# THE EX-PUBLIC FIGURE: A LIBEL PLAINTIFF WITHOUT A CLASS

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## I. INTRODUCTION

Nineteen ninety-four marked the thirtieth anniversary of *New York Times Co. v. Sullivan*,[2] the landmark United States Supreme Court decision proclaiming that defamation law would henceforth be closely scrutinized to ensure the constitutional guarantee of free speech. Nineteen ninety-three, in sharp contrast, marked the occasion of an announcement by a drafting committee of the National Conference of Commissioners on Uniform State Laws that it had failed, after a year-long effort toward compromise and consensus, to meet its charge of producing a uniform defamation act. The futile effort was a response to the growing demand for libel law reform in the wake of *New York Times*.[3] As the chairman of the committee explained in a letter to the conference president, the media "are unalterably opposed to broad defamation legislation of any kind."[4] Three decades after the *New York Times* decision, calls for sweeping reform remain unanswered as conflict and confusion over the constitutional balance between free speech and protection against harm to reputation continue.

At the heart of the lingering uncertainty is the public figure doctrine, a principle based on the notion that some members of society, including many professional athletes, are less deserving of legal protection against harm to reputation than others because, by their public deeds, they assume a greater risk than others of injury to reputation and enjoy greater access to media outlets so as to rebut false verbal attacks. The premise, in itself, is problematic for some.[5] If one accepts the premise, however, as does the author for purposes of this article, the next problem is in understanding the parameters of public figure status. The range of public figures today spans the socioeconomic spectrum, claiming, for example, those among the ranks of school teachers,[6] social workers,[7] medical appointments desk personnel,[8] and probation officers.[9] In fact, one's conduct, more so than one's position, engenders public figure sta-

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2. 376 U.S. 254 (1964).
3. *See* News Notes, 21 Med.L.Rptr. No. 14, June 8, 1993.
4. *Id.* (quoting letter from Harvey Perlman, Member, Uniform Defamation Act Drafting Committee and Dean, University of Nebraska College of Law to Dwight A. Hamilton, President, National Conference of Commissioners on Uniform State Laws and Richard C. Hite, Chair, Executive Committee, National Conference of Commissioners on Uniform State Laws (May 18, 1993)).
5. *See, e.g.*, Anderson, *Is Libel Law Worth Reforming,?* 140 U. PA. L. REV. 487, 526-30 (1991).
6. *See, e.g.*, Johnston v. Corinthian Television Corp., 583 P.2d 1101 (Okla. 1878).
7. Kahn v. Bower, 232 Cal. App. 3d 1648, 284 Cal. Rptr. 244, 252 (Cal. Ct. App. 1991).
8. Auvil v. Times Journal Co., 10 Med.L.Rptr. 2302 (E.D. Va. 1984).
9. Britton v. Koep, 470 N.W.2d 518 (Minn. 1991).

tus.[10] The ease with which public figure status can attach to an individual is apparent; it is not as clear, however, whether and to what extent the status, once acquired, can subsequently be extinguished as time passes and the individual withdraws from public activities to a life of relative obscurity.

The Supreme Court has expressly reserved judgment on the question of public figure status abatement.[11] Seldom has the issue been adjudicated, but where it has been, the majority of courts have rejected plaintiffs' claims that they were no longer public figures.[12] The effect of this trend is that past conduct, no matter how prudent, lawful or remote in time, can forever impair one's ability to redress injury to one's reputation in a court of law. This rule can be particularly harsh for formerly well-known individuals who are defamed after they no longer have any realistic expectations of gaining access to the media for rebuttal.

The purpose of this article is to examine how well erstwhile public figures have fared under the public figure doctrine in the years since *Gertz v. Robert Welch, Inc.*,[13] the leading United States Supreme Court opinion defining the public figure/private figure dichotomy. In pursuit of this objective, this article will provide a comprehensive review of libel cases in which there was a passage of time from the period when the plaintiff was active publicly to the date when the alleged defamation was published. The search included but was not restricted to cases in which the court actually addressed the effect of the passage of time on public figure status. This article exposes the inconsistency and unpredictability that characterize plaintiff status determinations in general. It also advocates the rejection of the permanent status retention rule as archaic, misplaced and contrary to the policies of *Gertz*. Finally, this

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10. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974) (defining the most common type of public figure as those who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved").

11. Wolston v. Reader's Digest Association, 443 U.S. 157, 166, n.7 (1979).

12. *See e.g.* Street v. National Broadcasting Co., 645 F.2d 1227, 1235 (6th Cir.) *cert. granted*, 454 U.S. 815, *cert. dismissed*, 454 U.S. 1095 (1981); Brewer v. Memphis Publishing Co., 626 F.2d 1238 (5th Cir. 1980), *cert. denied*, 452 U.S. 962 (1981); Time, Inc. v. Johnston, 448 F.2d 378 (4th Cir. 1971); Holt v. Cox Enterprises, 590 F. Supp. 408 (N.D. Ga. 1984); Underwood v. First National Bank, 8 Med. L. Reptr. 1278 (BNA)(Minn. Dist. Ct. 1982); Mobile Press Register v. Faulkner, 372 So.2d 1282 (Ala. 1979); Newson v. Henry, 443 So.2d 817 (Miss. 1983); Stripling v. Literary Guild, 5 Med. L. Rptr. 1958 (BNA) (W.D. Tex. 1979); Cohn v. National Broadcasting Co. 4 Med. L. Rptr. 2533 (BNA)(A.D., N.Y. App. Div.); Hartnett v. CBS, Inc., 12 Med. L. Rptr. 1824 (Sup. Ct. Westchester County 1986); Lewis v. Coursolle Broadcasting of Wisconsin, Inc., 127 Wis. 2d 105, 377 N.W.2d. 166 (Wis. 1985); Hart v. Playboy Enterprises 5 Med. L. Rptr. 1811 (D. Kan. 1979); Contemporary Mission, Inc. v. New York Times Co., 665 F. Supp. 248, 255 (S.D.N.Y. 1987); Zerangue v. TSP Newspapers, Inc. 814 F.2d. 1066 (5th Cir. 1987).

13. 418 U.S. 323 (1974)

article proposes an approach for determining whether and under what circumstances public figure status should no longer apply to a plaintiff. Part II traces the development of the public figure doctrine and the permanent status retention rule. Part III identifies theoretical paradigms inspired by the cases surveyed. Part IV explores whether efforts to disclaim public status acquisition rather than public status retention would constitute a reliable alternative means by which an ex-public figure might escape the rigors of the *New York Times* test. Part V offers a critical analysis of the permanent status retention rule. Part VI argues for the reversal of public figure status in appropriate cases. Part VII proposes an analytical approach that acknowledges the passage of time and the plaintiff's withdrawal efforts as factors capable of nullifying public figure status. The article concludes that the peculiar concerns of former public figures are not adequately addressed under current defamation law and that the consequences to society may be costly.

## II. HISTORICAL BACKGROUND

### *A. Development of the Public Figure Doctrine*

Libel in America was recognized as a strict liability tort until the United States Supreme Court handed down the landmark decision, *New York Times Co. v. Sullivan*[14] in 1964. The Court decided that existing state law threatened to deter free speech, particularly speech critical of the government and government officials.[15] The court acknowledged a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[16] Accordingly, the Court made it extremely difficult if not impossible for such officials to prevail in libel actions against media defendants. Unless the plaintiff could prove with "convincing clarity"[17] that the defendant acted with "actual malice"[18] in publishing false, defamatory statements relating to the plaintiff's official conduct, recovery would henceforth be prohibited under the first and fourteenth amendments.[19] The term "actual malice" was defined as knowledge by the defendant "that the statement was false or . . .

14. 376 U.S. 254 (1964).
15. *Id.* at 279.
16. *Id.* at 270.
17. *Id.* at 285-86.
18. *Id.* at 285.
19. *New York Times Co.*, 376 U.S. at 279-80, 283.

reckless disregard of whether it was false or not."[20] The introduction of constitutional imperatives into existing defamation law, as thus heralded in *New York Times*, signalled the beginning of an era in which free speech - including false speech - would significantly outweigh individual reputation.[21]

In subsequent decisions, the Court further clarified the new fault standard.[22] In *Curtis Publishing Co. v. Butts*,[23] for example, the Court widened the range of libel plaintiffs required to prove actual malice to include public figures, persons who were not public officials, but who commanded public interest and enjoyed media access sufficient to enable them to counteract defamatory statements.[24] In *Rosenbloom v. Metromedia, Inc.*,[25] Justice Brennan, writing for the plurality, extended the actual malice requirement to non-public plaintiffs who challenged statements published about them that also concerned matters of general or public interest. The Court repudiated this position in *Gertz v. Robert Welch, Inc.*, however, calling it an abridgment of a legitimate state interest in enforcing "a legal remedy for defamatory falsehood injurious to the reputation of a private individual."[26]

In *Gertz* and subsequent opinions, the Supreme Court developed a plaintiff-status calculus in which fault standards, proof standards, judge-jury relationships and recoverable damages varied depending on whether the plaintiff's status was public or private and on whether the content of the challenged speech was of public or private concern. In libel actions brought by private plaintiffs, the states were free "to impose liability on the publisher or broadcaster on a less demanding showing than that required by *New York Times*"[27] so long as they refrained from imposing liability without fault.[28]

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20. *Id.* at 280.

