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Patrick H. Hunt

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## Tortious Tweets: A Practical Guide to Applying Traditional Defamation Law to *Twibel*<sup>1</sup> Claims

*“A reputation once broken may possibly be repaired, but the world will always keep their eyes on the spot where the crack was.”*<sup>2</sup>

### INTRODUCTION

On March 17, 2009, Courtney Love expressed her outrage with the “Boudoir Queen,” Dawn Simorangkir, on Twitter<sup>3</sup> during a business dispute over \$4,000.<sup>4</sup> Simorangkir filed a defamation action in the Superior Court of Los Angeles County, claiming Love’s tweets<sup>5</sup> injured her reputation and negatively affected her clothing business.<sup>6</sup> A week before trial, Love settled the claim for \$430,000.<sup>7</sup> Following the settlement, Simorangkir’s attorney

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1. The term *twibel* is used to describe libelous statements posted on Twitter. See “Don’t Twibel on Me”: Tweets as Libel Lawsuits, JUSTICIA.COM (Apr. 1, 2011), <http://onward.justia.com/2011/04/01/dont-twibel-on-me-tweets-as-libel-lawsuits/>.

2. Mary Eule, *Your Reputation—Take It Seriously*, EZINEARTICLES (Oct. 17, 2005), <http://ezinearticles.com/?Your-Reputation---Take-It-Seriously&id=83895> (quoting Joseph Hall); @AndyBeal, TWITTER (Feb. 15, 2010), <https://twitter.com/#!/andybeal/status/9169919667> (quoting Joseph Hall).

3. Twitter is a “real-time information network” used to share the latest information about what users find interesting. See *About*, TWITTER, <http://twitter.com/about> (last visited Nov. 8, 2011). See also discussion *infra* Part II.

4. Matthew Belloni, *Courtney Love to Pay \$430,000 in Twitter Case*, REUTERS, Mar. 3, 2011, available at <http://www.reuters.com/article/2011/03/04/us-courtneylove-idUSTRE7230F820110304>.

5. The tweets in question included: “austin [sic] police are morethan [sic] ecstatic to pick her up she has a history of dealing cocaine, lost all custody of her child, assault and burglary”; “stay away well well away, and etsy cant [sic] wait to see [sic] the backof [sic] her, so goodbye asswipe nasty lying hosebag [sic] thief, now for pleasant things”; “scorched earth ignore and blacklist, few people ever deserve our total ignoring butthis [sic] thief and burglar does, austin [sic] police loathher!orange [sic];” “as one of her many bullied victims smashes her face soon as shes an assault addict herself ( theres [sic] apprently [sic] prostitution in her record too”; and “little bassists. goodbye ‘boudoir queen’ to be replacedby [sic] 100s of great indie designers on etsy that are trained that do know whattheyredo [sic].” Complaint at 6–7, *Simorangkir v. Love*, No. BG410593 (Cal. Sup. Ct. 2009), available at [http://www.citmedialaw.org/sites/citmedialaw.org/files/2009-03-26-Simorangkir%20Complaint\\_0.pdf](http://www.citmedialaw.org/sites/citmedialaw.org/files/2009-03-26-Simorangkir%20Complaint_0.pdf).

6. *Id.*

7. Shea Bennett, *The Price of Defame—Courtney Love’s Twitter Rant Costs Her \$430,000*, MEDIABISTRO (Mar. 4, 2011, 11:34 AM), [http://www.mediabistro.com/alltwitter/courtney-love-defame-lawsuit\\_b6126](http://www.mediabistro.com/alltwitter/courtney-love-defame-lawsuit_b6126).

opined, “One would hope that, given this disaster, restraint of pen, tongue, and tweet would guide Ms. Love’s future conduct.”<sup>8</sup> It didn’t.

While the *Love v. Simorangkir* litigation was pending, Love approached Rhonda Holmes at the Gordon & Holmes Law Firm in an effort to reenlist<sup>9</sup> Holmes as her attorney in a property dispute involving Love’s late husband, Kurt Cobain.<sup>10</sup> Holmes informed Love that Love’s substance abuse problem would preclude Holmes from serving as her attorney.<sup>11</sup> In response, Love tweeted, “I was f--ing devastated when Rhonda J Holmes Esq [sic] of San Diego was bought off . . . .”<sup>12</sup> Holmes and the law office filed a defamation suit alleging that Love’s tweets caused “irreparable damage to plaintiffs’ business, name[,] and reputation.”<sup>13</sup> Love’s motion to dismiss was denied, leaving open the possibility that a jury will decide whether the tweet could be construed as stating actual facts<sup>14</sup> about Ms. Holmes.<sup>15</sup>

Defamation actions arising from statements posted to Twitter are not limited to celebrities.<sup>16</sup> In July 2009, the Horizon

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8. Jason Beahm, *Courtney Love Twitter Defamation Case Settled: Love Pays \$430,000*, FINDLAW (Mar. 7, 2011, 5:48 AM) [http://blogs.findlaw.com/celebrity\\_justice/2011/03/courtney-love-twitter-defamation-case-settled-love-pays-430000.html](http://blogs.findlaw.com/celebrity_justice/2011/03/courtney-love-twitter-defamation-case-settled-love-pays-430000.html).

9. Gordon & Holmes previously represented Love in the Cobain property dispute on the condition that Love refrain from drug use during the attorney–client relationship. *Id.* Love fired the firm and retained another attorney. Robert Kahn, *Lawyers Claim Courtney Love Defamed Them*, COURTHOUSE NEWS SERV. (May 27, 2011), <http://www.courthousenews.com/2011/05/27/36895.htm>. Later that year, Love became dissatisfied with her attorney and solicited the assistance of Gordon & Holmes again. *Id.*

10. *Id.*

11. Eriq Gardner, *Courtney Love Twitter Defamation Case Moves Forward*, THE HOLLYWOOD REP., Sept. 23, 2011, <http://www.hollywoodreporter.com/thr-esq/courtney-love-twitter-defamation-case-239702>.

12. *Id.*

13. Complaint at 4, *Gordon & Holmes v. Love*, No. BC-462438, 2011 WL 2062323 (Cal. Super. Ct. May 26, 2011).

14. The First Amendment protects speech that cannot “reasonably [be] interpreted as stating actual facts about” an individual. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 (1990) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988)). Accordingly, Holmes will only recover if a reasonable reader would infer that Love’s tweet conveys “actual facts” about her.

15. Gardner, *supra* note 11.

16. In another defamation suit, singer Johnny Gill was sued by Ira DeWitt for tweeting that she hired another vocalist to finish his song and leaked an unofficial version. Lauren Dugan, *Twitter Defamation Cases Are Heating Up*, MEDIABISTRO (Aug. 17, 2011, 3:15 PM), [http://www.mediabistro.com/alltwitter/twitter-defamation-cases-are-heating-up\\_b12799](http://www.mediabistro.com/alltwitter/twitter-defamation-cases-are-heating-up_b12799). See also Julie Hilden, *Libel by Twitter? The Suit Against Kim K̄ardashian over the “Cookie Diet”*, FINDLAW (Jan. 4, 2010), <http://writ.news.findlaw.com/hilden/20100104.html>

Management Group filed a libel action against Amanda Bonnen for tweeting, “Who said sleeping in a moldy apartment was bad for you? Horizon realty thinks it’s okay.”<sup>17</sup> Fortunately for Bonnen, who could not afford defense counsel, several attorneys took the case pro bono and successfully moved for dismissal on the grounds that “the tweet was not defamatory as a matter of law because the tweet was indefinite, contained no verifiable facts, was not sufficiently connected to Horizon and when considered in the context of Bonnen’s other tweets, should be subject to innocent construction.”<sup>18</sup>

More recently, Dr. Jerry Darm sued blogger Tiffany Craig in Oregon for \$1,000,000 claiming that she damaged his reputation by tweeting about prior disciplinary action taken against the physician.<sup>19</sup> After viewing one of Dr. Darm’s television commercials, Craig performed a Google search for his name.<sup>20</sup> She then revealed her findings on Twitter, stating: “[A] little bit of research into @drdarm revealed a pretty nasty complaint filed against him for attempting to trade treatment for sex in 2001.”<sup>21</sup> Darm and Craig reached a settlement agreement on October 7,

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(discussing a twibel suit against Kim Kardashian for tweets refuting a third party’s claim that Kardashian was on a doctor’s “cookie diet”).

17. See Verified Complaint at 2, *Horizon Group Management, LLC v. Bonnen*, No. 2009-L-008675, 2009 WL 2231162 (Ill. Cir. Ct. July 20, 2009).

18. *Twitter Defamation Case Dismissed*, LESLIEREIS.COM (Jan. 23, 2010), [http://www.lesliereis.com/pb/wp\\_b375b750/wp\\_b375b750.html](http://www.lesliereis.com/pb/wp_b375b750/wp_b375b750.html). Bonnen’s attorney argued that the tweets, when considered together, could not be interpreted as stating actual facts about Horizon. 2-615 Motion to Dismiss, *Horizon Grp. Mgmt., LLC v. Bonnen*, No. 2009-L-008675 (Ill. Cir. Ct. Nov. 10, 2009), available at <http://www.citmedialaw.org/sites/citmedialaw.org/files/2009-11-10-Bonnen%20Motion%20to%20Dismiss.pdf>. However, the court’s dismissal order did not give reasons for the dismissal. See Order, *Horizon Grp. Mgmt., LLC v. Bonnen*, No. 2009-L-008675 (Ill. Cir. Ct. Jan. 20, 2010), available at <http://www.citmedialaw.org/sites/citmedialaw.org/files/2010-01-20-Horizon%20v.%20Bonnen%20Dismissal%20Order.pdf>.

19. Complaint, *Darm v. Craig*, No. 110708823, 2011 WL 2947342 (Or. Cir. July 11, 2011). See also Kara H. Murphey, *Defamation in 140 Characters or Less*, PORTLAND TRIB., Sept. 7, 2011, <http://portlandtribune.com/component/content/article?id=11881>.

20. Murphey, *supra* note 19.

21. *Id.*

2011<sup>22</sup>—approximately two weeks before the parties were due in court to continue arguing Craig’s motion to dismiss.<sup>23</sup>

The increased popularity of social media, particularly Twitter, has been accompanied by a concomitant rise in defamation lawsuits.<sup>24</sup> Despite arguments to the contrary,<sup>25</sup> the proliferation of Twitter use and the associated surge in twibel claims do not require a dramatic transformation in the legal standards applied to libel claims. The current standards continue to provide the most appropriate balance between First Amendment free speech considerations and the important state interest in protecting reputation.<sup>26</sup> This Comment seeks to assist courts confronted by twibel cases by demonstrating how traditional defamation considerations can, and should, be applied to defamatory tweets.<sup>27</sup>

The two critical components of the traditional analysis are the plaintiff’s status as a public or private figure and whether the allegedly defamatory remark relates to a matter of public or private concern.<sup>28</sup> Lower courts have set forth a number of tests to determine the status of a plaintiff in a defamation action.<sup>29</sup> These tests, coupled with several features of Twitter, provide courts with ample criteria to adjudicate whether the plaintiff is a public official–figure or private figure and, consequently, whether the

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22. Kara H. Murphey, *Blogger, Dr. Darm Settle Landmark Twitter Lawsuit*, PORTLAND TRIB., Oct. 11, 2011, <http://portlandtribune.com/component/content/article?id=13802>. Although the terms of the settlement remain confidential, the allegedly tortious tweet has not been removed from Craig’s Twitter page. *Id.*

23. Kara H. Murphey, *Twitter Standoff*, PORTLAND TRIB., Oct. 5, 2011, <http://portlandtribune.com/component/content/article?id=13399>. Craig moved to dismiss under Oregon’s anti-SLAPP law. *Id.* Anti-SLAPP laws are designed to discourage “Strategic Lawsuits Against Public Participation.” *Id.* Although Oregon’s anti-SLAPP law was a key issue in the Dr. Darm litigation, this Comment does not discuss the relationship between anti-SLAPP provisions and twibel claims.

24. *See supra* text accompanying notes 4–23.

25. The arguments for revising current defamation law in light of the media revolution are outlined in Part III *infra*.

26. *See, e.g.*, *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966) (“Society has a pervasive and strong interest in preventing and redressing attacks upon reputation.”).

27. Though this Comment focuses on defamation actions stemming from libelous communication on Twitter, the proposed approach might readily transfer to defamation claims arising from posts to other social media platforms such as Facebook and Google Plus.

28. *See generally* discussion *infra* Part I.

29. *See infra* Part I.C.2.

plaintiff must establish that the defendant acted with “actual malice”<sup>30</sup> in publishing the defamatory communication.

