

THE CONSTITUTIONAL CURE FOR A DEFAMATORY DISEASE: WHY THE SUPREME COURT'S DEFAMATION STANDARDS ARE OUTDATED

ABSTRACT

In *New York Times v. Sullivan*, the United States Supreme Court announced the requirement that public officials must prove actual malice in defamation claims. A decade after *New York Times*, in 1974, *Gertz v. Robert Welch, Inc.* distinguished private individuals from public officials and public figures, holding that private individuals need not show actual malice to bring a defamation suit. The Supreme Court allowed states to set the standard for private individuals proving defamation claims as any standard of care higher than strict liability. The Court reasoned that private individuals require a lower standard because they lack the access to “channels of effective communication” that public officials and figures may use to defend themselves. The Court’s second justification for the distinction was that public figures and officials typically voluntarily assume roles exposing them to potential defamation.

With the rise of social media and technological advancements since the *Gertz* decision, the public/private distinction of defamation victims is now unnecessary. As a result, the *New York Times* standard of requiring actual malice should be used for all defamation plaintiffs. The prevalence of social media gives private individuals sufficient access to channels of communication to defend themselves. Social media provides a speed and range of communication allowing self-defenses for all plaintiffs equally. Caselaw has also proven public figure determinations to be confusing and inconsistent.

Many North Dakota residents are active on social media. Eliminating the private individual distinction would prevent unnecessary media self-censorship and allow for free-flowing ideas and information. Additionally, residents could continue to use social media’s mass reach to defend their reputations from defamatory claims. Without the arbitrary private individual distinction, both local and national news outlets could also exercise their freedom of speech with increased defamation liability protection. Because of this technological evolution, the Supreme Court should eliminate the private/public distinction as soon as possible.

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I. LEGAL BACKGROUND

The First Amendment of the United States Constitution announces “Congress shall make no law . . . abridging the freedom of speech, or of the press”¹ The First Amendment was ratified in 1791.² Social media, by contrast, only came to existence in the last thirty years.³

1. U.S. CONST. amend. I.

2. *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 808 (2019).

3. See Esteban Ortiz-Ospina, *The Rise of Social Media*, OUR WORLD IN DATA n.1 (Sep. 18, 2019), <https://ourworldindata.org/rise-of-social-media> [<https://perma.cc/YR9F-BVUK>] (“The first recognizable social media site, in the format we know today, was . . . created in 1997 . . .”).

A. DEFAMATION GENERALLY

Defamation is one of the hallmark concepts of First Amendment protections.⁴ Defamation has been referred to by many names over the centuries, including “calumny” and “aspersion.”⁵ However, the concept has remained consistent—despite the strong speech protections of the First Amendment, not *all* speech is protected.⁶ The First Amendment has always permitted regulation of certain forms of speech “because of their constitutionally proscribable content.”⁷ These classes of speech are narrowly limited.⁸ Unprotected speech includes obscenity,⁹ fighting words,¹⁰ child pornography,¹¹ true threats,¹² incitement to riot,¹³ and—relevant to this discussion—*defamation*.¹⁴ In its simplest terms, defamation occurs when false statements are made to a third person which harm the reputation of the subject of those statements.¹⁵ Reputational harm can generally be suffered by “lower[ing] a person in the estimation of right-thinking members of society generally,” “mak[ing] them shun or avoid that person,” “subjecting the person to public contempt, disgrace, or ridicule, or by adversely affecting the person’s business,” or “deter[ring] third persons from associating or dealing with him.”¹⁶ Defamation

4. See generally *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 325 (1974) (“This Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment.”).

5. See *Defamation*, BLACK’S LAW DICTIONARY (12th ed. 2024).

6. Noelle Berkelman, Note, *First Amendment Protections for Anonymous & Defamatory Internet Posts*, 96 N.D. L. REV. 381, 384 (2021) (“In other words, speech that provides little to no value or benefit to society is unprotected by the First Amendment.”).

7. *Counterman v. Colorado*, 600 U.S. 66, 107 (2023) (Barrett, J., dissenting) (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 382-83 (1992)).

8. See *Gertz*, 418 U.S. at 385 (White, J., dissenting).

9. *Counterman*, 600 U.S. at 73 (citing *Miller v. California*, 413 U.S. 15, 24 (1973)); see also *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504 (1984) (citing *Roth v. United States*, 354 U.S. 476 (1957)).

10. *Counterman*, 600 U.S. at 109 (Barrett, J., dissenting) (first citing *Cohen v. California*, 403 U.S. 15, 20 (1971); then citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572-73 (1942); and then citing *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940)); see also *Bose Corp.*, 466 U.S. at 504 (citing *Chaplinsky*, 315 U.S. at 572).

11. *Bose Corp.*, 466 U.S. at 504 (citing *New York v. Ferber*, 458 U.S. 747 (1982)).

12. *Counterman*, 600 U.S. at 74 (first citing *Virginia v. Black*, 538 U.S. 343, 359 (2003); and then citing *United States v. Alvarez*, 567 U.S. 709, 717-18 (2012)).

13. *Bose Corp.*, 466 U.S. at 504 (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969)).

14. *Counterman*, 600 U.S. at 73 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 342 (1974)).

15. See *Defamation*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/defamation> [<https://perma.cc/EJ2X-ZCTG>] (last visited May 26, 2025) (“[T]he act of communicating false statements about a person that injure the reputation of that person : the act of defaming another.”); *Defamation*, *supra* note 5 (“Malicious or groundless harm to the reputation or good name of another by the making of a false statement to a third person.”).

16. *Defamation*, *supra* note 5 (citing P.H. Winfield, *A Textbook of the Law of Tort* § 72, at 242 (5th ed. 1950)) (“Defamation is the publication of a statement which tends to lower a person in the estimation of right-thinking members of society generally; or which tends to make them shun or

is committed through either slander (oral defamation) or through libel (written defamation).¹⁷ Writings constituting libel are not limited to words.¹⁸

B. DEFAMATION IN NORTH DAKOTA

With this general constitutional backdrop for civil defamation jurisprudence, each state carves out the legal boundaries and definitions which support its unique culture and priorities.¹⁹ North Dakota venerates free speech, as its state constitution makes evident: “Every man may freely write, speak and publish his opinions on all subjects, being responsible for the abuse of that privilege.”²⁰ However, this freedom is balanced with codified individual protections as “[e]very person . . . has the right of protection . . . from defamation, and from injury to the person’s personal relations.”²¹ Some of North Dakota’s unique defamatory protections to support its culture and priorities involve securities, agriculture, and insurance.²²

North Dakota defines libel as “a false and unprivileged publication by writing, printing, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes the person to be shunned or avoided, or which has a tendency to injure the

avoid that person.”); *Defamatory*, BLACK’S LAW DICTIONARY (12th ed. 2024); *see also* RESTATEMENT (SECOND) OF TORTS § 559 cmt. b (A.L.I. 1977) (“Communications are often defamatory because they tend to expose another to hatred, ridicule, or contempt. A defamatory communication may tend to disparage another by reflecting unfavorably upon his personal morality or integrity or it may consist of imputations which, while not affecting another’s personal reputation, tend to discredit his financial standing in the community . . .”).