21. *See Id.* at 271-72. The court stated that an "[e]rroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *Id.* (quoting N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963).

22. *See e.g.* Garrison v. Louisiana, 379 U.S. 64 (1964); Rosenblatt v. Baer, 383 U.S. 75 (1966); St. Amant v. Thompson 390 U.S. 727 (1968).

23. 388 U.S. 130 (1967).

24. *Id.* at 155. The Court was actually split on the question of which fault standard should apply to public figures with four votes for an "unreasonable conduct" standard more favorable to the plaintiff than actual malice, three votes for "actual malice" and two votes for press immunity. Nevertheless, *Butts* is widely recognized as extending the *New York Times* rule to public figures. *See* Harry Kalven, Jr., *The Reasonable Man and the First Amendment: Hill, Butts and Walker*, 1967 SUP. CT. REV. 267.

25. 403 U.S. 29, 43-44 (1971).

26. *Gertz*, 418 U.S. at 346.

27. *Id.* at 348.

28. *Id.* at 347. If private plaintiffs wished to recover presumed or punitive damages, however, they would be required to prove actual malice. *Id.* at 349.

Public figures, in general, like public officials, would continue to be held to the *New York Times* standard. They included all-purpose public figures, a narrow sub-group made up of those whose fame or notoriety is so pervasive that they become public figures "for all purposes and in all contexts,"[29] as well as limited-purpose public figures, the more common sub-group, including those who have attained public status only for a limited range of issues by having voluntarily "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved"[30] or by having been drawn involuntarily into such controversies.[31] The Court viewed private individuals as more vulnerable to defamatory injury than public persons because public persons "usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy."[32] The Court reasoned that public officials, by virtue of having sought governmental office, run "the risk of closer public scrutiny", and that public figures, by virtue of having assumed "roles of especial prominence in the affairs of society", can be deemed to have "voluntarily exposed themselves to increased risk of injury from defamatory falsehood."[33] A private individual, by contrast, "relinquished no part of his interest in the protection of his own good name, and consequently . . . has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood."[34] The Court concluded that "private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery."[35]

The public figure doctrine continued to unfold, albeit amorphously, in the aftermath of *Gertz*. In *Hutchinson v. Proxmire*,[36] the Court declined to classify a plaintiff as a public figure in light of the defendant's failure to demonstrate that the plaintiff had acquired that status *prior* to a controversy engendered by the defendant. The defendant could not, in effect, create his own constitutional privilege by relying on media attention that the plaintiff received as a direct result of the defendant's offending statements. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[37] the Court

29. *Id.* at 351.
30. *Id.* at 345.
31. *Gertz*, 418 U.S. at 351.
32. *Id.* at 344.
33. *Id.* at 344-45.
34. *Id.* at 345.
35. *Id.*
36. 443 U.S. 111, 135 (1979).
37. 472 U.S. 749 (1985).

held that in cases involving non-media defendants,[38] private plaintiffs need not prove actual malice in order to recover presumed and punitive damages when the defamatory statements at issue do not involve matters of public concern.[39] The following year, the Court instituted a constitutional requirement that plaintiffs, both private and public, bear the burden of proving falsity as well as fault in libel actions against media defendants for speech of public concern.[40] That same year the Court, in *Anderson v. Liberty Lobby, Inc.*,[41] also approved the disposition of libel cases by summary judgment, in effect, permitting judges to decide before the trial whether a plaintiff subject to the *New York Times* standard has demonstrated the requisite fault, actual malice, with clear and convincing clarity, a fact determination traditionally reserved for juries.These decisions left many questions unanswered. For example, in light of the recent emphasis on speech content as a determinant of the applicable fault standard, it is unclear whether public plaintiffs will be relieved from having to prove actual malice in cases where the speech is not of public concern.[42] It is also unclear whether private individuals are still required to prove fault at any level when the defamatory falsehood does not involve a matter of public concern;[43] whether the rules apply equally to media and non-media defendants;[44] what quantum of proof on the issue of falsity is required;[45] how to determine which matters are of public concern[46]

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38. The Court's position on whether the constitutional privilege in defamation law applies equally to media and nonmedia defendants is not altogether clear. In Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., all members appeared to reject a distinction between the two. *See* 472 U.S. 749, 783-84 (1985) (Brennan, J. dissenting). The Court subsequently has twice reserved judgment on the question, first in Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 779, n.4 (1986),and secondly in Milkovitch v. Loraine Journal Co., 497 U.S. 1, 20, n.6 (1990).

39. *Dun & Bradstreet*, 472 U.S. at 761.

40. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986).

41. 477 U.S. 242, 255-56 (1986).

42. In *Dun & Bradstreet*, the Court did not appear to exclude public figures when it held: "[i]n light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages — even absent a showing of 'actual malice'", 472 U.S. at 761.

43. While the four dissenters in *Dun & Bradstreet* acknowledged a fault requirement even for statements not of public concern, 472 U.S. at 781, (Brennan, J. dissenting), Justices Powell, Rehnquist and O'Connor disagreed, stating "[i]f the dissent were the law, a woman of impeccable character who was branded a 'whore' by a jealous neighbor would have no effective recourse unless she could prove 'actual malice' by clear and convincing evidence . . . .The dissent would, in effect, constitutionalize the entire common law of libel." 472 U.S. at 761, n.7. Chief Justice Burger appeared to adopt the latter view, *see Id.* at 764, as did Justice White, *Id.* at 773-74.

44. *See supra* note 38.

45. *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 n.4 (1986) (declining to consider the quantity of proof of falsity required of private-figure plaintiffs); *see also* Harte-Hanks Communications v. Connaughton, 491 U.S. 657, 661 n.2 (1989) (expressing no view on

and whether public figure status is permanent once acquired.

Federal appellate courts have attempted to clarify *Gertz* by schematizing the status inquiry.[47] The most comprehensive of the schemes was set forth by the United States Court of Appeals for the District of Columbia Circuit in *Waldbaum v. Fairchild Publications, Inc.*[48] The first stage of the *Waldbaum* inquiry is to determine whether the plaintiff is an all-purpose public figure. Key questions to be considered include whether public recognition of the plaintiff has risen to such a level that the plaintiff's name is a "household word" regardless of whether he actively pursued such general fame and notoriety and whether the media would afford him opportunities to rebut defamatory statements.[49] Relevant factors include statistical surveys on the plaintiff's name recognition, prior press coverage of the plaintiff and proof of whether others alter their conduct or ideas in light of the plaintiff's actions.[50]

If the plaintiff fails to satisfy the requirements for all-purpose public figure status, the court, according to *Waldbaum*, must then examine whether the person is a limited-purpose public figure. This stage of the inquiry requires an examination of whether and to what extent the plaintiff has participated in a public controversy that is the subject matter of the alleged defamation. To complete this examination the court must undertake the following: a) isolate the public controversy involved; b) analyze the plaintiff's role in it to determine his prominence and impact on the resolution of the controversy and c) determine whether the alleged defamation is germane to the plaintiff's participation in the controversy.[51]

In *Fitzgerald v. Penthouse International, Ltd.*,[52] the United States Court of Appeals for the Fourth Circuit adopted a five-step test for limited-purpose public figures that took into account wheth-

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whether falsity must be established by clear and convincing evidence or by a preponderance of the evidence").

46. In *Dun & Bradstreet*, Justices Burger and White seemed to equate matters of public concern with matters of general or public importance. 472 U.S. at 764, 773. Justice Powell, joined by Justices O'Connor and Rehnquist, stated that matters of public concern must be determined by the "content, form and context [of the challenged statement] . . . as revealed by the whole record." 472 U.S. at 761. The four dissenters, however, found "almost no guidance" in this statement. 472 U.S. at 785.

