

United States Court of Appeals,
Sixth Circuit.

Victoria Price STREET, Plaintiff-Appellant,
v.
NATIONAL BROADCASTING CO., Defendant-
Appellee.

No. 77-1682.

Argued Nov. 28, 1979.
Decided March 13, 1981.

This is a Tennessee diversity case against the National Broadcasting Company for libel and invasion of privacy. The plaintiff-appellant, Victoria Price Street, was the prosecutrix and main witness in the famous rape trials of the Scottsboro boys, which occurred in Alabama more than forty years ago. NBC televised a play or historical drama entitled "Judge Horton and the Scottsboro Boys," dramatizing the role of the local presiding judge in one of those trials.

The movie portrays Judge Horton as a courageous and tragic figure struggling to bring justice in a tense community gripped by racial prejudice and intent on vengeance against nine blacks accused of raping two white women. In the movie Judge Horton sets aside a jury verdict of guilty because he believes that the evidence shows that the prosecutrix plaintiff in this action falsely accused the Scottsboro defendants. The play portrays the plaintiff in the derogatory light that Judge Horton apparently viewed her: as a woman attempting to send nine innocent blacks to the electric chair for a rape they did not commit.

This case presents the question of what tort and First Amendment principles apply to an historical drama that allegedly defames a living person who participated in the historical events portrayed. The plaintiff's case is based on principles of libel law and "false light" invasion of privacy [FN1] arising from the derogatory portrayal. NBC raises alternative claims and defenses: (1) the claim that the published material is not defamatory; (2) the claim of truth; (3) the common law privilege of fair comment; (4) the common law privilege of fair report on a judicial proceeding; (5) the First Amendment claim that because the plaintiff is a public figure recovery must be based on a showing of malice; and (6) even if the malice standard is inapplicable, the claim that recovery must be based on a showing of negligence.

[FN1. False light invasion of privacy is one of four generally recognized forms of the tort of invasion of privacy. It differs from the other three forms in that falsity is one of its essential elements. See generally Prosser, Torts s 97 (2d Ed. 1955).

At the end of all the proof, District Judge Neese directed a verdict for defendant on the ground that even though plaintiff was not a public figure at the time of publication the defamatory matter was not negligently published. We affirm for the reason that the historical events and persons portrayed are "public" as distinguished from "private." A malice standard applies to public figures under the First Amendment, and there is no evidence that the play was published with malice.

I. STATEMENT OF FACTS

A. Historical Context

In April 1931, nine black youths were accused of raping two young white women while riding a freight train between Chattanooga, Tennessee, and Huntsville, Alabama. The case was widely discussed in the local, national, and foreign press. The youths were quickly tried in Scottsboro, Alabama, and all were found guilty and sentenced *1230 to death. The Alabama Supreme Court affirmed the convictions. [Weems v. State, 141 So. 215, 224 Ala. 524 \(1932\)](#); [Patterson v. State, 141 So. 195, 224 Ala. 531 \(1932\)](#); [Powell v. State, 141 So. 201, 224 Ala. 540 \(1932\)](#). The United States Supreme Court reversed all convictions on the ground that the defendants were denied the right to counsel guaranteed by the Sixth Amendment. [Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 \(1932\)](#). The defendants were retried separately after a change of venue from Scottsboro to Decatur, Alabama. Patterson was the first defendant retried, and this trial was the subject of the NBC production. In a jury trial before Judge Horton, he was tried, convicted, and sentenced to death. Judge Horton set the verdict aside on the ground that the evidence was insufficient. Patterson and one other defendant, Norris, were then tried before another judge on essentially the same evidence, convicted, and sentenced to death. The judge let the verdicts stand, and the convictions were affirmed by the Alabama Supreme Court. [Patterson v. State, 156 So. 567, 229 Ala. 270 \(1934\)](#), and [Norris v. State, 156 So. 556, 229 Ala. 226 \(1934\)](#). The United States Supreme Court again reversed, this time because blacks were systematically excluded from grand and petit juries. [Norris v. Alabama, 294](#)

[U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 \(1935\)](#), and [Patterson v. Alabama, 294 U.S. 600, 55 S.Ct. 575, 79 L.Ed. 1082 \(1935\)](#). At his fourth retrial, Patterson was convicted and sentenced to seventy-five years in prison. [Patterson v. State, 175 So. 371, 234 Ala. 342](#), cert. denied, [302 U.S. 733, 58 S.Ct. 121, 82 L.Ed. 567 \(1937\)](#). Defendants Weems and Andrew Wright were also convicted on retrial and sentenced to a term of years. Defendant Norris was convicted and his death sentence was commuted to life imprisonment by the Alabama governor. Defendants Montgomery, Roberson, Williams, and Leroy Wright were released without retrial. Powell pled guilty to assault allegedly committed during an attempted escape. The last Scottsboro defendant was paroled in 1950.