Additionally, a tweet’s relevance to a matter of public concern is discernable in the same manner as that of a statement published in a traditional medium. A statement on a matter of public concern published in the *New York Times* would retain its public nature if posted to Twitter.<sup>31</sup> It is possible, however, that an issue might become a matter of public concern simply by being discussed on Twitter.<sup>32</sup> This Comment will show that public issues arising from Twitter are identifiable and are easily analyzed under the traditional approach.

In order to assist courts with applying the traditional defamation standards to twibel claims, this Comment will first review the Supreme Court’s defamation case law, highlighting the emergence of the public figure distinction and “matter of public concern” considerations and the policies underlying these two factors. Part II explores the manner in which Twitter is used and discusses several of the site’s unique features that will help guide the defamation analysis. Part III outlines the arguments for revising the current defamation framework and identifies the flaws in these positions. Part IV begins by demonstrating how the traditional considerations outlined in Part I could be applied to twibel claims. This Part also addresses the importance of a broad approach to the context analysis.<sup>33</sup> Part IV argues that a straightforward approach

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30. The Court in *New York Times Co. v. Sullivan* defined *actual malice* as knowledge of falsity or a reckless disregard for the truth of the statement. 376 U.S. 254, 279–80 (1964).

31. For instance, a tweet communicating the death of Libyan Colonel Muammar el-Qaddafi relates to important public issues in the same way that an article published in the *New York Times* on the same matter does. Compare @Afterseven, TWITTER (Oct. 26, 2011), <http://twitter.com/Afterseven/status/129350664819183616> (“Qaddafi Reportedly Died of Wounds Sustained Before Capture is.gd/Yy4jBz because of course Muslims dont commit war crimes #tcot”), with Kareem Fahim et al., *Violent End to an Era As Qaddafi Dies in Libya*, N.Y. TIMES, Oct. 20, 2011, <http://www.nytimes.com/2011/10/21/world/africa/qaddafi-is-killed-as-libyan-forces-take-surt.html?r=1&scp=1&sq=gaddafi%20is%20dead&st=cse> (reporting the death of Qaddafi).

32. A user’s homepage on Twitter notes “trending topics”—that is, “the hottest emerging topics of discussion on Twitter that matter most” to the user. *FAQs About Twitter’s Trends*, TWITTER, <http://support.twitter.com/groups/31-twitter-basics/topics/111-features/articles/101125-faqs-about-twitter-s-trends> (last visited Jan. 2, 2013).

33. Context is a critical factor in at least two specific areas of defamation law. First, “[w]hether . . . speech addresses a matter of public concern must be determined by [the expression’s] content, form, and *context* . . . as revealed by the whole record.” *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (emphasis added) (quoting *Connick v. Myers*, 461 U.S. 138,

to these issues is the most effective method of extending traditional considerations to twibel claims.

### I. @SUPREMECOURT #SETTINGTHESTANDARD<sup>34</sup>

#### A. Defining #Defamation

Generally, a statement is defamatory if it “tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”<sup>35</sup> Defamation can take the form of libel (printed defamation) or slander (spoken defamation).<sup>36</sup> Although specific defamation law varies from state to state,<sup>37</sup> the plaintiff in a defamation action generally must establish four criteria to recoup damages: (1) the defendant published a false and defamatory statement about the plaintiff;<sup>38</sup> (2) the defendant made an

147–48 (1983)). Second, context analysis may aid the fact-finder in distinguishing actionable statements of “actual facts” from protected “subjective speculation” or “rhetorical hyperbole.” See *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180, 186 (4th Cir. 1998) (holding that in light of the “tenor, language, and context” of the article, the challenged statements were not defamatory because a reasonable reader would not view them as stating actual facts about the plaintiff); Lyrisa Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 939 (2000) (suggesting that statements should be considered in light of their immediate and broader social context to discern whether the communication should be interpreted as stating actual facts, “subjective speculation,” or “rhetorical hyperbole”); see also *infra* Part IV.C.

34. The use of the “@” and “#” symbols on Twitter is explained in depth in Part II *infra*.

35. RESTATEMENT (SECOND) OF TORTS § 559 (1977). See also PROSSER & KEETON ON TORTS § 111, at 773 (5th ed. 1984) (“Defamation is that which tends to injure ‘reputation’ in the popular sense; to diminish the esteem, respect, good will or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him.”).

36. 1 ROBERT D. SACK, SACK ON DEFAMATION § 2.3, at 2-8 (3d ed. 2001).

37. Compare *Kimmerle v. New York Evening Journal, Inc.*, 186 N.E. 217, 218 (N.Y. 1933) (citing *Sydney v. MacFadden Newspaper Publ’g Corp.*, 151 N.E. 209, 210 (N.Y. 1926) (“[W]ords which tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society.”), with *Madison v. Yunker*, 589 P.2d 126, 129 (Mont. 1978) (“Libel is a false and unprivileged publication by writing, printing . . . which exposes any persons to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.”).

38. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

unprivileged communication to a third party;<sup>39</sup> (3) the defendant is guilty of a level of fault arising at least to the level of negligence;<sup>40</sup> and (4) the communication is actionable per se<sup>41</sup> or causes special harm.<sup>42</sup> These criteria alone were sufficient to establish a claim for defamation until the Court's decision in *New York Times Co. v. Sullivan*.<sup>43</sup> For the first time, the *New York Times* Court considered the First Amendment implications of the common law tort of defamation.

*B. New York Times Co. v. Sullivan: @PublicOfficials  
#ActualMaliceRequired*

In *New York Times Co. v. Sullivan*,<sup>44</sup> L.B. Sullivan, the Commissioner of Public Affairs in Montgomery, Alabama, brought a defamation claim against four individuals and the *New York Times* newspaper.<sup>45</sup> Sullivan alleged that an advertisement implicitly accused him of countering Dr. Martin Luther King Jr.'s civil rights movement with "intimidation and violence."<sup>46</sup> Under instructions that the statements in the advertisement were libelous per se, the jury found for the plaintiff and awarded \$500,000 in damages.<sup>47</sup> According to then-existing Alabama law, a statement was libelous per se if it "tend[ed] to injure a person . . . in his reputation" or "bring him into public contempt."<sup>48</sup> At the time, the only defense to libel per se was truth in "all [the expression's] particulars."<sup>49</sup>

The United States Supreme Court held that requiring a commentator to prove that his criticism of official conduct is

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39. *Id.*

40. *Id.* See also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) ("[S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.").

41. Statements that are "actionable per se" render the publisher liable for defamation even though the statement does not cause special harm, unless the statement is true or the defendant was privileged to publish it. RESTATEMENT (SECOND) OF TORTS § 569 (1977).

42. *Id.* § 558.

43. 376 U.S. 254 (1964).

44. *Id.*

45. *Id.* at 256.

46. *Id.* at 258.

47. *Id.* at 256, 262.

48. *Id.* at 267.

49. *Id.*

factually true would inevitably lead to self-censorship.<sup>50</sup> To preserve the constitutional guarantees of free speech and freedom of the press, the Court held that a “public official” may not recover damages for defamatory statements addressing his official conduct unless the official can establish that the statement was made with “actual malice.”<sup>51</sup> The Court went on to define “actual malice” as “knowledge that [the statement] was false or [made] with reckless disregard of whether it was false or not.”<sup>52</sup> *New York Times* marked the first in a string of decisions that analyzed the First Amendment’s impact on the common law tort of defamation.

In *Rosenblatt v. Baer*,<sup>53</sup> the Court explained that the “public official” distinction in *New York Times* applied to governmental employees “who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.”<sup>54</sup> Defamation law protects society’s interest in preserving reputation, yet this interest conflicts with the constitutional guarantees of free speech and free press in cases where the interest in public discourse is particularly strong.<sup>55</sup> In an effort to resolve the tension between the conflicting interests, the Court held:

Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both elements [the Court] identified in *New York Times* are present and the *New York Times* malice standards apply.<sup>56</sup>

To ensure that free speech on public issues remains wide open, the Court has expanded the application of the *New York Times* “actual malice” standard to include a broader category of defamation plaintiffs.

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50. *Id.* at 279. The Court explained:

Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which “steer far wider of the unlawful zone.”

*Id.* (citing *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

51. *Id.* at 279–80.

52. *Id.*

53. 383 U.S. 75 (1966).

54. *Id.* at 85.

55. *Id.* at 86.

56. *Id.*

C. Extending #ActualMalice to @PublicFigures

1. Distinguishing @PublicFigures from @PrivateFigures

a. Curtis Publishing Co. v. Butts & Associated Press v. Walker: Effective #CounterSpeech

The “actual malice” standard was first extended to include persons that voluntarily involved themselves with the resolution of public issues. In 1967, the Court decided two companion cases—*Curtis Publishing Company v. Butts*<sup>57</sup> and *Associated Press v. Walker*<sup>58</sup>—addressing the applicability of the “actual malice” standard to “persons who are not public officials, but who are ‘public figures’ and [are] involved in issues in which the public has a justified and important interest.”<sup>59</sup>

The petitioner in *Curtis Publishing* published an article accusing Respondent Butts, the athletic director at the University of Georgia, of plotting to “fix” a football game between the University of Georgia (“UGA”) and the University of Alabama.<sup>60</sup> Prior to serving as the athletic director, Butts served as the head football coach at UGA and was well-known in the college football community.<sup>61</sup>

Walker filed the libel claim at issue in *Associated Press v. Walker* after the *Associated Press* released a news dispatch reporting that Walker led a violent crowd against federal marshals during a “massive riot” at the University of Mississippi.<sup>62</sup> The crowd was protesting federal efforts to compel the enrollment of an African American student at the university.<sup>63</sup> Walker admitted to speaking with a group of students during the rally but claimed that he advocated “restraint and peaceful protest” rather than violence.<sup>64</sup>

A majority of the Court agreed that the First Amendment limits state libel law as it relates to public officials and public figures yet disagreed about the appropriate standard that public figures must

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57. 388 U.S. 130 (1967) (plurality opinion).

58. *Id.*

59. *Id.* at 134.

60. *Id.* at 135–36.

61. *Id.*

62. *Id.* at 140.

63. *Id.*

64. *Id.* at 141. Walker was involved in the issue of physical federal intervention and openly advocated against such action. *Id.* at 140. The Court noted that he “could fairly be deemed a man of some political prominence” due to his involvement in the issue. *Id.*

prove to prevail on a defamation claim.<sup>65</sup> Chief Justice Warren's concurrence, joined by four other justices,<sup>66</sup> concluded that the *New York Times* standard extended to public figures allegedly defamed in relation to their role in matters of public concern.<sup>67</sup> Therefore, both public officials and public figures must prove that the defendant acted with "actual malice" to recover for defamatory statements related to their role in public issues.

The Court found that both Butts and Walker were public figures.<sup>68</sup> Butts's status as athletic director at UGA was likely sufficient to make him a public figure, the Court explained, and Walker's "purposeful activity" amounted to a "thrusting of his personality into the 'vortex' of an important public controversy."<sup>69</sup> Public figures are distinguishable from private figures because a public figure has "commanded sufficient continuing public interest and [has] sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements."<sup>70</sup>

Although *Curtis Publishing* and *Walker* clarified that the *New York Times* "actual malice" standard applies to both public officials and public figures, the Court gave no indication on the stance it would take with regard to private figures bringing a libel action.<sup>71</sup>

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65. *Id.* at 162 (Warren, C.J., concurring). A four-justice plurality stated that "a 'public figure' who is not a public official may . . . recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.* at 155 (plurality opinion). This standard did not carry the day, however, because four justices joined Chief Justice Warren's concurrence. *See infra* text accompanying note 66.

66. Justice Black and Justice Douglas joined Chief Justice Warren's opinion in *Curtis Publishing* to form a majority on the question of the appropriate standard for defamation of public figures, despite their view that publishers should have an absolute immunity from liability for defamation. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 336 n.7 (1974).

67. *Curtis Publ'g*, 388 U.S. at 164 (Warren, C.J., concurring).

68. *Id.* at 154-55 (plurality opinion).

69. *Id.*

70. *Id.* (citing *Whitney v. California*, 274 U.S. 357, 377 (1927)).