47. *See, e.g.*, Lerman v. Flynt Distributing Co., 745 F.2d 123, 136-137 (2d Cir. 1984), *cert. denied*, 471 U.S. 1054; Fitzgerald v. Penthouse International, Ltd., 691 F.2d 666, 668 (4th Cir. 1982) *cert. denied*, 460 U.S. 1024 (1983).

48. 627 F.2d 1287, 1294-1298 (D.C. Cir.) *cert. denied*, 449 U.S. 898 (1980).

49. *Id.* at 1294 (quoting David W. Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Welch, Inc.*, 54 TEX. L. REV. 199, 222-23 (1976).

50. *Id.* at 1295.

51. *Id.* at 1296-98. The court is to consider the facts, taken as a whole, "through the eyes of a reasonable person." *Id.* at 1293.

52. 691 F.2d 666, 668 (4th Cir. 1982) *cert. denied*, 460 U.S. 1024 (1983).

er the plaintiff *retained* the status, assuming the plaintiff had previously acquired it, at the time of the alleged defamation.[53] Other courts developed similar inquiries in which they examined, among other things, whether a plaintiff's public figure status continued to exist at the time of publication.[54] Such considerations of retention and continuation of public figure status clearly suggest an acknowledgement by some courts that public figure status could be temporary.

### *B. Development of the Passage of Time Rationale and the Permanent Status Retention Rule*

#### 1. The Passage of Time Rationale

The Supreme Court has never ruled whether a lapse of time coupled with efforts by the plaintiff to regain anonymity can extinguish public figure status. In *Hutchinson v. Proxmire*,[55] the Court established that the plaintiff's acquisition of public figure status must predate the accrual of his cause of action. It remained unclear, however, whether there is a limit to how far back in time the status can arise and still remain effective, particularly once the plaintiff withdraws from public view. The Court was set to review the issue in *Street v. National Broadcasting Co.* but that case was settled and subsequently dismissed.[56] Nevertheless, members of

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53. *Id.* The five requirements include the following:

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

*Id.*

54. Professor Rodney A. Smolla has compiled the following composite list of factors that courts have used in varying combinations to determine if plaintiffs are public figures:

> (1) The extent to which the "controversy" preceded the defamatory speech . . . ;
> (2) The effect of the "controversy" on the interests of nonparticipants;
> (3) The level of voluntariness in the plaintiff's involvement in the controversy;
> (4) The plaintiff's access to channels of communication for counterspeech;
> (5) The degree of public divisiveness concerning the controversy;
> (6) The extent of the plaintiff's prominence in the controversy;
> (7) The extend of the plaintiff's efforts to attempt to influence resolution of the controversy;
> (8) The extent to which the plaintiff's public figure status continued to exist at the time of publication;
> (9) The extent to which the allegedly defamatory speech is geographically or institutionally limited to the area on which the plaintiff had achieved public figure status.

Rodney A. Smolla, LAW OF DEFAMATION § 2.09 [3], at 2-33 (1994).

55. 443 U.S. 111 (1979).

56. 645 F.2d 1227 (6th Cir.) *cert granted*, 454 U.S. 815, *cert. dismissed*, 454 U.S. 1095 (1981). *See also* Barbash, *A Bizarre Epilogue to the Scottsboro Case*, SAN FRANCISCO CHRONI-

the Court have acknowledged that a passage of time could erase public figure status. In *Rosenblatt v. Baer*, for example, Justice Brennan commented that "there may be cases where a person is so far removed from a former position of authority that comment on the manner in which he performed his responsibilities no longer has the interest necessary to justify the *New York Times* rule."[57]

Justices Blackmun and Marshall subsequently advanced what is perhaps the genesis of the passage of time rationale in their concurring opinion in *Wolston v. Reader's Digest Association, Inc.*[58] The Court in *Wolston* held that the nephew of a pair of admitted Soviet spies did not become a public figure in 1958 for purposes of his libel suit sixteen years later despite his highly publicized legal troubles in 1958 stemming from his failure to respond to a grand jury subpoena.[59] The majority reserved the question of whether public figure status may fade over time because the plaintiff did not raise the issue.[60] Justices Blackmun and Marshall, while concurring in the result, favored adopting the "passage of time" rationale as a *ratio decidendi*.[61] They believed that the lapse of time between 1958 and 1974 "was sufficient to erase whatever public-figure attributes petitioner once may have possessed."[62] "Assuming, *arguendo*", wrote Blackmun, "that petitioner gained public-figure status when he became involved in the espionage controversy in 1958, he clearly had lost that distinction by the time respondents published [the offending statements] in 1974."[63] Blackmun recalled the two factors under *Gertz* that typically distinguish public from private figures: knowing assumption of the risk of greater public scrutiny and increased access to media channels for purposes of

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CLE, Feb. 3, 1982, at 35; *Figure in Scottsboro Case Settles Suit with NBC*, N.Y. TIMES, Dec. 9, 1981, at A16.

57. 383 U.S. 75, 87, n.14. Such was not the case in *Rosenblatt*, however, where, according to Justice Brennan, public interest in the plaintiff's prior administrative activities remained strong. *Id.*

58. 443 U.S. 157, 170-72 (Blackmun, J. concurring, 1979).

59. *Wolston*, 443 U.S. at 165-66.

60. *Id.* at 166 n.7. The plaintiff, Ilya Wolston, had attempted unsuccessfully to convince both lower courts in the case that, in the event he had become a public figure in 1958, the passage of time restored him to private figure status by 1974. Wolston v. Reader's Digest Association, 578 F.2d 427, 431 (D.C. Cir. 1978); 429 F. Supp. 167, 178 (D.D.C. 1977). He dropped the argument before taking his appeal to the Supreme Court, prompting Justice Rehnquist to comment:

> Because petitioner does not press the issue in this Court and because we conclude that petitioner was not a public figure in 1958, we need not and do not decide whether or when an individual who was once a public figure may lose that status by the passage of time.

*Id.* at 166, n.7.

61. *Id.* at 170 (Blackmun, J. concurring).

62. *Id.* at 172 (Blackmun, J. concurring).

63. *Id.* at 171 (Blackmun, J. concurring).

counterargument.[64] "The passage of time," wrote Blackmun, "often will be relevant in deciding whether a person possesses these two public-figure characteristics," noting that "a lapse of years between a controversial event and a libelous utterance may diminish the defamed party's access to the means of counterargument" and "may diminish the 'risk of public scrutiny' that a putative public figure may fairly be said to have assumed."[65] Blackmun cited Wolston's "conscious efforts to regain anonymity" following his 1958 ordeal as conduct negating any inference that Wolston "assumed the risk" of public scrutiny during that ordeal.[66]

2. The Permanent Status Retention Rule

The passage of time rationale, as applied to defamation, experienced a rather cool reception in the federal appellate courts. When *Wolston* was decided, the United States Court of Appeals for the Fourth Circuit had already rejected the notion that time could erase public figure status in *Time, Inc. v. Johnston*,[67] where it reversed a trial court decision that a former professional basketball player shed his public figure status nine years after his retirement.[68] "No rule of repose exists", the court said, "to inhibit speech relating to the public career of a public figure so long as newsworthiness and public interest attach to events in such public career."[69] The decision antedated both *Wolston* and *Gertz*,[70] however, and rested primarily on principles of privacy tort.[71] *Time, Inc.* offered little insight, therefore, into whether public figure status, as defined under libel law since 1974, would be affected by a lapse of time.[72]

Elsewhere, federal appellate courts have held that persons who were former public officials at the time their libel claims arose were public rather than private plaintiffs for purposes of their lawsuits, particularly when the alleged defamation concerned their activities while in office.[73] Plaintiffs who claimed to be ex-public figures received similar treatment, as is illustrated in *Brewer v. Memphis*

64. *Id.*
65. *Wolston*, 443 U.S. at 171.
66. *Id.*
67. 448 F.2d 378 (4th Cir. 1971).
68. *Id.* at 380-83.
69. *Id.* at 381.
70. 418 U.S. 323 (1974).
71. Time, Inc. v. Johnston, 448 F.2d at 381-82.
72. *See supra* text accompanying notes 148-177.
73. Gray v. Udevitz, 656 F.2d 588, 590 n.3 (10th Cir. 1981); Zerangue v. TSP Newspapers, 814 F.2d 1066, 1069 (5th Cir. 1987).