17. *Defamation*, *supra* note 5; *Libel*, BLACK’S LAW DICTIONARY (12th ed. 2024); *Slander*, BLACK’S LAW DICTIONARY (12th ed. 2024); N.D. CENT. CODE § 14-02-02 (1943).

18. *See Defamation*, *supra* note 5 (“A familiar statement is that libel is written whereas slander is oral. This covers the idea in a general way but tends to mislead because defamation may be published without the use of words and hence be neither written nor oral. Thus libel may be perpetrated by hanging a person in effigy and slander, by sign or gesture.” (quoting Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 489 (3d ed. 1982))); *see also Libel*, *supra* note 17 (“A defamatory statement published without just cause or sound justification and expressed in a fixed medium, esp. writing but also possibly a picture, sign, or electronic broadcast.”).

19. *See* Anthony J. Oncidi et al., *Defamation Basics in Employment Law*, LexisNexis Practical Guidance (2025) (“Though the U.S. Supreme Court has read the Constitution to impose limits on defamation liability, defamation law remains largely a creature of state law.”).

20. N.D. CONST. art. I, § 4.

21. N.D. CENT. CODE § 14-02-01 (1943).

22. *See id.* §§ 10-04-16.1(1)(a)(2) (2023) (“No person is liable to a broker-dealer, agent, investment advisor, federal covered advisor, or investment advisor representative for defamation relating to a statement that is contained in a record required or requested by the securities department . . .”), 32-44-01 to -04 (1997) (authorizing injunctive relief, compensatory damages, and exemplary damages for agricultural producers or products willfully or purposefully defamed, and permitting recovery of treble damages and requiring court ordered recovery of costs, disbursements, and attorney’s fees incurred for agricultural producers or products maliciously defamed), 26.1-04-03(3) (2023) (listing “[d]efamation” under “unfair methods of competition and unfair and deceptive acts or practices in the business of insurance”).

person in the person's occupation.”²³ “Slander is a false and unprivileged publication other than libel” which accuses a person of crime, alleges the person has certain unsavory diseases, harms a person's professional or business reputation, claims a person is impotent or promiscuous, or causes a person actual damage.²⁴ Privileged communications falling outside the purview of civil defamation action are those made while properly discharging official duties; in legislative, judicial, or other legally authorized proceedings; between interested parties or their representatives (without malice); or in reports or statements of judicial, legislative, or other proceedings (without malice).²⁵ Under North Dakota's Uniform Correction or Clarification of Defamation Act, defamation actions can *only* proceed after the plaintiff requests correction or clarification by the defendant, or if the defendant makes such a correction or clarification.²⁶ These corrections come with stringent requirements, including time limits and limits on damages.²⁷ Further, defamation claims are limited by a two-year statute of limitations.²⁸

C. ACTUAL MALICE FOR PUBLIC OFFICIALS

In *New York Times v. Sullivan*, the United States Supreme Court began carving out exceptions to First Amendment freedom of speech and press protections from defamation when it held that public officials must show actual malice to recover.²⁹ Sullivan, the elected commissioner of Montgomery, Alabama, commenced a civil libel suit against four individuals and the New York Times Company for a newspaper advertisement that “purported to illustrate the ‘wave of terror’ by describing certain alleged events” faced by civil rights advocates in retaliation for non-violent demonstrations.³⁰

The advertisement described that a group of college students were expelled from school after singing a patriotic song outside of the Alabama State Capitol and that armed police filled the Alabama State College Campus.³¹ The advertisement further alleged the campus dining hall was locked after

23. *Id.* § 14-02-03 (1943).

24. *Id.* § 14-02-04.

25. *Id.* § 14-02-05.

26. *Id.* § 32-43-03(1) (1995) (“A person may maintain an action for defamation only if the person has made a timely and adequate request for correction or clarification from the defendant or the defendant has made a correction or clarification.”).

27. *See id.* § 32-43-03(2) (limiting timely requests for correction or clarification to those requests made within the period of limitation to commence a defamation action and requiring said requests to be made within ninety days of knowledge of publication to recover anything more than provable economic loss).

28. *Id.* §§ 28-01-18(1) (2023), 32-44-04 (1997).

29. *See* 376 U.S. 254, 283 (1964).

30. *Id.* at 256-57.

31. *See id.* at 257.

students protested the police presence “by refusing to re-register.”³² Sullivan’s name was not used in the advertisement, but he alleged the use of “po-lice” implied his responsibility because he led the city’s police force as commissioner.³³

Additionally, the advertisement claimed Dr. Martin Luther King, Jr. was intimidated and violently harmed through multiple arrests.³⁴ Sullivan alleged this statement was also an accusation directed towards him as police commissioner, because police typically make arrests.³⁵

The trial court found for Sullivan, and the Supreme Court of Alabama affirmed.³⁶ The United States Supreme Court granted certiorari and reversed the ruling.³⁷ The Court’s opinion explained that some factual errors are inevitable while reporting on public official conduct.³⁸ In matters such as politics, authors may exaggerate to the point of falsity “[t]o persuade others to his own point of view.”³⁹ Protecting these factual errors from libel claims is vital to protect free debate of political views.⁴⁰ Further, statements criticizing the work of “government officials, such as elected city commissioners,” are protected even if written in a way that affects their reputation.⁴¹ Thus, since criticisms of public officials are constitutionally protected if either false *or* defamatory, the statements should also be protected if both false *and* defamatory.⁴² Forcing critics of public officials to ensure the truth of the entirety of their criticisms leads to self-censorship.⁴³

32. *Id.*

33. *Id.* at 258.

34. *See id.* at 257-58 (“Again and again the Southern violators have answered Dr. King’s peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for ‘speeding,’ ‘loitering,’ and similar ‘offenses.’ And now they have charged him with ‘perjury’—a *felony* under which they could imprison him for *ten years*.” (emphasis added)).

35. *Id.* at 258.

36. *Id.* at 256, 262-63.

37. *Id.* at 264.

38. *See id.* at 271-72.

39. *See id.* at 271 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940)).

40. *See id.* at 272 (“Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors. . . . The interest of the public here outweighs the interest of . . . any other individual. The protection of the public requires not merely discussion, but information. Political conduct and views which some respectable people approve, and others condemn, are constantly imputed to Congressman. Errors of fact, particularly in regard to a man’s mental states and processes, are inevitable. . . . Whatever is added to the field of libel is taken from the field of free debate.” (quoting *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C. Cir. 1942))).

41. *Id.* at 273 (“Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.”).

42. *Id.* at 273.

43. *Id.* at 279.