71. The *Curtis Publishing* plurality was unprepared to establish a standard for private plaintiffs. *See id.* at 155 n.19 ("Nor does anything we have said touch, in any way, libel or other tort actions not involving public figures or matters of public interest.").

b. *Rosenbloom v. Metromedia, Inc.: Extending #ActualMalice to @PrivateFigures*

The petitioner in *Rosenbloom v. Metromedia, Inc.*,<sup>72</sup> a distributor of nudist magazines, was arrested for violating Philadelphia's obscenity laws.<sup>73</sup> Following Rosenbloom's arrest, Respondent—a local radio station and newspaper—published reports that he was arrested for distributing “obscene literature” and was a “smut merchant.”<sup>74</sup> Petitioner Rosenbloom filed a libel action against the radio station, claiming that Respondent's characterization of the material as “obscene” constituted libel per se.<sup>75</sup> For the first time since *New York Times Co. v. Sullivan*, the Court granted certiorari to a case involving a defamation action filed by a private plaintiff on a matter of public concern.<sup>76</sup>

A plurality of the Court held that the First Amendment policy supporting the *New York Times* standard was equally as fundamental in the case of private figures.<sup>77</sup> To guard against self-censorship,<sup>78</sup> the plurality extended the “actual malice” standard to cases involving statements about a private-figure plaintiff's involvement in a public issue.<sup>79</sup>

c. *Gertz v. Robert Welch, Inc.: Abandoning #Rosenbloom*

Only three years later, the Court abandoned the *Rosenbloom* plurality's approach in *Gertz v. Robert Welch, Inc.*<sup>80</sup> The Court confirmed the holdings in *New York Times* and *Curtis Publishing*, noting that the “actual malice” standard functions as an

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72. 403 U.S. 29 (1971) (plurality opinion), *abrogated by* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

73. *Id.* at 32.

74. *Id.* at 33.

75. *Id.* at 36 (emphasis added). Respondent's publications bluntly described the literature as “obscene.” *Id.* The trial court later determined that the publications were not obscene as a matter of law. *Id.*

76. *See supra* text accompanying note 71. Until this point, the Court had only reviewed defamation cases involving public officials and public figures.

77. *Rosenbloom*, 403 U.S. at 52. The *New York Times* standard was “applied to libel of a public official or public figure to give effect to the Amendment's function to encourage ventilation of public issues, not because the public official has any less interest in protecting his reputation than an individual in private life.” *Id.* at 46.

78. The Court noted that a distinction between public and private figures “could easily produce the paradoxical result of dampening discussion of issues of public or general concern because they happen to involve private citizens.” *Id.* at 48.

79. *Id.* at 52.

80. 418 U.S. 323 (1974).

“accommodation between [the interest of the press and broadcast media in immunity from liability] and the limited state interest in the context of libel actions brought by public persons.”<sup>81</sup> The Court discarded the *Rosenbloom* approach,<sup>82</sup> however, for two reasons.

First, the primary method of recourse for any victim of defamation is “self help—using available opportunities to contradict the lie or correct the error and thereby minimize its adverse impact on reputation.”<sup>83</sup> Public officials and public figures have a greater access to the media, the Court reasoned, and therefore have a “more realistic” opportunity to counteract false statements than private figures.<sup>84</sup>

Second, the Court recognized a “compelling normative consideration” supporting a distinction between public and private figures: Public officials and public figures “must accept the certain consequences of [their] involvement in public affairs” and “run[] the risk of closer public scrutiny than might otherwise be the case.”<sup>85</sup> The public has an interest in matters that involve a “public official’s fitness for office.”<sup>86</sup>

Although these characteristics may not fairly describe every public official or public figure, the media is “entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.”<sup>87</sup> These two considerations distinguish public figures and officials from private figures because the public interest simply does not extend to the conduct of private figures.<sup>88</sup>

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81. *Id.* at 343.

82. *See supra* Part I.C.1.b (discussing the Court’s extension of the “actual malice” standard to private figures bringing a defamation action).

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

84. *Id.*

85. *Id.*

86. *Id.* at 344–45 (citing *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964)).

87. *Id.* at 345.

88. *Id.* Notably, the justifications accepted in *Gertz* for distinguishing between public and private figures were explicitly rejected by the plurality in *Rosenbloom*. *See Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), *abrogated by Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The *Rosenbloom* plurality rejected the “access to media” rationale, stating: “[T]he unproved, and highly improbable, generalization that an as yet undefined class of ‘public figures’ will be better able to respond through the media than private individuals also involved in such matters seems too insubstantial a reed on which to rest a constitutional distinction.” *Id.* at 46–47. The plurality also noted that a figure’s voluntary emergence into the public eye is immaterial to First Amendment values: “Exposure of the self to others in varying degrees is a concomitant of life in a civilized community.” *Id.* (quoting *Time, Inc. v. Hill*, 385 U.S. 374 (1967)). “Voluntarily or not, we are all ‘public’ men to some

Because the rationale supporting the heightened burden on public officials and public figures does not extend to private figures, the Court rejected the *Rosenbloom* approach and held that states may define the appropriate standard of liability for a publisher of defamatory falsehoods relating to private individuals but may not impose strict liability for defamatory falsehoods.<sup>89</sup>

Although the Court's decision in *Gertz* explains the distinguishing characteristics of public figures and officials, the Court provided little guidance to help lower courts determine whether a defamation plaintiff is a public or private figure.

## 2. @LowerCourts Try to Define @PublicFigures

The *Rosenblatt* Court established a fairly workable standard for defining a public official in a defamation action. A public official is a governmental employee whose position is one that "would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy."<sup>90</sup>

The law is less clear, however, in distinguishing between public figures and private figures. In *Gertz*, the Supreme Court discussed two reasons for distinguishing between public figures and private figures: the public figure has a greater access to the media and he has voluntarily placed himself in the public eye.<sup>91</sup> Although these characteristics explain the Court's motivation for creating the distinction between public and private figures, they do not establish a test for lower courts to use in making the distinction.<sup>92</sup> Accordingly, lower courts have crafted a test to distinguish public figures from private figures in defamation actions.<sup>93</sup>

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degree. Conversely, some aspects of the lives of even the most public men fall outside the area of matters of public or general concern." *Id.* at 48.

89. *Gertz*, 418 U.S. at 347. To recover punitive damages, however, a private-figure plaintiff must establish "actual malice." *Id.* at 349.

90. *Rosenblatt v. Baer*, 383 U.S. 75, 86-87 n.13 (1966).

91. *Gertz*, 418 U.S. at 344. See also *supra* Part I.C.1.c.

92. SACK, *supra* note 36, § 5.3.1, at 5-18.

93. *Id.* Whether an individual is a public figure for defamation purposes is a question of law for the trial court to judge. *Rebozo v. Wash. Post Co.*, 637 F.2d 375, 379 (5th Cir. 1981) (citing *Time, Inc. v. Firestone*, 424 U.S. 448 (1976)).

a. “All-Purpose” @PublicFigures Require #CelebrityStatus

There are at least two categories of public figures in defamation law: “all-purpose” public figures and “limited-purpose” public figures.<sup>94</sup> A person becomes an “all-purpose” public figure by thrusting “[himself] to the forefront of a particular public [controversy] in order to influence the resolution of the issues involved.”<sup>95</sup> These individuals “occupy positions of such persuasive<sup>96</sup> power and influence that they are deemed public figures for all purposes.”<sup>97</sup> In *Waldbaum v. Fairchild Publications, Inc.*, the Court of Appeals for the District of Columbia held that an “all-purpose” public figure is a “well-known ‘celebrity,’ his name a ‘household word.’”<sup>98</sup> The D.C. Circuit noted, “The public recognizes him and follows his words and deeds, either because it regards his ideas, conduct, or judgment as worthy of its attention or because he actively pursues that consideration.”<sup>99</sup> The *Waldbaum* Court cautioned that a person might achieve “general” fame without being known by the public at large.<sup>100</sup> The critical inquiry is whether the individual is known “to a large percentage of the well-informed citizenry.”<sup>101</sup> The court in *Waldbaum* enumerated several factors to help a court decide whether an individual is an “all-purpose” public figure:

The judge can examine statistical surveys, if presented, that concern the plaintiff’s name recognition. Previous coverage of the plaintiff in the press also is relevant. The judge can check whether others in fact alter or reevaluate their conduct or ideas in light of the plaintiff’s actions. He also can see if the plaintiff has shunned the attention that the public has given him and determine if those efforts have been successful . . . . No one parameter is dispositive; the decision still involves an element of judgment. Nevertheless, the weighing of these and other relevant factors can lead to more accurate and a more predictable

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94. See *Gertz*, 418 U.S. at 345. The *Gertz* Court also mentioned a possible third category of public figure—the “involuntary” public figure—but noted that this type of public figure is likely to be “exceedingly rare.” *Id.*

95. *Id.*

96. Did the Court mean “pervasive” power? SACK, *supra* note 36, § 5.3.2, at 5-18 n.132 (citing Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1216 n.56 (1976)).

97. *Gertz*, 418 U.S. at 345.

98. 627 F.2d 1287, 1294 (D.C. Cir. 1980).

99. *Id.*

100. *Id.* at 1295 n.20.

101. *Id.*

assessment of a person's overall fame and notoriety in the community.<sup>102</sup>

Lower courts have generally interpreted the “all-purpose” public figure test to establish a difficult burden on a defamation defendant.<sup>103</sup> As one judge noted, “[This test] sets up what amounts to a fairly strong presumption against a finding of widespread notoriety.”<sup>104</sup> Accordingly, few people are truly “all-purpose” public figures.<sup>105</sup>

*b. “Limited-Purpose” @PublicFigures & #VoluntaryThrust*

The more common category of public figures “thrust themselves to the forefront of *particular* public controversies in order to influence the resolution of the issues involved.”<sup>106</sup> These “limited-purpose” public figures must prove “actual malice” only when the defamatory communication relates to their participation in the particular controversy with which they have voluntarily associated themselves.<sup>107</sup>

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102. *Id.* at 1295. *See also* Wilson v. Daily Gazette Co., 588 S.E.2d 197, 204–05 (W. Va. 2003) (citing *Waldbaum*, 627 F.2d at 1295).

103. A defamation defendant must establish “clear evidence of general fame or notoriety in the community” for the plaintiff to be subjected to the *New York Times* “actual malice” standard as an “all-purpose” public figure. *In re Thompson*, 162 B.R. 748, 766 (Bankr. E.D. Mich. 1993).

104. *Id.*

105. *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1296 (D.C. Cir. 1980). Jerry Falwell, Ralph Nader, and Jimmy Carter are among the few plaintiffs whom courts have found to be “all-purpose” public figures. Erik Walker, *Defamation Law: Public Figures—Who Are They?*, 45 BAYLOR L. REV. 955, 960 (1993) (citing *Falwell v. Flynt*, 797 F.2d 1270 (4th Cir. 1986), *rev'd on other grounds sub nom. Hustler Magazine v. Falwell*, 485 U.S. 46 (1987)). Times have changed since *Waldbaum* was decided in 1980. It is likely that the number of “household names” has increased over the past 30 years with the innovation of the Internet, yet the rise in “all-purpose” public figures does not affect the central theme of this Comment. A rise in the number of “all-purpose” public figures does not render the traditional defamation analysis unworkable. Rather, the traditional analysis will account for the increase and ensure that speech concerning public figures remains protected under the First Amendment. *See infra* Part IV.A.

106. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) (emphasis added).

107. SACK, *supra* note 36, § 5.3.3, at 5-20. In *Marcone v. Penthouse International Magazine for Men*, the Third Circuit held that an attorney was a “limited-purpose” public figure in a libel action arising out of a magazine article indicating that the attorney was guilty of a drug crime for which he was only indicted. 754 F.2d 1072, 1087 (3d Cir. 1985). The court noted that the attorney represented many gang members in criminal actions but also met with members at the gang headquarters and took occasional weekend trips with the gangs. *Id.* at

The *Waldbaum* Court set forth a separate analysis for whether an individual is a “limited-purpose” public figure.<sup>108</sup> First, the Court must determine whether a public *controversy* exists.<sup>109</sup> Second, the court should discern the plaintiff’s role in the public controversy.<sup>110</sup> To become a “limited-purpose” public figure, the plaintiff must have played a significant role in resolving the controversy.<sup>111</sup> Third, the defamatory statement must have been “germane to the plaintiff’s participation in the controversy.”<sup>112</sup> Under the *Waldbaum* decision, a libel plaintiff will only be considered a “limited-purpose” public figure when these three prongs are met.

In addition to defining the defamation plaintiff’s public- or private-figure status, courts must examine the subject matter of the alleged defamation to determine the level of First Amendment protection afforded to the speech at issue.

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1086. The court concluded, “Given the public nature of the activities at issue here, the widespread media attention and the significant contact to the Pagans of a non-representational type, we hold that Marcone has crossed the threshold and become a limited purpose public figure.” *Id.* at 1086–87. Because Marcone was held to be a “limited-purpose” public figure, he would not have to prove “actual malice” in a libel action arising out of an issue that was not connected to his gang involvement, such as an article accusing him of adultery.

108. *Waldbaum*, 627 F.2d at 1296–98. Other courts have developed similar tests for defining “limited-purpose” public figures. *See, e.g.*, *Contemporary Mission, Inc. v. New York Times Co.*, 842 F.2d 612, 617 (2d Cir. 1988) (requiring a defamation defendant to establish that the plaintiff has (1) drawn public attention to his views to influence their views on the dispute that is the subject matter of the defamation; (2) voluntarily thrust himself into the specific public controversy; (3) assumed a prominent role in the public controversy; and (4) maintained regular access to the media).

