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When Time Stands Still: An Argument for Restoring Public Figures to Private Status

Olympia R. Duhart*

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I. INTRODUCTION

He never had a chance. William James Sidis was too shy, too introverted, and far too withdrawn to ever survive the barrage of publicity that surrounded him because of his preternatural mathematical skills.[1] The brilliant scholar, who had lectured to mathematicians on the topic of four-dimensional bodies at the age of eleven, and graduated Harvard at the age of sixteen,[2] could not cope with the media attention that tracked his academic success. Within time, the bright light of media glitz proved too brilliant, indeed. The one-time child prodigy—who suffered a nervous break-down from the unwanted attention—abandoned his intellectual pursuits in favor of

* The author is a May 2003 J.D. candidate at Nova Southeastern University in Fort Lauderdale, Florida. She received her B.A. in English from the University of Miami. Prior to law school, she taught American Literature and Creative Writing at Stoneman Douglas High School in Parkland, Florida. She also worked as a staff writer for *The Miami Herald*. The author would like to thank her family and friends for their support.

1. *See* Sidis v. F-R Publ'g Corp., 113 F.2d 806 (2d Cir. 1940).
2. *Id.* at 807.

a more private role in society and "cloaked himself in obscurity."[3] Quite deliberately, Sidis receded from the public eye; he carefully carved out a private place for himself free from the press and free of the public scrutiny.[4]

But the retreat would not last forever. More than twenty-five years after Sidis sought the solace of quietude, he found himself again a subject of inquiry.[5] Although Sidis had lived quietly for some time, a visit from a reporter transformed his life and highlighted an unusual time warp in the field of media law—one that would persist for years.

The case, denied a writ of certorari by the United States Supreme Court in 1940,[6] set the stage for the "permanent public figure." Surprisingly, a barrage of cases that deal with public figures in various contexts have done little over the past sixty years to change the problems raised by retention of public figure status. One who has achieved public figure status finds it nearly impossible to shed. More importantly, the retention of public figure status presents incredible hurdles for defamation and privacy plaintiffs.[7] This article will present a test for restoring one-time public figures to private status. Because of the need to restore the privacy rights of citizens and provide them with a shield against defamation, courts should adopt a new test to reinstate the private status of one-time public figures. Most importantly, courts should inject an element that allows for the passage of time into the public figure abatement analysis.

Part two of this article will provide a background of public figure law; it will discuss some of the legal hurdles presented by the *New York Times v. Sullivan* standard and the added dimensions it presents for public figures attempting to bring an invasion of privacy or a defamation suit. In Part three, this article will examine some representative cases that depict the problems faced by permanent public figures. Part four will propose a test for

3. *Id.* at 809. Sidis is not the only intellectual great to shun the public eye. "Many great scientists and philosophers, among them René Descartes, Ludwig Wittgenstein, Immanuel Kant, Thorstein Veblen, Isaac Newton, and Albert Einstein, have had . . . solitary personalities." SYLVIA NASAR, A BEAUTIFUL MIND 15 (1998).

4. *Sidis,* 113 F.2d at 809. In fact, the article in question discusses Sidis' attempt to live a private life. The piece follows his attempts to conceal his identity as a clerk whose job requires nothing extraordinary in the way of intellectual capabilities. *Id.* at 807.

5. The original celebrity surrounded Sidis' mathematical skills reached a peak in 1910. *Id.* On August 14, 1937, *The New Yorker*, a weekly magazine, portrayed Sidis in a biographical sketch and cartoon. *Id.* The court referred to the 1937 article on Sidis as a "ruthless exposure" of its subject. *Id.*

6. Sidis v. F-R Publ'g Corp., 311 U.S. 711 (1940).

7. Carol Anne Been, Note, *Public Status Over Time: A Single Approach to the Retention Problem in Defamation and Privacy Law*, 1982 U. ILL. L. REV. 951, 966 (1982).

restoring the private status of public figures who seek to bring an action for invasion of privacy or defamation. Finally, this article will conclude with a discussion of why a test for restoring private status is needed today.

II. PUBLIC FIGURES AND THE LAW

A. New York Times Co. v. Sullivan

The history of public figures and the law begins with an analysis of the landmark case *New York Times Co. v. Sullivan*.[8] The case, a 1964 decision, set the framework for the media law unique to public officials and, subsequently, public figures. The *New York Times* case was sparked by a newspaper advertisement entitled "Heed Their Rising Voices," which called attention to civil rights violations in the South.[9] Although the plaintiff was not named in the advertisement, he brought suit for defamation against the *New York Times*.[10] L.B. Sullivan, who was one of three elected commissioners of the City of Montgomery, Alabama, claimed that the word "police" referred to him as the Montgomery Commissioner who supervised the police department.[11] One of the paragraphs that served as a basis for Sullivan's claim is as follows:

> Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for 'speeding,' 'loitering' and similar 'offenses.' And now they have charged him with 'perjury'—a *felony* under which they could imprison him for *ten years* . . . .[12]

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8. 376 U.S. 254 (1964).

9. *Id.* at 256.

10. *Id.* The plaintiffs sought a total of $5,600,000. Kermit L. Hall, *Justice Brennan and Cultural History:* New York Times v. Sullivan *and Its Times*, 27 CAL. W. L. REV. 339, 351 n.67 (1991).

11. *New York Times*, 376 U.S. at 258. Sullivan was one of many state officials who played a prominent role in breaking the strides of the civil rights movement of the 1960s. He decided to disrupt the sit-in movement through force and intimidation. Hall, *supra* note 10, at 348. In one alarming example, state and city police stood by while "baseball wielding Klansman waded into a group of some 800 black students from Alabama State University supporting a sit-in at the restaurant in the state capitol." *Id.*

12. *New York Times*, 376 U.S. at 257–58.

The Court noted from the onset that it was "uncontroverted that some of the statements" were inaccurate.[13] However, the Court was prompted by weighty policy concerns in its landmark ruling. The Court acknowledged the need for uninhibited debate that sometimes included "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[14] Rather than strip journalists of their ability to criticize the government anytime the ensuing reports contained false or defamatory statements, the Court imposed a new standard by which to judge defamatory statements aimed at public officials.

