Unrelated Scandal, Unprotected Defamation: Why Courts Should Reject a Problematic Framing of the Germaneness-Scope Rule Which Prioritizes Potential Impact on Public Opinion

*Zachary R. Cormier**

Scandal makes for interesting news. The report itself, the reaction to it, the reaction to the reaction—all of it. It is no secret that a report of scandalous conduct captivates the public's attention. And it is only human nature that such a report can negatively impact public opinion about the person or persons involved. The negative impact itself can be a benefit for the public. Reporting about potentially scandalous conduct can, of course, be important for the public's consideration when the report is about a government official or truly famous person that has great influence over public issues. But what happens when the report was wrong, and the person that was the subject of the alleged conduct files a defamation/libel lawsuit? After a decade-long debate balancing free speech/free press and privacy interests, the United States Supreme Court held that "what happens" with such lawsuit does not depend upon the report's potential impact on public opinion, but rather on who the plaintiff is.

The Supreme Court established the actual malice privilege to protect public discussion and reporting about government officials and public figures. Specifically, the privilege requires that a government official or public figure satisfy a heightened burden of proof to obtain damages in a defamation lawsuit. In the pivotal case of Gertz v. Robert Welch, Inc.*, the Supreme Court established the core rule that public interest does not dictate the applicability of the privilege. The Supreme Court explained that for those persons who have become famous or influential only as to their involvement in a particular public issue or controversy—the limited purpose public figure—the actual malice privilege applies only to the limited range of issues for which the person has become a public figure. The privilege does not apply for all aspects of the limited purpose public figure's life.*

A germaneness-scope rule has evolved from Gertz*: a defamatory statement must be germane to the limited purpose public figure's participation in the*

* Stanton Foundation First Amendment Fellow at the Arizona State University, Sandra Day O'Connor College of Law.

controversy in order to qualify for the privilege. However, a growing group of courts has framed the germaneness-scope rule in a problematic fashion to prioritize protection of any statements about a limited purpose public figure's background or private life which might impact public opinion. In essence, if the statement relates to some past or separate scandal, it would likely be protected by the privilege. These courts threaten to broaden application of the privilege for limited purpose public figures beyond the boundaries established by Gertz. *As a result, there could be little-to-no distinction between the application of the privilege to generally famous public figures and limited purpose public figures. Worse still, such a framing of the germaneness-scope rule would return the privilege back to the overruled principle that it is required for any topic of public interest.*

This Article will explain why future courts should reject such problematic framing of the germaneness-scope rule. This Article will further describe an appropriate modern understanding of the germaneness-scope rule that preserves the meaning of the limited purpose public figure despite published statements of scandalous conduct which could impact public opinion.

I. INTRODUCTION

Scandal makes for interesting news. The report itself, the reaction to it, the reaction to the reaction—all of it. It is no secret that a report of scandalous conduct captivates the public's attention. And it is only human nature that such a report can negatively impact public opinion

about the person or persons involved. The negative impact itself can be a benefit for the public. Reporting about potentially scandalous conduct can of course be important for the public's consideration when the report is about a government official or truly famous person that has great influence over public issues. But what happens when the report was wrong, and the person that was the subject of the alleged conduct files a defamation/libel lawsuit? After a decade-long debate balancing free speech/free press and privacy interests, the United States Supreme Court held that "what happens" with such a lawsuit does not depend upon the report's potential impact on public opinion, but rather on who the plaintiff is.

The Supreme Court established the actual malice privilege to protect public discussion and reporting about government officials and public figures.[1] Specifically, the actual malice privilege provides that a government official or public figure must satisfy a heightened burden of proof for damages in a defamation lawsuit.[2] A government official or public figure must prove (by clear and convincing evidence) that the alleged defamation was carried out with "actual malice," which means that the defendant published the defamatory statement either with: 1) knowledge that the defamatory statement was false; or 2) reckless disregard as to whether the statement was false.[3] "Mere negligence does not suffice."[4] The government official or public figure must demonstrate that the defendant "in fact entertained serious doubts as to the truth of his publication" or otherwise acted with a "high degree of awareness" of "probable falsity."[5]

The actual malice standard is "quite purposefully" a "difficult standard to meet."[6] The First Amendment requires government officials and public figures to carry this high evidentiary burden so that news organizations do not unduly self-censor reporting about such individuals for fear of a lawsuit.[7] The calculated cost of such protection is that government officials and public figures are more likely to lose defamation claims, even when the statement at issue turned out to be

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[1] *See* Masson v. New Yorker Mag., Inc., 501 U.S. 496, 510 (1991) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964)).

[2] *See id.* (citing *Sullivan*, 376 U.S. at 279–80).

[3] *Id.* (citing *Sullivan*, 376 U.S. at 279–80).

[4] *Id.*

[5] *Id.* (quoting St. Amant v. Thompson, 390 U.S. 727, 731 (1968); Garrison v. Louisiana, 379 U.S. 64, 74 (1964)).

[6] Biro v. Condé Nast, 963 F. Supp. 2d 255, 277 (S.D.N.Y. 2013).

[7] *Id.* (quoting *St. Amant*, 390 U.S. at 731–32).

false and harmful: "[T]he stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies."[8]

The Supreme Court described such high stakes, and costs, in *Gertz v. Robert Welch, Inc.*, a pivotal case on the applicability (and limitations) of the actual malice privilege:

> [The actual malice privilege] administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander. And it exacts a correspondingly high price from the victims of defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the [privilege].[9]

Following a series of conflicted opinions at the outset of the actual malice privilege jurisprudence about whether a public figure component should be required at all (as opposed to basing the privilege solely on whether the statement relates to a "public issue"), the Supreme Court established the core rule in *Gertz* that public interest does not dictate the applicability of the privilege.[10] Rather, the Supreme Court established four categories of persons in *Gertz* and held that the applicability of the privilege will depend upon which category the plaintiff fits within: 1) government officials; 2) generally famous public figures; 3) limited purpose public figures; and 4) private persons.[11] The actual malice privilege typically applies to statements about government officials and generally famous public figures,[12] and never to statements about truly private persons.[13] The challenging analysis in future cases involves the limited purpose public figure.

In *Gertz*, the Supreme Court explained that for those persons who have become famous or influential only because of their involvement in a particular public issue or controversy (the limited purpose public

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[8] *Id.* (quoting *St. Amant*, 390 U.S. at 731–32).

[9] Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974).

[10] *Id.* at 345–47.

[11] *Id.* at 343–48, 351–52.

[12] *Id.* at 343–45, 351–52.

[13] *Id.* at 345–48; *see also* Talley v. Time, Inc., 923 F.3d 878, 898 n.20 (10th Cir. 2019) (citing *Gertz*, 418 U.S. 343–45) (explaining that the Supreme Court held in *Gertz* that "the actual malice standard applies to public figures but does not apply in cases brought by a private-figure plaintiff").

figure), the actual malice privilege applies only to the "limited range of issues" for which the person has become a public figure.[14] The actual malice privilege does not apply "for all aspects" of the limited purpose public figure's life.[15] The question for courts, then, is whether a statement published about the limited purpose public figure's background or private life should be included in this "limited range of issues."[16]

In *Waldbaum v. Fairchild Pub.'s, Inc.*, the D.C. Circuit established a three-part framework to apply the actual malice privilege to the *Gertz* limited purpose public figure category, which included a germaneness-scope rule: in order to apply the privilege, "the alleged defamation must have been germane to the plaintiff's participation in the controversy."[17] Judge Tamm of the D.C. Circuit explained in *Waldbaum* that a person's "talents, education, experience, and motives could have been relevant to the public's decision whether to listen to [her or] him."[18] The privilege, however, does not protect "[m]isstatements wholly unrelated to the controversy."[19] Numerous courts have adopted and applied the three-part framework from *Waldbaum*, specifically its germaneness-scope rule.[20]

Some courts, however, have framed the listed background categories, and language, from *Waldbaum* in a problematic fashion so that the actual malice privilege would in effect prioritize protection of any statements about a limited purpose public figure's background or private life which might impact public opinion.[21] In essence, if the statement relates to some past or separate scandal, it would likely be protected by the privilege. Such courts threaten to broaden application of the privilege for limited purpose public figures beyond the boundaries established by *Gertz* and *Waldbaum*, such that there would be little-to-no distinction between the application of the privilege to generally famous public figures and limited purpose public figures. Such a framing of the germaneness-scope rule would

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[14] *Gertz*, 418 U.S. at 343–45, 351–52.

[15] *Id.* at 352.

[16] *Id.* at 351.

[17] Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287, 1297–98 (D.C. Cir. 1980).

[18] *Id.* (citing *Gertz*, 418 U.S. at 344–45; Garrison v. Louisiana, 379 U.S. 64, 77 (1964); RESTATEMENT (SECOND) OF TORTS, § 580A (1977)).

[19] *Id.*

[20] *See infra* Part 0.

[21] *See infra* Parts 0 & 0.

otherwise return the privilege back to the overruled principle that it is required for any topic of public interest.