The Scottsboro case aroused strong passions and conflicting opinions in the 1930s throughout the nation. Several all white juries convicted the Scottsboro defendants of rape. Two trial judges and the Alabama Supreme Court, at times by divided vote, let these verdicts stand. Judge Horton was the sole trial judge to find the facts in favor of the defendants. Liberal opinion supported Judge Horton's conclusions that the Scottsboro defendants had been falsely accused.

During the lengthy course of the Scottsboro trials, newspapers frequently wrote about Victoria Price. She gave some interviews to the press. Thereafter, she disappeared from public view. The Scottsboro trials and her role in them continued to be the subject of public discussion, but there is no evidence that Mrs. Street sought publicity. NBC incorrectly stated in the movie that she was no longer living. After the first showing of "Judge Horton and the Scottsboro Boys," plaintiff notified NBC that she was living, and shortly thereafter she filed suit. Soon after plaintiff filed suit, NBC rebroadcast the dramatization omitting the statement that plaintiff was no longer living.

B. The Dramatization

The script for "Judge Horton and the Scottsboro Boys" was based on one chapter of a book by Dr. Daniel Carter, an historian, entitled *Scottsboro: A Tragedy of the American South* (Louisiana State University Press, 1969). The movie is based almost entirely on the information in Dr. Carter's book, which, in turn, was based on Judge Horton's findings at the 1933 trial, the transcript of the trial, contemporaneous newspaper reports of the trial, and interviews with Judge Horton and others. NBC purchased the movie from an independent producer.

Plaintiff's major libel and invasion of privacy claims are based on nine scenes in the movie in which she is portrayed in a derogatory light. ***

The facts recited above illustrate that the play does cast plaintiff in an extremely derogatory light. She is portrayed as a perjurer, a woman of bad character, a woman who falsely accused the Scottsboro boys of rape knowing that the result would likely be the electric chair. The play is a gripping and effective portrayal of its point of view about her, the Scottsboro boys, and Judge Horton. As an effective dramatic production, the play has won many awards, including the George Foster Peabody Award for playwrighting and awards from the Screenwriters' Guild and the American Bar Association.

II. COMMON LAW CLAIMS AND DEFENSES

A. Defamatory Nature of the Published Material

Taken as a whole, the play conveys a defamatory image of the plaintiff. Although the words "bum" and "hustle" may be considered rhetorical hyperbole and therefore not necessarily defamatory, [Letter Carriers v. Austin, 418 U.S. 264, 284-86, 94 S.Ct. 2770, 2781-82, 41 L.Ed.2d 745 \(1974\)](#), the reference to plaintiff as a "whore" and her portrayal as a perjurer and a suborner of perjury is obviously defamatory. The suggestive flashbacks showing her inviting sexual advances of Ramsey and Tiller reinforce the defamation. The effect of the drama as a whole is to create a character, Victoria Price. She is portrayed as a loose woman who falsely accuses the Scottsboro boys of raping her. This image of her character is created throughout the play by her own words and actions in the *1233 flashbacks and in the witness chair and by what others say about her.

B. The Privilege of Fair Comment

[1][2] The portrayal of Victoria Price in this way is not expressed in the play as a matter of opinion. The characterization is expressed as concrete fact. The common law privilege of fair comment, adopted in Tennessee and explained in [Venn v. Tennessean Newspapers, Inc., 201 F.Supp. 47, 52 \(M.D.Tenn.1962\)](#), aff'd, [313 F.2d 639 \(6th Cir.\)](#), cert. denied, [374 U.S. 830, 82 S.Ct. 1872, 10 L.Ed.2d 1053 \(1963\)](#), is now protected as opinion under the First Amendment, [Gertz v. Robert Welch, Inc., 418 U.S. 323, 339- 40, 94 S.Ct. 2997, 41 L.Ed.2d 789 \(1974\)](#). But this play does not say to the viewer that this is NBC's opinion about the character and actions of Victoria Price. It shows her inviting sexual

intercourse and swearing falsely. We do not believe this characterization fits within the traditional fair comment privilege protecting opinion. See [Cianci v. New York Times Publishing Co.](#), 639 F.2d 54 (2nd Cir. 1980, as amended Oct. 27, 1980) (magazine article interpreting evidence of rape not expression of opinion).