Prior to the milestone decision handed-down in *New York Times*, "[l]ibel in America was recognized as a strict liability tort."[15] In *New York Times*, however, the United States Supreme Court decided that the national interest in promoting robust debate on public issues warranted extra protection for journalists when their subjects were public officials. Accordingly, the *New York Times* Court made significant strides in the effort to protect free "speech critical of the government and government officials."[16] Under *New York Times,* a public official would have to show with "'convincing clarity' that the [newspaper] acted with 'actual malice' in publishing [a] false, defamatory statement."[17]

The term "actual malice" was defined by the Court as: 1) knowledge by the defendant that the statement was false; or 2) the defendant's reckless disregard for the statement's falsity.[18] Simple negligence in journalism—even that which resulted in false statements—would not support a defamation suit brought by a public official.[19] With such a high burden, "the Court made it extremely difficult if not impossible for such officials to prevail in libel actions against media defendants."[20]

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13. *Id.* at 258. The inaccuracies, however, were limited to mistakes in the details of the injustices King had suffered at the hands of Southern leaders. *Id.* For instance, one part of the advertisement referred to a song black students sang on the state capitol steps during a demonstration. *Id.* The advertisement identified the song as "My Country, 'Tis of Thee" when the students actually sang the National Anthem. *Id.* at 258–59. In another error, the advertisement referred to Dr. King's seven arrests at the hands of the southern police; in fact, he had been arrested four times. *New York Times*, 376 U.S. at 259.

14. *Id.* at 270.

15. Elsa Ransom, *The Ex-Public Figure: A Libel Plaintiff Without Class*, 5 SETON HALL J. SPORT L. 389, 391 (1995).

16. *Id.* at 391.

17. *Id.*

18. *New York Times*, 376 U.S. at 280.

19. *Id.* at 288.

20. Ransom, *supra* note 15, at 391.

Other policy considerations propelling the *New York Times* decision included the fear of self-censorship among media and the recognition of the legitimate public interest in the dealings of public officials. Other commentators have noted the political motives of the *New York Times* decision:

> *Sullivan* was a remarkable incident in modern American cultural history, an understanding of which reveals how conflicting social demands shaped and in turn were shaped by first amendment law. Historians and legal scholars have regularly insisted that *Sullivan* compels our attention because of its connection to the civil rights movement of the 1960s. *Sullivan*, in this view, was a necessary step in the legal confirmation of the civil rights movement, one that shielded its leadership from exposure to the constraining effects of state-administered common law rules of political libel. The white public officials of the South that brought *Sullivan* and other libel actions, according to this literature, were provincial racists, who hypocritically complemented the force and violence they used against the movement with a cynical invocation of the law's sweet reason. From this perspective, Justice Brennan wisely collapsed traditional lines of constitutional understanding in the face of massive, pent-up demands for racial equality.[21]

Whatever the motivation behind its origins, the impact of the *New York Times v. Sullivan* case immediately started a long-running debate on its need, and, eventually, its efficacy. One set of scholars celebrated the decision, calling it "an occasion for dancing in the streets."[22] Proponents of the *New York Times* decision believed the Court's ruling evinced its commitment to both the First Amendment and the principles of democracy that are central to America's promise.[23] Others, however, asserted that the *New York Times* test is so stringent that it actually invites journalistic misconduct, much to the detriment of the society it aims to protect. The standard advanced in *New York Times* "may so expose public officials to journalistic abuse that it

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21. Hall, *supra* note 10, at 341–42 (citations omitted).

22. Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221 n.125 (1964) (quoting Mr. Alexander Meiklejohn).

23. *Id.* "The theory of the freedom of speech clause was put right side up for the first time." *Id.* at 208.

will drive capable persons away from government service, thus frustrating, rather than furthering, the political process."[24]

Still, others praised the spirit of *New York Times* but criticized its limits. Any number of cases have shown how very far courts are willing to go without finding "reckless disregard." Just four years after *New York Times*, the United States Supreme Court found that failure to investigate or seek any corroboration before publishing an allegation does not rise to the level of reckless disregard for the truth.[25] Another case, *Masson v. New Yorker Magazine, Inc.*,[26] examined the effect deliberate alteration of quotes would have on libel action. Surprisingly, the Court ruled that the First Amendment protects deliberate alteration of quotes unless the plaintiff can prove that the change results in a "material" change of the speaker's meaning.[27]

Also, in *Harte-Hanks Communications, Inc. v. Connaughton*,[28] the United States Supreme Court found that failure to comply with professional standards in publication of a falsehood was insufficient to support a finding of "actual malice."[29] Indeed, it seemed the "actual malice" standard would create serious problems for a public official attempting a libel suit. In a short time, however, the class would be expanded.

B. *Expanding* New York Times

Just three years after the decision announced in *New York Times*, the United States Supreme Court examined two cases that involved the application of the *New York Times* standard to public figures. *Curtis Publishing Co. v. Butts*[30] involved a controversy surrounding a head football coach for a university.[31] Butts was not truly the kind of public figure or

24. GEOFFREY R. STONE ET AL., THE FIRST AMENDMENT 139 (1999). *See also* Richard Epstein, *Was* New York Times v. Sullivan *Wrong?* 53 U. CHI. L. REV. 782 (1986). "On balance, the common law rules of defamation (sensibly controlled on the question of damages) represent a better reconciliation of the dual claims of freedom of speech and the protection of individual reputation than does *New York Times* rule that has replaced it." *Id.* at 817.

25. St. Amant v. Thompson, 390 U.S. 727, 732–33 (1968).

26. 501 U.S. 496 (1991).

27. *Id.* at 497.

28. 491 U.S. 657 (1989).

29. *Id.*

30. 388 U.S. 130 (1967).

