant, head coach of the Alabama football team.[44] The article led to Butts's resignation, and Butts then brought suit.[45]

Second, the *Curtis Publishing* Court considered the appeal of *Associated Press v. Walker*.[46] The plaintiff, Walker, was a private individual who played a large role in the 1957 school segregation confrontation in Little Rock, Arkansas.[47] Prior to the confrontation, Walker retired from the United States Army and obtained a fair amount of political prominence.[48] In a news broadcast, an eyewitness alleged that Walker made an effort to prevent an African American student from

---

38. *New York Times Co.*, 376 U.S. 254 at 271–72 ("Erroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'") (quoting NAACP. v. Button, 371 U.S. 415, 433 (1963)).

39. *See generally* Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967).

40. In his concurring opinion, Chief Justice Warren noted that "differentiation between 'public figures' and 'public officials' and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy." Curtis Publ'g Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring).

41. *Id.* at 135 (Harlan, J., plurality).

42. *Id.*

43. *Id.* at 135.

44. *Id.* at 136.

45. *Id*. at 137. The trial judge found that Butts was not a public official; thus, the actual malice standard was not applicable. The Fifth Circuit Court of Appeals affirmed. *Id.* at 139.

46. *Curtis Publ'g Co.*, 388 U.S. 130; Associated Press v. Walker, 389 U.S. 28 (1967).

47. *Curtis Publ'g Co.*, 388 U.S. at 140.

48. *Id*. at 140.

enrolling at the University of Mississippi, despite a court decree allowing the student to attend.[49] Without giving reasons, the Texas Court of Civil Appeals affirmed the lower court and found that actual malice was not required, but the Supreme Court reversed.[50]

Ultimately, the Supreme Court found that the influential role public figures play in society warrants the same burden that is imposed upon public officials; thus, public figures are subject to the actual malice requirement.[51] Chief Justice Warren noted in his concurrence that public figures benefit from their command over public interest, access to media channels, and opportunity to rebut false statements similar to that of public officials.[52] The Court, however, did not set forth a method for distinguishing public figures from private citizens.[53]

After *Curtis Publishing Co. v. Butts*, the Supreme Court altered the application of the actual malice requirement in *Rosenbloom v. Metromedia, Inc.*[54] Although the Supreme Court later overturned *Rosenbloom*, the plurality in *Rosenbloom* primarily focused on whether the underlying event was one of public or general concern, rather than whether the plaintiff was a private individual or a public figure.[55] The Supreme Court favored a public controversy analysis over the access-to-media test.[56] The *Rosenbloom* principles presented an opportunity to focus primarily on the type-of-controversy analysis, rather than the type-of-plaintiff, in a new, effective test. Although the principles in *Rosenbloom*

---

49. *Id*.

50. *Id*. at 142.

51. *Id.* at 155.

52. *Id*. The decision in *Curtis Publishing* resulted in a mix of concurring and dissenting opinions. *See id*. at 133 (Justice Harlan announced the opinion, joined by Justice Clark, Justice Stewart, and Justice Fortas); *Id*. at 162 (Warren, C.J., concurring); *Id*. at 170 (Black, J., and Douglas, J., concurring in part and dissenting in part); *Id*. at 172 (Brennan, J., and White, J., concurring in part and dissenting in part).

53. *See generally Curtis Publ'g Co.*, 388 U.S. 130 (Harlan, J., plurality).

54. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 29 n.1 (1971) (citing to a string of cases and demonstrating that many cases, beginning with *New York Times Co. v. Sullivan*, involved plaintiffs who were public officials or figures suing newspapers or magazines). Here, the Court applied the standard to a case in which the plaintiff was a private individual who made statements regarding an issue of public or general interest. *See id*. at 31.

55. *Id*. at 43.

56. *Id*. at 43. The access-to-media test later became the standard. Gertz v. Robert Welch, 418 U.S. 323 (1974).

were short-lived due to the *Gertz* decision, the rationale may still be viable for a more flexible defamation framework.[57]

B. Gertz v. Robert Welch*, Its Progeny, and Public Figure Classification*

The application of actual malice to public figures, as well as to public officials, opened the door to the problem of distinguishing between public and private figures.[58] In *Gertz v. Robert Welch*, *Inc.*, the Court sought to create a plaintiff-status calculus to ease the application of *New York Times*.[59] Elmer Gertz, a prominent Chicago attorney, represented the family of a deceased youth in a civil trial.[60] When an article in the *American Opinion* referred to him as a "Leninist" and a "communist-fronter" and alleged that he had a criminal record, Gertz brought suit.[61]

The district court found in favor of the defendant: although Gertz was not a public figure or public official, the burden of proving actual malice applied to Gertz because the discussion surrounded a public issue.[62] The Court of Appeals for the Seventh Circuit affirmed.[63] The Supreme Court thereafter reversed the Seventh Circuit and determined that plaintiffs who are private citizens are not required to prove that the defendant made the false statement with actual malice, even when the controversy is one of public concern.[64] The Supreme Court found that Gertz was not a public figure because he did not play a role in the criminal prosecution, nor did he discuss the criminal or civil litigation with the press.[65] The Court's

57. *Gertz*, 418 U.S. 323. The decision in a later case, *Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 475 U.S. 767 (1986), refocused the test on the "form, content, and context of the relevant speech." Thomas C. Galligan, Jr., *U.S. Supreme Court Tort Reform: Limiting State Power to Articulate and Develop Tort Law – Defamation, Preemption, and Punitive Damages*, 74 U. CIN. L. REV. 1189, 1227 (2006).

58. *Gertz*, 418 U.S. at 323.

59. *Id.*

60. *Id.* at 325.

61. *Id.* at 326. This article discussed the criminal trial in which Gertz was not involved, not the civil trial in which Gertz was directly involved. The article alleged that the conviction of a police officer in the criminal trial was the result of a "Communist conspiracy to discredit local police" and, further, that Gertz played a part in "arrang[ing the officer's] 'frame-up.'" *Id*. at 323.

62. *Id.* at 329.

63. *Id*. at 332.

64. *Id.* at 348.

