Speaking Freely on Public Issues: Criminal Suspects as Involuntary Limited-Purpose Public Figures

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INTRODUCTION

The body of John, the owner of a popular local restaurant, was found on the floor of his restaurant's kitchen. He had been shot dead. A large-scale police investigation of the murder ensued and was covered extensively by the local media. In a public statement made a week after John's body had been found the District Attorney announced that the lead suspect in John's murder was Rex, the owner of another local restaurant that competed with John's. Rex and John had had a sordid history with one another and, although the police did not yet have enough evidence to arrest Rex for the murder, the DA expressed strong beliefs that Rex had both the motive and opportunity to commit the crime. He was their prime suspect. Following the DA's comments, John's father, Alex, held a press conference at his home. He implored anyone with information that could lead to Rex's arrest to go to the police immediately. During the press conference he referred to Rex as "a bad man" and "evil" and stated that Rex had "always been out to get my son, John." The following day, Rex filed a lawsuit against Alex in the local court of common pleas alleging that Alex had defamed him.

Is Alex liable for defamation? Should he be? In this author's opinion, the answer to both of these questions should be unequivocally "no." A law enforcement official identified Rex as a suspect in John's murder—a controversy that drew significant public attention. Alex's comments simply expressed agreement with the District Attorney and called for others to aid the police in their investigation. In other words, Alex was exercising his rights under the First Amendment to comment on, and speak freely about, a public issue. If Alex was exercising is First Amendment rights, then certainly he cannot be liable for defamation. Can he?

Under the current state of defamation law, the answer to this question is far from clear. Under long-standing Supreme Court precedent, a defamation plaintiff who is adjudged to be a public official or public figure must prove that a defendant acted with "actual malice" before prevailing against that defendant in a suit for defamation.[1] But if a defamation plaintiff is merely a private figure, then that plaintiff need only prove negligence to recover against a defendant for defamation.[2] Since actual malice is extremely difficult

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1 New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (public officials); Curtis Publishing Co. v. Betts, 388 U.S. 130, 154–55 (1967) (public figures). A defendant acts with "actual malice" in the defamation context when he speaks with "knowledge that [the statement] [is] false or with reckless disregard of whether it [is] false or not." *Sullivan*, 376 U.S. at 279.

2 Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) ("We hold that, so 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.").

to prove, the determination of whether a defamation plaintiff is a public or private figure is often outcome determinative.[3]

Thus, the key question in Rex's defamation suit is whether he is a public or private figure. But the answer to this question is not straightforward.[4] For instance, it is well established that one does not become a public figure simply by breaking the law.[5] This paper does not dispute this rule as a general proposition. Certainly the child who steals a gumball from the candy store or even the petty shoplifter who steals a pair of shoes from the department store are not public figures. But what about a circumstance, such as Rex's case, in which a law enforcement official makes a public statement that identifies an individual as a prime suspect in a criminal investigation? Is such a proclamation sufficient to convert that individual into a public figure, even if just for the limited purpose of commentary on that individual's involvement in the criminal investigation? This paper argues that it is.

In order to sufficiently answer this question another, highly contested, defamation law question must first be discussed. In order for an individual to become a public figure, that individual must play a substantial role in some sort of public controversy.[6] Typically, that person will have become involved in the public controversy voluntarily. Herein lies the problem with determining Rex's public figure status: he certainly has not become involved in the DA's criminal investigation voluntarily. Thus the question becomes: can one become a public figure involuntarily? While the Supreme Court has suggested that the answer to this question is "yes," it has never

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3 As one commentator notes:

> The importance of resolving [the] question [of whether a defamation plaintiff is a public or private figure] . . . is more than merely academic. Like many threshold matters, it can be outcome determinative. If the plaintiff is a public figure, she must prove actual malice on the part of the defendant as an element of her claim. Actual malice is defined as an intention to say something untrue about the plaintiff, or at least reckless disregard for the truth. But if the plaintiff is a private figure, she may, depending on state defamation law, need to prove only negligence. As negligence is far easier to prove, status as a public figure necessarily makes it much harder for a plaintiff to prevail and recover any damages.

Aureliano Sanchez-Arango, Case Note, 9 Geo. Mason L. Rev. 211, 213 (2000).

4 *Compare* Ruebke v. Globe Commc'ns, 738 P.2d 1246 (Kan. 1987) (suspect in triple homicide a public figure for purposes of his defamation suit against newspaper that reported on his involvement in the murders), *with* Stokes v. CBS Inc., 25 F. Supp. 2d 992, 1003 (D. Minn. 1998) (suggesting that a TV station could be liable for negligently reporting that wife was suspected of husband's murder even though the police deputy in charge of the murder investigation had previously said in a public statement that wife was the only suspect in husband's murder).

5 Wolston v. Reader's Digest Assn., Inc., 443 U.S. 157, 167 (1979).

6 *See infra* Part III.A.

definitively ruled on the matter.[7] In the wake of the uncertainty, some courts have adopted the involuntary public figure doctrine,[8] while others have rejected it.[9] This paper argues the courts that have adopted the involuntary public figure doctrine are correct. Indeed, in some circumstances, the involuntary public figure doctrine is necessary to provide First Amendment rights with an adequate level of protection.

The First Amendment guarantees to all American citizens the right to freely comment on matters of public concern. In order to ensure that this right is not chilled, individuals who have been publicly identified as criminal suspects by law enforcement officials should be held to be involuntary public figures. Some states already implicitly agree with this proposition by dismissing lawsuits that inhibit citizens from freely commenting on matters of public interest that are under investigation by official bodies.[10] But the protection of citizens' constitutional rights should not—and indeed does not—depend on state laws. This paper argues that the Supreme Court should formally recognize that individuals who are publicly identified by law enforcement officials as criminal suspects are involuntary public figures for purposes of defamation suits relating to their alleged criminal activity.

This paper proceeds in three parts. Part I reviews and discusses the evolution of United States defamation law in the Supreme Court, beginning with the watershed case of *New York Times Co. v. Sullivan*.[11] This Part concludes by explaining that the Court's opinions have never precluded the existence of involuntary public figures and in fact lend support to the doctrine. Part II turns its attention to lower court opinions that deal with cases of involuntary public figures. Although some courts and commentators have expressed doubts as to whether one can ever become a public figure involuntarily, this Part argues that, at least in a limited range of circumstances, the First Amendment demands that defamation plaintiffs can become public figures involuntarily. Part III then returns to the question posed in this Introduction: is an individual who has been publicly identified by a law enforcement official as a suspect in a criminal investigation an involuntary public figure? This Part answers this question in the affirmative. Both the laws of over half the states and many of the same policy arguments supporting the imposition of the actual malice standard on voluntary public figures justify imposing the actual malice standard on publicly identified criminal suspects as well. Thus, classifying such criminal suspects as

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7 Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974) ("[I]t may be possible for someone to become a public figure through no purposeful action of his own.").

8 *See infra* Part II.A.

9 *See infra* Part II.B.

10 *See infra* Part III.C.1.

11 376 U.S. 254 (1964).

involuntary public figures is justified and indeed necessary to protect citizens' First Amendment right to comment freely on matters of public concern.

I. SUPREME COURT DEFAMATION CASES

The law of defamation is grounded firmly in society's "great tradition of reverence for reputation."[12] As the Supreme Court has aptly noted, "[t]he right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."[13] Indeed, mankind's high valuation of reputation can be traced all the way back to biblical times and the Ninth Commandment, which provides: "Thou shalt not bear false witness against thy neighbor."[14]

Prior to the second half of the twentieth century, the Supreme Court rarely ruled on defamation cases.[15] As such, the development of defamation law was almost exclusively left up to the states. In 1964, the Court's "constitutionalization" of defamation law began when it handed down its opinion in *New York Times Co. v. Sullivan*.[16]

A. The Supreme Court and Defamation: New York Times *to* Gertz

The *Sullivan* case revolved around an advertisement the *New York Times* ran in on March 29, 1960. The ad charged Alabama state authorities with meeting African American students who were nonviolently protesting racism with "a wave of terror."[17] L.B. Sullivan, the Commissioner of Public Affairs for Montgomery County, Alabama, sued the *Times* for libel over this advertisement. Sullivan was awarded $500,000 after a jury trial.[18] The jury was instructed that "the statements in the advertisement were 'libelous per se' and were not privileged, so that [the *Times*] might be held liable if the jury found that they had published the advertisement and that the

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12 1 RODNEY A. SMOLLA, LAW OF DEFAMATION § 1.1 (2d ed. 2012).

13 Milkovich v. Lorain Journal Co., 497 U.S. 1, 22 (1990).

14 SMOLLA, *supra* note 12, § 1:1 (quoting Exod. 16:20).

15 SMOLLA, *supra* note 12, § 1:1.

16 *Id.* §§ 1.1, 2.1; New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

17 *Sullivan*, 376 U.S. at 256–57.

18 For additional background on the facts leading up to the *Sullivan* case and the proceedings in the trial court, see ANTHONY LEWIS, MAKE NO LAW 9–33 (1991). $500,000 was an "enormous" libel award in 1960; indeed, it was the largest in Alabama history at the time. *Id.* at 35. Considering the *Times* faced five nearly identical suits over the same ad, it faced potential liability of over $3 million, an amount that at that point in the paper's history likely would have ruined it. *Id.*

statements were made 'of and concerning' [Sullivan]."[19] Further, the jury was told that "because the statements were libelous per se, 'the law . . . implies legal injury from the bare fact of publication itself,' 'falsity and malice are presumed . . . .'"[20] These instructions were upheld by the Supreme Court of Alabama.[21]

The Supreme Court granted certiorari and reversed the Supreme Court of Alabama. In an opinion authored by Justice Brennan, the Court held that the jury instruction requiring malice to be presumed posed a significant risk of forcing "self-censorship" upon critics of official conduct.[22] Such a rule would "dampen[] the vigor and limit[] the variety of public debate" and thus have an impermissible chilling effect on citizens' rights to comment on matters of public concern.[23] To avoid such a result, the Court ruled that public officials may not recover damages for "defamatory falsehood[s] relating to [their] official conduct unless [they] prove[] that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[24] Concluding that Sullivan had failed to prove actual malice and, in fact, that on the facts in the record could not prove it, the Court reversed and held in favor of the *Times.*

While *Sullivan* established that public *officials* must prove actual malice when they sue someone over defamatory comments relating to their official conduct, it did not rule on the standard of proof that public *figures* must satisfy. This standard was determined by a string of cases beginning with *Curtis Publishing Company v. Butts* in 1967.[25]

Butts involved a defamation suit by famous college football coach Wally Butts against a newspaper that had accused him of fixing a football game. A federal jury ruled in Butts' favor and that verdict was affirmed by the Fifth Circuit. When the case came before the Supreme Court, it held that Butts was a public figure who, like public officials, must satisfy a heightened evidentiary burden in defamation

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19 *Sullivan*, 376 U.S. at 262. At the time, Alabama law held statements that "tended to injure a person in his repuration or to bring him into 'public contempt'" were libelous per se. SMOLLA, *supra* note 12, § 2:3. This was actually consistent with the majority of state defamation laws at the time. *Id.*

20 *Sullivan*, 376 U.S. at 262.

21 *Id.* at 263.

22 *Id.* at 279.

23 *Id. See also id.* at 270 ("[We have] a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."); SMOLLA, *supra* note 12, § 2:3 ("Justice Brennan . . . spoke of the necessity of fashioning libel rules that do not chill the free exercise of public criticism.").

24 *Sullivan*, 376 U.S. at 279.

