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THE ACCIDENTAL PURIST: RECLAIMING THE
GERTZ ALL PURPOSE PUBLIC FIGURE
DOCTRINE IN THE AGE OF "CELEBRITY
JOURNALISM"

James C. Mitchell*

I. INTRODUCTION

More than a quarter-century has passed since the Supreme Court of
the United States, in Gertz v. Robert Welch, Inc.,1 attempted to resolve
years of uncertainty in its defamation jurisprudence. One of several his-
toric elements of Gertz was its designation of certain libel plaintiffs as
"public figures for all purposes."2 Over the years, this category grew in
haphazard fashion to include not only persons of great influence in public
affairs, but celebrities in the entertainment and sports worlds as well.3

Journalism has undergone profound change since Gertz was decided.
Celebrity coverage is no longer relegated to the inside pages of newspapers
and magazines or the final moments of a newscast.4 The amount of news
media time and space given to celebrities has grown dramatically.5

This Article will argue that current interpretation of the Gertz "all
purpose public figure" rule is unfair to many people considered as celebri-
ties. They were not intended to fall indiscriminately under the Gertz orbit

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Louisville School of Law; B.S. 1988, Regents College, University of the State of New York.
2. Id. at 345.
3. See, e.g., Eastwood v. Nat'l Enquirer, Inc., 123 F.3d 1249 (9th Cir. 1997); Newton v.
NBC, Inc., 930 F.2d 662 (9th Cir. 1990); Carson v. Allied News Co., 529 F.2d 206 (7th Cir.
1976); see also Harry W. Stonecipher & Don Sneed, A Survey of the Professional Person as Libel
Plaintiff: Reexamination of the Public Figure Doctrine, 46 ARK. L. REV. 303, 303-09 (1993).
4. See Rodney A. Smolla, Will Tabloid Journalism Ruin the First Amendment for the Rest of
Us?, 9 DEPAUL-LCA J. ART & ENT. L. 1, 7 (1998) (noting that the "serious side" of traditional
mainstream news is crossing over into a "tabloid world").
5. See id. at 2. ("There is no recognition in tabloid journalism of any dividing line between
'public' and 'private' life. The private lives of celebrities and leaders, indeed, are a primary focus
of attention.").

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of this rule.\(^6\)

The approach suggested here is not a "free pass" for the famous. Many star performers, athletes, and other celebrities quite purposefully make themselves public figures with respect to certain subjects.\(^7\) In other instances, their celebrity touches sufficiently on matters of public importance to justify a high degree of solicitude for the news media.\(^8\) But this Article will suggest that mere fame is not enough to obliterate a celebrity's right to defend their reputations where extremely personal matters are at issue, that the Gertz Court could not have had such a result in mind, and that a modest reappraisal is appropriate.

Part II of this Article explains the dramatic rise in news media attention to celebrities. Part III traces the history of public plaintiff libel rules. Part IV examines the modern application of the all purpose public figure rule to celebrities and suggests that many entertainment and sports personalities were drawn into the all purpose public figure category virtually by accident. Part V proposes a modification of our current understanding of the public figure rules to create a more equitable balance between First Amendment freedoms and the right of all citizens—even celebrities—to protect their reputations.

**II. THE RECENT RISE OF CELEBRITY JOURNALISM**

Advances in technology, occurring simultaneously with new business pressures and changes in audience tastes, have made print and broadcast news content very different than they were in 1974 when *Gertz v. Robert Welch, Inc.*\(^9\) was decided.\(^10\) Modern journalists race through news cycles

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7. See *RESTATEMENT (SECOND) OF TORTS § 652D cmt. e* (1977) (defining "voluntary public figures" as those who place themselves in the "public eye" by actively engaging in public activities or by assuming public roles). "[T]here is a public interest which attaches to people who by their accomplishments, mode of living, professional standing or calling, create a legitimate and widespread attention to their activities." Gary Williams, *"On the QT and Very Hush Hush": A Proposal to Extend California’s Constitutional Right to Privacy to Protect Public Figures from Publication of Confidential Personal Information*, 19 Loy. L.A. ENT. L.J. 337, 347 (1999) (quoting Carlisle v. Fawcett Publ’ns, Inc., 20 Cal. Rptr. 405, 414 (Ct. App. 1962)).

8. See *RESTATEMENT (SECOND) OF TORTS § 652D cmt. f* (defining "involuntary" public figures as those who have not sought publicity or have not consented to it, but have nonetheless become a subject of public interest by virtue of their involvement with newsworthy events or people); see also Williams, *supra* note 7, at 348 (noting that a person can become an involuntary public figure by mere relation to an established "public" figure).


10. See Smolla, *supra* note 4, at 7–10 (hypothesizing that more "serious" news organizations have become "tabloidy" based on three factors: competitive pressures; changing cultural norms; and the proliferation of the media).
of hours, not days. Only a few years ago, newspaper proprietors dreaded being "scooped" by the more immediate medium of television—now television fears being beaten by twenty-four-hour cable channels, the Internet, and even wireless text messaging. Today's news has become, according to a former columnist of The New York Times, "a matter of star-gazing." Another journalist disapproved of the media as "runny with the virus of celebrity." The former CBS News anchor Walter Cronkite once decried tabloid shows as "travesties of genuine news presentations." Now, however, it is increasingly difficult to tell the difference. Although so-called tabloid media have covered some important stories and mainstream media occasionally have toppled into tabloid territory, there can be little doubt today that the two have converged.

