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Do Facebook and Twitter Make You a Public Figure?: How to Apply the Gertz Public Figure Doctrine to Social Media

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**DO FACEBOOK AND TWITTER MAKE YOU A
PUBLIC FIGURE?:
HOW TO APPLY THE GERTZ PUBLIC FIGURE
DOCTRINE TO SOCIAL MEDIA**

Matthew Lafferman†

Abstract

In Gertz v. Welch, the Supreme Court expanded First Amendment protections to defamation law by requiring a plaintiff who qualified as a public figure to prove a higher burden of proof to recover for damages under a defamation suit. The Court relied on two major rationales to delineate the Gertz doctrine: public figures “voluntarily exposed themselves to increased risk of injury” and had “significantly greater access to the channels of effective communication.” Applying this doctrine to online media poses challenges, specifically when applied to social media platforms. Many scholars have recognized that social media users have equal access to the same basic media features, rendering the Gertz Court’s access-to-the-media rationale inapplicable when applied to social media. A 216% rise in defamation suits against Internet users in the last three years alone, due to the recent discovery that most homeowner’s insurance policies cover libel liability, signals an almost inevitable rise in defamation suits that will eventually force courts to face the challenge of applying the Gertz public figure doctrine to social media.

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This Comment offers an approach that reconciles the problems of applying the public figure doctrine to social media. This Comment argues that courts should require defendants to overcome certain initial presumptions by clear and convincing evidence before designating a social media user an involuntary public figure or a general public figure. Moreover, when recommending an approach for courts to identify voluntary activity on a social network for limited-purpose public figures, courts should avoid defining mere access to social media as voluntary activity and instead conclude such access is an extension of an individual's private life. This approach would allow courts to apply much of the currently existing public figure doctrine to social media and help courts avoid the negative legal and policy consequences of abolishing the doctrine altogether.

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INTRODUCTION

Mr. Smith, like the majority of American adults,¹ has a social media profile, and he posts daily on his whereabouts, hobbies, and other interests. Mr. Smith becomes involved in promoting animal rights and, over a period of several months, he posts numerous accounts of animal brutality and encourages philanthropic action on his profile, which is accessible to around eight hundred “friends.”² Ms. Jones, who has access to Mr. Smith’s social media site, accuses Mr. Smith of being a fraud and labels him an animal killer. Experiencing reputational damage, Mr. Smith sues Ms. Jones for defamation. Can Ms. Jones claim Mr. Smith is a public figure and therefore avoid liability unless Mr. Smith can prove she acted with actual malice? Mr. Smith arguably thrust himself into a public controversy by posting comments on a controversial subject. However, finding Mr. Smith a public figure could result in defining every social media user as a public figure, which would substantially reduce the potential damages that many users could recover for defamation under the stringent actual malice standard.³ On the other hand, if courts were to avoid applying the public figure test altogether, it could deter many users who fear defamation liability from using social networks,⁴ chilling speech on social media that has proved to be socially beneficial in recent political and social

1. *The Infinite Dial 2011: Navigating Digital Platforms*, ARBITRON INC. & EDISON RESEARCH, 4, http://www.edisonresearch.com/Infinite_Dial_2011_ExecSummary.pdf (last visited Feb. 29, 2012) (study showing that more than half of all Americans aged twelve and older have a profile on Facebook); Tom Webster, *The Social Habit 2011*, EDISON RESEARCH (May 29, 2011), http://www.edisonresearch.com/home/archives/2011/05/the_social_habit_2011.php (research showing that fifty-two percent of Americans aged twelve and older have one or more social networking pages).

2. See *Adding Friends & Friend Requests*, FACEBOOK, <http://www.facebook.com/help/friends/requests> (last visited Feb. 23, 2012).

3. Chris Williams, Comment, *The Communications Decency Act and New York Times v. Sullivan: Providing Public Figure Defamation a Home on the Internet*, 43 J. MARSHALL L. REV. 491, 502-03 (2010) (“[The actual malice] standard proves a difficult hurdle for public figure plaintiffs to clear, thus making the likelihood of success in a public figure defamation action minimal.”) (footnote omitted).

4. Jeff Kosseff, *Private or Public? Eliminating the Gertz Defamation Test*, 2011 U. ILL. J.L. TECH & POL’Y 249, 272 (2011) (“If such voluntary action were enough to qualify someone to be a limited-purpose public figure, it could have an additional chilling effect on free speech: it would cause people who fear defamation to not take advantage of services such as Facebook.”).

movements, such as the Arab Spring.⁵

This hypothetical underscores the problems that courts will encounter when applying the public figure doctrine announced in *Gertz v. Welch*⁶ to social media.⁷ The public figure doctrine extended First Amendment protections to libel law by requiring a public figure plaintiff to establish that the defendant defamed the plaintiff with actual malice, instead of negligence, in order to recover damages for defamation.⁸ With more courts applying libel law, instead of slander, to Internet postings⁹ the application of the public figure doctrine to social media users has become particularly relevant. Furthermore, courts cannot necessarily look to similar forums when applying the public figure doctrine to social media. The widespread use of social media¹⁰ and its fully customizable privacy settings¹¹ make judicial application of the public figure doctrine to social media distinguishable from application to publicly available computer

5. See Clay Shirky, *The Political Power of Social Media*, 90 FOREIGN AFF. 28, 29-33 (2011).

6. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

7. For the purposes of this Comment, social media is used interchangeably with social networks, and refers to social media platforms such as Facebook, Twitter, LinkedIn, and Google+.

8. *Gertz*, 418 U.S. at 342-43.

9. See ROBERT D. SACK, SACK ON DEFAMATION § 2:3 (4th ed. 2012). Historically, slander was “oral or aural defamation” while libel was “written or visual defamation.” *Id.* at 2-9. Courts have applied libel law to defamation resulting from Internet postings. *Id.* at 2-12 (citing *W.J.A. v. D.A.*, 4 A.3d 601, 604 (N.J. Super. Ct. App. Div. 2010)); *Too Much Media, LLC v. Hale*, 993 A.2d 845, 865 (N.J. Super. Ct. App. Div. 2010), *aff’d*, 20 A.3d 364 (N.J. 2011) (“[I]t may take more forethought to type an [I]nternet posting than it does to blurt out spoken words. . . . [U]nlike spoken words that evaporate, Internet postings have permanence, as the posts can remain on that particular site for an indefinite period and can easily be copied and forwarded.”). Judge Robert D. Sack argues that in the future the distinctions between libel and slander will vanish, and the two causes of action will eventually evolve into the “single tort of ‘defamation.’” SACK, *supra*, at 2-12 (citing *Collins v. Purdue Univ.*, 703 F. Supp. 2d 862 *passim* (N.D. Ind. 2010); *Dugan v. Mittal Steel USA Inc.*, 929 N.E.2d 184 *passim* (Ind. 2010)).

10. See sources cited *supra* note 1.

11. Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. OF COMPUTER-MEDIATED COMM. 210, 211 (2008) (“What makes social network sites unique is not that they allow individuals to meet strangers, but rather that they enable users to articulate and make visible their social networks. This can result in connections between individuals that would not otherwise be made”); see also *Data Use Policy*, FACEBOOK, http://www.facebook.com/full_data_use_policy#onfb (last visited Feb. 29, 2012) (discussing profile “visibility control”); *Twitter Privacy Policy*, TWITTER, <http://twitter.com/privacy> (last visited Feb. 29, 2012) (discussing privacy settings).

bulletin boards,¹² blogs,¹³ or the Internet in general.¹⁴

Particular developments have also signaled a rise in online defamation suits. The recent discovery that most homeowner's insurance policies cover libel liability has contributed to a 216% increase in Internet defamation suits against bloggers and Internet users over the past three years alone.¹⁵ Attorneys now target these groups in online defamation suits because they can recover up to the limits of these individual's policies.¹⁶ The increased chance that a plaintiff will collect in defamation suits, combined with the growing number of social media participants, make an overall increase in these suits—especially those concerning social media platforms—inevitable.¹⁷

However, courts face challenges when applying the public figure doctrine to social media, especially the particular dilemma of invalidating *Gertz*.¹⁸ The Supreme Court relied on two major rationales to delineate the *Gertz* doctrine: public figures “voluntarily exposed themselves to increased risk of injury” and had “significantly greater access to the channels of effective communication.”¹⁹ Each social media user has access to the same basic features as every other user on the same social media platform.²⁰ As a result, it is extremely

12. See Thomas D. Brooks, Note, *Catching Jellyfish in the Internet: The Public-Figure Doctrine and Defamation on Computer Bulletin Boards*, 21 RUTGERS COMPUTER & TECH. L.J. 461 (1995) (discussing how the public figure doctrine should apply to online bulletin boards).

13. See Anthony Ciolli, *Bloggers as Public Figures*, 16 B.U. PUB. INT. L.J. 255 (2007) (discussing how the public figure doctrine should apply to bloggers).

14. See Aaron Perzanowski, Comment, *Relative Access to Corrective Speech: A New Test for Requiring Actual Malice*, 94 CALIF. L. REV. 833 (2006) (discussing how the public figure doctrine should apply to the Internet in general); Michael Hadley, Note, *The Gertz Doctrine and Internet Defamation*, 84 VA. L. REV. 477 (1998) (same).

15. James C. Goodale, *Can You Say Anything You Want on the Net?*, 242 N.Y. L.J. 3 (2009).

16. *Id.*

17. See *Online Defamation Cases in England and Wales “Double,”* BBC NEWS (Aug. 26, 2011, 1:03 PM), <http://www.bbc.co.uk/news/uk-14684620> (stating that the increase in social media users has led to an increase in online defamation cases).

18. This Comment assumes that social media users are initially private figures, and have essentially equal media contacts in the material world. As a result, this Comment does not discuss applying the public figure doctrine to social media users who may already qualify as public figures.

19. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-45 (1974).

20. See Boyd & Ellison, *supra* note 11, at 211-14.

difficult, if not impossible, for one social media user to have “greater access to the channels of effective communication” than other users.²¹ Thus, the *Gertz* Court’s rationale for what constitutes a public figure is partially inapplicable to social media users.²² Despite this inapplicability, *Gertz* can still be relevant in social media defamation cases. Courts could retain *Gertz*’s relevance by upholding *Gertz*’s other main principle—namely, that a social media user voluntarily assumes the risk of injury—when finding a social media user is a public figure.²³

It is not to say that this approach is without problems. Focusing on the voluntary principle of *Gertz* is especially challenging when applying the involuntary public figure designation, which has no assumption of risk or voluntary action test.²⁴ Moreover, courts also must be cautious when determining what action is “voluntary,” which

21. See Ann E. O’Connor, Note, *Access to Media All A-Twitter: Revisiting Gertz and the Access to Media Test in the Age of Social Networking*, 63 FED. COMM. L.J. 507, 526, 529 (2011) (“Communicating constantly through social networking and other Internet service providers has become so much a regular and routine practice of private individuals that there is not an assumption of receiving widespread attention from those communications. . . . When the *Gertz* Court spoke about accessing the media and the ease by which public figures were able to do so, it was addressing in simple terms what was a simple truth: those with a firm grasp on the public’s attention through their position as public officials or widely known figures would have the opportunity to garner the press’s attention to rebut statements made against them.”); Nathaniel Gleicher, Note, *John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 YALE L.J. 320, 335 (2008) (“[B]ecause anyone can easily publish speech on the Internet, the effect of public figures’ ‘significantly greater access to the channels of effective communication’ is limited.” (quoting *Gertz*, 418 U.S. at 344)) (citing *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (“[A]ny person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox.”)); see also PAUL SIEGEL, COMMUNICATION LAW IN AMERICA 495 (Molly Taylor & Karen Hanson eds., 2002) (stating that online plaintiffs “can reach an audience as large as the one exposed to the original defamation”); *Doe v. Cahill*, 884 A.2d 451, 455-56 (Del. 2005) (“Through the [I]nternet, speakers can bypass mainstream media to speak directly to ‘an audience larger and more diverse than any the Framers could have imagined.’” (quoting Lyriisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 895 (2000))).

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

23. See O’Connor, *supra* note 21, at 525 (“In order to appropriately protect the private blogger from the heightened standard of actual malice that she would be required to prove as a limited-purpose public figure, it is necessary to give weight to the other prongs of the test—that is, whether there is an isolated controversy, whether the plaintiff has voluntarily thrust herself into the controversy, and so on—before jumping straight to the access to media prong.”).

24. *Gertz*, 418 U.S. at 345 (“Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own . . .”).

