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Hatfill v. New York Times Co.: from Watchdog to Attack Dog—transforming the Modern Media into "Big Brother"

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Recent Decisions

THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

HATFILL V. NEW YORK TIMES CO.: FROM WATCHDOG TO ATTACK DOG—TRANSFORMING THE MODERN MEDIA INTO "BIG BROTHER"

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In *Hatfill v. New York Times Co.* (*Hatfill III*),[1] the United States Court of Appeals for the Fourth Circuit relied upon an expansive application of the limited-purpose public figure doctrine to dismiss a defamation claim against a major media organization.[2] The *Hatfill III* court broadly interpreted the relevant "particular public controversy" by misapplying the Fourth Circuit's established two-part inquiry for cases involving a defamation-plaintiff's qualification as a limited-purpose public figure.[3] By doing so, the *Hatfill III* court threatened private citizens' ability to succeed with defamation claims in the future when plaintiffs bring claims against the mainstream media for news content relating to national security.[4] A strict application of the Fourth Circuit's two-part inquiry, including a strict examination of the particular public controversy giving rise to the defamatory statements and a derivative use of the *Fitzgerald* test,[5] would have been more in line with Circuit precedent and would have avoided an overly expansive application of the limited-purpose public figure doctrine.[6]

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1. 532 F.3d 312 (4th Cir.), *cert. denied*, 129 S. Ct. 765 (2008).
2. *See infra* Part III.
3. *See infra* Part IV.A.
4. *See infra* Part IV.B.
5. *See infra* Part II.B.
6. *See infra* Part IV.B.

I. THE CASE

Twice during the weeks just after the terrorist attacks of September 11, 2001, an unknown person mailed envelopes laced with the deadly toxin anthrax to several members of the United States Congress and to the offices of several media outlets.[7] As a result of the anthrax attacks, five people who had handled the poisoned envelopes died, Congress closed legislative sessions, and the United States Postal Service experienced significant disruptions.[8] The Federal Bureau of Investigation ("FBI") responded to the national security threat by initiating an investigation into all possible domestic and international suspects.[9] During the investigation, but before any arrests had been made in the case, Dr. Steven Hatfill ("Hatfill"), a former biochemical weapons expert and private advisor for the United States government, became a subject of the investigation.[10]

From May 2002 through August 2002, Nicholas Kristof ("Kristof"), a regular opinion editorial ("op-ed") columnist for *The New York Times* ("the *Times*"), wrote a series of five articles that harshly criticized the FBI's "'lackadaisical'" and "'unbelievably lethargic'" anthrax investigations.[11] The columnist suggested that the FBI was leaving the

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7. Hatfill v. N.Y. Times Co. (*Hatfill III*), 532 F.3d 312, 315 (4th Cir.), *cert. denied*, 129 S. Ct. 765 (2008).

8. *Id.*

9. *Id.*

10. *See id.* (referencing five *New York Times* articles that presented evidence of Hatfill's potential involvement in the attacks). Hatfill had significant experience in the field of infectious diseases and bioterrorism research. Hatfill v. N.Y. Times Co. (*Hatfill II*), 488 F. Supp. 2d 522, 524 (E.D. Va. 2007), *aff'd*, 532 F.3d 312 (4th Cir.), *cert. denied*, 129 S. Ct. 765 (2008). After studying infectious diseases abroad, Hatfill began work in bioterrorism research while employed by the United States for work with the National Institutes of Health ("NIH"), National Aeronautics and Space Administration ("NASA"), and the United State Army Medical Research Institute for Infectious Diseases ("USAMRIID"). *Id.* at 524. Hatfill soon became a recognized expert in the field, and he consulted with the Defense Intelligence Agency ("DIA"), the State Department, the Central Intelligence Agency ("CIA"), and various other government institutions. *Id.* at 525. While working for the NIH at the Fort Detrick Army Base in Maryland, Hatfill came in contact with anthrax through his research on biochemical warfare, and he was vaccinated against anthrax infections. *Hatfill III*, 532 F.3d at 325. Throughout this time period, Hatfill frequently attempted to publicize the country's need to take greater preparations to protect against threats of bioterrorism. *Id.* at 320–21. Additionally, Hatfill served as a relatively frequent commentator in media reports focusing on bioterrorism, and before and after the 2001 anthrax attacks he appeared in publications and had contact with various media outlets, such as *Insight* magazine, *The Baltimore Sun*, *The Washington Times*, *CNN*, *The New York Times*, and National Public Radio, among others. *Id.* at 321–22.

11. *Hatfill III*, 532 F.3d at 315 (quoting Nicholas D. Kristof, *Anthrax? The F.B.I. Yawns*, N.Y. TIMES, July 2, 2002, at A21); *accord* Nicholas D. Kristof, *The Anthrax Files*, N.Y. TIMES, Aug. 13, 2002, at A19 (describing the FBI's investigation of Hatfill as evidence of the agency's failures).

United States unsafe and exposed to future bioterrorist threats by not moving swiftly to identify the likely perpetrators.[12] Specifically, Kristof detailed information he had gathered from confidential sources to argue that FBI officials were not pursuing Hatfill satisfactorily.[13] Through each of the five editorials in the *Times*, Kristof increasingly exposed various aspects of Hatfill's professional history and connections to the study of biochemical warfare, namely Hatfill's well-known focus on the use of anthrax in bioterrorism.[14] While suggesting that Hatfill had sufficient technical training, access, and motive to commit the 2001 anthrax attacks, Kristof wrote that the FBI's slow investigation of Hatfill contributed to the nation's overall unpreparedness against future threats of bioterrorism.[15]

Throughout the FBI's investigation and the media's suggestion that Hatfill had a hand in the anthrax attacks, the researcher maintained his innocence and decried attempts to impugn his reputation.[16] Twice, Hatfill held press conferences to refute facts that implicated his involvement in the crimes, and he appeared on television, radio, and in print after the attacks to defend his innocence.[17]

On July 13, 2004, Hatfill filed a three-count lawsuit against Kristof and the *Times* in the United States District Court for the Eastern District of Virginia.[18] Hatfill's suit sounded in claims of defamation, defa-

12. *Hatfill III*, 532 F.3d at 315; *see* Nicholas D. Kristof, *Connecting Deadly Dots*, N.Y. TIMES, May 24, 2002, at A25 (citing the FBI's faltering anthrax investigation as evidence of the government's inability to address increased security concerns sufficiently).

13. *See* Hatfill v. N.Y. Times Co. (*Hatfill I*), 416 F.3d 320, 325–28 (4th Cir. 2005). Kristof did not mention Hatfill by name until his fifth and final column. *Id.* at 327. Prior to the fifth article, Kristof continually detailed the profile of a "Mr. Z," a pseudonym for the person who Kristof claimed the FBI was failing to pursue effectively. *Id.* at 324–25. In his fifth editorial regarding the 2001 anthrax attacks, Kristof noted that he was revealing Hatfill as "Mr. Z" only after Hatfill had appeared on television to deny media attacks implying that Hatfill was the anthrax perpetrator. *Id.* at 327 (quoting Kristof, *The Anthrax Files*, *supra* note 11). *But see* Joel Mowbray, *Hatfill Strikes Back*, NAT'L REV. ONLINE, Aug. 26, 2002, http://www.nationalreview.com/mowbray/mowbray082602.asp (suggesting that Kristof actually fueled the FBI's escalated investigation of Hatfill). R

14. *Hatfill III*, 532 F.3d at 315.

15. *Id.* at 315–16.

16. *Id.* at 321–22.

17. *Id.* at 322.

18. *Hatfill I*, 416 F.3d at 328–29. Hatfill's filing in federal court was not his first lawsuit against the *Times*. *Id.* at 328. On June 18, 2003, Hatfill filed a $1 million defamation suit against Kristof and the *Times* in Virginia state court. *Id.* However, Hatfill took a voluntary nonsuit when he failed to serve the defendants. *Id.* In Hatfill's 2004 federal court case, the *Times* and Kristof successfully argued that Hatfill's second allegation of defamation per se was time-barred by Virginia state law. *Id.* at 329. On appeal, however, the court reversed and remanded this decision, holding that Hatfill's voluntary nonsuit in the Virginia state court tolled the statute of limitations on the defamation per se claims. *Id.* at 335.

mation per se, and intentional infliction of emotional distress.[19] The district court dismissed all three counts under Federal Rule of Civil Procedure 12(b)(6).[20] The district court held as a matter of law that Kristof's editorial columns were not defamatory because they merely reported on the FBI's investigation into Hatfill's involvement while avoiding ever actually accusing Hatfill of perpetrating the anthrax attacks.[21] Hatfill appealed the lower court's decision to the Fourth Circuit claiming that the district judge improperly dismissed the case before discovery could take place.[22]

The Fourth Circuit found error in all three of the trial court's rulings and reversed and remanded the entire case to proceed to discovery.[23] The Fourth Circuit held that under Virginia's defamation laws and with the facts taken as alleged by Hatfill's complaint, a court could reasonably find that Kristof or the *Times* had acted maliciously when accusing Hatfill of a crime involving "moral turpitude," thereby precluding dismissal of Hatfill's defamation claim under Rule 12(b)(6).[24] In dissent, Judge Niemeyer agreed with the trial judge's decision, arguing that Kristof's articles were not actionable under Virginia law because the columnist never actually accused Hatfill of committing a crime.[25]

On remand to the Eastern District of Virginia, the court held that Hatfill's experience and exposure related to the nation's bioterrorism security threats qualified Hatfill as a public official and as a public figure for both general and limited-purposes under the five-factor *Fitzgerald* test[26] commonly used in Fourth Circuit defamation cases.[27] Accordingly, the trial judge found that Hatfill was required to show through clear and convincing evidence that Kristof acted with "actual malice" when publishing the articles involving Hatfill's potential in-

19. Hatfill v. N.Y. Times Co. (*Hatfill II*), 488 F. Supp. 2d 522, 524 (E.D. Va. 2007), *aff'd*, 532 F.3d 312 (4th Cir.), *cert. denied*, 129 S. Ct. 765 (2008).

20. *Hatfill I*, 416 F.3d at 329.

21. *Id.*

22. *Id.*

23. *See id.* at 324, 334, 335, 337.

24. *Id.* at 334.

25. *See id.* at 338 (Niemeyer, J., dissenting) (arguing that reports of individual's suspicious activity do not necessarily "amount to an accusation of criminal conduct").

