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## HOW TO DO SURGERY ON THE CONSTITUTIONAL LAW OF LIBEL

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### I INTRODUCTION

Of late, the constitutional law of libel has become the focus of increasing dissatisfaction.<sup>1</sup> This dissatisfaction has taken various forms.<sup>2</sup> The argument below, however, is that the most crucial defect of constitutional libel law lies in the Court's continuing attempts to draw and utilize distinctions among public figure and private figure libel plaintiffs. The Court should abandon these attempts. Instead, the Court should attend, broadly and fundamentally, to the constitutionally vital distinction between libelous speech that does or does not address some matter of public interest and concern.

The argument below first emphasizes the constitutional logic underlying the Court's initial imposition of First Amendment limitations on the state tort law of libel.<sup>3</sup> The argument then critiques the Court's initial embrace of a supposedly fundamental but actually distracting distinction between public and private figure libel plaintiffs.<sup>4</sup> Interestingly, for a brief time, a divided Court returned to a focus on the underlying logic of putting First Amendment limits on the tort of libel,<sup>5</sup> only to then re-distract itself with a renewed focus on questions of public and private figure status.<sup>6</sup> Perhaps inevitably though, the Court's emphasis on public versus private figure status has been qualified, in limited ways, by recourse to the genuinely basic and more valuable distinction between speech

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1. For the most authoritative recent occasion, see the broad-ranging concerns briefly expressed by Justice Gorsuch in *Berisha v. Lawson*, 141 S. Ct. 2424, 2425–30 (2021) (Gorsuch, J., dissenting from denial of certiorari) (mem.).

2. For a sense of some of the major concerns, see Glenn Harlan Reynolds, *Rethinking Libel for the Twenty-First Century*, 87 TENN. L. REV. 465, 469–78 (2020).

3. See *infra* Section II.A.

4. See *infra* Section II.B.

5. See *infra* Section II.C.

6. See *infra* Section II.D.

that does or does not address some matter of public interest and concern.<sup>7</sup>

The argument below then catalogs some additional problems inherent in the Court's public versus private figure libel plaintiff distinction.<sup>8</sup> The argument then defends the essential priority of a focus on the public interest versus merely private interest nature of the subject matter of the libel defendant's speech.<sup>9</sup> A brief, but comprehensive, conclusion then follows.<sup>10</sup>

## II. THE DEVELOPMENT AND MISDIRECTION OF DOCTRINE IN THE MAJOR CASES

### A. THE COURT INITIALLY CHOOSES TO FOCUS ON THE STATUS OF PUBLIC OFFICIALS

Debates over First Amendment limitations on the state tort law of libel were given momentum in the landmark case of *New York Times Co. v. Sullivan*.<sup>11</sup> Famously, the *New York Times* case held that a public official, however defined, may not recover damages arising from "a defamatory falsehood relating to his official conduct unless he proves<sup>[12]</sup> that the statement was made<sup>[13]</sup> with 'actual malice'—that is, with knowledge that it was false or with reckless disregard<sup>[14]</sup> of whether it was false or not."<sup>15</sup>

Defamatory speech not addressing the libel plaintiff's official governmental conduct will typically be of reduced public interest. Of course, much speech on matters of public interest and concern in general will not also address the specific conduct of any particular public officials engaged in their official conduct. On the other hand, much speech addressing the official conduct of government officials, but not all such speech, should qualify as speech on a matter of public interest and concern.

The partial overlap between the category of speech addressing official conduct and the category of speech on matters of public interest and concern may have contributed to the intriguing fact that the Court's justification of its rule in *New York Times* focused largely, and quite sensibly, on the latter rather than on the former category.<sup>16</sup> The logic of the Court's landmark opinion in *New York Times* actually, and again quite rightly, draws more on the value of discussion of public issues in general than on the value of any critique of the

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7. See *infra* Section II.E.

8. See *infra* Part III.

9. See *infra* Part IV.

10. See *infra* Part V.

11. 376 U.S. 254 (1964).

12. A plaintiff must prove by clear and convincing evidence, rather than by a mere preponderance of the evidence or else beyond a reasonable doubt. See *id.* at 285–86.

13. The Court did not distinguish in this context between the media and nonmedia defendants in *New York Times*. See *id.* at 286.

14. This reckless disregard of the falsity of one's defamatory claims is to be judged mainly on a subjective, or state of mind, basis. See *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

15. *New York Times*, 376 U.S. at 279–80.

16. See *id.* at 269–71.

conduct of public officials in particular.<sup>17</sup>

Thus, the Court's logic in *New York Times* focused on "[t]he general proposition that freedom of expression upon public questions is secured by the First Amendment."<sup>18</sup> Freedom of speech and of the press "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."<sup>19</sup> Political change, let alone the broader category of social change, clearly extends far beyond critique of official conduct.

Even if we focus on political matters, however defined, the express logic of *New York Times* clearly transcends the mere criticism of official behavior. The Court thus declares that "the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system."<sup>20</sup>

The logic of *New York Times* thus clearly extends, on its own explicit terms, well beyond the presumed value of even inaccurate, "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."<sup>21</sup> The Court's logic in *New York Times* specifically embraced our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."<sup>22</sup> The speech at issue in *New York Times* was rightly categorized as "an expression of grievance and protest on one of the major public issues of our time."<sup>23</sup>

The concurring opinion in *New York Times* of Justices Black and Douglas<sup>24</sup> similarly emphasizes the discussion of "public affairs."<sup>25</sup> And the opinion of Justices Goldberg and Douglas rightly declares, broadly, that "[t]he theory of our Constitution is that every citizen may speak his mind and every newspaper express its view on matters of public concern."<sup>26</sup>

Justices Goldberg and Douglas thus join their colleagues in focusing broadly on "public affairs"<sup>27</sup> and on "public matters,"<sup>28</sup> above and beyond the conduct of public officials.<sup>29</sup> Justices Goldberg and Douglas refer in particular to Justice Douglas's extrajudicial declaration that a "main function of the First Amendment is to ensure ample opportunity for the people to determine and resolve public issues. Where public matters are involved, the doubts should be resolved in favor of freedom of expression rather than against it."<sup>30</sup>

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17. *See id.* at 270–71.

18. *Id.* at 269.

19. *Id.* (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

20. *Id.* (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

21. *Id.* at 270.

22. *Id.*

23. *Id.* at 271.

24. *Id.* at 293–97 (Black & Douglas, JJ., concurring).

25. *Id.*

26. *Id.* at 298–99 (Goldberg & Douglas, JJ., concurring in result).

27. *Id.* at 300.

28. *Id.* at 302.

29. *See id.*

30. *Id.* (quoting WILLIAM O. DOUGLAS, *THE RIGHT OF THE PEOPLE* 41 (1958)).

Doubtless the Court in *New York Times* decided the case before it and left a number of important issues outside the scope of its holding. The later cases addressing those unresolved issues clearly vary in their attention to, and consistency with, the explicitly cited foundations of *New York Times*.<sup>31</sup> But the logic of attending crucially to speech on matters of public interest and concern, rather than to the conduct of either public officials or of public figures outside the scope of public interest matters, is explicitly acknowledged in *New York Times*.<sup>32</sup> Attention to protecting speech on matters of public interest and concern, apart from any distinction between public and private figure libel plaintiffs, is clear in the case itself.<sup>33</sup>

The Court's first occasion to elaborate upon the practical meaning of *New York Times* arose in the context of determining who should count or not count as a "public official" subject to the actual malice rule of *New York Times*.<sup>34</sup> In *Rosenblatt v. Baer*, the Court acknowledged that it had not determined how far down in governmental rank or stature a libel plaintiff must be before the requirement to prove actual malice should no longer apply.<sup>35</sup>

The Court in *Rosenblatt* did not attempt to specify with any clarity the boundaries of the public official category in the libel context.<sup>36</sup> The term was thought to encompass "at the very least . . . those among the hierarchy<sup>[37]</sup> of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."<sup>38</sup>

Rather than attempt to draw any such a line, the Court in *Rosenblatt* instead recurred to the explicit logic of *New York Times* and in particular to the "profound national commitment to the principle that debate on public issue[s] should be uninhibited, robust, and wide-open."<sup>39</sup> The *Rosenblatt* Court thus rightly focused on the "strong interest in debate on public issues."<sup>40</sup>

More elaborately, Justice Douglas's concurring opinion in *Rosenblatt*<sup>41</sup> sharpened the focus on public issues rather than on public official status.<sup>42</sup> Justice Douglas began with a crucial focus on the value of "free discussion of

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31. See *infra* Sections II.B–E.

