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Limited-Purpose Public Figures: Spence v. Flynt as an Tilustration of the Need for a More Complete Test

Stacey L. Hayden

Limited-Purpose Public Figures: *Spence v. Flynt* as an Illustration of the Need for a More Complete Test

I. INTRODUCTION

In July of 1985 Gerry Spence, the notorious trial lawyer from Wyoming, was named "Asshole of the Month" by *Hustler* magazine.[1] Subsequently, Mr. Spence filed suit for defamation against the publisher of *Hustler* magazine, Larry Flynt. Part II of this note examines the important cases in defamation law that provide the background for *Spence v. Flynt*.[2] Part III discusses the facts of *Spence* and the reasoning behind the decision. Part IV analyzes why the Wyoming Supreme Court's suggestion that Gerry Spence is a private figure under a special exception for attorneys could lead to unjust results.[3] Finally, Part V proposes a three-part test for determining when a private individual is a limited-purpose public figure. This test strikes a balance between the vital protection offered by the First Amendment and the right of individuals without the opportunity of rebuttal or redress to be free from defamatory publications.

II. BACKGROUND OF DEFAMATION CASELAW

The leading case in defamation law is *New York Times Co. v. Sullivan*.[4] In *New York Times*, an elected official in Montgomery, Alabama brought suit in state court alleging that he had been libeled by an advertisement in *The New York Times*.[5] The advertisement included false statements about police ac-

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1. *Bits & Pieces*, HUSTLER, July 1985, *reprinted in* Spence v. Flynt, 816 P.2d 771, 793 app. A (Wyo. 1991), *cert. denied*, 112 S. Ct. 1668 (1992).

2. 816 P.2d 771 (Wyo. 1991), *cert. denied*, 112 S. Ct. 1668 (1992).

3. Note that the Wyoming Supreme Court did not explicitly hold that Spence was a private figure but remanded the case to the district court to decide the issue. *Id.* at 779. However, the dicta in *Spence* discussing attorneys as public figures, *id.* at 776-77, lends itself to a discussion of the need for a more complete test to determine if an individual is a limited-purpose public figure in certain circumstances.

4. 376 U.S. 254 (1964).

5. *Id.* at 256.

tion allegedly directed against students who participated in a civil rights demonstration and police action against a leader of the civil rights movement.[6] Sullivan claimed that the statements in the advertisement were defamatory and referred to him because his duties included supervision of the police department.[7]

The Supreme Court held that under the First and Fourteenth Amendments a state cannot award damages to a public official for defamatory statements relating to his official conduct unless that official proves "actual malice." In other words, the public official must prove that the statement was made with knowledge of its falsity or with reckless disregard of its truth.[8]

Three years later in *Curtis Publishing Co. v. Butts*,[9] the Supreme Court ruled that defamatory statements concerning non-public officials may be protected by the First and Fourteenth Amendments if the individual defamed has somehow become a public figure.[10] A plurality of the Court stated that a public figure who is not a public official could recover damages for a false defamatory statement if its "substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[11] This standard was intended to form a more lenient rule than that required when public officials are involved, but it "failed to gain acceptance by a majority of the court."[12] As a result of the *Butts* decision, the actual malice test applies to both public figures and public officials.[13]

The most important decision in the area of public figure defamation doctrine is *Gertz v. Robert Welch, Inc.*[14] In *Gertz* a Chicago policeman had been convicted of murder, and the victim's family retained Gertz to represent them in civil litigation against the policeman.[15] An article appearing in the

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6. *Id.* at 256-59.
7. *Id.* at 258.
8. *Id.* at 279-80.
9. 388 U.S. 130 (1967).
10. *Id.* at 153-55.
11. *Id.* at 155 (Harlan, Clark, Stewart, Fortas, JJ.).
12. Michael J. Gunnison, Note, *General Public Figures Since* Gertz v. Robert Welch, Inc., 58 ST. JOHN'S L. REV. 355, 362 (1984).
13. *Id.* at 362-63.
14. 418 U.S. 323 (1974).
15. *Id.* at 325.