65. *Id.* at 352.

emphasis on the plaintiff's status abrogated the type of controversy-focused conclusion set forth in *Rosenbloom*.[66]

Two types of public figures developed as a result of the *Gertz* decision: universal public figures and limited-purpose public figures.[67] Universal public figures have a substantial amount of notoriety and influence; thus, they are public figures for all purposes.[68] On the other hand, limited-purpose public figures are those who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved" and must prove actual malice for statements concerning the particular public controversy.[69] The Court also addressed an important problem by articulating the differences between public figures and private individuals.[70] The *Gertz* Court addressed two major distinctions between public figures and private figures: whether the individuals had access to means of rebuttal and whether they availed themselves to greater public scrutiny.[71]

The Supreme Court first identified persons who invite higher levels of scrutiny, attention, and comment as public figures.[72] Public figures effectively give up some of their rights to privacy and expose themselves in a way that private individuals do not.[73] Like public officials, public figures knowingly accept this consequence by pursuing public notoriety or inserting themselves into conversations about public controversies.[74]

In addition, the Supreme Court considered whether the plaintiff had access to means of "self-help."[75] Public figures readily refute false statements through their access to the media; thus, they can counteract some of the negative effects of defamation.[76] The access and control over the media that public figures exert leaves them less vulnerable to injury than private figures who do not enjoy the same access to the media.[77] The contemporary methods of production limited the media at the time of *Gertz*: print and broadcast networks provided both the means for

66. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43 (1971).
67. *Gertz*, 418 U.S. at 345.
68. *Id.*
69. *Id.*
70. *Id.* at 350.
71. *Id.* at 351–52.
72. *Id.* at 344–45.
73. *Id*.
74. *Id*. at 346.
75. *Id*. In the eyes of the Supreme Court, self-help is the ability to counteract false declaration through "channels of effective communication." *Id*. at 344.
76. *Id*.
77. *Id*.

publication of defamatory statements and the means for a plaintiff's self-help efforts.[78] Today, plaintiffs have access to traditional print and broadcast, along with social media and other online outlets.[79] When deciding *Gertz*, the Supreme Court was unable to consider the wide variety of media available today; therefore, the ruling in *Gertz* is less applicable in the present age.[80]

The Court struggled to clarify the concept of access to media in *Hutchinson v. Proxmire*.[81] In *Hutchinson*, the plaintiff was a scientist who used grant money to research objective measures of aggression among animals.[82] United States Senator William Proxmire awarded the plaintiff the Senator's "Golden Fleece of the Month Award," an "award" reserved for "the most egregious examples of wasteful governmental spending."[83] Further, the Senator referred to the plaintiff's research as worthless, a waste of taxpayer money, and "monkey business" in speeches to the Senate.[84] Both television programs and newsletters that the Senator sent out discussed these speeches and the award.[85] The plaintiff then filed suit for defamation.[86] The district court found that no evidence existed to establish actual malice and granted summary judgment in favor of the Senator.[87] The United States Court of Appeals for the Seventh Circuit upheld the ruling, but the Supreme Court reversed and remanded.[88] The Supreme Court determined that the plaintiff was not a public figure; thus, the Court did not require the plaintiff to prove actual malice.[89] In relevant part, the Court reasoned that although the plaintiff had published research, his ability to respond to Senator Proxmire was limited, and he did not possess the "regular and continuing access" from which public figures

78. Ann E. O'Connor, *Access to Media All A-Twitter: Revisiting* Gertz *and the Access to Media Test in the Age of Social Networking*, 63 FED. COMM. L.J. 507, 514 (2011).

79. *See* Simon Kemp, *Digital in 2018: World's Internet Users Pass the 4 Billion Mark*, WE ARE SOCIAL (Jan. 30, 2018), https://wearesocial.com/blog/2018/01/global-digital-report-2018 [https://perma.cc/7PMA-UKPW] (last visited on Sept. 20, 2018).

80. O'Connor, *supra* note 78, at 514.

81. Hutchinson v. Proxmire, 443 U.S. 111, 136 (1979).

82. *Id*. at 116.

83. *Id*. at 114.

84. *Id*. at 111.

85. *Id*. at 116.

86. *Id*. at 114.

87. *Id*. at 120.

88. *Id*. at 112.

89. *Id*. at 136.

benefit.[90] The *Hutchinson* definition emphasizes reoccurring access, in contrast to the main benefit of self-help addressed in *Gertz*.[91] This definition also fails to articulate what "media" is or how courts should adjust to technological advances in the future.[92]

II. USING THE INTERNET TO DO MOST EVERYTHING[93]

Gertz v. Robert Welch introduced the concept of access to the media, but the opinion limited technology to the notion of print and broadcast networks.[94] The Supreme Court could not have anticipated the effect that rapid advancements in technology would have on all aspects of individual privacy. Moreover, technology has, in other areas of the law, forced the Court to update old standards to reflect the current state of media.[95] Specifically, the Court did not foresee that a plaintiff's access to media would expand from the traditional modes of access, such as print and broadcast outlets, to methods of direct, instantaneous engagement with one's following, such as social media interaction.[96] In addition, the increased breadth of information readily available has revealed the need to reassess the balance between the "breathing space"[97] required for robust debate[98] and the privacy rights of individuals.

---

90. *Id*.

91. Gertz v. Robert Welch, 418 U.S. 323, 344 (1974).

92. *See Hutchinson*, 443 U.S. at 136.

93. "Today we use the Internet to do most everything. Smartphones make it easy to keep a calendar, correspond with friends, make calls, conduct banking, and even watch the game." Carpenter v. United States, 138 S. Ct. 2206, 2262 (2018).

94. *See generally Gertz*, 418 U.S. 323.

95. For example, the Supreme Court recently adapted privacy standards concerning Fourth Amendment rights to 21st century technology. In *Carpenter v. United States,* the Court held that the government was required to obtain a warrant because acquiring an individual's cell phone location data amounted to a Fourth Amendment search. 129 Fed. Cl. 558 (2016). Similarly, the Court will need to adjust prior standards regarding defamation to reflect the changing atmosphere of media. For other examples of rapid development, see *The 65 Best Inventions of the Past 65 Years*, POPULAR MECHANICS (Nov. 19, 2018), https://www.popularmechanics .com/technology/gadgets/a341/2078467/ [https://perma.cc/V9V3-KG9Y].

96. *See generally Hutchinson*, 443 U.S. 111 at 136.

97. New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964).

98. *Id*. at 270 ("Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . .").

A. Breadth and Depth of Information Available

Open debate and discussion are critical to keeping the public informed and educated on current events.[99] The media performs a major role in disseminating this information to the public.[100] As the media that began as purely print evolved into broadcast,[101] new media "ha[s] such a hold on the American imagination that newspapers and other print media found themselves having to adapt."[102] Print and broadcast outlets were the main sources of media at the time of *Gertz* and remain popular means of communication, but between 1984 and 2013, the United States experienced exponential growth in internet technology and use.[103] As of 2018, nearly 88% of Americans have regular access to the internet.[104] The internet gives users access to a wider breadth of information, both geographically and historically, than what was available in 1964 and has

99. *See generally id*.

100. *Id.*

101. America's first daily newspaper began circulation shortly after the founding of the United States. *See Understanding Media and Culture: An Introduction to Mass Communication Chapter 1.3 Evolution of Media*, U. MINN. LIBR., http://open.lib.umn.edu/mediaandculture/chapter/1-3-the-evolution-of-media/ [https://perma.cc/GT52-LPVQ] (last visited on Sept. 20, 2018). Citizens began to depend on the newspapers for information regarding the political climate in the country. *Id.* As the country developed, radio and television became the latest and greatest in media. *Id.*

102. Transitions from one technology to another have greatly affected the media industry, although it is difficult to say whether technology caused a cultural shift or resulted from it. The ability to make technology small and affordable enough to fit into the home is an important aspect of the popularization of new technologies. *Id.*

103. Susan Gunelius, *The History and Evolution of the Internet, Media, and News in 5 Infographics*, ACI INFO. GROUP (Oct. 24, 2013), https://aci.info/2013/10/24/the-history-and-evolution-of-the-internet-media-and-news-in-5-infographics/ [https://perma.cc/4UYH-BXH4] (last visited Sept. 20, 2018). The technological development of the internet began in 1969—around the time of the *Gertz* decision—but was far from available for public use. Reno v. ACLU, 520 U.S. 844, 849–50 (1997) (discussing the rise of the internet, beginning with the use of the internet solely by the military and evolving to use by the public); Susan Gunelius, *The History and Evolution of the Internet, Media, and News in 5 Infographics*, ACI INFO. GROUP (Oct. 24, 2013), https://aci.info/2013/10/24/the-history-and-evolution-of-the-internet-media-and-news-in-5-Finfographics/ [https://perma.cc/DP66-E9WA] (demonstrating that the internet did not begin to explode until the 1990s, with approximately 50 million users by 1998).