Gertz defined as “assum[ing] roles of especial prominence in the affairs of society”²⁵ or “thrust[ing] themselves to the forefront of particular public controversies.”²⁶ Courts should avoid a voluntariness definition that encompasses simple operation and use of a social media site. Such an approach would convert millions of users into public figures in one fell swoop,²⁷ which in turn would substantially decrease social media users’ chances at recovering for online defamation.²⁸ This result would violate a major principle of *Gertz*,²⁹ as well as a main tenet of tort law: compensation for the victim.³⁰

Section 230 of the Communications Decency Act (CDA)³¹ makes the proper application of *Gertz* to social media platforms even more important. Section 230 immunizes Internet service providers from liability for the defamatory statements of users.³² As a result, social media users can only recover under defamation suits in suits against individual social media users, as opposed to a social media platform or operating system. Thus, to allow users a remedy, courts must cautiously structure the public figure doctrine to prevent all social media users from becoming public figures. However, courts

25. *Id.*

26. *Id.*

27. *Key Facts*, FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last visited Feb. 29, 2012) (Facebook has more than 840 million monthly active users); Eric Ernest, *Google Plus Users Number 40 Million and Counting*, PCWORLD.IN (Oct. 24, 2011), <http://www.pcworld.in/news/google-plus-users-number-40-million-and-counting-57162011> (Google+ has more than forty million users); Chris Taylor, *Social Networking “Utopia” Isn’t Coming*, CNN (June 27, 2011), http://articles.cnn.com/2011-06-27/tech/limits.social.networking.taylor_1_twitter-users-facebook-friends-connections?_s=PM:TECH (Twitter has more than 300 million users).

28. Williams, *supra* note 3, at 502-03.

29. *Gertz*, 418 U.S. at 341, 343 (“The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. . . . [W]e conclude that the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them.”).

30. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 6 (W. Page Keeton ed., 5th ed. 1984) (“The purpose of the law of torts is to adjust these losses, and to afford compensation for injuries sustained by one person as the result of the conduct of another.” (citing Cecil A. Wright, *Introduction to the Law of Torts*, 8 CAMBRIDGE L.J. 238, 238 (1944))).

31. Communications Decency Act, 47 U.S.C. § 230 (2011).

32. See Ciolli, *supra* note 13, at 275 (stating that courts have interpreted the statute to grant “broad immunity to [I]nternet service providers, website hosting services, mailing list operators, discussion board owners, and other electronic services covered by the statute”).

should also avoid completely rejecting the public figure doctrine in order to avoid chilling speech on social media platforms³³ and, consequently, contradicting an important principle of the public figure doctrine³⁴ and reducing the socially beneficial speech that derives from such platforms.³⁵

This Comment sets forth a workable public-figure test to apply to social media users that upholds the principles of *Gertz*. Courts should require defendants to overcome certain initial presumptions by clear and convincing evidence before designating a social media user an involuntary public figure or a general public figure. To overcome the presumption that the plaintiff is not an involuntary public figure, courts should require a defendant to provide clear and convincing proof that the plaintiff has greater access to the media than other users on the plaintiff's social media network. Additionally, to overcome the presumption that the plaintiff is not a general public figure a defendant must offer clear and convincing evidence that the plaintiff has general notoriety or notoriety within the social media platform. Moreover, when determining what constitutes voluntary activity on a social network for limited-purpose public figures, courts should consider social media an extension of a social media user's private life.

Part I of this Comment provides a working definition of what constitutes social media, the differences between social media and the Internet in general, and the social benefits that derive from speech on social media platforms. Part II gives a short analysis of Supreme

33. Kosseff, *supra* note 4, at 272.

34. See *Gertz*, 418 U.S. at 342 (“Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury. . . . [But, i]n our continuing effort to define the proper accommodation between these competing concerns, we have been especially anxious to assure to the freedoms of speech and press that ‘breathing space’ essential to their fruitful exercise.” (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963))); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (“A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable ‘self-censorship’ . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.”); *id.* at 300-01 (Goldberg, J., concurring) (“The opinion of the Court conclusively demonstrates the chilling effect of the Alabama libel laws on First Amendment freedoms in the area of race relations.”).

35. See Shirky, *supra* note 5, at 29-33.

Court precedent on the public figure doctrine and a brief overview on lower courts' application of this test. Part III examines the Communications Decency Act and how the act affects the remedies available to a plaintiff defamed by online speech. Part IV analyzes the problems that courts will experience when applying each public figure designation to the Internet. It next recommends that to best uphold the principles of *Gertz*, courts should require a defendant to overcome certain starting presumptions by clear and convincing proof when determining whether a social media plaintiff is a general or involuntary public figure. Part IV then suggests that courts define voluntary activity as deliberate, nonincidental contact with a public forum—that is, any forum in which the public can freely access information without encountering privacy restrictions.³⁶ Although this definition includes social media profiles that users treat as “loudspeakers” instead of “mailboxes,” courts should avoid defining mere access of social media services as use of a public forum, and instead treat such access as an extension of the user’s private life.

I. WHAT IS SOCIAL MEDIA?

A. Defining Social Media

Social media refers to more typical social media platforms³⁷ and features that are considered general characteristics of these widely used services. These characteristics include a viewable profile listing personal characteristics and preferences,³⁸ some kind of viewable list of contacts or “friends,”³⁹ and the ability for one social media user to

36. See *infra* notes 281-84 and accompanying text.

37. Good examples of more typical social media networks include the three major social media networks: LinkedIn, Facebook, and Twitter. See Lauren McCoy, *140 Characters or Less: Maintaining Privacy and Publicity in the Age of Social Networking*, 21 MARQ. SPORTS L. REV. 203, 210 n.43 (2010) (citing Don Bulmer, *The Big Three Social Networks Have Emerged as Professional Networks: LinkedIn, Facebook, and Twitter*, SOCIALMEDIATODAY (Nov. 19, 2009), <http://www.socialmediatoday.com/SMC/143975> (stating that the most popular social media platforms are LinkedIn, Facebook, and Twitter)).

38. Boyd & Ellison, *supra* note 11, at 213 (“The public display of connections is a crucial component of [social network sites]. The Friends list contains links to each Friend’s profile, enabling viewers to traverse the network graph by clicking through the Friends lists. On most sites, the list of Friends is visible to anyone who is permitted to view the profile . . .”).

39. *Id.* at 211 (“While [social network sites] have implemented a wide variety of technical features, their backbone consists of visible profiles that display an articulated list of

post comments or statements on the profile of another user.⁴⁰ Social media platforms may also include some more advanced characteristics, most notably video and photo sharing capabilities.⁴¹ The defining feature of social media is the fact that users can modify their privacy settings to allow or restrict public access to their pages.⁴²

B. Distinguishing Social Media from Other Internet Media

Social media is a unique feature of the Internet. For this reason, other articles discussing the public figure doctrine and its legal consequences for other types of Internet platforms are inapplicable to social media. Social media differs from the rest of the Internet in three major ways. One distinguishing feature is that social media has internal privacy mechanisms.⁴³ These mechanisms give the user a range of privacy options, from making all of their information publicly available to restricting access to an exclusive group of predetermined users.⁴⁴ The ability to limit access on social media differs from the generally open nature of the Internet. While private blogs and web pages may offer this opportunity to users, these forums do not offer another distinguishing social media characteristic: the sheer number of people participating in a structured online community⁴⁵ with each user possessing identical web capabilities.⁴⁶ The third difference between social media and other Internet platforms is the public expectations of these forums. Many see social

Friends who are also users of the system.”) (footnote omitted).

40. *Id.* at 213 (“Most [social network sites] also provide a mechanism for users to leave messages on their Friends’ profiles. This feature typically involves leaving ‘comments,’ although sites employ various labels for this feature.”).

41. *Id.* at 214 (“Beyond profiles, Friends, comments, and private messaging, [social network sites] vary greatly in their features and user base. Some have photo-sharing or video-sharing capabilities; others have built-in blogging and instant messaging technology.”).

42. *Id.* at 211 (“What makes social network sites unique is not that they allow individuals to meet strangers, but rather that they enable users to articulate and make visible their social networks. This can result in connections between individuals that would not otherwise be made”); see also *Data Use Policy*, *supra* note 11; *Twitter Privacy Policy*, *supra* note 11.

43. See *Data Use Policy*, *supra* note 11; *Twitter Privacy Policy*, *supra* note 11; see also Boyd & Ellison, *supra* note 11, at 213 (“The visibility of a profile varies by site and according to user discretion.”).

44. See *Data Use Policy*, *supra* note 11; *Twitter Privacy Policy*, *supra* note 11.

45. See sources cited *supra* note 27.

46. See Boyd & Ellison, *supra* note 11, at 211-14.

media platforms as an extension of their social life in the material world.⁴⁷ These three dissimilarities create a unique challenge for applying the public figure doctrine in the social media context.

C. *The Social Benefits of Social Media*

Social media also provides an important benefit to society. Although some critics have claimed that social media has a limited social benefit,⁴⁸ many examples exist that rebut this claim. For example, social media has played a pivotal role in political campaigns in the United States.⁴⁹ Social networks also had an important role in several political movements throughout the world, including most notably the Arab Spring.⁵⁰ Most recently, social media use has helped proliferate information about the human rights violations in Syria.⁵¹ These incidents provide only a few examples of the numerous occasions in which social media use has played a key role in an important social or political event or movement by helping organize or disseminate ideas throughout the group.⁵² As a result, courts should avoid policies that might chill speech on social media platforms when deciding how to apply doctrine to social media platforms.

II. THE PUBLIC FIGURE DOCTRINE

Before considering how to apply the public figure doctrine to

47. See *id.* at 211, 221 (“On many of the large [social networking sites], participants are not necessarily ‘networking’ or looking to meet new people; instead, they are primarily communicating with people who are already a part of their extended social network. . . . Although exceptions exist, the available research suggests that most [social networking sites] primarily support pre-existing social relations.”).

48. See Malcolm Gladwell, *Small Change*, NEW YORKER, Oct. 4, 2010, at 40-42, available at http://www.newyorker.com/reporting/2010/10/04/101004fa_fact_gladwell.

49. See Beth Fouhy, *Elections 2012: The Social Network, Presidential Campaign Edition*, HUFFINGTON POST (Apr. 17, 2011, 5:30 PM), http://www.huffingtonpost.com/2011/04/17/elections-2012-social-media_n_850172.html.

50. See, e.g., Philip N. Howard et al., *Opening Closed Regimes: What Was the Role of Social Media During the Arab Spring?* (Project on Info. Tech. & Political Islam, Working Paper No. 2011.1, 2011), available at <http://pitpi.org/?p=1051> (follow download hyperlink); Anne Alexander, *Internet Role in Egypt’s Protests*, BBC NEWS, <http://www.bbc.co.uk/news/world-middle-east-12400319> (last updated Feb. 9, 2011, 1:00 AM).

51. See Anthony Shadid, *With Internet, Exiles Shape World’s Image of Syria Revolt*, N.Y. TIMES, Apr. 24, 2011, at A1.

52. See Shirky, *supra* note 5, at 29-33.

social media, it is instructive to review the current state of defamation law to highlight potentially troublesome aspects of the doctrine. Under the Second Restatement of Torts, the plaintiff satisfies the elements of defamation by proving that (1) the defendant published a statement to a third party (2) that is a false defamatory statement concerning the plaintiff, (3) the defendant's fault at least amounts to negligence, and (4) the statement caused damage to the plaintiff.⁵³ In order to establish the defendant negligently made the statement, the plaintiff must prove that the defendant failed to verify the truth of the statement.⁵⁴ The public figure doctrine, however, changes the threshold liability that the plaintiff must prove in order to recover.⁵⁵ If a plaintiff qualifies as a public figure, he must prove the defendant acted with "actual malice" when making the defamatory statement, which is defined as "reckless disregard for the truth."⁵⁶ It is not entirely clear when an individual acquires public figure status. An analysis of the public figure doctrine, as well as cases explaining the doctrine, illustrates the confusion surrounding the public figure doctrine.

A. *Supreme Court Precedent*

1. *New York Times* and *Gertz*

*New York Times Co. v. Sullivan*⁵⁷ is the starting point for American defamation law and the public figure doctrine.⁵⁸ *New York*

53. RESTATEMENT (SECOND) OF TORTS § 558 (1976); Quin S. Landon, Note, *The First Amendment and Speech-Based Torts: Recalibrating the Balance*, 66 U. MIAMI L. REV. 157, 163 (2011) ("To prevail in a defamation action a plaintiff must prove the following elements: (1) a false and defamatory statement was made against another; (2) an unprivileged publication of the statement was made to a third party; (3) if the defamatory matter is of public concern, fault amounting at least to negligence on the part of the publisher; and (4) damage to the plaintiff." (citing Aaron Larson, *Defamation, Law, and Slander*, EXPERTLAW (Aug. 2003), http://www.expertlaw.com/library/personal_injury/defamation.html)).

54. SACK, *supra* note 9, § 6:2.1.

55. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342-43 (1974).

56. See *id.* at 328, 342-43 ("Under [the *New York Times v. Sullivan*] rule respondent would escape liability unless petitioner could prove publication of defamatory falsehood 'with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.'" (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964))).

57. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

58. RODNEY A. SMOLLA, *LAW OF DEFAMATION* § 2:1 (2d ed. 2012).

Times involved a defamation lawsuit by an elected official of Montgomery, Alabama, against the *New York Times* after the *Times* published an advertisement criticizing Montgomery for the city's role in the civil rights movement.⁵⁹ In finding in favor of the *Times*, the Supreme Court extended First Amendment principles to defamation law by holding that individuals classified as "public officials" must prove "actual malice," instead of negligence, to recover for defamatory speech.⁶⁰ The Court based its decision on the premise that defamation law would have a chilling effect on free speech if a person critical of public officials would have to guarantee the truth of all his statements.⁶¹ The Court based its conclusion on the presumption that the risk of civil liability would force people being critical of "official conduct" to self-censor.⁶² The majority explained that such censoring would detract from the "debate on public issues," which "should be uninhibited, robust, and wide-open," and "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."⁶³

The Supreme Court expanded the actual malice standard to public figures in *Curtis Publishing Co. v. Butts*⁶⁴ and *Associated Press v. Walker*⁶⁵ in plurality opinions; however, *Gertz v. Welch* was the first case in which the Court officially set forth guidelines and a rationale for determining public figure status.⁶⁶ In *Gertz*, an attorney sued a publisher of a magazine who wrote an article claiming the attorney was a communist.⁶⁷ The publisher argued the attorney was a public official or a public figure and thus "entitled to invoke the privilege enunciated in *New York Times*."⁶⁸ In refusing to find that the lawyer fell into either of these designations, the Court effectively outlined the public figure doctrine.⁶⁹

59. See *N.Y. Times Co.*, 376 U.S. at 256-60.

60. See *id.* at 283-84 n.24.

61. See *id.* at 279; *id.* at 300-01 (Goldberg, J., concurring).

62. See *id.* at 279 (majority opinion); *id.* at 300-01 (Goldberg, J., concurring).

63. *Id.* at 270 (majority opinion).

64. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967).

65. *Id.*

66. SMOLLA, *supra* note 58, §§ 2:11-12.

67. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 326-27 (1974).

68. *Id.* at 327.

69. *Id.* at 344.

The Court explained the public figure doctrine rests on two major foundations⁷⁰: the individual's access to the media⁷¹ and the individual's assumption of risk of injury.⁷² The majority argued that both public officials and public figures have "significantly greater access to the channels of effective communication" and can thus rebut false statements more effectively than private individuals.⁷³ The Court also reasoned that public figures have assumed an "increased risk of injury" from defamatory statements by voluntarily assuming a role of fame or influence in society.⁷⁴

After explaining its rationale, the Court proceeded to identify at least two, and perhaps three,⁷⁵ types of public figures: general public figures, limited-purpose public figures, and involuntary public figures.⁷⁶ According to the majority, general public figures attain public figure status by voluntarily assuming a role of "especial prominence" in society.⁷⁷ In comparison, limited-purpose public figures reach public status when they "thrust themselves" into a specific public controversy in order to influence the outcome.⁷⁸ Although some controversy remains about the existence of involuntary public figures,⁷⁹ the *Gertz* Court also left open the possibility of their existence.⁸⁰ However, the majority pointed out that such cases would be few and far between.⁸¹ Finally, the Court made a

70. *Id.* at 344-45; SMOLLA, *supra* note 58, § 2:13.

71. *Gertz*, 418 U.S. at 344; SMOLLA, *supra* note 58, § 2:13.

72. *Gertz*, 418 U.S. at 345; SMOLLA, *supra* note 58, § 2:14.

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

74. *Id.* at 345.

75. W. Wat Hopkins, *The Involuntary Public Figure: Not So Dead After All*, 21 CARDOZO ARTS & ENT. L.J. 1, 21 (2003) ("[T]here is disagreement as to whether the Supreme Court identified two or three categories of public figure status.").

76. SMOLLA, *supra* note 58, §§ 2:14, 2:33.

77. *Gertz*, 418 U.S. at 345 ("[T]hose who attain this status have assumed roles of especial prominence in the affairs of society.").

78. *Id.* ("More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.").

79. Hopkins, *supra* note 75, at 21.

80. *Gertz*, 418 U.S. at 345 ("[I]t may be possible for someone to become a public figure through no purposeful action of his own . . .").

81. *Id.* ("[I]t 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.") (emphasis added).

point to eschew a bright-line rule or a case-by-case approach and instead indicated a preference for developing broad principles when determining public figure status.⁸²

2. Subsequent Supreme Court Cases

Gertz provided the general outline of the public figure doctrine, and later Supreme Court cases shed light on its precise definition. Two years after *Gertz*, in *Time, Inc. v. Firestone*,⁸³ Mary Alice Firestone filed a defamation suit after *Time* published defamatory material about her divorce from Russell Firestone, a descendant of the wealthy Firestone family.⁸⁴ *Time* argued that it did not act with the requisite intent of actual malice to incur liability because Mrs. Firestone was a public figure.⁸⁵ The majority refused to find Mrs. Firestone was a general or limited-purpose public figure and, in the process, elucidated the public figure doctrine.⁸⁶ The Court noted that an individual needed more than merely local notoriety to be a public figure.⁸⁷ The Court also expressed a concern about adopting a broad definition of a public figure that would encapsulate too large a class of people.⁸⁸ It therefore refused to define public controversy as any debate or issue that concerned a subject of public interest.⁸⁹ The Court also displayed great deference to the *Gertz* voluntariness requirement by relying on Mrs. Firestone's lack of voluntary action to decide she

82. See *id.* at 343, 346 (“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. . . . Nor does the Constitution require us to draw so thin a line between the drastic alternatives of the *New York Times* privilege and the common law of strict liability for defamatory error.”).

83. *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

84. *Id.* at 450-52.

85. *Id.* at 452-53.

86. *Id.* at 453 (“Respondent did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society, and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it.”).

87. *Id.*

88. *Id.* at 456-57 (“It may be argued that there is still room for application of the *New York Times* protections to more narrowly focused reports of what actually transpires in the courtroom. But even so narrowed, the suggested privilege is simply too broad.”).

89. *Id.* at 454 (“[P]etitioner seeks to equate ‘public controversy’ with all controversies of interest to the public Dissolution of a marriage through judicial proceedings is not the sort of ‘public controversy’ referred to in *Gertz* . . .”).

was not a public figure of any sort.⁹⁰

Subsequent Supreme Court cases, *Wolston v. Reader's Digest Association*⁹¹ and *Hutchinson v. Proxmire*,⁹² further developed the boundaries of the public figure doctrine. In *Wolston*, the Court refused to find that an individual who failed to appear in a grand jury hearing investigating Soviet intelligence activities in the United States was a public figure.⁹³ The Court reiterated its definition of a public controversy stated in *Firestone*: "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."⁹⁴ On the other hand, *Hutchinson* involved a suit brought by an adjunct professor against a U.S. Senator who criticized the professor's federal spending as unreasonably excessive.⁹⁵ The Court refused to find that the professor was a public figure partly because of its concern for crafting a rule that encompasses too large a class of people.⁹⁶ The majority explicitly stated that if it concluded the professor was a public figure, "everyone who received or benefited from the myriad public grants for research could be classified as a public figure—a conclusion that our previous opinions have rejected."⁹⁷ Both *Wolston* and *Hutchinson* emphasized the need to identify some voluntary action taken by the plaintiff before finding the plaintiff is a public figure.⁹⁸

90. *See id.* ("Nor did respondent freely choose to publicize issues as to the propriety of her married life.").

91. *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979).

92. *Hutchinson v. Proxmire*, 443 U.S. 111 (1979).

93. *Wolston*, 443 U.S. at 159-61.

94. *Id.* at 167.

95. *Hutchinson*, 443 U.S. at 114-15.

96. *Id.* at 135 ("[I]t is not sufficient to make Hutchinson a public figure. If it were, everyone who received or benefited from the myriad public grants for research could be classified as a public figure—a conclusion that our previous opinions have rejected.").

97. *Id.*

98. *See id.* at 135 ("Hutchinson did not thrust himself or his views into public controversy to influence others."); *Wolston*, 443 U.S. at 166 ("[T]he undisputed facts do not justify the conclusion of the District Court and Court of Appeals that petitioner 'voluntarily thrust' or 'injected' himself into the forefront of the public controversy surrounding the investigation of Soviet espionage in the United States.").

B. Lower Court Application of the Public Figure Doctrine

Despite the Supreme Court's efforts, lower courts continue to experience difficulty applying the public figure doctrine. In fact, one court has complained that the Supreme Court has not "fleshed out" the difference between a public figure and private person.⁹⁹ In light of the gaps remaining in the public figure doctrine, lower courts have shaped much of its finer contours.¹⁰⁰ Most lower courts have supported a plain reading of *Gertz*, and found *Gertz* can support three different public figure designations: general public figures, limited-purpose public figures, and involuntary public figures.¹⁰¹ Lower courts have established a large variety of tests for each of these designations.¹⁰² This Comment will focus on the general features or potentially problematic tests for each designation.

1. General Public Figures

Courts have generally required that an individual assume a level of notoriety in society before concluding the individual is a public figure.¹⁰³ Within the constructs of this test, courts have interpreted an assumption of risk to be some form of voluntary action on the plaintiff's behalf.¹⁰⁴ Most have defined voluntary activity as actually seeking and obtaining notoriety.¹⁰⁵ However, some courts have

99. Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287, 1292 (D.C. Cir. 1980).

100. Ciolli, *supra* note 13, at 266 ("Because the Supreme Court's most recent public figure decisions have failed to clarify the *Gertz* framework, lower courts have developed most of contemporary public figure doctrine." (citing Erik Walker, Comment, *Defamation Law: Public Figures—Who Are They?*, 45 BAYLOR L. REV. 955, 977 (1993))).

101. Hopkins, *supra* note 75, at 21 ("[T]here is disagreement as to whether the Supreme Court identified two or three categories of public figure status. . . . [A] number of courts have recognized—either explicitly or implicitly—that the involuntary public figure is one of three types of public figures identified by the *Gertz* Court.").

102. Walker, *supra* note 100, at 971 ("The tension between *Gertz* and subsequent Supreme Court decisions has produced inconsistent lower court holdings.").

103. See SACK, *supra* note 9, § 5:3.2; SMOLLA, *supra* note 58, § 2:80.

104. See Hopkins, *supra* note 75, at 25-26.

105. See, e.g., Carson v. Allied News Co., 529 F.2d 206, 209 (7th Cir. 1976) (finding Johnny Carson a public figure); Loeb v. Globe Newspaper Co., 489 F. Supp. 481, 485-86 (D. Mass. 1980) (finding the Globe Newspaper a general purpose public figure); Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341, 1348 (S.D.N.Y. 1977) (finding a billion dollar corporation an all-purpose public figure); Eastwood v. Superior Court, 149 Cal. App. 3d 409, 423-25 (1983) (finding Clint Eastwood a general purpose public figure), *superseded by statute*, CAL. CIV. CODE § 3344 (West 2010); Ithaca Coll. v. Yale Daily News Publ'g Co., 433 N.Y.S.2d 530, 533-

interpreted the assumption of risk to include behavior from which publicity inevitably results,¹⁰⁶ such as marrying a famous television-show personality¹⁰⁷ or a music star.¹⁰⁸

In regards to notoriety, most lower courts have set a high bar for an individual to be considered notorious in society.¹⁰⁹ Upon first glance it seems that an individual or entity must be a household name to achieve general public figure status, which has included the likes of Johnny Carson,¹¹⁰ Clint Eastwood,¹¹¹ Carroll Burnett,¹¹² Jerry Falwell,¹¹³ Ithaca College,¹¹⁴ the Globe Newspaper,¹¹⁵ and even a billion dollar corporation, Reliance Insurance.¹¹⁶ However, courts have also found individuals to be general public figures when they experience notoriety within a smaller community or context.¹¹⁷ Courts have found individuals to obtain notoriety when they gained fame or renown in narrow contextual situations, such as within the surfing community,¹¹⁸ inside a particular metropolitan ethnic community,¹¹⁹

34 (1980) (finding Ithaca College a general purpose public figure), *aff'd*, 85 A.D.2d 817 (1981); *see also* SACK, *supra* note 9, § 5:3.2; SMOLLA, *supra* note 58, § 2:80.

106. *See* James Corbelli, Comment, *Fame and Notoriety in Defamation Litigation*, 34 HASTINGS L.J. 809, 816 n.46 (1983) (“Although there is language in *Gertz* that appears to require ‘persuasive power and influence,’ . . . some lower courts have interpreted *Gertz* to allow a finding of public figure status based solely on fame.”) (citation omitted).

107. *See Carson*, 529 F.2d at 209 (finding Johnny Carson’s wife a public figure).

108. *See Brewer v. Memphis Publ’g Co.*, 626 F.2d 1238, 1255 (5th Cir. 1980) (finding Elvis Presley’s girlfriend a public figure).

109. *See Carson*, 529 F.2d at 209 (finding Johnny Carson a public figure); *Falwell v. Penthouse Int’l, Ltd.*, 521 F. Supp. 1204, 1208 (W.D. Va. 1981) (finding Reverend Jerry Falwell a general public figure); *Reliance Ins. Co.*, 442 F. Supp. at 1348 (finding a billion dollar corporation an all-purpose public figure); *Burnett v. Nat’l Enquirer, Inc.*, 144 Cal. App. 3d 991, 1008 (1983) (finding Carroll Burnett a general public figure); *Eastwood*, 149 Cal. App. 3d at 423-25 (finding Clint Eastwood a general purpose public figure); *see also* SMOLLA, *supra* note 58, § 2:81.

110. *Carson*, 529 F.2d at 209.

111. *See Eastwood*, 149 Cal. App. 3d at 423-25.

112. *Burnett*, 144 Cal. App. 3d at 1008.

113. *Falwell*, 521 F. Supp. at 1208.