109. *Waldbaum*, 627 F.2d at 1296. A public controversy differs from a matter of public interest in that a controversy is “a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants.” *Id.* The *Waldbaum* court noted that courts are not to question the legitimacy of the dispute. *Id.* at 1296–97. The only question is whether the public is debating a specific question.

110. *Id.* at 1297.

111. *Id.* *See also Gertz*, 418 U.S. at 345 (noting the standard for those that “have thrust themselves to the *forefront* of particular public controversies”) (emphasis added).

112. *Waldbaum*, 627 F.2d at 1298. Essentially, the third prong is only satisfied if the alleged defamation to injure the plaintiff’s reputation in such a way that relates to his or her role in the resolution of the public controversy. *Id.*

*D. Protecting Speech on #PublicIssues: Policy Considerations*

The First Amendment is primarily concerned with protecting speech pertaining to a matter of public concern.<sup>113</sup> Accordingly, defamatory speech related to an important public issue receives a greater level of constitutional protection than defamatory speech concerning a purely private matter.<sup>114</sup>

*1. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.: The Importance of #PublicSpeech*

In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,<sup>115</sup> the Court clarified the important distinction between defamatory speech on a matter of public concern and defamatory speech relating to private issues alluded to in *New York Times* and its progeny.<sup>116</sup> The issue before the Court was whether a private figure must prove “actual malice” to recover punitive damages for defamatory speech that did not relate to a matter of public concern.<sup>117</sup>

The Court held that a private figure may recover punitive damages for a defamatory statement related to a purely private issue, “even absent a showing of ‘actual malice.’”<sup>118</sup> Citing *Gertz*, the Court noted that the state interest in compensating private individuals for reputational injury is “strong and legitimate.”<sup>119</sup> Furthermore, the First Amendment interest in protecting defamatory statements about matters of private concern is less

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113. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (“The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions.”); *Hustler Magazine, Inc., v. Falwell*, 485 U.S. 46, 50 (1988) (“At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.”).

114. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985).

115. 472 U.S. 749 (plurality opinion).

116. Before the Court decided *Dun & Bradstreet*, the Court’s discussions centered on whether the plaintiff was a public or private person. The subject matter of the speech at issue in those cases generally related to matters of public concern, yet the question of whether the First Amendment protected speech on matters of private concern was left undecided. See *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 155 n.19 (1967).

117. *Dun & Bradstreet, Inc.*, 472 U.S. at 751. *Contra Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (The Court broadly ruled that “[s]tates may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of [‘actual malice’].”).

118. *Dun & Bradstreet, Inc.*, 472 U.S. at 761.

119. *Id.* at 757 (citing *Gertz*, 418 U.S. at 348).

compelling than the interest in protecting matters of public concern.<sup>120</sup>

The speech at issue in *Dun & Bradstreet*—false credit reports issued to a contractor’s creditors—were not matters of public concern in light of the “[expression’s] content, form, and context . . . as revealed by the whole record.”<sup>121</sup> The Court reasoned that the speech only concerned the speaker’s individual interests and specific business audience.<sup>122</sup> Thus, it was not the sort of speech deserving special First Amendment protection to guarantee that “debate on public issues [will] be uninhibited, robust, and wide-open.”<sup>123</sup>

The plurality decision in *Dun & Bradstreet* is important for three reasons.<sup>124</sup> First, it vastly narrowed the category of speech that is subject to *Gertz*’s high level of protection by permitting states to regulate as they see fit defamatory communication relating to matters of purely private concern.<sup>125</sup> Second, the decision puts courts in charge of judging whether the statement in question in a defamation action is a matter of public interest.<sup>126</sup> Third, the Court provided little guidance to help lower courts distinguish between matters of public concern and matters of purely private concern.<sup>127</sup> The public–private subject matter distinction was further developed in the Court’s recent decision involving funeral picketing.

## 2. *Snyder v. Phelps: #OverallThrust*

The Respondent in *Snyder v. Phelps*,<sup>128</sup> Westboro Baptist Church, picketed Lance Corporal Matthew Snyder’s funeral with hateful signs in an effort to spread its message that God hates

120. *Id.* at 758–59. “[S]peech on matters of public concern . . . is at the heart of the First Amendment’s protection.” *Id.* (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978)) (internal quotation marks omitted).

121. *Id.* at 761 (quoting *Connick v. Meyers*, 461 U.S. 138, 147–48 (1983)).

122. *Id.* at 762.

123. *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

124. SACK, *supra* note 36, § 1.2.7, at 1-23.

125. *Id.*

126. *Id.* See also *Dun & Bradstreet, Inc.*, 472 U.S. at 785 (Brennan, J., dissenting) (“Without explaining what is a ‘matter of public concern,’ the plurality opinion proceeds to serve up a smorgasbord of reasons why the speech at issue here is not.”).

127. See SACK *supra* note 36, § 1.2.7, at 1-23–1-24. See also *Dun & Bradstreet, Inc.*, 472 U.S. at 786 (Brennan, J., dissenting) (“The credit reporting at issue here surely involves a subject matter of sufficient public concern to require the comprehensive protections of *Gertz*.”).

128. *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

America for tolerating homosexuality.<sup>129</sup> Matthew Snyder's father sued the church for, among other things, defamation and intentional infliction of emotional distress.<sup>130</sup> The validity of Snyder's claim for intentional infliction of emotional distress hinged "on whether [the] speech [was] of public or private concern."<sup>131</sup>

The Court noted that because the majority of the signs related to matters of broad public concern—namely "the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy"<sup>132</sup>—Westboro's speech concerned topics of legitimate public interest. The Court glossed over the signs personally attacking the Snyders,<sup>133</sup> stating: "[E]ven if a few of the signs . . . were viewed as containing messages related to Matthew Snyder or the Snyders specifically, that would not change the fact that the *overall thrust and dominant theme* of Westboro's demonstration spoke to broader public issues."<sup>134</sup>

Additionally, the Court found that the "context" of the speech<sup>135</sup> did not transform the speech into a matter of private concern.<sup>136</sup> The adoption of an overall-thrust-and-dominant-theme approach implies that the First Amendment may protect individual remarks within a larger communication.<sup>137</sup> Thus, a string of tweets relating to a matter of public interest might be constitutionally protected under the First Amendment even if a single tweet in the

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129. *Id.* at 1213.

130. *Id.* at 1214. The defamation case was dismissed at the district court, but the jury found that Westboro's actions amounted to the intentional infliction of emotional distress. *Id.*

131. *Id.* at 1215. *Cf.* *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (holding that a public figure may not recover for the tort of intentional infliction of emotional distress unless he shows that the publication contains a false statement of fact that was made with "actual malice").

132. *Snyder*, 131 S. Ct. at 1217.

133. The Court acknowledged that several signs might be viewed as directly addressing the Snyder family. *Id.* These signs included messages such as "You're Going to Hell" and "God Hates You." *Id.*

134. *Id.* (emphasis added).

135. Snyder argued that the connection between his son's funeral and the speech at issue made the speech a matter of private concern. *Id.*

136. *Id.*

137. That is, provided that the speech may be broadly construed as public speech and that "there [is] no pre-existing relationship or conflict between [the parties] that might suggest [the defendant's] speech on public matters [is] intended to mask an attack on [the plaintiff] over a private matter." *Id.*

collection is nothing more than a personal attack on a public (or private<sup>138</sup>) figure.

## II. ENTER SOCIAL MEDIA: #WELCOME @TWITTER

Twitter is “a real-time information network that connects [users] to the latest stories, ideas, opinions, and news about what [they] find interesting.”<sup>139</sup> Users take advantage of Twitter to communicate with a broad audience: Over 100 million active users on Twitter contribute approximately 230 million tweets per day.<sup>140</sup> When Twitter users, referred to as *tweeters* or *twitterers*,<sup>141</sup> sign in to the website, the user initially views his or her “timeline.”<sup>142</sup> The “tweets”<sup>143</sup> from each user the tweeter “follows”<sup>144</sup> are posted in chronological order on his or her timeline.<sup>145</sup> At the top of each user’s timeline there is a box with the question “What’s Happening?”<sup>146</sup> By typing a message into this box, tweeters may share whatever is on his or her mind with members that follow the user.<sup>147</sup> Tweets are limited to 140 characters, including spaces.<sup>148</sup> By default, these messages are available to anyone with a Twitter

138. The *Snyder* Court did not analyze Mr. Snyder’s public- or private-figure status. See generally *Snyder*, 131 S. Ct. 1207.

139. *About*, supra note 3.

140. Leena Rao, *Twitter Opens the Kimono on Web Analytics; 3 Million Sites Now Using Tweet Button*, TECHCRUNCH.COM (Sept. 13, 2011), <http://techcrunch.com/2011/09/13/twitter-analytics/>.

141. *The Twitter Glossary*, TWITTER, <https://support.twitter.com/articles/166337-the-twitter-glossary#t> (last visited Oct. 9, 2011).

142. *What Is a Twitter Timeline?*, TWITTER, <https://support.twitter.com/articles/164083-what-is-a-timeline> (last visited Dec. 17, 2012).

143. *Tweet* is used to describe both a message posted via Twitter as well as the act of posting a message. See *The Twitter Glossary*, supra note 141 (defining *Tweet* (noun) and *Tweet* (verb)).

144. When a user “follows” another user, he is subscribing to the user’s tweets. See *FAQs About Following*, TWITTER, <http://support.twitter.com/groups/31-twitter-basics/topics/108-finding-following-people/articles/14019-what-is-following> (last visited Dec. 17, 2012).

145. *What Is a Twitter Timeline?*, supra note 142. For example, if user *A* follows user *B*, each tweet that user *B* posts will appear on user *A*’s timeline.

146. *How to Post a Tweet*, TWITTER, <https://support.twitter.com/articles/15367-how-to-post-a-tweet> (last visited Oct. 9, 2011).

147. *Id.*

148. *Id.* The 140-character limit does not include “@mentions,” however. See *About Tweets (Twitter Updates)*, TWITTER, <https://support.twitter.com/groups/31-twitter-basics/topics/109-tweets-messages/articles/127856-about-tweets-twitter-updates> (last visited Nov. 6, 2011).

account.<sup>149</sup> However, tweeters have the option to “protect” their tweets.<sup>150</sup> Protected tweets are different from public tweets in several ways. First, protected tweets are not available through the website’s search function.<sup>151</sup> Users may not view another user’s protected tweets unless they receive permission first.<sup>152</sup> Additionally, tweeters may not “re-tweet,”<sup>153</sup> or share, another tweeter’s protected tweets.<sup>154</sup>

Users’ actions on Twitter are not limited to simply contributing to “what’s happening.” For instance, tweeters may re-tweet another tweeter’s tweets.<sup>155</sup> Tweeters may also “mention” other users in their tweets.<sup>156</sup> Additionally, a tweeter may reply to another tweeter’s tweets by hovering his cursor over the tweet to which he wishes to reply and clicking the “reply” icon.<sup>157</sup> If a third user

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149. *About Public and Protected Tweets*, TWITTER, <https://support.twitter.com/articles/14016-about-public-and-protected-accounts> (last visited Oct. 9, 2011).

150. *Id.*

151. *Id.*

152. *Id.*

153. A user may share, or re-tweet, another user’s tweet by clicking on the “re-tweet” link located below the tweet. *See FAQs About Retweets (RT)*, TWITTER, <http://support.twitter.com/groups/31-twitter-basics/topics/109-tweets-messages/articles/77606-what-is-retweet-rt> (last visited Dec. 17, 2012).

154. *Id.*

155. *Id.* A tweeter’s ability to re-tweet certain tweets is restricted, however, in that one user may not re-tweet another user’s protected tweets. *See id.* A user’s ability to re-tweet a defamatory statement may exacerbate reputational injury by introducing the defamatory comment to a new audience each time the tweet is re-tweeted. Defamatory re-tweets present two unique issues that are not addressed in this Comment: First, to what extent is a user liable for re-tweeting a defamatory comment originally published by a third party? Second, to what extent is the original tweeter liable for damages caused by a defamatory re-tweet? To address these issues, it may be helpful to examine the interplay between section 230 of the Communications Decency Act and the common law doctrine of republication liability. Under the common law, the original publisher of a defamatory statement would be liable for damages caused by republication if republication could be reasonably anticipated. *See SACK, supra* note 36, § 2.7.2, at 2-91–2-92. However, § 230 may protect the re-tweeter from liability because neither Internet service providers nor Internet users “[are] treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1) (2006). Thus, in the context of a claim for re-tweet liability, a court must decide whether a re-tweeter is a “user” under § 230.

