Famous in a Small Town: Indeterminacy and Doctrinal Confusion in Micro-Public-Figure Doctrine

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I. Introduction

Imagine that you are a local television (TV) weatherperson with very high name recognition in your community. Most people know who you are within the boundaries of your TV market, although you have no celebrity status in the rest of the country. If you file a defamation suit, should you be considered a public figure? Does it matter if the defendant is the local newspaper or the *New York Times*? Or suppose you are a star gamer with a cult-like following among devotees of the somewhat obscure video game at which you excel. You are a superstar among that tiny sliver of humanity but anonymous otherwise. Same question—are you a public figure for defamation purposes? Should it matter if the defendant is a gaming website or CNN?

As critical as these sorts of questions are, the answers are unfortunately quite murky in courts across the United States. In the wake of *New York Times Co. v. Sullivan*,[1] the 1964 Supreme Court of the United States opinion that revolutionized fault standards in defamation, lower courts have largely been left to their own devices to sort out the status of these sorts of plaintiffs, creating a level of legal uncertainty that is quite remarkable in contemporary First Amendment[2] jurisprudence. Indeed, the creation of "public official" and "public figure" categories in defamation was driven by important free speech concerns, and the

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1. 376 U.S. 254 (1964).
2. U.S. CONST. amend. I.

results of this status determination for libel plaintiffs can be dramatic. As one commentator pointed out in 2008, "Identifying a plaintiff as a public or private figure is often outcome-determinative in libel cases, as proving actual malice is exceedingly difficult, and most cases involving public figures are dismissed outright."[3] Despite the tremendous importance of the public–private issue from a First Amendment perspective, lower courts, with very little useful Supreme Court guidance, are wildly inconsistent both in their methodologies and their results.

Renowned legal scholar Frederick Schauer wrote in 1984 that "[t]he issue of who is a public figure and who is not remains both problematic and hotly contested."[4] The fact that this assessment is no less true more than thirty years later is not just remarkable, but also cause for serious concern. The stakes are indeed high—public figures must generally prove actual malice with convincing clarity on the part of many libel defendants, an extremely daunting task, while private-figure plaintiffs can frequently prevail relatively easily with a showing of simple negligence.[5] This stark constitutional binary created by the status determination—and its implications for "uninhibited, robust, and wide-open"[6] public discourse—suggests that enhanced legal certainty in this domain is imperative.[7]

This Article focuses particularly on individuals whose fame is not nationwide—whether because it exists in a smaller geographic region or in a niche community related to the subject matter.[8] This Article employs the term "micro public figure" for such individuals. Should such plaintiffs be characterized as all-purpose public figures, given the high stakes of that determination? How thinly should such communities be sliced, since nearly everyone has considerable renown in some community, assuming

3. Amanda Groover Hyland, *The Taming of the Internet: A New Approach to Third-Party Internet Defamation*, 31 HASTINGS COMM. & ENT. L.J. 79, 91 (2008); s*ee also, e.g.*, Nat Stern, *Unresolved Antithesis of the Limited Purpose Public Figure Doctrine*, 33 HOUS. L. REV. 1027, 1028 (1996) (writing that "no element more frequently determines the [outcome] of defamation suits than the plaintiff's designation as either a public or private figure").

4. Frederick Schauer, *Defamation and the First Amendment: New Perspectives: Public Figures*, 25 WM. & MARY L. REV. 905, 906 (1984).

5. *See Sullivan*, 376 U.S. at 279–80.

6. *Id.* at 270.

7. *See, e.g.*, ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 5:3.1, at 5–20 (3d ed. 1999) (writing that "[t]he law pursuant to which courts determine who is and who is not a 'public figure,' however, is chaotic").

8. This work is an extension of an earlier article by this Author and a coauthor, Matthew D. Bunker & Charles D. Tobin, *Pervasive Public Figure Status and Local or Topical Fame in Light of Evolving Media Audiences*, 75 J. & MASS COMM. Q. 112 (1998).

it is defined at a sufficiently granular level?[9] As a popular country song observed, "Everybody dies famous in a small town."[10] Whether that small town is a geographic area or a cultural niche of some sort, either in the real world or online, many plaintiffs potentially could be regarded as pervasive public figures depending on precisely how the community is framed.[11]

This Article first recounts the Supreme Court's creation of the public-figure category. Next, it analyzes lower court opinions that insist upon national fame before declaring a plaintiff to be an all-purpose public figure. The Article then explores cases in which courts have held "micro" plaintiffs to be all-purpose public figures—on the basis of either fame within a limited geographic area, or within a particular cultural niche. Finally, the Article suggests a more precise approach to the micro-public-figure problem and offers concluding perspectives on this challenging area of defamation law.

