Deus ex Machina and the Unfulfilled Promise of New York Times v. Sullivan: Applying the Times for All Seasons

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Deus ex Machina and the Unfulfilled Promise of New York Times v. Sullivan: Applying the Times for All Seasons

Joseph H. King, Jr.

"It is lack of order which makes us slaves; the confusion of today discounts the freedom of tomorrow."

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1 UTILITY and Walter W. Bussart Distinguished Professor of Law, University of Tennessee College of Law. Research for this Article was supported by a generous summer research stipend from the College of Law. I am also indebted to David Chapman, a former research assistant, for his help with preliminary reference material for one subsection of this Article.

2 HENRI FREDERIC AMIEL, AMIEL'S JOURNAL 12 (Humphrey Ward trans., 2d ed. 1889) (entry for Aug. 15, 1851).

According to popular scientific lore and the second law of thermodynamics, the idea of entropy contemplates that it is in the nature of things in isolated systems to move from order to disorder.\(^3\) The Supreme Court's landmark decision in *New York Times v. Sullivan*\(^4\) has been followed by doctrinal disorder that has taken hold in subsequent cases addressing First Amendment limitations on state defamation law. The law in the evolving years has become a reification of entropy, and that lack of order can make us slaves. The disorder and uncertainty in the post-*New York Times* constitutional jurisprudence undermine the doctrines created to enhance freedom of expression. They thereby inhibit the very freedom that inspired the creation of those doctrines by deterring and demoralizing free expression. This disorder and uncertainty enslaves us by isolating and cutting us off from free communication, enslaving us all the same.

*New York Times* evokes a theatrical technique from Greek drama, which the Romans described by the phrase, "*Deus ex machina.*"\(^5\) It is literally translated as "a god from a machine."\(^6\) During plays, a statue of a deity was

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\(^3\) See R. Nave, *Entropy as Time's Arrow*, http://hyperphysics.phy-astr.gsu.edu/hbase/therm/entrop.html (last visited Apr. 27, 2006). Entropy is loosely described as follows:

One of the ideas involved in the concept of entropy is that nature tends from order to disorder in isolated systems . . . . It is a part of our common experience. Spend hours cleaning your desk, your basement, your attic, and it seems to spontaneously revert back to disorder and chaos before your eyes.

Some care must be taken about how you define "disorder" if you are going to use it to understand entropy. A more precise way to characterize entropy is to say that it is a measure of the "multiplicity" associated with the state of the objects.

*Id.* Science essayist, K.C. Cole, comments:

Disorder, alas, is the natural order of things in the universe . . . . Unlike almost every other physical property . . . , entropy does not work both ways. Once it's created it can never be destroyed. The road to disorder is a one-way street.

Entropy wins not because order is impossible but because there are always so many more paths toward disorder than toward order.


\(^6\) *Elizaeth Webber & Mike Feinsilber, Dictionary of Allusions* 148 (1999). Others translate the phrase as "god from the machinery." *New Oxford*, *supra* note 5, at 467. The phrase is a translation from the Greek *theos ek mēkhane*. *Id.*
suspended above the stage. Then, at a crucial juncture, the god-statue was suddenly introduced, lowered by a crude mechanism, the “machine,” down onto the stage. Once there, it would resolve the otherwise insoluble entanglements that had enveloped the players during the drama. The phrase has come to represent an attempt to use some artificial or improbable device to resolve a difficult quandary. The New York Times case was like a deity statue lowered onto the stage to resolve the threat then facing the press and critics of government and government officials. Both New York Times and the mechanical deity appear marvelous on stage at first sight. But, the reality is a different story.

Shortly after the New York Times decision, Professor Harry Kalven wondered whether it represented no more than “one pocket of cases” or the beginning of a “dialectic progression.” It seems now to have clearly been the latter. The case has produced a profligacy of conceptual sequelae beset with doctrinal complexity and uncertainty. The promise of New York Times has faltered almost from the beginning as the Court fitfully and lurchingly sought to define the reach and scope of its newly minted First Amendment limitations on state defamation law. In retrospect, it was easy to understand why the Court moved aggressively to stem the litigious threat to freedom of expression at such a crucial time in America's collective awakening to the scourge of racial injustice. As John Goldberg commented, “[i]n these respects, Sullivan was about as easy to resolve as a landmark decision could be.” But then there was the reality that “easy cases are not easy in all re-

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7 See Webber & Feinsilber, supra note 6, at 148.
8 See id.
9 See New Oxford, supra note 5, at 467.

It is not easy to predict what the Court will see in the Times opinion as the years roll by. It may regard the opinion as covering simply one pocket of cases, those dealing with libel of public officials, and not destructive of the earlier notions that are inconsistent only with the larger reading of the Court's action. But the invitation to follow a dialectic progression from public official to government policy to public policy to matters in the public domain, like art, seems to me to be overwhelming.

Id.
11 Id.
12 See generally Don Lewis, Dun and Bradstreet, Inc. v. Greenmoss Builders, Inc., Philadelphia Newspapers, Inc. v. Hepps, and Speech on Matters of Public Concern: New Directions in First Amendment Defamation Law, 20 Ind. L. Rev. 767, 767 (1987) (commenting that since Times, decisions have been "marked by a continual process of redefinition of the scope and strength of the 'constitutional privilege to defame'.")

pects." He explains that "because their outcomes are over-determined, they pose the problem of how to decide subsequent cases, in which all signs are not pointing toward one resolution . . . [and] require the Court to isolate the controlling principles underlying the initial decision."

The promise of *New York Times*—that of assuring a legal climate free of the fear of liability imposed for expressions made without awareness of their falsity or a conscious indifference to their truth or falsity—has not been fully realized. *New York Times* planted the seeds of a constitutional garden from which ever-growing layers of doctrinal and decision-making complexity have sprouted.

The Supreme Court's decision in *New York Times v. Sullivan* arrived at a flexion point in American history. It was a time of social upheaval and the stirrings of a national transformation in the collective American consciousness of racial injustice. As Justice Brennan noted, writing for the majority, the defendant's publication was an "expression of grievance and protest on one of the major public issues of our time."

To appreciate how great an impact the case had on American law and American society, we have to take ourselves back to the year when the libel action started, 1960. We have to understand two things about that time: what the state of race relations was, and what limits the United States Constitution put on libel judgments. The events of 1960 came six years after the Supreme Court, in *Brown v. Board of Education*, had held racial segregation to be unlawful in public education. Yet, in that year not a single black child

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14 *Id.*
15 *Id.* at 1477-78.
17 Goldberg, *supra* note 13, at 1476. Goldberg explains:

    Everything about it had signaled the propriety of Supreme Court intervention. The underlying litigation was brought at the height of regional strife over the civil rights movement. Indeed, the suit was part of a conscious effort by Alabama officials to deflect national scrutiny of the Southern states and to derail federal efforts to desegregate. The decisions of the state trial judge stretched jurisdictional and defamation rules to their breaking points, demonstrating that he was himself an active participant in this act of political resistance. The jury's $500,000 damage award, rendered without evidence of actual reputational damage, was grossly excessive . . . . In sum, what was nominally a private-law defamation suit filed by Sullivan on his own behalf was a thinly-veiled effort by which state and local governmental officials sought to suppress criticism of their policies. It is no wonder, then, that the Supreme Court reached out for the case and held, contrary to its own prior statements, that the law of defamation can, at least in some instances, unconstitutionally encroach on protected speech.

*Id.* at 1476-77 (footnotes omitted).
attended a public school with white children in Alabama, Georgia, Mississippi, Louisiana, or South Carolina. The state universities remained segregated in those same states. Blacks were prevented from voting in large parts of the Deep South by force or trick.

Those were the realities that Martin Luther King, Jr. and his colleagues were trying to change, along with segregation in the rest of life, in hospitals and cemeteries and department stores. Dr. King had an idea, an optimistic one. He thought that most Americans, if confronted with the ugliness and brutality of racism, would disapprove. It was true that most Americans at that time were actually unfamiliar with the realities of racism. Dr. King set out to confront them with those realities. The press, both print and broadcast, had an essential part to play if Dr. King’s optimistic strategy was to work.18

A free, unbowed press was essential to achieving the ends of the civil rights movement through non-violent means, trusting in the power of education in awakening the public conscience. The stark alternatives were either a continuation of a horrendous status quo or turning to a less peaceful way of kindling change in a forum more elemental than the press and voting booth.

The New York Times case arose out of statements contained in a full-page paid advertisement in the New York Times on behalf of several individuals and groups whose purpose was to call attention to a “wave of terror” against black citizens during the non-violent protests in the South.19 The plaintiff, one of three elected commissioners of Montgomery, Alabama, alleged that certain statements in the advertisement were inaccurate and


20 See id. at 256.
Defendants admitted that the advertisement contained several statements that were not completely accurate, such as the number of times Dr. King had been arrested (seven instead of four). According to Alabama's defamation law, once the meaning of the words were found tending to injure the person's reputation or bring him into public contempt under Alabama substantive tort principles, defendants then had no defense except to prove the truth of their assertions. A jury awarded sizeable damages to the plaintiff, which was affirmed by the state supreme court.

On appeal, the United States Supreme Court reversed on First Amendment grounds. In so doing, the Court for the first time injected a constitutional analysis into the matrix for deciding defamation cases that were creatures of state law and had otherwise been governed by state tort law. The majority opinion was written by Justice William Brennan, whose genius for gentle persuasion allowed him to craft the needed majority for this landmark decision.

The Court initially refuted three arguments by the plaintiff that the libel case was outside of the constitutional reach of the Court. Specifically, the Court held first that the state-action requirement needed to implicate the First Amendment is satisfied by a civil lawsuit based on state common-law rules. The threat of criminal prosecution under an Alabama criminal libel statute, with a fine not exceeding $500 and a prison sentence of six months, paled in comparison to the $500,000 award in the instant case.

1. See id.
2. See id. at 258-59. Alleged inaccuracies included the name of the song the students protesters sang; the reasons students were expelled; the statement about starving students by padlocking the dining hall, whereas the hall was actually never padlocked; the statement about the police ringing the campus, whereas the police never actually ringed the campus but were only deployed near it; and the number of King's arrests. See id. It also appeared that the plaintiff had not been a commissioner when three of four arrests occurred, and had no involvement in King's perjury indictment. See id. at 259. Moreover, facts pertaining to the alleged assault of Dr. King were disputed. Id.
3. See id. at 267.
4. Id. at 256.
5. See id. at 279-80, 291.
6. See Anthony Lewis, Make No Law: The Sullivan Case and the First Amendment 156 (1991) (referring to "Justice Brennan's achievement in building a majority on the Court [and]... holding that majority together behind an opinion with distinctive literary and historical qualities: an opinion so rich in its observations on freedom of expression and libel that on repeated readings one keeps discovering new meanings.").
7. See U.S. Const. amend. I ("Congress shall make no law ... abridging the freedom of speech, or of the press . . . ."). The First Amendment restrictions are made applicable to the States by the Fourteenth Amendment. See New York Times, 376 U.S. at 276-77.
8. See New York Times, 376 U.S. at 277 ("What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel."). The Court reasoned that it is not the form of the state power but the fact of its exercise that satisfies the state action doctrine. See id. at 265.
case; thus the fear of a damages award in civil action may be markedly more inhibiting than the threat of a criminal proceeding. Secondly, the Court found that the First Amendment was still applicable even though the allegedly defamatory statement was in the form of a commercial paid advertisement. Third, the Court held that defamation is nonetheless subject to constitutional scrutiny under the First Amendment, explaining that there is no “talismanic” dispensation for libel that precludes constitutional scrutiny just because an expression is alleged to be libelous.

Having swept aside the plaintiff's attempt to short-circuit any constitutional analysis of his defamation claim, the Court articulated its core holding:

The constitutional guarantees require . . . a rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice”—that is, knowledge that it was false or with reckless disregard of whether it was false or not.

In order to prevail, a plaintiff must prove both what state tort law requires, and the state of mind requirement of the First Amendment. Thus, the holding quite clearly demonstrates that the protections of the First Amendment are not limited to “true” statements.

Extending First Amendment protection beyond true statements was driven by the recognition that some degree of abuse is “inseparable from the proper use of every thing.” The Court seemed to recognize that the inchoate perception of unactualized truth makes some errors inevitable as the truth develops from the early, imperfectly formed factual base. Accordingly, the Court afforded the necessary “breathing space” with its limitation on defamation. In other words, the Court acknowledged that if the truth is to develop, it is imperative to grant the process essential “breathing space” because reciprocally, “[w]hatsoever is added to the field of libel is taken from the field of free debate.”

29 Id. at 277–78. The Court also noted that in civil cases, there are less procedural safeguards than in criminal proceedings. Id. Moreover, defamation liability poses the threat of a succession of such claims. Id.
30 See id. at 265–66.
31 Id. at 269.
32 Id. at 279–80.
33 Id. at 271 (quoting Madison).
34 Id. (“erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need to survive’ (citation omitted)).
35 Id. at 272 (quoting NAACP v. Button, 371 U.S. 415, 433 (1962)).
36 Id. (quoting Sweeney v. Patterson, 128 F.2d 457, 458 (D.C. Cir. 1942)).
the limitations on state defamation law, the Court, as if to underscore its determination, resolved the underlying case on the merits, ordering judgment for the defendants, finding as a matter of law that there was insufficient evidence of actual malice on the part of either the individual defendants or the Times.

*New York Times* heralded a fateful change in American defamation law. Although the law of defamation had traditionally been (and is still to a large extent) a product of state law, the legal rules governing defamation have derived from two sources since the *New York Times* case:

The rules mandated by the First Amendment have not . . . totally supplanted state law. Rather, the duality of state and federal constitutional law is more accurately viewed as a layered tapestry. State law has provided the base fabric overlaid by First Amendment rules that tailor and configure it to accommodate the competing interests of protecting personal reputations and ensuring freedom of expression.

The law of defamation may be likened to a bicycle. Its primary purpose is to transport victims along the path to a remedy for their damaged reputations. However, lest the machine travel too fast and endanger us all, various components are designed to control its speed. These devices, like the hand brakes on the bicycle, include the common law elemental prerequisites to recovery as well as the privileges insulating or limiting claims for otherwise actionable communications. They also include, like foot brakes, constitutionally mandated devices to provide further control.

The majority opinion by Justice Brennan is celebrated as lifting the torch of freedom of expression by rescuing it from the “chilling” men-

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37 The Court elaborated on its holding in several respects regarding defamation claims by public officials. First, it held that the standard of proof requires that plaintiff show that defendant had the requisite state of mind with “convincing clarity.” *Id.* at 285–86. Second, the requisite state of mind must exist in those persons having actual responsibility for the publication of the advertisement. *Id.* at 287. The Court stated that “[t]he mere presence of the stories in the files does not, of course, establish that the Times 'knew' the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the 'Times' organization having responsibility for the publication of the advertisement.” *Id.* Third, the Court hinted that at some point a state court's finding of falsity may be so minor that such findings themselves may “raise constitutional problems.” *Id.* at 289. And, finally, the Court held, in connection with the reference to the plaintiff element in defamation law, that statements critical of the government may not constitutionally be transmuted into criticism of the individual or deemed to refer to individual government officials. See *id.* at 291–92.

38 *Id.* at 284–86.


ace, the cryoknives, of defamation lawsuits. To protect the “citizen-critic of government,” the Constitution requires as a minimum that public officials prove that the defendant published the defamatory statement with knowledge of the falsity or reckless disregard of whether it was false.

Despite being lauded as a savior of free expression, the promise of the Times has not been realized. The question of why it has not been realized may have multiple instrumental, conceptual, or transactional answers. Nevertheless, the reason must rest in large measure on doctrinal impediments that have developed in its wake. This Article will focus on the conceptual impediments that are most salient and amenable to elegant solution. The first impediment stems from the courts’ uncertainty, ambivalence, and wavering over the extent to which the First Amendment limitations on defamation claims are determined by a status-driven test, by a content-based test, or by some sort of composite of the two. The post-New York Times evolution began with an ostensible commitment to a status-driven construct under which a plaintiff’s burden in defamation would depend on that plaintiff’s status—whether he or she was a public official or a private person. The New York Times rule was quickly extended to apply to public figures. From the beginning, however, the reality of the exclusiveness of a status-based rule for delineating the scope of First Amendment restrictions on defamation has been questionable. Imbedded in the voluntary public figure analysis is the requirement of an underlying public controversy, which inevitably calls for an assessment of the content of the subject matter. And, the possibility of involuntary public figures requires consideration of content even more so.

Second, the boundaries and outlines of the public figure classification have been formless and ill-defined. The hirsute contours of the public figure-private figure dichotomy have been especially vague for the involuntary public figure subcategory.

Third, the exclusiveness of the plaintiff’s status in determining the relevant constitutional rule has given way, at least in some respects, to an overtly binary matrix. Today, the level of constitutionally mandated limits


42 See id. at 279–80.

on state defamation law depends on two variables: "the status of the plaintiff—whether he was a private person or a public official or figure—and the content of the communication—whether it was a matter of private or public concern." Attempting to assess each component individually has proven frustrating enough, but taken together, the Court’s constitutional bipartite schema has multiplied the uncertainty by increasing the permutations. Uncertainty stems both from its inherent vagueness and the Court’s ambivalence about the nature and role of status-based rules and also from doctrinal tension. The latter is a function of the reciprocal hampering effect in applying the potentially disparate focuses on status and content, and attempting to harmonize both the status of the plaintiff (driven by respect for the reputation and autonomy of individuals, with its uneven emphasis on voluntariness and conscious choice to accept potential scrutiny) and the content of the communication (with its focus impelled by First Amendment freedom of expression concerns). Tying the standards for defamation to both status and content issues has multiplied the possible permutations, compounding the uncertainty and unpredictability under the bipartite construct. Legal principles tend to become more, not less, certain over time. This doctrinal entropy engenders uncertainty and difficulty in predicting outcomes.

Finally, defining the scope of the First Amendment safeguards in terms of status and content is too narrow, confining, and static a paradigm. It should not matter, for the purposes of the First Amendment, whether on any given day, a judge happens to deem or not deem a person to be a public figure. Nor should it matter whether a judge does or does not deem a topic to be a matter of public concern. These determinations are hopelessly subjective and fluid. The narrow, time-bound status-content framework not only undermines the traditional self-governing role of freedom of expression but also the realization of broader aims. Commentators are increasingly coming to realize that the conception of the First Amendment freedoms has focused too narrowly on the role of free communication in facilitating self-government. Freedom of expression should be “envisioned

44 King, supra note 39, at 349.


The first is the notion that the primary function of speech and press is to advance the processes of self-government. The First Amendment must be aligned with the preexisting societal choice of a democratic form of government; it derives its function and legitimacy from serving the process of self-government. And it does this primarily by standing guard against attempts by government to interfere in the self-governing process. The second major theme is the idea that the ultimate aim of the First Amendment is the advancement of the public or collective good and not that of any single individual

Id. at 439.
more broadly as encompassing decisionmaking on all social values and the vital role of communication in the dialogic process by which language is understood and evolves.

