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NOTES

WALDBAUM V. FAIRCHILD PUBLICATIONS, INC.: GIVING OBJECTIVITY TO THE DEFINITION OF PUBLIC FIGURES

A suit for defamation provides an avenue of legal redress for invasions of an individual's interest in reputation and good name.[1] To recover damages, a plaintiff must prove that the defamatory comments injured his reputation and impaired his standing among his peers.[2] An essential consideration in any defamation action is the status of the plaintiff. Whether a court[3] deems a person to be a private individual or a public figure is of paramount importance in such actions because public figures alleging defamation must prove the defendant published the defamatory comments with actual malice,[4] an exceedingly difficult task.[5] Private indi-

1. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 111, at 737 (4th ed. 1971). The tort of defamation is comprised of both libel and slander. Historically, libel has involved written or printed defamation, although defamation by the electronic media is also libelous. RESTATEMENT (SECOND) OF TORTS § 568A (1976). *But see* W. PROSSER, *supra* § 112, at 753-54. Slander, on the other hand, is oral defamation. In either case the interest protected by the law of defamation is the same: society's "pervasive and strong interest in preventing and redressing attacks upon reputation." Rosenblatt v. Baer, 383 U.S. 75, 86 (1966). Both forms of defamation require that something be communicated to a third person that may affect an individual's reputation and good name. *See* W. PROSSER, *supra* § 111, at 739; Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1354 (1975). A statement is defamatory if it "tend[s] to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace . . . ." Kimmerle v. New York Evening Journal, Inc., 262 N.Y. 99, 102, 186 N.E. 217, 218 (1933). The focus of this article is on the definition of public figures in libel actions and, therefore, the term defamation shall refer solely to libel.

2. 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 5.1, at 349-50 (1956).

3. Whether a plaintiff is a public figure is a question of law for the court to resolve. Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1293 n.12 (D.C. Cir.), *cert. denied*, 101 S. Ct. 266 (1980). *See also* Wolston v. Reader's Digest Ass'n, 578 F.2d 427, 429 (D.C. Cir. 1978), *rev'd on other grounds*, 443 U.S. 157 (1979); Note, *The Applicability of the Constitutional Privilege to Defame: Question of Law or Question of Fact?*, 55 IND. L.J. 389 (1980).

4. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

5. In a 1972 study of 52 cases applying the actual malice test to matters of public interest, 39 found no actual malice, 4 found malice, and 9 were inconclusive. Comment, *The*

viduals, by comparison, carry no such onerous burden.[6] The recent trend in the United States Supreme Court has been to restrict the public figure definition so that it encompasses relatively few plaintiffs.[7] Unfortunately, despite the importance of this distinction between private individuals and public figures, the Court has provided only a "skeletal description"[8] of the elusive public figure concept.

Recognizing this deficiency, the United States Court of Appeals for the District of Columbia, in *Waldbaum v. Fairchild Publications, Inc.*,[9] recently provided detailed guidelines for determining whether a plaintiff is a public figure. Focusing upon objective criteria, the court has attempted to eliminate the uncertainty plaguing this area of the law and, thus, to provide guidance to other courts, the press, and the general public.

The plaintiff, Eric Waldbaum, was president of Greenbelt Consumer Services, Inc., the second largest diversified consumer cooperative in the country. Following his dismissal in 1976 as head of this cooperative, Waldbaum alleged he was defamed by an article published in a newspaper owned by the defendant, Fairchild Publications, Inc. This article stated that, under his tenure, the company had been retrenching and losing money. Waldbaum filed a civil suit alleging that the statement was defamatory in that it was false and had injured his reputation as a businessman. Upon completion of discovery, the United States District Court for the District of Columbia granted the defendant's motion for summary judgment and ruled Waldbaum to be a public figure. On appeal, the United States Court of Appeals for the District of Columbia affirmed the district court's decision, and clarified the murky parameters of the public figure concept.

This Note will examine the new public figure analysis offered in *Waldbaum* and comment on its potential impact upon the press and defamation plaintiffs. It will trace the evolution of defamation from its common law roots through the recognition of constitutional restrictions on the tort developed in the landmark case of *New York Times Co. v. Sullivan*[10] and its progeny. Focusing on the development of the public figure stan-

Expanding Constitutional Protection For the News Media From Liability for Defamation: Predictability and the New Synthesis, 70 MICH. L. REV. 1547, 1565-66 (1972).

6. Private individuals need only demonstrate that they have suffered some actual damage to their reputation as a result of the defendant's publication of defamatory comments. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 348-50 (1974).

7. *See* notes 43-101 and accompanying text *infra*.

8. Waldbaum v. Fairchild Publications, Inc., 627 F.2d at 1292.

9. 627 F.2d 1287 (D.C. Cir.), *cert. denied*, 100 S. Ct. 266 (1980).

10. 376 U.S. 254 (1964).

dard, this Note will demonstrate the increasingly limited scope of this standard and *Waldbaum*'s consistency with this trend.

I. COMMON LAW DEFAMATION: PRESUMPTION OF MALICE

At common law, a libel plaintiff established a prima facie case by proving publication of a defamatory[11] statement that was understood by a third party to defame the plaintiff with harm resulting to the plaintiff.[12] The defendant's malice was presumed from publication even if he had no animosity toward the plaintiff and believed the statements to be true. The plaintiff did not have to prove that he suffered any actual harm from the statement since this, too, was presumed. In effect, the defendant was held strictly liable for publication of the defamatory comment.[13]

To avoid liability, the defendant had to prove that the statement was true[14] or that he had either an absolute or a qualified privilege to publish the statement. The absolute privilege was generally limited to government officials who made defamatory comments in the course of their official duties.[15] The rationale behind absolute immunity was the public policy favoring a government official's freedom of expression in the performance of his duties.[16]

In addition to absolute privileges, there were also several qualified privileges which protected a private party from liability for his allegedly defamatory remarks. The most important qualified privilege, for the purposes of this Note, was the fair comment privilege which protected the publication of statements concerning the conduct and qualifications of public offi-

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11. "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." RESTATEMENT (SECOND) OF TORTS § 559 (1976). *See also* note 1 *supra*.

12. RESTATEMENT (SECOND) OF TORTS § 613 (1976); W. PROSSER, *supra* note 1, § 114, at 776.

13. W. PROSSER, *supra* note 1, § 113, at 771-73.

14. The defendant had to prove only that the statement was substantially true rather than true in all of its particulars. RESTATEMENT (SECOND) OF TORTS § 581A, Comment f (1976). The earlier rule was that truth meant "literal" truth and thus slight factual inaccuracies would be held defamatory. W. PROSSER, *supra* note 1, § 116, at 798. The severity and absurdity of this rule led American courts to require only substantial truth. *See, e.g.*, Florida Publishing Co. v. Lee, 76 Fla. 405, 411-12, 80 So. 245, 246 (1918); Maguire v. Vaughan, 106 Mich. 280, 286, 64 N.W. 44, 46 (1895).

15. Absolute immunity was extended to such government officials as judges, jurors, legislators, and executive officers. W. PROSSER, *supra* note 1, § 114, at 777-82. *But cf.* Butz v. Economou, 438 U.S. 478, 489-90 (1978) (no immunity for federal official for acts beyond scope of official duties).

16. W. PROSSER, *supra* note 1, § 114, at 776-84.

cials.[17] This privilege was based on the belief that unfettered debate about public issues and the conduct of public officials was essential for an informed electorate.[18]

In light of the common law, the Supreme Court consistently refused to extend constitutional protection to any defamatory publication.[19] Finding libel analogous to obscenity, the Court noted that "[i]t has been well-observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[20] In 1964, the Court reversed the trend of following common law defamation principles in *New York Times Co. v. Sullivan*,[21] where first amendment[22] protection was extended to certain libelous comments.

II. CONSTITUTIONAL PROTECTION: *NEW YORK TIMES* AND ITS PROGENY

In *New York Times Co. v. Sullivan*,[23] the Court decided that the majority fair comment rule, which protected comments and opinion but not false

17. There was considerable disagreement whether this privilege protected misstatements of fact as well as opinion. The majority rule limited the privilege to opinion, while a minority of jurisdictions extended the privilege to include false statements of fact as well. *See* W. PROSSER, *supra* note 1, § 115, at 792, § 118, at 819-20. For further comment on both absolute and qualified privileges, see *Developments in the Law—Defamation*, 69 HARV. L. REV. 875, 917-31 (1956).