II. ORIGINS OF THE PUBLIC-FIGURE DOCTRINE

The roots of the public-figure doctrine, of course, lie in the landmark 1964 Supreme Court decision, *New York Times Co. v. Sullivan*.[12] *Sullivan* raised the bar dramatically for plaintiffs in defamation actions by interpreting the First Amendment to require that public-official plaintiffs must establish actual malice in order to obtain libel damages.[13] Actual malice, which was defined as defamatory speech that was published "with knowledge that it was false or with reckless disregard of whether it was false or not,"[14] was a dramatic departure from the strict liability standard that state courts frequently employed pre-*Sullivan*.[15]

9. *See* Harris v. Tomczak, 94 F.R.D. 689, 702 (E.D. Cal. 1982) ("[A]fter all, every father may be considered well known in his own home . . . . Everyone is always well known somewhere depending on how narrowly the region is drawn.").

10. MIRANDA LAMBERT & TRAVIS HOWARD, *Famous in a Small Town*, *on* CRAZY EX-GIRLFRIEND (Columbia Nashville 2007).

11. Although a few other scholars have delved into these issues, the literature is not large. *See, e.g.*, RODNEY A. SMOLLA, LAW OF DEFAMATION § 2:35, 2–55 (2d ed. 2014); Michael A. Bamberger, *Public Figures and the Law of Libel: A Concept in Search of a Definition*, 33 BUS. LAW. 709 (1978); Matthew Lafferman, *Do Facebook and Twitter Make You a Public Figure: How to Apply the* Gertz *Public Figure Doctrine to Social Media*, 29 SANTA CLARA COMPUTER & HIGH TECH. L.J. 199 (2012); George E. Stevens, *Local and Topical Pervasive Public Figures After* Gertz, 66 JOURNALISM Q. 463 (1989).

12. 376 U.S. 254 (1964).

13. *Id.* at 283–84.

14. *Id.* at 279–80.

15. Lee Levine, *Judge and Jury in the Law of Defamation: Putting the Horse Behind the Cart*, 35 AM. U. L. REV. 3, 78 (1985) ("At common law, defamation was a strict liability tort and, even in actions for slander, the only issue of fact was publication.").

The Court famously justified this First Amendment incursion into common law defamation doctrine by citing the need for "uninhibited, robust, and wide-open" debate on public issues, and noting that such debate "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[16]

Although *Sullivan* itself did not discuss public figures, it was a relatively short conceptual leap for the Court to apply the actual malice doctrine to public figures in later cases expanding *Sullivan*'s ambit. In *Curtis Publishing Co. v. Butts*[17] and *Associated Press v. Walker*,[18] decided in 1967, the Court began doing so.[19] However, it was not until the Court's decision in *Gertz v. Robert Welch, Inc.*[20] that it developed the seminal rubric for determining precisely which plaintiffs should be classed as public figures.[21] The Supreme Court created two classes of public figures: all-purpose public figures and limited-purpose public figures.[22] As the Supreme Court described the difference, "Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[23] Thus, archetypal, all-purpose public figures have, as lower courts have developed the doctrine, included "the stars of stage and screen, the great athletes of our time, the prize winners, the creators of our fads and fashions, the great corporations, and the movers and shakers."[24] The Court in *Gertz* provided two justifications for subjecting all-purpose public figures to the demanding actual malice standard. First, such individuals have access to the media and can thus rebut defamatory claims through a kind of self-help.[25] Second, the Supreme Court reasoned, public figures have "voluntarily exposed themselves to increased risk of injury from defamatory falsehood" by entering the limelight.[26] A close reading of the

16. *Sullivan*, 376 U.S. at 270.

17. 388 U.S. 130 (1967).

18. 389 U.S. 28 (1967).

19. *See* 388 U.S. 130; 389 U.S. 28.

20. 418 U.S. 323 (1974).

21. *Id.* at 344–52.

22. *Id.* at 351.

23. *Id.* at 345.

24. DONALD M. GILLMOR ET AL., FUNDAMENTALS OF MASS COMMUNICATION LAW 58 (1996), *quoted in* James C. Mitchell, *The Accidental Purist: Reclaiming the* Gertz *All Purpose Public Figure Doctrine in the Age of "Celebrity Journalism*," 22 LOY. L.A. ENT. L. REV. 559, 568 (2002).

25. *Gertz*, 418 U.S. at 344.

26. *Id.* at 344–45.

opinion makes clear that these two points were not intended as legal tests for the status determination. As one authoritative commentator has pointed out, "these were rationales and descriptions, not a definition. Indeed, the Court's observation that these generalities may not obtain in every instance disqualifies the observations as definitions."[27]

Gertz left somewhat unclear whether the all-purpose public figure's fame was necessarily at the national level. The majority opinion noted 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."[28] The reference to "community" at least left open the door to more modest levels of fame justifying public-figure status, as will be explored later in this work. Limited-purpose public figures, on the other hand, were not necessarily possessed of great fame, as long as they injected themselves into the debate on a public issue. The Court in *Gertz* also allowed for the possibility of an involuntary public figure, who achieves that status "through no purposeful action of his own," although the Supreme Court stated "the instances of truly involuntary public figures must be exceedingly rare."[29]

Although *Gertz* and other later Supreme Court public-figure cases in the 1970s[30] did clarify some aspects of the doctrine, these opinions nonetheless provided no direction to lower courts on the question of what this Article refers to as micro public figures—individuals who have achieved fame in some limited domain, whether geographic or based in some cultural niche. The unfortunate result, as noted earlier, is that courts are all over the map on this issue. The following sections analyze the array of positions in the lower courts.