32. See *supra* notes 18–30 and accompanying text.

33. And thus need not be treated as merely one possible line of further development. See Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221 (referring to the Court's possible "invitation to follow a dialectic progression from public official to government policy to public policy to matters in the public domain," apart from any ranking or priority among these categories.); see also LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 8, 45–46 (1991) (discussing Kalven in this regard).

34. *Rosenblatt v. Baer*, 383 U.S. 75, 83 (1966).

35. See *id.* at 85.

36. *Id.*

37. It may be possible though for a government official to have no hierarchical superior, but in an insignificant office, and to fall outside the policy logic of requiring government officials to show actual malice with respect to criticism of their official performance.

38. *Rosenblatt*, 383 U.S. at 85.

39. *Id.* (emphasis added) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

40. *Id.*

41. *Id.* at 88–94 (Douglas, J., concurring).

42. See *id.* at 89–91.

public issues.”<sup>43</sup> Pointedly, Justice Douglas observed:

If the term ‘public official’ were a constitutional term, we would be stuck with it and have to give it content. But the term is our own; and so long as we are fashioning a rule of free discussion of public issues I cannot relate it only to those who, by the Court’s standard, are deemed to hold public office.<sup>44</sup>

More concisely, Justice Douglas sensibly attended instead to “whether a public issue, not a public official, is involved.”<sup>45</sup>

Justice Douglas then joined an opinion by Justice Black.<sup>46</sup> In a relatively narrow formulation, Justice Black declared that “the right to criticize a public agent engaged in public activities . . . should not[] depend upon whether . . . that agent is arbitrarily labeled a ‘public official.’”<sup>47</sup> This, by itself, might suggest merely that Justice Black was seeking a broad definition of public official, perhaps to encompass all public school teachers, all police officers, and all public bureaucrats engaged in public activities. But then, crucially, Justice Black explicitly expanded his concern to endorse “[a]n unconditional right to say what one pleases about public affairs” as “the minimum guarantee of the First Amendment.”<sup>48</sup> Once again, the largely superficial attention to questions of public official status distracts from a more constitutionally valuable focus on discussion of public affairs or public issues, however such matters are to be defined.

#### B. THE COURT THEN UNFORTUNATELY CHOOSES TO FOCUS ON DISTINCTIONS BETWEEN PUBLIC AND PRIVATE FIGURE LIBEL PLAINTIFFS

A much more severe and pervasive misvaluation and sheer distraction was then introduced into the constitutional law of libel by the case of *Curtis Publishing Co. v. Butts*.<sup>49</sup> This case extended the *New York Times* actual malice rule and other rules regarding public official libel plaintiffs to cases brought by what the Court referred to as “public figures.”<sup>50</sup> In addition to the *New York Times* requirements, the Court required public figures who are not also public officials to make a showing of the libel defendant’s “highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting . . . adhered to by responsible publishers.”<sup>51</sup>

The *Curtis Publishing* case could hardly be expected to address, let alone

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43. *Id.* at 89.

44. *Id.* at 90.

45. *Id.* at 91. For discussion of Justice Douglas’s opinion on this point, see THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 526 (1970).

46. *Rosenblatt*, 383 U.S. at 94–100 (Black & Douglas, JJ., concurring and dissenting).

47. *Id.* at 95.

48. *Id.*

49. 388 U.S. 130 (1967).

50. *See id.* at 155.

51. *Id.* This requirement presumes a focus on an institutional press and on recognized minimum standards of professional journalism practice that is increasingly irrelevant to today’s emerging social media environment.

resolve, the various constitutional questions raised by any distinction between public figure and private figure libel plaintiffs. But the opinion did highlight that the libel plaintiffs “commanded a substantial amount of independent public interest at the time of the publications.”<sup>52</sup> This formulation, by itself, seems to suggest a possible difference between what we might call preestablished public figures and persons who might become a public figure, of one sort or another, only after or as a result of the defamatory publication and the public reaction thereto.

The Court in *Curtis Publishing* then pointed to a possible distinction in what we might call the source of, or path to, public figure status. Some nonpublic officials may be public figures as a result of their sufficiently prominent organizational leadership position.<sup>53</sup> Other persons, perhaps without such organizational status, may have “purposeful[ly]” thrust themselves sufficiently into the “vortex” of a sufficiently “important public controversy” to qualify as a public figure.<sup>54</sup>

Thus, the *Curtis Publishing* Court’s initial foray into the constitutional relevance of public figure status actually made the idea of a public issue or controversy into a necessary element of at least some forms of public figure status.<sup>55</sup> To this extent, the Court’s understanding of the public figure versus private figure distinction ironically, and quite revealingly, requires and depends upon incorporating into libel law the idea of a public controversy over some issue.<sup>56</sup>

On the Court’s view, public figure status is linked, whether by definition or as a practical matter, to some sufficient opportunity to meaningfully respond to the defamatory statements at issue.<sup>57</sup> The famous libel plaintiffs in *Curtis Publishing* “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.”<sup>58</sup>

There is, unfortunately, a difference between the realistic ability to command public attention in seeking to refute a defamatory statement, and the unlikely prospect of the truth actually catching up with the lie, in the sense of even reaching all persons who have somehow been made aware of the defamatory claim.<sup>59</sup> So the law must somehow account for the inescapable gap between an opportunity for a publicized rebuttal and a full recovery of one’s reputation.

Even apart from building some version of a concern for public issues into its

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52. *Id.* at 154

53. *See id.* at 154–55.

54. *Id.* at 155.

55. *See id.* at 154–55.

56. *See id.* at 155.

57. *See id.*

58. *Id.* (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

59. Hence the unfortunate result that the truth and the victim’s reputation are rarely fully reestablished on a lasting basis. For a sense of the popular-folk appreciation of this point, see *A Lie Can Travel Halfway Around the World While the Truth Is Putting on Its Shoes*, QUOTE INVESTIGATOR, <http://quoteinvestigator.com/2014/07/13/truth> [https://perma.cc/R5A7-KTBV] (Nov. 6, 2017).

theory of public figure status, the Court in *Curtis Publishing* continued to explicitly rely on the explanatory and guiding importance of free discussion of public matters.<sup>60</sup> The Court rightly specified, in particular, that freedom of speech and of the press is designed and intended to prevent “any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential.”<sup>61</sup>

### C. THE COURT THEN TEMPORARILY FOCUSES ON WHAT CONSTITUTIONALLY MATTERS MOST

The logic of the Court’s own basic assumptions was, unfortunately only briefly, brought to the forefront in the case of *Rosenbloom v. Metromedia, Inc.*<sup>62</sup> In *Rosenbloom*, a temporarily ascendant Court plurality, led by Justice Brennan, managed to rightly prioritize the nature or subject of the defamatory speech rather than the public figure or other status of the libel plaintiff.<sup>63</sup> On Justice Brennan’s view, “[f]reedom of discussion . . . must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.”<sup>64</sup>

Justice Brennan then declined to take a narrowly governmental, or expressly political, view of the subjects of public interest and concern.<sup>65</sup> Such subjects should include, as well, “myriad matters of public interest”<sup>66</sup> that encompass “truth, science, morality, and arts in general.”<sup>67</sup> And then, crucially, Justice Brennan inferred that the question of whether the libel plaintiff should count as a private figure should not take precedence over the need for responsible discussion of public issues, broadly conceived.<sup>68</sup>

The logic of this vital recognition led Justice Brennan to then declare the crucial question to be “whether the utterance involved concerns an issue of public or general concern.”<sup>69</sup> Given especially that “some aspects of the lives of even the most public [persons] fall outside the area of matters of public or general concern,”<sup>70</sup> a distinction between public and private figure libel plaintiffs is useful, at most, in shedding light on whether the speech at issue addresses a matter of public interest or not. Actually, Justice Brennan himself arguably goes even further in declaring that “[d]rawing a distinction between ‘public’ and ‘private’ figures makes no sense in terms of the First Amendment

60. *Curtis Publ’g Co.*, 388 U.S. at 147, 149–50.

61. *Id.* at 150 (citation omitted).

62. 403 U.S. 29 (1971) (plurality opinion).

63. *See id.* at 43–44.

64. *Id.* at 41 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940)).

65. *See id.* at 42.

66. *Id.*

67. *Id.* (quoting *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 147 (1967)).

68. *See id.* at 43–44. For an exceptionally thoughtful similar emphasis at the state level, see *Journal-Gazette Co. v. Bandido’s, Inc.*, 712 N.E.2d 446, 452 (Ind. 1999). *See also* *Pack v. Mast*, No. 3:19-CV-501, 2021 WL 411153, at \*6 n.2 (N.D. Ind. Feb. 5, 2021).

69. *Rosenbloom*, 403 U.S. at 44.

