

THE ANONYMOUS PUBLIC FIGURE:  
INFLUENCE WITHOUT NOTORIETY AND THE  
DEFAMATION PLAINTIFF

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INTRODUCTION

The chief executive of a West Virginia mining concern supports a pro-industry challenger for election to the state's high court. To that end, the executive organizes an advocacy group that runs advertisements critical of the pro-labor incumbent. The mining executive's role in the campaign is entirely behind-the-scenes. He does not publicly associate himself with the election controversy in any way.

A second advocacy group, this one favoring the incumbent, airs its own advertisement in response. This advertisement links the mining executive to the challenger's campaign and levels a variety of charges at both the executive and his company. Some of these charges are false, and the mining company and its executive bring suit for defamation. The defendant advocacy group argues that the executive's involvement in the election controversy makes him a public figure. If he is, then he must meet the heightened Constitutional standard of "actual malice" in order to recover for defamation.<sup>1</sup> The executive responds that he is obviously not a public figure because few members of the public have ever heard of him.<sup>2</sup>

At issue in this scenario is the public figure doctrine and in particular its "limited purpose" variety. In the seminal case of *Gertz v. Robert Welch, Inc.*,<sup>3</sup> the Supreme Court defined limited purpose public figures as persons who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."<sup>4</sup> A defamation plaintiff who is a limited purpose public figure must prove actual malice, but only with respect to statements that pertain to the public controversy within which he or she is a public figure.<sup>5</sup> The difficulty is in deter-

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<sup>1</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

<sup>2</sup> These facts are liberally based on those of *Massey Energy Co. v. United Mine Workers of Am.*, 72 Va. Cir. 54, 54-58 (2006).

<sup>3</sup> 418 U.S. 323 (1974).

<sup>4</sup> *Id.* at 345. "Universal" public figures, in contrast, are those who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes." *Id.*

<sup>5</sup> *See id.* at 352 (finding that the plaintiff was not a public figure with respect to the controversy to which the defamatory statements pertained and thus that the actual malice standard did not apply).

mining who is a limited purpose public figure. The *Gertz* Court spoke of a public figure's attempted "influence" upon a controversy and his or her position at the "forefront" of it.<sup>6</sup> As a matter of common sense, these characteristics will often be two sides of the same coin. One who is capable of exercising influence upon a public controversy is likely to be publicly prominent in connection with that controversy. Yet it is not always so. In the mining executive's case, the characteristics of influence and notoriety appear to diverge. Many other situations are imaginable in which a person might exercise influence comparable to that of a highly prominent figure, while keeping his or her role hidden from public view.

This Comment addresses the question of whether notoriety is a necessary condition for public figure status. If influence alone may be sufficient, then the possibility of an "anonymous public figure" emerges. If notoriety is required, then the notion of an anonymous public figure must be rejected as self-contradictory. Part I of this Comment surveys the jurisprudential history of the public figure doctrine with particular reference to the characteristics that the Supreme Court has attributed to the public figure. Part II begins by detailing how courts have conflated the distinct characteristics of notoriety and influence. It then highlights some social and political developments that render the assumption that influence necessarily involves notoriety increasingly untenable. Part III argues that, despite the apparent failure of courts to draw a distinction between notoriety and influence, some have in practice decided cases principally on the basis of influence without regard to notoriety. Finally, Part IV argues that a focus on influence should be preferred as most consonant with the purposes and history of the public figure doctrine, concluding that a public figure may indeed be unknown to the public.

## I. BACKGROUND

### A. *Toward a Public Figure Doctrine*

Prior to its decision in *New York Times Co. v. Sullivan*,<sup>7</sup> the Supreme Court left the states free to develop the common law of defamation without constitutional limitations.<sup>8</sup> Defamation is defined as expression that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."<sup>9</sup>

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<sup>6</sup> *Id.* at 345.

<sup>7</sup> 376 U.S. 254 (1964).

<sup>8</sup> See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 30 (1971). Some states themselves identified limitations based on freedom of speech, but they generally did so without direct reference to the federal Constitution. *E.g.*, *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C. Cir. 1942).

<sup>9</sup> Restatement of Torts § 559 (1938); accord Restatement (Second) of Torts § 559 (1977).

According to the traditional common law rule, a defamation plaintiff did not need to show any fault whatsoever on the part of the defendant,<sup>10</sup> although an affirmative defense of truth was available.<sup>11</sup>

In *New York Times*, the Supreme Court constitutionalized the law of defamation, requiring proof of “actual malice” in suits brought by public officials for defamation relating to their official conduct.<sup>12</sup> The Court defined “actual malice” as making a statement “with knowledge that it was false or with reckless disregard of whether it was false or not,”<sup>13</sup> a formulation that remains authoritative today.<sup>14</sup> The Court clarified after *New York Times* that “reckless disregard” is not to be measured against an objective standard; it instead requires that the speaker subjectively doubted the truth of his or her statement.<sup>15</sup>

*New York Times* involved a political fundraising advertisement that had inaccurately recounted incidents of official harassment against the Reverend Dr. Martin Luther King, Jr., and other civil rights demonstrators.<sup>16</sup> Both the newspaper and various signatories of the advertisement were named as defendants.<sup>17</sup> The plaintiff, a commissioner of Montgomery County, Alabama, prevailed in state courts.<sup>18</sup> Although the advertisement did not name the plaintiff, he succeeded on the theory that allegations of police misconduct were allegations against himself, since the advertisement identified him as the county commissioner in charge of supervising the police department.<sup>19</sup> Other allegations of harassment and violence identified the perpetrators only as “Southern violators,” but the plaintiff succeeded

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<sup>10</sup> See Restatement of Torts § 558 (1938) (elements of defamation).

<sup>11</sup> *Id.* § 582.

<sup>12</sup> *N.Y. Times*, 376 U.S. at 279-80.

<sup>13</sup> *Id.* at 280.

<sup>14</sup> See, e.g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 244 (1986) (citing *N.Y. Times*, 376 U.S. at 279-80); *Wells v. Liddy*, 186 F.3d 505, 520 (4th Cir. 1999) (same).

<sup>15</sup> *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

<sup>16</sup> *N.Y. Times*, 376 U.S. at 257-59. The advertisement sought donations to support civil rights efforts, including the legal defense of Dr. King against charges of perjury. *Id.* at 257. The story of those politically motivated charges and of the all-white, southern jury’s surprising verdict of acquittal is told in Edgar Dyer, *A “Triumph of Justice” in Alabama: The 1960 Perjury Trial of Martin Luther King, Jr.*, 88 J. AFR.-AM. HIST. 245 (2003).

<sup>17</sup> *N.Y. Times*, 376 U.S. at 256-57. Under the common law, a party that merely prints or otherwise repeats another’s defamatory statement is nonetheless considered to have made its own defamatory statement. See Restatement of Torts § 577 cmt. a (1938); Restatement (Second) of Torts § 577 cmt. a (1977).