Celebrity coverage is now a mainstay of the mainstream. The editor of the National Enquirer reportedly hung several magazine covers on his wall: Time trumpeted a story on UFOs; Newsweek pictured a gay musician and her lover planning a family; the Enquirer itself featured photos


12. See, e.g., Erin St. John Kelly, You Won't Believe This, but Marcia Brady Is in Prada, N.Y. Times, Aug. 30, 2001, at G3. Enrolled members of a wireless text messaging service, NYC Celeb Sightings, call in news of a celebrity in the area. Id. The news is then transmitted to cell phones and pagers of fellow subscribers, "allowing them to gawk vicariously." Id.


16. See Smolla, supra note 4, at 6-7; see also Tom Rosenstiell, U.S. Press: Paying for Its Sins, Wash. Post, Sept. 14, 1997, at C3 ("Instead of distinguishing ourselves from tabloids, and from pseudo news programs like 'Hard Copy' or from Web gossip mongers like Matt Drudge, we are starting to resemble them.").

17. See, e.g., Rosenstiell, supra note 16. Although this Article discusses only United States law, the tabloid phenomenon is international. Researchers at Westminster University in the United Kingdom reported that tabloid material—crime, consumer, and show business news—rose sharply on newscasts of the British Broadcasting Corporation and the ITV network. Matt Wells, 'Tabloid Shift' in TV News, Guardian (July 10, 2000), at http://www.guardian.co.uk/Distribution/RedirectArtifact/0,4678,0-341606,00.html.


19. Id. (detailing the events surrounding Melissa Ethridge).
of celebrity tragedy victims.\textsuperscript{20} The collage was entitled, “Which One Is the Tabloid?”\textsuperscript{21}

Many journalism observers believe that mainstream media’s embrace of tabloid values has been so complete that the original tabloids cannot compete.\textsuperscript{22} “The advent of 24-hour news networks, talk TV that blurs the line between truth and conjecture, entertainment news shows and the mainstream media’s growing appetite for sensational stories have eaten away at the tabs’ once-plentiful readership . . . .”\textsuperscript{23}

Celebrities often feel violated by coverage of their personal affairs.\textsuperscript{24} They consider it “the prose version of the strip search.”\textsuperscript{25} Many entertainment and sports figures likely would agree with the magazine writer who observed, “Journalism today . . . has become such an odd, arrogant animal [that] it no longer plays by any recognizable rules.”\textsuperscript{26}

When stars feel obliged to sue for libel, though, they find themselves included in the heavily-burdened category of public figure plaintiffs.\textsuperscript{27} As such, they have only a modest chance of surviving a summary judgment motion, let alone prevailing on the merits.\textsuperscript{28}

Perhaps even more significant—if less conspicuous in case reporters and law journals—is the celebrities’ common belief that recourse in court is not worth pursuing because the legal burden is too great.\textsuperscript{29} “There was a feeling that if you were a star, you had to take that kind of abuse—that it came with the territory,” according to a lawyer who frequently represents Hollywood personalities.\textsuperscript{30} Some celebrities feel that no remedy for media

\begin{enumerate}
\item \textit{Id.} (depicting celebrities such as Bill Cosby, whose son was murdered).
\item \textit{Id.}
\item See \textit{id.} at 70–71.
\item Darcie Lunsford, \textit{Taming the Tabloids}, \textit{AM. JOURNALISM REV.}, Sept. 2000, at 52, 55.
\item Gabler, \textit{supra} note 24.
\item See Beam, \textit{supra} note 24, at 60–61.
\item \textit{Id.} at 56 (quoting attorney Barry Langberg, who represented Carol Burnett in her libel
excess exists, short of punching their tormentors in the nose. Consequently, many libel suits may be devoutly wished, but never filed.

III. PUBLIC FIGURE PLAINTIFF RULES

Impliedly, public and private plaintiffs had identical status prior to the Supreme Court’s decision in *New York Times Co. v. Sullivan.* The common law privilege of fair comment protected some remarks and reports about public officials, civic leaders, persons taking positions on matters of public concern, and “those who offer their creations for public approval,” including artists, performers, and athletes. Some courts confined the privilege to statements of opinion, but others included misstatements of fact.

In 1964, the Supreme Court began to constitutionalize libel law in *New York Times,* holding that the First Amendment required a public official suing for defamation over a statement concerning his official conduct to prove by clear and convincing evidence that the defendant made the statement with “actual malice.” The Court defined actual malice as “knowledge that [the statement] was false or [made] with reckless disregard of whether it was false or not.”

The plaintiff in *New York Times* was an elected city commissioner with responsibility for, among other things, police and fire departments. The allegedly defamatory statements, in his view, concerned his official conduct. Sullivan thus was the perfect public plaintiff to face heavy bur-

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31. See Ann W. O’Neill, *High Court Won’t Provide Another Sequel to Baldwin Saga,* L.A. TIMES, June 18, 2000, at B1. The actor Alec Baldwin hit a photographer waiting for Baldwin and his wife, the actress Kim Basinger, to bring their newborn daughter home from the hospital. *Id.* Baldwin was acquitted of a misdemeanor battery charge and, in a civil trial, ordered to pay the photographer $4,500 for lost wages and medical bills. *Id.* The photographer’s appeal was denied. Zanger v. Baldwin, No. 5086796, 2000 Cal. LEXIS 4912 (June 14, 2000).


34. 1 ARTHUR B. HANSON, LIBEL AND RELATED TORTS ¶ 138 (1969).

35. Coleman v. MacLennan, 98 P. 281, 286 (Kan. 1908). The plaintiff in *Coleman* was a candidate for public office, but the court stated that its reasoning applied to “a great variety of subjects and include[d] matters of public concern, public men, and candidates for office.” *Id.* at 285.