70. *Id.* at 48.

guarantees.”<sup>71</sup>

Justice Black’s opinion in *Rosenbloom* correspondingly declared that “First Amendment protection extends to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.”<sup>72</sup> This entirely reasonable approach, however, was destined for sharp limitation, at least as a general matter.

D. THE COURT THEN RE-DISTRIBUTES ITSELF BY CHOOSING TO FOCUS ON PUBLIC AND PRIVATE FIGURE LIBEL PLAINTIFF STATUS

The Court unfortunately backtracked substantially from the *Rosenbloom* plurality view in *Gertz v. Robert Welch, Inc.*<sup>73</sup> In *Gertz*, Justice Powell appeared to assume, unnecessarily, that a rule focusing on the presence of a matter of public interest and concern would inevitably require something like realistic, or practical, near-immunity from libel judgments whenever the speech addressed such a matter.<sup>74</sup>

There is, however, no reason to assume that speech on a public matter must be protected by any particular test. Focusing on the public interest subject matter of the speech does not logically require anything like nearly absolute protection, any version of an actual malice standard, a showing of recklessness, or even of gross negligence. Nor does an emphasis on subject matter require proof of any state of mind of the libel defendant by, say, clear and convincing evidence, or for that matter, by a beyond a reasonable doubt standard or a substantial preponderance of the evidence standard. All of these matters should be resolved after attending not only to the value of speech on matters of public interest and concern but also to the relevant reputational and procedural interests as well.

In any event, Justice Powell in *Gertz* noted the inevitable conflicts between “the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury.”<sup>75</sup> *Gertz* then held that the *New York Times* actual malice rule should be limited in certain damages contexts in accordance with a distinction between public figure and private figure libel plaintiffs.<sup>76</sup>

The logic of *Gertz* in this respect is that, in general, public officials and public figures tend to have more effective self-help remedies against libel than do private figures.<sup>77</sup> Private figure libel victims tend to have less effective media access in seeking to rebut false and defamatory claims.<sup>78</sup> The theory is that private figures therefore tend to be more vulnerable to defamatory injuries that they cannot themselves redress.<sup>79</sup>

71. *Id.* at 45–46.

72. *Id.* at 57 (Black, J., concurring in judgment) (citation and internal quotation marks omitted).

73. 418 U.S. 323 (1974).

74. *See id.* at 346.

75. *Id.* at 342.

76. *See id.* at 343.

77. *Id.* at 344.

78. *See id.*

79. *Id.*

As well, the *Gertz* Court endorsed the theory that most public figures have voluntarily chosen to assume the risk of not only rough-and-tumble critique in general but also of negligent, and even reckless, defamatory abuse.<sup>80</sup> Justice Powell specifically rejected the alternative of focusing on whether the speech at issue addressed a matter of public interest.<sup>81</sup> Such a focus was mistakenly thought by Justice Powell to undervalue the reputational interests of private figure libel plaintiffs.<sup>82</sup> And Justice Powell also assumed that the courts should not be entrusted with the task of distinguishing between speech that is or is not on a matter of public interest and concern,<sup>83</sup> a conclusion that Justice Powell himself would later largely abandon.<sup>84</sup>

Of course, Justice Powell's approach unavoidably requires judicial determinations, in general and in particular cases, of who should be counted as a public figure. Even in *Gertz* itself, Justice Powell recognizes the possible further distinction between general-purpose public figures and limited-purpose public figures.<sup>85</sup> And then there would be the need to distinguish between voluntary and involuntary public figures.<sup>86</sup> Inescapably, the latter distinction would, at best, be a matter of degree.

What Justice Powell in *Gertz* could hardly have imagined, of course, would be the novel questions of public figure versus private figure status in our own era of dominant, but fragmented, social media, including viral outbursts that are both transient and permanently accessible.<sup>87</sup>

But even as of the time of *Gertz*, Justice Powell could have better separated the inquiry into the public or private interest status of the defamatory speech, and the degree to which such speech should be constitutionally protected. An emphasis on the importance of speech on matters of public interest, again, does not by itself imply that such speech should be protected by any particular standard, let alone by an actual malice standard.<sup>88</sup> Nor does a determination that speech is not on a matter of public interest somehow require, or necessarily permit, imposing strict liability on even a careful libel defendant.<sup>89</sup>

After *Gertz*, the Supreme Court as well as the lower courts have sought to work through some of the complications resulting from *Gertz*'s misguided priorities. Merely for example, the Court in *Time, Inc. v. Firestone*<sup>90</sup> determined that the nationally publicized divorce of one of the nation's wealthiest couples, though a "cause celebre," did not involve a public figure libel plaintiff.<sup>91</sup> The

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80. *See id.* at 344–45.

81. *Id.* at 346.

82. *See id.* Again, though, a focus on the nature of the libel defendant's speech does not by itself dictate any particular weight for any reputational interests at stake.

83. *Id.*

84. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985) (plurality opinion).

85. *See Gertz*, 418 U.S. at 345.

86. *See id.*

87. *See infra* notes 135–156 and accompanying text.

88. *But see Gertz*, 418 U.S. at 346 (assuming, without any explanation, the contrary).

89. *But see id.* (assuming, without any explanation, the contrary).

90. 424 U.S. 448 (1976).

91. *See id.* at 454–55.

real problem was that, pursuant to *Gertz*, the Court in *Firestone* was required to hold that while this divorce fell within the category of “controversies of interest to the public,” it somehow did not also fall within the category of a “public controversy” for purposes of determining public or private figure status.<sup>92</sup> The Court’s vain and unnecessary attempt to distinguish between “controversies of interest to the public” and “public controversies” relies significantly upon, while making more unmanageable, the *Rosenbloom* distinction that *Gertz* nominally sought to set aside.<sup>93</sup>

Soon thereafter, the Court determined that the libel plaintiff’s status as either a public figure or a private figure should refer to the plaintiff’s status before the time of the alleged defamation.<sup>94</sup> This principle reflects the judgment that a libel defendant should not be permitted to convert a private figure into a public figure, thereby invoking an actual malice requirement, by engendering a widespread interest in the libel plaintiff through fanning the flames of the controversy.<sup>95</sup> Thus, the defendant’s publicizing a controversy for which that defendant was responsible should not affect the relevant libel rules to the plaintiff’s detriment.

Initially, it may seem reasonable to fix the libel plaintiff’s status at the point before the defamation in question. But matters are, it turns out, actually more complicated. Not all of the postdefamation controversy and media controversy will necessarily have been engineered for manipulative purposes by the libel defendant. Imagine a firestorm of postdefamation media opportunities for the libel plaintiff along with numerous requests for national-level interviews across various media. Of course, none of this need be voluntarily sought out by the libel plaintiff. But on the logic of *Gertz* and the ensuing cases, why isn’t the plaintiff’s substantial and appropriately focused media access and attention relevant to public figure status? By assumption, the plaintiff can now address any defamatory statement with detailed, continuing, and broad media attention. The plaintiff’s side of the story can now be fully aired, perhaps to an extent not available to many previously established public figures or public officials. Why shouldn’t that matter? Why should the fact that the plaintiff could not have commanded media access before the defamation<sup>96</sup> be more relevant, and indeed decisive?<sup>97</sup>

Equally important is the unavoidably underdeveloped distinction between sufficiently and insufficiently voluntary actions by the eventual libel plaintiff. Voluntary and involuntary exposure to controversy do not come clearly labeled as such. The problem of making such determinations for purposes of the public

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92. *Id.* at 454.

93. *See supra* notes 53–54 and accompanying text.

94. *See Hutchinson v. Proxmire*, 443 U.S. 111, 134–35 (1979).