*Publishing Co.*[74]

*Brewer* involved a false newspaper report published in 1972 in Memphis stating that Anita Wood Brewer, a former local television personality and singer, had recently visited Elvis Presley at the Las Vegas hotel where he was then performing. She claimed that the article defamed her by conveying that she was "openly involved in a relationship with a married man."[75] Brewer had been linked romantically with Presley in press reports during the nineteen fifties, but claimed her relationship with him ended in 1960 or 1961 prior to his marriage. Brewer's husband, a former professional athlete, joined her in the action, claiming that the article had defamed him by conveying that he had been, in the court's words, "cuckolded".[76] In an attempt to escape the actual malice standard, the Brewers argued that they had never been all-purpose public figures or public figures for purposes of an article about their private lives which, they argued, did not constitute public questions.[77] They argued alternatively that even if they once were public figures, they no longer could be regarded as such, at least for purposes of an article describing conduct purportedly occurring after their retirement.[78] The court acknowledged problems in attempting to fit the Brewers into the *Gertz* public figure categories since they neither possessed the pervasive power and influence necessary to become all-purpose public figures,[79] nor participated in any public controversies that would qualify them as limited-purpose public figures.[80] Nevertheless, the court held that the Brewers became public figures when they acquired fame,[81] acknowledging that this result required a liberal interpretation of the limited-purpose public figure rule.[82] In addressing the passage of time issue, the court declined Justice Blackmun's analysis in *Wolston v. Reader's Digest Association, Inc.*,[83] finding it inapplicable to the Brewer case.[84] The public figure status that Anita Brewer acquired in the nineteen fifties remained intact nearly twenty years later.[85]

The United States Court of Appeals for the Sixth Circuit rejected the passage of time rationale in *Street v. National Broadcasting*

74. 626 F.2d 1238 (5th Cir. 1980), *cert. denied*, 452 U.S. 962 (1981).
75. *Id.* at 1243.
76. *Id.*
77. *Id.* at 1249.
78. *Id.*
79. *Brewer*, 626 F.2d at 1250, n.15.
80. *Id.* at 1254.
81. *Id.* at 1255.
82. *See Id.* at 1254-55.
83. 443 U.S. 157, 170-72 (1979) (Blackmun, J. concurring).
84. *Brewer*, 626 F.2d at 1257.
85. *Id.*

*Co.*, holding, instead, that "once a person becomes a public figure in connection with a particular controversy, that person remains a public figure thereafter for purposes of later commentary or treatment of *that controversy*."[86] More than forty years had passed from the time Victoria Price Street accused nine black youths of rape in the widely publicized "Scottsboro Boys" case to the time NBC broadcast a television "docu-drama" reenacting the Alabama trials, and, according to Street, defaming her in the process. The Sixth Circuit found that Street's conduct at the time of the trials - that she granted interviews to a clamoring press and "aggressively promoted her version of the case outside of her actual courtroom testimony" - satisfied the *Gertz* limited-purpose public figure test;[87] she became, in the words of the court, "the pivotal character in the most famous rape case of the twentieth century."[88] The court cited an invasion of privacy case[89] as well as *Time, Inc. v. Johnston*,[90] and *Brewer*,[91] to support its conclusion that Street retained her public figure status through the years.[92] In a critical reference to Justice Blackmun's concurring opinion in *Wolston v. Reader's Digest Association, Inc.*, the court commented that "[p]ast public figures who now live in obscurity do not lose their access to channels of communication if they choose to comment on their role in the past public controversy."[93] As previously noted, the Supreme Court granted certiorari to hear *Street* but dismissed the case after the parties reached a settlement.[94]

While federal appellate courts generally have been inclined to reject the argument for reversal of public figure status, a few courts nevertheless appeared to demonstrate some flexibility on the issue, at least in principle. For example, the District of Columbia Circuit, while, on the one hand, warning of the possible futility of efforts by a celebrity to abandon public status in *Waldbaum v. Fairchild Publications, Inc.*,[95] still recognized the plaintiff's attempts to shun publicity as relevant in determining the plaintiff's status.[96] In *Brewer*, furthermore, the Fifth Circuit, despite its rejection of the

86. 645 F.2d. 1227, 1235 (6th Cir.), *cert. granted*, 454 U.S. 815, *cert. dismissed*, 454 U.S. 1095 (1981).
87. *Id.* at 1235.
88. *Id.* at 1236.
89. *Id.* at 1235 (citing Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940)).
90. 448 F.2d 378 (4th Cir. 1971).
91. 626 F.2d 1238 (5th Cir. 1980), *cert. denied*, 452 U.S. 962 (1981).
92. *Street*, 645 F.2d at 1235.
93. *Id.* at 1236.
94. 454 U.S. 1095 (1981). *See supra* note 56.
95. 627 F.2d 1287, 1295 n.18 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980).
96. *Id.* at 1295.

status reversal argument, nevertheless speculated the following: "It might be that during the 'active' public figure period a wider range of articles, including those only peripherally related to the basis of the public figure's fame, are protected by the malice standard and that the passage of time or intentional retreat narrows the range of articles so protected to those directly related to the basis for fame."[97] In addition, the Fourth Circuit's status retention requirement in *Fitzgerald v. Penthouse International, Ltd.*, as mentioned previously, suggests an acknowledgement by that court that the status need not be permanent.[98] Despite the predominance of the permanent status retention rule since the early nineteen eighties, some speculation seems to persist nevertheless that public figure status can be abated under certain circumstances.[99]

## III. PARADIGMS

A survey of defamation cases involving once-prominent plaintiffs suggests several paradigms based on varying combinations of two factors: the time frame of the controversy in which the plaintiff participated and the time frame of the activity alleged in the challenged statement.[100] The combinations produce the following six possible factual patterns: 1) *Past Controversy/Current Activity*, in which the alleged defamation consists of a statement about the plaintiff's current or contemporaneous activity as opposed to a historical event and the controversy for which the plaintiff became well-known has ceased to exist by the time the statement is published; 2) *Past Controversy/Past Activity*, in which the alleged defamation consists of a statement about the plaintiff's past activity

97. *Brewer*, 626 F.2d at 1257.

98. 691 F.2d 666, 668 (4th Cir. 1982) *cert. denied*, 460 U.S. 1024 (1983).

99. A few courts have acknowledged that the passage of time may affect public figure status. *See* Rancho La Costa, Inc. v. Superior Court 106 Cal. App. 3d 646, 165 Cal. Rptr. 347 (1980), *appeal dismissed*, 450 U.S. 902 (1981); Marcone v. Penthouse International, Ltd. 754 F.2d 1072 (3d Cir.), *cert. denied*, 474 U.S. 864, *rehearing denied*, 474 U.S. 1014 (1985); Barasch v. Soho Weekly News, 208 N.J. Super. 163, 505 A.2d 166 (N.J. App. Div. 1986); Newson v. Henry 443 So.2d 817 (Miss. 1983).

100. The research in preparation for this article included a comprehensive review of defamation cases involving once-prominent plaintiffs. The study included cases in which there was a lapse of time from the period during which the plaintiff was well-known to the date of publication of the alleged defamation. It was not limited to those cases in which the status reversal issue was specifically raised and addressed since one objective was to explore whether, in light of the inflexibility of the *Street* rule, courts have silently developed alternative approaches to the status reversal issue so as not to preclude entirely the possibility that once-public individuals can return to private status. The author acknowledges that not all alleged defamation concerns the plaintiff's activities. Nevertheless, the term "activity" is used here because it best reflects the scenarios in the cases surveyed and is in keeping with the *Gertz* emphasis on conduct as a key factor in determining whether or not the plaintiff is a public figure, *see infra* text accompanying notes 30-33.

and the controversy for which the plaintiff was well-known has ceased to exist by the time the statement is published; 3) *Past Controversy/Continuing Activity*, wherein the allegedly defamatory statement concerns activity continuing from the past into the present while the controversy for which the plaintiff became well-known has ceased by the time of publication; 4) *Continuing Controversy/Current Activity*, in which the alleged defamation consists of a statement concerning the plaintiff's current or contemporaneous activity as opposed to a historical event and the controversy for which the plaintiff became well-known continues as of the time of publication; 5) *Continuing Controversy/Past Activity*, wherein the alleged defamation consists of a statement about the plaintiff's past activity and the controversy for which the plaintiff became well-known continues as of the time of publication and 6) *Continuing Controversy/Continuing Activity*, in which the alleged defamatory statement concerns an activity by the plaintiff that is continuing from the past into the present while the controversy for which the plaintiff became famous also continues as of the time of publication.