156. *What Are @Replies and Mentions?*, TWITTER, <https://support.twitter.com/articles/14023-what-are-replies-and-mentions> (last visited Oct. 9, 2011). A user *mentions* another user by typing the user’s handle into the tweet preceded by the “@” symbol. *Id.*

157. *Id.*

follows both the original tweeter and the replying tweeter, the reply will show up in the third party's timeline.<sup>158</sup>

Another important feature of Twitter is the tweeter's ability to link tweets to a specific subject matter by including the “#” symbol followed by keywords describing the subject of the tweet.<sup>159</sup> When a tweeter views a tweet with a “#” symbol, he may click the “hashtag”<sup>160</sup> and view a list of all tweets in that category.<sup>161</sup> Protected tweets, however, are only visible to tweeters that have been approved by the author.<sup>162</sup> By using hashtags to mark a tweet's relevance to a particular category, the user potentially increases his tweet's publicity.<sup>163</sup>

Several commentators have argued that the traditional defamation analysis should be reworked to account for changing media landscape, including the boom in the popularity of social media websites like Twitter.

### III. @COURTS SHOULD IGNORE COMMENTATORS' CRY FOR DEFAMATION REFORMATION

Commentators have argued that the recent changes to the media require a new (or revised) approach to modern defamation law.<sup>164</sup> Such calls for reform in defamation law overcomplicate the

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158. *Id.*

159. *What Are Hashtags (“#” Symbols)?*, TWITTER, <https://support.twitter.com/articles/49309-what-are-hashtags-symbols> (last visited Oct. 9, 2011). For example, users tweeting about the Super Bowl might include #SuperBowl in the their tweets. The “hashtag” would become a hyperlink that, if clicked on, would link users to other tweets discussing the Super Bowl at that time.

160. Tweeters use the #, called a *hashtag*, to categorize tweets. *Id.*

161. *Id.*

162. *Id.*

163. One website keeps an up-to-date list of hashtags that are trending on Twitter, and it includes whether the hashtag is becoming more popular, less popular, or remaining constant. *See Trending on Twitter*, HASHTAGS.ORG, <http://www.hashtags.org/trending-on-twitter/> (last visited Jan. 2, 2013).

164. *See, e.g.*, David Lat & Zach Shemtob, *Public Figurehood in the Digital Age*, 9 J. TELECOMM. & HIGH TECH. L. 403 (2011) (arguing that the change in the media landscape has rendered the *Gertz* distinction between public and private figures obsolete); Ann E. O'Connor, Note, *Access to Media All A-Twitter: Revisiting Gertz and the Access to Media Test in the Age of Social Networking*, 63 FED. COMM. L.J. 507 (2011) (proposing that the “access to media” consideration in *Gertz* should be revisited due to the proliferation of social media); Aaron Perzanowski, Comment, *Relative Access to Corrective Speech: A New Test for Requiring Actual Malice*, 94 CAL. L. REV. 833 (2006) (proposing a balancing test for requiring “actual malice” that accounts for “cacophony of internet speech” and the “increased diversity among defamation defendants and the concomitant variety of corrective speech opportunities”); Glenn H. Reynolds, *Libel in the Blogosphere: Some Preliminary Thoughts*, 84 WASH. U. L. REV. 1157, 1165

analysis by failing to consider a practical application of traditional defamation law to libel claims in new-age media, as well as the policies the traditional analysis supports. Revising the defamation analysis to provide added protection to every post or tweet would unnecessarily provide First Amendment protection to nonpublic speech. Additionally, this approach would leave parties who are not “public figures” under traditional standards without a means of redress for reputational damage caused by a tortious tweet. This Part proceeds by briefly explaining the arguments for reforming defamation law and identifies their shortcomings.

*A. @PrivateFigures Lack Meaningful Audience in the Twittersverse*

David Lat and Professor Zach Shemtob argue that the *Gertz* “public/private [figure] distinction” should be abandoned due to changes in modern media.<sup>165</sup> Instead, the authors urge courts to set *Gertz* aside in favor of Justice Brennan’s opinion in *Rosenbloom v. Metromedia, Inc.* for two reasons.<sup>166</sup>

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(2006) (arguing that libelous statements posted online should be analyzed under a slander analysis rather than a libel analysis); Julie Hilden, *Should the Law Treat Defamatory Tweets the Same Way It Treats Printed Defamation?*, JUSTICIA.COM (Oct. 3, 2011), <http://verdict.justia.com/2011/10/03/should-the-law-treat-defamatory-tweets-the-same-way-it-treats-printed-defamation> (arguing that twibel claims do not fit well within traditional defamation law); Matt Belloni & Eriq Gardner, *Courtney Love’s Tweets Lead to Unique Defamation Showdown*, THE HOLLYWOOD REP., Jan. 4, 2011, <http://www.hollywoodreporter.com/blogs/threesq/courtney-love-s-tweets-lead-68193> (statement of defamation defense attorney Alonzo Wickers) (“The way Twitter is evolving, it seems to be more of a means to express opinion. I would hope courts give tweets the same latitude as they do an op-ed piece or a letter to the editor.”). Unlike op-ed pieces, posts on Twitter are not immediately recognizable as opinion. Publications contained in the “op-ed” section of a newspaper are self-proclaimed opinion and are not to be taken as factual statements. Twitter, on the other hand, contains a mixture of opinion, news, and meaningless commentary. See PEAR ANALYTICS, TWITTER STUDY—AUGUST 2009 (2009), available at <http://www.scribd.com/doc/18548460/Pear-Analytics-Twitter-Study-August-2009>. For this reason, whether a statement made on Twitter is protected as a statement of pure opinion is better analyzed under the Court’s opinion in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). See *infra* Part IV.C.2.

165. Lat & Shemtob, *supra* note 164, at 410.

166. *Id.* at 410. The *Rosenbloom* plurality held that both public and private figures must prove “actual malice” to recover for a defamatory statement relating to their roles in public issues. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (plurality opinion), *abrogated by Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

First, they argue that the nature of modern media has undermined the self-help rationale set forth in *Gertz*.<sup>167</sup> The authors point out that, due to the availability of blogging and social media, “ordinary citizens have historically unprecedented access to effective communication channels.”<sup>168</sup> Consequently, they contend, the average citizen has the ability to counter defamatory statements in a manner sufficient to override the “access to media” rationale for distinguishing between public and private figures.<sup>169</sup>

Lat and Professor Shemtob’s argument merely pays lip service to one critical issue—posting a rebuttal on Twitter does not guarantee that anyone will read the reply.<sup>170</sup> They acknowledge that the platform for speech on Twitter is not shared equally but argue that equal access to media is not required under *Gertz*.<sup>171</sup> To say that all Twitter users do not have an equal voice on the website is an understatement. One source revealed that the average Twitter user only has 126 followers.<sup>172</sup>

An average user would likely be hard-pressed to effectively rebut a defamatory statement posted by a user with a larger than average number of followers. Moreover, for the rebuttal to be “effective,” it would have to reach at least some of the audience that had access to the original statement.<sup>173</sup> For example, the damages resulting from a defamatory tweet posted by user *A* with 1,000,000 followers about user *B* with 10 followers are unlikely to be mitigated if user *B* simply posts a tweet rebutting user *A*’s statement. User *B* could “mention” user *A* in a tweet, hoping that user *A* will re-tweet his rebuttal. Yet, courts would be ill-advised to acknowledge this approach as “effective” counter-speech because the rebuttal’s potential effectiveness hinges on whether the

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167. Lat & Shemtob, *supra* note 164, at 410.

168. *Id.*

169. *Id.* at 411.

170. Taken a step further, this argument completely ignores the possibility that an individual may not have access to the Internet or the means to afford a computer. Similarly, some potential defamation plaintiffs may have no desire to engage in social media use.

171. Lat & Shemtob, *supra* note 164, at 411.

172. Charles Arthur, *Average Twitter User Has 126 Followers, and Only 20% of Users Go Via Website*, THE GUARDIAN: TECH. BLOG (June 29, 2009, 10:24 AM), <http://www.guardian.co.uk/technology/blog/2009/jun/29/twitter-users-average-api-traffic>. Although this number may be slightly outdated, reliable sources as to the current average number of Twitter followers are not readily available. Nonetheless, the current average is certainly less than the number of followers that marquee celebrities like Lady Gaga have amassed. See @ladygaga, TWITTER, <https://twitter.com/#!/ladygaga> (last visited Jan. 31, 2012) (Lady Gaga has over 18 million followers.).

173. O’Connor, *supra* note 164, at 524.

defamer decides to publish (by re-tweeting) the response.<sup>174</sup> Although modern technology provides some private individuals greater access to the media, the increased access does not grant most private figures an effective means to counter defamatory statements posted by widely read users.

Lat and Professor Shemtob's second proffered justification for discarding *Gertz* in favor of *Rosenbloom* is that modern technology has "blurred, if not eliminated," the public-private figure distinction.<sup>175</sup> They argue that the *Gertz* rationale fails to consider two byproducts of the media revolution: the "microcelebrity" and the "niche celebrity."<sup>176</sup> Instead of dividing fame between a few celebrities and millions of "nobodies," "fame . . . is distributed along a spectrum."<sup>177</sup> "Microcelebrities"—those figures somewhere in the middle of the spectrum, such as reality TV stars and prominent bloggers—will continue to grow in number as society is broken into many "microcultures."<sup>178</sup> Justice Brennan's statement that "[v]oluntarily or not, we are all 'public' men to some degree,"<sup>179</sup> they reason, "ring[s] even more true in the digital age."<sup>180</sup>

The rise in "microcelebrities" does not justify abandoning the *Gertz* distinction between public and private figures. The argument that commentary about "microcelebrities" should be protected unless made with "actual malice" fails to consider the important "normative consideration"<sup>181</sup> implicit in the First Amendment. The purpose of protecting speech about public officials and public figures is to ensure that "public criticism" is uninhibited.<sup>182</sup> Of course, if a "microcelebrity" involves himself in a public controversy, he may become a "limited-purpose" public figure under the *Waldbaum* analysis.<sup>183</sup> But, barring any involvement in a

174. Accordingly, user *B* should not be considered a public figure due to his presence on Twitter alone. User *B* might be a public figure under the traditional analysis if he is a household name or has thrust himself to the forefront of a public controversy, *see infra* Part IV.B, but the fact that he is on Twitter does not justify forcing him to prove that user *A* acted with "actual malice." This approach is akin to considering a college student a public figure in a lawsuit against the *New York Times* simply because the student might be able to publish a rebuttal in the campus newspaper.

175. Lat & Shemtob, *supra* note 164, at 410.

176. *Id.* at 413.

177. *Id.*

178. *Id.*

179. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 48 (1971), *abrogated by Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

180. Lat & Shemtob, *supra* note 164, at 413.

181. Public figures must "accept certain necessary consequences of [their] involvement in public affairs." *Gertz*, 418 U.S. at 344.

182. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 278 (1964).

183. *See supra* Part I.B.2.b.

public controversy, there is no reason to afford speech about “microcelebrities” the heightened level of First Amendment protection outlined in *New York Times* and its progeny.<sup>184</sup>

Additionally, Lat and Professor Shemtob support their argument that everyone is a public figure in some regard by noting the rise of the “niche celebrity.”<sup>185</sup> They contend the rise of specialized blogs and interest groups within social networks makes it “startling easy” to become a celebrity within a particular area of interest.<sup>186</sup> Just as with the “microcelebrity,” a “niche celebrity’s” renown alone is insufficient to undermine the policy consideration set forth in *Gertz*. As the Court noted in *Dun & Bradstreet*: “[S]peech solely in the individual interest of the speaker and its specific business audience . . . warrants no special protection when . . . the speech is wholly false and clearly damaging to the victim’s business reputation.”<sup>187</sup> Again, if the “niche celebrity” has involved himself in the resolution of a public controversy, speech related to his involvement will be protected under the *New York Times* “actual malice” standard.<sup>188</sup>

Lat and Professor Shemtob offer Evan Chesler<sup>189</sup> as an example of a niche celebrity.<sup>190</sup> They argue that, although Chesler might not be classified as an “all-purpose” public figure or “limited-purpose” public figure, he is a “figure of great interest in [the legal community].”<sup>191</sup> Because the “legal profession is wealthy, powerful, and prominent, and [Chesler] is a leading figure within it . . . [w]hy shouldn’t he have to demonstrate ‘actual malice’ with respect to reporting that covers his leadership of Cravath?”<sup>192</sup> Lat and Professor Shemtob bolster their argument that “niche celebrities,” like Chesler, should be held to the “actual malice” standard with dictum from *Rosenblatt v. Baer*: “The subject matter

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184. There does not seem to be any justification for protecting a tweet attacking the reputation of Jersey Shore star Nicole “Snooki” Polizzi with the *New York Times* “actual malice” standard.