III. REJECTING LOCAL FAME

Some courts have refused to recognize micro public figures, holding that all-purpose public-figure status requires national fame of the highest order. For example, in *Bowman v. Heller*,[31] decided by the

27. SACK, *supra* note 7, § 5:3.1, at 5–21 (quoting *Gertz*, 418 U.S. at 345).

28. *Gertz*, 418 U.S. at 352 (emphasis added).

29. *Id.* at 345. For an excellent analysis of the involuntary figure, see W. Wat Hopkins, *The Involuntary Public Figure: Not so Dead After All*, 21 CARDOZO ARTS & ENT. L.J. 1 (2003).

30. *See, e.g.*, Hutchinson v. Proxmire, 443 U.S. 111 (1979); Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979); Time, Inc. v. Firestone, 424 U.S. 448 (1976).

31. 651 N.E.2d 369 (Mass. 1995). In addition to the cases discussed in the text, see, for example, *Avins v. White*, 627 F.2d 637 (3d Cir. 1980) (law school dean well known in legal academic circles was not a public figure although libel circulated in those circles); *Wheeler v. Green*, 593 P.2d 777 (Or. 1979) (well-known Appaloosa horse trainer was not a public

Massachusetts Supreme Judicial Court in 1995, the court declined to declare a defendant who ran for a local union office to be an all-purpose public figure in an infliction of emotional distress suit.[32] The Massachusetts high court reasoned that the degree of fame "required for an individual to be a public figure for all purposes, as opposed to a limited purpose public figure, is very great; the individual must be a 'household name' on a national scale."[33] The court cited the D.C. Circuit for the proposition that "the archetypes of the general purpose public figure" are "well-known athlete[s] or entertainer[s]."[34]

Similarly, in 2006, a federal court in Maryland found in *Haskins v. Baylis*,[35] that the plaintiff, who was well known in the dog-breeding world, was a private figure.[36] Frank Baylis, who had won numerous "Best of Breed" awards in the prestigious Westminster Kennel Club dog show, sued Frances W. Haskins for defamation after Haskins wrote a letter suggesting Baylis was addicted to prescription drugs.[37] The court found that Baylis did not fit into either *Gertz* public-figure category, rejecting the niche fame Baylis had achieved in the dog-show world.[38] "There is no evidence or allegation that Baylis is sufficiently famous or notorious to be treated as a public figure for all purposes," the court wrote.[39] "Baylis may be well known in the small world associated with breeding and showing purebred dogs, but that does not make him a public figure for defamation purposes."[40] The court in *Haskins* compared Baylis's fame to that of Mary Alice Firestone in *Time, Inc. v. Firestone*,[41] which consisted of local fame only in Palm Beach society and was therefore insufficient to render her a public figure in that case.[42]

figure despite circulation of libel exclusively among those in Appaloosa community); *Cooper v. Myer*, 944 A.2d 915 (Vt. 2007) (locally influential manager of well-known ski resort held to be private figure).

32. *Bowman*, 651 N.E.2d at 371.

33. *Id.* at 373.

34. *Id.* (citing Tavoulareas v. Piro, 817 F.2d 762, 772 (D.C. Cir. 1985), *cert. denied*, 484 U.S. 870 (1987)).

35. 440 F. Supp. 2d 455 (D. Md. 2006).

36. *Id.* at 463.

37. *Id.* at 456–57.

38. *Id.* at 462–63.

39. *Id.* at 463.

40. *Id.*

41. 424 U.S. 448 (1976).

42. *Haskins*, 440 F. Supp. 2d at 463.

IV. LOCAL OR REGIONAL ALL-PURPOSE PUBLIC FIGURES

One of the earliest lower court cases to accept the geographic micro public figure, although in dicta, is an influential 1980 decision by the United States Court of Appeals for the District of Columbia Circuit.[43] In *Waldbaum v. Fairchild Publications, Inc.*,[44] the court pointed out that, in *Gertz*, the Supreme Court noted that plaintiff Elmer Gertz had

> "no general fame and notoriety in the community" and that he was not generally known to "the local population." We therefore conclude that nationwide fame is not required. Rather, the question is whether the individual had achieved the necessary degree of notoriety where he was defamed [namely], where the defamation was published.[45]

The Wisconsin Supreme Court held a former state legislator to be an all-purpose public figure within his former legislative district in *Lewis v. Coursolle Broadcasting*[46] in 1985. The plaintiff, James R. Lewis, held a seat in the Wisconsin Assembly until he was convicted of perjury, for which he served a brief sentence. Lewis then sought to have the

