Public Plaintiffs and Private Facts: Should the "Public Figure" Doctrine Be Transplanted into Privacy Law?

Susan M. Gilles
Capital Univ. Law School, sgilles@law.capital.edu

Follow this and additional works at: https://digitalcommons.unl.edu/nlr

Recommended Citation
Susan M. Gilles, Public Plaintiffs and Private Facts: Should the "Public Figure" Doctrine Be Transplanted into Privacy Law?, 83 Neb. L. Rev. (2004)
Available at: https://digitalcommons.unl.edu/nlr/vol83/iss4/6
Public Plaintiffs and Private Facts: Should the "Public Figure" Doctrine Be Transplanted into Privacy Law?

TABLE OF CONTENTS

I. Introduction ........................................ 1205
II. The Evolution of the Public Figure Doctrine in Constitutional Libel Law ........................................ 1206
III. The Conflicting Tale of the Public Figure Doctrine in Privacy Cases Prior to Bartnicki ........................................ 1208
   A. The Absence of the Public Figure Doctrine from the Court's Constitutional Analysis of Privacy Torts .... 1208
   B. The Other Story—Public/Private Status as a Component of the Common Law of Privacy .......... 1212
   C. The Third Strand—The Public Figure Doctrine and Governmental Invasion of a Citizen's Right to Informational Privacy ........................................ 1215
IV. The Conflict Continues—Bartnicki v. Vopper ........................................ 1217
   A. The Facts—Cell Phones, Wiretaps, and Exploding Porches ........................................ 1217
   B. Justice Stevens's Opinion for the Court .......... 1219
   C. Justice Breyer's Concurrence ........ 1221
   D. The Dissent ........................................ 1223
   E. In Summary ........................................ 1225
V. The Future of the Public Figure Doctrine in Tort Actions for Invasion of Privacy ........................................ 1225
   A. A Content-Only Test Holds On? ................ 1225
   B. What Should a Public Figure Test Look Like in Tort Actions for Invasion of Privacy? ........ 1229
      1. Examining Justice Breyer's Approach ........ 1230
         a. Another Look at the Public Figure Analysis of Justice Breyer ........................................ 1230
When libel law conflicts with the First Amendment, the United States Supreme Court has held that the measure of protection received by the press depends primarily on whether the plaintiff is a public or private person.¹ This Article questions whether this “public figure doctrine”² is, or should become, part of the constitutional test applied to tort actions for invasion of privacy.³ This inquiry is made more urgent by the willingness of at least two members of the current Supreme Court, in Bartnicki v. Vopper,⁴ to incorporate the public figure doctrine into constitutional privacy law.

Part II of this Article briefly describes the rise of the public figure doctrine in constitutional libel law. Part III examines the limited use of the public figure doctrine in privacy law prior to the Court’s decision in Bartnicki. The Court repeatedly seemed to reject a plaintiff’s public/private status as part of the constitutional analysis in privacy cases. However, Part III notes that the common law of privacy has always embraced the public/private figure distinction and that the Court has used the doctrine in a related area—the individual’s right of informational privacy against the government.⁵

It was against this background that the Court decided Bartnicki.⁶ Part IV sets out the conflicting views of the Justices in the 2001 deci-

². Technically the doctrine to which I refer should be called the “public figure and public official doctrine,” since it covers both public figures and public officials. For simplicity’s sake, I will shorten it to the “public figure doctrine.”
³. I use the term “tort actions for invasion of privacy” to refer to tort actions seeking damages for the publication of private information by the press. Such actions include both the common-law torts of false light and public disclosure of private facts, recognized by the RESTATEMENT (SECOND) OF TORTS § 652A (1976); actions created by statute, such as the damages claim created by the wiretapping statutes considered in Bartnicki v. Vopper, 532 U.S. 514 (2001); and negligence per se claims such as that at issue in Florida Star v. B.J.F., 491 U.S. 524 (1989). I do not cover privacy claims that do not focus on publication (such as physical intrusion), or those that focus on the commercial value, rather than the private nature, of the information (such as trade secret or misappropriation actions).
⁵. See infra Part III.
⁶. 532 U.S. 514.
sion and explores Justice Breyer's view that a plaintiff's status (as a public or private person) is a core component of the test for constitutional protection in privacy cases. This Article argues that Justice Breyer's approach is a multifactored, ad hoc, balancing analysis that is dramatically different, and in many ways, inferior, to its libel law cousin.

Part V questions the future of the public figure doctrine after Bartnicki, and predicts that a person's status will become part of constitutional privacy law. However, this Article suggests that, if the Court is going to transplant a public figure doctrine into constitutional privacy law, it should adopt a doctrine based on definitional balancing, akin to that currently in libel law, and reject Justice Breyer's ad hoc approach.

II. THE EVOLUTION OF THE PUBLIC FIGURE DOCTRINE IN CONSTITUTIONAL LIBEL LAW

When a unanimous Supreme Court revolutionized common-law libel in New York Times Co. v. Sullivan, it adopted a test for constitutional protection that turned on both the status of the plaintiff (as a "public official") and the content of the offending speech (criticism of "official conduct"). In the decade that followed, the Court splintered. In 1971, a majority of Justices held that the level of constitutional protection should turn on the content of the speech alone, and advocated a "matter of public concern" test. Yet in 1974, the Court in Gertz v. Robert Welch, Inc. reversed itself and declared that the status of the plaintiff (as a private or public person), not the content of the speech, should dictate the level of protection.

Since Gertz, the Court has consistently predicated its constitutional analysis in libel cases on the status of the plaintiff. While questions as to the content of speech have crept back in at various points of the analysis, it remains true that in libel law, the public figure doctrine is the dominant canon. Indeed, the Court has created a detailed jurisprudence defining public persons, a term I use to include both public officials (who acquire their public status due to their "responsi-
bility for or control over the conduct of government affairs"),
and public figures (who acquire public status by taking on a role of "especial prominence" or by thrusting themselves into an ongoing debate).

The public figure doctrine posits that, while the State has a strong interest in providing a tort remedy to private persons who are libeled, the State has a much weaker interest in providing a remedy to public officials and public figures. First, the Court has posited that public plaintiffs have less need for a legal remedy because they can often engage in self-help, using their access to the media to rebut alleged libels. Since such public persons can help themselves, the State has a lesser interest in providing a tort remedy. In contrast, the State has a far greater interest in providing a remedy for private figures, since, lacking access to the media, they must rely on tort law as the only avenue to rebut false statements.

The Court has also theorized that public persons are less deserving of recovery because they assume the risk of injury to their reputations when they enter the public sphere. Public plaintiffs "must accept certain necessary consequences" of involvement in public affairs, including the risk of false and defamatory criticism. By voluntarily taking on public employment or prominent roles in society, public persons are presumed to have relinquished part of their interest in protecting their good names, and are, therefore, less "deserving of recovery" than private plaintiffs. Private persons, who have never voluntarily exposed themselves to the risk of false publicity, have a far greater claim to recovery. The Court has characterized this "assump-

13. Rosenblatt v. Baer, 383 U.S. 75, 85 (1966). The Court has made clear that not everyone on the government's payroll is a public official, but it has held that, at the "very least," it includes those with substantial control over public affairs. Id. For a more detailed discussion of the Court's public/private person jurisprudence, see Susan M. Gilles, From Baseball Parks to the Public Arena: Assumption of the Risk in Tort Law and Constitutional Libel Law, 75 TEMP. L. REV. 231 (2002).

14. Gertz, 418 U.S. at 344-45. The Court has identified three types of public figures: "all purpose public figures" whose "pervasive fame or notoriety" makes them public figures in all contexts; "limited [purpose] public figures" whose decision to "thrust themselves to the forefront of particular public controversies" subjects them to public scrutiny on that issue; and the exceedingly rare "involuntary public figure" who acquires public status "through no purposeful action of his own." See Gilles, supra note 13, at 248-60 (discussing in detail the various types of public plaintiffs and the tests used to identify them).

15. Gertz, 418 U.S. at 343-45. For a more detailed discussion of the Court's public figure jurisprudence, see Gilles, supra note 13, at 237-60 (discussing the Court's assumption-of-the-risk rationale).

16. Gertz, 418 U.S. at 344-45. The Court characterized self-help as the less important of the two rationales. Id. at 344.

17. Id. at 344-45.

18. Id.

19. Id. at 345.

20. Id. at 344.

21. Id. at 345.
tion of the risk" rationale as the more important basis for its public/private person distinction.22

Because of public plaintiffs' lesser interest in recovery, the Court has ruled that the First Amendment requires these plaintiffs not only to prove injury to reputation and falsity, but also to produce clear and convincing evidence that the press published the false report, knowing it was false or with reckless disregard of its truth or falsity.23 This rigorous fault standard, known as "actual malice,"24 prevents the overwhelming number of public plaintiffs from recovering.25 Indeed, one author has labeled actual malice an "insurmountable barrier" to recovery.26 In contrast, those deemed "private" plaintiffs, even when involved in a matter of public concern, usually have to prove only negligence.27

Thus, in libel law, the public figure doctrine is of immense significance—it is a central strand in the Court's libel jurisprudence, and, as a practical matter, it determines who wins and who loses most libel suits.