Under the Constitution, federal law must prevent public officials from recovering damages for false, defamatory statements about their public official conduct unless it can be proven the statements were made with actual malice.⁴⁴ The Court defined “actual malice” as “with knowledge that it was false or with reckless disregard of whether it was false or not.”⁴⁵ The evidence regarding the advertisement did not meet the actual malice standard for the newspaper or the individual defendants.⁴⁶ The petitioners individually named in the advertisement testified they did not consent to use of their names, but even if they had, no evidence showed knowledge of false information being published or otherwise reckless publication of these statements.⁴⁷ As to the newspaper, the New York Times’ Secretary asserted that he thought the publication was “substantially correct.”⁴⁸ Relying on this statement, the Court found no malice.⁴⁹ Even if it were not substantially correct, the Secretary’s belief was a reasonable opinion with no evidence indicating the publication was not made in good faith.⁵⁰

The Times did not retract on Sullivan’s demand but retracted on a subsequent demand by the state governor.⁵¹ This fact also does not establish malice because the Times reasonably distinguished the two in good faith.⁵² Failure to retract upon Sullivan’s request does not show malice because the Times responded with a letter evidencing reasonable doubt as to whether the advertisement could even be read to implicate Sullivan.⁵³ Also, this letter was not a final refusal as it requested an explanation as to how the ad implicated Sullivan—which Sullivan ignored.⁵⁴ The Times did not verify the advertisement’s truth against other files Times possessed.⁵⁵ However, mere possession of other files did not indicate knowledge sufficient to prove malice.⁵⁶ Also, the employees involved in publishing the advertisement relied upon opinions of responsible individuals with good reputations.⁵⁷ Further, employees reasonably relied on Times’s policy of refusing to publish advertisements “attack[ing] . . . personal character” and believed this advertisement fell outside

44. *Id.* at 279-80.

45. *Id.* at 280.

46. *See id.* at 285-86.

47. *See id.* at 260, 286.

48. *Id.* at 286.

49. *Id.*

50. *Id.*

51. *Id.*

52. *See id.* at 286-87.

53. *Id.* at 286.

54. *Id.*

55. *Id.* at 287.

56. *Id.*

57. *Id.*

of the policy.⁵⁸ This evidence, taken as a whole, was not sufficient to prove the Times acted with malice in its publication of the advertisement.⁵⁹

Shortly thereafter, in 1964, *Garrison v. Louisiana* broadened *New York Times* to constitutionally protect any information “which might touch on an official’s fitness for office” under the actual malice standard.⁶⁰ Due to the social benefit of offering society information about public officials, distinguishing between their private and public reputations is necessary to ensure an informed electorate.⁶¹

In *Monitor Patriot Co. v. Roy*, the Supreme Court expanded the actual malice standard to apply not only to public officials, but to candidates for public office as well.⁶² It also iterated that public officials’ and candidates’ criminal charges are such a matter shedding light on an individual’s fitness to hold public office “no matter how remote in time or place.”⁶³

D. STANDARDS FOR PUBLIC FIGURES

The standards for defamation claims brought by public figures were extended again in the 1967 case, *Curtis Publishing Co. v. Butts*.⁶⁴ *Curtis* consolidated two cases to determine whether the actual malice standard applies to defamation claims filed by public figures who are not public officials but are “involved in issues in which the public has a justified and important interest.”⁶⁵

In the first consolidated case, a newspaper published an article accusing Butts, a collegiate athletic director, of trying to “fix” one of his university’s football games after someone allegedly overheard a phone call where Butts revealed plays and strategies to a rival coach.⁶⁶ Butts was the former head coach and well respected by the football community.⁶⁷ Evidence at trial contradicted the article and established the newspaper’s investigation as being grievously inadequate.⁶⁸

In the second consolidated case, an Associated Press news dispatch reported riots at the University of Mississippi after the federal government

58. *Id.*

59. *See id.* at 288.

60. *See* 379 U.S. 64, 77 (1964) (“Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official’s private character.”).

61. *See id.*

62. *See* 401 U.S. 265, 271 (1971).

63. *Id.* at 277.

64. *See* 388 U.S. 130, 155 (1967).

65. *Id.* at 134.

66. *See id.* at 135-37.

67. *Id.* at 135-36.

68. *Id.* at 135-38, 157.

attempted to enforce desegregation.⁶⁹ It claimed Walker led a violent crowd by charging marshals, encouraged other rioters to be violent, and told others how to fight tear gas.⁷⁰ Walker, “a private citizen at the time of the riot and publication,” had previously commanded federal troops during a segregation dispute, made numerous statements on physical federal intervention which garnered widespread publicity, and secured political prominence and his own following.⁷¹ Walker filed a libel suit over the dispatch.⁷² At trial, there was little evidence of the dispatch’s examination of the facts other than the author’s presence on campus during the riot and instant reporting of observations to his office.⁷³

The Supreme Court held that public figures who are not public officials can recover for defamatory statements if they can demonstrate “highly unreasonable conduct” which departs extremely from responsible reporting and investigation standards.⁷⁴ Butts’s career and Walker’s choice to thrust himself into public controversy made them public figures.⁷⁵ The common denominator was that both were open and receptive to public interest, and both possessed avenues to rebut the statements to show falsity.⁷⁶ As a public figure, Butts *did* meet the reporting standard to show the newspaper acted unreasonably because editors conducted a lackluster investigation even though they knew the claims were not “hot news,” were capable of harm, and required immense investigation.⁷⁷ Conversely, Walker was unable to show extreme variance in reporting and investigation standards because the nature of the publication required release as soon as possible.⁷⁸

E. STANDARDS FOR PRIVATE INDIVIDUALS

The Supreme Court took a step in the right direction by attempting to impose the actual malice standard on private individuals with its plurality opinion in *Rosenbloom v. Metromedia, Inc.*⁷⁹ It held that the actual malice standard applies when defamatory statements about public or general

69. *Id.* at 140.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 141.

74. *Id.* at 155.

75. *Id.*

76. *Id.*

77. *See id.* at 156-57 (finding the investigations inadequacies to include failing to read notes from the phone call witness, failing to interview another witness, failing to review game film to verify claims, and failing to inquire into any changes by the other team prior to the game).

78. *See id.* at 156, 158.

79. *See* 403 U.S. 29, 44-45 (1971), *abrogated by*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

concerns are published about private individuals.⁸⁰ The Court later overturned *Rosenbloom* with its decision in *Gertz v. Robert Welch, Inc.*, but *Rosenbloom*'s reasoning is helpful for understanding why the Court's rationale in *Gertz* is without merit.⁸¹

I. Rosenbloom v. Metromedia, Inc.

Rosenbloom involved a libel suit where a nudist magazine distributor who was acquitted of charges for selling "obscene" materials sued a media company for libel after it reported about a "girlie-book peddler" involved in "smut literature racket."⁸² The broadcasts at issue in the libel suit did not explicitly name *Rosenbloom*.⁸³ However, earlier reports on the criminal investigation of the magazine distributor had identified him by name.⁸⁴

In holding that the actual malice standard applies to private individuals for matters of public concern, the United States Supreme Court reasoned the central focus of defamation claims should be on whether the substance is an issue of public interest rather than the status of victims involved.⁸⁵ Thus, whether First Amendment protections apply should depend on whether a public issue is being discussed.⁸⁶

Rosenbloom claimed he had less access to the media than a public figure to defend himself.⁸⁷ The Court explained that distinguishing public individuals for First Amendment analysis is nonsensical.⁸⁸ Further, the Court explained that the argument becomes moot once a public official or figure experiences a change in the circumstances which afforded them public status.⁸⁹ Usually, a public official's or public figure's ability to defend themselves depends on whether the media chooses to maintain coverage, which is also true for private individuals.⁹⁰ The Court said there was not enough evidence that public figures would have more media access for self-defense than private individuals.⁹¹ As a solution, the Court suggested giving victims more ways to respond to defamation instead of implicitly censoring statements

80. *Id.* at 52.