36. See *id.* at 279-80.

37. *Id.* at 280.

38. *Id.* at 256.

39. See *id.* at 258. Although Sullivan was not named or identified by his government position in the advertisement at issue, he argued that false allegations of police misconduct defamed
dens in a libel suit, for to write about his official conduct was to write about government. The Court even likened defamation lawsuits by public figures to charges of seditious libel.

Three years later, the Court expanded the actual malice rule to some non-official libel plaintiffs. Deciding Curtis Publishing Co. v. Butts and Associated Press v. Walker together, the Court found that the plaintiffs Butts and Walker enjoyed the special privilege of high public interest and the ability to refute defamatory allegations. Therefore, they should be considered public figures.

Butts was the athletic director of the University of Georgia. As such, he might logically have borne the public official’s burden, because the story—an allegation of cheating—concerned his conduct in his previous position as head football coach at the public university. However, his athletic director salary was paid by a private corporation, not by the State. Walker served in the United States Army. Although he no longer served as a public official, he remained an active and frequently controversial participant in public affairs.

The Court found that both plaintiffs were public figures. There was little doubt that by taking a prominent role in the matter leading to the claimed defamation—a contentious demonstration against desegregation at the University of Mississippi—General Walker had thrust “his personality into the ‘vortex’ of an important public controversy . . .

Butts’ status was a different matter. As noted above, he was not on the State payroll, although he was the functional equivalent of a public official. He had been a well-known and respected football coach at Georgia before assuming the athletic directorship. “[He] may have attained [his

40. See id. at 282–83.
42. 388 U.S. 130 (1967).
43. Id. at 154–55.
44. See id.
45. Id. at 135.
46. See id. at 135–36.
47. Id. at 135.
49. See id.
50. Id. at 154–55.
51. Id. at 155.
52. Id. at 135, 154.
53. Id. at 135–36.
public figure] status by position alone."  

Like Walker, Butts "commanded sufficient continuing public interest and had sufficient access to the means of counterargument" to expose the fallacies of defamatory allegations.  

Justice Harlan, writing for a four-member plurality, would have imposed a higher burden on such plaintiffs, but not as high as the burden required by New York Times.  

Under Harlan's formulation, a non-official public figure could "recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."  

However, examination of the Butts public figure concept must begin not with the plurality, but with the concurring opinion of Chief Justice Warren.  

He provided the lasting rationale for expanding the New York Times rule to certain non-official plaintiffs:  

Increasingly in this country, the distinctions between governmental and private sectors are blurred. Since the depression of the 1930's and World War II there has been a rapid fusion of economic and political power, a merging of science, industry, and government, and a high degree of interaction between the intellectual, governmental, and business worlds. Depression, war, international tensions, national and international markets, and the surging growth of science and technology have precipitated national and international problems that demand national and international solutions. While these trends and events have occasioned a consolidation of governmental power, power has also become much more organized in what we have commonly considered to be the private sector. In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately in-

55. Id. at 155.  
56. Id. (citing Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., dissenting)).  
57. See id.  
58. Id. at 155.  
59. Id. at 162.
volved in the resolution of important public questions or, by rea-
son of their fame, shape events in areas of concern to society at
large. 60

Although the Butts decision produced several opinions, all the Just-
tices agreed with the central proposition: the First Amendment requires
some limits on the use of state libel laws by public figures, as well as pub-
lic officials. 61 The status of the plaintiff continued to determine whether or
not actual malice must be proved. 62

A different threshold emerged briefly in Rosenbloom v. Metromedia,
Inc. 63 As in Butts, the Court's ambivalence was evident. 64 A plurality of
only three justices abandoned reliance on the public-private status of the
plaintiff. 65 Instead, the actual malice requirement applied if the disputed
statement involved a matter of general or public concern, regardless of the
plaintiff's status. 66 "The public's primary interest is in the event," Justice
Brennan wrote for the plurality. 67 The public focus "is on the conduct of
the participant and the content, effect, and significance of the conduct, not
the participant's prior anonymity or notoriety." 68

Justice Marshall, joined in dissent by Justice Stewart, feared that "all
human events are arguably within the area of 'public or general con-
cern.' " 69 Marshall also predicted that the plurality's approach would re-
quire the Supreme Court to assume "constant and continuing supervision of
defamation litigation . . .") 70 Justice Harlan, recalling the Warren concur-
rence in Butts, suggested that libelous depictions of private persons are not
likely to involve matters of public significance. 71

61. Id. at 162.
62. See id. at 154–55; see also Jerome A. Barron & C. Thomas Dienes, Handbook of Free Speech and Free Press 231–35 (1979) (stating that Chief Justice Warren's concurring opinion—that the New York Times actual malice standard should apply to public figures—has subsequently been cited as the authority for that proposition).
63. 403 U.S. 29 (1971).
64. See id. at 30 (indicating a three-justice plurality with concurring and dissenting opinions filed).
65. See id. at 44. Chief Justice Burger and Justice Blackmun joined Justice Brennan in the plurality opinion. Id. Justices Black and White filed opinions concurring in the judgment. Id. Justice Douglas, who might have been expected to join Justice Black in his usual view of an abso-
lute privilege against libel judgments, did not participate in the decision. Id.
66. Id. at 44–45, 52 n.18.
67. Id. at 43.
68. Id.
70. Id. at 81.
71. Id. at 71 (Harlan, J., dissenting). The author respectfully suggests that Justice Harlan
The uncertain "public concern" approach survived only two years.\textsuperscript{72} Then came \textit{Gertz v. Robert Welch, Inc.}\textsuperscript{73} Rejecting the Rosenbloom rationale, the Court returned to the public-private plaintiff approach.\textsuperscript{74} Public plaintiffs henceforth would include public officials, other persons who voluntarily play prominent roles in public controversies,\textsuperscript{75} and all purpose public figures.\textsuperscript{76}

Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More 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. In either event, they invite attention and comment.\textsuperscript{77}

Justice Powell, writing for the majority, suggested restraint in declaring anyone to be an all purpose public figure.\textsuperscript{78} "Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society," Powell declared, "an individual should not be deemed a public personality for all aspects of his life."\textsuperscript{79} Powell's view was consistent with Warren's public figure formulation in \textit{Butts}, which envisioned some important contribution to the conduct of public affairs; the all purpose public figure must be involved in resolution of public questions or must shape events that concern society.\textsuperscript{80}

\section*{IV. APPLICATION OF THE ALL PURPOSE PUBLIC FIGURE RULE}

Determination of the libel plaintiff's public or private status often decides the case itself.\textsuperscript{81} The Supreme Court has ruled that courts must grant
summary judgment to defamation defendants unless a public official or public figure plaintiff can show readiness to offer clear and convincing evidence of actual malice.\textsuperscript{82} Lower courts take this direction seriously: Approximately eighty-five percent of all libel suits brought by public official and public figure plaintiffs are dismissed with summary judgment.\textsuperscript{83}

It is now universally understood that certain celebrities—superstars and even lesser lights—are considered all purpose public figures.\textsuperscript{84} "Nothing changes their status. They are recognized by substantial segments of the mass audience . . . They include the stars of stage and screen, the great athletes of our time, the prize winners, the creators of our fads and fashions, the great corporations, and the movers and shakers."\textsuperscript{85}

Thus, Johnny Carson, a hugely successful entertainer who hosted "The Tonight Show" on the NBC television network for thirty years, was considered to be an all purpose public figure.\textsuperscript{86} Wayne Newton, a singer and actor best known for his enduring popularity in Las Vegas showrooms,\textsuperscript{87} and the comedienne and actress Carol Burnett\textsuperscript{88} have borne the same burden.\textsuperscript{89} So have the noted writer and former television host William F. Buckley, Jr.\textsuperscript{90} and the film actor Clint Eastwood.\textsuperscript{91}

Eastwood, a "mega-star"\textsuperscript{92} by any standard, made himself a public official for a time by serving in the elective office of mayor of Carmel, California.\textsuperscript{93} Under \textit{New York Times Co. v. Sullivan},\textsuperscript{94} he may be considered a public official with respect to statements concerning his official conduct. He has remained active in the political and economic life of the Carmel

\begin{footnotes}
\footnote{83. New LDRC Study, \textit{supra} note 27.}
\footnote{85. DONALD M. GILLMOR, ET AL., \textit{Fundamentals of Mass Communication Law} 58 (1996).}
\footnote{86. Carson v. Allied News Co., 529 F.2d 206, 210 (7th Cir. 1976).}
\footnote{87. See Newton v. NBC, Inc., 930 F.2d 662, 666 (9th Cir. 1990).}
\footnote{88. See Beam, \textit{supra} note 24, at 56.}
\footnote{89. \textit{Newton}, 930 F.2d at 668; see also Burnett v. Nat’l Enquirer, Inc., 193 Cal. Rptr. 206, 216 (Ct. App. 1983).}
\footnote{90. Buckley v. Littell, 539 F.2d 882, 884 (2d Cir. 1976).}
\footnote{91. Eastwood v. Nat’l Enquirer, Inc., 123 F.3d 1249, 1250–51 (9th Cir. 1997).}
\footnote{92. \textit{Id.} at 1254 (Judge Koziński, in his opinion for the court of appeals, used the term “litigious mega-star” to describe Eastwood.).}
\footnote{93. See Mark A. Stein, \textit{Eastwood Scores Easy Win in Carmel Mayor’s Election}, L.A. TIMES (Late Edition), Apr. 9, 1986, at 3.}
\footnote{94. 376 U.S. 254 (1964).}
\end{footnotes}
Although he is an all purpose public figure under current reasoning, under *Gertz v. Robert Welch, Inc.*, he surely could be a limited public figure for those matters in which he has voluntarily assumed a prominent role.

Buckley, as a political columnist and commentator, has thrust himself to the forefront of hundreds of public controversies. He would logically be a limited public figure on those many occasions. Such a prolific purveyor of discourse on public issues might even fit Chief Justice Warren's description of a person who, "by reason of [his] fame, shape[s] events in areas of concern to society at large."

One has difficulty however, understanding how Carson, Burnett, or Newton can be said to have shaped events or played a sufficiently "influential role in ordering society" to qualify for all purpose public figure status. A colorable argument can be made that Newton, by applying for ownership of a Las Vegas hotel and its gambling license, thrust himself to the forefront of an important public issue in that community. However, this particular act hardly makes him a "public personality for all aspects of his life."

And what of Carson's wife, who acquired public figure status entirely by her marriage? Or, sillier still, a man's wife once had a romantic relationship with Elvis Presley—Presley's public figure status was imputed to her, which in turn was imputed to her husband!