III. THE CONFLICTING TALE OF THE PUBLIC FIGURE DOCTRINE IN PRIVACY CASES PRIOR TO BARTNICKI

A. The Absence of the Public Figure Doctrine from the Court's Constitutional Analysis of Privacy Torts

In contrast to libel, when the Court considered the clash between the First Amendment and the privacy torts of false light and disclosure of true private facts,28 the Court did not employ the public/private person distinction to determine the scope of constitutional

22. *Id.* at 344.
25. One study estimated that just over eighty percent of defense motions for summary judgment based on plaintiffs' lack of evidence of actual malice were granted; and in those cases where plaintiffs survived pretrial motions and recovered at trial, appellate courts reversed pro-plaintiff judgments for lack of proof of actual malice in sixty-six percent of appealed cases. See Susan M. Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation*, 58 OHIO ST. L.J. 1753, 1774–79 (1998) (reporting on the statistical findings of the Libel Defense Resource Center and other researchers).
28. There are four common-law privacy torts; however only the two that punish the publication of private information (false light and disclosure of true private facts) are discussed in this Article. For the standard definition of these privacy torts, see *Restatement (Second) of Torts § 652A* (1976).
protection. The Court’s first encounter with a privacy tort was in *Time, Inc. v. Hill*, 29 where the Court faced a statutory version of the false light tort. False light is closely related to libel. It creates a cause of action for the publication of false information, but it does not require a showing of harm to reputation. Rather, it simply requires that the plaintiff was placed in a “false light” that would be “highly offensive to a reasonable person.”

Despite these similarities, the Court declared that it would not copy the structure it had established in the libel cases, but would instead assess anew the constitutional test that should apply. The divided Court then held that, where the speech was on a matter of public concern, proof of actual malice was constitutionally required. Content, not public figure status, seemed to be the key to constitutional protection in false light privacy cases.

---


30. For the standard definition of the false light tort, see *Restatement (Second) of Torts* § 652E (1976):

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if: (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

At issue in *Time, Inc.* was an action for a false or fictitious report created by statute. 385 U.S. at 376 n.1. While the statute, on its face, prohibited any commercial use of another’s name or image without written consent, the New York courts had construed it to cover false speech. *Id.* at 383–84 (citing New York caselaw). Thus the Supreme Court concluded that New York law gave an action to a public or private person whose “name, picture, or portrait is the subject of a fictitious report or article.” *Id.* at 384–85.

31. *Restatement (Second) of Torts* § 652E. Comment b to that section discusses the relationship between false light and libel. *Id.* at cmt. b. For an argument that any similarity between the two torts is superficial, see Diane Leenheer Zimmerman, *False Light Invasion Of Privacy: The Light That Failed*, 64 N.Y.U. L. Rev. 364, 393–95 (1989). The tort has not gained widespread acceptance. *Id.* at 451.


We hold that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.

*Id.* The Court went on to give matters of public interest a wide construction, concluding that it included entertainment as well as informational publications, and covered every issue “about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.” *Id.* at 388 (citing *Thornhill v. State of Alabama*, 310 U.S. 88, 102 (1940)).

34. While the *Time, Inc.* Court did not adopt a private/public figure test, the majority opinion was full of language discussing public figure status. The opinion has an
The result of *Time, Inc.* and the Court's refusal to adopt a public figure test may be an accident of timing. Decided in 1967, before the Court had mustered a majority in *Gertz* to endorse a private/public person test, the decision may simply reflect the split on the Court at that time. However, the Court has never disavowed *Time, Inc.*'s holding, and indeed in its only other false light case, *Cantrell v. Forest City Publishing Co.*, decided just after *Gertz*, the Court declined to rule on whether *Gertz* altered the holding of *Time, Inc.* Given this ambiguity, some lower courts continue to apply a public concern test in false light cases as announced in *Time, Inc.*, while others predict that the Court will incorporate a public/private figure test. But at

---

extensive discussion of New York tort law that did distinguish between newsworthy and non-newsworthy persons in some privacy cases. Thus, while New York law precluded an action based on true information about newsworthy persons and events, it did allow anyone, including newsworthy persons like the appellee, to recover for "fictionalization." The Court noted that the appellee (who with his family was held hostage in his home by escaped convicts) was regarded by the New York trial court as a "newsworthy person," thus barred from bringing a true private facts action but permitted to bring a fictionalization claim. *Id.* at 386.

The issue of public figure status came up again, this time in a constitutional context, after the Court announced its ruling. Arguing that its adoption of the actual malice rule was "not through blind application of *New York Times Co. v. Sullivan*," the *Time, Inc.* Court refused to engage in a factual comparison between the two cases. *Id.* at 390. The Court made clear that it was not deciding whether actual malice should apply to a libel action by private individuals (an issue later resolved in *Gertz*), or on a statutory privacy action by a public official. *Id.* at 390–91. The Court noted that the opportunities for self-help and assumption of the risk of publicity might vary in such cases, but held that the question of whether the same standard should apply to persons voluntarily and involuntarily thrust into the public limelight was not before the Court. *Id.* at 391.


36. *See, e.g., Erwin Chemerinsky, Constitutional Law Principles and Policies § 11.3.5.3 (2d ed. 2002) (commenting that the Court has avoided the issue of whether *Time, Inc.*'s use of a public concern test, rather than a public/private figure test, remains good law or is simply a historical anachronism; and noting that the lower courts are divided on this point).*

37. *Cantrell, 419 U.S. at 250–51* (noting that the private figure plaintiff in that case had proved actual malice, the Court indicated that it was not required to "consider whether a State may constitutionally apply a more relaxed standard of liability for a publisher or broadcaster of false statements injurious to a private individual under a false-light theory of invasion of privacy, or whether the constitutional standard announced in *Time, Inc. v. Hill* applies to all false-light cases.").

38. *Chemerinsky, supra* note 36, at 1019 (noting a split in the lower courts). *See also Daniel J. Solove & Mark Rotenberg, Information Privacy Law 158–59 (documenting the split in lower courts); Zimmerman, supra note 31, at 392 n.173 (listing cases which presume the public figure doctrine of libel law applies to the false light tort).*
least to date, the Supreme Court has not adopted a person's status as a component of the constitutional test in false light privacy cases.

The Court has also failed to use the public figure test in another line of privacy cases, the disclosure of true private fact cases, where it has instead created and repeatedly applied the "Daily Mail" test. The Restatement (Second) of Torts defines the tort as the publication of a "matter concerning the private life of another," where the matter publicized is "of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." Thus, it imposes liability for "publicity given to true statements of fact." The cases reaching the Court have typically concerned the press's revelation of the names of rape victims and juvenile offenders in violation of state statutes which prohibit such publication. The plaintiffs in these cases sought money damages from the press for the publication of true, yet very private, information.

The Court has consistently barred recovery, using the Daily Mail test, which focuses on the means of acquisition of the information and the content of the speech, not on the plaintiff's status. The Court has held that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." These cases have asserted strong privacy interests: the anonymity of juvenile accused, the anonymity of rape victims, and the confidentiality of a prelimi-

40. So named for its articulation in Smith v. Daily Mail Publ'g Co., 443 U.S. 97 (1979). Ironically, while the holding in Daily Mail has evolved into the controlling test in cases of conflict between privacy and press freedom, the Daily Mail Court claimed it was not deciding this question, asserting that "there is no issue here of privacy." Id. at 105.

41. Restatement (Second) of Torts § 652D (1976).

42. Id.


44. Daily Mail, 443 U.S. at 103.

45. Daily Mail, 443 U.S. 97 (holding unconstitutional a state statute which made it a crime to publish the name of a juvenile offender without the written approval of the juvenile court); Okla. Publ'g Co., 430 U.S. 308 (striking down as violative of the First Amendment a court order barring the publication of a juvenile accused's name and photograph obtained in open court).

46. Fla. Star, 491 U.S. 524 (overturning a jury verdict against the press for the revelation of a rape victim's name in violation of a Florida statute, where the newspaper obtained the information from publicly released police records); Cox Broad. Corp., 420 U.S. 469 (holding that there could be no recovery in tort for the publication of a rape victim's name where that name had been obtained from public records, despite a state statute which criminalized publication).
nary investigation into judicial misconduct.\(^4\) Yet in each case, the Court held that the revelation of the true private information was protected speech since it was lawfully acquired and concerned a matter of public significance.\(^4\) Thus, in disclosure of true private fact cases, the Daily Mail test dictates that constitutional protection turns on whether the speech is on a matter of public concern (as well as the means of acquisition),\(^4\) and not on whether the plaintiff is a private or public person.\(^5\)

In sum, the Court has considered the constitutionality of two privacy torts, false light and disclosure of true private facts, and each time it has announced a test that turns on the content of the speech, and not on the status of the plaintiff.

B. The Other Story—Public/Private Status as a Component of the Common Law of Privacy

Although the public figure doctrine has never been expressly adopted by the Court as part of its constitutional analysis of privacy cases, a plaintiff’s status as a public or private person has always played a major role in the common law of privacy. Warren and Brandeis, who are credited with the creation of the privacy tort, drew a distinction between public officials and private persons arguing that public persons had less of a claim to privacy.\(^5\) The authors asserted that “[t]he right to privacy does not prohibit any publication of matter which is of public or general interest.”\(^5\) But, what constituted “public interest” varied with whether the plaintiff was a private or public per-

\(^4\) Landmark Communications, Inc., 435 U.S. 829 (holding unconstitutional a Virginia statute that criminalized the publication of information about a confidential judicial inquiry).

\(^5\) See supra note 40.

\(^4\) Scholars have disagreed on the relative importance of each of these two factors. Compare, e.g., Patrick J. McNulty, The Public Disclosure of Private Facts: There Is Life After Florida Star, 50 Drake L. Rev. 93, 115 (2001) (arguing that Florida Star abandons a test based on content and focuses exclusively on how news is obtained), with Note, Leading Cases, 115 Harv. L. Rev. 306, 407 (2001) (suggesting that after Bartnicki, whether the information “addresses a matter of public concern—is now more important than how it was obtained”).

\(^5\) This is not to suggest that the opinions do not refer to the public figure doctrine. For instance, some of the cases summarize the Court’s libel decisions, including the distinction between public and private figures. See Fla. Star, 491 U.S. at 539–40; Landmark Communications, Inc., 435 U.S. at 838, 841; Cox Broad. Corp., 420 U.S. at 489–91.