26. Fitzgerald v. Penthouse Int'l, Ltd., 691 F.2d 666, 668 (4th Cir. 1982); *see also infra* Part II.B.

27. *See* Hatfill v. N.Y. Times Co. (*Hatfill II*), 488 F. Supp. 2d 522, 528 (E.D. Va. 2007) ("In this case, [Hatfill] qualifies as a public official both in fact and in appearance. . . . Even if [Hatfill] were not worthy of 'public official' status, the Court finds that Plaintiff qualifies as a 'public figure.'" (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 345, 351 (1973))), *aff'd*, 532 F.3d 312 (4th Cir.), *cert. denied*, 129 S. Ct. 765 (2008).

volvement in the anthrax attacks.[28] Because the trial court found that no malice existed and that Kristof based his written assertions on an actual, reasonable belief that Hatfill was the prime suspect in the FBI's case, the court dismissed the entire case on summary judgment.[29] Hatfill appealed once again to the Fourth Circuit, and the court heard oral arguments on the defamation exceptions for cases involving public officials, general-purpose public figures, and limited-purpose public figures.[30]

II. LEGAL BACKGROUND

Defamation law's limited-purpose public figure exception doctrine derives from the Supreme Court of the United States' "actual malice" standard, first announced in *New York Times Co. v. Sullivan*.[31] The Court later clarified the "actual malice" standard for use in cases including public figures.[32] The Fourth Circuit has developed a framework for applying the doctrine,[33] and has refined application of the limited-purpose public figure doctrine through use of a two-part inquiry.[34]

A. The New York Times *Standard: Requiring Defamation Plaintiffs to Show "Actual Malice" When Qualifying as Public Officials or Public Figures*

1. New York Times*: Early Developments of the "Actual Malice" Standard*

The Supreme Court created the "actual malice" standard to protect media organizations' expansive freedom of the press under the First Amendment in the landmark decision of *New York Times Co. v. Sullivan*.[35] During the heart of the 1960s civil rights era, L.B. Sullivan, one of three elected Commissioners of the City of Montgomery, Alabama, who oversaw the county departments protecting public safety, filed a defamation claim against the *Times*.[36] Sullivan claimed that the *Times* unlawfully published a full-page advertisement that wrongly crit-

28. *Id.* at 531.

29. *Id.* at 534.

30. *See* Hatfill v. N.Y. Times Co. (*Hatfill III*), 532 F.3d 312, 316–17 (4th Cir.) (explaining Hatfill's basis for appeal and limiting the appeal to the question of Hatfill's status as a public official or public figure), *cert. denied*, 129 S. Ct. 765 (2008).

31. 376 U.S. 254, 279–80 (1964); *see also infra* Part II.A.1.

32. *See infra* Part II.A.2.

33. *See infra* Part II.B.1.

34. S*ee infra* Part II.B.2.

35. 376 U.S. at 279–80.

36. *Id.* at 256.

icized Sullivan's alleged involvement in the harassment of Dr. Martin Luther King Jr. and other peaceful civil rights protestors in Montgomery.[37] Although the *Times* argued for protection under the First Amendment, the Supreme Court of Alabama affirmed the judgment in Sullivan's favor on the basis of a violation of Alabama's state defamation law and upheld the jury's finding of $500,000 in damages.[38]

The Supreme Court reversed the state court's judgment, and Justice Brennan, writing for the majority, established a new standard for defamation cases involving public official defamation-plaintiffs by relying upon the First Amendment's principle of protecting the free exchange of ideas in public debate.[39] Noting that a well-functioning democracy requires a "debate on public issues [that is] uninhibited, robust, and wide-open,"[40] the Court explained that false statements and erroneous assertions may arise in public discussion.[41] Justice Brennan surmised, however, that the First Amendment must protect such untrue statements to prevent the press from preemptively self-censoring publications in fear of future litigation.[42] While the Court did recognize the potential harm that could result to the reputations of public officials under this new standard,[43] Justice Brennan balanced such harms by illustrating that the public's access to a free exchange of ideas required the Court to create a rule that protected the press while still granting public officials an avenue for legal redress.[44] From the *New York Times* decision forward, public officials with defamation claims would be required to show through clear and convincing evidence that a publisher acted with "actual malice" or reckless disregard for the truth when printing false or untrue statements about a public official or the official's conduct.[45]

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37. *Id.* at 256–58.

38. *Id.* at 256, 263–64.

39. *See id.* at 269–70, 272, 279–80 (arguing for the need to protect the "breathing space" of media publications to avoid harmful journalistic self-censorship (citing NAACP v. Button, 371 U.S. 415, 429 (1962); Roth v. United States, 354 U.S. 476, 484 (1956); Bridges v. California, 314 U.S. 252, 270 (1941); Stromberg v. California, 283 U.S. 359, 369 (1931); Whitney v. California, 274 U.S. 357, 375–76 (1926); and United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943))).

40. *Id.* at 270.

41. *Id.* at 271–72.

42. *Id.* at 279.

43. *Id.* at 272–73.

44. *See id.* at 282 (comparing the media privilege under the First Amendment to the privilege granted to public officials to be free of libel suits by private citizens when the public official speaks in official capacity).

45. *Id.* at 279–80 ("The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—

Shortly after *New York Times*, in the companion cases *Curtis Publishing Co. v. Butts*[46] and *Associated Press v. Walker*,[47] the Supreme Court extended the coverage of the "actual malice" standard to defamation-plaintiffs who qualified as "public figures."[48] In both cases, the plaintiffs held public positions, but neither served as elected officials.[49] Chief Justice Warren's concurrence articulated the Court's lasting approach that requires "public figures" and "public officials" to meet the same "actual malice" standard when filing defamation claims.[50] Chief Justice Warren described public figures as individuals "who do not hold public office at the moment [yet] 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."[51]

2. Gertz*: Scope of the "Actual Malice" Standard for Public Figures*

The Supreme Court retraced its previous expansion of the First Amendment's "actual malice" protections in *Gertz v. Robert Welch, Inc.*,[52] when the Court deliberately distinguished the legal and policy justifications for treating public individuals and private citizens differently in defamation suits against the media.[53] In March 1969, publishers of the *American Opinion* printed a story about a lawyer, Elmer Gertz ("Gertz"), who represented a family whose son had been killed by a Chicago police officer.[54] The article falsely accused Gertz of supporting communist ideologies, hiding a criminal record, and partaking in a plot to discredit the Chicago police department.[55] Gertz brought a defamation action against the publisher, claiming that the publisher's

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that is, with knowledge that it was false or with reckless disregard of whether it was false or not.").

46. 388 U.S. 130 (1967) (plurality opinion).

47. 388 U.S. 130 (companion case).

48. *Id.* at 155.

49. *See id.* at 135–36 (describing Butts, an athletic director for the University of Georgia accused of fixing a football game); *id.* at 140 (describing Walker, a retired Army soldier who was reportedly leading a charge against federal troops trying to integrate the campus at the University of Mississippi).

50. *Id.* at 164 (Warren, C.J., concurring). Chief Justice Warren's concurring opinion included the legal standard with which a majority of the Court agreed. *See id.* (Warren, C.J., concurring) (outlining the Chief Justice's proposed legal standard for defamation cases involving public figures); *see also id.* at 170 (Black, J., concurring) (accepting the Chief Justice's legal standard); *id.* at 172 (Brennan, J., concurring) (same).

51. *Id.* at 164.

52. 418 U.S. 323 (1974).

53. *See id.* at 345–46 (emphasizing courts' obligation to provide redress to defamed private individuals who have not willingly sought public scrutiny in an attempt to acquire notoriety or influence public affairs).

54. *Id.* at 325–26.

55. *Id.* at 326.

article had damaged Gertz's "reputation as a lawyer and a citizen."[56] The Supreme Court granted certiorari to provide guidance to lower courts as to the difference between private and public plaintiffs in the application of First Amendment privileges in defamation claims against the media.[57]

Instead of focusing on the nature of the issue giving rise to the defamation, the Court explained that courts should focus on whether a plaintiff qualifies for public official or public figure status.[58] Recognizing the importance of the *New York Times* "actual malice" standard in the rule's protection of open public debate, the Court focused on the harm caused to an individual's reputation when media outlets publish defamatory content.[59] The Court explained that a private citizen's lack of ready ability to defend against false media assertions creates a more significant harm than when the media publishes false content about a public individual.[60] Typically, it noted, public officials and public figures have greater access to media sources to defend themselves,[61] place themselves in positions where public scrutiny is justified and beneficial,[62] and take active steps to influence the outcomes of public events.[63] Based on these factors, the Court outlined three categories of plaintiffs for which the "actual malice" standard would apply: (1) public officials, (2) general-purpose public figures,

56. *Id.* at 327.

57. *See id.* at 325 (expressing the struggle the Court has faced in attempting to find a balance between the First Amendment and defamation law). The *Gertz* Court took great lengths to explain prior jurisprudence leading to the Court's extension of First Amendment protections to defamation cases. *See id.* at 332–39 (comparing individual Justices' opinions in *New York Times, Curtis Publ'g Co.*, and *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971)). In particular, the Court examined the results of *Rosenbloom*, in which five individual Justices wrote opinions which led to courts using three separate, non-uniform methods of applying the "actual malice" standard in defamation cases involving news media-defendants. *See id.* at 333 ("One approach has been to extend the ['actual malice' standard] to an expanding variety of situations [based on the nature of the controversy]. Another has been to vary the level of constitutional privilege for defamatory falsehood with the status of the person defamed. And a third view would grant to the press and broadcast media absolute immunity for defamation.").

58. *See id.* at 346 (arguing that the "public or general interest test" of the subject matter fails to take into account the private citizen's inability to access communication outlets that would allow him to defend attacks against his reputation).

59. *See id.* at 340–41 (noting the tension between free public debate and state interest that is inherent in defamation law's ability to facilitate compensation for individuals whose reputations have suffered as a result of published attacks).

60. *Id.* at 344.