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95. See, e.g., Jesus Sanchez, *Star Studded Group to Buy Pebble Beach*, L.A. TIMES, June 18, 1999, at C2 (Eastwood, the golfer Arnold Palmer, and other investors bought the Pebble Beach golf course, a Monterey Peninsula landmark, in 1999.).
97. See id.
98. *Buckley*, 539 F.2d at 885–86.
99. *But see id.* (The court nevertheless found him a public figure for all purposes.).
101. *Id.; see also Gertz*, 418 U.S. at 345.
102. *See Gertz*, 418 U.S. at 345, 351–52 (discussing both all purpose and limited public figure status).
103. *See Newton*, 930 F.2d at 666.
105. *Carson*, 529 F.2d at 210 (Joanna Holland married Carson subsequent to the filing of his action against Allied News.).
106. *Id.* ("[O]ne can assume that the wife of a public figure such as Carson more or less automatically becomes at least a part-time public figure herself.").
107. Brewer v. Memphis Publ'g Co., 626 F.2d 1238, 1257–58 (5th Cir. 1980). Anita Brewer was a singer and entertainer in her own right; her husband was well-known as a football player at the University of Mississippi and later as a businessman and failed candidate for the Mississippi House of Representatives. *Id.* at 1248–49. None of his activities related to the statements at issue in the defamation lawsuit, which concerned Mrs. Brewer's former relationship
V. Pervasive Power and Influence?

How did public figure classification reach this point? One looks in vain for references in *Curtis Publishing Co. v. Butts*108 and *Gertz v. Robert Welch, Inc.*109 to television talkers, casino crooners, and Elvis exes.110 Since *Gertz*, the Supreme Court has acknowledged unspecified public figure status where the parties so stipulated.111 The Court’s pre-*Gertz* reference to Wally Butts—that he “may have attained that status by position alone” in contrast to General Walker’s purposeful activity112—is sometimes used as an example of the category.113 It is important to remember, however, that Butts’s position was virtually official and that the defamatory statement at issue concerned his conduct in that capacity.114

Perhaps the confusion began with the case of Orlando Cepeda, a star baseball player for the San Francisco Giants.115 Cepeda sued a media company that published criticism of his ability and questioned his future with the team.116 The defendant won summary judgment at the initial trial because the disputed statement was not libelous per se.117 The appeals court, however, reversed the summary judgment decision and the case was tried on the merits.118 These developments occurred before *Butts* was decided, so Cepeda’s claim was to have been tried, and the appellate review considered, under traditional libel law.119

with Presley. *Id.* at 1257–58.
110. See generally *Butts*, 388 U.S. at 130; *Gertz*, 418 U.S. at 323.
111. See, e.g., Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 57 & n.5 (1988). “Respondent is the host of a nationally syndicated television show and was the founder and president of a political organization formerly known as the Moral Majority. He is also the founder of Liberty University in Lynchburg, Virginia, and is the author of several books and publications.” *Id.* at 57 n.5 (citing *WHO’S WHO IN AMERICA* 849 (44th ed. 1986–1987)). The author submits Reverend Falwell could have been a limited public figure with respect to moral issues because many of his public comments concerned moral behavior. *Id.* at 48–49. His morality was lampooned in the parody leading to his libel and emotional distress complaints. *Id.* In any event, his all purpose public figure status attached not simply because of his fame, but because of his considerable involvement and national prominence in public discussion of morality and politics. See *id.* at 57 & n.5.
113. See, e.g., *Carson v. Allied News Co.*, 529 F.2d 206, 209 (7th Cir. 1976).
114. See *Butts*, 388 U.S. at 135–36.
117. *Id.* at 871.
118. *Id.* at 873.
119. See *Cepeda v. Cowles Magazines & Broad., Inc.*, 392 F.2d 417, 420 (9th Cir. 1968).
By the time trial began on the merits, the Butts decision had been published. The court of appeals expansively affirmed the trial judge’s determination that Orlando Cepeda was a public figure:

"Public figures" are those persons who, though not public officials, are "involved in issues in which the public has a justified and important interest." Such figures are, of course, numerous and include artists, athletes, business people, dilettantes, anyone who is famous or infamous because of who he is or what he has done.

The appellate panel apparently had little guidance in making this pronouncement, for there was no citation or other support. The court might have jumped too quickly at the Butts reference to Spahn v. Julian Messner, Inc. a case involving another legendary baseball player, Warren Spahn. The New York Court of Appeals had declared that Spahn "is a public personality and that, insofar as his professional career is involved, he is substantially without a right to privacy." However, the Supreme Court in Butts, citing Spahn, noted that Wally Butts and General Walker both "commanded a substantial amount of independent public interest at the time of the publications," thus both would be "labeled 'public figures' under ordinary tort rules."

Under Spahn, Cepeda would not have been a public figure for all elements of his life; however, under Butts, no such distinction was made. With respect to Cepeda, the distinction would not have made a difference because his libel complaint concerned not a purely personal matter, but the very public subject that made him a public figure—professional baseball.

A second and more lasting expansion of the public figure rule arrived in Waldbaum v. Fairchild Publications, Inc. Waldbaum, the head of a large retail services cooperative, sued Fairchild for defaming him in a re-

120. Id.
121. Id. at 419.
122. See id.
123. Id. at 418–20; see also Butts, 388 U.S. at 154–55.
125. Id. at 544.
126. Id. at 545 (emphasis added).
128. See Spahn, 221 N.E.2d at 545.
131. 627 F.2d 1287 (D.C. Cir. 1980).
port that the cooperative was losing money. Fairchild argued that it was entitled to summary judgment because Waldbaum was a public figure and could not prove actual malice as required of such a plaintiff as established in *Gertz*.\(^\text{133}\)

Although the district court found that Waldbaum was a limited public figure, not an all purpose public figure,\(^\text{134}\) the court of appeals felt obliged to define the latter category also.\(^\text{135}\) According to the court, "Unfortunately, the Supreme Court has not yet fleshed out the skeletal descriptions of public figures and private persons enunciated in *Gertz*."\(^\text{136}\) Noting that an all purpose public figure must have "assumed a 'role of especial prominence in the affairs of society,'"\(^\text{137}\) the court of appeals declared that a "general public figure is a well-known 'celebrity,' his name a 'household word.'"\(^\text{138}\)