<sup>18</sup> *N.Y. Times*, 376 U.S. at 256. The *Times* was ordered to pay damages of \$500,000. *Id.*

<sup>19</sup> *Id.* at 258, 262-63. The common law requires proof that a defamatory statement was made “of and concerning” the plaintiff. See *id.* at 262-63; Restatement of Torts § 564 (1938); Restatement (Second) of Torts § 564 (1977). In *N.Y. Times*, the jury found that this requirement was satisfied, whereas the Supreme Court held that as a matter of constitutional law it was not. *N.Y. Times*, 376 U.S. at 262, 288-92.

below in arguing that the accusations were implicitly directed at police and, by extension, at himself.<sup>20</sup>

The Supreme Court reversed, stating that common law standards standing alone were “constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments.”<sup>21</sup> The availability of a truth defense, the Court explained, did not sufficiently protect public discussion.<sup>22</sup> Some false statements had to be protected if true speech was to have “breathing space.”<sup>23</sup> The Court might have limited its ruling to the facts of the case, observing as it did that the plaintiff’s suit relied on transforming general criticism of governmental actions into personal criticism of the ultimately responsible official.<sup>24</sup> Stripped of its pretense, the plaintiff’s suit was essentially one for defamation of government, a cause of action that was unquestionably illegitimate.<sup>25</sup> The Court did not rest there, however. Rather, it likened all defamation of public officials concerning their official conduct to criticism of government itself,<sup>26</sup> which it of course found to be protected by the First Amendment.<sup>27</sup> The Court then reached the perhaps incongruous conclusion that recovery could be had upon proof of actual malice.<sup>28</sup> That burden, the Court ruled, was not met.<sup>29</sup>

Subsequent to *New York Times*, some courts extended the actual malice requirement to non-official public figures who commented on matters of

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<sup>20</sup> *N.Y. Times*, 376 U.S. at 258, 262-63. That the accusations were implicitly directed at *police* is not an implausible reading of the advertisement:

Again and again the Southern violators have answered Dr. King’s peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for “speeding,” “loitering” and similar “offenses.” And now they have charged him with “perjury”—a *felony* under which they could imprison him for *ten years*.

*Id.* at 257-58. As the plaintiff argued, the “they” who arrested Dr. King were presumably police, and that word can be read as referring to the same entity throughout. *Id.* at 258.

<sup>21</sup> *Id.* at 264. The role of the Fourteenth Amendment in the matter is simply to apply the First Amendment to the states. *See id.* at 264 n.4, 276-77.

<sup>22</sup> *Id.* at 279.

<sup>23</sup> *Id.* at 271-72.

<sup>24</sup> *See id.* at 288-92.

<sup>25</sup> *N.Y. Times*, 376 U.S. at 291-92.

<sup>26</sup> *See id.* at 273 (“Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.”).

<sup>27</sup> *See id.* at 269-76 (discussing generally the role of the freedom of speech and of the press in American democracy).

<sup>28</sup> *Id.* at 279-80. The concurring opinions of Justices Black and Goldberg would have barred recovery regardless of actual malice. *Id.* at 293 (Black, J., concurring); *id.* at 297-98 (Goldberg, J., concurring).

<sup>29</sup> *Id.* at 285-86 (majority opinion). The evidence of actual malice on the part of the *Times* consisted of its failure to check the facts of the advertisement against its own files and of its initial failure to issue a retraction upon demand of the plaintiff. *Id.* at 286. These facts, the Court held, were insufficient as a matter of law to prove the subjective bad faith required by the actual malice standard. *Id.* at 286-87.

public concern.<sup>30</sup> These rulings were often based on an impression that the *New York Times* rule “seem[ed] destined to extend beyond the public official concept.”<sup>31</sup> That narrow concept, such courts believed, did not capture the broader commitment to free and open debate embodied in the decision.<sup>32</sup> The Supreme Court itself gave hints that *New York Times* might have application beyond its specific holding. In one footnote in the case, the Court stated that it “ha[d] no occasion here to determine how far down into the lower ranks of government employees the ‘public official’ designation would extend for purposes of th[e] rule, or otherwise to specify categories of persons who would or would not be included.”<sup>33</sup> When the Court later revisited the first part of that question, it took the opportunity to put a finer point on the second:

We intimate no view whatever whether there are other bases for applying the *New York Times* standards—for example, that in a particular case the interests in reputation are relatively insubstantial, because the subject of discussion has thrust himself into the vortex of the discussion of a question of pressing public concern.<sup>34</sup>

These issues would be answered several different ways in subsequent cases.

In *Curtis Publishing Co. v. Butts*,<sup>35</sup> the Court extended the *New York Times* actual malice standard to public figures generally.<sup>36</sup> The case concerned an article in the *Saturday Evening Post* that accused the plaintiff, a well known former football coach and current athletic director of the University of Georgia, of conspiring with an adversary to “fix” a game.<sup>37</sup> The companion case, *Associated Press v. Walker*, involved a wire service report

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<sup>30</sup> *E.g.*, *Pauling v. Globe-Democrat Publ’g Co.*, 362 F.2d 188, 195-96 (8th Cir. 1966); *Walker v. Courier-Journal & Louisville Times Co.*, 368 F.2d 189, 190 (6th Cir. 1966); *Pauling v. Nat’l Review, Inc.*, 269 N.Y.S.2d 11, 18 (Sup. Ct. 1966), *aff’d mem.*, 281 N.Y.S.2d 716 (App. Div. 1967), *aff’d*, 239 N.E.2d 654 (N.Y. 1968).

<sup>31</sup> *Afro-American Publ’g Co. v. Jaffe*, 366 F.2d 649, 658 (D.C. Cir. 1966).

<sup>32</sup> *E.g.*, *Pauling v. News Syndicate Co.*, 335 F.2d 659, 671 (2d Cir. 1964); *see also N.Y. Times*, 376 U.S. at 270 (expressing “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”).

<sup>33</sup> *N.Y. Times*, 376 U.S. at 283 n.23.

<sup>34</sup> *Rosenblatt v. Baer*, 383 U.S. 75, 86 n.12 (1966).

<sup>35</sup> 388 U.S. 130 (1967).

<sup>36</sup> *Id.* at 164 (Warren, C.J., concurring). The case was decided together with *Associated Press v. Walker*. The plurality opinion set forth a novel standard: “highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.” *Id.* at 155 (plurality opinion). The separate opinions of Justices Black and Brennan, however, supplied a majority for Justice Warren’s extension of the actual malice standard. *Id.* at 170 (Black, J., concurring in *Walker* and dissenting in *Butts*); *id.* at 172 (Brennan J., concurring in *Walker* and dissenting in *Butts*). In *Gertz*, the Court treated Justice Warren’s opinion as having constituted the law on the issue. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335 (1974).

<sup>37</sup> *Curtis*, 388 U.S. at 135-36 (plurality opinion).

that the plaintiff, a politically prominent former military officer, had led a violent attack on federal marshals sent to integrate the University of Mississippi.<sup>38</sup> The Court stated in conclusory terms that both plaintiffs were public figures, and there is no suggestion that this was in dispute.<sup>39</sup> In both cases, the courts below had found for the plaintiffs, ruling that *New York Times* was applicable only to public officials.<sup>40</sup>

The Court affirmed in *Curtis* and reversed in *Walker*,<sup>41</sup> finding that actual malice was proved in the former but not in the latter.<sup>42</sup> The preparation of the defendants' respective press reports differed greatly.<sup>43</sup> In *Walker*, the evidence showed little more than negligence.<sup>44</sup> First, the author of the report had been present at the University of Mississippi and witnessed the violent events first hand.<sup>45</sup> Second, the defendant wire service that employed him had no reason to suspect him of being untrustworthy or incompetent.<sup>46</sup> Third, the substance of the report would not have put the defendant on notice of any errors.<sup>47</sup> Finally, the actions that the reporter attributed to the plaintiff were consistent with earlier public statements that the latter had made.<sup>48</sup> In short, there was no question of actual malice.<sup>49</sup>

*Curtis* presented a completely different scenario.<sup>50</sup> The defendant publisher gleaned its information from a single questionable source and made no attempt at verification.<sup>51</sup> The source apparently had been allowed, due to an error in phone transmission, to eavesdrop on a call between the plaintiff and the football coach of the University of Alabama.<sup>52</sup> The defendant published an article based on what the source had claimed to hear: the plaintiff giving away the plays his team was planning for its upcoming game with

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<sup>38</sup> *Id.* at 140.