18. *Cf.* Barr v. Matteo, 360 U.S. 564, 577 (1959) (Black, J., concurring) ("The effective functioning of a free government like ours depends largely on the force of an informed public opinion . . . . Such an informed understanding depends, of course, on the freedom people have to applaud or criticize the way public employees do their jobs . . . .").

19. *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250, 256-57 (1952) (dictum); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (dictum); Near v. Minnesota, 283 U.S. 697, 715 (1931) (dictum).

20. Chaplinsky v. New Hampshire, 315 U.S. at 572.

21. 376 U.S. 254 (1964).

22. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

23. 376 U.S. 254 (1964). The plaintiff in this action was the police commissioner in Montgomery, Alabama, who sued four Alabama clergymen and the New York Times for libel resulting from a full page advertisement published on March 29, 1960. The advertisement, a solicitation for contributions from a civil rights group, consisted largely of descriptions of community and police mistreatment of some civil rights protestors. Although these descriptions were substantially true, there were some slight factual inaccuracies which were alleged to be defamatory. The plaintiff sought $500,000 in damages and the jury awarded him the full amount. The Alabama Supreme Court affirmed. 273 Ala. 656, 144 So. 2d 25 (1962), *rev'd*, 376 U.S. 254 (1964).

statements of fact,[24] was insufficient to protect the rights guaranteed by the first amendment. To cure this deficiency, the Court adopted what had been the minority rule and held that a public official is barred from recovering damages for defamatory comments about his official conduct unless he proves with "convincing clarity"[25] that the comments were made with actual malice. The Court defined actual malice as either knowledge that the statements were false or that they were made with a reckless disregard for the truth.[26] This protection covered not only defamatory comments and opinions but also false statements of fact.[27] Thus, the Court's holding revolutionized the common law of defamation by extending constitutional protection to an area of speech which the majority of jurisdictions had previously held to be unprivileged.[28]

The impetus behind this new protection was the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ."[29] In order to guarantee the "breathing space" that freedom of expression needs to survive, the first amendment compels the protection of even false statements of fact about public officials.[30] In the Court's view, forcing a critic of official conduct to guarantee the truth of all factual statements, at the risk of large libel judgments, would inevitably lead to self-censorship by the press.[31]

This landmark ruling was soon followed by several decisions which generally expanded the scope of the *New York Times* rule. Two years later in *Rosenblatt v. Baer*,[32] the Court stated that the minimum boundaries of the public official category extend, at the very least, to those government employees who have or appear to have substantial influence over governmental affairs.[33] To recover damages for defamatory falsehoods relating to their official conduct, such plaintiffs must prove the defendants' actual malice.[34]

In 1967, the Court further expanded the *New York Times* privilege by extending it to statements about public figures as well as public officials.

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24. *See* note 17 and accompanying text *supra*.
25. 376 U.S. at 285-86.
26. *Id.* at 279-80.
27. *Id.* at 279-81.
28. *See* note 17 and accompanying text *supra*.
29. 376 U.S. at 270.
30. *Id.* at 271-72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).
31. 376 U.S. at 279.
32. 383 U.S. 75 (1966).
33. *Id.* at 85. In *Rosenblatt*, the Court stated that the plaintiff, a former supervisor of a county ski area, might be a public official for the purposes of the *New York Times* rule. *Id.* at 87.
34. *Id.* at 86.

In two companion cases, *Curtis Publishing Co. v. Butts*[35] and *Associated Press v. Walker*,[36] the Court ruled the plaintiffs to be public figures and thus required them to prove the defendants' actual malice to recover in their defamation actions.[37] Although the plurality decision was announced by Justice Harlan, the controlling opinion was issued by Chief Justice Warren.[38] Holding that public figures fall within the *New York Times* actual malice requirement, the Chief Justice observed that many individuals of great influence who may not be holding public office at the moment are nevertheless often "intimately involved in the resolution of important public questions or by reason of their fame, shape events in the areas of concern to society at large."[39] This was the only substantive definition the Court provided for the new public figure category. Chief Justice

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35. 388 U.S. 130 (1967).

36. *Id.*

37. *Id.* at 164 (Warren, C.J., concurring). The plaintiff in *Butts* was the athletic director at the University of Georgia. In March 1963, the Saturday Evening Post published an article accusing Butts of conspiring to "fix" a football game between the University of Georgia and the University of Alabama by supplying the Alabama coach information about Georgia's game plan before the game. In *Walker*, the plaintiff was a retired general who had become an outspoken critic of school integration. Walker alleged that the Associated Press published a defamatory news story accusing him of taking command of a violent demonstration protesting the enrollment of James Meredith at the University of Mississippi in September, 1962. In each case the jurors held in favor of the plaintiffs, with Butts being awarded $460,000 and Walker $500,000. The Supreme Court, while ruling both plaintiffs public figures, upheld the award in *Butts, id.* at 161, but reversed the verdict in *Walker, id.* at 161-62. In *Butts*, the concurring opinion by Chief Justice Warren, *see* note 38 *infra*, found that the plaintiff had proved the *New York Times* actual malice requirement by demonstrating that the defendant's investigative techniques constituted a reckless disregard for the truth, *id.* at 170, but stated there was no such culpability by the defendant in *Walker. Id.* at 165.

38. The opinion of Justice Harlan, which was joined by Justices Clark, Stewart, and Forbes, held that recovery for public figures should be allowed "on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.* at 155. Chief Justice Warren, joined by Justices Brennan and White, contended that the *New York Times* "actual malice" standard should include defamation of public figures. *Id.* at 164. Justices Douglas and Black, while maintaining their belief that the first amendment ought to allow much greater freedom for the press, nevertheless agreed with the Chief Justice that, at the bare minimum, the actual malice standard should apply to public figures. Thus, by a 5-4 split, the controlling view that emerged was that public figures, as well as public officials, must prove actual malice to prevail in a defamation action. For a thorough discussion of these two cases and their somewhat confusing judicial alignment, see Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267.

39. 388 U.S. at 163-64. Justice Harlan's plurality opinion defined public figures in slightly different words. He stated that one may attain the status of public figure by position alone or by "purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy." *Id.* at 155. However, in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the Court cited Chief Justice Warren's definition as controlling. *Id.* at 337.

Warren noted, however, that "an important consideration that distinguished these public figures from private individuals is the fact that public figures often have easy access to the media both to influence policy and to respond to criticism of their viewpoints and activities."[40] Despite this significant advancement in constitutional protection for the media, *Butts* provided little guidance to lower courts as to what constitutes a public figure.

The expansion of first amendment protection for the press reached its zenith in 1971 in *Rosenbloom v. Metromedia*.[41] A plurality—Justices Brennan, Warren, and Blackmun—held that all defamation plaintiffs, whether public figures or private individuals, must prove "actual malice" in order to recover when the defamation involves a matter of public or general concern.[42] This standard went significantly beyond any previous ruling by the Court because now virtually any defendant could escape liability simply by proving the defamatory comments concerned a matter of public or general interest. One of its effects, however, was to expose the problem of reconciling the individual's interest in his reputation with the need for a free and uninhibited press. The fact that five separate opinions were issued suggests that the Court was not completely comfortable with its holding. The uneasiness with its decision was manifested three years later when the Court effectively overruled *Rosenbloom*.

III. *Gertz v. Robert Welch, Inc.*: Redefining the Constitutional Limits

In 1974, the Court repudiated the *Rosenbloom* standard in *Gertz v. Robert Welch, Inc.*[43] It found that the public or general interest test not only failed to serve the competing interests involved in defamation actions,[44] but also forced courts to decide on an *ad hoc* basis what qualified as an

40. 388 U.S. at 164.

41. 403 U.S. 29 (1971).

42. *Id.* at 43-44. The plaintiff, a distributor of nudist publications, was arrested by Philadelphia police on criminal obscenity charges but was subsequently acquitted. He sued the defendant radio station for libel arising from its news report of his arrest which stated that the confiscated magazines were "obscene" rather than allegedly obscene and characterized the plaintiff and his associates as "smut distributors" and "girlie-book peddlers." The jury awarded him $300,000 in damages. 289 F. Supp. 737 (E.D. Pa. 1968). On appeal, the circuit court reversed, holding that because the broadcasts concerned a matter of public interest—a police campaign against obscenity—the plaintiff had to prove actual malice and had failed. 415 F.2d 892 (3d Cir. 1969), *aff'd*, 403 U.S. 29 (1971).