95. *See id.*

96. *See id.*

97. Note in particular *Gertz*’s focus on the plaintiff’s ability, at relevant times, to command significant media access and attention so as to meaningfully address and respond to the defamatory statements. *See supra* notes 77–78 and accompanying text; *see also* William P. Robinson III, Rachel M. Feit & Katherine M. King, *The Tie Goes to the Runner: The Need for Clearer and More Precise Criteria Regarding the Public Figure in Defamation Law*, 42 U. HAW. L. REV. 72, 106–09 (2019) (discussing the standard emphasis on determining public or private figure status based on the libel plaintiff’s voluntary activities before the libelous statements).

versus private figure distinction was helpfully illustrated in *Wolston v. Reader's Digest Ass'n*.<sup>98</sup>

In *Wolston*, the Court rejected the lower court's conclusion that the libel plaintiff *Wolston* amounted to a limited-purpose public figure.<sup>99</sup> The context involved official investigation into alleged Soviet espionage in the 1940s and 1950s.<sup>100</sup> *Wolston* decided to refuse to appear before a grand jury investigating such matters, thereby subjecting himself to a contempt citation.<sup>101</sup> The district court accordingly found that by such voluntary refusal to testify, *Wolston* "became involved in a controversy of a decidedly public nature in a way that invited attention and comment, and thereby created in the public an interest in knowing about his connection with espionage."<sup>102</sup>

The Supreme Court, however, rejected the idea that *Wolston's* involvement in an assumedly important public controversy qualified as "voluntary."<sup>103</sup> The Court instead concluded that while *Wolston* "voluntarily chose not to appear before the grand jury, knowing that his action might be attended by publicity," this choice was "not decisive on the question of public-figure status."<sup>104</sup> While *Wolston* had chosen to defend himself against the contempt charge, he had never discussed the matter with the press.<sup>105</sup> A private figure "is not automatically transformed into a public figure just by becoming involved in or associated with a [newsworthy] matter that attracts public attention."<sup>106</sup>

Reasonable minds could differ, certainly, as to whether *Wolston's* involvement in public controversy should be characterized as mostly, or entirely, voluntary or involuntary.<sup>107</sup> But that is hardly the point. Plainly, *Wolston's* acts were not involuntary in the sense of being like a reflexive muscle twitch or having his arm moved by some external force.<sup>108</sup> In this sense, any genuine act by *Wolston* would inevitably be voluntary. As used by the Court in determining public or private figure status, voluntary should instead be interpreted as something like "sufficiently free or unconstrained" for purposes of the public versus private figure distinction.

A person may freely, deliberately, and responsibly enter into an area of controversy, and yet be predictably or unpredictably then "swept up" or "caught up" by the perhaps uncontrollable emerging course of that controversy. And the

98. 443 U.S. 157 (1979).

99. *Id.* at 166.

100. *Id.* at 165.

101. *Id.*

102. *Id.* (quoting *Wolston v. Reader's Dig. Ass'n*, 429 F. Supp. 167, 178 n.33 (D.D.C. 1977), *aff'd*, 578 F.2d 427 (D.C. Cir. 1978), *rev'd*, 443 U.S. 157 (1979)).

103. *See id.* at 166.

104. *Id.* at 167.

105. *Id.*

106. *Id.* A contrary approach, the Court indicated, would in effect restore the plurality's focus on matters of public interest in *Rosenbloom. Id.* (citing *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44 (1971)).

107. *See* Frederick Adrian Siegler, *Voluntary and Involuntary*, 52 *MONIST* 268, 268–69 (1968) (discussing distinct types of involuntariness and voluntariness); Bernard Williams, *Voluntary Acts and Responsible Agents*, 10 *OXFORD J. LEGAL STUD.* 1, 1–4 (1990) (providing similar information).

108. *See* Williams, *supra* note 107, at 1, 4; Siegler, *supra* note 107, at 271.

person's initial entry into that arena may itself reflect varying degrees of freedom, deliberation, and responsibility.<sup>109</sup>

It is admittedly possible for someone to be initially swept up or caught up in a controversy in roughly the way a person sleeping in a mountainside location might be swept up or caught up in an unpredictable avalanche. But that person's subsequent acts to escape the avalanche would then normally be thought of as voluntary. Yet for many purposes, the person's attempts to respond to the avalanche might actually reflect widely varying degrees of freedom, deliberation, and responsibility, depending upon the circumstances and upon our reasons for asking about degrees of freedom and constraint.<sup>110</sup>

In typical cases, the voluntary actions of the libel plaintiff can be characterized as free, deliberate, and responsible in some respects but not others. This distinction is thus, inescapably, deeply complex and contestable. It is certainly possible that a decision to refuse to testify before a grand jury could be deemed free, deliberate, and responsible despite the high stakes.<sup>111</sup> But it is equally possible to conclude that a person who thus refused to testify was uncontrollably swept up by events and circumstances, such that the choice to not testify was insufficiently free, deliberate, and responsible for public figure status to attach.<sup>112</sup> There simply are no authoritative answers in such cases.

The courts thus plainly lack any principled guidance as to how to determine whether the person's generally voluntary actions were sufficiently free, deliberate, and responsible for public figure status. Nor is this at all likely to change any time soon. The relevant senses of freedom and constraint may well already bear controversial normative judgments within them<sup>113</sup> and, in any event, are generally indeterminate in legal contexts.<sup>114</sup> To the extent that the public versus private figure distinction depends, as it crucially does, on a reasonably clear and defensible understanding of "voluntariness," it must always and inherently be deeply problematic.

#### E. THE UNDERLYING LOGIC OF FREE SPEECH AND REPUTATION UNDERSTANDABLY BEGINS TO REASSERT ITSELF IN LIMITED CONTEXTS

Perhaps not surprisingly, judicial interest in whether the defamatory speech addresses a matter of public interest and concern enjoyed a very limited resurgence in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*<sup>115</sup> *Dun &*

109. See Siegler, *supra* note 107, at 268, 271; Williams, *supra* note 107, at 8–9. Thus, problems result from any attempt to emphasize the concept of voluntariness in distinguishing public and private figures. See, e.g., David A. Logan, *Rescuing Our Democracy by Rethinking New York Times Co. v. Sullivan*, 81 OHIO ST. L.J. 759, 785, 812 (2020).

110. See Siegler, *supra* note 107, at 272–73.

111. See *supra* note 104 and accompanying text. Sometimes, our freest and most authentic moral acts involve situations in which we feel that we had "no real choice" but to act as we did.

112. See *supra* note 104 and accompanying text.

113. See R. George Wright, *Why a Coercion Test is of No Use in Establishment Clause Cases*, 41 CUMB. L. REV. 193, 202 (2010).

114. See *id.* at 224.

115. 472 U.S. 749 (1985).

*Bradstreet* involved what was held to be a private figure libel plaintiff.<sup>116</sup> For a three-Justice plurality, Justice Powell set aside his own earlier view in *Gertz* that the courts should not attempt to distinguish matters of public concern from matters of merely private concern.<sup>117</sup> Justice Powell's opinion instead held that private figure libel plaintiffs may receive even "presumed and punitive damages . . . [without] a showing of 'actual malice' . . . when the defamatory statements do not involve matters of public concern."<sup>118</sup>

Justice Powell thus validated a judicial concern for matters of public versus private interest, at least in the limited context of *Dun & Bradstreet*. The problem, though, is that his underlying logic in attending to that distinction clearly carries beyond anything like the circumstances of *Dun & Bradstreet*. By Justice Powell's own logic, a focus on public interest, as distinct from private interest speech, should be fundamental to the constitutional law of libel.

Thus, Justice Powell resoundingly declared in *Dun & Bradstreet* that "[t]he First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"<sup>119</sup> The Court must ensure that "debate on public issues [will] be uninhibited, robust, and wide-open."<sup>120</sup> More specifically, "not all speech is of equal First Amendment importance."<sup>121</sup> Crucially, "[i]t is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection.'"<sup>122</sup> Justice Powell then declared that "speech on matters of purely private concern is of less First Amendment concern."<sup>123</sup>

In light of this need to distinguish between speech that is or is not on a matter of public concern, at least in some contexts, there is then an obvious need for judicial guidance as to how to draw the distinction in question. And in this regard, Justice Powell draws upon the more frequently litigated context of speech-based discipline of public employees.<sup>124</sup> The gist of the limited guidance Justice Powell offers is merely that "[w]hether . . . speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . as revealed by the whole record."<sup>125</sup>

116. *See id.* at 753.

117. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974).

118. *Dun & Bradstreet, Inc.*, 472 U.S. at 763. Why such libel plaintiffs must still show at least negligent disregard for falsity is left undiscussed by the plurality. *See id.* at 751–63.

119. *Id.* at 759 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

120. *Id.* at 762 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

121. *Id.* at 758.

122. *Id.* at 758–59 (some internal quotation marks omitted) (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978)).

123. *Id.* at 759 (citation omitted). Justice Powell leaves unclear why libelous speech, or indeed any other kind of speech, that does not address any matter of any public interest or concern should receive any distinctive free speech protection at all. *See R. George Wright, Cyber Harassment and the Scope of Freedom of Speech*, 53 U.C. DAVIS L. REV. ONLINE 187, 207–08, 208 nn.153–54 (2020) (discussing case split on this issue). While it makes more sense to deny any distinctive free speech protection to speech that does not implicate any reasons for protecting speech, we can, for present purposes, accept either approach. *See id.*

124. *See Dun & Bradstreet, Inc.*, 472 U.S. at 761 (relying on *Connick v. Myers*, 461 U.S. 138, 147–48 (1983)).