185. The term *niche celebrity* refers to “a figure of great interest in [a] particular field.” Lat & Shemtob, *supra* note 164, at 414. Lat and Shemtob offer a prominent attorney as an example of a “niche celebrity” due to his renown in the legal community. *Id.*

186. *Id.* at 413.

187. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985) (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980)).

188. *See supra* Part I.C.2.b.

189. Evan Chesler is the presiding partner at a leading law firm, Cravath, Swaine & Moore. Lat & Shemtob, *supra* note 164, at 413.

190. *Id.* at 414.

191. *Id.*

192. *Id.*

may have been only of local interest, but at least here, where publication was addressed primarily to the interested community, that fact is constitutionally irrelevant.”<sup>193</sup> In so doing, the authors confuse two separate areas of defamation law: classification of the plaintiff and classification of the subject matter.<sup>194</sup> The Court’s statement in *Rosenblatt*—that the subject matter was important to a specific community—was unrelated to the plaintiff’s classification. By stating that the subject matter of the speech was an important issue for a particular community, the Court was merely conceding the first issue—that is, that the allegedly defamatory speech at issue related to a matter of public concern. The key issue in *Rosenblatt* was whether the plaintiff was a “public official.”<sup>195</sup>

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193. *Id.* (citing *Rosenblatt v. Baer*, 383 U.S. 75, 83 (1966)). Lat and Professor Shemtob also cite to Justice Brennan’s dissent from the Court’s denial of certiorari in *Lorain Journal Co. v. Milkovich* to support their argument that those involved in issues that are relevant only to a small community should still be held to the *New York Times* standard in an action for defamation. Lat & Shemtob, *supra* note 164, at 414 n.50 (quoting *Lorain Journal Co. v. Milkovich*, 474 U.S. 953, 963 (1985) (Brennan, J., dissenting)). The author’s reliance on Justice Brennan’s argument that the Court’s commitment to free speech “applies as much to debate in the local media about local issues as it does to debate in the national media over national issues,” and that

[t]his Court’s obligation to preserve the precious freedoms established in the First Amendment is every bit as strong in the context of a local paper’s report of an incident at a local high school as it is in the context of an advertisement in one of the Nation’s largest newspapers supporting the struggle for racial freedom in the South

is misplaced. *Id.* The public issue in *Lorain Journal Co.* involved a brawl at a local high school during a wrestling match and allegations that the wrestling coach, who is also a teacher at the high school, lied under oath when discussing the altercation. 474 U.S. at 955–56 (Brennan, J., dissenting). Clearly, the local community had an interest in a scandal involving a local high-school teacher’s lying under oath about an incident involving student violence. See also discussion *infra* Part IV.C.2. The strong First Amendment values propounded by Justice Brennan do not readily transfer to commentary about the managing partner at a large private law firm. For example, there is little, if any, public interest in the size of the year-end bonus offered to associates at Cravath, Swaine, & Moore. David Lat & Elie Mystal, *Breaking: Cravath Bonuses Are Out; Welcome to the 2011 Bonus Season!*, ABOVEHELAW.COM (Nov. 28, 2011, 4:24 PM), <http://abovethelaw.com/2011/11/breaking-cravath-bonuses-are-out-welcome-to-the-2011-bonus-season/#more-106389>.

194. As the Court reiterated in *Rosenblatt*: “There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues.” *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

195. See *id.* at 83. Stated more concisely, that “[t]he subject matter may have been only of local interest . . . is constitutionally irrelevant” to the categorization of the plaintiff as a public official. *Id.*

The fact that an individual has become a prominent figure within a niche does not give rise to the strong First Amendment polices undergirding the Court's decision in *Gertz*. Why hold a figure, like Evan Chesler, to the practically insurmountable burden of establishing "actual malice" when he has become well-known in a community for simply excelling at his job? Evan Chesler has not thrust himself to the forefront of a public controversy.<sup>196</sup> Nor is he well-known to "a large percentage of the well-informed citizenry"<sup>197</sup> so as to become an "all-purpose" public figure. That Chesler has accumulated a following within the legal community<sup>198</sup> by performing his job<sup>199</sup> does not justify holding him to the *New York Times* standard.

Moreover, the "microcelebrity" and "niche celebrity" argument for overruling *Gertz* overlooks a large category of potential defamation plaintiffs: private figures that are neither "microcelebrities" nor "niche celebrities." The *Rosenbloom* approach suggested by Lat and Shemtob would subject every defamation plaintiff to the "actual malice" standard if the defamation related to the plaintiff's role in a public issue.<sup>200</sup> Adopting this standard would essentially leave a large category of defamation plaintiffs without recourse.<sup>201</sup>

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196. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

197. *Waldbaum v. Fairchild Publ'ns*, 627 F.2d 1287, 1295 n.20 (D.C. Cir. 1980).

198. Chesler may be widely known within the "Big Law" community; however, it is not readily apparent that he is known by "a large percentage of the well-informed" members of the legal community. *Waldbaum*, 627 F.2d at 1295 n.20.

199. Lat and Professor Shemtob compare Chesler's actions in leading Cravath to those of the petitioner in *Gertz*. This analogy does little to support the authors' argument. The petitioner in *Gertz* was a reputable attorney who was hired to represent a murder victim's family in a civil action against the murderer. 418 U.S. at 325. A newspaper published an article falsely implying that petitioner had a criminal record, that he helped plan an attack on Chicago police during the 1968 Democratic Convention, and that he was a "leninist" and a "Communist-fronter." *Id.* at 326. Why should successful attorneys such as Gertz and Chesler be held to the strict "actual malice" standard in a defamation action arising from patently false accusations?

200. See Lat & Shemtob, *supra* note 164, at 418; *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 (1971), *abrogated by Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

201. See Joel D. Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1373 (1975) (noting that the constitutional privilege for defamation defendants in an action brought by a public official established in *New York Times Co. v. Sullivan* has become a "near-immunity from defamation judgments").

Commentators have also suggested that defamatory statements published online, including twibel, should be subjected to a stricter standard because the statements are more akin to slander than libel.

*B. Tortious Tweets: Libel or Slander? #Twibel*

Several scholars have mentioned the possibility of considering defamatory posts on blogs and Twitter as slander rather than libel.<sup>202</sup> Julie Hilden notes that tweets, like slander, are easily repeated to another person.<sup>203</sup> Additionally, tweets are “evanescent,” that is, they are replaced by newer tweets on a user’s timeline.<sup>204</sup> Finally, Hilden notes that Twitter users are likely to be more careless about their tweets in the same way that speakers might be careless about their words in a casual setting.<sup>205</sup>

The rationale for distinguishing slander from libel is threefold. First, written publications are permanent; whereas, conversations are fleeting.<sup>206</sup> Second, the written word is capable of broader circulation than the spoken word.<sup>207</sup> Third, the act of reducing defamation to writing evidences a greater element of intent on the part of the publisher than orally communicating false statements of fact.<sup>208</sup>

Simply put, tweets do not conform to the policies underlying the distinction between slander and libel. Tweets are permanent. Although individual tweets eventually vanish from the bottom of a user’s timeline, they remain accessible through the search function on Twitter and even through search engines like Google.<sup>209</sup> Additionally, tweets are certainly capable of wide circulation through original publication to a user’s followers and subsequent re-tweets from the followers.

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202. See Reynolds, *supra* note 164, at 1165; Hilden, *supra* note 164. If twibel were treated as slander rather than libel, plaintiffs would only recover damages if they were able to prove that the defamatory tweet caused “special damages.” See SACK, *supra* note 36, § 2.3, at 2-10.

203. Hilden, *supra* note 164.

204. *Id.*

205. *Id.*

206. SACK, *supra* note 36, § 2.3, at 2-10.

207. *Id.*

208. *Id.* The intent element derives from the idea that reducing a statement to writing is more of an intentional act than saying something in a conversation. A person is more likely to accidentally say something than to accidentally publish a statement in writing.

209. Moreover, every public tweet is catalogued in the Library of Congress. Matt Reymond, *How Tweet It Is!: Library Acquires Entire Twitter Archive*, LIBRARY OF CONG. (April 14, 2010), <http://blogs.loc.gov/loc/2010/04/how-tweet-it-is-library-acquires-entire-twitter-archive/>.

The difference in intent with regard to tweets and conversation is less clear. Twitter users might post a tweet without fully thinking through the consequences in the same way that a person may reveal an idea in a conversation with a friend without much thought.<sup>210</sup> Indeed, some tweets may be attributed to an accidental slip of the tongue. The possibility that a defamatory tweet is posted with a lower level of intent than a statement published in a more traditional form does not, however, override the fact that tweets are more permanent than the spoken word and are capable of wide circulation.

The aforementioned arguments in favor of revising the defamation analysis do not comport with the Court's rationale in *New York Times* and its progeny. Additionally, they are unnecessary revisions that over-complicate an already confusing area of law. Trial courts will be better served to continue to apply traditional defamation law, regardless of the publication medium.

#### IV. @COURTS: IF IT AIN'T BROKE, DON'T FIX IT

The rise in Twitter's popularity has triggered a contemporaneous growth in twibel lawsuits.<sup>211</sup> This Part will demonstrate that the standards set forth in the Court's defamation jurisprudence remain workable, despite recent changes in technology. This Part first explains how the *Gertz* public-private figure distinction<sup>212</sup> can be approached in twibel claims. Second, this Part explores Twitter's impact on the *Dun & Bradstreet* subject matter considerations.<sup>213</sup> Finally, this Part discusses the importance of considering tweets in the context<sup>214</sup> of contemporaneously published tweets for the purpose of identifying

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210. The Supreme Court of Western Australia commented on the emerging distinction between traditional and electronic media, noting the possibility that a user might post a message online without the proper consideration:

Emails, SMS messaging, Twitter, blogs and other forms of social media such as Facebook impact on the way people communicate and the language they use. Communications through those media often lack the formality and careful consideration that was once thought to mark the difference between the written and spoken word. The very purpose of the media is to enable people to communicate instantaneously, often in a language that is blunt in its message and attenuated in its form. That will affect both what is regarded as defamatory and the potential for harm.

*Prefumo v. Bradley* [2011] WASC 251, ¶ 43 (Austl.).

211. See *supra* Introduction.

212. See *supra* Part I.C.1.c.

213. See *supra* Part I.D.1.

214. See *supra* text accompanying note 32.

matters of public concern and distinguishing false factual statements from statements of pure opinion.

*A. @Courts: The Gertz @Public–PrivateFigure Distinction Remains Relevant*

In *Gertz*, the Court noted the characteristics of public figures that justify the distinction between public and private figures in defamation lawsuits.<sup>215</sup> The “all-purpose” public figure “may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts.”<sup>216</sup> The “limited-purpose” public figure, on the other hand, “injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.”<sup>217</sup> The critical feature of public figures, according to the Court, is that they “assume special prominence in the resolution of public questions.”<sup>218</sup>

As discussed above, lower courts have expounded the *Gertz* criteria to establish a test for distinguishing between public and private figures.<sup>219</sup> A straightforward application of tests like the *Waldbaum* analysis<sup>220</sup> will yield accurate results, even in the context of modern twibel claims.

For example, lower courts have required an individual to essentially achieve “celebrity” status to be considered an “all-purpose” public figure.<sup>221</sup> This inquiry is readily applicable to twibel plaintiffs. One does not gain or lose celebrity status simply by being discussed on Twitter. If the plaintiff in a traditional defamation case<sup>222</sup> would be considered an “all-purpose” public figure, he should be considered an “all-purpose” public figure as the plaintiff in a twibel claim. For instance, if the roles were

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215. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344–45 (1974).

216. *Id.* at 351.

217. *Id.*

218. *Id.* Basing the public–private figure distinction on the individual’s “special prominence in the resolution of public questions” seems to require courts to first decide whether the issues underlying the individual’s alleged “public figure status” indeed constitute a public question, thereby forcing courts to examine the public nature of two separate issues in the process of determining whether “actual malice” applies.

219. See *supra* Part I.C.2.

220. See *supra* Part I.C.2. The *Waldbaum* Court set forth useful tests for identifying both “all-purpose” public figures and “limited-purpose” public figures.