This Article will analyze the problem in five parts. Specifically, this Article will: 1) briefly describe the relevant debates and holdings from the early actual malice jurisprudence leading to the *Gertz* public figure rules in support of a proper understanding of *Gertz*; 2) discuss the public figure rules from *Gertz*, and in particular the important distinction between generally famous public figures and limited purpose public figures; 3) analyze the key components of the *Waldbaum* germaneness-scope rule in order to explain why *Waldbaum* did not contemplate a broad germaneness-scope that would prioritize potential impact on public interest over the confines of the limited purpose public figure category from *Gertz*; 4) describe and analyze a problematic modern framing of the germaneness-scope rules from *Gertz* and *Waldbaum* that incorrectly prioritizes impact on potential public opinion; and finally 5) describe and analyze an appropriate modern framing of the germaneness-scope rules from *Gertz* and *Waldbaum* that preserves the meaning of the limited purpose public figure despite statements of scandalous conduct which could impact public opinion.

II. ANALYSIS

A. Gertz v. Robert Welch, Inc.—*the Important Distinction Between the Generally Famous Public Figure and the Limited Purpose Public Figure*

1. *New York Times, Co. v. Sullivan* and the Beginnings of the Actual Malice Privilege

The Supreme Court's application of the actual malice privilege to potentially defamatory statements about non-government officials was a rather disjointed subject before the *Gertz* case clarified the matter in 1974. The Supreme Court first adopted the actual malice privilege in 1964 through the landmark case *New York Times, Co. v. Sullivan*, though the doctrine as initially conceived only applied to statements made about government officials.[22] The Supreme Court held in *Sullivan* that the constitutional "guarantees" of free speech and a free press prohibit "a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was

[22] 376 U.S. 254, 280–83 (1964).

made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[23]

Two years later, the Supreme Court considered the scope of government officials to which the actual malice privilege may apply in *Rosenblatt v. Baer*.[24] Justice Brennan, writing for a majority, explained that though the Supreme Court did not need to draw "precise lines," it was "clear" that the "'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." [25]

The Supreme Court extended the actual malice privilege the very next year in 1967 to non-government officials through two cases. In *Time, Inc. v. Hill*, the Supreme Court held that the actual malice privilege applied to a false light suit brought by a private individual if the subject of the false light claim involved a matter of "public interest."[26] In *Curtis Pub. Co. v. Butts,* the Supreme Court held that the privilege also applied in libel cases involving a private individual that qualified as a "public figure."[27]

The plurality opinions in *Butts* became foundational for the final framework of the privilege's application to speech about a private person. Justice Harlan's plurality opinion based the "public figure" designation upon two factors: whether such person "commanded" public interest at the time of the publication, and whether such person had "sufficient access" to the media to be able to address the alleged defamatory statements as a means of "self-defense."[28] Justice Harlan explained that one of the plaintiffs in the case "may have attained that status by position alone[,]" whereas the other "by his purposeful activity amount[ed] to a thrusting of his personality into the 'vortex' of an important public controversy . . . ."[29] After *Gertz*, this second category of public figure became the limited purpose public figure.[30]

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[23] *Id.* at 279–80.

[24] 383 U.S. 75, 85 (1966).

[25] *Id.* (emphasis added).

[26] 385 U.S. 374, 387–88 (1967).

[27] 388 U.S. 130, 154 (1967).

[28] *Id.* at 154–55 (citations omitted).

[29] *Id.* at 155 (citation omitted).

[30] *See, e.g.*, Lluberes v. Uncommon Prod., LLC, 663 F.3d 6, 20 (1st Cir. 2011) ("*Gertz* defined a limited-purpose public figure not in terms of geography but in terms of the controversy that he has stepped into.") (emphasis omitted) (citations omitted); Wells v. Liddy, 186 F.3d 505, 535 (4th Cir. 1999) ("The Supreme Court stated in *Gertz* that

Chief Justice Warren also noted in his concurring opinion in *Butts* that the influence of famous private individuals with respect to public opinion had been rapidly growing in the era since the Great Depression and World War II.[31] "[I]t is plain that although they are not subject to the restraints of the political process, 'public figures,' like 'public officials,' often play an influential role in ordering society."[32] The public therefore "has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.'"[33]

In 1971, a plurality opinion in *Rosenbloom v. Metromedia, Inc.* authored by Justice Brennan attempted to recalibrate application of the privilege to be premised upon public interest in the subject matter of the speech alone, rendering the notoriety/influence of the individual irrelevant.[34] Justice Brennan believed that the Supreme Court's opinions in the seven years since *Sullivan* "disclosed the artificiality, in terms of the public's interest, of a simple distinction between 'public' and 'private' individuals or institutions . . . ."[35] Justice Brennan would "extend[] constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."[36] "If a matter is a subject of public or general interest," Justice Brennan argued, "it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not voluntarily choose to become involved."[37]

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the class of limited-purpose public figures included those individuals who 'thrust[ed] themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved,' . . . or who 'voluntarily inject[ed] [themselves] . . . into a particular public controversy . . . [and] assume[d] special prominence in the resolution of public questions . . . .'") (citations omitted).

[31] *Butts*, 388 U.S. at 163 (Warren, C.J., concurring).

[32] *Id.* at 164.

[33] *Id.*

[34] 403 U.S. 29, 43–44 (1971), *overruled by* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). The question presented in *Rosenbloom* was whether the actual malice privilege "applies in a state civil libel action brought not by a 'public official' or a 'public figure,' but by a private individual for a defamatory falsehood uttered in a news broadcast by a radio station about the individual's involvement in an event of public or general interest." *Id.* at 31–32.

[35] *Id.* at 41.

[36] *Id.* at 43–44.

[37] *Id.* at 43.

2. *Gertz v. Robert Welch, Inc.*—a *Limited* Application of the Actual Malice Privilege for a *Limited* Purpose Public Figure

Justice Brennan's conclusion that the "public" versus "private" person distinction should be immaterial to the interests involved in the actual malice privilege was overturned only three years later in *Gertz v. Robert Welch, Inc.*[38] Justice Powell, writing now for a majority of the Court, explained that the *Rosenbloom* plurality[39] had "abjured the suggested distinction between public officials and public figures on the one hand and private individuals on the other."[40] According to the *Rosenbloom* framework, "a private citizen involuntarily associated with a matter of general interest has no recourse for injury to his reputation unless he can satisfy the demanding requirements of the [*Sullivan*] test."[41] The Supreme Court's rule, which applied the actual malice privilege to "public persons" and "public officials," was affirmed.[42] "[T]he state interest in compensating injury to the reputation of private individuals," however, required a "different rule."[43] Namely, that the privilege should not prevent states from retaining authority to define the "appropriate standard of liability" with respect to defamation against a private individual.[44] In sum, the Supreme Court

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[38] 418 U.S. 323, 337 (1974).

[39] Justice Powell noted how disjointed the *Rosenbloom* decision had been:

> The eight Justices who participated in *Rosenbloom* announced their views in five separate opinions, none of which commanded more than three votes. The several statements not only reveal disagreement about the appropriate result in that case, they also reflect divergent traditions of thought about the general problem of reconciling the law of defamation with the First Amendment.

Id. at 333.

[40] *Id.* at 337.

[41] *Id.*

[42] *Id.* at 342. As Justice Powell summarized:

> Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth.

Id.

[43] *Gertz*, 418 U.S. at 343.

[44] *Id.* at 347.

held in *Gertz* that "the actual malice standard applies to public figures but does not apply in cases brought by a private-figure plaintiff."[45]

Justice Powell's opinion primarily focused upon differentiating the private person. Importantly, however, Justice Powell also substantively distinguished the remaining three categories of persons to which the actual malice privilege applies, as well as the scope of the privilege for each category of individual: 1) the government official; 2) the generally famous public figure; and 3) the limited purpose public figure.[46]

First, the actual malice privilege applies broadly to government officials.[47] Justice Powell explained that those who decide "to seek governmental office must accept certain necessary consequences of that involvement in public affairs."[48] One of those "consequences" is that the government official "runs the risk of closer public scrutiny than might otherwise be the case."[49] "[S]ociety's interest in the officers of government is not strictly limited to the formal discharge of official duties."[50] The "public's interest extends to 'anything which might touch on an official's fitness for office . . . .'"[51] "Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character."[52] It is important to acknowledge that Justice Powell made such observations about government officials specifically and in the context of the public's interest in the government official's fitness for office.[53] It is the interest of examining a government official's "fitness for office" (knowing the relevant character of the person handling public business or representing the public in an elected position) that justified the privilege's reach to topics outside the "discharge of official duty," such as separate events implicating "dishonesty, malfeasance, or improper motivation."[54]

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[45] Talley v. Time, Inc., 923 F.3d 878, 898 (10th Cir. 2019) (citing *Gertz*, 418 U.S. at 345–48).

[46] *Gertz*, 418 U.S. at 343–45, 351–52.

[47] *Id.* at 344–45.

[48] *Id.* at 344.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 344–45.

[52] *Gertz*, 418 U.S. at 345 (quoting Garrison v. Louisiana, 379 U.S. 64, 77 (1964)).

[53] *See id.* at 344–45.

