Almost Famous:

Reality Television Participants as Limited-Purpose Public Figures

- By Darby Green*

All is ephemeral – fame and the famous as well.
– Marcus Aurelius (A.D 121-180), Meditations IV

In the future everyone will be world-famous for fifteen minutes.
– Andy Warhol (A.D. 1928-1987)

In the highly lauded 2003 Golden Globe® and Academy Award® winner for best motion-picture, *Chicago* protagonist Roxie Hart croons, "I'm gonna be a celebrity – that means somebody everyone knows."[1] Although the film pointedly parodies the fame-obsessed society of the 1920s, it resonates with today's film audiences largely because the desire for media attention is ubiquitous in contemporary America.[2] Ms. Hart's dreams of celebrity have come to fruition for many ordinary people via their participation in reality television shows. Over the past decade, and in the past year especially, television airwaves have become flooded with a variety of reality programming. In the 2002-2003 season, a record twenty-five non-scripted series aired on the broadcast networks; statistics regarding the number of series that debuted in the summer of 2003 range from seventeen to over thirty; and the 2003-2004 season boasts at least six new reality television programs on the broadcast networks alone.[3]

Although the list is constantly expanding, what follows is a sampling of primetime offerings. *Survivor* and *The Amazing Race* feature psychological competitions held in exotic locales.[4] *American Idol, Fame,* and *Star Search* follow Hollywood hopefuls in their quest for a "big break."[5] *The Bachelor, The Bachelorette, Who Wants to Marry My Dad, For Love or Money,* and *Joe Millionaire* offer the chance for true love and potential marriage.[6] *Who Wants to Marry a Multimillionaire* and *Married by America* culminate with the betrothal of complete strangers.[7] *The Surreal Life*, *Celebrity Mole,* and *I'm a Celebrity: Get Me Out of Here!* feature B-list celebrities in reality television situations. *Are You Hot* places half-naked twenty-somethings in the limelight, where their egos are validated or vilified by celebrity judges.[8] *Temptation Island* and *Paradise Hotel* place half-naked twenty-somethings in a tropical setting, where their amorous affairs are tracked.[9] *The Anna Nicole Show,* the now-defunct *The Real Roseanne Show,* and *The Osbournes* showcase the daily lives of foulmouthed celebrities and their families and friends.[10] *The Joe Schmo Show* satirizes the reality genre: a would-be contestant believes he is participating in a reality television show; however, all of the other "contestants" are actors, the competitions are rigged, and much of the activity is scripted.[11] A reality television staple, *The Real World*, tells the "true story of seven strangers picked to live in a house and have their lives taped, to find out what happens when people stop being polite and start getting real."[12] The reality television machine has already produced spin-offs: the *Real World/Road Rules Battle of the Seasons* and the *Real World/Road Rules Battle of the Sexes*, feature former reality television "stars" competing in physical and mental challenges, while *American Juniors* and *America's Most Talented Seniors* provide aspiring singers the opportunity to become the next Ruben Studdard or Clay Aiken (of *American Idol* fame), albeit in a different demographic.[13] Additionally, the eighth installment of *Survivor*, promoted as an All-Star version, will feature the winners and other contestants from former seasons.[14]

Although some television executives are attempting to distance themselves from reality television, this phenomenon shows no signs of slowing down.[15] Each day CBS and The WB receive a minimum of five reality-show pitches, Fox and ABC receive ten, and NBC hears fifteen by phone, as well as numerous others from employees of its parent General Electric.[16] The reality television machine has

proved lucrative for television stations: Fox clocked its largest audience share ever during *Joe Millionaire's* finale, averaging 34.6 million viewers for the two-hour program, including 26.2 million 18-to-49-year-olds, and 40 million viewers during the final hour of the show.[17] These staggering numbers were larger than every sitcom or drama since the finale of *Seinfeld* in May 1998 and broke a night-long Fox ratings record set four weeks prior by the season premiere of *American Idol*.[18] Even more notably, this ratings coup resulted in the first February sweeps victory for Fox among viewers aged 18 to 49 in the history of the network.[19] Fox saw similar success in the May ratings sweep competition, as over 38 million viewers tuned in for the season finale of *American Idol*, making it the second-most popular entertainment show on television in 2003.[20] NBC earned the highest 18-to-49-year-old demographic rating of the summer with its finale of *For Love or Money,* peaking at 7.1 million viewers.[21] All told, seven of the top ten programs of the 2002-2003 television season were reality programs.[22] Not surprisingly, premium cable channels are embracing the craze: USA touts *Nashville Star*, Bravo is home to *The It Factor, Boy Meets Boy,* and *Queer Eye for the Straight Guy,* E! Entertainment broadcasts *The Michael Essany Show*, and TLC produces *Trading Spaces* and *A Wedding Story*.[23] MTV's fall line-up alone contains eight new reality programs, including *Sorority Life, Fraternity Life,* and *Newlyweds: Nick and Jessica*.[24]

As these programs continue to saturate the primetime schedule, a new class of celebrities has emerged. Many of these individuals have learned that the cost of their instant fame is the loss of their privacy. Tabloid and reputable publications alike have printed stories about embarrassing and private incidents in the lives of reality television participants.[25] While few reality television stars have taken legal action, it seems inevitable that many will in the future.[26] The current law is unclear as to how such individuals should be treated. Although they have not attained fame in a traditional manner, reality television participants are certainly not private figures. However, it seems unlikely that many, if any, of these individuals will parlay their stint as reality television participants into careers in the entertainment industry. Thus, they should not be grouped into the same category as actors, musicians, and other public figures. Reality television participants deserve a class all their own.

If the media continues along its current trajectory, the privacy rights of all individuals could be in jeopardy. As reality television grows rampant, so does the likelihood of any private individual having ties to a reality television participant; consequently, such private individuals might be subject to media scrutiny. This trend could be alleviated by differentiating reality television participants from general-purpose public figures. Accordingly, this Note aims to protect reality television participants from the tort of the public disclosure of private facts via two avenues: (1) the establishment of a class of limited-purpose public figures within the law of privacy; and (2) the placement of reality television participants in this new category.

This Note begins with an overview of the basic facets of privacy law, focusing on the tort of the public disclosure of private facts and its interaction with the First Amendment. Next, this Note explores the differences in rules for public, private, and involuntary public figures. The law of defamation is offered as a model for privacy law to emulate, specifically, the limited-purpose public figure created under *Gertz* and its progeny.[27] Then, the issue of whether one's status as a public figure may diminish over the passage of time is considered. This Note posits that limited-purpose public figures should exist in the realm of privacy law, and that reality television participants are appropriate for membership in this class. The ramifications of this categorization are discussed through the lens of both privacy law and defamation. Finally, this Note proposes a test for determining when former reality television participants might regain their status as private figures.

I. Privacy

A. What is Privacy?

The word "privacy" has taken on so many different meanings and connotations in so many different legal and social contexts that it has largely ceased to convey any single coherent concept.[28] The Supreme Court has broadly defined privacy as "the individual's control of information concerning his or her person," that is, the right to control the dissemination of information about oneself.[29] The Court also noted that at common law, the extent of protection of privacy was related to the "degree of dissemination of the allegedly private fact and the extent to which the passage of time rendered it private."[30] When most people hear the word "privacy," they intuitively think of a situation that fits within the category of law labeled as the tort of invasion of privacy by the public disclosure of embarrassing private facts.[31]

(1) Historical Development of the Private Facts Tort

Samuel Warren and Louis Brandeis' law review article of 1890 is widely regarded as one of the most influential pieces of writing in American legal history.[32] In the article, Warren and Brandeis argue that the common law should recognize a "right to privacy" which they view as a right preventing truthful but intrusive and embarrassing disclosures by the press.[33] This "right to be let alone," which has emerged as the general rationale behind the private facts tort, has since been recognized by a majority of American jurisdictions.[34]

Some courts have acknowledged the difficulty in creating a consistent definition of privacy. For example, the

Sixth Circuit has noted that "[t]he term 'right of privacy' is imprecise, because this beguiling expression has been used to designate many different rights of varying importance, from the Fourth Amendment freedom from arbitrary searches and seizures … to the right not to have one's name bruited about in gossip columns."[35] The Supreme Court has interpreted privacy to mean a bundle of constitutional rights against governmental intrusion.[36] Such constitutional "privacy" protects against: (1) governmental intrusion into a person's mind and thought processes and the related right to control information about oneself;[37] (2) governmental intrusion into an individual's personal space, for example, unreasonable search and seizure into a person's zone of private seclusion;[38] and (3) governmental intrusion into a person's right to make certain personal decisions.[39]

The more familiar interpretation of privacy is the right protected through the civil law of torts. The tort of invasion of privacy differs from Constitutional privacy in two important ways: (1) the types of acts which constitute an invasion of "privacy;" and (2) while constitutional "privacy" protects against governmental intrusion, the tort law of privacy primarily protects against invasion by private parties.[40]

IN Prosser's view, in order to recover under disclosure, or the private facts tort, the disclosure had to be public, the facts had to be private, and the matter had to be highly offensive to a reasonable person.

Dean William L. Prosser attempted to codify the emerging tort of invasion of privacy in his influential 1960 law review article.[41] He divided the tort of invasion of privacy into four separate and discrete categories: (1) intrusion; (2) disclosure; (3) false light; and (4) appropriation.[42] In Prosser's view, in order to recover under disclosure, or the private facts tort, the disclosure had to be public, the facts had to be private, and the matter had to be highly offensive to a reasonable person.[43] Additionally, the private facts tort required that the publication be truthful.[44] Prosser recognized that this private facts tort was bounded by the publishing of newsworthy events, which included current news, information, education, entertainment and amusement, as well as a logical connection to the plaintiff.[45]

The Second Restatement of Torts codified Prosser's four-part division of the invasion of privacy, identifying Publicity Given to Private Life, or the private facts tort, as one of its components.[46] Under the Restatement, liability is established for the publication of the private life of another, provided (1) the publicized matter is highly offensive to a reasonable person and (2) is not a matter of legitimate public concern.[47] The Restatement draws the line when publicity ceases to be the giving of information to which the public is entitled, and becomes no longer appropriate for public concern, that is, when publicity transforms into an unreasonable and sensational prying into private lives for its own sake.[48] However, this line is rather blurry, as courts have since struggled in their attempts to strike a balance between personal privacy and freedom of the press. Despite the lack of clarity, the private facts tort is recognized in forty-four states and the District of Columbia, and most jurisdictions follow the elements outlined in the Restatement.[49]

(2) The Private Facts Tort vs. the First Amendment

The publication of private facts tort challenges the First Amendment guarantee of freedom of the press.[50] As a result, courts must balance an individual's right to privacy against the media's right to disseminate newsworthy information.[51] This struggle is obvious because one of the two main defenses for the publication of private information is newsworthiness.[52] The second defense, consent, is easily recognized in situations where the plaintiff knew of the contents of the disclosure and agreed to its publication.[53] Newsworthiness, however, has been the root of much debate, and courts have yet to agree upon a uniform definition of this term.[54] The Supreme Court, in its limited dealings with the private facts tort, has expressly refused to address the issue by deciding the cases without discussing the definition of newsworthiness.