Rather than continue along a desultory path of trying to divine the contours of the status of plaintiffs and the public or private content of communications, or to reconcile the dissonant drags of status and content in defining the scope of constitutional limitations on state defamation law, this Article proposes an elegant solution. It is time to forthrightly extend the requirement of proof of knowledge or reckless disregard, falsity, and a provably false statement suggesting actual facts to all defamation plaintiffs in all cases without regard to either the status of the plaintiff or the nature of the content of the defendant's communication. This proposition has the virtues of certainty, simplicity, and most importantly, affording decisive support for the rights of freedom of expression. Nor would it depend on the fiction that certain categories of plaintiffs somehow did or did not choose their status, or on the ephemeral nature of "public concern."

Part II, A, of this article will discuss the leading post-Times Supreme Court decisions. Part II, B, will examine the emergence of the dual status-content framework for determining constitutional limits on state defamation law. The Article will examine the public figure classification and its amorphous parameters, particularly with respect to the involuntary public figure subcategory. It will also discuss the role of the *Dun & Bradstreet* decision in the emergence of the content component of the status-content framework. The discussion in Part II, B will demonstrate the entropic disorder that has befallen First Amendment defamation jurisprudence in the wake of *New York Times*. Finally, Part III sets forth a proposal for applying the knowledge or reckless disregard and provably false statement requirements to all defamation plaintiffs.

46 Id. at 471.

47 Paul Chevigny conceives of the right to free expression more fundamentally as serving a vital role in the dialogic process by which language itself is understood and evolves. See Paul G. Chevigny, *The Dialogic Right of Free Expression: A Reply to Michael Martin*, 57 N.Y.U. L. REV. 920 (1982). He writes:

A right to free expression need not be derived, as it has been traditionally, from the personal autonomy of the individual and free trade of ideas, but may also be rooted in the nature of language itself. . . Modern philosophy has come to accept the view that the meaning of words is a social matter, depending on usage and context. The meaning is ascertained through a dialogic process among participants. The necessity of such a dialogue in order to understand words at all, rather than merely to make decisions, gives rise to a necessity that the society allow the dialogue to proceed . . . .

Id. at 920; see also Paul G. Chevigny, *More Speech: Dialogue Rights and Modern Liberty* 75-80, 99, 122 (1988) (discussing the need for and role of freedom of expression for the vitality of dialogue in the sharing of information and functioning and freely associating in a society).
The remorseless increase in complexity and uncertainty of the post-1964 constitutional defamation jurisprudence surely cannot be what those transcending justices in *New York Times* foresaw when they came together to draw that first line in the sand. But, predictability and certainty have been elusive as each wave of doctrinal development passes over and erodes the promise. It is the same type of phenomenon metaphorically depicted by Leo Tolstoy at the conclusion of *War and Peace.* He teaches through his nation-ship metaphor that “[i]t is only by watching closely, moment by moment, the movement of that flow, and comparing it with the movement of the ship, that we are convinced that every moment that flowing by of the waves is due to the forward movement of the ship, and that we have been led into error by the fact that we are ourselves moving too.” Here too, the difficulty in recognizing the erratic path of the law since the *Times* may rest with our sense of doctrinal inertia flowing from the immanent embarkation point of *New York Times*.

Without doubt, the entropy that has followed the *New York Times* decision has cast a shadow of uncertainty over the light of that case. As T. S. Eliot hauntingly reminds us, “between the idea and the reality . . . falls the shadow.” The post-*New York Times* landscape is a shadowy world indeed. We must not underestimate the stifling effects from uncertainty over the threat of defamation liability and its ruinous consequences on freedom of expression. After all, Cody’s Books—the venerable Telegraph Avenue independent bookstore in Berkeley—was firebombed after it carried Salman Rushdie’s book, and that did not close it.

Economics, however, did succeed in closing it.

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50 Tolstoy, supra note 48, at 1131.
53 This Cody’s location is going out of business under its current ownership and will close (or presumably be sold to new owners). See id. Competition and declining sales from chain stores and the internet doomed the store of this family business. See id.; see also Jesse McKinley, *In Berkeley, a Store’s End Clouds a Street’s Future,* N.Y. TIMES, June 18, 2006, at A16 (noting that the store had been losing money for a number of years from competition from superstores and internet outlets).
II. The Court's Post-NEW YORK TIMES Entropy

A. The Status-Based Rule for Defining First Amendment Limits

What promised to be the dawn of a new transparent era of free expression, largely rescued from the threat of tripwire defamation liability, has fallen short of those lofty hopes. The problem has come in the attempts by the Supreme Court and lower courts to delineate the scope of constitutional restrictions on defamation once we have passed beyond claims by public officials. From the start, New York Times sequelae have come in tentative and uncertain steps, and increasingly appear as chaotic groping for direction beset by increasing legal complexity.

Several years after New York Times, the Supreme Court decided Curtis Publishing Co. v. Butts. In that case, the Court extended its knowledge-or-reckless-disregard requirement to claims by public figures who were neither associated with nor part of the government. The Court in Curtis reasoned that the realities of the standing and role of public figures in modern society justified extension of the New York Times limitation to them as well. Specifically, Chief Justice Warren pointed to the blurred distinction between the governmental and private sectors; the "fusion of economic and political power;" the increasingly organized power in the private sector; the influential role of the public figures in ordering society; the public figures' access to the media; and the fact that powerful public figures not employed by government "are not amenable to the restraints of the political process," which underscores the public interest in freedom of press to discuss them.

Although the status of the plaintiffs—i.e., whether they were public or private figures—had now become crucial, little attention was paid by the Curtis Court to defining public figures. Justice Harlan observed that the Curtis plaintiffs "commanded a substantial amount of independent public interest at the time of the publications; both, in our opinion, would have

54 Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967).
55 Although the lead opinion was written by Justice Harlan, his was a plurality opinion, with Justices Clark, Stewart, and Fortas joining, and thus it represented a minority position with respect to the test applicable to public figures. See id. Harlan wanted a less demanding test than the New York Times rule. See id. at 155. It was the opinion by Chief Justice Warren, representing five votes, approving application of at least the New York Times limitation on defamation liability to public figures, that carried the day. See id. at 162 (opinion by Warren, C.J.) (calling for application of New York Times standard); id. at 170 (opinion by Black, J., with Douglas, J., concurring) (calling for no liability for libel); id. at 172 (opinion by Brennan, J., with White, J., joining) (agreeing with Chief Justice Warren that the New York Times actual malice standard should be applied to public figures); see also ERWIN CHEREMINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1013 (2d ed. 2002) ("Thus five Justices said that public figures cannot recover for defamation with less than proof of actual malice.").
56 See Curtis Publ'g Co., 388 U.S. at 163–64.
been labeled ‘public figures’ under ordinary tort rules.” He also noted that plaintiff-Butts may have attained that status by position alone rather than by “his purposeful activity amounting to a thrusting of his personality into the ‘vortex’ of an important public controversy,” and that “both commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able ‘to expose through discussion the falsehood and fallacies’ of the defamatory statements.” It is evident that a sizeable majority of the Court believed that even the plaintiff-athletic director Butts was a public figure. It seems problematic whether Butts would qualify as either a voluntary or involuntary public figure under the categories developed by the Court in its later Gertz decision because Butts had attained his status by “position alone” rather than through purposeful activity.

Four years later, the uncertainty over the role of status and content as determinants of First Amendment limitations on defamation surfaced in Rosenbloom v. Metromedia, Inc. Although there was no commanding opinion, and only eight justices participated, the plurality opinion by Justice Brennan favored extending the New York Times requirements to even private plaintiffs if the defendant’s statement involved matters of public concern. A total of four justices agreed that such a measure was the very least required. Brennan reasoned: “Voluntarily or not, we are all ‘public’

57 Id. at 154.
58 Id. at 155.
59 Id. (quoting Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., dissenting)).
60 Chief Justice Warren, whose opinion carried the day on the applicability of the New York Times requirement to public figures, said, “similarly, the seven members of the Court who deem it necessary to pass upon the question agree that the respondents in these cases are ‘public figures’ for First Amendment purposes.” Id. at 162.
62 See Curtis Publ’g Co., 388 U.S. at 154-55.
64 Four justices, including Justice Brennan, supported (at the very least) extending the scope of the New York Times requirement to apply to private plaintiffs if the defendant’s statement involved matters of public concern. See id. at 43-44; id. at 57 (Black, J., concurring). A fifth member of the Court, Justice White, although opposing liability, premised his decision on the view that New York Times created a privilege allowing the press and media “to report and comment upon the official actions of public servants in full detail, with no requirement that the reputation or the privacy of an individual involved in or affected by the official action be spared from public view [absent actual malice as defined in New York Times Co. v. Sullivan].” Id. at 62. Thus, Justice Brennan’s view only carried 4 of the 8 Justices participating. The remaining three justices, Harlan, Stewart, and Marshall, dissented on various grounds, believing that private plaintiffs should only be required to prove negligence. See id. at 64 (Harlan, J., dissenting); id. at 86-87. Thus, there was neither a majority opinion nor an identifiable common ground that could be said to be endorsed by a majority of the Court.
65 Justice Black, one of the four concurring justices, would go even further and completely immunize the news media for statements of public concern “even when statements are
men to some degree . . . . Thus, the idea that certain 'public' figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view is, at best, a legal fiction." He added:

It is clear that there has emerged from our cases decided since New York Times the concept that the First Amendment's impact upon state libel laws derives not so much from whether the plaintiff is a 'public official,' 'public figure,' or 'private individual,' as it derives from the question whether the allegedly defamatory publication concerns a matter of public or general interest . . . . [We] think the time has come forthrightly to announce that the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern, albeit leaving the delineation of the reach of that term to future cases.

The Rosenbloom plurality was repudiated just three years later in Gertz v. Robert Welch, Inc. But, echoes of Rosenbloom have resonated through subsequent cases—and even in the Gertz case itself—as the Court attempted to spell out the scope of the First Amendment limitations in defamation cases and to elaborate, piecemeal, on the meaning of public figures. In Gertz, the Court held that so long as the states "do not impose liability without fault, [they] may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." The Court also held that no presumed or punitive damages could be awarded in a defamation case, at least in the absence of a showing that the defendant acted with knowledge or reckless disregard.

broadcast with knowledge they are false." Id. at 57 (Black, J., concurring).

66 Id. at 48. He elaborated:

If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not "voluntarily" choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety . . . . We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.

Id. at 43-44.

67 Id. at 44-45 (emphasis added).
69 Id. at 347.
70 See id. at 349. In other words, damages in such cases were limited to "actual injury," which would include not only economic loss but also for impairment of reputation, personal
In applying a constitutional proof-of-fault requirement to private plaintiffs that was less demanding than the knowledge-or-reckless-disregard requirement applicable to public officials and public figures, the Court weighed competing social values. It thus sought to accommodate competing interests of both the First Amendment in free speech and the "legitimate state interest" in protecting the reputation that underlies state libel law.\footnote{1} The Court desired to justify a less demanding constitutional hurdle for private plaintiffs and thus greater protection of their reputations by distinguishing them from public figures. First, reasoned the Court, the latter have greater access to channels of communications.\footnote{2} Second, public plaintiffs must be deemed to accept the consequences of their involvement in public affairs or their engagement in public controversies.\footnote{3} And, finally, there is greater public interest in learning the personal attributes of officials than of private persons.\footnote{4} \textit{Gertz} expressly repudiated the \textit{Rosenbloom} plurality's "subject matter test"\footnote{5} as unworkable. An \textit{ad hoc} approach evaluating "First Amendment values" in every case would not be feasible.\footnote{6} It would be unpredictable and would make the role of appellate courts unmanageable.\footnote{7}

Because of the importance of \textit{Gertz}'s public and private figures dichotomy, the Court attempted to offer guidance on the nature of the public figure category:

Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. 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 particu-

\footnotetext[1]{See \textit{id}. at 341.} \footnotetext[2]{See \textit{id}. at 344.} \footnotetext[3]{See \textit{id}. at 345 ("Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public official and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.").} \footnotetext[4]{See \textit{id}. at 344-45.} \footnotetext[5]{See \textit{id}. at 344.} \footnotetext[6]{See \textit{Lewis, supra note 12, at 768.}} \footnotetext[7]{See \textit{Gertz, 418 U.S. at 346.}}
lar public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.\textsuperscript{78}

But, the Court offered meager elaboration:

That designation may rest on either of two alternative bases. 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. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.\textsuperscript{79}

The Court's acceptance-of-the-risk rationale seemed precarious from the start. First, the Court said that the test was not actual willingness but the appearance of public figure status.\textsuperscript{80} Second, the Court expressly recognized the possibility that a person could involuntarily become a limited purpose public figure.

Not long after \textit{Gertz}, the Supreme Court decided three cases addressing the public figure question. In \textit{Time, Inc. v. Firestone},\textsuperscript{81} the Court held that a plaintiff engaged in divorce proceedings characterized by the trial court as a “cause celebre” with “the scion of one of America’s wealthiest industrial families” was not a public figure.\textsuperscript{82} Three years later, in \textit{Hutchinson v. Proxmire},\textsuperscript{83} the Court held that a behavioral research scientist engaged in government sponsored research who was also research director of a non-profit corporation was not a public figure in connection with bestowal on him of the “Golden Fleece” award by Senator Proxmire.\textsuperscript{84} And in \textit{Wolston v. Reader's Digest Ass'n},\textsuperscript{85} the Court held that a nephew of Soviet spies who failed to respond to a grand jury subpoena and was cited for contempt during a grand jury investigation of Soviet espionage, was not a public figure.\textsuperscript{86} In all three cases, the Court seemed intent on distancing itself from even the possibility that someone might become a public figure involuntarily.

\textsuperscript{78} \textit{Id.} at 345.
\textsuperscript{79} \textit{Id.} at 351.
\textsuperscript{80} See \textit{id.} at 344–45. To underscore the point, the Court added: “Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.” \textit{Id.} at 345.
\textsuperscript{81} \textit{Time, Inc. v. Firestone}, 424 U.S. 448 (1976).
\textsuperscript{82} \textit{Id.} at 453–55.
\textsuperscript{84} See \textit{id.} at 133–36.
\textsuperscript{86} See \textit{id.} at 167.
All three opinions selectively quote from *Gertz* so as to omit its reference to involuntary public figures. That selective use of the *Gertz* language seemed a calculated blink at even the theoretical possibility of involuntary public figures. In each of the three cases, the Court pointedly noted that the plaintiff did not "thrust" himself or herself into a public controversy. Except for a vague remark in *Firestone*, the Court did not even acknowledge the existence of the involuntary public figure classification. This point was driven home in *Wolston*, where the court emphasized that the plaintiff was "dragged unwillingly into the controversy." The Court explained that "[a] private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention," and that the "defendant must show more than mere newsworthiness to justify application of the demanding burden of *New York Times*." By deliberately ignoring the involuntary public figure possibility, these cases arguably close the door on any retreat from the primacy of a status-driven rule.

While the language in the *Firestone, Hutchinson*, and *Wolston* trilogy could be taken as a negative signal for the vitality of the involuntary public figure classification, the cases probably do not categorically repudiate the involuntary public figure. It is important to note that the Court did not say that it was repudiating the involuntary public figure. More to the point, all three cases were decided on grounds other than a frontal holding that the involuntary public figure classification was no longer an option. In each of

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87 In each case, the Court omitted reference to the crucial "hypothetically . . ." sentence of *Gertz*. See *Wolston*, 443 U.S. at 164; *Hutchinson*, 443 U.S. at 134; *Firestone*, 424 U.S. at 453.

88 See *Wolston*, 443 U.S. at 166; *Hutchinson*, 443 U.S. at 135; *Firestone*, 424 U.S. at 453.

89 See *Firestone*, 424 U.S. at 476 n.4 (Brennan, J., dissenting) (referring to a law review article that concludes that *Gertz* as suggests "a 'category of involuntary public figures' roughly equivalent to individuals involved in or affected by . . . official action'") (quoting David A. Anderson, *Libel and Press Self-Censorship*, 53 Tex. L. Rev. 422, 450–51 (1975)).

90 *Wolston*, 443 U.S. at 166.

91 *Id.* at 167–68. The Court expressly rejected the defendants' contention that anyone who "engages in criminal conduct automatically becomes a public figure for purposes of comment on a limited range of issues relating to his conviction." *Id.* at 168.

92 See, e.g., 1 RODNEY A. SMOLLA, LAW OF DEFAMATION § 2:33 (2d ed. 2005) (stating that "This trilogy of post-*Gertz* cases—*Firestone, Wolston, and Hutchinson*—appears to take virtually all of the oxygen out of the one-sentence musing in *Gertz* hypothesizing the possibility of involuntary public figures."); Dale K. Nichols, Comment, The Involuntary Public Figure Class of *Gertz v. Welch: Dead or Merely Dormant?*, 14 U. Mich. J.L. Reform 71, 80, 83–84 (1980) (noting that "[a] strong case can be made that . . . *Firestone* destroyed the involuntary public figure class," and that the *Firestone, Hutchinson*, and *Wolston* cases may have abolished the involuntary public figure class sub silentio).