Cases classified under categories 1, 3, 4, and 6 involve allegedly defamatory statements typically appearing in news reports on current or contemporaneous events postdating the period during which the plaintiff experienced some measure of fame or notoriety. These cases are particularly interesting analytically because they tend to present a weaker nexus both in terms of time and substance between the plaintiff's previous participation in a public controversy and the content of the allegedly defamatory statement.[101]

Cases in Categories 2 and 5 present a stronger nexus in terms of substance between the alleged defamation and the plaintiff's participation in a public controversy. These cases frequently involve modern day accounts of past events, as did *Street*, with results in accord with *Street*.[102]

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101. For example, suppose the following Category 1 scenario: [i]n 1974, P led a group of fellow apartment tenants in a publicity campaign to call attention to the need for increased police protection and a crack down on drug-related crime in her inner city neighborhood. After conducting numerous press interviews and leading demonstrations in front of city hall, P succeeded in increasing public awareness and support for her cause despite strong opposition from some city officials. Adequate police protection was subsequently instituted in P's neighborhood and the drug problem ceased, thus ending the particular controversy for which P became well known. In 1994, nineteen years after P's last public appearance, a newspaper falsely reports that she was recently seen selling cocaine.

Under the *Gertz* analysis, a controversy existed (adequate police protection in P's neighborhood) and P participated prominently in it but was the defamatory statement germane to P's participation in the controversy? Since the false accusation does not in any way address P's activities twenty years earlier, the answer should be "no"; the cases suggest, however, that some courts would rule in the affirmative.

102. In Stripling v. Literary Guild, 5 Med. L. Rptr, 1958 (W.D. Tex. 1979), Cohn v. National Broadcasting Co. 4 Med. L. Rptr, 2533 (A.D. App.Div. 1979) and Hartnett v. CBS, Inc.

The courts have indeed demonstrated a general unwillingness to accept the argument that public figure status is reversible. Whenever courts ruled that plaintiffs were private figures in cases involving a passage of time, the reason was not that their previously acquired public figure status had faded. Instead, it was that they never became public figures in the first place due to the lack of qualifications required under *Gertz*: The challenged statement did not involve a public controversy[103], or if there was a controversy, the plaintiff did not participate in it in the manner prescribed under *Gertz*,[104] or the defamation was not germane to the plaintiff's participation in a controversy or performance in public office where the plaintiff was a public official.[105] Such results do not mean, however, that the likelihood of escaping public figure status is enhanced much by adopting the argument that the status never attached in the first place. It is impossible to make that or any generalization about the outcomes of the *Gertz* inquiry because courts manipulate the public figure rule variously. As the following discussion illustrates, the problem of inconsistency and uncertainty is common in status determination cases whether or not there is a substantial separation in time between the period of the plaintiff's public activities and the publication of the alleged defamation.

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12 Med. L. Rptr. 1824 (Sup. Ct. Westchester County 1986), for example, the plaintiffs had played prominent roles in the infamous Communist witch hunts of the so-called McCarthy era during the nineteen fifties. All three failed to convince the courts that they had regained private status decades later after media defendants portrayed them in retrospectives of the postwar controversy.

103. *See, e.g.*, Pring v. Penthouse International, Ltd. 7 Med. L. Rptr. 1101, 1103 (D. Wyo. 1981), *rev'd on other grounds* 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983); Rutt v. Bethlehem's Globe Publishing Co., 484 A.2d 72, 81 (Pa. Super. 1984); Phyfer v. Fiona Press 12 Med. L. Rptr. 2211, 2214 (N.D. Miss. 1986).

104. *See* Wilson v. Scripps-Howard Broadcasting Co. 642 F.2d 371, 374 (6th Cir. 1981) *cert. granted*, 454 U.S. 962, *cert. dismissed*, 454 U.S. 1130 (1982).; Dresbach v. Doubleday & Co. 518 F. Supp. 1285, 1294 (D.D.C. 1981); Jones v. Himstead 7 Med. L. Rptr. 2433 (BNA)(Mass. Sup. Ct. Barnstable 1981).

105. *See* Crane v. The Arizona Republic 972 F.2d 1511, 1524-25 (9th Cir. 1992) (declining to treat the plaintiff as a public figure/official for those portions of the challenged article that addressed his activities as a private attorney after his retirement from the Justice Department.); Phyfer v. Fiona Press 12 Med. L. Rptr, 2211, 2213, 2215-16 (N.D. Miss. 1986) (concluding that a nude photograph, accompanied by a sexually suggestive quote, of a model whose published name and identification were similar to that of the plaintiff did not relate to a former alderwoman's public activities.) *Cf.* Naantaanbuu v. Abernathy 816 F. Supp. 218, 225 (S.D.N.Y. 1993). While this case involved a passage of some twenty years between the time of the incident alleged in the defendant's statements and the date of publication of the defendant's book, there is no indication that the plaintiff retreated to private life or relinquished access to media outlets prior to the date of publication. In that sense, the facts of this case are distinguishable from the fading public figure status situation. The plaintiff here acknowledges her public achievements but claims they do not make her a public figure for purposes of this lawsuit. *Id.* at 224-25.

## IV. THE GERTZ THRESHOLD INQUIRY: WAS THE PLAINTIFF REALLY A PUBLIC FIGURE IN THE FIRST PLACE?

The courts apply the public figure calculus with varying degrees of scrutiny, particularly on the fundamental questions of whether there is a controversy, whether the plaintiff participated prominently in it and whether the alleged defamation is germane to the controversy.

### *A. Is There a Controversy?*

Under *Gertz v. Robert Welch, Inc.*, without a controversy in which to participate, one cannot become a limited-purpose public figure.[106] The Supreme Court has not yet defined the term "public controversy", but federal appellate courts generally seem to agree that the term refers to a subject of debate or dispute affecting segments of the general public other than those who directly participate.[107] In *Brewer v. Memphis Publishing Co.*, the Fifth Circuit admitted that it would be hard pressed to find that a romantic relationship involving the plaintiff and Elvis Presley constituted a public controversy.[108] The Brewers' also lacked the pervasive power and influence necessary to be deemed public figures for all purposes.[109] The Fifth Circuit attached little significance to these deficiencies, however, concluding that the Brewers' past fame was sufficient to establish them as limited-purpose public figures.[110] This conclusion represents a significant departure from the Supreme Court's definition of limited-purpose public figures in *Gertz*. There, what matters is not simply that the plaintiff achieved fame, but how he did so, namely, by thrusting himself to the forefront of a particular controversy in order to influence its outcome.[111] By *Gertz* standards, therefore, the Brewers failed both the all-purpose and limited-purpose public figure tests, thus eliminating the need for further analysis on the effect of a time lapse on public figure status. The Brewers should have been ruled private figures.

While the Fifth Circuit was not deterred by the absence of a public controversy in *Brewer*, the Ninth Circuit appeared reluctant to recognize what seemed to be a clear-cut public controversy in

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106. 418 U.S. 323, 345.

107. *See* Waldbaum v. Fairchild Publications, Inc. 627 F.2d 1287, 1296 (D.C. Cir.) *cert. denied*, 449 U.S. 898 (1980); Marcone v. Penthouse International, 754 F.2d 1072, 1083 (3rd Cir. 1985), *cert. denied*, 474 U.S. 864 (1985); Silvester v. ABC, Inc., 839 F.2d 1491, 1494-95 (11th Cir. 1988).

108. 626 F.2d 1238, 1254 (5th Cir. 1980), *cert. denied*, 452 U.S. 962 (1981).

109. *Brewer*, 626 F.2d at 1250.

110. *Id.* at 1255.

111. Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

*Crane v. The Arizona Republic* surrounding a congressional committee investigation of alleged corruption in the United States Department of Justice.[112] Among the allegations being investigated were that the plaintiff, while head of the department's organized crime strike force nine years earlier, had been "soft on crime", and that after retiring to private law practice, he exploited his personal contacts in the agency to protect his clients from prosecution.[113] The defendant obtained the committee's records and published the allegations. Ultimately, the Ninth Circuit decided that the plaintiff was a public figure for purposes of the "soft on crime" statement because it concerned his activities while in public office, but not for purposes of the remaining statements since they pertained to his activities after leaving the department.[114] The court characterized the latter statements as comments concerning the activities of a private lawyer more so than as comments concerning a public controversy.[115]

*B. Did the Plaintiff Participate in the Controversy?*

Participation in a public controversy under *Gertz* entails voluntarily thrusting or injecting oneself to the forefront of the controversy for the purpose of influencing the resolution of the issues involved.[116] Such participation is usually accompanied by relatively easy access to the media to publicize one's views.[117] In *Wolston v. Reader's Digest Association, Inc.*, the Supreme Court ruled that the plaintiff's failure to appear when subpoenaed to testify at a grand jury hearing on Soviet espionage activities did not constitute the requisite participation as the lower courts had concluded.[118] "It would be more accurate," wrote Justice Rehnquist, "to say that petitioner was dragged unwillingly into the controversy."[119] Clearly, the emphasis in *Wolston* was on voluntary action, without which the plaintiff could not have participated in a public controversy. There was no discussion, by the way, of whether Wolston might have been an involuntary public figure for a limited range of issues.