25 388 U.S. 130 (1967) (plurality opinion).

cases.[26] But the Court splintered over what the appropriate standard of proof. The plurality opinion, authored by Justice Harlan and joined by three other Justices, concluded that public figures could recover damages for defamation upon "a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[27] In contrast, Chief Justice Warren agreed that Butts was a public figure, but argued that public figures should be held to the same actual malice standard that the Court applied to public officials in *New York Times*.[28] Since neither opinion commanded a majority of the Court, the precise standard to which public figures were held remained unclear.[29]

This uncertainty continued two years later when the Court handed down another plurality opinion in *Rosenbloom v. Metromedia, Inc.*[30] Justice Brennan, in an opinion joined by three other justices, concluded that the *New York Times* standard should apply to any speech involving matters of "public or general interest."[31] This ruling departed from the Court's previous defamation cases by looking to the nature of the speech itself, rather than the status of the defamation victim (i.e., public figure vs. private figure) and in doing so greatly expanded the reach of the *New York Times* actual malice standard.[32] Under Justice Brennan's approach, even private figures would have to prove actual malice when seeking to recover damages for defamatory comments that related to matters of "public or general interest." Society's interest in learning about certain issues was Justice Brennan's primary concern: "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved."[33] But again, since the Court failed to reach a consensus opinion, the question of when and to whom the *New York Times* actual malice standard applied remained unclear.

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26 It is worth noting that, although the Court held that Butts was a public figure, it still affirmed the lower court's ruling in favor of Butts, holding that "the jury must have decided that the investigation undertaken by the Saturday Evening Post, upon which much evidence and argument was centered, was grossly inadequate in the circumstances." *Id.* at 156.

27 *Id.* at 155.

28 *Id.* at 162 (Warren, C.J., concurring). The Court has since agreed with Chief Justice Warren. *See infra* discussion of Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

29 Despite the Court's failure to reach a consensus, *Butts* remains significant as the first case to hold that public figures must satisfy a higher standard of proof when seeking damages for defamatory statements relating to their public figure status.

30 403 U.S. 29 (1971).

31 *Id.* at 52.

32 SMOLLA, *supra* note 12, § 2:9.

33 *Rosenbloom*, 403 U.S. at 43.

The uncertainty created by *Butts* and *Rosenbloom* was finally resolved in *Gertz v. Robert Welch, Inc.*[34] *Gertz* involved an attorney, Gertz, who represented the family of a murder victim against the victim's murderer—a Chicago policeman—in a civil suit. Gertz never discussed the policeman with the media and was not involved in the criminal prosecution. Despite this, the magazine *American Opinion* (of which Robert Welch was founder and president) ran an article during the civil trial alleging that the policeman's murder conviction had been a Communist setup intended to embarrass Chicago law enforcement authorities, that Gertz had helped frame the policeman, implied that Gertz had a criminal record, and called Gertz a "Communist fronter."[35] Gertz sued the magazine for libel. By the time the case reached trial, it was undisputed that all the article's allegations against Gertz were false.[36] A jury returned a verdict in favor of Gertz, but the district court entered JNOV in favor of the magazine. Although it held that Gertz was not a public figure under *Butts*, it ruled that *Rosenbloom* required Gertz to satisfy the *N.Y. Times* actual malice standard because the magazine had been discussing a matter of "public interest."[37] The district court concluded that Gertz could not meet this standard. On appeal, the Seventh Circuit suggested that it thought Gertz was a public figure—further demonstrating the confusion the Court's previous defamation decisions had created—but ultimately affirmed the district court's *Rosenbloom* analysis.[38] Gertz appealed to the Supreme Court.

The Court, in an opinion by Justice Powell, reversed and in doing so overturned *Rosenbloom's* "public interest" test.[39] The Court finally established a clear line between public figures and private figures in defamation cases, holding that public figures must satisfy the actual malice test, while states are free to allow private figures to satisfy a lesser standard so long as it is something more than strict liability.[40] This rule balances the need to protect First Amendment

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34 418 U.S. 323, 325 (1974) ("This Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment. With this decision we return to that effort.").

35 *Id.* at 325–26.

36 *Id.* at 326.

37 *Id.* at 329–30 (citing Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971)); *see also supra* discussion of the holding in *Rosenbloom.*

38 *Gertz*, 418 U.S. at 330–31.

39 *Id.* at 346 ("The 'public or general interest' test for determining the applicability of the New York Times standard to private defamation actions inadequately [balances protection of the First Amendment and the protection of private citizens' reputations]."). *See also* Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976) (noting that the Court "repudiated" *Rosenbloom's* holding in *Gertz*).

40 *Gertz*, 418 U.S. at 344–52. *See also Firestone*, 424 U.S. at 465 (Powell, J., concurring) ("By requiring a showing of fault the Court in *Gertz* sought to shield the press and broadcast media from a rule of strict liability that could lead to intolerable self-censorship and at the same time recognize the legitimate

rights with the "legitimate state interest" in protecting citizens' right to protect their "good name."[41] Since this case, virtually all state courts have held that this ruling means that public officials and figures must satisfy the actual malice standard, while private figures must only prove negligence.[42]

The Court justified its holding on two grounds. First, it reasoned that self-help is the first recourse available to defamation victims. Since public officials and public figures typically enjoy significant access to "channels of effective communication," they can more easily combat and respond to defamatory statements.[43] Public figures thus require less protection than private individuals, who have much less ability to publicly respond to defamatory comments and thus are more vulnerable.[44]

Second, the Court reasoned that public figures require less protection from defamation laws than do private figures because public figures have assumed the risk of "closer public scrutiny" by stepping into the public arena.[45] In reaching this conclusion, the Court noted that there are two ways an individual can become a public

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state interest in compensating private individuals for wrongful injury from defamatory falsehoods."). It is worth noting that the opinion never explicitly states that it is making a departure from *Butts*, which purported to hold public figures to a standard greater than negligence, but less than *N.Y. Times* actual malice. *See supra* discussion of *Butts*. But this departure was strongly implied when the Court held that, since Gertz was not a public figure, "the *New York Times* standard is inapplicable to this case." *Gertz*, 418 U.S. at 352. This reading of *Gertz* was accepted by the Court in subsequent defamation cases. *See, e.g.*, Wolston v. Reader's Digest Assoc., Inc., 443 U.S. 157, 164 (1979) (noting that the New York Times actual malice standard was applied to public figures in *Gertz*).

41 *Gertz*, 418 U.S. at 341.

42 *See, e.g.*, Atlanta Journal-Constitution v. Jewell, 555 S.E.2d 175, 183 (Ga. Ct. App. 2002) ("The central issue presented by this appeal is whether Jewell, as the plaintiff in this defamation action, is a public or private figure, as those terms are used in defamation cases. This is a critically important issue, because in order for a 'public figure' to recover in a suit for defamation, there must be proof by clear and convincing evidence of actual malice on the part of the defendant. Plaintiffs who are 'private persons' must only prove that the defendant acted with ordinary negligence." (citing New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964); *Gertz*, 418 U.S. 323) (other internal citation omitted)); SMOLLA, *supra* note 12, § 3:88 ("The Court's opinion in *Gertz* did not actually use the word 'negligence.' . . . Across the country, however, lower courts interpreted the 'fault' requirement as establishing negligence as the minimum standard of culpability that the first amendment would tolerate in a suit by a private figure subject to *Gertz*.").

Though it is not necessarily relevant to this paper's argument, the reader should note that *Gertz* requires even private figures to satisfy the actual malice standard before obtaining punitive damages. *Gertz*, 418 U.S. at 349 ("[W]e hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.").

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

44 *Id.*

45 *Id.*

figure. There are those who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes."[46] But more often, one is a public figure for purposes only of "public controversies" they have "thrust themselves to the forefront" of "in order to influence the resolution of the issues involved."[47] In other words, they are a "limited-purpose public figure."[48]

Taking account of these two considerations, the Court ruled that Gertz was not a public figure. He certainly had not attained a position of "such persuasive power and influence" that he was a public figure for all purposes.[49] Further, although the trial of the Chicago policeman for murder was arguably a public issue, Gertz "plainly did not thrust himself into the vortex of this public issue."[50] He was not involved in the criminal prosecution and discussed neither the criminal nor civil cases with the media. His only involvement in the issue was as an attorney for a private litigant. As such, the Constitution did not require Gertz to satisfy the actual malice standard in order to prevail in his libel suit.

Although the issue was not before it, the Court also briefly addressed the question of whether one can ever become a public figure involuntarily. The Court's opinion seems to suggest that such a result is possible. For instance, the majority opinion noted that "it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare."[51] Later in the opinion, the Court also noted that "an individual [becomes a public figure when he] voluntarily injects himself or *is drawn into a* particular public controversy and thereby becomes a public figure for a limited range of issues."[52] In the years following *Gertz*, this language sparked much debate over whether, and if so when, an individual can involuntarily become a public figure.[53] The Court has had several opportunities to

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46 *Id.* at 345.

47 *Id.*

48 *See, e.g.*, Wolston v. Reader's Digest Assoc., Inc., 443 U.S. 157, 166 (1979) (applying the term "limited-purpose public figure" to the second class of public figures identified in the *Gertz* opinion).

49 *Gertz*, 418 U.S. at 351–52.

50 *Id.* at 352.

51 *Id.* at 345.

52 *Id.* at 351 (emphasis added).

53 *Compare* Sanchez-Arango, *supra* note 3, at 221 ("[F]ar from killing the involuntary public figure doctrine, [*Firestone*, *Hutchinson*, and *Wolston*] merely illustrate[] that voluntariness is merely the principal rout to public figure status."), *with* David L. Wallis, Note, *The Revival of Involuntary Liited-Purpose Public Figures*—Dameron v, Washington Magazine, Inc., 1987 BYU L. REV. 313, 317–18 ("In light of these three cases, the existence of an involuntary public figure is hypothetical at best. The Court stated in *Firestone*, *Hutchinson*, and *Wolston* that the public figure status is contingent on voluntary involvement.").

expound upon the possibility of involuntary public figures, but has declined to ever do so.[54] Despite this, analysis of these cases remains important to establish that the Court has never rejected the idea of an involuntary public figure.

B. The Supreme Court and Defamation: Firestone*,* Hutchinson*, and* Wolston

The first defamation case the Court heard following its ruling in *Gertz* came two years later in *Time, Inc. v. Firestone*.[55] Mary Alice Firestone had married Russell Firestone, of tire company fame, in 1961. In 1964, they went through an ugly[56] and highly publicized divorce that took more than three years to finalize.[57] Following the circuit court's entry of final judgment in the Firestones' divorce trial, *Time* magazine published an article on the proceeding, in which it stated that Russell had been granted divorce from Mary Alice "on grounds of extreme cruelty and adultery."[58] Although these had been the grounds on which Russell sued for divorce, the circuit court did not explicitly state in its order that these were indeed the grounds on which it was granting the divorce. Mary Alice sued Time for libel. She was awarded $100,000 following a jury trial, which award was affirmed by both a Florida District Court of Appeals and the Florida Supreme Court.

On appeal to the Supreme Court, *Time* argued that it could not be liable for publishing any falsehood about Mary Alice unless she proved that such publication was made with actual malice under the *New York Times* standard. Mary Alice, *Time* argued, was a public figure. The Court rejected this argument—Mary Alice was not a public figure. She did not "assume any role of especial prominence in the affairs of society . . . and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it."[59] Further, Mary Alice was not involved in a "public controversy" and thus could not have been a

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54 *See infra* Part I.B.

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

56 The trial judge in the divorce proceeding noted:

> According to certain testimony in behalf of the [husband], extramarital escapades of the [wife] were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, in [the wife's] behalf, would indicate that [the husband] was guilty of bounding from one bedpartner to another with the erotic zest of a satyr.

Id. at 450–51.

57 "The 17-month trial and related events attracted national news coverage, and elicited no fewer than 43 articles in the Miami Herald and 45 articles in the Palm Beach Post and Palm Beach Times." *Id.* at 485 (Marshall, J., dissenting).

58 *Id.* at 452 (majority opinion).

