

Access to Media All A-Twitter: Revisiting *Gertz* and the Access to Media Test in the Age of Social Networking

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*“[T]he individual’s right to the protection of his own good name reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.”*¹

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1. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (citing *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)) (internal quotation omitted).

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I. INTRODUCTION

Since the introduction of the actual malice requirement for public figures in defamation cases,² the test employed by courts to distinguish those public figures from private individuals has frequently included an inquiry as to the level of access to media the plaintiff enjoys. This determination has been one part of a multifactor test used to establish whether the plaintiff is in fact a public figure who then must prove actual malice in order to be successful with a defamation claim. Once the plaintiff is found to be a public figure by way of this test, the burden on the plaintiff is significantly higher—making the likelihood of success much lower. Because of the resulting difficulty for the public figure plaintiff, it is important that the test in place appropriately measures the plaintiff’s role within the controversy and in the public eye.

The definition of what comprises the media has changed in recent years—blogs are no longer at the periphery of the media world, but have found a place within mainstream media as a source and as a tool. The line has further blurred with more widely accessible and user-friendly services that allow users to share with an Internet audience at large; with the advent of such social networking tools as Facebook, YouTube, and Twitter, it has grown easier for anyone and everyone to access the media in one way or another. With the current media landscape such as it is—political candidates announcing their plans to run for office via Twitter and Facebook,³ widely followed print columnists employing blogs in their daily research, corporate America using YouTube videos to reach a wider advertising audience⁴—it is time to reconsider what exactly “access to media” means. Without such a reconsideration, the access to media factor in the public figure test in defamation law is outdated; furthermore, without appropriate reconsideration in the context of technological advances, this

2. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

3. Russell Lissau, *Candidates Like This. Following Obama’s Lead, Hopefuls Embrace the Internet*, CHI. DAILY HERALD, Jan. 2, 2010, at 1.

4. See, e.g., *Gatorade Mission Control*, YOUTUBE, <http://www.youtube.com/watch?v=InrOvEE2v38> (last visited Feb. 23, 2011) (highlighting the corporation’s use of social networking to better access its marketing audience).

test may lead to inaccurate conclusions as to who is a public figure, based on judicial confusion as to what access means.

This Note will present the history of the public-private distinction, beginning in Part II with the Supreme Court's decision in *New York Times Co. v. Sullivan*, where the Court announced the test applicable for public officials in defamation law—requiring a heightened burden to prove a defamation case when a public official alleges defamation. This case began a series of decisions by the Court in which the test was further refined, and the class of people who were required to meet the “actual malice” standard of proof was both clarified and expanded—by the time the Court decided *Gertz v. Robert Welch, Inc.*, those who must prove actual malice included public figures. With *Gertz*, the Court attempted to set forth explicitly the appropriate test for determining whether or not a person alleging defamation is in fact a public figure and must therefore prove actual malice. Because of the added—and not insignificant—burden placed on plaintiffs who are found to be public figures, the Court established a test by which public figures may be proven as such. This required showing that first, she has either achieved pervasive fame or notoriety because of his position in society,⁵ or that because of her role in the controversy at issue in the story, she is a public figure for purposes of coverage pertaining to that controversy. For the latter aspect of the test, the Court required either a showing that she had voluntarily thrust herself into the issue and taken on a position at its forefront, or that she had been involuntarily drawn into that issue.⁶

As one aspect of this determination, the Court instructed that an inquiry as to whether or not the plaintiff had access to the media to adequately redress the claims made against her should be employed.⁷ For this prong of the test, the Court concluded that an individual of prominence would have ways to access the media and therefore to address the public. It left the test at that, without delving into the adequacy required of that response, nor the mode or medium of access that would satisfy the requirement.

This Note will then go on in Part III to give an overview of how that access test has been applied by lower courts, and the results lower courts have come up with when grappling with what exactly access to media means. There is not a clear consensus across all jurisdictions as to the importance of this prong of the test, nor as to what exactly is required to find that access to media is present in a particular context. Indeed, it does not even seem clear what constitutes “media” for the purpose of showing

5. See *infra* note 35 and accompanying text.

6. See *infra* note 37 and accompanying text.

7. See *infra* note 39 and accompanying text.

media access by the plaintiff. This struggle has continued, and in recent years, has run up against the technological developments and trends in the area of online media and user-generated content. Part IV of this Note will provide an overview of the changing nature of the media landscape, noting the striking increase in the number and variety of ways that individuals can access larger audiences through the Internet—and the very fact that such networking has become ubiquitous (indeed, almost expected) in today’s society. The effect of such universal access and networking should not go unnoticed by courts when they are considering an individual who is claiming defamation, but such access does not necessarily equate to the level of access imagined by *Gertz* when the Court established that the ability to redress defamation claims is a factor to be considered.

This Note will then argue in Part V that the access to media test is no longer applicable as it currently stands in this age of widespread access to media, and as such may no longer appropriately serve as a safeguard for private plaintiffs as it was initially envisioned by the *Gertz* Court. In order to do what the Court initially intended of it, the access to media test must take into account what the definition of “media” actually means today, and it then must be adequately tailored to reflect the trend of social networking and many-to-many online communication.⁸ It is not enough to accept the ability to access some form of media—instead, the test must be appropriately limited in order to find only those who have the ability to access a similarly situated audience through a similar means of communication as having adequate means of redress through the media.

II. THE PUBLIC-PRIVATE DISTINCTION IN DEFAMATION LAW

Prior to 1964, defamation law was exclusively governed by state law,⁹ but that changed with *New York Times Co. v. Sullivan*.¹⁰ The case came before the Supreme Court in a time of political change, and with it came a sea of change for the legal world, as well; the Court’s decision was “one of the most famous and important cases in all of constitutional jurisprudence.”¹¹ With this decision, the Court gave a constitutional backbone to the law of defamation—recognizing the First Amendment importance of core political speech and the need to provide publishers with “breathing space” for such speech to occur.¹² In subsequent cases, the

8. See *infra* note 128 and accompanying text.

9. Erik Walker, *Defamation Law: Public Figures—Who Are They?*, 45 BAYLOR L. REV. 955, 956 (1993).

10. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 254 (1964).

11. MARC A. FRANKLIN, DAVID A. ANDERSON & LYRISSA BARNETT LIDSKY, *MASS MEDIA LAW* 271 (7th ed. 2005).

12. *N.Y. Times*, 376 U.S. at 272 (citing *NAACP v. Button*, 371 U.S. 415, 433 (1963)) (internal quotation omitted).

Court broadened the scope of the rules set forth in *New York Times* to occupy the area of defamation law by issuing a series of constitutional decisions,¹³ each decision building upon the last.

A. *New York Times Co. v. Sullivan*

The case with the most significant impact on defamation law began in the arena of the civil rights movement. It stemmed from a full-page editorial advertisement that ran in the *New York Times*¹⁴ that included statements about police and official action against civil rights demonstrators that had taken place in Montgomery, Alabama.¹⁵

The ad contained some apparently false statements regarding the events that had occurred in Montgomery.¹⁶ A claim was brought by the Commissioner of Public Affairs in Montgomery, L.B. Sullivan, who alleged that the advertisement concerned him because of his role in supervising the Montgomery Police Department.¹⁷ Sullivan claimed that the charges asserted by the advertisement were leveled at him simply because of the nature of his duties¹⁸ and that he had therefore been libeled by the advertisement.¹⁹ The trial court agreed, finding the advertisement libel per se,²⁰ a ruling that was upheld by the Supreme Court of Alabama.²¹

In a unanimous decision to reverse the ruling, the U.S. Supreme Court held that the rule of law applied by the Alabama courts was “constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct.”²² In addition, continued the Court, a public official must prove that the publication acted with “actual malice,” that is, “with knowledge that it was false or with reckless disregard of whether it was

13. Thomas Kane, *Malice, Lies, and Videotape: Revisiting New York Times v. Sullivan in the Modern Age of Political Campaigns*, 30 RUTGERS L.J. 755, 762 (1999).

14. *N.Y. Times*, 376 U.S. at 254.

15. *Id.*

16. *Id.* at 258–59 (including other falsehoods such as that the song the ad indicated was sung by the demonstrators was mistaken; that the reasons for the expulsion of some of the students were mischaracterized; that the campus dining hall was never padlocked; that students had protested by boycotting classes rather than refusing to register for classes; that the police never surrounded the campus, though they were deployed on three occasions; and that Dr. Martin Luther King, Jr. had only been arrested four times rather than seven).