114. *Ithaca Coll. v. Yale Daily News Publ’g Co.*, 433 N.Y.S.2d 530, 533-34 (1980), *aff’d*, 85 A.D.2d 817 (1981).

115. *Loeb v. Globe Newspaper Co.*, 489 F. Supp. 481, 485-86 (D. Mass. 1980).

116. *Reliance Ins. Co. v. Barron’s*, 422 F. Supp. 1341, 1348 (S.D.N.Y. 1977).

117. *See* SMOLLA, *supra* note 58, §§ 2:51-52.

118. *Chapman v. Journal Concepts, Inc.*, 528 F. Supp. 2d 1081, 1095 (D. Haw. 2007), *aff’d*, 401 F. App’x 243 (9th Cir. 2010).

or within a city's sports community.¹²⁰ Moreover, courts have also found a party to be a general public figure when the person gains notoriety in a specific geographic area.¹²¹ These cases have found individuals public figures when an individual gains notoriety in regions like Alabama,¹²² Montana,¹²³ and even smaller localities, such as the University of Minnesota.¹²⁴ This contextual notoriety presents particular problem when applied to social media platforms where users can freely segregate themselves into communities or groups of connections.¹²⁵ The different tests for notoriety and assumption of notoriety under the general public figure test make it important that courts analyze the doctrine's application to social media to determine the potential positive or negative effects of such application.

2. Limited-Purpose Public Figures

The limited-purpose public figure test is conceivably the most frequently used test within the public figure doctrine.¹²⁶ Although there are many different types of tests available for determining a limited-purpose public figure, generally the test can be broken into two parts: (1) a preexisting public controversy (2) that the plaintiff influences through his voluntary actions.¹²⁷

Lower courts have adopted a wide variety of approaches to

119. *Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 177 (2d Cir. 2000).

120. *Brooks v. Paige*, 773 P.2d 1098, 1099 (Colo. App. 1988).

121. *See Mobile Press Register, Inc. v. Faulkner*, 372 So. 2d 1282, 1285-86 (Ala. 1979); *Nelson v. Univ. of Minn.*, No. 92-3599, 1993 WL 610729, at *3 (Minn. Dist. Ct. June 25, 1993); *Williams v. Pasma*, 656 P.2d 212, 216 (Mont. 1982).

122. *Mobile Press Register*, 372 So. 2d at 1285-86.

123. *Williams*, 656 P.2d at 216.

124. *Nelson*, 1993 WL 610729, at *3. Note that the court found the plaintiff to be a limited-purpose public figure, and not a general purpose public figure, based on his notoriety at the University of Minnesota. *Id.*

125. *See Boyd & Ellison*, *supra* note 11, at 218-19.

126. *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1082 (3d Cir. 1985) ("More common are individuals deemed public figures only in the context of a particular public dispute.").

127. *See, e.g., Mandel v. Bos. Phoenix, Inc.*, 456 F.3d 198, 202 (1st Cir. 2006); *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 708 (4th Cir. 1991); *Contemporary Mission, Inc. v. N.Y. Times Co.*, 842 F.2d 612, 617-18 (2d Cir. 1988); *Marcone*, 754 F.2d at 1072, 1082; *Clark v. Am. Broad. Cos.*, 684 F.2d 1208, 1217-18 (6th Cir. 1982); *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1296 (D.C. Cir. 1980); *see also SMOLLA*, *supra* note 58, § 2:22.

determine what constitutes voluntary action.¹²⁸ The approaches can be distilled into two general methods¹²⁹ that mirror the assumption-of-risk approach for general public figures.¹³⁰ Under the first approach, an individual acts voluntarily when he takes definitive and assertive action to influence a controversy.¹³¹ Examples of this behavior range from a scientist trying to advocate a particular viewpoint¹³² to a builder promoting his business.¹³³ Under the second approach, actions that are merely likely to result in influence or publicity constitute voluntary action.¹³⁴ Courts differ when finding what behavior satisfies this test. The Third Circuit found an attorney should have known publicity would result from his actions after he represented a motorcycle gang involved in drug trafficking.¹³⁵ However, the Fifth Circuit held a mobster acted voluntarily when he “engaged in a course [of activity] that was bound to invite attention.”¹³⁶

Similar diversity exists in the lower courts’ approaches to the public controversy requirement. Aside from adopting a case-by-case interpretation,¹³⁷ courts have generally adopted two interpretations of a public controversy.¹³⁸ More often, courts have held a public controversy exists when controversy affects members of the public other than the litigants in the case.¹³⁹ A prime example of such a test

128. SMOLLA, *supra* note 58, § 2:31 n.11 (“The voluntariness element is truly an example of the existence of authorities ‘too numerous to mention,’ for almost no case dealing with the public figure classification problem fails to discuss it.”); Hopkins, *supra* note 75, at 24 (“One court held, for example, that while voluntariness is important to public figure status, ‘what is and is not voluntary is by no means self-evident.’” (quoting Schiavone Constr. Co. v. Time, Inc., 619 F. Supp. 684, 703 (D.N.J. 1985))).

129. See Walker, *supra* note 100, at 972-73.

130. See *supra* text accompanying notes 81-84.

131. Walker, *supra* note 100, at 973 (“[O]ther decisions suggest that an individual must actively seek public attention in order to meet the voluntariness requirement of *Gertz*.”).

132. See, e.g., *Reuber*, 925 F.2d at 710.

133. See, e.g., *Carr v. Forbes, Inc.*, 259 F.3d 273, 280-81 (4th Cir. 2001).

134. See *Marcone v. Penthouse Int’l Magazine for Men*, 754 F.2d 1072, 1083 (3d Cir. 1985); *Rosanova v. Playboy Enters., Inc.*, 580 F.2d 859, 861 (5th Cir. 1978); see also Walker, *supra* note 100, at 972-73.

135. *Marcone*, 754 F.2d at 1086.

136. *Rosanova*, 580 F.2d at 861 (quoting trial court decision).

137. Note, *Defining a Public Controversy in the Constitutional Law of Defamation*, 69 VA. L. REV. 931, 944 (1983).

138. See SACK, *supra* note 9, § 5:3.3; SMOLLA, *supra* note 58, § 2:29.

139. *Waldbaum v. Fairchild Publ’ns, Inc.*, 627 F.2d 1287, 1296 (D.C. Cir. 1980).

is the public controversy test utilized in *Waldbaum v. Fairchild Publications, Inc.*¹⁴⁰ In *Waldbaum*, the D.C. Circuit held that a story about a CEO being dismissed from the second largest cooperative in the nation constituted a public controversy because the company's "pathbreaking marketing policies" started a debate which encapsulated "consumers and retailers in the Washington area."¹⁴¹ The second variation of the public controversy test requires that the situations at issue be likely to draw publicity.¹⁴² For example, the Third Circuit has found "that a dispute over a professional football player's ability is a public controversy because such an issue is always newsworthy."¹⁴³ The variety of approaches under the limited-purpose public figure doctrine indicates it is as equally muddled as the general public figure doctrine.

An important distinction between the limited-purpose public figure doctrine and the general public figure doctrine is that a public figure plaintiff only needs to meet the actual malice standard regarding the statements made within the context of the controversy.¹⁴⁴ In contrast, the general public figure doctrine extends the actual malice standard to all statements made by the public figure plaintiff.¹⁴⁵ This difference is an important aspect for courts to consider when applying this doctrine to social media because of the potential implications of this test on a defendant's liability.

3. Involuntary Public Figures

The last, and most controversial, public figure designation from *Gertz* is the involuntary public figure. Courts have used this doctrine so sparingly that some courts and commentators have questioned its existence altogether.¹⁴⁶ When courts adopted the involuntary public

140. *See id.* at 1297-98.

141. *Id.* at 1299.

142. Walker, *supra* note 100, at 969-70.

143. *Id.* (citing *Chuy v. Phila. Eagles Football Club*, 595 F.2d 1265, 1280 (3d Cir. 1979)).

144. SMOLLA, *supra* note 58, § 2:78 ("The only difference between [public figures and limited-purpose public figures] is that the actual malice test applies to limited public figures only with regard to speech connected to the public controversy out of which the public figure status arises, whereas the pervasive public figure is subject to the actual malice test in all defamation actions.").

145. *Id.*

146. *Wells v. Liddy*, 186 F.3d 505, 538 (4th Cir. 1999) ("So rarely have courts determined

figure designation, they took two general approaches.¹⁴⁷

Courts often considered the involuntary public figure to be a separate public figure designation.¹⁴⁸ For example, consider *Dameron v. Washington Magazine, Inc.*,¹⁴⁹ where an air traffic controller sued *Washington Magazine* for defamation after the magazine asserted he was among the air traffic controllers who were to blame for an airplane crash that killed ninety-two people.¹⁵⁰ The D.C. Circuit agreed with the district court's determination that the air traffic controller was not a limited-purpose or general purpose public figure because he never "injected" himself into the controversy.¹⁵¹ However, the court held the air traffic controller was an involuntary public figure.¹⁵² The court based its finding on the fact that the air traffic controller assumed a role of special prominence in a public controversy, albeit by "sheer bad luck" of being the "controller on duty at the time of the . . . crash."¹⁵³ Other courts that have employed this doctrine have adopted a similar approach to that of *Dameron*, requiring only that the plaintiff obtain a high level of publicity, either within a specific controversy¹⁵⁴ or in general.¹⁵⁵

However, some courts consider the involuntary public figure to be a subset of the limited-purpose public figure or general public figure designations.¹⁵⁶ The Third Circuit best explained this rationale

that an individual was an involuntary public figure that commentators have questioned the continuing existence of that category."); Hopkins, *supra* note 75, at 18 (stating that "one commentator pointed out that 'rare' appeared to be a euphemism for 'nonexistent'" (quoting Nat Stern, *Unresolved Antitheses of the Limited Public Figure Doctrine*, 33 HOUS. L. REV. 1027, 1092 (1996))).

147. Hopkins, *supra* note 75, at 21-28.

148. *Id.* at 21-22.

149. *Dameron v. Wash. Magazine, Inc.*, 779 F.2d 736 (D.C. Cir. 1985).

150. *Id.* at 738.

151. *Id.* at 740-41.

152. *Id.* at 743.

153. *Id.* at 742.

154. See, e.g., *Foretich v. Advance Magazine Publishers, Inc.*, 765 F. Supp. 1099, 1107-08 (D.C. Cir. 1991); *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175, 186 (Ga. Ct. App. 2001); *Daniel Goldreyer, Ltd. v. Dow Jones & Co.*, 259 A.D.2d 353, 353 (N.Y. App. Div. 1999); *Bay View Packing Co. v. Taff*, 543 N.W.2d 522, 532-33 (Wis. Ct. App. 1995).

155. See, e.g., *Zupnik v. Associated Press, Inc.*, 31 F. Supp. 2d 70, 73 (D. Conn. 1998).

156. Hopkins, *supra* note 75, at 23 (stating that the Third Circuit has held that "there are not three categories of public figure status, but that 'involuntariness' is merely one means through which a libel plaintiff becomes a public figure"); see also *Grossman v. Smart*, 807 F.

when it stated that “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.”¹⁵⁷ Thus, based on this approach, an individual can still become a general or limited-purpose public figure involuntarily.¹⁵⁸ Nevertheless, although courts have sparingly used the involuntary public figure doctrine,¹⁵⁹ they should consider the role the test plays when considering how to apply the public figure doctrine to social media.

III. THE LACK OF AVAILABLE REMEDIES—SECTION 230 OF THE COMMUNICATIONS DECENCY ACT

Application of the public figure doctrine to social media is particularly important because current statutory online defamation law severely limits the remedy available to plaintiffs.¹⁶⁰ Today, online defamation law is largely controlled by Section 230 of the CDA, which was meant to overrule cases like *Stratton Oakmont v. Prodigy Services Co.*¹⁶¹ In *Stratton Oakmont*, a New York state court considered whether an online service provider should be liable after an unknown person posted defamatory statements on one of the service provider’s computer bulletin boards.¹⁶² The posting stated an investment banking firm’s securities offering was “major criminal fraud,” the firm’s president was “soon to be proven criminal,” and Stratton brokers “lie[d] for a living or get fired.”¹⁶³ The court found the service provider liable pursuant to the common law rule that

Supp. 1404, 1409 (C.D. Ill. 1992).

157. *Marcone v. Penthouse Int’l Magazine for Men*, 754 F.2d 1072, 1084 n.9 (3d Cir. 1985).

158. *Id.*; see also Walker, *supra* note 100, at 972.

159. Hopkins, *supra* note 75, at 21 (“[O]ver the quarter-century following *Gertz*, some twenty-three courts have struggled with the involuntary public figure doctrine in more than thirty cases, identifying plaintiffs as involuntary public figures nine times.”).

160. See SIEGEL, *supra* note 21, at 494; Ciolli, *supra* note 13, at 275 (stating that courts have interpreted the statute to grant “broad immunity to [I]nternet service providers, website hosting services, mailing list operators, discussion board owners, and other electronic services covered by the statute”).

161. *Stratton Oakmont, Inc. v. Prodigy Services Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, 47 U.S.C. § 230 (2011).

162. *Id.* at *1.