<sup>39</sup> *See id.* at 154-55; *id.* at 162 (Warren, C.J., concurring).

<sup>40</sup> *Id.* at 138-39, 141-42 (plurality opinion).

<sup>41</sup> *Id.* at 161-62.

<sup>42</sup> *Id.* at 164-65, 170 (Warren, C.J., concurring). The plurality opinion applied its "extreme departure" standard, reaching the same result. *Id.* at 155-56 (plurality opinion).

<sup>43</sup> *Curtis*, 388 U.S. at 158.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 141.

<sup>46</sup> *Id.* at 158.

<sup>47</sup> *Id.* at 158-59.

<sup>48</sup> *Id.* at 159.

*Walker* had made a statement on radio station KWKH at Shreveport, Louisiana, urging people to "rise to a stand beside Governor Ross Barnett at Jackson, Mississippi." He contended that the people had "talked, listened and been pushed around far too much . . ." He promised that he would "be there," on "the right side."

*Id.* at 159 n.22 (omission in original).

<sup>49</sup> *Curtis*, 388 U.S. at 165 (Warren, C.J., concurring).

<sup>50</sup> *Id.* at 158 (plurality opinion).

<sup>51</sup> *Id.* at 136, 157-58.

<sup>52</sup> *Id.* at 136-37.

Alabama.<sup>53</sup> The defendant's employees never examined the notes that the source claimed to have taken, nor did they attempt to view films of the football game to verify his allegations.<sup>54</sup> They were not knowledgeable about football and did not seek consultation with anyone who was.<sup>55</sup> At trial, experts testified that the information contained in the source's notes was general knowledge.<sup>56</sup> The Supreme Court found the evidence sufficient to prove actual malice.<sup>57</sup>

Justice Warren based the Court's extension of *New York Times* to non-official public figures on three grounds. First, the conduct of public figures was of as much "legitimate and substantial interest" to citizens as was the conduct of public officials.<sup>58</sup> Post-Depression and post-World War II society had produced a "blending of [public and private] positions of power," such that "many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions."<sup>59</sup> The public interest in robust debate regarding the actions of such persons was therefore as great as if they were officials.<sup>60</sup> Second, public figures had as great a degree of access to the mass media as did public officials and therefore had as great a degree of influence.<sup>61</sup> Third, public figures had, also due to media access, as great an ability to respond to criticism without resorting to the courts.<sup>62</sup> Thus the extension of the *New York Times* rule to public figures was premised on an analogy to public officials.<sup>63</sup>

The Court briefly expanded the scope of the *New York Times* rule still further with its plurality decision in *Rosenbloom v. Metromedia, Inc.*<sup>64</sup> There, the Court applied the actual malice requirement to all discussion of "matters of public concern," even if a private individual were defamed.<sup>65</sup> This expansive rule was short lived, however. The Court retreated from it only three years later in *Gertz*, finding the rule too burdensome on the states' legitimate interest in remedying defamation and too uncertain in

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<sup>53</sup> *Id.* at 136.

<sup>54</sup> *Id.* at 136, 157.

<sup>55</sup> *Curtis*, 388 U.S. at 158.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 170 (Warren, C.J., concurring). The need to remand was obviated by the jury's having found the defendant liable for punitive damages under instructions similar to those describing actual malice. *Id.* at 165-66.

<sup>58</sup> *Id.* at 164.

<sup>59</sup> *Id.* at 163-64.

<sup>60</sup> *Curtis*, 388 U.S. at 164 (Warren, C.J., concurring).

<sup>61</sup> *Id.* at 164.

<sup>62</sup> *Id.*

<sup>63</sup> *See id.* at 163-64.

<sup>64</sup> *See Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 43 (1971).

<sup>65</sup> *See id.* Such was the holding of the plurality opinion. As the Court later observed in *Gertz*, no rationale for the *Rosenbloom* judgment commanded a majority of the Court. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 333 (1974).

entrusting judges with deciding which matters merited “public concern.”<sup>66</sup> *Gertz* remains the principal authority on the public figure doctrine.<sup>67</sup>

#### B. *Gertz v. Robert Welch, Inc.*

The plaintiff in *Gertz* was an attorney who represented the family of a man shot and killed by a Chicago police officer.<sup>68</sup> The officer had been convicted of murder for the shooting.<sup>69</sup> The defendant in *Gertz* was the publisher of a right-wing magazine that accused the plaintiff of having been involved in a frame-up of the officer as part of a far-reaching Communist conspiracy.<sup>70</sup> At trial, the publisher defended on the alternative grounds that the attorney was a public official under *New York Times*, or a public figure under *Curtis*, or that the magazine’s statements involved a matter of public concern.<sup>71</sup> This last argument anticipated *Rosenbloom*, which had not yet been decided.<sup>72</sup> The trial court found that the plaintiff was neither a public official nor a public figure.<sup>73</sup> After the jury had returned a verdict awarding damages, however, the court accepted the defendant’s matter-of-public-concern defense.<sup>74</sup> Finding insufficient evidence of actual malice, the court entered judgment for the defendant.<sup>75</sup> Thus the final result in the case would turn on whether the Supreme Court chose to affirm or overrule *Rosenbloom*.

The Court overruled *Rosenbloom*<sup>76</sup> and returned to the *Curtis* standard.<sup>77</sup> But it elaborated on the earlier case by creating two categories of public figure.<sup>78</sup> The first was that of universal public figures, persons who “occupy positions of such persuasive power and influence that they are deemed public figures for all purposes.”<sup>79</sup> The second and more common

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<sup>66</sup> *Gertz*, 418 U.S. at 346. *But cf.* *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976) (holding that the divorce proceedings of a society couple did not qualify as a “public controversy” notwithstanding press attention).

<sup>67</sup> *See Hutchinson v. Proxmire*, 443 U.S. 111, 134 (1979) (applying *Gertz*); *Wolston v. Reader’s Digest Ass’n*, 443 U.S. 157, 164-69 (1979) (same); *Time*, 424 U.S. at 453-55, 459-64 (same); *Wells v. Liddy*, 186 F.3d 505, 531-32 (4th Cir. 1999) (same).

<sup>68</sup> *Gertz*, 418 U.S. at 325.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 325-26. The magazine was The John Birch Society’s *American Opinion*. *Id.* at 325.

<sup>71</sup> *Id.* at 327-28.

<sup>72</sup> *Id.* at 329-30.

<sup>73</sup> *Id.* at 328-29.

<sup>74</sup> *Gertz*, 418 U.S. at 329.

<sup>75</sup> *Id.* at 328-30.

<sup>76</sup> *Id.* at 346.

<sup>77</sup> *Compare id.* at 342, with *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring).

<sup>78</sup> *See Gertz*, 418 U.S. at 345-46.

<sup>79</sup> *Id.* at 345.

sort were limited purpose public figures, persons who “have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.”<sup>80</sup> Thus the limited purpose public figure has that status only with respect to statements concerning a particular public controversy.<sup>81</sup> The present inquiry, as well as the bulk of the case law, is concerned with the second category of public figures.<sup>82</sup>

The Court articulated two rationales for requiring public figures to prove actual malice, and these overlap with the rationales stated in *Curtis*. First, public figures can be expected to have “greater access to the channels of effective communication” than do private individuals and thus have greater opportunity to redress defamation by means of self-help.<sup>83</sup> Private individuals lack this opportunity and are thus “more vulnerable to injury” than are public figures.<sup>84</sup> This rationale echoes *Curtis*.<sup>85</sup> Second, public figures voluntarily “have assumed roles of especial prominence in the affairs of society.”<sup>86</sup> In essence, they have accepted the risk of a few bruises by entering the rough-and-tumble of public life.<sup>87</sup> They are for that reason less “deserving of recovery” than private individuals are.<sup>88</sup> To the extent that this voluntary-prominence rationale suggests that the public has a legitimate interest in the conduct of public figures because of their influence, the Court again followed *Curtis*.<sup>89</sup> Such a reading of *Gertz* comports with the opinion’s definition of universal public figures as persons of “persuasive power and influence.”<sup>90</sup> It likewise comports with the definition of limited purpose public figures as persons who “have thrust themselves to the forefront of particular public controversies in order to *influence* the resolution of the issues involved.”<sup>91</sup> Further, the *Curtis* rationale of legitimate public

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<sup>80</sup> *Id.*

<sup>81</sup> *See id.* at 352.