61. *Id.*

62. *Id.*

63. *Id.* at 345.

and (3) limited-purpose public figures.[64] While public officials and general-purpose public figures are required to meet the "actual malice" standard for all defamation claims, limited-purpose public figures must only meet the heightened standard for claims of defamation arising out of the limited purposes that created the public figure status.[65] With these distinctions, the *Gertz* Court expressly denied extension of the "actual malice" standard to private individuals' defamation claims against the media.[66] Thus, holding that Gertz served only as a lawyer representing clients in a public case, and was not himself a public figure even for the limited purpose of the litigation, the Court reversed and found that Gertz did not need to prove that the publisher acted with "actual malice" to succeed in his defamation claim.[67]

Since *Gertz*, the Supreme Court has commented directly on the application of the "actual malice" standard only three times, and in each case the Court articulated additional limitations on the public figure doctrine. In *Time, Inc. v. Firestone*,[68] then-Justice Rehnquist, writing for the majority, held that a person's involvement in the judicial system does not automatically qualify a person for public figure status for issues arising from the judicial proceedings.[69] Then-Justice Rehnquist noted events that cause public interest do not automatically

64. *See id.* (distinguishing first between general- and limited-purpose public figures and assuming a third category embodied by elected officials, or public officials). Furthermore, the Court suggested that an individual could qualify as an "involuntary public figure" without any voluntary action to gain prominence. *Id.* Courts, though, have proven unwilling to extend this involuntary category in defamation cases, and the *Gertz* Court qualified the classification's application as "exceedingly rare." *Id.*; *see also* Hatfill v. N.Y. Times Co. (*Hatfill III*), 532 F.3d 312, 318 n.3 (4th Cir.) (commenting on the rarity of courts' application of the "involuntary public figure" classification), *cert. denied*, 129 S. Ct. 765 (2008).

65. *See Gertz*, 418 U.S. at 351 (explaining how an individual could qualify as "a public figure for a limited range of issues").

66. *See id.* at 345, 347–48 (discussing the rationale for distinguishing between public and private individuals in defamation cases).

67. *Id.* at 352. However, the Court ordered a new trial because the district court jury had imposed liability without fault and had presumed damages without proof of injury. *Id.*

68. 424 U.S. 448 (1976). In *Firestone*, the defamation-plaintiff, Mary Alice Firestone, a prominent member of Palm Beach society, claimed that *Time Magazine* damaged her reputation by erroneously reporting that she had engaged in an extramarital affair, leading to her divorce from her husband, Russell Firestone. *Id.* at 450–52. *Time Magazine* writers acquired the information from public records published by the district court overseeing the Firestones' divorce proceedings. *Id.* at 451. In *Time Magazine*'s defense, the editors claimed that Firestone qualified as a public figure and the article reported facts the district court had made public. *Id.* at 453.

69. *Id.* at 455–56. *But see id.* at 471–72 (Brennan, J., dissenting) (arguing that any restraint on the media's ability to inform public debate creates likely grounds for media self-censorship); *id.* at 484–85 (Marshall, J., dissenting) (maintaining that Firestone's public prominence and engagement in press conferences related to the subject matter qualified her as a public figure required to meet the "actual malice" standard).

qualify all parties involved as public figures; rather, private individuals must take more active and public steps to influence the events' outcomes to satisfy the limited-purpose public figure classification.[70] Second, three years later the Supreme Court in *Wolston v. Reader's Digest Association, Inc.*[71] held that a private individual does not become a public figure merely by being involved in a public issue or by unwillingly being exposed to media attention.[72] Third, in *Hutchinson v. Proxmire*,[73] a researcher's receipt of significant government funds to conduct federal studies was not sufficient to qualify the researcher as a limited-purpose public figure for issues arising from the federal research projects.[74] The Court concluded that the federal researcher's passive response to media questioning about an issue of public concern and his history of publication in his academic field did not disqualify the researcher from maintaining his status as a private citizen.[75]

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70. *Id.* at 454–55 (majority opinion).

71. 443 U.S. 157 (1979). In *Wolston*, the defamation-plaintiff, Ilya Wolston, claimed that Reader's Digest Association, Inc. ("Reader's Digest") published a book that included false facts about Wolston's affiliation with the Soviet Union's espionage organization in the United States. *Id.* at 159–60. During a grand jury investigation of Wolston's relatives, Wolston had failed to respond to a subpoena which required him to testify before a grand jury, leading the court to hold Wolston in contempt. *Id.* at 162. Wolston's failure to appear generated significant media attention, and Reader's Digest argued that Wolston's decision not to respond to the subpoena served as Wolston's active involvement in a public controversy, sufficient to qualify him as a limited-purpose public figure. *Id.* at 162, 165. The lower courts agreed with Reader's Digest and ruled in favor of the publishers. *Id.* at 165.

72. *See id.* at 167 (noting that events generating media attention do not automatically qualify the events' key players as public figures in defamation cases that arise from the media's coverage).

73. 443 U.S. 111 (1979). In *Hutchinson*, Ronald Hutchinson, the defamation-plaintiff and a research behavioral scientist at the Kalamazoo State Mental Hospital, received federal funds for research projects devoted to the study of emotional behavior for NASA and the U.S. Navy. *Id.* at 114–15. Speaking on the Senate floor and sending newsletters to constituents arguing against wasteful government spending, Senator William Proxmire listed Hutchinson as a recipient of a "Golden Fleece Award," a symbolic classification the Senator hoped would bring attention to federal dollars the Senator believed scientists were wasting on ineffective research projects. *Id.* at 115–17. Responding, Hutchinson filed a defamation suit against Senator Proxmire, alleging that the Senator's broadcasting of speeches and distribution of newsletters that described the "Golden Fleece Award" misrepresented Hutchinson's research and injured his reputation in the scientific community. *Id.* at 118.

74. *Id.* at 135–36. The Court added that public figure status may have only been appropriate for defamatory reporting related directly to the publicly funded studies. *Id.*

75. *Id.* at 134–36.

B. The Public Controversy & the Fitzgerald *Test: The Fourth Circuit Court of Appeals' Formula for Distinguishing Between Private Citizens and Public Figures in Defamation Claims Against the Media*

1. Developing the Fourth Circuit's Fitzgerald *Test*

In *Fitzgerald v. Penthouse International, Ltd.*,[76] the Fourth Circuit set forth a five factor test for determining whether a defamation-plaintiff qualified as a limited-purpose public figure.[77] The defamation-plaintiff in *Fitzgerald*, a federal researcher who studied the military use of dolphins for the United States Navy and the Central Intelligence Agency, alleged that *Penthouse* had ruined the researcher's reputation by publishing a defamatory article about the researcher's past conduct.[78] Specifically, Fitzgerald claimed that *Penthouse* printed a story which implied that Fitzgerald had conspired to engage in espionage with several Latin American countries' military officials by attempting to sell top secret dolphin technology to them.[79] Fitzgerald was not an elected official, and his lack of general notoriety did not qualify him as a general-purpose public figure.[80] Thus, the Fourth Circuit reviewed the district court's finding that Fitzgerald's public appearances and actions related to his research on the military use of dolphins qualified him as a limited-purpose public figure for defamation claims stemming from his work with dolphin-related technology.[81]

First, the *Fitzgerald* court defined the pertinent public controversy to determine whether the issue was of significant public concern. By reviewing the context of the *Penthouse* article, the court found that the military use of dolphins was a sufficiently public topic of discussion that merited status as a controversy worthy of opening an individual to limited-purpose public figure classification.[82] Next, relying on Supreme Court jurisprudence,[83] Judge Ervin, writing for the three-judge unanimous opinion, outlined the following factors under which the court analyzed Fitzgerald's status:

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76. 661 F.2d 666 (4th Cir. 1982).

77. *Id.* at 668.

78. *See id.* at 669 (describing the written context of the *Penthouse* article and Fitzgerald's contact with the media).

79. *Id.* at 670.

80. *Id.* at 668–69.

81. *See id.* at 668 (reviewing the district court's grant of *Penthouse*'s motion for summary judgment).

82. *See id.* at 669 (analyzing the extent of coverage of subject-matter and "moral and humanitarian" concerns related to military use of dolphins).

83. *See id.* at 668–69 (citing *Wolston*, *Hutchinson*, *Gertz*, and *New York Times*, among others).

> [Whether] (1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in a public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statements; and (5) the plaintiff retained public figure status at the time of the alleged defamation.[84]

The court examined Fitzgerald's relationship with the Navy; his public lectures on the subject of dolphin technology; his printing of materials about the use of dolphins in anti-submarine warfare; and his appearance on *60 Minutes*, where he was interviewed about the topic of dolphin technology.[85] Concluding that Fitzgerald "thrust himself into a position of special prominence with respect to the controversy" and because he "sought pecuniary gain through the military and non-military use of dolphin technology,"[86] the Fourth Circuit affirmed the district court's finding that Fitzgerald qualified as a limited-purpose public figure for issues arising from his dolphin technology research.[87] Thereafter, the court reversed the district court's summary judgment that dismissed Fitzgerald's defamation claim, holding that, although Fitzgerald qualified as a limited-purpose public figure, the lower court's record did not provide sufficient evidence for the court to rule as a matter of law that Fitzgerald had failed to meet the "actual malice" standard.[88]

Subsequently, the Fourth Circuit employed the *Fitzgerald* test to decide *Reuber v. Food Chemical News, Inc.*[89] In *Reuber*, Melvin Reuber, a scientific researcher, claimed that Food Chemical News, Inc. unlawfully reprinted and widely published an employer-employee reprimand letter that allegedly discredited Reuber's scientific research on the harmfulness of certain pesticides.[90] The court began by generally outlining the applicable public controversy, which the court determined encompassed Reuber's participation in controversies involving pesticides, particularly the pesticide malathion.[91] The court then

84. *Id.* at 668.
85. *Id.* at 669.
86. *Id.*
87. *Id.* at 669–70.
88. *Id.* at 670, 672.
89. 925 F.2d 703, 708–11 (4th Cir. 1991) (en banc).
90. *Id.* at 707.
91. *Id.* at 708. The court clarified the scope of the controversy by citing a case from the District of Columbia Circuit. *Id.* at 709 (citing Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287, 1290, 1300 (D.C. Cir. 1980)). Specifically, the court noted that a person in a specialized field "who has not attracted general notoriety may nonetheless be a public fig-

progressed through application of the *Fitzgerald* factors.[92] Finding that Reuber frequently interacted with media sources reporting on the risks associated with malathion, the court found that Reuber had sufficient access to media sources to defend against attacks against his reputation as a qualified pesticide researcher.[93] Diverging slightly from *Fitzgerald*, the *Reuber* court combined the second and third *Fitzgerald* factors to conclude that Reuber's special prominence developed through his attempts to influence the controversy surrounding the carcinogenicity of malathion.[94] Finally, the court examined the historical background of the controversy and Reuber's influence therein to hold that Reuber qualified as a limited-purpose public figure.[95] Thus, Reuber was required to demonstrate that Food Chemical News, Inc. published the reprimand letter with "actual malice" or reckless disregard.[96]

2. *Crystallizing the Two-Part Inquiry Analysis*

Adding to the *Fitzgerald* test, *Foretich v. Capital Cities/ABC, Inc.*[97] set forth a two-part inquiry by which Fourth Circuit courts analyze defamation claims involving potential limited-purpose public figures.[98] Vincent and Doris Foretich, grandparents of a child involved in a highly publicized familial custody dispute, brought a defamation claim against ABC for producing a docudrama that the Foretiches claimed to have damaged the elderly couple's reputation.[99] Ruling on an interlocutory appeal of a lower court judgment that held that the Foretiches qualified as private citizens in their defamation claim against ABC, Judge Murnaghan, writing the unanimous three-judge opinion, first expressly examined the public controversy in ques-

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ure in the *context of a particular controversy covered by publications of specialized interest*." *Id.* (emphasis added).