31. *Id.*

official contemplated by the Court in *New York Times*.[32] Yet, he had achieved national fame as a football coach.[33] Butts filed a libel suit against Curtis Publishing Company, publisher of the *Saturday Evening Post*, for an article falsely accusing him of conspiring to "fix" a football game between the University of Georgia and the University of Alabama.[34] Butts sought $5,000,000 compensatory and $5,000,000 punitive damages.[35]

The companion case to *Curtis Publishing Co., Associated Press v. Walker*,[36] concerned a libel claim brought by a man accused of inciting a riot against federal marshals.[37] The plaintiff, who was a national military figure with his own following, the "Friends of Walker," was still not deemed a public official at the time the false news dispatch was released about him.[38] According to the dispatch, Walker led opposition to federal efforts to enforce court ordered desegregation at the University of Mississippi.[39]

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32. At the time the article about him was written, Butts was athletic director of the University of Georgia, which is a state university. *Id.* at 135. However, he was employed by the Georgia Athletic Association, a private corporation. *Id.* One case that had attempted to define the "public figure" was Rosenblatt v. Baer, 383 U.S. 75 (1966). In *Rosenbatt*, the United States Supreme Court held that the public figure status "applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Id.* at 85.

33. *Curtis Publ'g*, 388 U.S. at 136.

34. *Id.* "The article was entitled 'The Story of a College Football Fix' and prefaced by a note from the editors stating: 'Not since the Chicago White Sox threw the 1919 World Series has there been a sports story as shocking as this one . . . .'" *Id.*

35. *Id.* at 137. "The jury returned a verdict for $60,000 in general damages and for $3,000,000 in punitive damages." *Id.* at 138. "The trial court reduced the total to $460,000 by remittitur." *Id.*

36. 388 U.S. 130, 140 (1967). The United States Supreme Court combined the *Curtis* and *Associated Press* cases and issued one opinion.

37. *Id.*

> [The case] arose out of the distribution of a news dispatch giving an eyewitness account of events on the campus of the University of Mississippi on the night of September 30, 1962, when a massive riot erupted because of federal efforts to enforce a court decree ordering the enrollment of a Negro, James Meredith, as a student in the University. The dispatch stated that respondent Walker, who was present on the campus, had taken command of the violent crowd and had personally led a charge against federal marshals sent there to effectuate the court's decree and to assist in preserving order. It also described Walker as encouraging rioters to use violence and giving them technical advice on combating the effects of tear gas.

Id. at 140.

38. *Id.*

39. *Id.*

Walker sued the Associated Press for libel, claiming the report was false.[40] In its decisions, the United States Supreme Court expanded the *New York Times v. Sullivan* standard for public officials to include public figures.[41] Chief Justice Warren noted in his concurring opinion that the distinctions between governmental and private sectors are increasingly blurred.[42]

> In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.
>
> Viewed in this context, then, it is plain that although they are not subject to the restraints of the political process, "public figures," like "public officials," often play an influential role in ordering society.[43]

To be sure, the announcements in the *Curtis Publishing Co.* and *Associated Press* opinions would have far-reaching effects. They would make significant legal distinctions. "A private person and a public figure have different relationship in libel. The latitude for journalism is larger in the latter category."[44] The decisions also opened the door for a host of public figure classifications. Courts were no longer forced to confine the higher "actual malice" standard to public officials; now, the standard

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40. *Id.* at 140.

41. *CurtisPubl'g*, 388 U.S. at 155.

42. Warren reflected: "To me, differentiation between 'public figures' and 'public officials' and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy." *Id.* at 163 (Warren, J., concurring). Even Warren was probably unable to imagine how very blurred those lines would have become in 2002. Today, public figures and public officials are nearly impossible to distinguish. With presidential candidates routinely appearing on late-night entertainment shows, it seems there is almost no difference at all between officials and celebrities.

43. *Id.* at 163–64.

44. JOHN MURRAY, THE MEDIA LAW DICTIONARY 83 (1978).

extended to public figures as well.[45] Still, the Court needed to address a critical question: What made one a public figure?[46]

C. *Who is a Public Figure?*

The Supreme Court had the opportunity to explore this issue in the case *Gertz v. Robert Welch, Inc.*[47] The case involved a prominent Chicago attorney, Elmer Gertz, who was hired to represent the family of a man shot and killed by a policeman.[48] Gertz's role in the civil suit against the police officer prompted an article in the *American Opinion*, which "accused Gertz of being the architect of a 'frame-up' of [policeman] Nuccio and stated that Gertz had a criminal record and longstanding communist affiliation."[49] Gertz sued for libel.[50]

In examining the dispute, the United States Supreme Court was afforded the opportunity to clarify the definition of "public figure." The Court identified two attributes of public figure status. First, the Court noted the public figure's access to the channels of communications.[51] According to the majority opinion written by Justice Powell: "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."[52]

The second attribute of a public figure cited by the *Gertz* Court was the fact that a public figure is one "who has assumed a role of special promi-

45. *Curtis Publ'g*, 388 U.S. at 164.

46. The question has generated conflicting opinions from courts and scores of critical commentary from legal scholars. One commentator noted that "[t]he hard problem of line-drawing is how to define and treat those who are more than private persons but less than official: public figures. The question may well be unanswerable by any formula." Anthony Lewis, New York Times v. Sullivan *Reconsidered: Time to Return to the "Central Meaning of the First Amendment,"* 83 COLUM. L. REV. 603, 622 (1983).

47. 418 U.S. 323 (1974).

48. *Id.* at 325. Gertz was one of the most popular attorneys in his day. For example, one of his former clients was Jack Ruby. Ernest D. Giglio, *Unwanted Publicity, the News Media, and the Constitution: Where Privacy Rights Compete with the First Amendment*, 12 AKRON L. REV. 229, 238 (1978).