59 *Id.* at 453.

public figure. Comment on divorce proceedings, no matter how newsworthy, were not the sort of "public controversy" *New York Times* and *Gertz* sought to protect.[60] Not all matters of public interest—or "cause celebre" as the Florida Supreme Court put it—are deserving of the heightened actual-malice standard of *New York Times*.[61] A holding to the contrary would harken back to the public-interest rule of *Rosenbloom* that the Court overruled in *Gertz*. As such, *Time* could be held liable for publishing falsehoods about Mary Alice upon a showing of negligence.[62]

Three years after *Firestone*, the Court handed down decisions in *Hutchinson v. Proxmire*[63] and *Wolston v. Reader's Digest Association, Inc.*[64] In *Hutchinson*, a behavioral scientist who conducted psychological studies on monkeys for governmental agencies such as NASA and the Navy, sued Proxmire, a United States Senator who "awarded" NASA and the Navy a "golden fleece" award for wasteful government spending in connection with Hutchinson's studies.[65] Proxmire discussed this award on TV and radio programs and also mentioned it in a newsletter that reached over 100,000 people.[66] Hutchinson sued Proxmire for libel.

The Supreme Court held that Hutchinson was not a public figure. Hutchinson did not "thrust himself or his views into public controversy to influence others."[67] Although government expenditures are a matter of public concern, not everyone who receives a governmental grant "can be said to have invited that degree of public attention and comment . . . essential to meet the public figure level. . . . Hutchinson at no time assumed any role of public prominence in the broad question of concern about expenditures."[68]

The Court also recognized the "bootstrapping" issue raised by this case, noting that any public controversy Hutchinson was arguably involved in was caused by Proxmire's awarding of the golden fleece award to the institutions Hutchinson worked for.[69] "Clearly, those

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60 *Id.* at 454.

61 *Id.*

62 The case was ultimately remanded because it was unclear from the trial record whether the jury had been adequately instructed that it must find some degree of fault before Time could be liable for publishing defamatory statements. *Id.* at 464.

63 443 U.S. 111 (1979).

64 443 U.S. 157 (1979).

65 *Hutchinson*, 443 U.S. at 114.

66 *Id.* at 117.

67 *Id.* at 135.

68 *Id.*

69 W. Wat Hopkins, *The Involuntary Public Figure: Not So Dead After All*, 21 CARDOZO ARTS & ENT. L.J. 1, 16 (2003).

charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure."[70]

Finally, in *Wolston*, *Reader's Digest* published a book about Soviet espionage in post-World War II America.[71] The book stated that Wolston had been indicted for espionage and that Wolston was a "Soviet agent."[72] Wolston's aunt and uncle had pled guilty to charges of espionage, and Wolston was interviewed by the FBI on several occasions. He also testified before a grand jury in New York on several occasions. On one such occasion, Wolston failed to appear for a scheduled grand jury appearance due to illness. He was charged with contempt and pled guilty to the charge, which resulted in a one-year suspended sentence and three years of probation. Wolston's contempt charge and conviction drew some media attention, but he was out of the public eye shortly after pleading guilty. Wolston was never indicted for espionage and, other than the convictions of his aunt and uncle, there was no evidence to suggest that he was ever an agent of the Soviet Union. When the *Reader's Digest* book was released, Wolston sued for libel.

The Supreme Court held that Wolston was a private figure. Far from voluntarily injecting or thrusting himself into a public controversy, the Court noted that it would be more accurate to say that Wolston was "dragged unwillingly into the controversy." The Court emphasized the need to look to the "nature and extent of [Wolston's] participation in the particular controversy giving rise to the defamation."[73] Since Wolston never discussed this matter with the media and limited his involvement to only that necessary to defend against the contempt charge, the Court concluded that he only played a "minor role" in whatever public controversy surrounded the espionage investigation.[74] The Court refused to hold that such tangential involvement in a controversy—even a controversy of public concern—was sufficient to transform Wolston into a public figure.[75] The Court further rejected the argument that engaging in criminal conduct automatically confers public figure status, thus again emphasizing that it is the "nature and extent" of one's involvement in the public controversy that is determinative of public figure status.[76]

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70 *Hutchinson*, 443 U.S. at 135.

71 Wolston v. Reader's Digest Assoc., Inc., 443 U.S. 157, 159 (1979).

72 *Id.* at 159.

73 *Id.* at 167 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 352 (1974)).

74 *Id.*

75 *Id.* ("[Wolston's] failure to appear before the grand jury and citation for contempt no doubt were 'newsworthy,' but the simple fact that these events attracted media attention also is not conclusive of the public-figure issue."). *See also* Hopkins, *supra* note 69, at 17 (arguing that the "clear implication" of *Wolston* was that "public figures must be more than tangentially involved in public controversies").

76 *Wolston*, 443 U.S. at 168–69.

C. The Supreme Court and Defamation: The Status of the Involuntary Public Figure

As demonstrated by the preceding discussion, the Court reached its decisions in *Firestone*, *Hutchinson*, and *Wolston* without ever addressing the possibility that any of the defamation plaintiffs in those cases were involuntary public figures. Since the Court failed to address the involuntary public figure doctrine in each of these cases, even though each arguably presented the Court with an opportunity to do so, one might ask whether these decisions preclude the doctrine's existence. Several commentators argue that they have not. Their reasoning is persuasive.

One commentator argues that the Court in these three cases "focused on issues it obviously believed trumped involuntary public figure status."[77] In *Firestone* the Court held that the divorce proceeding was not a matter of "concern," thus rending the status of the defamation plaintiff irrelevant—you cannot have a public figure, voluntary or otherwise, without a matter of public concern upon which to base the public figure status.[78]

In *Hutchinson*, the "bootstrapping" issue precluded the Court from addressing the involuntary public figure doctrine: since defendants cannot create a public controversy and then use that controversy as a defense to a libel action, the Court did not need to fully address Hutchinson's public figure status.[79]

Finally, an initial reading of *Wolston* may appear to suggest that the Court rejected the involuntary public figure doctrine when it stated that Wolston was not a public figure because he had been "dragged unwillingly into the controversy."[80] But the Court never actually reached the question of whether Wolston was an involuntary public figure because Wolston "'played only a minor role' in a public controversy."[81] A plausible reading of this holding is that public figures, voluntary or otherwise, "must be more than tangentially involved in the public controversy."[82] What if Wolston had played a *major* role in the controversy, for example, because it turned out he actually was a Soviet spy? Presumably this would not have changed the fact that he was "dragged unwillingly into the controversy." But would it have changed the outcome of the case? The Court's ruling in *Wolston* does not answer this question.

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77 Hopkins, *supra* note 69, at 15–16.

78 *Id.* at 16

79 *Id. See also* Sanchez-Arango, *supra* note 3, at 225 ("The Court principally rejected Hutchinson as a candidate for public figure status because the claim amounted to little more than bootstrapping.").

80 Wolston v. Reader's Digest Assoc., Inc., 445 U.S. 157, 166 (1979).

81 Hopkins, *supra* note 69, at 16.

82 *Id.* at 17.

Since the Court's defamation decisions do not address when, if ever, an individual can become an involuntary public figure, it becomes necessary to turn elsewhere for an answer to the question this paper poses.

II. INVOLUNTARY PUBLIC FIGURE DOCTRINE IN LOWER COURTS

Since the Supreme Court has yet to expound upon the involuntary public figure doctrine, it is instructive to look to how lower courts have handled the doctrine in determining how it ought to be applied. A number of lower courts have held that defamation plaintiffs can become public figures involuntary—but not all courts agree. This Part explores cases that have come out on both sides of the involuntary public figure question and argues that involuntary public figures are sometimes necessary in order to protect First Amendment rights.

A. Lower Courts Supporting the Involuntary Public Figure Doctrine

One of the first courts to address the involuntary public figure doctrine was the United States District Court for the Northern District of California in *Trans World Accounts, Inc. v. Associated Press*.[83] Trans World was a debt collection agency and was under investigation by the FTC for unfair and deceptive loan practices. At the same time, the FTC was also investigating several other debt collection agencies for similar infractions. The FTC distributed a press release announcing its intent to file complaints against Trans World and the other debt collection agencies. Though the release stated that it intended to file complaints covering four types of infractions, the release also noted that two of the charges would not be made against Trans World. When the Associated Press reported on the press release, it failed to indicate that Trans World was not being charged with all four infractions—it simply lumped Trans World together with the other companies being investigated. Trans World sued AP for libel.

The district court held that Trans World was a public figure for purposes of its libel suit against AP and thus had to satisfy the *New York Times* actual malice standard.[84] The court began its analysis by acknowledging that Trans World had not donned the public figure mantle voluntarily: "[Trans World] cannot be said to have become a public figure by having achieved 'pervasive fame or notoriety.' Nor can it be said that it 'voluntarily inject[ed] [it]self . . . into a particular

83 425 F. Supp. 814 (N.D. Cal. 1977).

84 *Id.* at 819–22.

public controversy.'"[85] But the court recognized that these are not the only ways one can become a public figure: "*Gertz* [also] recognize[d] that a person may become a public figure for a limited range of issues by having been '*drawn into* a particular public controversy.'"[86] A public controversy certainly existed in this case: the FTC found that Trans World's debt collection practices posed a significant enough risk to the general public to consider lodging official charges against it.[87] The court distinguished this case from *Firestone*, which involved a marital dispute between *private* parties,[88] and *Gertz*, where the plaintiff attorney represented a client in a *private* lawsuit and was not involved in any of the public activities relating to the murder.[89] In this latter analysis, the court seemed to suggest that Gertz would have been a public figure if he had been involved criminal proceedings.[90]

Having established that a public controversy existed, the court went on to explain how Trans World's involvement in the controversy transformed it into a public figure. It noted that part of the FTC's effectiveness draws from the publicity that attends the issuance of its proposed complaints, which serves to both alert the public and motivate the offender to quickly remedy its infractions.[91] Thus, although "Trans World may not have been a 'public figure' until the proposed complaint issued[,] . . . it was clearly drawn into a particular controversy having its origin in Trans World's own conduct and activities and thereby became a public figure for the limited range of issues relating to the FTC's complaint."[92] Therefore, the FTC complaint turned Trans World into a public figure, despite the fact that Trans World did not voluntarily assume the risks attendant to public figure status.

Implicit in this ruling seems to be the conclusion that, once an official body publicly lodges a complaint against a person or entity, that complaint creates a public controversy and that person/entity becomes a public figure for the limited purpose of issues surrounding

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85 *Id.* at 819 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974) (alteration in original)).

86 *Id.* at 819–20 (emphasis added).

87 *Id.* at 821.

88 *Id.* at 820 (citing Time, Inc. v. Firestone, 424 U.S. 448 (1976)).

89 *Id*. at 821 n.4 (citing *Gertz*, 418 U.S. 323).

90 *Id.* ("In [*Gertz*], plaintiff was a private lawyer who merely represented the family of a boy shot by a policeman in a civil suit for damages against the policeman. He was not involved in criminal proceedings against the policeman or in any of the public activities relating thereto which formed the background of the allegedly defamatory story in which plaintiff was charged with having been involved in a Communist plot to discredit the police.").

91 *Id*. at 820.

92 *Id.* at 821.

that complaint. A ruling to the contrary would inhibit public discourse on an issue of public concern.[93]

Several years after *Trans World*, the D.C. Circuit weighed in on the involuntary public figure question in *Dameron v. Washington Magazine, Inc.*[94] Dameron was the lone air traffic controller on duty at Dulles International Airport during a fatal crash landing in 1974. Eight years later, *The Washingtonian* magazine published an article suggesting that Dameron was partly to blame for the crash. As Dameron had never been found responsible for the crash, he sued *The Washingtonian* for libel.