defendant's magazine labeled Gertz a "Communist-fronter" and alleged that the criminal murder trial was part of a Communist conspiracy to discredit the local police. It also stated that Gertz had helped frame the policeman and implied that Gertz had a criminal record.[16] Gertz brought an action for libel.[17]

The jury returned a verdict in favor of Gertz, but the district court held that the actual malice standard of *New York Times* applied to the case.[18] The court concluded that the actual malice standard protects media discussion of a public issue whether or not the person defamed is a public official or a public figure. Since Gertz had failed to prove knowledge of falsity or reckless disregard of truth, judgment notwithstanding the verdict was entered for the defendant.[19] The court of appeals affirmed the decision of the district court,[20] but the Supreme Court reversed.

The Court stated that, first, when a publisher defames an individual who is neither a public official nor a public figure, the publisher may not claim the actual malice standard as protection against liability even if the defamatory statements concern an issue of public or general interest.[21] Second, since private individuals have less effective opportunities of rebuttal than do public figures and public officials, they are more susceptible to injury from defamation and the state's interest in protecting them is greater.[22] Third, private figures are more deserving of recovery because they have not voluntarily exposed themselves to the risk of harm from defamation.[23] Finally, the Court stated that Gertz was not a public figure and that without "clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public figure for all aspects of his life."[24] Instead, the public figure issue should be decided by looking at the "individual's participation in the particular controversy giving rise to the defamation."[25]

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16. *Id.* at 326.
17. *Id.* at 327.
18. *Id.* at 329.
19. *Id.* at 329 & n.2.
20. *Id.* at 331-32.
21. *Id.* at 344-48.
22. *Id.* at 344.
23. *Id.* at 344-45.
24. *Id.* at 352.
25. *Id.*

The Court's opinion in *Gertz* gave rise to the dual concepts of limited-purpose public figures and general-purpose public figures. As a result of this classification, courts have adopted a two-step inquiry in defamation cases. The first inquiry is: Has the plaintiff achieved "such pervasive fame or notoriety that [she] becomes a public figure for all purposes and in all contexts"?[26] If the plaintiff meets this test, then she is a general-purpose public figure and defamation of any aspect of her life is subject to liability only under the actual malice standard. If the plaintiff is not a general-purpose public figure, a second inquiry must be undertaken: Has the plaintiff voluntarily injected herself into the controversy which gave rise to the defamation?[27] If the plaintiff meets this test, then she is a public figure for limited purposes and may win a defamation suit only by showing actual malice for those contexts in which she is a limited-purpose public figure.[28]

After the decisions in *New York Times* and *Gertz*, one of the key issues in any defamation litigation is whether the plaintiff is a public official, a public figure, or a private individual. This classification will determine whether the plaintiff must prove that the defendant acted with actual malice or mere negligence.

III. *Spence v. Flynt*

A. *Facts*

Gerry Spence represented Andrea Dworkin in her invasion of privacy suit against *Hustler* magazine. During the course of the litigation, *Hustler* named Gerry Spence "Asshole of the Month for July" 1985 and wrote alleged defamatory information concerning him.[29] The article attacked Spence's reputa-

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26. *Id.* at 351.
27. *Id.* at 352.
28. *Id.*
29. *Bits & Pieces*, HUSTLER, July 1985, *reprinted in* Spence v. Flynt, 816 P.2d 771, 793 app. A (Wyo. 1991), *cert. denied*, 112 S. Ct. 1668 (1992). The defamatory column written about Gerry Spence is as follows:

> Many of [those] we name Asshole of the Month are members of that group of parasitic scum-suckers often referred to as lawyers. [This] shameless [group] (whose main allegiance is to money) [is] eager to sell out their personal values, truth, justice and our hard-won freedoms for a chance to fatten their wallets. The latest of these hemorrhoidal types to make this page is Jackson, Wyoming, attorney Gerry Spence, our Asshole of the Month for July.

tion as a "country lawyer" and characterized him as being both greedy and a phony, claiming his "just folks" and "family values" reputation was merely a front.[30] In response to the article, Spence filed a suit for defamation. The district court granted Flynt's motion for summary judgment and Spence appealed.[31] The Wyoming Supreme Court reversed the summary judgment, stating that there was a genuine issue of material fact as to whether or not Spence was a public figure, and accordingly, remanded the case to the district court to decide the issue.[32]

B. Reasoning

Flynt's defense was "structured upon the proposition that Spence [had] taken up the fight against pornography, thrust himself into the controversy as a public figure, and [was] therefore subject to response by persons taking the other side."[33] In rejecting this defense, the Wyoming Supreme Court reasoned

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> Spence dudes himself up in western duds and calls himself a "country lawyer," but the log-cabin image is . . . phony . . . . [He] is worth millions and owns a 35,000-acre ranch. Spence's claim to fame is that in the name of "the little guy" he's won some mighty big judgments . . . . He'd like to add HUSTLER to the list [for Andrea Dworkin] . . . . In her latest publicity-grab, Dworkin has decided to sue HUSTLER for invasion of privacy among other things.
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> Dworkin seems to be an odd bedfellow for "just folks," "family values" Spence. After all, Dworkin is one of the most foul-mouthed, abrasive manhaters on Earth. In fact, when Indianapolis contemplated an antiporn ordinance *co-authored* by Dworkin, she was asked by its supporters to stay away for fear her repulsive presence would kill the statute. Spence, however, can demand as much as 50% of the take from his cases. And a possible $75 million would buy a lot of country for this lawyer . . . . [I]t appears Gerry "This Tongue for Hire" Spence is more interested in promoting his bank account than the traditional values he'd like us to believe he cherishes.
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> This case is a nuisance suit initiated by Dworkin, a cry-baby who can dish out criticism but clearly can't take it. The real issue is freedom of speech, something we believe even Dworkin is entitled to, but which she would deny to anyone who doesn't share her views. Any attack on First Amendment freedoms is harmful to all . . . Spence's foaming-at-the-mouth client especially. You'd think someone of Spence's stature would know better than to team up with a censor like Dworkin. Obviously, . . . *greed* has clouded [his] senses.

Id.

30. *Id.*
31. *Spence*, 816 P.2d at 772.
32. *Id.* at 776-77.
33. *Id.* at 776.

that, although the article in *Hustler* was "imaginative expression" and "rhetorical hyperbole"[34] protected under the First Amendment of the Wyoming Constitution,[35] Gerry Spence was acting on behalf of another individual, "arguably without personal involvement."[36] The court stated that in this kind of situation, "there ought to be, and there is, a limit."[37] The court noted that whether or not Spence was personally opposed to pornography was not determinative, since he was only "representing a client who [was] fighting pornography and [was] on her side only in the sense that he [was] providing professional services to her."[38] Thus, if Spence had been engaged in the controversy "beyond the confines of the litigation, he may [have been] subject to appropriate defamatory criticism—fair comment upon a matter of public concern."[39] However, because Spence did no more than represent his client in her litigation against *Hustler*, there was no constitutional privilege for the defamatory publications.[40]

The court further reasoned that "[a] professional person, who may be a 'public figure' for some purposes, should be free to offer his services to a client as a private professional without being subjected to public figure defamation."[41] Otherwise, the lack of protection from defamation would have "a chilling effect upon attorneys who undertake to represent clients in difficult, unpopular, high profile, or sensational types of cases."[42] The court stated that under these circumstances an attorney "is not subject to defamation without recourse."[43] The court empha-

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34. *Id.* at 774.