104. *See* Kemp, *supra* note 79.

given reporters a greater ability to research before reporting on historical controversies.[105]

Due to the internet, geographic location does not restrict users' access to a plethora of news sources.[106] Consumers are no longer limited to local newspapers and regional subscriptions; rather, consumers now have access to publications from all over world.[107] Users can now navigate to a free website from the comfort of their homes and can search by name, keyword, or year for news sources. In the past, this same user had to dig through files of physically archived articles.[108] In addition, information on the internet is permanent, and thus accessible information is unrestrained by time.[109] For example, websites digitally archive newspaper articles.[110] This "vast library including millions of readily available and indexed publications" provides speakers with a new source for research that they can use when reporting on historical controversies.[111] Additionally, the internet has opened a new channel of effective communication: social media. Although these technological developments have led to major changes in the media industry, the law on defamation does not account for any new types of media.[112]

B. Traditional Access to Media

A cornerstone of a plaintiff's designation as a public figure is the plaintiff's ability to use the media as a method of rebuttal.[113] Plaintiffs who have greater access to media, specifically public figures, are able to rebut false claims on a larger platform and are able to use the media as an avenue of dissemination.[114] Thus, public figures are less vulnerable to injury than

---

105. *Reno*, 520 U.S. at 849–50.

106. *Id*. at 850. Note, however, that certain countries and regions limit their citizens' ability to freely use and access the internet and various news sources.

107. *Id*. at 851 ("Taken together, these tools constitute a unique medium—known to its users as 'cyberspace'—located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.").

108. *Reno*, 520 U.S. 844 at 851 ("Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods.").

109. *See generally* Amy Gajda, *Privacy, Press, and the Right to be Forgotten in the United States*, 93 WASH. L. REV. 201, 264 (2018).

110. *See* NEWSPAPER ARCHIVE, https://newspaperarchive.com [https://perma.cc/33LB-EUTF] (last visited on Sept. 20, 2018).

111. *Id*.

112. *Understanding Media and Culture: An Introduction to Mass Communication Chapter 1.3 Evolution of Media*, *supra* note 101.

113. Gertz v. Robert Welch, 418 U.S. 323, 344 (1974).

114. *Id*.

private figures.[115] Courts must adapt to the modern means of media but do not need to altogether abandon the *Gertz* principles.[116] In some ways, online channels function in the same way as the traditional media. Many people, particularly those in younger generations, turn to online sources to receive their news, making online sources effective platforms for rebuttal of false statements.[117] Likewise, many public figures turn to online channels to refute false claims.[118] For example, a public figure may rebut a false statement through an official statement or interview either written and posted on an online news forum or videoed and uploaded to a streaming site.[119]

These online channels are similar to an interview printed in a newspaper or broadcasted through a network. In fact, many traditional media sources have implemented online versions.[120] In the new media age, public figures still exert a level of access to channels of effective communication greater than that of their private counterparts.[121] Thus, courts must continue to consider *Gertz* because traditional means of access still exist, offering public figures an avenue of rebuttal and broad

115. *See id.*

116. The Supreme Court had no way of envisioning the future of media. In *Curtis Publishing*, the Court referenced "newspapers, magazines, and broadcasting companies." Curtis Publ'g Co. v. Butts, 388 U.S. 130, 146 (1967) (quoting Buckley v. New York Post Corp., 373 F. 2d 175, 182 (2d Cir. 1967)). The articulated list was, however, unlikely to be exclusive.

117. Paul Grabowicz, *Tutorial: The Transition to Digital Journalism*, U.S. BERKELEY ADVANCED MEDIA INST. (2014), https://multimedia.journalism.berkeley.edu/tutorials/digital-transform/ [https://perma.cc/7EVK-N2CX] (last visited Sept. 19, 2018) ("Yet the trends are clear: people, especially the young, are turning to the internet for more and more of their news and developing an effective digital strategy is essential for long-term survival.").

118. *See generally* O'Connor, *supra* note 78.

119. For example, James Franco turned to the television program *Late Night with Seth Meyers* to address allegations of sexual misconduct. Matt Fernandez, *James Franco Further Addresses Sexual Misconduct Allegations on Seth Meyers*, VANITY FAIR (Jan. 11, 2018), https://variety.com/2018/film/news/james-franco-sexual-harassment-allegations-late-night-with-seth-meyers-1202661504/ [https://perma.cc/XY7B-VPZD].

120. Some major print newspapers that have created online counterparts include *The Wall Street Journal* and *The New York Times*. *See* WALL STREET J., https://www.wsj.com [https://perma.cc/55SR-FBL8] (last visited Sept. 28, 2019); N.Y. TIMES, https://www.nytimes.com [https://perma.cc/5H6L-UCA2] (last visited Sept. 28, 2019).

121. *See generally* Gertz v. Robert Welch, 418 U.S. 323 (1974).

audiences.[122] Due to the fact that online access differs from traditional modes, *Gertz* is not the only principle that courts must consider.

C. Bypassing the Media: Access to Following

Historically, public figures could take to the streets and personally tell people face-to-face that a claim was false, but public figures now have the ability to instantaneously refute false claims from their laptop computers or cell phones and send the message to all who follow her.[123] Public figures no longer solely rely on third parties to rebut false statements or promote themselves, their ideals, and their positions on issues of public concern.

A contemporary example demonstrates how having access to one's following can garner national attention and become an effective means of rebuttal. Taylor Swift took to Instagram, rather than news channels and other media sources, to tell the world her opinion on an overwhelmingly controversial topic: politics.[124] Swift's single post quickly gained national attention, obtained over 1.9 million "likes,"[125] and reportedly caused a spike in voter registration.[126] The colossal reach of a single social media post was unobtainable in an era of only print and broadcast media. Taking out a newspaper advertisement or a radio broadcast would not have likely garnered the same level of interaction as Swift's post.[127]

---

122. *See generally id*.

123. Joe Trevino, *From Tweets to Twibel: Why the Current Defamation Law Does Not Provide for Jay Cutler's Feelings*, 19 SPORTS L.J. 49, 64 (2012) ("Web sites like Twitter have given all figures, public and private alike, the opportunity to be heard instantly the world over.").