The court appeared to base this view on the presumption that celebrities have access to the media if they are defamed.\(^\text{139}\) The court reasoned that the "public's proven preoccupation" with the celebrity indicated that the media would happily cover a celebrity's response to a defamatory falsehood.\(^\text{140}\) Celebrities have "assumed the risk" that public exposure might lead to misstatements about them; the fame that brings many benefits may also generate adverse scrutiny.\(^\text{141}\)

This reasoning has a certain lazy charm. If people can't take the heat, it suggests, they should stay out of the spotlight. However, by making people public figures for all purposes, the *Waldbaum* approach forces celebrities into any spotlight, shone into the most intimate areas, not just the cleansing light of useful information on important public matters.\(^\text{142}\)

The court appeared to recognize this problem, but ignored it in pursuit of expansive dicta.\(^\text{143}\) Celebrities' "renouncement of anonymity or tolerance of publicity unavoidably carries with it the possibility that the press, in fulfilling its role of *reporting and critiquing matters of public concern*, may

\(^{132}\) *Id.* at 1290.

\(^{133}\) See *Gertz*, 418 U.S. at 342.

\(^{134}\) *Waldbaum*, 627 F.2d at 1291.

\(^{135}\) *Id.* at 1292–98.

\(^{136}\) *Id.* at 1292.

\(^{137}\) *Id.* at 1294 (quoting Time Inc. v. Firestone, 424 U.S. 448, 453 (1976)).

\(^{138}\) *Id.*

\(^{139}\) *Id.*

\(^{140}\) *Waldbaum*, 627 F.2d at 1294.

\(^{141}\) *Id.*

\(^{142}\) See *id*.

\(^{143}\) See *id.* at 1294–95.
investigate their talents, character, and motives.\textsuperscript{144}

Read logically, this passage suggests that the court was referring to character, talent, and motives relevant to matters of public concern. As the all purpose public figure has evolved, however, anything about a celebrity’s life—despite its traditionally private subject matter—has become fair game.\textsuperscript{145}

Such change may be the legacy of Rosenbloom v. Metromedia, Inc.\textsuperscript{146} The Supreme Court made clear in Gertz that it was abandoning the public interest criterion emphasized by Rosenbloom, instead returning to plaintiff-based standards.\textsuperscript{147} The Gertz court found that the Rosenbloom “approach would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable.”\textsuperscript{148} It was easier, therefore, to categorize plaintiffs and apply the appropriate standard of fault.\textsuperscript{149}

This perhaps explains why some courts, overreacting to the repudiation of Rosenbloom, have abandoned the principle that underlies First Amendment protection—facilitation of debate on public issues.\textsuperscript{150} In following the Gertz rule, courts have focused almost entirely on one half of the all purpose public figure test, while ignoring the other. Fame is not enough.\textsuperscript{151} The well-known plaintiff must also have “pervasive involvement in the affairs of society” to be declared a public figure for all purposes.\textsuperscript{152}

\section*{VI. RECALIBRATING THE PUBLIC FIGURE DETERMINATION}

How, then, can the rights of famous people be more appropriately reconciled with the need for uninhibited discussion of public issues? The author proposes using a two-part analysis to determine whether or not a celebrity should bear the heavy burden contemplated by Curtis Publishing Co. v. Butts\textsuperscript{153} and Gertz v. Robert Welch, Inc.\textsuperscript{154}

\textsuperscript{144} Id. at 1294 (emphasis added).
\textsuperscript{145} See, e.g., Carson, 529 F.2d at 206 (involving Carson's marriage to Joanna Holland).
\textsuperscript{146} 403 U.S. 29 (1971).
\textsuperscript{147} Gertz, 418 U.S. at 345-48.
\textsuperscript{148} Id. at 343.
\textsuperscript{149} See \textit{id.} at 343–44; see also Wolston v. Reader’s Digest Ass’n., 443 U.S. 157, 167 (1979) (holding that “[a] libel defendant must show more than mere newsworthiness . . . .”).
\textsuperscript{151} See Gertz, 418 U.S. at 352.
\textsuperscript{152} Id.
\textsuperscript{153} 388 U.S. 130 (1967).
\textsuperscript{154} 418 U.S. 323 (1974).
First, we should ask whether or not the person has such pervasive power and influence—not merely fame—in the affairs of the community to be considered an all purpose public figure. If the answer is no, the inquiry ends. The person is not an all purpose public figure by the simple, inclusive definition of Gertz: one who has "general fame or notoriety in the community, and pervasive involvement in the affairs of society." An- other kind of analysis presumably would begin, aimed at determining whether that person is a limited public figure with respect to the alleged defamatory statement at issue.

If the answer is yes, simply proceed to the second question: does the allegedly defamatory statement bear a sufficient connection to the famous person's pervasive influence? If so, the plaintiff would be required to prove actual malice. If not—if the matter is strictly personal and unrelated to the source of the plaintiff's influence—the plaintiff would not be required to prove actual malice. Under the constitutional rule prohibiting "li- ability without fault," such a plaintiff would presumably be required to prove negligence.

This inquiry, one must acknowledge immediately, seems contradictory to the very notion of an all purpose public figure who bears this heavy burden when seeking redress for any defamatory statement. However, it is not contradictory. The language of Gertz itself is much more precise than its subsequent interpretations by lower courts: "Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life.