[54] *Id.*

Justice Powell then observed that "[t]hose classed as public figures stand in a similar position."[55] Justice Powell explained, however, that there were two different kinds of "public figures," and that not all public figures would be open to such a broad application of the privilege.[56] "Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes."[57] Generally, these are famous public figures. In contrast, "[m]ore commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[58] These are limited purpose public figures. Each of these types of public figures "invite attention and comment,"[59] just to a different extent, and as such, come with a different scope for the privilege's applicability to their public and private lives.[60]

As Justice Powell would later reiterate, the "designation" of one as a public figure "may rest on either of two alternative bases."[61] "In some instances an individual may achieve such pervasive fame or notoriety that he *becomes a public figure for all purposes and in all contexts*."[62] And again, "[m]ore commonly, an individual voluntarily injects himself or is drawn into a . . . particular controversy and thereby *becomes a public figure for a limited range of issues*."[63] It should not be "lightly assume[d] that a citizen's participation in community and professional affairs render[s] him a public figure for all purposes."[64] Rather, "an individual should not be deemed a public personality for all aspects of his life" unless there is "clear evidence of general fame or notoriety in the community" and "pervasive involvement in the affairs of society. . . ."[65]

The Supreme Court therefore established a straightforward and sensible scope of applicability for these three remaining categories of individuals in *Gertz*. First, the actual malice privilege applies to a

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[55] *Id.* at 345.

[56] *See id.*

[57] *Id.*

[58] *Gertz*, 418 U.S. at 345.

[59] *Id.*

[60] *Id.*

[61] *Id.* at 351.

[62] *Id.* (emphasis added).

[63] *Id.* (emphasis added).

[64] *Id.* at 352.

[65] *Gertz*, 418 U.S. at 352.

government official's discharge of her or his duties, and otherwise beyond the discharge of duties into other events that might inform the government official's fitness for office, such as events indicating dishonesty, malfeasance, or improper motivation.[66] Second, the actual malice privilege applies to a generally famous "public figure for all purposes and in all contexts" given that person's pervasive notoriety, fame, and influence.[67] Third, for those persons who have become famous or influential only as to their involvement in a particular public issue or controversy, the actual malice privilege applies to the "limited range of issues" for which the person has become a limited public figure.[68] And of course more fundamentally, the Supreme Court established the core rule that public interest itself does not dictate the applicability of the actual malice privilege.[69]

B. *The Waldbaum Rule Regarding the Required "Germaneness" of a Statement to a Limited Purpose Public Figure's Controversy*

1. *Waldbaum v. Fairchild Publications, Inc.*

Eric Waldbaum was the president and chief executive officer for the second-largest consumer cooperative in the United States, where he participated not only in managing the cooperative but also in "setting policies and standards within the supermarket industry."[70] Mr. Waldbaum held meetings open to the press and public where he would discuss topics like supermarket practices, energy legislation, and fuel allocation.[71] Mr. Waldbaum's "actions generated considerable comment" about himself and the cooperative he managed "in trade journals and general-interest publications."[72] When Mr. Waldbaum was "dismissed" from his position at the cooperative in 1976, Fairchild Publications, Inc. ("Fairchild") published a five-sentence article which stated that the cooperative had been "losing money the last year and retrenching."[73]

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[66] *See id.* at 343–45.

[67] *See id.* at 344–45, 351–52.

[68] *See id.*

[69] *See id.* at 345–47.

[70] Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287, 1290 (D.C. Cir. 1980).

[71] *Id.*

[72] *Id.*

[73] *Id.*

Mr. Waldbaum believed the statement was false and brought suit against Fairchild for libel.[74] The district court found that Mr. Waldbaum qualified as a limited purpose public figure "for [a] limited range of issues" concerning the cooperative's "unique position within the supermarket industry and [Mr.] Waldbaum's efforts to advance that position."[75] The district court granted summary judgment against Mr. Waldbaum because he admitted that he could not prove the actual malice required of the privilege.[76]

Judge Tamm delivered the opinion for the D.C. Circuit on appeal.[77] Judge Tamm observed in a summary statement that a court's overall task in analyzing the potential scope of the actual malice privilege in the limited purpose public figure context is to "examine 'the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.'"[78] Judge Tamm identified three components of this analysis, which became the three-part test the D.C. Circuit and several other jurisdictions have used for the forty years since.[79]

First, a court must properly "isolate the public controversy."[80] "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."[81] A controversy does not become a "public controversy" simply because it may "attract attention" or engender "[n]ewsworthiness."[82] In sum, "[i]f the issue was being debated publicly and if it had foreseeable and substantial ramifications for non-participants, it was a public controversy."[83] A court may "define" the controversy's "contours" by examining "whether persons actually were discussing some specific question."[84] Judge Tamm

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[74] *Id.*

[75] *Id.* at 1291.

[76] *Waldbaum*, 627 F.2d at 1291.

[77] *Id.* at 1289.

[78] *Id.* at 1296 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 352 (1974)).

[79] *Id.* at 1296–98 (citations omitted); *see infra* Part II(B)(2)-(3).

[80] *Waldbaum*, 627 F.2d at 1296.

[81] *Id.*

[82] *Id.* (citing Wolston v. Reader's Digest Assoc., 443 U.S. 157, 167 (1979); Time, Inc. v. Firestone, 424 U.S. 448, 454–55 (1976)) (citation omitted).

[83] *Id.* at 1297.

[84] *Id.*

emphasized that "[c]ourts must exercise care" in making this determination.[85]

Second, a court must "analyze" the potential limited purpose public figure's "role" in the public controversy.[86] Judge Tamm explained that the Supreme Court was clear in *Gertz* that a limited purpose public figure is one who has "thrust themselves to the forefront" of the controversy, such that the person has become a "factor" in the controversy's "ultimate resolution."[87] "Trivial or tangential participation is not enough," as only a "'special prominence' in the debate" may achieve limited purpose public figure status.[88] Specifically, the person must either have been: 1) "purposely trying to influence the outcome" of the controversy; and/or 2) "realistically" expected to "have an impact on its resolution" because of the person's "position in the controversy . . . ."[89] Judge Tamm explained that some of the guiding factors for a court in determining the level of "prominence" that a person might have in the controversy include "past conduct, the extent of press coverage, and the public reaction to [her or] his conduct and statements."[90]

If the first two determinations lead to the conclusion that the person is a limited purpose public figure with respect to a well-defined/"isolated" public controversy, a court must make a critical third determination for purposes of applying the actual malice privilege: was the statement or statements at issue "germane" to the person's "participation in the controversy[?]"[91] Judge Tamm explained that the person's "talents, education, experience, and motives could have been relevant to the public's decision whether to listen to [her or] him."[92] Importantly, "[m]isstatements wholly unrelated to the controversy, however," do not receive protection from the actual malice privilege.[93] Judge Tamm reasoned that "[t]hose who attempt to affect the result of a particular controversy have assumed

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[85] *Id.* at 1296.

[86] *Waldbaum*, 627 F.2d at 1297.

[87] *Id.* (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974)).

[88] *Id.* (quoting *Gertz*, 418 U.S. at 351).

[89] *Id.* (citation omitted).

[90] *Id.* at 1297–98 (citing Time, Inc. v. Firestone, 424 U.S. 448, 454 n.3 (1976); Rosanova v. Playboy Enters., Inc., 411 F. Supp. 440, 445 (S.D. Ga. 1976)).

[91] *Id.* at 1298.

[92] *Waldbaum*, 627 F.2d at 1298 (citing *Gertz*, 418 U.S. at 344–45; Garrison v. Louisiana, 379 U.S. 64, 77 (1964); RESTATEMENT (SECOND) OF TORTS, § 580A (1977)).

[93] *Id.*

the risk that the press, in covering the controversy, will examine the major participants with a critical eye."[94] So too does the person who "is caught up in the controversy involuntarily," but fails to "reject[] any role in the debate," as this person has also "'invited comment' relating to the issue at hand."[95] In sum, "the court must ask whether a reasonable person would have concluded that this individual would play or was seeking to play a major role in determining the outcome of the controversy and whether the alleged defamation related to that controversy."[96]

Three particular observations about Judge Tamm's language and greater framework are important to understanding that the germaneness-scope rule *Waldbaum* contemplated did not intend to broadly protect statements about past/separate alleged conduct by the limited purpose public figure. First, Judge Tamm was careful to describe a limited purpose public figure test that would define a very specific, isolated controversy for application of the actual malice privilege.[97] A court must exercise care when defining the controversy's "contours" by examining "whether persons actually were discussing some specific question."[98] So, the controversy to which the germaneness-scope rule itself is tethered should be narrowly and specifically defined under the *Waldbaum* three-part test. It would not be reasonable to conclude that *Waldbaum* contemplated a broad or ambiguous germaneness-scope rule when it sought to fundamentally establish an isolated controversy for analysis.

Second, Judge Tamm did not use the term "wholly unrelated" to describe some vast germaneness-scope that focuses only on keeping out the most unrelated of statements.[99] There is no indication that Judge Tamm meant that *only* misstatements that are wholly unrelated do not receive the privilege's protection.[100] Rather, Judge Tamm flatly said that "[m]isstatements wholly unrelated to the controversy" are not germane and cannot be privileged.[101] The full paragraph from Judge Tamm illustrates an important context:

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94 *Id.*

95 *Id.* (citation omitted).

96 *Id.*

97 *Id.* at 1296–97.

98 *Waldbaum*, 627 F.2d at 1296–97.

99 *Id.* at 1298.

100 *See id.* (emphasis added).

