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Going Viral: Limited-Purpose Public Figures, Involuntary Public Figures, and Viral Media Content

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ABSTRACT

Viral content on the internet has become part of our everyday lives. It has even made its way into defamation litigation. This article explores how viral content is changing the legal definition of limited-purpose and involuntary public figures. The article argues that courts should not consider having access to social media alone as having "access to media" under the test for deciding when an individual is a limited-purpose public figure. Additionally, courts should focus the analysis on determining whether plaintiffs voluntarily injected themselves into a controversy to sway public opinion or to resolve the controversy either via the viral content or with other behavior. More importantly, we argue courts should no longer recognize involuntary public figures. Although some authors have suggested that in the age of the internet it makes sense to require more individuals to prove actual malice, we suggest courts should use a lower standard for some individuals to better compensate for injury to reputation.

On October 2, 2019, a Waterloo, Iowa, high school teacher named Matt Baish started his morning by scrolling through Facebook. Almost immediately, he was confronted with several Facebook posts about climate activist Greta Thunberg's rally in Iowa City two days later. A former student posted to ask who was planning to attend the rally, and Baish responded, "dont (sic) have my sniper rifle."[1] Within hours, a screenshot of the original post including Baish's comment began to circulate online, prompting intense backlash from the Iowa community. His comments "went viral."[2] Comments about Baish ranged from "hope he is fired" to "sounds like sarcasm to me not an actual

[1]Mariel Padilla, *Teacher Resigns After 'Sniper Rifle' Comment About Greta Thunberg,* N.Y. Times (Oct. 11, 2019), https://www.nytimes.com/2019/10/11/us/greta-thunberg-teacher-resigns.html.

[2]There are a large range of factors that determine when a media message will go viral. See generally, Karine Nahon & Jeff Hemsley, Going Viral (2013). Media content "is most likely to diffuse widely when it both attracts audience selection and prompts subsequent social sharing." Huyn Suk Kim, *Attracting Views and Going Viral: How Message Features and New-Sharing Channels Affect Health News Diffusion*, 65 J. of Communication 512, 513 (2015). In addition, content like Baish's tweet that evoke high-arousal positive (awe) or negative (anger) emotions is more likely to go viral. Jonah Berger and Katherine L. Milkman, *What Makes Online Content Go Viral?*, 49 J. of Mktg. Rsch. 192, 192 (2012). This means that emotionally charged material that might lead to future defamation cases has a higher likelihood of going viral. *See also* Henry Jenkins, Spreadable Media: Creating Value and Meaning in a Networked Culture (2013).

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threat."[3] By the end of the day, a local TV station was running stories about the post, and the Waterloo Community School District published a statement reporting Baish had been put on administrative leave. The school district said it would conduct a formal investigation.[4] Nine days later, on October 11, Baish resigned. By that time, however, the story had been picked up by major U.S. news outlets, including *Newsweek*,[5] the *New York Times*,[6] *USA Today*,[7] and BuzzFeed News.[8] Although the coverage would not merit a defamation lawsuit, the controversy is an example of how an individual can enter the public dialogue and become the center of media coverage very quickly and most likely unintentionally. Like other individuals who find themselves the subject of viral internet content, Baish quickly moved onto the media's radar.

If Baish had been defamed during the coverage of the controversy, what standard of fault would he have been required to prove? Although there are many legal questions that would need to be answered to know the outcome of a hypothetical case involving Baish, this article focuses on one: Would writing a social media post that touched tangentially on both gun violence and the environment—arguably two "public controversies"—that subsequently "went viral" transform Baish into a limited-purpose public figure or an involuntary public figure for the purpose of defamation law? Complicating matters is that the furor over Baish's post created a newsworthy event about a new public controversy—a high school teacher referencing gun violence against someone with whom he politically disagreed. Baish's post itself became a public spectacle and created its own controversy.

Consider the many defamation lawsuits Nicholas Sandmann filed. In 2019, an interaction near the Lincoln Memorial between Sandmann, a Park Hills, Kentucky, Covington Catholic High School student, and Native American activist Nathan Phillips was recorded and uploaded to social media platforms Instagram, Twitter, and YouTube, receiving millions of views.[9] Several media outlets caricatured Sandmann as a smirking teenage racist based on a video clip of him wearing a "Make America Great Again" hat and watching Phillips beat a drum.[10] As one scholar noted, "The viral video spurred viral outrage."[11] Unedited video, however, questioned the early narrative and tended to contradict Phillips's account.[12] As Lyrissa Lidsky noted, "Viewing the video as a whole,

[3]Taylor Vessel, *Waterloo Teacher's Controversial Comment Receives Mixed Reactions,* KWWL (Oct. 4, 2019), https://kwwl.com/news/2019/10/04/waterloo-teacher-on-leave-after-controversial-social-media-post.
[4]*Id.*
[5]Daniel Moritz-Rabson, *Teacher Who Made 'Sniper Rifle' Comment about Greta Thunberg on Facebook Put on Leave,* Newsweek (Oct. 4, 2019), https://www.newsweek.com/teacher-greta-thunberg-sniper-threat-facebook-1463301.
[6]Padilla, *supra* note 1.
[7]Tyler J. Davis, *Iowa teacher who posted 'sniper rifle' comment about Greta Thunberg visit resigns,* USA Today, (Oct. 11, 2019), https://www.usatoday.com/story/news/nation/2019/10/11/iowa-teacher-resigns-after-greta-thunberg-sniper-rifle-comment/3950995002.
[8]Tasneem Nashrulla, *A High School Teacher Who Made A "Sniper Rifle" Facebook Comment About Greta Thunberg Has Resigned,* Buzzfeed News, (Oct. 11, 2019), https://www.buzzfeednews.com/article/tasneemnashrulla/teacher-resign-greta-thunberg-sniper-rifle-facebook-comment.
[9]*Videos Show a Collision of 3 Groups That Spawned a Fiery Political Moment*, N.Y. Times (Jan. 22, 2019), https://www.nytimes.com/2019/01/22/us/covington-catholic-washington-videos.html.
[10]Antonio Olivo, Cleve R. Wootson, Jr., & Joe Heim, *"It Was Getting Ugly": Native American Drummer on the MAGA-Hat Wearing Teens Who Surrounded Him*, The Wash. Post (Jan. 19, 2019), https://www.washingtonpost.com/nation/2019/01/20/it-was-getting-ugly-native-american-drummer-speaks-maga-hat-wearing-teens-who-surrounded-him.
[11]Lyrissa Lidsky, *Sandmann: Bringing the Dream*, PrawfsBlawg (Aug. 2, 2020), https://prawfsblawg.blogs.com/prawfsblawg/2020/08/sandmann-bringing-the-dream.html.
[12]Sarah Mervosh & Emily S. Rueb, *Fuller Picture Emerges of Viral Video of Native American Man and Catholic Students*, N.Y. Times (Jan. 20, 2019), https://www.nytimes.com/2019/01/20/us/nathan-phillips-covington.html.

Sandmann did not appear to be in a confrontational posture vis-a-vis the Native American man or others at the scene but instead seemed to be in the posture of an awkward teenager watching a curious scene with his peers as a group of Black Hebrew Israelites hurled insults and invectives at them."[13] Based on media coverage of the incident, Sandmann's family filed lawsuits against *The Washington Post*,[14] CNN,[15] and other media outlets. Although many of the lawsuits were settled or dismissed, Sandmann's status as a plaintiff was one of the first legal questions raised. As Lidsky wrote, "Under what conditions does a person who 'goes viral' by being in the wrong place at the wrong time become a public figure for purposes of defamation law?"[16] Could Sandmann or other subjects of viral videos, including "Karens,"[17] become limited-purpose or involuntary public figures for simply being recorded?

Legally protecting personal reputation is not a new concept. The tort of defamation has evolved as new communication technologies, from the printing press to the television, have emerged. Many of the landmark defamation cases were decided in the 1960s and 1970s, long before the internet was pervasive. The Supreme Court of the United States ruled that public officials must prove actual malice to prevail in libel suits in *New York Times v. Sullivan* decision.[18] Three years later, the Court extended the actual malice ruling to public figures.[19] In *Gertz v. Robert Welch, Inc.*,[20] the Court defined limited-purpose and involuntary public figures and held that private figures must prove some level of fault—typically negligence—with the states free to establish a higher standard of fault for private persons if they chose.[21] Public figures are individuals who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[22] Involuntary figures are individuals "drawn into a particular public controversy" who "become a public figure through no purposeful action of [their] own."[23] Writing about defamation lawsuits involving bloggers, Amy Kristin Sanders and Sarah Arendt noted, "Although … [*Gertz*] clearly provides some guidance to courts making a determination of plaintiff status, that case occurred before the internet's development into a medium of mass communication."[24] Although the Court decided defamation cases since *Gertz*, the decisions have not addressed the ease with which private individuals can post on the internet or be recorded in public. This article explores the effect viral content has on the understanding of limited-purpose and

[13]Lidsky, *supra* note 11.
[14]Paul Farhi, *The Washington Post Sued by Family of Covington Catholic Teenager*, Wash. Post (Feb. 19, 2019), https://www.washingtonpost.com/lifestyle/style/the-washington-post-sued-by-family-of-covington-catholic-teenager/2019/02/19/aa252be4-349c-11e9-854a-7a14d7fec96a_story.html.
[15]Keith Coffman, *CNN Hit with $275 Million Defamation Suit by Kentucky Student*, Reuters (Mar. 12, 2019), https://www.reuters.com/article/us-usa-nativeamerican/cnn-hit-with-275-million-defamation-suit-by-kentucky-student-idUSKBN1QU0BY.
[16]Lidsky, *supra* note 11.
[17]"Karen" is a pejorative term for an entitled or demanding woman or a white woman who uses their privilege to demand they get what they want. *See* Karen (pejorative), Wikipedia Entry, https://en.wikipedia.org/wiki/Karen_(pejorative). Videos of "Karens" are frequently uploaded to social media platforms such as Twitter, Tik Tok, and YouTube. See *id.* for a list of "Notable examples" of Karens who were posted to social media.
[18]376 U.S. 254 (1964).
[19]*Curtis Publ'g v. Butts*, 388 U.S. 130 (1967).
[20]418 U.S. 323 (1974).
[21]*Id*. at 342–48.
[22]*Id*. at 345.
[23]*Id*.
[24]Amy Kristin Sanders & Sarah Arendt, *Bloggers as Limited-Purpose Public Figures: New Standards for a New Media Platform*, 2 J. Media L. & Ethics 5, 7 (2010).

involuntary public figures. It discusses whether the definitions should be expanded, given the nature of viral content.