124. Taylor Swift (@taylorswift), INSTAGRAM (Oct. 7, 2018), https://www.instagram.com/p/BopoXpYnCes/?hl=en&taken-by=taylorswift [https://perma.cc/EM7E-Z4ZK]. Swift's detailed caption dictated her personal views of candidates who were running for the Senate and the House of Representatives in the 2018 midterm election. Swift discussed each candidate's views and ultimately stated which candidate she would vote for. Swift concluded the post saying, "October 9th is the LAST DAY to register to vote in the state of TN. Go to vote.org and you can find all the info. Happy Voting!" *Id*.

125. *Id*.

126. Kevin Breuninger, *Voter Registration Skyrockets After Taylor Swift's Get-Out-to-Vote Push*, CNBC (Oct. 10, 2018), https://www.cnbc.com/2018/10/09/voter-registrations-skyrocket-after-taylor-swift-instagram-post.html [https://perma.cc/EE78-C2Z8].

127. Social media was not around at the time of *Gertz* or *New York Times*. In fact, social media did not become popular until the early 2000s. Newspaper advertisements and radio broadcasts are comparable to a social media post because each allows the individual to have control over what information is

The current law would likely be adequate if public figures similar to Taylor Swift were the only public figures bringing suit. The problem, however, occurs when public figures attempt to retreat into private life. Lower courts have squabbled over whether public figures can shed the actual malice requirement by reverting to private figure status, and, unfortunately, the Supreme Court remains silent.[128]

III. FAIR GAME FOR ETERNITY?[129]

The debate surrounding the potential to change status leads to much discussion, including calls for reform by Supreme Court Justice Clarence Thomas.[130] Some scholars have gone as far as to develop the passage-of-time rationale as an alternative solution.[131] The passage-of-time rationale is based on the idea that former public figures who have removed themselves from the public sphere should regain the equivalent rights of private citizens automatically after a certain number of years.[132] Additionally, commentators argue that the evidence needed for an "ex-public figure" to prevail under the actual malice standard will disappear over time; thus, after a passage of time, the public figure loses his status completely.[133] The passage-of-time hypothesis, however, is impractical because an arbitrary number of years will fail to account for the permanence of information available on the internet.[134]

Many courts have already rejected the idea that public figures can shed their status by the mere passage of time and have instead held that once a

---

displayed or announced. Advertisements, however, do not allow the direct interaction that social media posts do. *See generally* Esteban Ortiz-Ospina, *The Rise of Social Media,* OUR WORLD IN DATA (Sept. 18, 2019), https://ourworldindata.org/rise-of-social-media [https://perma.cc/DP55-CJXZ].

128. Ransom, *supra* note 23, at 416.

129. "Intuitively, one should not become fair game for eternity merely by injecting oneself into the debate of the moment." Pendleton v. City of Haverhill, 156 F.3d 57, 70 (1st Cir. 1998).

130. McKee v. Cosby, 139 S. Ct. 675 (2019) (Thomas, J., concurring in denial of certiorari). Justice Thomas stated: "We should not continue to reflexively apply this policy-driven approach to the Constitution. Instead, we should carefully examine the original meaning of the First and Fourteenth Amendments. If the Constitution does not require public figures to satisfy an actual-malice standard in state-law defamation suits, then neither should we." *Id.* at 676.

131. Ransom, *supra* note 23.

132. *Id.* at 416.

133. *Id.*

134. *See supra* Section II.A.

plaintiff is a public figure, he is always a public figure.[135] The Supreme Court, however, recognized the potential for a new rule.[136] Specifically, in *Rosenblatt v. Baer*, Justice Brennan noted, "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 responsibilities no longer has the interest necessary to justify the *New York Times* rule."[137] Yet courts still grapple with the ambiguous language of *New York Times* and *Gertz* in determining public figure status in fact-sensitive scenarios.

Plaintiffs who assert that they have relinquished their public figure status experience little success, as seen in *Brewer v. Memphis Publishing Co.*[138] *Brewer* details the story of Anita Wood Brewer, a locally and nationally recognized entertainer and well-known ex-girlfriend of Elvis Presley.[139] In connection with both her own talent and her relationship, Brewer appeared on multiple nationwide television programs and conducted extensive interviews.[140] Roughly nine years prior to the article, Anita Brewer married John Brewer and left the public eye.[141] Brewer and her husband, a former professional athlete and college football star, brought suit against a magazine that alleged Brewer was in a relationship with a married man.[142] The Brewers argued that either: (a) they were never public figures, or (b) they had each shed their public figure statuses for the purpose of an article concerning their private lives.[143] After considering the plaintiffs' lack of access to media, the time between the Brewers' fame and the article, and the difficulty in clearly placing the plaintiffs in one category, the Fifth Circuit still rejected the plaintiffs' argument of status reversal.[144] The court held that the plaintiffs were public figures for

135. *See* Street v. Nat'l Broad. Co., 645 F.2d 1227 (6th Cir. 1981); Brewer v. Memphis Publ'g Co., 626 F.2d 1238, 1248 (5th Cir. 1980); Rosenblatt v. Baer, 383 U.S. 75 (1966); Time, Inc. v. Johnson, 448 F.2d 381 (4th Cir. 1971).

136. *See* Rosenblatt v. Baer, 383 U.S. 75, 87 (1966).

137. *Id*. at 87 n.14.

138. Brewer v. Memphis Publ'g Co., 626 F.2d 1238 (5th Cir. 1980).

139. *Id*. at 1248.

140. *Id*.

141. *Id*. ("[I]n 1964[,] Anita Wood married John Brewer and, with the exception of possibly one television and one newspaper interview shortly thereafter, did not seek media attention or continue as a professional entertainer from that time to the filing of this suit.").

142. *Id*. at 1243. John Brewer was a member of the University of Mississippi football team. He later played from the Cleveland Browns for 1960–1967, and then for the New Orleans Saints from 1967–1970. His football career ended a mere 2 years prior to the article. *Id.* at 1248.

143. *Id*. at 1249.

144. *Id*. at 1257.

purposes of applying actual malice, regardless of their attempts to remove themselves from the public view.[145] The court, however, recognized that the need for a solution is evident when suggesting that retreat or passage of time could result in the narrowing of the range of topics subject to the actual malice standard.[146] This caveat paved the way for a new, modernized solution to assist courts in properly applying the *New York Times* and *Gertz* standards.

IV. NAILING A JELLYFISH TO A WALL:[147] THE 3-2 ACTUAL MALICE TEST

The influx of information available and the indefinite lifespan of an online article undoubtedly complicates the already confusing classification and permanence of public figure status for purposes of defamation lawsuits. The 3-2 Test modernizes the current standards from *New York Times* and *Gertz* by implementing an approach that considers the technological advancements of the last 50 years.[148] Specifically, the 3-2 Test narrows the topics protected under actual malice. The 3-2 Test can assist courts in determining whether a public figure has the burden of proving that the defendant acted with actual malice.[149]

The 3-2 Test asks three questions. First, the court will determine whether the plaintiff was ever a public figure. If the plaintiff was at one point a public figure, the court will move to the second question. The second question will use two factors to assess whether the plaintiff is an active or inactive public figure. The first factor considers the traditional notions of access available to the plaintiff. The second factor considers modern avenues of self-help. If the plaintiff is an active public figure, the court will require the plaintiff to show that the defendant acted with actual malice. If the plaintiff is inactive, the court will ask a third and final question: is the alleged defamatory statement directly related to the controversy that led to the plaintiff's original public figure status? If the court finds that the controversy surrounding the statement is directly related to the controversy that gave rise to the plaintiff's status, the court

145. *Id*.