The first constitutional challenge of the private facts tort addressed by the Supreme Court was in *Cox Broadcasting Corp v. Cohn*.[55] The Court acknowledged the need for the right to privacy but noted that the private facts tort "most directly confronts the constitutional freedoms of speech and press."[56] Limiting its decision to the narrow issue at bar, the Court held that a state may publish a rape victim's identity obtained from judicial documents that are open to public inspection, provided the information is accurate.[57] By failing to address the broader question of whether the publication of truthful information could ever be punished, the *Cox* decision merely reaffirmed that the private facts tort addresses the disclosure of private, truthful facts.[58]

In *Florida Star v. B.J.F.,* the Supreme Court invoked the First Amendment to find no liability for a newspaper who published the name of a rape victim received from a

police department press release.[59] Although this decision appeared to limit the reach of the private facts tort, the Court expressly rejected the newspaper's broad claim that the press could never be held liable for publishing the truth.[60] Again, the Court failed to put forward a coherent definition of newsworthiness, and merely expanded the definition of newsworthiness by denying liability where the information is provided by the government.[61]

(3) Tests for the Newsworthiness Defense

In order for private facts to be publicized, they must be newsworthy in nature. As stated, the Supreme Court has avoided taking steps to define newsworthiness, resulting in various jurisdictions' creating their own unique meanings and interpretations. Five tests for newsworthiness have emerged, each falling somewhere on a continuum ranging from absolute freedom of the press to complete censorship.[62]

a. REJECTION OF THE PRIVATE FACTS TORT

A few jurisdictions have chosen to not recognize the public disclosure of private facts tort.[63] By holding that all true speech is protected, these jurisdictions impliedly hold that all media communications are newsworthy and provide true disclosures with greater First Amendment protection than the United States Supreme Court requires.[64] The benefit of this outlook is its bright line approach, which creates judicial certainty and eliminates the chore of analyzing whether newsworthiness is present.[65] The downside of this approach, however, is that there is no recourse for publication of offensive true speech.[66]

b. "LEAVE-IT-TO-THE-PRESS MODEL"

A somewhat less stringent test is the "leave it to the press model" proposed by Diane Zimmerman in her famous law review article.[67] This approach, which allows the media to have final say regarding newsworthiness, essentially holds that "what is printed is by definition of legitimate public interest."[68] Although this method recognizes the tort of public disclosure of private information in theory, by allowing the press to decide its own limits, the private facts tort loses all strength in practice.[69] The rationale behind this approach is that the market will provide a check on the media because consumers are opposed to yellow journalism.[70] However, the success of tabloid journalism, "trashy" talk shows, and reality television of modern day media provide persuasive evidence that the press is unlikely to self-censor, as consumers are increasingly infatuated by tawdry entertainment.

c. RESTATEMENT APPROACH

The Second Restatement sets forth the most widely accepted test for newsworthiness. This test creates liability when the publicized matter would be highly offensive to a reasonable person and is not of legitimate concern to the public.[71] This standard was articulated by the Ninth Circuit in *Virgil v. Time, Inc*:

> "In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of community mores. 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."[72]

In other words, newsworthy matters are those of legitimate public concern and should be assessed based on the locality's community mores.[73] This approach adds the element of decency to the analysis, barring the disclosure of facts of legitimate public concern that are "so intimate and unwarranted in view of the victim's position" so as to clash with standards of morality.[74] The disadvantage of this outlook is that it may be difficult to apply, as its subjective nature results in a *sui generis* analysis and potential complications in varying jurisdictions.[75] Overall, however, this method is rather positive because it attempts to balance an individual's right to privacy with freedom of the press.

d. THE "NEXUS" APPROACH

The Fifth and Tenth Circuits have employed a nexus approach, which builds upon the tenets established in the Restatement method. Like the Restatement, this test allows for the disclosure of information that serves the public interest but does not overstep the bounds of decency.[76] However, this approach adds a "nexus requirement," first proposed in *Campbell v. Seabury Press*, which demands that "a logical nexus (or relationship) exist between the complaining individual and the matter of legitimate public interest."[77] In *Campbell,* the former sister-in-law of a civil rights leader sued the publisher of an autobiography that disclosed embarrassing private facts about her previous marriage.[78] The Fifth Circuit found for the defendant publisher because the facts of the plaintiff's marriage impacted the autobiography's author, creating a logical relationship worthy of Constitutional protection.[79] The Tenth Circuit embraced this method in *Gilbert v. Medical Economics Co*., but defined "nexus" as a "substantial relevance" rather than a "logical relationship."[80] The advantages and disadvantages of the nexus test mirror those discussed in the Restatement approach with some additional privacy protection (or media limitation) as a result of the relevance requirement.

e. THE CALIFORNIA APPROACH

The Supreme Court of California has created a three-prong test for newsworthiness determined by: (1) the

social value of the published facts; (2) the extent of the intrusion into private areas; and (3) the extent to which the complaining party has voluntarily placed himself/herself in the public eye.[81] Private facts are analyzed by these components and are also held to the decency standard, where decency is deemed absent once the plaintiff proves that the defendant published the information with reckless disregard for the truth.[82] Like the Restatement, the California approach attempts to balance privacy with the First Amendment.

The most recent study of the newsworthy standard was in *Shulman v. Group W Productions, Inc.*[83] In declaring the nationally syndicated broadcast of plaintiffs' treatment for injuries resulting from a car crash to be newsworthy, the California Supreme Court concluded that "a publication is newsworthy if some reasonable members of the community could entertain a legitimate interest in it."[84]

The *Shulman* case is evidence that this test may be in danger as California courts are embracing a more expansive approach to newsworthiness and are displaying an affinity for the nexus approach.[85] However, regardless of this risk of erosion, the California approach is intriguing because it takes the public/private status of the complainant under consideration.

B. Voluntary Public Figures

As established by case law, those who are famous, notorious, or simply noteworthy lose some portion of their privacy. Consequently, when public figures sue for invasion of privacy under the common law tort, they must contend with a lowered expectation of privacy.[86]

Two early cases that are often quoted have divergent views of the public figure's relation to the private facts tort. In *Melvin v. Reid,* the plaintiff was a former prostitute who had been acquitted of murder.[87] Subsequently, Ms. Melvin turned her life around and lived respectably in the private sector for many years in a community that had no knowledge of her lurid past.[88] However, her tumultuous history was revealed in a movie about the murder case that used her actual maiden name.[89] The court held that the creation of the movie violated her right to privacy because she had successfully reclaimed her private figure status.[90]

THOSE who are famous, notorious or simply noteworthy lose some portion of their privacy. Consequently, when public figures sue for invasion of privacy under the common law tort, they must contend with a lowered expectation of privacy.

Conversely, the Second Circuit determined in *Sidis v. F-R Publishing Corp*, that a reclusive former child prodigy who had hidden from the media for years was not a private figure.[91] Mr. Sidis sued *The New Yorker* magazine after he was featured and mocked in a "where is he now" article, but the court held that his public figure status had not diminished with the passing of time.[92] The *Sidis* decision stands for the premise that "at some point the public interest in obtaining information becomes dominant over the individual's desire for privacy."[93]

In *Time v. Hill*, a false light invasion of privacy case, the Supreme Court cited *Spahn v. Julian Messner, Inc.*, and applied the newsworthiness defense.[94] *Spahn,* a New York Court of Appeals decision, held that when a plaintiff is a public personality, he is substantially without a right to privacy, insofar as his professional career is involved.[95] The *Spahn* court warned, however, that the plaintiff maintained the right to protect his personality from fictionalization and exploitation in the form of an unauthorized biography.[96] Taking a cue from New York, the Supreme Court focused on the "actual malice" standard and performed a defamation analysis.[97]

Most jurisdictions agree there 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.[98] Those who have achieved a marked reputation or notoriety by appearing before the public, such as actors, actresses, and professional athletes, should have a reasonable expectation that their accomplishments and way of life will be the subject of print, radio, or television attention.[99] Such public figures have to some extent lost the right to privacy, and they are subject to fair comment and criticism by the media.[100] Additionally, the Fifth Circuit has noted that one of the public interest privileges in reporting private facts is to report truthful facts concerning public figures.[101]

Since judges typically emphasize the public's curiosity in the material rather than the public's need for it, courts are sometimes reluctant to apply the private facts tort to a celebrity plaintiff.[102] For example, in *Ann-Margret v. High Society Magazine*, the Southern District Court of New York granted the defendant magazine's motion for summary judgment after it published a photograph of actress Ann-Margret partly naked.[103] The court determined that the unauthorized publication did not violate her privacy because the "use of a person's name or picture in the context of an event within

the 'orbit of public interest and scrutiny,' [citation omitted] a category into which most of the events involving a public figure … fall," does not lie within the ambit of the private facts tort.[104] The court broadly construed newsworthiness and included "matters of entertainment and amusement, concerning interesting phases of human activity in general" ensuring that this instance of an unclad popular actress would be deemed newsworthy.[105]

The Restatement holds that "one who voluntarily places himself in the public eye, by engaging in public activities, or by assuming a prominent role in institutions or activities having general economic, cultural, social or similar public interest, or by submitting himself or his work for public judgment, cannot complain when he is given publicity that he has sought, even though it may be unfavorable to him."[106] No right of privacy remains for the public figure in relation to his public activities and appearances since these are no longer private affairs.[107] However, while no cause of action exists regarding revelations involving the public figure relating to his famous status, liability may arise when the interest of the public exceeds to the range of information that would otherwise be considered private.[108] In fact, one California court has held that public figures are entitled to keep some information about their domestic activities and sexual relations private. [109]

C. Involuntary Public Figures

For the purposes of the California newsworthiness test, involuntary public figures are treated much like private figures. In fact, the third prong of the newsworthiness test asks the fact-finder to consider whether the plaintiff has *voluntarily* placed himself in the public eye.[110] However, since other jurisdictions treat involuntary public figures differently than voluntary public figures, this class of plaintiffs warrants a brief discussion.[111]

Involuntary public figures are persons who have not sought public attention but who have become "news" as the result of their involvement in or association with an otherwise newsworthy event.[112] This category includes crime victims, accident victims, accused criminals, and people who perform heroic acts.[113] Additionally, those who are related to voluntary public figures gain involuntary public figure status.[114]

The Seventh Circuit opined that involuntary public figures have no legal right to regain their private status as long as the newsworthy events that made them public figures remain in the public interest.[115] The court noted that even if these "people who do not desire the limelight" would prefer that their experiences remain private, they are not equipped with the legal means to do so.[116]

In *Leverton v. Curtis Pub. Co*, the Third Circuit remarked that the invasion of privacy rights of involuntary public figures is not without limits.[117] The case concerned a young girl who had been involved in a car accident at age ten and had the misfortune of being photographed at that time.[118] At a later date, another magazine published the picture from the accident and the victim sued for invasion of privacy.[119] Although ultimately finding for the publishers, the court declared that the plaintiff's life may not be subjected to continuous public scrutiny and would only risk attention in situations closely related to the initial car accident.[120]

D. Private Figures

While intuitively, private figures should have a greater expectation of privacy than public figures, most jurisdictions do not consider the status of the plaintiff in determining newsworthiness.[121] The Supreme Court has stated, in dicta, that the risk of exposure to public view is an "essential incident of life in a society which places a primary value on freedom of speech and of press," so even private citizens' rights of privacy are difficult to protect.[122] Arguably, the tendency of the courts to favor the press over individuals, coupled with privacy-seeking people's reluctance to broadcast their private facts in court, has prevented the full development of the private facts tort.[123]

To this end, when the plaintiff in a private facts tort is a private figure, the "right to be let alone" must still be balanced against the public interest in the dissemination of news and information, as well as the constitutional guarantees of freedom of speech and of the press.[124] The right of privacy's main objective is to protect private life, and it is determined by a reasonable standard.[125] In other words, an allegedly objectionable publication must offend an "ordinary man."[126] Applying this standard, rather than the standard for public figures who arguably seek and enjoy publicity, assists the protection of private citizens who desire to be left alone.[127] In addition to the apparent benefits to private figures' privacy, this standard has the practical advantage of limiting the amount of frivolous and extraneous information that the press can report; that is, things done or said by public figures are more likely to serve the public in an educational or newsworthy way than those said or done by private figures.[128]

II. Defamation

A. Definition and Elements

Whereas the publication of private facts tort involves the reporting of true, personal facts, the law of defamation involves the reporting of false information about an individual. Both facets of law often feature a plaintiff protecting his or her image from a media defendant, highlighting the conflict between individuals' rights and the freedom of the press. The method of differentiating among private, limited-purpose, and public figures is a model that may be adopted by the private facts tort.