<sup>82</sup> *See* Erik Walker, Comment, *Defamation Law: Public Figures - Who Are They?*, 45 BAYLOR L. REV. 955, 960 & n.31 (1993) (noting that courts rarely find anyone save those who are clearly opinion leaders to be public figures). One reason that universal public figure status is rarely litigated may be that the bar is set so high that those who qualify leave little room for doubt. “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.” *Gertz*, 418 U.S. at 352.

<sup>83</sup> *Gertz*, 418 U.S. at 344.

<sup>84</sup> *Id.* at 345.

<sup>85</sup> *See supra* text accompanying note 61.

<sup>86</sup> *Gertz*, 418 U.S. at 345.

<sup>87</sup> *See id.* at 344-45.

<sup>88</sup> *Id.* at 345.

<sup>89</sup> *See Curtis*, 388 U.S. at 163-64 (Warren, C.J., concurring).

<sup>90</sup> *Gertz*, 418 U.S. at 345.

<sup>91</sup> *Id.* (emphasis added).

concern<sup>92</sup> was carried forward in the *Gertz* definition of limited purpose public figures: they are involved in “public controversies.”<sup>93</sup>

The reasoning of *Gertz* did differ from that of *Curtis* in two respects, however. First, the *Gertz* Court’s emphasis on voluntary assumption of the risk has no antecedent in *Curtis*.<sup>94</sup> Second, the *Curtis* rationale of the present day blurring of the line separating public officials from public figures finds no expression in *Gertz*.<sup>95</sup> Nonetheless, that much of the reasoning of *Curtis* was reflected in *Gertz* demonstrates that language from the earlier case can be legitimately relied on to supplement the latter’s somewhat meager explanation of what constitutes a public figure.

One of the more puzzling statements of the *Gertz* Court is that public figure status may sometimes apply even when the rationales for it do not.<sup>96</sup> The difficulty is that the Court gives virtually no other guidance for assessing public figure status than the rationales for the public figure doctrine.<sup>97</sup> The Court singled out voluntariness as potentially not applying to some public figures, even after characterizing that rationale as the “[m]ore important” one, but added that “involuntary public figures must be exceedingly rare.”<sup>98</sup> That prediction has proved true.<sup>99</sup> In any case, the attributes of a public figure can only be determined from what the Supreme Court has said on the matter, and thus the rationales set forth in *Gertz* must guide the present inquiry.

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<sup>92</sup> *Curtis*, 388 U.S. at 164 (Warren, C.J., concurring).

<sup>93</sup> See *Gertz*, 418 U.S. at 345. As the Court made clear in a later case, *Gertz* embraces only bona fide public controversies, not all controversies that command public interest. *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976) (holding that a socialite’s divorce was not a public controversy although it may have been “of interest to the public”).

<sup>94</sup> Compare *Gertz*, 418 U.S. at 344-45, with *Curtis*, 388 U.S. at 163-64 (Warren, C.J., concurring).

<sup>95</sup> Compare *Curtis*, 388 U.S. at 163-64 (Warren, C.J., concurring), with *Gertz*, 418 U.S. at 344-45.

<sup>96</sup> See *Gertz*, 418 U.S. at 344-45 (“[N]ot all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority. . . . Even if the forgoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk. . . .”).

<sup>97</sup> The opinion counseled lower courts to “look[] to the nature and extent of an individual’s participation in the particular controversy,” *id.* at 352, but what sort of nature and extent to look for is elucidated only by the Court’s rationales.

<sup>98</sup> *Id.* at 344-45.

<sup>99</sup> See Dale K. Nichols, *The Involuntary Public Figure Class of Gertz v. Robert Welch: Dead or Merely Dormant?*, 14 U. MICH. J.L. REFORM 71, 83-84 (1980) (arguing, prematurely, that the category had likely been abandoned). *But cf.* W. Wat Hopkins, *The Involuntary Public Figure: Not So Dead After All*, 21 CARDOZO ARTS & ENT. L.J. 1 (2003); *Dameron v. Wash. Magazine, Inc.*, 779 F.2d 736, 742 (D.C. Cir. 1985) (finding plaintiff to be an involuntary public figure); *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175, 186 (Ga. Ct. App. 2001) (same).

## II. THE PROBLEM: CONFUSION OF INFLUENCE AND NOTORIETY

### A. *Confusion in Gertz, Confusion in the Circuits*

A parsing of the Court's language in *Gertz* reveals a crucial assumption: that influential figures will also be notorious. Thus limited purpose public figures "have thrust themselves to the *forefront* of particular public controversies in order to *influence* the resolution of the issues involved."<sup>100</sup> Public figures in general "have assumed roles of especial *prominence* in the affairs of society."<sup>101</sup> The application of *Gertz* is therefore unclear in the context of an influential but behind-the-scenes actor.

If the Supreme Court believed that public figure status would be self-evident, it was mistaken with respect to the limited purpose variety. Indeed, that status has been notoriously difficult to assess.<sup>102</sup> The federal courts have taken two main approaches, both of which carry forward *Gertz's* conflation of notoriety and influence.

In *Fitzgerald v. Penthouse International*, the Fourth Circuit unpacked the two *Gertz* rationales, access to media and voluntary assumption of prominence for the purpose of influence,<sup>103</sup> to arrive at a five element test:

(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.<sup>104</sup>

Although the original formulation of the *Fitzgerald* test separates influence and notoriety into two separate requirements—that the plaintiff "assumed a role of special prominence" and that he or she "sought to influence"<sup>105</sup>—subsequent cases hew more closely to *Gertz* by treating prominence and influence as a single characteristic.<sup>106</sup> The Fourth Circuit has stated, "Typically, we have combined the second and third requirements, to ask 'whether the plaintiff had voluntarily assumed a role of special prominence in a public controversy by attempting to influence the outcome of the

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<sup>100</sup> *Gertz*, 418 U.S. at 345 (emphasis added).

<sup>101</sup> *Id.* (emphasis added).

<sup>102</sup> As one court put it, ascertaining public figure status is "like trying to nail a jellyfish to the wall." *Rosanova v. Playboy Enters.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978).

<sup>103</sup> *Gertz*, 418 U.S. at 344-45.

<sup>104</sup> *Fitzgerald v. Penthouse Int'l, Ltd.*, 691 F.2d 666, 668 (4th Cir. 1982).

<sup>105</sup> *Id.*

<sup>106</sup> *Cf. Gertz*, 418 U.S. at 345.

controversy.”<sup>107</sup> Thus any distinction that the *Fitzgerald* test makes between notoriety and influence is erased in its application.