43. 418 U.S. 323 (1974).

44. These competing interests were identified as the need for a vigorous and uninhibited press versus the legitimate state interest in compensating individuals for harm inflicted by defamatory statements. *Id.* at 341-42.

issue of public or general interest.[45] The Court found that the balance between the competing concerns struck by the *Rosenbloom* plurality weighed too heavily in favor of the press at the expense of the individual's reputational interests.[46] Therefore, the Court rejected the contention of the *Rosenbloom* plurality that whether the first amendment protects the publisher of an alleged defamation depends upon the subject matter of the publication.[47] Instead, the Court selected a standard that focuses upon the status of the plaintiff—that is, whether the plaintiff is a private individual or a public figure.[48]

In *Gertz*, the issue presented was whether the publisher of a defamatory falsehood about a private individual could claim a constitutional privilege under the aegis of *New York Times*. The plaintiff, Elmer Gertz, was a prominent attorney who had been retained by a Chicago family to bring a civil rights action against a policeman who had shot and killed their son. Gertz had long been active in community and professional affairs, serving as an officer of civic and professional organizations, and had published several books and articles on civil rights. In addition, Gertz had frequently appeared on national and local radio and television and had been the subject of over forty articles in Chicago newspapers.[49] The defendant was the publisher of *American Opinion*, a monthly magazine espousing the views of the John Birch Society. In March, 1969, the defendant published an article which purported to demonstrate the existence of a conspiracy against local police as part of a nationwide communist plot. The article discussed Gertz's involvement in the civil rights action against the policeman, and accused Gertz of having an extensive criminal record, of being a communist, and of having framed the policeman. Each of these accusations was false.[50]

Gertz sued for libel and the district court entered judgment for the defendant, concluding that even though the plaintiff was neither a public official nor a public figure, the *New York Times* standard should govern any discussion of a public interest.[51] The court of appeals, relying upon the

45. Id. at 346.
46. *Id.*
47. 403 U.S. at 43-44.
48. *See* Gertz v. Robert Welch, Inc., 418 U.S. at 343-46; Note, *An Analysis of the Distinction Between Public Figures and Private Defamation Plaintiffs Applied to Relatives of Public Persons*, 49 S. CAL. L. REV. 1131, 1175-83 (1976); text accompanying notes 68-69 *infra*.
49. Brief for Petitioner at 152-53 app., Gertz v. Robert Welch, Inc., 418 U.S. 323.
50. 418 U.S. at 325-28.
51. 322 F. Supp. 997 (N.D. Ill. 1970). It should be noted that this holding presaged the plurality opinion in *Rosenbloom*. *See* text accompanying notes 41-42 *supra*. The district court relied primarily on Time, Inc. v. Hill, 385 U.S. 374 (1967), an action involving a New

intervening plurality opinion in *Rosenbloom*, affirmed the lower court's ruling.[52] The Supreme Court reversed, ruling that Gertz was neither a public official nor a public figure.[53] The Court remanded the case to the state level for a new trial and directed the state to define the appropriate standard of liability, short of strict liability, to be used for a publisher's alleged defamation of a private individual.[54]

The Court acknowledged that for nearly a decade it had struggled to strike the proper balance between the law of defamation and the constitutionally protected rights of free speech and freedom of the press.[55] The Supreme Court recognized that it was necessary to "lay down broad rules of general application in order to end this struggle and provide proper guidance to the lower courts."[56] It thus seized the opportunity to develop the inadequate public figure definition supplied in *Butts*.[57]

At the outset, the Court identified two normative considerations underlying the distinction between private individuals and public figures. First, public figures usually enjoy greater access to the media and therefore have a better opportunity to rebut false statements.[58] Normally lacking such media access, private individuals consequently are more vulnerable to injury.[59] The second and more compelling consideration supporting the distinction is that public figures have voluntarily "thrust themselves into the forefront of particular public controversies in order to influence the resolution of the issues involved."[60] Therefore, the media is entitled to act on the assumption that public officials and public figures have voluntarily as-

York privacy statute rather than a libel action. This reliance on *Hill* proved prophetic for it was cited six months later by the Supreme Court in support of its proposition that first amendment protection extends to publications involving matters of public or general concern. Rosenbloom v. Metromedia, Inc., 403 U.S. at 42.

52. 471 F.2d 801, 805 (7th Cir. 1972).

53. 418 U.S. at 351-52.

54. *Id.* at 347, 352.

55. *Id.* at 325.

56. *Id.* at 343-44.

57. *See* notes 35-40 and accompanying text *supra*.

58. 418 U.S. at 344. The Court recognized the weakness in this argument, noting, "[o]f course, an opportunity for rebuttal seldom suffices to undo the harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie." *Id.* at 344 n.9. Nevertheless, despite the fact that "the self-help of rebuttal, standing alone, is inadequate to its task," *id.*, it does offer a moderate advantage that generally is unavailable to a private plaintiff.

59. *Id.* at 344.

60. *Id.* at 345. Although the voluntariness of the public figure's actions was a crucial consideration, the Court recognized that one may become an involuntary public figure without any self-initiated action. However, the Court minimized this possibility, asserting that "the instances of truly involuntary public figures must be exceedingly rare." *Id.*

sumed the risk of injury from defamatory falsehoods.[61] By contrast, private individuals have surrendered no part of their interests in the protection of their reputation and, as a result, are more deserving of recovery for injury inflicted by defamatory comments.[62]

In its analysis, the Court identified two tiers of public figures. The first tier consists of the general-purpose public figure who achieves such overriding public recognition that he becomes a public figure for all purposes and in all contexts.[63] The test is a strict one, for "[a]bsent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life."[64] The second and more common tier is comprised of those individuals who voluntarily inject themselves into a particular public controversy and thereby become limited-purpose public figures.[65]

In either case, those attaining public figure status "have assumed roles of especial prominence in the affairs of society" and therefore invite attention and comment.[66] To determine whether an individual is a public figure, the pertinent examination is "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation."[67] This test is a marked departure from the subject matter orientation of the *Rosenbloom* plurality. Under *Rosenbloom*, the defendant is protected if the subject matter of the defamation involves a public controversy.[68] Under *Gertz*, the central inquiry focuses upon the plaintiff's status within the controversy.

Applying these principles, the Court concluded that despite Gertz's long-standing involvement in professional and civic affairs, he was neither an all-purpose nor a limited-purpose public figure.[69] As a consequence of

61. *Id.*

62. *Id.* For a thorough examination of these underlying considerations, see Note, *supra* note 48, at 1187-221.

63. 418 U.S. at 351.

64. *Id.* at 352. *Accord* Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979).

65. 418 U.S. at 345.

66. *Id.*

67. *Id.* at 352.

68. 403 U.S. at 43-44.

69. 418 U.S. at 352. This result has been the subject of some criticism. One court emphatically stated that "[p]erhaps if attorney Gertz was not a public figure, nobody is." Hotchner v. Castillo-Puche, 404 F. Supp. 1041, 1044 (S.D.N.Y. 1975), *rev'd*, 551 F.2d 910 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977). In light of Gertz's active participation in numerous events and the media reports of his activities, there appears to be room for reasonable disagreement about the Court's decision that Gertz was not a public figure. Perhaps the best explanation of this result is that it was prompted by a policy determination by the Court that

this restrictive application of the Court's public figure criteria, the scope of the media's immunity was narrowed.[70]

IV. POST-*GERTZ*: CONTINUING TO NARROW THE PRIVILEGE

In three cases succeeding *Gertz*, the Court reaffirmed its intention that the public figure category be narrowly defined. In *Time, Inc. v. Firestone*,[71] the socially prominent former wife of a member of the Firestone tire family sued Time magazine for libel for falsely reporting that her divorce had been granted on grounds of her adultery and extreme cruelty.[72] Time contended that Mrs. Firestone was a public figure and that the nationally publicized divorce was a public controversy, thus rendering Time's inaccurate reporting of the divorce privileged in the absence of any proof of actual malice.[73] The Supreme Court rejected this argument, pointing out that despite the plaintiff's position of social prominence, she assumed no role of especial prominence in the affairs of society and therefore was not a general-purpose public figure.[74] Furthermore, the Firestone divorce was not the sort of public controversy referred to in *Gertz*, despite the interest it held for some segment of the public. Since Firestone was compelled by the state to go to court for legal release from her matrimony, her actions could not be classified as voluntary.[75] Unfortunately, the Court failed to further elaborate the requirements for a public controversy, a key element of their analysis. It was unpersuasive to the Court that Mrs. Firestone held several press conferences during the divorce proceedings,[76] thus demonstrating that access to the media is a consideration of little significance to the Court in determining a plaintiff's public figure status.[77] Moreover, in light of the plaintiff's prominence in her community, she con-

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it could best protect an individual's reputational interest by applying the public figure criteria restrictively.