C. The Defense of Truth and the Privilege of Fair Report of a Judicial Proceeding

In his opinion setting aside the verdict, Judge Horton found, in effect, that NBC's characterization of Victoria Price was true. The movie characterizes her as Judge Horton found the facts in his opinion. This does not mean, however, that the case should be withdrawn from the jury on the basis of the defense of truth or the privilege of fair report of a judicial proceeding.

[3] Neither Judge Horton's findings nor the final convictions based on the testimony of Victoria Price and affirmed on appeal settle the question of truth. That still remains an open question. Technical doctrines of res judicata and collateral estoppel do not apply in this context. Neither Victoria Price nor NBC were parties in the 1930s trials. In addition, citizens obviously have a right to attack the fairness of a trial. Judicial proceedings resolve disputes, but they do not establish the truth for all time. In libel cases the question of truth is normally one for the jury in a defamation action.

[4] Many of the scenes actually quote or paraphrase the trial transcript, but the movie is not a completely accurate report of the trial. Witnesses who corroborate Victoria Price's version of the facts are omitted. The portions of the original trial that show her as a perjurer and a promiscuous woman are emphasized. The flashbacks consistently show plaintiff's conduct in a derogatory light. The flashbacks entirely accept the theory of the case presented by Judge Horton and the defense and reject the theory of the case presented by the state and the plaintiff. Under such circumstances the common law privilege permitting publication of defamatory material as a part of a fair and accurate report on judicial proceedings is not satisfied. The element of balance and neutrality is missing. See [Langford v. Vanderbilt University](#), 44 Tenn.App. 694, 318 S.W.2d 568 (1958).

III. THE FIRST AMENDMENT DEFENSES

A. Plaintiff was a Public Figure During the

Scottsboro Trials

Since common law defenses do not support the directed verdict for NBC, we must reach the constitutional issues, particularly the question whether plaintiff should be characterized as a "public figure." In *Gertz*, the Supreme Court held that one characterized as a "public figure," as distinguished from a private individual, "may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." [418 U.S. at 342, 94 S.Ct. at 3008](#) (emphasis added).^[FN3] In balancing the need to protect "private personality" and reputation *1234 against the need "to assure to the freedoms of speech and press that 'breathing space' essential to their free exercise," the Supreme Court has developed a general test to determine public figure status.

^[FN3] In *Gertz*, a lawyer representing in civil litigation the family of an individual killed by a Chicago policeman was held not to be a public figure and the malice standard was therefore held inapplicable to the publisher of article accusing the lawyer of "framing" the policeman.

[5] *Gertz* establishes a two-step analysis to determine if an individual is a public figure. First, does a "public controversy" exist? Second, what is "the nature and extent of (the) individual's participation" in that public controversy? [418 U.S. at 352, 94 S.Ct. at 3013](#). Three factors determine the "nature and extent" of an individual's involvement: the extent to which participation in the controversy is voluntary, the extent to which there is access to channels of effective communication in order to counteract false statements, and the prominence of the role played in the public controversy. [418 U.S. at 344-45, 94 S.Ct. at 3009](#).

[6] The Supreme Court has not clearly defined the elements of a "public controversy." It is evident that it is not simply any controversy of general or public interest. Not all judicial proceedings are public controversies. For example, "dissolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in *Gertz*." [Time, Inc. v. Firestone](#), 424 U.S. 448, 455, 96 S.Ct. 958, 965, 47 L.Ed.2d 154 (1976). Several factors, however, lead to the conclusion that the *Scottsboro* case is the kind of public controversy referred to in *Gertz*. The *Scottsboro* trials were the focus of major

public debate over the ability of our courts to render even-handed justice. It generated widespread press and attracted public attention for several years. It was also a contributing factor in changing public attitudes about the right of black citizens to equal treatment under law and in changing constitutional principles governing the right to counsel and the exclusion of blacks from the jury.

[7] The first factor in determining the nature and extent of plaintiff's participation is the prominence of her role in the public controversy. She was the only alleged victim, and she was the major witness for the State in the prosecution of the nine black youths. Ruby Bates, the other young woman who earlier had testified against the defendants, later recanted her incriminating testimony. Plaintiff was left as the sole prosecutrix. Therefore, she played a prominent role in the public controversy.

[8] The second part of the test of public figure status is also met. Plaintiff had "access to the channels of effective communication and hence a realistic opportunity to counteract false statements." [Gertz, 418 U.S. at 344, 94 S.Ct. at 3009](#). The evidence indicates that plaintiff recognized her importance to the criminal trials and the interest of the public in her as a personality. The press clamored to interview her. She clearly had access to the media and was able to broadcast her view of the events.