The lower courts have not uniformly adopted the *Wolston* approach, with its emphasis on voluntariness, when confronting the issue of participation in a public controversy. A case in point is

112. Crane v. The Arizona Republic 972 F.2d 1511 (9th Cir. 1992).
113. *Id.* at 1521.
114. *Id.* at 1524-25.
115. *Id.* at 1525.
116. *Gertz*, 418 U.S. at 345.
117. *Id.* at 344.
118. 443 U.S. 164, 167 (1979).
119. *Id.* at 166.

*Clyburn v. News World Communications, Inc.*,[120] the facts of which somewhat parallel those of *Wolston*, although *Clyburn* does not involve the time lapse factor. In *Clyburn*, the federal appeals court for the District of Columbia Circuit found that the owner of a private Washington consulting firm participated in a public controversy over drug activity involving city officials and their friends, generally, because he conducted business with the city and "hobnobbed" with city government officials, and specifically, because he lied when questioned about his girlfriend's fatal drug overdose.[121] Federal and local authorities, as well as the press, wanted to know whether the death was linked to the administration of Mayor Marion Barry and, particularly, who, besides the plaintiff, had been present when the decedent collapsed. John Clyburn replied initially that he had been alone with the decedent but later recanted that statement. The court characterized the fabrication as "a cover-up attempt" which, along with other "conduct that he knew markedly raised the chances that he would become embroiled in a public controversy," barred Clyburn from claiming the same degree of protection for reputation available to private persons under *Gertz*.[122] Aside from the lying, the only instances of conduct to which the court specifically made reference were Clyburn's contractual agreements with the city, his social contacts with city officials and his presence at the scene of his girlfriend's drug overdose.[123]

As for the lying, it seems inconceivable that by avoiding the truth in responding to questions from investigators and the press, Clyburn voluntarily thrust himself to the forefront of a public controversy any more than Wolston did when he avoided appearing before a grand jury investigating Soviet espionage. In neither case did the plaintiff seek public attention in an attempt to influence the resolution of issues. Even if Clyburn's motive was to conceal a connection between the Barry administration and his girlfriend's drug overdose, it is difficult to imagine that his lie would ultimately earn him a position of "special prominence"[124] in the resolution of issues surrounding suspected drug use in District government. Had he held press conferences or distributed news releases in an attempt to quell suspicions on those issues, the result reached might have been more plausible.

The court's reliance on Clyburn's social and business contacts and his presence at the drug overdose scene to establish his partici-

120. 903 F.2d 29 (D.C. Cir. 1990).
121. *Id.* at 33.
122. *Id.*
123. *Id.*
124. *Gertz*, 418 U.S. at 345.

pation in a public controversy suggests a waiver-by-association approach: "[O]ne may hobnob with high officials without becoming a public figure, but one who does so runs the risk that personal tragedies that for less well-connected people would pass unnoticed may place him at the heart of a public controversy."[125] While this approach is reminiscent of *Brewer v. Memphis Publishing Co.*, where the Fifth Circuit based its determination of a plaintiff's public figure status largely on her past association with a famous entertainer,[126] the Supreme Court has never recognized one's association with the "well-connected" or with newsworthy events as participation in a public controversy. In *Time Inc. v. Firestone*, the court declined to impose public figure status on a plaintiff who had married into one of America's most prominent industrial families.[127] In *Wolston v. Reader's Digest Association, Inc.*, the Court similarly refused to find that one associated consanguineously with Soviet spies was a public figure.[128] Furthermore, the D.C. Circuit, in referring to Clyburn's personal tragedy as one incapable of passing unnoticed, apparently ignored the Supreme Court's conclusion in *Wolston* that "[a] private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention."[129] Indeed, even if John Clyburn had engaged in criminal conduct, a conclusion not stated in the opinion, such conduct, under *Wolston*, would not necessarily have amounted to participation in a public controversy sufficient to make him a public figure.[130]

In a more recent case, *Naantaanbuu v. Abernathy*,[131] a federal district court took a decidedly different approach in addressing the participation issue, emphasizing not only the voluntariness of the plaintiff's activities but also the nexus between those activities and the precise controversy involved. The Court declined to impose the waiver-by-association approach on a Memphis civil rights activist who dined with Martin Luther King in her home on the evening before his death and sued an author and publisher for libel twenty-one years later over statements suggesting she and King had an extramarital affair. The court distinguished *Clyburn* and concluded that the plaintiff's encounter with King could "hardly be described as 'hobnobbing'".[132] Adjua Abi Naantaanbuu had, in fact, affirma-

125. *Clyburn*, 903 F.2d at 33.
126. *Brewer*, 626 F.2d at 1257.
127. 424 U.S. 448, 455 (1976).
128. *Wolston*, 443 U.S. at 166.
129. *Id.* at 167.
130. *Id.* at 168.
131. 816 F. Supp. 218 (S.D.N.Y. 1993).
132. *Id.* at 225.

tively sought public attention prior to the book's publication through her civil rights activities and candidacy for elected office. The court did not regard that conduct as participation in the controversy to which the alleged defamation pertained, however. The court defined the controversy addressed in the published statements, rather narrowly, as "the question of the events that took place on the last night of King's life", or, "at its broadest, the question of King's involvement with women outside his marriage".[133] This was not the controversy, the court said, for which Naantaanbuu had sought and gained public attention.[134]

Further examples of a more conservative approach on the issue of the plaintiff's voluntary participation in a public controversy include *Spence v. Flynt*,[135] and *Wilson v. Scripps-Howard Broadcasting Co.*[136] In *Spence*, the Wyoming Supreme Court ruled that a nationally-known lawyer was a private figure because his legal representation of a client involved in the war against pornography did not constitute a thrusting of himself into the debate for *Gertz* purposes.[137] *Wilson*, a passage of time case, involved a cattleman who, while having enjoyed commercial success and media access to promote his business interests in previous years, did not, according to the court, voluntarily inject himself into a subsequent controversy concerning alleged cattle starvation and deaths on his ranch.[138]

### *C. Is the Alleged Defamation Germane to the Controversy?*

*Gertz v. Robert Welch, Inc.* requires courts to examine the plaintiff's "participation in the public controversy *giving rise to the defamation*".[139] The offending statement must relate to the plaintiff's participation in a public controversy. In order to determine this relationship, a court must first define both the controversy and the substance of the alleged defamation and then compare the two. The courts enjoy great latitude in fashioning such definitions. One common practice is to use the subject matter of the alleged defamation as a guide in characterizing the controversy. In *Bell v. Associated Press*, for example, a false news wire service report suggesting criminal misconduct by a professional athlete obviously prompted the court to define the public controversy as "charges of criminal

133. *Id.*
134. *Id.*
135. 816 P.2d 771 (Wyo. 1991).
136. 642 F.2d 371 (6th Cir. 1981), *cert. granted*, 454 U.S. 962, *cert. dismissed*, 454 U.S. 1130 (1982).
137. *Spence*, 816 P.2d at 776.
138. *Wilson*, 642 F.2d at 374.
139. *Gertz*, 418 U.S. at 352 (emphasis added).

misconduct" despite the plaintiff's contention that the statement "bore no relationship to [him] as a professional football player."[140] As the court in *Naantaanbuu v. Abernathy* aptly observed, "the 'controversy' into which a plaintiff has allegedly entered is defined as the event that the defamatory statements describe."[141]

The alleged defamation is more likely to be germane to the public controversy if both are characterized in general rather than specific terms. For example, the Fourth Circuit defined the controversy in *Fitzgerald v. Penthouse International, Ltd.* generally as "the public debate over military applications of trained dolphin technology."[142] The passage in issue was germane to the controversy because, in the broader sense, it concerned one such application -- intelligence. The court ruled, nevertheless, that the passage could be interpreted, more specifically, as an accusation that the plaintiff engaged in espionage in violation of federal law.[143] When thus characterized, the statement appears less related to the general debate over the military use of dolphins.

When the alleged defamation covers more than one subject area, the court may determine that the defamation is germane by first identifying more than one public controversy in which the plaintiff voluntarily participated and then tailoring each controversy to a different subject area. The court in *Contemporary Mission, Inc. v. New York Times Co.*[144] used this approach to determine that of the fourteen statements that a group of Catholic priests claimed were libelous, seven were germane to the religious controversy in which they injected themselves, three pertained solely to the business controversy surrounding them, two were hybrid, concerning both controversies and two were not related to either controversy.