92. *Id.* at 708–11.

93. *Id.* at 708–09. Reuber had worked with Congress and the Environmental Protection Agency to analyze the risks of pesticides, and had contributed to "numerous television, newspaper, and radio reports." *Id.* at 708. Most significantly, Reuber contributed to a report on the dangers of malathion at the height of the public controversy surrounding the general use of the pesticide. *Id.*

94. *Id.* at 709.

95. *Id.* at 710–11.

96. *Id.* at 711. The court also suggested that unwilling participants in a controversy could avail themselves to public figure status if they engaged in a course of action that "invites public attention." *Id.* at 709 (citing Clyburn v. News World Comm'n, Inc., 903 F.2d 29, 33 (D.C. Cir. 1990); McDowell v. Paiewonsky, 769 F.2d 942, 949–50 (3d Cir. 1985)).

97. 37 F.3d 1541 (4th Cir. 1994).

98. *Id.* at 1553.

99. *Id.* at 1543.

tion.[100] Second, the court assessed the "nature and extent of [the plaintiff's] participation in [that particular] controversy" to determine whether limited-purpose public figure status was justified.[101]

Applying this systematic two-part inquiry, Judge Murnaghan sought guidance from *Gertz*, *Wolston*, and *Firestone*, among others, to assess the appropriate scope of public controversies worthy of activating a public figure analysis.[102] Rather than creating a new rule, Judge Murnaghan adopted the definition of "public controversy" used by the United States Court of Appeals for the District of Columbia Circuit:

> A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way . . . . [E]ssentially private concerns or disagreements do not become public controversies simply because they attract attention . . . . Rather, a public controversy is a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants.[103]

Within this framework, Judge Murnaghan set forth the factual circumstances that convinced the court that the Foretiches' claim stemmed from a qualified "public controversy": The events were highly publicized; a congressional investigation had begun in response to the controversy; the controversy had caused Congress and the President to become involved in the familial dispute to pass legislation to waive criminal contempt charges brought against the child's father; and the dispute raised national awareness of the collateral effects of drawn-out custody battles.[104]

The court then progressed through the second part of the two-part inquiry, using the five-factor *Fitzgerald* test to determine whether the Foretiches participated in the child custody controversy significantly enough to warrant their status as limited-purpose public figures.[105] While recognizing that the Foretiches had presented themselves to the media on several occasions to rebut the charges against

100. *Id.* at 1554–55.

101. *Id.* at 1554, 1555–56.

102. *Id.* at 1554.

103. *Id.* (quoting Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287, 1296 (D.C. Cir. 1980)) (alterations in original) (internal quotation marks omitted).

104. *Id.* at 1555.

105. *See id.* at 1555–58 (examining the number of media reports about the controversy, the effect of the controversy on public policy, and the nature of the Foretiches' public appearances).

them and had appeared as passive participants in support of their son on a television talk show, the court refused to include these public appearances in the *Fitzgerald* test analysis.[106] The court looked to the serious effect that charges of child sexual assault could have on individuals' reputations,[107] and reasoned that such threat of serious harm justified private individuals' decisions to appear actively before the media to defend their reputations.[108] Thus, the court held that the sum of the Foretiches' public appearances was reasonable under the circumstances, proportionate to the charges against them, and not "excessively published."[109] The Foretiches' generally defensive participation in the public controversy was not significant enough to qualify them as limited-purpose public figures under the *Fitzgerald* test, even though they were involved in a public controversy.[110]

In *Carr v. Forbes*,[111] the Fourth Circuit again outlined the established culmination of principles for cases involving disputes over whether a defamation-plaintiff qualifies as a limited-purpose public figure.[112] In *Carr*, the Fourth Circuit followed the mechanical, systematic two-step inquiry to assess the defamation claim which allegedly involved a limited-purpose public figure plaintiff.[113] Relying upon the

106. *Id.* at 1557–58.

107. *Id.* at 1558 ("We, too, recognize the devastation that public accusations of child sexual abuse can wreak, and we are extremely reluctant to attribute public-figure status to otherwise private persons merely because they have responded to such accusations in a reasonable attempt to vindicate their reputations.").

108. *Id.*

109. *Id.* at 1563–64.

110. *Id.* at 1564. The court also examined the common law privilege of reply to question whether or not the Foretiches had waived their privilege by going too far in their defensive media appearance. *Id.* at 1559–60. On this point, the court reasoned that the Foretiches' defensive public appearances were relevant, responsive, proportionate, not excessively published, and reasonable in relation to the gravity of the juvenile assault charges against them. *Id.* at 1561–63.

111. 259 F.3d 273 (4th Cir. 2001). Robert Carr, the defamation-plaintiff and a developer of public infrastructure projects, brought a claim against Forbes, Inc. for its publication of an article that cast doubt on Carr's integrity as a businessman. *Id.* at 275. The controversy arose out of Carr's successful bid to build a public highway project in South Carolina. *Id.* at 276. The *Forbes* magazine article described Carr's past troublesome business practices with other municipalities and specifically outlined Carr's personal business failures that had doomed another public sewer system project in Arizona. *Id.* at 277.

112. *Id.* at 278.

113. *See id.* at 279–82 (defining the controversy specifically and applying the facts of Carr's involvement in the controversy to the *Fitzgerald* factors). In its review, the court outlined the Fourth Circuit's approach:

> [W]e conduct a two-part inquiry. First, we ascertain whether a public controversy gave rise to the defamatory statement. Second, we determine whether the plaintiff's participation in that controversy sufficed to establish him as a public figure within the context of that public controversy. The defendant bears the burden of proving the plaintiff's public figure status.

Fourth Circuit's analysis in *Foretich* and *Firestone*, Judge Motz first described how the negative externalities of a failed, publicly financed sewage project affected a community's public welfare and were thus significant enough to create a worthy "public controversy."[114] The court explicitly defined the controversy as "the financing and construction of the Apache Junction sewer and the Southern Connector highway."[115] Second, the court used the five *Fitzgerald* factors to assess whether the plaintiff's role in that particular public controversy qualified the plaintiff as a limited-purpose public figure.[116] Looking only at the facts that applied to the construction and financing of the two public projects, the court held that the plaintiff's significant public exposure and his active participation in acquiring the public project funds justified his status as a limited-purpose public figure.[117]

III. THE COURT'S REASONING

In *Hatfill v. New York Times Co.* (*Hatfill III*),[118] the Fourth Circuit affirmed the Eastern District of Virginia's judgment and held that Hatfill failed to meet the "actual malice" standard in his defamation claims against the *Times*, which was required because Hatfill qualified as a limited-purpose public figure with respect to the controversy over bioterrorism and the nation's preparedness for a biological attack.[119] Writing for the unanimous three-judge panel, Judge Niemeyer began by explaining the importance of maintaining the integrity of the "actual malice" standard in defamation exception cases involving public officials and public figures.[120] The court explained that the First Amendment's protection of free speech and a free press necessitated a legal standard that allowed citizens to openly discuss public officials while granting some refuge for malicious attacks on public officials' reputations.[121]

Avoiding the question of whether Hatfill qualified as a public official or an involuntary public figure,[122] the court examined whether

Id. at 278 (internal citation omitted).

114. *Id.* at 278–79 (quoting Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976); Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1554 (4th Cir. 1994)).

115. *Id.* at 279.

116. *See id.* at 280–82 (evaluating each individual factor of the *Fitzgerald* test).

117. *See id.* at 281–82 (describing the effect of Carr's past projects in Arizona on the defamation suit involving a more current project in South Carolina).

118. 532 F.3d 312 (4th Cir.), *cert. denied*, 129 S. Ct. 765 (2008).

119. *Id.* at 324–25.

120. *Id.* at 317–18.

121. *Id.*

122. *Id.* at 319 n.4. In a footnote, the court described the difference between a public official and a public figure. *Id.* at 317 n.2. The court noted that public officials include

Hatfill's background, experience, and public exposure qualified him as either a general-purpose or limited-purpose public figure or as a private citizen in his defamation suit against the *Times* and Kristof.[123] Examining *Gertz*, Judge Niemeyer explained the legal effect of the difference between a general-purpose public figure, one who holds a position "'of such persuasive power and influence that they are deemed public figures *for all purposes*,'"[124] and a limited-purpose public figure, one who has "'thrust [himself] to the forefront of *particular public controversies* in order to influence the resolution of the issues involved.'"[125] In defamation cases, the court explained, a general-purpose public figure must prove the defendant's "actual malice" in publishing a potentially harmful assertion that may be related in any way to the public figure's fitness; whereas, a limited-purpose public figure must only prove "actual malice" for assertions related to the particular public controversy for which the public figure has gained his or her prominence.[126]

To determine whether Hatfill functioned as a limited-purpose public figure for the purposes of his defamation case, Judge Niemeyer evaluated the events surrounding publication of Kristof's editorials in the context of the Fourth Circuit's five-factor *Fitzgerald* test.[127] The court engaged in an extensive examination of Hatfill's education, background, and professional involvement with the Central Intelligence Agency, National Institutes of Health, State Department, Defense Intelligence Agency, and a private defense contractor, Science Applications International Corporation.[128] The court further outlined Hatfill's public interactions with the media before and after the

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persons in government who hold public office or hold a position where the qualifications of the individual are pertinent to the public's interest. *Id.* (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974)). Like general-purpose public figures, all public officials must show "actual malice" in defamation cases where an allegedly defamatory statement is at all relevant to the official's fitness for office. *Id.* at 318. Limited-purpose public officials, who in contrast may not necessarily hold public office, are only required to show "actual malice" for statements related to the range of issues for which the general public would reasonably recognize the public figure as a person who "'ha[d] assumed [a] role[ ] of especial prominence in the affairs of society.'" *Id.* at 317 n.2 (quoting *Gertz*, 418 U.S. at 345).