The question is important because an increasing number of individuals are using social media platforms to discuss controversial issues and post videos.[25] With the internet, "the potential reach of one post is infinite," as it can be shared with ease "by anyone who views the original publication."[26] As David S. Ardia noted, the internet has made reputation more "enduring and yet more ephemeral."[27] Reputation is more enduring because the internet is "forever."[28] It is more ephemeral because "maintaining one's reputation in a networked society, replete with anonymous postings that can be instantly updated from nearly anywhere in the world," is difficult.[29] In addition, major mainstream news organizations, including *Newsweek*, the *New York Times*, and *USA Today*, frequently feature stories generated from viral content, such as the Sandmann video. Indeed, research suggests that even before former President Donald Trump's tweets became nightly features of cable news programming, social media posts were increasingly being used as sources in mainstream news coverage.[30] Finally, although citizen recording of public officials and protesters has become an important catalyst for social change,[31] the videos have the potential to affect individuals' reputational rights, which may cause protestors or others to refrain from exercising their First Amendment rights.[32]

To begin, we discuss the relevant defamation case law concerning public figure status. Next, we review the scholarly literature examining the public figure doctrine. Then, we analyze lower court decisions that discuss limited-purpose public figures and the internet. To conclude, we argue that courts should not consider having access to social media alone as qualifying as having "access to media" when deciding whether an individual is a limited-purpose public figure and contend that other factors are more salient in an age of viral media. More importantly, we argue courts should no longer recognize involuntary public figures. The involuntary public figure doctrine applied to viral media content would mean that every social media post or video that went viral would result in a plaintiff having to prove actual malice.

[25]As of 2019 there were an estimated 2.95 billion people were using social media worldwide. *See* J. Clement, *Number of Social Network Users Worldwide from 2010 to 2023*, Statista (Apr. 1, 2020), https://www.statista.com/statistics/278414/number-of-worldwide-social-network-users.

[26]Maureen T. DeSimone, *Insta-Famous: Challenges and Obstacles Facing Bloggers and Social Media Personalities in Defamation Cases,* 11 Mod. Am. 70, 72 (2018).

[27]David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 Harv. C.R.-C.L. L. Rev. 261, 262 (2010).

[28]*Id*.

[29]Derigan Silver, *Defamation*, in Social Media and the Law: A Guidebook for Communication Students and Professionals 30 (Daxton R. Stewart ed., 2017).

[30]*See, e.g.*, Matt Carlson, *Facebook in the News: Social Media, Journalism, and Public Responsibility Following the 2016 Trending Topics Controversy*, 6 Digit. J. 4 (2017); Steve Paulussen & Raymond A. Harder, *Social Media References in Newspapers: Facebook, Twitter and YouTube as Sources in Newspaper Journalism*, 8 J. Prac. 542 (2014); Alfred Hermida, *Twittering the News: The Emergence of Ambient Journalism*, 4 J. Prac. 297 (2010).

[31]*See, e.g.*, Sarah Almukhtar et al., *Black Lives Upended by Policing: The Raw Videos Sparking Outrage*, N.Y. Times (Apr. 19, 2018), https://www.nytimes.com/interactive/2015/07/30/us/police-videos-race.html?_r=0; Zeynep Tufekci, Twitter and Tear Gas: The Power and Fragility of Networked Protests 6–7 (2017) (discussing the role of cell-phone cameras in amplifying social movements).

[32]*See* Scott Skinner-Thompson, *Recording as Heckling*, 108 Geo. L. J. 126, 169–72 (2019) (discussing how courts should permit government regulation of citizen recording when it infringes on the corresponding First Amendment rights of those trying to maintain their privacy).

Defamation and public figures in the courts

One of the functions of the First Amendment is to open channels for dialogue, no matter how conflicting the participants' viewpoints may be. The U.S. Supreme Court has stated that no matter how "pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[33] The internet has allowed individuals unparalleled opportunities to participate in this marketplace of ideas.[34] Even on the internet, speakers do not have an absolute right to disseminate false statements of fact that harm another's reputation. Defamation is a communication that "harm[s] the reputation of another as to lower him in the estimation of the community."[35] Defamatory statements expose the victim "to hatred, ridicule or contempt."[36] The level of constitutional protections that a speaker receives for defamatory statements depends on the plaintiff's status and whether the statement is about a matter of public concern. For example, defamatory statements about a private individual by another private individual, regarding a private matter, receive less constitutional protection. Defamatory statements about a public figure regarding a matter of public interest receive the highest level of constitutional protections.[37]

Throughout the 1960s and 1970s, the Supreme Court articulated the constitutional protection for defamation. In *New York Times v. Sullivan*,[38] the Court held that the First Amendment requires public officials to prove, with "convincing clarity," that the defendant published the defamatory statement with "actual malice," defined as knowledge of the statement's falsity or with reckless disregard for the truth.[39] Later that year, the Court ruled that the actual malice requirement applied to criminal libel cases brought as the result of criticism of public officials.[40] In 1967, in the companion cases *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, the Court held that public figures would also need to show "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers" to win libel actions.[41]

The primary difference between *Sullivan* and *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker* was rooted in the distinction between public officials and public figures. Neither plaintiff in *Butts* or *Walker* was a government official or employee. Both, however, were in the public eye, or what the Court called a "public figure." In *Butts*, although the plaintiff was the athletic director at a state university, he did not hold a state-funded position. He did, however, have enough notoriety that he would be recognizable.[42] Similarly, in *Walker*, the plaintiff, a former army general who

[33] 418 U.S. at 340.
[34] *Reno v. ACLU*, 521 U.S. 844, 870 (1997). ("[The internet] includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.")
[35] RESTATEMENT (SECOND) OF TORTS § 559 (1977).
[36] *Id*.
[37] *See* Derigan Silver & Ruth Walden, *A Dangerous Distinction: The Deconstitutionalization of Private Speech*, 21 COMMLAW CONSPECTUS 59, 65–69 (2012) (discussing the difference between cases involving private individuals and private speech and cases involving public figures and matters of public concern).
[38] 376 U.S. 254 (1964).
[39] *Id*. at 279–80, 284–85.
[40] *Garrison v. Louisiana*, 379 U.S. 64 (1964).
[41] 388 U.S. 130, 155 (1967).
[42] *Id*. at 146.

was actively against desegregation of public schools, "thrust himself into the 'vortex' of the controversy."[43] A majority of the Court agreed that the actual malice standard—knowledge of falsity or reckless disregard for the truth—should apply to both Butts and Walker. In an age before social media, Chief Justice Earl Warren reasoned in his concurring opinion that both categories of individuals "often play an influential role in ordering society" and, importantly, have "ready access" to the media "both to influence policy and to counter criticism of their views and activities."[44] Warren defined public figures as individuals "who do not hold public office at the moment [but] are nevertheless 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."[45]

All-purpose public figures and limited-purpose public figures

In 1971, in *Rosenbloom v. Metromedia, Inc.*,[46] the Court momentarily shifted its focus away from the plaintiff's identity. A plurality decided that requiring actual malice in all cases involving "matters of public interest," an approach it used four years earlier in a false light invasion of privacy case,[47] was the appropriate standard in defamation cases. Three years later, the Court used a combination of the plaintiff's status and the damages sought to determine the appropriate fault standard. In *Gertz,*[48] Justice Louis Powell's majority opinion outlined five types of defamation plaintiffs: public officials, all-purpose public figures, limited-purpose public figures, involuntary public figures, and private individuals.[49] The Court ruled private individuals could not prevail in a defamation lawsuit unless they proved some level of fault—typically, negligence. The states remained free to require a higher standard of fault for private persons.[50] The lower fault standard only applied when plaintiffs sought compensatory damages. All plaintiffs would have to prove actual malice to recover presumed or punitive damages.[51] Justice Powell stated that certain similarities between public officials and public figures could not be ignored. "Public officials and public figures," Powell wrote, "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."[52]

[43] *Id.*
[44] *Id.* at 164 (Warren, C.J., concurring).
[45] *Id.*
[46] 403 U.S. 29 (1971).
[47] *Time, Inc. v. Hill*, 385 U.S. 374 (1967).
[48] 418 U.S. 323 (1974).
[49] Although scholars have debated about the number of plaintiff categories that exist or whether courts have consistently used all five categories, on its face *Gertz* created five separate categories. *See* Jeffery Omar Usman, *Finding the Lost Involuntary Public Figure,* 2014 Utah L. Rev. 951, 972 (2014).
[50] *Gertz,* 418 U.S. at 342–48.
[51] *Id.* at 349. The Court's opinion in *Gertz* was retroactively refined by its decision in 1985 in *Dun & Bradstreet v. Greenmoss Builders,* 472 U.S. 749 (1985), which added a subject matter test to the calculous. *See generally* Ruth Walden & Derigan Silver, *Deciphering* Dun & Bradstreet: *Does the First Amendment Matter in Private Figure-Private Concern Defamation Cases?,* 14 Comm. L. & Pol'y 1 (2009).
[52] 418 U.S. at 344 (emphasis added). The Court also noted other "compelling normative considerations underlying the distinction between public and private defamation plaintiffs." *Id.* Public officials accept the greater public scrutiny that comes from holding a public office. The Court wrote that public figures "stand in a similar position." "Public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." *Id.* at 345.

In *Gertz*, the Court broke "public figures" into two categories. The first, "all-purpose public figures," included individuals who, based on their fame or notoriety, are public figures in every aspect of their life. Justice Powell wrote, "For the most part those who attain this status have assumed roles of special prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes."[53] The Court termed individuals who make the conscious decision to enter the public sphere and engage in a "public controversy" as limited-purpose public figures, which it defined as individuals who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[54]

Like public officials and all-purpose public figures, limited-purpose public figures have access to media because of their involvement in a public controversy.[55] Limited-purpose public figures, however, are only public figures in relation to their statements or actions within the "limited scope" of the "public controversy" in which they have inserted themselves.[56] In other words, limited-purpose public figures are not public figures with regard to the other aspects of their life. Therefore, the defamatory speech in question must relate to the public controversy in which the individual is involved or be "germane" to the controversy.

The Court ruled that Gertz was not an all-purpose public figure. Although he was active in local civic groups and was a member of several professional organizations and was thus "well known in some circles, he had achieved no general fame or notoriety in the community."[57] In addition, the Court held that he had not injected himself into a public controversy to influence public opinion. Gertz's participation in any controversy was limited solely to his representation of a client. The Court noted that Gertz "never discussed either the criminal or civil litigation with the press and was never quoted as having done so. He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome."[58]

Involuntary public figures

In addition, the *Gertz* Court identified another type of public figure: the involuntary public figure. Unlike other public figures, the Court recognized that some individuals may inadvertently and involuntarily be thrown into the spotlight. Involuntary figures are those who are "drawn into a particular public controversy" and "become a public

[53]*Id*.
[54]*Id*.
[55]Silver, *supra* note 29, at 32.
[56]418 U.S. at 352 ("Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy *giving rise to the defamation*" (emphasis added)). *See also* Anthony Ciolli, *Bloggers as Public Figures,* 16 B.U. Pub. Int. L.J. 255, 264 (2007) ("Courts must treat limited purpose public figures as public figures only 'with respect to statements concerning the limited range of issues for which they are prominent'" (citing *Gertz*, 418 U.S. at 351–52)); Eric Walker, Note, *Defamation Law: Public Figures—Who Are They?*, 45 Baylor L. Rev. 955, 960 (1993).
[57]418 U.S. at 351–52.
[58]*Id*. at 352.

figure through no purposeful action of [their] own."[59] Scholars have noted that subsequent cases have done "very little to clarify the Court's definition of a public figure."[60]

After *Gertz*, the Court decided three cases in which it could have further addressed involuntary public figures, but it chose not to do so. The Court did not find any of the plaintiffs to be involuntary public figures, although the definition would arguably apply to all three. In 1976, in *Time, Inc. v. Firestone*,[61] the Court held that the "dissolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in *Gertz*."[62] Florida socialite Mary Alice Firestone and her husband, Russell Firestone, a member of the Firestone tire family, sought a divorce. Mary Alice Firestone sued *Time* magazine for a story that labeled her an adulteress. The Court wrote that she did not volunteer to be in a public controversy, noting that she had no choice but to turn to the court system to dissolve her marriage.[63]

