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A CONFLICT IN THE PUBLIC INTEREST: DEFAMATION AND THE ROLE OF CONTENT IN THE WAKE OF DUN & BRADSTREET V. GREENMOSS BUILDERS

Of course statesmanship is a craft few possess in the highest degree, and those who have it do not always exercise it for the public good. Of course very few Athenians in their assembly could claim to be statesmen. But the case for giving them a voice and a vote does not rest on the assumption that they are experts in statecraft; instead it involves several assumptions. The first, as voiced by Protagoras and later by Aristotle, is that you cannot have a community or city unless everyone—generally speaking—has that modicum of civic virtue, that respect for public opinion and that sense of justice, which makes living together possible. The second is that it makes for social stability if the citizens feel that they have some voice in determining the issues that affect their own lives and welfare.

I.F. STONE, THE TRIAL OF Socrates

I. INTRODUCTION

The history of the application of constitutional principles to defamation law is brief, but has already spawned a substantial body of judicial interpretation and academic comment. The constitutional law regarding defamation has

1. The first case to apply constitutional limitations to the common law of defamation, established by the states, was N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

2. This article surveys the main Supreme Court cases. Academic articles are too numerous to be listed here, but an interesting cross-section can be found in the publications of several symposia on the subject, including: Symposium: New Perspectives in the Law of Defamation, 74 Calif. L. Rev. 677 (1986); Melville B. Nimmer Symposium, 34 UCLA L. Rev. 1331 (1987); Symposium: Libel, 38 Mercer L.
evolved rapidly, perhaps because first amendment restraints on defamation actions relate directly to the rights and responsibilities of the information media, which have expanded considerably in both quantity and influence during the same period. This swift development has not, however, created a clear, functional set of legal principles.\(^3\) Both plaintiffs and defendants are dissatisfied with the complexity, expense and unpredictability of defamation suits.\(^4\)

The Supreme Court, through a series of cases, has forged a doctrine which determines the level of constitutional protection for defamatory statements based primarily on the status of the plaintiff, that is, the person or entity defamed.\(^5\) In so doing, the Court has emphasized and relied on three basic premises: first, that it is more difficult to administer a standard based on statement content than one based on plaintiff status;\(^6\) second, that public officials and public figures can counter reputational injuries more effectively because they have greater access to the media, and they have assumed the risk of such injuries by voluntarily taking positions of public influ-

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3. As stated in 50 AM. JUR. 2d Libel and Slander § 1 (1970):

> The law relating to defamation is a limitation upon the constitutional guaranty of freedom of speech and of the press, and the vagarious and complex structure of such law, as it exists today, is to a large extent a direct result of the friction between it, as a restriction on untrammeled freedom of expression, and the highly cherished rights of freedom of speech and of the press.

Id.


5. See Franklin, Constitutional Libel Law: The Role of Content, 34 UCLA L. REV. 1657 (1987) [hereinafter Franklin, Constitutional Libel Law]. Although most of the central rationales for the result [in New York Times Co. v. Sullivan] were presented in terms of the value of the speech, the Court framed its rule in terms of the status of plaintiffs . . . . After a tentative shift of the focus from plaintiff to content by applying the actual malice standard to any story implicating "general or public interest," the Court, in Gertz v. Robert Welch, Inc., returned the focus to plaintiffs.

Id. at 1660, 1662 (quoting Rosenbloom v. Metromedia, 405 U.S. 29, 43 (1971)).

6. See infra notes 69-76 and accompanying text.
ence; and third, that a content-based standard would not be sufficiently protective of the media. The Court has concluded that plaintiffs who achieve the status of public figures must show that a defamatory statement regarding their public office or activities was made with "actual malice" before recovering damages in a defamation action.

These premises are not, however, sufficient to fully explain the manner in which constitutional limitations on defamation recovery are applied. Indeed, a recent decision by the Supreme Court has given cause to doubt whether they are even at the heart of the analysis. Though not central to the language of the Court's stated test for applying constitutional limits to the law of defamation, the determination of whether a defamatory statement involves issues of significant concern to a large public audience has been a primary consideration in the formation and application of those limits. The purpose of this comment is to describe the role of statement content in the constitutional law of defamation.

To appreciate the importance of statement content in applying first amendment restraints on the common law of defamation, it is necessary first to examine the decisional background of constitutional defamation law: how the current doctrine has evolved and the problems created in the application of that doctrine. After setting out that background, this comment will analyze the role that content has played in the evolution of constitutional defamation law in the Supreme Court, and in the application of constitutional limitations by the lower

7. See infra notes 77-79 and accompanying text. See also Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967).
8. See infra note 93 and accompanying text.
9. Actual malice has been defined by the Supreme Court as: "knowledge that [the statement] was false or . . . reckless disregard of whether it was false or not." New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964). Private plaintiffs need only meet the traditional requirements of proving that a published or broadcast statement was defamatory, concerned the plaintiff, and could be presumed to have damaged his or her reputation. New York Times, 376 U.S. at 262-63.
11. As Professor Franklin summarizes:
In brief, the mess has resulted from the Court's preoccupation with the status of the libel plaintiff to the virtual exclusion of the content of the defamatory speech. Categorization based on the status of the plaintiff alone is inconsistent with what led the Court to protect false speech in the first place.

Franklin, Constitutional Libel Law, supra note 5, at 1657.
federal courts. This comment suggests that the question of whether a particular statement implicates a matter of public concern is central to the reasoning, if not the language, of every major Supreme Court decision. In addition, this comment notes that the issue of content constitutes the central inquiry in one of the most widely used tests of constitutional status in the lower federal courts. This comment will then consider the role that statement content has played in the application of first amendment limitations to related, non-defamation causes of action. Finally, the comment will argue that it is a conflict in the public interest—not a conflict between individuals, or the public and an individual—which is at the heart of the question of when and how to apply free speech protections to defamation. An effective analysis of these competing interests must explicitly determine whether issues of broad public concern are involved in a particular case or it fails to address the central issue presented by this area of the law. The comment concludes that the determination of whether a defamatory statement implicates issues of public concern should be explicitly recognized as the basis for apply-

12. For example: “Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (emphasis added).

There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues.

The thrust of New York Times is that when interests in public discussion are particularly strong, as they were in that case, the Constitution limits the protections afforded by the law of defamation.


13. See Waldbaum v. Fairchild Publications, 627 F.2d 1287 (D.C. Cir. 1980). Although still nominally applying the status-based test devised by the Supreme Court, as the first and most significant step in the test for determining whether the actual malice standard will be imposed, this case requires the courts to determine whether or not a “public controversy” is involved. See also infra notes 110-23 and accompanying text.


15. See infra notes 233-63 and accompanying text.
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ing first amendment limitations to defamation actions, in or-
order to ensure that the purposes and policies justifying the im-
position of such limitations are adequately considered, before
they are applied. 16

II. BACKGROUND: THE EVOLUTION OF CONSTITUTIONAL
DEFAMATION LAW AND PROBLEMS IN ITS APPLICATION

A. The Evolution of the Actual Malice Standard

In 1964, with its decision in New York Times Co. v.
Sullivan, 17 the Supreme Court began applying the First
Amendment of the United States Constitution to the common
law of defamation to limit the states’ power to impose liability
for false speech. 18 These limits proceed from the Supreme
Court’s holding in New York Times:

The constitutional guarantees require, we think, a federal
rule that prohibits a public official from recovering damag-
es for a defamatory falsehood relating to his official con-
duct unless he proves that the statement was made with
“actual malice”—that is, with knowledge that it was false or
with reckless disregard of whether it was false or not. 19

Since that benchmark decision, which applied what has be-
come known as the “actual malice” standard to government
officials only, the constitutional doctrine limiting defamation
actions has evolved rapidly. Soon after its decision in New York
Times, the Court extended limitations on defamation to non-governmental “public figures” as well as public officials,
reasoning that “[o]ur citizenry has a legitimate and substantial
interest in the conduct of such persons, and freedom of the
press to engage in uninhibited debate about their involvement
in public issues and events is as crucial as it is in the case of
‘public officials.” 20

16. See infra notes 270-78 and accompanying text.
18. As one federal district court has summarized it:

Modern defamation law is fundamentally State Law with restric-
tions and modifications as imposed nationwide by paramount law, by
virtue of the guaranty of free press and free speech in the First
Amendment applied to the States through the Fourteenth Amend-
ment. The history of these changes begins with N.Y. Times v. Sullivan.

Perhaps the broadest interpretation of the Constitution as a limit on defamation actions, and the first explicitly embracing the role of content in determining the applicability of those limits, was the plurality opinion in *Rosenbloom v. Metromedia*.

In *Rosenbloom*, the Court held that the "actual malice" standard established by *New York Times* should be applied to "all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous." The Court abandoned the consideration of plaintiff status, instead hinging application of the "actual malice" standard solely on statement content.

However, the Court subsequently revised its definition of how the "actual malice" standard would be applied. In *Gertz v. Robert Welch, Inc.*, the Supreme Court reaffirmed the *New York Times* standard, and held that it applied to both public officials and public figures. But the Court also expressly overturned *Rosenbloom*, returning to a more strictly status-based analysis. The Court stated:

[W]e conclude that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a pri-

concurring in result). The Court was not precise in defining who would be considered a public figure; however, the court made it clear that the rule of *New York Times* would no longer be limited to government representatives. The majority opinion also established a slightly different standard of proof than that required of public officials in *New York Times*, holding:

[A] "public figure" who is not a public official may also recover damages for a defamatory falsehood whose substance makes a substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

Id. at 155 (emphasis added). The standard to be applied to public figures was later unified with that applied to public officials. See infra note 25.

22. Id. at 44 (footnote omitted).
25. The Court related the facts and holding of Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), and noted that "[i]n his concurring opinion, Mr. Chief Justice Warren stated the principle for which these cases stand—the *New York Times* test reaches both public figures and public officials." *Gertz*, 418 U.S. at 336 n.7.
vate individual. The extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge this legitimate state interest to a degree that we find unacceptable.\textsuperscript{26}

Furthermore, the Court did not simply reinstate the "actual malice" doctrine as it existed prior to *Rosenbloom*, but also modified the damages available to plaintiffs. A private-figure plaintiff who successfully pursued an action for defamation could recover "only such damages as are sufficient to compensate him for actual injury."\textsuperscript{27} Thus, like their public counterparts, private figures could recover presumed or punitive damages only upon a showing of "actual malice."\textsuperscript{28}

Recently, the Supreme Court further modified the scope of the "actual malice" doctrine. In *Dun & Bradstreet v. Greenmoss Builders*,\textsuperscript{29} the Court again introduced the concept of adjusting defamation recovery based on whether the matters involved were of public concern. In the context of an action by a private-figure construction contractor against a corporate defendant for disseminating a false credit report, the Court stated that "[i]n light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages—ever absent a showing of 'actual malice.'"\textsuperscript{30} The Court thus modified its holding in *Gertz*, establishing that presumed and punitive damages could be awarded in an action by a private figure plaintiff without a showing of "actual mal-

\textsuperscript{26} *Gertz*, 418 U.S. at 345-46.

\textsuperscript{27} Id. at 350. The Court did not define "actual injury," except to say that it was not limited to out-of-pocket losses, and might include "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering . . . supported by competent evidence." Id. at 350. However, it is almost certainly to be construed as covering the same types of injuries as are provided for by the "special damages" provisions of state statutory and common law. See, e.g., the California Civil Code: "Special damages are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation." CAL. CIV. CODE § 48a(4)(b) (West 1982).

\textsuperscript{28} "[W]e hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." *Gertz*, 418 U.S. at 349.

\textsuperscript{29} 472 U.S. 749 (1985).

\textsuperscript{30} Id. at 761.
ice," so long as the statements at issue were not of public concern. 31

The constitutional law of defamation now stands as follows: With regard to public officials and non-governmental public figures, the Court requires the plaintiff to prove that a defamatory statement was published with "actual malice" in order to obtain damages of any kind. 32 The only well-established exceptions to this requirement arise, first, when the defamatory statement is made with regard to purely private conduct, rather than the official conduct, of a public official; 33 and, second, where a public figure becomes such by virtue of the attention focused on him or her due to the defendant's defamation. 34

If the plaintiff is a private figure, constitutional limits now require a showing of "actual malice" only where the plaintiff seeks to recover presumed or punitive damages and the defamatory speech is of public concern. 35 Subsequent cases have not significantly modified the roles of plaintiff status and statement content. 36 Neither have they altered the level of damages allowed the various classes of plaintiffs.

B. Problems in Application: The Public-Private Distinction in the Lower Courts

Although it has once again introduced the analysis of statement content into the constitutional jurisprudence of defamation, the Court's analysis is still primarily focused on the status of the plaintiff. 37 However, the Court has never clearly defined the distinction between public and private figures upon which that analysis is based.

31. Id. at 763.
33. See supra note 19 and accompanying text.
37. See Franklin, Constitutional Libel Law, supra note 5.
The task of providing detailed criteria for making the determination of plaintiff status has been left to the lower courts. As will be discussed in greater detail below, the determination of status does not free the courts from questions of statement content. The fact that the courts have considered statement content, tacitly or explicitly, is not alone a sufficient basis upon which to question the primarily status-based test established by the Supreme Court. If the result is consistently proper, the analysis is best left alone. However, the assertion that the courts must explicitly address the issue of content is also supported by the results obtaining in lower court cases utilizing the public-private distinction. A few examples will serve to illustrate this point.