The most troublesome issue is whether plaintiff "voluntarily" "thrust" herself to the forefront of this public controversy. It cannot be said that a rape victim "voluntarily" injects herself into a criminal prosecution for rape. See [Time, Inc. v. Firestone, 424 U.S. 448, 457, 96 S.Ct. 958, 966, 47 L.Ed.2d 154 \(1976\)](#). In such an instance, voluntariness in the legal sense is closely bound to the issue of truth. If she was raped, her participation in the initial legal proceedings was involuntary for the purpose of determining her public figure status; if she falsely accused the defendants, her participation in this controversy was "voluntary." But legal standards in libel cases should not be drawn so that either the courts or the press must first determine the issue of truth before they can determine whether an individual should be treated as a public or a private figure. The principle of libel law should not be drawn in such a way that it forces the press, in an uncertain public controversy, to guess correctly about a woman's chastity.

[9][10] When the issue of truth and the issue of voluntariness are the same, it is necessary to

determine the public figure status of the individual without regard to whether she "voluntarily" thrust herself in the forefront of the public controversy. If *1235 there were no evidence of voluntariness other than that turning on the issue of truth, we would not consider the fact of voluntariness. In such a case, the other factors prominence and access to media alone would determine public figure status. But in this case, there is evidence of voluntariness not bound up with the issue of truth. Plaintiff gave press interviews and aggressively promoted her version of the case outside of her actual courtroom testimony. In the context of a widely-reported, intense public controversy concerning the fairness of our criminal justice system, plaintiff was a public figure under Gertz because she played a major role, had effective access to the media and encouraged public interest in herself.

B. Plaintiff Remains a Public Figure for Purposes of Later Discussion of the Scottsboro Case

The Supreme Court has explicitly reserved the question of "whether or when an individual who was once a public figure may lose that status by the passage of time." [Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 166 n.7, 99 S.Ct. 2701, 2707, n.7, 61 L.Ed.2d 450 \(1979\)](#). In Wolston the District of Columbia Circuit found that plaintiff was a public figure and retained that status for the purpose of later discussion of the espionage case in which he was called as a witness. The Supreme Court found that the plaintiff's role in the original public controversy was so minor that he was not a public figure. It therefore reserved the question of whether a person retains his public figure status.

[11] Plaintiff argues that even if she was a public figure at the time of the 1930s trial, she lost her public figure status over the intervening forty years. We reject this argument and hold that once a person becomes a public figure in connection with a particular controversy, that person remains a public figure thereafter for purposes of later commentary or treatment of that controversy. This rule finds support in both case law and analysis of the constitutional malice standard.

On this issue the Fifth Circuit has reached the same conclusion as the District of Columbia Circuit in Wolston. In [Brewer v. Memphis Publishing Co., Inc., 626 F.2d 1238 \(5th Cir. 1980\)](#), plaintiff sued when a newspaper implied that she was reviving a long-dormant romantic relationship with Elvis Presley. The Fifth Circuit concluded that although the passage

of time might narrow the range of topics protected by a malice standard, plaintiff remained a public figure when the defendant commented on her romantic relationship. The court noted that plaintiff's name continued to be connected with Presley even after her retirement from show business.

Other courts have assumed sub silentio that the public figure status was retained over the passage of time. See, e. g., Meeropol v. Nizer, 560 F.2d 1061, 1066 (2d Cir. 1977), cert. denied, 434 U.S. 1013, 98 S.Ct. 727, 54 L.Ed.2d 756 (1978) (having spent most of their early years in limelight, sons of Julius and Ethel Rosenberg are public figures for purposes of subsequent commentary on Rosenberg trials). Some courts have relied on a pre-Gertz "newsworthiness" analysis to support a finding that the passage of time did not alter the standard of liability. See, e. g., Sidis v. F-R Publishing Corp., 113 F.2d 806, 809 (2d Cir.), cert. denied, 311 U.S. 711, 61 S.Ct. 393, 85 L.Ed. 462 (1940) (affirms invasion of privacy judgment for magazine that updated a twenty-seven year old story on child prodigy despite fact that subject had become a recluse; "his subsequent history, containing as it did the answer to the question of whether or not he had fulfilled his early promise, was still a matter of public concern"); Time, Inc. v. Johnston, 448 F.2d 378, 381 (4th Cir. 1971) (former professional basketball player was still a public figure despite nine years of retirement; "event to which publication related remained a matter of public interest not simply because of its relation to plaintiff's own career; it had an equal or greater interest as marking the spectacular debut of (Bill) Russell in a career that was still phenomenal at the time of the publication").