In 1979, Ilya Wolston sued *Reader's Digest* over a story that called him a Soviet agent.[64] Wolston was the nephew of two well-known American communists arrested during the Red Scare. Although the Court noted that Soviet espionage had constituted a legitimate public controversy in the mid 1950s, Wolston had never voluntarily injected himself into it. Rather, he was "dragged unwilling into the controversy."[65] Likewise, media attention did not automatically transform Wolston into a limited-purpose public figure. The Court wrote that although the events he was involved in were "newsworthy," the "simple fact that these events attracted media attention [was] not conclusive of the public-figure issue."[66] A private person does not automatically become a public figure "just by becoming involved in or associated with a matter that attracts public attention," the Court noted.[67] The justices found no evidence that Wolston attempted to influence the resolution of the issue.[68]

In another 1979 case, *Hutchinson v. Proxmire*,[69] Sen. William Proxmire awarded behavioral scientist Ronald R. Hutchinson "The Golden Fleece Award," which Proxmire had created to call out individuals he felt were wasting government money.[70] Proxmire called Hutchinson's work "nonsense," and discussed it on the Senate floor, with his staff, and in a newsletter.[71] Hutchinson sued, claiming that Proxmire's statements were defamatory and that his reputation had been damaged. The Court wrote there was no evidence that "Hutchinson was a public figure prior to the controversy engendered by the Golden Fleece Award; his access, such as it was, came after the alleged libel."[72]

[59] *Id*. at 345.
[60] Ciolli, *supra* note 56, at 265.
[61] 424 U.S. 448 (1976).
[62] *Id*. at 454.
[63] *Id*.
[64] *Wolston v. Reader's Digest*, 443 U.S. 157 (1979).
[65] *Id*. at 166.
[66] *Id*. at 167.
[67] *Id*.
[68] *Id*. at 168.
[69] 443 U.S. 111 (1979).
[70] *Id*. at 115. Hutchinson had been awarded a $500,000 grant to study animal aggression.
[71] *Id*. at 115–16.
[72] *Id*. at 135. ("To the extent the subject of his published writings became a matter of controversy, it was a consequence of the Golden Fleece Award. Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.")

Applying the public figure doctrine

For decades, scholars and judges alike have noted that it is notoriously difficult to apply the public figure doctrine, particularly as it applies to limited-purpose and involuntary public figures.[73] As one federal judge lamented in 1976: "How and where do we draw a line between public figures and private individuals? They are nebulous concepts. Defining public figures is much like trying to nail a jellyfish to the wall."[74]

Limited-purpose public figures in the lower courts

Although approaches differ, to decide whether a plaintiff is a limited-purpose public figure, courts typically follow a number of similar steps. Most courts use at least a two-part test: (1) There must be a preexisting public controversy that (2) the plaintiff influences via voluntary actions.[75] Many scholars and courts, however, apply a version of a three-step test.[76] Some suggest that making sure the allegedly defamatory statement concerns the public controversy the plaintiffs have injected themselves into constitutes a separate step.[77] Others say a four-step approach is common. Ciolli, for example, wrote, "Lower courts have generally used a four step analysis" to determine whether a plaintiff is a limited-purpose public figure: "(1) isolat[ing] the controversy and determin[ing] the scope of the public's interest; (2) examin[ing] the plaintiff's role in the controversy; (3) determin[ing] if the defamatory statement is germane to the plaintiff's role in the controversy; and (4) analyz[ing] the extent of the plaintiff's access to channels of media communication."[78]

Generally, courts hold that voluntary entry into the public eye to influence opinion about a controversy is a prerequisite for public figure status.[79] As Wat Hopkins noted, "Voluntariness [seems] to be the key element in determining whether a plaintiff is a public figure."[80] This, however, is not always the case.[81] In addition, courts do not always agree about what qualifies as "voluntary."[82] At times, simply speaking to the

[73]*See, e.g.*, Christopher Russell Smith, *Dragged into the Vortex: Reclaiming Private Plaintiffs' Interests in Limited Purpose Public Figure Doctrine*, 89 Iowa L. Rev. 1419, 1434 (2004) ("Commentators and judges alike have noted that the application of the limited purpose public forum doctrine has become morass"); Mark D. Walton, *The Public Figure Doctrine: A Reexamination of* Gertz v. Robert Welch, Inc. *in Light of Lower Federal Court Public Figure Formulations*, 16 N. Ill. U. L. Rev. 141, 170 (1995) (describing the "ambiguity and anomalous results caused by the *Gertz* public figure paradigm").

[74]*Rosanova v. Playboy Enter., Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976).

[75]Matthew Lafferman, *Do Facebook and Twitter Make You a Public Figure: How to Apply the Gertz Public Figure Doctrine to Social Media*, 29 Santa Clara Computer & High Tech. L. J. 199, 218 (2012).

[76]Ashley Messenger & Kevin Delaney, *In the Future We Will All Be Limited-Purpose Public Figures*, 30 Comm. Law. 4, 5 (2014) ("It is common to see courts apply a version of the three-part test") According to Messenger and Delaney, many courts follow some variation of the "Waldbuam test" from *Waldbaum v. Fairchild Publications Inc.*, 627 F. 2d 1287 (D.C. Cir. 1980). Step one requires the court to "isolate the public controversy." Step two requires the court to analyze the plaintiff's role in the controversy. Step three requires the court to determine whether the alleged defamation was "germane to the plaintiff's participation in the controversy.") *Id.* (citations omitted).

[77]*See, e.g.*, *Waldbaum v. Fairchild Publications, Inc.*, 627 F. 2d 1287, 1298 (D.C. Cir. 1980).

[78]Ciolli, *supra* note 56, at 266.

[79]Rodney Smolla, Law of Defamation § 2:31 n. 11 (2d. 2012) ("The voluntariness element is truly an example of the existence of authorities 'too numerous to mention,' for almost no case dealing with the public figure classification problem fails to discuss it").

[80]W. Wat Hopkins, *The Involuntary Public Figure: Not So Dead After All*, 21 Cardozo Arts & Ent. L. J. 1, 19 (2003).

[81]*See, e.g.*, *American Future Systems Inc. v. Better Business Bureau of Eastern Pennsylvania*, 923 A. 2d 389 (Penn. Super. Ct. 2007); *Krauss v. Globe International Inc.*, 674 N.Y.S. 2d 662 (App. Div. 1998).

[82]*See, e.g.*, Hopkins, *supra* note 80, at 24 ("One court held, for example, that while voluntariness is important to public figure status, 'what is and is not voluntary is by no means self-evident'" (quoting *Schiavone Constr. Co. v. Time, Inc.*, 619 F. Supp. 684, 703 (D.N.J. 1985)).

media about an existing public controversy over an extended period of time can transform a person into a limited-purpose public figure, particularly if the responses go beyond simply answering questions about an event an individual was involved in.[83] At other times, courts have ruled that engaging in actions that are "merely likely to result in influence or publicity constitutes voluntary action."[84] Christopher Russell Smith wrote that competition among media outlets has made it more likely that plaintiffs would be "dragged" into public controversies in which they were only remotely involved.[85] In recent years, the rise of viral content suggests this may happen even more frequently. As Baish's social media posts and Sandmann's viral video demonstrate, media competition and their ready access to public social media accounts make the likelihood of being "dragged" into a public controversy even more of a reality today than in the past.

Involuntary public figures in the lower courts

Things only get more muddled when courts consider whether an individual is an involuntary public figure. At the time *Gertz* was decided, the Court wrote that "the instances of truly involuntary public figures must be exceedingly rare."[86] Since then, scholars have noted that the Court's reference to involuntary public figures has "generated much confusion"[87] in lower courts. Some courts have suggested that plaintiffs can be involuntary public figures for all purposes, while other courts have found plaintiffs to be an involuntary public figure for only limited purposes.[88]

Other scholars, however, have questioned whether this category of plaintiffs continues to exist[89] after the Court's opinions in *Firestone*, *Hutchinson*, and *Wolston*. Nat Stern argued that the Court's rulings revoked *Gertz*'s five categories of plaintiffs.[90] Based on his analysis of *Firestone*, *Hutchinson*, and *Wolston,* Hopkins noted that although the

[83]*See, e.g.*, *Anaya v. CBS Broadcasting*, 626 F. Supp. 1158 (D.N.M. 2009) (holding that a defendant was transformed over time into a limited-purpose public figure because of her "concerted effort to publicize exonerating evidence" about herself); *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175 (Ga. Ct. App. 2001), cert. denied, 2002 Ga. LEXIS 104 (2002) (holding that the plaintiff was a limited-purpose public figure after he voluntarily gave a dozen interviews to local and national media outlets).

[84]Lafferman, *supra* note 75, at 219. *See also Lohrenz v. Donnelly*, 350 F. 3d 1272 (D.C. Cir. 2003); *Carr v. Forbes*, 259 F. 3d 273 (4th Cir. 2001); *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1083 (3d Cir. 1985); *Rosanova v. Playboy Enters., Inc.*, 580 F.2d 859, 861 (5th Cir. 1978).

[85]Smith, *supra* note 73, at 1422 ("Fierce competition between press organizations for limited advertising dollars has resulted in increased media intrusion into private life").

[86]418 U.S. 323, 345 (1974)

[87]Smolla & Nimmer on Freedom of Speech § 23:4 (2021). *See also* J. Wilson Parker, *Free Expression and the Function of the Jury*, 65 B.U. L. Rev. 483, 546 n.314 (1985) ("The Court's confusion in Gertz became evident in its attempted application of the *Gertz* rule to other involuntary public figures"); Nat Stern, *Unresolved Antitheses of the Limited Public Figure Doctrine*, 33 Hous. L. Rev. 1027, 1096 (1996) (indicating that "the potency of the involuntary public figure doctrine remain[s] uncertain").

[88]Hopkins, *supra* note 80, at 26. *See id.* at 27–44 for examples of plaintiffs who were found to be all purpose involuntary public figures and in voluntary limited-purpose public figures. At the time of Hopkins's study there were more cases in which a plaintiff was found to be an involuntary limited-purpose public figure than cases in which the plaintiff was found to be an involuntary all-purpose public figure.

[89]*See, e.g.*, Lyrissa Barnett Lidsky & R. George Wright, Freedom of the Press: A Reference Guide to the United States Constitution 81 (2004) (noting that "[T]he lower courts have split on how to define involuntary public figures and, indeed, whether the category even continues to exist"); Smolla, supra note 85, at § 2.33 (expressing skepticism about the existence of involuntary public figures).

[90]Stern, *supra* note 87, at 1101("the Court should rule either that *Gertz* meant what it said, or that the Court's post-*Gertz* trilogy revoked that category of public figures").