In Brewer v. Memphis Publishing Co., the court found an erstwhile beauty queen and her retired football-player husband to be public figures for the purposes of an article reporting an affair between the wife and Elvis Presley and the divorce of the husband and wife. Although the court found the article to be defamatory per se, it found that the plaintiffs had failed to demonstrate the requisite "actual malice," and reversed the lower court, entering judgment for the defendant. Noting that Gertz established that "the press is not adequately protected by a rule that allows a court to determine whether a published article is relevant to an issue of general or public interest," the court held:

In our view, the plaintiffs in this case were, at least at some time and for purposes of some articles, public figures who, as such, must prove defendant's "malice," not because they are to be punished for having sought press attention but, rather, because the first amendment requires that the press be afforded the protection of the "malice" standard vis-a-vis those who have sought its coverage, either through direct invitation or by participating in activities whose success depends in large part on publicity.

38. See infra notes 110-23 and accompanying text. Furthermore, the fact that an individual may be held to be an "involuntary" public figure, as in Dameron v. Washington Magazine, 779 F.2d 736, 740-41 (D.C. Cir. 1985), indicates that the nature of the controversy may be a more central concern than the status of the plaintiff in some cases. This will also be discussed further below.
39. 626 F.2d 1238 (5th Cir. 1980), cert. denied, 452 U.S. 962 (1980).
40. Id. at 1260
41. Id. at 1252-53.
In performing its role the press covers not only political events and public controversies, but also sports and entertainment.\textsuperscript{(42)}

Here the court followed the status test to its logical extreme, essentially holding that any matter on which the press is privileged to report is sufficient to support a finding that any person involved in that matter is a public figure. Moreover, the court explicitly rejected the possibility that a finding of public figure status might be connected in any way with the content of the defamatory statement.

In \textit{Carson v. Allied News Co.},\textsuperscript{(43)} the court of appeals accepted, almost without discussion, the finding of the district court that entertainer Johnny Carson and his second wife, Joanna Holland, were public figures for the purposes of articles alleging that Carson had moved his show to Hollywood, prior to divorcing from his first wife, in order to be near Holland. Here again, the notoriety of the plaintiffs was sufficient to require the imposition of the “actual malice” standard despite the absence of any “interchange of ideas for the bringing about of political and social changes desired by the people.”\textsuperscript{(44)}

In \textit{Woy v. Turner},\textsuperscript{(45)} the court found the sports agent of a professional baseball player involved in a contract dispute to be a public figure for the purpose of defamatory comments made about him by the owner of the baseball franchise in a televised interview. The court found that the agent was a public figure because he had “voluntarily thrust himself into the forefront of a public controversy—the contractual dispute.”\textsuperscript{(46)} The court set out a three-part test for determining when a plaintiff would be considered a public figure, which emphasized the factors cited by the \textit{Gertz} court and contained no reference to the substance of the defamatory statement.

Finally, in \textit{Gomez v. Murdoch},\textsuperscript{(47)} the court found a jockey to be a public figure for the purposes of an article accusing him of having held back his horse and “‘robbed’ those persons

\textsuperscript{42.} Id. at 1255.
\textsuperscript{43.} 529 F.2d 206 (7th Cir. 1976).
\textsuperscript{46.} Id. at 38.
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who had bet on the horse 'as if he had plucked money out of their wallets.' The court stated:

"The trial judge said that "there is no way in the world that a man could decide to become a jockey, put the silks on and ride before hundreds of thousands of people . . . and not call himself a public figure." The judge also stated that "many people on television see him run," and further mentioned "the public interest in horseracing." . . . We agree with the trial judge's view that plaintiff here was a public figure."

The court thus found the jockey to be a public figure on the basis of his participation in the sport of horseracing, without considering whether the "public interest in horseracing" was sufficiently important to justify the imposition of the burden of proving "actual malice" on the plaintiff. The court further noted that "[w]e are not here dealing with comments about the plaintiff's activities outside of his professional life, which comments would not be privileged except in the case of a person of pervasive fame or notoriety." So, even while limiting the case at hand, the court states its understanding that essentially any comment regarding a person of "pervasive fame or notoriety" will be subject to the "actual malice" test.

It can, perhaps, be argued that these decisions were simply incorrect in their interpretation of current constitutional doctrine. If that is so, it merely strengthens the argument that doctrinal reform is needed. Because the determination of status lends itself to decisions based on the notoriety of the plaintiff rather than on the interests intended to be served by imposing constitutional limitations, such errors are probably inevitable.

In addition, although each of these cases was decided prior to the Supreme Court's decision in *Dun & Bradstreet*, that decision would not have assisted these plaintiffs. The exception framed in *Dun & Bradstreet*, at least as it was established in that case, permits the award of presumed or punitive damages absent a showing of "actual malice" only when the plaintiff is

48. Id. at 599, 475 A.2d at 624.
49. Id.
50. Id. at 600, 475 A.2d at 625.
not a public figure. As the cases above indicate, a status-based test which makes no reference to statement content will preclude most plaintiffs from ever reaching that exception.

C. Problem and Proposal

The difficulties engendered by a primarily status-based analysis are inherent to that analysis. By looking to the status of the plaintiff, rather than the nature of the issue involved, constitutional limitations are imposed or denied depending on the notoriety of the plaintiff. Although the Supreme Court has attempted to limit the doctrine by requiring the statement to relate to the plaintiff’s participation in “public issues and events,” the cases outlined immediately above indicate that the “actual malice” standard has been imposed despite the questionable public importance of the information involved. As long as the primary denominator remains the status of the plaintiff, the result is not necessarily determined by the main interest justifying the imposition of constitutional limitations: the public interest served by the dissemination of such information.

The Supreme Court’s continuing reliance on a primarily status-based analysis is not a necessary evil. This comment suggests that, despite the current formulation of constitutional defamation law, the consideration of statement content has always played an important role in the Supreme Court’s decisions. This role has been strengthened by the decisions of some lower courts, especially by the status-determination test set out in *Waldbaum v. Fairchild Publications*. Furthermore, the Supreme Court has explicitly or implicitly incorporated the consideration of statement content into the constitutional jurisprudence of several related, non-defamation causes of action.

This comment also attempts to identify the nature of the competing interests at stake in the law of defamation—reputation and freedom of speech—in order to determine whether current constitutional doctrine adequately addresses these interests, and concludes that it does not. The comment

51. See supra notes 29-30 and accompanying text.
then proposes a content-based test for the application of constitutional limitations on defamation actions.

III. ANALYSIS

A. The Role of Content in the Supreme Court Decisions

1. Content Prior to the Gertz Decision

The reasoning of *New York Times Co. v. Sullivan*,\(^{54}\) upon which constitutional defamation law is largely founded, assumes a conflict between "the principle that debate on public issues should be uninhibited, robust, and wide-open"\(^{55}\) on the one hand, and the interest of public officials in protecting their official reputation on the other.\(^{56}\) The opinion is largely concerned with the importance of protecting the public's ability to comment on matters of official conduct,\(^{57}\) an emphasis restated in the concurring opinions.\(^{58}\) The Court mentions the special status of public officials only to analogize the protection for the public created by the "actual malice" standard with the absolute privilege granted to all statements of public officials made "within the outer perimeter"\(^{59}\) of their duties. The holding explicitly requires a determination of the content of a defamatory statement, by limiting its application to "defamatory falsehood relating to [the public official's] official conduct."\(^{60}\) The court must determine whether the statement impugns an official's conduct in office, because if it does not, the statement fails to involve the public interest in the quality of governance. Because the holding was limited to public officials, however, *New York Times* set the stage for a series of in-

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55. Id. at 270.
56. Id. at 272-73.
57. The *New York Times* Court stated:
   
   The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

Id. at 269 (emphasis added); see also id. at 269-70.
58. See id. at 293-305 (Black, J., concurring).
59. Id. at 282 (quoting Barr v. Matteo, 360 U.S. 564, 575 (1959)).
60. Id. at 279 (emphasis added).
interpretations which resulted in the emergence of a doctrine based primarily on the status of the plaintiff.

In *Curtis Publishing Co. v. Butts*,\(^6\) which extended the ruling of *New York Times* to public figures who are not employed as public officials, the majority opinion of the Supreme Court still cited the protection of the public interest in self-government as the primary goal of the "actual malice" doctrine.\(^6\) At the same time, however, the Court utilized the concept of plaintiff status as a justification for the extension of the doctrine, noting that "as a class these 'public figures' have as ready access as 'public officials' to mass media of communication, both to influence policy and counter criticism of their views and activities."\(^6\) Having extended the standards of *New York Times* beyond the realm of the patently official, and having done so by comparing the status and influence of public figures to their official counterparts, the Court relied on the delimiting principle of plaintiff status as providing the clearest basis for determining when that standard should be applied. The basis for the Court's preference for the subtleties of status over the complexities of determining whether the content of a defamation invoked the first amendment would be spelled out in the *Gertz* decision.\(^6\)

Before being recapitulated by *Gertz*, however, the "actual malice" doctrine briefly abandoned consideration of plaintiff status altogether. In *Rosenbloom v. Metromedia*,\(^6\) the analysis of plaintiff status was replaced by a determination of whether the content of the defamation was "of public or general inter-

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62. This was evident in both the majority opinion and the influential concurrence of Chief Justice Warren. In the majority opinion the Court discussed the conflict between "the important public interest in being informed about the events and personalities involved ... [and] society's 'pervasive and strong interest in preventing and redressing attacks upon reputation.'" Id. at 146. The majority noted that "[w]e fully recognize the force of these competing considerations and the fact that an accommodation between them is necessary not only in these cases, but in all libel actions arising from a publication concerning public issues." Id. at 147 (emphasis added). In his concurrence, Chief Justice Warren added that "many who do not hold public office at the moment are nonetheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." Id. at 164.
63. Id. at 164 (Warren, C.J., concurring).
64. See infra notes 69-97 and accompanying text.
65. 403 U.S. 29 (1971).
The plurality opinion stated that application of the "actual malice" standard since *New York Times* had "disclosed the artificiality, in terms of the public interest, of a simple distinction between 'public' and 'private' individuals," and held that "constitutional protection [extends] to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous." The role of content in determining the application of constitutional limitations on defamation recovery was thus made explicit in *Rosenbloom*, but a precise definition of what constituted a matter of public concern was not provided, and a divided Court left the issue open for reconsideration.

2. A Critique of the Gertz Decision

In *Gertz v. Robert Welch, Inc.*, the Supreme Court returned to an application of constitutional limitations based primarily on plaintiff status, explicitly addressing and rejecting the pure content test created in *Rosenbloom*. The Court attempted to define the requirements for the application of the "actual malice" doctrine in a more circumspect fashion, seeking to prevent reputational injury to private individuals from going unredressed. Its reasons for rejecting the "public or general interest" test of *Rosenbloom* were threefold.

a. The Analysis of Content versus the Analysis of Status

First, the *Gertz* Court cited the "difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of 'general or public interest' and which do not . . . . We doubt the wisdom of committing this task to

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66. *Id.* at 43.
67. *Id.* at 41.
68. *Id.* at 44.
70. *Id.* at 345-46.
71. In rejecting the test formulated by the *Rosenbloom* court the Court in *Gertz* held:

[The States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual. The extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge this legitimate state interest to a degree that we find unacceptable.]