17. *Id.* at 256.

18. *Id.* at 258 (“Respondent and six other Montgomery residents testified that they read some or all of the statements as referring to him in his capacity as Commissioner.”). Sullivan was never actually referred to by name in the advertisement itself. *See id.*

19. *Id.* at 256.

20. *Id.* at 262.

21. *Id.* at 263.

22. *Id.* at 264.

false or not.”²³

This holding by the Court marked the first time that the First Amendment played a role in defamation law; the Court upheld these protections as necessary to give freedom of expression the “breathing space” it requires.²⁴ This was a recognition by the Court of the potential for a “chilling” effect if such core political speech was not protected.²⁵ For the first time, the bright line that protected plaintiffs from untrue speech was blurred—the actual malice test ultimately protected those speakers who acted without legitimate awareness of the falsity of their speech when speaking about public officials. The aim was to allow discourse concerning public officials as it advanced the introduction of important ideas into the marketplace.

Following this decision, a series of cases fell into line before the Court. Over the next decade, one case after another was decided that expanded upon or clarified the Court’s decision in *New York Times*. Most significantly for purposes of this Note, the Court expanded the class of individuals who were subjected to the actual malice requirement to include not just public officials, but also public figures.²⁶

B. *Gertz and the Origins of the Access to Media Test*

In 1973, a case came before the Court regarding a Chicago attorney, Elmer Gertz, who was representing the family of a youth who had been shot by a Chicago policeman. His defamation case resulted from an editorial in *American Opinion*²⁷ that accused Gertz of being a “Communist-fronter”²⁸ and of being a member of an organization that had planned a Communist attack on the Chicago police.²⁹ However, the issue in this case

23. *Id.* at 280.

24. *Id.* at 271–72.

25. Kane, *supra* note 13, at 771.

26. This extension was officially made in the companion cases *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, 388 U.S. 130, 155 (1967), but the test for determining how a plaintiff should achieve the status of public figure was set forth in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974).

27. *American Opinion* is a publication of the John Birch Society. *Gertz*, 418 U.S. at 325. At the time, the publication was reporting on a supposed Communist conspiracy against law enforcement. *Id.* For more information about the John Birch Society, see *About the John Birch Society*, JOHN BIRCH SOC’Y, <http://www.jbs.org/about> (last visited Feb. 23, 2011).

28. *Gertz*, 418 U.S. at 326.

29. *Id.* (noting that the organization was the National Lawyers Guild, of which the plaintiff was in fact a member, but that there was no evidence that he or the organization had taken any part in planning the demonstrations during the 1968 Democratic Convention, as asserted by the article). Significantly, in light of the actual malice standard, the Court noted that the editor of *American Opinion* had made no effort to verify the charges against Gertz, despite an editorial introduction to the article that claimed extensive research had been

that was the focus of much of the Court's discussion³⁰ was that of Gertz's presence in the public realm—or lack thereof.

Two years earlier, the Court decided *Rosenbloom v. Metromedia, Inc.*, in which it concluded that the *New York Times* standard applied in such cases that concerned matters of public or general concern³¹—a holding that would certainly lend itself to application in this case because of the publicity surrounding the youth's death in Chicago. However, the plurality decision in *Rosenbloom* left no clear guidance for the application of the *New York Times* standard, so the Court in *Gertz* had to revisit the decision in order to place its holding in the “proper context.”³² In doing so, the Court determined that *Rosenbloom* extended the application of the *New York Times* standard to a degree that the Court found “unacceptable,”³³ leaving otherwise private plaintiffs without an adequate legal remedy for defamatory falsehoods injurious to their reputations.³⁴ Under the precedent set by *Rosenbloom*, any time a private plaintiff found himself involved in a story of interest to the public, he would be required to prove *New York Times* actual malice. With *Gertz*, the Court took a step back from this broad view of the standard for the sake of protecting the truly private plaintiff. The Court recognized that a story garnering media attention does not necessarily make every individual involved in that story a public figure without more. Had it left the test as it was, any person mentioned in any story in the media would automatically meet the *Rosenbloom* standard and be required to show actual malice. This was a burden the Court was not willing to force upon all individuals without requiring a more searching inquiry into their actual role in the issue, and whether they were capable of responding to any allegations leveled at them.

With such concerns in mind, the Court held that the standard for determining whether a plaintiff is in fact a public figure should require looking to the reach of the plaintiff's prominence. On the one hand, courts must consider whether he has achieved “pervasive fame or notoriety . . . for all purposes and in all contexts,”³⁵ making him a general-purpose public figure. On the other hand, a court must consider whether it is dealing with a plaintiff who has voluntarily injected himself into, or has been drawn involuntarily into, a public controversy such that he “becomes a public

conducted. *Id.* at 327.

30. The Court also discussed at length the appropriate level of proof necessary for plaintiffs depending upon whether they are classified as public or private figures. *Id.* at 342–48. However, this aspect of the Court's holding is not relevant to the discussion here.

31. 403 U.S. 29, 44 (1971).

32. *Gertz*, 418 U.S. at 333.

33. *Id.* at 346.

34. *Id.*

35. *Id.* at 351.

figure for a limited range of issues”³⁶—the limited-purpose public figure.³⁷ In describing how a plaintiff might voluntarily inject himself into an issue, the Court stated that he must “thrust himself into the vortex of [the] public issue, [or] engage the public’s attention in an attempt to influence its outcome.”³⁸ A key aspect to the Court’s reasoning was the fact that public figures, like the public officials discussed in *New York Times*, also tend to have more effective opportunities to redress such defamatory statements by maintaining regular access to the media.³⁹

This final point—the self-help available to public figures—has remained a factor in subsequent defamation cases without adequate consideration of its context at the time of the *Gertz* decision and its changing context in light of today’s media landscape. The Court addressed the issue quite simply in *Gertz*, stating merely: “Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.”⁴⁰

The Court treated the notion of access with little explanation, because at the time there existed only one definition of what media could mean, so invariably the media world in which the plaintiff was defamed would be similar to, if not the same as, the type in which that plaintiff could attempt to respond. The Court made no reference to whether there was a differentiation necessary when the defamation appeared in national media versus local media, but it seemed to accept that media, generally speaking, meant the print and broadcast media of the day. Thus it was in those media that defamation could be expected to originate, and it was in those same media that the plaintiff should seek to rebut such defamation.

III. THE ACCESS TO MEDIA TEST IN ACTION

Since *Gertz*, the access to media element of the public figure test has been used frequently by the Supreme Court, as well as by lower courts

36. *Id.*

37. It is clearly much more common for an individual to rise to the level of public figure in the context of one particular controversy. Consider, for instance, Bernard Madoff, who was little known outside Wall Street prior to his arrest and conviction for “the biggest financial swindle in history.” Robert Frank & Amir Efrati, *‘Evil’ Madoff Gets 150 Years in Epic Fraud*, WALL ST. J., June 30, 2009, at A1. For a person to achieve pervasive fame or notoriety, it is generally understood that his name must be universally (or at least widely) recognizable. Examples might include the late Michael Jackson or Oprah Winfrey, figures who are not linked to one particular achievement or controversy but who are recognizable in all contexts.

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

39. *Id.* at 344; see also RODNEY A. SMOLLA, LAW OF DEFAMATION § 2.05 (1st ed. 1986).

40. *Gertz*, 418 U.S. at 344.

(though not with complete consistency⁴¹), to separate the categories of defamation plaintiffs. The Court has continued to justify and explain the element,⁴² and lower courts have continued to rely on it, frequently citing to *Gertz* for the basis of the test.⁴³

A. *The Role of the Test in Categorizing Plaintiffs*

Members of the Court have seen private individuals' inability to access the media as a vulnerability, one that justifies protection of the private individual by not requiring her to prove actual malice under *New York Times*.⁴⁴ In *Hutchinson v. Proxmire*, the Court provided further elucidation of the rule, and found that it is not sufficient merely to show that the plaintiff is able to respond to the defamatory statements and have such responses published in order to establish that he has access to media.⁴⁵ Instead, the plaintiff must have what the Court describes as "regular and continuing access to the media," as such is "one of the accouterments of having become a public figure."⁴⁶ In addition, in order for such access to be sufficient for the purposes of the *Gertz* test, it must command enough media attention to effectively rebut the defamatory statements⁴⁷ (despite the Court's concession in *Gertz* that rebuttal "seldom suffices to undo harm of defamatory falsehood"⁴⁸).