Court seemed to "ignore an involuntary public figure doctrine, it did not explicitly retreat from the concept."[91] In addition, some lower courts have found plaintiffs to be involuntary public figures.[92] Jeffrey Omar Usman, however, noted that it is unclear whether "the judges saw either the same thing or the same thing from the same angle."[93] Usman wrote, "Trying to understand and define the contours of the involuntary public figure category, or indeed to ascertain if it even exists, has been a source of tremendous confusion and uncertainty."[94]

Thus, unsurprisingly, definitions of who qualifies as an involuntary public figure vary. In 2003, Hopkins identified 30 cases in 23 courts in which a court attempted to define an involuntary public figure; the courts ruled that a plaintiff was an involuntary public figure in only nine.[95] The simplest test courts used was to determine whether a public controversy existed and then to determine the plaintiff's role in the controversy.[96] Other courts required a showing that the plaintiff "*assumed the risk* of publicity, even if the plaintiff didn't *seek* publicity."[97] Based on this, Hopkins's research led him to conclude that "there was a fine line between the limited-purpose public figure … and the involuntary public figure."[98]

The Court's decisions in *Sullivan* and its progeny have been touchstones for defamation cases for nearly 60 years. However, as noted, a great deal of confusion existed even before the internet. Numerous scholars have proposed solutions to both the general confusion over the public figure doctrine and the added confusion created by online speech. Several advocated for the elimination of limited-purpose and involuntary public figures in favor of a return to the *Rosenbloom* plurality's application of actual malice to all cases involving a matter of public concern.[99] Usman, however, disagreed with this approach. Instead, he favored clarifying "the mysterious involuntary public figure category."[100] He wrote that the Court should bring meaning to *Gertz*'s "fleeting and cryptic reference to involuntary public figures" and provide "a useful cornerstone

[91]Hopkins, *supra* note 80, at 18.
[92]*See, e.g.*, *Dameron v. Wash. Magazine, Inc.*, 779 F.2d 736, 740–42 (D.C. Cir. 1985); *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175, 186 (Ga. Ct. App. 2001); *Daniel Goldreyer, Ltd. v. Dow Jones & Co.*, 687 N.Y.S.2d 64, 64 (App. Div. 1999); *Wilson v. Daily Gazette Co.*, 588 S.E.2d 197, 208–09 (W. Va. 2003); *Zupnik v. Associated Press, Inc.,* 31 F. Supp. 2d 70, 73 (D. Conn. 1998); *Foretich v. Advance Magazine Publishers, Inc.*, 765 F. Supp. 1099, 1108 (D.D.C. 1991); *Price v. Chi. Magazine*, No. 86 C 8161, 1988 WL 61170, at *4–5 (N.D. Ill. June 1, 1988).
[93]Usman, *supra* note 49, at 951.
[94]*Id*. at 952.
[95]Hopkins, *supra* note 80, at 21. According to Hopkins's research, in another nine cases, courts "recognized the viability of involuntary public figure status, but held that the category of public figure status did not apply to the facts in the cases at bar." *Id*. at 22 (citations omitted). Also, in two other cases courts "acknowledged that involuntary public figures may have once existed, at least hypothetically, but indicated that the Supreme Court, in effect, abandoned that category in its *Firestone*, *Wolston*, and *Hutchinson* rulings." *Id*. (citations omitted).
[96]*Id*. at 25.
[97]*Id*. (emphasis added). *See also Wells v. Liddy*, 186 F.3d 505, 540 (4th Cir. 1999); *Schultz v. Reader's Digest Ass'n*, 468 F. Supp. 551, 560 (E.D. Mich. 1979).
[98]Hopkins, *supra* note 80, at 45.
[99]*Id*. at 46. *See also* Peter J. Hageman, Rosenbloom: *Its Time Has Come Again*, 17 Comm. L. 9, 9–13 (1999); David Lat & Zach Shemtob, *Public Figurehood in the Digital Age*, 9 J. Telecomm. & High Tech. L. Rev. 403, 404 (2011); Douglas B. McKechnie, *The Death of the Public Figure Doctrine: How the Internet and the Westboro Baptist Church Spawned a Killer*, 64 Hastings L.J. 469, 490–97 (2013); Howard M. Wasserman, *Two Degrees of Speech Protection: Free Speech Through the Prism of Agricultural Disparagement Laws*, 8 Wm. & Mary Bill Rts. J. 323, 349 (2000).
[100]Usman, *supra* note 49, at 1006. Usman suggested a test for determining when a private plaintiff should be treated as an involuntary public figure: An otherwise private individual will be treated as an involuntary public figure to the extent that the individual is integrally intertwined with addressing the following: (1) the official conduct or qualifications for office of a public official, (2) the actions of a public figure with regard to a matter of public concern, or (3) a matter of public concern itself. *Id*. at 1007.

constructing this category in light of four decades of post-*Gertz* societal and jurisprudential evolution."[101]

Public figures and the internet

Scholars have offered an even broader range of solutions to the public figure question as the number of internet defamation cases has increased. The internet has provided a platform for mass distribution of information, expanded the 24-hour news cycle, and created an avenue for private individuals to participate in the public sphere in ways not possible with traditional mass media.[102] A 2019 Pew Research Center study showed that 73% of American adults use YouTube, 69% of American adults use Facebook, and 22% use Twitter.[103] Instagram and Snapchat are frequently used by more than 60% of 18- to 29-year-olds.[104] Social media platforms allow users to interact with content, share posts they find relevant, and comment on others' content. This interactivity has changed the way individuals interact with information and with one another, which might suggest that a new approach to online defamation is needed.

Additionally, most social media users see "at least a little bit of political content in their feed," and one-quarter see a substantial number of political posts.[105] Nearly one-third of social media users admit they either often or sometimes interact with political posts, whether that be by commenting or by sharing.[106] Many of these private individuals probably do not think about the possible consequences of their comments. In addition, more individuals than ever now carry cell phones with high-quality cameras that make it easier to record others in public. This makes it even more important to revisit the public figure doctrine to understand how a private individual's status can change when content goes viral.

Beginning with works on "bloggers," scholars have studied this shifting landscape for more than a decade, offering numerous tests and warnings. Sanders and Arendt suggested a three-part test, focusing on how well-known the blogger was, the subject matter of their posts, and their access to the defendant's audience.[107] Ciolli, on the other hand, argued that all "bloggers" should be treated as limited-purpose public figures for the purpose of torts like defamation or publication of private facts.[108] Ciolli wrote, "The simple act of blogging requires individuals to 'thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.'"[109]

[101] *Id.*
[102] *Id.* at 987.
[103] Andrew Perrin & Monica Anderson, *Share of U.S. Adults Using Social Media, Including Facebook, Is Mostly Unchanged Since 2018,* Pew Research Center (Apr., 10, 2019), https://www.pewresearch.org/fact-tank/2019/04/10/share-of-u-s-adults-using-social-media-including-facebook-is-mostly-unchanged-since-2018.
[104] *Id.*
[105] Maeve Duggan & Aaron Smith, *Political Content on Social Media,* Pew Research Center (Oct. 25, 2016), https://www.pewinternet.org/2016/10/25/political-content-on-social-media.
[106] *Id.*
[107] Sanders & Arendt, *supra* note 24. Sanders and Arendt proposed a test for bloggers: When determining whether a blogger plaintiff is a limited-purpose public figure, the court must focus on three specific aspects of the plaintiff's blog and blogging habits: 1) whether the blogger was well-known among members of the relevant community; 2) whether the topic the blogger was discussing is a legitimate matter of public controversy; and finally, 3) whether the blogger had access to a majority of the defendant's audience to engage in corrective speech. *Id.* at 25.
[108] Ciolli, *supra* note 56, at 257.
[109] *Id.* (citations omitted). Noting that in 2007, there was little consensus on what the term "blog" meant, Ciolii used three definitions of "blogs": The Chronological Definition, "The Diary Definition," and the "The Amateur Journalist Definition." *Id.* at 258–59.

Matthew Lafferman found this approach problematic when looking at Facebook and Twitter users.[110] Lafferman counseled courts against "bestowing individuals with public figure status en masse due to the general difficulties of establishing actual malice."[111] Courts should "rely heavily on the other main principle of *Gertz*, the assumption of risk of voluntariness rationale."[112] Lafferman concluded the best approach was for courts to use a clear-and-convincing standard, a higher burden of proof, to establish that a social media user was a public figure.[113]

Ashley Messenger and Kevin Delaney also questioned whether being "internet famous" was enough to be deemed a public figure and if all Internet users would soon be public figures.[114] They focused on a two-prong test for labeling a plaintiff a limited-purpose public figure. First, courts must determine whether the plaintiffs have "sufficient access to effective channels of communication to counteract the defamatory statements."[115] Second, courts must determine whether the plaintiffs voluntarily thrust themselves to the forefront of a public controversy in order to influence the outcome.[116] Messenger and Delaney believed plaintiffs must have a "realistic opportunity to counteract false statements"[117] and continuous access to the channel of communication. In addition, the channel must have a similar audience.[118] The authors concluded that while virtually all platforms allowed for regular and continuing access to media,[119] courts were unlikely to rule that social media platforms provided plaintiffs with "a realistic opportunity to counteract false statements"[120] because of the limited number of people who see the average social media post. Comparing a Facebook rebuttal to a defamatory statement published in the *New York Times* based on sheer audience size would be unlikely to qualify an individual. Ultimately, Messenger and Delaney concluded that courts would make decisions on a case-by-case basis after balancing several factors.[121]

Thomas E. Kadri and Kate Klonick compared legal remedies with content moderation, focusing on Facebook.[122] Kadri and Klonick noted that although private companies host vast amounts of content and have great power over online discourse, they are

[110]Lafferman, *supra* note 75.
[111]*Id*. at 225–26.
[112]*Id*. at 226.
[113]*Id*. at 233–34. According to Lafferman, courts should only find a social media user was an involuntary public figure "if the defendant can provide clear and convincing evidence that the plaintiff had greater access to the media than other users on the plaintiff's social media network." *Id*. at 233. A social media user would only be considered an all-purpose public figure if there was clear-and-convincing evidence the social media user had obtained notoriety within the social network itself. *Id*. at 234.
[114]Messenger & Delaney, *supra* note 76, at 4.
[115]*Id*. at 5.
[116]*Id*.
[117]*Id*. (quoting *Gertz*, 418 U.S. at 344).
[118]*Id*.
[119]*Id*. at 6. ("Making a post on either site costs no money and can be visible, within a matter of seconds, to your friends (if using Facebook), your followers (if using Twitter), or the general public (if using either).")
[120]*Id*. (noting that the average Facebook user in 2012 had 245 friends and 16 percent of those friends, on average, see a post) (citing Hayley Tsukayama, *Your Facebook Friends Have More Friends than You*, Wash. Post (Feb. 3, 2012), http://www.washingtonpost.com/business/technology/your-facebook-friends-havemore-friends-than-you; Bianca Bosker, *Facebook Explains How Often Your Posts Actually Get Seen*, Huffington Post (Feb. 29, 2012), http://www.huffingtonpost.com/2012/02/29/facebook-posts-n_1311330.html.
[121]*Id*. These factors included "(1) the size of the audience that the plaintiff can reach through social media, (2) the scope of the public controversy, and (3) the plaintiff's intent in affecting the outcome of the controversy." *Id*.
[122]Thomas E. Kadri & Kate Klonick, *Facebook v.* Sullivan*: Public Figures and Newsworthiness in Online Speech*, 93 S. Cal. L. Rev. 37 (2019).

not bound by the First Amendment.[123] Instead, social media companies implement semipublic rules that govern users' communication. Facebook, for example, uses "Community Standards" to regulate users' speech.[124] They distinguish between public and private individuals[125] and speech on matters of public and private concern.[126]