43. Waldbaum v. Fairchild Publ'ns Inc., 627 F.2d 1287 (D.C. Cir. 1980); s*ee also, e.g.*, Brewer v. Memphis Publ'g Co., 626 F.2d 1238 (5th Cir. 1980) (husband and wife—former football player and girlfriend of Elvis, respectively—were all-purpose public figures, at least regionally); Kroll Assocs. v. City & Cty. of Honolulu, 833 F. Supp. 802 (D. Haw. 1993) (despite national media attention given to plaintiff–corporation, it did not have sufficient fame in the city and county of Honolulu to be considered an all-purpose public figure); Harris v. Tomczak, 94 F.R.D. 687 (E.D. Cal. 1982) (although evidence was insufficient to decide status, fame where the defamation is published is sufficient to warrant all-purpose public-figure status); *In re* Thompson, 162 B.R. 748 (U.S. Bankr. Ct. 1993) (finding plaintiff was private figure after applying local-fame standard); Biskupic v. Cicero, 756 N.W.2d 649 (Wis. Ct. App. 2008) (controversial former district attorney was all-purpose public figure in Appleton, Wisconsin and surrounding area in which he had obtained notoriety); Weber v. Lancaster Newspapers, Inc., 878 A.2d 63 (Pa. Super. 2005) (although plaintiff was found to be a private figure, court used local-fame standard); Am. Family Mut. Ins. Co. v. Edgar, No. 92-CV-779, 1995 WL 370221 (Cir. Ct. Wis. Jan. 25, 1995) (insurance company plaintiff, although not operating nationwide, was a general-purpose public figure in Wisconsin, the community in which the defamation took place); Brewer v. Rogers, 211 Ga. App. 343, 439 S.E.2d 77 (1993) (high school football coach was public figure as to local TV news broadcast); Nelson v. Univ. of Minn., No. 92-3599, 1993 WL 610729 (Minn. Dist. Ct. June 25, 1993) (controversial local landlord was public figure due to notoriety around university campus); Brooks v. Paige, 773 P.2d 1098 (Colo. App. 1988) (locally famous professional soccer player was public figure as to Denver media); Williams v. Pasma, 656 P.2d 212 (Mont. 1982) (politician was public figure within state of Montana); Mobile Press Register, Inc. v. Faulkner, 372 So. 2d 1282 (Ala. 1979) (former officeholder was all-purpose public figure within the state of Alabama); Steere v. Cupp, 602 P.2d 1267 (Kan. 1979) (lawyer was all-purpose public figure based on fame and notoriety in Kansas county).

44. 627 F.2d 1287 (D.C. Cir. 1980).

45. *Id.* at 1295 n.22 (citation omitted).

46. 377 N.W.2d 166 (Wis. 1985).

conviction vacated—an attempt that generated significant publicity. Some years later, a radio station in Waupun, Wisconsin broadcast a story falsely identifying Lewis as having attempted to extort money from the makers of Tylenol.[47]

In the ensuing libel action, the Wisconsin high court reasoned that the public-figure doctrine necessarily implied "some specific geographic context as a limit."[48] The key question, the court stated, was whether the plaintiff had achieved fame in the area where the defamatory statements were published.[49] Here, the defamation occurred on a radio station from Waupun, which meant "the listening audience encompassed approximately the same geographic area as Lewis' former legislative district."[50] The court concluded that "this region constitutes the community in which Lewis was a 'public figure' for the purpose of this action."[51]

At least one court has recognized a geographic micro public figure despite the fact that the defamatory statements were reported by a national news organization and circulated well beyond the area where the plaintiff was famous. In *Owens v. National Broadcasting Co.*,[52] a Louisiana state appellate court found that the plaintiff was a singer of some local renown who was erroneously identified on the NBC Nightly News as a "stripper-turned-singer." The plaintiff alleged the "stripper" claim was defamatory, and contended that while she might have attained local or regional fame, she was not a national, all-purpose public figure for purposes of the NBC broadcast.[53]

The court in *Owens* rejected the "overlap" principle of the status determination—that is, that the area of the plaintiff's fame and that of the dissemination of the libel must be basically coextensive to justify application of the actual malice standard.[54] "While the geographical range of an individual's fame or notoriety may be relevant in an initial determination of his 'public person' status, we do not interpret the jurisprudence as placing geographical boundaries upon the *New York Times* constitutional privilege," the court wrote.[55] The court explicitly declined to adopt the plaintiff's theory that "would extend the privilege

47. *Id.* at 167–68.
48. *Id.* at 172.
49. *Id.*
50. *Id.*
51. *Id.*
52. 508 So. 2d 949 (La. Ct. App. 1987).
53. *Id.* at 950–51.
54. *Id.* at 952.
55. *Id.* at 951.

to the local media but withhold it from any media with a geographically broader audience."[56] Instead, the court in *Owens* held that the protections of *Sullivan*'s actual-malice standard were not geographically bound, and thus, applied to NBC.[57]

V. NICHE CULTURAL FAME

A significant number of courts have recognized as all-purpose public figures those who have attained prominence in some narrow cultural niche, despite the fact that they are not household names to a broad audience at either the national or local level.[58] These cases essentially reframe the *Gertz* "community" to be one of like-minded individuals who are connected through their interests rather than strictly based on physical geography. The vast majority of these niche public figures are simply not famous enough to the general public to be considered household names.