The individual's right to protect his own good name "reflects no more than our basic concept of the essential

dignity and worth of every human being – a concept at the root of any decent system of ordered liberty."[129] A state "has a 'strong and legitimate interest' in compensating private persons" for injury to reputation by defamatory statements.[130] Accordingly, in a claim for defamation, the court presumes that the plaintiff is a private individual, subject to the defendant's burden of proving that the plaintiff is a public figure.[131]

The elements required to create liability for defamation are: (1) "a false and defamatory statement concerning another;" (2) "an unprivileged publication to a third party;" (3) "fault amounting at least to negligence on the part of the publisher;" and (4) "either actionability of the statement irrespective of special harm or the existence of special harm caused by publication."[132]

Although neither the Restatement nor the Supreme Court has sufficiently defined public figures or private figures, they have recognized that these categories are entitled to differing sets of rules regarding defamation.[133] Liability is created when one "publishes a false and defamatory communication concerning a public official or public figure in regard to his conduct, fitness or role in that capacity" if the publisher: (1) "knows that the statement is false and that it defames the other person," or (2) "acts in reckless disregard of these matters."[134] Alternatively, "one who publishes a false and defamatory communication concerning a private person … is subject to liability … if he: (1) knows that the statement is false and that it defames the other, (2) acts in reckless disregard of [the truth], or (3) acts negligently in failing to ascertain [the truth]."[135] This stricter standard is also applicable to public officials or public figures when the alleged defamatory conduct involves the dissemination of information in a purely private matter not affecting their conduct, fitness or role in their public capacity.[136]

B. History

Prior to 1964, the law of defamation was primarily left to state law, as defamation was not protected by the auspices of the First Amendment.[137] The common law strongly favored the State's interest in preventing and redressing injuries over potential damage to individuals' reputations.[138]

(1) *New York Times v. Sullivan* - Defamation and Public Officials

In the landmark *New York Times v. Sullivan* decision, the Supreme Court broke with the common-law tradition and extended First Amendment coverage to defamation concerning the conduct of public officials.[139] The Court held that the First and Fourteenth Amendments prohibit a public official from recovering damages for a defamatory falsehood relating to his official conduct absent proof that the statement was made with "actual malice."[140]

Justice Brennan, writing for the majority, said that "where the plaintiff is a public official, his place in the governmental hierarchy is sufficient evidence to support a finding that his reputation has been affected by statements that reflect upon the agency of which he is in charge."[141]

The Court went on to define "actual malice" as the possession of prior knowledge that the allegedly defamatory statement was false or the display of reckless disregard for the truth.[142] This actual malice must be demonstrated with convincing clarity, that is, by clear and convincing proof.[143]

(2) *Butts* and *Walker* - Defamation and Public Officials

In the companion cases of *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, the Supreme Court extended the constitutional protection guaranteed by *New York Times* to public figures.[144] The Court understood public figures to be persons who, "by reason of their fame, shape events in areas of concern to society at large" or nonpublic persons who "are nevertheless intimately involved in the resolution of important public questions."[145] Later, the Ninth Circuit offered public figures as "those persons who, though not public officials, are involved in issues which the public has a justified and important interest."[146] The numerous types of people who may be viewed as public figures "include artists, athletes, business people, dilettantes, [and] anyone who is famous or infamous because of who he is or what he has done."[147]

(3) *Rosenblum* - Defamation and Public Issues

In *Rosenbloom v. Metromedia, Inc.*, a plurality of the Supreme Court extended the actual malice standard to private persons, providing the statements concerned all "matters of public or general concern" or interest.[148] However, this public/private issue distinction was patently rejected in later Supreme Court decisions in favor of the public/private actor distinction that had been advanced in *Gertz v. Welch, Inc.*[149]

(4)*Gertz* - Defamation and Limited-Purpose Public Figures

In *Gertz*, the Supreme Court focused on the private or public status of the plaintiff as the determinative factor in calculating the extent of protection, and determined that the actual malice standard still governed for public officials and public figures, but not for private figures.[150] Recognizing that the public/private dichotomy was insufficient, the Court divided public figures and public officials into three categories: "(1) 'involuntary public figures,' who become public figures through no purposeful action of their own; (2) 'all-purpose public figures,' who achieve such pervasive fame or notoriety that they become public figures for all purposes and in all contexts; and (3) 'limited-purpose public figures,' who voluntarily inject themselves into a particular public controversy and thereby become public figures for a limited

range of issues."[151] Further, the Court noted that private individuals deserve substantially more rights; consequently, the Court eliminated the need to overcome the "actual malice" burden.

The Court noted that the malice burden variation between private individuals and public officials and figures stemmed from two crucial differences between those individuals. First, public officials and public figures usually enjoy significantly greater access to the channels of effective communication and can consequently counteract false statements more easily than private individuals can.[152] As a result, the state interest in protecting private individuals is greater because they are more vulnerable to injury than public officials and public figures.[153] Second, an individual who voluntarily thrusts himself into the public arena, in the manner that public officials and public figures do, must accept the necessary consequences resulting from involvement in public affairs.[154]

THE limited-purpose public figure is an individual who voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.

The categories of public figures and public officials are comprised of those individuals who obtain notorious achievements or who vigorously and successfully seek the public's attention, as well as those who hold governmental office.[155] The *Gertz* court noted that, "in some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts."[156] Such individuals are recognized as all-purpose public figures and are required to meet the "actual malice" burden established in *New York Times*.

Recognizing that without 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 identified another, more common type of public figure.[157] The limited-purpose public figure is an individual who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues."[158] These limited-purpose public figures, who "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved," are held to the *New York Times* standard, provided they fulfill the "public figure" requirements previously discussed.[159] Whether a defamation plaintiff is a limited-purpose public figure is an issue of law.[160]

The *Gertz* court, however, declined to expand the protection afforded by that standard to defamation actions brought by private individuals.[161] The Court reached this conclusion following application of their two-prong test: (1) public figures and officials are less vulnerable to injury from defamation because of their ability to self-help; and (2) public figures and officials are less deserving of protection because of their voluntary exposure to the increased risk of injury from de-famation.[162] In other words, "private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery."[163] Based on this distinction, the Court granted the communications media the privilege to "act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them."[164] The Court also determined that "states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[165]

(5) Application of *Gertz* - Is *Anybody* a Limited-Purpose Public Figure?

Although the *Gertz* court went to great lengths to carve out a definition of limited-purpose public figures, and multiple Courts of Appeals have categorized plaintiffs as limited-purpose public figures, the Supreme Court has been reluctant to label anyone a limited-purpose public figure.[166] There have been three Supreme Court cases since *Gertz* in which the defendants attempted to categorize the plaintiffs as limited-purpose public figures; however, the Court determined that these plaintiffs were private individuals in all three occasions.[167]

In *Gertz*, the Supreme Court did not provide "a detailed chart of the contours of the public and private figure categories;" rather, it "elect[ed] to paint with a broad brush [in lieu of] a case by case approach."[168] Subsequently, the Court has developed a two-prong inquiry to determine whether an individual is a limited-purpose public figure.[169] The test asks (1) whether there "was a particular 'public controversy' that gave rise to the alleged defamation" and (2) "whether the nature and extent of the plaintiff's participation in that particular controversy [was] sufficient to justify 'public figure' status."[170]

a. THE PUBLIC CONTROVERSY

Although the Supreme Court has not announced an explicit definition of "public controversy," the D.C. Circuit offered:

> a public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way. A public controversy is a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants.[171]

In *Time, Inc. v. Firestone*, the Supreme Court decided that mere newsworthiness is insufficient to justify application of the demanding "actual malice" burden of *New York Times*.[172] In *Firestone*, the wife of a descendant of "one of America's wealthier industrial families sued her husband for divorce."[173] The charges and countercharges in the suit were sensational and the press displayed a great deal of interest in the proceedings.[174] The Court found "that although the divorce proceedings were a matter of public record and public interest, they were not a public controversy."[175] Further, the Court decided that Ms. Firestone was neither an all-purpose nor a limited-purpose public figure because she "did not assume any role of especial prominence in the affairs of society," and she did not "thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it."[176] "Ms. Firestone's resort to the judicial process to arrange her marital affairs was, for all practical purposes, involuntary," and the controversy over her marriage and divorce, if one existed, was private.[177] In refusing to "equate 'public controversy' with all controversies of interest to the public," the Court determined that "news coverage of a 'cause celebre' was insufficient to create a public controversy."[178] Thus, "[t]he newsworthiness of an event is not the measuring stick for identifying public controversy."[179] "Nor is a voyeuristic interest in someone's private affairs an appropriate substitute."[180]

IN refusing to "equate 'public controversy' with all controversies of interest to the public," the Court determined that "news coverage of a 'cause celebre' was insufficient to create a public controversy."

Likewise, the Court found in *Wolston v. Reader's Digest Association, Inc.*, that the petitioner was not a limited-purpose public figure because he was dragged unwillingly into a controversy.[181] The petitioner, Ilya Wolston, was the nephew of two admitted Russian spies.[182] The respondent published a book in 1974 entitled *KGB*, which included Mr. Wolston's name on a list of Soviet agents, even though he had never been indicted for espionage.[183] In 1958, Mr. Wolston had been interviewed several times by the Federal Bureau of Investigation and also served as a witness in trials pursuant to grand jury subpoenas.[184] However, Mr. Wolston failed to respond to one jury subpoena because of his pressing mental health problems, and his absence garnered media attention.[185] The Court found that even though Mr. Wolston knew there was a possibility that his absence might attract media attention, his decision not to appear before the grand jury was simply not persuasive enough evidence to convert him into a public figure.[186]

The Fourth Circuit adopted this reasoning in *Wells v. Liddy*, when it determined that a secretary employed in the office of the Democratic National Committee during the time of the Watergate break-in was not a limited-purpose public figure.[187] The facts stipulated that Ms. Wells' only media contact over the course of twenty-seven years since Watergate was a handful of interviews, and each one was in response to inquiries from reporters requesting her eye-witness account.[188] Applying *Firestone*, the Fourth Circuit declared that "voluntary discussion of events with the press does not per se indicate that a defamation plaintiff has 'thrust herself to the forefront of a public controversy.'"[189] The court also suggested that an individual who has had contact with the press may be properly seen as a limited-purpose public figure when he "attempts to influence the merits of a controversy," "draws attention to himself in order to invite public comment," or "invites that degree of public attention and comment essential to meet the public figure level."[190] Since Ms. Wells failed to act in a manner that would satisfy any of these three factors, she was deemed a private figure.[191]

In *Hutchinson v. Proxmire*, the Supreme Court held that a research scientist who received federal funding was a private figure, not a limited-purpose public figure.[192] As the respondents did not identify a particular controversy and merely pointed to concern about general public expenditures, the Court found that there was no public controversy with which to treat Mr. Hutchinson as a public figure.[193] Additionally, the nature and extent of Mr. Hutchinson's involvement in the issue of federal expenditures, namely, applying for federal grants and publishing articles in professional journals, was unconvincing to transform him into a public figure.[194] Finally, Mr. Hutchinson's limited access to the media, in the form of responding to the allegedly libelous statements, did not provide the foundation to establish him as a public figure.[195]