93 See W. Wat Hopkins, The Involuntary Public Figure: Not So Dead After All, 21 CARDOZO ARTS & ENT. L.J. 1, 15–17 (2003) (noting the issues other than involuntary public figure status that were involved in each case); Nichols, supra note 92, at 80–83 (identifying the narrower grounds for the decision in each case).
the three there was arguably a basis for deciding that the plaintiff was not a public figure besides the mere fact that the plaintiff had not voluntarily thrust himself or herself into a public controversy. In both Firestone and Hutchinson the Court found insufficient evidence of the existence of public controversy,94 and in Wolston the Court relied on the fact that the plaintiff played a “minor role”—not a central role—in the public controversy over Soviet espionage.95 Thus, it is apparent that the existence of a public controversy—and the plaintiff’s central role with it—is essential even in the recognition of voluntary public figures.96

B. Emergence of a Content Component in the Status-Content Dualism

The exclusiveness of a narrow status-based rule for determining constitutional limitations on defamation has been illusory almost from the start. There have been three overarching influences contributing to the rise of a content-based component for determining the scope of First Amendment limits on state defamation law. First, as evidenced in both Gertz and the Firestone, Hutchinson, and Wolston trilogy, the classification of a voluntary limited purpose public figure has been anchored to the presence of a public controversy.97 Admittedly, the Court has, in Hutchinson in particular, attempted to keep separate the ideas of a public controversy for the purposes of public figures and matters of public concern more generally.98 But, it seems to be a blurred, fluid dichotomy. Behind both a finding of a public controversy and a matter of public concern is the public interest served in airing the story. Second, the Court’s express recognition in Gertz of involuntary public figures leads inexorably to considerations of the nature of the content of the communication. And finally, in 1985, the Court in Dun & Bradstreet expressly adopted a content-based rule as one of the determinants for at least some First Amendment limitations on defamation.99 That was followed a

94 See Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979); Firestone, 424 U.S. at 454. Writing for the Court in Firestone, Justice Rehnquist concluded that the “[d]issolution of a marriage through judicial proceedings was not the sort of ‘public controversy’ referred to in Gertz ....” Firestone, 424 U.S. at 454. The Court in Hutchinson noted that a defendant could not bootstrap plaintiff into becoming a public figure by dragging him into the national spotlight by the very communication that is the basis for the lawsuit: “Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.” Hutchinson, 443 U.S. at 135. The Court noted that the defendant had not identified “such a particular controversy; at most, they point to concern about general public expenditures. But that concern is shared by most and relates to most public expenditures: it is not sufficient to make [plaintiff] a public figure.” Id. at 135.
95 See Wolston, 443 U.S. at 167.
96 See infra Part II, B, 1.
97 See infra note 93 and accompanying text.
98 See Hutchinson, 443 U.S. at 134–36; see also infra notes 246–52 and accompanying text.
year later by *Philadelphia Newspapers, Inc. v. Hepps*, in which the Court held that "at least where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false." And, in 1990, the Court in *Milkovich v. Lorain Journal Co.*, held that "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection."

The result of all of this has been an ill-defined dual set of determinants of the scope of constitutional limits on defamation, the effect of which has been the further clouding of the doctrinal landscape that was supposed to afford reassurance and encouragement to communicators regarding their potential jeopardy from oppressive defamation claims. These matters are discussed below.

1. Public Controversy Focus of the Limited Purpose Voluntary Public Figure Classification.—In general, the question of the status of the plaintiff is a question of law for the court. The Supreme Court, however, has not offered meaningful guidance on the criteria for determining the crucial matter of the plaintiff's status. The influential post-*Gertz* opinion in *Waldbaum v. Fairchild Publications, Inc.* observed that "[u]nfortunately, the Supreme Court has not yet fleshed out the skeletal descriptions of public figures and private persons enunciated in *Gertz*. The very purpose of the rule announced in *New York Times* [sic], however, requires courts to articulate clear standards that can guide both the press and the public." *Waldbaum* offered the following often-cited three-step analysis for the most litigated public figure subcategory, the limited purpose voluntary public figure:

As the first step in its inquiry, the court must isolate the public controversy. 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 . . . . [E]ssentially private concerns or disagreements do not become public controversies simply because they attract attention . . . . Once the court has defined the controversy, it must analyze the plaintiff's role in it . . . . The language of Gertz [sic] is clear that plaintiffs must have "thrust themselves to the forefront" of the controversies so as to become factors in their ultimate resolution . . . . They must have achieved a "special prominence" in the debate . . . . The plaintiff either must have been purposely trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to have an impact on its resolution . . . . Finally, the alleged defamation must have been germane to the plaintiff's participation in the controversy . . . .

The other leading case, Wells v. Liddy,109 uses a six-part test for voluntary public figure status:

[T]he defendant must prove that: (1) the plaintiff has access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in the 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 statement; and (5) the plaintiff retained public-figure status at the time of the alleged defamation . . . . [6] And, as [an additional consideration] . . . if the content of a defamatory statement touches upon an area that state law has traditionally considered to be defamatory per se, then the plaintiff cannot be categorized as a limited-purpose public figure solely because he makes reasonable public replies to the statement.110

As is obvious from these two leading cases, the common denominator in most cases addressing the limited purpose voluntary public figure subcategory has been the requirement of a public controversy and the plaintiff's voluntary participation in it. Thus, Gertz reduced the "public-figure question . . . to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation."111 This means that

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108 Id. at 1296–98 (citations and footnotes omitted).
110 Id. at 534 (citations omitted).
111 Gertz v. Robert Welch, Inc., 418 U.S. 323, 352 (1974); see also Dan B. Dobbs, The Law of Torts § 418, at 1175 (2000) (noting that "[c]ourts often conclude that the plaintiff is not a limited purpose public figure unless (a) there was a pre-existing public controversy and (b) the plaintiff injected herself into that controversy by voluntary action" (footnotes omitted)); Smolla, supra note 92, § 2:21 ("One of the common denominators running through Gertz, Firestone, Wolston, and Hutchinson is the requirement that the plaintiff, to be classified as a limited public figure, must have voluntarily injected himself into a matter of 'public controversy.' This requirement obviously puts great definitional pressure on the term 'public controversy,' and explication of that term has proved to be central to the efforts of lower courts to apply the public figure/private figure distinction." (footnotes omitted)); Christopher
even under an ostensibly status-based test, the courts are necessarily still forced to reflect on the content of the statement. How else does one decide whether, in the words of Waldbaum, the controversy is not only a "real dispute," but one "the outcome of which affects the general public or some segment of it in an appreciable way"?

The classification of a person as a voluntary public figure is inherently unpredictable. As one court remarked, "Although the public figure concept has eluded a truly working definition, it falls within that class of legal abstractions where 'I know it when I see it...'." As an example of just how amorphous and lacking in rigor the status-based limited purpose "voluntary" public figure classification can be, consider the analysis in one recent article. The writer contends that:

[P]articipants in reality television shows should be treated as limited-purpose public figures. In practice, this means that these pseudo-celebrities may only gain attention in relation to their status as a reality television participant... [T]he extent of public scrutiny these individuals may receive will be directly correlated with the level of their involvement in their individual reality program.

The outcome here is said to depend on the type of reality show and what outcome the participant is seeking to influence. Such an ad hoc analysis

R. Smith, Note, Dragged Into the Vortex: Reclaiming Private Plaintiffs' Interests in Limited Purpose Public Figure Doctrine, 89 IOWA L. REV. 1419, 1435 (2004) (noting that the tests for the limited purpose public figure category "have two basic considerations in common: the nature and the extent of the plaintiff's involvement in a public controversy").

112 Waldbaum, 627 F.2d at 1296.
113 Id.
114 Rosanova v. Playboy Enters., 580 F.2d 859, 860 (5th Cir. 1978) (quoting Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).
116 Id. at 107.
117 On the public controversy element, he says that "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. Thus, just by participating in reality television programming, an individual may satisfy the first prong of the test for limited-purpose figure status." Id. at 106 (footnote omitted).

And on the requirement that plaintiff have voluntarily thrust himself into the "controversy," he comments:

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
is hopelessly vague and subjective. Moreover, it would be oppressive and unworkable for the trial and appellate courts and would pose unacceptable uncertainty for publishers.

2. Involuntary Public Figures: Slouching Toward a Content-Based Calibration of Limitations on Defamation.—A more direct embrace of a content-based orientation in deciding the scope of First Amendment limitations on defamation can be found in the involuntary public figure classification. The possibility of one becoming an involuntary public figure was expressly legitimized by the language in Gertz that “[h]ypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare.”

Thus, Gertz added to the unpredictability and uncertainty by expressly opening the door to the possibility of an involuntary public figure—albeit a “truly rare” species. That, in turn, left open the possibility of erosion of the exclusivity or even primacy of the status-based rule for defining the parameters of First Amendment limitations on defamation. In other words, if it is indeed possible to become a public figure involuntarily, then the crucial inquiry would inexorably shift both from the plaintiff’s status and from the Gertz opinion’s most important rationale—the “compelling normative consideration underlying the distinction between public and private defamation plaintiffs” that public persons “must accept the necessary consequences of that involvement in public affairs.” Instead of an exclusively or even paramountly status-driven analysis, the possibility of an involuntary public figure necessarily shifts the focus to the nature of the underlying public controversy, and inevitably to the nature of the content of the defendant’s statement.

Gertz offered virtually no meaningful guidance with respect to the involuntary public figure subcategory. The leading Waldbaum case also reflected the Court’s equivocation on the nature of the involuntary public figure subcategory and whether or the extent to which its subjects are involuntary. The court stated: “Occasionally, someone is caught up in the controversy involuntarily and, against his will, assumes a prominent position in its outcome. Unless he rejects any role in the debate, he too has ‘invited comment’ relating to the issue at hand.”

merely hope to garner media attention and do not wish to affect the outcome of the program with any specific significance.

Id. at 106. The author then seems to back away from his initial conclusion, saying, “[t]he 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.” Id.

119 Id.
The involuntary public figure classification has contributed to the re-emergence of content-based analysis and to the underlying confusion. Although the courts have not agreed on the legal framework of the involuntary public figure subcategory, or even on its continued validity, most seem to agree that an alleged defamatory statement must relate to a public controversy. That necessarily leads to considerations of content. Moreover, the possibility of one becoming an involuntary public figure leads to consideration of the content of the statement since the relevance of the status of the plaintiff is reduced. The potential existence of involuntary public figures directly challenges the fundamental premise on which the distinction between public and private plaintiffs was supposed to rest—that the former assumed the risk of less protection for their reputations. Confusion caused by the potential involuntary public figure category has been compounded by uncertainty over the standing or contours of the involuntary public figure classification.

A variety of approaches to the involuntary public figure subcategory have been adopted by the courts or characterized by commentators. These approaches are discussed briefly below. The dizzying variety of approaches is enough on its own to demonstrate the post-New York Times entropy.

121 See id. at 1296; see also Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1554–55 (4th Cir.1994) (indicating that the public controversy requirement is a preliminary inquiry); James Chadwick, Comment, A Conflict in the Public Interest: Defamation and the Role of Content in the Wake of Dun & Bradstreet v. Greenmoss Builders, 31 SANTA CLARA L. REV. 997, 1012 (1991) ("[D]eciding exactly what makes a plaintiff a public figure is not a simple task, nor does it free the court from considerations of content. As an examination of the criteria established by the federal courts in Waldbaum v. Fairchild Publications and the cases following it discloses, the analysis of whether a statement involved a "public controversy" would turn out to be central to that definition. These criteria... essentially require the court to consider both the nature of the controversy in which the plaintiff is involved, and the content of the statements about the plaintiff. The status-based test, then, did not relieve the courts of the task that the Gertz majority found so onerous: that of analyzing and categorizing the content of the defamatory statement." (footnotes omitted)); id. at 1025 ("Taken together, the criteria adopted by the Waldbaum court form a test in which the dominant concerns are the content of the defamatory statement and whether that content involves issues of public importance.")

122 See Chadwick, supra note 121, at 1012.

123 See Gertz, 418 U.S. at 345.
a. Dead Letter.—Some cases and commentators suggest that the involuntary public figure subcategory is becoming a dead letter or is heading in that direction. They have usually pointed to the Firestone, Hutchinson, and Wolston trilogy and the deadening silence of the Court with respect to the involuntary public figure category. Other cases have taken to essentially ignoring the classification's existence, or at least deigning not to acknowl-

124 See Wells v. Liddy, 186 F.3d 505, 538 (4th Cir. 1999), cert. denied, 528 U.S. 1118 (2000) (commenting that "[s]o rarely have courts determined that an individual was an involuntary public figure that commentators have questioned the continuing existence of that category"); Schultz v. Reader's Digest Ass'n, 468 F. Supp. 551, 559 (E.D. Mich. 1979) (opining that the Firestone case "forecloses the possibility" of the involuntary limited-purpose public figure); Dombey v. Phoenix Newspapers, Inc., 724 P.2d 562 (Ariz. 1986). The Dombey court expressly disclaimed any reliance on a claim that the plaintiff was an involuntary public figure, expressing doubt on the subcategory's continued existence. It commented that "aside from its articulation in Gertz, it [the involuntary public status] has never been applied by the Supreme Court and may have been abandoned." Id. at 567; see infra note 165 and notes 176–80 and accompanying text for a more in-depth discussion of Dombey.

125 See, e.g., SMOLLA, supra note 92, § 2:33 (stating that "[i]t is not at all clear that this language in Gertz was anything more than musing dicta," and that subsequent Supreme Court cases have taken all of the "oxygen" out of the Gertz involuntary public figure language); Nichols, supra note 92, at 80–82; David L. Wallis, Note, The Revival of Involuntary Limited-Purpose Public Figures—Dameron v. Washington Magazine, Inc., 1987 BYU L. Rev. 313, 323–24 (1987) (noting that the Supreme Court "has not acknowledged the existence of the involuntary public figure category" since Gertz and urging the lower courts not to attempt to fit plaintiffs into the "illusive category of involuntary public figures").

126 See, e.g., Gerald G. Ashdown, Of Public Figures and Public Interest—the Libel Law Comundrum, 25 Wm. & Mary L. Rev. 937, 941 n.28 (1984) ("The Court's subsequent [post-Gertz] decisions . . . have eliminated even this possibility"); David Elder, Defamation, Public Officialdom and the Rosenblatt v. Baer Criteria—A Proposal for Revivification: Two Decades after New York Times Co. v. Sullivan, 33 BUFFALO L. Rev. 579, 613 n.141 (1984) (stating that "it is highly doubtful if such a sub-status continues to exist in light of the post-Gertz decisions of the Court. It is noteworthy that the Court subsequently reinterpreted Gertz as specifying only 'two ways' of becoming a 'public figure'—'all' or 'limited' purpose" (citing Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 164 (1979)); David A. Elder, Kentucky Defamation and Privacy Law—the Last Decade, 23 N. Ky. L. Rev. 231, 233 n.14 (1996) (noting that since Gertz the Court "has not discussed the 'involuntary' designation in any subsequent opinion" (citation omitted)); Mark Rosen, Media Lament—The Rise and Fall of Involuntary Public Figures, 54 St. John's L. Rev. 487, 502 (1980) (commenting that the involuntary public figure category is "all but extinct"); Mark T. Karinja, Comment, Defamation: Conflict in the Definition of "Public Figure," 10 Seton Hall L. Rev. 822, 846 (1980) (stating that "it is apparent that the [Supreme] Court has rejected sub silentio" the involuntary public figure classification); Nichols, supra note 92, at 80, 82 (stating that "[a] strong case can be made that . . . Firestone destroyed the involuntary public figure class," and that the Firestone, Hutchinson, and Wolston cases appear to have abolished the involuntary public figure class sub slentio" and have dealt the involuntary public figure classification a "death blow"); Wallis, supra note 125, at 319 (contending that "the existence of an involuntary public figure is hypothetical at best," and pointing to Wolston as "further evidence of the demise of the involuntary public figure category").
edge it. Some other courts pay lip service to the involuntary public figure category but then essentially act as though it were not a viable option.

See, e.g., Wayment v. Clear Channel Broad., Inc., 116 P.3d 271 (Utah 2005). In Wayment, a local television health reporter claimed that her former employer defamed her by stating she had been terminated because she used her reporter contacts to attempt to start a children's cancer foundation for her benefit. See id. at 277. The Supreme Court of Utah held that even if this situation had been a public controversy, that the plaintiff was not a limited-purpose public figure because she did not "voluntarily thrust herself to the forefront of the controversy." Id. at 285. The court relied on a narrow reading of Wolston, saying:

[Classifying the plaintiff as a public figure] would be equivalent to holding that any individual who engages in activities that attract public attention thereby injects himself into a public controversy over the conduct. The Supreme Court eschewed such a result in Wolston, refusing to hold the plaintiff a public figure based on his "failure to appear before the grand jury and citation for contempt" even though this behavior attracted significant media attention . . . . The Court explained that the plaintiff did not "invite a citation for contempt in order to use the contempt citation as a fulcrum to create public discussion about the methods being used in connection with an investigation or prosecution." . . . Because the plaintiff did not intend his action "to draw attention to himself in order to invite public comment or influence the public with respect to any issue," he was not a limited-purpose public figure . . . . Similarly here, nothing in the record even hints that Wayment sought to create a conflict of interest in order to stimulate public debate on such matters.

Id. (quoting Wolston, 443 U.S. at 167–68). Since the court held that no public controversy existed, it would be impossible for Wayment to become an involuntary public figure. However, the case is important to an overall analysis of the involuntary public figure doctrine because the Wayment court did not even acknowledge the possibility that the plaintiff could have become a public figure through no voluntary action of her own. See id. Instead, the Court focused on Justice Powell's statement in Gertz that public figure status rests on "either of two alternative bases." Id. at 279 (quoting Gertz, 418 U.S. at 351). In reality, Justice Powell in Gertz was referring to all-purpose and voluntary limited-purpose public figures. Nevertheless, Wayment apparently took this language to mean that involuntary public figures, an independent third category within Gertz, either do not exist or are so rare as to make even their consideration unnecessary.