125. *Id.* (quoting *Connick*, 461 U.S. at 147–48). Whether the idea of speech on a matter of

Since *Dun & Bradstreet*, the Court has acknowledged the usefulness of inquiring into the public versus private interest character of the speech at issue in other specific libel contexts. Thus, even a private figure libel plaintiff bears the burden of showing the falsity of the allegedly defamatory statements where a newspaper defendant, and presumably other defendants, addresses a matter of public concern.<sup>126</sup> Here, once again, the Court finds that it must, in some limited contexts, incorporate a distinction between speech on public versus private matters into its jurisprudence of public and private figure libel plaintiffs.

The Court has also incorporated explicit attention to the public versus private interest distinction in a further, less frequently litigated context. The case of *Bartnicki v. Vopper*<sup>127</sup> involved the broadcast of a cell phone conversation that had been illegally taped by an unknown person and then forwarded to media defendants.<sup>128</sup> In such a case, the Court held that the obvious privacy interests at stake<sup>129</sup> must be weighed against the core First Amendment value of appropriately encouraging “the publication of truthful information of public concern.”<sup>130</sup> The Court here neatly cited the classic 1890 Warren and Brandeis law review article for the principle that “[t]he right of privacy does not prohibit any publication of matter which is of public or general interest.”<sup>131</sup>

### III. ADDITIONAL PROBLEMS WITH ATTEMPTS TO DISTINGUISH BETWEEN PUBLIC AND PRIVATE FIGURE LIBEL PLAINTIFFS

The Supreme Court cases that have focused on and attempted to apply distinctions between the categories of public and private figure libel plaintiffs have provided only limited judicial guidance.<sup>132</sup> The distinction, even at the most basic level, was “problematic and hotly contested” as of 1984.<sup>133</sup> It is fair to say that the rise of a pervasive, highly fragmented, and largely unprofessionally curated social media landscape has only multiplied the difficulties of making

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public interest should be defined differently in the libel context, as distinct from the public-employee-discipline context, is left undiscussed. *See id.* In any event, it is largely true that the overall majority in *Dun & Bradstreet, Inc.* “provided almost no guidance as to what constitutes a protected ‘matter of public concern.’” *Id.* at 786 (Brennan, J., with Marshall, Blackmun & Stevens, JJ., dissenting); *see also* *City of San Diego v. Roe*, 543 U.S. 77, 83 (2004) (per curiam) (“[T]he boundaries of the public concern test are not well defined . . .”).

126. *See* *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768–69 (1986).

127. 532 U.S. 514 (2001).

128. *Id.* at 517.

129. *See id.* at 532–33.

130. *Id.* at 534.

131. *Id.* (quoting Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214 (1890)).

132. *See, e.g.*, Erik Walker, Comment, *Defamation Law: Public Figures—Who Are They?*, 45 BAYLOR L. REV. 955, 955 (1993) (“Lower courts have found little guidance in the few United States Supreme Court decisions relating to a plaintiff’s public or private figure status.”); *see also* Ashley Messenger & Kevin Delaney, *In the Future, Will We All Be Limited-Purpose Public Figures?*, 30 COMM’NS LAW. 4, 4 (2014); Delery H. Perret, *An Unforeseen Problem: How Gertz Failed to Account for Modern Media and What to Do Now*, 80 LA. L. REV. 541, 558 (2020); Amy Kristin Sanders & Holly Miller, *Revitalizing Rosenbloom: The Matter of Public Concern Standard in the Age of the Internet*, 12 FIRST AMEND. L. REV. 529, 532, 542 (2014).

133. Frederick Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905, 906 (1984).

even the most basic of such distinctions.<sup>134</sup>

Merely for example, consider whether the libel plaintiff “Dr. Luke” should be considered either a general-purpose or a limited-purpose public figure in the context of a rape allegation brought by a well-known person.<sup>135</sup> Dr. Luke “is an acclaimed music producer and well known in the entertainment industry.”<sup>136</sup> He “has appeared in articles in mainstream media for his contributions to pop music, his discovery and development of talent, his rise in the music industry and his talent as both a businessman and music producer.”<sup>137</sup>

Dr. Luke might, on this basis, seem readily classifiable as some sort of public figure. But the appellate court majority determined that, despite his high-profile career within a major segment of popular entertainment, Dr. Luke “is not a household name”<sup>138</sup> and thus not a general-purpose public figure without more.<sup>139</sup> A dissenting opinion, however, adopted an importantly different standard.<sup>140</sup> On that dissenting standard, Dr. Luke “is a household name *to those that matter*.”<sup>141</sup>

There is certainly some logic to discounting the significance of persons who have never heard of the libel plaintiff, the libel defendant, or any matter in controversy. But this oddly judgmental dissenting approach could, in focusing on “those who matter,” logically convert almost anyone, counterintuitively, into a general-purpose public figure.<sup>142</sup>

Part of the problem here is that the Court’s attempt to distinguish between

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134. For the most recent authoritative challenge to the status of the public figure versus private figure distinction, see *Berisha v. Lawson*, 141 S. Ct. 2424, 2425 (2021) (Thomas, J., dissenting from denial of certiorari) (mem.) (“[S]urely this Court should not remove a woman’s right to defend her reputation in court simply because she accuses a powerful man of rape.”). See also Cass R. Sunstein, *Clarence Thomas Has a Point About Free-Speech Law*, TWINCITIES.COM (Feb. 25, 2019, 12:11 AM), <https://www.twincities.com/2019/02/25/cass-sunstein-clarence-thomas-has-a-point-about-free-speech-law/> [https://perma.cc/FLS7-BMZD]; Cristina Carmody Tilley, *(Re)Categorizing Defamation*, 94 TUL. L. REV. 435, 488, 508 (2020); Glenn Harlan Reynolds, *Rethinking Libel for the Twenty-First Century*, 87 TENN. L. REV. 465, 477–80 (2020) (discussing the proposals of Justice Thomas and Professor Sunstein).

135. See *Gottwald v. Sebert*, 148 N.Y.S.3d 37, 42–43 (1st Dep’t 2021).

136. *Id.* at 43.

137. *Id.* at 45.

138. *Id.* at 43.

139. *Id.* Note also the recent observation of Justice Gorsuch:

[P]rivate citizens can become “public figures” on social media overnight. Individuals can be deemed “famous” because of their notoriety in certain channels of our now-highly segmented media even as they remain unknown in most.

. . . .

Rules intended to ensure a robust debate over actions taken by high public officials . . . increasingly seem to leave even ordinary Americans without recourse for grievous defamation.

*Berisha*, 141 S. Ct. at 2429 (Gorsuch, J., dissenting from denial of certiorari) (mem.).

140. See *Gottwald*, 148 N.Y.S.3d at 48 (Scarpulla, J., dissenting in part).

141. *Id.* at 49 (emphasis added).

142. The dissenting opinion notes that “Dr. Luke has actively sought out publicity,” at least with regard to his professional status in general. *Id.* But this, on the dissenting opinion’s own logic, might amount only to expanding the pool of those media consumers who are deemed to “matter.” See *id.*

general-purpose public figures and private figure libel plaintiffs arose in a much more homogeneous, less diverse, and less fragmented media landscape than exists today. Consider, in the extreme, that a 1983 episode of the network television series *M\*A\*S\*H* attracted 105.9 million viewers;<sup>143</sup> a 1980 episode of *Dallas* had 83 million viewers;<sup>144</sup> and the 1993 finale of *Cheers* drew 80.4 million viewers,<sup>145</sup> with total populations lower than today. By contrast, the most popular non-sports network television series programing for 2020–2021 averaged less than 13 million viewers.<sup>146</sup> By any measure, a popular media celebrity is plainly qualitatively and quantitatively different than it was in, say, 1974, when *Gertz v. Robert Welch, Inc.* was decided.<sup>147</sup>

But the contestability of Dr. Luke’s status extends even to whether he should count as a limited-purpose public figure. Dr. Luke quite clearly, and quite successfully, “actively sought out publicity”<sup>148</sup> in connection with his professional role. However, it is unclear whether this should matter for limited public figure libel plaintiff status. After all, Dr. Luke had not, as the majority determined, also “injected himself into the debate about sexual assault or abuse of artists in the entertainment industry, which is the subject of the defamation.”<sup>149</sup>

This further debate illustrates the problem that the scope of the vortex into which a party has more or less voluntarily thrust him- or herself, for limited public figure status, is not self-defining. If one successfully seeks attention, at least in certain circles, as an athlete in a particular sport, then has one thereby

143. Stacy Conradt, *The Ten Most-Watched TV Series Finales Ever*, MENTAL FLOSS (Feb. 28, 2010), [www.mentalfloss.com/article/24673/10-most-watched-series-finales-ever](https://www.mentalfloss.com/article/24673/10-most-watched-series-finales-ever) [https://perma.cc/TQ88-BAU9].