81. *See Gertz*, 418 U.S. at 337, 347.

82. *See Rosenbloom*, 403 U.S. at 32-36.

83. *Id.* at 34.

84. *Id.* at 33.

85. *See id.* at 42-45.

86. *Id.* at 44-45.

87. *Id.* at 45.

88. *See id.* at 45-46.

89. *See id.* at 46.

90. *Id.*

91. *See id.* at 46-47.

regarding public issues.⁹² It noted that for this censorship, “the cure seems far worse than the disease.”⁹³

Rosenbloom also argued that he had not voluntarily involved himself in the media.⁹⁴ In rejecting this argument, the Court stated, “[v]oluntarily or not, we are all ‘public’ men to some degree.”⁹⁵ It is unrealistic to believe public figures have “exposed their entire lives to public inspection,” yet private individuals have not.⁹⁶ A mere negligence standard would not serve First Amendment protections because fear of accidentally publishing false information induces self-censorship and represses true, accurate publications.⁹⁷ It is not “the possibility of a judgment for damages,” but the mere threat of enduring long, expensive litigation that would create harmful self-censorship.⁹⁸

2. *Gertz v. Robert Welch, Inc.*

The 1974 case of *Gertz v. Robert Welch, Inc.* explored the constitutional privileges afforded to those publishing statements about private individuals.⁹⁹ The family of a man killed by a police officer hired well-known attorney Elmer Gertz to represent them in a civil lawsuit against the officer, who was already criminally convicted of the murder.¹⁰⁰ A magazine claimed Gertz orchestrated the officer’s criminal conviction, although in truth, Gertz had no involvement in the charge.¹⁰¹ Further, the article suggests Gertz framed the officer in support of an anti-law enforcement Communist campaign.¹⁰² Most of the information in the article was incorrect, and the editor failed to investigate the truth before publication.¹⁰³ Gertz filed a defamation suit against the magazine.¹⁰⁴

Before presentment to the jury, the trial judge ruled Gertz was neither a public figure nor a public official.¹⁰⁵ The only issue presented to the jury was the measure of damages, and the jury awarded \$50,000.¹⁰⁶ After the verdict

92. *Id.* at 47.

93. *Id.*

94. *See id.* at 45.

95. *Id.* at 48.

96. *Id.*

97. *See id.* at 50, 52-53.

98. *Id.* at 52-53.

99. *See* 418 U.S. 323, 325 (1974).

100. *Id.*

101. *Id.* at 326.

102. *Id.*

103. *Id.* at 326-27.

104. *Id.*

105. *Id.* at 328.

106. *Id.* at 329.

was returned, the trial court deviated from its earlier conclusion and decided the *New York Times* standard should apply even though Gertz was neither a public figure nor official because speech regarding public issues should be protected regardless of the subject's status.¹⁰⁷ The trial court entered judgment notwithstanding the jury's verdict for Gertz and found for the defendant.¹⁰⁸ After the Seventh Circuit Court of Appeals affirmed, the United States Supreme Court granted certiorari.¹⁰⁹

The Supreme Court ruled that states are allowed to dictate their own standards of liability, so long as the standard was higher than strict liability.¹¹⁰ The Court overturned *Rosenbloom*, criticizing its standard as being too subjective with judges deciding "general or public interest."¹¹¹ The Court used two distinct justifications for its holding: 1) the *New York Times* actual-malice standard is burdensome for private individuals to meet, and 2) when public officials and figures assume their positions, they expect and assent to criticism from society.¹¹² The first justification relied on the fact that private individuals have lesser access to "channels of effective communication," so they are more vulnerable and less equipped to defend themselves against defamatory statements.¹¹³ Because "[t]he first remedy of any victim of defamation is self-help," the Court implies that private individuals have fewer "opportunities to contradict the lie or correct the errors and thereby to minimize its adverse impact on reputational harm."¹¹⁴

The basis of the second justification for the Court's holding was that public plaintiffs knew they were putting themselves in a role where they were more likely to face defamation.¹¹⁵ Also, society benefits from having information about both the professional and private lives of public officials which could reveal their "fitness for office."¹¹⁶ Private individuals, however, did not elect themselves for criticism from the public, so they are more vulnerable and "more deserving of recovery."¹¹⁷

Gertz established two forms of public figures—general and limited purpose.¹¹⁸ The Court offered two ways in which individuals can "assume[]" roles

107. *Id.*

108. *Id.*

109. *Id.* at 325, 330-32.

110. *Id.*

111. *See id.* at 346-47.

112. *See id.* at 344-45.

113. *Id.* at 344.

114. *See id.*

115. *Id.* at 345.

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

117. *Id.* at 345.

118. *See id.* at 351; Michael Hadley, Note, *The Gertz Doctrine and Internet Defamation*, 84 VA. L. REV. 477, 488-89 (1998).

of especial prominence in the affairs of society” and become public figures.¹¹⁹ General purpose public figures are typically public officials in high-ranking positions or celebrities with widespread, immense prominence.¹²⁰ To become a general purpose public figure is to face so much “pervasive fame or notoriety that [one] becomes a public figure for all purposes and in all contexts.”¹²¹ Because of the great fame and influence that accompany these positions, the public has high interest in information about their lives in their entirety.¹²² General purpose public figures are bound to the actual malice standard for practically any defamatory statement.¹²³

The second, more common, path to public figure status is by being pulled into or voluntarily interjecting oneself “into a particular public controversy and thereby becom[ing] a public figure for a limited range of issues.”¹²⁴ While limited purpose public figures lack immense prominence, they have “thrust themselves” into controversies to sway the outcomes.¹²⁵ This self-insertion forces them to “assume[] prominence for a limited time or on a limited range of issues,” and the actual malice standard applies only to those limited issues.¹²⁶ The decision clarified that public figure status could, hypothetically, be reached involuntarily, albeit such instances “must be exceedingly rare.”¹²⁷

The Court did not view Gertz as a public figure.¹²⁸ It is preferable to decide public figure status by looking at an individual’s actions in the controversy at hand.¹²⁹ Despite longstanding presence in his local and legal communities, Gertz lacked the general fame or notoriety in the type of community required of general-purpose public figures.¹³⁰ Gertz neither “thrust himself into the vortex of this public issue” nor garnered attention from the community to affect the controversy’s resolution, so he was not a limited purpose public figure either.¹³¹ Without public figure status, the actual malice

119. *Gertz*, 418 U.S. at 345, 351.