In Sewell, the plaintiff-professor sued a newspaper publisher for defamation for reporting that he had made anti-American comments about the war in Iraq in class without allowing the expression of contrary views. The court expressly acknowledged that Gertz had recognized that "a limited-purpose public figure may become so either voluntarily or involuntarily." Id. at *3. But then, the court proceeded to analyze issue of the plaintiff's status exclusively in terms of whether the plaintiff "by discussing the controversy in his classroom, . . . thrust himself to the forefront of the controversy." Id. The court concluded that the plaintiff had not done so,
b. Merle Dameron's "sheer bad luck".—At the other end of the spectrum, there is the approach represented by *Dameron v. Washington Magazine, Inc.* Merle Dameron was the sole air traffic controller on duty at Dulles Airport the tragic day in 1974 when a TWA airplane crashed into Mt. Weather. He sued for defamation based on a magazine's lengthy article on another airline crash that stated that some air traffic controllers "have been assigned partial blame in a few accidents," including the 1974 TWA crash. The court of appeals expressly held that the plaintiff was an involuntary public figure. The court reasoned:

> It is true ... that Dameron cannot fairly be said to have "injected" himself into the controversy. This one factor, however, is not the be-all and end-all of public figure status. Injection is not the only means by which public-figure status is achieved. Persons can become involved in public controversies and affairs without their consent or will. Air-controller Dameron, who had the misfortune to have a tragedy occur on his watch, is such a person. We conclude that Dameron did become an involuntary public figure for the limited purpose of discussions of the Mt. Weather crash.... He is an ordinary citizen who was completely unknown to the public before the Mt. Weather crash, never sought to capitalize on the fame he achieved through the Mt. Weather crash, and never acquired any notoriety apart from the crash. Dameron is not by any means, therefore, a general-purpose public figure. However, we think the public-figure doctrine ... encompasses Mr. Dameron and raises him, involuntarily, to the status of limited-purpose public figure.\footnote{See id. at 740-41. The court pointed out that "[i]n *Gertz* the Supreme Court noted that it is 'possible to become a public figure through no purposeful action of [one's] own' although it added that 'the instances of truly involuntary public figures must be exceedingly rare.'" *Id.* at 742 (quoting *Gertz*, 318 U.S. at 351). The court distinguished *Wolston v. Reader's Digest Ass'n, Inc.* It noted that Dameron was a central figure in the "discrete and specific..."}

The court elaborated, "[w]e think that within the very narrow framework represented by the facts of this case, such has been Dameron's fate. By sheer bad luck, Dameron happened to be the controller on duty at the time of the Mt. Weather crash.... Dameron 'assume[d a] special prominence in the resolution of [a] public question[.]' He became embroiled, through no desire of his own, in the ensuing controversy over the causes of the accident. He thereby became well known to the public in this one very limited connection."

and therefore remained a private figure. *Id.* As a result, the plaintiff was only required to prove negligence in his defamation claims. *Id.* The court determined that therefore his defamation claims should not have been dismissed. *Id.*

Despite the court’s reassurances that “[t]he circumstances in which an involuntary public figure is created will . . . continue to be few and far between,” its approach contained few discernible limitations on the involuntary public figure classification except for the requirement of the plaintiff’s “central” involvement in a public controversy. Indeed, some have read the case broadly to signal a re-emergence of a Rosenbloom content-centric rule.

public controversy with respect to which he was allegedly defamed—the controversy over the cause of the Mt. Weather crash.” Id. at 742–43. “Wolston, by contrast, was not defamed with respect to the controversy in which he played a central role—his refusal to testify before a grand jury—but rather with respect to a controversy in which he played a role that was at most tangential—the investigation of Soviet espionage in general.” Id. at 743 (citing Wolston v. Reader’s Digest Ass’n, 443 U.S. 157, 167 (1979)).

134 Id. at 743.

135 Id. at 741 (noting that there was “no question that Dameron played a central, albeit involuntary, role in this controversy”); see also Wiegel v. Capital Times Co., 426 N.W.2d 43, 50 (Wis. Ct. App. 1988) (plaintiff’s “role in the controversy was far more than ‘tangential’ or ‘trivial’”).

136 See Wells v. Liddy, 186 F.3d 505, 539 (4th Cir. 1999), cert. denied, 528 U.S. 1118 (2000) (“Because Dameron has not narrowly tailored the class of possible involuntary public figures, it has created a class of individuals who must prove actual malice that is equivalent to the class in Rosenbloom. Under either Dameron or Rosenbloom all individuals defamed during discourse on a matter of public concern must prove actual malice. In light of the Supreme Court’s repeated rejection of Rosenbloom, we are unwilling to adopt an approach that returns us to an analysis that is indistinguishable.”); Wallis, supra note 125, at 320 (stating the court’s analysis in Dameron leads to reemergence of Rosenbloom public interest test).
A number of cases have approved the *Dameron* holding or utilized a similar approach, sometimes with little or no analysis. Consider, for example, *Wagstaff v. Morning Call, Inc.* The defendant-newspaper reported

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137 See, e.g., Lohrenz v. Donnelly, 223 F. Supp. 2d 25, 44 (D.D.C.), aff'd on other grounds, 350 F.3d 1272 (D.C. Cir. 2003) (finding that plaintiff, one of the first two women trained to fly the Navy's F-14 fighter aircraft, was "a limited purpose public figure, albeit possibly involuntary"); Atlanta Humane Soc'y v. Mills, 618 S.E.2d 18, 23 (Ga. Ct. App. 2005) (finding that the plaintiff was a voluntary public figure, but also recognizing at least in principle the "possibility of an involuntary public figure" when someone is caught up in a controversy involuntarily); Atlanta Journal-Constitution v. Jewell, 555 S.E.2d 175, 186 (Ga. Ct. App. 2002) (holding that a security guard who became focus of investigation in connection with the 1996 Centennial Olympic Park bombing and who variously was portrayed as hero and suspect, and was eventually cleared of any involvement, was an involuntary limited purpose public figure); Daniel Goldreyer, Ltd. v. Dow Jones & Co., 687 N.Y.S.2d 64, 65 (N.Y. App. Div. 1999) (citing *Dameron*) (holding that an art restorer who used a controversial restoration technique was an involuntary limited purpose public figure); *Wagstaff v. Morning Call, Inc.*, 41 Pa. D.&C. 4th 431, 437-43 (Ct. C.P. Lehigh County 1999), aff'd, 758 A.2d 732 (Pa. Super. Ct. 2000); Erdmann v. SF Broad. of Green Bay, Inc., 599 N.W.2d 1, 5-7 (Wis. Ct. App. 1999); Bay View Packing Co. v. Taff, 543 N.W.2d 522, 533 (Wis. Ct. App. 1995) (food processor and its president were involuntary public figures in connection with report that they failed to immediately comply with government's request to recall contaminated food and the public controversy surrounding potential distribution of contaminated food products); *Wiegel v. Capital Times Co.*, 426 N.W.2d 43, 50 (Wis. Ct. App. 1988) (holding that the farmer with the largest acreage of land area that allegedly eroded and contributed to pollution of a state park was an involuntary limited purpose public figure). The language in *Wiegel* is revealing:

We agree with this analysis and believe that the focus of the inquiry should be on the plaintiff's role in the public controversy rather than on any desire for publicity or other voluntary act on his or her part. The purpose served by protecting the press from defamation suits for comment on public issues and the people involved in those issues could well be frustrated if the individuals could, by themselves and wholly independent of their involvement in the controversy, determine whether they are, or are not, "public figures."

The court added that it was "inevitable that the controversy would focus on ... the farmer with the largest acreage in the area." *Id.* at 50. The court added that it was "inevitable that the controversy would focus on ... the farmer with the largest acreage in the area." *Id.*

138 See Daniel Goldreyer, Ltd., 687 N.Y.S.2d 64; Bay View Packing Co., 543 N.W.2d 522.

that an auto repair garage was the base of operation of two persons who had committed a violent bank robbery.\textsuperscript{140} Actually, the subject garage was a separate garage in the same building that the plaintiff had rented to a third person.\textsuperscript{141} The owner of the garage sued for defamation.\textsuperscript{142} The court invoked \textit{Dameron}, and held that the plaintiff was a public figure.\textsuperscript{143} Specifically, the court stated that "it is not necessary for a plaintiff to have injected himself voluntarily into a public controversy, or foresaw becoming involved in it, in order to be deemed a limited purpose public figure."\textsuperscript{144} The court emphasized that the subject was "a brazen criminal act of breathtaking proportion . . . committed on the public streets,"\textsuperscript{145} and that the article addressed "questions of immediate public concern involving . . . the safety of the community . . . [and] the integrity of of its banks."\textsuperscript{146} Finally, the court noted that the "[p]laintiff, by his own conduct, was drawn into these questions. He leased space which became the robbers' base of operations . . . . To that extent, plaintiff found himself in the path of legitimate inquiry."\textsuperscript{147}

Perhaps the quintessential example of the \textit{Dameron} approach is represented by \textit{Atlanta Journal-Constitution v. Jewell}.\textsuperscript{148} The court held that, Richard Jewell, a security guard who became the focus of investigation in connection with the 1996 Centennial Olympic Park bombing and who was variously portrayed as hero and suspect before being cleared of any involvement, was at least an involuntary limited-purpose public figure, if not a voluntary limited-purpose public figure.\textsuperscript{149} The \textit{Jewell} court expressly relied on \textit{Dameron}, saying:

\begin{quote}
The same considerations that led the \textit{Dameron} court to find the plaintiff in that case was an involuntary public figure require the same conclusion in this case. Even if we found that Jewell did not "inject" himself into the controversy, "[i]njection is not the only means by which public-figure status is achieved. Persons can become involved in public controversies and affairs without their consent or will." Jewell, who had the misfortune to have a tragedy occur on his watch, is such a person.\textsuperscript{150}
\end{quote}

\textsuperscript{140} See id. at 433.
\textsuperscript{141} See id. at 435 n.2.
\textsuperscript{142} See id. at 434.
\textsuperscript{143} See id. at 439-43.
\textsuperscript{144} Id. at 439.
\textsuperscript{145} Id. at 442.
\textsuperscript{146} Id. at 442.
\textsuperscript{147} Id. at 443.
\textsuperscript{149} See id. at 186.
\textsuperscript{150} Id. (quoting \textit{Dameron} v. Washington Magazine, Inc., 779 F.2d 736, 741 (D.C. 1985)). The court further explained:

\begin{quote}
[T]here is no question that Jewell played a central, albeit possibly
In light of these cases, one can understand how the *Dameron* case has been criticized in terms of its potential breadth and open-endedness. Its broad view of the involuntary public figure subclassification has also been rejected by some courts on that basis.

Involuntary, role in the controversy over Olympic Park safety. Jewell happened to be the security guard on duty at the time of the bombing, happened to be the security guard who found the bomb, and happened to be involved in the evacuation of the public from the area where the bomb was located. He became embroiled in the ensuing discussion and controversy over park safety and became well known to the public in this one very limited connection. Whether he liked it or not, Jewell became a central figure in the specific public controversy with respect to which he was allegedly defamed: the controversy over park safety.

Jewell, 555 S.E.2d at 186.

Dean Smolla has written:

In setting the doctrinal parameters of the involuntary public figure concept in terms far too elastic, the *Dameron* formulation invites acceptance of a class of involuntary public figures far too expansive . . . .

For if all that is required to qualify as an involuntary public figure under *Dameron* is the bad luck of some central connection to [a] newsworthy event, involuntary figures are not by any calculation exceedingly rare, but exceedingly common, and growing more common all the time. Any of us, at any moment, might find ourselves swept up in some dramatic or traumatic event that becomes the focus of intense public inquiry or debate. The sad fact is that bad luck is relatively common . . . .

SMOLLA, supra note 92, § 2:35.50. He elaborates:

As new technologies make it increasingly routine, in this epoch of the “media feeding frenzy,” the “fifteen minutes of fame,” or the “media firestorm,” for an obscure person who is just going about his or her business to suddenly be placed in a “central role” in some sudden story du jour, and instantly broadcast around the world on satellite, radio, television, cable, and the Internet, our law must decide whether it must serve as the hapless vassal to such phenomenon, or will instead assert itself, and anchor public figure doctrine on firmer moral and policy sensibilities.

Id.

Finally, Smolla adds:

The public figure doctrine is heavily grounded in cultural and moral equity—if you can’t stand the heat of the fire, stay out of the kitchen . . . . [T]hose who voluntarily seek to influence events and issues may appropriately be forced to accept as part of the bargain a greater risk of defamation. But when reputational redress for defamation is substantially diminished by the ‘sheer bad luck’ of one’s connection to a newsworthy event, the law has lost its tie to these moral assumptions and policy functions.

Id.
c. Typical Approach.—Professor Nat Stern has pointed out that the involuntary public figure category might be circumscribed by restricting the types of controversies into which a plaintiff may be drawn so as to render that person an involuntary public figure. Stern says that "the controversy into which the plaintiffs have been drawn is not an abstract issue of public policy; rather it implicates a concrete and serious threat to public health and safety." He adds that "the controversy will have been ignited by a particular event that inflicts or threatens grave consequences." Stern criticizes an approach that would limit involuntary public figure status to cases in which there was a "nexus between the plaintiff's position and the character of the defamation," or, in other words, a requirement that the plaintiff's position have invited comments like the alleged defamatory statement. He explains that "insistence on even a moderate nexus between the plaintiff's position and the character of the defamation might exclude someone like Rodney King ... [who] would seem to belong to any category of involuntary figures that an equitable model might retain."

Some of the existing involuntary public figure cases may fit within Stern's typal parameters. For example, in Wagstaff v. Morning Call, Inc., the court emphasized that the subject matter was a "brazen criminal act of breathtaking proportion ... committed on the public streets," that concerned the safety of the community and the integrity of its banks.

d. Primary Assumption of Risk Analogy.—Professor Susan Gilles has attempted to explain the nature of the involuntary public figure classification

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153 See Nat Stern, Unresolved Antitheses of the Limited Public Figure Doctrine, 33 HOUSTON L. REV. 1027, 1099 (1996).
154 Id. at 1099.
155 Id.
156 Id. at 1100.
157 Id. Stern comments: "While King was literally dragged unwillingly into what by any definition was a public controversy, there is not even an attenuated link between King's flight from pursuing police officers and a plausible expectation of incurring the scale and intensity of attention that he ultimately received. Yet, King would seem to belong to any category of involuntary figures that an equitable model might retain."
159 Id. at 442; see also Tomson v. Stephan, 699 F. Supp. 860 (D. Kan. 1988) (plaintiff who had settled sexual harassment lawsuit was not deemed a public figure with respect to defendants' statements in press conference regarding the merits of the plaintiff's case). The court reasoned that "the suit was hardly the type of controversy in which the public had a strong vested interest, like the crash of a public carrier at our nation's capitol and a review of an FAA program." Id. at 865–66.
by drawing upon traditional assumption of risk doctrine. She analogizes the voluntary public figure classification to so-called secondary assumption of risk while analogizing the involuntary public figure classification to primary assumption of risk. She explains that:

This is exactly the dividing line between primary and secondary assumption of risk: primary would apply if the plaintiff 'voluntarily' engaged in an activity that has inherent risks of false publicity, even though the plaintiff was 'involuntarily' dragged into the debate. In contrast, the secondary assumption would be triggered only if the plaintiff purposefully elected to thrust herself into the debate.

Gilles's analogy is useful. Nevertheless, as she acknowledges, it leaves the difficult, perhaps insoluble, problem of coming up with a sensible and workable test for deciding which situations warrant a primary assumption of risk analysis when dealing with the involuntary public figure categorization. In other words, there are difficulties in deciding when to limit the duty owed to a defamation plaintiff irrespective of plaintiff's actual willingness to accept the risk of public scrutiny. Gilles posits the following approach:

The Court could adopt a list of fact-based scenarios which would trigger primary assumption: for instance, engaging in activities that trigger a criminal investigation; accepting a job on which the safety of a substantial segment of the public depends; or filing a lawsuit. For these “activities” the Court could hold the risks of publicity so well known that primary assumption is triggered. For all others, secondary assumption could be required.

161 See Susan M. Gilles, From Baseball Parks to the Public Arena: Assumption of the Risk in Tort Law and Constitutional Libel Law, 75 TEMPLE L. REV. 231 (2002). Primary and secondary assumption of the risk are two forms of implied assumption of the risk. Id. at 234. Secondary assumption of the risk refers to situations in which the plaintiff knows that the risk is present, understands its nature, and freely and voluntarily chooses to incur it. See id. Secondary assumption of the risk is a purely subjective inquiry. See id. at 234–35. Primary assumption of the risk, on the other hand, is a question of duty. See id. at 235. This “doctrine embodies a legal conclusion that there is no duty on the part of the defendant to protect the plaintiff from a particular risk.” See id. Primary assumption of the risk is used to “limit the duty the defendant owes to the plaintiff because of the plaintiff’s voluntary decision to engage in an activity or association.” Id. The difference between primary and secondary assumption of the risk is that “primary assumption of the risk does not require proof of either subjective knowledge and appreciation of the risk by the plaintiff or actual consent to that risk; merely engaging in the activity is sufficient to trigger assumption.” Id. at 236.

162 Id. at 245–48.

163 Id. at 266.

164 Gilles, supra note 161, at 267–68.

165 Id. at 268 (footnotes omitted). Gilles apparently recognizes, however, that the mere fact that one engages in criminal conduct may not ipso facto transform the actor into a public figure. See id. n.239 (citing Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157 (1979) (rejecting the “contention of respondents that any person who engages in criminal conduct
A case perhaps illustrating what Gilles may have had in mind is *Erdmann v. SF Broadcasting of Green Bay, Inc.* A teenage "victim" reported that a masked man had shot him after asking for his sister. Attention turned to the plaintiff, about whom complaints had been made that he was stalking the "shooting victim's" sister. The plaintiff was subsequently arrested, and a report of the events was aired on the defendant's newscast. The following day, the supposed shooting victim confessed that he had shot himself and made up the story about the masked shooter. In holding that the plaintiff was a limited purpose public figure, the court reasoned:

[The plaintiff's] possession of automatic weapons, his "survivalist" inclinations, his stalking history, and his unknown whereabouts were all more than mere allegations of criminal conduct and raised an issue of public concern.

The thrust of Erdmann's contention that he is not a limited purpose public figure seems to flow from his contention that he did nothing to place himself in the public controversy. Unfortunately, Erdmann was thrust into this public controversy primarily because of the sixteen-year-old boy's false report of being shot by a masked gunman. From this, and other information gained from the purported victim's family, the police concluded that Erdmann was the assailant, that he was violent, that he had access to automatic weapons and that he was dangerous. Although police formulated these conclusions without any conduct or action by Erdmann, it is clear that "it may be possible for someone to become a public figure through no purposeful action of his own."

... [W]e can find no support for Erdmann's claim that limited figure public status cannot be created without purposeful or voluntary conduct by the individual involved.

Gilles's approach would seem to require that the plaintiff have consciously undertaken activities in which the risks of publicity were so well known as to be inherent. The problem with Gilles's model is that it falls short of the kind of straightforward vindication of First Amendment interests that is essential. It does so by preserving significant control by potential plaintiffs over their status and thus over the level of threat of defamation automatically becomes a public figure for purposes of comment on a limited range of issues relating to his conviction.

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167 See id. at 3.
168 See id.
169 See id. at 3-4.
170 Id. at 4.
171 Id. at 6-7 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974)).
claims posed to the freedom of others to communicate about their activities. In doing so, it concomitantly abides continuing enervation of freedom of expression.

e. The Wells Compromise.—The most evolved judicial attempt to define the involuntary public figure subcategory in a way that embraces both a status-based and content-based analysis is found in Wells v. Liddy. The plaintiff was a former secretary at the Democratic National Committee (DNC) headquarters at the time of the Watergate burglary. She sued Gordon Liddy, one of the accused Watergate conspirators, for defamation. She alleged that Liddy made statements theorizing that the purpose of the break-in was to determine whether the democrats possessed information embarrassing to then-legal counsel to the president, John Dean, specifically, whether photographs of his fiancé were located in the plaintiff's desk among several photographs used to offer prostitution services. The plaintiff contended that Liddy's statements falsely suggested that she had acted as a procurer of prostitutes for men who visited the DNC.