However, it is not clear to what extent the plaintiff must have the ability to rebut defamatory statements. In *Hutchinson*, the Supreme Court attempted to provide more guidance as to this factor,⁴⁹ and in doing so, it created ambiguity as to the threshold for sufficiency when it comes to rebuttal or media access. This decision by the Court obscured the notion of what type of access is necessary, giving weight to the ability to access the media on a regular basis, rather than simply for the purpose of rebuttal in

41. See discussion of *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980) *infra* pp. 13–15.

42. See, e.g., *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 15 (1990); *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 774 (1986); *Hutchinson v. Proxmire*, 443 U.S. 111, 136 (1979).

43. See, e.g., *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, 1090 (5th Cir. 1984); *Street v. NBC*, 645 F.2d 1227, 1234 (6th Cir. 1981); *Mzamane v. Winfrey*, 693 F. Supp. 2d 442, 501 (E.D. Penn. 2010); *Chapman v. Journal Concepts, Inc.*, 528 F. Supp. 2d 1081, 1090 (D. Haw. 2007); *Desai v. Hersh*, 719 F. Supp. 670, 673 (N.D. Ill. 1989); *Reader's Digest Ass'n v. Superior Court*, 690 P.2d 610, 615 (Cal. 1984); *Stolz v. KSFM 102 FM*, 35 Cal. Rptr. 2d 740, 743 (Ct. App. 1994); *Ellerbee v. Mills*, 422 S.E.2d 539, 540 (Ga. 1992).

44. *Philadelphia Newspapers, Inc.*, 475 U.S. at 789 (Stevens, J., dissenting).

45. *Hutchinson*, 443 U.S. at 136.

46. *Id.*

47. *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 171 (1979) (Blackmun, J., concurring).

48. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 n.9 (1974).

49. *Hutchinson*, 443 U.S. at 136.

response to media attention in the alleged defamation.⁵⁰ For lower courts, this has resulted in a trend of paying “lip service to the media access requirement,”⁵¹ but without a clear consensus on what its weight should be, nor on what “access to media” means.⁵² As one federal court put it, the resulting analysis for courts in determining who is a public figure has become “much like trying to nail a jellyfish to the wall.”⁵³

An example of a lower court’s struggle with the access to media factor was demonstrated by the Fourth Circuit in *Hatfill v. New York Times Co.*⁵⁴ In this case, the access to media factor was used as one of several factors that were determinative of the plaintiff’s status as a limited-purpose public figure.⁵⁵ Hatfill, a well-regarded scientist in his field of study, was accused by a columnist in the *New York Times* of sending letters containing anthrax to members of Congress and news organizations.⁵⁶ The court considered his renown in the field of bioterrorism and biological weapons, and therefore his ability to gain attention from media and the public in that arena, as sufficient for showing that he had continuing access to the media.⁵⁷ Instead of focusing on whether he could access the same types of media that had published the allegedly defamatory statements, the court focused on his ongoing relationship with scientific journals and experts in the field as proving sufficient access to channels of communication.⁵⁸

Hatfill cited the Fourth Circuit’s decisions in *Reuber v. Food Chemical News, Inc.*⁵⁹ and *Fitzgerald v. Penthouse International*.⁶⁰ In *Fitzgerald*, the court announced a five-factor test for determining whether the plaintiff is a public figure.⁶¹ The first factor asked whether “the plaintiff had access to channels of effective communication.”⁶² When the court in 1990 again was faced with a defamation claim in *Reuber* by a plaintiff who purported to be a limited-purpose public figure, the court applied this same *Fitzgerald* test and focused on the plaintiff’s activity within his field of expertise, including lectures he had given and reports he had published.⁶³ In

50. *Id.*

50. Walker, *supra* note 9, at 976.

51. *Id.*; see, e.g., Lerman v. Flynt Distrib. Co., 745 F.2d 123, 136–37 (2d Cir. 1984).

53. Rosanova v. Playboy Enters., 411 F. Supp. 440, 443 (S.D. Ga. 1976), *aff’d*, 580 F.2d 859 (5th Cir. 1978).

54. 532 F.3d 312 (4th Cir. 2008).

55. *Id.* at 318–19.

56. *Id.* at 314, 320–21.

57. *Id.* at 322.

58. *Id.* at 320–21.

59. 925 F.2d 703 (4th Cir. 1991).

60. 691 F.2d 666 (4th Cir. 1982).

61. *Id.* at 668.

62. *Id.*

63. *Reuber*, 925 F.2d at 708.

this instance, it was within this scientific arena that Reuber's reputation had come under fire, and based on that fact, the court found that looking at these channels and his access therein was the appropriate inquiry in considering where that reputation could be redeemed.⁶⁴ "The inquiry into access to channels of communication proceeds on the assumption that public controversy can be aired without the need for litigation and that rebuttal of offending speech is preferable to recourse to the courts."⁶⁵

The court in *Reuber* unnecessarily went on to note that it was significant that the plaintiff there had not attempted to rebut the statements through those channels to which he had access. However, *Gertz* did not ever clearly state that an attempt at rebuttal is necessary, but rather the appropriate inquiry is only whether the individual had the *opportunity* to do so based on his status.⁶⁶ And so in *Hatfill*, the Fourth Circuit correctly stepped back toward the *Gertz* conclusion and away from the analysis that the *Reuber* court had engaged in. The *Hatfill* court determined that it is not required that rebuttal be attempted, merely that the plaintiff's capability to do so be considered in weighing the individual's potential access to media.⁶⁷

But in *Hatfill*, the court also seemed to disregard the importance of its position in *Reuber* that the channels of communication that are considered "effective" for the purposes of response are those same channels in which the reputation of the plaintiff was first at issue.⁶⁸ When the *Hatfill* court relied on this precedent, it mistakenly relied upon the attention Reuber had garnered within the same arena in which he was defamed—the court treated this as a signal that a visible reputation within a scientific community was sufficient to show access to channels of effective communication.⁶⁹ The error the *Hatfill* court committed when drawing its comparison to *Reuber* was its disregard for the fact that Reuber, unlike *Hatfill*, was alleging defamation in the same arena in which he had gained public recognition; in contrast to Reuber, *Hatfill* was alleging defamation in the *New York Times*—clearly *not* a scientific journal or science-specific publication. And while the court engaged in a discussion of the various times he had been interviewed by or mentioned in similar such media

64. *Id.*

65. *Id.* at 708–09 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974)).

66. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).

67. See *Hatfill v. N.Y. Times Co.*, 532 F.3d 312, 317–18, 322 (4th Cir. 2008).

68. *Reuber*, 925 F.2d at 708–09.

69. *Hatfill*, 532 F.3d at 322 ("In *Reuber*, we found that the plaintiff had testified before Congress and the Environmental Protection Agency; had given lectures on subjects related to the allegedly defamatory articles in which he was mentioned; had provided interviews to a newspaper; and had published several relevant scientific papers. If Reuber's access to channels of communication was sufficient, so too is Dr. *Hatfill's*." (citation omitted)).

outlets, the court did not make it clear that it was on the basis of his ability to access those outlets that his access to media was considered sufficient.⁷⁰ Indeed, it is not clear from the court's analysis whether it would have been merely sufficient for the purposes of the access to media test to show that Hatfill enjoyed renown in the field of bioterrorism, or whether it was the fact that he had also had been interviewed for both newspapers and television reports that satisfied the requirement.⁷¹

It is that latter level of effectiveness that would seem to be the one considered and set forth by *Gertz*, since the *Gertz* Court was aiming at the notion of rebuttal—the ability to mitigate harm done by the purportedly defamatory statement by accessing the same or a substantially similar audience.⁷² Merely showing that a plaintiff enjoys some access to some form of media is not sufficient; in *Hatfill*, it must have been his access to the same or substantially similar outlets to the one in which the defamatory material appeared that proved he had the appropriate level of access to media to satisfy that prong of the limited-purpose public figure test.

B. *Departure from the Access to Media Test*

Other lower courts have not given this media access factor the same weight as the courts in the decisions discussed above; and some have found that it is not necessarily an integral part of the test in determining whether the individual is a public figure—despite references to *Gertz* and use of its language in stating the rule to be applied.