49. Stone, *supra* note 24, at 143.

50. *Id.* After a jury trial, Gertz won a $50,000 judgment. The trial court, however, entered a judgment n.o.v. based on its application of the *New York Times v. Sullivan* standard to anyone embroiled in a discussion of a public issue. *Id.* The court of appeals affirmed, but the United States Supreme Court reversed. *Id.*

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

52. *Id.* at 345.

nence in society and thus invites public scrutiny and the accompanying risks."[53] As Justice Powell expressed:

> An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties .... Those classified as public figures stand in a similar position.[54]

Applying its newly announced test for a public figure to Gertz, the Court held the prominent attorney to be a private person for the purposes of the *New York Times v. Sullivan* standard.[55]

Subsequent cases attempted to inject other factors into the public figure status determination: the controversy involved and the plaintiff's role in the dispute. In *Time, Inc. v. Firestone*[56] and *Wolston v. Reader's Digest Ass'n*,[57] respectively, the Supreme Court addressed these issues. In *Time*, the Court rejected the public status of the plaintiff, applying the controversy standard.[58] The Court held that the dissolution of a marriage was not the type of "public controversy" contemplated by the *Gertz* Court.[59] The plaintiff, therefore, would not be deemed a public figure because of her lack of involvement in a public controversy. The *Wolston* case limited the public figure status by the plaintiff's role in the controversy.[60] The plaintiff in

53. Been, *supra* note 7, at 955.

54. *Gertz*, 418 U.S. at 344–45.

55. *Id.* at 352. According to the Court's analysis, Gertz failed both prongs of the test. He did not discuss the case with the media, and therefore lacked access to the press to rebut claims. Been, *supra* note 7, at 955. Also, "because Gertz had merely represented a client, he had not invited the risks associated with close public scrutiny." *Id.*

56. 424 U.S. 448 (1976).

57. 443 U.S. 157 (1979).

58. *Time*, 424 U.S. at 453.

59. *Id.* at 454. The *Time* case involved a divorce between a member of a socially prominent family and Russell Firestone, a member of one of America's wealthiest families. *Id.* at 450. "Time magazine erroneously reported that the divorce was granted on the grounds of adultery." Stone, *supra* note 24, at 149. Mrs. Firestone sued the magazine for libel. *Id.* Part of the final judgment alluded to the wild allegations that surfaced during the divorce: "According to certain testimony in behalf of the defendant, extramarital escapades of the plaintiff were bizarre and of an amatory nature which would have made Dr. Freud's hair curl." *Time*, 424 U.S. at 450.

60. Been, *supra* note 7, at 957. *Wolston* involved a plaintiff who was convicted of contempt in the late 1950s for his refusal to appear before a grand jury investigating Soviet espionage. Stone, *supra* note 24, at 149. The case was highly publicized at the time.

Wolston prevailed in his libel suit against the defendant because he had not willingly engaged the attention of the public.[61]

Commentators have advanced the same test. In a recent lecture, Professor Rodney Smolla posed the question: "How do we know when we are dealing with a public figure or a private person?"[62] His answer: "Have they voluntarily injected themselves into a public controversy?"[63]

Taken together, then, the factors considered by the United State Supreme Court in conferring public figure status upon individuals include: 1) plaintiff's access to the media; 2) assumption of a special role in the public eye; 3) the plaintiff's involvement in a "public controversy"; and 4) the plaintiff's role in the controversy. While these guidelines may prove helpful in determining who constitutes a public figure, they are not at all useful under the abatement issue. Even if one meets the public figure status —and summarily triggers the difficult hurdles presented by the *New York Times v. Sullivan* standard—when can one retreat into a private legal status?

The answer to this question has proven elusive. Unfortunately, however, it is one that often emerges in both defamation and privacy cases.[64]

"Sixteen years later, the defendant published a book erroneously identifying plaintiff as a Soviet agent." *Id.*

61. *See Wolston*, 443 U.S. at 157. The Court's decision in *Wolston* was based on its refusal to classify the plaintiff as a public figure. Therefore, it never had to reach the question of whether the passage of time (sixteen years here) would make Wolston a private plaintiff. In their concurring opinion, however, Justices Blackmun and Marshall argued that even if the plaintiff gained public figure status at the time of the espionage charges, sixteen years of anonymity would restore him to private status. *Id.* at 171 (Blackmun, J., concurring). Blackmun stated that the time lapse between Wolston's participation in the controversy and the magazine's defamatory reference "was sufficient to erase whatever public-figure attributes" Wolston once possessed. *Id.* (Blackmun, J., concurring).

62. Rodney Smolla, Goodwin Seminar Speech, Shepard Broad Law Center, Nova Southeastern University in Ft. Lauderdale, Fla. (Jan. 17, 2002). Smolla is a member of the law faculty at the University of Richmond, and the author of numerous books on Free Speech and First Amendment issues.

63. *Id.*

64. Although the *New York Times* case involved defamation, lower courts generally defer to the Supreme Court's defamation test to "assess public figure status in privacy cases ." Been, *supra* note 7, at 963. The law of privacy has had to rely heavily on judge-made law. In fact, privacy law in this country originated in the seminal article written by Samuel Warren and Louis Brandeis. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). The American Law Institute did not officially recognize the tort of public disclosure of private fact as one of the four types of invasion of privacy torts until 1976. Phillip E. DeLaTorre, *Resurrecting A Sunken Ship: An Analysis of Current Judicial Attitudes Toward Public Disclosure Claims*, 38 SW. L.J. 1151, 1151 (1985). *See also* RESTATEMENT (SECOND) OF TORTS § 652A (2002).