The district court, relying on Dameron, determined that the plaintiff was an involuntary public figure because she had the "misfortune" of having "been drawn by a series of events into the Watergate controversy." The court of appeals rejected the district court's analysis and held that the plaintiff was not an involuntary public figure. The court reasoned that "'misfortune' is only one of the considerations that should be weighed before concluding that an individual is an involuntary public figure." The court emphasized that it was "hesitant to rest involuntary public figure status on 'sheer bad luck'" alone.

The court of appeals acknowledged that some commentators have questioned the continuing vitality of the involuntary public figure subcategory and that it had never "explored the parameters of the involuntary branch of the public figure typography." In developing its own analysis,

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172 Wells v. Liddy, 186 F.3d 505 (4th Cir. 1999); see also Wilson v. Daily Gazette Co., 588 S.E.2d 197, 208 (W. Va. 2003) (referring to Wells as "[t]he leading case to explore the contours of the involuntary public figure doctrine").
173 See Wells, 186 F.3d at 512.
174 Id. at 518.
176 Id. at 541.
177 See Wells, 186 F.3d at 538-42.
178 Id. at 538.
179 Id.
180 Id. (noting that some authorities have questioned the continuing vitality of the involuntary public figure).
181 Id.
the court rejected the *Dameron* approach. The court declined to find it alone sufficient for the involuntary public figure status that a person had become the focus of media through "misfortune," "sheer bad luck," or "happenstance." The court's analysis drew generally upon the rationales in *Gertz* for drawing the line separating public and private figures: 1) whether the plaintiff had access to media and channels of communication for self-help in responding to potential defamation, and 2) whether the plaintiff "voluntarily assumed the risk of publicity." The court also emphasized *Gertz*’s restrictive description of the involuntary public figure subcategory as "exceedingly rare."

The court then adopted the following test for involuntary public figure status. First, the plaintiff must have been a central figure in a significant public controversy, which requires that the defendant "put forth evidence that the plaintiff has been the regular focus of media reports on the controversy." Second, the plaintiff must have engaged in publicity-accepting conduct, or as the court says, must have assumed the risk of publicity.

Thus, for involuntary public figure status, the focus was not on whether the

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182 *Id.* at 539. (stating that "because *Dameron* has not narrowly tailored the class of possible involuntary public figures, it has created a class of individuals who must prove actual malice that is equivalent to the class in *Rosenbloom*. Under either *Dameron* or *Rosenbloom* all individuals defamed during discourse on a matter of public concern must prove actual malice. In light of the Supreme Court’s repeated rejection of *Rosenbloom*, we are unwilling to adopt an approach that returns us to an analysis that is indistinguishable." (citation omitted))

183 *Id.* at 538 (stating that misfortune is merely one aspect if the relevant considerations).

184 *Id.* (stating that "[w]e are hesitant to rest involuntary public figure status upon 'sheer bad luck.'")

185 *Id.* at 540 (stating that its “test excludes from the category of involuntary public figures those individuals who by happenstance have been mentioned peripherally in a matter of public interest or have merely been named in a press account").

186 *Id.* at 539 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974)).

187 *Id.* (citing *Gertz*, 418 U.S. at 344).

188 *Id.* (citing *Gertz*, 418 U.S. at 345). The court stressed the “need for a narrow class of involuntary public figures.” *Id.*

189 *Id.* at 539-40.

190 *Id.* at 540. The 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.” *Id.*

191 *Id.* The Court stated:

[Although an involuntary public figure need not have sought to publicize her views on the relevant controversy, she must have nonetheless assumed the risk of publicity. Therefore, the defendant must demonstrate that the plaintiff has taken some action, or failed to act when action was required, in circumstances in which a reasonable person would understand that publicity would likely inhere.

*Id.*
plaintiff was seeking to influence the “outcome of debate on the matter,” but on whether plaintiff’s path implied his acquiescence in or acceptance of the publicity.

A number of cases have voiced support for the *Wells* test, and a few earlier ones seem to have anticipated the *Wells* analysis. In *Wilson v. Daily Gazette Co.* (Wilson v. Daily Gazette Co., 588 S.E.2d 197, 208 (W. Va. 2003)).

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192 *Id.* (“Unlike the limited-purpose public figure, an involuntary public figure need not have specifically taken action through which he has voluntarily sought a primary role in the controversy to influence the outcome of debate on the matter.”)

193 See *id.* at 539-40. The court further required that “the controversy must have existed prior to the publication of the defamatory statement; and . . . [that] the plaintiff retained public-figure status at the time of the alleged defamation.” *Id.* at 540. The court added that its involuntary public figure analysis must also accommodate the plaintiff’s interest in attempting self-help and thus should not be based on plaintiff’s conduct in making a “reasonable response to reputation-injuring statements.” *Id.* at 537. In that vein, the court also said that where “an involuntary public figure attempts self-help, the *Foretich* rule must apply with equal strength.” *Id.* at 540. The *Foretich* rule says that a private person “cannot be deemed a ‘limited purpose public figure’ merely because he or she makes reasonable public replies to those accusations.” *Foretich v. Capital Cities/ABC, Inc.*, 37 E3d 1541, 1558 (4th Cir.1994) (footnote omitted).


195 See *Marcone v. Penthouse Int’l Magazine for Men*, 754 F.2d 1072, 1083 (3d Cir. 1985) (stating that “the plaintiff’s action may itself invite comment and attention, and even though he does not directly try or even want to attract the public’s attention, he is deemed to have assumed the risk of such attention,” and that “courts have classified some people as limited purpose public figures because of their status, position or associations,” and that “[i]f 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”); *Dombey v. Phoenix Newspapers, Inc.*, 724 F.2d 562, 569–70 (Ariz. 1986) (holding that the plaintiff was a public figure because he had assumed “a role of public prominence with respect to a matter of public concern”); *Dobber v. Dow Jones & Co.*, 687 N.Y.S.2d 64 (N.Y. App. Div. 1990) (citing *Dameron*, with little analysis, but seeming to support a *Wells* “goes with the territory” analysis by holding that an art restorer who used a controversial restoration technique was an involuntary public figure for purposes of his restoration of a valuable painting for a Dutch museum).

In *Dombey*, the plaintiff sued for allegedly defamatory newspaper articles that he had engaged in improprieties while serving as the insurance agent of record for Maricopia County. *Dombey*, 724 F.2d at 563. The court expressly disclaimed any reliance on a claim that the plaintiff was an involuntary public figure. *Id.* at 567. But, then the court looked to the expectations of the plaintiff in an analysis similar to *Wells*. The court reasoned:

By assuming the position that he held, Dombey invited public scrutiny and should have expected that the manner in which he performed his duties would be a legitimate matter of public concern, exposing him to public and media attention . . . . [N]o bright line can be drawn . . . .

. . . Dombey entered into a continuing relationship with the government and could be expected to receive the scrutiny that eventually attends upon all major governmental efforts. Dombey cannot complain
Gazette Co.,\textsuperscript{196} a high school athlete was the subject of a newspaper report repeating a rumor that he had exposed himself after a basketball game.\textsuperscript{197} The court held that the plaintiff was not an involuntary public figure, and expressly applied the \textit{Wells} test.\textsuperscript{198} Specifically, the court required that:

(1) the plaintiff have become a central figure in a significant public controversy, (2) that the allegedly defamatory statement has arisen in the course of discourse regarding the matter, and 3) the plaintiff has taken some action or failed to act when action was required, in circumstances in which a reasonable person would understand that publicity would likely inhere.\textsuperscript{199}

\textbf{f. Family Members and Acquaintances of Public Figures as Involuntary Public Figures.---}A number of courts have found that some family members and acquaintances of public officials or figures may be at least limited purpose public figures.\textsuperscript{200} Most of the cases addressing the question of whether a relative or acquaintance of an established public person is a public figure are devoid of meaningful analysis. Thus in the \textit{Zupnick} case, for example, the court held that the wife of a doctor embroiled in claims of overbilling and professional negligence became a public figure when "Dr. Zupnick's

\begin{flushleft}
\textsuperscript{197} See id. at 200.
\textsuperscript{198} See id. at 208-09.
\textsuperscript{199} Id.
\textsuperscript{200} See, e.g., Meeropol v. Nizer, 560 F.2d 1061, 1066 (2d Cir.1977), \textit{cert. denied}, 434 U.S. 1013 (1978) (holding that natural children of accused Soviet spies were public figures, and stating that "[i]n the course of extensive public debate revolving about the Rosenberg Trial [their children] were cast into the limelight and became public figures"); Carson v. Allied News Company, 529 F.2d 206, 210 (7th Cir. 1976) (stating, after the plaintiffs, entertainer Johnny Carson and his second wife conceded that they were public figures, that "one can assume that the wife of a public figure such as Carson more or less automatically becomes at least a part-time public figure herself"); Zupnick v. Associated Press, Inc., 31 F. Supp. 2d 70, 72 (D. Conn. 1998) (holding that wife of the doctor embroiled in claims of overbilling and professional negligence who was also sued for allegedly conspiring with her husband in a fraudulent conveyance of property for the purposes of hiding assets from potential creditors was an involuntary public figure, and noting that "[d]espite the fact that the plaintiff has not sought a public role, she had been thrust into the role of a public figure by virtue of her marriage to Dr. Zupnik" and intense public interest surrounding her husband, and her alleged conspiring in a fraudulent conveyance, "transformed her into an involuntary figure"); Scaccia v. Dayton Newspapers, Inc., Nos. 18435, 18729, 2001 WL 1517043, at *9 (Ohio Ct. App. Nov. 30, 2001) (stating that the fact that the plaintiff is married to a public official bolsters her public-figure status."
\end{flushleft}
notoriety spilled over upon the plaintiff and drew her into the public spotlight.”

Some courts have taken a cautious approach on the sufficiency of a relationship as a basis for limited purpose public figure status. In Naantaanbuu v. Abernathy, the female plaintiff, at whose home Martin Luther King Jr. had eaten dinner the evening before his assassination, was not deemed a public figure. Her defamation claim was based on a report in a biography implying that she and Dr. King had engaged in an extramarital affair that evening. Specifically, the court held that the plaintiff’s connection with King was “too fleeting for her to be an involuntary public figure.” The court noted that the plaintiff in Dameron by contrast occupied a “central role” in the public controversy.

g. Khawar’s “Access” Test.—In Khawar v. Globe International, Inc., the defendant published a photo with an arrow pointing at the plaintiff indicating that he was the assassin of Senator Robert Kennedy. The court held that the plaintiff, a Pakistani citizen and freelance photo journalist on assignment for a Pakistani periodical who stood on the podium near Robert Kennedy before Kennedy left the room and was shot in the hotel pantry area, was not an involuntary public figure. The court recognized the involuntary public figure category in principle, but explained:

By stating that it is theoretically possible to become a public figure without purposeful action inviting criticism . . . , the high court has indicated that purposeful activity may not be essential for public figure characterization. But the high court has never stated or implied that it would be proper for a court to characterize an individual as a public figure in the face of proof that the individual had neither engaged in purposeful activity inviting criticism nor acquired substantial media access in relation to the controversy at issue. We read the court’s decisions as precluding courts from affixing the public figure label when neither of the reasons for applying that label has been demonstrated. Thus, assuming a person may ever be accurately characterized as an involuntary public figure, we infer from the logic of Gertz that the high court would reserve this characterization for an individual who, despite never having voluntarily engaged the public’s attention in an attempt to influence the outcome of a public controversy, nonetheless has acquired such

201 Zupnik, 31 F. Supp. 2d at 73.
203 Id. at 223 n.2.
204 Id. (noting also that the plaintiff in the instant case “has gone some twenty-five years without being pulled into the controversy over what happened that night”).
206 See id. at 699.
207 See id. at 702–04.
public prominence in relation to the controversy as to permit media access sufficient to effectively counter media-published defamatory statements.\textsuperscript{208}

Thus, the \textit{Khawar} court contemplated that, in order to become an involuntary public figure, at the very least the person must either have "engaged in purposeful activity inviting criticism" or have "acquired substantial media access in relation to the controversy at issue."\textsuperscript{209}

\textbf{h. Stealth Involuntary Public Figure Applications.---}In some cases there is a marked disjunction between the courts' disavowal of reliance on the involuntary public figure classification (or at least disinclination to invoke it) and what the courts seem to actually do. Thus, in \textit{Dombey v. Phoenix Newspapers, Inc.},\textsuperscript{210} the plaintiff sued for allegedly defamatory newspaper articles suggesting that he had engaged in improprieties while serving as the county's insurance agent of record.\textsuperscript{211} The court expressly disclaimed any reliance on a claim that the plaintiff was an involuntary public figure, and even cast doubt on that category's continued existence.\textsuperscript{212} Nonetheless, the court reasoned that the plaintiff, "[b]y assuming the position that he held, . . . invited public scrutiny and should have expected that the manner in which he performed his duties would be of legitimate matter of public concern, exposing him to public and media attention."\textsuperscript{213} The court then stated in a conclusory manner that "[w]hatever requirement there might be to 'thrust' oneself into a public controversy was satisfied by his voluntary participation in activity calculated to lead to public scrutiny."\textsuperscript{214} Casting further doubt on its disclaimer of reliance on the involuntary figure category, the court cited the \textit{Dameron} case,\textsuperscript{215} the poster child of the broad involuntary public figure classification.

The tendency of courts to disavow the involuntary public figure classification while partly relying on it is evident in other cases.\textsuperscript{216} Of particular

\begin{itemize}
\item \textsuperscript{208} \textit{Id.} at 702.
\item \textsuperscript{209} \textit{Id.}
\item \textsuperscript{210} \textit{Dombey v. Phoenix Newspapers, Inc.}, 724 P.2d 562 (Ariz. 1986).
\item \textsuperscript{211} \textit{See id.} at 563.
\item \textsuperscript{212} \textit{See id.} at 567 ("aside from its articulation in \textit{Gertz}, it [the involuntary public status] has never been applied by the Supreme Court and may have been abandoned . . . . Accordingly, we do not rely on that doctrine for resolution of this case.")
\item \textsuperscript{213} \textit{Id.} at 570.
\item \textsuperscript{214} \textit{Id.} at 571.
\item \textsuperscript{215} \textit{Id.} at 571 (citing \textit{Dameron v. Washington Magazine, Inc.}, 779 F.2d 736 (D.C. Cir. 1985)).
\item \textsuperscript{216} \textit{See Clyburn v. News World Commc'ns, Inc.}, 903 F.2d 29, 33 (D.C. Cir. 1990) (plaintiff held to be limited public figure in part because of numerous contacts with D.C. government officials); \textit{Marcone v. Penthouse Int'l Magazine for Men}, 754 F.2d 1072, 1084 n.9 (3d Cir. 1985) ("[R]ather than creating a separate class of public figures, we view [the involuntary public figure] description as merely one way an individual may come to be considered a
noteworthiness is *Lohrenz v. Donnelly*. The plaintiff was one of the first two female naval officers trained and assigned to fly the Navy F-14 fighter; the other was killed while crash-landing an F-14 on the U.S.S. Abraham Lincoln. Plaintiff sued defendants Elaine Donnelly and the Center for Military Readiness for defamation based on alleged statements in a report suggesting "that female and male naval aviators were treated differently in that female aviators were promoted on a lower standard and received special concessions, ... and that plaintiff was one pilot who received special treatment which permitted her to advance."

The district court in *Lohrenz*, seemed to straddle both the voluntary and involuntary subcategories of the limited public figure classification, finally stating that the plaintiff was a limited purpose public figure "albeit possibly involuntarily." The District of Columbia Court of Appeals also found that the plaintiff was a limited purpose public figure, but it professed to decide the matter exclusively on a voluntary public figure basis. The court reasoned:

Because [the plaintiff] ... chose the F-14 combat jet while well aware of the public controversy over women in combat roles, her challenge to the ruling that she was a voluntary limited-purpose public figure once the Navy assigned her to the F-14 combat aircraft rings hollow: she chose combat training in the F-14 and when, as a result of that choice, she became one of the first two women combat pilots, a central role in the public controversy came.

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219 CMR was "a public policy organization concerned with military personnel issues." *Id.* at 30.
220 *Id.* at 32.
221 *Id.* at 44.
with the territory. Having assumed the risk when she chose combat jets that she would in fact receive a combat assignment, Lt. Lohrenz attained a position of special prominence in the controversy when she “suited up” as an F-14 combat pilot.\(^{222}\)

In deciding that the plaintiff was a *voluntary* limited purpose public figure, the court of appeals expressly declined to address either the plaintiff’s status under an involuntary public figure analysis or whether the *Dameron* case should be reconsidered.\(^{223}\) The court also resisted invoking the involuntary public figure subcategory despite the plaintiff’s assiduous efforts to pigeonhole the defendant’s public figure argument into that category.\(^{224}\) The court summarily responded that the plaintiff’s focus was misplaced because the evidence showed that “Lt. Lohrenz was a *voluntary* limited-purpose public figure.”\(^{225}\)

In its voluntary public figure analysis, the court articulated a “special prominence” inquiry requiring that “[t]he plaintiff must either have been purposefully trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to have an impact on its resolution.”\(^{226}\) But, the court concluded that the plaintiff was a voluntary public figure based on conduct that seemed dissimilar from that of the classical voluntary public figure who thrusts herself into the fray\(^{227}\) of a public controversy.\(^{228}\) The court stated:

\(^{222}\) *Lohrenz*, 350 F.3d at 1274.

\(^{223}\) *Id.* at 1274, 1278.

\(^{224}\) *Id.* at 1278. Indeed, the court acknowledged that the plaintiff devoted “precious little of the argument in her brief” to the voluntary limited-purpose public figure doctrine, nor did she challenge the appropriateness in principle of the analysis of that doctrine based on the Waldbaum case. *Id.* “Rather [the plaintiff] focused primarily on the involuntary public figure analysis in *Dameron*. *Id.* The plaintiff contended that on the merits she could not be a voluntary public figure because “she had not ‘thrust’ herself” into a public controversy. *Id.*

\(^{225}\) *Id.* (emphasis added).

\(^{226}\) *Id.* at 1280 (quoting Waldbaum v. Fairchild Publ’ns, Inc., 627 F.2d 1287, 1297 (D.C. Cir. 1980).