146. *Id.*

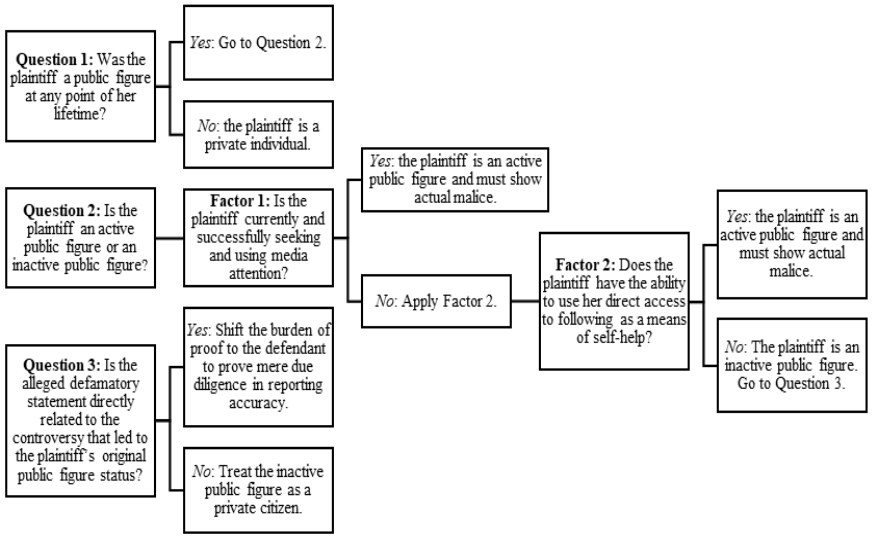
147. "Defining public figures is much like trying to nail a jellyfish to the wall." Rosanova v. Playboy Enter., Inc., 411 F. Supp. 440, 443 (S.D. Ga. 1976).

148. *See generally id*. at 1238.

149. A majority of courts recognize that it is the court's responsibility to determine public figure status, not a duty of the jury. *See id.* at 1247 (citing Rosanova v. Playboy Enterprises, Inc., 580 F.2d 859, 861–62 (5th Cir. 1978)).

will shift the burden of proof to the defendant to provide evidence that she partook in due diligence to ensure truthfulness of the statement.[150]

Figure 1. The Three-Question, Two-Factor Test ("3-2 Test").



The 3-2 Test will result in four possible plaintiff designations: (1) private plaintiffs; (2) active public figures; (3) inactive public figures with unrelated controversies; and (4) inactive public figures with related controversies. The court's designation of the plaintiff will determine which party has the burden of proof. Additionally, this designation will determine the level of proof that is necessary to prevail.

150. The plaintiff will bear the burden of providing evidence that he is or is not a public figure and that he is active or inactive. Typically, the plaintiff will want to prove that he is not a public figure or, alternatively, that he is inactive.

Figure 2. Potential Outcomes of the 3-2 Test.

	Inactive Public Figure	Active Public Figure
Unrelated Controversy	Treat plaintiff as a private individual.	Plaintiff has the burden of proving actual malice.
Related Controversy	Shift the burden of proof to the defendant to show mere effort to determine truth of statements or to show that the statements are based in opinion.	

A. Question 1: No Difficulty in Distinguishing Among Defamation Plaintiffs[151]

The first inquiry of the 3-2 Test uses the existing jurisprudential standards to determine whether the plaintiff is, or at any time was, a public figure or a public official. Courts can complete the first step by applying the tests for general- and limited-purpose public figures set forth in *Gertz*.[152] The court will look at the plaintiff's access to means of "self-help."[153] Plaintiffs with greater access to means of rebutting falsities are more likely public figures. Additionally, the court will consider each plaintiff's level of public notoriety and whether the plaintiff placed himself at the "forefront of particular public controversies in order to influence the resolution of the issues involved."[154]

If the plaintiff was never a public figure, the actual malice standard will not apply.[155] Alternatively, if the plaintiff was a public figure at any point during the plaintiff's life, the court will proceed to the second question and classify the plaintiff as an active public figure or as an inactive public figure. For example, because Geoffrey Owens was a public figure while on *The Cosby Show*, the court would move to Question 2.[156]

B. Question 2: Not All Public Figures Are Created Equal

The second question asks whether the public figure is an active public figure or an inactive public figure. To answer this question, the court will

151. Gertz v. Robert Welch, 418 U.S. 323, 344 (1974).
152. *Id.* at 351.
153. *See id.*
154. *Id.* at 345.
155. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
156. *From Learning Lines to Serving the Long Line!* The Cosby Show *Star Geoffrey Owens Is Spotted Working as a Cashier at Trader Joe's in New Jersey*, *supra* note 1.

consider two factors: (1) whether the plaintiff is engaged in voluntary access to traditional methods of communication; and (2) whether the public figure enjoys direct access to the public figure's following. The first factor specifically considers the plaintiff's interaction with media outlets, including both traditional media forms and modern media sources, to determine whether the plaintiff has the same level of access to the means of rebuttal that the *Gertz* Court discussed. On the other hand, the second factor examines the plaintiff's individual ability to rebut false claims directly to her following. The plaintiff is an active public figure if she satisfies either factor. In general, active public figures engage with and intentionally communicate information to those with whom they have notoriety. Conversely, inactive public figures are those who have withdrawn from the public eye and no longer have access to the media.[157] Those who do not actively seek out the media or use their prominence as a platform are inactive and should be allowed the same privacy considerations as a private person in a defamation suit. By categorizing public figures into two subcategories, the court will account for the loss of privacy rights that accompanies public notoriety while simultaneously narrowing the class of plaintiffs subject to the actual malice standard.[158]

1. Factor 1: Traditional Notions of Access in a Modern World

The first factor the court will consider is whether the plaintiff enjoys traditional means of access to the media.[159] An active public figure is one who vigorously and successfully seeks media attention and maintains the ability to use media access to rebut false accusations. The Supreme Court in *Gertz* articulated that public figures benefit from a greater access to media that private citizens do not enjoy.[160] This observation holds true today.

A court may find that a plaintiff has met the first factor in a multitude of ways, including the plaintiff's participation in interviews or guest

157. *See Celebrities Who've Quit Social Media: Kayne West, Adele, Justin Bieber, More*, NEWSDAY, https://www.newsday.com/entertainment/celebrities/celebrities-who-quit-social-media-1.12706108 [https://perma.cc/MJ7T-MFQN] (last updated Feb. 15, 2018) (demonstrating that some figures who have acquired fame have taken one proactive step, abstaining from social media, to withdraw from the public eye).

158. *See generally* Brewer v. Memphis Publ'g Co., 626 F.2d 1238 (5th Cir. 1980).

159. *See generally* Gertz v. Robert Welch, 418 U.S. 323 (1974).