*Id.* at 345-46.
judges." Although the Court found the vagaries of plaintiff status less confounding than determining when a statement involved an issue of public importance, it did not provide a definitive test of that status. Moreover, deciding exactly what makes a plaintiff a public figure is not a simple task, nor does it free the court from considerations of content. As an examination of the criteria established by the federal courts in *Waldbaum v. Fairchild Publications* and the cases following it discloses, the analysis of whether a statement involved a "public controversy" would turn out to be central to that definition. These criteria will be discussed in greater detail below, but they essentially require the court to consider both the nature of the controversy in which the plaintiff is involved, and the content of the statements about the plaintiff. The status-based test, then, did not relieve the courts of the task that the *Gertz* majority found so onerous: that of analyzing and categorizing the content of the defamatory statement.

b. Distinctions Between Public and Private Plaintiffs

The *Gertz* Court drew a sharp distinction between private individuals on one hand, and public officials and public figures on the other. In doing so, the Court relied on two basic premises. The first premise is that "[p]ublic officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." The second premise asserts that "the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory false-

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72. *Id.* at 346.
73. The *Gertz* Court limited the "actual malice" standard to "[t]hose who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office." *Id.* at 342.
75. *Id.* at 1296.
76. *Id.* at 1296-98. See infra notes 111-23 and accompanying text for a detailed discussion of the criteria employed by some of the federal courts in analyzing when a plaintiff will be classified a public figure.
77. *Gertz,* 418 U.S. at 344-45.
78. *Id.* at 344 (footnote omitted).
hood concerning them. No such assumption is justified with respect to the private individual. 79

Both of these distinctions were anticipated by the Rosenbloom opinion. Addressing the contention that public figures are better able to respond to defamations by having greater access to the media, the Rosenbloom Court stated:

While the argument that public figures need less protection because they can command media attention to counter criticism may be true for some very prominent people, even then it is the rare case where the denial overtakes the original charge . . . . If the states fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern. 80

Because the inquiry demanded by the New York Times "actual malice" standard goes to both the conduct and state of mind of the defendant, 81 the difficulty of proving a sufficient degree of malice in publication is very great. 82 That standard is applied only to public figures, with the consequence that many public figures, unable to meet the enhanced proof requirement, must see statements that even the publisher admits are false go unanswered. Furthermore, even where the plaintiff is able to obtain a retraction, as the Rosenbloom opinion noted, "[d]enials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story." 83 These

79. Id. at 345.
80. Rosenbloom v. Metromedia, 403 U.S. 29, 46-47 (1971) (footnote omitted). The Gertz Court acknowledged that reply may be an insufficient remedy to one defamed, noting that "an opportunity for rebuttal seldom suffices to undo [the] harm of defamatory falsehood . . . . But the fact that the self-help remedy of rebuttal, standing alone, is inadequate to its task does not mean that it is irrelevant to our inquiry." Gertz, 418 U.S. at 344 n.9.
81. "It is the conduct element, therefore, on which we must principally focus if we are to resolve the antithesis between civil libel actions and the freedom of speech and press." Curtis Publishing Co. v. Butts, 388 U.S. 130, 153 (1967). As previously noted, in order to show "actual malice" the plaintiff must show, in addition to the common law elements of the tort, that the defendant made the defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964). Furthermore, the plaintiff must show this with "convincing clarity." Id. at 285-86.
82. See infra note 146.
83. Rosenbloom, 403 U.S. at 46.
facts, combined with the cynicism with which we greet the seemingly inevitable denials of the accused, indicate that self-help rebuttal through the media is, at least at present, an inadequate remedy. Especially in light of recent proposals for an alternative remedy in defamation cases, it is apparent that the presumption that a public-figure plaintiff's independent access to the media provides an adequate alternative to a judicial remedy is unwarranted. Leaving the rectification of a defamation up to the plaintiff and the media has resulted in an inconstant justice at best.

84. Several proposals providing for summary judgment proceedings or extra-judicial arbitration in defamation cases argue the need for an alternative to the present remedies of self-help or full-scale litigation. See, e.g., Franklin, A Declaratory Judgement Alternative to Current Libel Law, 74 CALIF. L. REV. 809 (1986), and Barrett, Declaratory Judgments for Libel: A Better Alternative, 74 CALIF. L. REV. 847 (1986); H.R. 2846, 99th Cong., 1st Sess. (1985) (introduced by Rep. Charles Schumer); Wissler, Why Current Libel Law Doesn't Work, supra note 4, at 51. Moreover, the need for an alternative to the traditional libel action would seem, if anything, greater on the part of public figures than on the part of private individuals, who need not meet the "actual malice" standard. As Dean Bezanson has recently noted:

Recovery for injury to the reputation of public figures—a category that includes, although is not limited to, the wealthy and powerful whose protection was greatest at common law—is much more difficult than recovery for injury to the reputation of a private individual. While the common law . . . was imperfect and somewhat class-biased in its greater protection of the wealthy and powerful, it is nonetheless likely that, as a rule, the greatest reputational damage to a career or to an economic livelihood will occur in such persons. If this proposition is accepted, the conclusion seems inescapable that the constitutional privileges have limited the instances of the tort's operation to the very cases in which the least reputational harm has occurred.


85. The findings of the Iowa Libel Research Project support the assertion that public figures are as much or more in need of an alternative to the present system of libel litigation, and that they are unable to obtain satisfaction from the media. As Dean Bezanson reports:

Plaintiffs—particularly public plaintiffs—often contact the media before they contact a lawyer. The media response is usually offensive to the plaintiffs, who report being angered by the media’s indifference, arrogance, or insensitivity, and the plaintiffs’ reactions appear to be a significant factor in their decision to sue. Plaintiffs express their harm in largely nonfinancial terms, and appear to engage a lawyer (usually on some form of contingency) already having decided to sue. Plaintiffs, particularly in public cases, hire lawyers specifically to bring suit . . . .

In significant respects, media defendants confirm this picture of plaintiffs' actions and motivations. Defendants indicated that between one third and one-half of libel-type complaints have validity, that a
Addressing the question of whether, by entering the public arena, one has voluntarily assumed the risk of defamation regarding one's involvement in public actions and events, the Rosenbloom Court held:

We have recognized that "[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community" . . . . Voluntarily or not, we are all "public" men to some degree. Conversely, some aspects of the lives of even the most public men fall outside the area of matters of public or general concern . . . . Thus, the idea that certain "public" figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view is, at best, a legal fiction. 86

There is a policy decision inherent in every determination of where to place the burden of risk. It is reasonable to assert that a person who assumes a public office or enters into a public debate for the purpose of affecting its outcome assumes the risk that his or her qualifications or performance will in turn elicit public comment. Where an individual's actions impinge on the outcome of events which will affect a large sector of the public, the principle of self-determination central to democracy requires that the public be allowed to respond to and comment on those actions. But what is the principle that protects a libel regarding a person who, though sufficiently well known to be considered a "public figure," may never have participated in such events? The mere statistical probability that one who attracts public curiosity will eventually be libeled is not sufficient justification to assert that they have voluntarily assumed the risk of such libels. The proposition that by driving on a public highway we have assumed the risk of injury due to the negligence or recklessness of another is untenable, and yet the statistical probability of a driver being involved in such an accident is almost certainly as high as the chance of a public figure being defamed.

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86. Rosenbloom, 403 U.S. at 47-48 (quoting Time Inc. v. Hill, 385 U.S. 374, 388 (1967)).
False speech is insulated only to protect the true, and true speech is protected primarily to promote social and political self-determination. Therefore, any protection extended to defamatory statements must go toward the protection of statements whose value to public self-determination, were they true, would be clear. No such value accrues to a statement simply by virtue of its being made about a public figure. Nonetheless, the actual malice doctrine has been applied where plaintiffs in defamation actions were found to be public figures based on their notoriety, even though the statements involved had nothing to do with their participation in events of political or social importance.\footnote{87} Moreover, it is not at all clear that the plaintiff's participation in the events giving rise to his or her public figure status need be voluntary.

In setting out the guidelines for establishing public-figure status, the \textit{Gertz} court noted that "[h]ypothetically, it may be possible for someone to become a public figure through no purposeful action of his own."\footnote{88} This possibility was not long to remain hypothetical. In \textit{Dameron v. Washington Magazine},\footnote{89} an air traffic controller, on duty at the time an airplane crashed while approaching Dulles Airport, was found to be an involuntary public figure for the purposes of an article about the crash, despite his "relatively passive involvement in this controversy."\footnote{90} Therefore, the requirement of voluntary participation—one of the principle justifications for the Court's distinction between public and private figures—is not indispensible to a finding of public figure status.

Finally, placing the burden of risk of defamation on those who attain a degree of public influence necessarily discourages both private citizens and public figures from participating in the resolution of public issues. Private citizens must avoid such participation lest they be classed as public figures, and thus subjected to the scrutiny and comment of the media with only the most minimal recourse if that comment is libelous. As the \textit{Rosenbloom} opinion points out, a distinction in the level of

\footnote{87. See, e.g., Brewer v. Memphis Publishing Co., 626 F.2d 1298 (5th Cir. 1980); Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976); Woy v. Turner, 573 F. Supp. 35 (N.D. Ga. 1983), discussed supra text accompanying notes 45-46.}
\footnote{89. 779 F.2d 796 (D.C. Cir. 1985), \textit{cert. denied}, 476 U.S. 1141 (1986).}
\footnote{90. Id. at 741.}
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protection given to a defamatory statement that is based on the status of the defamed "could easily produce the paradoxical result of dampening discussion of issues of public or general concern because they happen to involve private citizens while extending constitutional encouragement to discussion of aspects of the lives of 'public figures' that are not in the area of public or general concern." The Court's decision in *Dun & Bradstreet* makes it clear that statements which do not touch on matters of public concern are to be considered of "reduced constitutional value." Although some degree of public scrutiny and comment is inevitable, the only justification for its negative effect on individual participation is the necessity for public participation. If matters of public concern are not at the core of what constitutional defamation law seeks to protect—and under a primarily status-based test they are not—then that doctrine fails to protect the only interest that adequately justifies it.

c. Protecting the Media from Strict Liability

Finally, the *Gertz* Court reasoned that the content standard was not sufficiently protective of the media, because "a publisher or broadcaster of a defamatory error which a court deems unrelated to an issue of public or general interest may be held liable in damages even if it took every reasonable precaution to ensure the accuracy of its assertions." This, however, is not a necessary effect of the *Rosenbloom* decision or of utilizing a content-based test.

Long before *Rosenbloom*, publishers traditionally had been held strictly liable for defamatory publications regardless of whether they resulted from malice, negligence, or simply from non-negligent error. The *Gertz* holding did nothing to alter

94. The common law rule of strict liability in defamation has been described as follows:

Following the rule laid down by the English decisions, the defendant has been held liable, without regard to any question of negligence . . . . The only limitation placed upon the liability is that the defamatory meaning and the reference to the plaintiff must be reasonably conveyed to and understood by others . . . .
this (in states which still adhered to the traditional strict liability rule) except to require a showing of at least negligence before a private plaintiff could recover presumed or punitive damages. This offered little additional protection to publishers, because plaintiffs rarely obtain such damages.

In addition, nothing inherent in a content-based analysis prevents liability from being premised on a showing of at least negligence, if the Court believes that is necessary to prevent chilling of first amendment rights. Such a doctrine would simply require the plaintiff to demonstrate negligence where no issue of public concern was involved, and "actual malice" where such an issue existed. Nor is there anything inherent in the status-based test to prevent the courts from imposing liability despite good-faith efforts to ensure accuracy, if the plaintiff is found to be a private figure. This was precisely the state of the law following the decision in *Curtis Publishing Co. v. Butts*, before the *Gertz* Court imposed the requirement of showing at least negligence.

Finally, there is little constitutional value in protecting publishers from defamation awards resulting from significant reputational injuries, where no issue of public importance is involved. The constitutional value of promoting political and social self-determination is not promoted by limiting such awards. The Court acknowledged this in *Dun & Bradstreet*, holding that the *New York Times* standard should not be applied to limit recovery by a private plaintiff to "actual injury" when no issue of public concern is implicated.

The effect of this strict liability is to place the printed, written or spoken word in the same class with the use of explosives or the keeping of dangerous animals. If a defamatory meaning, which is false, is reasonably understood, the defendant publishes at his peril, and there is no possible defense except the rather narrow one of privilege.


96. In a study of defamation cases by Professor Franklin, punitive damages: [W]ere sought in at least 134 (25 percent) of the 534 cases . . . . The appellate decisions in these cases reveal that only 2 plaintiffs in media cases kept their punitive awards. Among the plaintiffs in nonmedia cases, 16 kept punitive awards. During this period, lower courts considered such damages constitutionally permissible in media cases when the *Times* standard was met.

Franklin, *Winners and Losers*, supra note 4, at 477 (footnotes omitted).

d. Summary

These premises, upon which the primarily status-based test adopted by the Court is based, are not adequate to support either the predominance of considerations of status, or the relegating of content analysis to its current minor role. Self-help, even for eminently public figures, has been shown to be an inadequate recourse. The assertion that public figures have voluntarily assumed the risk of defamation is also inadequate to support the status test. The social policy ramifications of placing the burden of risk of defamation on those who attempt to influence events of public importance do not favor such a disposition of risk, and have led the courts to impose a higher burden of proof even where no issue of first amendment importance is involved. Indeed, it is not clear that voluntary participation in the public events at issue is even a requirement. Nor does the utilization of a content-based test necessarily involve a greater risk of chilling free speech.

Moreover, even in articulating these distinctions the Court did not free itself entirely from considerations of statement content. With regard to public figures, the Court defined the outer limit of a statement that might demand first amendment protection by stating that "the public's interest extends to 'anything which might touch on an official's fitness for office.'" With regard to public figures, the Court held that a plaintiff might be so deemed where they had a prominent role in "the affairs of society" or "particular public controversies." However, these limitations on the kind of content that might be protected were not sufficient to guide the lower courts, and the Court would be obliged to modify the doctrine yet again.

99. Id. at 345.
100. The Court granted certiorari in Dun & Bradstreet based on its recognition that there was "disagreement among the lower courts about when the protections of Gertz apply." Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749, 753 (1984).
3. The Reemergence of Content Since the Gertz Decision

In *Dun & Bradstreet v. Greenmoss Builders,* the Court reintroduced the consideration of statement content, in order to limit the requirement imposed by *Gertz* that a private figure plaintiff demonstrate the defendant's knowledge of falsity or reckless disregard for the truth of a statement before recovering presumed or punitive damages. The Court held that this requirement would be imposed only when the statements at issue "involve matters of public concern." Although the Court's holding was narrow, its language was not. In arriving at the conclusion that it would not apply the limitations to recovery imposed on private figures by *Gertz* where no matter of public concern is involved, the Court stated:

> [S]peech on matters of purely private concern is of less First Amendment concern. As a number of state courts, including the court below, have recognized, the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent. In such a case "there is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press."