"While the [defamation and invasion of privacy] torts do address different individual interests, the reputational and personal integrity concerns in both causes of action are of equivalent value in the balance against free speech guarantees."[65] Several cases highlight the need for a new test that factors in the passage of time and allows public figures to retreat in time to privacy. Moreover, the "Supreme Court has expressly reserved the question of whether the passage of time can extinguish an individual's status as a public figure."[66]

III. REPRESENTATIVE CASES

A. Brewer v. Memphis Publishing Co.

Many cases demonstrate the need for a new approach to the public figure abatement problem. The case of *Brewer v. Memphis Publishing Co.*[67] is one such case. In *Brewer*, plaintiff Anita Wood Brewer filed a defamation suit based on a newspaper article that ran about her and Elvis Presley in the *The Commercial Appeal*, a Memphis newspaper.[68] The article, which ran in a *People* column on September 8, 1972, inferred that Brewer and Presley were rekindling an old, romantic relationship.[69] The article read:

> FLICKERING FLAME: Back in 1957 Anita Wood, who came from Jackson, Tenn., to Memphis to sing on TV, was Elvis Presley's "No. 1 girl." This week as Elvis closed his month-long show at the Las Vegas Hilton, Miss Wood stopped by the hotel for what appeared to be a "reunion" of two old friends. Elvis recently filed for divorce from his wife of five years, Priscilla. Miss Wood is divorced from former Ole Miss football star Johnny Brewer.[70]

After John Brewer contacted the newspaper, the paper ran a correction stating that Anita Brewer was not in Las Vegas on the date in question, nor was she divorced from John Brewer.[71] The Brewers brought separate

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65. Been, *supra* note 7, at 966.

66. Robert M. Dato, Comment, *The Effect of Passage of Time on the Status of Inactive Public Figures*, 35 FED. COMM. L.J. 235, 242 (1983).

67. 626 F.2d 1238 (5th Cir. 1980).

68. *Id.* at 1240.

69. *Id.*

70. *Id.* Accompanying the article was a photograph of Wood. *Id.*

71. *Id.*

defamation actions against Memphis Publishing Company, and the suits were consolidated.[72]

By the time the case reached the Fifth Circuit Court of Appeals, the initial issue was whether Anita Brewer or John Brewer were public figures.[73] The court made the determination that both Anita and John Brewer were public figures.[74] It based its decision on the fact that Anita Brewer, in the early to mid-1950s, won talent and beauty contests and worked as a disc jockey with a radio station in Jackson, Tennessee.[75] The court also noted that Anita Brewer had been awarded a motion picture contract, though she had never done a movie.[76] In addition, she had appeared on national television, once on the *Jack Paar Tonight Show* and about five times on the *Andy Williams Show*, as a singer.[77] More important to the content of the article in question, Anita Brewer had dated Elvis Presley for about five or six years, from 1955 to 1960 or 1961.[78] The court also made note of the fact that after Anita Brewer's marriage to John Brewer in 1964, she did not seek media attention or continue as a professional entertainer.[79]

The court assessed John Brewer's status as a public figure through both his football career and his marriage to Anita Brewer.[80] "John Brewer was a member of the Ole Miss football team the year it was ranked number one in the nation."[81] He also played professional football from 1960 to 1970, first with the Cleveland Browns, then with the New Orleans Saints.[82] The court also pointed out that John Brewer may have achieved public figure status through his marriage to Anita Brewer.[83]

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72. *Brewer*, 626 F.2d. at 1240–41. In 1974, a jury found for the Brewers and awarded each $400,000. *Id.* The judge granted a new trial on damages alone and the second jury awarded Anita Brewer $250,000 and John Brewer $150,000; they accepted a remittitur to $100,000 and $50,000 respectively. *Id.*

73. *Id.* at 1241.

74. *Id.* at 1255.

75. *Id.* at 1248. Anita Brewer once did the "Antics of Anita" radio show. *Id.*

76. *Brewer*, 626 F.2d at 1248.

77. *Id.*

78. *Id.*

79. *Id.* There was possibly one exception of a television/newspaper interview shortly after her marriage. *Id.*

80. *See Brewer*, 626 F.2d at 1255.

81. *Id.* at 1248.

82. *Id.* "In a published interview he was quoted as saying that his football career had made his name well-known enough to open business opportunities for him the rest of his life . . . ." *Id.*

83. *Id.* at 1249 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)).

The Brewers maintained that they were neither all-purpose public figures nor limited public figures.[84] They asserted that neither one of them had "'assume[d] special prominence in the resolution of public questions.'"[85] The Fifth Circuit rejected the argument and found that, under *Gertz*, the Brewers were public figures.[86] Therefore, they could only win in their defamation claim by proving the "actual malice" standards advanced in *New York Times*.[87] As for Anita Brewer's deliberate retreat from the media, the court held that "even viewing Anita as one who had retreated several years before this article, she would be required to prove malice in her suit based on this article."[88]

B. Friedan v. Friedan

The case of *Friedan v. Friedan*[89] offers a unique view of the public figure-status retention issue. In this case, the Southern District of New York considered whether one can retroactively be deemed a public figure through his or her connection to one who later emerged as a public figure.[90] *Friedan* involved a suit between plaintiff Carl Friedan and his former wife, Betty Friedan, a well-known leader of the feminist movement.[91] The lawsuit was the result of an article written by Betty Friedan, which ran in *New York* magazine.[92] The magazine issue featuring the Freidan article was part of a special issue dedicated to "a twenty-five year throwback to the year 1949."[93]

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84. *Id.*

85. *Brewer*, 626 F.2d at 1249 (alteration in original) (quoting *Gertz*, 418 U.S. at 351).

86. *Id.* at 1255.

87. *Id.*

88. *Id.* at 1257. The court seemed to hinge its decision on the fact that some of the same issues that gave rise to Anita Brewer's classification as a public figure—her romantic involvement with Elvis Presley—was the subject of the article. *Id.*

89. 414 F. Supp. 77 (S.D.N.Y. 1976).

90. *Id.*

91. *Id.* Betty Friedan is widely recognized as America's feminist leader. Her book *The Feminine Mystique* (1963) challenged several long-established American attitudes. Betty Friedan also founded the National Organization for Women in 1966. *Betty Naomi Friedan*, *in* Microsoft Encarta Online Encyclopedia 2002, *at* http://encarta.msn.com/encnet/refpages/RefArticle.asp (last visited Oct. 23, 2002).