163. *Id.*

subjects those who repeat or republish defamatory statements to liability.¹⁶⁴

In response to this decision, Congress decided to eschew the common law approach by passing the CDA.¹⁶⁵ Congress passed this legislation with the purpose of overruling *Stratton Oakmont* and other similar cases¹⁶⁶ because these decisions could hamper the growth of the Internet and the “vibrant and competitive free market that presently exists for the Internet.”¹⁶⁷

Section 230 is responsible for shaping the current state of online defamation.¹⁶⁸ The applicable language in this section states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”¹⁶⁹ This statement has widely been read to absolve online service providers of liability “even when the Internet company clearly intended to benefit from the rhetorical excesses of those subscribers.”¹⁷⁰ Subsequent cases have supported this broad interpretation of Section 230.¹⁷¹ Moreover, courts have found or indicated that social media platforms fall within the definition of an Internet service provider.¹⁷² One such case is *Doe v.*

164. *Id.* at *4-5.

165. Communications Decency Act, 47 U.S.C. § 230 (2011).

166. H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.) (“[S]ection [230] provides ‘Good Samaritan’ protections from civil liability for providers . . . of an interactive computer service for actions to restrict . . . access to objectionable online material. One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers . . . as publishers or speakers of content that is not their own because they have restricted access to objectionable material.”).

167. 47 U.S.C. § 230(b)(1)-(2) (2011) (“It is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media [and] . . . to preserve the vibrant and competitive free market that presently exists for the Internet”); *see also* Perzanowski, *supra* note 14, at 854 n.137 (“At common law ‘every one who takes part in the publication, as in the case of the owner, editor, printer, vendor, or even carrier of a newspaper is charged with publication.’” (quoting KEETON ET AL., *supra* note 30, at 799)).

168. *See* ASHLEY PACKARD, DIGITAL MEDIA LAW 195-96 (2010); ANDREW B. SERWIN ET AL., PRIVACY, SECURITY AND INFORMATION MANAGEMENT: AN OVERVIEW § 4:4, at 49-50 (2011); SIEGEL, *supra* note 21, at 444-45.

169. 47 U.S.C. § 230(c)(1) (2011).

170. SIEGEL, *supra* note 21, at 494.

171. *See, e.g.,* Batzel v. Smith, 333 F.3d 1018, 1027-28 (9th Cir. 2003); Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

172. *See* Doe v. MySpace, Inc., 528 F.3d 413, 418 (5th Cir. 2008); *see also* SERWIN ET

*MySpace, Inc.*¹⁷³ In *Doe*, the plaintiff sued MySpace for failing to “implement basic safety measures to prevent sexual predators from communicating with minors on its Web site.”¹⁷⁴ In finding for the defendant, the Fifth Circuit found MySpace to constitute an Internet service provider.¹⁷⁵ Thus, because Section 230 bestowed immunity on the social media platform, the court found plaintiffs “may sue the third-party user who generated the content, but not the interactive computer service that enabled them to publish the content online.”¹⁷⁶

Doe indicated not only that courts will consider social media platforms Internet service providers, but also that they are immune from suits alleging negligence for failure to adequately operate internal safety measures.¹⁷⁷ Another part of Section 230 immunizes Internet service providers from potential liability stemming from “any action voluntarily taken in good faith to restrict access to . . . obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected”¹⁷⁸ By immunizing Internet service providers from liability, Section 230 prevents social media users from obtaining a remedy from a social media platform that negligently operates its internal safety measures.

Section 230 has complicated online defamation and narrowed plaintiffs’ available remedies to include only direct defamation lawsuits against the speaker.¹⁷⁹ Although many scholars have

AL., *supra* note 168, §4:4, at 49-50. Cases where courts have found blogs to be an Internet service provider are also informative on this issue because of the similar features between blogs and social media platforms. For that reason, see *Dimeo v. Max*, 433 F. Supp. 2d 523, 527-32 (E.D. Pa. 2006), *aff’d*, 248 F. App’x 280 (3d Cir. 2007); *Blumenthal v. Drudge*, 992 F. Supp. 44, 50-53 (D.D.C. 1998).

173. *MySpace, Inc.*, 528 F.3d at 413.

174. *Id.* at 416.

175. *Id.* at 419.

176. *Id.*

177. *See id.* at 419; *see also* SERWIN ET AL., *supra* note 168, §4:4, at 47, 49-50 (stating that the CDA immunizes the Internet provider in all circumstances except for when the “service provider contributes to the content”).

178. 47 U.S.C. § 230(c)(2)(A) (2011).

179. *See* Ciolli, *supra* note 13, at 275 (stating that courts have interpreted the statute to grant “broad immunity to [I]nternet service providers, website hosting services, mailing list operators, discussion board owners, and other electronic services covered by the statute”); SIEGEL, *supra* note 21, at 494.

different views of the main purpose of tort law, almost everyone can agree that providing a remedy to a wronged individual plays a large role.¹⁸⁰ Thus, when developing a test that applies the public figure doctrine to social media, courts must ensure the test provides an adequate remedy to plaintiffs in order to uphold this important tort law principle.

IV. APPLYING THE PUBLIC FIGURE DOCTRINE TO SOCIAL MEDIA

This Comment analyzes potential legal and policy implications that arise when applying the public figure doctrine to social media by evaluating each public figure designation individually. To best enhance understanding of the doctrine's application, this Section first considers involuntary public figures, then general public figures, and, finally, limited-purpose public figures, before recommending an approach for courts to consider when applying the public figure doctrine to social media. This Comment then recommends an approach to follow when applying the involuntary public figure and general public figure doctrine to social media. Finally, it analyzes certain approaches courts have taken when applying the public figure doctrine to the Internet in general to ascertain the best approach to identifying and defining what constitutes voluntary activity on social media.

A. *Background Principles*

When applying the public figure doctrine to social media, courts should uphold several general background principles. First, courts must be faithful to the binding precedent of *Gertz* and its progeny.¹⁸¹ Second, they must provide the plaintiff with an adequate remedy.¹⁸² This involves balancing the First Amendment concerns about chilling speech against the plaintiff's need for a remedy in online defamation.¹⁸³ Accordingly, courts should avoid bestowing

180. See KEETON ET AL., *supra* note 30, at 6 (“The purpose of the law of torts is to adjust these losses, and to afford compensation for injuries sustained by one person as the result of the conduct of another.” (quoting Wright, *supra* note 30, at 238)).

181. See *supra* Part II.A.1-2.

182. Legal scholars have previously highlighted that one main purpose of tort law is to provide a remedy to a wronged plaintiff. KEETON ET AL., *supra* note 30, at 6.

183. See *supra* notes 62-63 and accompanying text.

individuals with public figure status en masse due to the general difficulty of establishing actual malice.¹⁸⁴ Finally, courts should consider the policy repercussions of finding social media users are public figures using the different public figure tests.

As mentioned earlier, an initial problem that arises when applying the public figure doctrine to social media is the inapplicability of the access-to-media rationale of *Gertz*.¹⁸⁵ Unlike the material world, each social media user has access to essentially the same tools as the next user.¹⁸⁶ As a result, no user has an advantage over another in accessing channels of communication to respond to defamatory statements.¹⁸⁷ Thus, in order to avoid rendering *Gertz* irrelevant, courts should rely heavily on the other main principle of *Gertz*, the assumption of risk or voluntariness rationale, when finding a social media user is a public figure.¹⁸⁸ With this premise in mind, it is useful to analyze each public figure designation individually to identify the unique problems each designation poses when applying the respective designation to social media.

184. Williams, *supra* note 3, at 502-03 (“[The actual malice] standard proves a difficult hurdle for public figure plaintiffs to clear, thus making the likelihood of success in a public figure defamation action minimal.”) (footnote omitted).

185. See *supra* notes 19-22 and accompanying text.

186. One commentator has argued that this equal access gives Internet users a self-help measure which upholds the access to the media rationale of *Gertz* because the majority in *Gertz* based the access to the media prong on the fact that public figures could use their greater access to the media to rebut defamation more effectively than private figures who did not have this access. Perzanowski, *supra* note 14, at 860-61; see also Kosseff, *supra* note 4, at 266 (“In the past three decades, the ability for self-help has spread to the masses, largely due to the Internet. Services such as Blogspot and Blogger offer free blogs, so anyone with an Internet connection can create a publicly accessible forum to correct false statements.”). However, “[t]he existence of so many sources of information reduces the number of eyes on any one source; so despite posting information on the Internet, an Internet user does not necessarily guarantee herself access to an audience of any significant proportion.” O’Connor, *supra* note 21, at 527.

187. See sources cited *supra* note 21; Boyd & Ellison, *supra* note 11, at 211-14.

188. See O’Connor, *supra* note 21, at 525 (“In order to appropriately protect the private blogger from the heightened standard of actual malice that she would be required to prove as a limited-purpose public figure, it is necessary to give weight to the other prongs of the test—that is, whether there is an isolated controversy, whether the plaintiff has voluntarily thrust herself into the controversy, and so on—before jumping straight to the access to media prong.”).

B. *The Public Figure Designations*

1. Involuntary Public Figures

The involuntary public figure designation presents the most legal and policy problems when applied to social media users. Primarily, applying this doctrine to social media invalidates *Gertz*. With the voluntary rationale of *Gertz* inapplicable to the involuntary public figure doctrine, the test becomes heavily reliant on the access-to-media rationale.¹⁸⁹ However, as noted earlier, no social media users have an inherent advantage over one another in access to the media.¹⁹⁰ Therefore, applying the involuntary public figure test in the context of social networks would render *Gertz* completely inapplicable.

With no guiding principles, any judicial determination that an individual is an involuntary public figure would be arbitrary and discretionary. This case-by-case approach would violate another principle of *Gertz*, as the Supreme Court deliberately avoided a case-by-case approach¹⁹¹ in favor of “broad rules of general application.”¹⁹² Moreover, using a case-by-case determination substantially increases the possibility that courts designate a large number of people involuntary public figures. After all, social media users would be powerless to escape a public figure designation without avoiding social media altogether. This indiscriminately broad application of the test would also disregard the Court’s reluctance to apply the public figure doctrine when the test would convert an entire class of people into public figures.¹⁹³

189. See Barbara L. Stocker, Note, *An Analysis of the Distinction Between Public Figures and Private Defamation Plaintiffs Applied to Relatives of Public Persons*, 49 S. CAL. L. REV. 1131, 1217-18 (1976) (“If the involuntary public figure concept is to be made consistent with the [F]irst [A]mendment theory of *Gertz*, then only people who are apparently prominent in a particular controversy are involuntary public figures.”); see also Hopkins, *supra* note 75, at 26 (citing Stocker approvingly).

190. See *supra* notes 185-88 and accompanying text.

191. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974) (“Theoretically . . . 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. . . . But this approach would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable.”).

192. *Id.* at 343-44.

193. See *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979) (“[I]t is not sufficient to make Hutchinson a public figure. If it were, everyone who received or benefited from the myriad

The policy implications of adopting a case-by-case approach supplement this analysis. Section 230 of the CDA already presents the plaintiff with little, if no recourse, other than a direct defamation suit against the original party.¹⁹⁴ Thus, if every social media user would be designated a public figure, the online defamation doctrine would bar most social media users from obtaining a remedy. With most social media users having to meet an actual malice standard, it would be extremely unlikely that any user would recover because of the difficulty in overcoming this burden.¹⁹⁵

Indiscriminately determining public figure status would also carry many negative incentives for social media users. First, adopting such a test would disincentivize people from using social media platforms. Some scholars argue that a social media users' fear of reputational damage from defamatory speech would lead to some social media users at the margin to abandon social media altogether.¹⁹⁶ Other scholars argue that fear of obtaining public figure status would cause social media users to desert social networking.¹⁹⁷ Whatever the reason users abandon social media platforms, leaving such platforms would reduce the speech on social networks that has

public grants for research could be classified as a public figure—a conclusion that our previous opinions have rejected.”); *Time, Inc. v. Firestone*, 424 U.S. 448, 456-57 (1976) (“It may be argued that there is still room for application of the *New York Times* protections to more narrowly focused reports of what actually transpires in the courtroom. But even so narrowed, the suggested privilege is simply too broad.”). An en masse application would also contradict the *Gertz* Court’s assertion that involuntary public figures are “exceedingly rare.” *Gertz*, 418 U.S. at 345.

194. See *supra* Part III.

195. See Williams, *supra* note 3, at 502-03.

196. Kosseff, *supra* note 4, at 272 (“If such voluntary action were enough to qualify someone to be a limited-purpose public figure, it could have an additional chilling effect on free speech: it would cause people who fear defamation to not take advantage of services such as Facebook.”).

197. O’Connor, *supra* note 21, at 528 (arguing that if social media users could easily become public figures “individuals might be deterred from sharing or networking broadly online”); Gleicher, *supra* note 21, at 335 (“[T]he uncertainty of whether online speech will transform its speaker into a public figure may dissuade people from contributing to the public sphere. Faced with reduced legal protection, potential speakers may avoid speaking if they risk transforming themselves into public figures. While true public figures have to accept this bargain in order to ensure robust public debate, the lower the threshold, the more those not seeking publicity will refrain from even limited contribution, and the less participatory the public sphere will become.”).

had such a socially beneficial role.¹⁹⁸ Instead of leaving social media, implementing an indiscriminate test would also incentivize users to put more effort into making any potentially defamatory statements anonymously. This would exacerbate the problem of anonymous online defamation suits, which already poses a significant problem in the online defamation doctrine.¹⁹⁹ Finally, for users who ultimately chose to remain on social media platforms, this indiscriminate test could lead to converting social media users into public figures en masse. As a result, social networks could become increasingly hostile and slanderous environments,²⁰⁰ which in turn would decrease the social utility of speech on such platforms. These negative repercussions that would inevitably result from applying the involuntary public figure test to social media platforms should provide enough reasons for courts to reconsider the application of the involuntary public figure test to such platforms.