If speech on matters of purely private concern is less deserving of first amendment protection, it is difficult to perceive why such speech should be granted protection simply because it is made with regard to a public figure. Nonetheless, just such an outcome has resulted in some cases, and is probably unavoidable as long as the application of limitations on defamation actions is premised on a plaintiff's public-figure status, and does not consider statement content. Furthermore, the Court in *Dun & Bradstreet* provided no detailed criteria for determining when a matter of public concern is presented, referring only to its holding in *Connick v. Myers* that "'whether-
er . . . speech addresses a matter of public concern must be determined by the expression's content, form, and context . . . as revealed by the whole record.'”

Although its impact on the constitutional law of defamation was not as dramatic, another recent case has confirmed the importance of content in the Supreme Court's analysis of defamation claims. In Philadelphia Newspapers v. Hepps, the Supreme Court imposed another content-based restriction on defamation claims, holding that “at least where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false.” The impact of this ruling was to shift the burden of proof on the issue of falsity. Under traditional defamation law, a statement would not be found defamatory if the defendant could prove that it was true. Truth, then, was a complete defense to a defamation claim. Under the Supreme Court's ruling, where an issue of public concern is involved, the burden is shifted to the plaintiff to prove that the statement is false. In its opinion, the Court emphasized the role that content had played in the application of first amendment limitations to the common law of defamation, noting:

One can discern in [the previous Supreme Court decisions] two forces that may reshape the common-law landscape to conform to the First Amendment. The first is whether the plaintiff is a public official or figure, or is instead a private figure. The second is whether the speech at issue is of public concern.

The Court added another content-based restriction to the constitutional doctrine, but again failed to articulate any clear criteria for determining when a statement would be considered one of public concern.

107. Id. at 768-69 (emphasis added).
108. Id. at 775.
The conflict between the status and content tests has not been resolved. The Court in Gertz embraced a primarily status-based test as the more balanced and limited of the two. However, the principles on which that test depended were not sufficient to properly balance the important competing interests at stake. The reappearance of the issue of content in Dun & Bradstreet and Philadelphia Newspapers, and the lack of specific guidelines for determining the nature of such content, indicate the need for further reconsideration and clarification of this important area of constitutional law.

B. The Waldbaum Case and the Role of Content in the Lower Courts

The Supreme Court decisions establishing the status test expressed distrust of the ability of judges to determine when the content of a defamatory statement involved issues of public importance. They failed, however, to establish detailed criteria for determining precisely what a public figure might be. That task was left to the lower courts. In Waldbaum v. Fairchild Publications, the Court of Appeals for the District of Columbia devised a widely adopted test for determining public-figure status. This test demonstrates the degree to which the courts, while embracing the status test adopted by the Supreme Court, have been forced to consider questions of content.

The main steps established by the Waldbaum court are: first, whether a plaintiff may be classified as a "general public figure"; and then, through a three-step process, whether he or she is to be considered a "public figure for limited purposes." To answer the first question, the Waldbaum court considered several factors, including previous coverage of the

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114. Id.
plaintiff in the press, whether people actually reevaluate their conduct or ideas in light of the plaintiff's actions, and the voluntariness of the plaintiff's prominence.\textsuperscript{115} In this analysis the emphasis is on the status of the plaintiff, and the criteria set by the court are designed to establish the scope and willingness of the plaintiff's influence, and his or her access to the media. However, as the \textit{Waldbaum} holding went on to note:

> Few people, of course, attain the general notoriety that would make them public figures for all purposes....\textsuperscript{116}

The court then proceeded to describe the three-step process by which it proposes to identify those who, although not sufficiently notorious to qualify as public figures \textit{per se}, will nonetheless be considered public figures in the context of a particular issue:

As the first step in its inquiry, the court must isolate the public controversy. A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way. The Supreme Court has made it clear that essentially private concerns or disagreements do not become public controversies simply because they attract attention. Rather, a public controversy is a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants.\textsuperscript{117}

The court, then, must not only determine whether the plaintiff was involved in a public controversy, but also if the controversy implicated matters of genuine public concern. It is impossible, obviously, to make such a determination without considering the content of the issue at hand. The \textit{Waldbaum} opinion

\textsuperscript{115} \textit{Id.} at 1295.

\textsuperscript{116} \textit{Id.} at 1296 (quoting \textit{Gertz v. Robert Welch, Inc.}, 418 U.S. 323, 352 (1974)).

\textsuperscript{117} \textit{Id.} (citing \textit{Time, Inc. v. Firestone}, 424 U.S. 448, 454-55 (1976)) (emphasis added).
provides a practical and useful standard for making that determination, defining a public controversy, as emphasized above, as one the ramifications of which will be felt by persons who are not direct participants.\textsuperscript{118}

In the second step of its test, the \textit{Waldbaum} opinion examined the extent of the plaintiff's participation, requiring that "[t]he plaintiff either must have been purposely trying to influence the outcome or . . . realistically have been expected, because of his position in the controversy, to have an impact on its resolution."\textsuperscript{119} Although framed as an examination of the voluntariness of the plaintiff's participation, as emphasized by the Supreme Court in \textit{Gertz}, this criterion amounts to little more than a requirement that the plaintiff have been substantially involved, voluntarily or otherwise. In a more recent decision in the same circuit, a plaintiff was found to be an "involuntary public figure,"\textsuperscript{120} thus establishing that voluntary participation in a controversy is not an indispensable prerequisite to application of the "actual malice" standard.

Finally, the \textit{Waldbaum} criteria explicitly address the content of the defamatory statement, holding:

\begin{quote}
[T]he alleged defamation must have been germane to the plaintiff's participation in the controversy. His talents, education, experience, and motives could have been relevant to the public's decision whether to listen to him. Misstatements wholly unrelated to the controversy, however, do not receive the \textit{New York Times} protection.\textsuperscript{121}
\end{quote}

\begin{flushleft}
\textsuperscript{118} The difficulty of defining when an issue of public concern is implicated was one of the reasons cited by the Supreme Court for rejecting the content-based test of \textit{Rosenbloom}. \textit{Gertz} v. Robert Welch, Inc., 418 U.S. 323, 346. This difficulty has also been emphasized by commentators. T. EMERSON, \textsc{The System of Freedom of Expression} 541 (1970) ("Efforts to define the concept of 'public issue' in the field of libel law have been . . . fruitless."); Lewis, \textit{supra} note 109, at 792 ("[T]he question is just too difficult to handle."). However, the \textit{Waldbaum} opinion provides an excellent objective criteria—the ramifications of the issue for non-participants—by which to make this determination. This is not to suggest that the determination will be a simple matter, only that it is a manageable one.

\textsuperscript{119} \textit{Waldbaum}, 627 F.2d at 1297.

\textsuperscript{120} Dameron v. Washington Magazine, 779 F.2d 736, 741 (D.C. Cir. 1985), \textit{cert. denied}, 476 U.S. 1141 (emphasis omitted), discussed \textit{supra} text accompanying notes 89-90.

\textsuperscript{121} \textit{Waldbaum}, 627 F.2d at 1298 (footnote omitted).
\end{flushleft}
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Here the Waldbaum court emphasizes the point noted above: status alone is not the determining factor even in the status test, or any statement made regarding a plaintiff who had been found to be a public figure would be protected by the "actual malice" standard.\textsuperscript{122} Taken together, the criteria adopted by the Waldbaum court form a test in which the dominant concerns are the content of the defamatory statement and whether that content involves issues of public importance. Although couched in the language of the "assumption of the risk" and "enhanced ability to respond" arguments relied on by the Gertz Court,\textsuperscript{123} the question of content emerges as the central element in those criteria. As the Waldbaum opinion indicates, only by addressing the content of a defamatory statement can the courts adequately assess and balance the conflicting public interests involved in this area of the law.

C. Consideration of Statement Content in Applying First Amendment Limitations to Non-Defamation Actions

Since the United States Supreme Court's ruling in New York Times Co. v. Sullivan,\textsuperscript{124} recovery for injury to reputation under state tort law has been limited by the first amendment. Through a series of cases,\textsuperscript{125} first amendment limitations on state defamation actions have been crafted into a comprehensive constitutional doctrine. However, in the same period tort law has also evolved. States have increasingly come to recognize a need to protect privacy and emotional tranquility as well as reputation. Actions based on the invasion of these interests are now commonly pleaded as additional counts in defamation suits.\textsuperscript{126} The Supreme Court has begun to extend constitutional limitations to actions for invasion of privacy and intentional infliction of emotional distress.\textsuperscript{127}

\begin{itemize}
\item \textsuperscript{122} See supra notes 73-76 and accompanying text. It should be noted, however, that the Gertz test has led at least one court to precisely this conclusion; see supra note 50 and accompanying text.
\item \textsuperscript{123} See Waldbaum, 627 F.2d at 1294-98.
\item \textsuperscript{124} 376 U.S. 254 (1964).
\item \textsuperscript{127} See Florida Star v. B.J.F., 491 U.S. 524 (1989); Hustler Magazine v.
The role that statement content plays in the application of constitutional limitations to defamation actions is primarily subtextual; that is, it is not explicitly addressed, but is nonetheless an important consideration. In certain non-defamation areas, however, the question of whether the publication at issue involves matters of public concern is specifically incorporated into constitutional doctrine.\(^1\) In other areas, the question of public concern, or "newsworthiness," seems to play an important implicit role.\(^1\) The Supreme Court's willingness to consider the nature of the content of a publication in certain non-defamation actions, and the role that content plays even when not explicitly considered, support the argument that the examination of statement content would be useful in defamation analysis as well.

1. The Role of Content in Actions for Invasion of Privacy

The American jurisprudence of privacy can be traced primarily, if not exclusively, to the seminal article of Samuel Warren and Louis Brandeis, *The Right to Privacy*.\(^1^2\) Although the right of privacy has now become the basis for the assertion of diverse rights, that article was primarily concerned with protecting individual privacy from intrusion by the press.\(^1^3\) The article discussed the availability of damages for emotional distress,\(^1^4\) and the inadequacy of traditional libel law to address


\(^1^2\) Those areas are the privacy actions based on public disclosure of one's private life and publicity placing one in a false light; see infra notes 140-71 and accompanying text. In the area of false light, however, the current vitality of that role is not clear; see Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 498 n.2 (1975) (Powell, J., concurring).

\(^1^3\) These are actions based on intrusion into one's seclusion, appropriation, and intentional infliction of emotional distress; see infra notes 172-228 and accompanying text.

\(^1^4\) Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). References to this article are legion. A few citations from the legal areas discussed in this article include: Time, Inc. v. Hill, 385 U.S. 374, 380 (1967); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 487 (1975); RESTATEMENT (SECOND) OF TORTS § 652A comment a (1965).

\(^1^5\) Warren & Brandeis, supra note 130, at 193-97.

\(^1^6\) Warren & Brandeis, supra note 130, at 197-98 n.1.
the interests the authors sought to have protected. Warren and Brandeis argued for “a principle which may be invoked to protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds.”

Even this earliest discussion of the right of privacy, however, recognized the requirement for limitations on such a principle. The first limitation incorporated by Warren and Brandeis was that “[t]he right of privacy does not prohibit any publication of matter which is of public or general interest.” The authors perceived the need to protect public access to information that weighed upon issues of public importance: “Peculiarities of manner and person, which in the ordinary individual should be free from comment, may acquire a public importance, if found in a candidate for political office.”

This distinction, between matters that are of public concern and those that are not, has carried through at least in part into the modern law of invasion of privacy. The tort of invasion of privacy is generally divided into four categories: publicity given to another’s private life (public disclosure); publicity placing another in a false light (false light); intrusion upon the seclusion of another (intrusion); and appropriation of another’s name or likeness (appropriation). The determination of the public interest in the content of a publication has been explicitly incorporated into the constitutional jurisprudence of the torts of public disclosure and false light. That determination may also play a role in the areas of intrusion and appropriation. These actions, and the role that statement content plays in applying first amendment limitations to each, will be examined in turn.

133. Warren & Brandeis, supra note 130, at 197-98.
134. Warren & Brandeis, supra note 130, at 206.
135. Warren & Brandeis, supra note 130, at 214.
138. See infra notes 140-71 and accompanying text.
139. See infra notes 172-96 and accompanying text.
a. Public Disclosure

This action provides a remedy for the general publication of facts which, although true, are private and not of legitimate public concern. The Restatement describes the tort as follows:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person; and (b) is not of legitimate concern to the public.140

The determination of statement content is an integral element of the cause of action. If the matter is one of legitimate public concern, no liability will arise from its publication, no matter how offensive the publicity.141

The analysis of the public interest in the content of a publication has been explicitly incorporated into the constitutional analysis of the tort. In Cox Broadcasting Corp. v. Cohn,142 the Supreme Court considered the claim of the father of a woman who had been raped and had subsequently died. The name of the victim was obtained from indictments filed in the criminal action against her attackers, and was broadcast by a Georgia television station, in violation of a Georgia statute.143 Summary judgment was granted in favor of the victim's father, and was affirmed by the Georgia Supreme Court.144 The United States Supreme Court reversed.