144. *Millions Tune in to Find Out Who Shot J.R.*, HIST., [www.history.com/this-day-in-history/millions-tune-in-to-find-out-who-shot-j-r](http://www.history.com/this-day-in-history/millions-tune-in-to-find-out-who-shot-j-r) [https://perma.cc/DX53-VHKF] (Nov. 19, 2020). The 83 million viewers amounted, remarkably, to 76% of the nation’s televisions sets. *See id.*

145. Conradt, *supra* note 143.

146. *See* Michael Schneider, *100 Most-Watched TV Shows of 2020–21: Winners and Losers*, VARIETY (May 25, 2021, 2:08 PM), <https://variety.com/2021/tv/news/most-popular-tv-shows-highest-rated-2020-2021-season-1234980743/> [https://perma.cc/9N6R-BHPH]. We hereby set aside the complications of best measuring audiences across various platforms and time of viewing practices. *See id.*

147. In 1974, the year in which *Gertz* was decided, the network television programs *All in the Family*, *Sanford and Son*, *Chico and the Man*, and *The Jeffersons* collectively averaged approximately 20 million viewers per episode, which would at least approach something like a collectively shared familiarity or cultural frame of reference. *See TV Ratings: 1974–1975*, CLASSIC TV HITS, <http://www.classictvhits.com/tvratings/1974.htm> [https://perma.cc/KD3K-KDZ5]. Note also that at the time of the alleged defamation of Carol Burnett by the *National Enquirer*, Burnett’s network television show had been running for nine consecutive years. *See* Kara Kovalchik, *16 Fun Facts About The Carol Burnett Show*, MENTAL FLOSS (Apr. 16, 2018), <https://www.mentalfloss.com/article/73448/16-fun-facts-about-carol-burnett-show> [https://perma.cc/F4R8-Z728] (noting that Burnett’s show began in 1967); Robert Lindsey, *Carol Burnett and Enquirer Clash in Court*, N.Y. TIMES (Mar. 18, 1981), <https://www.nytimes.com/1981/03/18/us/carol-burnett-and-enquirer-clash-in-court.html> [https://perma.cc/DQ6Q-592H] (noting that alleged defamation occurred in 1976); *see also* Burnett v. Nat’l Enquirer, Inc., 193 Cal. Rptr. 206, 216 (Ct. App. 1983) (highlighting the lower court’s assumption of Carol Burnett’s public figure status).

148. *Gottwald v. Sebert*, 148 N.Y.S.3d 37, 49 (1st Dep’t 2021) (Scarpulla, J., dissenting in part).

149. *Id.* at 45 (majority opinion).

become a limited-purpose public figure with respect to any or all of the preexisting major controversies clearly associated with that sport?<sup>150</sup>

Let us simply pose the following hypothetical scenario: Suppose Person A accuses Person B of sexually assaulting her. Now, crucially, let us set aside any question as to whether the accusation and related discussion addresses a matter of public interest and concern. On this basis, we must then ask why the outcome of Person B's libel suit against Person A should crucially depend on whether Person B is, in any relevant sense, voluntarily or involuntarily well-known and thus a public figure of any sort. If genuinely crucial questions of the presence or absence of speech on matters of public interest and concern are set aside, why should the law, in this sense, be a respecter of persons?<sup>151</sup> Why should Person B's fame, or lack thereof, matter in itself?

More generally, celebrity-libel-plaintiff law suffers to the extent that concern for matters of public interest is backgrounded or ignored. As the libel expert Professor Rodney Smolla has observed, "[t]he sex life of a rock star may appeal to our prurient curiosity,"<sup>152</sup> but unless some public issue is thereby implicated, it is hardly clear why traditional libel law principles should be upended in such a case.

Consider, then, a defamatory statement regarding a person we shall assume to be a general-purpose public figure. As of a recent survey, the personal Twitter accounts of noted pop stars Justin Bieber, Katy Perry, Rihanna, Taylor Swift, Ariana Grande, and Lady Gaga were each followed by at least 80 million persons.<sup>153</sup> Imagine any of these public figures being falsely accused of, say, drunken behavior at a restaurant.<sup>154</sup> Each such public figure would have to show not merely negligence or objective recklessness in publishing the libel but actual malice by clear and convincing evidence.<sup>155</sup>

Now, it well might be that each of the above general-purpose public figures would indeed have a broader and more easily reached audience for their response than the accuser would have had for the initial accusation. What is doubtful, though, is the legal relevance of that fact and of their public figure status.

After all, on the assumptions built into this hypothetical, the celebrity victim's response to the libel likely brings the accusation itself to the attention of more

150. More narrowly, consider the determination that a libel plaintiff became a limited-purpose public figure, thus assuming the risk of false claims, by injecting himself into a public controversy merely by "boasting about his jet ski modifications and speeds" on a narrowly focused website. *Hibdon v. Grabowski*, 195 S.W.3d 48, 62 (Tenn. Ct. App. 2005).

151. See *Walter Carrington, Equality Before the Law*, 8 VA. L. REG. 481, 481 (1922) ("[T]he law is no respecter of persons" is presumed to embody an "absolute and indisputable truth[.]"); see also *McKee v. Cosby*, 139 S. Ct. 675, 680 (2019) (Thomas, J., concurring in denial of certiorari) ("There are sound reasons to question whether either the First or Fourteenth Amendment, as originally understood, encompasses an actual-malice standard for public figures or otherwise displaces vast swaths of state defamation law.").

152. Rodney A. Smolla, *Core Doctrine Likely to Hold*, 22 COMM'NS LAW. 11, 22 (2004).

153. See *List of Most-Followed Twitter Accounts*, WIKIPEDIA, [https://en.wikipedia.org/w/index.php?title=List\\_of\\_most-followed\\_Twitter\\_accounts](https://en.wikipedia.org/w/index.php?title=List_of_most-followed_Twitter_accounts) [https://perma.cc/3AAW-H9PP] (Sept. 25, 2021, 7:30 PM).

154. See *Burnett v. Nat'l Enquirer, Inc.*, 193 Cal. Rptr. 206, 208 (Ct. App. 1983).

155. See *id.* at 216.

persons than the accuser was able to reach. More fundamentally, though, it is far from clear how designating the libel plaintiff as a public figure, and on that basis applying an actual malice requirement, distinctively serves the basic purposes and values underlying freedom of speech,<sup>156</sup> let alone any reputational concerns.

Also, the public versus private figure libel plaintiff distinction is particularly ill-suited to cases involving some persons who crucially influence important public issues. Consider in particular the anonymous,<sup>157</sup> power-behind-the-throne influencer who may be decisive in resolving a vital public issue but who remains behind the scenes and avoids the limelight.<sup>158</sup> Such a person may vitally but unofficially affect a matter of public interest and concern without at all thrusting him- or herself into the vortex of public controversy.<sup>159</sup> If libeled, such a person would not fit the established criteria for either general or limited public figure status.<sup>160</sup> Once again, the public versus private figure libel plaintiff distinction is, at best, irrelevant and typically misleading.

#### IV. DEVELOPING THE ALTERNATIVE APPROACH: HOW TO BEST UTILIZE THE CLEARLY CRUCIAL DISTINCTION BETWEEN LIBEL THAT DOES OR DOES NOT ADDRESS MATTERS OF PUBLIC INTEREST AND CONCERN

The sheer irrelevance, distraction, and unavoidable unworkabilities of any distinctions among the various sorts of public and private figure libel plaintiffs seem clear. In general, the public and private figure libel plaintiff cases unfortunately have broken loose from the underlying logic of freedom of speech, if not also from the underlying logic of legitimate privacy concerns. Originally, the imposition of free speech limits on the state tort law of libel in the *New York Times* case “was firmly rooted in the desire to promote discussion about matters related to self-government.”<sup>161</sup> Unfortunately, “as time passed, the Court and lower courts drifted farther and farther from that objective.”<sup>162</sup>

Focusing instead on whether the allegedly libelous speech addresses a matter of public interest and concern would allow the constitutional law of libel to

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156. Consider whether an objectively reckless false accusation of drunken behavior in a restaurant serves the democratic and other free speech values at stake in the *New York Times* case. See *supra* notes 19–20; ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 197 (1991) (discussing the *Burnett* case); see also Elena Kagan, *A Libel Story: Sullivan Then and Now*, 18 L. & SOC. INQUIRY 197, 199, 205–07, 211–12 (1993) (reviewing LEWIS, *supra*) (describing the scope of libel law as now extending well beyond the core free speech purposes). A similar logic should apply even to more serious accusations of criminal or civil misconduct and to other ethically objectionable behavior, except insofar as such accusations address matters of public interest and concern.