For instance, in *Waldbaum v. Fairchild Publications, Inc.*,⁷³ the district court set forth a three-part rule for determining whether the plaintiff is a limited-purpose public figure. First, there must be a public controversy

70. *See id.* at 321–22.

71. If it is the latter that the court intended to point to, then this would seem to satisfy the *Gertz* test as the court originally imagined it. That is, if it was because he was quoted in an article in the *Washington Post* and featured in a news broadcast on ABC News, as well as the variety of different media outlets that ran stories featuring comments by Hatfill in the days following the initial allegation, then this would seem to show that he had access to effective channels of communication that are in the same vein as the media outlet that initially published the allegedly defamatory statement (the *New York Times*). However, it is the court's reliance on *Reuber* that blurs its conclusion because of the different categories of media involved in the two cases. In *Reuber* it was only necessary to show that the plaintiff had access to scientific journals and similar such outlets; in *Hatfill*, the plaintiff's access must go significantly beyond the scientific community. Therefore, stating "If Reuber's access to channels of communication was sufficient, so too is Dr. Hatfill's," *Hatfill*, 532 F.3d at 322, seems to underestimate the level of access necessary for Hatfill to satisfy the *Gertz* test.

72. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974) (emphasizing the ability of plaintiffs to "counteract false statements" when considering what "effective communication" means).

73. 627 F.2d 1287 (D.C. Cir. 1980).

or a dispute that has received media attention because of its potential impact.⁷⁴ Second, the plaintiff's role in the controversy must be analyzed by considering whether he or she has in fact, as set forth in *Gertz*, "thrust" himself or herself into the public controversy.⁷⁵ Finally, the *Waldbaum* court considered the defamatory statement and its relationship to the plaintiff's role in the controversy.⁷⁶

The court in *Waldbaum* makes no mention of access to effective channels of communication in order to respond to the defamatory statements, and, similar to *Waldbaum*, many courts have relied on such tests that do not use the access to media factor.⁷⁷ In fact, one such court makes a note of the lesser importance of the access to media factor of the test, even when it is used by courts, before proceeding to decline to use the test itself: "Almost anyone who finds himself in the middle of a controversy will likely have enough access to the press to rebut any allegedly libelous statements, thus satisfying the Supreme Court's first concern. It is perhaps because of this that the Court has regarded the second justification as more important."⁷⁸

And so lower courts continue to regard the limited-purpose public figure test with some confusion, and without a consistent voice. These courts have attempted to use the guidance offered by the Supreme Court by way of *Gertz* and *Hutchinson*, but have not managed to reach a consensus on the importance of the access to media prong of the test.⁷⁹ While it is clear that the Court regarded the role of the plaintiff in the controversy itself as an important determination for a court to make when assessing the classification of the plaintiff, his access to media was certainly an aspect the Court considered essential in *Gertz* and *Hutchinson*. It is just the exact nature of this access that was not clearly defined.

74. *Id.* at 1296.

75. *Id.* at 1297; *see also Gertz*, 418 U.S. at 345.

76. *Waldbaum*, 627 F.2d at 1298.

77. *See, e.g., Parsi v. Daiouleslam*, 595 F. Supp. 2d 99, 105 (D.D.C. 2009); *Framsted v. Mun. Ambulance Serv.*, 347 F. Supp. 2d 638, 662 (W.D. Wis. 2004); *Howard v. Antilla*, No. 97-543-M, 1999 U.S. Dist. LEXIS 19772, at *3-4 (D.N.H. Nov. 17, 1999).

78. *Clyburn v. News World Comms., Inc.*, 903 F.2d 29, 32 n.2 (D.C. Cir. 1990).

79. From lower courts' downplaying of what "access to media" actually means in the defamation context, it often appears that the heart of the overall test to determine whether a plaintiff is public or private is in fact the role the individual played in the controversy—whether he had voluntarily injected himself in it or thrust himself to the forefront. This is in keeping with the discussion in *Gertz* that emphasized that the heart of the issue was not the relative ease with which the public individual can access the media, but the very fact that he brought publicity upon himself in the first place. *Gertz*, 418 U.S. at 344, 345. Eliminating the access to media test, however, ignores the Court's added concern about plaintiff's ability to respond to the allegations, and therefore to effectively redress the claims made against him. *See id.* at 344.

C. *The Test as Imagined by the Gertz and Hutchinson Courts*

In considering *Gertz* and *Hutchinson* together, the Court's aim with the access to media element of the test seems to be weighing the plaintiff's ability to command media attention in order to redress claims leveled against him.⁸⁰ This would seem to resemble something more like the Fourth Circuit's description in *Reuber* of the capability to access "the fora where [the plaintiff's] reputation was presumably tarnished and where it could be redeemed."⁸¹ It was the Supreme Court's goal to consider when a plaintiff would be able to effectively limit the damage done to him by defamatory statements in the media, and lower courts that recognize the importance of that aspect of defining a public figure have continued to use that element of the test.⁸²

The difference between a public figure and a private individual changes the nature of what the plaintiff must prove in a defamation case, and a public figure—more capable of accessing the media and therefore of clearing his name—has a more difficult burden of proof. So it is the private figure that the *Gertz* and *Hutchinson* courts were considering; it is the private figure—who is unable to effectively stave off the negative comments made against him by responding with his own comments—that the Court was interested in protecting. Thus the Court's concern was allowing those private individuals to prove their case and receive their remedy through the courts.

However, the actual use of the test as applied by the lower courts⁸³ often looks primarily at the first factor in the limited-purpose public figure test—that of the plaintiff's role in the controversy—and less so at the plaintiff's ability to respond effectively to defamatory statements that appear in the media. Doing so, in fact, may seem logical in today's world of twenty-four-hour news cycles and fully integrated media outlets; the media are not only more accessible for the private individual, but in fact are at his fingertips.⁸⁴ But this is not necessarily the most protective approach for private individuals. This media world, with so many eyes on so many

80. *Id.* at 345; *Hutchinson v. Proxmire*, 443 U.S. 111, 136 (1979).

81. *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 708 (4th Cir. 1991).

82. *See, e.g., Wells v. Liddy*, 186 F.3d 505, 531, 534 (4th Cir. 1999); *Douglass v. Hustler Magazine*, 769 F.2d 1128, 1141 (7th Cir. 1985); *Chapman v. Journal Concepts, Inc.*, 528 F. Supp. 2d 1081, 1093 (D. Haw. 2007).

83. *See* Mark D. Walton, *The Public Figure Doctrine: A Reexamination of Gertz v. Robert Welch, Inc. in Light of Lower Federal Court Public Figure Formulations*, 16 N. ILL. U. L. REV. 141, 166 nn.134–35 (1995).

84. *See, e.g.,* Aaron Perzanowski, Comment, *Relative Access to Corrective Speech: A New Test for Requiring Actual Malice*, 94 CALIF. L. REV. 833, 836 (2006) ("The public figure doctrine fails to account for access to means of corrective speech so prevalent on the [I]nternet. But ironically, the ability to respond to defamatory speech served as a central consideration in the creation of the public figure test.").

different sources, still does not allow for just anyone to have the kind of access that the *Gertz* Court had imagined was possessed solely of public figures. And it is true that not all courts have moved away from the access to media test altogether. Therefore, the access to media test remains a potentially confusing and damaging tool for the courts to wield in separating public figures from private individuals. In order to effectively make this distinction, the *Gertz* vision of the access to media prong must be revived to give it a new meaning and new life.

IV. DEVELOPMENTS IN MEDIA, SHIFTS IN THE MAINSTREAM CURRENT

At the time that *Gertz* was decided, the media consisted solely of print and broadcast outlets. This media makeup was taken for granted by the Court in its almost dismissive reference to the greater access enjoyed by public officials and public figures.⁸⁵ While it remains true that public officials and public figures are in the best position to garner the attention of large media outlets with minimal effort, this model fails to account for the massive changes that have taken place—and are still taking place—in the media world, and how those changes may impact the limited-purpose public figure.

A. *New Definitions, New Media*

In recent years, the communication world has undergone a “dramatic democratization”⁸⁶ and the media landscape has shifted greatly. With the advent of the blogosphere, followed closely by the rise of Facebook, YouTube, and Twitter, Internet media are no longer irrelevant or obscure.