35. WYO. CONST. art. I, § 37. The Wyoming Supreme Court also cited to Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988), and compared the ad parody in *Falwell* to the article in *Spence*. *Spence*, 816 P.2d at 774. *Falwell* involved a suit filed by Jerry Falwell for defamation against *Hustler* for its parody of a liquor ad in which Falwell was portrayed as having engaged in an incestuous drunken rendezvous with his mother in an outhouse. *Falwell*, 485 U.S. at 48. The Court in *Falwell* held that this "speech" was so outrageous and unbelievable that it was protected by the First Amendment. The Court further held that Falwell was a public figure for purposes of First Amendment law and denied his claim for damages. *Id.* at 57.

36. *Spence*, 816 P.2d at 774.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 777.

43. *Id.*

sized that there must be a balance between freedom of speech and other interests protected by the Constitution and that "[f]ree speech cannot equate with the freedom to intimidate, destroy and defame an advocate seeking to represent a client."[44] The court concluded that a lawyer who is merely an advocate for a famous or controversial client is not a public figure simply because he has taken on that client, and that under the circumstances of this case and the principles of the *Gertz* decision Spence was entitled to his day in court.[45]

Flynt, in its characterization of Spence as a public figure, relied in part upon the publication of Spence's books, *Trial by Fire*[46] and *With Justice for None*.[47] Neither book was published until after the defamatory article was written.[48] Thus, the court reasoned that the controversy giving rise to the defamation was Andrea Dworkin's fight against pornography and that Gerry Spence may not have been a public figure who had entered the fight against pornography previous to the publication of the *Hustler* article.[49]

IV. ANALYSIS

A. Attorneys as Public Figures

Several cases have addressed the issue of whether or not an attorney becomes a public figure by virtue of her involvement in litigation. If an attorney is a prosecutor, she is often

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44. *Id.*

45. *Id.*

46. GERRY SPENCE, TRIAL BY FIRE: THE TRUE STORY OF A WOMAN'S ORDEAL AT THE HANDS OF THE LAW (1986). This book describes a case in which Spence represented Kim Pring, the 1978 Miss Wyoming and a champion baton twirler. *Penthouse* magazine published a short story about a baton-twirling Miss Wyoming, who bore a remarkable resemblance to Miss Pring. Miss Pring sued Penthouse International and the author of the story for libel. The jury found for Miss Pring and awarded her $26.5 million in damages. *Id.* at 396-97. However, the decision was reversed on appeal. *Id.* at 446-52; *see also* Pring v. Penthouse Int'l, Ltd., 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).

47. GERRY SPENCE, WITH JUSTICE FOR NONE: DESTROYING AN AMERICAN MYTH (1989).

48. The article was published in 1985, while the books were published in 1986 and 1989. In order to be a public figure whom publishers are privileged to defame, absent malice, the party must at least have been involved in the public controversy before the defamatory statement was published. *See* Hutchinson v. Proxmire, 443 U.S. 111, 134-35 (1979); *see also* Vern Sims Ford, Inc. v. Hagel, 713 P.2d 736, 739 (Wash. Ct. App. 1986) ("[P]laintiff must be involved in a public controversy before the defamatory statement is published.").

49. *Spence*, 816 P.2d at 776.

considered to be a public official and must satisfy the *New York Times* actual malice standard to maintain a suit for defamation.[50] However, if a private attorney has not thrust herself into the public controversy surrounding a case, she is a private figure and can sue under a negligence standard for defamation.[51] The Supreme Court in *Gertz* held that an attorney is not a public figure simply because she is an officer of the court, is active in civic and professional associations, or has published many books and articles on legal subjects.[52] The Court went on to state that an attorney, in order to become a limited-purpose public figure in relation to the litigation, must thrust herself into the vortex of the public issue or engage the public's attention in order to influence the outcome of the litigation.[53]

B. Defining the Public Figure in Relation to the Particular Controversy Giving Rise to the Defamatory Publication

In *Spence* the court suggested that because Gerry Spence had not injected himself into the fight against pornography as an individual, but had only agreed to represent a client involved in the fight against pornography, he was not a public figure for defamation purposes in relation to that particular

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50. Lackland H. Bloom, Jr., *The Press and the Law: Some Issues in Defamation Litigation Involving Media Coverage of Legal Affairs and Proceedings*, 43 SW. L.J. 1011, 1018 (1990).