For example, famed federal appellate Judge Richard A. Posner wrote a majority opinion declaring an obscure academic journal author to be a public figure in *Dilworth v. Dudley*,[59] decided by the United States Court of Appeals for the Seventh Circuit in 1996. The litigation began when William Dilworth, an engineer who had published a few articles in academic mathematics journals, was declared a "crank" by mathematics professor Underwood Dudley, who had published a book with the memorable title *Mathematical Cranks*.[60]

Judge Posner wrote that Dilworth was a public figure, without specifying which type, although he acknowledged that Dilworth was an "obscure engineer."[61] Nonetheless, Posner reasoned, "anyone who

56. *Id.* at 951–52.

57. *Id.* at 952.

58. *See, e.g.*, Dilworth v. Dudley, 75 F.3d 307 (7th Cir. 1996); Chuy v. Phila. Eagles Football Club, 595 F.2d 1265 (3d Cir. 1977) (professional football player was public figure at least as to sports fans and issues surrounding his career); Vandenburg v. Newsweek, 507 F.2d 1024 (5th Cir. 1975) (track coach was public figure, type not specified); Adler v. Conde Nast Publ'ns, 643 F. Supp. 1558, 1564 (S.D.N.Y. 1986) (plaintiff–journalist "had general fame or notoriety in the literary and journalistic community" and was thus a public figure); Barry v. Time, Inc., 584 F. Supp. 1110 (N.D. Cal. 1984) (basketball coach at University of San Francisco became limited-purpose public figure by taking on coaching position at school with record of NCAA recruiting issues); Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341, 1349 (S.D.N.Y. 1977) (although insurance company was not a household name, it was well known among readers of the business press and in the financial community); Wilsey v. Saratoga Harness Racing, 528 N.Y.S.2d 688 (N.Y. App. Div. 1988) (harness racing driver was public figure).

59. 75 F.3d 307 (7th Cir. 1996).

60. *Id.* at 308.

61. *Id.* at 309.

publishes becomes a public figure in the world bounded by the readership of the literature to which he has contributed . . . . [he] enter[s] voluntarily into one of the submarkets of ideas and opinions and consent[s] therefore to the rough competition of the marketplace."[62]

Judge Posner's public-figure determination in *Dilworth* leaves some important questions unanswered. For example, does "anyone who publishes" include only those publishing work in serious academic journals? That was certainly the context in the case at bar, but the language Judge Posner employs appears to sweep much more broadly. What about those who contribute to trade journals, nonacademic political journals, trade books, the popular press, or Twitter? Unfortunately, Judge Posner's brief discussion of the matter sheds no light on those scenarios.

A Hawaii federal district court determined that a surfer and surfboard maker was an all-purpose public figure in the surfing community in *Chapman v. Journal Concepts, Inc.*[63] in 2007.[64] The plaintiff, Craig "Owl" Chapman, a renowned surfer, sued *The Surfer's Journal* and other defendants after the publication ran "an article recounting [the author's] pursuit of a custom-shaped, single-fin surfboard, photographs, and other surfers' recollections."[65] The piece suggested that Chapman was not particularly helpful to his clients and had abused drugs and alcohol.[66]

It was clear, the court found, that Chapman had acquired renown in the surf world by being among the original group of surfers who rode very large and dangerous waves on Oahu's North Shore.[67] In analyzing the public-figure status of athletes generally, the court determined that earlier courts had frequently placed athletes in the limited-purpose public-figure category. "That legal theory is inapplicable here," the court wrote. The "[p]laintiff has not inserted himself into any public interest dispute in order to bring about its resolution."[68] Although Chapman argued that he was not a household name on the scale of, say, Tiger Woods, the court nonetheless—after pointing out that the *Gertz* categories should not be regarded as "absolute prototypes"—determined that he was an all-purpose public figure within the surfing community.[69]

62. *Id.*
63. 528 F. Supp. 2d 1081 (D. Haw. 2007).
64. *Id.* at 1085.
65. *Id.* at 1084–85.
66. *Id.* at 1085–86.
67. *Id.* at 1092.
68. *Id.* at 1090.
69. *Id.* at 1090–91.