In analyzing why platforms would adopt First Amendment norms, Kadri and Klonick noted that there are three reasons that have traditionally justified the distinction between public individuals and private individuals. First, public individuals have greater access to channels of effective communication to rebut harmful speech.[127] Second, public figures were less deserving of protection because they had invited scrutiny of their activities by voluntarily assuming the risk of possible negative attention.[128] Third, the "social status of public figures serves as a proxy for their newsworthiness."[129] Kadri and Klonick found social media platforms employed all three rationales, "particularly given how virality alters ideas about voluntariness."[130] Worried that social media platforms too broadly defined public figures,[131] they concluded courts should "[insist] that people have voluntarily embroiled themselves in a 'particular public controversy' and not simply been swept up in events that suddenly become 'of interest to the public.'"[132]

Finally, building on the work of previous authors,[133] some scholars have suggested that the rise of social media creates even more reasons to abandon *Gertz* and return to *Rosenbloom v. Metromedia, Inc.* David Lat and Zachary Shemtob, for example, argued that the "internet has rendered *Gertz* not only obsolete but legally

[123]*Id*. at 58. *See also* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1658–62 (2018). The question whether the First Amendment restricts the *government's* use of social media is a different issue. *See Knight First Amendment Institute v. Donald J. Trump*, No. 18-1691-cv (2nd Cir. Jul. 9, 2019) (holding that by blocking plaintiffs on Twitter for expressing political views President Trump engaged in unconstitutional viewpoint discrimination); Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 975, 1979–2002 (2011) (discussing how the public-forum doctrine might apply to when government actors use social media); Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. 899, 899 (2010) (analyzing how the government-speech doctrine might adapt, given government's increasing reliance on social media).
[124]Kadri & Klonick, *supra* note 122, at 58.
[125]*Id*. at 70. Courts use this distinction in defamation. Facebook uses this distinction as part of its anti-bullying policy.
[126]*Id*. Courts use this distinction in defamation, privacy, and intentional infliction of emotional distress cases. Facebook uses this distinction for deciding when "disturbing content like graphically violent or hateful speech" can be taken down.
[127]*Id*. at 72.
[128]*Id*. at 73.
[129]*Id*. at 74.
[130]*Id*. at 75. To support this contention, Kadri and Klonick examined five real-world examples similar to the situation described in the introduction to this article. First, the authors reviewed the case of a Target employee who became the subject of the hashtag #AlexFromTarget. Two days after a Twitter user posted a photo of the employee with the hashtag, the hashtag had over a million Twitter hits. Before long, the employee had 250,000 followers, appeared on the *Ellen* show, and began receiving death threats and was the subject of fabricated stories. *Id.* at 82. Next, they examined the example of Justine Sacco, who tweeted before boarding a flight to Cape Town, South Africa: "Going to Africa. Hope I don't get AIDS. Just kidding. I'm white." After the tweet went viral, the hashtag "HasJustineLandedYet" started trending and was the number one worldwide trend by the time Sacco landed. Sacco's story was picked up by major media outlets and Sacco lost her job. Finally, they explored the actions of students from Covington Catholic High School whose interactions with Native American activists became a news story after a video of the incident went viral. They also noted that things become more complicated when children are thrust into the spotlight by parents, discussing the case of six-year-old Adalia Rose Williams, whose mother created a Facebook page about the girl's fatal condition. Finally, they noted that some public figures, such as comedienne Leslie Jones, attract such hateful online abuse that it is hard to say they are undeserving of additional protections even if they are public figures. *Id*. at 82–85.
[131]*Id*. at 85. ("If, as one court has remarked, a public figure is 'anyone who is famous or infamous because of who he is or what he has done,' there will be far too many public figures in this world.") (Citations omitted.)
[132]*Id*. at 85–86 (quoting *Time, Inc. v. Firestone*, 424 U.S. 448, 453–54 (1976)).
[133]*See generally*, Hopkins, *supra* note 80; Hageman, *supra* note 99; McKechnie, *supra* note *99*; Wasserman, *supra* note 99.

incoherent."[134] Lat and Shemtob wrote that changes in the media landscape have undermined *Gertz's* media access or "self-help" rationale and that digital media has "blurred, if not eliminated, the entire public/private distinction" *Gertz* relied on.[135] Lat and Shemtob wrote that by 2011, "Methods of communication [had] expanded and changed dramatically."[136] The authors contended that in the age of "microcelebrity," fame was distributed along a spectrum, "not according to a dichotomy,"[137] and that *Gertz* failed to take into account "niche celebrities."[138] Therefore, the authors advocated rejecting *Gertz* in favor of Justice Brennan's opinion in *Rosenbloom v. Metromedia, Inc.*[139] The only drawback of doing so, according to the scholars, was that the actual malice standard would be applied to private individuals who were the subject of statements of matters of public concern, which might provide too much protection for publishers.[140] Additionally, the authors wrote, "To the extent that *Rosenbloom* results in more favorable regime for publishers and speakers, it simply reflects the law evolving to accommodate advances in communications technology."[141]

Social media and public figures in the courts

Lower courts have split on whether to use *Gertz* and its progeny or apply their own judgment in online defamation cases. In the cases described next, courts have focused on the plaintiff's notoriety in the public sphere, whether plaintiffs have voluntarily chosen to insert themselves into the public sphere, and the amount of access they have to mainstream media outlets to defend their reputation.[142] Finally, some courts added the requirement that the allegedly defamatory statement must be "germane" to the controversy the plaintiff was involved in. None of the cases found the plaintiff to be an involuntary public figure.

Limited-purpose public figure tests

Many of the cases used a three-part test to determine whether a plaintiff was a limited-purpose public figure. The Tennessee Court of Appeals offered one of the clearest articulations in 2005:

[134]Lat & Shemtob, *supra* note 99, at 410.
[135]*Id.*
[136]*Id.*
[137]*Id.* at 413. "Instead of a world with a few huge celebrities and millions of 'nobodies,' we now live in a world with a 'long tail' of minor celebrities (e.g., reality TV stars, prominent bloggers)." *Id.*
[138]*Id.* According to the authors, these are individuals who are celebrities within "highly targeted blogs, interest groups within social networks, or even social networking sites for specific interest groups."
[139]403 U.S. 29 (1971).
[140]Lat & Shemtob, *supra* note 99, at 416. To counter this argument, Lat and Shemtob noted that three states have essentially adopted *Rosenbloom* without substantial problems. According to Lat and Shemtob, "Colorado, Alaska, and Indiana, have essentially adopted the *Rosenbloom* approach, and two others, New Jersey and New York, have standards similar to *Rosenbloom*." *Id.* (citing James C. Mitchell, Rosenbloom's *Ghost: How a Discredited Decision Lives on in Libel Law*, 40 IDAHO L. REV. 427, 436–38 (2004)).
[141]*Id.* at 416–17.
[142]Cases involving social media and discussing public figures were identified via the literature outlined above and a Nexis Uni search of the terms "defamation," "public figure," and "social media." Only cases that discussed the appropriate public figure standards to apply to social media users were analyzed.

> Does a public controversy exist, and what is the nature and extent of the individual's participation in that controversy? The nature and extent of the individual's participation is determined by looking to three factors: the extent to which participation in the controversy is voluntary, the extent to which there is access to channels of effective communication [in] order to counteract false statements, and the prominence of the role played in the public controversy.[143]

Around the same time, a California appellate court used a similar test.[144] Twelve years later, the Georgia Court of Appeals returned to the same analysis in *Ladner v. New World Communications of Atlanta*.[145]

In a case involving viral media content, *Gilmore v. Jones*,[146] the U.S. District Court for the Western District of Virginia set out a detailed test in a case involving viral internet content. Brennan Gilmore, an individual who protested against white supremacists and neo-Nazi groups participating in the "Unite the Right" rally in Charlottesville, Virginia, on August 12, 2017, sued for defamation based on comments about a video he posted.[147] While at the rally, Gilmore filmed someone driving a car into the crowd, killing one person and injuring 36 others. Gilmore posted the video on Twitter, where it quickly went viral. Afterward, several individuals published stories alleging Gilmore was "a 'deep state' operative who conspired to orchestrate violence in Charlottesville for political purposes."[148]

In deciding whether Gilmore was a limited-purpose public figure, the court looked at:

> '[W]hether a public controversy gave rise to the defamatory statement[s]' and 'whether the plaintiff's participation in that controversy sufficed to establish him as a public figure within the context of that public controversy.' Defendants must prove that '(1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in the public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statement; and (5) the plaintiff retained public-figure status at the time of the alleged defamation.'[149]

The court ruled that acquiring media attention via a social media account *and then* granting interviews with "multiple television news networks and other news media to provide an eyewitness account" established access to media channels.[150] The court focused on Gilmore's access to mainstream media after his posts went viral, rather than the fact that they went viral.

[143] *Hibdon v. Brabowski,* 195 S.W.3d 48, 59 (Tenn. Ct. App. 2005) (quoting Cloyd v. Press, Inc., 629 S.W.2d 24, 25–26 (Tenn. Ct. App. 1981)).
[144] *Ampex Corp. v. Cargle*, 128 Cal. App. 1569 (Cal. Ct. App. 2005). "First, there must be a public controversy … Second, the plaintiff must have undertaken some voluntary act through which he or she sought to influence resolution of the public issue. In this regard it is sufficient that the plaintiff attempts to thrust him or herself into the public eye. And finally, the alleged defamation must be germane to the plaintiff's participation in the controversy." *Id. at* 1578.
[145] 806 S.E.2d 905 (Ga. App. 2017). The court concluded that "a court must isolate the public controversy, examine the plaintiff's involvement in the controversy, and determine whether the alleged defamation was germane to the plaintiff's participation in the controversy." *Id.* at 911.
[146] 370 F. Supp. 3d 630 (W.D. Va. 2019).
[147] *Id.* at 642.
[148] *Id.*
[149] *Id.* at 667 (citations omitted).
[150] *Id.* at 668. (Writing "at oral argument, Gilmore conceded that he gave interviews to, at a minimum, CNN, NBC, and *The New York Times* in the hours and days following the rally, and that he wrote an online editorial for Politico on August 14, 2017, describing and analyzing what he witnessed.")