51. *See, e.g.*, Western Broadcasting of Augusta, Inc. v. Wright, 356 S.E.2d 53, 54-55 (Ga. Ct. App. 1987) (holding that an attorney, who never availed himself of opportunities to present his case informally through news media and did not make use of whatever notoriety was thrust upon him to influence any public issues, was not a public figure); Steere v. Cupp, 602 P.2d 1267, 1273-74 (Kan. 1979) (stating that an attorney who actively represents a client does not become a public figure for limited purposes without an attempt to gain public attention to influence the outcome of the controversy); Kurth v. Great Falls Tribune Co., 804 P.2d 393, 395 (Mont. 1991) (stating that an attorney does not become a public figure for defamation purposes merely because she represents a client who is of concern to the public). *But cf.* Finkelstein v. Albany Herald Publishing Co., 392 S.E.2d 559, 561 (Ga. Ct. App. 1990) (holding that an attorney who had voluntarily and deliberately thrust himself into forefront of controversy by appearing on local television program for purpose of discussing problems occurring in specific cases was a public figure); Hayes v. Booth Newspapers, Inc., 295 N.W.2d 858, 865-66 (Mich. Ct. App. 1980) (holding that an attorney, by the manner in which he conducted himself in a public judicial proceeding and by consenting to television and newspaper interviews, was a public figure and was required to prove actual malice).

52. *Gertz*, 418 U.S. at 351-52.

53. *Id.*

controversy.[54] However, in defining whether or not Gerry Spence was a public figure in relation to the controversy which provoked the defamation, the court overlooked the fundamental reason for which *Hustler* attacked Mr. Spence.

Hustler attacked Mr. Spence not only for his role as an attorney representing clients in the fight against pornography, but also for his role as an attorney in general. Ordinarily attorneys are not public figures solely because of their choice of profession; Mr. Spence, however, is hardly an ordinary attorney. He is widely known, primarily for his choice of controversial clients,[55] his unconventional courtroom tactics,[56] and his flamboyant style of representation.[57] Although these charac-

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54. *See supra* part III.B.

55. Mr. Spence has represented such controversial and notorious clients as Imelda Marcos, *see* Paul Moses, *Imelda's True Believer*, NEWSDAY, May 7, 1990, at 8; the surviving children of Karen Silkwood, *see* GERRY SPENCE & ANTHONY POLK, GERRY SPENCE: GUNNING FOR JUSTICE (1982); Dave Foreman, *see* Douglas S. Looney, *Protector or Provocateur?: Dave Foreman, Cofounder of the Radical Group Earth First!, Faces Trial for Conspiracy*, SPORTS ILLUSTRATED, May 17, 1991, at 54; and Ed Cantrell, the Wyoming policeman charged with murdering his own undercover agent, a key witness in a drug trial, to keep him from talking to a grand jury, *see* Paul Brinkley-Rogers, *Wyoming Jury Acquits City Sheriff on First-Degree Murder Charge*, WASH. POST, Dec. 1, 1979, at C8.