In order to make this determination, the court in *Chapman* devised a five-part inquiry that required it to "define the applicable community, consider whether [the] [p]laintiff is in fact a general purpose public figure in the surfing community in general terms, whether he has access to media, whether he has assumed the risk of publicity, and whether any public figure status has eroded over time."[70] As to the applicable community inquiry, the court found that there was in fact a distinct surfing culture, complete with "a unique culture, lingo, style of dress, and etiquette."[71] This cultural determination did not employ a particularly rigorous methodology; the court supported it only by citations to several surfing websites.[72] Moreover, the allegedly defamatory statements were targeted to that culture with considerable precision, given that they were published in *The Surfer's Journal*, the subscribers of which were overwhelmingly "mature (over 40 years of age) surfing enthusiasts."[73] Thus, the existence of a distinct community, which happened to be precisely where the alleged libel was circulated, meant that the first part of the test was met.[74]

Second, as to Chapman's status within the community, the court easily determined that he was an iconic personality within that culture.[75] Chapman had been widely written about, filmed, and otherwise "exalted as a 'living legend on the North Shore.'"[76]

The third part of the test—access to the channels of communication—also produced a positive finding. Recall that *Gertz* had identified this factor as a rationale to subjecting public figures to the rigors of the actual malice standard, since they could presumably use their media access to defend themselves against defamatory assertions.[77] The court in *Chapman* reasoned that the surfing community was still interested in Mr. Chapman, and thus, "Although the record on this matter is thin, it appears to the court that if [the] [p]laintiff wanted to rebut Johnson's article—whether through an interview, profile, or opinion piece—the surfing media would be receptive."[78]

As to the fourth factor—the assumed risk of publicity—Chapman argued that he had neither entered professional surf competitions nor

70. *Id.* at 1091.
71. *Id.*
72. *Id.*
73. *Id.* at 1092.
74. *Id.*
75. *Id.*
76. *Id.*
77. 418 U.S at 345.
78. 528 F. Supp. 2d at 1092.

sought endorsements, which should render him a private figure.[79] The court nonetheless found that his exploits had voluntarily exposed him to the public eye: Chapman "assumed a role or position of special prominence and notoriety within the surfing community by tackling exceptionally dangerous and difficult waves (and, according to press reports, causing a certain degree of mischief)."[80] These activities, along with interviews, film appearances, and the like, were sufficient to constitute a voluntary embrace of fame within the surfing culture, the court reasoned.[81]

On the fifth factor—the passage of time—the court concluded Chapman had remained sufficiently prominent within the surfing community in the years leading up to the allegedly defamatory article and that his public status had not disappeared.[82] Given the weight of the five factors, the court held that Chapman was indeed "a general public figure in the limited context of the surfing community," and thus was required to demonstrate actual malice.[83]

The United States Court of Appeals for the Second Circuit employed a considerably less baroque analysis to conclude, in 2000, that a plaintiff had fame within a particular ethnic community within a metropolitan area—an interesting hybrid of geography and cultural niche.[84] In *Celle v. Filipino Reporter Enterprises, Inc.*,[85] one of the plaintiffs was Lino Celle, a commentator on Radyo Pinoy, a radio station primarily serving Filipino Americans in New York City and northern New Jersey.[86] As the court noted, "Radyo Pinoy is a 'side carrier'—in order to listen to its programs a special radio is required to pick up its frequency."[87] Celle was also a newspaper columnist.[88]

After Celle sued for numerous alleged defamatory statements by the *Filipino Reporter* newspaper, the Second Circuit determined, with almost no analysis, that Celle was a public figure, despite the relative obscurity of his radio station, which required a special receiver to even access.[89] The Second Circuit simply noted that because of "Celle's own

79. *Id.* at 1093.

80. *Id.*

81. *Id.* at 1093–94.

82. *Id.* at 1095.

83. *Id.*

84. In the same vein, see *DeCarvalho v. DaSilva*, 414 A.2d 806 (R.I. 1980) (plaintiff was an all-purpose public figure in a Portuguese community in Rhode Island).

85. 209 F.3d 163 (2d Cir. 2000).

86. *Id.* at 172.

87. *Id.*

88. *Id.*

89. *Id.* at 176–77.

characterization of himself as a 'well known radio commentator' within the Metropolitan Filipino-American community, the district court correctly held that he is a public figure."[90] The court failed to designate which branch of public-figure doctrine Celle fell into, and it did not discuss the breadth of circulation of the *Filipino Reporter*. However, the opinion at least implies that the newspaper circulated within Celle's zone of fame—the Filipino-American community around New York City.

VI. ANALYSIS AND DISCUSSION

The micro-public-figure doctrine is clearly in a state of considerable disarray. The failure of lower courts to achieve any reasonable consensus here is a concern, since enhanced First Amendment protection for libel defendants is available in inconsistent fashion, depending on the particular court's interpretation of *Gertz* and related cases. Even in those courts that recognize the doctrine, the method of its deployment is often murky.

As some lower courts have recognized, the language of the *Gertz* majority suggests that national fame need not be required in order to declare a plaintiff an all-purpose public figure.[91] The Supreme Court noted of Gertz that "he had achieved no general fame or notoriety in the community. None of the prospective jurors called at the trial had ever heard of [the] petitioner prior to this litigation, and [the] respondent offered no proof that this response was atypical of the local population."[92] This style of analysis strongly implies that the micro-public-figure concept has the Court's blessing, at least in the geographic sense.