Just a few short years ago, blogs were considered to be on the periphery of the media world, something less than real journalism. In 2006, blogs were referred to by one columnist as “the bustling, energetic Wild West of the new Internet media.”⁸⁷ Even though, at that time, blogs had proven their significance by forcing Dan Rather’s hand in revealing the truth about President George Bush’s military record after he reported on President Bush’s National Guard service based on what turned out to be forged documents,⁸⁸ blogs were still on the verge of being taken seriously.

However, bloggers no longer go relatively unnoticed. If there are rumors circulating in the blogosphere, they will often be responded to in

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

86. Perzanowski, *supra* note 84, at 833.

87. Ellen Goodman, *Bloggers Owe Carroll an Apology*, BOS. GLOBE, Apr. 7, 2006, at A17.

88. *See* Tim Goodman, *Apology from CBS on Bush Memos*, S.F. CHRON., Sept. 21, 2004, at A1.

the media. An example from the McCain-Palin campaign demonstrates this phenomenon. Despite the absence of any “mainstream” press coverage of Palin’s sixteen-year-old daughter’s pregnancy, a press release was issued by McCain’s campaign addressing the pregnancy to dispel rumors that had been cropping up on blogs.⁸⁹ Now “prominent journalists, many of whom are bloggers themselves, promote blogs—or at least certain blogs, such as those run by mainstream media outlets—as legitimate media outlets.”⁹⁰ Blogs have become normal features on news outlets’ websites,⁹¹ and in fact, it is commonly a marketing or corporate tool, without which professional competitors might see an organization as an outcast.⁹²

In addition to blogs, Facebook and Twitter have recently taken on a legitimate role in the world of online media. More and more organizations are using Facebook and Twitter for their massive reach and their communication and marketing potential. Congressmen are taking tutorials on how to use Facebook to further relationships with constituents,⁹³ and there have been announcements of political candidacy on Twitter that are then reported in the print media.⁹⁴

With so much integrated use of online services, it is clear that these tools are coming closer to the center of the media stage. However, it is not clear that courts are in tune with these changes, nor is it clear that they are prepared to accept the possibility that an otherwise private individual may have the capacity to reach thousands through her Facebook page, tweets, or blog, without necessarily assuming a place in the realm of public figures.

89. Michael D. Shear & Karl Vick, *No Surprises from Palin, McCain Team Says*, WASH. POST, Sept. 2, 2008, at A17 (“McCain advisers said that after talking to Palin, they decided to issue the statement about Bristol’s pregnancy in the wake of repeated inquiries from reporters after liberal blogs raised questions . . .”).

90. Anthony Ciolli, *Bloggers as Public Figures*, 16 B.U. PUB. INT. L.J. 255, 257 (2006).

91. See, e.g., *CNN Political Ticker*, CNN.COM, <http://politicalticker.blogs.cnn.com/> (last visited Feb. 23, 2011); *Blog Directory*, NYTIMES.COM, <http://www.nytimes.com/ref/topnews/blog-index.html> (last visited Feb. 23, 2011).

92. Etan Horowitz, *Film Recalls Blogging’s Simpler Times*, ORLANDO SENTINEL, Aug. 9, 2009, at G1; see also Rob Johnson, *Running the Show—Screen Shots: Product Placements Aren’t Just for Big Companies Anymore*, WALL ST. J., Sept. 28, 2009, at R9 (explaining the potential for product placement and advertising on Facebook, Twitter, and blogs).

93. Ian Shapira, *Lawmakers Find a Friend in the Power of Facebook*, WASH. POST, Dec. 30, 2009, at C01 (discussing a lesson given by a Facebook representative to Republican congressman, Rep. Peter Roskam of Illinois, who was learning about the ways to use Facebook to provide more personal and timely information to his constituents, and to help his constituents feel more connected to him).

94. See, e.g., Tom Infield, *Gerlach Declares GOP Run for Governor*, PHILA. INQUIRER, July 15, 2009, at B01.

B. “New” Media and the Impact on Defamation Law

The Supreme Court’s basic assumptions as to media in the time of *New York Times* and *Gertz* reflect the nature of media in that time—“a simplistic and antiquated conception”⁹⁵ that hardly compares to how the media world looks today. The contexts in which blogs come up in courtrooms often involve reporters’ privileges (that is, whether privileges that are granted to journalists should be extended to bloggers, as well⁹⁶) and whether or not anonymous bloggers can be forced to reveal themselves when they have made defamatory statements.⁹⁷

Courts are certainly not entirely unaware of the existence of this form of media, be it blogs or Facebook or MySpace.⁹⁸ Instances of abuse or harassment stemming from interactions on Facebook and MySpace are not infrequent;⁹⁹ child pornography and other cybercrimes force courts to look

95. Perzanowski, *supra* note 84, at 833.

96. *See, e.g., In re Miller*, 397 F.3d 964, 979 (D.C. Cir. 2005) (Sentelle, J., concurring).

[I]f we extend that privilege to the easily created blog . . . have we defeated legitimate investigative ends of grand juries in cases like the leak of intelligence involved in the present investigation? . . . [D]oes the privilege also protect the proprietor of a web log; the stereotypical “blogger” sitting in his pajamas at his personal computer posting on the World Wide Web his best product to inform whoever happens to browse his way? If not, why not?

Id. at 979, 981 (Sentelle, J., concurring); *see also Lee v. Dep’t of Justice*, 401 F. Supp. 2d 123, 140 (D.D.C. 2005) (“The proliferation of communications media in the modern world makes it impossible to construct a reasonable or useful definition of who would be a ‘reporter’ eligible to claim protection from a newly minted common law privilege.”). There is little exploration by courts as to whether bloggers are journalists, or something different entirely. *See BidZirk, LLC v. Smith*, No. 6:06-109-HMH, 2007 U.S. Dist. LEXIS 78481, at *16 (D.S.C. Oct. 22, 2007) (“[T]here is no published case deciding whether a blogger is a journalist.”).

97. *See, e.g., McVicker v. King*, 266 F.R.D. 92 (2010) (finding that First Amendment rights can be asserted by those posting on a blog, thereby leaving their anonymity intact); *Mobilisa, Inc. v. Doe*, 170 P.3d 712 (Ariz. Ct. App. 2007) (setting forth the test that must be met in order to compel the discovery of an anonymous Internet user in defamation cases); *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231 (Ct. App. 2008) (holding that a subpoena to reveal an Internet poster’s identity should have been quashed).

98. *See, e.g., Salter v. State*, 906 N.E.2d 212, 220 (Ind. Ct. App. 2009) (acknowledging that Facebook and MySpace increase the risk of child pornography images appearing on the Internet); *In re Forgione*, 908 A.2d 593, 603 n.11 (Conn. Super. Ct. 2006) (acknowledging that students could access one another’s personal information via “an Internet program or service known as ‘The Facebook’”).

99. *See, e.g., United States v. Beckett*, No. 09-10579, 2010 U.S. App. LEXIS 4989 (11th Cir. Mar. 9, 2010) (dealing with an appeal from a conviction for child pornography charges that arose from the defendant’s falsely created MySpace accounts, which were used to persuade minors to send nude photos over the Internet); *United States v. McCloud*, 590 F.3d 560 (8th Cir. 2009) (dealing with an appeal from a conviction for producing child pornography and in which the court described the defendant’s interactions with victims over MySpace); *United States v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2009) (describing interactions over MySpace through a fake profile set up by defendant, including the resulting suicide of the target of the MySpace interactions); *United States v. Infante*, No. 10-6144M, 2010 U.S.

to the Internet and develop at least a cursory understanding of its contents. Even jury instructions appropriately address the Internet services that might allow jurors to communicate with others.¹⁰⁰ However, it does not seem that courts are yet comfortable with defining the role that the Internet will play in defamation law as a component of the media—not just as courts grapple with how to appropriately address anonymous bloggers who are liable for defamation, but also how this arm of the media should be treated in considering the defamed individual’s options for redress.

Media are rarely specifically defined in the defamation context, giving little guidance for what should be included in a court’s assessment of just what media qualify for the access to media test.¹⁰¹ Without taking that extra step to establish the types of media at play, courts are missing a major point of the *Gertz* test: the *Gertz* Court imagined this prong as a means of redress—redress cannot happen unless an audience that is the same or substantially similar can be accessed and exposed to such a rebuttal.

Dist. LEXIS 30730 (D. Ariz. Mar. 30, 2010) (describing the defendant’s stalking of the victim, which included contact via Facebook).