56. Some of Spence's controversial tactics have included the following: keeping a box containing "the embalmed leg his plaintiff had lost in the accident at issue" on the table in front of him during the trial, Bennett H. Beach, *The Fastest Gun in the West: Cowboy Attorney Gerry Spence Mows Down Corporate Giants*, TIME, Mar. 30, 1981, at 48; arguing with judges, "preceding questions with a brief preamble about why he is asking them and following them up with remarks such as 'good' or 'thank you,' " Paul Moses, *Will Her Suffering Sway Marcos Jury?*, NEWSDAY, June 3, 1990, at 8; and making misleading statements to jurors, leading them to believe that the prosecution may have withheld evidence, William C. Rempel & Kristina M. Luz, *Angry Judge Scolds Marcos Lawyer*, L.A. TIMES, May 31, 1990, at A22.

Spence is also famous for his unique opening statements, one of which was three and a half hours long and included a statement which admitted to mistakes even before the first witness had testified. Moses, *supra* note 55, at 8. One of Spence's opening statements was borrowed for a scene in the movie *Legal Eagles* in which a defense attorney played by Robert Redford tricks jurors into admitting they think his client is guilty before the trial begins. He then gives an inspirational speech on individual rights and persuades the jurors that his client deserves a fair trial and that they will give his client that right. Catherine M. Spearnak, *Thanks to Message, Lawyers Forgive Film's Distortions*, L.A. TIMES (San Diego County), Mar. 9, 1989, § 6, at 1.

57. Spence is described as "commanding." He is six feet, two inches tall and 225 pounds. He moves constantly around the courtroom and speaks in a deep baritone. He likes to illustrate his arguments with props, such as a milking stool whose legs he removes one at a time to demonstrate how his opponent's case will collapse. He also enjoys using folksy, country sayings such as "You've got to get the hogs out of the spring if you want to get the water cleared up." Beach, *supra*

teristics are not always factors in determining if an individual is a public figure, Mr. Spence has used the media throughout his career to gain notoriety and success.[58] He has published four books concerning his cases, his life story, and his methods of client representation.[59] Furthermore, although Mr. Spence had not become involved in the controversy regarding pornography and First Amendment rights before the 1985 *Hustler* article, he had voluntary thrust himself into the public eye as an attorney with a knack for defending the underdog, "just folks," and "family values."[60] Spence's media exposure prior to 1985 would appear to meet the *Gertz* standard of "clear evidence of general fame or notoriety in the community and pervasive involvement in the affairs of society,"[61] thus classifying Spence as a public figure. Pervasive involvement in the affairs of soci-

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note 56, at 48.

58. Prior to 1985 Gerry Spence was notorious in the press as an attorney. *See* Chilton Williamson Jr., *An American Myth*, 1983 NAT'L REV. 332 (reviewing GERRY SPENCE & ANTHONY POLK, GERRY SPENCE: GUNNING FOR JUSTICE (1982)); Beach, *supra* note 56, at 48; Brinkley-Rogers, *supra* note 55, at C8; *Silkwood Damage Trial*, WASH. POST, Mar. 8, 1979, at A5. Not only was Spence notorious in the papers, but prior to 1985 he also appeared as a guest on the television show "Late Night With David Letterman." *See* Sam Merrill, *Playboy Interview: David Letterman*, PLAYBOY, Oct. 1984, at 65, 76.

Since 1985 Gerry Spence has been discussed and quoted in numerous media articles, *see supra* notes 55-56. See also *Spence*, 816 P.2d at 794-95 app. B, for a list of media events in which Spence has participated.

59. GERRY SPENCE & ANTHONY POLK, GERRY SPENCE: GUNNING FOR JUSTICE (1982); GERRY SPENCE, OF MURDER AND MADNESS (1983); GERRY SPENCE, TRIAL BY FIRE: THE TRUE STORY OF A WOMAN'S ORDEAL AT THE HANDS OF THE LAW (1986); GERRY SPENCE, WITH JUSTICE FOR NONE: DESTROYING AN AMERICAN MYTH (1989).