123. *See id.* at 319–24 (presenting the factual background of Hatfill's case and applying the facts to the *Fitzgerald* test).

124. *Id.* at 318 (quoting *Gertz*, 418 U.S. at 345); *see also supra* note 122 and accompanying text. R

125. *Hatfill III*, 532 F.3d at 318 (quoting *Gertz*, 418 U.S. at 345).

126. *Id.* at 317–19; *see also supra* note 122 and accompanying text. R

127. *See Hatfill*, 532 F.3d at 318–19 (quoting the five factors set out in *Fitzgerald v. Penthouse Int'l, Ltd.*, 691 F.2d 666, 668 (4th Cir. 1982)).

128. *See id.* at 319–20 (discussing Hatfill's education in Rhodesia (now known as Zimbabwe) and his breadth of work for government agencies).

2001 anthrax attacks, and illustrated Hatfill's extensive publications as a specialist in the field of bioterrorism threat readiness.[129] After this detailed study, the court immediately examined the first *Fitzgerald* factor and concluded that Hatfill had sufficient access to effective communication as demonstrated by his professional prominence and his publication as an expert in his field.[130]

After establishing that the first factor was satisfied, the court applied the facts to the remaining four *Fitzgerald* factors.[131] The court described the particular public controversy at issue, and agreed with the *Times*' broader interpretation of the scope.[132] Judge Niemeyer analyzed Hatfill's defamation claims in the more expansive context of national security, and more specifically the nation's readiness against threats of bioterrorism.[133] Relying on the broad national security controversy, as opposed to Hatfill's more narrow argument that the controversy in Kristof's articles only related to the FBI's investigation of the 2001 anthrax attacks, the court reasoned that Hatfill frequently took active steps to influence issues related to bioterrorism in the United States.[134] Further, Hatfill's active engagement in public issues related to bioterrorism qualified him as a limited-purpose public figure for all issues related to the threats of bioterrorism, including for

129. *See id.* at 320–22 (discussing Hatfill's interactions with various media outlets in his academic and professional capacities).

130. *See id.* at 322 (explaining that Hatfill's prominence in bioterrorism research allowed him to "command attention in this field"). The court compared Hatfill's exposure to that of the defamation-plaintiff in *Reuber v. Food Chemical News, Inc.*, 925 F.2d 703, 708–09 (4th Cir. 1991), and concluded that Hatfill's extensive contacts with media sources were greater than those demonstrated by the limited-purpose public figure in *Reuber*. *Hatfill III*, 532 F.3d at 322.

131. *Hatfill III*, 532 F.3d at 322–24. In the midst of analyzing the second and third *Fitzgerald* factors, the court went through a lengthy evaluation of the scope and nature of the controversy at issue. *Id.*

132. *See id.* at 322–23 (presenting both parties' contentions as to the scope of the controversy). In analyzing the scope of the controversy, the court analogized the facts in *Hatfill III* to those present in *Fitzgerald*. *Id.* at 323–24.

133. The court stated:

> We agree with the view suggested by The New York Times. In light of the purpose of the public figure doctrine to encourage robust and uninhibited commentary on public issues, it stands to reason that we should look to the scope of the message conveyed in The New York Times through the articles that Dr. Hatfill is challenging. A fair reading of Kristof's columns reveals a debate about national security, the nation's lack of preparedness for bioterrorism, and the example provided by the FBI's investigation of the anthrax attacks in light of the evidence appearing against Dr. Hatfill.

Id. at 323.

134. *Id.* at 324.

example, all issues germane to the anthrax attacks in 2001.[135] The court held that Hatfill was required to show that the *Times* and Kristof published the five articles with "actual malice".[136] Thus, Hatfill either had to show that the *Times* or Kristof published the material "with knowledge that [the assertions] were false or with reckless disregard of [the articles'] falsity" to succeed on his defamation claims.[137]

Based on this finding, the court turned to whether clear and convincing evidence obtained during discovery illustrated that the *Times* or Kristof acted with "actual malice" in publishing the editorials.[138] The court expressly noted that evidence of mistaken facts in Kristof's reporting or a lack of ordinary care in verifying source information would not have met Hatfill's burden.[139] As such, the court concluded that Kristof was diligent in pursuing the factual background to support his articles, and held that "no reasonable jury could find that Kristof had [published the articles with] 'a high degree of awareness' that Dr. Hatfill was *not* the anthrax mailer."[140] Because the court found that Hatfill qualified as a limited-purpose public figure for issues related to the field of bioterrorism threat analysis, the issue of the 2001 anthrax attacks was merely a microcosm of the larger national security controversy in Kristof's bioterrorism editorials, and no reasonable jury could find "actual malice" in the *Times* or Kristof's actions, Judge Niemeyer affirmed the trial judge's summary judgment decision and dismissed the first defamation count in Hatfill's appeal.[141]

Using the same analysis, the court quickly dismissed Hatfill's second and third counts of defamation per se and intentional infliction of emotional distress.[142] Agreeing with the lower court's use of the "subsidiary meaning doctrine,"[143] Judge Niemeyer found that the editorial columns as a whole were not defamatory, and so individual assertions within the columns could not qualify independently for

135. *See id.* (including analysis of Hatfill's prominence as an academic before the 2001 anthrax attacks and his attempt to use the attacks as a "platform" to gain further prominence).

136. *Id.*

137. *Id.*

138. *See id.* at 324–25 (describing Hatfill's "actual malice" burden as having to show that Kristof published the articles either with knowledge or with a high degree of certainty that Hatfill was not the anthrax killer).

139. *Id.* at 325.

140. *Id.* (quoting Garrison v. Louisiana, 379 U.S. 64, 74 (1964)).

141. *Id.* at 324–25.

142. *See id.* at 325–26 (approaching each of Hatfill's allegations with the same legal framework used in Hatfill's foundational common law defamation claim).

143. *See* Hatfill v. N.Y. Times Co. (*Hatfill II*), 488 F. Supp. 2d 522, 532 (E.D. Va. 2007) (citing Herbert v. Lando, 781 F.2d 298, 307–08, 312 (2d Cir. 1986)), *aff'd*, 432 F.3d 312 (4th Cir.), *cert. denied*, 129 S. Ct. 765 (2008).

claims of defamation per se.[144] Similarly, the court agreed with the district court's finding that Virginia law at minimum required a showing of "intentional or reckless [conduct that] was outrageous and intolerable" to succeed on a claim of intentional infliction of emotional distress.[145] Because Hatfill failed to meet the lower standard of "actual malice" in his original defamation claim, the court denied his claim of intentional infliction of emotional distress as well.[146]

IV. ANALYSIS

In *Hatfill v. New York Times Co.* (*Hatfill III*), the Fourth Circuit applied the limited-purpose public figure doctrine with a broadened scope of the particular public controversy at issue, which led to the court's dismissal of an individual's defamation claim filed against a major news organization.[147] The court based its opinion on a disorganized application of the Fourth Circuit's two-part inquiry—before defining the particular controversy explicitly, the court started the legal analysis by applying the *Fitzgerald* test. This loosened analysis resulted in the court overestimating the scope of the relevant public controversy.[148] The court should have instead first defined the public controversy, and then applied the *Fitzgerald* test with more properly limited evidence relating to Hatfill's professional background.[149] A strict application of the Fourth Circuit's established two-part inquiry may have caused the court to more effectively protect the rights of private citizens in defamation suits against major media outlets, most notably when the media reports on national security concerns.[150]

A. Hatfill III *Misapplies the Two-Part Inquiry Used for Limited-Purpose Public Figure Cases*

Reviewing the district court's finding that Hatfill qualified as a limited-purpose public figure, the court began its analysis by reiterating the importance of the First Amendment's protections of free speech and the press.[151] The court analyzed the most significant, relevant Supreme Court cases dealing with the First Amendment's effect on defamation law, particularly with regard to the application of a

144. *Hatfill III*, 532 F.3d at 325.
145. *Id.* at 325–26.
146. *Id.* at 326.
147. *Id.* at 322–25.
148. *See infra* Part IV.A.
149. *See infra* Part IV.B.
150. *See infra* Part IV.B.
151. *Hatfill III*, 532 F.3d at 317.

public official or public figure's obligation to meet an "actual malice" burden.[152] The court also recognized the private citizen's right to redress attacks on his or her reputation when the media negligently exceeds its duty to inform public discussion.[153] After analyzing the Supreme Court precedent, however, the court overlooked other relevant Fourth Circuit jurisprudence that should have compelled it to begin by defining the pertinent public controversy.[154] Instead, the court laid out Hatfill's experience as a bioterrorism researcher and moved prematurely into the *Fitzgerald* test analysis.[155] As a result, Judge Niemeyer did not address the pertinent public controversy at issue until *after* he had already begun the application of the *Fitzgerald* test,[156] and evaluated whether Hatfill had access to effective channels of communication prior to defining the relevant public controversy.[157]

The court should have applied the *Fitzgerald* test only *after* it had defined the particular public controversy at issue.[158] The purpose of the two-part inquiry framework for cases involving limited-purpose public figures is to protect private citizens from having to meet the

152. *See id.* at 317–18 (citing Hutchinson v. Proxmire, 443 U.S. 111 (1979); Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157 (1979); Time, Inc. v. Firestone, 424 U.S. 448 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964)).

153. *See id.* (discussing the Supreme Court's attempts to balance the interests of private citizens with the benefits of an informed public discussion about public affairs).

154. *See id.* at 322 (addressing Hatfill's access to communication before focusing on the relevant public controversy at issue). *But see* Carr v. Forbes, Inc., 259 F.3d 273, 278 (4th Cir. 2001) (using the two-part inquiry to define the scope of the relevant controversy before applying the *Fitzgerald* test); Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1554 (4th Cir. 1994) (same).

155. *See Hatfill III*, 532 F.3d at 319–22 (describing the full array of Hatfill's professional experience as a bioterrorism researcher and using those facts in the *Fitzgerald* test).

156. *Id.* at 322 ("To determine whether these combined factors [the second and third factors of the *Fitzgerald* test] are satisfied, we first address the nature of the 'particular public controversy' that gave rise to the alleged defamation to determine whether Dr. Hatfill thrust himself into *that* controversy.").