Thus, a dispute is not transferred into a public controversy just because it is litigated and that litigation acquires some news coverage.[196] Similarly, private individuals are not transformed into public figures, limited or otherwise, simply by virtue of their being drawn into a courtroom or

by becoming involved or associated with a matter that attracts public attention.[197]

b. NATURE AND EXTENT OF PARTICIPATION

In determining whether a plaintiff is a limited-purpose public figure, a court must also focus on the "nature and extent of an individual's participation in the particular controversy giving rise to the defamation."[198] This requirement speaks to the intended and actual participation of an individual in a controversy. In general, to be a limited-purpose public figure, a plaintiff must voluntarily cast himself into the vortex of a dispute.[199] This allows a person who is not a public official or a general public figure to become a limited public figure.[200] In other words, a plaintiff must actively participate in a public issue in a manner intended to obtain attention in order to be seen as a limited-purpose public figure.[201] Therefore, a person who has been publicly accused of committing a crime cannot be deemed a limited-purpose public figure merely because he or she makes reasonable public replies to those accusations.[202] Voluntariness is a crucial component because it creates the notion of the assumption of risk and the consequent fairness in labeling the person a public figure.[203]

Additionally, courts have classified some people as limited-purpose public figures because of their "status, position, or association."[204] "If a position itself is so prominent that its occupant unavoidably enters the limelight, then a person who voluntarily assumes such a position may be presumed to have accepted public figure status."[205] Even if a person has no ideological thesis to promulgate, when that person has chosen to engage in a position which draws him regularly into regional and national attention and leads to "fame and notoriety in the community," he may properly be regarded as a limited-purpose public figure, and he invites general public discussion.[206] For example, in *Chuy v. Philadelphia Eagles Football Club*, Pennsylvania's Eastern District Court found a professional football player to be a public figure because of the American public's fascination with professional sports.[207] While conceding that the public's interest in professional football is not "important to the commonwealth or to the operation of a democratic society in the same sense as are political and ideological matters," the court decided that professional football was nonetheless an important aspect of the fabric of American society.[208] Thus, as one who voluntarily entered a "particular sphere of activity" to which society has chosen to direct massive public attention, Mr. Chuy, by extension, invited such attention and was thus classified as a limited-purpose public figure.[209]

These varying schools of thought have been somewhat codified by the Fourth Circuit, which enumerated five factors necessary to establish an individual as a limited-purpose public figure.[210] These requirements, first presented in *Reuber v. Food Chemical News, Inc.*, are: "(1) the plaintiff has 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."[211]

The Seventh Circuit has accepted a "federal analysis," as proposed by Wisconsin courts, to determine who is a limited-purpose public figure.[212] This federal analysis "deemphasizes the voluntariness of the plaintiff's involvement in the controversy and focuses on the plaintiff's role."[213] The three-part inquiry requires: "(1) isolating the controversy at issue [and determining whether it was a controversy of substantial statewide public interest affecting persons beyond the immediate participants in dispute]; (2) examining the plaintiff's role in the controversy to be sure that it is more than trivial or tangential; and (3) determining if the alleged defamation was germane to the plaintiff's participation in the controversy."[214]

(6) Involuntary Public Figures

The Supreme Court first introduced the concept of involuntary public figures in *Gertz* and has not mentioned it since, save for a brief mention in a footnote in *Firestone*.[215] Although the Supreme Court has never identified an individual who would properly fall into the involuntary public figure category, there has been some discussion among the circuit courts.[216] The leading cases of *Dameron v. Washington Magazine, Inc.* and *Wells v. Liddy* propose conflicting means of finding an individual to be an involuntary public figure.[217] Whereas the D.C. Circuit stated in *Dameron* that people can become public figures through sheer bad luck, the Fourth Circuit in *Wells* declared that there must be evidence that a person assumed the risk of publicity in order to transform him into a public figure.[218]

> IN general, to be a limited-purpose public figure, a plaintiff must voluntarily cast himself into the vortex of a dispute.

In *Dameron*, the court determined that injection into the midst of a controversy need not be voluntary for an individual to attain public-figure status.[219] The court concluded that the facts of the case created the rare situation acknowledged

by the Supreme Court in *Gertz* in which an individual may become a limited-purpose public figure involuntarily.[220] Mr. Dameron, an air-traffic controller who was on duty during the Mt. Weather plane crash, was transformed into a limited-purpose public figure for discussions of that crash.[221] Mr. Dameron was a central figure in the controversy over the causes of the crash, thereby assuming a "special prominence in the resolution of a public question."[222] Further, his name and likeness were often used in numerous press reports about the Mt. Weather crash.[223]

The facts of *Dameron* may be distinguished from both *Firestone* and *Wolston*. In *Dameron*, the nature of the trial and the controversy was significantly more serious than the *Firestone* divorce, because *Dameron* dealt with the administration of a governmental agency, the safety of many Americans, and an extensive public investigation into the events of the crash.[224] Accordingly, Dameron was at the center of a public controversy.[225] In *Wolston*, the petitioner's alleged defamation was in reference to his tangential role in the investigation of Soviet espionage in general, rather than his central role in refusing to testify before a grand jury.[226] Conversely, Mr. Dameron's alleged defamation stemmed explicitly from the public controversy in which he bore a central role.[227] The *Dameron* court thus concluded that, based on these specific facts, the plaintiff was an involuntary public figure for the very limited-purpose of discussion of the Mt. Weather crash.[228]

The Fourth Circuit, fearing that *Dameron* had returned to the *Rosenbloom* method of judging public figure status in terms of the nature of the controversy, instead of the plaintiff's role in the controversy, attempted to remedy this perceived problem in the *Wells* decision.[229] Returning to *Gertz* for guidance, the *Wells* court proposed a test that considered both the controversy and the plaintiff's role, but placed more weight on the latter factor.[230] In order to be deemed an involuntary public figure, a plaintiff must be a "central figure" and the "regular focus of media reports" involving a significant public controversy.[231] The *Wells* court defined a significant public controversy as one "that touches upon serious issues relating to, for example, community values, historical events, governmental or political activity, arts, education, or public safety."[232] Additionally, the "allegedly defamatory statement must have arisen in the course of discourse regarding the controversy."[233] Further, despite an involuntary public figure's failure to actively seek out the publicity of his views on the relevant controversy, he must have, nonetheless, assumed the risk of publicity.[234] In other words, the plaintiff must have taken some action, or failed to act when action was required, in such a way to make it reasonably foreseeable that public interest would likely attach.[235] Finally, the controversy must have existed prior to publication of the defamatory statement, and the plaintiff must have retained his status as a public figure at the time of the alleged defamation.[236]

Thus, in certain defamation cases, plaintiffs may correctly be categorized as public figures even if they do not directly try or even want to attract the public's attention.[237] These situations arise when a plaintiff's action may itself invite comment and attention; consequently, the plaintiff is deemed to have assumed the risk of such attention.[238]

III. Change of Public Status Over Time

A. Defamation: Limits on "Limited-Purpose"

The Supreme Court has specifically and explicitly declined to address whether or when an individual who was once a public figure may lose that status by the passage of time, and few circuits have addressed this issue.[239] Those that have decided this question have concluded that the passage of time does not alter an individual's status as a limited-purpose public figure.[240]

In *Sidis v. F-R Publishing Corp.*, a case preceding *New York Times* and *Gertz*, the Second Circuit held that a child prodigy who was once a public figure remained a public figure years later even though he had since "cloaked himself in obscurity," because "his subsequent history, containing as it did the answer to the question of whether or not he had fulfilled his early promise, was still a matter of public concern."[241] The Second Circuit affirmed its contention that the passage of time will not necessarily change an individual's status as a public figure in *Meeropol v. Nizer*.[242] In *Meeropol*, the court found that the children of Julius and Ethel Rosenberg were general purpose public figures because they were "cast into the limelight" during the Rosenberg trial.[243] This public figure status was retained twenty years later upon the publication of a book containing commentary on the Rosenberg trial.[244]

More recently, in *Contemporary Mission, Inc. v. New York Times Co.*, the Second Circuit found that the appellant priests and their mission were limited-purpose public figures with respect to the religious controversy surrounding them in the early 1970s.[245] The priests voluntarily injected themselves into the public controversy surrounding 1971 ordinations and had multiple and prolonged contacts with the media.[246] Further, the court found that the appellants' public status had not diminished in twenty years (despite the absence of media appearances since 1974) because of Contemporary Mission's ongoing business activities and their involvement in numerous lawsuits.[247] The court conceded that the first prong of the *Gertz* test might not be satisfied because the priests' access to the media may have declined somewhat over time.[248] However, the second, more important prong of *Gertz* was fulfilled, as the appellants "voluntarily exposed themselves to increased risk of injury

from defamatory falsehood concerning them" by thrusting themselves into the forefront of the religious controversy.[249] Thus, the Second Circuit concluded that the appellants had maintained their public figure status.[250]

In the Seventh Circuit decision of *Milsap v. Journal/Sentinel, Inc.*, the court held that an individual who was once a public figure with respect to a controversy remains a public figure for later commentary on that controversy.[251] The court did not find merit in the plaintiff's arguments that he was no longer a public figure because his involvement in public controversy had ended about twenty-five years prior to the newspaper column at issue and he had moved out of the Milwaukee area.[252] It held that a person who injects himself into public controversy assumes the risk of negative public comment on his role in the controversy, both contemporaneously and into the future.[253] In Mr. Milsap's case, the risk included comment on his financial responsibility during his time in the public eye, so his financial dealings at that prior time were fair game for public discussion.[254]

In contrast, the First Circuit declared in *Pendleton v. City of Haverhill* that "there may be a temporal dimension to any limited-purpose public figure analysis."[255] Although recognizant of the lack of case law in support of this hypothesis, the court stated that "intuitively, one should not become fair game for eternity merely by injecting oneself into the debate of the moment."[256]

In *Wolston*, the Supreme Court, after holding that the petitioner was not a public figure, reserved judgment regarding the conditions in which a once-public figure might shed this status over time.[257] However, Justice Blackmun wrote in his concurrence that even if Mr. Wolston had attained public-figure status in 1958, he had lost that distinction by 1974 when the allegedly defamatory book was published.[258] Justice Blackmun proposed that the passage of time would have substantial effects on whether an individual possessed the characteristics required by public figures under the *Gertz* two-prong test.[259] As to the first prong, Justice Blackmun noted that the passage of time between the controversy and a "libelous utterance may diminish the defamed party's access to the means of counterargument."[260] In terms of the second prong, Justice Blackmun suggested that the time lapse might "diminish the 'risk of public scrutiny' that a putative public figure may fairly be said to have assumed."[261] Thus, a one-time limited-purpose public figure may not be dragged back into the public arena, particularly if he intentionally avoids the public eye for a length of time.[262]

JUSTICE Blackmun proposed that the passage of time would have substantial effects on whether an individual possessed the characteristics required by public figures under the *Gertz* two-prong test.