\(^{227}\) Typically, a voluntary limited purpose public figure will “have thrust themselves to the front of particular public controversies in order to influence the resolution of the issues involved.” *Gertz* v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

\(^{228}\) See Smolla, *supra* note 92, § 2:35.50. Dean Smolla states:

> [A]lthough the Court of Appeals in *Lohrenz* did argue that *Lohrenz* had “volunteered” for public figure status, her voluntariness was not the usual kind of voluntariness found in public figure cases. The Court of Appeals conceded that Lohrenz had not volunteered entry into a public debate to influence its outcome, or volunteered for media attention, or volunteered in for anything other than suiting up to fly combat jets at a time when the role of women in the military was controversial. For the Court of Appeals to insist that it was not engaging *Dameron* and the involuntary public figure doctrine was thus not entirely persuasive. For
Although, as we understand Lohrenz’s position on appeal, it was the Navy, not she, that placed her at the center of the controversy about women as combat pilots, the evidence does not support her position. Lohrenz not only alleged that she “chose to be trained in combat aviation,” her actions and statements belie any basis on which to conclude that she did not voluntarily seek to be in the combat pilot position to which the Navy assigned her. Once she “chose ... combat aviation” by indicating her preference for the F-14 while knowing of the preexisting public controversy over the appropriateness of women in combat positions, Lt. Lohrenz assumed the risk that if she succeeded in qualifying for a combat assignment and the Navy made such an assignment, she would find herself at the center of the controversy as a result of the special prominence that she and only one other woman combat pilot attained upon receiving their F-14 assignments. That Lt. Lohrenz might have preferred a combat assignment that did not place her in the center of the public controversy is legally irrelevant.

... [A]t the point she “suited up” as an F-14 pilot ... she assumed the risk that she would attain such an assignment, which, in light of the public controversy, meant she would be in a position of special prominence in that controversy ... [S]he is a voluntary public figure ... .

The court of appeals concluded with the following remark: “Lt. Lohrenz was confronted with the choice of piloting a supersonic combat fighter jet as a voluntary public figure, or giving up her dream of being a Navy pilot in order to remain a private figure.” The court's analysis shows the difficulty of separating status and content, and it highlights the hopeless artificiality and subjectiveness of the determination of whether a person has morphed into a voluntary public figure, or when (or even whether) a person may be deemed an involuntary public figure. The court seems in reality to have converted voluntariness into a sort of vague assumption-of-the-risk-of-publicity test. Not far beneath the surface is the true driving force behind the court's analysis (and the involuntary public figure subcategory

in holding that a woman because she was a woman took on public figure status merely for volunteering for combat jets at time in our history when such roles were controversial for women was to stretch the concept of “volunteering” to the point at which it became essentially involuntary volunteering. If what Lohrenz did counts as volunteering for public figure status, then the requirement of voluntary entry into the public arena becomes little more than a play on words.

229 Lohrenz, 350 F.3d at 1280–82. The court added that, “although Waldbaum ‘provides us with useful analytic tools[,]’ nevertheless, the touchstone remains [the standard the Supreme Court set forth for classifying an individual as a public figure, namely] whether an individual has ‘assumed [a] role[ ] of especial prominence in the affairs of society ... [that] invite[s] attention and comment.’” Id. at 1279 (quoting Gertz, 418 U.S. at 345).

230 Id. at 1282.

231 The court emphasized the assumption of risk underpinnings of its holding repeatedly. See id. at 1281–82.
that the court skirted): a concern about the public’s interest in free debate respecting matters which are deemed newsworthy.

Take, for example, the case of Clyburn v. News World Communications, Inc.\(^{232}\) The plaintiff’s defamation claim was based on statements by the defendant publisher’s newspaper describing the death of plaintiff’s girlfriend from possible drug overdose and “depict[ing] . . . plaintiff . . . as waiting ‘several critical hours’ after [her] collapse to call for help, in order to allow other partygoers to leave the scene.”\(^{233}\) In finding that the plaintiff was a voluntary limited purpose public figure, the court noted:

Clyburn denies that he injected himself into the public controversy at all . . .

. . . We view this cover-up attempt as going beyond an ordinary citizen’s response to the eruption of a public fray around him . . .

More important, Clyburn’s acts before any controversy arose put him at its center. His consulting firm had numerous contracts with the District government, he had many social contacts with administration officials, and Medina, at least as one may judge from attendance at her funeral, also enjoyed such ties. Clyburn also spent the night of Medina’s collapse in her company. One may hobnob with high officials without becoming a public figure, but one who does so runs the risk that personal tragedies that for less well-connected people would pass unnoticed may place him at the heart of a public controversy. Clyburn engaged in conduct that he knew markedly raised the chances that he would become embroiled in a public controversy. This conduct, together with his false statements at the controversy’s outset, disable him from claiming the protections of a purely “private” person.\(^{234}\)

Thus, although some cases may speak in terms of voluntary public figure status, their underlying analysis, with its emphasis on “run[ning] the “risks”\(^{235}\) and “rais[ing] the chances”\(^{236}\) of becoming a news item or engaging in activities that “most require public scrutiny,”\(^{237}\) gravitates toward an involuntary public figure analysis.

Some cases almost seem to deliberately blur the line between the voluntary and involuntary public figure categories. For example, in Marcone v. Penthouse International Magazine for Men, the court found that the plaintiff

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\(^{233}\) Id. at 30.

\(^{234}\) Id. at 32–33 (emphasis added).

\(^{235}\) Id. at 33.

\(^{236}\) Id.

\(^{237}\) Marcone v. Penthouse Int’l Magazine for Men, 754 F.2d 1072, 1086 (3d Cir. 1985).
was a limited purpose public figure. In reaching that conclusion, the court noted that the plaintiff had attained notoriety for representing members of two motorcycle gangs, for having been indicted himself for conspiracy to distribute marijuana (which was subsequently withdrawn by the government), and for having non-representational contacts with the motorcycle gangs. Commenting on the involuntary public figure subcategory, the court said:

Some courts and commentators have questioned whether Gertz also created a third class of public figures: the involuntary public figure. In general, rather than creating a separate class of public figures, we view such a description as merely one way an individual may come to be considered a general or limited purpose public figure. Thus, to the extent a person attains public figure status by position, status, or notorious act he might be considered an involuntary public figure. The court added that "if [the plaintiff's] actions are sufficient to transform him into a limited public figure, it is of no moment that Marcone did not desire such status." Then the court reasoned that the "purpose of the first amendment would be frustrated if those persons and activities that most require public scrutiny could wrap themselves in a veil of secrecy and thus remain beyond the reach of public knowledge."

i. Decision Avoidance.—Some courts, almost with a sigh of relief, assiduously avoid deciding the question of the scope of the involuntary public figure subcategory. For example, in Flowers v. Carville, the court found that Jennifer Flowers was a voluntary public figure with respect to the controversy over alleged statements that tape-recordings with President Clinton were "doctored" or "selectively edited." The court then remarked

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238 Id.
239 Id. at 1076.
240 Id. at 1084 n.9.
241 Id. at 1086.
242 Id.; see also Rosanova v. Playboy Enters., Inc., 580 F.2d 859, 861 (5th Cir. 1978) ("In our view of the law resulting from the inevitable collision between First Amendment freedoms and the right of privacy, the status of public figure Vel non does not depend upon the desires of an individual. The purpose served by limited protection to the publisher of comment upon a public figure would often be frustrated if the subject of the publication could choose whether or not he would be a public figure.").
243 Flowers v. Carville, 310 F.3d 1118, 1129 n.7 (9th Cir. 2002); see also Deupree v. Iliff, 860 F.2d 300, 304 (8th Cir. 1988) ("Although Deupree 'played a[n] ... involuntary[] role,' ... we need not decide whether she falls within that class of individuals who ... [are] drawn into a particular controversy," thereby becoming limited-purpose public figures.).
244 Flowers, 310 F.3d at 1127, 1129.
that "[w]e can therefore stay clear of the intercircuit conflict over purely involuntary public figures."245

3. Dun & Bradstreet: Overt Reemergence of Content-Based Limitations.—In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*246 the Supreme Court concluded that the second core holding of *Gertz*—"that a [s]tate could not allow recovery of presumed and punitive damages [in defamation cases] absent a showing of 'actual malice'"247 (knowledge or reckless disregard)—did not apply unless the allegedly defamatory statement involved a matter of public concern.248 The Court narrowly interpreted *Gertz*, saying that nothing in that opinion "indicated that this same balance would be struck regardless of the type of speech involved."249 The result was the sudden surfacing of a content-based dimension that had until then lurked occultly in the analytical crawl spaces beneath the status-of-the-plaintiff rule. Although technically *Dun & Bradstreet* addressed only the second core holding of *Gertz*,250 its

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245 *Id.* at 1129 n.7 (citing the *Dameron* and *Wells* cases, which are discussed *supra* Parts II.B. subparts 2b and 2e, to illustrate the conflict).
247 *Id.* at 756.
248 *Id.* at 753. Although Justice Powell was joined by only two other justices (Rehnquist and O'Connor, JJ.) in his opinion, his rule still represented the majority of the Court because two additional justices, Chief Justice Burger and Justice White, brought support for the Powell position to five. Recall from their dissenting opinions in *Gertz* that Chief Justice Burger and Justice White disapproved of *Gertz* and preferred a position reducing the scope of First Amendment limitations. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 355, 370 (1974) (Burger, C.J., and White, J., dissenting).
249 *Dun & Bradstreet, Inc.*, 472 U.S. at 756–57. The Court elaborated:

> We have never considered whether the *Gertz* balance obtains when the defamatory statements involve no issue of public concern. To make this determination, we must employ the approach approved in *Gertz* and balance the State's interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression . . . .

> . . . We have long recognized that not all speech is of equal First Amendment importance. It is speech on "'matters of public concern'" that is "at the heart of the First Amendment's protection."

*Id.* at 756–57 (citing First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978) (footnote omitted)).

250 The Court's language was ambiguous and vacillating. Initially, Justice Brennan stated the question as "whether this rule of *Gertz* applies when the false and defamatory statements do not involve matters of public concern." *Id.* at 751. But, later in his opinion, Justice Brennan seemed to invite a broader reading of the Court's analysis, one that would require a finding of a matter of public concern before either of the *Gertz* restrictions applied. *Id.* at 757 Here, he referred to the question broadly as "whether the *Gertz* balance obtains when the defamatory statements involve no issue of public concern." *Id.* Ultimately, Justice Brennan returned to a narrow scope, stating: "we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of 'actual malice.'" *Id.* at 761. In
matter-of-public-concern qualification probably narrows the scope of both holdings of *Gertz*, including the requirement of at least some level of fault in claims by private plaintiffs, although it remains unclear.

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a footnote to this holding, however, Justice Brennan again paints more broadly, saying "what the *Gertz* language indicates is that the State's interest is not substantial relative to the First Amendment interest in public speech." *Id.* at 761 n.7. This latter language may imply that no constitutional restrictions on defamation apply "on purely private matters." *Id.*

The Court in *Dun & Bradstreet* did not expressly spell out whether its "matter of public concern" requirement applied to both of the core First Amendment-based limitations adopted in *Gertz*, or only to the second one—related to presumed and punitive damages. *Dun & Bradstreet, Inc.*, 472 U.S. at 761. The Court's language in subsequent cases seems to support construing *Dun & Bradstreet* broadly as leaving all defamation rules up to states when not dealing with matters of public concern. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20-21 (1990) ("[W]here a statement of "opinion" on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth ... [W]here such a statement involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault as required by *Gertz*." (footnote omitted)); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768-69, 774 (1986) (hedging at first, saying "we hold that, at least where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false[,]" but then stating that "[W]hen the speech is of exclusively private concern and the plaintiff is a private figure ... the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape"); see also *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1196 (9th Cir. 1989) (stating that "[I]t is clear recently, in *Dun & Bradstreet* ... a majority of the Justices opined that defamatory statements of untrue fact contained in private figure/private concern speech are unprotected by the first amendment"); *Mutatsis v. Erie Ins. Exch.*, 775 F.2d 593, 595 (4th Cir. 1985) ("[A] majority of the [*Dun & Bradstreet*] Court ruled that the principles of *New York Times* and *Gertz* had no application where the speech concerned no public issue but was speech solely in the individual interest of the speaker and was on a matter of purely private concern."); *Neill Grading & Constr. Co. v. Lingafelt*, 606 S.E.2d 734, 739 (N.C. Ct. App. 2005) (interpreting *Dun & Bradstreet* as holding that "where the plaintiff is a private figure, and the speech at issue is of private concern, a state court is free to apply its governing common law without implicating First Amendment concerns") (citing *Dun & Bradstreet*, 472 U.S. at 763). One court even held that liability could be imposed for defamatory statements uttered with common-law malice rather than actual malice if the statement did not involve public officials, public figures, or matters of public concern. *See Johnson v. Johnson*, 654 A.2d 1212, 1215-16, 1216 n.1 (R.I. 1995) (stating in dicta—since the "defendant [had] not preserved the federal constitutional issues"—that the constitutional limitation was "not applicable to the case at bar because we are not dealing with public officials, public figures, or even matters of public concern.").

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251 See *Taylor, supra* note 12, at 774-75 (stating that it remains an open question whether
In its overt introduction of a content-based, matter-of-public-concern requirement as an integral part of the constitutional matrix in *Dun & Bradstreet*, the Court ignored the fact that *Gertz* had assiduously repudiated a content-based approach. Recall *Gertz*'s rejection of the *Rosenbloom* plurality with the following erstwhile language admonishing against a case-by-case, content-driven approach:

Theoretically, of course, the balance between the needs of the press and the individual’s claim to compensation for wrongful injury might be struck on a case-by-case basis. As Mr. Justice Harlan hypothesized, “it might seem, purely as an abstract matter, that the most utilitarian approach would be to scrutinize carefully every jury verdict in every libel case, in order to ascertain whether the final judgment leaves fully protected whatever First Amendment values transcend the legitimate state interest in protecting the particular plaintiff who prevailed . . . .” But this approach would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an ad hoc resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application . . . .

. . . . And it would occasion the additional difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of “general or public interest” and which do not-to . . . . We doubt the wisdom of committing this task to the conscience of judges. 253

The *Dun and Bradstreet* case not only resurrected a content-based test, but crucially raised the stakes of a determination of the absence of a matter of public concern. Instead of applying the matter-of-public-concern inquiry as a threshold for imposing the requirement of a finding of knowledge or reckless disregard (as proposed in *Rosenbloom*), *Dun & Bradstreet* employed the public concern inquiry as a threshold precondition for applying the limitation on defamation contemplated in the second core holding of *Gertz*. Thus, under *Dun & Bradstreet*, the absence of a public concern meant that not even the requirements of *Gertz* (or at least not some of them254) would apply to restrain state defamation law, which raises the specter of some state attempting to apply strict liability in a defamation claim.

If one takes the Court’s pre-*Dun & Bradstreet* language at face value, the constitutional limitations on defamation depended on a unitary test focused

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254 See supra note 216.
exclusively on the status of the plaintiff. The Court's language in *Gertz* had already expressly repudiated the content-based approach of *Rosenbloom*. Other opinions by the Court had also referred to the rejection of a content-based rule for defining constitutional limitations on defamation claims. But, that changed with *Dun & Bradstreet*. The new post-*Dun & Bradstreet* reality was also evident in *Hepps*, where the Court took cognizance of "two forces that may reshape the common-law landscape to conform to the First Amendment. The first is whether the plaintiff is a public official or figure, or is instead a private figure. The second is whether the speech at issue is of public concern." The reality of *Dun & Bradstreet* is the overt re-emergence of content as a major driver in First Amendment defamation jurisprudence, which is also evident in a largely overlooked opinion by Justice Brennan. In *Lorain Journal Co. v. Milkovich*, Justice Brennan dissented from the decision of the Court to deny certiorari with respect to a decision of the Ohio Supreme Court classifying a plaintiff as a private figure. He wrote: "Our decisions in this area rest at bottom on the need to protect public discussion about matters of legitimate public concern."

With the recrudescence of an overt content-based component came the challenge of trying to figure out what should and should not be deemed a matter of "public concern." The opinion in *Dun & Bradstreet* did little to assuage concerns voiced in *Gertz* and elsewhere about the inherent amorphousness of the concept of "public concern." The Court began with a boilerplate recitation that "[w]hether...speech address[ed] a matter of public concern must be determined by [the expression's] content, form, and context...as revealed by the whole record." The Court then addressed the specific speech at issue (which was a credit report), and empha-

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255 *See Time, Inc. v. Firestone, 424 U.S. 448, 456 (1976) (stating that Gertz had eschewed "a subject matter test for [on]e focusing upon the character of the defamation plaintiff"); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 499 n.2 (1975) (referring to the Court's abandonment of the "(matter) of 'general or public interest' standard as the determinative factor for deciding whether to apply the New York Times [sic] malice standard to defamation litigation brought by private individuals.")); *Lewis, supra* note 12, at 768 (*Gertz* rejected the subject matter test).

256 *Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1986).* The Court in *Hepps* held that "at least where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover without also showing that the statements at issue are false." *Id.* at 768–69.

257 *Lorain Journal Co. v. Milkovich, 474 U.S. 953, 953 (1985) (mem.)* (Brennan, J., dissenting from decision to deny petition for certiorari). The Court eventually reviewed the Ohio case on other grounds relating to First Amendment significance of the fact-opinion dichotomy in defamation. *See Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990)* (holding that "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation" or that cannot reasonably be interpreted as stating actual facts "will receive full constitutional protection").

258 *Milkovich, 474 U.S. 953.*


sized that it "was speech solely in the interest of the speaker and its spe-
cific business audience" and "was made available only to five subscribers,
who, under the terms of the agreement, could not disseminate it further." The Court also noted that this type of speech was "hardy and unlikely to
be deterred by incidental state regulation," that it was "more objectively
verifiable," and that it was responsive to powerful market incentives to
be accurate. The Court then virtually assured future courts would engage
in unpredictable ad hoc analyses, saying that there was "simply no credible
argument that this type of credit reporting requires special protection to
ensure that 'debate on public issues [will] be uninhibited, robust and wide-
open.'"

III. Thesis

Tethering the scope of constitutionally mandated limitations on state defa-
mation law to the status of the plaintiff and the content of the communica-
tion has been improvident. It is time to extend the scope of the beneficent
limitations announced in the New York Times and in several of its sequela,
including Hepps and Milkovich, to all defamation claims irrespective of the
status of the plaintiff and the content of the speech. Accordingly, all plain-
tiffs in all defamation cases should be required—in addition to satisfying
the elements of applicable state law—to prove with convincing clarity that
the defendant published the alleged defamatory statements with knowl-
edge of their falsity or reckless disregard of their potential falsity, that the
statements were untrue, and that the statements were provably false state-
ments suggesting actual facts.