120. Hadley, *supra* note 118, at 489.

121. *Gertz*, 418 U.S. at 351.

122. See Frank D. LoMonte & Stephanie J. Leibert, *Internet Famous: Are Online Influencers and Micro-Celebrities Public Figures Under Defamation Law?*, 88 MO. L. REV. 715, 721-22 (2023).

123. Hadley, *supra* note 118, at 489.

124. *Gertz*, 418 U.S. at 351.

125. LoMonte & Leibert, *supra* note 122, at 720-21 (quoting *Gertz*, 418 U.S. at 345).

126. Hadley, *supra* note 118, at 489.

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

128. *Id.* at 352.

129. *Id.*

130. *Id.* at 351-52 (“None of the prospective jurors called at the trial had ever heard of petitioner prior to this litigation, and respondent offered no proof that this response was atypical of the local population.”).

131. *Id.* at 352.

standard was inappropriate, and the case was subsequently reversed and remanded.¹³²

Justice William Brennan's dissent promoted the actual malice standard as the only option for balancing public and private interests.¹³³ He reiterated his arguments from *Rosenbloom* that both private and public individuals are restrained by whether the media will allow them to counter defamatory statements and that involvement in society inescapably requires some exposure to public scrutiny.¹³⁴ He criticized lower standards as forcing publishers to preemptively analyze every publication through a lens of potential litigation expense calculation and jury verdict speculation.¹³⁵ Further, he pointed out that juries may misuse verdicts to punish opposing opinions under lower standards.¹³⁶

II. *GERTZ'S FIRST FLAW: VIEWING THE NEW YORKTIMES STANDARD AS TOO HEAVY FOR PRIVATE INDIVIDUALS*

Proper protections for freedoms of speech and press require eliminating status distinctions and imposing an actual malice standard for all plaintiffs. The justification for eliminating this distinction lies in the shortcomings of *Gertz's* two-justification rationale. While the Court's holding may have been somewhat reasoned at the time of its decision in 1974, evolving social media and social relations render it unpersuasive today.

A. TOO MUCH CONFUSION WITH PUBLIC FIGURES

The first justification for the *Gertz* holding claims private individuals are distinguishable because they lack the channels of communication afforded to public individuals.¹³⁷ The greatest issue with the first justification is the difficulty and inconsistency which accompany public figure determination.¹³⁸ The *Gertz* opinion is contradictory as it critiques the *Rosenbloom* standard for allowing subjective application of "public issues," yet it creates concepts of public figures which also require subjective application.¹³⁹

132. *Id.*

133. *Id.* at 361, 369 (Brennan, J., dissenting).

134. *Id.* at 362, 364.

135. *Id.* at 365-366.

136. *Id.* at 367.

137. *Id.* at 344 (majority opinion).

138. See LoMonte & Leibert, *supra* note 122, at 723.

139. See *Gertz*, 418 U.S. at 337, 346.

Limited purpose public figure determinations tend to be more difficult than general ones as they are more fact-driven.¹⁴⁰ Courts examine limited purpose public figure status through the context of the “nature and extent” of the plaintiff’s “participation in the particular controversy giving rise to the defamation.”¹⁴¹ Due to the breathing room this context affords, limited purpose public figure determinations are confusing, and courts have inconsistently classified plaintiffs.¹⁴²

Limited purpose public figure analyses examine: 1) voluntary involvement, 2) in a controversy with hopes of affecting the controversy’s outcome, and 3) media interaction.¹⁴³ However, courts have subjectively decided to ignore one or more of these unofficial factors when they do not fit the status determination desired. For example, in *Dameron v. Washington Magazine, Inc.*, the court found an air traffic controller to be a limited purpose public figure.¹⁴⁴ Dameron was deemed to be involved in a controversy as he was responsible for a fatal airplane crash, but his involvement was involuntary.¹⁴⁵ As part of a public governmental investigation, he testified at numerous hearings which were widely publicized.¹⁴⁶

By contrast, *Time, Inc. v. Firestone* involved a widely publicized divorce of the well-known, and very wealthy, Firestone family.¹⁴⁷ Despite participating in press conferences about her divorce, the United States Supreme Court determined Mrs. Firestone was not a limited purpose public figure as she had not inserted herself into any controversy to affect its outcome.¹⁴⁸ While the divorce may have been a source of entertainment to some members of the public, it was not viewed as the type of controversy to which the actual malice standard applied.¹⁴⁹

Establishing that there is a “controversy” to apply this three-part analysis can be in itself quite troublesome—creating a loophole in status determination.¹⁵⁰ An individual who is well known within a local community can

140. LoMonte & Leibert, *supra* note 122, at 723.

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

142. LoMonte & Leibert, *supra* note 122, at 723.

143. See *Gertz*, 418 U.S. at 345; see also Zachary R. Cormier, *The News Media Engagement Principle: Why Social Media Has Not Actually Overrun the Limited Purpose Public Figure Category*, 78 U. MIAMI L. REV. 64, 94-95 (2023) (illustrating several cases in which the Supreme Court has used media engagement to find that individuals thrust themselves into public controversies).

144. See 779 F.2d 736, 738, 743 (D.C. Cir. 1985).

145. See *id.* at 742.

146. *Id.*

147. See 424 U.S. 448, 450 (1976).

148. See *id.* at 485 (Marshall, J., dissenting); *id.* at 453 (majority opinion).

149. See *id.* at 454.

150. LoMonte & Leibert, *supra* note 122, at 725.

escape public figure status.¹⁵¹ For example, if a plaintiff is well known for inserting themselves into a matter not deemed to be a controversy, they are not subject to limited purpose public figure status.¹⁵² Also, an individual could have a large online following with which to communicate, but if they are only well-known in a niche community, they may still be labeled as a private individual.¹⁵³ Further, for limited purpose public figures, the actual malice standard only applies for the controversy at hand.¹⁵⁴ Thus, if an individual is known for inserting themselves into one controversy but are defamed regarding another issue, they would be held to a lower standard.¹⁵⁵

For example, North Dakota is the state which produces the most honey.¹⁵⁶ If a North Dakota beekeeper was prolific within the beekeeping community and that individual involved themselves in some sort of honey-related scandal, their status as a plaintiff in a defamation case could depend on whether a honey scandal is a controversy. Even if it *were* found to be a controversy, imagine that individual then involves themselves in an unrelated drug trafficking scandal. Because drug trafficking is not the controversy this individual is known for, they may not be considered a public figure if they sued another for defamatory statements about this trafficking because it is not the controversy for which this individual is well known.¹⁵⁷

It is clearly established that a matter is not a controversy simply because the public has taken great interest in it.¹⁵⁸ If the media writes a story about a matter in which the public is curious about but is not necessarily a controversy, the standard is lower.¹⁵⁹ This blurred boundary causes self-censorship, which harms principles of the freedoms of speech and press because the public does not hear about the issues they want to.¹⁶⁰ North Dakota is not immune to this issue—the state alone houses twelve television stations and two-

151. *Id.* at 724.