101 *Id.*

> Finally, the alleged defamation must have been germane to the plaintiff's participation in the controversy. His talents, education, experience, and motives could have been relevant to the public's decision whether to listen to him. Misstatements wholly unrelated to the controversy, however, do not receive the *New York Times* protection.[102]

The "wholly unrelated" language was a specific qualifier and warning with respect to statements about the limited purpose public figure's background.[103] Though a limited purpose public figure's "talents, education, experience, and motives" might be relevant to that person's participation in the controversy—and whether the public should decide to listen to that person—Judge Tamm eliminated any ambiguity that such specific categories provided a license for protection of statements about a person's private life that did not actually bear on the controversy.[104]

Third, these four categories of a limited purpose public figure's life and background were specific, intentional, and limited. The limited purpose public figure's "talents, education, experience, and motives" could not be reasonably interpreted to allow statements about alleged scandal or misconduct that are not actually related to the controversy, even if such scandal or misconduct in the abstract might affect the public's opinion of the limited purpose public figure.[105] Such categories do not invite comment on a limited purpose public figure's morality or virtues. Instead, these categories speak to a limited purpose public figure's: 1) ability to provide a helpful or meaningful perspective (because of her talents, education, and experience); and 2) potential agenda or bias (motives) underlying her participation in the controversy.[106]

More importantly, beyond the express language and framework of *Waldbaum* itself, the greater context of the three-part test from *Waldbaum* was Judge Tamm's attempt to fashion a practical application of *Gertz*, which the Supreme Court decided only six years prior.[107] Indeed, Judge Tamm began his opinion with this thesis: "[i]n this action we must determine when an individual not a public official has

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[102] *Id.* (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344–45 (1974); Garrison v. Louisiana, 379 U.S. 64, 77 (1964); RESTATEMENT (SECOND) OF TORTS, § 580A (1977)).

[103] *See id.*

[104] *See id.*

[105] *See id.*

[106] *See Waldbaum*, 627 F.2d at 1298.

[107] *Id.* at 1289.

left the relatively safe harbor that the law of defamation provides for private persons and has become a public figure within the meaning of the Supreme Court's decision in *Gertz* . . . ."[108] *Gertz* was clear that limited purpose public figures are only subject to the actual malice privilege for "a limited range of issues," namely the controversy in which the person has thrust themself to the forefront.[109] Limited purpose public figures are not subject to the privilege "for all purposes and in all contexts" like the generally famous public figure.[110] The privilege simply does not apply "for all aspects" of a limited purpose public figure's life.[111] As such, the *Waldbaum* germaneness-scope rule should be interpreted and applied in a manner further guided by *Gertz's* own definitive explanations which preclude application of the privilege to statements about alleged background/conduct that are not concretely related to the actual controversy.

2. *Jankovic v. Int'l. Crisis Grp.*

The D.C. Circuit recently affirmed the *Waldbaum* germaneness-scope rule in 2016 in *Jankovic v. Int.'l Crisis Grp.*[112] Though *Gertz* ultimately controls the fundamental substance of the limited purpose public figure analysis, Judge Rogers confirmed that the D.C. Circuit still employed the "three-part inquiry" from *Waldbaum* to apply the *Gertz* framework.[113] This included the germaneness-scope rule from *Waldbaum*, which requires that the alleged "defamatory statement must be germane to the [limited purpose public figure's] participation in the controversy" in order to qualify for the actual malice privilege.[114] Judge Rogers also affirmed that "'[m]isstatements wholly unrelated to the controversy' are not protected, but statements, including those highlighting a plaintiff's 'talents, education, experience, and motives,' can be germane."[115] *Jankovic* did not expand these four categories, even after nearly forty years had passed since *Waldbaum*.[116]

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[108] *Id.*

[109] *Gertz*, 418 U.S. at 344–45, 351–52.

[110] *See id.*

[111] *Id.* at 352.

[112] 822 F.3d 576, 589 (D.C. Cir. 2016) (emphasis added) (quoting *Waldbaum*, 627 F.2d at 1298).

[113] *Id.* at 585 (citing *Waldbaum*, 627 F.2d at 1298).

[114] *Id.*

[115] *Id.* at 589 (emphasis in original).

[116] *Id.*

Judge Rogers emphasized that "[t]he purpose of the germaneness inquiry is to ensure that the allegedly defamatory statement—whether true or not—is related to the plaintiff's role in the relevant public controversy."[117] This fundamental principle "ensures that publishers cannot use an individual's prominence in one area of public life to justify publishing negligent falsehoods about an unrelated aspect of the plaintiff's life."[118] *Jankovic* therefore not only reaffirmed the *Waldbaum* germaneness-scope rule, but also established its proper boundaries so as to confine its application to the limited purpose public figure defined in *Gertz*.[119]

3. *Waldbaum* Adopted and Applied by Numerous Courts

The overall three-part test from *Waldbaum* has been "universally regarded as the benchmark decision in the application of the rule in *Gertz*" because of its "analytical schema in resolving the legal question of whether a supposedly defamatory statement concerning a limited public figure is sufficiently related to the controversy in which the party has exposed himself to public scrutiny . . . ."[120] The Fifth and Eleventh Circuits have expressly adopted the *Waldbaum* three-part test.[121] The Eleventh Circuit found that "[t]he proper standards for determining whether plaintiffs are limited public figures are best set forth in *Waldbaum* . . . ."[122] The Seventh and Eighth Circuits have also recognized the three-part *Waldbaum* test as a proper test for the determination and application of the actual malice privilege to a limited purpose public figure.[123]

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[117] *Id.*

[118] *Jankovic*, 822 F.3d at 589 (citing *Waldbaum*, 627 F.2d at 1298).

[119] *Id.* at 585, 589.

[120] Kessler v. Zekman, 620 N.E.2d 1249, 1255 (Ill. App. Ct. 1993); *see also*, Anaya v. CBS, Broad. Inc., 626 F. Supp. 2d. 1158, 1192–93 (D.N.M. 2009) (following the *Waldbaum* three-part test and noting that the test had been expressly adopted by the Fifth and Eleventh Circuits); WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568, 571–72 (Tex. 1998) (explaining that the *Waldbaum* "elements provide a 'generally accepted test' to determine limited-purpose public-figure status."); Wiegel v. Cap. Times Co., 426 N.W.2d 43, 49 (Wis. Ct. App. 1988) (citing to *Waldbaum* and explaining that "the federal courts have developed a three-step inquiry").

[121] Silvester v. Am. Broad. Cos., Inc., 839 F.2d 1491, 1494 (11th Cir. 1988); *see also* Trotter v. Jack Anderson Enters., Inc., 818 F.2d 431, 433–34 (5th Cir. 1987) (citing Tavoulareas v. Piro, 817 F.2d 762, 772 (D.C. Cir. 1987) (en banc) (describing the *Waldbaum* three-part test)).

[122] *Silvester*, 839 F.2d at 1494.

[123] O'Donnell v. CBS, Inc., 782 F.2d 1414, 1417 (7th Cir. 1986) (noting that the "parties agree that application of the three-part test for determining limited purpose

Within this broad group of courts that have generally accepted and applied the *Waldbaum* overall three-part test, a number of courts have further recognized, adopted, and applied the specific germaneness-scope rule from *Waldbaum* (in some cases as reaffirmed by *Jankovic*) by either quoting the "wholly unrelated" language or the background categories of a limited purpose public figure's "talents, education, experience, and motives."[124] Yet some courts that have relied upon *Waldbaum*'s germaneness-scope rule have framed the background categories and language from *Waldbaum* in a problematic fashion by using the privilege to protect any statements about a limited purpose public figure's background or private life that might impact public opinion.[125] Such courts threaten a trend that would broaden

public figures enunciated in *Waldbaum* . . . is proper"); *In re* IBP Confidential Bus. Documents Litig., 755 F.2d 1300, 1316 (8th Cir. 1985) ("A limited public figure, by playing an influential role in resolving a public controversy, invites media attention and comment germane to his participation in that controversy.").

[124] *See, e.g.*, Safex Found., Inc. v. Safeth, Ltd., 531 F. Supp. 3d 285, 305 (D.D.C. 2021); Gubarev v. BuzzFeed, Inc., 354 F. Supp. 3d 1317, 1330 (S.D. Fla. 2018); Biro v. Condé Nast, 963 F. Supp. 2d 255, 271 (S.D.N.Y. 2013); Anaya v. CBS, Broad. Inc., 626 F. Supp. 2d 1158, 1192–93 (D.N.M. 2009); Medure v. Vindicator Printing Co., 273 F. Supp. 2d 588, 612 (W.D. Pa. 2002); Smith v. A Pocono Country Place Prop. Owners Ass'n, Inc., 686 F. Supp. 1053, 1059 (M.D. Pa. 1987); Unsworth v. Musk, No. 2:18-cv-08048-SVW-JC, 2019 WL 8220721, at *7 (C.D. Cal. Nov. 18, 2019); Fine v. ESPN, Inc., No. 5:12-CV-0836, 2016 WL 6605107, at *6 (N.D.N.Y. Mar. 25, 2016); Kisser v. Coal. for Religious Freedom, No. 92 C 4508, 1995 WL 3996, at *2 (N.D. Ill. Jan. 5, 1995); Atlanta J.-Const. v. Jewell, 555 S.E.2d 175, 185–86 (Ga. Ct. App. 2001); WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568, 573 (Tex. 1998); Hunter v. Hartman, 545 N.W.2d 699, 704–05 (Minn. Ct. App. 1996); Kessler v. Zekman, 620 N.E.2d 1249, 1256 (Ill. App. Ct. 1993).