70. As another court has succinctly noted, "[w]hatever is added to the field of libel is taken from the field of free debate." Sweeny v. Patterson, 128 F.2d 457, 458 (D.C. Cir. 1942), *quoted in* New York Times Co. v. Sullivan, 376 U.S. at 272. For further commentary on the narrowing effect of *Gertz*, see Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 442 (1975); Beytagh, *Privacy and a Free Press: A Contemporary Conflict in Values*, 20 N.Y.L.F. 453 (1975); *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 139 (1974).

71. 424 U.S. 448 (1976).

72. *Id.* at 450-52.

73. *Id.* at 452-53.

74. *Id.* at 453.

75. *Id.* at 454.

76. *Id.* at 454 n.9.

77. This result may conflict with the *Gertz* statement that such access is an important distinction between public figures and private individuals. 418 U.S. at 344. *See* text accompanying note 58 *supra*.

ceivably could have been defined as an all-purpose public figure.[78] The Court's contrary conclusion is further evidence of its desire to limit the application of this public figure category and demonstrates judicial deference to the libeled plaintiff's reputational interest.

In the 1978 term, the Court continued this narrowing trend in *Hutchinson v. Proxmire*.[79] The plaintiff was a research scientist who had obtained a series of federal grants to study the aggressive behavior of monkeys. The defendant, United States Senator William Proxmire, contended in his Golden Fleece Award, designed to expose egregious government waste, that Hutchinson had "made a fortune from his monkeys and in the process made a monkey out of the American taxpayer."[80] The district court concluded that Hutchinson's long and active involvement with publicly funded research and the public interest in the expenditure of taxpayer money to support such research made him a public figure.[81] On appeal, the Seventh Circuit affirmed.[82] In reversing the lower courts, the Supreme Court rejected the contention that Hutchinson was a public figure for the limited purpose of comment on his receipt of federal funds for research projects.[83] In the Court's view, Hutchinson had not thrust himself into a public controversy to influence others. A general concern over federal expenditures was not a public controversy and therefore was insufficient to make Hutchinson a public figure.[84] Moreover, despite his active pursuit of

78. Mrs. Firestone was an active member of the Palm Beach, Florida social circuit and even employed a press clipping service to monitor media coverage of herself. 424 U.S. at 485 (Marshall, J., dissenting). It would appear that under *Gertz* she might have qualified as an all purpose public figure because she had acquired the requisite "general fame or notoriety in the community." 418 U.S. at 351-52. Although the *Gertz* Court failed to elaborate on this point, a literal reading would lead one to believe that the scope of the individual's fame or notoriety need extend only as far as the population in the plaintiff's community. However, after *Firestone*, it appears that a general purpose public figure's fame or notoriety must extend somewhere beyond the local community.

79. 443 U.S. 111 (1979).

80. *Id.* at 115-16. These statements appeared in the *Congressional Record*, a press release, and a newsletter. The implication of financial misconduct appeared to be the basis of Hutchinson's libel action.

81. 431 F. Supp. 1311, 1327 (W.D. Wis. 1977).

82. 579 F.2d 1027, 1034-35 (7th Cir. 1978).

83. 443 U.S. at 134. Proxmire conceded that the plaintiff was not an all-purpose public figure. *Id.* In addition, the Court rejected Proxmire's assertion that the Speech and Debate Clause of the Constitution, U.S. CONST. art. I, § 6, protects a member of Congress for allegedly defamatory statements made by the member in press releases and newsletters. *Id.* at 127-33. For a complete discussion of this other significant aspect of *Hutchinson*, see Note, *Legislative Immunity and Congressional Necessity*, 68 GEO. L.J. 783 (1980).

84. 443 U.S. at 135. The Court stated that such a finding would make all recipients of public research grants public figures. This would be equivalent to a subject matter classification, a public figure analysis which was rejected in *Gertz*. *Id.*

nearly one-half million dollars in federal funding and the publication of numerous articles concerning his work in scientific journals, Hutchinson had not invited the necessary amount of public attention and comment to be a public figure.[85]

The *Hutchinson* decision has been criticized on the ground that by characterizing the disputed statement as representing merely a concern about general public expenditures,[86] the Court distorted the crux of the dispute which actually centered on the public funding of esoteric behavioral studies.[87] Had the Court identified this as the public controversy, it is more likely that in light of Hutchinson's active solicitation of funds to conduct such research, the Court could have concluded that he had thrust himself into the forefront of the controversy and thus had become a public figure for the limited purpose of this controversy. Nevertheless, the Court declined to so define the public controversy. Thus, *Hutchinson* can be viewed as another indication of the Court's desire to narrow the category of public figures.

Finally, in *Wolston v. Reader's Digest Ass'n,*[88] the Court again reversed the lower courts[89] and ruled that the plaintiff was not a public figure.[90] In 1958, Ilya Wolston had been convicted on a contempt charge for failing to respond to a subpoena of a federal grand jury investigating Soviet espionage in the United States. Wolston had made several previous appearances before the grand jury but had attracted no media attention. However, his failure to appear and his subsequent contempt conviction resulted in fifteen stories in New York and Washington newspapers.[91] The alleged defamation occured sixteen years later when the defendant published a book characterizing Wolston as a Soviet agent.[92]

The federal appellate court had reasoned that, by failing to appear before the grand jury, Wolston had voluntarily thrust himself into the forefront of the public controversy surrounding the investigation and thereby had become a limited-purpose public figure.[93] The Supreme Court rejected this logic, finding instead that the plaintiff had been "dragged un-

85. *Id.*
86. *Id.*
87. *See* Comment, *Defamation and the First Amendment in the 1978 Term: Diminishing Protection for the Media*, 48 U. CIN. L. REV. 1027, 1036 (1979).
88. 443 U.S. 157 (1979).
89. Wolston v. Reader's Digest Ass'n, 429 F. Supp. 167 (D.D.C. 1977), *aff'd*, 578 F.2d 427 (D.C. Cir. 1978), *rev'd*, 443 U.S. 157 (1979).
90. 443 U.S. at 161.
91. *Id.* at 161-62.
92. *Id.* at 159.
93. 578 F.2d at 431.

willingly"[94] into the controversy and had not "engaged the attention of the public in an attempt to influence the resolution of the issues involved."[95] The Court could find no basis to conclude that Wolston had relinquished any interest in protecting his name and therefore concluded that he had remained a private individual at all times.[96]

As in *Firestone* and *Hutchinson*, the result in *Wolston* could have been different if the Court had applied the *Gertz* standards less restrictively. The Court might have found that Wolston's voluntary decision not to answer the subpoena, a decision which had attracted media attention, made him an involuntary public figure, a category of public figures reluctantly acknowledged in *Gertz*.[97] While the Court declined to so hold, the feasibility of such a finding demonstrates the major flaw of *Gertz*: its lack of developed methodology and objective criteria has led to malleable applications and inconsistent results.[98] Several courts have followed the restrictive trend of *Gertz* and its progeny and have refused to find an individual to be a public figure if any part of *Gertz* is unsatisfied.[99] Other courts have taken a more liberal stance and have held several plaintiffs to be public figures despite their apparent desire for obscurity.[100] In an attempt to

94. 443 U.S. at 166.

95. *Id.* at 168.

96. *Id.*

97. 418 U.S. at 341. *See also* note 60 *supra*.

98. *See* Comment, *supra* note 87, at 1037-39. Remarking on the lack of clear guidance in *Gertz*, one court has aptly noted that "[d]efining public figures is much like trying to nail a jellyfish to a wall." Rosanova v. Playboy Enterprises, Inc., 411 F. Supp. 440, 443 (S.D. Ga. 1976).