As for niche public figures, a number of courts have recognized the concept, and it certainly seems within the spirit of *Sullivan* and *Gertz*, even if not directly contemplated by those opinions.[93] Many scholars have recognized how the proliferation of media outlets, including countless cable channels and online sources, have splintered what was once a relatively homogenous cultural environment in the United States anchored by a few influential news magazines, three major networks, and several dominant national newspapers.[94] That indeed was the media landscape when *Sullivan* and its progeny were decided. Our current cultural and political terrain is such that it only makes sense to recognize

90. *Id.* at 177.

91. *See, e.g.*, *Waldbaum*, 627 F.2d 1287.

92. *Gertz*, 418 U.S. at 351–52.

93. *See, e.g.*, *Dilworth*, 75 F.3d 307; *Chuy*, 595 F.2d 1265; *Vandenburg*, 507 F.2d 1024; *Adler*, 643 F. Supp. 1558; *Barry*, 584 F. Supp. 1110; *Reliance Ins. Co.*, 442 F. Supp. 1341; *Wilsey*, 528 N.Y.S.2d 688.

94. *See, e.g.*, NICHOLAS NEGROPONTE, BEING DIGITAL (1995).

these diverse and frequently unconnected cultural niches as potentially independent domains in which an individual might obtain sufficient notoriety to justifiably be held to the actual malice standard. In what is arguably becoming a post-mass-media world, honoring the animating principles of *Sullivan* and *Gertz* might indeed suggest extending their doctrine to the cultural nooks and crannies that now dominate many citizens' media interactions.

Even if one concluded that it is stretching *Gertz* too far to attempt to encompass micro public figures of the niche variety, it must be remembered that *Gertz* only prescribes the minimum standard of protection for defamation defendants under the federal Constitution. As Judge Sack has pointed out, "It would therefore be consistent with [*Gertz*] for a state tribunal to provide a broader definition of public figure than the minimum set forth in *Gertz* and its progeny."[95] Thus, state courts are entirely free via their own constitutions to venture more deeply into micro-public-figure territory than might appear to be countenanced by Supreme Court precedent.

Although some courts have been responsive to applying the actual malice standard to niche public figures,[96] few have provided much in the way of methodological criteria for recognizing which plaintiffs should fall into that category. Perhaps the closest thing to a standard legal test is proffered in the *Chapman* case, discussed earlier, in which a federal trial court in 2007 found a well-known surfer to be an all-purpose public figure in the surf world.[97] The *Chapman* formulation has its flaws, but it is a worthwhile starting point.

As discussed earlier, the court in *Chapman* created a five-part test for determining whether the plaintiff was a public figure in his limited domain of the surfing field. The five prongs of this test were (1) a definition of the applicable community; (2) plaintiff's degree of fame within that community; (3) plaintiff's access to the channels of communication; (4) the assumed risk of publicity; and (5) the passage of time.[98] Factors three and four, however, are drawn from the *Gertz* description of the rationale for holding public figures to the actual malice standard. They were not, as discussed in more detail earlier in this Article, intended as identifying characteristics of public figures, but rather as observations about many, but not all, public figures that tend to justify that status. Thus, it makes little sense to apply either access to

95. SACK, *supra* note 7, § 5:3.11, at 5–73; *see also* William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

96. *See, e.g.*, *Dilworth*, 75 F.3d 307.

97. 528 F. Supp. 2d at 1084.

98. *Id.* at 1091–95.

the media or assumption of the risk of negative publicity as some sort of after-the-fact "test" to determine whether a given plaintiff is in fact a public figure. This approach is a clear misreading of *Gertz*.

Similarly, factor five (passage of time) is not a cogent consideration for micro public figures in general. Instead, this factor responds to a particular argument advanced by the plaintiff in *Chapman*: that his star within the surfing community had dimmed of late and that he should thus no longer be considered a pervasive public figure within that community.[99] While that argument is a legitimate one in the proper context, if one is attempting to construct a more general standard for micro public figures, the degree of one's fame, past or present, is perhaps better considered under the second *Chapman* factor.