157. See William M. Krogh, Comment, *The Anonymous Public Figure: Influence Without Notoriety and the Defamation Plaintiff*, 15 GEO. MASON L. REV. 839, 839–40 (2008).

158. See *id.*

159. See *supra* note 54 and accompanying text.

160. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342–46 (1974).

161. David A. Anderson, *Second Thoughts: A Response to David A. Logan’s Rescuing Our Democracy by Rethinking New York Times v. Sullivan*, 82 OHIO ST. L.J. ONLINE 23, 26 (2021) (citing David A. Logan, *Rescuing Our Democracy by Rethinking New York Times Co. v. Sullivan*, 81 OHIO ST. L.J. 759, 775 (2020)).

162. *Id.*

attend, crucially, to the underlying reasons for specially protecting speech in the first place. Such a shift in focus would require the courts to pay less attention to the status, or to some sort of legal classification, of the libel plaintiff. While the crucial focus would thus no longer be on how to characterize the libel plaintiff, the focus would not then shift to the status of the libel defendant. Instead, the central inquiry would rightly be into the subject matter of the allegedly defamatory speech.

It has been suggested that any such inquiry into the subject matter of the speech would involve uncertainties and impracticalities,<sup>163</sup> or an increased danger to speech and debate on matters relevant to democratic self-government.<sup>164</sup> These and related critiques certainly deserve attention, which is provided in some measure below.

The Court's own modest guidance in this regard is largely summarized in the military funeral outdoor protest case of *Snyder v. Phelps*.<sup>165</sup> *Snyder*'s account begins with the declaration that "[s]peech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community.'"<sup>166</sup> This formulation, while unfortunately including the term *concern* in the very definition of public concern, usefully suggests an understanding of public concern that clearly exceeds the scope of the political or of governmental affairs.

Perhaps to elaborate or provide a closely related but alternative understanding of public concern, the Court in *Snyder* then referred to "a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public."<sup>167</sup> This formulation, too, unhappily imports the very terms to be defined into the definition, but this formulation more importantly highlights the possibility of both subjective and objective "interest" in a given matter.

One can be subjectively interested in a matter which is objectively trivial, or even in what one recognizes and concedes to be trivial. However, it is also possible to fail to take an interest, subjectively, in a matter of objectively great importance. A person may concede their lack of subjective interest in an objectively important matter. Worse though, one might fail to take an interest in an objectively important matter because, to take the extreme case, one has been propagandized or brainwashed in that regard.

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163. See James C. Mitchell, *Rosenbloom's Ghost: How a Discredited Decision Lives on in Libel Law*, 40 IDAHO L. REV. 427, 427 (2004).

164. See Stephen J. Mattingly, Note, *Drawing a Dangerous Line: Why the Public-Concern Test in the Constitutional Law of Defamation Is Harmful to the First Amendment, and What Courts Should Do About It*, 47 U. LOUISVILLE L. REV. 739, 739–41 (2009). The specific argument by Mattingly is that any reliance on the public concern test, in any context, "threatens the First Amendment's . . . central aim of protecting speech on issues relevant to self-government." *Id.* at 741. There is in particular such a fear "if the government itself were frequently allowed to decide what speech is relevant to self-government." *Id.* at 739. Of course, any such determinations would typically be made by more or less independent judges rather than by legislators or executive officials. See *id.* In any event, and more substantively, it is difficult in the extreme for critics to condemn speech as both wrong in its politics and as also not political.

165. 562 U.S. 443 (2011). The paradox is typically glaring.

166. *Id.* at 453 (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983)).

167. *Id.* (quoting *City of San Diego v. Roe*, 543 U.S. 77, 83–84 (2004)).

The *Snyder* opinion then usefully observes that the “inappropriate or controversial character of a statement is irrelevant to . . . whether it deals with a matter of public concern.”<sup>168</sup> Also, even the clear falsity of a claim does not affect whether it addresses a subject of public interest and concern. Whatever the free speech value of a false statement,<sup>169</sup> its falsity does not literally change the nature of its subject.

The *Snyder* Court’s elaboration then reiterated the need for a broad examination of the “content, form, and context”<sup>170</sup> of the speech at issue. This examination should involve taking distinctive account of the broad value of freedom of expression.<sup>171</sup> And finally, when considering the speech’s “content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.”<sup>172</sup>

Overall, this official guidance leaves many questions unresolved, if not entirely unaddressed. Let us, then, consider how to elaborate on the start the Court has made in addressing the most significant remaining issues.

First, a focus on the subject matter addressed by an instance of speech is already a dramatic upgrade over any approach that requires any official assessment, even by independent courts, of the constitutional value of the instance of speech on its own substantive merits. Particularly in a culture of mutual distrust, alienation, political self-indulgence, and polarization,<sup>173</sup> it is not difficult to downgrade the value of speech with which one disagrees on the merits. Such downgrading may be done subconsciously or without any conscious awareness of bias.<sup>174</sup>

Far less credible and far less easily rationalized, though, is any claim that disfavored speech on some public matter is actually not speech that addresses any public matter. Simply put, one can hardly condemn bad political speech, in any sense, only to then claim, paradoxically, that it is actually not bad political speech because it does not address any public issue. Bad political speech inescapably addresses some aspect of politics, but in some way that is then found to be objectionable on the merits. By analogy, institutional theologians can hardly condemn a theological heresy without inescapably judging the heresy to

168. *Id.* (quoting *Rankin v. McPherson*, 483 U.S. 378, 387 (1987) (public employee speech discipline case)).

169. See JOHN STUART MILL, *ON LIBERTY* 76–77 (Gertrude Himmelfarb ed., 1974) (1859); see also R. George Wright, “*What Is That Honor?*”: *Re-Thinking Free Speech in the “Stolen Valor” Case*, 60 CLEV. ST. L. REV. 847, 850 (2013) (discussing the Court’s ambivalence as to the constitutional value of not merely false, but deliberately lying, speech).

170. *Snyder*, 562 U.S. at 453 (citation and internal quotations omitted).

171. *Id.*

172. *Id.* at 454; see also Clay Calvert, *Public Concern and Outrageous Speech: Testing the Inconstant Boundaries of IIED and the First Amendment Three Years After Snyder v. Phelps*, 17 U. PA. J. CONST. L. 437, 442, 446 (2014); Lyriisa Barnett Lidsky, *Not a Free Press Court?*, 2012 BYU L. REV. 1819, 1825–26; Mark Strasser, *What’s It to You: The First Amendment and Matters of Public Concern*, 77 MO. L. REV. 1083, 1083 (2012) (“The Court must do more than merely say, ‘It depends[.]’ . . .”).

173. See, e.g., KEVIN VALLIER, *TRUST IN A POLARIZED AGE* 1–4 (2021).

174. See, e.g., Dan M. Kahan, *Ideology, Motivated Reasoning, and Cognitive Reflection*, 8 JUDGMENT & DECISION MAKING 407, 407–08 (2013).

be theological or on some matter of theology, however objectional on its merits.<sup>175</sup> It is technically possible to claim that one's political opponent is not, in any sense, talking about politics, but any such paradoxical move would be transparently strategic.<sup>176</sup>

Doubtless any legal distinction is subject, by one degree or another, to manipulation.<sup>177</sup> Whether the speech of one's political, social, or cultural antagonist is "important," "legitimate," "reasonable," or "dangerous" is, in our culture, open to irresolvable debate. Nonetheless, the category of speech that addresses, however briefly, inarticulately, incompetently, or irresponsibly, any matter of public interest and concern<sup>178</sup> is exceptionally resistant to political self-serving manipulation.<sup>179</sup>

Some real-world cases, however, involve defamatory speech that contains some elements of speech that do, and others that do not, address some matter of public interest. In some of those cases, it may be reasonably practical to separate out the elements of the speech that do, and that do not, address any matter of public interest. Thus separated, the courts would then apply the relevant aspects of the substantive law of libel to each element.

More interesting would be a case in which the defamatory speech in some inseparable respects both does and in other respects does not address a matter of public concern. The speech in this kind of case cannot be disaggregated or disentangled into the two separate categories. Doubtless these would be relatively rare cases. In such cases, the courts can usefully look, by analogy, to the way courts have addressed cases in which commercial speech is inseparably intertwined with noncommercial, or broadly political, speech.<sup>180</sup>

Thus, in cases in which the government seeks to regulate commercial speech

175. See, e.g., *Heresy*, BLACK'S LAW DICTIONARY (11th ed. 2019).

176. Imagine the mental gymnastics required to conclude, e.g., that some fascist screed or THE COMMUNIST MANIFESTO does not address any matter of public interest and concern. See generally Kahan, *supra* note 174.