[125] *See, e.g.*, *Condé Nast*, 963 F. Supp. 2d at 271 ("Yet, once a plaintiff is deemed a limited purpose public figure, courts allow the heightened protections to sweep broadly, covering all statements by defendants that are not 'wholly unrelated to the controversy.'") (quoting *Waldbaum*, 627 F.2d at 1298); *Kisser*, 1995 WL 3996, at *2 ("Standing as close as we are to the First Amendment's core, we must diminish this risk by taking a view of 'relevance' broad enough to reveal whether the statement might affect public opinion without discriminating based on the reasons why."); *see also Gubarev*, 354 F. Supp. 3d at 1330 (stating simply that the germaneness "standard is whether [the statement] is 'wholly unrelated'") (quoting *Waldbaum*, 627 F.2d at 1288); *Smith*, 686 F. Supp. at 1059 (holding that publication was germane because it attempts to "discredit" the other side of a controversy); *Fine*, 2016 WL 6605107, at *6 (quoting *Biro*, 963 F. Supp. 2d at 271; ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 5:3.3 (4th ed. 2015)) (agreeing that "once a plaintiff is deemed a limited purpose public figure, courts allow the heightened protections to sweep broadly, covering all statements by defendants that are not 'wholly unrelated to the controversy'" and further explaining that the law requires only that "the statement need be no more than generally related to a dispute in issue to qualify for protection") (quoting *Biro*, 963 F. Supp. 2d at 271; SACK, SACK ON DEFAMATION: LIBEL,

application of the privilege for limited purpose public figures beyond the boundaries established by *Gertz* and *Waldbaum*, resulting in little to no distinction between the application of the privilege to generally famous public figures and limited purpose public figures. Such a framing of the germaneness-scope rule would revert the actual malice privilege for limited purpose public figures back to the overruled principle from *Rosenbloom* that the privilege is required for any topic of public interest.

C. *Problematic Modern Framing of the Germaneness Rules from* Gertz *and* Waldbaum*:* Kisser v. Coalition for Religious Freedom *and Other Courts Prioritize Potential Public Opinion over the Defined Scope of the Limited Purpose Public Figure*

1. The *Kisser* Opinion

The district court case of *Kisser v. Coalition for Religious Freedom* is a prime example of problematic framing of the *Waldbaum* germaneness-scope rule.[126] Cynthia Kisser was the Executive Director of the Cult Awareness Network.[127] There was no dispute that a public controversy existed regarding "the actual and potential dangers of alleged religious cults," and that Ms. Kisser was a limited purpose public figure because she had "injected herself into the fray" of the public discussion on such controversy by critiquing organizations she considered religious cults.[128] In an effort to apparently discredit or shame Ms. Kisser, Defendant Coalition for Religious Freedom ("Coalition") asserted in a publication that Ms. Kisser had previously been a "topless dancer."[129] Ms. Kisser argued that this comment should not be protected by the actual malice privilege because it was not germane to the controversy about the dangers of religious cults.[130]

In discussing the scope of the germaneness rule, Judge Zagel explained that the credibility of public figures speaking on, or providing information about, public controversies is critical because the public does not generally have the time or resources to gather

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SLANDER, AND RELATED PROBLEMS § 5:3.3; *Jewell*, 555 S.E.2d at 185 (explaining without qualification that "a publication is germane to a plaintiff's participation in a controversy if it might help the public decide how much credence should be given to the plaintiff").

[126] No. 92 C 4508, 1995 WL 3996 (N.D. Ill. Jan. 5, 1995).

[127] *Id.* at *1.

[128] *Id.*

[129] *Id.* at *1–3.

[130] *Id.* at *1.

information on its own about the great number of controversies that arrive in the news.[131] People encounter innumerable demands for their attention from both public and private issues, which "compete for each individual's attention . . . ."[132] And beyond the volume of issues that limits a person's availability to devote attention to any one issue, Judge Zagel explained that "high costs discourage or prohibit all but a few from undertaking original research in most areas of civic controversy."[133] As such, "[p]ublic perception and opinion often depends" on which speakers are able to garner public trust.[134] "The sincerity and capacity of those who speak out on controversial issues, especially those presenting themselves as experts, thus become critical issues in the public debate."[135]

Given his fundamental belief about how reliant the public is on public figures delivering information or opinion on a controversy, Judge Zagel placed a central importance on what he viewed as the broad confines of the germaneness-scope rule from *Waldbaum*: "[f]or this reason, constitutional protection extends to allegedly defamatory statements about a limited-purpose public figure's 'talents, education, experience and motives [that] *could have been relevant* to the public's decision [about] whether to listen to [her].'"[136] The key determination at issue for Judge Zagel was how a court should determine such relevance for the public:

> This case raises a question regarding what conception of relevance should guide the inquiry. Should we focus on whether a statement might actually [a]ffect public debate, regardless of whether the effect ripples through the medium of reason or prejudice, or should we insist upon a stricter, more logical, conception of relevance, such as the rules of evidence embrace?[137]

Judge Zagel conceded, as the basic concept of the germaneness rule requires, that "if no rational relationship exists between a published statement and public controversy, negligence-based liability may seem to accommodate public and individual interests better than

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131 *Id.* at *2.

132 *Kisser*, 1995 WL 3996, at *2.

133 *Id.*

134 *Id.*

135 *Id.*

136 *Id.* (quoting *Waldbaum*, 627 F.2d at 1298) (emphasis added in *Kisser*).

137 *Id.*

actual malice."[138] Judge Zagel, however, was wary that a standard of relevance similar to that found in the rules of evidence may be problematic because such rules were established for a setting (trial) that "presents no danger of chilling legitimate political speech."[139] "[W]here a statement could affect public opinion regarding a legitimate public issue, we stand close to the First Amendment's core."[140] Judge Zagel feared that "requiring a journalist who has information that might affect public opinion to determine whether it meets anything like evidentiary standards of relevance threatens to chill speech precious by First Amendment standards."[141] This concern won out, as Judge Zagel found that in "[s]tanding as close as we are to the First Amendment's core, we must diminish this risk by taking a view of 'relevance' broad enough to reveal whether the statement might affect public opinion *without discriminating based on the reasons why*."[142]

Since "relevance" under the germaneness rule meant any possible effect on public opinion about the limited purpose public figure, Judge Zagel found that "[s]tatements charging [Ms.] Kisser with exposing her breasts in public for remuneration" were entitled to the actual malice privilege because the statements "could affect the public's assessment of her as a critic of religious cults."[143] "Some might regard such activity as the symptom of a character so deeply flawed that *they would expect other symptoms*, such as untruthfulness."[144] Others that consider "topless dancing as base, immoral, or sinful—especially the rank-and-file of those self-styled religious groups targeted by [Ms.] Kisser—might consider a former topless dancer less likely to understand, appreciate, or fairly judge the motives and practices of organizations claiming spiritual inspiration and purpose, or their members' lifestyles."[145] Judge Zagel went so far as to say that "[e]ven if no one took the issue as dispositive on [Ms.] Kisser's credibility, topless dancing could weigh in the balance."[146]

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[138] *Kisser*, 1995 WL 3996, at *2.

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.* (emphasis added).

[143] *Id.* at *3.

[144] *Kisser*, 1995 WL 3996, at *3 (emphasis added).

[145] *Id.*

[146] *Id.*

2. Framing Problem #1: Prioritizing Potential Public Opinion over the Confines of the Limited Purpose Public Figure from *Gertz*

Gertz established, and still controls, Supreme Court precedent on the limited purpose public figure's place within the actual malice privilege.[147] A germaneness-scope analysis should therefore be framed fundamentally within the confines of the limited purpose public figure category contemplated in *Gertz*. Again, *Gertz* was clear that limited purpose public figures are only subject to the actual malice privilege for "a limited range of issues," namely the controversy in which the person has thrust themself to the forefront—not "for all purposes and in all contexts" like the generally famous public figure. [148] The actual malice privilege does not apply for all aspects of the limited purpose public figure's life.[149]

Gertz did not qualify these limitations on the application of the privilege by the potential for impact on public opinion.[150] And certainly, *Gertz* did not define relevance or germaneness by potential impact on the public's opinion of the limited purpose public figure.[151] Indeed, in overturning *Rosenbloom*, *Gertz* established the core rule that public interest does not dictate the applicability of the actual malice privilege.[152]

Judge Zagel's prioritization of the potential impact on public opinion (regardless of the reason) in the very definition of germaneness[153] would wrongfully return the scope of the actual malice privilege for limited purpose public figures back to the overruled principle from *Rosenbloom* that the privilege is required for any issue of potential public interest. At a minimum, to define germaneness for the limited purpose public figure as information that might affect public opinion would in substance transform the limited purpose public figure into a generally famous public figure for application of the privilege. This was exactly the concern expressed in *Jankovic* in reiterating a limited germaneness-scope rule: "[t]his ensures that

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147 *See* Jankovic v. Int'l Crisis Grp., 822 F.3d 576, 585 (D.C. Cir. 2016).

148 Gertz v. Robert Welch, Inc., 418 U.S. 323, 344–45, 351–52 (1974).

149 *Id.* at 352.

150 *Id.* at 344–45.

151 *Id.* at 345–46.

152 *Id.* at 345–47.