The D.C. Circuit held that Dameron was a public figure. Although Dameron did not "inject" himself into a public controversy, the court noted that this one factor "is not the be-all and end-all of public figure status."[95] The court then went on to explicitly state that, in this situation, Dameron was an involuntary public figure:

> Injection is not the only means by which public-figure status is achieved. Persons can become involved in public controversies and affairs without their consent or will. Air-controller Dameron, who had the misfortune to have a tragedy occur on his watch, is such a person. We conclude that Dameron did become an *in*-voluntary public figure for the limited purpose of discussions of the [plane] crash.[96]

The court recognized that, typically, a central part of the limited-purpose public figure analysis is "an inquiry into the plaintiff's *voluntary* actions that have caused him to become embroiled in a public controversy" in order to determine whether the plaintiff played a "sufficiently central role in that controversy."[97] But this analysis must sometimes be modified to accommodate the Supreme Court's acknowledgement that, in rare cases, an individual may become a

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93 *See id.* at 820 n.2 ("In the first place, in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally." (quoting Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491–92 (1975))).

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

95 *Id.* at 740–41.

96 *Id.* at 741.

97 *Id.* (emphasis added) (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974); Waldbaum v. Fairchild Pubs., Inc., 627 F.2d 1287, 1296–98 (D.C. Cir. 1980)).

public figure involuntarily.[98] Dameron's case was one of these rare situations. Though it was by "sheer bad luck," Dameron "assume[d] [a] special prominence in the resolution of [a] public question[ ]."[99] He "was at the center of a controversy involving the loss of many lives in a mishap involving . . . the management of a program administered by the FAA, an arm of the government."[100] Dameron also appeared at FAA hearings following the crash. Such circumstances, the D.C. Circuit concluded, were sufficient for a finding that Dameron had become a public figure involuntarily: "[L]ike it or not, Dameron was embroiled in a public controversy."[101]

As in *Trans World*, the D.C. Circuit took care to distinguish *Dameron* from Supreme Court precedent. Unlike *Firestone*, much more than mere newsworthiness made the plane crash a public controversy. It involved significant loss of human life that may have been caused by mismanagement of a government agency.[102] The court also distinguished this case from *Wolston*, noting that Wolston "was not defamed with respect to the controversy in which he played a central role—his refusal to testify before a grand jury—but rather with respect to a controversy in which he played a role that was at most tangential—the investigation of Soviet espionage in general."[103]

The application of *Dameron* by a Wisconsin Court of Appeals in *Bay View Packing Co. v. Taff*[104] provides further insight into the involuntary public figure doctrine. In *Bay View*, the City of Milwaukee's water supply was contaminated by parasitic bacteria. Bay View was a Milwaukee–based company that pickled food products. The pickling process required Bay View to use water from the city water supply. The FDA told Bay View to recall its food products since they were likely contaminated. Bay View eventually complied, but not until four days after the FDA's request. That evening, a Wisconsin news channel reported that Bay View had "completely disregarded" the FDA's recall request and that contaminated Bay View products remained on shelves for sale.[105] Bay View filed a defamation suit against the news station.

The Wisconsin Court of Appeals held that Bay View was an "involuntary limited purpose public figure."[106] First, the court

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98 *Id.* at 741–42 ("In *Gertz* the Supreme Court noted that it is 'possible to become a public figure through no purposeful action of [one's] own' although it added that 'the instances of truly involuntary public figures must be exceedingly rare.'" (quoting *Gertz*, 418 U.S. at 345)).

99 *Id.* 742 (quoting *Gertz*, 418 U.S. at 351).

100 *Id.*

101 *Id.*

102 *Id.*

103 *Id.* (citing Wolston v. Reader's Digest Association, Inc., 443 U.S. 157, 167 (1979)

104 543 N.W.2d 522 (Wis. Ct. App. 1995).

105 *Id.* at 525–26.

106 *Id.* at 533.

established that the contamination of Milwaukee's water supply was a public controversy. An issue is a public controversy, the court noted, if it is "being debated publicly and if it had foreseeable and substantial ramifications for non-participants."[107] The water contamination issue certainly satisfied this definition. Hundreds of thousands of people were affected by the bacteria and many people's lives were threatened. The effects of the contamination were felt throughout the state. The court also identified the production of foodstuffs with contaminated water as a subcontroversy of this larger public controversy.[108]

Having recognized a public controversy, the court turned to the more difficult question of Bay View's involvement in the controversy. Citing *Gertz* and *Dameron*, the court recognized that, although public figure status usually results when one voluntarily injects himself into a public controversy, "it may be possible for someone to become a public figure through no purposeful action of his own."[109] The court held that this was such a case. Though Bay View sought no publicity in this case, the plaintiff's desire for publicity is irrelevant to public figure analysis because "[p]ersons can become involved in public controversies . . . without their consent or will."[110] Bay View's failure to timely comply with the FDA's recall request in the face of a major public health crisis "inevitably put [Bay View] into the vortex of a public controversy."[111] Bay View could not change this fact simply because it had not wanted to be involved in the controversy. Thus, Bay View was an "involuntary limited purpose public figure."[112]

The Georgia Court of Appeals has also contributed to the involuntary public figure discussion. *Atlanta Journal-Constitution v. Jewell*[113] centered around Richard Jewell, who was a security guard at the 1996 Olympics. Jewell discovered a bomb in Atlanta's Centennial Park during the Games and helped lead the evacuation of spectators from the park. Jewell became a media hero as a result of his actions and in the days and weeks following the incident was interviewed by a number of media outlets and appeared on TV several times. Jewell was also, however, investigated by the FBI as a suspect in the bombing, though its investigation ultimately cleared him of any involvement in the bombing. During the FBI investigation, a local newspaper ran a number of articles implying that Jewell was guilty of the bombing. Jewell sued the paper for libel.

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107 *Id.* at 531 (quoting Waldbaum v. Fairchild Pubs., Inc., 627 F.2d 1287, 1297 (D.C. Cir. 1980))

108 *Id.* at 532.

109 *Id.* (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974); Dameron v. Wash. Magazine, Inc., 779 F.2d 736, 740–41 (D.C. Cir. 1985)).

110 *Id.* at 533 (quoting *Dameron*, 779 F.2d at 741).

111 *Id.*

112 *Id.* at 534.

113 555 S.E.2d 175 (Ga. Ct. App. 2001).

The Georgia Court of Appeals concluded that not only was Jewell a limited-purpose public figure, he was also an "involuntary limited-purpose public figure."[114] The court noted that, "[o]ccasionally, someone is caught up in [a] controversy involuntarily and, against his will, assumes a prominent position in its outcome."[115] Like the plaintiff in *Dameron*, Jewell was an ordinary citizen unknown to the general public before the Olympic bombing.[116] But, like it or not, Jewell became a "central figure" in the controversy surrounding the park bombing and public safety.[117] One who assumes such a central role in a public controversy is a public figure, whether they assumed such status voluntarily or not.

B. Lower Courts Rejecting the Involuntary Public Figure Doctrine

Despite the holdings of lower courts just discussed, some lower courts—most notably the Fourth Circuit—do not abide by the involuntary public figure doctrine. For instance, the Fourth Circuit appeared to reject the doctrine in *Foretich v. Capital Cities/ABC, Inc.*[118] *Foretich* involved a highly publicized custody battle between Doctors Elizabeth Morgan and Eric A. Foretich over their daughter, Hilary. Morgan was initially awarded full custody of Hilary, subject to Foretich's receiving scheduled visitation rights. Several years later, Morgan began refusing to allow Foretich to visit with Hilary because she believed Hilary was being sexually abused by Foretich and his parents (Hilary's grandparents). Morgan brought a civil action against Foretich and his parents for sexual abuse, but after a four-day trial a jury ruled against Morgan. Neither Foretich nor his parents were ever indicted or convicted of sexual abuse.

Despite losing her civil claim, Morgan continued her refusal to permit Foretich to see their daughter. She went as far as hiding Hilary from Foretich and the court. As a result, Morgan was held in contempt of court and sentenced to 25 months in jail. The Fourth Circuit noted that Morgan's incarceration, and the flurry of charges and coutnercharges that followed it, "generated a torrent of publicity. . . . Hundreds of newspaper and magazine articles were published about virtually every aspect of the controversy. The broadcast media devoted extensive coverage to the dispute and to the various public policy debates that it inspired."[119] Indeed, the controversy drew so much publicity that it inspired the passage of a federal law limiting the amount of time one can be held in jail for

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114 *Id.* at 186.

115 *Id.*

116 *Id.*

117 *Id.*

118 37 F.3d 1541 (4th Cir. 1994).

119 *Id.* at 1544.

contempt of court. As a result, Morgan was released from jail. A private investigator eventually discovered that Hilary was living in New Zealand with Morgan's parents. Morgan subsequently won full custody of her daughter in a New Zealand court.

During the controversy, Foretich's parents were frequently mentioned in news reports. They even appeared in the news on several occasions, but only to defend themselves against Morgan's allegations of child abuse.

Years later, ABC broadcast a docudrama about the custody battle. The docudrama strongly implied that Foretich and his parents had abused Hilary. Foretich's parents sued ABC for defamation. A district court held that Foretich's parents were private figures and ruled in their favor. On appeal, the Fourth Circuit affirmed. The court began by holding that the custody battle was a public controversy because it had "foreseeable and substantial ramifications for persons beyond its immediate participants."[120] The custody battle "heightened social awareness" of child-abuse allegations, the unfortunate realities of custody battles, and even prompted the passage of a new federal law regarding contempt jail sentences.[121]

But despite finding the presence of a public controversy, the court held that Foretich's parents were private figures. In seemingly contradictory reasoning, the court noted that *Gertz* divided public figures into three categories, including "'involuntary public figures,' who become public figures through no purposeful action of their own,"[122] but then stated that, in determining public figure status, it must ask "whether the plaintiff ha[d] *voluntarily* assumed a role of special prominence in a public controversy by attempting to influence the outcome of the controversy."[123] With this requirement in mind, the Fourth Circuit concluded that Foretich's parents were not limited-purpose public figures because they did not "voluntarily assume a role of special prominence in the Morgan-Foretich controversy in order to influence its outcome."[124] Despite conceding that *Gertz* recognized the involuntary public figure doctrine, the court did not even consider whether Foretich's parents had become public figures involuntarily.[125]

The Fourth Circuit continued to eschew the involuntary public figure doctrine in *Wells v. Liddy*.[126] This case revolved around

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120 *Id.* at 1555 (quoting Waldbaum v. Fairchild Pubs., Inc., 627 F.2d 1287, 1292, 1296 (D.C. Cir. 1980).

121 *Id.* at 1555.

122 *Id.* at 1551 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974)).

123 *Id.* at 1553 (quoting Reuber v. Food Chem. News, Inc., 925 F.2d 703, 709 (4th Cir. 1991) (emphasis added)).

124 *Id.* at 1556.

125 Indeed, the word "involuntary" only appears two times in the entire opinion and both times it is part of a quote from *Gertz*. *Id.* at 1551–52.

126 186 F.3d 505 (4th Cir. 1999).

G. Gordon Liddy's theory regarding the true purpose of the 1972 Watergate burglary. The commonly accepted theory is that the burglars were targeting the office of Larry O'Brien, the Chairman of the DNC.[127] But Liddy and others contend that the break-in's true purpose was to obtain information about a call-girl ring being run out of the DNC.[128] While this is not a widely accepted theory, it is a long-standing theory for which there is at least some corroborating evidence.[129] Liddy's theory essentially boiled down to a belief that the burglary's true aim was to break into the desk of a DNC secretary—Ida Wells—from which Liddy believed the call girl ring was being organized.[130] Liddy espoused this theory in several speeches, on the Internet, and on the radio.[131] Wells sued him for defamation.

The United States District Court for the District of Maryland held that Wells was an involuntary limited purpose public figure.[132] The district court held that Wells was a central figure in the controversy surrounding the purpose of the Watergate burglary and that she was in the same, albeit involuntary, position as the plaintiff in *Dameron*:

> Wells is in virtually the identical position [as the plaintiff in *Dameron*]. She had the misfortune to be working at the DNC at the time of the break-in; it is her desk and her telephone that have been said (by others prior to Liddy) to have been used in connection with a prostitution ring; and it was the key to her desk that was seized by an arresting officer from one of the Watergate burglars. Unfortunate though the circumstances may be, before Liddy made any of the statements allegedly defaming her, Wells had been drawn by a series of events into the Watergate controversy.[133]

Thus, because Wells "stood in a path of legitimate public inquiry into the reasons behind the break-in," the district court found that she was an involuntary limited-purpose public figure.[134]

But on appeal the Fourth Circuit reversed the district court, holding that Wells was not a public figure—involuntary or otherwise.[135] Staying true to the reasoning in *Foretich*, the Fourth

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127 Sanchez-Arango, *supra* note 3, at 214.