152. *LoMonte & Leibert*, *supra* note 122, at 725.

153. *See id.* at 724.

154. *Cormier*, *supra* note 143, at 72.

155. *Id.* at 72.

156. *Apiary (Honey Bees)*, N.D. DEP'T AGRIC., <https://www.ndda.nd.gov/divisions/plant-industries/apiary-honey-bees> [<https://perma.cc/KNQ8-KD9K>] (last visited June 1, 2025).

157. *See generally supra* notes 150-54 and accompanying text; *Cormier*, *supra* note 143, at 72.

158. *See generally Dameron v. Wash. Mag., Inc.*, 779 F.2d 736, 742 (D.C. Cir. 1985).

159. *See id.*

160. *See generally Cormier*, *supra* note 143, at 115-16 (“A rule that flatly punishes any ‘error’ made in a news report or public statement—without consideration for its broader consequences—therefore ‘runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press.’ Indeed, absence of the privilege would allow for ‘a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions,’ which of course ‘may lead to intolerable self-censorship.’” (footnote omitted)).

hundred radio stations.¹⁶¹ As a result, any of these stations must carefully analyze whether the subject of their reports *might* be deemed a controversy—which could be a difficult prediction.¹⁶² Local media companies lacking funds to defend against claims or investigate certain controversies may err on the side of caution and avoid coverage completely, inducing self-censorship.¹⁶³ Also, as the *Rosenbloom* Court pointed out regarding channels of self-defense, both public and private individuals are at the mercy of whether mainstream media wants to cover their stories, so distinguishing between the two based on their media access is futile.¹⁶⁴

Those classified as limited purpose public figures are considered as such “for a limited time or on a limited range of issues.”¹⁶⁵ While establishing this classification in *Gertz*, the Court did not offer any guidance as to how long this limited time extends.¹⁶⁶ This confusion surrounding public figures is no surprise, since the Supreme Court has not directly addressed standards for limited public figure determination since the 1970’s.¹⁶⁷

B. PLAINTIFFS TODAY HAVE MORE ACCESS TO COMMUNICATIONS

Gertz used access to communication for defending oneself as support for distinguishing plaintiffs of different statuses.¹⁶⁸ Chief Justice Earl Warren

161. *Broadcast Media Companies in North Dakota*, CIENCE, <https://www.cience.com/companies-database/united-states/broadcast-media/north-dakota> [<https://perma.cc/2MHE-W4JK>] (last visited June 1, 2025).

162. See generally LoMonte & Leibert, *supra* note 122, at 735 (“The Supreme Court’s relatively few decisions have staked out some outer boundaries . . . but the cases have not set forth any universal governing principles for where ‘public controversy’ begins and ends. Lacking clear guidance, lower courts have reached irreconcilably different understandings of what it means to take part in a public controversy.” (footnote omitted)).

163. See generally LoMonte & Leibert, *supra* note 122, at 748 (“The application of the limited public figure doctrine has been widely criticized as unpredictable, even before the explosion of social media. Uncertainty promotes self-censorship, because a rational speaker has no interest in risking damages by venturing into a gray area.” (footnote omitted)); *Rosenbloom v. Metromedia*, 403 U.S. 29, 52-53 (1971) (noting that the mere possibility of litigation or a judgment for damages induces self-censorship and “[t]oo, a small newspaper suffers equally from a substantial damage award . . .”), *abrogated by*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

164. See *Rosenbloom*, 403 U.S. at 46.

165. Hadley, *supra* note 118, at 489; see also *Gertz*, 418 U.S. at 351.

166. See *Gertz*, 418 U.S. at 351.

167. See generally Cormier, *supra* note 143, at 94-95 (“The Supreme Court has not read-dressed the limited purpose public figure framework since this formative period from 1967 to 1979”); Derigan Silver et al., *Going Viral: Limited-Purpose Public Figures, Involuntary Public Figures, and Viral Media Content*, 27 COMM’N L. & POL’Y 49, 55-56 (2022) (highlighting that subsequent cases after *Gertz* “have done ‘very little to clarify the Court’s definition of a public figure.’”); Josie Jasmin, Article, “Fake News”: A Systemic Review of the “Actual Malice” Standard in Light of the Digital Age, 13 ARIZ. ST. SPORTS & ENT. L.J. 127, 145 (2024) (“Because many of our defamation precedents date back to the 1960s and 1970s, before the Internet gained prominence, the United States Supreme Court has yet to address . . . the ease at which private individuals can gain prominence from a simple post.”).

168. See *Gertz*, 418 U.S. at 344.

“noted that since the end of the Second World War, the line between public officials and public figures had ‘blurred’” because they both had accessible forms of mass media allowing them to influence the public and fire back at critics.¹⁶⁹ A similar phenomenon has occurred in modern times for *all plaintiffs* as the rise of social media allows all defamation victims to fire back.¹⁷⁰ In “January 2022, more than four billion people [were] using social media”—over half of the world’s population.¹⁷¹ North Dakota places third, tied with South Dakota, in a ranking of which states use social media the most, with 79.1% of the state’s population using the internet for social media.¹⁷²

From April 2022 to April 2023, worldwide, there were approximately 4.7 new social media users every second.¹⁷³ Such widespread use amounts to 11.5 billion hours a day spent on social media among all users.¹⁷⁴ Per person, the average social media use amounts to two hours and twenty-four minutes a day.¹⁷⁵ These numbers are not surprising when paired with the fact that the average person uses more than six social networks every month.¹⁷⁶ America is no exception, as 87% of Americans use social media daily.¹⁷⁷ This appears to affect traditional media usage because in 2024, only 26% of Americans received their news from printed newspapers—the lowest number recorded in survey history.¹⁷⁸ Because many of the influential Supreme Court cases regarding defamation were decided when printed news was more popular,

169. Hadley, *supra* note 118, at 483 (citing *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 163-64 (1967) (Warren, C.J., concurring)).

170. *See Nunez v. Lizza*, 486 F. Supp. 3d 1267, 1300 n.7 (N.D. Iowa 2020) (“The Court recognizes that access to the media in the traditional sense the Supreme Court contemplated in *Sullivan* or even *Gertz* may be an outdated concept with the advent of social media through which private people can reach millions.” (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz*, 418 U.S. 323)).

171. Nick Antonopoulos, *Social Media Platforms*, SEO DESIGN CHI. <https://seodesignchicago.com/social-media-tips/how-many-social-media-platforms/> [<https://perma.cc/UP4C-MAVM>] (last visited June 1, 2025).

172. *Study Reveals Which U.S. States Have the Highest Population on Social Media*, HEALTH TECH DIGIT. (June 14, 2024, 10:00 AM), <https://www.healthtechdigital.com/study-reveals-which-us-states-have-the-highest-population-on-social-media> [<https://perma.cc/6WSB-U9XM>].