100. See, e.g., *In re MAI-CIVIL*, 2009 Mo. LEXIS 544, at *5–6 (Mo. Nov. 23, 2009) (including an instruction admonishing jurors that they are not to “use a cell phone, record, photograph, video, e-mail, blog, tweet, text, or post anything about this trial . . . to the Internet, ‘facebook’, ‘myspace’, ‘twitter’, or any other personal or public web site . . .”); *People v. Jamison*, 899 N.Y.S. 2d 62 (N.Y. Sup. Ct. 2009) (instructing jury not to use Google Earth or to text or chat online about the case, in addition to instructing them not to communicate on social websites such as Facebook, MySpace, or Twitter).

101. Thomas D. Brooks, Note, *Catching Jellyfish in the Internet: The Public-Figure Doctrine and Defamation on Computer Bulletin Boards*, 21 RUTGERS COMPUTER & TECH. L.J. 461, 478 (1995) (“The Court has never offered anything near a working definition of ‘the media.’ Rather, its approach is reminiscent of that employed by Justice Stewart when faced with the task of defining pornography: the justices know it when they see it.”) (citing *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)); see also, e.g., *Chapman v. Journal Concepts, Inc.*, 528 F. Supp. 2d 1081 (D. Haw. 2007); *Fiacco v. Sigma Alpha Epsilon Fraternity*, 484 F. Supp. 2d 158 (D. Me. 2007) (summarizing that the position held by the plaintiff involved access to media, mentioning only articles published in a campus newspaper); *Chafoulias v. Peterson*, 668 N.W.2d 642, 654 (Minn. 2003) (concluding that, despite the fact that the initial defamatory story aired on a national ABC program, the plaintiff’s ability to appear in a two-part story on a local NBC affiliate was sufficient to show he had “broad media access, allowing him to strategically place media appearances . . .”). In *Chapman*, which concerned a plaintiff who was a surfer, the court summed up his media access:

[T]he sheer volume of published materials quoting or referencing Plaintiff indicate that the surfing media was, and continues to be, interested in him Although the record on this matter is thin, it appears to the court that if Plaintiff wanted to rebut [the] article—whether through an interview, profile, or opinion piece—the surfing media would be receptive.

Chapman, 528 F. Supp. 2d at 1092. This is not atypical of a court’s treatment of this prong of the test, wherein the court ignores any mention of the type of media in which those “interview, profile, or opinion” pieces might run. After acknowledging the necessity of assessing access, courts do not specifically explain what media would have satisfied the prong, nor the types of media involved in the instant case that do satisfy the prong.

V. ACCESS, ACCESS EVERYWHERE

In the current media environment, anyone with a computer can become a publisher, and while many bloggers remain in obscurity, bloggers and those well connected on social networking sites can successfully gain media attention.¹⁰² When that occurs, a blogger who was otherwise a private individual may open herself up to the possibility of defamatory statements.

In order to appropriately protect the private blogger from the heightened standard of actual malice that she would be required to prove as a limited-purpose public figure, it is necessary to give weight to the other prongs of the test—that is, whether there is an isolated controversy, whether the plaintiff has voluntarily thrust herself into the controversy, and so on—before jumping straight to the access to media prong. In the absence of such an approach, courts will necessarily lapse back to the reasoning of the Court in *Rosenbloom*—one that was found to be unacceptable by the *Gertz* Court¹⁰³—by weighing only the element of public interest in the controversy at hand and allowing that to uniformly create limited-purpose public figures.

Once the other factors of the test have been appropriately weighed, courts can turn to the access to media prong to differentiate plaintiffs who may not automatically seem to be a central figure in the controversy from those who clearly have thrust themselves into the controversy and have taken the lead in determining its outcome.¹⁰⁴ It is with this prong that courts

102. See, e.g., Kyra Kyles, *Bravo to Ordinary Twitter Celebrity*, REDEYE (Aug. 6, 2010, 8:18 AM), <http://www.chicagonow.com/blogs/kyles-files/2010/08/column-fodder-bravo-to-ordinary-twitter-celebrity.html>. The blog discusses Twitter user Steven Holmes, a UK citizen who became the first person rapper Kanye West began following shortly after West started using Twitter. Holmes rejected the attention the celebrity's following incited, tweeting—presumably after the interviews he granted to local British media—“I won't be speaking to anybody else; surprisingly not everyone wants to be famous That's all I'm saying—peace out x.” *Id.* The RedEye column noted Holmes' ability to “recognize, and rebuff, the ridiculous fame seemingly bestowed on anybody these days, from a baby singing ‘Single Ladies’ to a grown man squealing like a sow over double rainbows.” *Id.*; see also Sarah Lyall, *A Tweet Read Across Britain Unleashes a Cascade of Vitriol on a User*, N.Y. TIMES, Nov. 2, 2009, at A8 (discussing a “tweet” made by a user called “brumplum” that launched a frenzied debate and called attention to the user, an otherwise unknown resident of Birmingham, England); Maureen Ryan, *An Unlikely New Source of Writing Talent: Blogs*, CHI. TRIB., Oct. 8, 2003, at C1 (discussing bloggers who had garnered wide following and readership, and their subsequent hiring potential); P.J. Huffstutter & Jerry Hirsch, *Blogging Moms Wooed by Firms*, L.A. TIMES, Nov. 15, 2009, at A1 (discussing a trend of food companies calling upon “mommy bloggers” to review their products).

103. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974).

104. If this is the case, an individual will often be both attracting and creating media coverage through the very nature of her involvement in the controversy. This is when the access to media prong can appropriately be downplayed, since when evaluated, it will be found to be satisfied.

can gauge the individual's ability both to seek redress through the media and to access an audience through which the defamation can be rebutted.

A. *Constant Contact Between Private Individuals*

Communicating constantly through social networking and other Internet service providers has become so much a regular and routine practice of private individuals that there is not an assumption of receiving widespread attention from those communications.¹⁰⁵ In this age of social networking, virtually everyone who is active on the Internet has become a publisher to some extent¹⁰⁶—this means there are millions of potential news outlets to be accessed everyday, with far fewer eyes on any individual outlet. However, even though “[m]illions of teenagers use MySpace, Facebook, and YouTube to display their interests and talents, . . . the posting of that information hardly makes them celebrities.”¹⁰⁷

Without an emphasis on the voluntariness and involvement in the controversy, it could be argued that anyone who can publish online should be considered a limited-purpose public figure.¹⁰⁸ Inaccurate assumptions about accessing online audiences may lead to widening the scope of limited-purpose public figures, as it may be taken for granted that communicating to audiences online does not necessarily equate to seeking

105. Cf. Ciolli, *supra* note 90, at 257 (arguing that a blogger must expect to receive attention when she puts her thoughts about a controversy on a publicly accessible website because of widespread readership of blogs). *But see* Lyall, *supra* note 102 (noting that the user “brumplum” stated on his blog that his seemingly casual and “mildly critical” tweet about British actor Stephen Fry had resulted in an unexpected surge of Twitter followership and media attention, thus demonstrating the unexpected attention that a private individual can spur without doing more than typing a quick tweet); *Nottingham ‘Tweeter’ Gets Followed Online by Kanye West*, NOTTINGHAM EVENING POST (U.K.), Aug. 6, 2010, at 3 (noting that the Twitter user whom Kanye West began following did not think the publicity of having a celebrity following him, a move which resulted in the user gaining 6,000 followers on the social networking site despite his otherwise relative obscurity on Twitter, was “worth it.”).

106. See Perzanowski, *supra* note 84, at 835.

107. *D.C. v. R.R.*, 106 Cal. Rptr. 3d 399, 428 (Ct. App. 2010). This is contrary to what was once thought about the ability to respond on the Internet; when first the possibility of posting immediately on message boards became an option, some thought that this would mean that anyone capable of creating such a posting could adequately respond. Thus, by the same argument, anyone who could access the Internet was a public figure. For this argument, see generally Mike Godwin, *The First Amendment in Cyberspace*, 4 TEMP. POL. & CIV. RTS. L. REV. 1 (1994); Michael Hadley, Note, *The Gertz Doctrine and Internet Defamation*, 84 VA. L. REV. 477 (1998). However, it has become clear more recently that the Internet is more often a place for private individuals to network broadly than for private individuals to take on a public persona by virtue of their networking.

108. See David Gordon, *Taking the First Amendment on the Road: A Rationale for Broad Protection for Freedom of Expression on the Information Superhighway*, 3 COMMLAW CONSPECTUS 135, 142 (1995).