99. *E.g.*, Ryder v. Time, Inc., 557 F.2d 824 (D.C. Cir. 1976) (former elected representative and active politician did not thrust himself into controversy involving attorney's suspension from practice); Mills v. Kingsport Times-News, 475 F. Supp. 1005 (W.D. Va. 1979) (homicide defendant had not assumed a role of special prominence as a result of the criminal charges); Schultz v. Reader's Digest Ass'n, 468 F. Supp. 551 (E.D. Mich. 1979) (ex-convict with lengthy criminal record had not voluntarily thrust himself into controversy surrounding investigation of former labor leader's disappearance); Jenoff v. Hearst Corp., 453 F. Supp. 541 (D. Md. 1978) (police informant never attempted to publicize his role or views regarding drug traffic); Lake Havasu Estates, Inc. v. Reader's Digest Ass'n, 441 F. Supp. 489 (S.D.N.Y. 1977) (land sale corporation did not thrust itself into forefront of land fraud controversy); Lawlor v. Gallagher Presidents' Report, Inc., 394 F. Supp. 721 (S.D.N.Y. 1975) (former high echelon executive in major corporation did not inject himself into a public controversy).

100. *E.g.*, Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265 (3d Cir. 1979) (former professional football player a public figure because of well publicized trade and contractual dispute); Orr v. Argus-Press Co., 586 F.2d 1108 (6th Cir. 1978) (attorney charged with fifteen count securities indictment was a public figure because of his involvement in fraudulent scheme leading to indictment); Rosanova v. Playboy Enterprises, Inc., 580 F.2d 859 (5th Cir. 1978) (reputed underworld figure a public figure because of previous media reports of his activities); Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434

eliminate such results in this "confused and meandering state of affairs,"[101] the United States Court of Appeals for District of Columbia recently offered a detailed public figure analysis to supplement the skeletal guidelines offered by the Supreme Court.

V. *WALDBAUM V. FAIRCHILD PUBLICATIONS, INC.*: FLESHING OUT THE SKELETON

From 1971 through 1976 Eric Waldbaum was the president and chief executive officer of Greenbelt Consumer Services, Inc., a diversified consumer cooperative that in the early nineteen-seventies ranked as the second largest such cooperative in the country. During his tenure as president, Waldbaum was active in managing the cooperative and in advocating certain supermarket industry standards. He supported the introduction of consumer oriented practices such as unit pricing and open dating. As president of a consumer-owned franchise, he believed his job should extend beyond the balance sheet to include the advocacy of consumer oriented policies.[102] During his presidency, twenty-two articles about Greenbelt appeared in various publications, ten of which mentioned Waldbaum by name. These articles concerned various aspects of Greenbelt, including Waldbaum's appointment as president, Greenbelt's financial reports, the cooperative's criticism of its competitors through its advertisements, and its efforts in oil exploration.[103]

On March 16, 1976, Greenbelt's board of directors dismissed Waldbaum as president. Following this action, *Supermarket News*, a national trade publication owned by the defendant, Fairchild Publications, Inc., ran a brief article on Waldbaum's ouster. The article stated in part that Greenbelt "has been losing money the past year and retrenching."[104]

On Septemer 28, 1976, Waldbaum filed a libel action in United States

U.S. 1013 (1978) (plaintiffs, sons of public figures, were themselves public figures because of extensive publicity surrounding the trial of their parents); Ethridge v. North Miss. Communications, Inc., 460 F. Supp. 347 (N.D. Miss. 1978) (undercover policeman was both a public official and public figure because his activities were known to officials in the community and were the subject of public debate); Logan v. District of Columbia, 447 F. Supp. 1328 (D.D.C. 1978) (defendant in criminal proceedings became a public figure by voluntarily injecting himself into police undercover operation).

101. Comment, *Libel Law: A Confused and Meandering State of Affairs*, 6 CUM. L. REV. 667, 667 (1976).

102. Walbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1299 n.35 (D.C. Cir.). *cert. denied*, 101 S. Ct. 266 (1980) (quoting deposition of Eric Waldbaum).

103. 627 F.2d at 1290 n.3.

104. *Id.* at 1290. The body of the article reads as follows:

> WASHINGTON (FNS) - Eric Waldbaum has been replaced as president of Greenbelt Consumer Services.

District Court for the District of Columbia alleging that the disputed statement was false and that its publication had damaged his reputation as a businessman. He sought $75,000 in compensatory and exemplary damages.

Upon completion of discovery, Fairchild moved for summary judgment, contending that Waldbaum was a public figure. Since Waldbaum had conceded that the article was published without actual malice, Fairchild argued that he was barred from recovering. On February 15, 1979, the district court granted Fairchild's motion and held that Waldbaum qualified as a public figure for the limited purpose of the controversy concerning "Greenbelt's unique position within the supermarket industry and Waldbaum's efforts to advance that position."[105] Waldbaum appealed to the Court of Appeals for the District of Columbia, which affirmed the lower court's ruling.[106]

Judge Tamm, writing for the court, began by briefly reviewing *New York Times* and its progeny, focusing upon the *Gertz* public figure analysis and its subsequent applications. He then stated that "[u]nfortunately, the Supreme Court has not yet fleshed out the skeletal descriptions of public figures and private persons enunciated in *Gertz*."[107] The absence of such guidelines, in the court's view, created a possible chilling effect on the dissemination of constitutionally protected ideas since "members of the press might choose to err on the side of suppression when trying to predict how a court would analyze a news story's first amendment status."[108] Furthermore, the court reasoned that a lack of clarity might also deter citizen participation in public affairs. The fear of having no redress for injury might force an individual to refrain from voicing his views on public issues and therefore shy away from entering the public arena.[109] The court recognized that to guard against these possibilities, both the press and the gen-

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> Rowland Burnstan will serve as acting chief executive office [*sic*] until a new president is named. Burnstan, an independent management consultant and economist, has worked for various Government agencies and businesses.
>
> Greenbelt said part of his interim job will be to locate a new president for the co-op, which has been losing money the past year and retrenching.
>
> Waldbaum had served as president since 1971. His plans are not known.

Id.

105. Waldbaum v. Greenbelt Consumer Services, Inc., No. 76-1810, slip op. at 15 (D.D.C. Feb. 15, 1979), *aff'd sub nom.* Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287 (D. C. Cir.), *cert. denied*, 100 S. Ct. 266 (1980).

106. 627 F.2d 1287 (D.C Cir.), *cert. denied*, 100 S. Ct. 266 (1980).

107. *Id.* at 1292.

108. *Id.* at 1293.

109. *Id.*

eral public need some objective criteria from which they can fashion their behavior.

The court then announced the standards courts[110] should use to distinguish between public figures and private individuals.[111] Although Waldbaum conceded that he was not a general-purpose public figure,[112] the court nevertheless devoted a significant portion of its opinion to the delineation of a precise definition for such a figure.[113] This definition of a general-purpose public figure was supplied in an apparent effort to influence future decisions, although it may be considered dicta.

To be deemed a public figure for all purposes, the court noted, an individual must be a celebrity whose name is a household word.[114] The public must follow his words or actions with great interest, either because his words or actions are worthy of attention or because the individual has actively pursued this public recognition.[115] Several factors may be useful to a court in determining whether an individual should be deemed an all-purpose public figure.[116] Surveys of the plaintiff's name recognition, pre-

110. The court maintained that this issue is one for the court to resolve. *Id.* at 1293 n.12. This is grounded in the belief that jurors are less qualified than judges to make the intricate distinctions necessary to the resolution of this issue. Wolston v. Reader's Digest Ass'n, 578 F.2d 427, 429 (D.C. Cir. 1978), *rev'd on other grounds*, 443 U.S. 157 (1979). Furthermore, allowing juries to make this decision heightens the possibility that "juries will use the cloak of a general verdict to punish unpopular ideas or speakers." Rosenblatt v. Baer, 383 U.S. 75, 88 n.15 (1966). *See* Note, *The Applicability of the Constitutional Privilege to Defame: Question of Law or Question of Fact?*, 55 IND. L.J. 389 (1980).

111. As in *Gertz* and its progeny, the court identified two justifications for this distinction: the availability of the media for rebuttal and the fact that, by entering the public arena, a public figure has voluntarily assumed the risk that the exposure might lead to misstatements about him. 627 F.2d at 1294.. *See also* notes 58-62 and accompanying text *supra*. The court also posited that a public figure may attempt to return to an anonymous position in society but be thwarted by continuing public interest and media attention. Since he remains able to reply to attacks through the press, he retains a certain amount of power and influence. Therefore, an individual may properly be deemed an involuntary public figure despite his efforts to renounce publicity. 627 F.2d at 1295 n.18. *See also* Gertz v. Robert Welch, Inc., 418 U.S. at 345; note 60 *supra*. The analysis in *Waldbaum* continues the two tier approach of *Gertz*, which distinguished between all-purpose and limited-purpose public figures, but *Waldbaum* provides more definitive standards.