Definition of public controversy

The lower courts in these cases used a variety of definitions for public controversy, often relying on various Circuit Court tests. Two of the most prominent tests come from cases that do not involve the internet. In *Foretich v. Capital Cities/ABC,* the Fourth Circuit stated that "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."[151] In *Waldbaum v. Fairchild Publications, Inc.,* the D.C. Circuit wrote that to be a public controversy, the issues had to be "debated publicly" and have "foreseeable and substantial ramifications for nonparticipants."[152]

The U.S. District Court for the Western District of Virginia recently applied the *Foretich* approach in an internet defamation case. In *Edwards v. Schwartz*, the plaintiff was a scientist involved in the Flint Water Crisis, a clear public controversy.[153] Marc Edwards, a Virginia Tech professor involved in exposing the contamination, sued over a letter emailed to the Virginia Tech president and others, as well as statements made via email, Facebook, Twitter, blogs, and text messages.[154] The court wrote:

> It can hardly be debated that the allegedly defamatory statements giving rise to this matter are related to an existing public controversy—that is, 'a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way.' The Flint water crisis (and the advocacy-related disputes arising therefrom) plainly qualifies as a public controversy as there are 'foreseeable and substantial ramifications for persons' beyond the litigants in this suit.[155]

Similarly, in *Ampex Corp. v. Cargle*, a case involving posts by a former employee of Ampex on a Yahoo! message board that criticized the management of the company, a California Court of Appeals defined a public controversy as an issue that "was debated publicly and had foreseeable and substantial ramifications for nonparticipants."[156] Applying this standard to the facts of the case, the court ruled there was a public controversy. First, there were several postings on a public forum, the Yahoo! message boards, critiquing the management of Ampex prior to the allegedly defamatory statement.[157] Second, the court reasoned that, including responses to original posts, more than 40 postings total occurred over a three-day period.[158] Finally, "the causes and consequences of Ampex's multimillion-dollar venture into the internet television business had foreseeable and substantial ramifications for nonparticipants."[159]

Other courts have applied the *Waldbaum* definition. In *Hibdon v. Brabowski*,[160] the Tennessee Court of Appeals wrote, "A public controversy is defined as a real dispute, the outcome of which affects the general public or some identifiable segment of the

[151] 37 F.3d 1543, 1554 (1994).
[152] 627 F.2d 1287, 1296 (D.C. Cir. 1980).
[153] 378 F. Supp. 3d 468, 477 (W.D. Va. 2019).
[154] *Id.* at 478–79.
[155] *Id.* at 506.
[156] 128 Cal. Rptr. 3d 863, 870 (Cal. App. 2005).
[157] *Id.*
[158] *Id.*
[159] *Id.* ("Ampex's decision and action in discontinue iNEXTV amounted to a public controversy that elicited concerns about the management of Ampex.")
[160] 195 S.W.3d 48 (Tenn. App. 2005).

public in an appreciable way."[161] In the case, Kerry Hibdon, who operated a jet ski customizing business, sued over comments made on the group rec.sport.jetski and for comments posted on one of the defendant's websites.[162] After Hibdon posted about his modified jet skis on rec.sport.jetski, he was featured in *SPLASH Magazine*.[163] This led the defendants to post comments on rec.sport.jetski and other websites questioning the speed Hibdon claimed his jet skis could achieve.

The Tennessee court explained courts should look to "see what matters were already in dispute prior to the time of the alleged defamatory statements were made."[164] The court ruled that a public controversy existed over the purported success of Hibdon's jet ski modifications. "The controversy was 'public,'" the court wrote, "due to the international reach of rec.sport.jetski, the national circulation of *SPLASH Magazine*, as well as the significance of the claims being asserted by Hibdon." The court further explained:

> The dispute received public attention because its ramifications would be felt by persons who are not direct participants, those persons being individuals in the jet ski modification business, as well as recreational jet ski enthusiasts and purchasers of jet skis.[165]

Returning to *Gilmore*, the case involving the viral video of the Charlottesville rally, the district court missed a key opportunity to clearly articulate why the "Unite the Right" rally was a public controversy. The court explained that "a public controversy 'must be a real dispute' that 'in fact has received public attention because its ramifications will be felt by persons who are not direct participants.'"[166] In the case, the court determined that the "underlying issue" was not whether Gilmore was a member of the deep state, but rather "the meaning underlying the Unite the Right rally and associated counter-protests."[167] The court then concluded that this was a public controversy without explaining why.[168]

The 11th Circuit also missed an opportunity to define a public controversy in *McCafferty v. Newsweek Media Group, Ltd.*,[169] a lawsuit involving a 12-year-old whose Facebook videos supporting then-candidate Donald Trump went viral. During the 2016 presidential campaign, "C.M." publicly endorsed Trump and released videos that went viral, attracting more than 325,000 views on Facebook alone.[170] C.M. then granted interviews to multiple media outlets, including Russian television stations and *Philadelphia* magazine.[171] When *Newsweek* published an article about Trump's "Mini-Mes" featuring C.M., his parents sued on his behalf.[172] In determining whether C.M.

[161] *Id.* at 59.
[162] *Id.* at 55–56.
[163] *Id.* at 59.
[164] *Id.* at 60.
[165] *Id.*
[166] 370 F. Supp. 3d 630, 667 (W.D. Va. 2019) (citing *New Life Ctr., Inc. v. Fessio*, 229 F.3d 1143 (4th Cir. 2000) (quoting *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1554 (4th Cir. 1994))).
[167] *Id.* at 667.
[168] *Id.* ("Although Defendants' statements regarding a 'deep state' conspiracy to orchestrate violence in Charlottesville were not themselves the subject of a genuine public controversy … [t]he Court finds that the publications' broader focus on the meaning underlying the Unite the Right rally and associated counter-protests was addressed to a public controversy on that subject.")
[169] 955 F.3d 352 (2020).
[170] *Id.* at 355.
[171] *Id.*
[172] *Id.* at 356.

was a limited-purpose public figure, the court wrote C.M. "'voluntarily inject[ed] himself" into the political controversies surrounding President Trump and the President's critics."[173] But the court failed to define public controversy or explain why the political controversies surrounding Trump and his critics were a public controversy. In addition, the court did not discuss the requirement that C.M. injected himself in order to influence the outcome of the controversy, although it was clear from other parts of the court's opinion than C.M.'s goal was to influence public opinion about the presidential election.[174]

Finally, in *DC v. RR*, a California Court of Appeals concluded there was no "particular public controversy" involved when one teen left comments on the message board of another teen's website about the quality of the second teen's music.[175] But the court offered no reason why.

The voluntary requirement

There were also varying standards for what qualified as voluntarily injecting oneself into a controversy. In *Edwards v. Schwartz*, the Flint Water Crisis case, a "clear public controversy,"[176] the court determined Edwards voluntarily injected himself into the "important and emotionally-fraught public controversy"[177] by engaging in "advocacy-related work, affecting and/or touching on the welfare of Flint residents" and by "immers[ing] himself in spirited online exchanges."[178] Edwards, the court wrote, was more than a "scholar confined to academic pursuits" whom the defendants "suddenly singled out."[179] Rather, he "entered a political arena in which heated discourse was to be expected"[180] and therefore "must accept the banging and jostling of political debate, in ways that a private person need not."[181] In *Tipton v. Warshavsky*, the Ninth Circuit held a website owner in the case elevated himself to the status of a limited public figure when he "voluntarily involved himself in public life by inviting attention and comment" by starting a website called "ourfirsttime.com."[182]

In *Ladner v. New World Communications of Atlanta, Inc.*, the Georgia Court of Appeals used a three-part test to determine whether Shane Ladner, who was then a police officer for the City of Holly Springs, Georgia, was a limited-purpose public figure in part because others posted about him on social media.[183] Although the event that brought Ladner attention was a fatal train collision—something he did not voluntarily participate in—according to the court his actions both prior to and after the event qualified him as a limited-purpose public figure, rather than an involuntary public figure. Ladner voluntarily provided material to be selected for a veteran's appreciation event, wrote a bio that portrayed his service that he knew would be published on social

[173] *Id.*
[174] *See id.* at 355. C.M. publicly endorsed Trump and called Hillary Clinton "deplorable."
[175] 106 Cal. Rptr. 3d 399, 428 (Cal. App. 2010).
[176] 378 F. Supp. 3d 468, 477 (W.D.Va. 2019).
[177] *Id.* at 514.
[178] *Id.*
[179] *Id.*
[180] *Id.* (internal quotations and citations removed).
[181] *Id.* (internal quotations and citations removed).
[182] *Tipton v. Warshavsky*, 32 Fed. Appx. 293, 295 (9th Cir. 2002).
[183] 806 S.E.2d 905 (Ga. Ct. App. 2017).

media, and rode on a parade float.[184] The court noted the publicity that was "publicly announced" on Twitter by the Holly Springs Police Department and the local press. Ladner thus "took action that raised his public profile."[185] In addition, after the accident occurred, Ladner "took action that raised his public profile in its aftermath,"[186] issuing a public statement and giving interviews to local media.

Two cases dealt with advertising and public relations activities and whether these would lead a business to become a limited-purpose public figure. In *Franklin Prescriptions v. New York Times*,[187] a case involving online pharmacies, the court ruled that engaging in regular online advertising did not automatically qualify as voluntarily injecting oneself into a controversy. The court wrote that the pharmacy in question was "a neutral party playing no part in the controversy of 'online' pharmacies as it only posted a Website for information similar to an advertisement in a telephone directory."[188] The pharmacy had not engaged in an "advertising blitz," something that could have transformed it into a limited-purpose public figure. Rather, its "limited involvement" with the internet was "too remote and tenuous to consider it a public figure."[189] The pharmacy "merely provided an information only Website on the internet and did not invite public attention, comment or criticism regarding the controversy of making drugs available via the internet."[190]

In contrast, in *Ampex Corp. v. Cargle*, the case involving posts by a former employee of Ampex, the California appellate court determined that the corporation had injected itself into the controversy by writing internet posts, press releases, and an annual statement.[191] The court wrote:

> Although respondents deny inserting themselves into the controversy, they did, by way of press releases and letters posted on their Web site. For example, Ampex's July 2001 press release announcing the discontinuance of iNEXTV attributed its decision to 'adverse capital market conditions.' As well, Chairman Bramson's 2000 annual letter, also posted on the Ampex Web site, touted the significance of iNEXTV to Ampex's success.[192]

Thus, while in *Franklin Prescriptions* an online advertising campaign was not enough to qualify as injecting the pharmacy into the public controversy, the *Ampex Corp.* court found public relations material posted to the internet qualified as voluntary injection into a public controversy.

Access to media

In the two cases involving viral videos and the one involving social media posts about jet skis, three courts discussed how voluntarily working with traditional media was part

[184] *Id.* at 912.
[185] *Id.* The court wrote that Ladner "voluntarily sought public recognition for his military service by applying to participate in the Hunt for Heroes event; writing a bio that portrayed his service, which he knew would be published; and riding on a parade float that bore his name as one of the wounded veterans." The court found that this "placed the subject of his military service before the public, inviting attention and comment" and noted that his participation in the event was publicly announced on Twitter and in the local press. *Id.*
[186] *Id.*
[187] 267 F. Supp. 2d 425 (E.D. Pa. 2003).
[188] *Id.* at 437.
[189] *Id.*
[190] *Id.* at 440.
[191] 128 Cal. Rptr. 3d at 870.
[192] *Id.*

of the limited-purpose public figure equation. In these three cases, the plaintiffs were found to be limited-purpose public figures in part because their social media posts led to requests for interviews by the mainstream media. Gilmore, the individual who filmed the viral video at the "Unite the Right" rally,[193] was found to have injected himself into the controversy of the "meaning underlying the Unite the Right rally and associated counter-protests."[194] The court wrote that Gilmore had "spoke[n] with the press on multiple occasions in the hours and days after the rally."[195] Importantly, Gilmore went beyond simply being an eyewitness to the attack. Although he did not seek out the interviews on network news, he "consented to appear" on the programs and "voluntarily penned a Politico editorial."[196] The court noted that in addition to simply providing a factual account of what happened, Gilmore made public commentary on the rally organizers' views and President Trump's reaction to the rally,[197] and his original Twitter post was meant to influence public opinion about the rally.[198] The court wrote that this indicated Gilmore intended to influence the resolution of the public debate about the meaning of the rally.[199]

In *Hibdon v. Brabowski*,[200] the jet ski case, the Court of Appeals of Tennessee wrote that the plaintiff was a limited-purpose public figure because he injected himself into the controversy by "boasting about his jet ski modifications and speeds"[201] on the internet, had "access to and effective means of communication, both through news groups and through SPLASH Magazine,"[202] and he "was the figure at the center of the controversy."[203] Thus, although the opinion in the case focused heavily on social media and the interaction on social media among the plaintiff and the defendants, the opinion also included discussion of the role *SPLASH Magazine* played in the case. Therefore, it is difficult to say that the plaintiff's internet behavior *solely* transformed him into a limited-purpose public figure, although this was a key factor in the decision.