\(^5\) Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 215 (1890). Warren and Brandeis seemed to equate public plaintiffs with those who held or sought public office, id. at 215–16, although their proffered definition, those “who, in varying degrees, have renounced the right to live their lives screened from public observation,” id. at 215, was considerably wider.

\(^5\) Id. at 214.
son.\textsuperscript{53} Public figures, who "have renounced the right to live their lives screened from public observation,"\textsuperscript{54} had a lesser claim to privacy, since matters "which would in the ordinary individual" be private, in public figures could become a "subject of legitimate interest to their fellow citizens."\textsuperscript{55} For example, "[p]eculiarities of manner and person, which in the ordinary individual should be free from comment, may acquire a public importance, if found in a candidate for political office."\textsuperscript{56} The authors acknowledged that this doctrine would require a court to examine the "varying circumstances of each case" to assess the propriety of publication, and admitted that this "unfortunately renders such a doctrine not only more difficult in application, but also to a certain extent uncertain in its operation."\textsuperscript{57}

The public/private figure distinction was incorporated into the \textit{Restatement (Second) of Torts} definition of the tort of publication of private facts.\textsuperscript{58} The \textit{Restatement} reiterated that what qualified as a matter of public concern, thus exempt from liability, varied with the plaintiff's status.\textsuperscript{59} Public figures could not complain about publicity given to public activities (since these were not private facts), and, Comment e suggested, even as to private matters, public figures had less of a claim to tort protection: "the legitimate interest of the public in [public figures] may extend beyond those matters which are themselves made public, and to some reasonable extent may include information as to matters that would otherwise be private."\textsuperscript{60}

\textsuperscript{53} Id.
\textsuperscript{54} Id. at 215.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Id. at 215–16.
\textsuperscript{58} \textit{Restatement (Second) of Torts} § 652D cmts. e, f, h (1976). It is not clear whether the public/private person distinction is part of the common-law tort of false light. See Zimmerman, supra note 31, at 373 (noting "disagreement among [the] courts [as to] whether the newsworthiness of the subject matter or the plaintiff's status as a public or a private figure should affect the availability of the action").
\textsuperscript{59} \textit{Restatement (Second) of Torts} § 652D cmts. e, f, h. Comment e defined a voluntary public figure as "[o]ne who voluntarily places himself in the public eye, by engaging in public activities, or by assuming a prominent role in institutions or activities having general economic, cultural, social or similar public interest, or by submitting himself or his work for public judgment." Comment f recognizes and defines involuntary public figures.
\textsuperscript{60} Id. cmt. e. Comment h repeats this distinction announcing that permissible publicity of information concerning either voluntary or involuntary public figures is not limited to the particular events that arouse the interest of the public. Id. cmt. h. That interest, once aroused by the event, may legitimately extend, to some reasonable degree, to further information concerning the individual and the facts about them, which are not public and which, in the case of one who had not become a public figure, would be regarded as an invasion of his purely private life.
The Restatement did recognize that public figures have some expectation of privacy, but made clear that the scope of tort liability depended on the plaintiff's status: "revelations that may properly be made concerning a murderer or the President of the United States would not be privileged if they were to be made concerning one who is merely injured in an automobile accident."

The public/private figure distinction continues to play an important part in common-law analysis today. In assessing whether information is "of legitimate concern" to the public (or, as some states phrase it, is "newsworthy"), most state courts include consideration of the plaintiff's status as a public or private figure. For instance, one of the leading cases, Kapellas v. Kofman, enunciated a three-part test for newsworthiness that considers the value to society of publishing the fact, the depth of intrusion into a person's private affairs, and the "extent to which the party voluntarily acceded to a position of public notoriety."

In an interesting twist, many courts perceive this common-law public figure rule as required by the constitutional protection afforded by the First Amendment—even though the Supreme Court has never adopted such a test.

---

61. Id. (suggesting that even for public figures such as movie actresses "[t]here may be some intimate details of her life, such as sexual relations, which even the actress is entitled to keep to herself").

62. Id.


64. 459 P.2d 912 (Cal. 1969).

65. Id. at 922. This test has been widely followed. See, e.g., Goodrich, 448 A.2d at 1331; Wilson, 687 A.2d at 1016. Other states simply adopt Comment h of the Restatement, which suggested that public figures have a lesser expectation of privacy. See, e.g., Rawlins, 543 P.2d at 992–93; Bilney, 406 A.2d at 659. The Kapellas test was ostensibly reaffirmed by the California Supreme Court in Shulman v. Group W Productions, Inc., 955 P.2d 469 (Cal. 1998), although much of the plurality opinion focuses on a "logical nexus test" for involuntary public figures, id. at 483–85, which the court claims is a "natural adaptation of Kapellas." Id. at 486 n.9. This has created confusion in California as to the continued authority of the Kapellas factors. Compare Carafano v. Metrosplash.com, Inc., 207 F. Supp. 2d 1055, 1068–69 (C.D. Cal. 2002) (applying the Kapellas factors and citing to Shulman), with Michaels v. Internet Entm't Group, Inc., No. CV 98-0583 DPP (CWx), 1998 U.S. Dist. LEXIS 20786, at *24–25 (C.D. Cal. 1998) (applying the logical nexus test articulated in Shulman and balancing "the depth of the intrusion against the relevance of the matters broadcast to matters of legitimate public concern"). See also Gary L. Bostwick, The Newsworthiness Element: Shulman v. Group W Prods., Inc. Muddies The Waters, 19 Loy. L.A. Ent. L. Rev. 225 (1999) (critiquing Shulman).

66. See, e.g., Shulman, 955 P.2d at 479 (noting that the Supreme Court has given little guidance on the constitutional limits on privacy actions, the California court
C. The Third Strand—The Public Figure Doctrine and Governmental Invasion of a Citizen's Right to Informational Privacy

The final chapter in the story of public figures and privacy law is the Court's 1977 decision in *Nixon v. Administrator of General Services*. *Nixon* is not a privacy case in the same sense this Article has been discussing it, which is a tort action against the press for speech that invades privacy. Rather, in *Nixon*, the Court considered a challenge by former President Nixon to the Presidential Recordings and Materials Preservation Act, which authorized the government to take possession of, sort (into public and private), and then selectively release Nixon's presidential papers and tape recordings. Nixon asserted that he had a constitutional right of informational privacy against the government that was violated by its screening of his papers. The Court held that Nixon had a constitutional right to prevent government disclosure of personal information, but found, after bal-

---

68. Id. at 433-34.
69. Id. at 455-65 (discussing the privacy challenge).
70. Id. at 465 (commenting that “appellant has a legitimate expectation of privacy in his personal communications”). This constitutional right of privacy is a right only against government disclosure of private information. To date, the Court has not recognized a constitutional right of privacy against disclosure by the press or other nongovernmental entities. See Paul Gewirtz, *Privacy and Speech*, 2001 SUP. CT. REV. 139, 172 (observing that “freedom from governmental abridgement is explicitly protected by the Constitution, and freedom of the press from nongovernmental interference with privacy is not”); Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1107 (2000).

Some scholars see the *Bartnicki* decision as potentially opening the door to such a universal constitutional right to privacy, based either in a constitutional privacy right *per se* or derived from a First Amendment right to private speech. *See, e.g.*, Martin E. Halstuk, *Shielding Private Lives From Prying Eyes: The Escalating Conflict Between Constitutional Privacy and the Accountability Principle of Democracy*, 11 COMM.LAW CONSPectus 71, 96 (2003) (opining that *Bartnicki* “recognized for the first time a constitutional right of privacy concerning disclosure of private information obtained from a non-governmental source”). However, most commentators read the *Bartnicki* opinion as simply according privacy very great weight, and not as recognizing privacy as a constitutional right. *See, e.g.*, Fred H. Cate & Robert Litan, *Constitutional Issues in Information Privacy*, 9 MICH. TELECOMM. & TECH. L. REV. 35, 41-42 (2002) (arguing that “[w]hether the Constitution protects individuals’ interests in avoiding collection and use of information about them by private-sector entities is a critical question, but *Bartnicki* is a slender basis for such a claim. Whether the case will prove to mark the first step in the beginning of a real change in the Court’s thinking, or whether it is merely an
ancing numerous factors, that this privacy right was not violated by the Act. For our purposes here, the most notable feature of the decision is the Court's repeated focus on Nixon's public figure status. The Court began its privacy analysis by citing to its libel jurisprudence and discussing whether, by entering public life, Nixon had "voluntarily surrendered the privacy secured by law for those who elect not to place themselves in the public spotlight." It concluded that even public officials have some privacy rights against the government, holding that "public officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life." The Court expressly included "public figure" status as part of its multifactor balancing test to determine if there was a violation of this privacy right.

The Court has not returned to the Nixon case, and it has failed to explain the scope of this constitutional right against the government, let alone how public figure status impacts this right. However, Nixon stands for the proposition that, at least when the privacy claim is the right to informational confidentiality against the government, public figure status is part of the constitutional analysis. While this does not support an argument that the Court will adopt public figure status as part of the constitutional test for tort actions for invasion of privacy, it does show that the Court has, in some contexts, treated public figure status as relevant to privacy.