The D.C. Circuit has created a three-step test,<sup>108</sup> which has been adopted by the Fifth and Eleventh Circuits.<sup>109</sup> First, “the court must isolate the public controversy.”<sup>110</sup> Second, “[t]he plaintiff either must have been purposely trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to have an impact on its resolution.”<sup>111</sup> Finally, “the alleged defamation must have been germane to the plaintiff’s participation in the controversy.”<sup>112</sup>

Although the three-step test does not require notoriety in terms, the court that created it assumed that public figures would be notorious. For example, the D.C. Circuit explained the public figure doctrine as a protecting the role of the press in “reporting, analyzing, and commenting on *well-known persons* and public controversies.”<sup>113</sup> Elsewhere, however, the court contrasts the notoriety required for universal public figures with the emphasis on influence that applies to limited purpose public figures:

From analyzing *Gertz* and more recent defamation cases, we believe that a person can be a general public figure only if he is a “celebrity” his name a “household word” whose ideas and actions the public in fact follows with great interest. We also conclude that a person has become a public figure for limited purposes if he is attempting to have, or realistically can be expected to have, a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants.<sup>114</sup>

From the apparent contradiction between the court’s two statements, it seems clear that it did not squarely face the question of whether a limited purpose public figure must be notorious. In sum, the courts have mirrored the confusion of notoriety and influence seen in *Gertz*.

### B. *The Need for a Distinction*

The question of the behind-the-scenes influential actor is raised by *Massey Energy Co. v. United Mine Workers*, in which a corporate executive, Don Blankenship, may have directed the activities of a political advo-

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<sup>107</sup> *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1554 (4th Cir. 1994) (quoting *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 709 (4th Cir. 1991)).

<sup>108</sup> *Waldbaum v. Fairchild Publ’ns, Inc.*, 627 F.2d 1287, 1292 (D.C. Cir. 1980).

<sup>109</sup> *Silvester v. Am. Broad. Co.*, 839 F.2d 1491, 1494 (11th Cir. 1988); *Trotter v. Jack Anderson Enters.*, 818 F.2d 431, 433-34 (5th Cir. 1987).

<sup>110</sup> *Waldbaum*, 627 F.2d at 1296.

<sup>111</sup> *Id.* at 1297.

<sup>112</sup> *Id.* at 1298.

<sup>113</sup> *Id.* at 1292 (emphasis added).

<sup>114</sup> *Id.*

cacy group, And for the Sake of the Kids,<sup>115</sup> though he did not publicly associate himself with it in any way.<sup>116</sup> The advocacy group supported a certain candidate for election to the West Virginia Supreme Court of Appeals.<sup>117</sup> An opposing advocacy group, West Virginia Consumers for Justice, ran an advertisement linking the candidate to the corporate executive and accusing the latter of various misdeeds, prompting him to bring suit for defamation.<sup>118</sup> The West Virginia Consumers for Justice raised the possibility of the Blankenship's public figure status in a motion relating to discovery of his involvement with And for the Sake of the Kids.<sup>119</sup> The plaintiff resisted discovery on the basis that his involvement with the group was irrelevant to his possible status as a public figure, since any such involvement was unknown to the public.<sup>120</sup> The court ordered discovery, using language that minimized the role of notoriety in the determination of the plaintiff's status.<sup>121</sup>

Instances like this one, in which a defamation defendant asserts that a relatively unknown plaintiff is a public figure by influence alone, are likely to arise with greater frequency in the future, given the changing nature of political campaigns. The Bipartisan Campaign Reform Act of 2002,<sup>122</sup> popularly called McCain-Feingold,<sup>123</sup> tightened restrictions on fundraising and expenditures in campaigns for national office.<sup>124</sup> Federal regulators have not applied the legislation to so-called 527 interest groups, which are

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<sup>115</sup> See *Massey Energy Co. v. United Mine Workers of Am.*, 72 Va. Cir. 54, 56 (2006). The extent of the executive's involvement was not specifically alleged but was sought in discovery. See *id.*

<sup>116</sup> *Id.* at 58.

<sup>117</sup> *Id.* at 55-56.

<sup>118</sup> *Id.* at 54-56.

<sup>119</sup> *Id.* at 56. It is important to distinguish the issue in *Massey Energy* from one matter that was not at issue. No one claimed that Massey's executive was a public figure by position alone. As the Supreme Court has stated, "Being an executive within a prominent and influential company does not by itself make one a public figure." *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1299 (D.C. Cir. 1980).

<sup>120</sup> *Massey Energy*, 72 Va. Cir. at 56, 58.

<sup>121</sup> See *id.* at 58. The court stated, "The basic index of public-figure status is 'the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.'" *Id.* (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352, (1974)). The court continued, "It is not dispositive that Plaintiffs neither appeared in nor publicly endorsed the advertisements run by And for the Sake of the Kids. Although public-figure status requires that one has 'assumed a role of special prominence in the public controversy,' prominence is not equivalent to general notoriety." *Id.* (footnote omitted) (quoting *Wells v. Liddy*, 186 F.3d 505, 540 (4th Cir. 1999)) (then citing *Reuber v. Food Chemical News, Inc.*, 925 F.2d 703, 709 (4th Cir. 1991)).

<sup>122</sup> Pub. L. No. 107-155, 116 Stat. 81 (codified primarily in scattered sections of 2 and 47 U.S.C.).

<sup>123</sup> Trevor Potter, Op.-Ed., *McCain-Feingold: A Good Start*, WASH. POST, June 23, 2006, at A25.

<sup>124</sup> The Act's major provision brings all campaign funds for national elections within the federal regulatory scheme, thus eliminating the category of unregulated "soft money." See Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441i (2006).

officially independent of campaigns and political parties.<sup>125</sup> These organizations have therefore assumed much greater importance since McCain-Feingold.<sup>126</sup> Several of them, including those named Swift Boat Veterans for Truth and America Coming Together, played a pivotal role in the 2004 presidential election.<sup>127</sup> Although such groups are widely known to the public, their backers and organizers may not be, but they are influential nonetheless.<sup>128</sup>

Changes to the nature of the communications media may also increase the number of anonymous, influential figures. Consider the potential case of a popular internet “blogger” whose private identity is unknown to his or her readers.<sup>129</sup> The author of *Underneath Their Robes*, a tabloid-style “blog” focusing on the federal judiciary, was known only by the moniker Article III Groupie until he revealed himself to be a young assistant federal prosecutor named David Lat.<sup>130</sup> Had Mr. Lat defamed one of the judges who was his subject matter and the judge defamed Mr. Lat in return, the two would face radically different standards in their respective lawsuits if Mr. Lat’s anonymity were dispositive as to public figure status.<sup>131</sup> Although an author writing under a pseudonym could become influential using traditional media, the Internet seems to offer greater opportunities for an anonymous individual like Mr. Lat to reach a wide audience.<sup>132</sup>

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<sup>125</sup> Thomas B. Edsall, *FEC Adopts Hands-Off Stance on “527” Spending*, WASH. POST, June 1, 2006, at A4. The name “527” refers to the section of the Internal Revenue Code that applies to the organizations, I.R.C. § 527 (2006).

<sup>126</sup> James V. Grimaldi & Thomas B. Edsall, *Super Rich Step Into Political Vacuum; McCain-Feingold Paved Way for 527s*, WASH. POST, Oct. 17, 2004, at A1.

<sup>127</sup> *Id.*

<sup>128</sup> The organizations’ most significant backers include well known billionaires, such as George Soros, as well as less familiar names. *See id.* It is doubtful that financial support alone could constitute influence on a public controversy of the type sufficient to render one a limited purpose public figure. Hence the decision in *Massey Energy* did not rely on the plaintiff’s donations to a political organization but rather turned on the possibility of more active involvement. *See Massey Energy Co. v. United Mine Workers of Am.*, 72 Va. Cir. 54, 56, 58.

<sup>129</sup> A “blogger” is one who writes or maintains a journal on the Internet, called a “weblog,” or “blog.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 198 (4th ed. 2006).