221. See, e.g., *Waldbaum v. Fairchild Publ’ns, Inc.*, 627 F.2d 1287, 1294 (D.C. Cir. 1980).

222. This section uses the term *traditional defamation case* to refer to a defamation case involving traditional media, such as a newspaper or the radio.

reversed<sup>223</sup> in *Simorangkir v. Love*,<sup>224</sup> Ms. Love would likely be an “all-purpose” public figure<sup>225</sup> and be required to prove that Simorangkir acted with “actual malice” in order to recover damages. Conversely, if the plaintiff in a traditional defamation action has not achieved the pervasive notoriety required for “all-purpose” public figure status, he should not be labeled as such just because the defamatory statement was published on Twitter.<sup>226</sup>

The “limited-purpose” public figure analysis should be applied in a similar fashion. The test set forth in *Waldbaum* requires courts to consider three factors when defining the plaintiff’s public or private figure status: (1) whether there is a public controversy; (2) whether the plaintiff thrusts himself to the forefront of the public controversy; and (3) whether the defamation directly addresses the plaintiff’s role in the public controversy.<sup>227</sup> To extend this test to twibel claims, courts need only take special care in defining the scope and origin of the public controversy. One of two possible scenarios will emerge once the controversy is defined.

First, the public controversy may have originated on Twitter.<sup>228</sup> In this case, the court should consider the number of times the plaintiff tweeted in an effort to help resolve the issue and the extent to which the plaintiff addressed the issue through other mediums. For Twitter-specific controversies, evidence will be readily available (because public tweets are immortalized in the Library of Congress<sup>229</sup>) to provide concrete examples of the plaintiff’s voluntary immersion in the resolution of the controversy. If the plaintiff has only tangentially involved himself in the dispute, he

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223. That is, if Love sued Simrangkir for a defamatory tweet.

224. See *supra* text accompanying notes 4–15.

225. Love’s infamous status as the “most controversial woman in the history of rock,” in addition to her highly publicized marriage to the late Kurt Cobain is likely sufficient to classify her as an “all-purpose” public figure. See Chris Harris, *Courtney Love Loses Temporary Legal Control of Frances Bean*, ROLLING STONE, Dec. 14, 2009, <http://www.rollingstone.com/music/news/courtney-love-loses-temporary-legal-control-of-frances-bean-20091214>.

226. For instance, Dr. Darm likely has not achieved sufficient “fame” or “notoriety” to be considered an “all-purpose” public figure by virtue of his profession alone in his twibel action against Tiffany Craig. See *supra* text accompanying notes 19–23.

227. See *Waldbaum v. Fairchild Publ’ns, Inc.*, 627 F.2d 1287, 1296 (D.C. Cir. 1980); see also *supra* Part I.C.2.b.

228. Twitter-specific public controversies will likely be rare, but the scenario might emerge if a certain topic gained sufficient coverage as a “trending topic.” See *About Trending Topics*, *supra* note 32. The possibility remains that enough Twitter users might debate a public issue on Twitter enough to establish a “controversy” even though the issue has not arisen to the level of a “controversy” in the traditional media.

229. See Reymond, *supra* note 209.

should not be classified as a “limited-purpose” public figure, and the state-defined level of fault is applicable.<sup>230</sup>

The second and more likely scenario that might arise when courts define the origin of the public controversy is that the dispute originated outside the realm of Twitter. In this case, the analysis should proceed in the same manner that it would if the defamatory statement were published in a different form. The defamer’s choice of medium is irrelevant for the issue of defining the plaintiff’s public or private status.

Essentially, courts should distinguish public figures (whether “all-purpose” or “limited-purpose”) from private figures in twibel claims in the same manner that courts make this distinction in a traditional defamation claim. The fact that the defamatory statement was posted on Twitter does not change the extent of the plaintiff’s involvement in the resolution of a public controversy. As such, there appears to be no barrier to applying the *Waldbaum* analysis, or similar tests, for the purpose of distinguishing between public and private figure twibel plaintiffs. The ease with which these analyses transfer to twibel claims is mirrored in other areas of defamation law, including the public–private subject matter considerations.

#### *B. Hashtag Relevance: Defining #MattersOfPublicConcern*

The public or private nature of a twibelous statement can be readily discerned by logically analyzing the subject matter of the statement. Again, two scenarios are possible where the statement relates to a “matter of public concern.”<sup>231</sup> First, the statement may clearly concern a matter of broad public interest, such as a presidential election. In this case, the fact that the claim arose from a tweet is irrelevant, and the claim should be analyzed in the same way as a defamation claim arising from a traditional publication.

The second scenario might arise when the defamatory tweet concerns an important issue, not to the public as a whole, but to a specific online community.<sup>232</sup> To gauge the public’s interest in the

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230. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

231. There is, of course, a third scenario that would arise when the tweet bears no relation to a matter of public concern.

232. This scenario is possible when the twibel plaintiff has voluntarily thrust himself or herself to the forefront of a “trending topic.” See *supra* text accompanying note 32. Additionally, this scenario could arise when the tweet centers on a specific issue that is of great importance for a specific group of people. For example, tweets that focus on defamation on Twitter may be important to First Amendment scholars who are trying to determine how the issue will be resolved.

subject matter, courts may use “Twitter Search”<sup>233</sup> or “Advanced Twitter Search”<sup>234</sup> to determine the frequency with which users are discussing an issue on Twitter. Furthermore, users’ inclusion of the hashtag should aid courts in deciding whether the defamatory statement relates to an issue about which other users have voiced concern. If a “Twitter Search” reveals tweets containing a hashtag relevant to the defamatory tweet at issue, a court may click on the hashtag to reveal other tweets on the same topic.<sup>235</sup>

“Hashtag tracking” may be used as an additional means to consider the public nature of the allegedly defamatory tweet’s subject matter. Frequently used hashtags are tracked as “trending topics.”<sup>236</sup> Although treating oft-tweeted topics as matters of public concern may broaden the category of speech included in “matters of public concern,”<sup>237</sup> considering “trending topics” will allow courts to appreciate modern concerns that are appealing to a larger community instead of limiting the inquiry to traditional topics.

One might argue that the 140-character limit for tweets may limit a court’s ability to discern the specific subject matter of the defamatory statement in some cases.<sup>238</sup> When a tweet appears to contain an incomplete thought, courts should look to see whether the tweet was posted by itself or contemporaneously with subsequent tweets that clarify the author’s message. If the defamatory tweet is published alone without at least partially implicating a public issue, the tweet should be characterized as one relating to a matter of purely private concern. If, however, the tweet is posted contemporaneously with other tweets, the court

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233. Users may use the “search” feature on Twitter to search for tweets about a certain topic. *How to Search on Twitter*, TWITTER, <https://support.twitter.com/groups/31-twitter-basics/topics/110-search/articles/132700-how-to-search-on-twitter> (last visited Jan. 2, 2013).

234. The “advanced search” feature can be used to fine tune search results if the basic search feature did not reveal the desired results. *How to Use Advanced Twitter Search*, TWITTER, <https://support.twitter.com/groups/31-twitter-basics/topics/110-search/articles/71577-how-to-use-advanced-twitter-search> (last visited Nov. 6, 2011).

235. See *What Are Hashtags (“#” Symbols)?*, *supra* note 159 (“Clicking on a hashtagged word in any message shows you all other Tweets marked with that keyword.”).

236. *FAQs About Twitter’s Trends*, *supra* note 32.

237. By including topics that would not traditionally be considered public questions.

238. The 140-character limit on Tweets may limit the user’s ability to publish his or her entire message in a single tweet. Tweets reflecting incomplete thoughts might be misconstrued if not properly analyzed in the context of contemporaneously published tweets. See *infra* Part IV.C.

must engage in a context analysis to determine whether the overall thrust of the message addresses a matter of public concern.<sup>239</sup>

*C. Referring to Contemporaneously Published Tweets for #ContextAnalysis*

*1. Using Concurrent Tweets to Identify #MattersOfPublicConcern*

At times, a tweet's relevance to a matter of public concern may be difficult to determine due to the 140-character limitation. In these cases, courts must examine the "content, form, and *context*" of the twibelous statement.<sup>240</sup> Presently, it is unclear whether the context of a single tweet includes tweets published contemporaneously by the defendant for the purposes of determining whether a tweet relates to a matter of public concern.<sup>241</sup> This Comment argues that courts should consider the user's related tweets in determining whether the allegedly libelous tweet addresses a matter of public concern.<sup>242</sup>

The scope of the appropriate "context analysis" will be defined more easily, and the end result will be more just, if courts adopt a simplified approach for determining the context of a libelous tweet. Due to the 140-character limitation and the resulting limitation on the amount of information that can be included in a tweet,<sup>243</sup>

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239. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) ("Whether . . . speech addresses a matter of public concern must be determined by [the expression's] content, form, and *context* . . . ." (emphasis added) (quoting *Connick v. Meyers*, 461 U.S. 138, 147–48 (1983))); see also *Snyder v. Phelps*, 131 S. Ct. 1207, 1217 (2011) (holding that when the "overall thrust" of the communication relates to a matter of public concern, the communication should be protected).

240. *Dun & Bradstreet, Inc.*, 472 U.S. at 762 (1985) (emphasis added) (quoting *Connick v. Meyers*, 461 U.S. 138, 147–48 (1983)).

241. Lyrisa Lidsky, *A Libel Proof Defendant? Courtney Love's Twitter Defamation*, PRAWFSBLAWG (Feb. 5, 2011, 6:27 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2011/02/a-libel-proof-defendant-courtney-loves-twitter-defamation.html>.

242. This approach is comparable to the Court's analysis in *Snyder*, 131 S. Ct. at 1217. There, the Court considered all of the protest signs together to conclude that the "overall thrust and dominant theme of Westboro's demonstration spoke to broader public issues." *Id.*

243. Furthermore, the user forfeits additional characters if the tweeter inserts a hashtag. See *How to Post Links (URLs) in Tweets*, TWITTER, <https://support.twitter.com/groups/31-twitter-basics/topics/109-tweets-messages/articles/78124-how-to-post-links-urls> (last visited Dec. 18, 2012) (noting that links posted in tweets may be shortened to 20 characters but still detract from the 140-character allotment). The inclusion of links in the 140-character limit supports the

fairness dictates that contemporaneously published tweets should be considered in determining whether the tweet at issue relates to a matter of public concern. Twitter is a valuable medium for discussing important issues, but if tweets are singled out and examined in a vacuum, users may be less likely to discuss important issues for fear of being punished for a statement that is subject to multiple interpretations when taken out of context. The possible self-censorship that might result from this form of interpretation is contrary to the policies underlying the First Amendment.<sup>244</sup>

At first glance, this issue appears to be straightforward. Why wouldn't courts look to the lines directly above and below the tweet in question to determine a tweet's relevance to matters of public concern? The complication emerges when the tweet is considered from the perspective of the tweeter's audience. When a user signs in to his Twitter account, he is presented with his "timeline," which publishes all of the tweets published by any user that he follows on Twitter. The tweets appear in real time rather than appearing in an order prescribed by the user.<sup>245</sup> Therefore, a tweeter that follows a large number of people may receive a large number of tweets at one time. This has the effect of possibly creating a large separation between a single user's tweets published only minutes apart.<sup>246</sup>

The problems with a "context analysis" that considers contemporaneously published tweets alongside the allegedly defamatory tweet for purposes of defining the tweet's relevance to a matter of public importance do not outweigh the First Amendment ramifications of analyzing single tweets under a microscope. Ultimately, refusing to consider tweets that may clarify the author's message will chill speech because users will be less likely to discuss important public issues on Twitter if, in so

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proposition that contemporaneously published tweets should be considered with the allegedly defamatory tweet because, although links reduce the number of characters a user may dedicate to his personal message, they may help link the statement to a public issue. Inserting an @mention does not detract from the 140-character limit. *See About Tweets (Twitter Updates)*, *supra* note 148.

244. *See* *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) ("The rule thus dampens the vigor and limits the variety of public debate . . . . It is inconsistent with the First and Fourteenth Amendments.").

245. *See What Is a Twitter Timeline?*, *supra* note 142.

246. For instance, User *A* may post a tweet which appears on one of his follower's, User *B*'s, timeline. While User *A* is formulating a related tweet, User *B* may receive tweets from Users *C*, *D*, and *E*. Therefore, when User *A* posts the second tweet, it will be separated from his first tweet on User *B*'s timeline by the three tweets from other users.

doing, they run the risk of being subjected to a large damage award for libel. Moreover, the ambiguity that might arise if intervening tweets separate related messages from a single user may be resolved if the audience investigates the twibelous statement further by clicking on the tweet. When a user clicks on the name of the user who posted the original tweet, a pop-up window appears above the user's timeline, providing additional information related to that message.<sup>247</sup> Thus, clicking on a user's name above his or her tweet will immediately place the defamatory tweet in the context of other tweets that were published around the same time. Moreover, clicking on the user's name in the pop-up window will redirect the viewer to the tweeter's full profile, thereby revealing all of the user's tweets. Therefore, a proper "context analysis" will consider contemporaneously published tweets to ensure that the court views the twibelous statement in the same context as a user viewing the tweet.<sup>248</sup> This sort of analysis should provide the court with sufficient information to determine the tweet's relevance to important public issues and reduce the danger of mischaracterizing the tweet.