---

72. Id. at 457.
73. Id. at 465 (listing factors to be considered as including "appellant's status as a public figure").
74. The lower courts in attempting to apply Nixon have developed a mixed record on the importance of public figure status in deciding these privacy claims. While most Courts adopt a balancing approach, some include "public figure status" as a factor to be balanced. Compare Plante v. Gonzalez, 575 F.2d 1119, 1134-35 (5th Cir. 1978) (finding public officials have a lesser interest in privacy because they were elected officials), with United States v. Westinghouse Elec. Corp., 638 F.2d 570, 578 (3d Cir. 1980) (adopting a multifactor balancing test which does not include public figure status).
75. I am not arguing that the test for governmental invasion of citizen's constitutional right to privacy should be identical to the First Amendment limits on tort actions for invasion of privacy. Rather this Article makes a simpler point: that the Court has, on occasion, treated public figure status as relevant to informational privacy, and, as discussed supra, has done so for precisely the reason it is
This is the conflicted tale of the public figure doctrine in privacy law prior to Bartnicki. The Court had seemingly rejected it as a component of the test for constitutional protection in privacy tort cases, electing instead to focus on the content of speech and, sometimes, the means of acquisition. However, the common law of privacy had long embraced a public/private figure distinction as part of tort law. Moreover, in its constitutional analysis of a different privacy conflict (the government’s release of private information), the Court had apparently approved the use of public status as a component of constitutional analysis.

IV. THE CONFLICT CONTINUES—BARTNICKI v. VOPPER

The Court’s ambivalence as to whether a plaintiff’s public/private status has a role in privacy law was revealed in the three opinions in Bartnicki v. Vopper. The majority, in an opinion by Justice Stevens, applied the “Daily Mail” content-based test, eschewing any reference to the plaintiffs’ status. The dissenting opinion of Chief Justice Rehnquist argued that speech that invades privacy merits little, if any, constitutional protection, and made only passing reference to the plaintiffs’ status. However, the concurring opinion of Justice Breyer, joined by Justice O’Connor, advocated a constitutional test that expressly included analysis of the plaintiffs’ public/private status. Each opinion is discussed separately following an outline of the pertinent facts.

A. The Facts—Cell Phones, Wiretaps, and Exploding Porches

The facts of Bartnicki are memorable. From 1992 through 1993, the teachers’ union and school board for Wyoming Valley West High School were at logger heads. The “contentious” pay negotiations received repeated press coverage. In May 1993, two of the union representatives, plaintiffs Kane and Bartnicki, discussed union strategy in light of the board’s apparent intransigence. In the course of the discussion, Kane said “[i]f they’re not gonna move for three percent, we’re gonna have to go to their, their homes . . . [t]o blow off their front porches, we’ll have to do some work on some of those guys.
(PAUSES). Really, uh, really and truthfully because this is, you know, this is bad news. This conversation would have probably remained unknown and the case unlitigated if Bartnicki had not used her car cell phone to call Kane and if an unknown person had not intercepted and recorded the call.

The unknown interceptor placed the tape of the call in the mailbox of Jack Yocum, the head of a local taxpayers' organization which had vociferously opposed the union's demands. Yocum played the tape for some members of the school board and then handed the tape over to Vopper, a local radio commentator, whose previous broadcasts had been critical of the union. Vopper broadcast the tape of the Kane/Bartnicki conversation on the air. This broadcast triggered extensive, and presumably critical, follow-up coverage in the local press.

Plaintiffs Kane and Bartnicki sued Yocum (the tax advocate who found the tape), Vopper (the radio commentator) and the media (that played or reported the content of the tape) in federal court. The plaintiffs' amended complaint sought damages for the illegal interception of their phone call in violation of state and federal wiretapping statutes. Both statutes imposed fairly steep fines for each violation. It is clear that the actual interceptor, the unknown person who intercepted and taped the call, was liable—but no one was able to identify, and thus sue, the interceptor. Rather, the plaintiffs sought to sue Yocum, Vopper, and the media for their later disclosure of the content of the illegal interception.

83. Id. at 518–19.
84. Id.
85. Id. at 519.
86. Id.
87. Id.
88. Id.
89. Yocum was added as a defendant in an amended complaint after discovery revealed he was the source of the tape. Id.
90. Id.
91. Id.
92. The federal act allowed actual damages or "statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000." 18 U.S.C. § 2520(c)(2) (2000), cited in Bartnicki, 532 U.S. at 520 n.2. The Pennsylvania statute had a lesser penalty ($100 a day or $1,000, but it also allowed punitive damages and attorney fees). 18 PA. CONS. STAT. § 5725(a) (2000), cited in Bartnicki, 532 U.S. at 520 n.2.
On its face, the federal wiretapping statute imposed liability on any person who "intentionally discloses . . . to any other person the contents of any . . . electronic communication, knowing or having reason to know that the information was obtained through the interception of a . . . electronic communication."\(^{95}\) As the case reached the Court, the presumed facts revealed that the original interception of the call was unlawful; that the defendants, "at a minimum . . . had reason to know" the interception was unlawful; and that the defendants had intentionally disclosed the content of the intercepted call to others.\(^{96}\) In short, the defendants had violated the federal statute and the parallel state provision.\(^{97}\) Thus, "[t]he only question [for the Court was] whether the application of these statutes in such circumstances violates the First Amendment."\(^{98}\) A majority of six held that it did, finding, in Justice Stevens's words, that "privacy concerns give way when balanced against the interest in publishing matters of public importance."\(^{99}\)

**B. Justice Stevens's Opinion for the Court**

Justice Stevens's opinion for the Court, which garnered the votes of Justices Ginsburg, Kennedy, Souter, Breyer and O'Connor,\(^{100}\) upheld the right of the press (and citizens) to disclose the content of private telephone conversations so long as they had no role in the illegal wiretap and the speech was on a matter of public concern.\(^{101}\) The opinion had two notable features.

First, the opinion ascribed great importance, perhaps even constitutional weight, to privacy. At the outset of his opinion, Justice Stevens characterized the case as presenting "a conflict between interests of the highest order: on the one hand, the interest in the full and free dissemination of information concerning public issues, and, on the other hand, the interest in individual privacy and, more specifically, in fostering private speech."\(^{102}\) This emphasis on the importance of privacy and the Court's characterization of privacy as including a


\(^{96}\) Bartnicki, 532 U.S. at 524–25 (setting out the factual assumptions on which the Court based its decision).

\(^{97}\) Id. at 525.

\(^{98}\) Id.

\(^{99}\) Id. at 534. The majority of six consisted of Justices Stevens, Ginsburg, Kennedy, Souter, Breyer, and O'Connor. Bartnicki, 532 U.S. 514. Chief Justice Rehnquist, joined by Justices Scalia and Thomas, dissented. Id.

\(^{100}\) Three Justices—Ginsburg, Kennedy and Souter—joined Stevens's opinion without qualification. As discussed below in section IV.C, Justice Breyer, joined by Justice O'Connor, wrote a concurring opinion. Id.

\(^{101}\) Id. at 518.

\(^{102}\) Id.
speech right have left scholars debating whether Bartnicki signals a new era of heightened protection for privacy.\textsuperscript{103}

While Justice Stevens's opinion was innovative in its description of the privacy right, its solution to the speech/privacy conflict was not. The majority opinion expressly adopted and applied the Daily Mail rule\textsuperscript{104}—thus, constitutional protection turned on whether the information was "lawfully obtained" and was a "matter of public significance."\textsuperscript{105} The Court easily concluded that "the subject matter of the conversation was a matter of public concern."\textsuperscript{106} While noting that a protracted debate over teacher pay at a public high school, "may be more mundane than the Communist rhetoric that inspired Justice Brandeis' classic opinion in Whitney v. California," the Bartnicki Court held that "it is no less worthy of constitutional protection."\textsuperscript{107}

The issue of whether the information was lawfully obtained was more controversial, but the Court, early in its opinion, made two findings that allowed it to conclude that this requirement was met (while considerably expanding the test for "lawfully obtained"). First, the Court noted, unremarkably, that defendants played no role in the actual interception\textsuperscript{108}—but the Court also found that the defendants' "access to the information on the tapes was obtained lawfully, even though the information itself was intercepted unlawfully by someone else."\textsuperscript{109} The Court held that unless the media was tied to the illegal interception, there could be no liability: "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern."\textsuperscript{110}

Having fairly rapidly concluded that the speech merited First Amendment protection under Daily Mail, Justice Stevens spent the majority of his Bartnicki opinion assessing the strength of the government's interests, to see if they were of the "highest order" as demanded by the Daily Mail test.\textsuperscript{111} Concluding that neither the

\textsuperscript{103} See supra note 70 (discussing the literature).
\textsuperscript{104} Bartnicki, 532 U.S. at 527–28. The majority opinion makes clear that it is adopting the Daily Mail test, but it has been the subject of scholarly criticism for its lack of clarity on other vital issues, for instance the level of scrutiny to be applied. See, e.g., Gewirtz, supra note 70, at 142 (critiquing Justice Stevens's opinion for "notable elusiveness in discussing the governing legal standard").
\textsuperscript{105} Bartnicki, 532 U.S. at 527–28.
\textsuperscript{106} Id. at 525. The Court focused on the subject matter of the speech, not the circumstances in which the conversation occurred, to determine that the conversation was on a matter of public concern.
\textsuperscript{107} Id. at 535 (citations omitted).
\textsuperscript{108} Id. at 525.
\textsuperscript{109} Id. The Court noted that no statute prohibited the receipt of illegally intercepted information, just its further disclosure.
\textsuperscript{110} Id. at 535.
\textsuperscript{111} Id. (analyzing the government's asserted interests).
interest in deterring wire taps,\textsuperscript{112} nor the interest in minimizing harms to persons whose conversations had been illegally intercepted,\textsuperscript{113} outweighed the interest in publishing true information on a matter of public concern, the Court held that the First Amendment barred recovery in this case.\textsuperscript{114}