60. *See* GERRY SPENCE & ANTHONY POLK, GERRY SPENCE: GUNNING FOR JUSTICE (1982). In this book Spence commends himself for being a fighter for the underdog: "I am no longer a prosecutor of men. I save men from blind justice, which flogs out against the accused with cold iron hands." *Id.* at 8. Later in the book he describes himself as an attorney:

> Any trial lawyer can come [in] to the courtroom, demolish a witness, and perhaps strike a fatal blow to some opponent. But there is the occasional man who can do his gunfighting with grace and skill and style, which is an art and transcends the act of killing, which is the ultimate performance in the courtroom.

Id. at 16.

Spence called the Silkwood case "the most important case in history." Williamson, *supra* note 58, at 333. Spence also stated that the cases in which he defends crime victims who sue their attackers for civil damages "are as close to basic historical justice as man has ever known." Bennett H. Beach, *Getting Status and Getting Even: The Victims' Movement Forces Some Criminals to Right Wrongs*, TIME, Feb. 7, 1983, at 40. Spence also discussed his representation of the underdog with TIME in 1981. *See* Beach, *supra* note 56, at 48.

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

ety could also be imputed from Spence's comments that his cases were of great importance to society and his claim as savior of the underdog.[62]

Although the article in *Hustler* may not have been published if Spence had not represented Andrea Dworkin, it did not attack him solely on that basis. The *Hustler* article attacked him by pointing out that "Spence dudes himself up in western duds and calls himself a 'country lawyer' " while being "more interested in promoting his bank account than the traditional values he'd like us to believe he cherishes."[63] The article further noted that although Spence has won very large monetary judgments in the name of the "little guy," he takes up to fifty percent of the money awarded.[64] Gerry Spence, by seeking publicity as an attorney and benefiting from such publicity, should also be subject to criticism for his notorious techniques and his claim to fame as an attorney who represents family values and wins cases for the underdog. When one benefits from the media, one must also bear the risk of media criticism.

C. Access to Effective Opportunities for Rebuttal as a Deciding Factor in Defamation Litigation

The Wyoming Supreme Court ignored the reasoning of *Gertz* which stated that the rationale for protecting private figures or limited-purpose public figures is that they have less effective opportunities for rebuttal and therefore are more vulnerable to injury from defamation.[65]

In this particular case, Gerry Spence has ample access to the media in order to rebut the accusations against his character as an attorney, and he has taken advantage of this opportunity. Few private persons have the opportunity to publish four books about their lives and careers, nor do they have extensive media exposure of the job that they perform. Gerry Spence has had all of these opportunities. If *Hustler* had defamed him in an area concerning something other than his career as an attorney, he may have had very little, if any, opportunity to use the media to rebut the defamation. However, since *Hustler*'s comments concerned Spence's work as an attorney, something

62. *See supra* note 60.
63. *See supra* note 29.
64. *See supra* note 29.
65. *Gertz*, 418 U.S. at 343-45.

for which he is famous and receives frequent media coverage, this should be the least protected area of his life under the reasoning of *Gertz*.

V. PROPOSED THREE PART TEST TO DETERMINE WHETHER DEFAMED INDIVIDUAL IS A PUBLIC FIGURE

This note proposes a three part test to determine whether a person should be considered a public figure in defamation litigation when a limited-purpose public figure is involved. Instead of classifying the pubic figure only according to the controversy giving rise to the defamation, the public figure should also be classified in relation to the subject of defamatory attack. This dual classification would prevent the media from being censored when discussing an individual as a public figure in one area just because the person has not thrust herself to the forefront of the debate in a given controversy.

A. Did the Plaintiff Voluntarily Inject Herself into the Particular Controversy Which Gave Rise to the Defamation?

A court should first inquire whether the subject of an alleged defamatory statement thrust herself into the vortex of controversy which encouraged the defamation. This is not a new test; it is simply a restatement of the one established in *Gertz*.[66] In many cases the plaintiff's participation in the particular controversy which gave rise to the defamation will be determinative of whether or not the plaintiff is to be considered a public figure for the defamation litigation. For example, this situation may arise where the article defaming the plaintiff attacks the plaintiff solely for her involvement in the controversy and the article is limited to that issue. In *Spence*, however, *Hustler* attacked Gerry Spence not only for representing Andrea Dworkin in her invasion of privacy suit against *Hustler* but also for his past and present reputation as an attorney and his previous statements concerning his traditional values and his representation of the underdog.