128 *Id.* at 214–16.

129 *See generally id.*

130 Wells v. Liddy, 1 F. Supp. 2d 532, 534 (D. Md. 1998).

131 *Id.*

132 *Id.* at 536.

133 *Id.* at 540–41.

134 *Id.* at 541.

135 Wells v. Liddy, 186 F.3d 505 (4th Cir. 1999).

Circuit acknowledged that the Supreme Court had identified "involuntary public figures" as a type of public figure, but went on to hold that even involuntary public figures must assume the risk of publicity.[136] Under this reasoning, Wells was not an involuntary public figure because she was not a "central figure in media reports *on Watergate*. . . . In the great wealth of materials *on Watergate*, [she was], at most, a footnote."[137] The court noted its hesitance to base public figure status on "sheer bad luck," noting that such reasoning would risk a return to the rejected reasoning of *Rosenbloom*.[138]

C. Who is Right?

As evidenced by the cases discussed above, there is clear disagreement over how to treat the involuntary public figure doctrine. This paper encourages the Supreme Court to adopt the reasoning of cases like *Trans World, Dameron*, *Bay View*, and *Jewell*.[139] These cases further the First Amendment's goal of promoting a "common quest for truth" across a broad "spectrum of ideas and topics"[140] by recognizing that the actual malice standard is necessary to protect debate on public issues.[141] The right of every citizen to comment and engage in debate on matters of public concern is a freedom that lies at the very core of democratic society. This being the case, it is important to ensure that our laws do not deter citizens from exercising this freedom. The actual malice standard does this by limiting the amount of second-guessing speakers must engage in before commenting on public controversies. Under the actual malice standard, statements made in good faith, even if not fully informed, are protected from defamation liability.[142] Such a standard encourages citizens to engage in debate on matters of public concern, thus promoting citizen involvement in the democratic process.[143]

By comparison, when mere negligence is the standard applied to speech, citizens will more frequently stop to ask themselves "Do I

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136 *Id.* at 540.

137 *Id.* at 541 (emphasis added).

138 *Id.* at 539–40 (citing Dameron v. Washington Magazine, Inc., 779 F.2d 736 (D.C. Cir. 1985).

139 *See supra* Part II.A.

140 SMOLLA, *supra* note 12, § 1:29.

141 *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967); Hopkins, *supra* note 69, at 47.

142 *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 334 n.6 (1974) (actual malice requires "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication"). Mere failure to double-check the accuracy of a statement is insufficient for a finding of actual malice. *Id.* (citing *Sullivan*, 376 U.S. at 287–88).

143 *See, e.g.*, Hopkins, *supra* note 69, at 47 ("A rule . . . protecting discussion of [matters of public concern] and the people significantly involved in such issues is mandated by the commitment of the First Amendment to self-government.").

know enough about this issue to comment on it?" As soon as such questions are asked, speech rights have been chilled.[144] Though such a limit on speech rights may not always be undesirable, for instance when it comes to discouraging citizens from making comments that disparage a private citizen's reputation, such a chilling effect is impermissible when it comes to comment on matters of public concern. Society cannot hope to encourage its citizens to engage in debate on matters of public concern if its laws result in citizens having to think twice before they speak.[145] This being the case, the mere fact that a participant's involvement in a public controversy is involuntary should not be the sole deciding factor in determining what standard applies in defamation cases.[146] A public controversy warranting free public comment can exist regardless of whether direct participants' involvement is voluntary or not. Voluntary "injection" of oneself into a public controversy should not be the "be-all and end-all of public figure status."[147] This principle was recognized *Trans World*, *Dameron*, *Bay View*, and *Jewell*.[148]

Take *Dameron*, for instance. An airplane crashed, resulting in the tragic loss of a great many lives. In the wake of the accident, it came to light that problems with FAA regulation may have been partly to blame for the crash. Such a controversy involving a government agency is certainly a matter of public concern and thus an issue on which the First Amendment seeks to promote public debate.[149] Once a court has established that a matter of public concern exists, the protection of citizens' freedom to comment on such matters should come first and foremost in any subsequent First Amendment analysis. This is not to say we should return to the rule of *Rosenbloom*.[150] Rather, it is simply to say that First Amendment

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144 *See, e.g.*, Kimberly Caswell, *Soldiers of Misfortune: Holding Media Defendants Liable for the Effects of Their Commercial Speech*, 41 FED. COMM. L.J. 217, 230 (1989) ("[A] decision to allow a negligence cause of action may chill protected speech."). It is much easier to be found liable under a simple negligence standard, than more demanding standards such as actual malice. This specter of civil liability and the potentially large jury verdicts that accompany deter citizens from speaking, thus chilling speech rights. *Id.*

145 *See generally Sullivan*, 376 U.S. at 278–79 (addressing the adverse First Amendment consequences of laws that result in such "self-censorship").

146 This reasoning mirrors that used by the Court in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 154 (1967) when it determined that public figures are in the same league as public officials: The public's interest in matters of public concern is no less great when a public figure is involved than when a public official is involved. Extending this logic, the public's interest in matters of public concern is no less great simply because a central figure in that matter becomes so involuntarily.

147 Dameron v. Wash. Magazine, Inc., 779 F.2d 736, 740–41 (D.C. Cir. 1985).

148 *See supra* Part II.A.

149 *See, e.g.*, Johnson v. Multnomah Cnty., Or., 48 F.3d 420, 425 (9th Cir. 1995) ("[M]isuse of public funds, wastefulness, and inefficiency in managing and operating government entities are matters of inherent public concern.").

150 As discussed in greater detail above, the *Rosenbloom* plurality held that any speech involving matters of "public or general interest" should be governed by

analysis should not always begin and end with the question of whether a participant's involvement in a matter of public concern was voluntary. While the fact that a participant's involvement in the public controversy was involuntary should certainly factor into the analysis, that factor alone should not lead to a per se application of the negligence standard. Such a per se rule would overlook the fact that there is nonetheless still a public controversy that citizens should feel free to comment on openly. Courts that apply such a per se rule (i.e., those courts that reject the involuntary public figure doctrine) are thus focusing their First Amendment analysis too narrowly. The question should not be "was the participant's involvement in the controversy involuntary?" but rather "if the participant's involvement in the controversy was involuntary, does the need to protect citizens' First Amendment rights nevertheless demand application of the actual malice standard in this case?" This latter question reflects an appropriate balancing of the participant's interest in their reputation and the First Amendment rights at issue—a balancing that the Supreme Court has recognized is necessary and that courts adopting the per se rule fail to engage in.[151]

Dameron and other cases recognize that this latter question is the correct one by noting that "[i]njection is not the only means by which public-figure status is achieved."[152] In *Dameron*, the fact that the air traffic controller was "embroiled in a public controversy" was sufficient for a finding that he was a public figure.[153] The implication of this holding is that the need to protect public comment on a matter of public concern outweighed the fact that the air traffic controller's involvement in the controversy was involuntary. When one's participation in a public controversy is significant enough, the need to promote First Amendment debate on that controversy is sufficiently strong to outweigh even the involuntary participant's interest in protecting their reputation. While the Supreme Court has yet to address such reasoning, it has certainly never rejected it.[154] Further,

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the *New York Times* actual malice standard. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 (1971) (plurality opinion). This paper is not arguing for such a blanket rule. Rather, it simply argues that if there is a matter of "public or general interest," the fact that a participants involvement in that matter is involuntary should not automatically preclude application of the *New York Times* standard. Arguably, support for this position can be found in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). In *Dun & Bradstreet* the Court held that a defamation plaintiff did not need to show actual malice to obtain presumed and punitive damages where the defendant's comments did not relate to a matter of public concern. *Id.*at 760–61. Such reasoning suggests that taking into account the nature of the speech in question is relevant for determining the burden of proof in a defamation case.

151 *See, e.g.*, *Gertz*, 418 U.S. at 348 (noting that the approach taken in *Gertz* strikes the necessary balance between the First Amendment and states' interest in protecting individuals' reputations).

152 *Dameron*, 779 F.2d at 741. *See also* similar statements in *Trans World*, *Bay View*, and *Jewell*.

153 *Dameron*, 779 F.2d 742.

the Court's dicta in *Gertz* that involuntary public figures do exist suggests that the Court would find this reasoning to be persuasive.

The reasoning of *Dameron* and like courts is further bolstered by the fact that the reasoning of courts like the Fourth Circuit is incorrect for several reasons. First, the Fourth Circuit's reasoning is contradictory. It openly acknowledges that the Supreme Court has recognized the possibility of involuntary public figures, yet still requires some voluntary action on the part of the defamation plaintiff before they are labeled an involuntary public figure. Though the Fourth Circuit pays lip service to the involuntary public figure doctrine, its decisions essentially reject it completely. For instance, one commentator notes that

> by injecting the need for voluntariness into the "involuntary category," the Fourth Circuit creates a third category that swallows the first. That is, any meaningful distinction between an "involuntary limited purpose public figure" and simply a "limited purpose public figure" is blurred beyond recognition.[155]

Such reasoning flies in the face of the Supreme Court's suggestion in *Gertz* that "it may be possible for someone to become a public figure through no purposeful action of his own" and that one becomes a public figure either by "voluntarily" injecting himself into a public controversy *or* by being "*drawn into* a particular public controversy."[156]

Second, the Fourth Circuit's reasoning is based on an incorrect interpretation of case law. In *Wells*, the Fourth Circuit identified two rationales the Supreme Court used to justify requiring public figures to satisfy the actual malice standard. One of these was that "the public figure has taken actions through which he has voluntarily assumed the risk of publicity."[157] While the Supreme Court did indeed say this, it also noted that those who become public figures involuntary would be an exception to this rationale. The Court stated that

> it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. *For the most part* those who

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154 *See supra* Part I.C.

155 Sanchez-Arango, *supra* note 3, at 230.

156 Gertz v. Robert Welch, Inc., 418 U.S. 323, 345, 351 (1974).

157 Wells v. Liddy, 186 F.3d 505, 539 (4th Cir. 1999) (citing *Gertz*, 418 U.S. at 344).

> attain this status have assumed roles of especial prominence in the affairs of society.[158]

Note that the Court says "for the most part." Taken in context, this language means that those individuals referenced in the previous sentence (those who "become a public figure through no purposeful action of [their] own") are an exception to the general rule. This interpretation must be the correct one because such a caveat is necessary in order for this passage of the Court's opinion to make sense. The Court cannot be saying that public figure status *always* requires voluntary action because it recognizes in the same paragraph that sometimes one can become a public figure without taking any "purposeful action." Thus, the Fourth Circuit's premise that public figure status requires an individual to "voluntarily assume[] the risk of publicity" is incorrect.

The Fourth Circuit also incorrectly interprets cases like *Dameron* that have recognized the involuntary public figure doctrine. The Fourth Circuit worries that *Dameron* was little more than a return to the *Rosenbloom* rule that was rejected by the Court in *Gertz*: "Under either *Dameron* or *Rosenbloom* all individuals defamed during discourse on a matter of public concern must prove actual malice."[159] This interpretation of the *Dameron* rule is incorrect. *Dameron* still requires that the defamation plaintiff be more than tangentially related to the public controversy. This rule is much narrower than the *Rosenbloom* rule, which looked only to the nature of the speech itself. Thus, under *Rosenbloom*, one who had absolutely no relation to a public controversy would still have to satisfy the actual malice standard if the person allegedly defaming them was commenting on a matter of public concern. *Dameron* departs from this broad rule by looking to the status of the defamation plaintiff and determining that plaintiff's level of involvement in the public controversy.[160]

Finally, the Fourth Circuit errs by failing to identify the correct public controversy. The Fourth Circuit held that Wells was not a public figure because she was at most a "footnote" in the Watergate controversy. But the Watergate controversy in general was not the public controversy actually in dispute in *Wells*. Rather, the public controversy at issue in *Wells* was the more specific question of the purpose of the burglary.[161] Such a question is still a matter of public concern, but is also clearly a much different controversy than the Watergate controversy in general. The Fourth Circuit's "footnote"

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158 *Gertz*, 418 U.S. at 344 (emphasis added).