B. Privacy Law: Old News

Much of the litigation regarding the privacy rights of former public figures is parallel to the defamation rights of such personages.[263] Some courts have held that once individuals become public figures, they can never regain the privacy they lost due to their status.[264] Alternatively, some courts have determined that the subject of an article who was newsworthy in the past may no longer be so after a period of time.[265]

In the realm of privacy law, newsworthiness is largely determined by public interest, and this interest may embrace matters that are not strictly limited to current events.[266] Thus, the passage of time alone is insufficient to eliminate the newsworthiness of an item.[267] Similarly, plaintiffs that were made public figures by events that occurred a considerable time ago may not regain their private figure status merely by this time lapse.[268] Dean Prosser recommended that "once a man has become a public figure, or news, he remains a matter of legitimate recall to the public mind to the end of his days."[269] The Restatement suggests that formerly public figures may regain their public status if the previous activity attaches to a currently newsworthy event.[270]

A significant lapse of time, however, is a factor to consider in determining whether the publicity unreasonably reveals facts about a former public figure who has attempted to resume his private status.[271] The final determination should be reached after an analysis of community standards and mores.[272]

The New York legislature has asserted that once an item has been deemed newsworthy, it retains this status even when it is no longer of current interest.[273] However, New York courts have reached a different conclusion when dealing with involuntary public figures. [274] In explaining that public figure status does not last throughout perpetuity, one court stated, "when an ordinary citizen becomes newsworthy under circumstances, either of calamity or honor, it is only for a brief period of notoriety and for a reasonable length of time thereafter that pictures, stories, and comments may be made about him without his consent."[275]

California, too, has recognized the important distinction between past figures and past acts. For example, in terms of past crimes, courts are in agreement that reports of the facts are newsworthy as they may prove educational

and the public has a strong interest in enforcing the law.[276] Conversely, the identification of the actor of long past crimes serves little independent purpose, save for quenching the curiosity of the masses.[277] Once a crime has been long settled, the identification of the offender is unlikely to assist in bringing forth witnesses, gaining a sense of closure for the victims, or performing the general administration of justice.[278]

IV. The Rights Afforded to Reality Television Participants

A. Reality Television Participants are Limited-Purpose Public Figures

Reality television participants are not famous or notorious enough to acquire the title of all-purpose figures. However, they do not enjoy the same level of anonymity as private figures. Although there is a subset of reality television participants who may be correctly viewed as involuntary public figures, such as those featured on shows like *COPS*, these participants are such a minority that they are insignificant to a discussion of the broader category of reality show participants. Thus, reality television participants first appear well-suited for the limited-purpose public figure category by default. However, once analyzed under the law of defamation, membership in this category becomes more convincing.

B. Protection Against Defamation

Under the *Foretich* test, whether an individual is a limited-purpose public figure depends upon (1) whether there was a particular public controversy that gave rise to the alleged defamation, and (2) whether the nature and extent of the plaintiff's participation in that particular controversy was sufficient to justify "public figure" status.[279]

As previously discussed, a public controversy must surpass the level of mere newsworthiness.[280] At first glance, a reality television participant is not transformed into a public figure just by virtue of agreeing to join a show. Without the presence of a public controversy, reality television participants should be treated as private figures. However, reality television arguably satisfies the criteria of a public controversy because of the ongoing debate regarding the advantages and disadvantages of the entire programming genre.[281] Thus, just by participating in reality television programming, an individual may satisfy the first prong of the test for limited-purpose public figure status.

Alternatively, some courts have suggested that one who has contact with the press may be viewed as a limited-purpose public figure if he draws attention to himself to invite public comment, attracts enough public attention and discussion to meet the public figure level, or attempts to influence the merits of a controversy.[282] Through this lens, reality television participants certainly qualify for membership as limited-purpose public figures: they draw enough public attention by their presence on a television show so as to invite public commentary.

Assuming *arguendo* that the ongoing debate about the merits of reality television is a public controversy, whether an individual reality television participant is a limited-purpose public figure depends upon the nature and extent of her participation in the controversy.[283] If the public controversy is equated with reality television as a whole, then the large majority of participants would see the same fate, as the "nature and extent of their participation" was largely the same: they filled out an application, they signed a contract, and they appeared on a reality television program. However, the nature and extent should be determined based upon the level of participation within an individual's program. For example, the first contestant to be eliminated from the island in the original *Survivor* was clearly not as involved in the process as Richard Hatch, the eventual winner. Similarly, the lovelorn contestants on *The Bachelor* whose fates were early rejections did not participate to the same extent as the actual Bachelor, Alex Michel. The rationale for distinguishing among participants on the same program becomes more lucid when analyzed in terms of the five-prong *Reuber* test.[284]

First, the plaintiff must have access to channels of effective communication. Someone as recognizable as Trista Rehn, the *Bachelorette*, who made appearances on the talk show circuit and at A-list events including the Superbowl and the Golden Globes, obviously enjoys access to the media. Conversely, many of the original twenty-five bachelors on Ms. Rehn's show have disappeared from the public eye and the public consciousness. It would most likely prove more difficult for them to defend themselves via the media to the same degree that Ms. Rehn could.

Second, the plaintiff must have voluntarily assumed a role of special prominence in a public controversy. This prong is satisfied by all reality television participants, though, arguably, the "main character" of a dating reality show has a "special prominence" as compared to other contestants.

Third, the plaintiff must have sought to influence the resolution or outcome of the controversy. In the realm of dating reality shows, this role is solely acquired by the main character, and the other participants act in relation to him or her. In the competition-driven shows, each of the participants intends to influence the program's outcome by emerging as the victor. However, in shows professing to portray real life, participants merely hope to garner media attention and do not wish to affect the outcome of the program with any specific significance. The lack of intent shown by the large majority of reality television participants provides evidence that they do not rise to the level of public figure required by the *Reuber* test.

Fourth, the controversy must have existed prior to

the publication of defamatory statements. Here, reality television has had a presence in America since the first *Real World* eleven seasons ago, and the controversy has grown pervasive within the past year. Therefore, all contemporary reality television participants arguably fulfill this requirement.

Fifth, the plaintiff must have retained public figure status at the time of the alleged defamation. As previously discussed, courts are split as to whether public figure status can be sustained over time. However, were any current or recent reality television stars to be the focus of a defamation suit, they would most likely be deemed public figures because they remain in the public consciousness. It is clear that the winner of the inaugural season of *American Idol*, Kelly Clarkson, is far more memorable than a contestant eliminated at auditions (unless they were particularly "dreadful"). Thus, even though the show has ended, Ms. Clarkson remains a public figure, while most of the 10,000 contestants should be treated as private figures. The court would likely focus upon public consciousness to determine whether each individual person satisfies this prong of the *Reuber* test.

The Seventh Circuit's "federal analysis" test would also suggest that the limited-purpose public figure status of a reality television participant should be determined through a *sui generis* approach. First, there must be a public controversy. This has been established previously within the *Reuber* analysis. Second, the plaintiff's role in the controversy must be more than trivial or tangential. This prong reinforces the hypothesis that minimal participants in reality programming should be able to reclaim their private figure status much more easily than the "famous" reality television participants. Finally, the alleged defamation must be connected to the plaintiff's participation in the controversy. Thus, publications fabricating torrid love affairs about *Married by America* contestants would pass this test, whereas those same rumors regarding *Star Search* contestants might not pass muster.

REALITY television participants certainly qualify for membership as limited-purpose public figures: they draw enough public attention by their presence on a television show so as to invite public commentary.

Thus, for the purpose of defamation suits, participants in reality television shows should be treated as limited-purpose public figures. In practice, this means these pseudo-celebrities may only gain attention in relation to their status as a reality television participant. Additionally, the extent of public scrutiny these individuals may receive will be directly correlated with the level of their involvement in their individual reality program. As limited-purpose public figures, reality television participants will be held to the "actual malice" standard in defamation suits directly related to their involvement in television; however, for all other allegations of defamation, they shall be granted the same rights as private individuals.

C. Protection Against the Private Facts Tort

In most jurisdictions, one's status as a public or private figure is of little importance in the private facts tort. As the private/public status of a plaintiff is not expressly listed as a means to determine newsworthiness, many jurisdictions ignore this attribute altogether.[285] However, the California approach to determining newsworthiness should be embraced, as one's characterization as a public or private figure affects her expectations of privacy. Additionally, the limited-purpose public figure should be recognized in determining newsworthiness, as some classes of people, like reality television participants, do not fall neatly within the private or public figure category.

The Restatement acknowledges the private facts tort when the information revealed (1) would be highly offensive to a reasonable person and (2) is not of legitimate concern to the public.[286] Personal facts about public figures typically need to be of a higher level of offensiveness than personal facts about private figures in order to satisfy the first prong, as public figures lose much of their right to privacy. Reality television participants should expect some invasion while they enter the public eye; however, they should enjoy normal expectations of privacy as they become less of a public concern. Thus, they should be treated as limited-purpose public figures; that is, they can expect public scrutiny, only in regards to their stint on television, for a reasonable length of time.

In terms of the legitimate concern to the public, or newsworthiness, the California three-prong test should be employed. This test considers (1) the social value of the published facts; (2) the extent of the intrusion into private areas; and (3) the extent to which the complaining party has voluntarily placed himself/herself in the public eye.[287] This newsworthiness test would provide a substantial level of privacy protection without resulting in an unconstitutional chilling of the First Amendment freedom of the press.

Protection from the disclosure of private facts is pertinent because a number of reality television participants have become the focus of media attention for activities not

related to their television appearances. Legitimate and tabloid publications are fraught with stories about the true lives of reality television stars.[288] In February, 2003 Alton Williams of *The Real World: Las Vegas* was arrested and charged with assault and resisting arrest after engaging in a bar fight in North Carolina.[289] *American Idol* hopeful Frenchie Davis was eliminated from the competition after the media discovered she had once posed for a pornographic website.[290] Greg Todtman, a suitor on *The Bachelorette*, was arrested for drug possession at New York's JFK airport.[291] Rick Rockwell, the title figure of *Who Wants to Marry a Multimillionaire,* had once been under a restraining order sought by a former fiancée who alleged that he hit her and threatened to kill her.[292] *Survivor's* Brian Heidik had a soft-core porn background before his $1 million victory in Thailand.[293] Ytossie Patterson and Taheed Watson, a featured couple on *Temptation Island,* were removed from the show because they already had a child in violation of the show's rules.[294] Denise Luna, a contestant on *Married By America,* was found to be an ineligible bachelorette because she was never divorced from her long separated husband and was technically still married.[295] Corey Clark was eliminated from *American Idol* when Fox learned he had charges pending for assault and resisting arrest.[296] Rob Campos, the leading man on *For Love or Money,* had been accused of drunkenly groping a female officer during his stint in the U.S. Marine Corps.[297] And Sarah Kozer, the first runner-up on *Joe Millionaire,* was the subject of arguably the largest reality television scandal.[298] What follows is an illustration of the California test for newsworthiness as applied to Ms. Kozer's predicament, illuminating the need for privacy protection of reality television participants.

REALITY television participants should expect some invasion while they enter the public eye; however, they should enjoy normal expectations of privacy as they become less of a public concern.

Fox's wildly popular program, *Joe Millionaire*, brought twenty women to a chateau in France to meet the potential man of their dreams, Evan Marriott.[299] Although Mr. Marriott was a construction worker who generated $19,000 annually, the show's creators informed the women that he was a multimillionaire, and Mr. Marriott agreed to go along with the ruse.[300] Each woman, drawn to Mr. Marriott's charming personality, Adonis-like physique, and allegedly bulging wallet attempted to win his heart and a series of bejeweled baubles.[301] Mr. Marriott had the ability to dismiss his would-be suitors at his whim. The Smoking Gun website broke a scandalous story, which was summarily embraced by the Associated Press and Reuters, about one of the three finalists, Ms. Kozer.[302] Apparently, Ms. Kozer has performed under a pseudonym as an actress in a number of bondage and fetish films. The Smoking Gun posted numerous snapshots from Ms. Kozer's extensive film career, a variety of publications printed accounts of her experiences, and Ms. Kozer was left to defend her fetish film past throughout the talk-show circuit, weeks after *Joe Millionaire* ended its lucrative run on Fox.[303]

Under the California test, the revelations about Ms. Kozer might not be deemed newsworthy. First, the social value of the published facts appears minimal at best. The public's interest in this information stems mainly from its infatuation with sex and scandals. Additionally, the most reasonable purpose for revealing this information seems to be to embarrass and belittle Ms. Kozer.

The second prong of the newsworthiness test, the extent of intrusion into private areas, might prove problematic for Ms. Kozer because her films were already in the public domain. Therefore, there is a strong case to be made that Ms. Kozer's films did not constitute part of her private life. However, Ms. Kozer used a pseudonym to mask her true identity, implying that a certain degree of investigation and intrusion must have occurred to link her with her alias in the first place. Additionally, as discussed previously, public figures may be entitled to keep information regarding their sexual relations and domestic activities private. If Ms. Kozer's films are interpreted as an expression of her sexual proclivities, she might be justified in preventing them from public distribution.