2. General Public Figures

The general public figure test poses its own unique problems for courts when applied to social media. One of the most pressing challenges that courts face is the notoriety prong of the general public figure test.²⁰¹ Courts have found figures such as Clint Eastwood, Johnny Carson, Carroll Burnett, and Reverend Jerry Falwell to be general public figures,²⁰² and it is unlikely a social media user would obtain such notoriety based on social media activity alone.²⁰³

198. See *supra* Part I.C.

199. For more discussion of anonymous online defamation lawsuits see Yang-Ming Tham, Comment, *Honest to Blog: Balancing the Interests of Public Figures and Anonymous Bloggers in Defamation Lawsuits*, 17 VILL. SPORTS & ENT. L.J. 229 (2010); Jason C. Miller, *Who's Exposing John Doe? Distinguishing Between Public and Private Figure Plaintiffs in Subpoenas to ISPs in Anonymous Online Defamation Suits*, 13 J. TECH. L. & POL'Y 229 (2008).

200. See Ciolli, *supra* note 13, at 278 ("If courts require blogger-plaintiffs to meet the high actual malice standard to succeed on a defamation claim, a significant amount of false statements and other misinformation about bloggers may become commonplace on the [I]nternet, thereby undermining the [I]nternet as a 'marketplace of ideas.' Bloggers, knowing that they can escape liability for posting defamatory statements about a fellow blogger by not investigating their source's credibility, will post potentially untrue statements with impunity.").

201. See *supra* Part II.B.1.

202. See *supra* notes 109-16 and accompanying text.

203. See William M. Krogh, Comment, *The Anonymous Public Figure: Influence Without Notoriety and the Defamation Plaintiff*, 15 GEO. MASON L. REV. 839, 847 n.82 (2008) ("One reason that universal public figure status is rarely litigated may be that the bar is set so high that

However, problems arise when courts have only required contextual or geographic notoriety.²⁰⁴ It is well known that many social media users set their privacy settings to only allow their own social circles to view their profile.²⁰⁵ Moreover, several smaller social media platforms are already segregated based on ethnic, religious, nationality, or other “niche demographics.”²⁰⁶ Thus, if courts were to find social media users meet the notoriety requirement when they are well-known within their own social media circles, the notoriety requirement would be reduced to a mere formality in many cases. After all, most social media users would inevitably gain notoriety within some subset of their friends or contacts.²⁰⁷

The contextual notoriety approach would be particularly problematic when combined with some courts’ tendencies to define voluntary activity under the general public figure test as behavior from which publicity inevitably results.²⁰⁸ After all, publicity inevitably results from almost all activity on social media because social media users inevitably participate in these social groups, and some level of notoriety for the user within these groups is bound to occur.²⁰⁹ However, when combined with the contextual notoriety approach, defining voluntary activity as behavior from which publicity inevitably results would further guarantee an en masse designation of social media users as general public figures.

Utilizing this definition of voluntary activity or the contextual notoriety approach would also violate several foundational principles in *Gertz*. First, in both *Firestone* and *Wolston*, the Court indicated disapproval for this definition of voluntary activity.²¹⁰ Second, the en

those who qualify leave little room for doubt.”); *see also* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974) (“Absent *clear evidence* of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life.”) (emphasis added).

204. *See supra* notes 117-24 and accompanying text.

205. *See* sources cited *supra* note 11.

206. *See* *Boyd & Ellison, supra* note 11, at 218-19.

207. *See* James Grimmelmann, *Saving Facebook*, 94 IOWA L. REV. 1137, 1159 (2009) (“[T]he constant human desire to be part of desirable social groups drives social-network-site adoption and use.”).

208. *See supra* notes 106-08 and accompanying text.

209. *See* Grimmelmann, *supra* note 207, at 1159.

210. *See supra* notes 89, 94 and accompanying text.

masse designation of public figures that would inevitably result from either of these approaches would violate a common principle of all Supreme Court public figure cases: courts should avoid applying the doctrine when the doctrine would encompass too large a class of people.²¹¹ Finally, courts should avoid this definition of voluntary activity because such a definition would dilute the last applicable rationale of *Gertz* to social media.²¹² Because public figures on social media are unable to experience a media advantage as compared to other social media users, courts would place more emphasis on the voluntariness rationale of *Gertz*.²¹³ It is hardly voluntary to engage in activity that is likely to engender publicity when such publicity has such a low threshold.

Thus, the current notoriety approach would permit an inordinately large number of social media users to become general public figures. The approach suffers from the same policy repercussions as the involuntary public figure test.²¹⁴ For the same reasons outlined above, courts should avoid using contextual notoriety tests or defining voluntary activity as actions likely to engender publicity.

3. Limited-Purpose Public Figures

The limited-purpose public figure test presents the fewest problems when applied to social media. However, this public figure designation creates some challenges. Lower courts' divergent definitions of what constitutes a public controversy pose a problem for legal and policy reasons.²¹⁵ The definition of a public controversy as an issue "likely to engender public interest" would likely encompass most social media users for similar reasons the definition

211. See *supra* notes 88, 96-97 and accompanying text.

212. See *supra* text accompanying notes 19-23, 188.

213. See Gleicher, *supra* note 21, at 335 ("A single video, posted to YouTube, is all that is required to start a phenomenon. Because online speech is inexpensive, long-lasting, and far-reaching, it is difficult to predict what speech will seize enough public attention to transform its speaker into a public figure. This undermines the notion of voluntary accession to publicity that is inherent in the public figure doctrine.") (footnote omitted).

214. See *supra* text accompanying notes 194-200.

215. For the different legal approaches courts have adopted to determine a "public controversy" see *supra* Part II.B.2.

of voluntariness in the general public figure doctrine would do so.²¹⁶ Social media users, after all, have garnered international attention with a single posting about their preferences despite their relatively anonymity.²¹⁷ Thus, any social media activity whatsoever expressing an opinion on a subject could create a public controversy. Moreover, this definition would directly contradict the Supreme Court's preference to avoid encompassing too large a class of people within the public figure status, which the Court has repeatedly reiterated.²¹⁸

Each designation under the public figure doctrine poses its own problems when applied to social media users. The presence of problems in every designation warrants the consideration of a dynamic new approach to the doctrine for social media users.

C. *Recommended Approach for Public Figure Designations*

Because of the negative consequences that result from applying the involuntary public figure or general public figure analysis to social media,²¹⁹ courts should require defendants to meet a higher burden of proof to establish these particular public figure designations. Courts have frequently applied the clear-and-convincing standard to situations in which courts disfavor certain claims.²²⁰ Furthermore, strong presumptions can only be overcome by clear and convincing evidence.²²¹ The standard is particularly appropriate for overcoming the strong presumption that social media users experience relatively equal media access within their social networks²²² and for avoiding the disfavored approach of allowing a social media user to easily meet the access-to-the-media prong, which carries negative

216. See *supra* text accompanying notes 137-43.

217. Sarah Lyall, *A Tweet Read Across Britain Unleashes a Cascade of Vitriol on a User*, N.Y. TIMES, Nov. 2, 2009, at A8 (recounting how a Twitter user's social media posting catapulted him into the national spotlight in England).

218. See *supra* notes 88, 96-97 and accompanying text.

219. See *supra* Part IV.B.1-2.

220. See KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE 427 (John W. Strong ed., 5th ed. 1999).

221. See 31A C.J.S. *Evidence* § 209 (2011) ("The general rule is that strong presumptions are accepted, unless clear and convincing evidence has been introduced by the party opposing the presumption which establishes the nonexistence of the presumed fact."); see also *Rahnema v. Rahnema*, 626 S.E.2d 448, 458 (Va. App. 2006).

222. See sources cited *supra* note 21.

legal and policy implications.²²³ Thus, courts should only consider a social media user an involuntary public figure if the defendant can provide clear and convincing evidence that the user-plaintiff had greater access to the media than other users on the plaintiff's social media network. Moreover, courts should strictly construe this burden when considering a social media user's access to the media within the social network itself because of the difficulty in determining when a social media user has greater access to the media.²²⁴

If defendants can make such a showing, the access-to-the-media rationale for public figure designations would no longer be inapplicable to involuntary public figures in the social media context.²²⁵ After all, requiring a defendant to prove that there was a "high probability" the plaintiff had a greater access to the media would demand more certainty than a preponderance of the evidence standard.²²⁶ This increased certainty would lead to a more definable standard, which would substantially reduce, if not eliminate, the arbitrariness of the involuntary public figure test when applied to social media users. Eliminating the arbitrary standard reduces risk that courts using the involuntary public figure test will convert every social media user into a public figure.

Courts should consider a similar argument when deciding if the defendant has satisfied his burden in proving that the plaintiff is a general public figure. The clear-and-convincing standard should be adopted for the notoriety prong of the general public figures analysis for similar reasons that the standard should be used for the involuntary public figure test; courts should disfavor allowing social media user to easily obtain notoriety because of the substantial risk in

223. See *supra* Part IV.B.1.

224. O'Connor, *supra* note 21, at 527 (noting that on social media, especially Twitter, "a relatively unknown individual can drum up followers numbering in the thousands, many of whom may not even know the user's real name"). However, if a defendant can provide any evidence that the plaintiff has greater media access outside of the social network, especially media contacts in the material world, then the presumption that media access is equal within social networks would no longer be relevant, and the defendant would have satisfied his burden.

225. See *supra* text accompanying notes 19-23, 189.

226. Although various definitions have been offered for "clear and convincing" evidence, the most applicable standard to social media context would be the "highly probable" standard because this situation does not fall under criminal law. See BROWN ET AL., *supra* note 220, at 425.

invalidating *Gertz* or encompassing too large a class as public figures.²²⁷ Adopting this burden would also mirror the advantages of using the test for involuntary public figures, as a higher evidentiary standard would likely create a less arbitrary test, reducing the risk of mass flight from social media networks without decreasing the chance of recovery.²²⁸ Thus, courts should only find that a social media user is a general public figure if the defendant can provide clear and convincing evidence that the user-plaintiff had notoriety within the social network itself. Similar to the involuntary public figure test, courts should strictly construe this burden but find the burden satisfied when the defendant provides evidence of notoriety in the material world.²²⁹

Comparatively, courts should favor applying limited-purpose public figure doctrine to social media users because this designation presents the fewest legal and policy problems if certain precautions are taken. First, the use of limited-purpose public figure test would be unlikely to invalidate *Gertz* if courts refused to define public controversy as an event that is likely to engender publicity.²³⁰ Instead courts should adopt the test used in *Waldbaum* and find that a public controversy occurs when controversy affects members of the public other than the litigants in the case.²³¹ Furthermore, preferring to apply the limited-purpose public figure test to social media users upholds the *Gertz* Court's determination that the limited-purpose doctrine is the preferred public figure doctrine.²³² Finally, adopting this approach would increase the likelihood that plaintiffs will have remedies. Even

227. See *supra* text accompanying notes 201-13.

228. See *supra* text accompanying notes 194-200.

229. Similar to the access to the media prong of the involuntary public figure test, this burden should be strictly construed when considering whether a social media user is notorious within the social network itself because of the unlikelihood that a social media user would obtain such notoriety within a social media platform. See *supra* text accompanying notes 202-03. Evidence that the plaintiff is notorious outside of the social media context would be sure to satisfy this burden because the presumption that media access is equal within social networks would no longer be relevant and the risk of violating *Gertz* would disappear.

230. See *supra* text accompanying notes 216-18.

231. *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1296 (D.C. Cir. 1980).

232. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974) ("It is *preferable* to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.") (emphasis added); see also SMOLLA, *supra* note 58, § 2:79.

if a plaintiff were a public figure, the actual malice standard would only apply to statements the plaintiff made in connection to the controversy.²³³ Thus, unlike the other two designations, finding a plaintiff is a limited-purpose public figure would not practically bar the plaintiff from recovering in all circumstances, improving the overall likelihood that the plaintiff could recover in the future.²³⁴

One problem with the limited-purpose public figure doctrine is its ambiguity in identifying voluntary activity.²³⁵ This ambiguity might create problems with invalidating, or at least diminishing, the rationales of *Gertz* by diluting the last applicable rationale of *Gertz* to social media.²³⁶ Even if a court were to eschew the definitions of voluntariness that include less unequivocally voluntary behavior, what constitutes voluntary activity for a social media user is not clear.²³⁷ In order to determine the best approach to defining voluntariness in the context of social media activity, it is instructive to consider how courts have defined voluntary activity on the Internet in general.