92. *Friedan*, 414 F. Supp. at 78. In addition to suing his ex-wife, Carl Friedan also sought recovery of damages from *New York* magazine and thee broadcasting companies for using the magazine in spot commercials on their television channels promoting the article. *Id.*

93. *Id.* The magazine's retrospective was themed "The Year We Entered Modern Times." *Id.*

The article aimed to present the contrasting lifestyles of Ms. Friedan, who was a connubial housewife in the 1940s.[94]

The article was illustrated with a photograph of Betty Friedan, her then husband, Carl, and their son in 1949.[95] Carl Friedan brought suit under the Civil Rights Law of New York, the statute that protected privacy rights.[96] Carl Friedan argued that he had made "every effort" to disassociate himself from his former wife's public status to preserve his identity as a private individual.[97] However, the Southern District of New York held that the article—and the accompanying picture—describing Ms. Friedan's life twenty-five years before her emergence as a feminist leader was held to be a matter of public interest.[98] First, the court noted from the onset that the defendant, Betty Friedan, as a leader of the feminist movement, was a public figure.[99] The court held: "All incidents of her life, including those which contrast with her present status and views, are significant in terms of the interest of the public in news."[100]

The court then went an additional step and held that her life experiences twenty-five years ago—before Betty Friedan herself achieved public-figure status—was also a matter of public concern.[101] Finally, the court concluded by citing *Sidis v. F-R Publishing Corp.*,[102] and noted that Carl Friedan's privacy would have to be subordinated to the public interest in his former wife's life. The court noted, "'[e]veryone will agree that at some point the public interest in obtaining information becomes dominant over the individual's desire for privacy.'"[103] The court failed, however, to note a major distinction between the *Sidis* case and the facts in *Friedan*. In *Sidis*, the plaintiff was a public figure himself at one time. In *Friedan*, the plaintiff

94. *Id.* at 78–79. Betty Freidan has reflected many times on her slow entrance to the feminist movement. She said recently in an interview: "Looking at my own experience . . . when I was a graduate of Smith, the best women's college in America, I knew nothing of feminism, I knew very little of the battle for women's rights that took place in the last century and in the first half of this century." Kathleen Erickson, *An Interview with Betty Friedan*, THE REGION, *at* http://minneapolisfed.org/pubs/region/94-09/int949.cfm (Sept. 1994).

95. *Friedan*, 414 F. Supp. at 78.

96. Carl Friedan brought suit against Betty Friedan under sections 50 and 51 of the Civil Rights Law of New York. *Id.* at 78.

97. *Id.* at 79.

98. *Id.*

99. *Id.* at 78.

100. *Friedan*, 414 F. Supp. at 78.

101. *Id.* at 79.

102. 113 F.2d 806 (2d Cir. 1940).

103. *Friedan*, 414 F. Supp. at 79 (quoting *Sidis*, 113 F.2d at 809)).

Carl Friedan was not a public figure at the time the picture of him was taken in 1949. Moreover, the court never did address the two decades that elapsed since Carl Friedan was married to the now-famous Betty Friedan.[104] With these failures, it is clear that the court's decision in *Friedan* is not based on solid analysis.

C. Bernstein v. NBC

In *Bernstein v. NBC*,[105] the District of Columbia considered a suit brought by a former death-row inmate who had been convicted of first-degree murder in 1933.[106] In 1933, plaintiff Charles S. Bernstein (under the name Charles Harris) was tried and convicted of first-degree murder and sentenced to death by electrocution.[107] Prompted by various people and committees working to aid Bernstein, reporter Martha Strayer, who worked for the *Washington Daily News*, worked to get the death sentence commuted to life imprisonment.[108] In 1935, Bernstein's death sentence was indeed commuted to life imprisonment.[109] Five years later, Bernstein received a conditional release from his life sentence.[110] Finally, in 1945, Bernstein received a presidential pardon.[111]

After his release from prison, Bernstein joined the public and attempted to live a normal life.[112] His efforts were destroyed in 1952, however, when the defendant, NBC, telecast, live, a program entitled "The Big Story."[113] The story was a fictionalized dramatization based on Bernstein's conviction and pardon.[114] Bernstein sued for invasion of privacy.[115]

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104. The impact the passage of time should have on public status abatement will be discussed in further detail by the author. *See infra* pp. 13–15.

105. 129 F. Supp. 817 (D.D.C. 1955).

106. *Id.* at 818.

107. *Id.*

108. *Id.* at 818–19.

109. *Id.* at 819.

110. *Bernstein*, 129 F. Supp. at 819.

111. *Id.*

112. *Id.* Bernstein operated a "resort lodge." *Id.*

113. *Id.* The story was telecast over thirty-nine stations in its network. *Id.*

114. *Bernstein*, 129 F. Supp. at 819. Although the story was based on Bernstein, the names were changed. *Id.* at 820. Bernstein asserted, however, that the character playing him had a strong resemblance to the way he had appeared years earlier, and that the portrayal of him was "recognizable to him and to his friends and acquaintances" in the public. *Id.*

115. Bernstein sought $250,000 in actual damages for mental pain and personal injury caused by the telecast. *Id.*

Although the defendant network asserted that the docudrama did change the name of the parties involved, Bernstein insisted that he was readily identifiable through the show.[116] More importantly, he stressed that the passage of time between his release in 1940 and the show's airing in 1952 should restore his privacy rights.[117] Was Bernstein still a public figure despite his efforts to avoid the press, or had he become "stale news?"[118]

As one commentator has noted, almost all individuals portrayed as major characters in a docudrama fall within the public figure or public official cate-gory.[119] "After all, if the individual was not at least a limited public figure, why would the network produce the telefilm?"[120] Consequently, a plaintiff in a docudrama is almost always faced with the *New York Times v. Sullivan* standard.[121] Certainly, the court in *Bernstein* agreed. While the District of Columbia discussed at length society's need to "sustain the unfortunate rather than tear him down,"[122] the court still elected to find that Bernstein was not removed from the realm of public interest.[123] Therefore, the court held that any protection afforded by time "to a [former] public figure is not against repetition of the facts which are already public property."[124]

D. *A Closer Look at* Sidis

The quintessential case for public figure abatement is *Sidis*. The case vividly highlights the inherent problems in the so-called permanent public

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116. *Id.*

117. *Bernstein*, 129 F. Supp. at 824.