160. *Id*. at 344.

starring on radio talk shows and television programs.[161] In these instances, the public figure gives information to media sources and press outlets, which subsequently distribute the information to readers or viewers.[162] For example, many public figures purposefully seek attention from media sources to speak their minds through exclusive interviews[163] or award show speeches.[164] In contrast, public figures who do not participate in the creation of the story, such as being featured in paparazzi photos, do not meet the first factor. Because a plaintiff's interaction with the media can be similar to the type of self-help from *Gertz*, plaintiffs who meet the first factor are active public figures and are faced with the burden of proving actual malice.[165]

The court may find that a public figure acted in a way that satisfies the first factor for an active public figure. For example, in *McKee v. Cosby*, the plaintiff, Katherine McKee, gave an interview to the Daily News in which she declared that Bill Cosby raped her.[166] In response, Cosby's team sent a letter to the Daily News asserting that McKee lacked credibility.[167] This letter appeared on news outlets around the world.[168] McKee then sued, alleging defamation.[169] McKee was clearly a public figure at one

161. *See, e.g.*, text accompanying note 116.

162. The public figure's voluntary action is in contrast to interactions in which the public figure plays no role in creating, such as paparazzi photos or stories written about the public figure without his participation.

163. McKee v. Cosby, 874 F.3d 54 (1st Cir. 2017), *cert. denied*, 139 S. Ct. 675 (2019). In *McKee v. Cosby*, the plaintiff participated in an interview to tell her "#MeToo" story. Nancy Dillon, *Bill Cosby Accused of Raping Ex-Girlfriend of Sammy Davis, Jr.*, DAILY NEWS (Dec. 22, 2014, 2:30 AM), http://www.nydailynews.com/news/national/bill-cosby-accused-raping-ex-girlfriend-sammy-davis-jr-article-1.2052890 [https://perma.cc/X4TP-8VLE].

164. Meryl Streep took to the Golden Globes to discuss her political views, demonstrating her ability to access the media. *See* Daniel Victor and Giovanni Russonello, *Meryl Streep's Golden Globes Speech*, N.Y. TIMES (Jan. 8, 2017), https://www.nytimes.com/2017/01/08/arts/television/meryl-streep-golden-globes-speech.html [https://perma.cc/V3QC-VJJH].

165. Courts have interpreted the heightened burden of actual malice in a number of ways. New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964); *see also* Garrison v. Louisiana, 379 U.S. 64, 74 (1964) ("false statements made with [a] high degree of awareness of their probable falseness"); St. Amant v. Thompson, 390 U.S. 727, 731–32 (1968) ("the defendant in fact entertained serious doubts as to the truth of his publications.").

166. McKee v. Cosby, 874 F.3d 54, 58 (1st Cir. 2017).

167. *Id*. at 59.

168. *Id*.

169. *Id*. at 58.

point because she was a famous actress and a showgirl for over 50 years.[170] She gained great notoriety in her field to the point of becoming a household name during her prime.[171] The United States Court of Appeals for the First Circuit, however, found that regardless of McKee's past status, she was now a limited-purpose public figure for the specific purposes of the interview and her rape allegations.[172] The court's analysis hinged on deciding that the rape allegations surrounding Cosby were a matter of public concern, rather than private.[173]

The 3-2 Test would simplify the court's analysis. As McKee was at one point a general public figure, the court would answer the first question affirmatively and move on to the first active public figure factor.[174] The court would then consider whether McKee utilized traditional means of access to the media. McKee voluntarily approached the news outlet and conducted an exposé interview in which she shared her "#MeToo" story.[175] The fact that she easily obtained an interview demonstrates her ample ability to access the media and, furthermore, her potential ability to use the media to rebut false claims. The *Gertz* Court considered and foresaw this type of action.[176] Because the first factor is met, the court would find that McKee is an active public figure under the second question.[177] As an active public figure under the test, McKee would be subject to proving the defendant acted with actual malice.[178]

On the other hand, *Street v. National Broadcasting Co.* illustrates a situation in which a plaintiff would fail the first active public figure

---

170. *See generally id*.

171. *See* Waldbaum v. Fairchild Publ'ns, 627 F.2d 1287, 1294 (D.C. Cir. 1980).

172. *McKee*, 874 F.3d 54 at 62.

173. *Id*. at 61.

174. *Id*. at 58.

175. *Id*. The MeToo movement began in 2007 when women began using the hashtag "#MeToo" on social media to share stories of sexual assault. The movement enabled women to stand in solidarity with one another. Additionally, the movement has brought attention to large issues, including sexual assault in the workplace. *About*, ME TOO MOVEMENT (2018), https://metoomvmt.org/about/ [https://perma.cc/7X6F-Y7G9]. For more information and a discussion of other legal implications of the MeToo movement, *see* Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229 (2018).

176. Gertz v. Robert Welch, 418 U.S. 323, 344 (1974).

177. Dillon, *supra* note 163.

178. The First Circuit ultimately found that McKee was a limited-purpose public figure because the sexual allegations against Cosby were matters of public controversy. *McKee*, 874 F.3d 54 at 62. Under the new test, McKee would be subject to the actual malice standard based on her own voluntary actions of seeking out the media.

factor.[179] In *Street*, the United States Court of Appeals for the Sixth Circuit addressed two major issues: (1) whether the plaintiff was a public figure during the controversial event; and (2) whether the plaintiff remained a public figure 40 years later.[180] The plaintiff, Victoria Street, brought suit after a historical drama recounting the events of the famous Scottsboro Boys rape trials[181] portrayed her in a negative light.[182] Street was the main witness in the trials and was a public figure at the time of the trials.[183] The court unequivocally found that the plaintiff was a public figure at the time of the trials.[184] The historical drama came to fruition 40 years after the trials without Street's influence, yet the court found that she remained a public figure.[185] The court reasoned that the plaintiff was a crucial character in what remains a "living controversy" because the discussion of the Scottsboro Boys continued years later and will continue to be a matter of public concern.[186] Conversely, under the 3-2 Test, the court would recognize that Street effectively withdrew from the public eye, did not participate in interviews, and became somewhat secluded.[187] Consequently, Street would not meet the first factor, and the court would move on to analyze the second factor.

2. Factor 2: Access to Following

Public figures who are unsuccessful at seeking traditional media attention may turn to other avenues of access to interact with and disseminate rebuttals to their fans. This direct communication, rather than through news and media sources, gives the public figure a new means of self-help. Courts, therefore, must consider whether the public figure is

179. Street v. Nat'l Broad. Co., 645 F.2d 1227 (6th Cir. 1981).

180. *Id*. at 1234–35.

181. The Scottsboro trials created turmoil throughout the 1930s. Nine African American youths were accused of raping two white women while traveling from Tennessee to Alabama. These allegations led to a trial in Alabama, in which all were sentenced to death. The Supreme Court reversed all convictions due to Sixth Amendment violations. In one of the retrials, the trial court judge set aside the jury's guilty verdict. Other retrials were overturned due to a lack of African Americans on the juries. *See id*. at 1230.

182. *Id*. at 1229.

183. *Id*. at 1234.