112. 627 F.2d at 1298.

113. *See* notes 114-20 and accompanying text *infra*.

114. 627 F.2d at 1294.

115. *Id.* This definition is essentially the same as that supplied in *Gertz*. 418 U.S. at 351-52. *See* text accompanying notes 62-63 *supra*. However, the court added significantly to *Gertz* by providing valuable commentary concerning the appropriate methodology to be used in applying this definition.

116. The court stated that sometimes position alone can make one a public figure. 627 F.2d at 1299 n.36. *See* Chuy v. Philadelphia Eagles Football Club, Inc., 431 F. Supp. 254, 267 (E.D. Pa. 1977), *aff'd*, 595 F.2d 1265 (3d Cir. 1979) (en banc). Many well-known athletes, entertainers, and other personages are often courted to endorse commercial products

vious press coverage, and the effect of his actions upon the conduct or ideas of others provide some evidence of the plaintiff's status.[117] In making its determination, a court must view the facts objectively and ask whether a reasonable person would conclude that the public is attentive to the plaintiff's ideas, conduct, or judgment.[118]

In its discussion, the court expanded upon some incidental comments by the Supreme Court[119] concerning the scope of public recognition necessary for an individual to be deemed a public figure for all purposes. The court stated that an individual's fame need not extend nationwide. Instead, the plaintiff need be known only to a large percentage of the general population in the area where the defamation was published.[120] Thus, in essence, *Waldbaum* has shifted the focus from the plaintiff's community recognition to his fame within the area of media circulation. This appears to be a desirable extrapolation since an individual is injured by defamatory comments only in the geographical area in which the comments are disseminated. To require nationwide fame when the defamatory publication is circulated in a limited area would so severely limit the size of the all-purpose public figure category as to make it of little significance.

Although few individuals will ever be deemed public figures for all pur-

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and to support political candidates. This power to capitalize on one's general fame by lending one's name to products, candidates, and other causes is a good indication of the broad influence and recognition that an individual commands. 627 F.2d at 1294. However, the court cautioned that categorization of public figures solely by position should be avoided since such an analysis is equivalent to the forbidden subject-matter classification. *Id.* at 1299 n.36. *See* Hutchinson v. Proxmire, 443 U.S. at 135; Time, Inc. v. Firestone, 424 U.S. at 456.

117. 627 F.2d at 1295. The court stressed that these factors must be examined as they existed before the defamation was published. Otherwise, the press could use the defamation itself as a medium to convert a plaintiff into a public figure by creating a controversy concerning the defamation. *Id.* at 1294 n.19. *See* Hutchinson v. Proxmire, 443 U.S. at 135 ("those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure").

118. 627 F.2d at 1292-94 n.15. This requirement of looking "through the eyes of a reasonable person at the facts taken as a whole," *id.* at 1292, has not been specifically adopted in Supreme Court opinions dealing with the public figure question. *But cf.* Curtis Publishing Co. v. Butts, 388 U.S. at 154 (whether a publisher has acted improperly in making defamatory comments should be determined by the reasonable man standard). With the adoption of this objective approach, the defendant's own subjective belief as to whether the plaintiff was a public figure is of no legal importance. *See* RESTATEMENT (SECOND) OF TORTS § 580A, Comment c (1976). Focusing upon what a reporter, editor, or publisher actually knew or believed can introduce subjective elements that are difficult to prove and even more difficult to predict. 627 F.2d at 1293. An objective approach allows both the press and the individual to gauge the public figure status with an ascertainable norm. *Id.* at 1294.

119. Gertz v. Robert Welch, Inc., 418 U.S. at 351-52. *See also* note 78 *supra*.

120. 627 F.2d at 1295 n.20, 1295-96 n.22.

poses,[121] there are nevertheless many persons who attempt "to have, or realistically can be expected to have, a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants."[122] To identify these limited purpose public figures, the court delineated a three-step analysis.

The first step is to isolate the particular public controversy involving the plaintiff.[123] A public controversy is not merely a matter of public interest. Instead, it must be a "specific public debate that has foreseeable and substantial ramifications for persons beyond its immediate participants."[124] Matters essentially of a private nature do not become public controversies

121. *Id.* at 1296. *See also* Gertz v. Robert Welch, Inc., 418 U.S. at 352 ("Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society an individual should not be deemed a public personality for all aspects of his life.").

122. 627 F.2d at 1292. Compared to the scant definition offered in *Gertz* (limited purpose public figures are those who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved," 418 U.S. at 345), the *Waldbaum* description is much more explicit and demanding. Under the *Waldbaum* definition it is probable that fewer defendants will successfully prove a plaintiff's public figure status. *See* notes 142-43 and accompanying text *infra*.

In a libel action, when a media defendant claims qualified privilege protection to comment upon the activities of a public figure, the claim of privilege constitutes an avoidance and must be pleaded as an affirmative defense. *E.g.*, Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972); Drummond v. Spero, 350 F. Supp. 844 (D. Vt. 1972). *See also* White v. Chicago, Burlington and Quincy R.R., 417 F.2d 941 (8th Cir. 1969). In raising an affirmative defense, the defendant carries the burden of proving all elements of the defense. Therefore, when a defendant claims that the allegedly defamatory comments were privileged because the plaintiff was a public figure, the defendant has the burden of proving the plaintiff's public figure status. *See* Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341, 1346 (S.D.N.Y. 1977). *But see* RESTATEMENT (SECOND) OF TORTS § 580A, Comment c (1977) (where burden of proof lies as to facts concerning plaintiff's public figure status is unsettled). If the defendant is unsuccessful in proving the plaintiff is a public figure, then the plaintiff may recover as a private individual if he is successful in establishing his prima facie case. *See* notes 11-13 and accompanying text *supra*. However, if the defendant successfully establishes the public figure privilege, the burden shifts to the plaintiff to defeat the privilege by proving either the defendant's actual malice or his abuse of the privilege. *See, e.g.*, Zuschek v. Whitmoyer Laboratories, Inc., 430 F. Supp. 1163, 1166 (E.D. Pa. 1977), *aff'd*, 571 F.2d 573 (3d Cir. 1978).

123. 627 F.2d at 1296. In *Gertz*, the Court failed to specify what it considered a public controversy to be although it is a crucial element in the public figure definition. *See* 418 U.S. at 351. The Court has never directly addressed this issue, although peripherally the Court has stated what does not qualify as a public controversy. Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979) (a general concern over federal expenditures is not a public controversy); Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976) (divorce proceedings are not the sort of "public controversy" referred to in *Gertz*).

124. 627 F.2d at 1292. This is essentially a reaffirmation of the *Gertz* repudiation of the general or public interest test advanced by the *Rosenbloom* plurality. *See* notes 43-48 and accompanying text *supra*.

simply because they have sparked the public's curiosity.[125] Judge Tamm cautioned, however, that courts are forbidden to question the legitimacy of the public's interest in a nonprivate dispute. Otherwise, courts would become censors of "what information is relevant to self-government."[126] In sum, in determining whether a public controversy exists, the court must view the facts objectively and ask whether a reasonable person would expect the dispute to have forseeable and substantial ramifications for persons beyond the immediate participants.[127]

Once it has been determined that a public controversy exists,[128] the second step in the court's analysis is to determine the plaintiff's role in the controversy.[129] Expanding upon the *Gertz* requirement that the plaintiff's status within the controversy be of a "special prominence,"[130] the court stated that the plaintiff "must have been purposely trying to influence the outcome or realistically have been expected because of his position in the controversy, to have an impact on its resolution."[131] Among the relevant factors a court may view in ascertaining the plaintiff's level of involvement are his previous conduct, the amount of media coverage he has generated, and the public reaction to his actions and statements.[132]

In the third and final step of its inquiry, a court must determine whether the alleged defamation was "germane" to the plaintiff's involvement in the controversy.[133] Comments wholly unrelated to the controversy remain un-

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125. 627 F.2d at 1296. *See* Time, Inc. v. Firestone, 424 U.S. at 454-55.