What is notable for the purposes of this Article is that the Court seemed wedded to \textit{Daily Mail}, and its public concern/lawful access test in privacy cases.\textsuperscript{115} The Court’s opinion in \textit{Bartnicki} seemed to signal, once again, that in privacy cases, the content of the speech and not the status of the plaintiff was the key to constitutional protection. Justice Stevens never mentioned the public figure doctrine,\textsuperscript{116} and the only caveat in the opinion was his insistence that the \textit{Bartnicki} Court was only deciding the “narrow” issue presented by the facts\textsuperscript{117} and his express refusal to announce a general rule on whether there ever could be liability for the publication of true facts.\textsuperscript{118}

\section*{C. Justice Breyer’s Concurrence}

Justices Breyer and O’Connor in concurrence—a concurrence that supplied the votes necessary to make a majority—took a radically different approach.\textsuperscript{119} Justice Breyer’s relatively short opinion started by emphasizing that he and Justice O’Connor viewed the majority’s decision as "a narrow holding limited to the special circumstances pre-

\begin{itemize}
  \item \textsuperscript{112} Id. at 529–32 (finding the interest plainly insufficient).
  \item \textsuperscript{113} Id. at 532–34 (characterizing this interest as “considerably stronger,” but ultimately concluding that it must “give way when balanced against the interest in publishing matters of public importance”).
  \item \textsuperscript{114} Id. at 534–35.
  \item \textsuperscript{115} Id. at 527 (citing \textit{Daily Mail}, 443 U.S. 97 (1979)).
  \item \textsuperscript{116} There is only one point in Justice Stevens’s opinion that can be seen as referencing, even obliquely, the plaintiff’s status. Id. at 534. After expressly adopting a public concern test and quoting Warren and Brandeis for the proposition that “[t]he right to privacy does not prohibit any publication of matter which is of public or general interest,” the Court uses language which seems to evoke the assumption-of-the-risk rationale which, as we have seen, is usually tied to the public figure doctrine. Id. (citing \textit{Samuel D. Warren & Louis D. Brandeis, The Right to Privacy}, 4 HARV. L. REV. 193, 214 (1890)). Thus, the Court comments that: “One of the costs associated with participation in public affairs is an attendant loss of privacy.” Id. The Court never develops this thought, never mentions the public figure doctrine, and instead returns to the importance of open debate on matters of public concern. Id.
  \item \textsuperscript{117} Id. at 517 (labeling question presented as both “novel” and “narrow”), 528 (characterizing the issue as a “narrower version of that still-open question”).
  \item \textsuperscript{118} Id. at 529 (commenting that “[o]ur refusal to construe the issue presented more broadly is consistent with this Court’s repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment”).
  \item \textsuperscript{119} Id. at 535–41 (Breyer, J., concurring).
\end{itemize}
sent here,” and opposed any reading of the case as implying “a significantly broader constitutional immunity for the media.”

Justice Breyer then stressed the importance both he and Justice O'Connor attached to the right of privacy. Repeating the majority’s description of privacy as an interest of the “highest order,” Justice Breyer described privacy as a “constitutional concern.” Since the case, in his eyes, involved “competing constitutional concerns,” he argued that use of traditional First Amendment strict scrutiny was “out of place.” Instead, citing only to his own concurrences in prior speech cases, Justice Breyer proposed that the constitutional test was one of “proper fit:” that is “whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences.” Justice Breyer made clear that many statutes enacted to protect privacy would pass this test, but held that the wiretapping statutes at issue “do not reasonably reconcile the competing constitutional objectives.”

In performing this reasonable fit analysis, Justice Breyer looked at three factors: (1) the “lawful nature” of the press’s behavior; (2) the topic of the speech (a threat of violence to others); and (3) whether, as “limited public figures,” the plaintiffs had a “lesser interest in privacy.” He concluded that, “[h]ere, the speaker’s legitimate privacy expectations are unusually low, and the public interest in defeating those expectations is unusually high,” and “[g]iven these circumstances, along with the lawful nature of [the press’s] behavior, the

120. Id. at 536.
121. Id.
122. Id. at 536 (citing to the Court at 518).
123. Id.
124. Id.
125. Id.
126. Id.
127. Id. He elaborated on the test explaining that we must ask if statutes “impose restrictions on speech that are disproportionate when measured against their corresponding privacy and speech-related benefits, taking into account the kind, the importance and the extent of these benefits, as well as the need for the restrictions in order to secure those benefits?” Id.
128. Id. at 537–38 (commenting that “[a]s a general matter, despite the statutes’ direct restrictions on speech, the Federal Constitution must tolerate laws of this kind because of the importance of these privacy and speech-related objectives”).
129. Id. at 538. Justice Breyer argued that the wiretapping statutes enhanced speech as the assurance of privacy “encourage[d] conversations that otherwise might not take place.” Id. at 537. They restricted speech by “directly, deliberately, and of necessity” penalizing media publication. Id.
130. Id. at 540.
131. Id. at 539 (Justice Breyer noted that revelation of such violent threats would be privileged at common law.).
132. Id. at 539–40.
Thus, Justice Breyer approach was different from the *Bartnicki* majority's in two ways. First, it advocated a case-by-case balancing test for reasonable fit (rejecting strict scrutiny). Second, it included the plaintiffs' status as a factor to be considered in this balance (transforming the majority's *Daily Mail* test from a two- to three-factor test).

Justice Breyer did not discuss why public figure status should be used in privacy cases; he simply asserted that it was relevant and cited to libel law where, as we have seen, public figure status is a recognized ingredient. Justice Breyer then held that, as union negotiators in a controversial strike, the plaintiffs were "limited public figures" because they had "voluntarily engaged in a public controversy," and thus had "subjected themselves to somewhat greater public scrutiny and had a lesser interest in privacy than an individual engaged in purely private affairs." Justice Breyer made clear that public figures do not lack any privacy interest, indeed he implied that when the balance is altered and the publication is of private and intimate facts (not a matter of public concern) even public plaintiffs should be entitled to recover.

He concluded by again emphasizing that his and O'Connor's votes should not be counted on in future privacy cases: "I consequently agree with the Court's holding that the statutes as applied here violate the Constitution, but I would not extend that holding beyond these present circumstances."

D. The Dissent

Chief Justice Rehnquist, who wrote the dissenting opinion in *Bartnicki* and was joined by Justices Scalia and Thomas, made two main points: he argued against the application of strict scrutiny and asserted that privacy was a vital interest deserving of protection. Chief Justice Rehnquist argued that "strict scrutiny" was inappropriate because the statutes enhanced rather than diminished free speech, were content neutral, and did not fall within the ambit of the *Daily Mail* cases. Having rejected strict scrutiny, the *Bartnicki* dissent would uphold the statutes because they "further [two]
substantial government[ ] interest[s]:”142 Congress’s interest in deter-
rning the initial interception by making illegal the later disclosure of
intercepted calls (the “dry-up-the-market” theory),143 and Congress’s
interest in protecting the “venerable right of privacy.”144

In the last three pages of his dissent, Chief Justice Rehnquist dis-
cussed this right of privacy and argued that it encompassed a right to
private phone conversations: “the interest in individual privacy, at its
narrowest, must embrace the right to be free from surreptitious eaves-
dropping on, and involuntary broadcast of, our cellular telephone con-
versations.”145 He pointed out that Warren and Brandeis viewed
privacy as essential to all individuals,146 that criminal law had long
protected the public’s expectation that telephone conversations are
private,147 that the First Amendment recognized a right not to
speak,148 and that the free speech of millions of cellular phone users
would be chilled by the Court’s decision.149 In the dissenters’ view,
when this important privacy interest was balanced against “a margi-
nal claim to speak freely,” privacy, not speech, should win out.150

In extolling the importance of privacy, and criticizing the major-
ity’s failure to protect it, Chief Justice Rehnquist made his sole refer-
ce to public figure status. He commented:

The Constitution should not protect the involuntary broadcast of personal con-
versations. Even where the communications involve public figures or concern
public matters, the conversations are nonetheless private and worthy of pro-
tection. Although public persons may have forgone the right to live their lives
screened from public scrutiny in some areas, it does not and should not follow
that they also have abandoned their right to have a private conversation with-
out fear of it being intentionally intercepted and knowingly disclosed.151

On one hand, this reference to public figures indicates that, when
it comes to the issue of the privacy of phone conversations, both the
content of the conversation and the public/private status of the
speaker were irrelevant to the dissent. Everyone (including both pub-
lic and private figures) enjoys the right to private conversation. Under this reading, for the three dissenters, public figure status was
irrelevant.

142. Id. at 548–49.
143. Id. at 549–53. Ironically, Chief Justice Rehnquist, hardly known for his own def-
erence to Congress, faults the majority with not recognizing that Congress is a far
better factfinder than the judiciary. Id. at 549–50.
144. Id. at 553.
145. Id. at 555.
146. Id. at 553.
147. Id.
148. Id. at 553–54.
149. Id. at 554.
150. Id. at 555–56.
151. Id. at 554–55.
But, on the other hand, Rehnquist's exact wording that while "public persons may have forgone the right to live their lives screened from public scrutiny in some areas," they have not "abandoned their right to have a private conversation,"152 may indicate that for issues other than private phone conversations, public figure status is relevant. For each claimed privacy right, Chief Justice Rehnquist implied, we would have to check to see if it had been abandoned by public figures. So, while public figure status is irrelevant if the claimed privacy right is a right to have a private phone conversations, it may be relevant to other privacy claims.

E. In Summary

Bartnicki shows that the Court is deeply divided as to the role of public figure analysis in privacy cases. Two current Justices—Breyer and O'Connor—are now on the record as including public figure status as part of the constitutional test in privacy cases, but for the other four members of the majority, such status seems irrelevant (content and means of acquisition under Daily Mail being the deciding factors). For the three dissenters, while their commitment to greater protection for privacy is clear, their attitude toward the general relevancy of public figure status is not.