Finally, when the alleged defamation is wholly unrelated to the plaintiff's participation in any public controversy, the court may simply classify the plaintiff as a public figure for all purposes, thus

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140. 584 F. Supp. 128, 131 (D.D.C. 1984).

141. 816 F. Supp. 218, 225 (S.D.N.Y. 1993).

142. 691 F.2d 666, 668 (1982). The alleged defamation occurred in the following passage describing the activities of an expert in the field:

> Fitzgerald continued his own Florida operation. He even made overtures, possibly with CIA and Navy knowledge, to sell dolphin torpedoes or "open-ocean weapons systems" to Mexico, Peru, Colombia, Chile, Argentina, and Brazil. This private merchandising astounded one of Fitzgerald's associates, who observed: "The work in Key West had been top secret, with only a small handful of people in the whole country knowing of its existence, not to mention its purpose." Yet Fitzgerald wanted to make some fast bucks on the side by turning small countries into "instant naval powers." The Pentagon couldn't possibly object for fear of exposing its whole operation.

*Id.* at 670.

143. *Id.*

144. 665 F. Supp. 248, 255 (S.D.N.Y. 1987).

eliminating the need to associate the alleged defamation with his public conduct. The Supreme Court of Wisconsin adopted this approach in *Lewis v. Coursolle Broadcasting of Wisconsin, Inc.*,[145] where a former state legislator sued a broadcasting company for libel because its radio station falsely identified him as the suspect in a widely publicized drug tampering and extortion case involving the manufacturers of the pharmaceutical product Tylenol. The court was not deterred by the fact that the Tylenol scare bore no relationship to the plaintiff's activities in public office prior to his retirement three years earlier.[146] The court deemed him a public figure for all purposes, thus foreclosing the question of whether or not the Tylenol case was germane to his participation in a public controversy.[147]

In sum, the analysis of public figure status acquisition, as derived from *Gertz*, has produced unpredictable results. While formerly well-known plaintiffs may have occasionally succeeded in escaping the actual malice standard, such results have not been consistent. The whole process is, in the words of one court, "much like trying to nail a jellyfish to a wall."[148] Legitimate past public figures should, nevertheless, have the benefit of a rule that extends beyond status acquisition to address the issue of status retention. For reasons explained in Part V, the rule prescribed in *Street v. National Broadcasting Co.* is not satisfactory.

## V. Reexamining The Permanent Status Retention Rule

The authorities traditionally cited in post-*Gertz* libel cases to defeat the argument for public figure status reversal are of questionable precedential value. These authorities include *Sidis v. F-R Publishing Corp.*,[149] *Cohen v. Marx*,[150] *Werner v. Times-Mirror Co.*,[151] and *Rawlins v. Hutchinson Publishing Co.*,[152] all of which concern the right to privacy. In *Sidis*, a former child prodigy and one-time press favorite sought recovery under common law invasion of privacy tort from *New Yorker* magazine because it revealed intimate details of his reclusive life as an adult including some "bizarre" personal habits and propensities.[153] The Second Circuit ac-

145. 377 N.W.2d. 166 (Wis. 1985).
146. While the plaintiff had been convicted of perjury, causing him to surrender his seat in the state assembly, that conviction bore no relationship to the Tylenol case.
147. *Lewis*, 377 N.W.2d at 171.
148. Rosanova v. Playboy Enterprises, 411 F. Supp. 440, 443 (S.D. Ga. 1976).
149. 113 F.2d 806 (2d Cir. 1940), *cert. denied*, 311 U.S. 711 (1940).
150. 211 P.2d 320 (Cal. Dist. Ct. App. 1949).
151. 14 Cal. Rptr. 208 (1961).
152. 543 P.2d 988 (Kan. 1975).
153. *Sidis*, 113 F.2d at 807.

knowledged that the article had invaded the privacy of this "once public character"[154] but found that the plaintiff's claim was not actionable because "his subsequent history . . . was still a matter of public concern" despite his efforts to regain anonymity during the twenty-seven year interim from the time he was famous in 1910 to the date the article was published.[155] The court recognized the continuing newsworthiness of the subject matter of the article as a defense to liability. The court suggested that some revelations of private facts about individuals might be so unwarranted as to outrage the community's notions of decency, but such would not ordinarily be the case when the individual in question is a "public character".[156]

In *Cohen v. Marx*, an ex-prize fighter was no more successful in his attempt to recover damages for invasion of privacy from Groucho Marx after sustaining a jab from the radio comedian's on-air humor.[157] The court noted that the plaintiff had relinquished his right to privacy on matters relating to his former career and "could not, at his will and whim draw himself like a snail into his shell and hold others liable for commenting upon the acts which had taken place when he had voluntarily exposed himself to the public eye."[158]

Likewise, in *Werner v. Times-Mirror Co.*, a former city attorney who figured prominently in a municipal scandal during the nineteen thirties failed in his invasion of privacy claim against a newspaper publisher for its 1958 rehashing of the unpleasant events in his past.[159] The court stated that the "[m]ere passage of time does not preclude publication of incidents of public interest from the life of one formerly in the public eye which are already public property . . . "[160] The California Supreme Court later adopted this rule regarding the effect of passage of time on public figure status in privacy tort.[161]

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154. *Id.*
155. *Id.* at 809.
156. *Id.*
157. 211 P.2d 320 (Cal. Dist. Ct. App. 1949).
158. *Id.* at 321.
159. 14 Cal. Rptr. 208, 216 (1961).
160. *Id.* at 212. The court went on to quote from an article by Dean Prosser on the passage of time issue in privacy tort:

> There can be no doubt that one quite legitimate function of the press is that of educating or reminding the public as to past history, and that the recall of former public figures, the revival of past events that once were news, can properly be a matter of present public interest . . . Such decisions indicate that once a man has become a public figure, or news, he remains a matter of legitimate recall to the public mind to the end of his days.

*Id.* (quoting William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 418.
161. Forsher v. Bugliosi, 608 P.2d 716, 726 (Cal. 1980).

The Kansas Supreme Court ruled similarly in *Rawlins v. Hutchinson Publishing Co.*[162] against a former police officer who claimed a lapse of ten years following his firing amid charges of misconduct had restored him to private status.[163] The court stated that the press was privileged to report the matter truthfully even without being invited by the plaintiff to do so.[164] "Once these facts entered the public domain they remained there."[165]

As *Rawlins* illustrates, the privilege available to defendants in right to privacy actions does not primarily or necessarily rest on the plaintiff's purposeful attempts to attract media and public attention. Instead, it is based on the nature of the subject matter of the statements made by the defendant. From the earliest cases, courts have regarded subject matter characteristics, notably, newsworthiness, public interest, and non-offensiveness, as justification for affording protection to speech over individual privacy interests.[166] More recently, the Supreme Court has added to this list yet another subject matter characteristic, the requirement that the information published be lawfully acquired.[167] So long as a statement satisfies these criteria, its publisher is insulated from liability under the tort of public disclosure of private facts regardless of the plaintiff's status. A rule attaching permanence to public figure status has little significance under these circumstances where the plaintiffs have nothing to gain in the way of available protection by recapturing private status.

In defamation law, by contrast, the plaintiff's status is a controlling factor in determining the measure of reputation protection available to him under *New York Times Co. v. Sullivan* [168] and its progeny, such that public plaintiffs in libel actions have a great deal to gain in recapturing the status of private figures. Status under defamation law is a function not only of the subject matter characteristics of the published statement but also of the plaintiff's conduct. This is especially true in light of the Supreme Court's focus on "voluntariness" in *Wolston v. Reader's Digest Association, Inc.*[169] The contrast in privileges as between defamation and the

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162. *Id.* at 996.
163. 543 P.2d 988 (Kan. 1975).
164. *Id.*
165. *Id.*
166. *See* Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940)); Smith v. Doss 37 So.2d 118 (Ala. 1948); Stryker v. Republic Pictures Corp. 238 P.2d 670 (Cal. App. 2d. 1951); Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976).
167. Florida Star v. B.J.F., 491 U.S. 524, 541 (1989); Smith v. Daily Mail, 443 U.S. 97, 103 (1979).
168. 376 U.S. 254 (1964).
169. 443 U.S. 157 (1979).

public disclosure of private facts tort is particularly well illustrated in those cases where the plaintiff who brings twin claims for defamation and private facts disclosure arising from the same publication succeeds in obtaining a determination of private figure status for defamation purposes but fails in the privacy claim due to newsworthiness.[170] In the tort of public disclosure of private facts, newsworthiness is the cornerstone of privilege; in defamation, newsworthiness has been expressly rejected by the Supreme Court as a determinant of privilege.[171] Principles of privacy tort do not otherwise control in resolving issues in defamation law regarding the scope of protection of the plaintiff's interests. Why should they do so when the issue is whether the passage of time affects public figure status? In defamation law, where constitutional privilege depends heavily on the plaintiff's status, which, in turn, is largely defined by the plaintiff's conduct, a rule against the return to private status, grounded as it is in the privacy defenses of truth, newsworthiness, and non-offensiveness, is alien and inappropriate.