## *2. Using Concurrent Tweets to Identify #StatementsOfFact*

The "context analysis" described above should also be applied to distinguish statements of fact from statements conveying the author's opinion. For an expression to form the basis of a defamation lawsuit, it must include a false statement of fact.<sup>249</sup> Statements amounting to nothing more than "rhetorical hyperbole" or "epithets" are not considered to be defamatory.<sup>250</sup>

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247. See *What Is a Twitter Timeline?*, *supra* note 142. The added information includes the tweeting user's most recent tweets.

248. When considering a user's tweets as a whole for the purpose of establishing the public nature of the tweet's subject matter, courts should consider the length of time between the various tweets. Because a user's timeline is updated in real time as tweets are posted, tweets posted within a short period of time will likely appear in close proximity to each other on the timeline of the users following the tweeter. While there is a possibility that a small lapse of several minutes would allow other users' tweets to interrupt the string of thought from a single user, the probability increases significantly with a longer lapse in time. Therefore, delayed publication of subsequent tweets that clarify the user's message should be valued less than tweets published only moments later.

249. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19–20 (1990).

250. *Greenbelt Coop. Publ'g Ass'n, Inc. v. Bresler*, 398 U.S. 6, 13–14 (1970).

The Court's decision in *Milkovich v. Lorain Journal Company*<sup>251</sup> highlights the importance of considering twibelous statements in the context of contemporaneously published tweets for this purpose. The petitioner in *Milkovich* was a high school wrestling coach who sued a local newspaper for defamation, alleging that an article it published accused him of perjury.<sup>252</sup> The Court granted certiorari to consider whether statements of opinion are privileged under the First Amendment in defamation cases.<sup>253</sup> Specifically, the Court discussed whether a piece of dicta from *Gertz* supported an opinion exemption:

Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correctness not on the conscience of judges and juries, but on the competition of other ideas. But there is no constitutional value in false statements of fact.<sup>254</sup>

The Court rejected the newspaper's argument that, under this passage from *Gertz*, statements of opinion are absolutely protected in defamation actions.<sup>255</sup> Rather, the Court held that "the 'breathing space' which '[f]reedoms of expression require in order to survive' is adequately secured by existing constitutional doctrine<sup>256</sup> without the creation of an artificial dichotomy between 'opinion' and fact."<sup>257</sup> Furthermore, statements of opinion can also

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251. 497 U.S. 1.

252. *Id.* at 6. The article's headline and nine statements in the body of the article implied that Petitioner lied under oath during a judicial proceeding regarding an incident involving Petitioner and his wrestling team at a wrestling match. *Id.* at 3.

253. *Id.* at 10.

254. *Id.* at 18 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974)).

255. *Id.* at 18.

256. See *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) (requiring the plaintiff in a defamation action to prove falsity as well as fault); *Greenbelt Coop. Publ'g Ass'n, Inc. v. Bresler*, 398 U.S. 6, 13–14 (1970) (finding that the word *blackmail* was not defamatory under the circumstances because "even the most careless reader must have perceived the word was no more than rhetorical hyperbole, a vigorous epithet"); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (holding that the First Amendment protects ad parody focused on a public-figure plaintiff which "could not reasonably have been interpreted as stating actual facts about the public figures involved"); *Letter Carriers v. Austin*, 418 U.S. 264, 284–86 (1974). (The word *traitor* was not defamatory under the circumstances because it was used "in a loose, figurative sense" and was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members.").

257. *Milkovich*, 497 U.S. at 19 (citations omitted).

imply a false statement of fact.<sup>258</sup> Thus, the essential question for determining whether a statement is actionable is whether a reasonable reader would conclude that the communication implies a factual assertion about the plaintiff.<sup>259</sup> The *Milkovich* Court found that the headline and nine statements in the article, read together, implied that Petitioner perjured himself at the judicial proceeding.<sup>260</sup> If the statements were found to be factually false,<sup>261</sup> Petitioner would be permitted to recover upon a showing that the newspaper acted with the requisite level of fault.<sup>262</sup>

Just as the statements in the *Milkovich* publication were considered together, tweets published together must be read in the context of one another to determine whether a “reasonable factfinder”<sup>263</sup> would conclude that the tweet conveys a provably

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258. *Id.* at 18. Although the *Milkovich* Court held that opinion is not per se protected by the Constitution, oftentimes opinion can neither be proved true nor false. Because a plaintiff must prove falsity to prevail, opinion remains protected as a matter of constitutional law in many cases. *See* SACK, *supra* note 36, § 4.2.4.2, at 4-15 (citing *Andrews v. Stalling*, 892 P.2d 611 (N.M. Ct. App. 1995)).

259. *See Milkovich*, 497 U.S. at 21 (“The dispositive question in the present case then becomes whether a reasonable factfinder could conclude that the statements in the Diadium column imply an assertion that petitioner Milkovich perjured himself . . .”).

260. *Id.*

261. The Court reasoned that a perjury action would be able to determine whether or not Petitioner did, in fact, perjure himself. *Id.* Once transcripts and witnesses were presented, the lower court would be in a position to determine whether the statements in the article were actually “false statements of fact.” *Id.*

262. Petitioner would either be required to prove the newspaper acted with “actual malice” or with the state supplied level of fault per *Gertz*. The Court did not discuss whether Petitioner was to be classified as a public figure, but the Ohio Supreme Court noted in dicta that Petitioner was likely to be considered a public figure. *See Scott v. News-Herald*, 496 N.E.2d 699, 704 (Ohio 1986) (“To say that Milkovich nevertheless was not a public figure for purposes of discussion about the controversy is simply nonsense.” (quoting *Lorain Journal Co. v. Milkovich*, 474 U.S. 953, 964 (1985) (Brennan, J., dissenting))).

263. *Milkovich*, 497 U.S. at 21. *See also Mashburn v. Collin*, 355 So. 2d 879, 885 (La. 1977) (“Words which, taken by themselves, would appear to be a positive allegation of fact, may be shown by the context to be a mere expression of opinion or argumentative influence.”); *Gray v. St. Martin’s Press, Inc.*, 221 F.3d 243, 248–49 (1st Cir. 2000) (“Whether calling something a ‘fake’ is or is not protected opinion depends very much on what is meant and therefore on context.”). Moreover, as the New York Court of Appeals stated:

To illustrate, if the statement “John is a thief” is actionable when considered in its applicable context, the statement “I believe John is a thief” would be equally actionable when placed in precisely the same context. By the same token, however, the assertion that “John is a thief” could well be treated as an expression of opinion or rhetorical hyperbole when it is accompanied by other statements, such as “John

false statement of fact.<sup>264</sup> The 140-character limitation might limit the *reasonable interpretation* inquiry in the same way that it may hinder courts trying to identify a tweet's relevance to a matter of public concern.<sup>265</sup> An author may not be able to provide sufficient information in 140 characters to fully explicate his position. Therefore, a court must look beyond the tweet at issue to fully grasp the author's message.<sup>266</sup>

Julie Hilden offered a different approach for distinguishing statements of fact from statements of pure opinion. Hilden noted that tweeters should develop a way to verify that a tweet reflects the author's opinion and does not reflect a statement of fact, such as using the abbreviation "IMHO" ("in my humble opinion").<sup>267</sup> Although the solution seems simple enough, inserting an opinion disclaimer is likely insufficient by itself to grant the statement constitutional protection alone. As the Court stated in *Milkovich*, "[s]imply couching such statements in terms of opinion does not dispel these implications; and the statement, 'In my opinion Jones is a liar,' can cause as much damage to reputation as the statement, 'Jones is a liar.'"<sup>268</sup> Or as Judge Friendly noted: "[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'"<sup>269</sup>

In *Finkel v. Dauber*,<sup>270</sup> an Internet user filed a defamation suit against several adolescent Facebook<sup>271</sup> users, alleging that posts

stole my heart," that, taken in context, convey to the reasonable reader that something other than an objective fact is being asserted.  
Gross v. New York Times Co., 623 N.E.2d 1163, 1169 (N.Y. 1993).

264. See *Milkovich*, 497 U.S. at 21.

265. See *supra* Part IV.B.

266. As the New Jersey Supreme Court stated in *Leers v. Green*:

The distinction between an allegation of fact and expression of opinion . . . often depends on what is stated in the rest of the [communication]. If the defendant accurately states what some public man has really done, and then asserts that 'such conduct is disgraceful,' this is merely [a nonactionable] expression of his opinion, his comments on the plaintiff's conduct.

131 A.2d 781, 787 (N.J. 1957) (quoting ODGERS, LIBEL AND SLANDER 166 (6th ed. 1929)). This statement remains relevant post-*Milkovich*. See SACK, *supra* note 36, § 4.3.1, at 4-30.

267. Hilden, *supra* note 164.

268. *Milkovich*, 497 U.S. at 19.

269. *Cianci v. New Times Publ'g Co.*, 639 F.2d 54, 64 (2d Cir. 1980).

270. 906 N.Y.S.2d 697 (N.Y. App. Div. 2010).

271. Facebook is a social media website dedicated to giving "people the power to share and make the world more open and connected." *Facebook*—

made to a “secret group”<sup>272</sup> damaged her reputation.<sup>273</sup> The posts included statements that the plaintiff was seen having sexual relations with a horse, contracted HIV from sharing needles with heroin addicts, contracted AIDS from a male prostitute, and transformed into the devil.<sup>274</sup> The defendants moved for partial summary judgment on the issue of liability.<sup>275</sup> The trial court granted the defendants’ motion, noting:

A reasonable reader, given the context of the posts, simply would not believe that the Plaintiff contracted AIDS by having sex with a horse or a baboon or that she contracted AIDS from a male prostitute who also gave her crabs and syphilis, or that having contracted sexually transmitted diseases in such a manner she morphed into the devil. Taken together, the statements can only be read as puerile attempts by adolescents to outdo each other.<sup>276</sup>

Rather than scrutinize each comment posted to the Facebook group individually, the court analyzed the posts in the context of one another.<sup>277</sup>

The *Finkel* decision demonstrates the importance of fully analyzing the context of defamatory tweets. If the *Finkel* Court analyzed each post separately, the statements might reasonably be interpreted as stating actual facts about the plaintiff. But when analyzed together, the Facebook posts were properly considered to be nonactionable rhetorical hyperbole.<sup>278</sup> By following the *Finkel* Court’s approach, courts will mitigate the challenges imposed by Twitter’s 140-character limitation and ensure that tweets

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*About*, FACEBOOK, <https://www.facebook.com/facebook?sk=info> (last visited Dec. 18, 2012).

272. The statements posted to the secret group were not visible to anyone other than the six members of the group. *Finkel*, 906 N.Y.S.2d at 700.

273. *Id.*

274. *Id.* at 700.

275. *Id.*

276. *Id.* at 702.

277. *See id.* (quoting *Guerrero v. Carva*, 779 N.Y.S.2d 12, 18 (N.Y. App. Div. 2004)) (“[T]he courts should look to the over-all context in which the assertions were made and determine on that basis whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff.”).

278. *See Finkel*, 906 N.Y.S.2d at 702. The *Finkel* Court did not actually label the statements as “rhetorical hyperbole” but chalked the posts up to be a “vulgar attempt at humor.” *Id.* The critical point in the decision is that, considered together, the posts would not be interpreted by a reasonable reader to convey provably false statements of fact. *Id.*

surmounting to no more than “rhetorical hyperbole” or “vigorous epithets” are not misconstrued as asserting actionable false statements of fact.

As this Comment has argued, traditional defamation law remains applicable decades after *New York Times* was decided. Twibel claims, an unheard-of form of defamation at the time the Court began interpreting the First Amendment implications of state defamation law, may be analyzed under the traditional defamation framework originally applied to defamatory statements in newspapers and radio broadcasting.

#### CONCLUSION

In many regards, Twitter has revolutionized modern communication. Hundreds of thousands of people log in to Twitter every day to read the news, share interesting stories, and connect with their peers. For the first time in history, the average citizen has the ability to participate in the same forum as celebrities, politicians, major news networks, and famous athletes. The transformation in electronic media will soon force a court to answer one question: Must the law adapt to give leeway to the inexperienced citizen-publisher, or must tweeters<sup>279</sup> remain mindful of the carefully crafted compromise between the core values implicit in the First Amendment and society’s interest in redressing the injury caused by fictitious attacks on reputation set forth in the string of case law following *New York Times Co. v. Sullivan*? This Comment argues that the latter is the appropriate approach. Rather than engage in a superfluous discussion of legal theory, this Comment has set forth a realistic, step-by-step approach that will guide a trial court in applying the traditional defamation framework to the modern twibel claim.

*Patrick H. Hunt\**

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279. And others who employ the new forms of electronic communication.

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