Despite problems with factors three, four, and five, the first two prongs of the *Chapman* test seem promising. First, the court defines the relevant community.[100] Although the court in *Chapman* was not particularly rigorous in defining the community, simply citing a few websites that alleged there was indeed a distinct surfing culture,[101] that level of rigor could be improved by requiring testimony or even empirical demonstration of the existence of a pre-existing, cohesive, niche community of some sort. Where the existence of the field or niche is common knowledge (for example, sports in general, academic fields, popular music genres, or the literary realm), courts could simply take judicial notice of that fact without additional evidence. As part of the first prong, the court in *Chapman* also required "measur[ing] the population of the relevant community by the distribution of the allegedly defamatory statements."[102] In other words, the court applied what this Article has referred to as the "overlap" principle—where defamatory statements must be circulated only within the boundaries of the community in which the plaintiff is famous in order to impose public-figure status. Obviously, policing such boundaries is difficult in any media context, but perhaps particularly in online media where defamatory statements can start in one limited online community, but quickly spread to other parts of the online ecosystem. This is, of course, no less true in the geographic micro-public-figure cases, since even small-town newspapers and broadcast stations, while continuing their normal modes of distribution, now have online sites that allow stories intended largely for a limited geographic audience to be viewed around the world. The same can be true for non-media defendants, given the rising use of social media sites

99. *Id.* at 1094.
100. *Id.* at 1091.
101. *Id.*
102. *Id.*

among the general populace.[103] Despite these difficulties, a reasonable approach to such issues can simply require that the defamatory material circulate *largely* among the particular group or community in question, recognizing that some wider dissemination is inevitable.

While some decisions, such as the case of *Owens* discussed earlier, have rejected application of the overlap principle,[104] it seems unworkable to delineate a geographic locale or niche community in which a plaintiff who has not attained national fame is notorious, and then proceed to completely ignore the limits of that individual's fame and simply apply actual malice regardless of the putative libel's circulation. That approach also seems to contravene what one could interpret as the Supreme Court's conclusion in *Firestone*, that local notoriety would not be sufficient for public-figure status in a case involving a nationally circulated magazine.[105]

The second prong in *Chapman* requires a demonstration of the plaintiff's degree of notoriety within the now-identified community.[106] In applying this factor, the court in *Chapman* simply noted the plaintiff's numerous magazine profiles, film appearances, and mentions in reference works.[107] This seems to be a reasonable approach to this factor; although in close cases, it is possible a litigant might wish to provide some empirical demonstration of the plaintiff's name recognition (or lack of recognition) among the relevant community. As far as a precise metric to determine the necessary level of fame or notoriety, that does not seem possible beyond an acceptable verbal formulation that will inevitably create some degree of uncertainty. Although some courts have demanded "household name" status before declaring a plaintiff to be a pervasive public figure,[108] the Supreme Court's language in *Gertz* does not seem to go quite that far, defining the category as consisting of those who "occupy

103. This Article does not explore the media versus non-media distinction among defendants in the application of the actual malice standard. For an excellent analysis of that distinction, see Clay Calvert et al., *Plausible Pleading and Media Defendant Status: Fulfilled Promises, Unfinished Business in Libel Law on the Golden Anniversary of Sullivan*, 49 WAKE FOREST L. REV. 47 (2014); Rebecca Phillips, *Constitutional Protection for Nonmedia Defendants: Should There Be a Distinction Between You and Larry King*?, 33 CAMPBELL L. REV. 173 (2010).

104. *See Owens*, 508 So. 2d at 949.

105. 424 U.S. at 453. Of course, the Court's statement that "[the] Respondent did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society" could also be read as antithetical to the very notion of a micro public figure, without regard to the circulation issue. *Id.* While true, that ignores contrary language from *Gertz* that seems supportive of at least the geographic micro public figure.

106. 528 F. Supp. 2d at 1092.

107. *Id.*

108. *See Bowman*, 651 N.E.2d at 373.

positions of such persuasive power and influence that they are deemed public figures for all purposes."[109] Clearly, a plaintiff might have notoriety such that she could wield considerable power and influence without necessarily having "household name" status. In any event, it seems reasonable to require that the individual be well known within the community, even if not universally recognized.

Thus, the two parts of the *Chapman* approach emphasized here might usefully be split into three prongs. Faced with a micro-public-figure issue, a court should (1) confirm the existence of the claimed community; (2) determine whether the circulation of the alleged defamation is reasonably coextensive with the boundaries of that community; and (3) measure the level of the plaintiff's notoriety within that community. This tripartite standard seems a reasonable start toward some practical methodology for dealing with this type of case. Obviously, complications can arise. For example, one issue that might need to be confronted is the size of the community in question. Courts would, in all probability, not wish to recognize as viable communities those groups that are so small in size that the very concept of a public figure becomes an absurdity since every member of the group is a "household name" to every other member. Thus, without necessarily setting a numerical minimum, courts would need to apply some sort of rule of reason to prevent slicing and dicing ever smaller units.

VII. CONCLUSION

The micro-public-figure doctrine raises difficult questions for defamation law. Although the concept now has significant support in the courts, that support is anything but universal. Moreover, existing Supreme Court doctrine offers considerably more direct support for the notion of geographic micro figures than for the niche-community figures. This Article has argued that recognition of micro public figures of all stripes both makes sense given the post-*Sullivan* doctrinal landscape and the fact that such recognition advances important First Amendment values. The Article also proposed the beginnings of an analytical approach, drawn from existing case law, which could help bring some uniformity to the doctrine. Although some issues, no doubt, need further analysis and development, it is hoped this work can advance that conversation.

109. 418 U.S. at 345.