*1236 Our analytical view of the matter is based on the fact that the Supreme Court developed the public figure doctrine in order that the press might have sufficient breathing room to compose the first rough draft of history. It is no less important to allow the historian the same leeway when he writes the second or the third draft.

Our nation depends on "robust debate" to determine the best answer to public controversies of this sort.[FN4] The public figure doctrine makes it possible for publishers to provide information on such issues to the debating public, undeterred by the threat of liability except in cases of actual malice. [FN5] Developed in the context of contemporaneous reporting, the doctrine promotes a forceful exchange of views.

FN4. See New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964); Orr v. Argus-Press Co., 586 F.2d 1108, 1117 (6th Cir. 1978), cert. denied, 440 U.S. 960, 99 S.Ct. 1502, 59 L.Ed.2d 773 (1979).

FN5. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 343-46, 94 S.Ct. 2997, 3008-3010, 41 L.Ed.2d 789 (1974).

[12] Considerations that underlie the public figure doctrine in the context of contemporaneous reporting also apply to later historical or dramatic treatment of the same events. Past public figures who now live in obscurity do not lose their access to channels of communication if they choose to comment on their role in the past public controversy. And although the publisher of history does not operate under journalistic deadlines it generally makes little difference in terms of accuracy and verifiability that the events on which a publisher is reporting occurred decades ago. Although information may come to light over the course of time, the distance of years does not necessarily make more data available to a reporter: memories fade; witnesses forget; sources disappear.

There is no reason for the debate to be any less vigorous when events that are the subject of current discussion occurred several years earlier. The mere passage of time does not automatically diminish the significance of events or the public's need for information. A nation that prizes its heritage need have no illusions about its past. It is no more fitting for the Court to constrain the analysis of past events than to stem the tide of current news. From Alfred Dreyfus to Alger Hiss, famous cases have been debated and reinterpreted by commentators and historians. A contrary rule would tend to restrain efforts to shed new light on historical events and reconsideration of past errors.

[13] The plaintiff was the pivotal character in the most famous rape case of the twentieth century. It became a political controversy as well as a legal dispute. As the white prosecutrix of nine black youths during an era of racial prejudice in the South, she aroused the attention of the nation. The prosecutions were among the first to focus the conscience of the nation on the question of the ability of our system of justice to provide fair trials to blacks in the South. The question persists today. As long as the question

remains, the Scottsboro boys case will not be relegated to the dusty pages of the scholarly treatise. It will remain a living controversy.

C. Evidence Insufficient to Support Malice [\[FN6\]](#)

[FN6](#). The District Court found that even if plaintiff was a public figure forty years ago, she no longer was a public figure at the time of publication. The court then directed a verdict for NBC on grounds that there was no evidence of negligence. The evidence indicates, however, that there is arguably some proof of negligence by NBC. NBC was notified between the first and second showings of the film that not only was plaintiff alive but that she objected to her characterization in the movie. NBC made no attempt to verify the factual presentation in the movie thereafter. This arguably presents a jury-submissible case of negligence, as Judge Peck's dissent points out.

[\[14\]\[15\]](#) A plaintiff may not recover under the malice standard unless there is "clear and convincing proof" that the defamation was published "with knowledge of its falsity or with reckless disregard for the truth." [Gertz, 418 U.S. at 342, 94 S.Ct. at 3008](#). There is no evidence that NBC had *1237 knowledge that its portrayal of Victoria Price was false or that NBC recklessly disregarded the truth. The derogatory portrayal of Price in the movie is based in all material respects on the detailed findings of Judge Horton at the trial and Dr. Carter in his book. When the truth is uncertain and seems undiscoverable through further investigation, reliance on these two sources is not unreasonable.

We gain perspective on this question when we put to ourselves another case. Dr. Carter, in his book, persuasively argues, based on the evidence, that the Communist Party financed and controlled the defense of the Scottsboro boys. A different playwright might choose to portray Judge Horton as some Southern newspapers portrayed him at the time as an evil judge who associated himself with a Communist cause and gave his approval to interracial rape in order to curry favor with the eastern press. The problem would be similar had Judge Horton for many years before his death an obscure private citizen sued the publisher for libel.