<sup>130</sup> Jonathan Miller, *He Fought the Law. They Both Won*, N.Y. TIMES, Jan. 22, 2006, § 14 (New Jersey Weekly), at 1.

<sup>131</sup> *See N.Y. Times, Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (holding that public officials must prove actual malice); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (holding that public figures must prove actual malice).

<sup>132</sup> Apparently, it is so easy to become notorious and influential on the Internet that one can do both without even intending to do either. Such was the fate of the blogger who called herself Washingtonienne. *See April Witt, Blog Interrupted*, WASH. POST, Aug. 15, 2004, § W (Magazine), at 12. The young Capital Hill staffer’s online diary, which detailed her sometimes lucrative trysts with well connected Washington men, was intended for the consumption of a few friends only. *Id.* Yet after only two weeks online, it was discovered and publicized by the widely read Washington gossip blogger Wonkette. *Id.* Washingtonienne’s diary sparked significant public discussion of the extent of licentiousness on Capital Hill, the moral implications of trading sex for money and favors, and the progress of

Justice Warren observed in *Curtis* that changes in society had blurred the once clear distinction between public officials and non-official public figures.<sup>133</sup> More recent changes may have blurred the distinction between public figures and private individuals. The Courts that decided *Curtis* and *Gertz* were not confronted with an anonymous, influential individual. Both plaintiffs in *Curtis* were not only influential but also well known.<sup>134</sup> The plaintiff in *Gertz* was neither influential nor well known.<sup>135</sup> It may be useful, then, to look to the substantial body of case law that has developed around *Curtis* and *Gertz* for additional evidence of whether a public figure must be well known.

### III. CASES DECIDED ON THE BASIS OF INFLUENCE

#### A. *A Limited Notoriety – Being Known Within a Particular Circle*

Although courts have typically treated notoriety as a characteristic of the limited purpose public figure,<sup>136</sup> many have limited the significance of any such requirement by finding that a public figure need not be known outside of a public controversy of circumscribed interest. In *Reuber v. Food Chemical News, Inc.*, the Fourth Circuit was confronted with the case of a defamation plaintiff who had involved himself in a controversy over the carcinogenicity of the pesticide malathion.<sup>137</sup> The plaintiff, a scientist, had established a reputation within his specific field, though he alleged he was “not known to the public at large.”<sup>138</sup> The court held the latter fact not dispositive, stating, “Someone who has not attracted general notoriety may nonetheless be a public figure in the context of a particular controversy covered by publications of specialized interest.”<sup>139</sup> In finding that the plaintiff was a public figure, the court stated that he had “invited attention” by “knowingly deploying himself on the front-lines of debate.”<sup>140</sup>

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women in achieving equality in the workplace. *Id.* Thus Washingtonienne’s writings touched on the character of government officials, were posted in a freely accessible forum, and ended up sparking considerable public debate. *See id.* Nonetheless, Washingtonienne would not and should not qualify as a voluntary, limited purpose public figure, because she did not intend to influence public discussion. *See Gertz*, 418 U.S. at 345. Yet the tale illustrates the ease with which one may become anonymously influential via the Internet.

<sup>133</sup> *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 163-64 (1967) (Warren, C.J., concurring).

<sup>134</sup> *See id.* at 135-36, 140.

<sup>135</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974).

<sup>136</sup> *See supra* Part II.A.

<sup>137</sup> *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 706, 709 (4th Cir. 1991).

<sup>138</sup> *Id.* at 708-09.

<sup>139</sup> *Id.* at 709. One federal circuit applies a contrary rule. *Snead v. Redland Aggregates Ltd.*, 998 F.2d 1325, 1330 (5th Cir. 1993).

<sup>140</sup> *Reuber*, 925 F.2d at 709-10.

The court relied on *Waldbaum v. Fairchild Publications, Inc.*,<sup>141</sup> in which the plaintiff supermarket executive had publicly advocated for certain then-innovative practices in the industry, including “unit pricing” and “open dating.”<sup>142</sup> Although the *Waldbaum* court stated that the controversy “generated considerable comment . . . in trade journals and general-interest publications,”<sup>143</sup> common sense would suggest that interest in the issues raised would be largely confined to industry insiders. Indeed the alleged defamation appeared in the publication, *Supermarket News*.<sup>144</sup> Nonetheless, the court found the plaintiff to be a public figure because he had “thrust himself into the public controversies . . . in an attempt to influence the policies of firms in the supermarket industry and merchandising generally.”<sup>145</sup> Thus “he assumed the risk.”<sup>146</sup> From these cases it appears that the essential characteristic of a voluntary, limited purpose public figure is that he has willingly acted for the purpose of influencing a public controversy. At the least, general notoriety is not required.

It might be argued that these conclusions run contrary to the Supreme Court’s opinion in *Hutchinson v. Proxmire*.<sup>147</sup> The defendant, a United States Senator from Wisconsin, conferred his “Golden Fleece” award on federal agencies that had sponsored the research of the plaintiff scientist.<sup>148</sup> That dubious distinction was awarded in honor of what the Senator considered to be outrageous examples of government waste, those that “fleeced” taxpayers.<sup>149</sup> The waste in question was the spending of approximately \$500,000 to study behavioral indicators of aggression in animals.<sup>150</sup> The Senator issued a press release and newsletters on the subject, and these contained statements that allegedly defamed the plaintiff.<sup>151</sup> In his defense, the Senator argued that the plaintiff was a public figure and could not prove actual malice.<sup>152</sup> There is no indication in the Court’s opinion that the plain-

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<sup>141</sup> *Id.* at 709 (citing *Waldbaum v. Fairchild Publ’ns, Inc.*, 627 F.2d 1287, 1290, 1300 (D.C. Cir. 1980)).

<sup>142</sup> *Waldbaum*, 627 F.2d at 1290, 1300. Unit pricing is the practice of displaying a product’s price per unit of measure rather than only its package price. See UNIF. UNIT PRICING REGULATION § 2 (Nat’l Conference on Weights and Measures, Nat’l Inst. of Standards & Tech. 1997). Open dating is the practice of displaying a product’s expiration date, in a readily comprehensible format, on its package. See UNIF. OPEN DATING REGULATION § 1.1 (Nat’l Conference on Weights and Measures, Nat’l Inst. of Standards & Tech. 1985).

<sup>143</sup> *Waldbaum*, 627 F.2d at 1290.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 1300.

<sup>146</sup> *Id.*

<sup>147</sup> 443 U.S. 111 (1979).

<sup>148</sup> *Id.* at 114.

<sup>149</sup> *Id.* at 114, 116.

<sup>150</sup> *Id.* at 114-15.

<sup>151</sup> *Id.* at 116-17.

<sup>152</sup> *Id.* at 118.

tiff was known to the public prior to Senator Proxmire's remarks,<sup>153</sup> and the Court ruled that he was not a public figure.<sup>154</sup> Crucially, however, the Court did not base its decision on the plaintiff's lack of notoriety.<sup>155</sup> The Court held that the plaintiff was not a public figure for three reasons. First, any controversy over the plaintiff's research was of the Senator's own making.<sup>156</sup> Second, the plaintiff did not voluntarily attempt to influence the outcome of any controversy over the public funding of research.<sup>157</sup> Finally, the plaintiff did not have "regular and continuing access to the media."<sup>158</sup> Thus despite the conflicting outcomes of the factually similar cases of *Reuber* and *Hutchinson*,<sup>159</sup> the latter does not stand for the proposition that general notoriety is a requirement for public figure status but rather tends to undermine it.<sup>160</sup>

#### B. *Other Indications that Notoriety Is Not Required*

*Reuber* casts doubt on the existence of a notoriety requirement for limited purpose public figures for reasons that go beyond its "publications of specialized interest" holding.<sup>161</sup> Specifically, it is unclear that the plaintiff was extensively known even among those interested in the particular public controversy at issue. That controversy involved the pesticide malathion.<sup>162</sup> The plaintiff's main involvement in the controversy was to provide his research manuscript to a single participant in that controversy, to mention to others that the recipient had the manuscript, and to write one letter to each of two state agencies.<sup>163</sup> The court deftly avoided coming to terms with the issue of whether the plaintiff was well known among the participants to the controversy through three maneuvers. First, it defined the scope of the controversy vaguely so that it could rely on evidence of the plaintiff's well known involvement in past controversies over the safety of chemicals other

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<sup>153</sup> See *Hutchinson*, 443 U.S. at 135.