184. *Id*. ("[P]laintiff was a public figure under *Gertz* because she played a major role, had effective access to the media and encouraged public interest in herself.").

185. *Id*. at 1235.

186. *Id*. at 1236.

187. *Id*. at 1230.

voluntarily engaging with her audience by exerting control over information given straight to the public. Active public figures are those who use their platforms to promote themselves, their ideals, and their positions on issues of public concern.[188] Plaintiffs may meet the second active public figure factor by using social media to share news, promote topics unrelated to their careers, or refute false statements.[189] These active public figures are plaintiffs who make deliberate, non-incidental,[190] and direct contact with a public forum and therefore forfeit some of their privacy rights.[191]

Street's voluntary actions would not meet the second factor under the 3-2 Test.[192] No evidence demonstrates that Street used any of her personal influence that she gained through her notoriety during the trials to rebut the drama's portrayal of her.[193] The court decided *Street* in 1981; thus, Street did not have access to social media.[194] The facts, however, state that Street withdrew from the public to such an extent that the drama's producers believed she was deceased at the time of broadcasting.[195] Her contact with the media was nonexistent at that point, and she did not take

188. Engagement with one's following may include, but is not limited to, hosting meet-and-greets; actively engaging on social media through commenting, vlogging, and similar avenues; and hosting social media "live" segments where a public figure instantaneously responds to questions. It is also important to note that at this stage in the analysis, these considerations are not applicable to private individuals, many of whom do try to promote themselves.

189. For example, Taylor Swift actively seeking media coverage to respond to defamatory statements of Kayne West in his song "Famous" would satisfy the second public figure factor. *See 2016: The Year Social Media Replaced Celebrity P.R.,* VANITY FAIR (Dec. 21, 2016), https://www.vanityfair.com/style/2016/12/celebrity-social-media-replacing-pr-publicists [https://perma.cc/2QTP-X9ZG].

190. For example, non-incidental activity includes posting statements and videos or going live on social media. On the other hand, a third party taking a video of the plaintiff, and that video going "viral" as a meme, is incidental due to the plaintiff's inability to control. *See generally* Cory Batz, *Trending Now: The Role of Defamation Law in Remedying Harm from Social Media Backlash*, 44 PEPP. L. REV. 429 (2017).

191. Matthew Lafferman, *Do Facebook and Twitter Make You a Public Figure: How to Apply the* Gertz *Public Figure Doctrine to Social Media*, 29 SANTA CLARA COMPUTER & HIGH TECH L.J. 199, 242 n.281 (2002) (noting that some case law has pointed to deliberate, non-incidental action as "voluntary"). Further, non-incidental contact exceeds the contact of an average individual's private life. *Id.* at 243, n.284.

192. *See* Street v. Nat'l Broad. Co., 645 F.2d 1227 (6th Cir. 1981).

193. *See id.*

194. *See generally id.*

195. *Id.* at 1230.

any affirmative steps to distribute her version of the story to people directly.[196] Her interactions and access to any following or fans would be minimal, if she had interactions at all. Street's effective withdrawal from the public would render her an inactive public figure under the 3-2 Test.

Public figures not seeking media attention and not directly engaging with their followers do not exert the same level of control and access to the media as active public figures.[197] These inactive public figures may maintain social media accounts, but they are merely acting as private citizens.[198] If the court determines that the plaintiff does not meet either of the factors, like Victoria Street, the plaintiff is an inactive public figure, and the court should consider the third question of the 3-2 Test.

C. Question 3: The Role of the Historian Defendant in the 3-2 Test

Separating active public figures and inactive public figures alone does not solve the problem at hand.[199] Media reporters who reevaluate and republish past events and controversies, also known as historians, dredge up incidents to create headlines and garner viewership.[200] An inactive public figure, therefore, is subject to the same level of invasive behavior by the media as active public figures.[201]

For example, in *Street v. National Broadcasting Co.*, movie producers revisited and recreated the plaintiff's past into a historical drama.[202] Although the events occurred 40 years prior to the film, the Sixth Circuit reasoned that the plaintiff should have the burden of proving that the defendant acted with actual malice because "although information may come to light over the course of time, the distance of years does not necessarily make more data available to a reporter: memories fade; witnesses forget; sources disappear."[203] Further, the court reasoned that the passage of time should not limit free debate, but rather, the events that

196. *See id.*

197. *See generally* Gertz v. Robert Welch, 418 U.S. 323 (1974).

198. Ransom, *supra* note 23, at 417 ("Perhaps the true ex-public figure is actually a hybrid, sharing in common with public figures the experience of having once commanded the public's attention while sharing in common with private figures a greater vulnerability to injury.").

199. *Street*, 645 F.2d 1227 at 1236 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

200. *Id*. (distinguishing the press and the historian, but asserting that the Supreme Court demands protection for the uninhibited reporting by both).

201. *Id*.

202. *Id*. at 1230.

203. *Id*. at 1236.

occurred in the past are still relevant to vigorous and open debate in the present.[204] The court held that once a court determines that a plaintiff is a public figure, the public figure retains that status for all future commentary of that controversy.[205]

Considering modern developments, the Sixth Circuit was mistaken in stating that the passage of time "does not necessarily make more data available to a reporter."[206] With modern technology, media, and online permanence, reporters have access to significantly more information than in 1981, the year of the *Street* decision.[207] It remains important for courts to allow historians the same "breathing room" that courts give to contemporaneous reporters, but courts must also ensure due diligence and promote responsibility of historians to report history with accuracy.[208] Unlike contemporaneous speakers, historians have both time and opportunity to investigate.[209] Further, the Sixth Circuit reasoned in *Street* that "a nation that prizes its heritage need have no illusions about its past."[210] Indeed, a nation that prizes its heritage should protect the past from being incorrectly recounted and altered.

Courts, therefore, should narrow the scope of topics historians may report on under the protection of actual malice. To do so, courts should ask the third and final question of the 3-2 Test: does the defamatory statement relate directly to the public controversy that originally gave rise

---

204. *Id*.

205. *Id*. at 1235.

206. *Id*. at 1236.

207. *See Learn How Google Works in Gory Detail*, PPCBLOG, http://www.ppcblog.com/how-google-works/ [https://perma.cc/28BJ-SVTW] (last visited Oct. 10, 2018) (detailing the process in which Google is able to scan the web using a "series of simultaneous calculations requiring only a fraction of a second" and resulting in thousands of web pages relevant to one's search terms); Mohammad Reza Soleymani et al., *The Effect of Internet Addiction on the Information-Seeking Behavior of the Postgraduate Students*, 28 MATERIA SOCIO-MEDICA 191, 191–92 (2016) ("Internet helps a wide range of the researchers and the students to satisfy their information needs with no physical presence in the libraries or other information centers.").

208. *Street*, 645 F.2d 1227 at 1236.

209. Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 171 (1979) (Brennan, J., dissenting) ("While historical analysis is no less vital to the marketplace of ideas than reporting current events, historians work under different conditions than do their media counterparts. A reporter trying to meet a deadline may find it totally impossible to check thoroughly the accuracy of his sources. A historian writing *sub specie aeternitatis* has both the time for reflection and the opportunity to investigate the veracity of the pronouncements he makes.").