D. Approaches to Consider for Voluntary Activity

The Supreme Court has yet to consider the definition of voluntariness in the context of the Internet. Although only a few lower courts have employed the limited-purpose public figure test when determining if a plaintiff's Internet activity renders him a public figure,²³⁸ these courts have generally considered two main

233. See *supra* text accompanying notes 144-45.

234. See *supra* text accompanying notes 144-45.

235. See *supra* text accompanying notes 128-36.

236. See *supra* text accompanying notes 19-23, 188.

237. Kosseff, *supra* note 4, at 272 ("The ease at which people can disseminate personal information over the Internet calls into question whether there ever could be a black-letter definition of 'voluntary' in the *Gertz* context."); see also Gleicher, *supra* note 21, at 335 ("A single video, posted to YouTube, is all that is required to start a phenomenon. Because online speech is inexpensive, long-lasting, and far-reaching, it is difficult to predict what speech will seize enough public attention to transform its speaker into a public figure. This undermines the notion of voluntary accession to publicity that is inherent in the public figure doctrine.") (footnote omitted).

238. See *Tipton v. Warshavsky*, 32 F. App'x 293, 295 (9th Cir. 2002); *Franklin Prescriptions, Inc. v. N.Y. Times Co.*, 267 F. Supp. 2d 425, 437 (E.D. Pa. 2003), *aff'd*, 424 F.3d 336 (3d Cir. 2005); *D.C. v. R.R.*, 106 Cal. Rptr. 3d 399, 428-30 (Ct. App. 2010); *Bieter v. Fetzer*, No. A04-1034, 2005 WL 89484, at *4 (Minn. Ct. App. Jan. 18, 2005); *Worldnet*

approaches: the inherently public approach and the inherently private approach.

1. Inherently Public Approach

Courts utilizing the inherently public approach have implicitly or explicitly treated the Internet as a public forum. As a result, courts have concluded that merely entering this forum equates to voluntarily accessing an arena for public discussion. For example, consider *Hibdon v. Grabowski*,²³⁹ where jet ski enthusiasts posted remarks on *rec.sport.jetski*, an Internet news group devoted to jet skiing.²⁴⁰ The enthusiasts criticized Hibdon, the owner of a jet ski customizing business, after he appeared in two magazine articles and advertised and published information about the speed of his jet skis on *rec.sport.jetski*.²⁴¹ In response to this criticism, Hibdon sued the jet ski enthusiasts for defamation.²⁴² However, the Tennessee state court held Hibdon voluntarily inserted himself into a public controversy over the top speed of his jet skis when he posted statements on *rec.sport.jetski* and appeared in a magazine.²⁴³ The court explicitly indicated it considered the Internet a public forum, explaining that “[t]he controversy was ‘public’ due to the international reach of the Internet news group *rec.sport.jetski*”²⁴⁴ Another example is *Ampex Corp. v. Cargle*,²⁴⁵ which involved a disgruntled former employee who had posted material on a message board criticizing Ampex, a publicly traded company, about its business practices.²⁴⁶ In response to this action, Ampex sued the former employee for defamation.²⁴⁷ However, the California state court held that Ampex voluntarily inserted itself into a public controversy over Ampex’s business practice after it

Software Co. v. Gannett Satellite Info. Network, Inc., 702 N.E.2d 149, 155 (Ohio Ct. App. 1997); *Hibdon v. Grabowski*, 195 S.W.3d 48, 60-62 (Tenn. Ct. App. 2005).

239. *Hibdon*, 195 S.W.3d at 48.

240. *Id.* at 54.

241. *Id.* at 53-54.

242. *Id.* at 54.

243. *Id.* at 60.

244. *Id.*

245. *Ampex Corp. v. Cargle*, 27 Cal. Rptr. 3d 863 (Ct. App. 2005).

246. *Id.* at 866-67.

247. *Id.* at 867-68.

posted “press releases and letters . . . on their Web site.”²⁴⁸ In fact, the court expressly indicated that it considered the Internet a public forum when it stated that the “Yahoo! message board itself is a public forum.”²⁴⁹

The Ninth Circuit employed similar analysis in *Tipton v. Warshavsky*,²⁵⁰ where the court found that an individual qualified as a public figure when he “voluntarily involved himself in public life by inviting attention and comment on ourfirsttime.com.”²⁵¹ Based on the court’s explicit reliance on Ninth Circuit precedent, which considered a media outlet a public forum, the court was equating a website with a public forum.²⁵² Both of these courts, either implicitly or explicitly, defined voluntary activity as merely publishing content on the Internet. Thus, under the inherently public approach, the Internet is a public forum because Internet activity in itself is sufficient to constitute voluntary activity under the limited-purpose public figure test.

2. Inherently Private Approach

Courts have also used the inherently private approach. This approach treats the Internet as an inherently private forum. For example, consider *D.C. v. R.R.*²⁵³ In *D.C.* a high school student, *D.C.*, operated a website on which he promoted his entertainment career.²⁵⁴ Another group of fellow high school students posted messages on *D.C.*’s website which called *D.C.* derogatory homosexual slurs and

248. *Id.* at 870. Another California state court relied on *Ampex* to apply a nearly identical analysis. See *Eagle Broadband, Inc. v. Mould*, No. H030169, 2007 WL 4358515, at *18-19 (Cal. Ct. App. Dec. 14, 2007).

249. *Ampex Corp.*, 27 Cal. Rptr. 3d at 870.

250. *Tipton v. Warshavsky*, 32 F. App’x 293 (9th Cir. 2002).

251. *Id.* at 295.

252. See *id.*; Ciolli, *supra* note 13, at 270 (“The court relied on both *Gertz* and *Stolz v. KSFM 102 FM* in making this determination. In *Stolz*, a California appellate court held that the owner of a media outlet is a limited purpose public figure, even if he or she as an individual does not have public notoriety. Through its reliance on the *Stolz* holding, the Ninth Circuit clearly considers websites media outlets.”) (footnotes omitted). This conclusion is also supported by the fact that ourfirsttime.com was not a media website, but an adult entertainment website.

253. *D.C. v. R.R.*, 106 Cal. Rptr. 3d 399 (Ct. App. 2010).

254. *Id.* at 405.

threatened his safety.²⁵⁵ After D.C. sued these students for defamation, the court considered whether D.C. had obtained public figure status.²⁵⁶ The court specifically avoided designating D.C. a public figure based on his online activity.²⁵⁷ In fact, the court explicitly expressed concerns about the implications of finding public figure status based on web access, or social media access, alone.²⁵⁸ Primarily, the court seemed to act out of fear that finding D.C. a public figure would turn “millions of teenagers” into public figures.²⁵⁹ Accordingly, the court in *D.C.* treated the Internet as an inherently private forum when it refused to hold that mere access to the Internet was sufficient to render someone a public figure.²⁶⁰ Thus, this court viewed the Internet as an extension to the material world, where participation in activities that are widely considered attributable to a private forum—talking and socially interacting with friends—is not considered sufficient in itself to turn someone into a public figure.

Whether or not the court in *D.C.* thought a certain breadth or specific type of online activity would turn an Internet user into a public figure is uncertain. However, other courts that have considered the Internet a private forum have looked to certain activity when determining if an individual has left the private forum. One such case is *Franklin Prescriptions, Inc. v. New York Times Co.*²⁶¹ In *Franklin Prescriptions*, a Pennsylvania district court considered whether a local pharmacy injected itself into a controversy after it created an information-only website.²⁶² The court refused to find that the pharmacy voluntarily acted when the website never sold or took orders over the Internet, but only advertised.²⁶³ A Minnesota state

255. *Id.* at 405-06.

256. *See id.* at 406, 429-30.

257. *See id.*

258. *See id.* at 428-30 (“Millions of teenagers use MySpace, Facebook, and YouTube to display their interests and talents, but the posting of that information hardly makes them celebrities.”).

259. *See id.*

260. *See id.*

261. *Franklin Prescriptions, Inc. v. N.Y. Times Co.*, 267 F. Supp. 2d 425 (E.D. Pa. 2003), *aff’d*, 424 F.3d 336 (3d Cir. 2005).

262. *Id.* at 429-31.

263. *Id.* at 437. For another case where a court looked to the scope of Internet advertising to determine public figure status see *Worldnet Software Co. v. Gannett Satellite Info. Network, Inc.*, 702 N.E.2d 149, 155 (Ohio Ct. App. 1997) (“Despite the fact that Worldnet advertises on

court employed a similar standard in *Bieter v. Fetzer*.²⁶⁴ In *Bieter*, a philosophy professor who published articles about a conspiracy theory sued Fetzer for defamation after Fetzer started an Internet chat group in an effort to refute Bieter's conspiracy claims.²⁶⁵ In finding Bieter to have voluntarily acted, the court relied on particular behavior exhibited by Bieter.²⁶⁶ The court specifically pointed to the fact that Bieter had trumped his own credentials when arguing with Fetzer on the Internet chat group.²⁶⁷ *Franklin Prescriptions* and *Bieter v. Fetzer* demonstrate the inherently private designation of the Internet in which courts consider mere Internet activity alone insufficient to constitute voluntary activity under the public figure doctrine. Instead, these courts tried to identify specific behavior or activity the court could point to as evidence of voluntary activity.

E. The Recommended Approach for Voluntariness

1. Inherently Public Approach v. Inherently Private Approach

Courts should adopt the inherently private approach employed in *Franklin Prescriptions* and *Bieter v. Fetzer*²⁶⁸ to determine what acts are voluntary. This approach upholds *Gertz's* voluntariness rationale, which must take precedence in a world of balanced media access for social media users. It is important for courts to preserve *Gertz's* relevancy by providing a clear definition of voluntary action.²⁶⁹ Moreover, adopting a clear definition also provides unambiguous guidelines for social media users, offering users increased certainty about the legal consequences of their actions. The inherently private approach provides clarity by providing broad identifying characteristics of voluntary behavior while leaving discretion to individual courts to define the precise actions that constitute voluntary activity.

the Internet, the record, as developed thus far, does not demonstrate extensive advertising.”).

264. *Bieter v. Fetzer*, No. A04-1034, 2005 WL 89484 (Minn. Ct. App. Jan. 18, 2005).

265. *Id.* at *1.

266. *See id.* at *3-4.

267. *Id.* at *4.

268. *See supra* Part IV.D.2.

269. *See supra* text accompanying notes 236-37.

Further analysis demonstrates why courts should prefer the inherently private approach over the inherently public approach. The inherently public approach carries serious legal and policy consequences. The test sets a very low bar for a social media user to become a limited-purpose public figure. As a result, once a public controversy develops every social media user could become a limited-purpose public figure. Thus, this approach converts too large a class of people into public figures, which not only contradicts the principles elucidated in Supreme Court cases²⁷⁰ but also has policy implications by running the risk of incentivizing people to avoid social media altogether.²⁷¹ The inherently private approach avoids these consequences. The approach permits individual courts to measure a social media user's activity and establish a threshold to determine when he voluntarily thrusts himself into a public controversy. Faithfulness to *Gertz* requires a test that avoids encompassing too large a class of people within the public figure designation, and the inherently private approach accomplishes this goal better than the inherently public approach.

Moreover, utilizing the inherently private approach provides the appropriate balance between a remedy and chilling speech that *Gertz* attempted to strike.²⁷² This test avoids universal public figure status for social media users by allowing some social media users a remedy through defamation suits. An inherently public approach, on the other hand, would not provide the same balance because this approach

270. See *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979) (“[I]t is not sufficient to make Hutchinson a public figure. If it were, everyone who received or benefited from the myriad public grants for research could be classified as a public figure—a conclusion that our previous opinions have rejected.”); *Time, Inc. v. Firestone*, 424 U.S. 448, 456-57 (1976) (“It may be argued that there is still room for application of the *New York Times* protections to more narrowly focused reports of what actually transpires in the courtroom. But even so narrowed, the suggested privilege is simply too broad.”).

271. Kosseff, *supra* note 4, at 272 (“If such voluntary action were enough to qualify someone to be a limited-purpose public figure, it could have an additional chilling effect on free speech: it would cause people who fear defamation to not take advantage of services such as Facebook.”).

272. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (“Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury. . . . [But, i]n our continuing effort to define the proper accommodation between these competing concerns, we have been especially anxious to assure to the freedoms of speech and press that ‘breathing space’ essential to their fruitful exercise.” (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963))).

would substantially decrease the likelihood of social media users from succeeding in defamation suits.²⁷³

The inherently private approach would also avoid chilling speech, one of the most important principles of First Amendment law espoused in *New York Times*.²⁷⁴ Under the inherently public approach, the risk of obtaining public figure status by merely joining social networks would lead many social media users to eschew entering such networks or to leave them altogether.²⁷⁵ The resulting hesitation to participate in social media platforms could chill discussion on a forum many see as an extension of their private lives²⁷⁶ and, thus, a new forum where the First Amendment protects members' speech.²⁷⁷ Chilling speech on social media platforms also reduces the socially beneficial speech that occurs on these platforms.²⁷⁸ In contrast, an inherently private approach does not convert social media users into public figures by merely accessing social networks, presenting a decreased risk that users will easily obtain public figure status. Accordingly, this approach avoids disincentivizing people from joining social networks and engaging in socially beneficial behavior.²⁷⁹ Adopting the approach would also align the law with

273. Williams, *supra* note 3, at 504 (stating that the actual malice standard “acts almost as an affirmative defense for one accused of defaming a public figure, making a plaintiff’s survival of summary judgment unlikely”).

274. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279, 300-01 (1964). Policy makers have expressed concerns when considering the possibility of chilling speech affecting the Internet; see also Communications Decency Act, 47 U.S.C. § 230 (2011).

275. O’Connor, *supra* note 21, at 528 (“If individuals no longer feel that they are free to connect and share with one another without exposing themselves to the risk of becoming public figures in defamation claims, this modern version of the marketplace of ideas could be chilled.”).

276. See Boyd & Ellison, *supra* note 11, at 211, 221 (“On many of the large [social networking sites], participants are not necessarily ‘networking’ or looking to meet new people; instead, they are primarily communicating with people who are already a part of their extended social network. . . . Although exceptions exist, the available research suggests that most [social networking sites] primarily support pre-existing social relations.”).

277. See *id.*

278. See *supra* Part I.C.

279. See Ciolli, *supra* note 13, at 278 (“If courts require blogger-plaintiffs to meet the high actual malice standard to succeed on a defamation claim, a significant amount of false statements and other misinformation about bloggers may become commonplace on the [I]nternet, thereby undermining the [I]nternet as a ‘marketplace of ideas.’ Bloggers, knowing that they can escape liability for posting defamatory statements about a fellow blogger by not investigating their source’s credibility, will post potentially untrue statements with impunity.”);

people's expectations of social media as an extension of their private lives.²⁸⁰ Thus, the inherently private approach strikes the appropriate balance between providing a remedy to social media plaintiffs without chilling speech on social networks

2. Identifying Voluntary Activity

Perhaps the most important advantage of considering a social network an inherently private forum is that it allows courts to apply much of the current public figure doctrine in the social media context. Courts have found social media users to have acted voluntarily when they have had deliberate contact with a public forum.²⁸¹ On social networks and the material world alike, a public forum comprises any forum where all users can freely access information the plaintiff placed into the forum.²⁸² To be voluntary, the plaintiff's action of placing information into a public forum must go beyond incidental,

see also supra Part I.C.

280. *See* Boyd & Ellison, *supra* note 11, at 211, 221; *see also* O'Connor, *supra* note 21, at 526 n.107 (“[I]t has become clear more recently that the Internet is more often a place for private individuals to network broadly than for private individuals to take on a public persona by virtue of their networking.”).

281. Some case law has indicated that an action is voluntary when the plaintiff has deliberate, non-incidental contact with a public forum. For example, in *Carr v. Forbes, Inc.*, 259 F.3d 273 (4th Cir. 2001), the plaintiff acted voluntarily when he advertised his business. *Id.* at 280-81. Thus, the plaintiff in *Carr* acted voluntarily when he deliberately put information into a public forum by releasing information about his business in public meetings, editorials, and in local media stories. *Id.*; *see also* Reuber v. Food Chem. News, Inc., 925 F.2d 703, 710 (4th Cir. 1991) (finding a scientist acted voluntarily when he constantly advocated and disseminated his research by sending his research to government agencies); Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287, 1299-300 (D.C. Cir. 1980) (finding a company CEO acted voluntarily when he directed an aggressive advertising campaign and sent a letter to shareholders about a public controversy).

282. An example of a public forum on a social network would be a “Page” on Facebook because outside members of Facebook can access this information. *About Facebook Pages: What is a Facebook Page?*, FACEBOOK, <http://www.facebook.com/help?page=262355163822084> (last visited Mar. 11, 2012) (“Pages are for organizations, businesses, celebrities, and bands to broadcast great information in an official, public manner to people who choose to connect with them.”). In comparison, “Groups” on Facebook allow for privacy settings that would prevent the forum from being considered public. *See Groups Basics: How are Pages Different from Groups?; Which One Should I Create?*, FACEBOOK, <http://www.facebook.com/help/groups/basics> (last visited Mar. 11, 2012) (stating that Groups have privacy settings which could “provide a closed space for small groups of people to communicate about shared interests”).

everyday contact.²⁸³ Individuals in the material world regularly contact and place information into public forums, yet the current case law indicates an individual only acts voluntarily when the contact or placement is deliberate and nonincidental.²⁸⁴ This rationale applies equally well to social media.

Public forums not only include publicly accessible locations on social networks but also social media user profiles that are used as a “loudspeaker” instead of a “mailbox.”²⁸⁵ A social media page or profile is analogous to a loudspeaker when it has no privacy or visibility restrictions and its content is completely accessible to those who do not even use social media.²⁸⁶ On the other hand, a social media page or profile with its visibility limited to a set group of people is analogous to a mailbox. A user with a loudspeaker profile is more likely to deliberately enter information into a public forum than a user with a mailbox profile, who is more likely to only have incidental contact with public forums. As a result, the loudspeaker-mailbox dichotomy would properly align with the interpretation of

283. See, e.g., *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979); *Franklin Prescriptions, Inc. v. N.Y. Times Co.*, 267 F. Supp. 2d 425, 437 (E.D. Pa. 2003), *aff'd*, 424 F.3d 336 (3d Cir. 2005); *Worldnet Software Co. v. Gannett Satellite Info. Network, Inc.*, 702 N.E.2d 149, 155 (Ohio Ct. App. 1997).

284. Some case law has indicated that an individual’s contact with a public forum must be beyond what is considered incidental contact with a public forum that occurs during the course of the individual’s private life or occupation. See, e.g., *Hutchinson*, 443 U.S. at 135 (finding a professor not to have acted voluntary when “Hutchinson’s activities and public profile are much like those of countless members of his profession”); *Franklin Prescriptions*, 267 F. Supp. 2d at 437 (finding that a pharmacy did not act voluntary when the pharmacy’s website never sold or took orders over the Internet); *Worldnet Software*, 702 N.E.2d at 155 (“Despite the fact that Worldnet advertises on the Internet, the record, as developed thus far, does not demonstrate extensive advertising.”).

285. The terminology for this dichotomous type of social media use was originally developed during author’s personal discussions with Michael I. Krauss, Professor of Law at George Mason University School of Law in October 2011.

286. A good example of a loudspeaker profile would be a corporation’s page on Twitter. Corporations, like CNN, set their privacy settings to give the profile complete accessibility, even to non-social media users who can access the profile through a Google search. *Twitter Privacy Policy*, *supra* note 11 (“[Y]our public Tweets are searchable by many search engines and are immediately delivered . . . to a wide range of users and services.”). A loudspeaker profile would also extend to Facebook profiles which non-social media users have complete access to because the privacy settings have been turned off. *Sharing and Finding You on Facebook*, FACEBOOK, <http://www.facebook.com/about/privacy/your-info-on-fb#controlprofile> (last visited Mar. 11, 2012) (“Choosing to make something public is exactly what it sounds like. It means that anyone, including people off of Facebook, will be able to see or access it.”).

voluntary activity mentioned above.

F. The Recommended Approaches Applied

This section provides two hypotheticals to illustrate a working model of the recommended approach.

1. The Clear and Convincing Evidentiary Standard Applied to Social Media

The “clear and convincing” evidentiary standard is best illustrated by a hypothetical involving Mr. Green.²⁸⁷ Mr. Green likes to use his Facebook profile to post videos of himself doing unorthodox or humorous activities. Most of these videos draw little attention. One day Mr. Green posts a particular video on his Facebook profile that only Mr. Green’s eight hundred friends can access. Another user then mocks Mr. Green, harming his reputation in the process. As a result, Mr. Green sues this individual for defamation.

Under the current formulation of the public figure test, it is unclear whether Mr. Green is a public figure. A court may find that Mr. Green acted voluntarily when he accessed the social media platform. On the other hand, a court might find that posting the video constitutes voluntary activity. If applied universally, however, both of these definitions convert almost every social media user who utilizes a social media feature into a public figure. Because of this consequence, a court may avoid finding that Mr. Green acted voluntarily. Nevertheless, a court may define Mr. Green as an involuntary public figure. A court could rationalize that Mr. Green had greater access to the media because he has considerably more than 245 friends, a Facebook user’s average amount of friends.²⁸⁸ It would be unclear, however, that Mr. Green’s additional friends give

287. This hypothetical is loosely based on *Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128 (D.D.C. 2009), in which the D.C. Circuit noted that the plaintiff was “[a]rguably . . . a limited-purpose public figure” when the plaintiff “posted a YouTube.com video alleging that in November 1999, while visiting Chicago, he met then-state senator Barack Obama and then purchased cocaine from, used cocaine with, and performed a sex act on Mr. Obama.” *Id.* at 130, 133.

288. Hayley Tsukayama, *Your Facebook Friends Have More Friends Than You*, WASH. POST (Feb. 3, 2012), http://www.washingtonpost.com/business/technology/your-facebook-friends-have-more-friends-than-you/2012/02/03/gIQAuNlMq_story.html (“The average Facebook user has 245 friends.”).

him greater access to the media. After all, the greater number of friends or contacts on a social network does not exactly correspond with greater access to media to rebut a claim.²⁸⁹

Under the recommended approach, however, a court would find Mr. Green is a private figure. Mr. Green has not acted voluntarily because he failed to place information within a publicly available forum. After all, Mr. Green's profile is defined as a mailbox, as opposed to a loudspeaker profile, because his privacy settings limited his profile's visibility to only his friends. Thus, if Mr. Green is a public figure, he can only be found an involuntary public figure, if the defendant can prove beyond a "clear and convincing" standard that Mr. Green has greater access to the media than other users on the plaintiff's social media network. In Mr. Green's case, the defendant cannot meet this burden when Mr. Green's access to the media only consists of his eight hundred friends. One person having a drastic amount of friends or contacts, such as several thousand, may meet the clear and convincing standard for greater access to the media. However, as mentioned earlier, a greater number of friends or contacts than average does not necessarily mean that Mr. Green has greater access to the media.²⁹⁰ Moreover, Mr. Green has no access to the media outside the social media platform, which would certainly satisfy this burden. As a result, the defendant cannot rebut the presumption that social media users have relatively equal access to the media. Based on this evidence, a court should find the defendant failed to satisfy his burden of proof. Accordingly, the court should conclude Mr. Green is a private actor, and he need not show the defendant acted maliciously in order to recover.

2. The Voluntariness Approach Applied to Social Media

The voluntariness approach is best demonstrated by applying the

289. O'Connor, *supra* note 21, at 526-27 ("While certainly a person posting on the news feeds of his 800 Facebook friends may be well-known within that group, that is hardly grounds to require him to prove *New York Times* actual malice the moment he is defamed; this is even more evident on Twitter, where a relatively unknown individual can drum up followers numbering in the thousands, many of whom may not even know the user's real name. . . . Communicating constantly through social networking and other Internet service providers has become so much a regular and routine practice of private individuals that there is not an assumption of receiving widespread attention from those communications.") (footnote omitted).

290. *Id.*

Mr. Smith hypothetical described at the beginning of this Comment.²⁹¹ With the public controversy at issue involving animal rights, Mr. Smith would only be a limited-purpose public figure if he acted voluntarily. However, it is unclear whether Mr. Smith is a public figure under the current public figure doctrine. Similar to the Mr. Green hypothetical, a court may find that Mr. Smith's access or postings constituted voluntary activity. However, line-drawing problems arise when determining when Mr. Smith's behavior actually became voluntary. Moreover, if a court chose to apply the limited-purpose public figure test, courts would also have to determine if Mr. Smith entered a public controversy. Defining a public controversy as a situation that is likely to draw publicity would essentially create a public controversy when a social media user uses any social networking feature. After all, a single social media post from a little-known user can result in international attention.²⁹²

The recommended approach provides a straightforward framework for determining Mr. Smith's public figure status. The public visibility of Mr. Smith's profile page determines the voluntariness of his action. If Mr. Smith's page has no visibility restrictions, the frequency of Mr. Smith's postings about animal cruelty could be evidence that Mr. Smith uses his social media profile as a "loudspeaker" to voluntarily place information into a public forum. Based on these facts, a court would conclude Mr. Smith is a limited-purpose public figure and he must prove Ms. Jones acted maliciously in the context of the controversy. However, if Mr. Smith has limited the visibility of his profile, it is more likely he used his profile as a "mailbox" and merely sharing an issue he felt very strongly about with his defined social network. Under these circumstances, a court would conclude Mr. Smith is a private figure and he does not need to show Ms. Jones behaved with actual malice.

CONCLUSION

As social media expands and online defamation suits continue to increase, courts face the dilemma of how to properly apply the public

291. See *supra* INTRODUCTION.

292. Lyall, *supra* note 217, at A8 (recounting how a Twitter user's social media posting catapulted him into the national spotlight in England).

figure doctrine to social media users without violating the principles underlying *New York Times*, *Gertz*, and their progeny. To best uphold these principles, courts should require a social-media-user defendant to prove certain elements of the public figure doctrine according to a clear-and-convincing evidentiary standard. To prove a social media user is an involuntary public figure, the defendant must provide clear and convincing evidence that a social media user plaintiff has greater access to the media than other users on the plaintiff's social media network. However, to prove the social media user is a general public figure, the defendant must provide clear and convincing evidence that the user has general notoriety or notoriety within the social media platform. Moreover, when applying the limited-purpose public figure test, courts should adopt the presumption that social media is an extension of an individual's private life. Only then can courts apply a legal test that not only upholds *Gertz* but also avoids grave policy implications.