<sup>154</sup> *Id.* at 135-36.

<sup>155</sup> See *id.* at 135-36 (stating grounds for decision).

<sup>156</sup> *Id.* at 135.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 136.

<sup>159</sup> Compare *Hutchinson*, 443 U.S. at 115, with *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 706 (4th Cir. 1991).

<sup>160</sup> The *Reuber* court distinguished *Hutchinson* on the basis that "Hutchinson was completely unknown to the public before Senator Proxmire presented him with the 'Golden Fleece' award." *Reuber*, 925 F.2d at 709. But no such observation was among the stated bases of the decision in *Hutchinson*. See *Hutchinson*, 443 U.S. at 135-36 (stating grounds for decision).

<sup>161</sup> See *Reuber*, 925 F.2d at 709.

<sup>162</sup> *Id.* at 709.

<sup>163</sup> *Id.* at 709-10. The plaintiff also gave "at least one" interview to a newspaper, but the court did not devote much attention to that fact. See *id.* at 708.

than malathion.<sup>164</sup> Second, the court minimized the significance of any flaws in its analysis by suggesting that even if the plaintiff were not a voluntary public figure, he might be an involuntary one.<sup>165</sup> Third, the court stressed certain equitable concerns that have no ascertainable relationship to the public figure issue.<sup>166</sup> For example, the court criticized the plaintiff for using his employer's stationery to write letters critical of the research of one of its clients.<sup>167</sup> Given these flaws in the court's reasoning, the decision can be better explained on the sole basis that the plaintiff voluntarily attempted to influence the outcome of a public controversy, although he was not publicly identified with it. That voluntary attempt at influence was among the bases on which the court rested its decision.<sup>168</sup> The weaker links in the court's chain of reasoning become unnecessary once voluntary influence is made the exclusive requirement for limited purpose public figure status.

The case of *Thompson v. Evening Star Newspaper Co.*<sup>169</sup> yields additional support for that approach. The case's authority is somewhat diminished, but not eliminated, by the fact that it was decided under *Curtis*, a precursor to *Gertz*.<sup>170</sup> The case involved a defamation suit brought by a political campaign chairman.<sup>171</sup> In upholding the trial court's finding that the chairman was a public figure, the court was dismissive of the fact that he was "not so well-known as Butts and Walker,"<sup>172</sup> the plaintiffs in the two cases consolidated in *Curtis*.<sup>173</sup> The court offered these observations, which might be applied with equal force to *Massey Energy*:<sup>174</sup>

The public plainly has a vital interest not only in the calibre of candidates for political office, but in the nature of the groups or factions supporting the candidates, and the quality of candidates' spokesmen and backers are appropriate considerations to be taken into account. They "often play an influential role in ordering society."<sup>175</sup>

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<sup>164</sup> See *id.* at 706, 708.

<sup>165</sup> See *id.* at 709.

<sup>166</sup> See *id.* at 706-07, 710.

<sup>167</sup> *Reuber*, 925 F.2d at 710.

<sup>168</sup> *Id.* at 709-10.

<sup>169</sup> 394 F.2d 774 (D.D.C. 1968).

<sup>170</sup> Compare *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974), with *Curtis v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring). For a discussion of the many similarities in the reasoning of the two cases, see *supra* text accompanying notes 83-93.

<sup>171</sup> *Thompson*, 394 F.2d at 775.

<sup>172</sup> *Id.* at 776.

<sup>173</sup> *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 136-40 (1967).

<sup>174</sup> See *supra* text accompanying note 2.

<sup>175</sup> *Thompson*, 394 F.2d at 776 (quoting *Curtis*, 388 U.S. at 163-64 (Warren, C.J., concurring)).

Thus the court minimized the plaintiff's lack of notoriety and focused on his "role in 'the resolution of important public questions,'"<sup>176</sup> in a word, his influence.

#### IV. INFLUENCE ALONE SHOULD DETERMINE STATUS AS A VOLUNTARY, LIMITED PURPOSE PUBLIC FIGURE

Earlier, this Comment described the failure of courts to distinguish between the characteristics of notoriety and influence on the part of potential limited purpose public figures.<sup>177</sup> It was then shown that courts have sometimes treated voluntarily assumed influence as the decisive factor.<sup>178</sup> This Comment concludes by arguing that a focus on influence is indeed the appropriate approach. The preliminary question is whether such an approach is in conflict with *Gertz*.

##### A. *Consistent with the Express Language of Gertz*

The *Gertz* Court described limited purpose public figures in terms of both influence and notoriety.<sup>179</sup> The question is whether the Court meant to impose a requirement that public figures be notorious or merely assumed that they would be. An aspect of this question is whether the express language of the case excludes the possibility of an anonymous public figure. The Court stated that limited purpose public figures "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved"<sup>180</sup> and "have assumed roles of especial prominence in the affairs of society."<sup>181</sup> Is the "forefront" of a controversy a position of special influence or a position of special notoriety? Is "prominence" to be understood as a high degree of involvement or as a high degree of visibility? One dictionary defines "forefront" as "the position of most activity, importance, etc."<sup>182</sup> and "prominent" as "noticeable at once; conspicuous; . . . widely and favorably known."<sup>183</sup> Thus "forefront" clearly accommodates the senses of both influence and notoriety. "Prominence," meanwhile, can be understood to require either that a figure be conspicuous to the public at the time that the defamation occur or that the figure's importance in the controversy be conspicuous in a conceptual sense. Under the

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<sup>176</sup> See *id.* at 776 (quoting *Curtis*, 388 U.S. at 163-64).

<sup>177</sup> See *supra* Part II.

<sup>178</sup> See *supra* Part III.

<sup>179</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* (describing public figures in general).

<sup>182</sup> WEBSTER'S NEW WORLD DICTIONARY 545 (2d college ed.) (David B. Guralnik ed., 1986).

<sup>183</sup> *Id.* at 1137.

latter interpretation, prominence may consist of influence alone. Consequently, the language of *Gertz* does not foreclose the possibility of an anonymous public figure.

B. *Consistent with the Rationales of Gertz*

Even if the possibility of an anonymous public figure is not explicitly excluded by *Gertz*, there remains the question of whether the idea of such a figure is fully consonant with the reasoning of the case. The *Gertz* Court found that private individuals are “more deserving of recovery” than are public figures, for two reasons.<sup>184</sup> First, public figures have voluntarily assumed the risk of attention by attempting to influence the resolution of public questions.<sup>185</sup> Second, they have greater access to the mass media and thus a greater ability to respond to defamatory falsehoods.<sup>186</sup> The question is whether these rationales apply with full force to an anonymous, influential figure.