V. THE FUTURE OF THE PUBLIC FIGURE DOCTRINE IN TORT ACTIONS FOR INVASION OF PRIVACY

What should we make of this conflicting tale of the relevance of public figure status in privacy cases? And, more importantly, what is the future of the public figure doctrine in constitutional privacy law?153

A. A Content-Only Test Holds On?

The first possibility is that the public figure doctrine remains exiled from privacy cases. As documented above, none of the Court's key privacy tort cases—neither the Time, Inc. line nor the Daily Mail line—uses a public figure test, instead focusing on content.154 This

152. Id.
153. This Part discusses possible tests to determine the constitutionality of the tort actions for invasion of privacy (false light and disclosure of private facts) when they conflict with the free speech rights of the press. It does not offer a test for governmental invasions of citizens' privacy, where a very different constitutional balance may well be drawn. In such cases, the government possesses no constitutional right to free speech, and indeed it is the plaintiff who asserts a constitutional right to stop government speech on matters deemed private. In media cases, by contrast, the First Amendment accords a constitutional right to speak. Thus, a very different balance is likely to be drawn in these two sets of cases.
154. See supra section III.A.
position is supported by the Court's majority opinion in *Bartnicki*, which uses means of acquisition and matter of public concern as the keys to constitutional protection.\textsuperscript{155} However, a future without some public figure analysis seems unlikely for three reasons: the weakness of the above-cited precedent, the policy justifications supporting the inclusion of a public figure analysis, and the votes on the current Court.

The first reason it is unlikely that a content-only test will prevail is that the authority supporting it is weak. As discussed in section III.A, *supra*, *Time, Inc.*, was decided before the public figure doctrine was fully articulated, and its general applicability is at least open to question after *Cantrell*.\textsuperscript{156} Some courts read this ambiguous precedent as suggesting that the public figure doctrine is part of the constitutional analysis at least in false light privacy cases.\textsuperscript{157}

The *Daily Mail* line of cases, applied to the public disclosure of true facts tort, is equally ambiguous. The Court does not expressly reject a public figure rule in any of these cases.\textsuperscript{158} Moreover, the opinions in these cases, although adopting a content-based test, often refer to constitutional libel law and discuss private/public figure status.\textsuperscript{159} Thus, they are weak authority for the position that public figure status is incompatible with, or alien to, privacy law.

This precedent's weakness is magnified by the express and repeated refusal of the Court to announce a general rule for privacy. In both *Time, Inc.*,\textsuperscript{160} and in its *Daily Mail* cases, the Court has refused to adopt a general privacy rule, simply announcing a rule for the case before it.\textsuperscript{161} Thus, the precedent, while never adopting a public figure test, also has never rejected it and indeed has left the door open.

Second, an analysis of the justification offered by the Court to support use the public figure doctrine in libel law makes its adoption in privacy law seem likely. As discussed in Part II, *supra*, in libel law

\begin{itemize}
\item \textsuperscript{155} 532 U.S. 514.
\item \textsuperscript{156} See *supra* section III.A for a discussion of the continued validity of *Time, Inc.*'s holding post-Gertz.
\item \textsuperscript{157} See *supra* section III.A.
\item \textsuperscript{158} In most of the cases the plaintiffs were private figures (rape victims named in governmental records and juvenile accused), and the Court was not called on to address how public figures would be treated. The exceptions are *Bartnicki*, 532 U.S. at 543 (where the plaintiffs were union representatives, and in Justice Breyer's eyes, public figures) and *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 829 (1978) (where the plaintiff, a state court judge, was a public official).
\item \textsuperscript{159} See *supra* notes 34, 50 (detailing the discussion of public figures in the *Daily Mail* line of case).
\item \textsuperscript{160} 385 U.S. 374, 390–91 (1967) (declining to announce a rule going beyond the facts before it).
\item \textsuperscript{161} See, e.g., *Bartnicki*, 532 U.S. at 528–29; *Fla. Star v. BJF*, 491 U.S. 524, 532–33 (1989); *Landmark Communications*, 435 U.S. at 838.
\end{itemize}
the most important rationale offered by the Court for its public figure doctrine is that public plaintiffs are less deserving of recovery because they assume the risk of adverse publicity.\footnote{162} This same rationale has been frequently proffered by the Court when discussing privacy. For instance, in \textit{Time, Inc.}, the Court left open the possibility that public and private figures in privacy cases would receive differing treatment because of their differing degrees of self-help and assumption of the risk.\footnote{163} Justice Breyer in his \textit{Bartnicki} concurrence, also proffers the assumption-of-the-risk rationale as supporting the use of a public figure test in privacy cases: characterizing the plaintiffs' "legitimate privacy expectations as unusually low,"\footnote{164} he notes that, as union negotiators, they "voluntarily engaged in a public controversy . . . [and] thereby subjected themselves to somewhat greater public scrutiny and had a lesser interest in privacy than an individual engaged in purely private affairs."\footnote{165}


\footnote{163. 385 U.S. at 390–91. The same concept, that public figures assume the risk and so have a lesser privacy interest, is found in tort law. As several courts have put it, "[a] person who by his accomplishments, fame or mode of life, or by adopting a profession or calling which gives the public a legitimate interest in his doings, affairs or character, is said to become a public personage, and thereby relinquishes a part of his right of privacy." \textit{Rawlins v. Hutchinson Publ'g Co.}, 543 P.2d 988, 993 (Kan. 1975) (quoting prior cases). \textit{See also} \textit{Kapellas v. Kofman}, 459 P.2d 912, 923 (1969) (commenting that "[t]hose who seek elected public position realize that in so doing they subject themselves, and those closely related to them, to a searching beam of public interest and attention"); \textit{Goodrich v. Waterbury Republican-Am. Inc.}, 448 A.2d 1317, 1331 (Conn. 1982) (holding that a public figure had a lesser privacy interest because he "voluntarily injected himself into the public eye"); \textit{Bilney v. Evening Star Newspaper Co.}, 406 A.2d 652, 660 (Md. 1979) (holding that basketball players "[h]aving sought and basked in the limelight, by virtue of their membership of the team, will not be heard to complain when the light focuses on their imminent withdrawal from the team"). One who voluntarily places himself in the public eye . . . cannot complain when he is given publicity that he has sought. In such a case . . . the legitimate interest of the public in the individual may extend beyond those matters which are themselves made public, and to some reasonable extent may include information as to matters that would otherwise be private. \textit{Restatement (Second) of Torts} § 652D cmt. e (1976).}

\footnote{164. 532 U.S. at 540 (Breyer, J., concurring).}

\footnote{165. \textit{Id.} at 539 (citing to libel case law).}
We may question the validity of the Court’s entire assumption-of-the-risk rationale, but, if we are willing to accept it in libel cases, it seems equally plausible in privacy cases. If anything, it seems more plausible to assert that public figures expect a loss of privacy when they enter public life, than that they expect negligently false reports. In the aftermath of the Clinton–Lewinsky saga, at least one commentator has concluded that public figures should have no expectation of privacy and should “act on the assumption that every aspect of their lives may become widely known.” In sum, the primary reason offered by the Court to explain its incorporation of public figure status in constitutional libel law seems to support, with equal if not greater force, the inclusion of this doctrine in privacy cases.

Finally, adoption of a public figure doctrine in privacy cases seems likely because of the current votes on the Supreme Court. Bartnicki reveals that, on the current Supreme Court, there are only four votes for a content-only test (Justices Stevens, Kennedy, Souter and Ginsburg). Justices Breyer and O'Connor (who made up the vital fifth and sixth votes of the majority), advocate the incorporation of public figure status. The three votes in dissent (Chief Justice Rehnquist and Justices Scalia and Thomas) wish little, if any, limitations on actions for invasion of privacy and are at least open to the use of public figure status in privacy cases. If the Court were to face a claim by a private figure based on publication of private facts, Justices Breyer and O'Connor would presumably combine with the three votes in dissent, to create a new majority on the Court. This majority would

166. For an examination of the assumption-of-the-risk rationale, see Gilles, supra note 13.
167. William A. Glaston, The Limits of Privacy: Culture, Law and Public Office, 67 GEO. WASH. L. REV. 1197, 1203 (1999) (opining that “for the foreseeable future, candidates and public officials must act on the assumption that every aspect of their lives may become widely known”). See also Anita L. Allen, Privacy and the Public Official: Talking About Sex as a Dilemma for Democracy, 67 GEO. WASH. L. REV. 1165, 1165 (1999) (noting, and lamenting, that Americans, and in particular public officials, have a diminished expectation of privacy); Shaun B. Spencer, Reasonable Expectations and the Erosion of Privacy, 39 SAN DIEGO L. REV. 843, 874–77 (2002) (observing that public officials have a decreased expectation of privacy and arguing that, therefore, an expectations-based test should be rejected); McNulty, supra note 49, at 135 (commenting that “current community mores dictate that there is very little privacy left for public figures.”).
168. See supra section IV.B for a discussion of the majority opinion.
169. See supra section IV.C for a discussion of the concurring.
170. See supra section IV.D for a discussion of the dissent.
171. See supra section IV.B for a discussion of the majority opinion. The likelihood that Justices Breyer and O'Connor would vote with the Bartnicki dissenters in a private figure case, is evidenced by the warning at the outset and the end of their concurrence that the majority opinion must not be read to imply broader immunity for the press beyond the facts of the case, Bartnicki v. Vopper, 532 U.S. 514, 536–37, 541 (2001); the indication that many other statutes protecting privacy would be constitutional and the legislatures should not be unduly restricted in
seemingly vote for recovery by private persons, making the public/private status the key to recovery in privacy cases. In short, because the two swing votes (essential to form a majority) see the distinction as important, the public/private figure is likely to become part of constitutional privacy law.