159 *Wells*, 186 F.3d at 539.

160 *See, e.g.*, Sanchez-Arango, *supra* note 3, at 232 ("[T]he *Waldbaum-Dameron* test would exclude individuals who are only tangentially mentioned in media accounts or who otherwise are simply too unimportant to be deemed a part of a controversy.").

161 *See* Hopkins, *supra* note 69, at 230.

conclusion is arguably correct in the latter case, but most certainly incorrect in the former one. In the former, Wells was a key player. The burglars had a key to her desk and Liddy theorized that Wells was helping to organize the call-girl ring. The Fourth Circuit's failure to identify the correct public controversy caused it to incorrectly find that Wells was only tangentially related to a public controversy.

In sum, the Supreme Court should explicitly recognize that defamation plaintiffs can become public figures involuntarily. A per se rule that involuntary participation in a public controversy requires application of a negligence standard in defamation cases overlooks the fact that there still exists a matter of public concern that citizens should be free to comment on publicly. The involuntary public figure doctrine leads to a more appropriate analysis by balancing the participant's involuntary involvement against the First Amendment rights at stake.

III. CRIMINAL SUSPECTS AS INVOLUNTARY PUBLIC FIGURES

Having concluded that the Supreme Court should recognize the involuntary public figure doctrine because it strikes an appropriate balance between individual reputation and citizens' First Amendment rights, we now turn back to the original question posed by this paper: Should an individual who has been publicly recognized by a law enforcement official as a suspect in an ongoing criminal investigation be classified as an involuntary public figure? Simply acknowledging that involuntary public figure status is a possibility does not answer this question—deeper analysis is required.

One thing that becomes clear upon review of both Supreme Court and lower court jurisprudence is that there are three prerequisites to a holding that a defamation plaintiff is a limited-purpose public figure—involuntary or otherwise. First, there must be a "public controversy" upon which public figure status can be predicated.[162] Second, if there is such a public controversy, the defamation plaintiff's involvement in that controversy must be more than merely tangential.[163] Finally, the allegedly defamatory comment

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[162] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974) (holding that individuals most often become public figures by "thrust[ing] themselves to the forefront of particular *public controversies*" (emphasis added)); Dameron v. Wash. Mag., Inc., 779 F.2d 736, 741 (D.C. Cir. 1985) (noting that the first step in its limited-purpose public figure analysis is to "determine that there is a *public controversy*" (emphasis added)).

[163] *See* Wolston v. Reader's Digest Assoc., Inc., 443 U.S. 157, 167 (1979) ("It is clear that petitioner played only a *minor role* in whatever public controversy there may have been concerning the investigation of Soviet espionage."(emphasis added)); *Gertz*, 418 U.S. at 351 (noting that all public figures "assume special prominence in the resolution of public questions"); *Dameron*, 779 F.2d at 741 ("[T]his court [uses] a three-part framework for analyzing whether someone has become a limited-purpose public figure. Under this test the court must determine that there is a public controversy; *ascertain*

must be "germane" to the plaintiff's involvement in the controversy.[164] In order to answer this paper's central question, we must determine whether the criminal suspect in that question satisfies all three of these requirements. This final Section argues that he does.

A. Public Controversy

Before one can be deemed any kind of public figure, there must be a public controversy upon which public figure status can be based.[165] As such, there must be a public controversy before Rex—the murder suspect from the Introduction—can be said to be a public figure. Courts are virtually unanimous in requiring that an event's resolution have an impact on people who are not direct participants in order for the controversy to be a "public controversy."[166] Thus, a public controversy existed in *Dameron* because loss of life that was potentially due to deficiencies in the FAA raised questions about government regulation, the resolution of which would impact the general public.[167] Similarly, the questions of FTC regulation raised in *Trans World*, FDA food safety regulation in *Bay View*, and general public safety in *Jewell* were public controversies because the resolution of each of those controversies would have impacts on society in general—not just the direct participants in those controversies. Even the Fourth Circuit in *Foretich* concluded that the controversy that arose out of the custody battle was a public controversy—it raised social awareness of child abuse and custody issues and even resulted in the passage of a new federal law.[168]

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that the plaintiff played a sufficiently central role in that controversy; and find that the alleged defamation was germane to the plaintiff's involvement in the controversy." (emphasis added)); *see also* Wells v. Liddy, 186 F.3d 505, 534 (4th Cir. 1999) ("Before a plaintiff can be classified . . . as a limited-purpose public figure, the defendant must prove that [the plaintiff] . . . assumed a role of special prominence in the public controversy."); *see also* Hopkins, *supra* note 69, at 17 (arguing that the "clear implication" of *Wolston* is that "public figures must be more than tangentially involved in public controversies").

164 *See, e.g.*, *Dameron*, 779 F.2d at 741.

165 That is, unless the person is in that select category of individuals who are public figures for all purposes. *See Gertz*, 418 U.S. at 345 ("For the most part those who attain [public figure] status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes."). The murder suspect in this paper's central question is not such a person.

166 *See, e.g.*, Wells v. Liddy, 186 F.3d 505, 534 n.24 (4th Cir. 1999) (noting that Watergate was a "public controversy" because it is "an event that has evoked extensive political and historical interest and debate and has had effects felt well beyond the direct participants"); Bay View Packing v. Taff Co., 543 N.W.2d 522, 531 (Wis. Ct. App. 1995) ("[I]f the issue was being debated publicly and if it had foreseeable and substantial ramifications for non-participants, it was a public controversy."(quoting Waldbaum v. Fairchild Pub, 627 F.2d 1287, 1297 (D.C. Cir. 1980))).

167 *Dameron*, 779 F.2d at 742.

168 Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1555 (4th Cir. 1994).

Rex's situation is comparable to these situations. When a law enforcement official publicly identifies an individual as a suspect in an ongoing criminal investigation, the subsequent resolution of that investigation will have effects on society in general—not just those directly involved in the investigation. As Justice Brennan once observed, the judicial process, as with the other branches of government, must be "subject[] . . . to extensive public scrutiny and criticism."[169] A line of Supreme Court cases has also recognized a qualified First Amendment right of public access to judicial proceedings, which further serves to emphasize the benefits of allowing the public to monitor the courts.[170] A primary reason for this is that "mismanagement in the criminal justice system, and the resulting potential threat to the public, is a matter of public concern."[171] In short, a law enforcement official's public recognition of an individual as a suspect in an ongoing criminal investigation implicates the "public interest in a fair and effective criminal justice system."[172] Citizens not directly involved in a criminal investigation still have an interest in the perpetrator's being brought to justice. Public confidence in the criminal justice system is shaken when a criminal is not brought to justice and such results may suggest the need for reform. Such circumstances are most certainly within the ambit of issues that can have "foreseeable and substantial ramifications for non-participants." As such, once the district attorney publicly identified Rex as a suspect in John's murder, Rex became a participant in a public controversy.

It should be noted that this result will not cause John's father, Alex, run into the "bootstrapping" problem identified by the Supreme Court in *Hutchinson*.[173] Recall that one of the issues that arose in *Hutchinson* was that the public controversy in the case was created by Proxmire, whom Hutchinson subsequently sued for defamation. The Court recognized the inequity that would result if it were to deem Hutchinson a public figure based upon a public controversy created by the man he was suing for defamation.[174] This issue would arise in

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169 Time, Inc. v. Firestone, 424 U.S. 448, 477 (1976) (Brennan, J., dissenting).

170 *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); *see also* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984); Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986). Among the interests served by presumptive openness are enhancing public confidence in the judicial branch, informing the public about the workings of government, encouraging persons with knowledge about matters that are pending in the legal system to come forward and disclose what they know, and serving as a check on incompetence, venality, or corruption.

171 Bonomi v. Gaddini, 11 Fed. App'x 832, 833 (9th Cir. 2001).

172 Rakas v. Illinois, 439 U.S. 128, 156 (1978) (Powell, J., concurring).

173 Hutchinson v. Proxmire, 443 U.S. 111 (1979). *See also* Hopkins, *supra* note 69, at 16.

174 *Hutchinson*, 443 U.S. at 135 ("Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.").

Rex's case if he were to sue *the government* for defamation. *Hutchinson*'s bootstrapping rule would not permit the government to argue that Rex is a public figure who has to satisfy the actual malice standard because it was the government that created the public controversy by publicly identifying Rex as a criminal suspect.

By contrast, Alex would not be hindered by the bootstrapping rule because he did not create the public controversy at issue in Rex's case. This result is consistent with the result in *Trans World*. Trans World became a public figure after a government agency, the FTC, publicly accused Trans World of unfair debt collection practices. Had Trans World sued the FTC for defamation, presumably the bootstrapping rule would have prevented the FTC from arguing that Trans World was a public figure. But that is not what happened in *Trans World*. Rather, Trans World sued a newspaper that had reported on the FTC's press release. The *Trans World* court allowed the newspaper to successfully argue that Trans World was a public figure and thus that it had to satisfy the actual malice standard. Alex is in a comparable position to the newspaper in *Trans World* and thus would not be hindered by the bootstrapping rule. As such, in the case of a law enforcement official identifying an individual as a suspect in a criminal investigation, there exists a public controversy upon which public figure status can be predicated.

B. The Importance of Correctly Defining the Controversy

Before moving onto the second prong of the analysis (the plaintiff's involvement in the public controversy), an issue related to determining the public controversy at issue warrants discussion.

As was just established, the public interest in the criminal justice system's fair and effective resolution of criminal investigations creates a public controversy when a law enforcement official publicly identifies an individual as a suspect in an ongoing criminal investigation. But the observant reader may have noted that this is not the only possible way to frame the controversy. Arguably, there is also a narrower controversy at issue: who committed the specific criminal act? But when it comes time to determine a suspect's involvement in this narrower controversy a significant problem arises: The suspect's degree of involvement in the controversy is unknown because he is just that, a *suspect*, not a known criminal perpetrator. If the suspect did indeed commit the criminal act, then clearly he played a significant role in the controversy and perhaps is even a *voluntary* public figure for purposes of public comment on the criminal act. On the other, if the suspect is actually innocent, then he almost certainly had no involvement in the controversy and thus would not be a public figure at all.

This circumstance demonstrates the importance of determining the precise nature of the public controversy at issue in a defamation case. Both courts and commentators have recognized this

importance.[175] Focusing on a controversy that is either too narrow or too broad can lead to incorrect public figure determinations. Recall that this is one of the pitfalls the Fourth Circuit fell into in *Wells v. Liddy*.[176] Rather than focusing on the narrower controversy over the purported existence of a call-girl ring in the DNC, the court instead framed the controversy as the much broader Watergate scandal. Clearly in the latter controversy, a mere secretary at the DNC played little part in the scandal that resulted in President Nixon's resignation. But in the former controversy—which was actually the controversy at issue in the case—that secretary may have played a pivotal role in organizing the call-girl ring. This is a vital point and one about which courts determining questions of public figure status must be cognizant.

The problem posed in the Introduction demonstrates this principle. Defining the public controversy too narrowly (i.e., "Who killed John?" or "Who broke the law prohibiting murder?") both leads to an impossible public figure determination and also ignores the more general public interest in fair and effective criminal law enforcement. The broader public controversy created by the district attorney's public identification of Rex as a suspect in the murder investigation—which implicates several issues of public concern[177]—is thus the appropriate public controversy for a court to use in this case.