126. 627 F.2d at 1297.(quoting Rosenbloom v. Metromedia, Inc., 403 U.S. at 79 (Marshall, J., dissenting)).

127. 627 F.2d at 1297.

128. If no public controversy exists, the inquiry should go no further since the dispute would be of a private nature, and therefore the *New York Times* privilege would be unavailable. Time, Inc. v. Firestone, 424 U.S. at 454.

129. 627 F.2d at 1297.

130. 418 U.S. at 351.

131. 627 F.2d at 1297. *Cf.* Rosenblatt v. Baer, 383 U.S. 75, 85 (1966) (the public official category extends to those government employees who have, or appear to the public to have substantial influence over governmental affairs).

132. 627 F.2d at 1297. Although the court failed to state how distant in time these factors should be viewed, the court did not limit its present examination to Waldbaum's tenure as Greenbelt's president. Instead, it also viewed his activities prior to joining Greenbelt. *Id.* at 1299. This is consistent with a prior analysis undertaken by the same court. Wolston v. Reader's Digest Ass'n, 429 F. Supp. 167 (D.D.C. 1977), *aff'd*, 578 F.2d 427 (D.C. Cir. 1978), *rev'd*, 443 U.S. 157 (1979). There, both the district court and the court of appeals considered Wolston's entire life history in deciding his public figure status. The Supreme Court decided that Wolston was not a public figure, but expressed no opinion as to whether such an expansive range of facts is relevant in determining the public figure issue.

133. 627 F.2d at 1298. This requirement does not appear explicitly in any Supreme Court decisions dealing with the public figure issue. *But cf.* Garrison v. Louisiana, 379 U.S. 64, 77 (1964) (comments about the personal attributes of a public official such as dishonesty

protected by the *New York Times* privilege.

Applying this analysis to the facts of the case before it, the court concluded that Waldbaum was a limited-purpose public figure and on this basis affirmed the district court's grant of summary judgment for the defendant. The court found that the innovative policies pioneered by Greenbelt[134] had created a public debate that would affect consumers in the Washington, D.C. area and beyond.[135] The court found that two public controversies existed: first, the commercial viability of cooperatives, and second, the wisdom of Greenbelt's innovative policies.[136]

Proceeding to the second step of its analysis, the court examined the role Waldbaum had played in these controversies. Finding that Waldbaum had taken an active part in the cooperative's controversial actions,[137] the court decided that a reasonable person would conclude that Waldbaum had "thrust himself" into the aforementioned public controversies.[138]

Finally, the court applied the third step of its inquiry and found that the allegedly defamatory article, which reported that Greenbelt had been losing money, was germane to the controversy surrounding the cooperative's innovative marketing approach. The court viewed the commercial success of Greenbelt as relevant to the question of whether other firms should implement similar policies. Therefore, the publication was protected under the *New York Times* rule.[139] Since Waldbaum, as president of Greenbelt, had assumed a position of great influence within a specific area and had used the position to advance controversial policies substantially affecting

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or improper motivation are germane to the official's fitness for office and are thus protected under *New York Times*). A possibly more direct source of this requirement appears in RESTATEMENT (SECOND) OF TORTS § 580A, Comment c at 217-18 (1976) (whether a defamatory statement affects a public figure in a manner germane to his capacity as a public figure is a question of federal constitutional law).

134. The court identified these controversial supermarket policies as unit pricing, open dating, and competitive advertising. 627 F.2d at 1299.

135. *Id.*

136. *Id.*

137. *Id.* at 1299 n.35. The court quoted the district court's language that Waldbaum "did not become merely a boardroom president whose vision was limited to the balance sheet. He became an activist, projecting his own image and that of the cooperative far beyond the dollars and cents aspects of marketing." *Id.* at 1300 (quoting Waldbaum v. Greenbelt Consumer Services, Inc., No. 76-1810, slip op. at 12 (D.D.C. Feb. 15, 1979)).

138. 627 F.2d at 1300.

139. *Id.* The court stated that in advocating innovative merchandising practices, Waldbaum assumed the risk that the press might comment upon the profitability of enterprises under his leadership. It concluded that the commercial success of these enterprises was relevant to the public debate over whether other supermarkets should adopt similar policies. *Id.*

others, he became a public figure for the limited purposes of that debate.[140]

VI. The Effect of *Waldbaum*: May the Media and Corporate Executives Beware

The *Waldbaum* court has provided other courts a proper methodology and more precise guidelines for deciding the threshold question of whether a plaintiff qualifies as a public figure. Although the court found Waldbaum to be a public figure, the guidelines and analysis are generally consistent with the Supreme Court's post-*Gertz* trend of protecting the plaintiff's reputational interest by reducing the media's first amendment privilege. One effect of the decision is that the restrictive guidelines concerning public controversy and the plaintiff's participation within such controversies have substantially increased the burden the media must bear to prove the plaintiff is a public figure.[141] However, the court's third requirement, that the defamation be germane to the plaintiff's participation in the controversy, may be sufficiently malleable to allow for expansive applications. The curious aggregation of these restrictive and expansive requirements has produced a result possessing several significant ramifications for the media and certain private individuals.

In *Gertz*, the Supreme Court stated that to be a public figure one must assume a role of "special prominence" in a certain "public controversy." The *Waldbaum* court has construed these two crucial concepts restrictively. The public controversy must have both foreseeable and substantial ramifications for members of the general population.[142] If such a dispute does not exist, the plaintiff will not be deemed a public figure and the inquiry goes no further. Moreover, the plaintiff's level of involvement in the dispute must be such that he possesses either the ability or the desire to have a *major* impact in the resolution of the dispute. He must play a significant role in the controversy—tangential participation will not suffice.[143] Again, if this rigid requirement is not met, the plaintiff should be considered a private individual.

By establishing such strict standards for determining public figure status, the court has created several immediate and long-range effects. Among its immediate effects, the stringency of these standards makes it less likely that a plaintiff will satisfy each requirement. Unless the defendant can prove that the plaintiff fulfills each requirement, a court should deem the plaintiff

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140. *Id.*

141. The plaintiff's public figure status is an affirmative defense that must be pleaded and proved by the defendant. *See* note 122 *supra*.

142. 627 F.2d at 1297.

143. *Id.*

to be a private individual. Thus, fewer media defendants should be able to prove successfully a plaintiff's public figure status. Indeed, it is arguable that such a stringent burden of proof for the defendant nearly creates a presumption against holding a plaintiff to be a public figure.[144] At a minimum, such exacting standards decrease the scope of the media's first amendment privilege since the public figure category will be limited to relatively few plaintiffs.

A further consequence of the narrow public figure standards developed by the *Waldbaum* court is that the availability of summary judgment on the issue of the plaintiff's public figure status is likely to be curtailed.[145] Traditionally, summary judgment has been an effective method for media defendants to avoid the burden and expense of full litigation.[146] Since under the *Waldbaum* standards fewer plaintiffs will be held to be public figures, it follows that fewer defendants will prevail in establishing the plaintiff's public figure status at the summary judgment level. This result will force defendants to litigate fully this issue in court, a long and expensive process.[147] The possibility of such costs may chill dissemination of free speech by forcing a publisher without substantial financial resources

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144. Such a presumption would almost certainly create a chilling effect upon the dissemination of constitutionally protected information and ideas. The knowledge of such a presumption might persuade a member of the media to refrain from publishing material when an individual's public figure status is in question.

145. The Federal Rules of Civil Procedure provide that summary judgment for the moving party shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The party moving for summary judgment carries the burden of proving that there exists no genuine issue of any material fact. 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2727, at 524-25 (1973). However, the adverse party may not rely merely upon general allegations to show the existence of a genuine issue for trial. He must set forth specific facts that establish the existence of such an issue. FED. R. CIV. P. 56(e).

The two most common issues in motions for summary judgment by media defendants in defamation actions are: first, whether the plaintiff is a public figure; second, whether the defendant published the defamation with actual malice. Of these two issues, a summary judgment motion is most often made and granted upon the actual malice issue. *See, e.g.*, Schuster v. U.S. News & World Report, 602 F.2d 850 (8th Cir. 1979); Arnheiter v. Random House, Inc., 578 F.2d 804 (9th Cir. 1978); Schultz v. Reader's Digest Ass'n, 468 F. Supp. 551 (E.D. Mich. 1979). While the issue of summary judgment on the actual malice requirement is significant, it is beyond the scope of this Note. The present discussion is limited to the availability of summary judgment on whether the plaintiff is a public figure. For a valuable commentary on defendants' use of summary judgment on the actual malice issue, see Note, *The Role of Summary Judgment in Political Libel Cases*, 52 S. CAL. L. REV. 1783 (1979).