[\[16\]](#) Some controversial historical events like the

Scottsboro trials become symbolic and take on an overlay of political meaning. Speech about such events becomes in part political speech. The hypothetical case and the actual case before us illustrate that an individual's social philosophy and political leanings color his historical perspective. His political opinions cause him to draw different lessons from history and to see historical events and facts in a different light. He believes the historical evidence he wants to believe and casts aside other evidence to the contrary. So long as there is no evidence of bad faith or conscious or extreme disregard of the truth, the speaker in such a situation does not violate the malice standard. His version of history may be wrong, but the law does not punish him for being a bad historian.

The malice standard is flexible and encourages diverse political opinions and robust debate about social issues. It tolerates silly arguments and strange ways of yoking facts together in unusual patterns. But it is not infinitely expandable. It does not abolish all the common law of libel even in the political context. It still protects us against the "big political lie," the conscious or reckless falsehood. We do not have that in this case.

Accordingly, the judgment of the District Court is affirmed.

JOHN W. PECK, Senior Circuit Judge, dissenting.

The majority offers no convincing reasons in law or policy for extending to NBC the protection of the New York Times privilege of freedom from liability for defamatory statements made without "malice." Forty years after the events that made Mrs. Street famous (or infamous), the purposes behind the legal distinction (not the everyday *1247 distinction) between public figures and private individuals are served only by ranking Mrs. Street among the latter.

The majority exalts "robust debate on social issues." So do we all. If that were the only interest of weight in defamation and privacy cases, there would be no need to distinguish between public figures and private persons in our law. It would be much better to apply the New York Times "malice" test in all cases; yet it is no mystery why this is not our rule of law.

The Constitution does not protect damaging misstatements of fact because of their intrinsic worth. "(T)here is no constitutional value in false statements of fact." [Gertz v. Robert Welch, Inc., 418 U.S. 323, 340, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789 \(1974\)](#).

False reports are protected because they are "inevitable in free debate." *Id.* The inevitability of demonstrable error lessens with the passage of time. Accordingly, when the pressures of contemporaneous reporting subside, the need for the protection of the "malice" standard disappears. A negligence [FN1] standard is enough. I would follow the reasoning of Justices Blackmun and Marshall, and hold that the passage of time can extinguish public figure status. See [Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 169-72, 99 S.Ct. 2701, 2708-10, 61 L.Ed.2d 450 \(1979\)](#) (concurring opinion).

[FN1] Under *Gertz*, states may, in actions brought by private persons, set their own standards of liability for defamation, "so long as they do not impose liability without fault " [418 U.S. at 347, 94 S.Ct. at 3010](#). Tennessee applies a negligence standard. [Memphis Pub. Co. v. Nichols, 569 S.W.2d 412, 418 \(Tenn.1978\)](#).

The majority adopts the rule, not that public figure status is eternal, but that it persists as long as the public controversy that gave rise to it. For my brethren, Scottsboro persists as a public controversy because the trials have taken on "an overlay of political meaning." In short, Mrs. Street is a public figure today because the majority thinks the Scottsboro affair merits public attention. This reasoning resurrects the "newsworthiness" test for applying the "malice" standard in defamation cases a test proposed by a plurality of the Supreme Court in [Rosenbloom v. Metromedia, Inc., 403 U.S. 29 \(1971\)](#), and rejected by a majority of the Court in *Gertz*. It is not the business of judges to decide "what information is relevant to self-government." [Gertz, supra, 418 U.S. at 346, 94 S.Ct. at 3010](#) (quoting Justice Marshall's dissent in *Rosenbloom*).

Gertz put an end to the binary system where defamatory publications either enjoyed the protection of the "malice" standard or suffered the strict liability imposed by the common law. The majority ignores the distinctions drawn in *Gertz* and casts the issues of this case in terms of speech versus suppression of speech. This perception also overlooks the basic distinction in tort law between compensation and punishment. Although under *Gertz* and current Tennessee law Mrs. Street could recover actual damages upon showing falsity, [FN2] negligence, causation and injury, she could not receive punitive damages without proving *1248 "malice." See, e. g.,

[Gertz at 418 U.S. 349, 94 S.Ct. at 3011; Maheu v. Hughes Tool Co., 569 F.2d 459 \(9th Cir. 1977\); Davis v. Schuchat, 510 F.2d 731 \(D.C.Cir.1975\)](#). Thus Mrs. Street's status as a public or private person determines only what she must prove to show a prima facie entitlement to compensatory damages. It does not determine whether the law may "punish" historians for error, or prohibit them from committing error.