The premise that public figures have voluntarily accepted the risk of
defamation, or that it goes with the territory, is nothing more than a handy
fiction. The courts indulge in it to demonstrate that the First Amendment
is secure and that states' rights to protect the reputations of their citizens
(and the interests of those representing clients on both sides of this dance)
are respected. When it comes to constitutional rights, the shadowy gap be-
tween the conception and the reality is too often papered over by a reassur-
ing legal bromide. Behind this Potemkin village lies a disjunction between
rights and obligations, with "rhetorical emphasis . . . on the importance of
the right; the obligation is a byproduct, an after-thought . . . ." And so it

260 Id. at 749–50.
261 Id. at 750.
262 Id. at 762.
263 Id.
264 Id. at 762–63.
265 Id. at 762 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).
266 Susan P. Koniak, Through the Looking Glass of Ethics and the Wrong with Rights We Find There, 9 GEO. J. LEGAL ETHICS 1, 10, 23–24 (1995); see generally John C. Jeffries, The Right-
is when it comes to discerning the contours of the limited purpose public figure, a concept subject to widely divergent views.\textsuperscript{267} The public figure concept is also too amorphous and unpredictable to assuage the chill of publishers.\textsuperscript{268} Not only is the voluntariness of public figures an ill-defined and unpredictable fiction, but whether or not one happens to be deemed a public figure should simply not control the scope of First Amendment safeguards. If one then adds to this brew the vague possibility of involuntary public figures, the whole voluntary-goes-with-the-territory-if-you-can't-stand-the-heat idea becomes suspect.

What was said of the status-based analysis is also true for the content of the speech analysis. The Court in \textit{Dun \& Bradstreet} embossed a new "matter of public concern" overlay onto the line marking the reach of at least some First Amendment constitutional limitations on state defamation law. This seems fundamentally dissonant with the underpinnings of the First Amendment. The question of whether a statement relates to a matter of public concern is fraught with uncertainty. First, the doctrinal reach of the "public concern" prerequisite is unclear. Does it apply only to the \textit{Gertz} First Amendment limitations on presumed or punitive damages, or does it also extend to the more fundamental requirement of plaintiff's proof of fault and falsity in defamation?\textsuperscript{269}

Second, the range of plaintiffs to which the public concern requirement applies is unclear. Does the requirement apply only to private plaintiffs,

\textsuperscript{remedy Gap in Constitutional Law, 109 YALE L.J. 87, 87 (1999) (discussing the "right-remedy gap," and observing that "[t]he distance between the ideal and the real means that there will always be some shortfall between the aspirations we call rights and the mechanisms we call remedies").

\textsuperscript{267} Nichols, supra note 92, at at 76; see id. at 79 (noting the "widely divergent" views on the meaning of the involuntary public figure references in \textit{Gertz}).

\textsuperscript{268} See Dombey v. Phoenix Newspapers, Inc., 724 P.2d 562 570 (Ariz. 1986) (noting that "no bright line can be drawn."). Inconsistent results only add to a publisher's confusion about how to interpret the public figure concept. For example, in the highly publicized defamation litigation arising out of a custody dispute involving the daughter of two physicians, two courts came out differently on the public figure issue. \textit{Compare} Foretich v. Advance Magazine Publishers, Inc., 765 F. Supp. 1099, 1108, 1109 (D.D.C. 1991) (grandmother in a highly publicized child visitation dispute was, "[a]t the very least" an involuntary limited purpose public figure), \textit{with} Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1551, 1558, 1563, 1564 (4th Cir. 1994) (holding that grandmother's public comments and appearances in a custody dispute were merely "reasonable public replies" to accusations of serious sexual misconduct and were not sufficient to render her a limited-purpose public figure, and tacitly rejecting by its silence, except for quoting \textit{Gertz}, classifying her as an involuntary public figure).

\textsuperscript{269} See supra notes 210–29 and accompanying text (discussing unresolved questions about the scope of \textit{Dun \& Bradstreet}).
or does it extend to all plaintiffs, public and private figures alike? The Supreme Court has not offered much useful guidance here either.

Third, the Court has never offered meaningful direction for deciding when a communication should or should not be deemed a matter of public concern. In truth, the notion of public concern defies meaningful ob-

270 See Arlen W. Langvardt, Media Defendants, Public Concerns, and Public Plaintiffs: Toward Fashioning Order from Confusion in Defamation Law, 49 UNIV. PITT. L. REV. 91, 125 (1987) ("The question is whether, in cases involving public official or public figure plaintiffs, the constitutional fault and proof of falsity rules previously imposed on such plaintiffs are to be regarded as inapplicable if the defendant's statement did not deal with a matter of public concern.") (footnote omitted). Professor Langvardt adds:

Of all the potential ramifications of the renewed public concern focus exemplified by the Dun & Bradstreet and Hepps decisions, the most troublesome is the prospect that the public concern-private concern determination will be explicitly required, even in public plaintiff cases, as one of the triggering factors in determining whether the plaintiff must satisfy the constitutional proof of fault requirements.

Id. at 133.

Some have opined that it might not even be possible for there to exist communications about public figures, without there being matters of public concern. See Dworkin v. Hustler Magazine Inc., 867 F.2d 1188, 1196-97 (9th Cir. 1989) ("we doubt that it is possible to have speech about a public figure but not of public concern"); Taylor, supra note 251, at 179 (stating that "it is doubtful whether it is possible to have speech about a public figure which is not also of public concern" (footnote omitted)).

271 For example, New York Times seems to have left the door open to application of the public concern threshold to public official when it qualified its holding as being applicable to defamatory falsehoods "relating to [the] official conduct" of the public official. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (stating that "[t]he constitutional guarantees require ... a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."). On the other hand, Hepps contains broadly sweeping language that seemed to assume that the public concern requirement extended to all plaintiffs, public and private. The Court stated: "[w]hen the speech is of public concern and the plaintiff is a public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law." Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1986). Similarly, in Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988), the Court articulated its holding without mentioning a "matter of public concern" precondition to constitutional limitations on liability:

We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice,' i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true.

Id.

272 See Langvardt, supra note 270, at 126 (stating that the Court injected the public
jectification. Given the inherent amorphousness of the *Dun & Bradstreet* three factor “content, form and context” formulation, it should come as no surprise that the Court never specified the relative weight of content, form, and context.273 One writer has commented that “[t]his test amounts to little more than an implied assertion by the plurality that no stated standards are necessary to guide courts in making the public concern-private concern determination, because judges will know a matter of public concern when they see it.”274 Lower courts have dutifully recited the “content, form, and context” catechism—ort of an obligatory “may I”—before proclaiming *ipse dixit* that a statement was or was not a matter of public concern.275

Fourth, the determination of whether the content of a statement will be deemed to be a matter of public concern will necessitate a case-by-case determination. This not only entails an onerous burden for the courts, but it is a dangerously subjective model. The current approach inevitably involves a process and outcomes that are unpredictable and subjective. It invites inconsistent results.276 Whether something is a matter of public concern is a function of the current winds, which causes the determination to be fanned in different directions by polycentric influences. The public concern question is inevitably time-bound and situational. Tying First Amendment protections to the ephemeral value perceptions of judges is fundamentally at odds with the essence of the First Amendment. As Justice Hugo Black noted, “[n]o suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression.”277

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273 See Lewis, supra note 12, at 785.

274 Langvardt, supra note 270, at 126.

275 See, e.g., Flamm v. Am. Ass’n of Univ. Women, 201 F.3d 144, 150 (2d Cir. 2000) (deciding that a selective directory of attorneys compiled by a non-profit was a matter of public concern after stating this determination is made by examining the “content, form, and context of [the] given statement.”).

276 See Taylor, supra note 251, at 178 (noting “the reality that different judges will interpret the same speech differently, thus creating a risk of inconsistent results,” and that “[a]llowing judges alone to freely define ‘public concern’ invites them to make personal judgments regarding the relative worth of speech . . . create[ing] the potential for the imposition of different rules on different speakers despite seemingly similar situations”).

277 Bridges v. California, 314 U.S. 252, 269 (1941). The language is in keeping with Justice Black’s strong beliefs about the inviolate nature of First Amendment protections. He is often associated with the phrase (or paraphrase of the First Amendment) that “no law means no law.” See New York Times Co. v. Sullivan, 376 U.S. 254, 297 (1964) (Black, J., concurring). In *Bridges*, the Court held it was unconstitutional for a court to find the petitioner in contempt for comments published in the newspaper concerning pending litigation. *Bridges*, 314 U.S. at 274-75. Justice Black framed the issue in terms of “the scope of our national constitutional policy safeguarding free speech and a free press.” Id. at 258.
Professor Langvardt refers to the "increasingly blurry yet technical constitutional law of defamation." Consider again the holding of *Dun & Bradstreet* that a credit report incorrectly indicating that the plaintiff had filed bankruptcy was not a matter of public concern. Reflect on that conclusion against a backdrop of the collapse of Enron and more generally of our debt-ridden society, economy, and government, and our under-funded pension and retirement programs. In light of those considerations, Professor Langvardt comments that "[o]ne is left to speculate about how a report of a company's alleged bankruptcy may be of only private concern, but a report of an individual's alleged sale of obscene material is of public concern." He cautions:

It is inevitable that the essentially standardless *Dun & Bradstreet-Hepps* [sic] approach to the public concern question will lead to ad hoc determinations on the constitutionally suspect bases of the relative value or importance of speech. Judges necessarily will consider their own personal notions of value or importance, and those personal ideas will not always coincide with those of the public, or even those of other judges. The resulting uncertainty and inconsistency on the public concern question will likely lead to the chilling of first amendment freedoms. Speakers, uncertain of where the seemingly arbitrary public concern line will be drawn, may elect to remain silent out of fear of the consequences . . . .

Finally, the line separating the status and content analyses is illusory. The question of the existence of a public controversy that is central to the limited purpose public figure category may mirror, to a significant extent, the matter-of-public-concern question. Despite the fact that the Court has occasionally sought to keep the ideas conceptually separate

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278 Langvardt *supra* note 270, at 94.
279 *Id.* at 131-32.
280 *Id.* at 127-28.
281 See Smith, *supra* note 111, at 1437 (opining that "most lower courts have incorporated a public or general concern question reminiscent of Rosenbloom [sic] into their limited purpose public figure analysis by assessing whether or not the cases involve a 'public controversy'").
282 See Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 167-68 (1979) ("A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention."); Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979) (stating that a defendant could not bootstrap plaintiff into becoming a public figure by dragging him into the national spotlight by the very communication that is the basis for the lawsuit because "[c]learly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure."); Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976) (rejecting attempts to "equate 'public controversy' with all controversies of interest to the public").

The Court, in the preceding cases, was addressing voluntary public figures, but a similar concern was expressed in *Wells v. Liddy* in the context of involuntary public figures. See *Wells v. Liddy*, 186 F.3d 505, 541 (4th Cir. 1999) ("The touchstone of involuntary public figure status
and to admonish us that public figure status may not be created by the alleged defamation itself, one wonders on what principled basis the two ideas—public controversy and matter of public concern—can or should be separated. They are inextricably intertwined. The public controversy issue for the purpose of deciding the status question of whether the plaintiff was a public figure, and the discrete public concern issue recognized in Dun & Bradstreet overlap and sometimes appear almost interchangeable despite the Court’s profession of their separateness. The differentiation of a public controversy and a matter of public concern is a frail, indistinct dichotomy. We are never sure about what these two concepts mean, or even whether they mean the same thing. Some post-Dun & Bradstreet cases have exacerbated the uncertainty with their imprecise use of language to denote “public concern.” Consider, for example, some of the terminology of Justice Brennan (the author of the New York Times opinion). Referring to the nature of the controversy in the Milkovich case, Brennan wrote oxymoronically that “[t]his was not a private matter of public concern merely to gossips.” The Gertz opinion itself uses the phrase “public issue” in place of controversy at one point.

Some state and lower federal court decisions contain language that facially seems to equate, or use interchangeably, the ideas of a “public controversy” and “public concern,” while others

283 See Hutchinson, 443 U.S. at 135 (“[t]o the extent the subject of his published writings became a matter of controversy, it was a consequence of the Golden Fleece Award. Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.”); see also supra note 246.

284 See supra note 246-47 and accompanying text.


286 Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974) (“He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public’s attention in an attempt to influence its outcome.”).

287 See, e.g., Prendeville v. Singer, 155 Fed. Appx. 303, 305 (9th Cir. 2005) (“A limited purpose public figure is a person who voluntarily injects himself or is thrust into a particularly public controversy or public concern, and thereby becomes a public figure for a limited range of issues.” (quoting Gertz, 418 U.S. at 351-52)); Dworkin v. Hustler Magazine Inc., 867 F.2d 1188, 1197 (9th Cir. 1989) (“An individual is a public figure not through involvement in mere ‘controversies of interest to the public,’ but only through participation in ‘public controversies’—i.e., matters of public concern.”); Gray v. St. Martin’s Press, Inc., No. 95-285-M, 1999 WL 813909, at *1, *3 (D.N.H. May 19, 1999) (“Finally, notwithstanding plaintiff’s efforts to narrowly circumscribe the scope of the ‘public controversy’ into which he thrust himself, each of the alleged defamatory statements ... relates directly to plaintiff’s lobbying activities, his access to powerful and influential Washington ‘insiders,’ and his demonstrated ability to shape public opinion on various issues of public concern.”); Schwartz v. Am. Med. Ass’n, 23 F. Supp. 2d 1271, 1274 (D.N.M. 1998) (quoting with approval Furgason v. Clausen, 785 P.2d 242, 338 (N.M. Ct. App. 1989)); Hibdon v. Grabowski, 195 S.W.3d 48, 60 (Tenn. Ct. App. 2005) (“In determining whether there is a public controversy, it is vital to ascertain whether the dispute existed as a public concern prior to the alleged defamatory comments.”);
use language that seems intent on keeping the phrases discrete and separate.\footnote{See Chadwick, supra note 121, at 1000-01. Chadwick proposes “that the determination of whether a defamatory statement implicates issues of public concern should be explicitly recognized as the basis for applying first amendment imitations to defamation actions.” Id. But, then he elaborates using the “public controversy” language. Thus, he describes his analysis as focusing on whether there is “a public controversy involved” and (in almost a status-based analysis) whether “the plaintiff’s involvement in the events giving rise to the controversy predate the making of the defamatory statement[.]” Id. at 1059.}

Neither the concept of public controversy nor the matter of public concern concept is sufficiently predictable to reassure the press, and certainly not predictable enough to head off a lawsuit or to assuage fear of defamation claims and the litigation costs that such prospects entail.\footnote{See, e.g., Wayment v. Clear Channel Broad., Inc., 116 P.3d 271, 284 (Utah 2005) (stating that, “in Hutchinson ... the Supreme Court made clear that a public ‘controversy’ is a concept distinct from a ‘matter of public concern.’”); Krauss v. Globe Int’l, Inc., 674 N.Y.S.2d 662, 664 (A.D. 1998) (“Significantly, in order to be considered a public controversy for this purpose, the subject matter must be more than simply newsworthy).} As aptly observed, “[i]t does little good to provide the media an additional measure of protection if the media cannot determine when it is being protected.”\footnote{Nichols, supra note 92, at 84. Referring in particular to the public concern issue, Taylor writes:}

The language of commentators also sometimes seems to equate the ideas. See Chadwick, supra note 121, at 1000-01. Chadwick proposes “that the determination of whether a defamatory statement implicates issues of public concern should be explicitly recognized as the basis for applying first amendment imitations to defamation actions.” Id. But, then he elaborates using the “public controversy” language. Thus, he describes his analysis as focusing on whether there is “a public controversy involved” and (in almost a status-based analysis) whether “the plaintiff’s involvement in the events giving rise to the controversy predate the making of the defamatory statement[.]” Id. at 1059.

\footnote{Nichols, supra note 92, at 84-85 (stating that as a result of “no clear test” and the “lack of a concrete and workable test,” the “media will have no meaningful standard by which to gauge its conduct.”); Taylor, supra note 251, at 153 (stating that “[d]espite pervasive rhetoric professing a deep national commitment to freedom of expression, the law of defamation has rendered the exercise of this freedom a hazardous activity”). As Justice Brennan stated:}

\begin{quotation}
[B]y allowing damages to be awarded upon a showing of negligence, thereby diminishing the “breathing space” allowed for free expression in the \textit{New York Times} case, the decision in \textit{Gertz} exacerbated the likelihood of self-censorship with respect to reports concerning “private individuals.” Consequently, the rules we adopt to determine an individual’s status as “public” or “private” powerfully affect the manner in which the press decides what to publish and, more importantly, what not to publish. \textit{Milkovich}, 474 U.S. at 954 (Brennan, J., dissenting) (citations omitted).
\end{quotation}

\begin{quotation}
\footnote{Nichols, supra note 92, at 84. Referring in particular to the public concern issue, Taylor writes:}

\begin{quotation}
[\textit{E}ven assuming that judges will know speech of public concern when they see it, such a “standard” provides the speaker with no reliable}
\end{quotation}
Anthony Lewis has written eloquently that "[t]he accommodation of conflicting interests is always complicated." But, perhaps it has been allowed to become too complex. Moreover, the need to decide the status and content issues under the bipartite test has multiplied the possible permutations. As Don Lewis explains:

[S]ince the Court now recognizes both a distinction between private and public plaintiffs and a distinction between speech not of public concern and speech of public concern, every defamation case can now be placed in one of four categories. The number of possible categories had previously been limited to two. Given the difficulty that courts have had with defamation cases to this point, one cannot hold too much hope of clearer and more logical results now that the number of categories into which each defamation case may be placed has been doubled.

Also, an approach that variously depends on the status of the plaintiff and the content of the communication may create a reciprocal hampering effect. Attempting to protect the First Amendment with a content-based prong focusing on the newsworthiness of the communication, and an attempt to uphold the reputation and autonomy of individuals with a status-driven emphasis on the plaintiff's voluntariness and conscious choice to accept potential scrutiny may skew both and achieve neither. The underlying interests in freedom of expression and reputation may diverge. And, the content and status inquiries may not be coterminous. Thus, the pressure to accommodate one may influence or impinge upon the other.

Over the years, a variety of proposals have emerged to address the uncertainty in the constitutional defamation jurisprudence. Some commentators, for example, have argued in favor of a unitary test to determine the scope of constitutional limits on defamation. Accordingly, some recommend using only a status-based test. Others suggest using only a content-based test. Some would simply apply a constitutional limit to all defamation but

guidelines with which to evaluate his speech prior to publication. Thus, the very existence of this distinction, from which different degrees of protection will flow, creates a chilling effect. An author may forgo the risk of speech altogether for fear of being wrong about the category into which his speech falls.