118. *See id.* at 835.

119. Jacqui Gold Grunfeld, *Docudramas: The Legality of Producing Fact-Based Dramas—What Every Producer's Attorney Should Know*, 14 HASTINGS COMM. & ENT. L.J. 483, 494 (1991).

120. *Id.*

121. *Id.* at 494–95.

122. *Bernstein,* 129 F. Supp. at 827. The Bernstein court also discussed in detail the "Red Kimono" case. *Id.* (construing Melvin v. Reid, 297 P. 91 (Cal. Dist. Ct. App. 1931)). In *Melvin*, a reformed prostitute was tried and acquitted on a murder charge. After her acquittal, Gabrielle Darley "abandoned her life of shame," married, and "became entirely rehabilitated." *Melvin*, 297 P. at 91. More than five years later, defendant made and released a movie without Darley's consent. *Id.* "The Red Kimono" was based on Darley's past life. *Id.* Darley sued for invasion of privacy. *Id.* The Melvin case was one of the few that got it right—the court ruled that Darley's privacy had been invaded. *Id.* at 93–94.

123. *Bernstein*, 129 F. Supp. at 828.

124. *Id.*

figure status retention. The life of William James Sidis[125] was defined early by his father as a matter of public concern. The elder Sidis, an early psychotherapist, believed that "geniuses are made the way twigs are bent"[126] and worked hard to mold his child into a prodigy. He was also eager to show off his success to the public.[127]

The effort was also aided by the natural genius of Sidis, who was said to have had an IQ between 250 and 300.[128] Sidis qualified for admission to Harvard University at age nine, but had to wait two years before he could enter as a special student.[129] The young Sidis was also fluent in five languages by age five, and could read Plato in the original Greek as a child.[130]

Such remarkable skills, coupled with his father's demands for attention, generated enviable publicity for the young scholar. Sidis was featured in front-page stories of the *New York Times* nineteen times.[131] In time, however, the press that glorified the child prodigy turned cynical and waited to be the first to predict his burnout. And in many ways, the burnout was inevitable. For all of his brilliance, Sidis was a recluse. At his Harvard graduation, he was said to have told reporters: "'I want to live the perfect life. . . . The only way to live the perfect life is to live it in seclusion. I have always hated crowds.'"[132]

Sidis then made various career moves, and failed.[133] Eventually, however, he found his place as a law clerk in a New York business firm, where he worked for twenty-three dollars a week.[134] The job did not require any of the extraordinary talents possessed by Sidis.[135] He lived a quiet life,

125. Sidis was named for his godfather, the psychologist and philosopher Williams James, who was a friend of Sidis' father. *Good Will Sidis,* HARVARD MAG., *available at* http://www.harvard-magazine.com/issues/ma98/pump.html (last visited April 24, 2002).

126. *Bent Twig*, Time-Life Books, at http://www.sidis.net/TimeLife.htm (last visited Nov. 3, 2002).

127. *Id.*

128. *Id.*

129. *Good Will Sidis*, *supra* note 125, *available at* http://www.harvard-magazine.com/issues/ma98/pump.html (last visited April 24, 2002).

130. *Bent Twig*, *supra* note 126, at http://www.sidis.net/TimeLife.htm (last visited Nov. 3, 2002).

131. *Id.*

132. *Good Will Sidis*, *supra* note 125, *available at* http://www.harvard-magazine.com/issues/ma98/pump.html (last visited April 24, 2002).

133. Sidis tried a teaching stint at Rice University but failed. *Id.* He also entered Harvard Law school, but dropped out in his last semester. *Id.*

134. *Id.*

135. Sidis v. F-R Publ'g Corp., 113 F.2d 806, 807 (2d Cir. 1940).

entertaining himself by collecting streetcar transfers and writing unpublished books.[136] When the press turned its attention to him in 1937, it pierced Sidis' veil of privacy with a vengeance.[137] The biographical sketch depicted his lodgings ("'a hall bedroom of Boston's shabby south end'"), his laugh, and his manner of speech.[138] All told, it was absolutely merciless. Sidis's subsequent suit against the publisher was based on both invasion of privacy and libel.[139] The Second Circuit Court of Appeals acknowledged Sidis's constant disdain for the press; yet ruled that Sidis was not entitled to privacy rights because he was still a public figure in 1937—when the one-time child prodigy was thirty-nine years old.[140]

> [E]ven if Sidis had loathed public attention at that time, we think his uncommon achievements and personality would have made the attention permissible. Since then Sidis has cloaked himself in obscurity, but 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.[141]

Sidis lost on the invasion of privacy claims, and in 1944 the magazine paid him a reported $500 to settle a companion suit for malicious libel.[142] Just three months later, Sidis suffered a cerebral hemorrhage and died.[143] He was forty-six years old.[144] If the public truly had a right to know whether Sidis "fulfilled his [childhood] promise,"[145] it satisfied its curiosity at a demanding

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136. *Good Will Sidis*, *supra* note 125, *available at* http://www.harvard-magazine.com/issues/ma98/pump.html (last visited April 24, 2002). Sidis wrote science fiction and a two-volume history of America. *Id.* He also published a book, *The Animate and the Inanimate*, advancing the theory of black holes fifteen years before astronomers advanced it. *Id.*

137. *Sidis*, 113 F.2d at 807.

138. *Id.*

139. *Id.* The suit actually alleged three causes of action: 1) invasion of privacy under the law in California, Georgia, Kansas, Kentucky, and Missouri; 2) infringements of the rights afforded to him under the New York Civil Rights Law; and 3) malicious libel under the laws of Delaware, Florida, Illinois, Maine, Massachusetts, Nebraska, New Hampshire, Pennsylvania and Rhode Island. *Id.*

140. *Id.*

141. *Id.* at 809.

142. *Good Will Sidis*, *supra* note 125, *available at* http://www.harvard-magazine.com/issues/ma98/pump.html (last visited April 24, 2002).

143. *Id.*

144. *Id.*

145. *Sidis*, 113 F.2d at 809.

price. Again, the court improperly failed to allow for the abatement of the plaintiff's public figure status.