177. Consider the idea of a governmental interest that is deemed "compelling" or a regulation that either is or is not "narrowly tailored" to its purpose. See, e.g., R. George Wright, *The Fourteen Faces of Narrowness: How Courts Legitimize What They Do*, 31 LOY. L.A. L. REV. 167, 169–70, 194–95 (1997).

178. Presumably, the dangerous political speech of one's opponents should, because of that presumed danger, be of especially intense public concern.

179. As well, speech that addresses matters of public interest and concern need not do so at any great length or with any further degree of articulateness. Speech on matters of public interest may thus be brief and not especially articulate. See *Cohen v. California*, 403 U.S. 15, 16 (1971) (anti-draft jacket display). In general, articulateness and clarity are not required of protected speech. See, e.g., *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) (discussing protection of even vaguely expressed ideas of various sorts). And whether this minimum standard is, in its turn, sufficiently met is a question that can inevitably be asked in the context of any legal claim, including that of public figure status. Every legal concept involves questions of its minimally sufficient presence in some cases. Every concept must have some threshold of applicability.

180. See, e.g., *Nike, Inc. v. Kasky*, 539 U.S. 654, 677–79 (2003) (Breyer, J., dissenting) (per curiam); *Bd. of Trs. v. Fox*, 492 U.S. 469, 473–75 (1989); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988); *Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952, 958 (9th Cir. 2012); *Comm'ns Workers of Am. v. Ector Cnty. Hosp. Dist.*, 467 F.3d 427, 437–38 (5th Cir. 2006); *Kasky v. Nike, Inc.*, 45 P.3d 243, 260 (Cal. 2002), *cert. granted*, 534 U.S. 654 (2003), *cert. dismissed as improvidently granted*, 539 U.S. 654 (2003).

that is inextricably intertwined with political speech, the courts extend the highest level of free speech protection to the inseparably combined commercial and political speech.<sup>181</sup> In *Riley*, the Court declared that “we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected expression.”<sup>182</sup>

Analogous reasoning would suggest that where an item of defamatory speech addresses matters of public interest while also failing to do so in other inseparable respects, the speech as an inseparable whole should be treated as addressing a matter of public interest. And this seems to be the most reasonable approach, but it includes several stipulations, all with more general implications.

Importantly, the overall distinction between speech that addresses and speech that does not address a matter of public interest does not itself dictate the precise constitutional test or level of scrutiny that should apply to either category. The distinction is, of course, clearly intended to provide substantially stronger constitutional protection for speech on matters of public interest. However, the distinction itself does not dictate, precisely, the *New York Times* test, a general strict scrutiny standard, or an objective recklessness standard for libel addressing matters of public interest.

Nor does the distinction as to matters of public versus private interest itself dictate that regulations of libel not addressing a matter of public interest should still be bound by, say, the *Dun & Bradstreet* plurality test,<sup>183</sup> by mid-level or minimum scrutiny, or by no federal constitutional protection at all beyond the constitutional requirements of due process and equal protection.

Thus, the distinction between speech addressing and not addressing matters of public interest in itself leaves open, within sensible limits, a number of other jurisprudential issues, and this is as it should be. The most crucial problem with attempts to distinguish between public and private figure libel plaintiffs is not that they did not implicate, in some fashion, interesting questions of libel law. Rather, the basic problem with the distinction between public and private figures, even where reliably drawable, is that it points the law in the wrong direction. The basic reasons for protecting freedom of speech on broad public matters simply do not track the plaintiff’s public or private figure status.<sup>184</sup>

Still, it would be helpful to develop some further sense of how to classify speech as either addressing or not addressing a matter of public interest and concern. Many cases, and certainly most of the inherently important cases, will involve speech that clearly addresses a matter of public interest. Other cases will clearly fall short of addressing any such matter. Where further guidance would be most useful is, as common sense would suggest, in the middle-ground or borderline cases.

One option would be to decide the inevitable middle-ground or close cases on

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181. See *Riley*, 487 U.S. at 796.

182. *Id.*

183. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759–61 (1985); see also *supra* note 123 and accompanying text.

184. See *supra* Part II.

more or less strategic but also principled grounds.<sup>185</sup> In the middle-ground cases, the courts should be permitted to promote basic free speech purposes and values, without violating any clear privacy rights. In particular, courts should be permitted in this range of close cases to reasonably incentivize speakers to shift their focus, where entirely feasible and appropriate, in the direction of more clearly public-interest-related speech, thus converting a borderline case into an easier one.

On this approach, potential speakers would be judicially encouraged to consider whether they could—at low cost, in practical terms, and with respect to their own free speech values and priorities—formulate their allegedly defamatory speech in some way that more clearly implicates a matter of public interest. The speaker’s point would not be distorted or suppressed but perhaps appropriately expanded in its scope and implications.<sup>186</sup>

Thus, for example, consider the case of defamatory speech that would fall into some murky middle-ground as neither clearly within nor clearly short of a matter of public interest. The potential speaker in such a case would be legally incentivized to consider whether some broader social or political policy implication follows naturally and undistortedly from the personalized elements of the speaker’s grievance.

Perhaps the speaker’s objection to the eventual libel plaintiff’s conduct actually implicates, say, broad nondiscrimination norms. Perhaps the speaker believes not merely that the eventual libel plaintiff’s behavior toward the speaker has been objectionable but that such behavior reflects a relevant broader pattern or practice<sup>187</sup> or an institutional culture of which the eventual libel plaintiff is merely a small part. If so and if the speaker wishes to make that clearly related, broader, and more socially significant point along with or in support of a more personalized grievance, the speaker should, in the middle-range of cases, be reasonably encouraged to do so.<sup>188</sup>

Finally, it is certainly true that speech, whether defamatory or not, can address matters of public interest and concern and yet be partly or entirely false and perhaps deliberately so. The distinction between speech that is or is not on a matter of public interest does not itself attempt to distinguish between true and false speech. But, of course, neither do any of the attempts to distinguish

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185. See generally R. George Wright, *Speech on Matters of Public Interest and Concern*, 37 DEPAUL L. REV. 27, 30–31 (1987) (providing background information and further discussion in various contexts).

186. Where otherwise appropriate, this incentivized broadening of the focus of one’s speech, for the middle-ground cases, might also tend to increase the audience for the speech in question. See *id.* at 31.

187. As suggested in the racial discrimination in employment context by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804–05 (1973). See also the idea of a “pattern or practice” of discrimination referred to in 42 U.S.C. § 2000e-6.

188. For an example from another context, a speaker may wish solely to accuse a celebrity of raping that speaker, but the speaker as in many “Me Too” cases may also wish to make a clearly related, broader social point. Consider cases such as *McKee v. Cosby*, 139 S. Ct. 675 (2019) (Thomas, J., concurring in denial of certiorari). The lower courts in *McKee* unfortunately focused on the distraction, at best, of whether the speaker McKee should be considered a limited-purpose public figure, apart from the nature of her speech. See *id.* at 675–76.

between public figure and private figure libel plaintiffs. Any broader approach to libel law must, at some point, somehow address issues of falsity. The constitutional value, if any, of false statements, and of deliberately false statements in particular, is in any event currently contested.<sup>189</sup>

## V. CONCLUSION

The constitutional law of libel has unfortunately focused crucially on distracting and misguided inquiries into the various distinctions among public figure and private figure libel plaintiffs. Equally unfortunate, attempts to reform and reconfigure the constitutional law of libel have often focused on public versus private figure libel plaintiff distinctions. The logic of free speech law itself suggests, instead, a judicial abandonment of this misconceived category. Attention instead to the distinction between defamatory speech that addresses and that does not address a matter of public interest and concern, however reasonably defined, actually tracks the basic reasons for protecting, and for limiting, freedom of speech in the first place. And this is where the constitutional law of libel should primarily focus.

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189. See generally Wright, “*What Is That Honor?*”: *Re-Thinking Free Speech in the “Stolen Valor” Case*, *supra* note 169. The classic defense of the social value of at least some forms of false or mistaken claims on public issues is that of JOHN STUART MILL, *supra* note 169, at 76–77, 80. But in an increasingly fragmented culture, the very ideas of truth and falsity can be subject to critique, subjectivization, and deconstruction. See, e.g., LEE MCINTYRE, *POST-TRUTH* 6, 9–10 (2018). At least on Mill’s classical terms, there remains a sense that some false claims can revitalize public debate and challenge dogmatically held beliefs in uniquely valuable ways. Perhaps even a deliberate lie can reveal, uniquely, something of genuine political value about the speaker. Certainly, some merely negligent falsity in political claims must be tolerated. In any event, we need take no stand here on the precise legal test to be applied to false speech on a public issue. But it is certainly difficult to see much constitutionally relevant value in false and defamatory claims that do not address any matter of public interest.