Taylor, supra note 251, at 178-79.

291 Lewis, supra note 26, at 244.

292 Lewis, supra note 12, at 782. More generally, K.C. Cole observes in connection with the nature of entropy, that "the more factors in the equation... the less likely their paths will coincide in an orderly way." Cole, supra note 3.

293 See Langvardt, supra note 270, at 128-29 (commenting that "the solution effecting a vastly more reliable protection of the first amendment interests of speakers is to opt for a set of fault requirements hinging on the status of the plaintiff—as was the situation after Gertz [sic] and its constitutional predecessors but before Dun & Bradstreet [sic].").

294 See Chadwick, supra note 121, at 1000-01 (proposing "that the determination of
set the bar lower than the *New York Times* "actual malice" requirement. Yet others tinker with the constitutional parameters in other ways, suggesting changes in the various tests, such as "shoring up the multitude of judicial tests" applied to public figures or by explicitly suggesting abolishing the involuntary public figure subcategory in connection with the status-based analysis. None of these go far enough and sometimes are so ambivalent and indeterminate that they might actually compound the existing confusion. The sensible response is not to attempt to adopt a single factor rule—be it status or content—with all its inherent slipperiness. Nor is it to narrow the First Amendment protection even further by simply redefining the classes of public figures into a mellowy formlessness. It is due season for a more definitive construct.

Freedom of expression is the life breath for the interchange of ideas and for an informed citizenry in a free democratic society. Justice Cardozo called it "the matrix, the indispensable condition, of nearly every other form of freedom." One of the cardinal imperatives of a thoughtful First Amendment jurisprudence is precision "so that speakers know in whether a defamatory statement implicates issues of public concern should be explicitly recognized as the basis for applying first amendment limitations to defamation actions"); *supra* note 251 and accompanying text; *see also* Hopkins, *supra* note 93, at 46. Hopkins would subsume both limited purpose public figure and involuntary public figures into what he characterizes as a "Rosenbloom Rule," whereby "all persons who are actively involved in matters of general or public concern, and who bring libel actions based on discussion of their involvement in those matters, would be required to prove actual malice ...." *Id.* Hopkins seems, however, to gravitate toward a dual-focus rule that would to a significant extent depend on the status of the plaintiff. His proposal would, for example, depend on "the nature and extent of a libel plaintiff's involvement in a matter of public concern" and "whether the plaintiff was sufficiently involved with the issue for the actual malice rule to attach," adding that the "[k]ey to such a determination would be whether the plaintiff assumed an increased risk of criticism by taking some action." *Id.* at 47-48.

295 See Taylor, *supra* note 251, at 183 ("To mitigate the chilling effect associated with a strict liability standard, negligence should be the minimal level of fault required for a plaintiff to recover in a defamation action.").

296 Smith, *supra* note 111, at 1449-50 (endorsing the *Waldbaum* analysis if "strictly construe[d]").

297 See Nichols, *supra* note 92, at 72 (stating that in light of the Court's language "in *Firestone, Hutchinson, and Wolston*, the involuntary class should be abolished").

298 See Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988) (observing that "[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern"); *see also* Stanley Ingber, *The Marketplace of Ideas: A Legitimising Myth*, 1984 DUKE L.J. 1, 3 (discussing the background of the "marketplace of ideas" metaphor in First Amendment jurisprudence, and noting that "[t]his theory assumes that a process of robust debate, if uninhibited by governmental interference, will lead to the discovery of truth, or at least the best perspectives or solutions for societal problems").


300 See SMOLLA, *supra* note 92, §§ 4:59, 4:59 n.1 (stating that "[p]recision is a pervasive
advance what speech is and is not permitted, thereby avoiding the self-censorship caused by uncertainty." The Supreme Court has acknowledged that "uncertainty as to the scope of the constitutional protection can only dissuade protected speech—the more elusive the standard, the less protection it affords." But, despite the candor in those words, the doctrinal dissolution continues. The absence of predictable and workable guidance from the Court entails serious costs for those who may be subject to defamation liability and protracted litigation, and to those who must apply the porous rules. Extending the New York Times requirements to all defamation claims will help to abate the increasing doctrinal complexity and uncertainty contributing to the corrosion of First Amendment freedoms caused by the chill of indeterminate defamation litigation. Eliminating the need to classify the plaintiff’s status or the statement’s content thereby promotes the beneficent interests served by freedom of expression and its central theme of modern first amendment analysis,” and referring to the “precision principle” as one of the modern “[F]irst [A]mendment constant[s]”).

301 Id. § 4:59. Even those advocating a more contextual, less rule-bound approach to freedom of speech concede that it is “open to the criticism that it fails to provide the degree of certainty essential to secure freedom of speech from the chilling effect of perceived regulation and that it affords unbridled judicial discretion.” “Trollinger, supra note 40, at 228.


303 See Frederick Schauer, Categories and the First Amendment: A Play in Three Acts, 34 Vand. L. Rev. 265, 299 (1981) (stating that the “problem of notice can occur because the more flexibility the trial court has, the less certain anyone can be in advance of the likely result in a particular case”).

304 I previously explored some of the analysis that follows. See generally King, supra note 39, at 382–86.

305 See C. Edwin Baker, Human Liberty and Freedom of Speech 5, 6–12, 47–54 (1989) (identifying the values protected by freedom of expression, and favoring a model based on a protected “arena of individual liberty” serving “individuals’ self-realization and self-determination without improperly interfering with the legitimate claims of others”); Thomas I. Emerson, Toward a General Theory of the First Amendment 3, 3–15 (1966) (identifying First Amendment values, including “assuring individual self-fulfillment, . . . attaining the truth, . . . securing participation . . . in social, . . . [and] political, decision-making, and . . . maintaining the balance between stability and change in the society”); Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People 26 (1960) (stating that the “welfare of the community requires that those who decide issues shall understand them”); Martin H. Redish, Freedom of Expression: A Critical Analysis 11 (1984) (saying the guarantee of free speech serves “individual self-realization,” the “only true value”); Clay Calvert, The Voyeurism Value in First Amendment Jurisprudence, 17 Cardozo Arts & Ent. L.J. 273, 273–74 (1999) (summarizing reasons for protecting expression under the First Amendment); Chevigny, supra note 47, at 920 (reasoning that inhibiting freedom of expression may impede the evolution of language, saying “[a] right to free expression need not be derived, as it has been traditionally, from . . . personal autonomy . . . and free trade in ideas, but may also be rooted in the nature of language itself” and “that the meaning of words is a social matter, depending on . . . a dialogic process among participants” and therefore “society should afford its citizens a right to participate in the dialogue”); Alexander Meiklejohn, The First Amendment is an Absolute, 1961 Sup. Ct. Rev. 245, 255 (viewing the First Amendment as protecting “the
role in a free society sustained by the vital interchange of ideas.\textsuperscript{306}

There is a direct correlation between the doctrinal uncertainty and the "chilling effect"\textsuperscript{307} on freedom of expression. The so-called "fear product"\textsuperscript{308} comes in large measure from the specter of potential liability, especially liability imposed inappropriately.\textsuperscript{309} Both the real threat of liability and its perception are magnified by the imprecision and vagueness of controlling legal principles.\textsuperscript{310} Deterrence is a function of the perceived threat as compared to the incentives and benefits of engaging in the subject activity.\textsuperscript{311} The threat of over-deterrence is heightened for news publishers because of market asymmetry due to the inherently short shelf life of the news.\textsuperscript{312} The
chilling effect is reified in self-censorship when defamation law discour-
ages communication.\textsuperscript{313}

The approach suggested by this Article is also responsive to broader
concerns about the increasingly impenetrable legal complexity of the
American civil justice system in general.\textsuperscript{314} Professor Peter Schuck identifies “indeterminacy” as an important marker of this legal complexity.\textsuperscript{315}

Adjudicative consistency is necessary for “advantageous predictability
in the ordering of private conduct.”\textsuperscript{316} Professor Anthony D’Amato explains that “[l]egal certainty decreases over time.”\textsuperscript{317} He adds that “[r]ules and
principles of law become more and more uncertain in content and in
application because legal systems are biased in favor of unraveling those rules and principles.”\textsuperscript{318} As a result, “lawyers’ ability to predict for clients how
their actual or potential cases might be resolved by a court is becoming increas-ingly uncertain.”\textsuperscript{319} The persistence of this doctrinal entropy and con-
comitant uncertainty may also be a function of psychological biases of not

\textsuperscript{313} Lidsky, supra note 40, at 888; Jeffries, supra note 266, at 90 (noting that “limiting money
damages for constitutional violations fosters the development of constitutional law” and “facilitates constitutional change by reducing the costs of innovation”).

\textsuperscript{314} See, e.g., Richard A. Epstein, Simple Rules for a Complex World (1995); Peter
H. Schuck, Legal Complexity: Some Causes, Consequences, and Cures, 42 Duke L.J. 1, 50 (1992). According to Schuck, such costs include transaction costs, which he likens to “friction in
mechanics, they are ubiquitous and limit the system’s performance,” and governance costs. \textit{Id.} at 19–20. Concern about complexity in the American legal system is nothing new. Indeed, the

\textsuperscript{315} Schuck, supra note 314, at 4. Indeterminate rules are “usually open-textured, flexible,
multi-factored, and fluid.” \textit{Id.}

\textsuperscript{316} Christopher J. Peters, Foolish Consistency: On Equality, Integrity, and Justice in Stare

\textsuperscript{317} Anthony D’Amato, Legal Uncertainty, 71 Cal. L. Rev. 1, 1 (1983).

\textsuperscript{318} \textit{Id.} He defines “law” as meaning “not some metaphysical abstraction, but rather what
the law means to the average person: a prediction of official behavioral reaction to what she
plans to do (or avoid doing).” \textit{Id.}

\textsuperscript{319} \textit{Id.} at 3.
only attorneys but also of judges and legal commentators, particularly law professors.

While it may not be possible to eliminate doctrinal uncertainty altogether, one way to mitigate it "is to repeal as many of the rules as possible," which D'Amato calls "delegalization." This Article's proposal appropriately mediates these dynamics by scrapping dependence on categorization of the plaintiff's status and the statement's content.

Not only is the current regime too uncertain and unpredictable to serve

320 D'Amato comments:

[P]ractitioners of the law have a deep psychological investment in the assumption that their activities render the law increasingly certain . . . [T]hese beliefs are rationalizations . . . [T]he increasing volume of litigation and rulemaking results in internal contradictions, a multiplication of ambiguities, and normative specifications that invite persons to avoid rules of law by planning their activities around them . . . [T]he sheer volume of reported cases makes it increasingly difficult for any one court in any one case to consider all relevant precedents . . .

. . . . .

. . . Under information theory, the information value of any given message increases as the actual message diverges from the predicted message. Because any lawyer's prediction of official legal reaction to a client's fact situation is a prediction of the content of the message that will be received from that official source, a result that contradicts the informed lawyer's prediction will have higher information value.

Id. at 7, 19.

321 D'Amato opines (albeit somewhat cynically):

Some judges, whether consciously or not, desire status, fame, and greatness in their profession. Routinely following precedent and always acting predictably do not often lead to notice and acclaim. There is little "news value" in decisions that reach completely expected results. Moreover, by reaching predicted results, the judge adds little or nothing to the substantive content of the law, and thus the judge loses some of the gratification that would come from the feeling of "making a contribution" to the law. Hence, we can reasonably infer, in the aggregate, a self-interested tendency on the part of the judiciary to maximize the information value of its services, which can be accomplished by rendering decisions against the party that was expected to win. Even if judges do this only a small part of the time, the net effect is still enough to constitute a force for rendering law increasingly uncertain.

Id. at 19–20.

322 See id. at 21–22 (saying that "[o]ther things being equal, a professor of law will reap greater professional rewards by challenging the results of a line of cases or by stating a new theory than by merely restating the law. For a new theory has information value; a restatement, by contrast and almost by definition, is not noteworthy.").

323 D'Amato, supra note 317, at 46.

324 Id. at 46.
the First Amendment freedom it espouses, but its subjective methodology for assessing the public-private status of the plaintiff and the public's concern with the content of the speech invites corrosive value judgments. Woolly classificatory analyses like the status of the plaintiff and the content of the speech are doubly dangerous because they deceptively reassure judges that they are making the "right" decision. The late Charles Black believed that mistake and arbitrariness "are reciprocally related." He wrote that "[a]s a purported 'test' becomes less and less intelligible, and hence more and more a cloak for arbitrariness, 'mistake' becomes less and less possible—not . . . because of any certainty of one's being right, but for the exactly contrary reason that there is no 'right' or 'wrong' discernible." Similarly, D'Amato claims that "[w]hat is really undesirable about uncertain rules of law is that they leave persons unsure of their entitlements while affording unfettered discretion to official decisionmakers." Uncertain rules ominously threaten to move our society from one under law "to a regime of official discretion." Trollinger has written about the pernicious implications of the current praxis:

The marketplace mechanism of . . . discriminating among forms of speech necessarily requires a political judgment of value. Speech cannot neutrally be excluded from the First Amendment ambit on the basis of an impartial conclusion that it does not contribute to the marketplace of ideas. All speech contributes in some manner to the process of market interchange and competitive discourse. Some speech simply does not contribute in the manner or of a quality some decisionmaker deems advisable or appropriate

An illusion of neutrality is more destructive of speech freedom and ultimate liberty than overt assumption of responsibility and overt admission of choice. The pretense can only frustrate aspirations and impede the path to humanity, aggravating, rather than minimizing and reconciling, the social differences and inequalities that permeate society.

The neutrality of marketplace theory is, thus, more than illusory. It is affirmatively and selectively destructive of the freedom of the disempowered, the subordinated, the impoverished, and the socially injured.

326 Id.
327 D'Amato, supra note 317, at 6.
328 Id. at 7.
IV. Conclusion

The Supreme Court's decision in *New York Times v. Sullivan*\(^\text{330}\) has produced a profligacy of conceptual sequelae beset with doctrinal complexity and uncertainty. The promise of *New York Times* has faltered almost from the beginning as the courts sought to define the reach and scope of First Amendment limitations on state defamation law. In retrospect, it was easy to understand why in 1964 the Court moved aggressively to stem the litigious threat to freedom of expression at such a crucial time in America's collective awakening to the scourge of racial injustice. Sadly, the promise of *New York Times*—that of assuring a legal climate free of the fear of liability imposed for expressions made without awareness of their falsity or a conscious indifference to their truth or falsity—has not been realized. *New York Times* planted the seeds of a constitutional garden from which ever-growing layers of doctrinal and decision-making complexity have sprouted.

*New York Times* heralded a fateful change in American defamation law. Although traditionally the law of defamation had been (and is still largely) a product of state law, the legal rules governing defamation since *New York Times* have been derived from two sources—state and constitutional principles. The majority opinion by Justice Brennan is celebrated as lifting the torch of freedom of expression by rescuing it from the "chilling" menace of defamation lawsuits. Why the promise of *New York Times* has not been realized may have many instrumental, conceptual, or transactional answers. Nevertheless, the reason must rest in large measure on conceptual impediments that have developed in its wake.

The first impediment stems from the courts' uncertainty, ambivalence, and wavering over the question of the extent to which the First Amendment limitations on defamation claims are determined by a status-driven test, by a content-based test, or by some sort of composite of the two. The post-*New York Times* evolution began with an ostensible commitment to a status-driven construct under which a plaintiff's burden in defamation would depend on that plaintiff's status—whether she was a public official or a private person. The *New York Times* rule was quickly extended to apply to public figures. From the beginning, however, the reality of the exclusiveness of a status-based rule for delineating the scope of First Amendment restrictions on defamation has been questionable. Imbedded in the voluntary public figure analysis is the requirement of an underlying public controversy, which inevitably calls for an assessment of the content of the subject matter. Additionally, the possibility of involuntary public figures requires consideration of content to an even greater extent.

Second, the boundaries and outlines of the public figure classification have been formless and ill-defined. The hirsute contours of the public fig-

ure-private figure dichotomy have been especially vague for the involuntary public figure subcategory.

Third, the exclusiveness of the plaintiff's status in determining the relevant constitutional rule has given way, at least in some respects, to an overtly binary matrix. Today, the level of constitutionally mandated limits on state defamation law depends on two variables: the status of the plaintiff—i.e., whether he was a private person or a public official or figure—and the content of the communication—i.e., whether it was a matter of private or public concern.\footnote{King, supra note 39, at 379–81.} Attempting to assess each component individually has proven frustrating enough, but taken together, the Court's constitutional bipartite schema has multiplied the uncertainty by increasing the permutations. Uncertainty stems not only from its inherent vagueness and the Court's ambivalence about the nature and role of status-based rules but also from doctrinal tension. The latter is a function of the reciprocal hampering effect in applying the often disparate focuses on status and content, and attempting to harmonize both the status of the plaintiff (driven by respect for the reputation and autonomy of individuals, with its uneven emphasis on voluntariness and conscious choice to accept potential scrutiny) and the content of the communication (with its newsworthiness focus impelled by First Amendment concerns). Tying the standards for defamation to both status and content issues has multiplied the possible permutations, compounding the uncertainty and unpredictability under the bipartite construct. This muddying of the waters is consistent with Professor D'Amato's observation that legal principles tend to become less, not more, certain over time,\footnote{See D'Amato, supra note 317.} and it is a prime example of doctrinal entropy that engenders uncertainty and difficulty in predicting outcomes.

Finally, defining the scope of the First Amendment safeguards in terms of status and content is too narrow, confining, and static a paradigm. It should not matter, for the purposes of the First Amendment, whether on any given day, a judge happens to deem or not deem a person a public figure. Nor should it matter whether a judge does or does not deem a topic a matter of public concern.

Rather than continue along a desultory path of trying to reconcile the dissonant drags of status and content in defining the scope of constitutional limitations on state defamation law, this Article proposes a finished solution. The Supreme Court should extend the constitutionally mandated requirement of proof of knowledge or reckless disregard, falsity, and a provably false statement suggesting actual facts to all defamation plaintiffs in all cases without regard to either the status of the plaintiff or the nature of the content of the defendant's communication. This proposition has the virtues of certainty, simplicity, and most importantly, affording decisive sup-
port for the rights of freedom of expression. It is transparent and elegant in its simplicity. It will, in a single stroke, end the current doctrinal entropy and offer meaningful reassurance to participants in communication.