In *McCafferty v. Newsweek Media Group, Ltd.*, the case involving Trump's "Mini-me," C.M., the court found that C.M. was a limited-purpose public figure in part because he "enjoy[ed] significant greater access to the channels of effective communication than his peers."[204] To support this, however, the court wrote, "One of C.M.'s videos has been watched hundreds of thousands of times, and news outlets both here and abroad have sought him out to discuss his political exploits."[205] Thus, the court left it unclear whether a viral video viewed hundreds of thousands of times alone would have been enough to qualify as having greater access to channels of effective communication.

[193] 370 F. Supp. 3d at 642.
[194] *Id.* at 667–68.
[195] *Id.* 668.
[196] *Id.*
[197] *Id.*
[198] *Id.* at 669.
[199] *Id.*
[200] 195 S.W.3d 48.
[201] *Id.* at 62.
[202] *Id.*
[203] *Id.*
[204] 955 F. 3d 352, 359 (2020).
[205] *Id.*

The future of the limited-purpose and involuntary public figure

Do we all run the risk of becoming public figures if we are the subject of viral content on the internet? Does society really believe that an individual's participation in an online forum or public appearance where they might be recorded automatically makes them a public figure if the content goes viral? Using this reasoning, could a private plaintiff even exist in a world of viral content? This standard would suggest that all individuals who appear in public or post on the internet take the risk of becoming public figures—a revolutionary and perhaps dangerous thought. This is clearly not the current expectation in our society. Although we live in a world where many people strive to be "social-media famous," many individuals continue to express surprise, shock, and embarrassment when they "go viral." Therefore, the courts need to establish appropriate standards.

Limited-purpose public figures

Requiring everyone who is the subject of viral content to prove actual malice in a defamation lawsuit represents a "pay to play" mentality. That is, if you want to engage in free speech on the internet or risk a viral video of you appearing on the internet, you need to "pay up" by accepting that you'll automatically be a public figure if you sue for defamation. Danielle Keats Citron has referred to this as the "internet as a Wild West free speech zone" approach.[206] The internet, however, is increasingly becoming indispensable to public dialogue.[207] Social media platforms allow ordinary people to communicate with government officials, government staffers, and other opinion leaders. Additionally, the prevalence of mobile phones means that many people now carry high-quality cameras in their pockets that can easily record others in public. They can distribute the video to the world nearly instantaneously via social media. But requiring private individuals to automatically become a public figure whenever they comment on a public controversy or appear in public would decrease freedom of speech on the internet. Many private figures would not be willing to give up their private figure status, and thus, speech would be chilled. But this does not demand a brand-new standard that makes everyone a public figure. Rather, existing standards can be adjusted so that online speech and other online viral content are treated similarly to offline speech. As Citron has noted, online speech "deserves the same protection as offline speech. No more, no less."[208]

Following a modified approach, courts should first realize that the "self-help" rationale of *Gertz* applies to many more individuals today. The rationale could be applied to anyone with a Twitter account or anyone in a viral video, making many more individuals public figures. Today, nearly everyone has access to some channel of communication through social media sites. Public official, public figures, and traditional news media can all enter dialogue with random private individuals. In addition, the traditional media's increasing use of viral content to generate content means that more people, in

[206]Danielle Keats Citron, Hate Crimes in Cyberspace 26 (2014).
[207]*See, e.g., Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) ("[Social media sites] can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard").
[208]Citron, *supra* note 218, at 26.

some form, have "access to the media" if they post something that goes viral or appear in a viral video. Therefore, in an age where we all have "access to the media" in some form, courts should state that alone this not a legitimate factor in the limited-purpose public figure equation.

Similarly, whether a social media account is public should not automatically transform the individual into a public figure. Requiring everyone to make all their social media posts private robs individuals of an important free speech platform and would hinder online expression. An extremely large social media following could be part of the equation. In addition, voluntary interaction with traditional media in addition to a viral post of video could be considered. It has long been held that "a private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention,"[209] but courts have ruled that interacting with the media can elevate someone to public figure status.[210] While the courts appeared to adopt this second approach in *Gilmore v. Jones*,[211] *Hibdon v. Brabowski*,[212] and *McCafferty v. Newsweek Media Group, Ltd.*,[213] an explicit statement from the courts would have helped to clarify the issue.

Next, courts should reinforce that a foundational characteristic of public figures is that they must act voluntarily. A second, and perhaps more important, criterion of the limited-purpose public figure doctrine, however, is that they must enter the debate to advocate a position. These should be the two guiding questions.

These standards should consider the intent of the individual who entered the public controversy. Did the plaintiff intend for their comment to be brought into a larger focus in order to sway public opinion? In addition, courts must also be sure to focus on the "influence prong" of the limited-purpose public figure test. Did the plaintiff voluntarily try to affect the outcome or influence public opinion about the public controversy prior to the allegedly defamatory statement via social media? Once the court determines a public controversy exists, it should determine whether the plaintiff voluntarily played a role in the controversy to influence public opinion. Voluntary action on social media could include *repeated* participation in platforms with clear evidence that the plaintiff was attempting to influence public opinion. Courts could also consider whether the plaintiff engaged others of opposing or similar views online or in a viral video. Voluntary actions in viral videos could be attempts to verbally or otherwise influence others. These questions are closely related to the long-held necessity that limited-purpose public figures "actively seek publicity." For example, the courts in *Gilmore v. Jones*,[214] *Hibdon v. Brabowski*,[215] and *McCafferty v. Newsweek Media Group, Ltd.*[216] all explicitly or implicitly noted that the plaintiffs' original internet posts were designed to

[209] *Wolston v. Reader's Digest*, 443 U.S. 157, 167 (1979).
[210] *See, e.g.*, *Anaya v. CBS Broadcasting*, 626 F. Supp. 1158 (D.N.M. 2009) (holding that a defendant was transformed over time into a limited-purpose public figure because of her "concerted effort to publicize exonerating evidence" about herself); *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175 (Ga. Ct. App. 2001), cert. denied, 2002 Ga. LEXIS 104 (2002) (holding that the plaintiff was a limited-purpose public figure after he voluntarily gave a dozen interviews to local and national media outlets). *Atlanta Journal-Constitution*, 555 S.E.2d at 185.
[211] 370 F. Supp. 3d 630.
[212] 195 S.W.3d 48.
[213] 955 F. 3d at 359.
[214] 370 F. Supp. 3d at 642.
[215] 195 S.W.3d 48.
[216] 955 F. 3d 352.

influence public opinion, even if in *Gilmore* and *Hibdon* the courts also held that the plaintiffs' later interactions with traditional media contributed to their public figure status.

Finally, courts could look at what internet groups the plaintiff belongs to. The internet is scattered with unique affinity groups where participants can share their views with other supposed like-minded individuals. Participation in these groups could be evidence of attempts to influence public opinion as well. Even when one is arguing an opinion to others who have the same opinion, there is an effort to reinforce public opinion on the topic that would qualify a plaintiff as a limited-purpose public figure.

Engaging in an online conversation in a public forum, however, without an attempt to sway public opinion should not automatically make someone a public figure. If there is evidence that an individual's post was a one-time posting that went viral without evidence that it was part of a pattern of posts that served to inject the plaintiff into the controversy in question, then the plaintiff should not be considered a limited-purpose public figure. The plaintiff should have to do more than merely become associated with a public controversy to become a limited-purpose public figure. Even if a tweet goes viral or is covered by the legacy media and garners a great deal of attention, that doesn't necessarily mean that an individual was trying to influence public opinion.

The good news is that while scholars have wondered whether courts would start considering everyone a public figure in the age of the internet for decades, the courts seem to be adjusting established precedent to deal with cases involving viral content, rather than making rash changes to existing law. For example, the federal district court's approach in *Gilmore v. Jones*[217] is illustrative of this approach. In the case, the court used an established five-part limited-purpose public figure test that included access to effective channels of communication, a voluntariness requirement, and a requirement that the plaintiff sought to influence public opinion about the controversy.[218] The court found the Gilmore had access to effective channels of communication because of his social media accounts and his multiple interactions with news media.[219] It then analyzed the content of Gilmore's voluntary[220] interactions with the news media to determine that rather than simply being a "witness to history" who happened to be in the wrong place at the wrong time, he sought to influence the resolution of the public debate about the meaning of the Unite the Right rally.[221] Finally, the court found Gilmore's purpose in posting the viral video to Twitter in the first place was to influence public perception about the rally.[222] Thus, the court found Gilmore did much more than simply post content that went viral.

Applying this standard to Matt Baish, his single post that went viral on October 2, 2019, would not make him a limited-purpose public figure for his original Facebook posts about climate activist Greta Thunberg's rally *unless* the posts was part of a larger pattern of behavior related specifically to climate change or gun control. If Baish made

[217]370 F. Supp. 3d 630.
[218]*Id*. at 667.
[219]*Id*. at 668.
[220]*Id*. ("Although Gilmore did not solicit interview requests he voluntarily 'consented to appear' when asked, and voluntarily penned a Politico editorial.")
[221]*Id*.
[222]*Id*. at 669. ("Gilmore's motivation for posting his footage of Field's attack was to rebut 'media outlets [that] were suggesting the incident was something other than a deliberate attack.'")

a single post of "dont (sic) have my sniper rifle"[223] and this single post went viral, he should not automatically be a limited-purpose public figure. Climate change and gun rights are both "real dispute[s], the outcome of which affects the general public or some segment of it in an appreciable way."[224] And Baish arguably injected himself to at least some extent by making a comment about using a sniper rifle on Thunberg. But if this was the only time that Baish had commented on either climate change or gun rights, there is no evidence he entered into those two controversies in order to affect the outcome or influence public opinion about these public controversy via social media posts. His statement "dont (sic) have my sniper rifle" was crude and immature. But it certainly wasn't an attempt to convince others climate change is not real or that the Second Amendment should protect the owning of sniper rifles. It was a one-time comment that became controversial, but lacking other evidence of attempts to influence public opinion in these two specific public controversies certainly should not transform him into a limited-purpose public figure for a defamation suit related to those controversies.

It is important to note, however, that Baish—a teacher whose comment suggested a teenage climate activist should be shot—clearly injected himself in a new public controversy when his comment and the controversy it created on the internet were deemed serious enough for him to garner national news coverage and to be placed on leave. A teacher posting this type of public comment should expect a public controversy to result and should be considered a public figure for comments related to this new controversy that he created. The controversy Baish created is not about climate change or gun rights, however, but rather about suggesting criminal/terrorist use of a gun to silence someone with whom you disagree. Any suit instigated related to defamatory comments made about this controversy should require a showing of actual malice.