Since being defamed may itself result in notoriety, whether *Gertz* accommodates the concept of an anonymous public figure boils down to whether a public figure must be notorious *prior* to being defamed.<sup>187</sup> The first *Gertz* rationale, assumption of risk,<sup>188</sup> has no logical relationship to any such requirement. Indeed, to require pre-existing notoriety would result in a rather peculiar concept of assumption of risk. One could not be said to have assumed the risk of attention until that risk had come to fruition. No analogous rule could even be coherently proposed for ordinary negligence cases involving assumption of the risk, because there the risk at issue has necessarily materialized at the very instant the tort occurred.<sup>189</sup> A requirement that the risk materialize before that time would be incomprehensible. Likewise, to say that a plaintiff cannot have assumed the risk of attention unless he or she was already well known would be absurd.

Additionally, whether an attempt at influence will result in public attention is largely a matter of chance, particularly when one acts behind the scenes and may or may not be “outed” by the press or an opponent. That a risk has been assumed, where that is the question, is sufficiently demonstrated by a plaintiff’s voluntarily undertaking the risky activity.<sup>190</sup> Whether

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<sup>184</sup> *Gertz*, 418 U.S. at 345.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 344.

<sup>187</sup> *Cf. Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979) (“[T]hose charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.”).

<sup>188</sup> *Gertz*, 418 U.S. at 345.

<sup>189</sup> *See generally* Restatement (Second) of Torts § 496A (1977).

<sup>190</sup> *Cf. Gertz*, 418 U.S. at 345 (“[P]ublic figures have voluntarily exposed themselves to increased risk . . .”).

the risk materializes is neither necessary nor sufficient, from a logical standpoint, to prove that the risk has been assumed.

The second *Gertz* rationale, access to media,<sup>191</sup> also suggests no reason that an anonymous, limited purpose public figure cannot exist. Access to media is an independent characteristic of the public figure plaintiff under *Gertz*.<sup>192</sup> Thus there is no reason to attempt to ensure such access through a notoriety requirement. Further, the influence-seeking requirement<sup>193</sup> bears a stronger logical relationship to media access than a possible notoriety requirement does. It is difficult to imagine how a person could have substantial involvement in the resolution of public controversies without access to media. That person might be anonymous, but public influence implies an ability to communicate.

A third rationale for the public figure doctrine is implicit in *Gertz* and explicit elsewhere: that the public has an interest in learning about the conduct of public figures.<sup>194</sup> This rationale fully supports the application of the public figure doctrine to anonymous influential persons. If the public has an interest in knowing about those who act in the open for the purpose of influencing public matters, then *a fortiori* it has an interest in discovering the role of those whose influence is covert. The purposes of the public figure doctrine are therefore furthered rather than undermined by its application to anonymous, influential persons.

### C. *Consistent with the Public Official Doctrine*

An additional ground for recognizing the existence of anonymous public figures emerges from the fact that the public figure doctrine grew out of the public official doctrine.<sup>195</sup> In *Curtis*, Justice Warren reasoned that the distinction between those who govern and those who merely influence government is no longer clear.<sup>196</sup> This is an additional reason to apply the same defamation standards to both groups. But more fundamentally, it seems logical that the public figure doctrine should be consistent with the public

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<sup>191</sup> *Id.* at 344.

<sup>192</sup> *See id.*; *see also* Fitzgerald v. Penthouse Int'l, 691 F.2d 666, 668 (4th Cir. 1982) (setting forth a five-factor test that includes access to media).

<sup>193</sup> *See Gertz*, 418 U.S. at 345.

<sup>194</sup> *See id.* at 344-45 (describing the public interest in learning about the conduct of officials and analogizing to public figures); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 163-64 (1967) (Warren, C.J., concurring) (describing the public interest in learning about the conduct of public figures).

<sup>195</sup> *See Curtis*, 388 U.S. at 133-35 (plurality opinion); *id.* at 162-65 (Warren, C.J., concurring). The *Curtis* Court repeatedly analogized between public officials and public figures, stating that the conduct of public figures is of as much legitimate public interest as that of officials, that public figures have as great a degree of influence as officials do, and that public figures have as much ability to use the press to rebut criticism as officials do. *Id.* at 164.

<sup>196</sup> *Id.* at 163-64.

official doctrine of which it is an extension. It is therefore significant that public official status requires having, or appearing to have, “substantial responsibility for or control over the conduct of governmental affairs.”<sup>197</sup> That characteristic is arguably equivalent to the “influence” required for voluntary public figures.<sup>198</sup> Entirely absent from the test for public figure status, however, is any requirement of notoriety.<sup>199</sup> Presumably, a bureaucrat who remained unknown to the public until he or she was defamed would still be held to be a public official, so long as that bureaucrat was in a position of sufficient responsibility. The same standard should apply to voluntary public figures. Influence and not notoriety should be the test.

#### D. *Equity*

An additional basis for the recommendation made here is the apparent inequity of allowing a plaintiff who wields influence behind the scenes to prove defamation under a negligence standard<sup>200</sup> while requiring an openly influential plaintiff to prove actual malice. Two influential plaintiffs, one notorious and the other anonymous, might even find themselves opponents in the same public controversy, and each might defame the other. In such a case, the legal playing field would be hopelessly uneven. The *Gertz* Court conceded that “many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test.”<sup>201</sup> Another court was perhaps more forthright when it stated that “the level of clear and convincing proof required now . . . to show ‘actual malice’ in a defamation case is almost insuperable.”<sup>202</sup>

Concern for equal treatment of the participants to a debate was at play in *New York Times*.<sup>203</sup> There, the Court noted that it had previously held federal officials to enjoy an absolute privilege from defamation liability for statements made “within the outer perimeter” of their duties.<sup>204</sup> The states,

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<sup>197</sup> *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

<sup>198</sup> *See Gertz*, 418 U.S. at 345.

<sup>199</sup> *See Rosenblatt*, 383 U.S. at 85.

<sup>200</sup> Although the common law imposed strict liability for defamation, *see* Restatement of Torts § 558 (1938) (elements of defamation), *Gertz* imposed a requirement that even private individual plaintiffs prove some measure of fault, *Gertz*, 418 U.S. at 347. In later cases, the Court implied that this requirement did not apply to speech involving “matters of purely private concern.” *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757-61 (1985); *see also Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986).

<sup>201</sup> *Gertz*, 418 U.S. at 343.

<sup>202</sup> *Reliance Ins. Co. v. Barron’s*, 442 F. Supp. 1341, 1344 (S.D.N.Y. 1977). *Gertz* requires actual malice to be shown by “clear and convincing proof.” *Gertz*, 418 U.S. at 342.

<sup>203</sup> *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 282-83 (1964).

<sup>204</sup> *Id.* at 282 (quoting *Barr v. Matteo*, 360 U.S. 564, 575 (1959)).

the Court added, apply a similar privilege to their own officials.<sup>205</sup> The purpose of the privilege is to remove inhibitions on the robust administration of the laws.<sup>206</sup> “Analogous considerations,” the *New York Times* Court wrote, “support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official’s duty to administer.”<sup>207</sup> A similar principal of reciprocity is appropriate in the present context. Fairness requires that all those who voluntarily intervene in a public controversy, whether overtly or covertly, be judged by the same standard.

## CONCLUSION

The Supreme Court’s ruling in *Gertz* created confusion by conflating the characteristic of notoriety with that of influence. In applying the precedent to voluntary, limited purpose public figures, lower courts have preserved the case’s language while sometimes ignoring its apparent, if not genuine, notoriety requirement. That approach is in fact the one that is most consistent with the underlying principles of *Gertz* and of its precursors. The *Gertz* Court had merely assumed that notoriety would be a characteristic of those who influence public discussion, and that assumption has proved unfounded. When a court next finds itself confronted with a case of an anonymous though influential defamation plaintiff, the time will have come to recognize that a public figure need not be notorious.

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<sup>205</sup> *N.Y. Times*, 376 U.S. at 282.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* (citing *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled* by *Brandenburg v. Ohio*, 395 U.S. 444 (1969)).