157. *See id.*

158. *See, e.g.*, *Carr*, 259 F.3d at 278–79 (explaining that in the initial analysis of the particular controversy, courts must review "the scope of the alleged defamatory statements and the facts surrounding them"); *Foretich*, 37 F.3d at 1554 (describing explicitly the need to first address the particular public controversy at issue). Additionally, state courts outside the Fourth Circuit have emphasized the importance of first reviewing the public controversy to apply Supreme Court precedent appropriately when cases involve limited-purpose public figures. *See, e.g.*, Lassonde v. Stanton, 956 A.2d 332, 340 (N.H. 2008) ("Identification of the implicated public controversy is not a mere formality, because the scope of the controversy in which the plaintiff involves himself defines the bounds of his public presence." (internal citations and quotation marks omitted)).

heightened "actual malice" standard in defamation claims.[159] The two-part inquiry restrains the court's analysis to the limited purposes defined within the scope of the controversy.[160] Also, the two-part test prevents the court from considering a defamation-plaintiff's actions that are unrelated to the particular public controversy when the court begins the *Fitzgerald* test analysis.[161] However, in *Hatfill III*, by beginning the limited-purpose public figure analysis without first defining a particular public controversy, Judge Niemeyer had established at the outset what he had sought to prove—that Kristof's op-ed articles discussed bioterrorism-related national security threats and that Hatfill possessed extensive public exposure and a lengthy background in bioterrorism research.[162]

The purpose of Kristof's articles, while generally falling into a national security framework, specifically focused on one particular suspect involved in the 2001 anthrax attacks and the FBI's failure to follow-up on this suspect effectively.[163] Had the court strictly defined

159. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345–46 (1974) (discussing the importance of recognizing the important interests at stake to the individual and society as a whole in creating an appropriate application of the "actual malice" standard in defamation cases); *see also Foretich*, 37 F.3d at 1553 ("First, was there a particular '*public* controversy' that gave rise to the alleged defamation? Second, was the nature and extent of the plaintiff's participation in that particular controversy sufficient to justify 'public figure' status?"). The second component of the inquiry is satisfied by the *Fitzgerald* test. *Carr*, 259 F.3d at 280; *Foretich*, 37 F.3d at 1555–56.

160. *See supra* note 158 and accompanying text. **R**

161. *See, e.g.*, *Lassonde*, 956 A.2d at 340 (noting the importance of strictly defining the controversy); *cf.* Hutchinson v. Proxmire, 443 U.S. 111, 135–36 (1979) (explaining that the defamation-plaintiff's experience in his broad field of expertise should not be included in the public figure analysis when the scope of the controversy dealt with a more specific context of events giving rise to the defamation).

162. Rather than approach the question of Hatfill's access to media with regard to a yet-to-be-named controversy, Judge Niemeyer first pointed to the extensive record of Hatfill's media appearances and government interactions as a prominent bioterrorism researcher. *See Hatfill III*, 532 F.3d at 322 (discussing Hatfill's work with government agencies and the researcher's appearance in media reports). However, without having defined the particular controversy at issue, whether Hatfill's background as a bioterrorism expert was important should have been unknown. *Compare Hutchinson*, 443 U.S. at 135 (refusing to examine non-pertinent media appearances and work with government agencies), *with Hatfill III*, 532 F.3d at 322 (including Hatfill's public background without first explaining why the background was relevant to the particular public controversy at issue).

163. Kristof's five op-ed articles for the *Times* primarily focused on the FBI's investigation of the 2001 anthrax attacks. *See* Hatfill v. N.Y. Times Co. (*Hatfill I*), 416 F.3d 320, 325–28 (4th Cir. 2005) (reproducing the critical excerpts of Kristof's op-ed articles between May 2002 and August 2002). Further, in August 2008, after the Fourth Circuit decided *Hatfill III*, Kristof wrote an apology op-ed directed at Hatfill, which the *Times* published. Nicholas D. Kristof, *The Media's Balancing Act*, N.Y. TIMES, Aug. 28, 2008, at A27. In this apology, Kristof summarized his purpose to include "Mr. Z" in his articles: "I referred to 'Mr. Z' as an example of the flaws in the FBI's investigation." *Id.* Kristof explained later in the piece that he pursued the story because of his concern for the public's

the prima facie context of Kristof's articles before considering Hatfill's background as a bioterrorism researcher, the court may have settled on a particular public controversy that was truly present and central in all five of Kristof's op-eds.[164] Instead, the court evaluated the op-ed series in the broad context of national security from the outset, and Judge Niemeyer justified his definition of the particular controversy by citing merely two minor phrases from Kristof's articles, both of which Kristof had written as corollary justifications of the main issue surrounding the FBI's failed search for the 2001 anthrax attacker.[165]

The purpose of the *Fitzgerald* test is to evaluate a presumed private citizen's involvement in a *particular* controversy to determine whether that private citizen should qualify as a limited-purpose public figure for the *particular* public controversy in question.[166] The two-part inquiry, which secondarily includes the *Fitzgerald* test, plays an integral role in balancing a private citizen's right to maintain his good name against society's generalized interest in fostering free discussion.[167] By avoiding the first step of the Fourth Circuit's two-part inquiry, the court created two significant errors in its opinion.

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interest, but involved Hatfill specifically for the purpose of disparaging the FBI's efforts. *Id.* Similarly, Hatfill's legal team argued to the Fourth Circuit that the lower court's broad interpretation of the controversy read the "particular" requirement out of the legal analysis, thereby resulting in an erroneous scope of the events at issue. Brief of the Appellant, at 25–26, *Hatfill III*, 532 F.3d 312 (No. 07-1162) [hereinafter Brief of the Appellant].

164. *See* Brief of the Appellant, *supra* note 163, at 25–27 (describing the potentially absurd results to defamation-plaintiffs who courts subject to overly broad scopes of the particular public controversy in question). R

165. *See Hatfill III*, 532 F.3d at 323 (pointing to the articles' phrases "to threaten America's national security" and "there are two larger issues [related to national security]" to define the broader purpose of Kristof's series).

166. *See* Fitzgerald v. Penthouse Int'l, Ltd., 691 F.2d 666, 668 (4th Cir. 1982) (evaluating the limited-purpose public figure factors after defining the particular public controversy); *see generally* Bradden C. Backer, Note, *Constitutional Protection of Critical Speech and the Public Figure Doctrine: Retreat by Reaffirmation*, 1980 WIS. L. REV. 568, 585–95 (discussing the development of the factors for qualifying a private citizen as a limited-purpose public figure). The original application of the "actual malice" standard to defamation-plaintiffs provided the media greater ability to discuss the fitness or character of public individuals whose actions affected the lives of the public in general, not private citizens. *Cf.* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 135–36 (1967) (requiring a popular head football coach of a major state university to meet the "actual malice" standard); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 256 (1964) (creating the "actual malice" standard to extend the media's ability to discuss the fitness of an elected Commissioner of the City of Montgomery, Alabama). *But see* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345, 351 (1974) (explaining the dangers of an overly expansive application of the "actual malice" standard on private citizens and refusing to extend the public figure standard to a private lawyer).

167. *See* Hutchinson v. Proxmire, 443 U.S. 111, 135–36 (1979) (arguing that defining the controversy prevents a private citizen from being placed into a defensive position in his case against a defamatory media publication); *see also* Robert D. Richards & Clay Calvert, *Suing the News Media in the Age of Tabloid Journalism: L. Lin Wood and the Battle for Accountabil-*

First, the court inappropriately evaluated the first *Fitzgerald* factor—whether Hatfill had sufficient access to the media to defend against harmful media reports—by including analysis of Hatfill's media contacts that may have been irrelevant to the true controversy at issue.[168] An ability to defend attacks through a public forum increases the likelihood that an individual may meet the first *Fitzgerald* factor and subsequently may qualify as a limited-purpose public figure.[169] In Hatfill's case, however, the court detailed Hatfill's professional association with government agencies; his historical appearances on radio, television, and print media prior to the 2001 anthrax attacks; and his prominence in the bioterrorism community, generally, without ever first detailing why these associations were relevant to his access to communication.[170] Had the controversy correctly been limited to Hatfill's ability to utilize media outlets to speak out about the FBI's investigation of the 2001 anthrax attacks, Hatfill's interaction with the media may not have been sufficient to satisfy the *Fitzgerald* test's first factor, and may have qualified Hatfill as a private citizen for his defamation claim against the *Times*.[171] Indeed, Hatfill's media exposure was limited *until after* the publication of Kristof's May 24, 2002 *New York Times* op-ed which urged readers to demand that the FBI more

ity, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 467, 479 (2006) (explaining that courts across the country often misapply the limited-purpose public figure standard to include any individual who receives public attention).

168. *See Hatfill III*, 532 F.3d at 322 ("[O]n whether Dr. Hatfill had 'access to channels of effective communication,' it becomes readily apparent from the record that Dr. Hatfill was viewed as an expert on the topics of bioterrorism and biological weapons, including anthrax, and that he could command attention in this field.").

169. *See Fitzgerald*, 691 F.2d at 669 (outlining the plaintiff's significant interaction with public media forums to justify qualifying him as a limited-purpose public figure); *accord* Reuber v. Food Chemical News, Inc., 925 F.2d 703, 708–09 (4th Cir. 1991) (discussing the importance of a limited-purpose public figure's access to communication in qualifying him as such, yet permitting Reuber's failure to rebut the published claims as satisfying the first *Fitzgerald* factor).