IV. ONE MORE TEST

Using the principles asserted in cases that have led to the development of media law, a new test for restoring pubic figures to private status should be advanced. The test should rely on four factors, most of which have their basis in the seminal cases of *New York Times, Curtis Publishing/Associated Press*, and *Gertz*. The factors should include: 1) whether the plaintiff has retreated from the media, or is still actively seeking media attention; 2) whether the plaintiff is involved in a matter that is legitimately a matter of public concern; 3) the plaintiff's access to the media; and 4) the passage of time. By allowing courts to examine these factors, they can more properly determine who is still a public figure. The current policy of "once a public figure always a public figure" unfairly penalizes individuals and essentially robs them of any protection under defamation and privacy laws.[146]

"[F]ederal appellate courts generally have been inclined to reject the argument for reversal of public figure status . . . ." [147] Nonetheless, a few courts have discussed, in a limited capacity, the effect time would have on one's public figure status. Even in *Brewer*, for instance, the Fifth Circuit offered this speculation:

> It might be that during the "active" public figure period a wider range of articles, including those only peripherally related to the basis of the public figure's fame, are protected by the malice standard and that the passage of time or intentional retreat narrows the range of articles so protected to those directly related to the basis for fame.[148]

Nevertheless, the *Brewer* court rejected the plaintiff's argument for public status reversal.[149] Because courts do not properly factor the passage of time into the public figure abatement cases, private individuals have been wrongly held to the difficult standards presented by *New York Times*.

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146. Ransom, *supra* note 15, at 411. Although a public figure may still bring an action for defamation or invasion of privacy, the fact is that the "actual malice" standard required by *New York Times* creates nearly insurmountable obstacles for plaintiffs. *Id.*

147. *Id.* at 401.

148. Brewer v. Memphis Publ'g Co., 626 F.2d 1238, 1257 (5th Cir. 1980).

149. *Id.* at 1247–48.

One more media test is needed to aid courts in securing the legal rights of so-called public figures. First, the title "public figure" has been extended by courts to include a wide range of people who hardly meet the standards established in *Gertz*. For instance, "[t]he range of public figures today spans the socioeconomic spectrum"[150] and has been held to include everyone from schoolteachers[151] to social workers.[152] "Courts have applied the public figure concept quite loosely, often encompassing plaintiffs whose lives clearly were not public until the defendants' disclosures made them so."[153] While this concept has aided courts in their efforts to shield defendants from liability, it has made success in privacy actions much more difficult to achieve.[154]

As the cases in this article demonstrate, the passage of time usually has little or no effect on public figure status. "With few exceptions, the cases that have dealt with this question have held that once a person's activities become a matter of public interest, the mere lapse or passage of time will not in itself reinstate a person's prior right of privacy . . . ."[155] Therefore, those deemed worthy of public figure status might forever lose the legal protection extended to individuals through libel and privacy laws. "Until they have reverted to the lawful and unexciting life led by the great bulk of the community, they are subject to the privileges which publishers have to satisfy the curiosity of the public as to their leaders, heroes, villains, and victims."[156] Is this a fair trade? As Warren and Brandeis wrote in their now-famous article on privacy more than one hundred years ago: "The right to privacy does not prohibit any publication of matter which is of public or general interest."[157] The sound reasoning behind such limits, however, should not prevent a once-public figure from ever restoring his or her privacy rights.[158]

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150. Ransom, *supra* note 15, at 390.

151. Johnston v. Corinthian Television Corp., 583 P.2d 1101 (Okla. 1978) (holding that a grade school wrestling coach was a "public figure" within the *New York Times v. Sullivan* standard).

152. Kahn v. Bower, 284 Cal. Rptr. 244 (Ct. App. 1991) (finding that a social worker was a "public official").

153. DeLaTorre, *supra* note 64, at 1164.

154. *Id.*

155. 62A AM. JUR. 2D *Privacy* § 203, at 821–22 (1990).

156. *Id.* at 822.

157. Warren and Brandeis, *supra* note 64, at 214.

158. *Id.*

V. CONCLUSION

A more complete test for restoring public figures to private status is demanded by prevailing public policy concerns. First, the primary factors that make one a public figure according to *Gertz*—the access to the media to rebut false claims and the deliberate assumption of a role in the public eye—are no longer present for those seeking to return to private status through the passage of time. For instance, the plaintiffs in *Brewer*, *Sidis*, and *Friedan* clearly demonstrated their efforts to invoke their rights to be "let alone." The plaintiffs had not deliberately sought attention from the media; rather, they each had effected a retreat.

Also, society's rehabilitative goals are not fostered by preventing prisoners who find themselves in the public eye from ever returning to the "privacy" of the general society. As the Supreme Court of California wrote in *Briscoe v. Reader's Digest*,[159] "[o]ne of the premises of the rehabilitative process is that the rehabilitated offender can rejoin that great bulk of the community from which he has been ostracized for his anti-social acts. In return for becoming a 'new man,' he is allowed to melt into the shadows of obscurity."[160] When the prisoner is wrongly convicted and later released, as in *Bernstein*, the reasons for allowing a prisoner to "melt" into the shadows of obscurity are even more compelling.

Considering how difficult it is for public figures to win defamation and privacy suits, courts should consider the issue of public figure abatement seriously. "Both willing and unwilling public figures are the objects of legitimate public interest during a period of time after their conduct or misfortune has brought them to the public attention."[161] This result is sometimes offensive to both justice and our human sensibilities. Therefore, there is a need for one more test in the media law arena—one that would factor in the passage of time. After all, no one can make time stand still.

159. 483 P.2d 34 (Cal. 1971).

160. *Id.* at 41. As the Supreme Court of California noted in *Melvin v. Reid*: "Even the thief on the cross was permitted to repent during the hours of his final agony." 297 P. 91, 93 (Cal. 4th Dist. Ct. App. 1931).

161. 62A AM. JUR. 2D *Privacy* § 203, at 822 (1990).