Third, one must consider the extent to which Ms. Kozer has voluntarily placed herself in the public eye. While she did take steps to join the cast of *Joe Millionaire*, most courts would agree that her privacy is curbed only in relation to that show and actions stemming from that show. For example, it would seem that were Ms. Kozer to get married, the public would have a legitimate interest because of the "dating game" nature of *Joe Millionaire*. However, Ms. Kozer's prior career choices and/or personal sexual predilections would not be subject to public scrutiny, as they overstep the boundaries of decency. It should be noted, however, that Fox edited the show in a manner that emphasized an alleged sexual relationship between Ms. Kozer and Mr. Marriott. Additionally, as a finalist on *Joe Millionaire,* even without the videotape scandal, Ms. Kozer enjoyed more publicity than many of her fellow contestants. If one of the women eliminated in an early round had made a videotape, she would arguably have a higher expectation of privacy than Ms. Kozer. Thus, depending on the court's discretion, and the weight

given to one prong over another, Ms. Kozer's past activities may or may not be deemed newsworthy.

Alternatively, under the Restatement's approach to newsworthiness, the level of offensiveness to a reasonable person and the degree of legitimate public concern must be analyzed. The latter component is coterminous with the first prong of the California test. As to the offensiveness prong, Ms. Kozer might not be insulted by the public becoming aware of the fact that she made films. However, the risqué nature of the films arguably surpasses the level of offensiveness that would be deemed acceptable to a reasonable person. Thus, the exposure of such cinematic activities may be seen as an invasion of Ms. Kozer's privacy. Ms. Kozer took steps to separate herself from those films by using a false name: at a minimum she would not want them to receive the degree of public attention they attained. Based on the negligible social value of Ms. Kozer's films and the offensive nature of their content, her right to be protected from the disclosure of private facts may have been violated. Therefore, Ms. Kozer should be able to sue for damages caused by the publication of this information. Additionally, those similarly situated, i.e., reality television participants in general, should be able to state a claim for the public disclosure of private facts.

D. Protection After Lapse of Time

As discussed earlier, courts are split as to whether public figures may ever shed their public status. As limited-purpose public figures, reality television participants should be able to regain their private figure personages over time. When a former reality television participant is revisited by public attention, he may avoid it if he is no longer a public figure. A proposed test to determine whether he is a public or private figure should consider (1) the nature and extent of his participation in reality television; (2) the amount of time he has been removed from the public limelight; (3) his attempts to embrace or reject fame once his show concluded; and (4) the relationship between the current controversy and his prior notoriety. This test incorporates variations of factors used to determine limited-purpose public figure status in defamation law and newsworthiness in privacy law, as well as the plaintiff's intent and activities once his fifteen minutes of fame has elapsed.

V. Conclusion

As the reality television phenomenon continues its exponential growth, the need to clarify and codify the status and rights of reality television participants becomes significant. With record numbers of reality programs on the horizon, the potential for any member of the public to have contact with a reality television participant grows likely; consequently, it is possible that any member of the public's status as a private individual could be jeopardized. This may be particularly dangerous in the realm of privacy law, because there is no recognized class of limited-purpose public figures. In order to protect the privacy rights of all involved, privacy law should acknowledge limited-purpose public figures, and reality television participants should be deemed members of this class.

Although limited-purpose public figures are the cause of much confusion within the law of defamation, they act as an important middle ground between all-purpose public figures and private figures. Reality television participants should be considered limited-purpose public figures; therefore, they must overcome the actual malice standard while they are in the public eye. Despite the court's tendency to retain one's public status for perpetuity, limited-purpose public figures, specifically reality television participants, should be able to reclaim their private status eventually. The journey from limited-purpose public figure to private figure should be influenced by the circumstances surrounding one's stint as a reality television participant, his subsequent interactions with the media, and the time that has lapsed since his fifteen minutes of fame expired.

ENDNOTES

* J.D. Candidate, Vanderbilt University Law School, 2004; B.A., Dartmouth College, 2001. The author wishes to thank her family for their continuing and unconditional support, Professor John C. P. Goldberg for his guidance, and her friends for aiding the research by enduring countless hours of reality television.

[1] CHICAGO (Miramax Films 2002).

[2] Martha Irvine, *Tech Creates Breed of Attention-Seekers,* MSN Entertainment, *at* http://entertainment.msn.com/news/article.aspx?news=128729 (July 20, 2003).

[3] Lynette Rice, *When Reality Attacks*, ENTM'T WEEKLY, Mar. 14, 2003, at 33; Bill Carter, *Networks Plan Flood of Reality for Summer*, N.Y. TIMES, Feb. 24, 2003, at C1; Bill Carter, *Even as Executives Scorn the Genre, TV Networks Still Rely on Reality,* N.Y. TIMES, May 19, 2003, at C1; Bill Carter and Jim Rutenberg, *Networks Try Reality Cure for Summer Rerun Blues,* N.Y. TIMES, June 9, 2003, at C1.

[4] *See generally* Reality Television Links, *at* http://www.sirlinksalot.net/realitytelevision.html (listing hundreds of hyperlinks to latest news articles and sites about primetime reality television shows in general, as well as hyperlinks to official network sites and unofficial fan sites about specific reality television shows) (last visited Oct. 13, 2003).

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] Alessandra Stanley, *Frontier of Surreality: Mocking Reality Shows,* N.Y. Times, Sept. 2, 2003, at E6.

[12] *Id.*

[13] *Id.*

[14] David Carr, *Major Stars Not So Crucial as Concept Trumps Celebrity,* N.Y. Times, June 23, 2003, at A1.

[15] Bill Carter, *Even as Executives Scorn the Genre, TV Networks Still Rely on Reality,* N.Y. Times, May 19, 2003, at C1.

[16] Rice, *supra* note 3, at 33.

[17] Gary Levin, *For Fox, 'Joe Millionaire' Breaks the Ratings Bank,* USA Today, Feb. 19, 2003, at 1D, *available at* http://www.usatoday.com/money/media/2003-02-19-joe-millionaire_x.htm (last visited Oct. 13, 2003).

[18] *Id.*

[19] Rice, *supra* note 3, at 33.

[20] Bill Carter, *Fox Mulls How to Exploit the Mojo of 'American Idol,'* N.Y. Times, May 23, 2003, at C1.

[21] *'For Love or Money' Finale is the Summer's #1 Telecast in 18-49,* NBC Media Village Entm't, *at* http://www.nbcmv.com/entertainment/release_detail.nbc/entertainment-20030708000000-forloveormoneyfinal.html (July 8, 2003).

[22] Carr, *supra* note 13.

[23] The foregoing lists are by no means exhaustive, and are intended to show the pervasiveness of reality television programming on all networks.

[24] Associated Press, *MTV to Debut Eight New Reality Shows,* Akron Beacon Journal, *available at* http://www.ohio.com/mld/ohio/6227786.htm (July 3, 2003).

[25] David Bauder, *The Smoking Gun Preys on Reality TV Stars,* Philly.com, *at* http://www.philly.com/mld/philly/entertainment/6048534.htm (June 9, 2003).

[26] Seeling v. Infinity Broadcasting Corp., 119 Cal.Rptr.2d 108 (Cal. Ct. App. 2002).

[27] Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); *see also* Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157 (1979); Hutchinson v. Proxmire, 443 U.S. 111 (1979); Time, Inc. v. Firestone, 424 U.S. 448 (1976).

[28] J. Thomas McCarthy, The Rights of Publicity and Privacy § 1.6 (2d ed. 2000); *see also* Morris L. Ernst & Alan U. Schwartz, Privacy: The Right to Be Left Alone 1 (1962).

[29] U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 US 749, 763 (1989).

[30] *Id.*

[31] McCarthy, *supra* note 28, § 1.6.

[32] *Id.* § 1.10

[33] *Id.*

[34] *See* William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 386-88 (1960) (declaring that the private facts tort had been adopted in 27 jurisdictions, probably would be adopted in seven additional jurisdictions, and was recognized in some form by four state statutes).

[35] Cordell v. Detective Publ'ns, Inc., 419 F.2d 989, 990 (6th Cir. 1969).

[36] McCarthy, *supra* note 28, § 5.55.

[37] *See* Ramie v. City of Hedwig Village, 765 F.2d 490, 492 (5th Cir. 1985).

[38] *See, e.g.,* Stanley v. Georgia, 394 U.S. 557 (1969).

[39] Paul v. Davis, 424 U.S. 693, 713 (1976).

[40] McCarthy, *supra* note 28, § 5.52.

[41] John A. Jurata, Jr., Note, *The Tort That Refuses to Go Away: The Subtle Reemergence of Public Disclosure of Private Facts,* 36 San Diego L. Rev. 489, 494 (1999); Prosser, *supra* note 34, at 386-88.

[42] McCarthy, *supra* note 28, § 1.19.

[43] Jurata, *supra* note 41, at 494.

[44] *Id.*

[45] *Id.* at 495.

[46] Restatement (Second) of Torts §§ 652A-D (1977).

[47] *Id.* at § 652D; Jurata, *supra* note 41, at 496.

[48] Restatement (Second) of Torts § 652D (1977); Jurata, *supra* note 41, at 496.

[49] Jurata, *supra* note 41, at 497 nn. 51-54.

[50] Dianna M. Worley, *Shulman v. Group W Productions: Invasion of Privacy by Publication of Private Facts – Where Does California Draw the Line Between Newsworthy Information and Morbid Curiosity?,* 27 W. St. U. L. Rev. 535, 538 (1999-2000).

[51] *Id.* at 539.

[52] Geoff Dendy, Note, *The Newsworthiness Defense to the Public Disclosure Tort,* 85 Ky. L.J. 147, 151 (1996-1997).

[53] *Id.*

[54] *Id.*

[55] Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975).

[56] Jurata, *supra* note 41, at 499 (quoting *Cox*, 420 U.S. at 489).

[57] Jurata, *supra* note 41, at 499; *see also Cox,* 420 U.S. at 491-96.

[58] Jurata, *supra* note 41, at 500.

[59] *Id.*; *see also* Florida Star v. B.J.F., 491 U.S. 524 (1989).

[60] Jurata, *supra* note 41, at 501, *see also Florida Star*, 491 U.S. at 532.

[61] Jurata, *supra* note 41, at 502.

[62] Dendy, *supra* note 52, at 157.

[63] *Id.* at 158; *see* Barbara Moretti, Note, *Outing: Justifiable or Unwarranted Invasion of Privacy? The Private Facts Tort as a Remedy For Disclosures of Sexual Orientation*, 11 Cardozo Arts & Ent. L.J. 857, 903 (1993) ("The following states do not recognize a cause of action for the publication of private facts: Minnesota, Nebraska, New York, North Carolina, North Dakota, and Virginia.")

[64] Dendy, *supra* note 52, at 158; *see, e.g.,* Hall v. Post, 372 S.E.2d 711 (N.C. 1988) (The North Carolina Supreme Court determined that the public disclosure of private facts tort is "constitutionally suspect.")

[65] Dendy, *supra* note 52, at 158.

[66] *Id.*

[67] *Id.* (discussing Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis' Privacy Tort,* 68 Cornell L. Rev. 291, 353 (1983)).

[68] Dendy, *supra* note 52, at 158 (discussing Zimmerman, *supra* note 67, at 353).

[69] Dendy, *supra* note 52, at 159.

[70] *Id.*

[71] Restatement (Second) of Torts § 652D (1977).

[72] Virgil v. Time, Inc., 527 F.2d 1122, 1129 (9th Cir. 1975).

[73] *Id.*; Dendy, *supra* note 52, at 161.

[74] Dendy, *supra* note 52, at 161. (quoting Sidis v. F-R Publishing Corp., 113 F.2d 806, 809 (2d Cir. 1940)).