140. Restatement (Second) of Torts § 652D (1965). This action actually consists of four elements, which are spelled out in § 652D comments a-d.

First, the information must be publicized. This is not the same as “publication” in the context of defamation, where communication to a single person is sufficient. For the purposes of a public disclosure action, the publicity must be to the public generally, or to a very substantial number of people.

Second, the facts publicized must be private. No liability arises from the publication of facts already made public, or for recording or publicizing actions taken by a person in public. (Although surveillance that amounts to harassment may give rise to an action for intrusion.)

Third, the publicity must be highly offensive to a reasonable person. A community standard may be employed here.

Fourth, no liability attaches, even for highly offensive publicity, if the matter publicized is of legitimate public concern.

141. Restatement (Second) of Torts § 652D comment d (1965).
143. Id. at 471-74.
144. Id. at 474-75.
While recognizing the legitimacy of the need to protect privacy, the Court in *Cox Broadcasting* also emphasized the importance of countervailing first amendment interests. "Because the gravamen of the claimed injury is the publication of information, whether true or not, the dissemination of which is embarrassing or otherwise painful to an individual, it is here that claims of privacy most directly confront the constitutional freedoms of speech and press."\(^{145}\) The Court narrowly framed the issue as "whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records."\(^{146}\) It found that the developing law of privacy recognized a privilege for reports of judicial proceedings.\(^{147}\) Nonetheless, it went on to consider the issue of whether such reports are a matter of public interest.

The conclusion is compelling when viewed in terms of the First and Fourteenth Amendments and in light of the public interest in a vigorous press . . . .

By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served . . . . The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.\(^ {148}\)

The Supreme Court addressed the conflict between the right to privacy and the need to ensure public access to information of legitimate public concern in a number of subsequent cases. In *Oklahoma Publishing Co. v. District Court,*\(^ {149}\) the Court held that a state court's pretrial order enjoining publication of the name or photograph of an 11-year-old boy involved in a juvenile proceeding was unconstitutional. In *Smith v. Daily Mail Publishing Co.*,\(^ {150}\) the Court similarly held unconstitutional a state statute forbidding publication of the name of any juvenile offender without the approval of the juvenile court. Most recently, the Supreme Court has returned

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145. Id. at 489.
146. Id. at 491.
147. Id. at 493.
148. Id. at 495.
149. 430 U.S. 308 (1977) (per curiam).
to the issue of the publication of the name of a rape victim in violation of state law. In *Florida Star v. B.J.F.*, the Supreme Court struck down an award of damages based on a violation of a Florida law prohibiting the publication of the name of any victim of a sexual offense. Summarizing the principals of the earlier cases, especially *Daily Mail*, the Court held that its initial inquiry when faced with such an issue would be "whether the newspaper 'lawfully obtain[ed] truthful information about a matter of public significance.'" If the answer was affirmative, the state would be required to show that the law was necessary "to further a state interest of the highest order."

Taken together, these cases establish an essentially absolute privilege for the accurate publication of information obtained from public records. They can also be fairly characterized as embracing a determination of whether the information published is of public concern. However, they fail to address a number of situations where the right of privacy may conflict with first amendment principles, most notably the situation in which the information has not been obtained from a public record. They also fail to establish whether the passage of time plays any role in what will be considered a matter of public interest. This leaves open the question of whether disclosure of a matter that was once of public concern, and is still contained in public records, can form the basis of liability if sufficient time has passed.

The lower courts, however, have invoked the first amendment in denying liability for invasion of privacy in a number of situations involving information not obtained from public records. In *Gilbert v. Medical Economics Co.*, plaintiff claimed an invasion of privacy through public disclosure of private facts, and defendants raised a defense of first amendment privilege. The court held that "the first amendment protects the publication of private facts that are 'newsworthy, that

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152. Id. at 536 (quoting Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979)).
153. Id. at 537 (quoting Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979)).
154. See, e.g., Briscoe v. Reader's Digest Ass'n., 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971), imposing liability in such circumstances.
155. 665 F.2d 305 (10th Cir. 1981).
156. Id. at 307.
is, of legitimate concern to the public." The court also recognized, however, that the privilege was not absolute.

Even where certain matters are clearly within the protected sphere of legitimate public interest, some private facts about an individual may lie outside that sphere. Therefore, to properly balance freedom of the press against the right of privacy, every private fact disclosed in an otherwise truthful, newsworthy publication must have some substantial relevance to a matter of legitimate public interest.

In Virgil v. Time, Inc., plaintiff sued for invasion of privacy and the district court granted summary judgment for defendant. The court of appeals vacated the summary judgment and remanded, holding:

The public's right to know is ... subject to reasonable limitations so far as concerns the private facts of its individual members.

If the public has no right to know, can it yet be said that the press has a constitutional right to inquire and to inform? In our view it cannot. It is because the public has a right to know that the press has a function to inquire and to inform. The press, then, cannot be said to have any right to give information greater than the extent to which the public is entitled to have information.

We conclude that unless it be privileged as newsworthy ... the publicizing of private facts is not protected by the First Amendment.

These cases make it clear that the first amendment places limitations on actions for invasion of privacy through public disclosure of private facts, entirely apart from situations where the report is based on information contained in public records. They also make it clear that a primary consideration in such cases will be whether the content of the publication is of legitimate public concern.

157. Id. at 308 (citing Time, Inc. v. Hill, 385 U.S. 374, 388-89 (1967)).
158. Id.
159. 527 F.2d 1122 (9th Cir. 1975), cert. denied, 425 U.S. 998 (1976).
160. Id. at 1128 (citing Columbia Broadcasting Syst. v. Democratic Nat'l Comm., 412 U.S. 94, 122 (1973) and Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969)).
b. False Light

This action provides a remedy for the publication of false statements which, while not necessarily defamatory, create an incorrect and highly offensive impression of a person in others. It is worth noting that this action may be stated as an added basis for liability when a defamatory statement regarding the plaintiff is based on information derived from or concerning the plaintiff's private life. Alternatively, it may be an independent cause of action where the statement places the plaintiff in an objectionable light, but is not actually defamatory.\(^\text{161}\)

The Supreme Court first considered the constitutional implications of this cause of action in *Time, Inc. v. Hill*.\(^\text{162}\) In that case the Hill family, whose travails had inspired a book and a subsequent play about a family held hostage and brutalized by criminals, sued when *Life* magazine published an article specifically linking the play to the family. It was undisputed that the play was a fictionalization, and that it departed in some respects from the events as they actually occurred. The Hills brought their action under New York's unique privacy statute.\(^\text{163}\) Although this statute was originally designed to remedy what would now be called the appropriation of name or likeness, it had been expanded by the New York courts to protect a number of related interests.\(^\text{164}\) However, as the Supreme Court noted, "[r]eflecting the fact ... that such applications may raise serious questions of conflict with the constitutional protections for speech and press, decisions under the statute have tended to limit the statute's application ... 'to avoid any conflict with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest.'\(^\text{165}\)"

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162. 385 U.S. 374 (1967).
The New York statute did, however, give one "a right of action when his name, picture, or portrait is the subject of a 'fictitious' report or article." This action would later be recognized as essentially the same as an action for false light publicity. In this case, James Hill was considered to be a "newsworthy" person. The question, then, was whether the "fictionalization" could provide a basis for liability on a standard lower than that required for defamation. The Supreme Court held that it could not. "We hold that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth." Here, again, the application of constitutional limitations turned on a finding that the publication was of public concern.

The constitutional doctrine articulated in *Time, Inc. v. Hill* was reaffirmed by the Supreme Court in *Cantrell v. Forest City Publishing Co.* *Cantrell* involved a false light claim by the wife and son of a man killed in a bridge collapse against a newspaper that ran a follow-up article about the family containing numerous distortions and fabrications. The Court reiterated the principles of *Time, Inc. v. Hill*, citing the passage quoted above. However, because the district's court's instructions required the jury to make a finding of actual malice, the Court was not required to address the issue of whether newsworthy reports regarding private individuals could be subjected to liability on a lesser showing of fault.

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166. *Id.* at 384.
169. *Id.* at 387-88 (emphasis added).
170. 419 U.S. 245 (1974). It should be noted, however, that the doctrine of *Time, Inc.* may not rest on an unshakable foundation. In his concurring opinion in *Cox Broadcasting*, supra note 128, Justice Powell questioned the continuing validity of that doctrine in light of the court's decision in *Gertz v. Robert Welch*, Inc., 418 U.S. 323, 346 (1974), which rejected a content-based test in the area of defamation, in favor of one based primarily on the public or private status of the plaintiff.
171. *Cantrell*, 419 U.S. at 250. The district court's instructions also required the jury to find that the facts on which liability was based were not newsworthy. *Id.* at 250 n.3.
In the area of false light publicity, as in the area of publicity given to private facts, the courts have explicitly addressed the question of whether a publication is of public concern. While the current status of that test is not clear, it has played a formative role in the application of constitutional limitations to actions based on false light publicity.

c. **Intrusion upon Seclusion**

As set out in the Restatement, the tort of intrusion upon the seclusion of another is defined as: “One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.”172 As the comments to this section indicate, the tort does not depend upon any publicity being given to the person whose privacy is invaded. It arises solely from an objectionable invasion into his or her physical privacy or affairs.173

The Supreme Court has not decided a case which was based specifically on a claim of intrusion upon seclusion. However, two important federal court cases have shaped the issues involved in claims that this tort conflicts with the first amendment.

In *Dietemann v. Time, Inc.*,174 two reporters for *Life* magazine obtained permission from the Los Angeles District

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The question of whether private-figure plaintiffs can recover under a less demanding standard has been addressed by at least one lower court. In *Wood v. Hustler Magazine*, 736 F.2d 1084 (5th Cir. 1984), *cert denied*, 469 U.S. 1107 (1985), the court of appeals construed the holding of *Gertz* to permit the states to adopt a negligence standard in false light claims by private-figure plaintiffs. The court affirmed an award of damages against Hustler Magazine, holding that it had been negligent in publishing a nude photo of the plaintiff. However, the significance of this holding is questionable. It is extremely unlikely that, had a standard requiring the plaintiff to show “actual malice” where the publication was of public concern been imposed, the outcome would have been any different. The claim was based on Hustler Magazine’s publication of a nude photo of the plaintiff in its “Beaver Hunt” section. The photograph had been stolen from the plaintiff, and falsely submitted under her name. It is almost impossible to imagine any court finding such a publication “newsworthy.” Therefore, liability would have been imposed even under the standard articulated in *Time, Inc.*

174. 449 F.2d 245 (9th Cir. 1971).
Attorney's Office to interview and photograph the plaintiff prior to his arrest for practicing medicine without a license. They obtained entry to the plaintiff's home under false pretenses, and surreptitiously recorded and photographed him. After his arrest, *Life* published an article describing plaintiff as a quack, and including his name and photograph. On appeal, the court upheld plaintiff's claim of intrusion.\textsuperscript{175} In response to the magazine's claim that its news gathering activities were protected by the first amendment, the court held that "[t]he First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering."\textsuperscript{176} *Time* also claimed that, even if it could be subjected to liability for invasion of privacy, its publication of the information obtained could not be considered in calculating damages.\textsuperscript{177} In response to this claim, the court held that such a rule would deny the plaintiff recovery for real injury, with no countervailing benefit to the public interest; furthermore, it "would encourage conduct by news media that grossly offends ordinary men."\textsuperscript{178}

However, the court in *Pearson v. Dodd*\textsuperscript{179} reached a somewhat different conclusion. In that case newspaper columnists Drew Pearson and Jack Anderson obtained copies of documents improperly taken from the files of Senator Thomas Dodd. Two former employees of Dodd, with the help of current staffers, copied the documents without Dodd's knowledge and delivered them to Pearson and Anderson. Pearson and Anderson wrote articles alleging misconduct by Dodd, based on this information. Dodd brought actions based on intrusion upon seclusion and conversion. The district court granted summary judgment on the intrusion claim, but found Pearson and Anderson guilty of conversion. They appealed. In affirming summary judgment for the defendants on the invasion of privacy claim,\textsuperscript{180} the court of appeals noted that "[i]t has always been considered a defense to a claim of invasion of priva-

\textsuperscript{175} Id. at 250.
\textsuperscript{176} Id. at 249.
\textsuperscript{177} Id.
\textsuperscript{178} Id. at 250.
\textsuperscript{180} The district court's ruling finding Pearson and Anderson guilty of conversion was reversed. Id. at 708.
cy by publication . . . that the published matter complained of is of general public interest." The court also emphasized the importance of separating the invasion from the publication of the information obtained. The court held that Pearson and Anderson were not liable for the invasion itself, because they were not participants in the purloining of the files. Despite that fact that the evidence was found to have established that appellants were aware the information was improperly obtained, the court went on to hold that liability could not be premised on the publication of the information, either.

[W]here the claim is that private information concerning plaintiff has been published, the question of whether that information is genuinely private or is of public interest should not turn on the manner in which it has been obtained . . . .

Here we have separately considered the nature of appellants' publications concerning appellee, and have found that the matter published was of obvious public interest. The publication was not itself an invasion of privacy.