“both influence and attention.”¹⁰⁹ While certainly a person posting on the news feeds¹¹⁰ of his 800 Facebook friends may be well-known within that group, that is hardly grounds to require him to prove *New York Times* actual malice the moment he is defamed; this is even more evident on Twitter, where a relatively unknown individual can drum up followers numbering in the thousands, many of whom may not even know the user’s real name.¹¹¹ This becomes a dangerous gray area when defamation is at issue, because the plaintiff who cannot successfully show he is a private figure will be required to show actual malice—a burden that the Supreme Court never imagined would extend to truly private individuals.

Early views of the Internet did not take into account the possibility of this user-generated world that is the Web of today.¹¹² As one attorney noted in 1995, “[the Internet publisher] has greater access (than private figures) to the mass media and, thus, needs less libel protection, because he can rebut claims against him Through global, instantaneous communication, everybody has the ability to rebut everybody.”¹¹³ It is true that the individual has means on the Internet to widely access other individuals, and now almost any individual can be such an “Internet publisher”; but the assumption that “[t]he mere act of creating a blog draws public attention to the author and his or her views”¹¹⁴ does not hold true in an era of such proliferation of user-generated content. The existence of so many sources of information reduces the number of eyes on any one source; so despite posting information on the Internet, an Internet user does not necessarily guarantee herself access to an audience of any significant proportion. Therefore, without properly balancing the generalization that Internet users can adequately rebut statements made about them against the other considerations of the limited-purpose public figure test, and without tailoring the test to reflect the nature of the media involved both in the defamation and in the potential for response, it is not clear how widely such a classification might reach.

As such, it is necessary for courts to approach this new version of access to media with caution. Simply concluding that “[b]y creating a blog,

109. Ciolli, *supra* note 90, at 271.

110. Facebook publishes a “News Feed” on the home page of all users, documenting the status messages and activity of the user’s friends.

111. This is made clear by the plight of “brumplum,” the Twitter user who had the misfortune of offending a popular actor, and therefore who now has over 1,200 followers. Lyall, *supra* note 102.

112. See, e.g., Godwin, *supra* note 107, at 5.

113. Gordon, *supra* note 108, at 142 (alteration in original) (quoting David L. Marburger, a lawyer for a defendant in an Internet libel suit) (internal quotation marks omitted).

114. Ciolli, *supra* note 90, at 272.

especially a blog that enables comments or [W]eb syndication feeds, individuals seek both attention and influence in public debate, and thus fulfill one of the elements of a limited purpose public figure,”¹¹⁵ the limited-purpose public figure test will know no bounds on the Internet. Private individuals who are actively involved on the Internet will be crossing liability lines unawares—or worse, if such a trend were to actually gain legal steam,¹¹⁶ individuals might be deterred from sharing or networking broadly online. This could put a damper on user-generated content on the Internet, a tool that has become ubiquitous in today’s culture, and which is continually changing to reflect the new ways it can be used to connect individuals more widely on an international scale.¹¹⁷ If individuals no longer feel that they are free to connect and share with one another without exposing themselves to the risk of becoming public figures in defamation claims, this modern version of the marketplace of ideas could be chilled.

B. *Gertz in the Age of Social Networking*

When the Court was deciding *Gertz*, it did so with a singular

115. *Id.*

116. *Id.* at 269 (noting that as of the date of that publication, no blogger had sued another individual or entity for defamation, but such lawsuits are inevitable).

117. Social networking sites have contributed to coordinating political activism on a grand scale in recent years. This was especially apparent amid the January 2011 uprisings in Tunisia and Egypt, the organization of which was largely credited to Facebook by a number of media outlets. *See, e.g.,* Roger Cohen, *Facebook and Arab Dignity*, N.Y. TIMES, Jan. 24, 2011, available at http://www.nytimes.com/2011/01/25/opinion/25iht-edcohen25.html?_r=1&scp=1&sq=facebook%20and%20arab%20dignity%20cohen&st=cse (In discussing the successful Arab uprising that overthrew the government of Tunisia without an identifiable leader, Cohen notes, “Or rather, its leader was far away: Mark Zuckerberg, the founder of Facebook. Its vehicle was the youth of Tunisia, able to use Facebook for instant communication and so cyber-inspire their parents. . . . Facebook propelled insurrection from the interior to the Tunisian capital in 28 days.”); Griff Witte, *Egyptian Opposition Calls for Massive Protest; Foreigners Flee*, WASH. POST, Feb. 1, 2011, at A1 (noting that while Facebook was initially an organizational tool, Internet access became scarce after several days of protests). Similarly, in Iran in 2009, protesters used Twitter to draw international attention to violence against protesters as the protests were happening. *See* David Zurawik, *Iran Protests Present a Revelation, Challenges in Newsgathering*, BALT. SUN, June 28, 2009, at 1E; Nazila Fathi, *Iran’s Opposition Seeks More Help in Cyberwar with Government*, N.Y. TIMES, Mar. 19, 2010, at A6; *see also The Rage of Followers*, WASH. POST, Apr. 11, 2010, at G2 (questioning whether sites such as Twitter and YouTube allow for more power to challenge leaders—or at least for more global recognition of repressive leadership—in light of protests in Kyrgyzstan); Michael Wines, Sharon LaFraniere & Jonathan Ansfield, *China’s Censors Tackle and Trip over the Internet*, N.Y. TIMES, Apr. 8, 2010, at A1 (describing a particular blogger who maintains six different blogs in order to try to outwit Chinese censors who attempt to block certain types of political speech on the Internet and noting how this particular blogger sees other Chinese Internet users growing incensed against the restrictions on their Internet speech and attempting to push the wall back).

understanding of the media landscape as it existed in 1974.¹¹⁸ At that time, the media were entirely limited to print and broadcast media, often represented by large conglomerate news organizations.¹¹⁹ The notion of the citizen journalist (a term that has been given to bloggers and other such individuals who take on the role of journalist, generally without affiliations with any news outlet¹²⁰) or even the Internet were not so much as blips on the Court's radar screen. But the Court based its decision to include "access to media" as an element in establishing a plaintiff as a public figure for a particular reason, that of protecting the "good name" of the private individual.¹²¹ That reasoning still has meaning today, despite the great shifts in the media landscape.

Today, more than thirty years after *Gertz*, millions of people get their news from the Internet¹²²—whether from a blog or from a news organization's website, the Internet has become a widespread resource for accessing real and current news. As a realistic component of what comprises media in this era, this needs to be factored in to courts' considerations. When the *Gertz* Court spoke about accessing the media and the ease by which public figures were able to do so, it was addressing in simple terms what was a simple truth: those with a firm grasp on the public's attention through their position as public officials or widely known figures would have the opportunity to garner the press's attention to rebut statements made against them. The Court, seemingly without feeling the need to elaborate, accepted that it was these people who needed less protection from the courts because they had more opportunity to remedy

118. See Perzanowski, *supra* note 84, at 833.

119. See Marc A. Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 5 AM. B. FOUND. RES. J. 455, 465 (1980) (defining the context for defamation cases and listing media defendants as those "engaging in newspaper, magazine, or book publishing or in broadcasting"); Max M. Kampelman, *Congress, the Media, and the President*, 32 PROC. ACAD. POL. SCI. 85, 90 (1975) ("There were in 1975 fewer than forty-five cities with two or more competing dailies and about 1,500 cities with a noncompetitive daily press. And each year more and more of these noncompetitive dailies are purchased by the big corporate chains.").

120. See, e.g., Mark Glaser, *Your Guide to Citizen Journalism*, PBS (Sept. 27, 2006), <http://www.pbs.org/mediashift/2006/09/your-guide-to-citizen-journalism270.html> ("The idea behind citizen journalism is that people without professional journalism training can use the tools of modern technology and the global distribution of the Internet to create, augment or fact-check media on their own or in collaboration with others. . . . Because of the wide dispersion of so many excellent tools for capturing live events—from tiny digital cameras to videophones—the average citizen can now make news and distribute it globally, an act that was once the province of established journalists and media companies.").

121. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (citing *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

122. See, e.g., Scott Kirsner, *On the Web, Audience Size Matters*, SAN JOSE MERCURY NEWS, May 27, 2007.

their grievances elsewhere.¹²³

It is now, with the media evolution well under way and the continuing trend of more widely accessible online services shifting toward the center of the media stage, that this test does need elaboration. The aim in *Gertz* was to establish parameters as to who would be held to the higher standards invoked by requiring the *New York Times* actual malice test—and necessarily, to limit that group to those actually worthy of the protection, which that test affords. The Court imagined a plaintiff capable of redressing harms that may have resulted from defamatory statements in the media, and that a line would be drawn around those people capable of such access. Those on the other side of the line—private figures unable to access the audience privy to defamatory statements about them—would not be required to meet the heightened standard set forth by the Court.

The scenario may have been quite straightforward to the Court: perhaps it imagined the likes of Johnny Carson facing defamatory statements in the media (that is, in a newspaper or magazine, on the radio, or on television). In order to rebut what was said against him, he would have the capability of accessing a large audience by making a public statement, issuing a press release, holding a press conference, or otherwise addressing the allegations. (He could have, of course, also attempted a defamation claim in court, but would naturally have been required to prove actual malice.) The initial allegation and the subsequent response given by Carson would have drawn similar audiences and similar attention. It was because of this attention that the Court appropriately included this element in its public figure test; the litigation brought by those who have been defamed may only be a secondary concern if they are able to counteract the statement outside of court, and in doing so, to curb the statement's damage.

The *Gertz* Court's position, with such potential scenarios in mind, should now be recognized as one that aimed at encouraging public debate and the introduction of new ideas into the marketplace of ideas—and one that was extremely reluctant to chill any sort of speech that might result from self-censorship. The Court's goal was to protect those private individuals who did not have the means to adequately redress the defamatory words leveled against them because they did not have access to an audience that would effectively serve as a forum for rebuttal. In imagining this person, the Court had in mind someone who could not immediately turn to the same or similarly situated media outlets to address what had been said about him or her.

The test imagined by the Court in *Gertz*—and later in *Hutchinson*—would seem to construe the access to media element of the test by using a

123. Walker, *supra* note 9, at 975.

relatively narrow definition of access to media: not one that encompasses any and all opportunities to be heard by all varieties of audiences, but rather the opportunity to defend oneself to the audience (or a similar such audience) that initially received the damaging information. It is this same reasoning that should guide courts to a new conclusion as to what access to media means; in this age, there is little guarantee that a posting on a blog or social networking site will reach a similarly situated audience¹²⁴ that had exposure to the initial defamatory statement. Thus, a court that factors into its analysis the mere existence of a plaintiff's blog or the sheer number of Facebook friends who have access to statements made by the plaintiff online will not be carrying on the intent of the *Gertz* Court.

This is not to say that the audience sizes or compositions must be identical; instead, the point is that the defamed individual should have the opportunity to respond “effectively”¹²⁵ to statements made against him. In order to consider a response effective,¹²⁶ it must have some impact on the audience of or the effect of the initial defamation. This will simply not be true of a majority of online outlets, considering both the many-to-many mode of communication¹²⁷ and the very existence of such a vast number of sources of information available to the average Internet user. With fewer eyes on any particular online source, the defamation plaintiff is not in a position to effectively respond to allegedly defamatory statements by making a posting on just any site online.

It is the courts' responsibility to ensure that the correct lines are drawn between public and private plaintiffs in defamation cases. One of the tools that courts can use is the access to media test—but only if it is appropriately tailored to this era of communication. That means not simply accepting that any and all media outlets and networking sites are sufficient

124. Because of the international nature of the Internet, this could mean an audience similarly situated geographically, but it could also mean an audience of roughly equivalent size and composition that had (or could have had) initial exposure to the defamatory content. This Author tends to take the latter view when discussing “similarly situated.” The same is true when the Author uses the description of “the same or substantially similar” with regard to the audience.

125. See *Carr v. Forbes, Inc.*, 259 F.3d 273, 282 n.2 (4th Cir. 2001) (noting that “a court does not ask whether a defamation plaintiff has ever had access to a media outlet with the same size readership of the allegedly defamatory publication; such an inquiry would effectively prohibit widely read publications from ever commenting on local controversies. Our inquiry is rather whether the evidence demonstrates that the defamation plaintiff had access to channels of effective communication to respond to the allegedly defamatory statements.”).

126. Effective is defined as “producing a decided, decisive, or desired effect.” THE MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 397 (11th ed. 2004).

127. Perzanowski, *supra* note 84, at 834 n.9 (“Many-to-many communications media allow users to both contribute and receive information. Blogs, file sharing, and Wikis are among the current many-to-many applications.”).

to show that effective channels of communication exist, but rather that the plaintiff have access to media such that he can effectively respond to the statements made against him in such a way as to have a public impact.

VI. CONCLUSION

In this era of mass communication possible with the click of a mouse (or the tap of a button, or screen, on a cell phone), courts cannot shy away from the difficult task of clarifying how the Internet interacts with the law. Defamation cases are certain to encounter these issues sooner rather than later, and when that happens courts will have choices to make. Are they to ignore the dozens of ways every individual can access the media? Are they to find that access sufficient to call anyone with a Facebook account a public figure? Or are they to appropriately consider the widespread use of networking online as an everyday activity of private individuals, placing the correct emphasis on how that individual became a part of the controversy at hand?

The courts should begin by considering the role of the individual within the controversy and how it is that he wound up in such a role (that is, whether she “thrust” herself or was “drawn” into the controversy¹²⁸), and then to look at the nature of any access to media the plaintiff might have. By putting into place clear guidance that lower courts can use with consistency, “commentators will know in advance whether their statements will be protected.”¹²⁹ This is to say, by understanding the role of access to media to be a lesser factor in the test as compared to the individual’s participation in the controversy, the likelihood of confusion over what satisfies the test will be decreased. But at the same time, an understanding of what access to media means will ensure that courts are not tripping themselves up or merely paying lip service to the test. Rather than blindly accepting that any individual with the capability to blog may sufficiently find recourse through the Internet, courts should carefully and closely examine what the make-up of the audience was and how access to a sizeable and geographically similar audience may have tempered and served to mitigate the defamation. By analyzing this component of the plaintiff’s status, the court will be giving the appropriate measure of importance to the ability of the individual to redress the harms done against him through the publication of potentially defaming statements.

In order to do so with accuracy and precision, courts must face the fact that the individuals that come before them alleging defamation are likely to be Internet users. It is a simple fact of today’s culture that it is difficult to find a person not at least somewhat versed in the ways of the

128. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974).

129. *Walker*, *supra* note 9, at 977.

Internet.¹³⁰ As such, courts should approach individuals who are well connected and established on social networking sites by properly balancing the prongs of the limited-purpose public figure test. After the court has established what exactly the individual's role in the controversy is, and how that person found herself in that role—that is, whether it was through a voluntary thrust or through involuntarily being drawn into the controversy—the court must then weigh the results of this consideration against the access to media that the individual does or does not have. The court should do so by beginning with considering the media context in which the allegedly defamatory material appeared. The court must consider that this individual's connections on Facebook or Twitter, or followers on her blog, will not be dispositive—and this is particularly true if the defamation took place in the traditional context of mainstream media. Was this a national radio or television broadcast, or a newspaper or magazine article published in a publication with widespread readership? It must then assess whether this person has garnered media coverage of their social networking; or whether the social networking they engage in is merely the private practice of a private individual wishing to stay current and connected with her friends. If it is in fact the latter, the court cannot mistake connections online for the greater requirements of media access—and it certainly cannot do so if the context in which the initial defamation appeared was such that the Internet connections the individual is able to make will do little by way of effectively responding to the much more widely publicized allegations.

In order to reach such conclusions, it is necessary for courts to embrace the current era of social networking. As time progresses, generations will continue to start their Facebook accounts at a younger age and become more savvy with Twitter, not to mention take advantage of sites and tools not yet in existence. As such, it is up to courts to track these changes with tailored decisions, reflecting the truth that individuals are only going to continue to be more connected online, without necessarily being any less in need of the protections imagined by *Gertz* as necessary for private individuals not equipped to successfully respond to defamation on their own.

With such calculated balancing and refined definitions to match the current Internet landscape, courts can successfully maintain the protections that the Supreme Court set forth for private individuals in order to

130. While the Author's eighty-two-year-old grandfather and noncomputer user would be an obvious exception to that generalization, a seventy-three-year-old great uncle of the Author recently recounted the telecommuting he does to continue his consulting work well into retirement.

safeguard that individual's own good name, notwithstanding a plaintiff's large pool of Facebook friends.