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66. *Id.*

B. Did the Plaintiff Voluntarily Thrust Herself into the Public Eye on the Subject Addressed by the Defamatory Article?

Secondly, the court should inquire whether the plaintiff had voluntarily thrust herself into the public eye on the subject addressed by the defamatory article. This step of the test acknowledges that a public controversy involving the plaintiff may give rise to a defamatory article which does not discuss the plaintiff in light of that particular controversy. Therefore, this test takes into account the subject of the defamatory article itself, not just the controversy giving rise to it. This test can work both ways for plaintiffs. In *Spence*, Gerry Spence will be viewed as a public figure in that he is being attacked as an attorney for his past conduct, but not as a public figure in First Amendment litigation since he did not voluntarily express his personal views on this issue. On the other hand, if a plaintiff is involved in a public controversy and a defamatory article attacks her regarding a subject not related to that controversy, then the plaintiff is not a public figure for the unrelated subject even though the controversy the plaintiff was involved in as a public figure gave rise to the publicity which promoted the article.

Of course this particular test would only be effective if the plaintiff were a limited-purpose public figure under *Gertz*. If the plaintiff were a general-purpose public figure on the other hand, all aspects of her life would be subject to the actual malice standard in defamation litigation.

C. Does the Limited-Purpose Public Figure Have Effective Opportunities for Rebuttal Through the Media or Otherwise?

If one of the first two prongs of the test is met, it must be determined whether the person is to be considered a limited-purpose public figure in a particular area. *Gertz* made it clear that a private person's lack of access to the media increases a state's interest in protecting her.[67] Hence the third test inquires whether the plaintiff has access to the media. This factor becomes extremely important in cases involving attorneys and other professionals. Although a professional may be well

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67. *Id.*

known throughout her field, access to media and opportunities for rebuttal may be limited. An attorney may be well respected, or even notorious, and still lack the requisite media access to be a limited-purpose public figure. However, access to the media should be an important and decisive factor in a case such as this one; not only is Gerry Spence a well-known attorney, but he also has access to the media and has thrust himself voluntarily into the public eye in his role as an attorney.

Active use of this third prong would help protect that which the Wyoming Supreme Court seemed so concerned about in its decision—the chilling effect upon attorneys taking on high profile, controversial, or unpopular clients. This third prong would also protect professional attorneys who do not voluntarily seek fame and notoriety through the media and who do not have access to it for rebuttal. So long as they have not met the required elements of the test, these attorneys would feel free to take on controversial cases without the fear that defamatory statements would be made about them or their personal lives.

VI. CONCLUSION

This note concludes that, under the precedent-setting case of *Gertz*, Gerry Spence is a limited-purpose public figure in his role as a professional and as an attorney, but not as an individual in First Amendment litigation.

This note also suggests a three-part test to determine if an individual is a limited-purpose public figure in regards to particular defamatory statements and publications. First, did the plaintiff voluntarily inject herself into the controversy giving rise to the defamatory publication or statement? Second, did the plaintiff voluntarily thrust herself into the public eye on the subject addressed by the defamatory publication? If one of these two tests has been met, the court must then determine if the plaintiff has sufficient access to the media or other means for effective rebuttal. If so, the plaintiff is considered a limited-purpose public figure for purposes of the defamatory litigation in question, and actual malice must be shown to win the suit.

This test strikes a balance between the vital protection offered by the First Amendment and the right of private individuals who lack the opportunity for rebuttal or redress to be free from malicious and false publications.

Stacey L. Hayden