[75] Jurata, *supra* note 41, at 503.

[76] Dendy, *supra* note 52, at 162; *see* Campbell v. Seabury Press, 614 F.2d 395 (5th Cir. 1980).

[77] Dendy, *supra* note 52, at 162, *see Campbell,* 614 F.2d at 397.

[78] Jurata, *supra* note 41, at 507; *see Campbell,* 614 F.2d at 396.

[79] Jurata, *supra* note 41, at 508; *see Campbell,* 614 F.2d at 397.

[80] Dendy, *supra* note 52, at 163; *see* Gilbert v. Med. Econ. Co., 665 F.2d 305, 308 (10th Cir. 1981).

[81] Dendy, *supra* note 52, at 163; Jurata, *supra* note 41, at 506-07; *see* Kapellas v. Koffman, 459 P.2d 912, 922 (Cal. 1969). The court suggested that the test for newsworthiness should consider "the social value of the facts published, the depth of the article's intrusion into ostensibly private affairs, and the extent to which the party voluntarily acceded to a position of public notoriety." *Kappellas*, 459 P.2d at 922.

[82] Dendy, *supra* note 52, at 163; Jurata, *supra* note 41, at 507; *see* Briscoe v. Reader's Digest Ass'n, 483 P.2d 34, 44 (Cal. 1971).

[83] Shulman v. Group W Prod., Inc., 955 P.2d 469 (Cal. 1998).

[84] 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 Infromation,* 19 Loy. L.A. Ent. L. Rev. 337, 344 (1999) (quoting *Shulman*, 955 P.2d at 485-86).

[85] Jurata, *supra* note 52, at 507.

[86] Williams, *supra* note 84, at 346-47.

[87] Melvin v. Reid, 297 P. 91 (Cal. Ct. App. 1931).

[88] *Id.*

[89] *Id.*

[90] *Id.* at 93.

[91] Sidis v. F-R Publishing Corp., 113 F.2d 806, 809 (2d Cir. 1940).

[92] *Id.* at 807.

[93] *Id.* at 809.

[94] Time, Inc. v. Hill, 385 U.S. 374, 386 (1967) (quoting Spahn v. Julian Messner, Inc., 221 N.E.2d 543, 545 (N.Y. Ct. App. 1966)).

[95] *Spahn*, 221 N.E. 2d at 545.

[96] *Id.*

[97] *Id.* See *infra* Part II, B, 1 for a discussion of the "actual malice" standard.

[98] Williams, *supra* note 84, at 347; *see* Carlisle v. Fawcett Publ'n, Inc., 20 Cal. Rptr. 405, 414 (Cal. Ct. App. 1962); *see* 44 N.Y. Jur 2d Defamation and privacy § 323 (2003) ("a person who, by his accomplishments, fame, or mode of life, or by adopting a profession or calling which gives the public a legitimate interest in his doings, his affairs, and his character, may be said to have become a public figure."); *see also* 62A Am. Jur. 2d *Privacy* § 193 (2002) ("A person who by his or her accomplishments, fame, or mode of life, or by adopting a profession or calling which gives the public a legitimate interest in his or her doings, affairs, and character, may be said to have become a public personage, thereby relinquishing at least a part of his or her right of privacy").

[99] Williams, *supra* note 84, at 347.

[100] *Id.*; *see Carlisle,* 20 Cal. Rptr. at 405. *See generally* 62A Am. Jur. 2d *Privacy* § 193 (2002); Briscoe v. Readers' Digest Ass'n, 483 P.2d 34 (Cal. 1971).

[101] Campbell v. Seabury Press, 614 F.2d 395, 397 (5th Cir. 1980).

[102] D. Scott Gurney, Note, *Celebrities and the First Amendment: Broader Protections Against the Unauthorized Publication of Photographs,* 61 Ind. L.J. 697, 701 (1986).

[103] Ann-Margret v. High Society Magazine, Inc., 498 F. Supp. 401, 407 (S.D.N.Y 1980).

[104] *Id.* at 405 (quoting Meeropol v. Nizer, 560 F.2d 1061, 1066 (2d Cir. 1977)).

[105] Gurney, *supra* note 102, at 702 (quoting *Ann-Margret*, 498 F. Supp. at 405).

[106] Restatement (Second) of Torts § 652D cmt. e (1977).

[107] *Id.*

[108] *Id.*

[109] Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762, 773 (Cal. Ct. App. 1983).

[110] Briscoe v. Readers' Digest Ass'n, 483 P.2d 34, 43 (Cal. 1971).

[111] For a more detailed discussion, see *infra* Part II, B, 6.

[112] Williams, *supra* note 84, at 348.

[113] *Id.*

[114] *Id.*

[115] Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1232 (7th Cir. 1993).

[116] *Id.*

[117] Leverton v. Curtis Pub. Co, 192 F.2d 974 (3d Cir. 1951).

[118] *Id.* at 974-75.

[119] *Id.* at 975.

[120] *Id.* at 976.

[121] See discussion *supra,* Part I, A, 3, a-e.

[122] Time, Inc. v. Hill, 385 U.S. 374, 388 (1967).

[123] James H. Barron, *Warren & Brandeis, The Right to Privacy 4 Harv. L. Rev. 193 (1890): Demystifying a Landmark Citation*, 13 Suffolk U. L. Rev. 875, 879-81 (1979).

[124] Gill v. Hearst Pub. Co., 253 P.2d 441, 443 (Cal. 1953).

[125] *Id.*

[126] *Id.* at 444.

[127] *Id.* at 446 (Carter, J., dissenting).

[128] *Id.*

[129] Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) (quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

[130] Procter & Gamble Co. v. Amway Corp., 242 F.3d 539 (5th Cir. 2001) (citing National Life Ins. Co. v. Phillips Publ'g, Inc., 793 F. Supp. 627, 648 (D. Md. 1992)).

[131] Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1553 (4th Cir. 1994).

[132] Restatement (Second) of Torts § 558 (1977).

[133] *Compare* Restatement (Second) of Torts § 580A (1977) *with* Restatement (Second) of Torts § 580B (1977). *See generally Gertz*, 418 U.S. at 345-47.

[134] Restatement (Second) of Torts § 580A (1977).

[135] Restatement (Second) of Torts § 580B (1977).

[136] Id.

[137] Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072, 1080 (3d Cir. 1985).

[138] Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1551 (4th Cir. 1994).

[139] *Marcone*, 754 F.2d at 1080.

[140] New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964); *see* Wolston v. Readers' Digest Ass'n, Inc., 443 U.S. 157, 163 (1979); *Marcone*, 754 F.2d at 1080-81.

[141] *New York Times*, 376 U.S. at 267.

[142] *Id.* at 289-90; *Gertz*, 418 U.S. at 342.

[143] *Foretich*, 37 F.3d at 1551 (quoting *New York Times*, 376 U.S. at 285-86); *see also Gertz*, 418 U.S. at 342.

[144] Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967); Associated Press v. Walker, 388 U.S. 162 (1967); *see Wolston*, 443 U.S. at 163; *Marcone*, 754 F.2d at 1081.

[145] *Gertz*, 418 U.S. at 337 (quoting *Curtis Publishing*, 388 U.S. at 164 (Warren, C.J., concurring)).

[146] *Rosanova*, 411 F. Supp. at 444 (quoting Cepeda v. Cowles Magazines and Broad., Inc., 392 F.2d 417, 419 (9th Cir 1968)).

[147] *Id.*

[148] Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44 (1971); *see Marcone*, 754 F.2d at 1081.

[149] *See* Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976); *see also Wolston*, 443 U.S. at 167.

[150] *Gertz*, 418 U.S. at 347; *Marcone*, 754 F.2d at 1081.

[151] *Foretich*, 37 F.3d at 1551-52 (discussing *Gertz*, 418 U.S. at 345, 351).

[152] *Gertz*, 418 U.S. at 344.

[153] *Id.*

[154] *Id.*

[155] *Id.* at 342.

[156] *Id.* at 351.

[157] *Id.* at 352.

[158] *Id.* at 351.

[159] *Id.* at 345.

[160] *Foretich*, 37 F.3d at 1551.

[161] *Wolston*, 443 U.S. at 164 (discussing *Gertz*, 418 U.S. at 344-47).

[162] *Id.*

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

[164] *Id.*

[165] *Id.* at 347.

[166] *Foretich*, 37 F.3d at 1552; *see Wolston*, 443 U.S. at 166; Hutchinson v. Proxmire, 443 U.S. 111, 134-36 (1979); *Firestone*, 424 U.S. at 453-55.

[167] *Foretich*, 37 F.3d at 1552; *see Firestone*, 424 U.S. at 453-55; *Hutchinson*, 443 U.S. at 134-136; *Wolston,* 443, U.S. at 157.

[168] *Marcone*, 754 F.2d at 1081 (citing *Gertz*, 418 U.S. at 343-44).

[169] *Foretich*, 37 F.3d at 1553.

[170] *Id.*

[171] *Id.* at 1554 (quoting Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1296 (D.C. Cir. 1980)).

[172] *Wolston,* 443 U.S at 167-68. *See generally Firestone*, 424 U.S. at 454.

[173] *Firestone,* 424 U.S. at 450.

[174] Dameron v. Wash. Magazine, Inc. 779 F.2d 736, 742 (D.C. Cir. 1985) (discussing *Firestone,* 424 U.S. at 454).

[175] Wells v. Liddy, 186 F.3d 505, 533 (4th Cir. 1999); *see Firestone*, 424 U.S. at 454.

[176] *Wells*, 186 F.3d at 533 (quoting *Firestone,* 424 U.S. at 454).

[177] *Dameron*, 779 F.2d at 742 (discussing *Firestone*, 424 U.S. at 454-55).

[178] Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1554 (4th Cir. 1994) (quoting *Firestone,* 424 U.S. at 454).

[179] *Dameron*, 779 F.2d at 742.

[180] *Id.*

[181] *Wolston*, 443 U.S. at 166.

[182] *Id.* at 161.

[183] *Id.* at 159-60.

[184] *Id.* at 161-62.

[185] *Id.* at 166-67.

[186] *Id.* at 167.

[187] Wells v. Liddy, 186 F.3d 505, 533 (4th Cir. 1999).

[188] *Id.*

[189] *Id.*

[190] *Id.*; *see Firestone*, 424 U.S. at 454 n.3 ; *Wolston*, 443 U.S. at 168; Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979).

[191] *Wells*, 186 F.3d at 537; *cf.* Flowers v. Carville, 310 F.3d 1118 (9th Cir. 2002). The court found Ms. Flowers was involved in a public controversy, namely, an affair with the governor of a state during a presidential nomination campaign. *Flowers*, 310 F.3d at 1129. Additionally, the court found that Ms. Flowers voluntarily thrust herself into the public arena by holding a press conference in which she played tape recordings of the governor's phone calls. *Id.* These two factors led to the conclusion that Flowers was a limited-purpose public figure. *Id.*

[192] *Hutchinson,* 443 U.S. at 135.

[193] *Id.*

[194] *Id.*

[195] *Id.* at 136.

[196] *Wolston*, 443 U.S. at 167-69; *Firestone*, 424 U.S. at 453-57; Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1554 (4th Cir. 1994).

[197] *Wolston*, 443 U.S. at 167; *Firestone*, 424 U.S. at 457.

[198] *Wolston,* 443, U.S. at 167 (quoting *Gertz*, 418 U.S. at 352).

[199] Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072, 1083 (3d Cir. 1985).

[200] Fitzgerald v. Penthouse Int'l, Ltd., 691 F.2d 666, 668 (4th Cir. 1982) (citing *Gertz*, 418 U.S. at 345).

[201] *Marcone*, 754 F.2d at 1083.