153 *See* Kisser v. Coal. for Religious Freedom, No. 92 C 4508, 1995 WL 3996, at *2 (N.D. Ill. Jan. 5, 1995).

publishers cannot use an individual's prominence in one area of public life to justify publishing negligent falsehoods about an unrelated aspect of the plaintiff's life."[154]

3. Framing Problem #2: Ignoring the Express Background Categories Listed in *Waldbaum*

Though Judge Zagel listed the germaneness-scope background categories provided in *Waldbaum*—"talents, education, experience and motives"—he failed to acknowledge in any way that these categories provided a limitation for the germaneness contemplated by *Waldbaum*.[155] He instead focused only upon the fact that these categories were listed in *Waldbaum* because such categories "*could have been relevant* to the public's decision whether to listen to [the limited purpose public figure]."[156] Judge Zagel did not attempt to analyze whether the allegation that Ms. Kisser had previously worked as a topless dancer specifically fit within the "talent," or "education," or "experience," or "motives" categories actually established by *Waldbaum*.[157] It would be difficult to imagine how it would.

But moreover, Judge Zagel did not attempt to analyze whether the statement that Ms. Kisser had previously worked as a topless dancer more generally related to her ability to provide a helpful or meaningful perspective on religious cults (the broader principle embodied by the talents, education, and experience categories), or otherwise related to whether there might be some agenda or bias underlying Ms. Kisser's participation in the controversy about religious cults (the broader principle embodied by the motives category).[158]

Instead, Judge Zagel framed the background portion of the *Waldbaum* germaneness-scope rule only upon whether the statement could possibly have been relevant to the public's opinion of Ms. Kisser for *any reason*. Other courts have fallen into similarly broad framings of *Waldbaum* outside of the express background categories.[159] For example, Chief Judge Nealon of the Middle District of Pennsylvania held that a publication was germane fundamentally because the

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[154] *Jankovic*, 822 F.3d at 589.

[155] *Kisser*, 1995 WL 3996, at *2–3.

[156] *Id.* at *2 (quoting *Waldbaum*, 627 F.2d at 1298) (emphasis added in *Kisser*).

[157] *Id.* at *2–3.

[158] *Id.*

[159] *See, e.g.*, Smith v. A Pocono Country Place Prop. Owners Ass'n, 686 F. Supp. 1053, 1059 (M.D. Pa. 1987); Atlanta J.-Const. v. Jewell, 555 S.E.2d 175, 185 (Ga. Ct. App. 2001).

publication attempted to "discredit" the other side of a controversy.[160] Similarly, Judge Johnson of the Georgia Court of Appeals explained without qualification that "a publication is germane to a plaintiff's participation in a controversy if it might help the public decide how much credence should be given to the plaintiff."[161]

This is a much broader scope than intended in *Waldbaum*, wherein the phrase "could have been relevant to the public's decision whether to listen to [the limited purpose public figure]" was made only to specifically justify the express categories of talents, education, experience, or motives listed by Judge Tamm.[162] Judge Zagel did not appear to believe that the actual categories listed in *Waldbaum* mattered, and he did not hide the fact that the court was shaking off any tethers to such categories—he explained that the court must take "a view of 'relevance' broad enough to reveal whether the statement might affect public opinion *without discriminating based on the reasons why*."[163]

4. Framing Problem # 3: Ignoring the "Wholly Unrelated" Qualifier from *Waldbaum* or Misinterpreting the "Wholly Unrelated" Language to Refer *Only* to Exclusion of the Most Unrelated of Topics

Notably, Judge Zagel omitted *Waldbaum's* qualifier, or warning, that the specific background categories listed were further limited from allowing "[m]isstatements wholly unrelated to the controversy."[164] Judge Zagel's inclination to expand the actual malice privilege to a statement about any type of conduct that might affect the public's perception of the limited purpose public figure is emblematic of some courts' framing of the *Waldbaum* germaneness-scope rule.

In *Biro v. Condé Nast*, Judge Oetken of the Southern District of New York initially explained that "[b]y definition, comments regarding a limited purpose public figure are subject to heightened scrutiny only to the extent that they are relevant to the public figure's involvement in a given controversy."[165] Similar to *Kisser*, Judge Oetken, however,

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[160] Smith v. A Pocono Country Place Prop. Owners Ass'n, 686 F. Supp. 1053, 1059 (M.D. Pa. 1987).

[161] Atlanta Journal-Constitution v. Jewell, 555 S.E.2d 175, 185 (Ga. Ct. App. 2001).

[162] Waldbaum v. Fairchild Publ'ns, 627 F.2d 1287, 1298 (1980).

[163] *Kisser*, 1995 WL 3996, at *2 (emphasis added).

[164] *Waldbaum*, 627 F.2d at 1298.

[165] 963 F. Supp. 2d 255, 270–71 (S.D.N.Y. 2013) (citing Faigin v. Kelly, 978 F. Supp. 420, 426 (D.N.H. 1997)).

framed *Waldbaum's* germaneness-scope rule to only exclude the most conceivably irrelevant of statements if the person was a limited purpose public figure: "Yet, once a plaintiff is deemed a limited purpose public figure, courts allow the heightened protections to sweep broadly, covering all statements by defendants that are not 'wholly unrelated to the controversy.'"[166] Quoting *Kisser*, Judge Oetken emphasized that "[s]tanding as close as we are to the First Amendment's core, we must diminish this risk by taking a view of 'relevance' broad enough to reveal whether the statement might affect public opinion without discriminating based on the reasons why."[167] Judge Ungaro of the Southern District of Florida similarly explained that the germaneness "standard" is simply determining "whether [the statement] is 'wholly unrelated.'"[168]

Whether by omission of the "wholly unrelated" qualifier (like *Kisser*), or by an out-of-context interpretation of the "wholly unrelated" qualifier (like *Biro* and *Gubarev*), the result as explained by *Biro* under such framing is that a court will allow the privilege to "sweep broadly" so as to allow for most any statement made about the limited purpose public figure's background or private life.[169] This is not allowed by *Gertz* and was not intended by *Waldbaum*, as Judge Tamm did not mean that *only* misstatements that are wholly unrelated do not receive protection from the privilege.[170] Rather, Judge Tamm was qualifying the specific categories of "talents, education, experience, and motives" he had just listed so as to cut off ambiguity that such specific categories provided a license for protection of statements about a person's private life that did not actually bear on the controversy.[171] To miss Judge Tamm's connection between the "wholly unrelated" language and these specific categories is to miss his point in using such language entirely.

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[166] *Id.* at 271 (citing *Waldbaum*, 627 F.2d at 1298); *see also* Fine v. ESPN, Inc., No. 5:12-CV-0836, 2016 WL 6605107, at *6 (N.D.N.Y. Mar. 25, 2016) (quoting Biro v. Condé Nast, 963 F. Supp. 2d 255, 271 (S.D.N.Y. 2013)). "The law requires only that 'the statement need be no more than generally related to a dispute in issue to qualify for protection.'" *Id.* (quoting ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 5:3.3 (4th ed. 2015)).

[167] *Biro*, 963 F. Supp. 2d at 271 (quoting *Kisser*, 1995 WL 3996, at *2).

[168] Gubarev v. BuzzFeed, Inc., 354 F. Supp. 3d 1317, 1330 (S.D. Fla. 2018) (quoting *Waldbaum*, 627 F.2d at 1288).

[169] *Biro*, 963 F. Supp. 2d at 271.

[170] *Waldbaum*, 627 F.2d at 1298.

[171] *See id.*

D. *An Appropriate Modern Framing of the Germaneness Rules from* Gertz *and* Waldbaum*:* Unsworth v. Musk*, Preservation of the Meaning of the Limited Purpose Public Figure Despite Statements of Scandalous Conduct*

1. *Unsworth v. Musk*: A World-Famous Event, a World-Famous Defendant, and Scandalous Alleged Conduct About the Limited Purpose Public Figure that Would Otherwise Impact Public Opinion

In the summer of 2018, Plaintiff Vernon Unsworth participated in the internationally famous rescue efforts of a group of twelve children trapped in the Tham Luange Nang Non cave system.[172] Mr. Unsworth had "extensive knowledge" of the cave system and "provided advice and guidance to the Thai Navy divers on where the [trapped children] may have been located" in the caves.[173]

Defendant Elon Musk is an internationally famous entrepreneur that has held leadership positions in several important companies like Space X, Tesla, Inc., and The Boring Company.[174] Mr. Musk mobilized resources from many of his companies in an effort to help the Thai government with the rescue of the children.[175] Mr. Musk's companies built three miniature submarines and delivered them to the Thai government for the rescue.[176] The Thai government did not end up using these submarines because conventional divers ultimately rescued the children.[177]

Days after the rescue, Mr. Unsworth was interviewed by CNN and was asked what he thought of the submarines donated by Mr. Musk.[178] Mr. Unsworth said that "it was a 'PR stunt,'" that the submarines "had absolutely no chance of working," and that Mr. Musk "had no conception of what the cave passage was like."[179] For whatever reason, Mr. Unsworth punctuated the interview by saying that Mr. Musk "could 'stick his submarine where it hurts.'"[180]

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[172] Unsworth v. Musk, No. 2:18-cv-0848, 2019 WL 8220721, at *1 (C.D. Cal. Nov. 18, 2019).

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Unsworth*, 2019 WL 8220721, at *1.