These two cases, then, take different approaches to the question of whether the publication of information that is of public interest is relevant to a claim of intrusion upon seclusion. Under Dietemann, publication may at least be considered a part of the tort for the purposes of calculating damages. Under Pearson, however, publishing information with the knowledge that it was improperly obtained will not result in liability, so long as the information was of public interest. It seems reasonable to conclude from the emphasis in Pearson on separating the invasion from the publication, that even if defendants there had been liable for the invasion itself, the publi-

181. Id. at 703 (citing Warren & Brandeis, supra note 130).
182. Id. at 705 ("[I]n analyzing a claimed breach of privacy, injuries from intrusion and injuries from publication should be kept clearly separate.").
183. Id.
184. Id. at 705-06.
185. Although the court in Dietemann did not address the question, it seems reasonable to assume that, had it done so, it would have found the matter to be one of legitimate public concern. See Hill, Defamation and Privacy Under the First Amendment, 76 COLUM. L. REV. 1205, 1282 (1976) (citing Dietemann and arguing that liability for intrusion upon seclusion should not be imposed for exposing "current criminal activity"; in that case, medical quackery).
cation of the information obtained would not have been available as a basis for calculating damages.

Another intrusion case supports the assertion that the consideration of the public interest in the matter disclosed has a role to play in analyzing the tort. In *Galella v. Onassis*, the court upheld a restraining order issued against a photographer who was found to be harassing Jacqueline Onassis and her children. In reaching this holding, however, the court engaged in a brief consideration of the public interest in the information that might be obtained.

Of course legitimate countervailing social needs may warrant some intrusion despite an individual's reasonable expectation of privacy and freedom from harassment. However the interference allowed may be no greater than that necessary to protect the overriding public interest. *Galella*’s action went far beyond the reasonable bounds of news gathering. When weighed against the *de minimis* public importance of the daily activities of the defendant, *Galella*’s constant surveillance was unwarranted and unreasonable.

Based on the opinions in *Pearson* and *Galella*, there is reason to believe that the consideration of public interest in the information disclosed may be a factor in both the imposition of liability and the calculation of damages.

d. *Appropriation of Name or Likeness*

This action is primarily directed to prevention of commercial exploitation of a person's name or image. However, it also extends to situations in which a person's name, image or personality is adopted for some non-monetary advantage it confers. The Restatement describes the action as follows: “One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.” Although it is not infrequently brought as an additional action in a claim for invasion of priva-

186. 487 F.2d 986 (2d Cir. 1973).
187. *Id.* at 995.
188. *Restatement (Second) of Torts* § 652C comment b (1965).
There is, however, a single Supreme Court case which discusses the matter directly. In *Zacchini v. Scripps-Howard Broadcasting Co.*, the Court addressed an appropriation claim by a "human cannonball." Defendant television station recorded and broadcast the performer's entire 15-second act. The Supreme Court of Ohio gave judgment for the television station because it found that a television station "has a privilege to report in its newscasts matters of legitimate public interest which would otherwise be protected by an individual's right of publicity." The United States Supreme Court reversed.

The Court held that the tort of appropriation was distinguishable from other privacy claims, notably false light. The only way to protect the plaintiff's interest in false light cases is to minimize publication of the damaging matter, whereas the only issue in appropriation cases is "who gets to do the publishing." Nonetheless, the Court did not hold that there was no conflict whatever between a claim of appropriation and the first amendment. Instead, it held:

It is evident, and there is no claim to the contrary, that petitioner's state-law right of publicity would not serve to prevent respondent from reporting the newsworthy facts about petitioner's act. Wherever the line in particular situations is to be drawn between media reports that are pro-

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192. For a discussion of such law, especially that arising under the New York privacy statute, see Hill, supra note 185, at 1276-77. An early case pertinent to this discussion is Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481 (3d Cir. 1956), cert. denied, 351 U.S. 926 (1956).
194. Id. at 565 (quoting Zacchini v. Scripps-Howard Broadcasting Co., 47 Ohio St. 2d 224, 351 N.E.2d 454, 455 (1976)).
195. Id. at 573.
tected and those that are not, we are quite sure that the
First and Fourteenth Amendments do not immunize the
media when they broadcast a performer's entire act with-
out his consent.196

Therefore it seems apparent that in claims of invasion of
privacy by appropriation of name or likeness, as in other priva-
cy claims, the ability of the press to report information of legiti-
mate concern to the public must be considered. Where the
line will be drawn, as indicated by the Court, is a case-by-case
determination, but the weighing of public interest in the con-
tent of the publication or broadcast is required by the first
amendment.

2. The Role of Content in Actions for Intentional Infliction of
Emotional Distress

The recognition of the intentional infliction of emotional
distress as an independent tort is a relatively recent phenome-
non.197 It can be differentiated from the more historically
established tort of negligent infliction of emotional distress,
which is generally tied to the creation of a risk of physical
injury to the plaintiff or a third party.198 Intentional infliction
claims typically arise in situations where the conduct com-
plained of is either predominantly or entirely speech.199 Al-
though the current Restatement formulation provides for lia-

196. Id. at 574-75 (citing RESTATEMENT (SECOND) OF TORTS § 652C comment d
(Tent. Draft No. 22, 1976)).
197. The emotional distress tort was first incorporated by the Restatement of
Torts in 1948. See LeBel, Emotional Distress, the First Amendment, and "This Kind of
Speech:" A Heretical Perspective on Hustler Magazine v. Falwell, 60 U. COLO. L. REV.
315, 320 (1989). The 1948 Restatement version was widely adopted by the states.
Id.
199. LeBel, supra note 197, at 321.
200. RESTATEMENT (SECOND) OF TORTS § 46(2) (1965).
such emotional distress, and if bodily harm to the other results from it, for such bodily harm.\textsuperscript{201}

The Supreme Court has recently defined the nature of the limitations imposed by the first amendment on actions for intentional infliction of emotional distress. In \textit{Hustler Magazine v. Falwell},\textsuperscript{202} the Court considered an action by Jerry Falwell, nationally known minister and founder of the political action group, Moral Majority. Falwell had been lampooned by an ad parody in \textit{Hustler}, which implied that he was a drunk and had incestuous relations with his mother. In rejecting Falwell's claim of intentional infliction of emotional distress, the Court made two significant holdings, one apparent and the other somewhat less obvious.

Analogizing from the traditional analysis established by \textit{New York Times} and the subsequent Supreme Court defamation cases, the Court held:

\begin{quote}
[\textit{P}ublic figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," \textit{i.e.} with knowledge that the statement was false or with reckless disregard as to whether or not it was true.\textsuperscript{203}
\end{quote}

The explicit holding of the Court addressed the concern that plaintiffs might use the claim of intentional infliction of emotional distress to circumvent the constitutional limitations imposed on defamation actions. If the statement at issue contains a false statement of \textit{fact}, which would also make it the basis for a claim of defamation, public figures and public officials must show "actual malice" in order to recover damages.

The Court also held—without explicitly stating—that the mere expression of an \textit{opinion} can never form the basis for liability, even should actual malice be shown. Early in the analysis, the Court cited the famous statement from its opinion in \textit{Gertz v. Robert Welch, Inc.}\textsuperscript{204} that "[t]he First Amendment recog-
izes no such thing as a false idea." The Court accepted the trial jury's finding that the parody "could not 'reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated.' The Court then held that an award for intentional infliction of emotional distress could not be based on such conduct. It reversed the award with no discussion of whether the actual malice standard had been met, or was even applicable, thereby establishing that a mere expression of opinion could not form the basis of liability for intentional infliction of emotional distress, at least in a claim by a public figure.

Although explicitly premising constitutional limitations on the status of the subject of the statement as a public official or public figure, the Court's opinion suggested that public interest in the content of that statement played a significant role in the analysis of whether limitations would be applied. The Court premised its analysis with a restatement of the central principles served by the first amendment. The Court specifically pointed to the need to protect expression on matters of public concern: "At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."

Furthermore, in rejecting Falwell's claim that the intent to inflict emotional distress was sufficient to permit liability to be imposed, the Court stated that "while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures."

Comparison of the result in Falwell with that in another Supreme Court decision supports the conclusion that the publication...
lic or private nature of the information at issue will play a role in the analysis of emotional distress claims. In *Time, Inc. v. Firestone*, the Supreme Court upheld an award of damages in a defamation action against a claim that the publication was protected by the first amendment. Plaintiff was the wife of Russell Firestone, “scion of one of America’s wealthier industrial families.” She sued for divorce, and her husband counter-claimed. The court’s judgment, which was a public record, noted some of the allegations made by the parties and dissolved the marriage. The basis for the dissolution was incorrectly reported by defendant, *Time* magazine, and the allegations were reported as facts. Plaintiff brought a libel action against the magazine.

At trial, plaintiff decided to forgo recovery for injury to her reputation, and sought damages instead based on what was essentially emotional distress. The jury awarded $100,000 in damages, and the Supreme Court affirmed the award. While it explicitly rejected the content-based test of *Rosenbloom*, the court also examined the nature of the public interest in the content of the publication in deciding a claim that privilege should attach to all reports of courtroom proceedings. The court stated that:

Imposing upon the law of private defamation the rather drastic limitations worked by *New York Times* cannot be justified by generalized references to the public interest in reports of judicial proceedings. The details of many, if not most, courtroom battles would add almost nothing toward advancing the uninhibited debate on public issues thought to provide principle support for the decision in *New York Times*.

What distinguishes the claim by Reverend Falwell from the claim by Mrs. Firestone? First, the publication in *Falwell* was not characterized as a statement of fact, which the publication in *Firestone* clearly was. Second, Mrs. Firestone was

212. Id. at 450.
213. Id. at 460-61.
214. Id. at 461.
215. Id. at 456-57.
216. Id. at 457.
not found to be a public figure, which the Reverend Falwell clearly was. But the opinions in both cases indicate that the nature of the issues involved was a significant factor in the determination of whether the "actual malice" standard would be imposed.

As noted above, the Supreme Court established in Falwell that an expression which could not be understood as a statement of fact could not form the basis for liability in a claim of intentional infliction of emotional distress. The Court did not, however, establish guidelines for determining what would be considered a statement of fact and what would not. In addressing claims of emotional distress, lower courts were required to make this determination, and established tests for doing so.

In Ault v. Hustler Magazine, the court of appeals addressed claims of libel, false light, and intentional infliction of emotional distress. The court found it well-established that an expression of opinion could not form the basis of liability in a libel or false light claim. It also noted that the Supreme Court had extended this rule in Falwell to claims for intentional infliction of emotional distress. The court then applied the same test to determine whether a publication was a statement of opinion or of fact, for the purpose of deciding whether plaintiff could proceed under any of these actions.

The court set out a three-pronged test for deciding whether the substance of the publication was fact or opinion:

(1) whether the words can be understood in a defamatory sense . . . ; (2) whether the context in which the statements were made, e.g. public debate or a labor dispute, would lead the audience to anticipate persuasive speech . . . ; and (3) whether the language used is the kind generated in a "spirited legal dispute."

The court went on to define the concept of "context," making it clear that the court was to consider the general pub-
lic concern with the issue involved. "We must reject Ault’s effort to limit the meaning of ‘public debate’ to an oral, contemporaneous exchange of ideas. We think it is clear that there is a heated and spirited debate on pornography, of which this article is a part." 223

Another widely adopted analysis of the fact/opinion distinction was outlined in Deupree v. Iliff. 224 In affirming a judgment notwithstanding the verdict on a false light claim and reversing an award of damages for intentional infliction of emotional distress, the court’s opinion dealt almost exclusively with the question of whether the statement at issue was one of fact or opinion. The court set out the following factors for making that distinction: “(1) the precision and specificity of the disputed statement; (2) the plausible verifiability of the statement; (3) the literary context in which the statement was made; and (4) the public context in which the statement was made.” 225

Again, in analyzing the question of whether the public context was one which would indicate that the statement was one of opinion, the court considered the content as well as the forum.

The statement was made during the sort of call-in radio show that is generally designed to encourage listener participation and to foster the airing of divergent viewpoints . . . . [T]he show served as a broad-based forum for opinions on the appropriateness of sex education in schools generally as well as a forum for the specific discussion of a controversial sex education course in a local public school. 226

In holding that such a statement could not serve as the basis for a claim of intentional infliction of emotional distress, the court cited Falwell, and noted that there “the Court held that ‘in the area of public debate’ . . . first amendment principles must operate to limit ‘a State’s authority to protect its citizens from the intentional infliction of emotional dis-

223. Id.
224. 860 F.2d 300 (8th Cir. 1988).
226. Deupree, 860 F.2d at 303-04.
The court also held that the fact that plaintiff was a private figure did not remove the statement from first amendment protection.\textsuperscript{228}

Taken together, these cases show that the determination of whether a statement is one of fact or opinion will often be the dispositive question in claims of intentional infliction of emotional distress based on speech. Furthermore, they indicate that consideration of statement content cannot be separated from the determination of whether a statement is one of fact or opinion, and that a statement will be more likely to be considered one of opinion when made in the context of a debate on an issue of significant public interest.