146. *Id.* at 1794-1801.

147. This analysis presumes that the defendant's motion for summary judgment on the actual malice issue is unsuccessful.

to refrain from publishing a story when a person's public figure status is uncertain.

In contrast to these strict standards, the requirement that the defamation be germane to the plaintiff's participation in the controversy is susceptible to broad application. The only limitation imposed by the court is that false statements wholly unrelated to the controversy are unprivileged.[148] This relatively lax requirement conceivably could permit all but the most irrelevant statements to receive the *New York Times* protection. While it is almost certain that the court did not intend such a result, a literal reading would appear to permit it. Perhaps such expansive language was intended to counterbalance the restrictiveness of the other two requirements.[149] After successfully completing the first two steps, the defendant must then satisfy the relatively easy burden of proving only that the statements were not wholly unrelated to the plaintiff's participation in the particular controversy. The potential expansiveness of this requirement's application is well evidenced in the court's conclusion in *Waldbaum* that the statements about Greenbelt's financial status were germane to Waldbaum's support of innovative marketing policies. Thus, the court concluded, Waldbaum could be properly considered a limited purpose public figure.[150]

The court's analysis also raises a serious question as to whether many prominent business executives might be deemed limited-purpose public figures for the range of their business activities.[151] In the court's view, while Waldbaum was head of Greenbelt, he took an active role in such public controversies as the cooperative form of business and Greenbelt's consumer-oriented policies, such as unit pricing and open dating. He was the "mover and shaper"[152] of the cooperative's controversial actions and extended his and Greenbelt's images into areas beyond mere profit maximization. From these facts, the court concluded that Waldbaum had thrust himself into these public controversies in an attempt to influence other firms and their merchandising policies.[153]

Waldbaum's role as president of this innovative company, however, would appear to differ very little from that which any prominent business executive would assume. Virtually every company president is expected to

148. 627 F.2d at 1298.

149. It is questionable whether such an intent could be realized since it is only after satisfying the first two difficult elements that the defendant confronts this less restrictive burden.

150. 627 F.2d at 1300.

151. *See* Petition for Writ of Certiorari at 30-35, Waldbaum v. Fairchild Publications, Inc., No. 79-2064 (June 27, 1980).

152. 627 F.2d at 1300.

153. *Id.*

be a "mover and shaper" of the company's actions. As head of the second largest cooperative of its kind, it was inevitable that Waldbaum would assume an active role in advocating the cooperative's policies—in fact, it was expected of him.[154] Therefore, it appears that he became a public figure not because of his role in public controversies, but rather as a result of his position as president of a controversial company. This closely resembles the forbidden subject-matter classification, for it subjects all leading executives of controversial or innovative companies to public figure status.[155]

The court anticipated this criticism and attempted to discount it by stating that "[b]eing an executive within a prominent and influential company does not by itself make one a public figure."[156] To avoid public figure status, however, the executive must limit his role to being "simply a conduit for announcing and administering company policies made by others."[157] This would appear to be an unworkable definition in the modern business world because one does not become and remain the president of a leading company by being a mere figurehead. Instead, attaining and continuing in this position usually requires acting as a vigorous and outspoken proponent of company policies. More often than not, such activity is simply part of the job. As a result, within the analytical framework developed in *Waldbaum*, most high echelon business executives would probably become public figures by their position alone. In light of the *Hutchinson* and *Firestone* prohibitions of such subject-matter classifications, the validity of such a proposition is debatable.

The restrictive construction of the public figure test announced in *Waldbaum* is generally harmonious with the recent Supreme Court decisions in this area. This can be seen by the fact that under the *Waldbaum* analysis, the public figure status of the plaintiffs in *Firestone, Hutchinson*, and *Wolston* would be the same as that found by the Court in each respective case. In *Firestone*,[158] it seems apparent that the plaintiff would fall within the ambit of neither the all-purpose nor the limited-purpose public figure definitions of *Waldbaum*. Although Mrs. Firestone might have been well known within the Palm Beach social circuit, she certainly was not a celebrity of national repute. Since *Waldbaum* requires that the plaintiff's fame extend to a large percentage of the population within the area of

154. *Id.* at 1299 n.35.

155. Such subject-matter classifications are prohibited by case law. *See* Hutchinson v. Proxmire, 443 U.S. at 135; Time, Inc. v. Firestone, 424 U.S. at 456; Gertz v. Robert Welch, Inc., 418 U.S. at 344-46; note 84 *supra*.

156. 627 F.2d at 1299.

157. *Id.*

158. 424 U.S. 448 (1976). *See* notes 71-78 and accompanying text *supra*.

media circulation[159] and the alleged defamation was published in a national magazine, Mrs. Firestone would fall outside of the all-purpose category.

The inquiry into Mrs. Firestone's limited-purpose public figure status would be equally brief. *Waldbaum* makes clear that a public controversy must have ramifications which will be felt by those beyond the dispute's direct participants.[160] Since the public would be unaffected by the ramifications of the plaintiff's divorce in *Firestone*, no public controversy would exist. The court's inquiry, therefore, would go no further and the plaintiff would be deemed a private individual.

Applying the *Waldbaum* analysis to the facts of *Hutchinson*,[161] again a court would hold the plaintiff to be a private individual. Since Hutchinson's name was in no way a household word, his inability to satisfy the all purpose public figure criteria seems clear. Furthermore, even if a court found, as at least one commentator has suggested,[162] that a public controversy existed concerning federal funding of esoteric behavioral studies, it does not appear that Hutchinson's position would enable him to have a major impact on this controversy as required by *Waldbaum*.[163] Prior to receiving the Golden Fleece Award, Hutchinson occupied a position shared by countless other research scientists. There is no evidence to support the belief that through his position or his reputation among his peers, he possessed the ability to have a substantial influence upon such a controversy. Hutchinson would, therefore, fail to fulfill the second step of the *Waldbaum* analysis and would be deemed a private individual.

Finally, the plaintiff in *Wolston*[164] would also be considered a private individual under *Waldbaum* by failing the second step of the analysis. Assuming a court found that a public controversy existed over the investigation of the presence of Soviet espionage agents in the United States, Wolston's position within this controversy was so trivial as to preclude an ability to affect the resolution of this issue. His role was limited simply to testifying before a grand jury, a role doubtlessly shared by many other innocent participants in the investigation. His fleeting fame resulted not from any major role he played or sought to play in this controversy, but rather from his professed psychological inability to appear before the

159. *See* notes 120-21 and accompanying text *supra*.
160. 627 F.2d at 1296. *See* notes 124-28 *supra*.
161. 443 U.S. 111 (1979). *See* notes 79-87 and accompanying text *supra*.
162. *See* Comment, *supra* note 87, at 1036.
163. 627 F.2d at 1298. *See* notes 129-33 and accompanying text *supra*.
164. 443 U.S. 157 (1979). *See* notes 88-96 and accompanying text *supra*.

grand jury.[165] His nexus with the controversy was at best tangential and therefore falls far short of the demanding *Waldbaum* criteria for a limited-purpose public figure.

VII. Conclusion

The analysis developed in *Waldbaum* is generally consistent with the restrictive approach applied by the Supreme Court since *Gertz*. By developing rigid guidelines in an effort to aid other courts confronted with the troublesome public figure issue, *Waldbaum* will have a twofold effect. First, its strict standards will make it more difficult for the defendant to prove the plaintiff is a public figure, thus strengthening the plaintiff's chances of recovering in defamation suits. Second, these stringent standards will decrease the scope of the media's immunity from defamation actions by limiting the scope of their qualified privilege. The impetus behind these effects is the desire to protect the private individual's legitimate interest in his good name. However, one must question whether such prophylactic protection for the individual's reputational interest has not effectively eroded the "breathing space" that *New York Times* sought to secure in order to ensure vigorous and uninhibited debate on public issues. Whether such an ominous effect will be generated by *Waldbaum* remains to be seen. It does seem certain, however, that under *Waldbaum* the media's task in convincing a court of a plaintiff's public figure status will be exacting.

Thomas H. Suddath, Jr.

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165. 443 U.S. at 162.