[202] *See Foretich*, 37 F.3d at 1558; *accord Hutchinson*, 443 U.S. 135 (finding that plaintiff's access to the media after the alleged libel was insufficient to transform him into a public figure).

[203] *Marcone*, 754 F.2d at 1083.

[204] *Id.*

[205] *Id.*

[206] *Id.* at 1083-84 (quoting Chuy v. Philadelphia Eagles Football

Club, 431 F. Supp. 254, 267 (E.D. Pa 1976).

[207] *Chuy,* 431 F. Supp. at 267.

[208] *Id.*

[209] *Id.*

[210] Fitzgerald v. Penthouse Int'l, Ltd., 691 F.2d 666, 668 (4th Cir. 1982); Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1553 (4th Cir. 1994); Wells v. Liddy, 186 F.3d 505, 534 (4th Cir. 1999).

[211] Reuber v. Food Chem. News, Inc., 925 F.2d 703, 708-10 (4th Cir. 1991) (en banc); *Fitzgerald*, 691 F.2d at 668; *Foretich*, 37 F. 3d at 1553; *Wells*, 186 F.3d at 534.

[212] Harris v. Quadracci, 48 F.3d 247, 249 (7th Cir. 1994).

[213] *Id.* at 251

[214] *Id.*

[215] Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974); Time, Inc. v. Firestone, 424 U.S. 448, 476 n.4 (1976).

[216] *See* Penobscot Indian Nation v. Key Bank of Me., 112 F.3d 538, 561 (1st Cir. 1997); Lundell Mfg. Co., Inc. v. American Broad. Co., Inc., 98 F.3d 351, 362 (8th Cir. 1996); Schiavone Const. Co. v. Time, Inc., 847 F.2d 1069, 1079 n.11 (3d Cir. 1988); Carson v. Allied News Co., 529 F.2d 206, 210 (7th Cir. 1976) (stating in dicta that wife of famous entertainer "more or less automatically becomes at least a part-time public figure herself").

[217] Dameron v. Wash. Magazine, Inc. 779 F.2d 736, 742 (D.C. Cir. 1985); Wells v. Liddy, 186 F.3d 505 (4th Cir. 1999).

[218] *Dameron,* 779 F.2d at 741-42; *Wells*, 186 F.3d at 538-40.

[219] *Dameron,* 779 F.2d at 741.

[220] *Id.* at 742; *Gertz*, 418 U.S. at 345.

[221] *Dameron,* 779 F.2d at 741.

[222] *Id.* at 742 (quoting *Gertz*, 418 U.S. at 345).

[223] *Dameron,* 779 F.2d at 742.

[224] *Dameron,* 779 F.2d at 742; *cf.* Time, Inc. v. Firestone, 424 U.S. 448, 453 (1976).

[225] *Dameron,* 779 F.2d at 742.

[226] *Id.* at 743; Wolston v. Readers' Digest Ass'n, Inc., 443 U.S. 157, 167 (1979).

[227] *Dameron*, 779 F.2d at 742-43.

[228] *Id.* at 743.

[229] *Wells*, 186 F.3d at 539.

[230] *Id.* at 540.

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] *Id.*

[235] *Id.*

[236] *Id.*

[237] Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072, 1083 (3d Cir. 1985); *see, e.g.*, Rosanova v. Playboy Enter., Inc., 411 F. Supp. 440, 443 (S.D. Ga. 1976).

[238] *Marcone*, 754 F.2d at 1083; *see, e.g.*, *Rosanova*, 411 F. Supp. at 443.

[239] Partington v. Bugliosi, 56 F.3d 1147, 1152 n.8 (9th Cir. 1995) (discussing *Wolston,* 443 U.S. at 166 n. 7); *see also* Milsap v. Journal/Sentinel, Inc., 100 F.3d 1265, 1270 (7th Cir. 1996); Contemporary Mission, Inc. v. New York Times Co., 842 F.2d 612, 619-20 (2d Cir. 1988).

[240] *Partington*, 56 F.3d at 1152 n.8.

[241] *Contemporary Mission*, 842 F.3d at 619 (quoting Sidis v. F-R Publishing Corp., 113 F.2d 806, 809 (2d Cir. 1940)). *See also* discussion, *supra* Part I, B.

[242] Meeropol v. Nizer, 560 F.2d 1061, 1066 (2d Cir. 1977).

[243] *Id.*

[244] *Contemporary Mission*, 842 F.3d at 619.

[245] *Id.* at 618.

[246] *Id.*

[247] *Id.* at 619.

[248] *Id.* at 619-20; *Gertz*, 418 U.S. at 344.

[249] Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974); *Contemporary*, 842 F.3d at 620.

[250] *Contemporary Mission*, 842 F.3d at 620.

[251] Milsap v. Journal/Sentinel, Inc., 100 F.3d 1265, 1270 (7th Cir. 1996); *accord Contemporary Mission,* 842 F.2d at 619-20*; Street v. National Broad. Co.,* 645 F.2d 1227, 1235-36 (6th Cir. 1981); *Brewer v. Memphis Publ'g Co*., 626 F.2d 1238, 1256-57 (5th Cir. 1980); *Wolston v. Reader's Digest Ass'n, Inc*., 443 U.S. 157, 167 (1979); *Time, Inc. v. Johnston*, 448 F.2d 378, 381-82 (4th Cir. 1971); *see also Partington v. Bugliosi*, 56 F.3d 1147, 1152 n.8 (9th Cir. 1995) *("*it appears that every court of appeals that has specifically decided this question has concluded that the passage of time does not alter an individual's status as a limited-purpose public figure.")

[252] *Milsap*, 100 F.3d at 1270.

[253] *Id.*; *see Contemporary Mission*, 842 F.2d at 620; *Johnston*, 448 F.2d at 381-82 (citing, inter alia, Estill v. Hearst Pub. Co., 186 F.2d 1017, 1022 (7th Cir. 1951)).

[254] *Milsap,* 100 F. 3d at 1270.

[255] Pendleton v. City of Haverhill, 156 F.3d 57, 70 (1st Cir. 1998).

[256] *Id.*

[257] *Wolston*, 443 U.S. at 167.

[258] *Id.* at 170 (Blackmun, J., concurring).

[259] *Id.*

[260] *Id.* at 171.

[261] *Id.*

[262] *Id.*

[263] See discussion *supra,* Part III, A.

[264] Williams, *supra* note 84, at 349.

[265] *See Wolston*, 443 U.S. at 163.

[266] 44 N.Y. Jur 2d Defamation and privacy § 312 (2003).

[267] *Id.*

[268] Restatement (Second) of Torts § 652D cmt. k (1977).

[269] Prosser, *supra* note 34, at 383.

[270] Restatement (Second) of Torts § 652D cmt. k (1977); Forsher v. Bugliosi, 608 P.2d 716 (Cal. 1980).

[271] Restatement (Second) of Torts § 652D cmt. k (1977).

[272] *Id.*

[273] 44 N.Y. Jur 2d Defamation and privacy § 312 (2003).

[274] *Id; see* Rome Sentinel Co. v. Boustedt, 252 N.Y.S.2d 10 (N.Y. Spec. Term 1964).

[275] *Rome Sentinel*, 43 N.Y.S.2d at 12.

[276] Briscoe v. Readers' Digest Ass'n, 483 P.2d 34, 40 (Cal. 1971).

[277] *Id.*

[278] *Id.*

[279] Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1553 (4th Cir. 1994); *see also* discussion, *supra* Part II, B, 5.

[280] *See* Wolston v. Readers' Digest Ass'n, Inc., 443 U.S. 157, 167-68 (1979).

[281] *See, e.g.*, Bill Carter, *Reality Shows Alter the Way TV Does Business*, N.Y. Times, Jan. 25, 2003, at A1; Bill Carter, *Even as Executives Scorn the Genre, TV Networks Still Rely on Reality,* N.Y. Times, May 19, 2003, at C1; Rice, *supra* note 3. *See generally* Catherine Orenstein, *Fairy Tales and a Dose of Reality*, N.Y. Times, March 3, 2003, at A3; Mark Seal, *Reality Kings,* Vanity Fair, July 2003, at 120 (discussing the careers of Fox V.P. Mike Darnell and Next Entertainment's Mike Fleiss, the producers of Fox's and ABC's reality television programs, respectively).

[282] Wells v. Liddy, 186 F.3d 505, 533 (4th Cir. 1999); *see* discussion, *supra* Part II, B, 5.

[283] Gertz v. Robert Welch, Inc., 418 U.S. 323, 352 (1974).

[284] Reuber v. Food Chem. News, Inc., 925 F.2d 703, (4th Cir. 1991).

[285] See discussion *supra*, Part I, A, 3, a-d.

[286] Restatement (Second) of Torts § 652D (1977).

[287] Dendy, *supra* note 52, at 163; *see* Kapellas v. Koffman, 459 P.2d 912, 922 (Cal. 1969).

[288] *See, e.g.,* Stephen Battaglio, *TV contestants have colorful ties to past*, DAILY NEWS, Jan. 31, 2003, at 119 (discussing the past legal battles, risqué experiences, and indiscretions of a number of reality television participants that became public information after the television shows aired); Bauder, *supra* note 25; Amy C. Sims, *'Unveiling' Reality Stars' Steamy Pasts*, FoxNews.com, *at* http://www.foxnews.com/story/0,2933,79043,00.html (discussing the tendency of reality show contestants to have "checkered pasts") (Feb. 20, 2003); Alessandra Stanley, *You've Seen the Web Site. Now See the TV Show,* N.Y. TIMES, Aug. 20, 2003, at E6 (reviewing *Smoking Gun TV,* an offshoot of the website that revealed many of the stories about reality show contestants).

[289] *"Real World" Star in Fundraiser Scrum*, The Smoking Gun, *at* http://www.thesmokinggun.com/archive/altonreal1.html (last visited Oct. 20, 2003).

[290] *"American Idol" Star Bounced*, The Smoking Gun, *at* http://www.thesmokinggun.com/archive/frenchie1.html (last visited Oct. 20, 2003).

[291] *See* Sims, *supra* note 288.

[292] Bauder, *supra* note 25.

[293] *See id.*; *Exposing a Soft-Core "Survivor,"* The Smoking Gun, *at* http://www.thesmokinggun.com/archive/heidik.html; *see* Battaglio, *supra* note 288.

[294] Battaglio, *supra* note 288.

[295] Marcus Errico, *Fox's Married "Married" Player*, E!online, *at* http://www.eonline.com/News/Items/0,1,11392,00.html (Mar. 6, 2003).

[296] Bauder, *supra* note 25.

[297] NBC Media Village, *supra* note 21.

[298] *Bound for Victory?* The Smoking Gun, *at* http://www.thesmokinggun.com/archive/kozer1.html (Jan. 29, 2003).

[299] Amy C. Sims, *Reality TV Gets Twisted,* FOX NEWS, *at* http://www.foxnews.com/story/0,2933,73389,00.html (Dec. 19, 2002).

[300] *Id.*

[301] *Id.*

[302] *Id. See Bound for Victory?* The Smoking Gun, Jan. 29, 2003, *at* http://www.thesmokinggun.com/archive/kozer1.html (last visited Oct. 20, 2003).

[303] Lia Haberman, *Joe's "Dirty Soled" Girl Comes Clean*, E!online, *at* http://www.eonline.com/News/Items/0,1,11217,00.html (Jan. 31, 2003); Lisa de Moraes, *A 'Joe Millionaire' Contestant Who Knows the Ropes*, WASH. POST, Jan. 30, 2003, at C7, *available at* http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A63715-2003Jan29 (last visited Oct. 20, 2003); Tracy Connor, *Sarah Hoped to go from Gags to Riches*, DAILY NEWS, Jan. 30, 2003, at 3, *available at* http://www.nydailynews.com/entertainment/story/55839p-52148c.html (last visited Oct. 18, 2003); *see* Sims, *supra* note 288.