It seems obvious that the determination of whether a statement is one of fact or opinion cannot be made without considering the content of the statement; it would be impossible to do so otherwise. But it is also reasonable to conclude that statements regarding matters of public concern will also be more likely to be opinions. First, issues of public concern are those in which members of the public are likely to be most motivated to speak, and a high degree of motivation to speak is likely to produce energetic or hyperbolic statements of opinion, rather than objective assertions of fact. Second, issues of public concern are generally issues precisely because they are unresolved or incapable of simple factual resolution; speech regarding such issues is less likely to consist of factual assertions itself, and to the extent that it does, those assertions are more likely to be received with skepticism. Finally, it is in the area of debate on issues of legitimate public interest that it is most important to protect erroneous statements of fact, in order to ensure that the discussion necessary to the resolution of such issues is not excessively chilled.

In emotional distress claims, then, the consideration of whether the content of the statement at issue implicates issues of public concern is a vital element in the application of first amendment limitations. The need to foster debate on such issues is explicitly relied upon to support the application of first amendment principles to this area of the law, and is a

\textsuperscript{227} Id. at 304 (quoting Hustler Magazine v. Falwell, 485 U.S 46, 50 (1988)).

\textsuperscript{228} Deupree, 860 F.2d at 304-05 (citing Ollman v. Evans, 750 F.2d 970, 975 (D.C. Cir. 1984) (en banc)); see supra note 225.
functional element in the analysis of when those limitations will be applied.

3. **Links to the Law of Defamation**

As has already been mentioned, and as several of the cases discussed above illustrate, claims of defamation, invasion of privacy, and intentional infliction of emotional distress are now commonly brought in the same action, based on the same conduct.\(^{229}\) In an action for defamation, the plaintiff may abandon any attempt to show injury to reputation, and rely on proof of emotional distress as the basis for an award of damages.\(^{230}\) The relationship between defamation and the invasion of privacy was recognized in the formative articulation of the right of privacy,\(^{231}\) as was the relationship of the right of privacy to claims for damages based on emotional distress.\(^{232}\)

The close relationship between these areas of the law is also emphasized by the reliance of the courts on the constitutional limitations forged in the defamation cases in applying similar constraints to privacy and emotional distress claims. A similar analysis and a similar standard of fault—the "actual malice" standard—have now been applied to all three areas. The consistent consideration of statement content in these non-defamation actions argues persuasively for the viability of a content-based test in the area of defamation.

D. **The Nature of the Competing Interests: Reputation versus Freedom of Expression**

The role of content in the formation and application of the constitutional law of defamation and several related causes of action has been significant. Perhaps more important to the analysis of constitutional limitations on defamation actions, however, is understanding the function that content serves in balancing the conflicting public interests involved. Only the determination that a defamatory statement contains content of public importance can provide an adequate basis for resolving the conflict between the societal interest in the protection of

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\(^{229}\) Smolla, *supra* note 126, at 430.


\(^{231}\) Warren & Brandeis, *supra* note 130, at 197-98.

individual reputation, and the vital importance of free speech to a democratic society.

Traditionally, the states provided for the protection of individual reputation by holding those found guilty of publishing defamatory statements strictly liable for their offenses, and by presuming monetarily compensable damage to the plaintiff's reputation, rather than requiring proof of such damage. Ultimately, the Supreme Court perceived a danger in allowing the states to use defamation law to silence criticism of government officials or public figures who might influence events of public importance. Now, however, the Court is confronted with the dilemma of protecting the public interest in political and social self-determination, through the dissemination of comment and information, without protecting false statements of fact that bear no relation to that interest. The Court must steer between the Scylla of unredressed libel and the Charybdis of censorship and intimidation of the media and public.

In order to suggest a possible course, we must have a clear understanding of the nature of these competing interests. Constitutional defamation law is usually understood as addressing a conflict between the individual's interest in protecting his or her reputation (or the states' solicitation for that interest), and the public interest in protecting free speech as a means to more effective self-determination, in either the governmental or societal realms. This interpretation tends to support a status-based determination of the applicability of limits on defamation recovery, by presenting the interest in protecting reputation as safeguarding an essentially individual right. If the right to protection from unfounded attacks on one's reputation is essentially individual, then the assertion that such a right can be voluntarily abandoned by individual actions is a

233. See supra note 94.
reasonable one. This is not, however, the only possible con-
struction of the interest in the protection of reputation. Nor is it a necessary assumption of current constitutional doctrine.

Alternatively, the interest in freedom of speech protected by the Constitution may be conceived of as one grounded in an individual need for self-expression, regardless of social con-
text or impact, opposing society's concern for preventing the impairment of social order and cohesion that results from unredressed injury to individual reputations. Again, it is ques-
tionable whether such a theory of free speech is adequate to explain the application of first amendment protections. Still, if the interest in either reputation or in freedom of expression is more intimately related to the benefit of society as a whole, then constitutional doctrine should be weighted to favor that interest. For this reason, it is essential to examine the nature of our interests in reputation and free speech in more detail.

1. The Interest in the Protection of Reputation

Professor Post has discussed the main theories of the na-
ture of reputation that have had an impact on legal reasoning in the area of defamation. Post identifies three basic con-
cepts of reputation as being the most influential. The first of these is the concept of reputation as property:

It is this concept of reputation that underlies our image of the merchant who works hard to become known as creditworthy or of the carpenter who strives to achieve a name for quality workmanship. Such a reputation is capa-
ble of being earned, in the sense that it can be acquired as a result of an individual's efforts and labor . . . .

The concept of reputation as property presupposes that individuals are connected with each other through the institution of the market . . . . The purpose of the law of defamation is to protect individuals within the market by ensuring that their reputation is not wrongfully deprived of its proper market value.

However, despite its apparent social importance, and its influence on the law of defamation, the concept of reputation

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236. Post, The Social Foundation of Defamation Law: Reputation and the Constitu-
tion, 74 CALIF. L. REV. 691 (1986).
237. Id. at 693-95.
238. See, e.g., Rosenbloom, 403 U.S. at 64 (Harlan, J., dissenting) and Gertz, 418
as property alone is not sufficient to explain all aspects of that law. Post finds evidence of this in the fact that "[t]he common law of defamation will not offer redress for untrue communications that are not defamatory, even if they cause damage to an individual's credit or business opportunities. An example is a communication to the effect that an individual is dead." 239 The concept of reputation as property also cannot explain the common law presumption of damages which "puts defamation law in the business of compensating individuals for harms which, from the perspective of reputation as property, may well be nonexistent." 240

Post next examines the concept of reputation as honor, which, he says "may be defined as a form of reputation in which an individual personally identifies with the normative characteristics of a particular social role and in return personally receives from others the regard and estimation that society accords to that role." 241 He sees the function of this form of reputation to be the reinforcing of social roles, and notes that "[t]he function was epitomized in the law of seditious libel." 242 However, as Post notes, the doctrine of seditious libel was explicitly repudiated by the Supreme Court in New York Times Co. v. Sullivan. 243 In addition, the reinforcement of social roles does not have a profound influence in the United States, where the individual's right and ability to determine his or her own social status is greatly prized. 244 The concept of reputation as honor, then, is no longer central to constitutional defamation law.

Finally, Professor Post describes the concept of reputation as dignity. He first cites Justice Stewart's frequently quoted concurrence in Rosenblatt v. Baer, 245 to the effect that "[t]he

U.S. at 350; both opinions discuss defamation damages as specifically ascertainable—a view which reflects the concept of reputation as having a market, hence a quantifiable, measure of value.

240. Post, supra note 236, at 697.
241. Post, supra note 236, at 699.
242. Post, supra note 236, at 702.
243. Post, supra note 236, at 723 (citing N.Y. Times, 376 U.S. 254, 273-78 (1964)).
244. Post, supra note 236, at 706-07.
right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."246 Individual dignity, as this passage indicates, is at the core of the interest that defamation law seeks to protect. From what source do we derive this dignity, and how can the statements of another deprive us of it? As Post observes, individuals derive their dignity, their sense of place and worth, from their relationship to society, which provides it by enforcing certain rules of conduct between its individual members. In this way, he explains:

[O]ur own sense of intrinsic self-worth . . . is perpetually dependant upon the ceremonial observance by those around us of rules of deference and demeanor. The law of defamation can be conceived as a method by which society polices breaches of its rules of deference and demeanor, thereby protecting the dignity of its members . . . .

The dignity that defamation law protects is thus the respect (and self-respect) that arises from full membership in society . . . . Implicit in the concept of reputation as dignity, therefore, is the potential for a dual function of defamation law: the protection of an individual's interest in dignity . . . and the enforcement for society's interest in its rules of civility, which is to say its interest in defining and maintaining the contours of its own social constitution.247

Post argues that both the concepts of reputation as property and of reputation as dignity are present in the common law of defamation.248 In the area of defamation law, however, the goals of the common law come into conflict with the constitutional doctrine of free speech. The clash, as Post frames it, is not "an abstract conflict between the first amendment and something called 'reputation,'"249 but rather "the complex and profoundly significant issue of striking a balance between the protection of [the] constitutional autonomy [of

246. Id. at 92.
247. Post, supra note 236, at 710-11.
248. Post, supra note 236, at 717.
249. Post, supra note 236, at 740.
the individual] and the maintenance of community cohesion and identity."^{250}

Post frames this conflict in terms precisely opposite to those traditionally employed.^{251} Rather than addressing a conflict between a societal interest in free speech and an individual interest in reputation, he describes constitutional defamation law as a conflict between the societal interest in enforcing the rules of deference and demeanor that are the basis of reputation, and the individual's interest in self-expression. Post is persuasive in describing the nature of society's interest in protecting reputation. Society maintains its cohesion and identity in part by redressing injuries to individual reputations. If this proposition is accepted, then the value addressed by the tort of defamation is not merely the protection of individual reputation, but the maintenance of the cohesion and identity of the community as a whole. While this may to some degree be true of all tort actions, in that they create a general deterrent to wrongdoing by requiring compensation of victims, Post has demonstrated the unique role that defamation law plays in preserving adherence to precepts of social interaction necessary to individual dignity and communal order. The interest in protecting this value is not determinatively affected by the voluntariness of a plaintiff's participation in a public controversy, because the public interest would be impaired by permitting an individual plaintiff, by his or her actions, to waive the protection of an interest invested in society as a whole.

However, society's interest in free speech is not simply a matter of protecting an individual need for freedom of expression. As shall be seen, the need for freedom of expression is as vital to society as a whole as is the protection of reputation.^{252}

2. *The Interest in Freedom of Expression*

Professor Schauer has analyzed free speech theories in light of the trend in constitutional law to reduce the influence of juries on the outcome of public defamation cases.^{253}

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251. See *supra* note 235 and accompanying text.
252. See *infra* notes 253-63 and accompanying text.
253. Schauer, *The Role of the People in First Amendment Theory*, 74 CALIF. L.
Schauer draws a contrast between utilitarian theory, which "employs as its standard of evaluation some calculus designed to determine what is best for the population as a whole," and deontological theory, which "focuses on the inherent rightness or wrongness of particular actions, regardless of the consequences those actions produce." With regard to deontological theory, he notes:

"[T]hese theories are couched in terms of self-expression, self-realization, or self-fulfillment, but the core idea is the same—speaking is part of what it is to be a person, and restrictions on that expression of personhood by the state are simply wrong, even if the public interest would be served by those restrictions."

As Professor Schauer goes on to discuss, however, there are several flaws in the 'self-expression' theory of free speech as an explanation for the nature of constitutional defamation law. First, Schauer observes:

Self-expression theories founder because they do not distinguish speaking from a wide range of other self-expressive activities that fall outside the purview of the first amendment. A satisfactory theory of free speech must explain not only why speech is distinguishable from other distinctly human activities, such as riding a motorcycle or appearing naked in public, but also why speech needs more protection.

So the special role of speech in protecting a democratic society's interest in self-determination is not addressed by a theory which protects self-expression on its own merits. Second, Schauer notes that "self-expression theories do not provide a reason for protecting those self-expressive activities that can cause harm to others . . . a plausible natural-rights theory of free speech based on liberty of self-expression must contain an exception allowing restriction when harm is caused." Thus, the self-expression theory fails to accommodate one of the central concerns of constitutional defamation law: redress-
ing injury to reputation that may be caused by unrestricted speech. Finally, he states:

Self-expression theories evaluate freeness of speech in terms of the human needs of some human being. Under such a theory it would no longer be clear that speech by corporations implicates the protections of free speech . . . nor would it remain clear that speech with respect to matters of politics, or public concern . . . has some special place in the first amendment pantheon.\textsuperscript{259}

Although speech involving matters of public concern is not limited to purely political issues,\textsuperscript{260} it is clear that matters of public concern are given special importance in the constitutional law of defamation.\textsuperscript{261} Furthermore, since many cases implicating constitutional limits on defamation law now involve media defendants who are corporations, the failure of the self-expression theory to address their speech interests would seem to be a fatal anomaly.\textsuperscript{262} The interest in freedom of speech that constitutional defamation law seeks to protect, then, is not adequately defined by a theory based on the protection of an individual right of free expression.