The Court's caution was well-grounded in its earlier actual malice cases. Even public officials were not assumed to have opened their entire lives to the risk of defamatory falsehood. In New York Times Co. v. Sullivan, the constitutional protection was extended only to statements about the plaintiff's official conduct. A subsequent decision made clear that other defamatory falsehoods about a public official were entitled to New York Times protection if they "touch on an official's fitness for of-
Thus, reports on personal characteristics of dishonesty, malfeasance, or improper motivation would still be afforded protection as long as the nexus with official conduct was established.\(^{165}\)

For non-official all purpose public figures, oddly, the burden's boundaries are more loosely set.\(^{166}\) Under current interpretations of *Gertz*, anything goes if the plaintiff is an all purpose public figure.\(^{167}\) In theory at least, the President of the United States must prove actual malice only if the defamatory statement concerns his official conduct or touches on his fitness for office; a film star or a basketball hero must prove actual malice even if the defamatory statement has nothing to do with movies or sports.\(^{168}\) This seems a strange result indeed for a fault rule that was conceived to protect "uninhibited, robust, and wide-open" debate on public affairs and government.\(^{169}\)

We must also recognize the privacy paradox. Society continues to impose limits on publication of material of no public concern, even if the material is true, without necessarily requiring a high level of defendant fault.\(^{170}\) More than four-fifths of the states and the District of Columbia acknowledge the tort of public disclosure of private facts.\(^{171}\) Liability is subject to constitutional limitations\(^{172}\) and to a comprehensive defense of newsworthiness,\(^{173}\) but the tort's viability indicates a public view that some things simply should not be publicized against the subject's will.\(^{174}\) Thus we have an absurd situation in which plaintiffs can have relief for publication of *truthful* statements about their most intimate affairs, but face much greater difficulty winning damages for a *false* statement about the same matter.\(^{175}\)

Professor Rodney A. Smolla, discussing privacy, has suggested some subjects that may be considered "quintessentially intimate" material about

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165. Id.
166. See *Carson*, 529 F.2d at 208–09.
167. See id.
168. As a practical matter, of course, a modern President of the United States is likely to be such a celebrity—a household name—that he or she would also be an all purpose public figure under the current rules. See *discussion supra* Part IV.
170. See *TEDFORD*, supra note 84, at 104–05; see generally *PEMBER*, supra note 84, at 223–24.
171. See *PEMBER*, supra note 84, at 223–24.
172. See, e.g., *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975) (finding no liability for publishing truthful information lawfully obtained from judicial records open to public inspection).
173. See *RESTATEMENT (SECOND) OF TORTS* § 652D cmt. h.
174. See *TEDFORD*, supra note 84, at 104–05.
175. See id.
an individual, including mental and emotional condition, physical health, love and sexual relationships, family relationships, victimization (including whether an individual has been the victim of violent or sexual assault), and financial matters. In Professor Smolla's analysis, information may be deemed private by considering its "intrinsic intimacy," the "extrinsic offensiveness" of disclosing it, and the extent to which the information has already been disseminated.

Similarly, Professor Gary Williams has suggested that physical and mental condition, financial affairs, or sexual and other personal relationships are among those subjects that even a public figure should generally be allowed to keep private. Professor Williams notes that California courts have found that even public figures retain some privacy rights. Such matters surely are among "the sacred precincts of private and domestic life" that Samuel D. Warren and Louis D. Brandeis envisioned in their historic call for recognition of a right to privacy.

These views are consistent with the Restatement (Second) of Torts with respect to defining a zone of privacy:

The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.

The Restatement further concludes that some "reasonable proportion is also to be maintained between the event or activity that makes the individual a public figure and the private facts to which publicity is given." A similar common sense approach to all purpose public figure defamation would be perfectly symmetrical with the public official standard, for it would impose the higher fault burden only when the defamatory

176. RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 128 (1992). Citing Professor Smolla's list of intimate subjects does not imply that he would endorse the views advanced in this Article. Indeed, Professor Smolla believes that the balance of public figures' and publishers' interests must be tipped in favor of the publishers because making logically principled judgments about newsworthiness is so difficult where public figures are involved. Id. at 125-26.

177. Id. at 127.

178. Williams, supra note 7, at 352-53 (1999). The author does not intend to impute his views on this topic to Professor Williams.

179. Id. at 352 & n.107 (citing Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762, 773 (Ct. App. 1983)).


181. RESTATEMENT (SECOND) OF TORTS § 652D cmt. h.

182. Id.
statement touches on the public figure's equivalent of official conduct, i.e., the matter of public interest that has made the plaintiff a public figure.

An examination of all purpose public figure cases will illustrate the impact and limits of the Gertz recalibration advanced in the beginning of this Part. Under the suggested two-part test, all purpose public figure plaintiffs might have prevailed in some cases, but not all.

Orlando Cepeda, the baseball hero, would not have to prove actual malice because he was not pervasively involved in the affairs of society. This does not mean that criticism of his playing ability would be chilled; it likely would be permitted under the long-established fair comment privilege. An opinion about Cepeda's playing ability would also be protected as long as it was based on true facts and asserted no fact that could be proven false.

Johnny Carson, the television star, would not be required to prove actual malice unless a connection between his fame and a matter of sufficient public concern could be shown. The defamatory statement at issue suggested that because of a love affair, Carson might move his enormously popular network television program from New York to California. Such a decision could reasonably be seen as having significant artistic impact and economic consequences. If this nexus could be established, Carson would be required to prove actual malice pursuant to the Gertz recalibration.