173. *Social Media Statistics Details*, U. ME. <https://umaine.edu/undiscoveridmaine/small-business/resources/marketing-for-small-business/social-media-tools/social-media-statistics-details/> [<https://perma.cc/EHG3-BZWJ>] (last visited June 1, 2025).

174. *Id.*

175. *Id.*

176. *See id.*

177. Zachary Russell, *Survey: 87% of Americans Use Social Media Daily*, CHAIN STORE AGE (Oct. 23, 2024), <https://chainstoreage.com/survey-87-americans-use-social-media-daily> [<https://perma.cc/VTF5-L749>].

178. *News Platform Fact Sheet*, PEW RSCH. CTR. (Oct. 16, 2024), <https://www.pewresearch.org/journalism/fact-sheet/news-platform-fact-sheet/> [<https://perma.cc/RLL6-EXEX>].

the “lack of access” rationale is outdated as it is based on an antiquated mode of communication.¹⁷⁹

This widespread social media use offers more opportunities for defamation victims to defend themselves.¹⁸⁰ Even those with small followings have the possibility of their responses being seen by many as social media algorithms, such as Tik Tok’s “For You Page,” boost posts to increase viewers.¹⁸¹ Unlike the printed media of days gone by, social media allows for practically instantaneous sharing of information.¹⁸² This speed can be concerning, as an eleven-year study of social media platform X (formerly Twitter) found that false news reports spread more quickly than true news reports.¹⁸³ However, the knife cuts both ways, and defamed subjects of false reports, including North Dakota residents, can also instantly disseminate information on social media to defend themselves.

Finally, the rise of fact-checking capabilities offers victims greater avenues to defend themselves.¹⁸⁴ Fact checking is the process by which social media companies verify a statement’s information to avoid the spread of misinformation.¹⁸⁵ Fact checking programs use objective information like statistics, history, or scientific data to verify statements, and social media sites have begun using them to verify the accuracy of posts.¹⁸⁶ Thus, if there is objectively false and defamatory information posted about an individual, the platform could inform viewers of its falsity, thus defending the reputation of the victim. The availability of these features to *all* users of a social media platform, including those in North Dakota, reinforces the need to eliminate status distinctions for defamation plaintiffs.

179. See, e.g., *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 155 (1967) (subjecting public figures, who are not public officials, to the actual malice standard); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-45 (1974) (distinguishing private individual plaintiffs in defamation suits from public figures and public officials); *Wolston v. Reader’s Dig. Ass’n, Inc.*, 443 U.S. 157, 166-67 (1979) (finding that voluntarily failing to appear before a grand jury did not create limited purpose public figure status because the plaintiff “played only a minor role” in a potential controversy as he was “dragged” into the controversy, never spoke to the press, and took no greater action than necessary to defend himself from a contempt charge).

180. See generally *supra* note 179 and accompanying text.

181. See Sammi Burke, *Understanding TikTok’s Algorithm: Here’s How to Go Viral*, BACKSTAGE (Sep. 25, 2024), <https://www.backstage.com/magazine/article/tik-tok-algorithm-explained-75091/>.

182. See Berkelman, *supra* note 6, at 404.

183. Zoe Kleinman, *Fake News ‘Travels Faster,’ Study Finds*, BBC (Mar. 9, 2018), <https://www.bbc.com/news/technology-43344256> [<https://perma.cc/FFJ6-QWT6>].

184. See Abigail Adu-Daako & Aishwarya Vardhana, *The Fairness of Fact-Checking and Its Impact on Social Media*, TECHPOLICY.PRESS (Nov. 4, 2024), <https://www.techpolicy.press/the-fairness-of-the-factchecking-and-its-impact-on-social-media/> [<https://perma.cc/V9CG-EVT7>].

185. See *id.*

186. See *id.*

III. GERTZ'S SECOND FLAW: PUBLIC OFFICIALS AND FIGURES VOLUNTARILY OPEN THEMSELVES UP TO DEFAMATION

The second justification for the *Gertz* holding supports the actual malice standard for public officials and figures because these individuals know they are more likely to face criticism and defamation due to their position.¹⁸⁷ A public official's public and private matters affect their ability to hold office effectively, further explaining why public officials face the higher burden for defamatory claims.¹⁸⁸ *Gertz* attempts to argue actual malice is an inappropriate standard for private individuals because they have not similarly waived their self-interests.¹⁸⁹ These justifications for status distinctions fail to recognize overlapping and interchanging statuses, misrepresent the assent given by some public figures, and fail to recognize how private individuals also accept the risk of defamation.¹⁹⁰

A. PUBLIC OFFICIAL/ PUBLIC FIGURE DUAL STATUS

The *Gertz* opinion seems to discuss public officials and public figures as two mutually exclusive statuses.¹⁹¹ In reality, such classifications are not so black and white. A question remains about the applicable standard for plaintiffs who transition between statuses, such as celebrities who become political candidates and vice versa.¹⁹² Individuals like Arnold Schwarzenegger and Donald Trump have shown that the jump from celebrity to politician is possible.¹⁹³ Additionally, if a politician no longer holds public office but maintains widespread notoriety, such as Barack Obama or Bill Clinton, for how

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

188. See *id.*

189. *Id.* at 345.

190. See *id.* at 344-45.

191. See *id.* (The Court explained that the statuses share some similarities, but public officials must accept closer public scrutiny. Whether the statuses can apply to an individual—simultaneously or sequentially—is not addressed.)

192. See Delery H. Perret, Comment, *An Unforeseen Problem: How Gertz Failed to Account for Modern Media and What to Do Now*, 80 LA. L. REV. 541, 567 (2020) (“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.” (citing *Street v. Nat'l Broad. Co.*, 645 F.2d 1227, 1235 (6th Cir. 1981))); *id.* at 558 (noting that plaintiffs in defamation cases who argue they have given up public figure classification “experience little success”); see also *Rosenblatt v. Baer*, 383 U.S. 75, 101 n.14 (1966) (“[T]here 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.”).

193. See *Arnold Schwarzenegger*, GOVERNORS' GALLERY, <https://governors.library.ca.gov/38-schwarzenegger.html> [<https://perma.cc/R2SN-TADJ>] (last visited June 1, 2025); Olga Khazan, *The Forgotten Secret of Trump's Success*, ATLANTIC (Nov. 8, 2021), <https://www.theatlantic.com/politics/archive/2021/11/trump-celebrity-candidate-phenomenon/620619/> [<https://perma.cc/J6QP-XEY7>].

long are they subjected to the actual malice standard for anything which illuminates their “fitness for office?”¹⁹⁴ If criminal charges may show fitness for office “no matter how remote in time or place,” is there ever a point in which a former public official may transition into a private individual or limited public figure?¹⁹⁵ For instance, Barack Obama is no longer able to hold office as President of the United States because he has reached the two-term maximum.¹⁹⁶ Would he be considered a public figure, and thus subjected to a general versus limited determination? Or, is there an assumption he could always run for another political office, thus maintaining his public official status and subjecting him to the actual malice standard for any statement?¹⁹⁷ As applied to North Dakota, similar questions could arise regarding former Governor Doug Burgum.¹⁹⁸ As he is no longer the state’s governor, is he considered a public figure, subjecting him to a public figure determination? Is there an assumption that he is still a public official because he could run for another political position in the future, such as President of the United States?