[179] *Id.*

[180] *Id.*

Mr. Musk took to Twitter two days later, posting the following four tweets about Mr. Unsworth:

> [1] Never saw this British expat guy who lives in Thailand (sus) at any point when we were in the caves. Only people in sight were the Thai navy/army guys, who were great. Thai navy seals escorted us in—total opposite of wanting us to leave.
> [2] Water level was actually very low & still (not flowing)—you could literally have swum to Cave 5 with no gear, which is obv how the kids got in. If not true, then I challenge this dude to show final rescue video. Huge credit to pump & generator team. Unsung heroes here.
> [3] You know what, don't bother showing the video. We will make one of the mini-sub/pod goingss [sic] all the way to Cave 5 no problemo. Sorry pedo guy, you really did ask for it.
> [4] Bet ya a signed dollar it's true.[181]

Mr. Musk deleted the last two tweets accusing Mr. Unsworth of having been a "pedo" after shareholders communicated concerns about these comments.[182] Mr. Musk tweeted apologies for having issued his tweets in anger, but "did not disavow or retract his accusation[] of pedophilia against" Mr. Unsworth.[183] Mr. Musk, in fact, doubled down the next month with another tweet: "You don't think its strange [Mr. Unsworth] hasn't sued me? He was offered free legal services."[184] Mr. Unsworth asserted that the average reader would also understand that this last tweet would imply that Mr. Unsworth's failure to sue was "evidence that [Mr. Unsworth] is, in fact, a pedophile."[185]

BuzzFeed News published an article about Mr. Musk's ongoing accusations that Mr. Unsworth was a pedophile.[186] Mr. Musk sent an email to a BuzzFeed News reporter, who later published statements from the email:

> Off the record.
> I suggest that you call people you know in Thailand, find out what's actually going on and stop defending child rapists, you [expletive] [expletive]. He's an old, single white guy from England who's been traveling or living in Thailand for

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[181] *Id.* at *1–2.

[182] *Id.* at *2.

[183] *Id.*

[184] *Unsworth*, 2019 WL 8220721, at *2.

[185] *Id.*

[186] *Id.*

> [thirty] to [forty] years, mostly Pattaya Beach, until moving to Chiang Rai for a child bride who was about [twelve] years old at the time. There's only one reason people go to Pattaya Beach. It isn't where you'd go for caves, but it is where you'd go for something else. Chiang Rai is renowned for child sex-trafficking.
>
> He may claim to know how to cave dive, but he wasn't on the cave dive rescue team and most of the actual dive team refused to hang out with him. I wonder why . . .
>
> As for this alleged threat of a lawsuit, which magically appeared when I raised the issue (nothing was sent or raised beforehand), I [expletive] hope he sues me.[187]

Mr. Unsworth sued Mr. Musk for defamation/libel based upon all of these statements.[188] Mr. Musk admitted in the litigation that his statements were false with respect to Mr. Unsworth having: been a "child rapist;" "married a twelve-year-old child;" "engaged in sex trafficking;" "excluded by the dive team because of alleged misconduct with children;" "visited Pattaya Beach;" "lived in Thailand for [thirty] to [forty] years;" and "lived in Chiang Rai with a [twelve]-year old bride." [189] Mr. Musk moved for summary judgment, however, asserting in relevant part that Mr. Unsworth was a limited purpose public figure and that Mr. Unsworth could not prove that the false statements were published with actual malice.[190]

2. Two Clear Public Controversies in Which Mr. Unsworth Made Himself a Limited Purpose Public Figure

Judge Wilson of the Central District of California found that the rescue efforts of the children were "indisputably a public controversy," as the issue "received wall-to-wall media attention throughout 2018 (even after the rescue was completed) and involved the entire Thai government and aid from several other nations including the United States."[191] Additionally, "from the broader initial public controversy over the [r]escue of the [c]hildren, a narrower controversy arose over the viability of the [submarines provided by Mr. Musk's companies]."[192] Mr. Unsworth "played a significant role in bringing the question to [the] forefront of public debate" in his CNN interview by harshly

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187 *Id.* at *2–3.

188 *Id.* at *4.

189 *Id.* at *3.

190 *Unsworth*, 2019 WL 8220721, at *4.

191 *Id.* at *5.

192 *Id.*

criticizing Mr. Musk's submarines, saying that they "had absolutely no chance of working . . . wouldn't have gone round any corners or round any obstacles . . . and wouldn't have made the first fifty meters into the cave."[193] A number of other articles also discussed the viability of the submarines.[194] As such, Judge Wilson identified two public issues: the rescue and the viability of the submarines.[195]

Judge Wilson found that Mr. Unsworth rather easily satisfied the requirement that he injected himself into the forefront of these public controversies.[196] Mr. Unsworth had achieved international attention from several news reports for his role in the rescue and had otherwise decided to appear in a CNN interview where he criticized Mr. Musk's submarines before an audience of millions."[197] He projected himself publicly as an expert alongside comments which demonstrated that he was attempting to influence public debate about the rescue efforts.[198] In sum, Mr. Unsworth offered himself "'as a fulcrum to create public discussion'" about the evaluation of the rescue efforts, which included criticism of the ability of Mr. Musk's submarines to help with the rescue.[199]

3. The Potential Impact on Public Opinion Did Not Make the Unrelated Statements About Mr. Unsworth Germane to the Controversies—Preventing the Treatment of Mr. Unsworth as a Generally Famous Public Figure Under the Privilege

Application of the actual malice privilege to Mr. Musk's statements about Mr. Unsworth was halted by Judge Wilson's germaneness analysis. Mr. Musk's defamatory statements must have been related to Mr. Unsworth's "participation in the controversy."[200] Quoting *Waldbaum* and *Jankovic*, Judge Wilson explained that "[c]omments 'wholly unrelated to the controversy are not protected.'"[201] Judge Wilson, however, specifically noted that

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[193] *Id.*

[194] *Id.*

[195] *Id.* at *6.

[196] *Unsworth*, 2019 WL 8220721, at *6.

[197] *Id.*

[198] *Id.*

[199] *Id.* (citing *Jankovic*, 822 F.3d at 588).

[200] *Id.* (citing Makaeff v. Trump Univ., LLC, 715 F.3d 254, 267 (9th Cir. 2013); *Waldbaum*, 627 F.2d at 1298).

[201] *Id.* (quoting *Jankovic*, 822 F.3d at 589).

statements which highlighted a plaintiff's "talents, education, experience, and motives" could prove to be germane to the controversy.[202]

Judge Wilson explained that for Mr. Musk's comments to relate to Mr. Unsworth's participation in the rescue efforts, a relationship must exist between the alleged pedophilia and the rescue of the children or the submarines.[203] The "limited-purpose public figure doctrine exists" only because "[t]hose who attempt to affect the result of a particular controversy have assumed the risk that the press, in covering the controversy, will examine the major participants with a critical eye."[204] Judge Wilson emphasized that "this eye only reaches 'the issues at hand.'"[205] This limitation is critical because "[t]o allow criticism into every aspect of a plaintiff's life simply because he chose to get involved in a limited issue would render him an all-purpose public figure—effectively merging the limited-purpose public figure doctrine."[206]

Judge Wilson's strong recognition of the important boundaries between the two categories of defined public figures demonstrates an appropriate modern commitment to preserving the *Gertz* rule that limited purpose public figures are only subject to the privilege for "a limited range of issues."[207] Namely, the controversy in which the person has thrust themself "to the forefront"—not "for all purposes and in all contexts" like the generally famous public figure.[208] In playing off of *Waldbaum's* "critical eye" metaphor, Judge Wilson correctly explained that actual malice privilege does not apply for all aspects of the limited purpose public figure's life.[209] Otherwise, by definition, the two categories of public figures under *Gertz* would merge.[210]

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[202] *Unsworth*, 2019 WL 8220721, at *6 (quoting *Jankovic*, 822 F.3d at 589).

[203] *Id.* at *7.

[204] *Id.* (quoting *Waldbaum*, 672 F.2d at 1298).

[205] *Id.*

[206] *Id.*

[207] Gertz v. Robert Welch, Inc., 418 U.S. 323, 345, 351–52.

[208] *Id.*

[209] *See id.*

[210] Unsworth v. Musk, No. 2:18-cv-08048, 2019 WL 8220721, at *7 (C.D. Cal. Nov. 18, 2019).

4. Recognizing the Limited Context of the *Waldbaum* Background Categories—"Wholly Unrelated" Is Not an Invitation to Allow Most Any Statements About the Limited Purpose Public Figure

Still, Mr. Musk argued that *Waldbaum* contemplated a broad application of the privilege to a limited public figure's background ("talents, education, experience, and motives") if such background "could have been relevant to the public's decision whether to listen to him."[211] Judge Wilson, recognizing the intent of *Waldbaum's* "wholly unrelated" language as having qualified such background categories, however, found that "[o]n closer reading, *Waldbaum* and *Jankovic* are supportive of . . . [Mr. Unsworth's] assertion that the alleged defamation is 'wholly unrelated' to the public controversy."[212]

As Judge Wilson explained, the reference to "motive" in *Waldbaum* was not in the abstract, but rather "specifically in the context of the media's ability to inquire into [a p]laintiff's motive for participating in the controversy."[213] "Because limited-purpose public figures are voluntarily attempting to influence public debate, the *Waldbaum* court reasoned that those persons should not be immune from criticism as to *why* they entered the controversy."[214] For example, the plaintiff in *Waldbaum* had a "role as a president of a well-publicized food cooperative" and was otherwise "the mover and shaper of many of the cooperative's controversial actions."[215] It was these roles specifically which "led the [*Waldbaum*] court to believe the plaintiff had voluntarily injected himself into 'the public controversies concerning unit pricing, open dating, the cooperative form of business, and other issues.'"[216] Because the *Waldbaum* plaintiff's role at the cooperative led him into the controversy, the media was "justified in criticizing" the plaintiff's "tenure at the cooperative."[217]

Judge Wilson also noted that *Jankovic* emphasized:

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[211] *Id.* (citing *Waldbaum*, 627 F.2d at 1298).