210. *Street*, 645 F.2d 1227 at 1236.

to the plaintiff's public figure status and to the plaintiff's participation in the controversy?[211]

In *Durham v. Cannan Communications, Inc.,* the Court of Appeals of Texas, Amarillo, demonstrated how to determine controversy relatedness.[212] The plaintiff, an attorney in Amarillo, brought suit against the defendant, a corporation owning a television broadcasting station, for two broadcasts that connected the plaintiff with a club.[213] The club, called the Chicken Ranch, doubled as a party house for orgies and prostitution.[214] Throughout his career, the plaintiff garnered a fair amount of local notoriety and held a number of press conferences.[215] For example, when the Attorney General appointed the plaintiff as special counsel for a court of inquiry, which ultimately uncovered the mismanagement of county funds, the press frequently published articles about the plaintiff related to his job as special counsel.[216] The court found that the plaintiff was a limited-purpose public figure pertaining to those specific controversies.[217] The court continued to distinguish the controversy surrounding the plaintiff's notoriety from the controversy of the alleged defamatory broadcasts.[218] Because the defamatory statements regarding the Chicken Ranch were not directly related to the legal investigation that gave rise to the plaintiff's notoriety, the court determined that the plaintiff was not required to prove that the defendant acted with actual malice.[219]

Like the court in *Durham*, courts applying the 3-2 Test should distinguish between the controversy that gives rise to a plaintiff's public figure status and the controversy that is the subject of the alleged defamation.[220] In cases in which the public figure is inactive and the controversy is unrelated to the controversy giving rise to the plaintiff's public figure status, the court should hold the plaintiff to the same standard as a private party.[221] For a plaintiff who is an inactive public figure where the controversy is specifically related to her time as an active public figure,

---

211. *See id.* at 1235.
212. Durham v. Cannan Commc'ns, 645 S.W.2d 845 (Tex. Ct. App. 1982).
213. *Id*. at 847.
214. *Id*.
215. *Id*. at 850.
216. *Id*.
217. *Id*. at 851.
218. *Id*. ("There is no evidence appellant's alleged involvement with the Chicken Ranch had anything to do with his legal and investigative activities for the county government.")
219. *Id*.
220. *Id*.
221. *See* Gertz v. Robert Welch, 418 U.S. 323, 339 (1974).

the burden of proof should shift to the defendant to show that he engaged in mere due diligence when reporting history. Shifting the burden of proof to the defendant in cases of inactive public figures with related controversies will not exploit the danger of media self-censorship that the *Gertz* Court feared.[222] Instead, the 3-2 Test will encourage historians to dedicate the appropriate amount of time to diligently research history prior to publication and will further deter speakers from inaccurately depicting historical controversies.

In the example of *Street*, the court would use questions one and two to easily classify Victoria Street as an inactive public figure under the 3-2 Test.[223] Thus, the court would turn to the third and final question: whether the alleged defamation was directly related to the controversy that gave rise to the plaintiff's public figure status. Here, the historical drama portrayed the events that led to Street's original notoriety.[224] Because the controversy is directly related to Street's notoriety, the burden of proof would shift to the defendant to present clear and convincing evidence of either his diligent attempts to uphold the integrity of facts and accurately portray historical events, or his concerted effort to disclaim the portrayal as based in opinion, rather than fact.[225]

D. Applicability of the 3-2 Test

The 3-2 Test distinguishes active public figures from inactive public figures and provides a new standard for inactive-related public figures. Fact-specific judicial examinations, such as this new layer of analysis, may lead to discrepancies among lower courts. For example, each factor of the 3-2 Test is dependent on specific facts and the plaintiff's actions. Thus, two courts may view the plaintiff's actions as inactive or active. The potential discrepancy within lower courts, however, is the downside of any jurisprudential test geared toward individuality rather than lumping plaintiffs into clear groups. This proposed analysis is simpler than others, however, because it forgoes overly subjective factors in favor of straightforward factors.[226] For example, a group of scholars proposed a test that focuses on the "relevancy of the private information to the public," whether the "information is necessary to learning about the world," and

---

222. *Id.* at 350.

223. *See supra* Section IV.B.2.

224. Street v. Nat'l Broad. Co., 645 F.2d 1227, 1236 (6th Cir. 1981).

225. *Id.*

226. *See generally* Shlomit Yanisky-Ravid & Ben Zion Lahav, *Public Interest v. Private Lives—Affording Public Figures Privacy in the Digital Era: The Three Principle Filtering Model*, 19 U. PA. J. CONST. L. 975, 1000–01 (2017).

proportionality.[227] Each of these principles is important, but it is easy to foresee that courts will differ in opinions of relevance, necessity, and proportionality.[228] In comparison, the questions in the 3-2 Test ask the court to point to specific actions of the plaintiff in order to characterize them as active or inactive.

The 3-2 Test provides a simple, step-by-step analysis that courts can follow and will consistently lead to a result that balances the interests of the plaintiff and defendant. By separating public figures into active and inactive categories and then shifting the burden of proof to the defendant in certain cases, courts can forge a middle ground between negligence and actual malice. This test defines some of the gray area between the actual malice standard and the standard courts apply to private individuals, allowing public figures who no longer possess means of self-help some protection from defamatory statements.

CONCLUSION

The digital revolution has improved the traditional means of communication and has created new avenues of media access.[229] Courts are desperately in need of guidance when applying *New York Times* and *Gertz* to modern-day cases. Additionally, the digital revolution provides historical reporters with a greater responsibility to report history accurately.[230] Technology has advanced, but defamation law has remained relatively static. Creating an updated analysis is crucial to account for the changing media landscape.

Adopting the 3-2 Test will streamline the judicial analysis of cases and allow for more consistent applications of *New York Times* and *Gertz*. Plaintiffs like Geoffrey Owens, who were once at the center of controversy but no longer have access to means of self-help, deserve to find redress in court. These inactive public figures have somewhat regained their privacy, only to have reporters, who fail to take proactive steps to ensure truthfulness or to represent the article as one of opinion, exploit their stories. A passage-of-time solution creates too narrow a protection for the

227. *Id.* "According to the proportionality test, the relevant question is whether one can satisfy a legitimate public interest with a less invasive action, which avoids harming the rights of others involved . . . . For example, it may be proportionate to publish facts about medical diseases or a crime without pictures of the victims or other irrelevant identifiable information." *Id*. at 1006.

228. *Id*.

229. New York Times Co. v. Sullivan, 376 U.S. 254 (1964); *see* Shearer & Gottfried, *supra* note 15.

230. *See supra* Section II.A.

press and may inadvertently discourage historians from reporting historical events. Thus, dividing public figures according to their actions becomes the most plausible solution because it balances the rights of individuals with the rights of the press. In situations like that of Geoffrey Owens, where an inactive public figure has lost his voice to refute false statements, the inactive public figure should not have to prove that a defendant acted with actual malice. Instead, shifting the burden of proof to the defendant to show that she engaged in due diligence will hold reporters to an appropriate standard of care while leaving the breathing room necessary for debate.