B. What Should a Public Figure Test Look Like in Tort Actions for Invasion of Privacy?

Having concluded that it is likely that the Court will incorporate some form of public figure doctrine into constitutional privacy law, the remainder of this Article will argue that the form of analysis advocated by Justice Breyer should be rejected and an alternative public figure analysis, based on definitional balancing, should be adopted.

Other scholars have pointed out that there may now be a majority of votes on the Supreme Court in favor of protecting privacy. See, e.g., Dorf, supra note 70, at 119 (opining that "in some future case," the interest at stake "may well tip the balance in the other direction"); Gerwitz, supra note 70, at 139, 141 (observing that "[w]hen read alongside the opinion of the three dissenters, who thought the media should lose this case, the Breyer opinion makes clear that a majority of the Court is prepared to uphold significant restrictions on the media in order to protect privacy"); Halstuk, supra note 70, at 91 (opining that Breyer and O'Connor "could easily cast their key votes with Rehnquist, Scalia and Thomas, forming a new majority in the future"); Hunt, supra note 70, at 386 (noting that Breyer and O'Connor might well join the dissent to form a new majority who would impose liability on the media); Richard D. Shoop, Bartnicki v. Vopper, 17 BERKELEY TECH. L.J. 449, 464 (2002) (opining that if Justice Stevens had not written so narrow a ruling, Justices Breyer and O'Connor could well have voted with the dissent, creating a new majority).

Indeed, given the express refusal of even Justice Stevens to rule on how a private matters case would come out, and his repeated description of privacy as an "important interest," there may be nine votes on the Court to allow liability for publication of a matter of private concern about a private person. See Bartnicki, 532 U.S. at 532–33. This has led some scholars to debate whether privacy is close to being recognized as a constitutional right. See supra note 70 (summarizing conflicting positions).

The distinction between "ad hoc balancing" and "definitional balancing" was first offered by Professor Nimmer. See Melville B. Nimmer, The Right To Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy, 56 CAL. L. REV. 935, 942 (1968). While "ad hoc balancing" weighs the competing interest anew in each and every case, in "definitional balancing" the Court weighs the competing interests for a whole class of cases and announces a substantive constitutional rule to be applied to all cases within that class. Id.; see also John Hart Ely, Democracy and Distrust, 105–16 (1980) (discussing balancing approaches); Thomas I. Emerson, First Amendment Doctrine and the Burger Court, 68 CAL. L. REV. 422, 447–54 (1980) (discussing the Burger Court's use of both ad hoc and definitional balancing). Some critiques have charged that both types of balancing are flawed. See T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 YALE L.J. 943, 948 (1987).
1. Examining Justice Breyer's Approach

a. Another Look at the Public Figure Analysis of Justice Breyer

A review of the “public figure” analysis advocated in Justice Breyer's concurrence reveals that it is strikingly similar to the approaches already at play in Nixon and at common law. First, the public figure analysis adopted in each of these areas calls for multifactor balancing, with public figure status being one of the factors. Thus, in Nixon, the Court looked at a panoply of factors to determine whether the former President’s privacy right had been violated, including consideration of his public figure status, his expectation of privacy in the material, the public interest in the information, and the measures taken to keep the information secret.\(^{174}\) This same ad hoc, mul-

Balancing itself is usually contrasted with a categorical approach when the Court, rather than balancing competing interests, simply classifies areas of speech as protected or unprotected. Some categorical approaches are absolute (speech is either absolutely protected or not protected at all) but other categorical approaches admit of varying levels of protection. See, e.g., Aleinikoff, supra, at 943–45 (outlining forms of balancing); Nimmer, supra, at 935–42 (discussing the three principal approaches of absolutism, ad hoc balancing and definitional balancing); Pierre J. Schlag, An Attack on Categorical Approaches to Freedom of Speech, 30 UCLA L. Rev. 671, 671–75 (1983) (providing detailed definitions of each methodology).

This Article accepts that the current Court is wedded to balancing, see infra section V.C, but urges the adoption of the definitional balancing approach used in libel law, over the ad hoc balancing approach seemingly proposed by Justice Breyer. Id.

174. The Court in fact considered at least nine factors: the extent of intrusion into Nixon's privacy; his status as a public figure; his expectation of privacy in the materials in question; the importance of the public interest; the level of difficulty involved in segregating private and public documents; the Act's sensitivity to privacy interests; the measures taken to keep the materials private, including the unblemished record of the archivists; and the likelihood that further regulations would be promulgated to protect privacy. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 465 (1977) (summarizing the factors the Court considered in concluding there was no privacy violation).

The lower courts have also followed this multifactor balancing approach. Recognizing the balancing test asserted in Nixon, the Second Circuit has held that using a balancing approach is the appropriate standard of review when considering the privacy of personal matters. Barry v. City of New York, 712 F.2d 1554, 1559 (2d Cir. 1983). For further discussion, see also Plante v. Gonzalez, 575 F.2d 1119, 1134–36, (5th Cir. 1978) (adopting a balancing approach but stating that Nixon provides little guidance in public disclosure cases); Fadjo v. Coon, 633 F.2d 1172, 1176 (5th Cir. 1981) (discussing Nixon and maintaining that a balancing approach is appropriate as an intermediate standard of review); Fraternal Order of Police v. Philadelphia, 812 F.2d 105, 110 (3d Cir. 1987) (applying a multifactor balancing test comprised of factors other than those articulated in Nixon); Slevin v. City of New York, 551 F. Supp. 917, 930–31 (S.D.N.Y. 1982) (citing to Nixon and stating that most lower courts have applied a balancing approach).
tifactor balancing approach is often present at common law: one prevalent approach determines whether a report is newsworthy by balancing the value of the information to society, the depth of intrusion into a person's private affairs, and the extent to which the plaintiff voluntarily acceded to a position of public notoriety. Justice Breyer's opinion in Bartnicki recommends that the same type of multifactor approach be adopted in constitutional law. He advocates balancing the speakers' "legitimate privacy expectations," "the public interest" in the subject matter, and "the lawful nature" of the defendant's conduct to see if they are reasonable. Under such an approach, public/private figure status is, as one state court explained, "not determinative, but only one of a variety of factors to be weighed."

The second notable trait in these three areas is that, while the factors vary, all three include not just the plaintiff's public status, but also whether the information is a matter of public concern. Both the plaintiff's status and the content of the speech are factors to be balanced in each of these tests.

Finally, Justice Breyer's approach, just like the Court's approach in Nixon and the common law's test, is an individualized, ad hoc, balancing test. Thus in Nixon, the Court refused to consider the claim "in the abstract," instead insisting that the issues must be reviewed "in context." This same ad hoc balancing is present at common law. The test advocated by Justice Breyer is also an individualized,

175. See, e.g., Kapellas v. Kofman, 459 P.2d 912, 922 (Cal. 1969). Interestingly, for the reasons set out later in this Article, some courts, including the California Supreme Court (which created the Kapellas test), have had concerns with an ad hoc balancing test and have sought to frame a more categorical approach. See Shulman v. Group W Prods., Inc., 955 P.2d 469, 485–86 (Cal. 1998) (endorsing the Kapellas test, but concerned with fact-dependent balancing of First Amendment rights attempting to incorporate a relevancy analysis, which it argues will reduce ad hoc balancing). For a discussion of Shulman, see Bostwick, supra note 65, at 225.

176. See supra section IV.C discussing the concurrence.

177. Bartnicki, 532 U.S. at 540.

178. Shulman, 955 P.2d at 486 n.9.

179. See Nixon, 433 U.S. at 465 (including public figure status and importance of public interest in the material at issue); Bartnicki, 532 U.S. at 540 (Breyer, J., concurring) (examining both whether the matter was of public concern and the plaintiff's public figure status); Kapellas, 459 P.2d at 922 (including the value to society of the facts to be published and whether the person was in a position of public notoriety).

180. For the classic distinction between ad hoc balancing and definitional balancing, see supra note 173.

181. 433 U.S. at 458.

182. Id. at 465.

183. See, e.g., Bilney v. Evening Star Newspaper Co., 406 A.2d 652, 660 (Md. Spec. App. 1979) (noting that the Restatement's test is "reasonableness under the facts presented"); see also Shulman, 955 P.2d at 485, 486 (endorsing the Kapellas test,
case-by-case balancing test.\textsuperscript{184} Breyer expressly cautions the Court to “avoid adopting overly broad or rigid constitutional rules,”\textsuperscript{185} and insists on an \textit{ad hoc} inquiry as to whether “looked at more specifically, the statutes, as applied in these circumstances” were reasonable.\textsuperscript{186}

Thus Justice Breyer’s model seems to share several key characteristics of the public figure analysis already at play in privacy law prior to \textit{Bartnicki}. These three distinct characteristics are that it is a multifactored test; that both plaintiff’s status and the content of the speech are factors; and that the balancing is done \textit{ad hoc}, case by case.\textsuperscript{187}

\textbf{b. Justice Breyer’s Public Figure Doctrine Is Not the Public Figure Doctrine of Constitutional Libel Law}