[212] *Id.* (citing *Waldbaum*, 627 F.2d at 1289).

[213] *Id.* at *8 (citing *Waldbaum*, 627 F.2d at 1294).

[214] *Id.*

[215] *Id.* (citing *Waldbaum*, 627 F.2d at 1294).

[216] *Unsworth*, 2019 WL 8220721, at *8 (citing *Waldbaum*, 627 F.2d at 1294).

[217] *Id.*

> The purpose of the germaneness inquiry is to ensure that the allegedly defamatory statement—whether true or not—is related to the *plaintiff's role* in the relevant public controversy. This ensures that publishers cannot use an individual's prominence in one area of public life to justify publishing negligent falsehoods about an *unrelated aspect* of the plaintiff's life.[218]

In *Jankovic*, the germaneness test was satisfied because the alleged defamation was relevant to understanding why the plaintiff wanted to be involved in the reform effort at issue.[219] Judge Wilson held that *Jankovic*, which most recently interpreted and applied the *Waldbaum* germaneness-scope rule for the D.C. Circuit, stands for the proposition that "a plaintiff's motive is relevant when it helps the public understand *why* the plaintiff has chosen to inject himself into the public controversy."[220]

In applying this understanding of the motive component from *Waldbaum* and *Jankovic*, Judge Wilson held that there was "absolutely no relationship between any aspect of the [r]escue of the [children or the submarines] and alleged pedophilia."[221] As such, the alleged "[p]edophilia therefore bears no credible relationship to [Mr. Unsworth's] role in the controversy."[222] Moreover, "[t]here could hardly be a topic less-related to [Mr. Unsworth's] expertise as a caver than accusations of pedophilia."[223] Neither Mr. Unsworth's role in the rescue of the children nor his harsh criticisms of the donated submarines allowed for Mr. Musk to attack Mr. Unsworth "on a wholly unrelated subject."[224]

Unlike the *Kisser* case, and others like it, Judge Wilson correctly acknowledged that the express background categories from *Waldbaum* were intentional, limited, and had substantive meaning. Such categories were not an invitation to allow statements about any area of a limited purpose public figure's background or private life. Judge Wilson's analysis, particularly of the motives category, confirmed the purpose of *Waldbaum*. The limited purpose public figure's "talents, education, experience, and motives" could not be reasonably

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[218] *Id.* (citing Jankovic v. Int'l Crisis Grp., 822 F.3d 576, 589 (D.C. Cir. 2016)).

[219] *Id.* (citing *Jankovic*, 822 F.3d at 589).

[220] *Id.*

[221] *Id.*

[222] *Unsworth*, 2019 WL 8220721, at *8.

[223] *Id.*

[224] *Id.*

interpreted to allow statements about an alleged scandal or misconduct that are not actually related to the controversy. This is so even if such a scandal or misconduct might in the abstract affect the public's opinion of the limited purpose public figure. Instead, such categories speak to a limited purpose public figure's ability to provide a helpful or meaningful perspective (talents, education, and experience), as well as whether there might be some agenda or bias underlying the limited purpose public figure's participation (motives).

Judge Wilson's "closer reading" of *Waldbaum* and *Jankovic* led to the correct contextual recognition that *Waldbaum's* intent for the "wholly unrelated" language was to provide a specific qualifier and warning with respect to statements about the limited purpose public figure's background.[225] Though a limited purpose public figure's "talents, education, experience, and motives" might be relevant to that person's participation in the controversy—and whether the public should decide to listen to that person—such specific categories did not provide for protection of statements about a limited purpose public figure's private life that did not actually bear on the controversy.[226]

5. Proposed General "Credibility" Rule

Mr. Musk also similarly argued that the pedophilia allegations about Mr. Unsworth are germane under *Waldbaum's* scope because such information would make Mr. Unsworth "less credible as an authority on how best to affect the [r]escue of the [c]hildren" and would otherwise be "relevant to the public's decision whether to listen to him."[227] In making such argument, Mr. Musk proposed that Judge Wilson find a general "credibility" rule for limited purpose public figures.[228] Judge Wilson rejected Mr. Musk's invitation to broaden the *Waldbaum* background categories generally to any matter that may affect credibility, and he found that allegations of pedophilia had "no bearing" on Mr. Unsworth's actual credibility on the issue of the rescue.[229]

Judge Wilson looked to Federal Rule of Evidence 608 on witness credibility as "guidance on which types of conduct are relevant to a

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[225] *See id.* at *7.

[226] *Id.* at *7–8.

[227] *Id.* at *8 (citing Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287, 1298 (D.C. Cir. 1980)).

[228] *Id.*

[229] *Unsworth*, 2019 WL 8220721, at *8.

witness's 'character for truthfulness or untruthfulness'"[230] Rule 608(b) allows for "the introduction of 'specific instances' of a witness's conduct on cross-examination 'if they are probative of the character for truthfulness or untruthfulness.'"[231] At least for purposes of admissible evidence, Judge Wilson observed that courts have narrowly interpreted the types of misconduct which are "probative of a witness's credibility . . . such as perjury, fraud, swindling, forgery, bribery and embezzlement.'"[232] Misconduct such as sexual behavior,[233] illegal drug operation, adultery, and violence generally are not considered probative of a person's truthfulness.[234] As such, even if Judge Wilson was to consider "credibility" as a component of the germaneness-scope, the alleged pedophilia was "also unrelated to [Mr. Unsworth's] credibility generally."[235]

Judge Wilson held that there was "no relationship between the established public controversies" of the rescue of the children and the viability of the submarines, Mr. Unsworth's role in the controversies, and Mr. Musk's allegedly defamatory statements.[236] Mr. Musk's statements that Mr. Unsworth was a pedophile were not germane to the actual public controversies at issue and were therefore not subject to the actual malice privilege that is otherwise applicable to limited purpose public figures.[237]

III. CONCLUSION

In summary, *Waldbaum's* germaneness-scope rule should not be framed to prioritize potential public opinion on alleged scandalous conduct over the important confines of the limited purpose public figure *Gertz* established. *Gertz* is clear that limited purpose public figures are only subject to the actual malice privilege for "a limited

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[230] *Id.* at *9 (citing FED. R. EVID. 608(a)).

[231] *Id.* (citing FED. R. EVID. 608(b)).

[232] *Id.* (quoting United States v. Heard, 709 F.3d 413, 433 (5th Cir. 2013)).

[233] Judge Wilson also found *Grenier v. Taylor* to be persuasive, wherein the California Court of Appeals held that alleged defamatory accusations of sexual abuse were not germane to a popular minister's role "as an expert on the Bible and its teachings" because the minister had not injected himself into the forefront of a public controversy regarding child abuse. 183 Cal. Rptr. 3d 867, 878 (Cal. Ct. App. 2015).

[234] *Unsworth*, 2019 WL 8220721, at *9 (citing United States v. Bentley, 706 F.2d 1498, 1510 (8th Cir. 1983); State v. Stanley, 129 P.3d 1144, 1154 (Haw. Ct. App. 2005); State v. Moses, 726 A.2d 250, 252 (N.H. 1999)).

[235] *Id.*

[236] *Id.*

[237] *Id.*

range of issues," namely the controversy in which the person has thrust themself to the forefront—not "for all purposes and in all contexts" like the generally famous public figure. [238] The actual malice privilege does not apply "for all aspects" of a limited purpose public figure's life."[239]

Furthermore, in *Waldbaum*, Judge Tamm: (1) was careful to describe a limited purpose public figure test that would define a very specific, "isolate[d]" controversy for application of the actual malice privilege;[240] (2) did not use the "wholly unrelated" language in a way that described some vast germaneness-scope that focused on keeping out only the most unrelated of statements;[241] and (3) listed the four specific background categories of "talents, education, experience, and motives" in an intentionally limited manner, which cannot be reasonably interpreted to allow statements about scandal or misconduct that are not actually related to the controversy.[242]

Future courts should reject a problematic framing of the *Waldbaum* germaneness-scope rule like that found in the *Kisser* and *Biro* line of cases which prioritize potential public opinion over the defined scope of the limited purpose public figure. Courts should instead follow a more specific and limited understanding of the *Waldbaum* germaneness-scope rule demonstrated in *Jankovic* and *Unsworth* to preserve the meaning of the limited purpose public figure as defined in *Gertz*.

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[238] Gertz v. Robert Welch, Inc., 418 U.S. 323, 345, 351–52.

[239] *Id.* at 352.

[240] Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287, 1296–97 (D.C. Cir. 1980).

[241] *Id.* at 1298.

[242] *See id.*


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