170. *See Hatfill III*, 532 F.3d at 319 (outlining Hatfill's background without first defining the purpose of doing so); *see also* Brief of the Appellant, *supra* note 163, at 24–25 (describing how Hatfill's professional experience would be irrelevant to the FBI's 2001 anthrax investigations had Hatfill not been forced to refute allegations that he was involved in the attacks). R

171. Further, the court could have reached the same result, dismissing Hatfill's claim, by qualifying Hatfill as a private citizen. *See Hatfill III*, 532 F.3d at 324–25 (explaining that the lower court's record sufficiently showed that Kristof sincerely believed that Hatfill was the attacker and did not act negligently in reporting the story). Such an opinion would have concluded Hatfill's case without unnecessarily expanding the scope of the relevant particular public controversy for future Fourth Circuit defamation-plaintiffs.

seriously investigate "one middle-aged American" in the bioterrorism community.[172]

Second, the court improperly reviewed Hatfill's background and professional experience as a bioterrorism researcher in the context of a combined analysis of the second and third *Fitzgerald* factors.[173] Not until this belated point in the opinion did Judge Niemeyer seek to define the scope of the relevant controversy.[174] Furthermore, by having already put forth the array of Hatfill's professional background

172. *See* Hatfill v. N.Y. Times Co. (*Hatfill I*), 416 F.3d 320, 325 (4th Cir. 2005) (referencing Kristof's May 24, 2002 article about "Mr. Z," soon to be exposed as Hatfill in a subsequent August 2002 op-ed after the FBI's investigation focused on Hatfill more intently). Not until after Kristof's early anthrax op-eds did media and law enforcement attention focus more significantly on Hatfill's potential involvement in the anthrax attacks. *See* Marilyn W. Thompson, *The Persuit* [sic] *of Steven Hatfill*, WASH. POST, Sept. 14, 2003 (Magazine), at W06 (describing how the FBI's investigation of Hatfill increased dramatically during the summer of 2002 after the *Times* had begun publishing the Kristof op-ed articles); *see also* Brief of the Appellant, *supra* note 163, at 28–31 (describing in detail the extent of Hatfill's media contacts before Kristof started publishing his op-eds). R

Additionally, as demonstrated in *Foretich*, certain defensive media responses may not be included in the *Fitzgerald* test analysis. *See* Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1558 (4th Cir. 1994) ("[W]e are extremely reluctant to attribute public-figure status to otherwise private persons merely because they have responded to . . . accusations in a reasonable attempt to vindicate their reputations."). In *Foretich*, the court weighed the potential threat to one's reputation resulting from the gravity of juvenile sexual assault accusations, and precluded defensive media appearances from serving as evidence of the grandparents' public figure status. *Id.* at 1558–59, 1563. In Hatfill's case, Kristof's insinuations and inferences suggested that Hatfill may have been a domestic terrorist at a time when America was living in fear of the September 11th attacks. *See Hatfill III*, 532 F.3d at 315 (describing the general fear that resulted from the post-September 11th anthrax attacks). Such inferences might have carried the same weight as accusations of juvenile sexual assault and, if so, the first *Fitzgerald* test should not have included consideration of the several defensive media appearances Hatfill made after Kristof's articles damaged Hatfill's reputation. *See* Scott Shane, *Anthrax Figure Steps Up Offense*, BALT. SUN, Aug. 26, 2002, at 1A (describing Hatfill's summer news conferences in which Hatfill strongly criticized Kristof, the Attorney General of the United States, and the FBI). *Compare Foretich*, 37 F.3d at 1558, 1563 (precluding the use of the defamation-plaintiffs' media interactions in the *Fitzgerald* test analysis), *with Hatfill III*, 532 F.3d at 322 (accepting all of the defamation-plaintiff's media interactions as relevant to the second and third *Fitzgerald* factors). Moreover, even though defensive responses may be "'uninhibited, robust, and wide-open,'" *Foretich*, 37 F.3d at 1560 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)), the *Hatfill III* court never addressed whether Hatfill's public replies were excludable. *See Hatfill III*, 532 F.3d at 322 (referring to Hatfill's defensive press conferences as evidence of his access to media); *see also* Mowbray, *supra* note 13 (describing Hatfill's defensive responses to media accusations, specifically Kristof's, suggesting Hatfill was involved in the 2001 anthrax attacks). R

173. *See* Brief of the Appellant, *supra* note 163, at 24–25 (explaining how the lower court similarly misapplied the second and third *Fitzgerald* test factors by basing the analysis on an overly broad scope of the particular public controversy); *see also supra* notes 155–156 and accompanying text. R R

174. *See supra* notes 132–133 and accompanying text (describing Judge Niemeyer's discussion of the broad public controversy at issue in Hatfill's case). R

and media exposure, both related and unrelated to the 2001 anthrax attacks, before defining the particular controversy, the court created momentum for its eventual finding that Kristof's articles broadly covered "the debate on the threat from bioterrorism and the nation's lack of preparation for it,"[175] rather than simply the FBI's investigation of the 2001 anthrax terrorist suspects.[176] With such a broad scope, the court improperly included Hatfill's entire professional background as evidence of his influence and prominence on issues related to the risk that bioterrorism posed to America's national security.[177] Indeed, the broadened scope served as a death-knell to Hatfill's claim.[178]

B. The Misapplication of the Circuit's Two-Part Inquiry Threatens Private Citizens' Ability to Redress Media Attacks on Their Reputations

The limited-purpose public figure doctrine developed as the Supreme Court sought to evaluate defamation cases in which a plaintiff did not quite qualify as a public official yet seemed to function in a more prominent role than that of a private citizen.[179] In attempting to strike a judicial balance between private individuals' active involvement in prominent affairs and private citizens' lessened ability to defend against public attacks, the Supreme Court and Fourth Circuit have warned repeatedly of the threat to private citizens should they be

175. *Hatfill III*, 532 F.3d at 322.

176. *Cf.* Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979) (noting that broad classifications of public controversies may "'too often result in an improper balance between the competing interests'" of informed public debate and private citizens' right to protect their reputation) (quoting Time, Inc. v. Firestone, 424 U.S. 448, 456 (1976)).

177. *Hatfill III*, 532 F.3d at 323–24. The court cites as examples of Hatfill's influence in the "controversy" his prior "lectures, writings, participation on panels, and interviews." *Id.* at 324. However, the Court in *Hutchinson* specifically rejected a similar attempt to replace a narrow controversy with a more generalized concept. *Hutchinson*, 443 U.S. at 135. In that case, the Court denied the relevance of a researcher's professional experience in his scientific field as evidence of his special prominence or effort to influence the outcome of the particular controversy which had given rise to the defamation claim. *Id.*

178. *See Hatfill III*, 532 F.3d at 324 (qualifying Hatfill as a limited-purpose public figure and requiring him to meet the heightened "actual malice" standard).

179. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974) (creating a judicial standard that applied to non-elected individuals' actions whose influence affects public outcomes); *see also supra* note 166 and accompanying text (describing the purpose of the "actual malice" standard and the limited-purpose public figure doctrine). Prior to *Gertz*, the Court in *New York Times* had expanded First Amendment protections without clear limits on the privilege's application. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (announcing the "actual malice" standard for public officials, yet not limiting the new standard's application). R

subjected to an "actual malice" standard inappropriately.[180] Additionally, harms caused to private citizens by the negligent reporting of prominent events can be incredibly detrimental not only to a private citizen's reputation but also to the private citizen's emotional and physical well-being.[181] Since *New York Times* and *Gertz*, the Supreme Court has backtracked on its application of the "actual malice" standard and has reaffirmed lower courts' need to protect private citizens from defamatory statements.[182] Nevertheless, in contrast to the Su-

180. *See, e.g.*, *Gertz*, 418 U.S. at 348–49 ("[W]e endorse [the limited-purpose public figure standard] in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation."); *see also* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 147–48 (1967) (referencing the importance of protecting private persons' reputations in the context of the development of libel law); Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1552 (4th Cir. 1994) ("[P]ublic figures are less deserving of protection than private individuals because public figures, like public officials, have voluntarily exposed themselves to increased risk of injury from defamatory falsehood.").

181. *See* Richards, *supra* note 167, at 479 (describing the practical effect of an overly broad application of the limited-purpose public figure doctrine on defamation-plaintiffs who otherwise may have qualified as private citizens). The 2001 anthrax attacks investigations and subsequent media reporting had extremely detrimental effects on an incredibly large number of innocent individuals caught in the midst of the controversy. *See, e.g.*, William J. Broad & Scott Shane, *For Suspects, Anthrax Case Had Big Costs*, N.Y. TIMES, Aug. 10, 2008, at A01 (outlining the social costs to over eight innocent suspects whose involvement in the anthrax investigation seemingly led to social outcast, unemployment, alcoholism, paranoia, divorce, and suicide); Doug Donovan, *Death Brings Questions: Apparent Suicide of Anthrax Suspect Challenges Role of Leaks in Probes*, BALT. SUN, Aug. 2, 2008, at 5A (reporting on the likely role of the investigations in the apparent suicide of Dr. Bruce Ivins, another bioterrorism researcher connected to the anthrax virus and national security preparedness). Furthermore, beyond the anthrax investigations, negligent reporting on private citizens involved in government investigations has taken a significant toll on other individuals who have been wrongly associated with publicized crimes. *See* Richards, *supra* note 167, at 494–96 (explaining the life-long negative consequences for Richard Jewell, one-time suspect of the 1996 Atlanta Olympic Games bombing, of his portrayal in the news media as having committed the act of terrorism); *see also* Steve Chapman, *The News Media vs. the Innocent*, CHI. TRIB., Mar. 27, 2008, at 19 (chiding the news media for overstepping its role of informing the public and in turn ruining private citizens' lives as a consequence); Ted Gup, *Gotcha; You May or May Not Be a Suspect, But You Will Be All Over the News*, WASH. POST, Aug. 18, 2002, at B01 (warning against recent tendancies in the news industry to report on criminal suspects before fully considering the implications of publicly labeling individuals "persons of interest" or "suspects"). R R

182. *See* Richards, *supra* note 167, at 479–80 (arguing that lower courts' application of the limited-purpose public figure doctrine does not align with post-*Gertz* Supreme Court opinions and has blurred the line between general-purpose, limited-purpose, and involuntary public figures); *see, e.g.*, Hutchinson v. Proxmire, 443 U.S. 111, 134–35 (1979) (explaining that a private individual does not automatically become a public figure once he or she has received public funds); Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 167 (1979) (denying that a private individual immediately qualifies as a limited-purpose public figure merely because he or she is involved in public judicial proceedings); Time, Inc. v. Firestone, 424 U.S. 448, 453–54 (1976) (strengthening the requirement that even a prominent member of society does not automatically qualify as a limited-purpose public figure; rather, to qualify she must thrust herself into a controversy publicly for the purpose of R

preme Court's general trend towards increasing protection of private citizens, the *Hatfill III* court permitted an expansive definition of the particular controversy to serve as the foundation of the public figure doctrine's analysis merely because the op-ed series's author briefly considered how national security may have been impacted.[183]

The *Hatfill III* court's analysis seemingly extinguishes the purposeful delineation between the general-purpose and limited-purpose public figure doctrines whenever national security is a tangential issue of a more specifically centered media report.[184] Purposely defining

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resolving it). Additionally, prominent practitioner Lin Wood describes cases in which the practical misapplication of the heightened "actual malice" standard has caused severe hardship for his prior clients, including Richard Jewell, Gary Condit, and the parents of JonBenét Ramsey. Richards, *supra* note 167, at 470, 483, 495. R

183. *See Hatfill III*, 532 F.3d at 323 (referring to the broader issues of national security and bioterrorism preparedness with the FBI's investigation of the anthrax attacker as an example).