C. Involvement in the Public Controversy

Having established that a public controversy does in fact exist when a law enforcement official publicly identifies an individual as a criminal suspect—and that this is indeed the proper public controversy to be analyzing—the public figure inquiry turns to the nature of that individual's involvement in that public controversy. This is where the involuntary public figure doctrine is of vital importance to resolving this paper's central question. Certainly Rex, and virtually all other criminal suspects in like positions, did not voluntarily become involved in the criminal investigation of which he is a part. Nonetheless, as the lead suspect in the district attorney's investigation of John's murder, Rex is certainly a central figure in the public controversy arising out of that criminal investigation. As cases that utilize the involuntary public figure doctrine demonstrate, Rex's role as a central player in a public controversy would likely be sufficient for a finding that he is an involuntary public figure for purposes of public comment on the criminal investigation.

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175 *See, e.g.*, Waldbaum v. Fairchild Pubs., Inc., 627 F.2d 1287, 1297 n.27 (D.C. Cir. 1980) (noting the importance of defining the controversy either "narrowly or broadly"); Sanchez-Arango, *supra* note 3, at 233 ("[A]n error in this area [determining whether there is a controversy] can be outcome-determinative.").

176 *See supra* Part II.C.

177 *See supra* Part III.A.

For example, just as Richard Jewell was an involuntary public figure because he "played a central, albeit possibly involuntary, role in the controversy over Olympic Park safety" and became "embroiled in the ensuing discussion and controversy over park safety,"[178] Rex plays a central role in the controversy over effective criminal law enforcement and is certainly embroiled in any discussion relating to that controversy. Similar analogies can be drawn between Rex's situation and the other involuntary public figure cases this paper has discussed.[179] In jurisdictions where the involuntary public figure doctrine is already accepted, this would likely be the end of the analysis (assuming the allegedly defamatory comments were germane to Rex's involvement in the controversy[180]). Rex would be deemed an involuntary public figure and would have to prove that Alex acted with actual malice. But since uncertainty about the involuntary public figure doctrine continues to exist in many of this country's jurisdictions, further explanation and support of this result will be useful to help courts analyze involuntary public figure questions correctly. Both state law and sound policy arguments provide such explanation and support.

1. State Anti-SLAPP Laws

Under the laws of many states, Rex's defamation suit against Alex is likely already an impermissible infringement upon Alex's free speech rights. Many states recognize the potentially chilling effects of lawsuits that discourage citizens from publicly commenting on public issues. The legal world has termed such suits "strategic lawsuits against public participation" ("SLAPP") and laws prohibiting such lawsuits as "Anti-SLAPP" laws.[181] More than half of the states have adopted such laws.[182] The goal of anti-SLAPP laws is to prevent claimants from bringing lawsuits against individuals who are exercising their right of free speech "in connection with an issue under consideration or review by [a governmental or official proceeding]" or their "right to petition government for a redress of grievances."[183]

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178 Atlanta Journal-Constitution v. Jewell, 555 S.E.2d 175, 186 (Ga. Ct. App. 2001).

179 *See supra* Part II.A.

180 See analysis of this factor, *supra*.

181 *Guarding Against the Chill" A Survival Guide for SLAPP Victims*, FIRST AMENDMENT PROJECT, http://www.thefirstamendment.org/antislappresourcecenter.html#What%20are%20slapps (last visited Nov. 1, 2012).

182 *State Anti-SLAPP Laws*, PUBLIC PARTICIPATION PROJECT, http://www.anti-slapp.org/your-states-free-speech-protection (last visited Oct. 29, 2012).

183 GA. CODE ANN. §§ 9-11-11.1(b)–(c) (2012). Other state anti-SLAPP laws contain virtually identical wording. *See, e.g.*, CAL. CIV. PROC. CODE §§ 425.16(b)(1), (e) (2009) ("A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike . . . .

Under such laws, a lawsuit by an individual who has been identified as a criminal suspect in an ongoing criminal investigation against a private citizen who commented on that individual's involvement in the criminal investigation would likely be dismissed. This is so because the private individual's speech would is "in connection with an issue under consideration or review by [a governmental or official proceeding]" and thus within the ambit of anti-SLAPP laws. At least one court has explicitly accepted this result. In *Hindu Temple & Community Center of the High Desert, Inc. v. Raghunathan*,[184] the Hindu Temple was under investigation for running a credit card scam. Hindu Temple sued Raghunathan after he told law enforcement officials that Hindu Temple had made unauthorized charges to his credit card. A Georgia Court of Appeals dismissed the suit under Georgia's anti-SLAPP law because Raghunathan's statement had been "made in furtherance of an ongoing investigation regarding [Hindu Temple's] alleged criminal activity."[185] Because "[s]uch speech is in furtherance of the right . . . to petition government for a redress of grievances [it] thus represent[ed] the type of speech that the anti-SLAPP statute is designed to protect."[186]

Under such reasoning, Alex would be protected from Rex's defamation lawsuit if he lived in a state with an anti-SLAPP statute. Alex's comments about Rex were "made in furtherance of an ongoing investigation regarding [Rex's] alleged criminal activity" and as such were "in furtherance of [Alex's] right . . . to petition government for a redress of grievances," therefore qualifying them for anti-SLAPP protection.[187] This is not to say that state anti-SLAPP laws are a sufficient substitute for protecting Alex's First Amendment rights, for citizens should not have to depend on state law to protect their constitutional rights.[188] But the fact that Rex's defamation lawsuit

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> As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.").

184 714 S.E.2d 628 (Ga. Ct. App. 2011).

185 *Id.* at 632.

186 *Id.*

187 *Id.*

188 *See, e.g.*, California v. Greenwood, 486 U.S. 35, 43 (1988) ("We have never intimated . . . [that] the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs."); Christopher v. Nestlerode,

against Alex would be dismissed under the laws of over half the states certainly provides support for a finding that Rex, at the very least, should have to satisfy a higher burden of proof in order to prevail in his suit against Alex.

2. Reduced need to protect reputation

Several of the policy arguments for requiring public figures to satisfy a higher standard of proof in defamation cases equally support requiring individuals who have been identified as criminal suspects by law enforcement officials to satisfy the actual malice standard. Three policy arguments underlie the Supreme Court's holding in *Gertz*: (1) individuals' right to protect their reputations from falsehoods sometimes trump others' First Amendment rights; (2) public figures have ready access to media and thus can more easily combat falsehoods than private figures; and (3) public figures, by stepping into the public spotlight, have assumed the risk of being negligently defamed.[189] As discussed previously, this third policy argument does not work in the involuntary public figure context.[190] Indeed, the Supreme Court seemed to recognize this in *Gertz*.[191] The remaining two policy considerations support a holding that individuals who have been publicly identified by law enforcement officials as criminal suspects are public figures. First, the need to protect First Amendment rights should win out over the right of such individuals to protect their reputations. Any damage done to their reputation by comments following the official's proclamation is de minimis in comparison to the harm already inflicted by that proclamation. Second, such individuals likely have the increased access to media that the Supreme Court has recognized as supporting a higher burden of proof requirement.

Reputation. It is important to remember that the existence of a defamation cause of action is a restriction of free speech rights.[192] Defamation laws discourage citizens from engaging in certain types of speech and thus, to a certain extent, have a chilling effect on free speech rights. But such limitation is warranted, at least in certain situations, because society, in addition to valuing speech rights, also values individuals' right to protect their reputations from false statements. Thus, the Supreme Court in *Gertz* justified its holding—namely, that public figures must satisfy a higher standard than private

373 F. Supp. 2d 503, 513 (M.D. Pa. 2005) ("Neither the Fourth Amendment nor the Constitution as a whole depends upon the law of a single state for substantive meaning."), *aff'd*, 240 F. App'x 481 (3d Cir. 2007).

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

190 *See supra* Part II.C.

191 *Id.*

192 *See, e.g.*, Eric M. Jacobs, Comment, *Protecting the First Amendment Right to Petition: Immunity for Defendants in Defamation Actions through Application of the* Noerr-Pennington *Doctrine*, 31 AM. U. L. REV. 147, 168 (1981) ("The Court found that an action for defamation does limit free speech rights, and consequently developed the *New York Times-Gertz* standard of liability.").

figures in defamation suits—as recognizing "the strong and legitimate state interest in compensating private individuals for injury to reputation."[193] It further noted that "there is no constitutional value to false statements of fact."[194]

This principle is illustrated by the typical defamation suit. *B*, an ordinary private citizen, makes a false statement about *A* in a public place that many people overhear. Wishing to protect his reputation, *A* sues *B* for defamation (or, to be more specific, slander in this case).[195] In such a defamation suit between two private persons, *A*, in order to prevail in his defamation suit for compensatory damages, would simply have to prove that *B* acted with negligence in making the false statement.[196] *B* is only required to satisfy this lesser standard because defamation law recognizes that private citizens have an interest in protecting their reputations from false statements—an interest that is so strong that it warrants placing a limit on free speech rights.[197]

But when it comes to a private citizen being sued for defamation by an individual who has been publicly identified by a law enforcement official as a criminal suspect, the interest in protecting that individual's reputation is not as strong. This is so because enormous damage has already been done to the criminal suspect's reputation by the law enforcement official's announcement

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193 *Gertz*, 418 U.S. at 348.

194 *Id.* at 340.

195 Oral defamation is called "slander." BLACK'S LAW DICTIONARY 660 (3d pocket ed. 2006).

196 *Gertz*, 418 U.S. at 347 ("We hold that, so 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."); *see also* Time, Inc. v. Firestone, 424 U.S. 448, 464–65 (1976) (explaining that *Gertz's* holding means that there is no "First Amendment constraint against allowing recovery upon proof of negligence" in a suit by a private figure for "defamatory falsehood"); Atlanta Journal-Constitution v. Jewell, 555 S.E.2d 175, 183 (Ga. Ct. App. 2002) ("The central issue presented by this appeal is whether Jewell, as the plaintiff in this defamation action, is a public or private figure, as those terms are used in defamation cases. This is a critically important issue, because in order for a 'public figure' to recover in a suit for defamation, there must be proof by clear and convincing evidence of actual malice on the part of the defendant. Plaintiffs who are 'private persons' must only prove that the defendant acted with ordinary negligence." (citing New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964); *Gertz*, 418 U.S. 323) (other internal citation omitted)).

197 "[P]rivate individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery." *Gertz*, 418 U.S. at 345. Despite this, "the tort of defamation should be an unfavored cause of action because it implicates first amendment freedom of speech rights. It is therefore appropriate to place major restrictions on the ability to recover in defamation." Carl C. Monk, *Evidentiary Privilege for Journalists' Sources: Theory and Statutory Protection*, 51 MO. L. REV. 1, 42 (1986). The Supreme Court has recognized this principle by "impos[ing] a greater burden on public official and public figure defamation plaintiffs because the tort of defamation inherently implicates first amendment rights." *Id.* at 42 n.222 (citing *Sullivan*, 376 U.S. 254; Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967)).

before any other comments about the criminal suspect have been made.[198] The impact of subsequent comments by private citizens on the individual's criminal status will have a relatively insubstantial impact on that individual's reputation as compared to the massive harm already inflicted by the official's public accusation. Taking this paper's hypothetical as an example, is Rex's reputation substantially more tarnished than it already has been by the district attorney's pronouncement after Alex announces his agreement with the district attorney? This seems unlikely. By the time Alex made his comments, Rex had already been officially branded a criminal suspect. Subsequent accusations of Rex's guilt would seem to pale in comparison.