B. CONSENT BY PUBLIC FIGURES

The second justification for the *Gertz* holding exaggerates the level of consent some public figures have given for potential defamation.¹⁹⁹ While general purpose public figures must prove actual malice for practically any statement about them, limited purpose public figures typically only do for the controversies in which they insert themselves.²⁰⁰ Again, a happening does not constitute a controversy simply because the public has great interest in a

194. See generally *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974) (establishing that one way to meet public figure classification is by facing such “pervasive fame or notoriety that [one] becomes a public figure for all purposes and in all contexts.”); *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964) (“The *New York Times* rule is not rendered inapplicable merely because an official’s private reputation . . . is harmed. The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. . . . [A]nything which might touch on an official’s fitness for office is relevant.”).

195. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1972) (“[A] charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official’s or a candidate’s fitness for office for purposes of application of the ‘knowing falsehood or reckless disregard’ rule of *New York Times Co. v. Sullivan*.”).

196. See U.S. CONST. amend. XXII; *President Barack Obama*, NATIONAL ARCHIVES, <https://www.obamalibrary.gov/obamas/president-barack-obama> [https://perma.cc/RfV6-7UL8] (last visited June 1, 2025).

197. See *supra* note 192.

198. *Burgum Announces He Won’t Seek Third Term, Highlights Progress Made During Time as Governor*, N.D. GOV. (Jan. 22, 2024, 9:01 AM), <https://www.nd.gov/news/burgum-announces-he-wont-seek-third-term-highlights-progress-made-during-time-governor> [https://perma.cc/ZD4M-5UV3].

199. See generally *Gertz*, 418 U.S. at 345 (explaining that both avenues for classification as a public figure “invite attention and comment” and media may assume public figures have availed themselves to a higher likelihood of suffering defamation).

200. See *Cormier*, *supra* note 143, at 71-72.

particular event.²⁰¹ Thus, if the media writes about an issue the public takes great interest in, but it does not amount to a public controversy, a lower standard would apply as the issue is outside the scope of the limited public figure's consent.²⁰² It is easier for limited purpose public figures to file suit in these instances and consequently induces self-censorship as the media needs to preemptively analyze whether their reports include controversies and whether the subjects have inserted themselves into those specific controversies.²⁰³ This self-censorship harms the integrity of First Amendment protections.²⁰⁴ The second justification also fails to recognize the lack of consent given by involuntary limited public figures.²⁰⁵ These parties have not waived their self-interests because they did not voluntarily assume positions with increased defamatory risk.²⁰⁶

C. PRIVATE INDIVIDUALS DO SIGN UP FOR PUBLIC SCRUTINY

Perhaps the greatest issue with the second justification is the lack of acknowledgement that private individuals today largely *do* open themselves up to public scrutiny. As the Supreme Court was astute to point out in *Rosenbloom*, it is unrealistic to argue that public figures have opened the entirety of their lives to public scrutiny while private individuals have completely sheltered their personal concerns from the public's view.²⁰⁷ Engaging in social media is entirely optional.²⁰⁸ Anyone choosing to use social media accepts the possibility that others may see their posts and scrutinize their statements and behavior.²⁰⁹ The purely voluntary nature of social media is

201. *See Dameron v. Wash. Mag., Inc.*, 779 F.2d 736, 742 (D.C. Cir. 1985).

202. *See id.*

203. *See Rosenbloom v. Metromedia*, 403 U.S. 29, 52-53 (1971) (criticizing the negligence standard as inducing self-censorship by publishers in an effort to avoid litigation or judgments for damages), *abrogated by*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *see also* LoMonte & Leibert, *supra* note 122, at 748 (explaining how inconsistency in limited public figure determination encourages self-censorship and advocating for clearer guidance on when social media use constitutes a controversy); Alan H. Bomser et al., *A Lawyer's Ramble Down the Information Superhighway*, 64 *FORDHAM L. REV.* 697, 801 (1995) (questioning what amounts to a public controversy for limited public figure purposes as "millions of people debate each other continuously on a wide variety of controversial subjects" online).

204. *Rosenbloom*, 403 U.S. at 52.

205. *See Gertz*, 418 U.S. at 345; *see also* Jasmin, *supra* note 167, at 145 ("[The] 'involuntary public figure' classification presents a significant threat to 21st Century defamation lawsuits, as the subject of any viral video may be involuntarily thrust into the public spotlight, and thus adjudged an 'involuntary public figure.'").

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

207. *Rosenbloom*, 403 U.S. at 48.

208. Bryan Y. Baniaga, *Congress Shall Make no Law, so Someone Else Should: Why the First Amendment's "Free Speech" Promise Does Not (and Should Not) Extend to Social Media Companies*, 57 *U.C. DAVIS L. REV.* 2869, 2886 (2024).

209. *See id.* at 2871 (describing how social media platforms allow users to share opinions worldwide).

evidenced by the fact that users must consent to terms of service on social media platforms when creating accounts.²¹⁰ In comparison to traditional media forms, such as newspapers or television, it is much easier and faster to disseminate information with social media.²¹¹ With the simple tap of a screen or click of a button, information can be instantaneously disseminated worldwide; upon receipt of that information, others can respond with defamatory claims about the original poster—again, with the simple tap of a screen or click of a button.²¹²

IV. CONCLUSION

The *Gertz* decision was delivered when social relations and dissemination of information varied greatly from today. Past decades have proven that its reasoning does not stand up to the test of time.²¹³ Private individuals now have the same channels of communication as any public plaintiff. Further, with the current state of social media, private individuals open themselves to the risk of defamation just as public plaintiffs do. Thus, the Supreme Court should eliminate defamation plaintiff distinctions as soon as possible.

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210. *Id.* at 2871-2872, 2888.

211. *See* LoMonte & Leibert, *supra* note 122, at 726 (“The average video watch time online is ten seconds or less, and consumers typically spend fifteen seconds or less reading an article, a significant change from how adults previously engaged with news.” (footnote omitted)).

212. Hadley, *supra* note 118, at 491 (“Thus, while it is true that an individual can ‘libel [someone] instantly in front of one and a half million people,’ it is also possible ‘to post a nearly universal and instantaneous response.’” (alteration in original) (footnote omitted)).

213. *See generally* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *supra* notes 176, 179 and accompanying text.

* Thank you to the NORTH DAKOTA LAW REVIEW Board of Editors and its Members for their assistance in publication of this Note. A special thank you to my family for their constant support and encouragement in all of my endeavors.