Carol Burnett, another television star, might fare better under this recalibration. She sued a tabloid publication over its false report that she was drunk and abusive in a public restaurant. This behavior is not as "quintessentially intimate" as the matters suggested by Professors Smolla and Williams and it has no connection with the reason for Burnett's fame—her skill as an actress and comedienne. Thus, under the recalibration test,

183. See, e.g., Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976); Cepeda v. Cowles Magazines & Broad., Inc., 392 F.2d 417 (9th Cir. 1968).

184. But see Cepeda, 392 F. Supp. at 420 (finding that Cepeda had the burden to prove actual malice).

185. See RESTATEMENT (SECOND) OF TORTS §§ 606–610. The result would be the same even though the fair comment privilege has been omitted. Id. A statement of opinion that does not imply a defamatory statement is no longer actionable, thus the fair comment privilege is no longer needed. Id.


187. Contra Carson, 529 F.2d at 213.

188. Id. at 208.


190. However, Burnett is also known for speaking out against alcoholism. Id. at 221.
Burnett would not have to prove actual malice. It is worth noting, of course, that Burnett prevailed in her libel suit even with the actual malice burden, but not all public plaintiffs will be blessed with evidence of such egregiously reckless reporting as the *National Enquirer* used in its false story about her.

Clint Eastwood presents perhaps the most interesting example of the recalibration at work, for seldom has there been a show business personality of such great fame who is so involved in non-entertainment public affairs. Suppose that a news medium publishes or broadcasts a story about Eastwood's personal life. Assume that it concerns a subject in the Smolla-Williams universe of purely private matters. Nothing about the hypothetical item involves public affairs. When the story appears, Eastwood is participating in many matters of substantial interest to the citizenry. As in real life, he is campaigning energetically for changes in permissible land use on a section of the Monterey Peninsula. Eastwood wants to build his own golf course development in another area nearby. Also, as in real life, a Carmel hotel he owns was sued under the Americans With Disabilities Act ("ADA") for allegedly failing to provide appropriate accommodations for visitors with certain physical handicaps. When he criticized the ADA during Congressional testimony, he drew a packed hearing room and international press coverage.

Surely Eastwood is at minimum a limited public figure with respect to any one of these issues, with the possible exception of the ADA lawsuit.

191. *Id.* at 223.
194. *See supra* notes 176–79 and accompanying text.
196. *See id.*
200. If the matters were taken in isolation, there might be a question about Eastwood's voluntary participation in the ADA lawsuit. Simply being sued is unlikely to convert a private per-
But put them together, then add his former position as elected mayor, and it would be reasonable to conclude that his influence is indeed pervasive and powerful, at least in Carmel and the surrounding area. These facts, not fame alone, might make him a public figure of the kind that Chief Justice Warren envisioned: someone "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large."201

If that is so, then there can be only one answer to the first question proposed in this Article: Eastwood is a public figure. As long as Gertz is applied in accordance with the current understanding, he would be a public figure for all areas of his life.202

But must this combination of show business fame and civic activism put him in such an untenable position when he tries to recover for damage to his reputation in a purely personal area of his life? For that, we must ask the second question: does the allegedly defamatory statement bear a sufficient connection to the famous person's pervasive influence? The author submits that it does not. Unless a nexus could be established between the private matter and some area of Eastwood's civic or business involvement, he should not be required to prove actual malice.

VII. INHIBITION OF PRESS FREEDOM?

Any revision of the existing Gertz v. Robert Welch, Inc.203 formula is likely to be seen as a retreat from essential, well-established news media freedoms.204 That is not the intention of this proposal. In fact, defamation defendants would retain a considerable array of protection against inappropriate lawsuits.
Truth, as always, remains a complete defense to libel claims. In addition, the burden of proving falsity would remain on the plaintiff. Another fundamental principle of Gertz, that there can be no liability without fault, is unchanged by this proposal.

A defendant may show a nexus between the allegedly defamatory statement, however personal on its face, and the source of the plaintiff's celebrity. For example, if a film star or athlete regularly gave interviews promoting the joy of monogamous marriage and the defamatory statement alleged that the celebrity was promiscuous, a nexus might be established.

The rule established by New York Times Co. v. Sullivan recognized that error is inevitable in free debate. This recalibration of Gertz simply recognizes that false statements about intimate subjects, unrelated to public issues, arguably contribute little or nothing to free debate as an ordered society understands it.

VIII. CONCLUSION

The creation in Gertz v. Robert Welch, Inc. of all purpose public figure plaintiffs was intended to protect reporting and commentary on those persons who have general fame or notoriety and pervasive involvement in the affairs of society. Mere stardom in the entertainment or sports world should not be enough to saddle a libel plaintiff with the heavy burden of proving actual malice when the defamatory statement concerns a purely private—indeed, sometimes intimate—matter with no public consequences. Such a burden far exceeds the stated purpose of the Supreme Court opinions in New York Times Co. v. Sullivan, Curtis Publishing Co. v. Butts, and Gertz.

205. Restatement (Second) of Torts § 566 cmt. a.
207. Gertz, 418 U.S. at 347.
208. See Restatement (Second) of Torts § 652D cmt. h.
209. This circumstance might arguably make the celebrity a limited public figure for purposes of the marriage discussion. See Gertz, 418 U.S. at 345. However, some courts might find that a discussion of marriage does not amount to thrusting oneself to the forefront of a sufficiently controversial topic to become a limited public figure. See id. In such a case, the rule proposed in this Article would actually provide additional protection for a news media defendant.
211. Id. at 271–72 (citing NAACP v. Button, 371 U.S. 415, 433 (1963)).
213. Id. at 345.
Thus the all purpose public figure doctrine should be more correctly understood as imposing the actual malice burden on celebrities only when they are pervasively involved in public affairs and when the defamatory statement bears a sufficient connection to the celebrity’s influence on those affairs.