3. A Conflict in the Public Interest

If constitutional protection of free speech is not supported solely by an individual right of self-expression, how is it to be justified? The answer is articulated in the first decision of the Supreme Court applying first amendment principles to the common law of defamation:

\textsuperscript{259} Id. at 773 (footnotes omitted).
\textsuperscript{260} Note, for example, the protection extended to purely commercial speech in Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748 (1976), and Central Hudson Gas v. Public Serv. Comm'n, 447 U.S. 557 (1980).
\textsuperscript{261} Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749, 761 (1986). See also the preceding discussion of the role of content in the Supreme Court, supra notes 54-109 and accompanying text, and lower court decisions, supra notes 111-23 and accompanying text.
\textsuperscript{262} For example, the defendants in most of the major cases in the development of constitutional defamation law have been corporations. See Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1986); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Rosenbloom v. Metromedia, 403 U.S. 29 (1971); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).
The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[263]

Although self-expression in its own right is not sufficient to support or to explain constitutional limitations of defamation recovery, its role in protecting the political and social self-determination of the members of a democratic society is central. The ability to disseminate information and opinion regarding persons and events that may significantly affect the lives of its constituents is the cornerstone of a democratic society. Without that ability, even the right to elect representatives and executives is impaired, because uninformed participation in the electoral process does not effectively manifest the will of the electorate.

The public interest in protecting free speech, then, is not less significant than the interest in maintaining community cohesion and identity. Both are fundamental needs of a society which seeks to protect and maximize the dignity of its individual members. The conflict implicit in constitutional defamation doctrine is not between individual interests in reputation or in self-expression on one hand, and the interests of society as a whole on the other. It is, rather, a conflict between equally vital and important public interests, a conflict in the public interest itself.

E. The Inadequacy of the Current Doctrine to Protect the Interests at Stake

As noted at the outset of this comment, there is considerable discontent with the current state of libel litigation.[264] For plaintiffs, public figures in particular, the requirements imposed by the New York Times actual malice standard have rendered judicial relief extremely difficult to obtain.[265] However,
it is not at all clear that the current constitutional law of defamation adequately serves any of its stated goals. As Dean Bezanson has noted:

For those whose interest is in protecting reputation, today's libel tort fails in almost all respects to do so. It underprotects the community-based interest in reputation, and overprotects the reputationally-unrelated interests in truth, responsible journalism, and freedom from emotional harm. For those whose interest is protecting the press from unnecessary inhibition and government control of the standards of journalism, today's libel tort is anathema, for the chief consequence of libel today is inhibition of the press from violating judicially-crafted standards of journalism. Finally, for those who placed faith in the privileges created by New York Times Co. v. Sullivan and its progeny, today's libel tort must be discouraging, if not utterly devastating, for it falls substantially short of safeguarding press freedom and fails to safeguard individual reputation as well.266

Professor Franklin has also described the state to which current constitutional defamation doctrine has brought the administration of the law:

By using what it intended to be a content-free surrogate—the plaintiff's status—the Court has the worst of both worlds. Some courts apparently decide the plaintiff's status

In 90 percent of reported cases that reach the courts, plaintiffs lose, largely on the basis of constitutional privilege issues. When the privileges are determined to be applicable, their application often renders falsity and reputational harm practically irrelevant. Thus, plaintiffs who have been falsely defamed may not be able to clear their names because they cannot prove that the defendant acted negligently or with actual malice. Even in cases in which the truth or falsity of the statements is adjudicated, the slowness of the litigation process means that the decision comes long after the time when it can help to restore the plaintiff's reputation.


266. Bezanson, The Libel Tort Today, 45 WASH. & LEE L. REV. 535, 556 (1988). The proposition that current constitutional defamation doctrine is inadequate to protect the interest in freedom of speech is restated in the conclusion of the Iowa Libel Research Project that "even though the press prevails in the vast majority of cases, enormous costs are incurred litigating state of mind and related privilege issues. The chilling effect of libel suits is due more to litigation costs and intrusion into the editorial process that to adverse judgments." Wissler, Why Current Libel Law Doesn't Work, supra note 4, at 31.
surreptitiously by looking first at content. Those that try to use the announced rules grant more protection to gossip columns than to investigative reports. . . . Once the Court decided in Gertz that false speech needed protection from strict liability for libel damages, it rejected any further role for the first amendment and turned the rest of the task over to tort law. This had the effect of ignoring why the Court rejected strict liability in the first place—concern for the impact on public discussion.267

Still, despite the difficulties that constitutional intrusion into the common law may have caused, there is a general agreement that some accommodation of first amendment interests is required in this area of the law.268 The question remaining is what form that accommodation should take, especially in light of the problematic outcome of decisions in the lower courts applying the current status-based test.

F. Summary of the Analysis

Both the interest in protecting free speech and the interest in maintaining community cohesion and identity through protection of reputation are vital needs of a society which seeks to maximize the dignity and social participation of its individual members. The current, primarily status-based analysis of the application of constitutional limitations on defamation actions fails to adequately protect either society's interest in the protection of reputation or its interest in ensuring free expression regarding issues of genuine public concern. In addition, the premises upon which the primarily status-based test adopted by the Court is based are not adequate to support either the predominance of considerations of status, or the relegating of content analysis to its current minor role. These premises have led the courts to impose a higher burden of proof even where no issue of first amendment importance is involved. Nor does the utilization of a content-based test necessarily involve a greater risk of chilling free speech. On the contrary, the consideration of statement content in several

267. Franklin, Constitutional Libel Law, supra note 5, at 1682 (footnotes omitted).
268. The author's research has not disclosed any commentator who suggests that constitutional limitations on defamation actions should be entirely eliminated, and the doctrine returned to the common law.
non-defamation causes of action indicates its utility in properly balancing interests which conflict with the principle of free speech.

An analysis which premises the application of first amendment limitations to defamation recovery primarily on the status of an individual plaintiff fails to address the central issue in the conflict between reputation and freedom of expression. The public's fundamental interest is not in the relative familiarity of a plaintiff's name, nor in the title of his or her office, but rather in the plaintiff's ability to affect the outcome of events that will have a substantial impact on the public as a whole, or on some significant portion of it. As the Supreme Court stated in Rosenbloom:

> If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved . . . . The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety.269

The only sufficient justification for imposing on a plaintiff the nearly insurmountable burden of demonstrating "actual malice," then, is the need to avoid placing on the public the truly impossible task of effectively guiding the development of its own civic life without the ability to learn of and comment on the people and events that shape that life. At least to the degree that it recognizes the vital role that content analysis must play in reconciling the competing interests in this area, the holding of Dun & Bradstreet represents a significant improvement over prior cases. There is still, however, much room for improvement.

IV. PROPOSAL

In the wake of Dun & Bradstreet, several commentators have argued for a rejection of the consideration of statement content and a return to the more purely status-based determination of Gertz.270 These authors argue that the movement

270. See, e.g., Comment, Dun & Bradstreet v. Greenmoss: Cutting Away the Protective Mantle of Gertz, 37 HASTINGS L.J. 1171 (1986) [hereinafter Comment: Cutting
toward basing the application of first amendment limitations on a content determination—evidenced by the Dun & Bradstreet opinion—may "deter exercise of the freedom of expression"271 or result in "the uncertain administration of justice."272 There is, however, no sound foundation for the assertion that a content-based test would necessarily be less protective of freedom of expression.273 There is also substantial evidence to support the assertion that the current doctrine is insufficiently solicitous of society's interest in protecting reputation.274 As to the assertion that a content-based test will result in an unpredictable application of constitutional protections, this is the result of the Supreme Court's imprecise definition of how to determine what content will be protected, not an inherent defect in a content-based analysis itself. One of the most detailed and influential tests of public figure status—that formulated by the Waldbaum court—already consists largely of content considerations.275 There is no reason, then, to presume that content determination will be more difficult than status determination.

Professor Franklin has recently considered the role of content in constitutional defamation law,276 and has proposed a two-tiered approach to the application of first amendment limitations to recovery. On the first and most protected tier, defamatory speech which clearly involved issues of self-governance would invoke the full force of the N.Y Times "actual malice" doctrine.277 On the second tier, content and status would both be considered in determining whether the N.Y.
The need for a more functional and well-founded test for the application of constitutional limits is clear. Franklin's proposal is a considerable improvement on the current status of the law. However, given the inherent complexity and difficulty involved in weighing the competing interests in this area, a simpler, single-criterion test is preferable and would adhere more closely to the goals of the first amendment outlined above.

Under this test, and following closely the requirements outlined by the Waldbaum court, the application of first amendment limitations on the law of defamation would be premised on public interest content, without regard to the status of the plaintiff. The analysis would proceed as follows:

I. Is a public controversy involved?
   A. Is there a "real dispute," i.e. an issue where there is substantial and reasonable variance of opinion among those addressing it, such that assertions as to the conduct of persons involved will not automatically be dismissed as spurious and false?
   B. Will the outcome of the dispute affect the general public, or a significant segment of it, in an appreciable way; i.e. will its ramifications be felt by a significant number of persons who are not direct participants?

II. Is the statement pertinent to the plaintiff's participation in that controversy?

III. Does the plaintiff's involvement in the events giving rise to the controversy predate the making of the defamatory statement?

Only if all the prongs of this test were met would the 'actual malice' standard be applied, and the plaintiff be required to prove the defendant's knowledge of falsity or reckless disregard of the truth. Short of this, the remedies available to the plaintiff would be determined by the tenets of the state's common law.

The application of such a test should be sufficient to allow the courts to discriminate between those issues that truly in-

278. Franklin, Constitutional Libel Law, supra note 5, at 1679.
voke values protected by the first amendment, and those that—whatever their appeal to transitory fancy—are not of a kind meriting the nearly impenetrable insulation of the 'actual malice' standard.

The public controversy criterion would serve two important goals not addressed by the current doctrine. First, by requiring a real dispute, it would ensure that the protection of that standard was not extended to fanciful or irrelevant assertions. Second, by requiring that the outcome have an impact on a significant number of persons not participating in the dispute, this test would withdraw the protection from issues at most tangentially related to the values that the first amendment was designed to protect. Some difficulty would doubtless be encountered in determining whether the number of persons affected by an issue is significant. This difficulty could be mitigated by assessing whether the scope of the publication was such that it would be likely to reach the interested audience, but not to vastly exceed that audience.

By requiring that the statement be pertinent to the public controversy involved, the second criterion of the test would ensure that participation in such issues did not open the floodgates for defamatory allegations regarding any aspect of a plaintiff’s life.

Although the first two branches of the test may seem sufficient to determine whether the issue is one of public concern, they are not alone sufficient to protect potential plaintiffs. Absent a requirement that the plaintiff’s participation in the events giving rise to the controversy predate statements about him or her, a false allegation of the plaintiff’s involvement in a crime or other matter of public interest would be protected. By demanding that the plaintiff’s participation in the controversy predate the allegedly defamatory statement, the test would also prevent the defendant from manufacturing a controversy in order to attack the plaintiff’s reputation.

Such a test would serve to comprehensively reform the constitutional law of defamation. More importantly, how-

279. The burden of proof establishing that a matter is or is not one of public concern has not been discussed, and is beyond the scope of this comment. However, under existing doctrine, if the matter was arguably of public interest, the burden would probably be placed on the plaintiff. Philadelphia Newspapers v. Hepps, 475 U.S. 767, 768-69 (1986).
ever, regardless of the particular test devised for its application, a content-based analysis will encourage the courts to consider the issues that lie at the heart of the conflict between constitutional protections of free expression and the societal interest in protecting individual reputation.

V. CONCLUSION

I do not mean to suggest, as have other commentators, that speech involving matters of political self-governance is the only kind protected by the first amendment. Artistic, philosophic, scientific, and even commercial expression can and do have as profound an impact on society as speech more closely linked to matters of self-governance, and hence are also worthy of protection. However, when expression—in any of these forums—crosses the line into defamation, and factual assertions are made which damage the reputation of individuals or entities, we have left the arena of opinion or reasoned debate. Society's ability to protect the dignity of its members and its own cohesion is implicated, and only profound societal interests can justify the protection of such false speech. The only interest sufficient to this role is our fundamental dedication to political and social self-determination, to public participation in the events that will shape our society. By embracing a primarily status-based analysis of the application of first amendment protections in the area of defamation, the Supreme Court, even while attempting to ensure greater protection of individual reputation, abandoned the only criterion by which it could ensure that interest would not be excessively invaded.

The considerable body of critical commentary on the current doctrine of constitutional defamation law indicates the pressing need for reform and clarification in this area of the law. The test outlined above, when combined with a summary judgment alternative for plaintiffs who seek simply an adjudication of falsity rather than a determination of fault, presents a comprehensive alternative to the present system of libel tort litigation. Still, the particular test adopted by the Court is less

important than the recognition that the status-based analysis in current constitutional defamation doctrine has led this area of law far astray. The application of first amendment principles to the area of defamation will always be a complex task, and one which requires a case-by-case calculation of the weight of the competing aspects of the public interest: protection of dignity and community cohesion on the one hand, and providing for the fundamental interest in societal self-determination on the other. The introduction of a content-based test to constitutional defamation doctrine will not eliminate the need to balance these conflicting interests, but such a test offers the best opportunity for ensuring that the issues addressed are those that are central to this conflict, and thus that it is truly the public interest that is served.

James Chadwick