Accepting that Alex's comments have a relatively de minimis impact on Rex's already tarnished reputation, finding that Rex is an involuntary public figure, and thus must satisfy the actual malice standard, becomes significantly more justified. As we have seen, the rule that allows private figures to prove only negligence in defamation suits is predicated on the value society places on individuals being allowed to protect their reputations from falsehoods. Indeed, society places such a high value on individual reputation that, at least in the context of private figure defamation plaintiffs, the right to protect one's reputation substantially trumps the defamation defendant's First Amendment rights. But when it comes to the case of an individual who has been publicly identified as a criminal suspect, society's need to protect that individual's reputation from subsequent harm becomes much weaker because the public official's announcement has already inflicted considerable damage to that individual's reputation. Thus, the predicate upon which defamation law's limitation of First Amendment rights is based is not nearly as strong in this context, while society's interest in protecting First Amendment rights remains as strong as ever. This being the case, the scales should tip back in favor of protecting First Amendment rights.[199] And the way to provide greater protection to First Amendment rights in the defamation arena is to find that the defamation plaintiff is a public figure and thus must satisfy the actual malice standard. Thus, Rex should be deemed a public figure who has to prove actual malice.[200]

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198 Simply being accused of a criminal act can have serious repercussions for one's reputation. For instance, our nation's grand jury system recognizes this by operating in secrecy in order to "protect innocent criminal suspects from damage to their reputations." George T. Marcou, *Grand Jury*, 71 GEO. L.J. 475, 483 (1982).

199 This is not to say that the criminal suspect loses all right to protect his reputation—citizens are still prohibited from recklessly defaming the criminal suspect. Rather, the point here is that, in the battle of right to reputation versus right to freedom of speech, free speech should, absence recklessness on the part of the speak, win in this circumstance.

200 The author recognizes that this argument raises a not insignificant question: if this line of reasoning were indeed adopted, shouldn't the criminal suspect, if it turns out that he is actually innocent, then have a cause of action against the

Access to Media. The Supreme Court in *Gertz* also justified holding public figures to a higher standard because they "usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements then private individuals normally enjoy."[201] Public figures require less protection from defamation law because they can quickly respond to allegedly defamatory comments through mediums that reach a broad audience, thus allowing them to repair their reputations through self-help.[202]

This justification holds equally true in the case of criminal suspects, like Rex, who have been publicly recognized as such by a law enforcement official. Once the law enforcement official makes his announcement, media outlets will be clamoring to get the

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law enforcement official? This question raises several difficult questions, not the least of which being qualified immunity, that are beyond the scope of this paper. For an interesting perspective and possible answers to similar questions, see Kyu Ho Youm, *Freedom of Expression and the Law: Rights and Responsibilities in South Korea*, 38 STAN J. INT'L L. 123 (2002). Professor Youm's article discusses, among other things, how South Korea has balanced "expressive rights . . . with societal interests such as reputation, privacy, and public morality." *Id.* at 125. South Korean law provides a possible solution to the question of what action the criminal suspect would have against the law enforcement official. It has several laws in place that "allow litigants to demand follow-up reports on the criminal proceedings where any of the defendants involved were acquitted. These statutory provisions were enacted to provide a means by which the *damaged reputation* and privacy of exonerated criminal suspects could be restored." *Id.* at 140–41 (emphasis added). But the article also recognizes the likely opposition such laws would face in the United States: "These right of reply provisions have been frequently attacked in South Korean courts on the grounds that they violate freedom of the press." *Id.* at 141.

The Supreme Court has also briefly addressed right to reply statutes. In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), the Court upheld an FCC regulation requiring radio stations that broadcast personal attacks against an individual to provide that individual with adequate airtime to voice a response to those attacks. Such a rule "enhance[s] rather than abridge[s] the freedoms of speech and press protected by the First Amendment." *Id.* at 375. Further, Justice Brennan suggested in his concurring opinion in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) that statutes requiring a speaker to retract a statement that had been found to be defamatory might pass constitutional muster. But it should be noted that the majority opinion in *Tornillo* struck down a Florida right-to-reply statute that required a newspaper that attacked a political candidate's personal character to afford that candidate with free space in the paper to respond. Justice Brennan also suggested in his *Gertz* dissent that a statute "provid[ing] for an action for retraction or for publication of a court's determination of falsity if the plaintiff is able to demonstrate that false statements have been published concerning his activities" would be constitutional. *Gertz*, 418 U.S. at 369 n.3 (Brennan, J., dissenting).

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

202 *Id.* ("The first remedy of any victim[] of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation.").

suspect's side of the story.[203] Any reporter or newscaster worth his salt would be foolish to turn down an opportunity to speak to the suspect and report on the suspect's side of the story. This gives the criminal suspect a remedy to defamatory comments that everyday citizens simply do not have. While this access to media may not be enough, in and of itself, to justify placing a heightened standard of proof on the criminal suspect,[204] when combined with the other factors discussed in this Part, it certainly provides further justification for a finding that the suspect is an involuntary public figure.

3. Consistency with Precedent

Briefly, it should also be noted that holding that the district attorney's public identification of Rex as a criminal suspect makes Rex an involuntary public figure is not at odds with the Supreme Court's long-established holdings that neither mere involvement in litigation, nor engaging in criminal activity, are enough for a finding of a public controversy. The Court noted in *Firestone* that it saw "little reason why [participants in litigation] should substantially forfeit that degree of protection which the law of defamation would otherwise afford them simply by virtue of their being drawn into a courtroom."[205] And in *Wolston* it rejected the contention that "any person who engages in criminal conduct automatically becomes a public figure for purposes of comment on a limited range of issues relating to his conviction."[206]

The case of Rex and other like criminal suspects can be distinguished from these precedents. First, the Court's rule in *Firestone* is not an absolute one. It recognized that "participants in some litigation may be legitimate 'public figures.'"[207] Further, the facts of *Firestone* are radically different than those in Rex's case. Firestone involved a divorce suit between a husband and wife—a civil action. Rex's case, on the other hand, involves a serious criminal accusation. The distinction here is clear. Civil actions are most often between private parties over private affairs and thus less deserving of the First Amendment's protection of free public comment. In contrast, Rex's case is a serious criminal matter implicating issues of public

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203 Of course, the suspect's attorney will frequently discourage the suspect from making statements to the media or the general public. But the suspect's increased access to the media still remains. The suspect could release carefully worded statements to the press or could wait until the criminal investigation has concluded before speaking out. Both courses of action are not uncommon in today's society.

204 The Supreme Court noted in *Gertz* that "an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie. But the fact that the self-help remedy of rebuttal, standing alone, is inadequate to its task does not mean that it is irrelevant to our inquiry." *Id.* at 344 n.9.

205 Time, Inc. v. Firestone, 424 U.S. 448, 457 (1976).

206 Wolston v. Reader's Digest Assoc., Inc., 443 U.S. 157, 168 (1979).

207 *Firestone*, 424 U.S. at 457.

concern that does warrant public comment.[208] It is certainly more serious and of much greater public concern than the "cause celebre" at issue in *Firestone*.[209] Thus, holding that Rex is a public figure does not conflict with *Firestone*.

Wolston is also distinguishable. Like *Firestone*, *Wolston* does not establish an absolute rule. It merely rejected that proposition that criminal activity "automatically" turns one into a public figure. In that case, *Wolston* was guilty of a relatively minor crime: contempt of court. Rex, on the other hand, is a *murder* suspect who has been publicly identified as such by a law enforcement official. This situation is a far cry from that in *Wolston*. While there is little need to provide public comment on an individual's conviction for contempt of court with greater protection than it receives under the negligence standard, the public interests implicated by an ongoing criminal investigation do warrant greater protection. At least one court has acknowledged this distinction.[210] Therefore, *Wolston* does not preclude Rex from being an involuntary public figure.

D. Comments Germane to Involvement in Public Controversy

The analysis throughout this Part has assumed that Alex's comments about Rex were related to Rex's involvement in the public controversy (the criminal investigation). It seems to the author that this factor will rarely be a contentious one, but it should certainly be acknowledged in order to emphasize an important point: involuntary

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208 The Northern District of California agrees with this reasoning:

> Neither the mere involvement in litigation nor the associated publicity where the participants attract public interest is sufficient to turn litigants into public figures. But as the Court there recognized, "participants in some litigation may be legitimate 'public figures,' either generally or for the limited purpose of that litigation . . ." The litigation in this case was not a controversy between private parties nor simply an action by the government over an issue essentially of concern only to the government and the respondent. Instead, the proposed complaint which was the subject of the publication here was the result of an investigation into Trans World's business activities and reflected a determination that some of those activities created a sufficient risk of harm to a significant segment of the public that enforcement proceedings should be instituted.

Trans World Accounts, Inc. v. Associated Press, 425 F. Supp. 814, 820 (N.D. Cal. 1977) (citing *Firestone*, 424 U.S. 448).

209 *Firestone*, 424 U.S. at 454.

210 *See* Ruebke v. Globe Commc'ns, 738 P.2d 1246 (Kan. 1987). In this case, Ruebke was accused of a triple homicide and eventually charged. Globe reported on his involvement in the murders and Ruebke sued for defamation. In finding that Ruebke was a public figure, the Supreme Court of Kansas recognized *Wolston*, but held that the proper inquiry was to determine the nature and extent of [Ruebke's] participation in the controversy giving rise to the [alleged] defamation." *Id.* at 1251. The great "public concern" surrounding the murders justified the court's finding that Ruebke was a public figure. *Id.* at 1252.

public figures must necessarily be limited-purpose public figures. As discussed throughout this Part, individuals become involuntary public figures by virtue of their pivotal involvement in a *particular* public controversy. Although they become a public figure involuntarily, they are only a public figure for purposes of comment on the controversy in which they are involved. This third and final step of the analysis recognizes this. By ensuring that the allegedly defamatory comment is "germane" to the involuntary public figure's involvement in the controversy, it ensures that that person is a public figure only for purposes of the controversy in which they are involved.

The "germane" requirement is satisfied so long as the "primary concern" of the allegedly defamatory comment is the "plaintiff's role" in the public controversy.[211] In this paper's hypothetical it is clear that the "primary concern" of Alex's comments about Rex is Rex's involvement in the criminal investigation. But say Alex had instead said something like: "Rex puts rat poison in his hamburgers. No one should ever eat at his restaurant. It is the worst restaurant I in town." Comments such as these would not be "germane" to the public controversy upon which Rex's public figure status is based, meaning that if Rex sued Alex over these comments Rex would not have to prove actual malice. This requirement thus ensures that involuntary public figures are still able to protect their reputations in contexts outside the public controversy in which they are involved.

CONCLUSION

It is time for the Supreme Court to definitively rule on the public figure question. In order to adequately protect the citizens' First Amendment right to comment freely on matters of public concern, the Court should recognize that there are a limited range of circumstances where, even if a plaintiff's involvement in the matter is involuntary, the *New York Times* actual malice standard should apply. A situation where an individual has been publicly identified by a law enforcement official as a suspect in a criminal investigation is one such circumstance. Several factors justify the application of the involuntary public figure doctrine in such a context. First, a defamation suit brought by such a suspect is already likely to be dismissed under many states' anti-SLAPP laws as an impermissible infringement on free speech rights. Second, the policy arguments justifying the requirement that public figures satisfy the actual malice standard also support applying that standard to such criminal suspects. Individuals who have been publicly identified as criminal suspects by law enforcement officials have already suffered immense harm to their reputations. As such, the need to protect their reputations is not as great as in the typical defamation case. This being the case, the ever present need to protect First Amendment

[211] Silvester v. American Broadcasting Co., 839 F.2d 1491, 1497 (11th Cir. 1988).

rights justifies imposing the actual malice standard. Further, such criminal suspects have greatly increased access to media with which they can combat allegedly defamatory comments.

The involuntary public figure doctrine is necessary to ensure the First Amendment rights of citizens like Alex are not chilled.

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† © 2012. J.D. expected May 2013, Case Western Reserve University School of Law, Cleveland, Ohio. The author would like to dedicate this paper to Steve Sneiderman and his family. I would like to thank Dean Jonathan Entin for reading earlier drafts of this paper and providing me with useful insight into the intricacies of the First Amendment.