[FN2] In *Nichols*, *supra* note 1, the Tennessee Supreme Court stated that there is a presumption of the falsity of an alleged defamatory utterance a presumption which "the defendant may rebut by proving truth as a defense." [569 S.W.2d at 420](#). This correctly states the common law, but such a presumption cannot be reconciled with *Gertz's* command that states not impose liability without fault. See [Herbert v. Lando, 441 U.S. 153, 159, 170, 175-76, 99 S.Ct. 1635, 1639, 1646, 1648-49, 60 L.Ed.2d 115 \(1979\); Cianci v. New Times Pub. Co., 639 F.2d 54 at 60 \(2d Cir. 1980, as amended Oct. 27, 1980\)](#) (per Friendly, J.). *Cianci* speaks only of cases within the ambit of *Sullivan*. I would go farther and hold that *Gertz* requires plaintiffs to prove falsity in all defamation cases. The majority adopts neither approach, but rather treats truth as a defense, although noting that public figure plaintiffs must show "malice" by clear and convincing evidence.

Under Tennessee law, substantial truth or falsity is at issue in defamation cases. [Nichols, supra, 569 S.W.2d at 420-21](#). *Nichols* held that a literally true article could convey a defamatory meaning by the omission of essential, unobvious facts. I believe the logical extension of this is that a trivially inaccurate report could convey a substantially true meaning. This of all theories would best support the directed verdicts in this case, although I nonetheless believe the question of truth was improperly taken from the jury.

By making a plaintiff's status hinge on its determination of the significance of a defendant's speech, the majority pushes the Court into a quagmire where the law of defamation is standardless, easily manipulated, and no more speech-protective than the judges who happen to be applying it. The better

approach is to take the distinction between public and private figures back to its roots, and examine the present status of the plaintiff in light of the reasons behind the distinction, as did Justices Blackmun and Marshall in [Wolston](#). See [443 U.S. at 170-72](#), [99 S.Ct. at 2709-2710](#) (concurring opinion).

The First Amendment affords less protection to the reputations of public figures not because news of them is deemed significant but because they can more easily rebut falsehoods in public media, and because they have as a rule assumed the risk of public commentary. In short, the law encourages and expects those labeled public figures to be uninhibited, robust debaters. See [Wolston, supra, 443 U.S. at 164](#), [99 S.Ct. at 2706](#); [Gertz, supra, 418 U.S. at 344](#), [94 S.Ct. at 3009](#). This is too much to expect of the plaintiff today.

Over forty years ago, the prominence Mrs. Street gained through the Scottsboro trials allowed her to speak through public media. She was unquestionably a public figure in the current legal sense. Today her voice cannot rebut network "docudramas," which literally reach the entire nation in "gripping" displays. Few people assume the risk that the most personal aspects of their lives will be presented to the nation as dramatic entertainments. The majority hold that Mrs. Street assumed that risk by her involvement in an unspecified number of interviews over forty years ago.

When NBC broadcast "Judge Horton," Mrs. Street was not only not a public figure, she was a nonentity. Dr. Carter, historian and author of the book on which "Judge Horton" was loosely based, had been unable to trace Mrs. Street, and had described her death in some detail.[\[FN3\]](#) The majority offers no convincing reason why those who would write of her today should not be liable for damages caused by their failure to make reasonable efforts to get their facts straight.

[FN3](#). Wrote Bancroft Award winner Carter: "Like the Scottsboro boys, Victoria Price and Ruby Bates were also soon forgotten. In 1961, thirty miles apart from each other, Ruby Bates and Victoria Price died." D. Carter, *Scottsboro: A Tragedy of the American South* 415-16 (1969) (footnote omitted).
Even Homer nods.

II

NBC broadcast "Judge Horton" not once but twice. Nothing in the record shows that the network was even negligent in the first broadcast: the best available information from the leading scholar on the Scottsboro incident was that Victoria Price Street was dead.

After the first broadcast, Mrs. Street brought a defamation action against NBC and sought an injunction against republication of the program. The district court wisely refused to issue such an injunction. Mrs. Street's complaint vaguely alleged that NBC's program presented a false, sensationalized picture of her, but gave no examples of false statements in the program. Nothing in the record allows the inference that agents of NBC's did in fact seriously doubt the truth of any specific factual presentation in "Judge Horton." I therefore fully agree with the majority's conclusion that no jury question of "malice" existed under the subjective New York Times standard.

Yet under the objective, "ordinarily prudent person" standard that the courts of Tennessee apply in defamation actions brought by private persons, [\[FN7\]](#) a jury could readily conclude that NBC was negligent in its second broadcast of "Judge Horton." NBC's counsel admitted at trial that no one at NBC compared the transcripts of the 1933 Patterson trial with the parts of the movie purporting to reenact that trial. Dr. Carter and the screenwriter of "Judge Horton" testified that no one at NBC discussed ***1250** Mrs. Street's charges of falsity with them. NBC might have chosen to rely on the conclusions in Dr. Carter's historical work, but a jury would be permitted to determine whether this reliance was unreasonable in light of Dr. Carter's testimony that parts of "Judge Horton" find no support whatsoever in Dr. Carter's history.