Similarly, Sandmann, the high schooler photographed with an Indigenous protester in Washington, DC, would not initially be considered a limited-purpose public figure under this test. While there were several public controversies surrounding the events—the Trump administration, the treatment of Indigenous peoples, and so on—Sandmann did little to inject himself into these controversies other than wear a MAGA cap.[225] In addition, beyond wearing the cap, Sandmann did not engage in any behavior that day designed to influence public opinion about a public controversy.[226] According to Sandmann's complaint against the *Washington Post*, he had "zero history of political activism … and did not exhibit any such conduct when confronted … at the National Mall."[227] Therefore, for the purpose of a defamation lawsuit, it is unlikely Sandmann

[223]Padilla, *supra* note 1.
[224]627 F. 2d at 1297-98.
[225]Michael E. Miller, *Viral Standoff Between a Tribal Elder and a High Schooler Is More Complicated Than It First Seemed*, Wash. Post (Jan. 22, 2019), https://www.washingtonpost.com/local/social-issues/picture-of-the-conflict-on-the-mall-comes-into-clearer-focus/2019/01/20/c078f092-1ceb-11e9-9145-3f74070bbdb9_story.html (discussing the lack of video evidence to support claims that students shouted "Go back to Africa" or "Indians in my state are drunks or thieves").
[226]*Sandmann v. WP Company LLC*, No: 2:19-cv-00019-WOB-CJS (E.D. Ky., Jul. 26, 2019) at 3 ("Sandmann did not confront Phillips or move toward him, and Phillips made no attempt to go around Sandmann. Sandmann remained silent and looked at Phillips as he played his drum and sang").
[227]Complaint, *Sandmann v. WP Company LLC*, No: 2:19-cv-00019-WOB-CJS (E.D. Ky., Feb. 19, 2019). *See also Covington Catholic High School Student Nick Sandmann's Statement*, Wash. Post (Mar. 1, 2019), https://www.washingtonpost.com/covington-catholic-high-school-student-nick-sandmann-s-statement/d6420bbf-5fd3-49ca-8419-c46851e2f9f7_note.html?questionId=4019a36f-e14e-4eb4-93ef-49afee7b84fc&utm_term=.9047d655425a&itid=lk_inline_manual_2 ("I never interacted with this protestor. I did not speak to him. I did not make any hand gestures or other aggressive moves … I believed that by remaining motionless and calm, I was helping to diffuse the situation").

would have to prove actual malice under this test. Like others who see themselves unwillingly thrust into a public controversy and then grant media interviews, however, for any defamatory statements made after Sandmann gave interviews about his encounter, Sandmann would become a limited-purpose public figure. Sandmann gave interviews to the Today Show[228] and FOX News,[229] gave a speech at the Republican National Convention,[230] and then gave another interview to FOX News[231] about his speech at the Republican National Convention.

Involuntary public figures

More importantly, the involuntary public figure is no longer a viable concept in the age of viral media content, and courts should abandon it. Already fraught with problems throughout its history, the involuntary public figure concept is especially damaging when applied to viral content. It is important to remember that even though the *Gertz* Court emphasized that a defamation plaintiff can become an involuntary public figure "through no purposeful action of his own," such public figures were "exceedingly rare" in 1974.[232] That is less likely to be true today when social media posts and videos taken without our consent can easily go viral and mainstream media elevate and amplify it with their coverage.

Hopkins argued that the doctrine provides important protections for the news media.[233] But such protections must be balanced with individuals' reputational rights and their ability to participate in public life without constant fear that they will have to prove actual malice in a defamation suit. In an age where it is so easy to unwittingly become the center of widespread attention, the existence of the involuntary public figure doctrine tips the scales too far in the direction of protecting the news media.[234]

The Court held in *Time, Inc. v. Firestone*,[235] *Wolston v. Reader's Digest*,[236] and *Hutchinson v. Proxmire*[237] that there are some situations where plaintiffs are dragged into the spotlight unwillingly without becoming a public figure. In *Firestone*, the Court noted Firestone did not volunteer to be in a public controversy and had no choice but to turn to the court system to dissolve her marriage. In *Wolston* the Court concluded

[228]Eun Kyung Kim, *Nick Sandmann on Encounter with Nathan Phillips: "I Wish I Would've Walked Away,"* TODAY (Jan. 23, 2019), https://www.today.com/news/nick-sandmann-interview-today-show-s-savannah-guthrie-encounter-native-t147242
[229]Matt London, *"Covington Kid" Nick Sandmann Says He's Lived Under "Constant Threat" for Over a Year*, Fox News (Apr. 13, 2020), https://www.foxnews.com/media/nick-sandmann-covington-lincoln-memorial-media.
[230]Matt Pearce, *At the RNC, Former Covington Catholic High Student Nicholas Sandmann Attacks the News Media*, L.A. TIMES (Aug. 25, 2020), https://www.latimes.com/politics/story/2020-08-25/rnc-nicholas-sandmann
[231]Caleb Parke, *Nicholas Sandmann: I Would've Given Same Speech at DNC if They "Cared About Holding the Media Accountable,"* Fox News (Aug. 26, 2020), https://www.foxnews.com/media/rnc-nick-sandmann-speech-covington-catholic-media-bias-trump.
[232]418 U.S. at 345.
[233]Hopkins, *supra* note 80, at 45. "There are individuals who become embroiled in public events through no will of their own and, because of their involvement, become targets of public interest and, therefore, of the media. The media deserve protection in reporting on these involuntary public figures, and that protection should be equivalent to the protection media receive in reporting on public officials, all-purpose public figures, or limited-purpose public figures." *Id*.
[234]In the end, Hopkins found the involuntary public figure doctrine was so problematic in lower courts that he also recommended the Court abandon it. *Id*. at 46 (writing that the Court should eliminate both the involuntary public figure and limited-purpose public figure categories of defamation plaintiffs and revive the "Rosenbloom Rule").
[235]424 U.S. 448.
[236]443 U.S. 157.
[237]443 U.S. 111.

the plaintiff was "dragged unwilling into the controversy." Likewise, simply because Wolston garnered media attention did not automatically transform him into a limited-purpose public figure. The Court wrote that although events he was involved in were "newsworthy," the "simple fact that these events attracted media attention [was] not conclusive of the public-figure issue."[238] Finally, in *Hutchinson v. Proxmire*, the Court wrote that libel plaintiffs can't be turned into public figures via the behavior of the defendants, noting, "Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure."[239]

Sandmann is an excellent modern-day example of how the involuntary public figure doctrine could be applied in an overly broad way to someone who was simply in the wrong place at the wrong time.[240] Although multiple media outlets caricatured Sandmann as a smirking teenage racist,[241] the entire unedited video raised doubts about what really happened. Upon further review, Sandmann largely appeared to be "an awkward teenager watching a curious scene with his peers."[242] Thus, Sandmann should not be considered an involuntary public figure because of the encounter, even though he was caught up in a public controversy. It's true that today many individuals become newsworthy for being in the wrong place at the wrong time or for being recorded engaging in questionable behavior. But today it has become so easy to be dragged into matters of public concern that involuntary public figure status chills participation in public life, rather than protecting speech.[243] Although the involuntary public figure might have been "exceedingly rare" in the 1970s, the same thing can't be said in 2022. As the Court wrote in *Wolston*, even though someone is involved in "newsworthy" events, the "simple fact that these events attracted media attention is not conclusive of the public-figure issue."[244]

In this way, current doctrine could be modified in several ways to protect the news media, while also providing protection for individuals' privacy rights. According to Hopkins's research, several courts that have used the involuntary public figure status have used "the assumption of risk" concept as a stand-in for "voluntary injection,"[245] a concept that could be applied to almost all individuals who post on social media or who engage in behavior they should know is likely to go viral if filmed. Being on the internet is inherently risky for anyone attempting to maintain their status as a private individual, as is engaging in extreme behavior or affirmative newsworthy behavior in public. By making a sensational post on Facebook, for example, Matt Baish took the risk his post would go viral. As one federal court wrote, "[A] person who engages in conduct that unintentionally or unknowingly attracts public attention might be classed as … [a] public figure because in some sense he can be said to have assumed the risk of his own conduct."[246] Or, as Hopkins summarized, "Courts held that 'a high degree

[238]*Id.* at 167.
[239]443 U.S. at 135.
[240]*Sandmann v. WP Company LLC*, No: 2:19-cv-00019-WOB-CJS (E.D. Ky., Jul. 26, 2019) at 3 ("Sandmann did not confront Phillips or move toward him, and Phillips made no attempt to go around Sandmann. Sandmann remained silent and looked at Phillips as he played his drum and sang").
[241]*See generally* Olivo, Wootson, Jr., & Heim, *supra* note 10.
[242]*Id. See also* Miller, *supra* note 241.
[243]*See, e.g.*, Skinner-Thompson, *supra* note 29, at 169–72 (discussing how citizen recordings can infringe on the corresponding First Amendment rights of those trying to maintain their privacy).
[244]443 U.S. at 167.
[245]Hopkins, *supra* note 80, at 25–26.
[246]*Schultz v. Reader's Digest Ass'n*, 468 F. Supp. 551, 569 (E.D. Mich. 1979).

of public activity' or a 'high degree of affirmative conduct' on the part of libel plaintiffs was important to being designated as involuntary public figures because a plaintiff taking some action resulting in public attention is different from a plaintiff who received attention without any action."[247] Such an approach applied to social media and viral video content, however, would mean that every post or video that went viral would result in a plaintiff having to prove actual malice as an involuntary public figure.

This approach is also preferable to a return to *Rosenbloom v. Metromedia, Inc.* As noted above, in *Rosenbloom* a plurality of the Court decided that in all defamation cases involving "reports of matters of public interest," plaintiffs would have to prove actual malice to prevail. This standard would swallow private speech on the internet, effectively making nearly all plaintiffs who commented on anything related to a public interest or appeared in a viral video of public interest be required to prove actual malice. Even casual internet users or anyone caught on video could become a public figure. This approach would chill as much speech as an approach that automatically made every social media user a limited-purpose public figure.

Conclusion

Many of our defamation precedents date to the 1960s and 1970s, long before the internet was widely accessible to the public. As a result, some are problematic. But the courts have at their disposal tests for limited-purpose public figures that can be applied to social media posts. There is no need to radically change that part of the law of defamation to adapt to modern communication realities. There is no need to return to the *Rosenbloom* rule, abandon the limited-purpose public figure doctrine entirely, or declare that everyone who decides to post on the internet or anyone who ends up in a viral video is automatically a public figure. Courts should instead focus on the intent of the plaintiff's decision to post on social media or their behavior in the viral video. Did the plaintiff try to affect the outcome or influence public opinion about the public controversy via his or her social media posts or their actions that were recorded? By examining the content of viral media, the frequency and number of posts by the plaintiff, and other aspects of the plaintiff's behavior before the viral media content was published, courts can use established tests to determine when a plaintiff should properly be categorized as a limited-purpose public figure. Other areas of the law, however, need more proactive change. The time has come for courts to abandon the involuntary public figure doctrine. This doctrine is outdated and has no place in the age of viral media content. By adopting the approaches highlighted in this article and dropping the concept of involuntary public figures, courts can apply the actual malice standard to individuals who voluntarily enter the public sphere while protecting the reputational rights of individuals who do little to nothing of their own volition to invite public attention.

[247]Hopkins, *supra* note 80, at 26.