184. Judge Niemeyer's generous assumption that the social interest involved in Kristof's reporting on the failed anthrax attack investigations seems to resemble the overruled holding of *Rosenbloom* in which the Supreme Court proposed the use of the "public or general interest" test to apply the "actual malice" standard. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43–44 (1971) (plurality opinion), *overruled by Gertz*, 418 U.S. 323. Moreover, in *Gertz*, the Court explicitly warned of the negative repercussions of adopting such a standard. *See Gertz*, 418 U.S. at 346 ("[A] private individual whose reputation is injured by defamatory falsehood that does concern an issue of public or general interest has no recourse unless he can meet the rigorous requirements of [the 'actual malice' standard].").

By reading into Kristof's articles a national concern for the threat of bioterrorism on national security preparedness, the Fourth Circuit degrades the purpose of defining a *particular* public controversy and seemingly reverts to an overruled *Rosenbloom* analysis, weakening the purposeful development of the limited-purpose public figure doctrine. *See Hatfill III*, 532 F.3d at 323 (discussing the "broader" issue encompassing the larger context of the articles); *see also* Brief of the Appellant, *supra* note 163, at 25–27 (outlining the faults R of defining an overly broad controversy). Such an approach threatens the right of states to use defamation laws to protect private citizens who may be involved in industries related to the country's preparedness against terrorist attacks. These citizens' professions inherently involve national security and any investigation relating to their employment likely would be viewed as connected to a broader national security interest, particularly if, for example, a reporter briefly mentions a potential threat to national security in a media report. *Cf.* Richards, *supra* note 167, at 488–89 (arguing that the "24/7" news channels and the In- R ternet create a media atmosphere that demands instantaneous reporting at the cost of previously strict and appropriate self-regulation by the media).

Moreover, the *Hatfill III* court's limited-purpose public figure analysis certainly will affect subsequent defamation cases brought in the Fourth Circuit, such as Vicki Iseman's recently-filed lawsuit against the *Times*. In her complaint, Iseman alleges that, during the 2008 presidential campaign, the *Times* defamed her by erroneously reporting on "an illicit 'romantic' and unethical relationship in breach of the public trust in 1999" between her and Senator John McCain. Complaint at 1, Iseman v. New York Times Co., No. 3:08CV848 (E.D. Vir. Dec. 30, 2008). Had the parties not reached a settlement, the *Hatfill III* court's broadened analysis may have permitted the *Times* to include Iseman's mere association with a presidential candidate as trial evidence of Iseman's limited-purpose public figure status, as a presidential candidate's associates are tangentially related to the candidate's approach to national security. *See* Ashby Jones, *Vicki Iseman: Is She a Public or Private Figure?*,

the scope of the controversy is critical for courts to appropriately qualify a plaintiff as a limited-purpose public figure.[185] When the scope of the controversy is defined too broadly, a court may unfairly burden a private citizen's defamation claim by labeling private events as public.[186] A court could erroneously determine that a private citizen's participation in "newsworthy" events were public merely because the media covered the events widely.[187] An overbroad scope may cause a court to determine incorrectly that a prominent individual qualifies as a limited-purpose public figure because of his or her public pedigree or status in society not related to the public controversy.[188] An overly expansive controversy also may lead a Fourth Circuit court to misinterpret the *Fitzgerald* test by including evidence of extraneous media interactions in the limited-purpose public figure determination.[189]

WALL ST. JOURNAL'S LAW BLOG, Jan. 23, 2009, http://blogs.wsj.com/law/2008/12/31/vicki-iseman-is-she-a-public-or-private-figure/ (reporting an interview with prominent First Amendment scholar and professor Clay Calvert about Iseman's key legal issue, whether or not her actions as a lobbyist or her association with Senator John McCain should qualify her as a limited-purpose public figure); *see also* Ashby Jones, *A Law Blog Conversation with Vicki Iseman*, WALL ST. JOURNAL'S LAW BLOG, Feb. 20, 2009, http://blogs.wsj.com/law/2009/02/20/a-law-blog-conversation-with-vicki-iseman/ (discussing Iseman's dissatisfaction with the *Times*' allegedly contradictory public statements made after the parties had reached a settlement agreement).

185. *See Foretich*, 37 F.3d at 1556–57 (evaluating *Time, Inc. v. Firestone* to define the scope of the particular controversy cautiously and to avoid an erroneous inclusion of a plaintiff's actions which were not directly related to the particular public controversy).

186. *See, e.g.*, *Hutchinson*, 443 U.S. at 135 (explaining the danger of using the subject matter of the controversy as the deciding factor in determining whether to apply the limited-purpose public figure doctrine for fear of over-burdening private citizens); *Firestone*, 424 U.S. at 455–56 (holding that although judicial proceedings eventually become a matter of public record, the events giving rise to the proceedings do not necessarily trigger an automatic public controversy classification). The Court in *Firestone* also explicitly noted that courts should be extremely mindful of granting undue protection to defamation-defendants when private citizens' reputations would come as a significant cost in the balance between constitutional and individual rights. *Firestone*, 424 U.S. at 456.

187. *See, e.g.*, *Wolston* 443 U.S. at 167 (referencing the Court's overruling of *Rosenbloom* to affirm that courts should evaluate private individuals' active participation in a series of events to determine whether they qualify as limited-purpose public figures, rather than evaluating the nature of the events themselves).

188. *See, e.g.*, *Firestone*, 424 U.S. at 454 (arguing that social status should not necessarily influence whether a court should apply the limited-purpose public figure classification to defamation-plaintiffs). *But see id.* at 481 (Brennan, J., dissenting) (asserting that fully informed debate requires courts to enforce the heightened "actual malice" standard against nearly all defamation-plaintiffs who bring claims against the media to prevent harmful self-censorship).

189. *See, e.g.*, Wells v. Liddy, 186 F.3d 505, 537 (4th Cir. 1999) (excluding examples of a defamation-plaintiff's several interactions with the media from the *Fitzgerald* test because some instances qualified as reasonable responses to reputation-injuring statements and other instances were made without the plaintiff's intention to impact the resolution of the controversy).

Finally, an overly broad controversy may influence a court to misinterpret a defamation-plaintiff's self-help, defensive actions against serious criminal charges as an attempt by the plaintiff to influence the outcome of the controversy.[190]

By broadening the scope of the particular public controversy, the *Hatfill III* court followed an inappropriate trend of judicial deference to an overly expansive First Amendment protection of media outlets.[191] The outcome in *Hatfill III* may have been significantly different had Judge Niemeyer applied the Circuit's two-part inquiry strictly to limit the scope of evidence available for the *Fitzgerald* test, and thereby limiting the particular public controversy to the direct context present in all of Kristof's anthrax-related articles published between May and August 2002.[192] As the court stated in *Hatfill III*, the five Kristof op-ed articles gradually introduced more evidence that suggested that Hatfill was the FBI's prime suspect; provided greater rationale behind Hatfill's ability and motive to weaponize anthrax; and, finally, admonished the FBI for failing to act quickly to determine Hatfill's involvement in the 2001 attacks.[193] The subject matter of the articles was not absolutely clear and, beginning with its disorganized application of the Fourth Circuit's two-part limited-purpose public figure inquiry, the court chose to focus on the broadest interpretation available.[194] By adopting the *Times*' approach, the *Hatfill III* court

190. *But see Foretich*, 37 F.3d at 1558 (excluding the Foretiches' public appearances from the *Fitzgerald* test analysis and withholding their media appearances from the court's evaluation of the Foretiches' involvement in the controversy because the appearances served as reasonable attempts to defend against serious charges of juvenile sexual assault).

191. *See* Richards, *supra* note 167, at 480–81 (discussing judges' unfamiliarity with defamation law and courts' general preference for deferring to media claims that the free press will be hampered by not applying the "actual malice" standard to defamation-plaintiffs); *accord* Heidee Stoller et al., *Developments in Law and Policy: The Costs of Post-9/11 National Security Strategy*, 22 YALE L. & POL'Y REV. 197, 224, 227–31 (2004) (evaluating judicial trends in the Second, Sixth, and D.C. Circuits on issues related to terrorism to suggest that courts can become overly deferential to parties that claim to act on behalf of national security to justify their actions). R

192. *See supra* note 162 and accompanying text (explaining how Hatfill's public exposure may not have been relevant to the scope of a more narrow controversy). R

193. *See* Hatfill v. N.Y. Times Co. (*Hatfill III*), 532 F.3d 312, 315 (4th Cir.) (providing a summary of the major themes of Kristof's op-eds involving Hatfill's relation to the FBI's anthrax investigations), *cert. denied*, 129 S. Ct. 765 (2008).

194. Not surprisingly, this was also the approach urged by the *Times*' legal team. *See* Brief of Appellee at 43–46, *Hatfill III*, 532 F.3d 312 (Nos. 07-1124, 07-1162) (arguing for the most expansive interpretation of the controversy at issue in relation to Kristof's articles, taken as a whole); *see also* Brief of Amici Curiae ABC, Inc. et al. in Support of Appellee the New York Times Company at 14–19, *Hatfill III*, 532 F.3d 312 (No. 07-1124) (supporting the *Times*' position that an expansive interpretation of the scope of the particular controversy was necessary to avoid media self-censorship); Jerry Markon, *N.Y. Times Urges Judge to Dismiss Hatfill Suit*, WASH. POST, Jan. 6, 2007, at A06 (reporting on the *Times*' position that

gave credence to a retroactive application of the limited-purpose public figure doctrine, widened the scope of relevant controversies that may expose private citizens to the limited-purpose public figure classification, and weakened states' abilities to use defamation laws to protect certain private citizens from negligent media reports.[195]

V. CONCLUSION

In *Hatfill v. New York Times Co.* (*Hatfill III*), the Fourth Circuit used the limited-purpose public figure doctrine as the basis to dismiss a defamation suit brought by an individual against a major news outlet.[196] The court's opinion questionably expanded the developing requirement for defamation-plaintiffs who may be required to meet a heightened "actual malice" standard.[197] Specifically, the court widened the scope of the particular public controversy at issue by misapplying the Circuit's two-part inquiry,[198] which led to a flawed use of the *Fitzgerald* test.[199] As a result, future defamation-plaintiffs involved professionally in national security fields may face a more difficult burden to succeed in defamation claims against media outlets reporting on suspects involved in government investigations.[200]

"[t]he larger issue in the columns was the nation's preparedness to handle biological attacks").

195. *See supra* note 184 and accompanying text. R

196. *See supra* Part III.

197. *See supra* Part IV.A.

198. *See supra* Part II.

199. *See supra* Part IV.A.

200. *See supra* Part IV.B.