[FN7](#). See [Nichols, supra, 569 S.W.2d at 418, A 1955](#) Tennessee statute sets lack of "due care" as the standard of broadcasters' liability for defamatory statements uttered on the air by those other than the broadcasters' agents. [Tenn.Code Ann. s 29-24-104\(a\)](#) (Michie 1980). Under this statute, broadcasters carry the burden of showing that due care was taken. [Id. s 29-24-104\(b\)](#). The statute's uniform standard of liability has been superseded by Gertz's dual

standards. The statute's allocation of the burden of proof is now unconstitutional. See [New York Times v. Sullivan](#), 376 U.S. 254, 283-84, 84 S.Ct. 710, 727-728, 11 L.Ed.2d 686 (1964). The majority opinion is silent on the applicability and constitutionality of this statute.

NBC's counsel admitted at oral argument that he had discovered this statute, unilaterally found it inapplicable, and decided not to bring it to the trial court's attention.

My fundamental disagreement with the majority concerns the constitutionality of permitting states to impose liability for negligence in defamation cases where the pressures of contemporaneous reporting are totally absent. The majority argues that different pressures work on historians, since "the distance of years does not necessarily make more data available to a reporter: memories fade; witnesses forget; sources disappear." Obviously, a negligence standard does not expect a writer to discover what is forever lost. When truth is unknowable, falsity, and hence defamation,[\[FN8\]](#) cannot be proven.

[FN8](#). See note 2, supra.

III

The majority's unstated assumption is that application of the New York Times "malice" standard necessarily creates "breathing space" for uninhibited speech. Yet a publisher's decision to print or broadcast a libelous story is only partly influenced by the probability of winning or losing a lawsuit. While the publication decision involves a complex calculus, the salient cost factors are likely to be the probability that the publisher will be sued, and the cost of defending if suit is brought. Rules affecting the publisher's ultimate liability are thus likely to be marginal considerations in the decision to publish.

L. Tribe, American Constitutional Law, s 12-13 at 643 (1978). Since no evidentiary privilege protects the editorial process, [Herbert v. Lando](#), 441 U.S. 153, 159-67, 99 S.Ct. 1635, 1639-44, 60 L.Ed.2d 115 (1979), litigation costs are not likely to vary with the application of New York Times "malice" or Gertz "fault" rules. In the present case, the district court did not decide the question of Mrs. Street's status until

the close of all proof. Had this action been brought after Lando, and had the trial judge (contrary to his actual ruling) early in the trial held Mrs. Street a public figure, the evidence (and outcome) in the trial might have been different, but it is incredible that either the hypothetical or the actual outcomes would significantly influence future publishing decisions. Invocation of *New York Times v. Sullivan* does not exorcise what to the majority is the demon of self-censorship. Only abolition of the torts of defamation and invasion of privacy can do that, and that abolition is a price measured in individual dignity that our Constitution does not exact.

A living person is not a means to an end. Events may be symbolic, but individuals are not mere symbols.[\[FN9\]](#) The dramatic effect of "Judge Horton," and the merit of its historical interpretation, however important they may be to the majority, are not matters before us, nor were they before any jury. The substantial truth of factual assertions in the work, and the liability of the network for any material errors in them, were questions for the jury to decide.

[FN9](#). The Supreme Court has repeatedly refused to find individuals public figures because they were involved in events of symbolic or exemplary import. See [Wolston](#), supra, 443 U.S. at 166-68, 99 S.Ct. at 2707-2708 (failure to comply with subpoena of grand jury investigating Soviet espionage in United States did not result in public figure status); [Time, Inc. v. Firestone](#), 424 U.S. 448, 454, 96 S.Ct. 958, 965, 47 L.Ed.2d 154 (1976) (society divorce is not a "public controversy" triggering application of malice standard in defamation action). Firestone is vulnerable to the same criticisms as is Rosenbloom's "newsworthiness" test for first amendment privileges. See L. Tribe, supra, s 12-13 at 644. Yet one clear lesson of *Wolston* and *Firestone* is that the term "public controversy" is read narrowly, not broadly. With imagination, any human activity acquires "symbolic" importance.

645 F.2d 1227, 7 Media L. Rep. 1001

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