The libel cases traditionally cited to support permanent status retention are suspect. In *Time Inc. v. Johnston*, the Fourth Circuit followed the privacy tort precedent when it held that "[n]o rule of repose exists to inhibit speech relating to the public career of a public figure so long as newsworthiness and public interest attach to events in such public career."[172] *Time, Inc.* is now superseded by *Gertz v. Robert Welch, Inc.*[173] Another oft-cited libel case, *Meeropol v. Nizer*,[174] actually fails to address status retention or reversal at all. In *Meeropol*, the Second Circuit ruled that the adult sons of Ethel and Julius Rosenberg were public figures for purposes of their libel claim against the author and publisher of a book about the trial, conviction and execution of their parents in an infamous Soviet espionage case.[175] The ruling is questionable, however, because, following the executions in 1953, the plaintiffs lived anonymously under the name of their adoptive parents, Meeropol, a name that never appeared in the book the defendant published twenty years later.[176] The questions thus raised are whether the plaintiffs, as Meeropols, were indeed public figures and whether the libel claim should have been dismissed, based not on the plaintiffs' failure to show actual malice but on their failure to show that they

170. *See* Dresbach v. Doubleday & Co. 518 F. Supp. 1285 (1981).
171. *Wolston*, 443 U.S. at 167.
172. 448 F.2d 378, 381 (1971).
173. 418 U.S. 323 (1974).
174. 560 F.2d 1061 (2d Cir. 1977) *cert. denied*, 434 U.S. 1013 (1978).
175. *Meeropol*, 560 F.2d at 1066.
176. *Id.* at 1067-68.

were sufficiently identified in the defendant's book.[177]

All of these defects critically undermine *Brewer* and *Street*, the principal post-*Gertz* authorities cited for rejecting the passage of time rationale in libel cases. For this reason, courts should seriously question the continued viability of the status retention rule.

## VI. An Argument For the Reversal of Public Figure Status

The intent of the author is not to advocate the reversal of public figure status merely to spare legitimate public figures the discomfort of unwanted publicity at the expense of freedom of expression. What is urged, rather, is an approach to classifying once-famous or -infamous plaintiffs that adheres more faithfully to the principles and policies of *Gertz v. Robert Welch, Inc.* For all of its inherent ambiguities and uncertainties, *Gertz* nevertheless remains the principal authority for defining the contours of the modern public figure doctrine in defamation law. Issues concerning the plaintiff's status that are not specifically addressed under *Gertz* should nevertheless be resolved based on *Gertz* principles. Under those principles, the plaintiff's conduct is, in large part, what separates public from private figures. When the conduct ceases, a reevaluation of the plaintiff's status may be warranted to determine whether the *Gertz* imperatives favoring increased protection of reputation for private individuals still apply to the plaintiff. If such individuals no longer enjoy access to the channels of effective communications and hence have no realistic opportunity to counteract false defamatory statements, it makes no difference whether or not they have ever experienced fame. Their situation is no less compelling than that of ordinary private individuals simply because they, at one time, enjoyed some measure of public attention. Their situation may indeed be *more* compelling than that of the ordinary private plaintiff if they are denied the opportunity for effective redress in both the media and the courts. Such plaintiffs deserve at least the same level of protection against harm to reputation that *Gertz* affords private figures. Furthermore, the actual malice standard can impose a particular hardship on the once-public plaintiff when the alleged defamation concerns events of the distant past and the evidence requi-

177. The ambiguity in the *Meeropol* result has been the subject of some criticism. *See* Street v. National Broadcasting Co., 645 F.2d 1227, 1249 (6th Cir.)(Peck, J. dissenting) *cert. granted*, 454 U.S. 815, *cert. dismissed*, 454 U.S. 1095 (1981). Commentators have duly noted the failure of *Meeropol* to address the status retention issue despite having been cited often to support the proposition. *See* Alan Kaminsky, Note, *Defamation Law: Once a Public Figure Always a Public Figure?*, 10 Hofstra L. Rev. 803, 815-16 (1982); Thomas D. Long, Case Comment, *Public Figures and the Passage of Time: Scottsboro Revisited in Street v. National Broadcasting Co.*, 34 Stanford L. Rev. 901, 916, n.93 (1982).

red of the plaintiff is no longer available.[178]

Finally, there are the social costs of a rule that rewards individual leadership, outspokenness, professional accomplishment, political and social activism and the like with permanent impairment of one's ability to obtain the highest level of protection against harm to reputation available constitutionally. The apprehension that merely one past act, neither illegal, immoral nor indiscreet, could result in a loss, forever, of adequate redress for harm to reputation may deter individuals from stepping forward and assuming leadership roles on the important public issues of the day. Significant individual contributions to society could thus be thwarted in what might be described as a reverse chilling effect.

## VII. RECOMMENDATION

The United States Supreme Court should ultimately decide, as it had agreed to do in *Street v. National Broadcasting Co.*, whether public figure status may be extinguished. Until the Court renders a decision in the matter, lower courts should uniformly adopt a two-step inquiry, first concerning the acquisition and, second, the retention of public figure status, in cases where the plaintiff raises the status reversal issue. At the first stage of the inquiry, courts should adhere closely to the requirements and policies set forth in *Gertz v. Robert Welch, Inc.*, notwithstanding its lack of precision, in determining whether public figure status attached to the plaintiff prior to the date on which the challenged statement was published. If such proves to be the case, the court should next determine whether the plaintiff retained the status on that date. It should consider whether the plaintiff has continued to participate prominently in the controversy addressed in the alleged defamation and, in particular, whether he has continued to consent to media interviews and coverage in connection with the controversy. Where there have been media appearances, the court should take into account their dates, frequency and length in terms of broadcast air time or space on the printed page. The more recent, frequent and substantive the plaintiff's public exposure is, the more likely it is that the plaintiff retained public figure status on the date of publication. On the

178. *Street*, 645 F.2d at 1247 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974)). On this point, the dissent in *Street* noted:

> [f]alse reports are protected because they are [under *Gertz*] "inevitable in free debate." The inevitability of *demonstrable* error lessens with the passage of time. Accordingly, when the pressures of contemporaneous reporting subside, the need for the protection of the "malice" standard disappears. A negligence standard is enough.

*Id.*

other hand, affirmative efforts by the plaintiff to regain anonymity, where successful, would support a determination that public figure status no longer existed as of the publication date, particularly where there was a considerable separation in time between the plaintiff's exit from the public arena and the publication of the alleged defamation. Courts should ultimately determine whether the plaintiff is any less deserving of protection from harm to reputation than the private figure who has never participated prominently in public controversies.

## VIII. CONCLUSION

Perhaps the true ex-public figure is actually a hybrid, sharing in common with public figures the experience of having once commanded the public's attention while sharing in common with private figures a greater vulnerability to injury. Unlike the public figure, the hybrid lacks access to channels of communication for counterargument. Unlike the private figure, the hybrid is constitutionally barred from seeking redress in the courts for harm to reputation except under the most demanding standards. *Gertz*, as interpreted over the past two decades, offers no contingency for such a plaintiff. The ex-public figure, in this sense, is a plaintiff without a class.

Once public status acquisition is established, public status retention is likely to be presumed. Yet, this blanket presumption has no place in libel law. Its origins lie elsewhere and are outdated. It violates the principle that underlies the *Gertz* dichotomy by denying non-public plaintiffs the constitutional deference reserved for those who are not public figures. The choice of which existing class best suits the hybrid figure should be based on the policies of *Gertz*: greater protection for those who are more vulnerable and less for those with the power and influence to help themselves. If, in fact, the hybrid has recaptured the attributes of a private figure, the hybrid should be classified accordingly.

Failure to recognize the potential for reversal of public figure status can manifest a lifelong penalty for positive conduct; in itself, it can constitute a disincentive to speech as well as to individual contributions that could very well benefit all of society.