When we compare the public figure test described above to the doctrine created in libel law, it is apparent that we have two very different approaches, masquerading under the same name. Let us return to libel law. The proponents of the public figure test in libel saw two main benefits for the public figure test (over the competing pubic concern test). First, a public figure test avoided the significant difficulties the Court saw with adopting a test that required the Court to designate which topics were of interest to the public.\textsuperscript{188} Indeed, these Justices questioned not just the competency of the Court to offer a workable definition of matters of public concern, but also the constitu-

\begin{itemize}
  \item \textsuperscript{184} Other scholars have noted that Breyer’s approach is a case-by-case balancing approach. See Dorf, \textit{supra} note 70, at 116; James M. Hilmert, \textit{Note, The Supreme Court Takes on the First Amendment Privacy Conflict and Stumbles: Bartnicki v. Vopper, the Wiretapping Act, and the Notion of Unlawfully Obtained Information, 77 Ind. L.J. 639, 655 (2002)} (characterizing Justice’s Breyer’s test as “an amorphous \textit{ad hoc} balancing test”); Note, \textit{supra} note 49, at 410 (observing that Breyer “would balance privacy and free speech interests case by case”).
  \item \textsuperscript{185} Bartnicki v. Vopper, 532 U.S. 514, 541 (2001).
  \item \textsuperscript{186} \textit{Id.} at 538.
  \item \textsuperscript{187} Some scholars have suggested \textit{ad hoc} weighing approaches similar to that advocated by Justice Breyer. See, \textit{e.g.}, Matthew J. Coleman, \textit{The “Ultimate Question”: A Limited Argument for Trafficking in Stolen Speech, 55 Okla. L. Rev. 559, 609 (2002)} (advocating that the level of free speech protection accorded in each case be determined by evaluating a series of factors including the nature of the speech and the plaintiff’s status).
  \item \textsuperscript{188} For instance, in dissent in \textit{Rosenbloom v. Metromedia, Inc.}, 403 U.S. 29 (1971), Justice Marshall attacked Justice Brennan’s proposed public interest test, because “[c]ourts, including this one, are not anointed with any extraordinary prescience,” and asked whether “courts are [to] simply take a poll to determine whether a substantial portion of the population is interested or concerned in a subject” or whether courts are to “somehow pass on the legitimacy of interest in a particular event or subject.” \textit{Id.} at 79. \textit{See also} Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974) (Powell, J.) (offering the same reasons for rejecting \textit{Rosenbloom’s} public concern test).\end{itemize}
tional wisdom of the Court taking on such a role, since requiring judicial approval of topics would endanger freedom of speech. In contrast, the Gertz Court saw relatively few difficulties in defining public and private plaintiffs, commenting that "we have no difficulty in distinguishing among defamation plaintiffs." Thus in libel law, when the Court adopted the public figure doctrine, it also rejected the public concern test.

The Court also offered a second reason for the adoption of the public figure test: it avoided the need for case-by-case balancing, and instead offered a definitional balancing approach. As the Court put it: "Because an ad hoc resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application." Thus in libel law, the public figure doctrine requires the Court to determine to which category a plaintiff belongs, and thereby, what level of fault the plaintiff must prove. It does not call for an individualized, multifactor balancing test, and indeed such a test was specifically rejected by the Court.

In sum, libel law's public figure doctrine was adopted to minimize the role of a public concern test and to achieve definitional, not ad hoc, balancing. Yet, as advocated by Justice Breyer (and indeed as employed in Nixon and at common law), the public figure doctrine works in the opposite way—public figure and public concern are combined as factors to be balanced in an ad hoc weighing of multiple factors. Far from importing libel's public figure doctrine, what is evolving in privacy law is a very different animal.

2. Outlining a "Libel-Like" Public Figure Doctrine for Privacy Cases

What would a constitutional test for privacy look like if it incorporated libel's public figure doctrine? First, such an approach would mandate that the courts always, as a first step, ascertain the plaintiff's status. The Court would then have to devise general rules detailing the proof required for each category of plaintiffs, depending on the Court's balancing of the interest of the states in protecting that cate-

189. Gertz, 418 U.S. at 346 (Powell, J.) (observing that "[w]e doubt the wisdom of committing this task to the conscience of judges"); Rosenbloom, 403 U.S. at 79 (Marshall, J., dissenting) (commenting that "[t]he danger such a doctrine portends for freedom of the press seems apparent").
190. 418 U.S. at 344.
191. Over the years since Gertz, whether a matter is of public concern has crept back into some areas of constitutional libel law. See supra note 12.
192. Gertz, 418 U.S. at 343-44. For the classic distinction between ad hoc balancing and definitional balancing, see supra note 173.
193. Gertz, 418 U.S. at 343-44.
194. Id. at 347–48.
195. Id. at 343–44.
gory of plaintiffs and the free speech interest. In false light cases, the actual malice test and similar fault rules created in constitutional libel law could be transposed into privacy law, since both torts seek to punish false speech. However, where the privacy action is for public disclosure of true private facts, the offending speech is true and the libel rules which focus on the press's knowledge of falsity cannot be applied.

Yet it is possible to imagine a scheme, based on definitional balancing, for the disclosure tort and similar statutory actions. For instance, the Court could hold that public figures could never recover for publication of true private facts (concluding that states' lesser interest in providing a remedy for those who have assumed the risk of such publicity is outweighed by the interest of the public in true information about such public persons). For private persons, where the matter is of public concern, the Court could continue to hold that, upon proof that the information is of public concern and that it was lawfully acquired, there can be no liability for publication in the absence of a governmental interest of the "highest order" (i.e., the Daily Mail test). This leaves the strongest case for recovery: private person/private facts. Here, given the vote in Bartnicki, a majority of the

---

196. In other words, the Court would engage in "definitional balancing," weighing the competing interests in each class of cases (public figure/public facts cases; public figure/private facts cases; private figure/public facts cases; and private figure/private facts cases) and announcing substantive rules to be applied to all cases falling within each class. See supra note 173, defining definitional balancing.

197. In constitutional libel law, if a plaintiff is determined to be a public figure or a private figure and the speech is on a matter of public concern, the plaintiff must prove falsity and a heightened fault standard (actual malice or negligence respectively) that focuses on the press's attitude toward the truth. See Gertz, 418 U.S. 323. Such heightened fault standards would work in false light privacy cases, since falsity must be proven, and thus the Court could, as it did in Time, Inc., transplant the actual malice test. Time, Inc., v. Hill, 385 U.S. 374, 387–88 (1967).

The Court, of course, could find a different balance of interests and therefore adopt a different set of liability rules in false light cases. As Professor Zimmerman has pointed out, though libel and false light are similar, they are not identical. Zimmerman, supra note 31, at 393–95. In particular, false light does not require the plaintiff to suffer reputational harm, and thus false light plaintiffs may have less of an interest in recovery—suggesting that a more pro-press set of substantive rules should be adopted. Id. at 435–51 (arguing that the false light rules are inadequate to address the free speech problems created by the false light tort).

198. See supra notes 40–43 and accompanying text (defining the disclosure of private facts tort).

Court may well conclude that there is a low First Amendment interest in facts of no public concern (even though true), a high state interest in giving a remedy to a private person, and thus recovery should be allowed, perhaps with some limitation on damages.\footnote{200}

It is not the goal of this Article to advocate one set of substantive constitutional rules versus another. It is sufficient for this piece to point out that the adoption of a definitional balancing approach, similar to that employed in libel law, would lead to a very different "public figure" doctrine than that advocated by Justice Breyer.

C. Why Libel's Definitional Approach Is Better than Justice Breyer's Proposal

This section argues that the Court should adopt a definitional, rather than \textit{ad hoc}, balancing approach. Some justices, most notably Justice Black, have objected to any balancing, arguing instead for absolute rules, on the grounds that balancing undervalues free speech interests and is contrary to the text of the First Amendment.\footnote{201} Yet his position never won out in the libel cases,\footnote{202} and the Court has openly acknowledged that it is engaged in balancing.\footnote{203} The Court today seems firmly committed to balancing.\footnote{204}

\footnote{200. It is not my position that allowing a private figure/private concern action adequately protects free speech values, given that the State is seeking to penalize true speech. See Susan M. Gilles, \textit{All Truths Are Equal, But Are Some Truths More Equal Than Others?}, 41 \textit{Case W. Res. L. Rev.} 725 (1991) (advocating that there should be no liability where speech is true). My point is simply that, counting the votes in \textit{Bartnicki}, there seem to be five, perhaps even nine, votes on the current Court for allowing recovery for a private person suing for publication of true private facts. See supra section V.A for a discussion of the votes in \textit{Bartnicki}. Since the Court is likely to allow such an action, this Article suggests how to best craft constitutional limitations on such actions so as to protect free speech.}

\footnote{201. See, e.g., Konigsberg v. State Bar of Cal., 366 U.S. at 61–63 (Black, J., dissenting). For a spirited argument that balancing should be widely rejected, see Aleinikoff, supra note 173.}


\footnote{203. See, e.g., \textit{Gertz}, 418 U.S. at 342 (seeking the "proper accommodation" between free speech and reputational interest); \textit{see also} \textit{Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.}, 472 U.S. 749, 757 (1987) (characterizing the "approach approved in \textit{Gertz}" as "balanc[ing] the State's interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression."). As one commentator has observed, while \textit{New York Times} itself did not seem to engage in balancing, from \textit{Gertz} on, the Court has consistently employed definitional balancing in libel cases. See, Aleinikoff, supra note 173, at 1001 (arguing that \textit{New York Times} did not employ balancing), 977 (noting that since \textit{Gertz}, the Court has weighed First Amendment interests against reputational interest in libel cases).}

\footnote{204. Indeed, one commentator has concluded that "[c]onstitutional law has entered the age of balancing." See Aleinikoff, supra note 173, at 972. Justice Stevens,
The distinction between libel law's approach and Justice Breyer's is not between balancing and no balancing, rather it is between definitional balancing and case-by-case balancing. That is, the issue is whether the Court (1) will perform a weighing for an entire category of cases (e.g., public figures cases) and announce a rule to be followed in all cases within that category or (2) reweigh the factors in every individual case as Justice Breyer advocates.205

This dilemma is not a new one for the Court. As Justice Powell pointed out thirty years ago in Gertz while facing this same choice in libel law, "theoretically, of course the balance between the needs of the press and the individual's claim to compensation . . . might be struck on a case-by-case basis."206 But he identified two drawbacks to a case-by-case approach: it "would lead to unpredictable results and uncertain expectations,"207 and it could "render [the Court's] duty to supervise the lower courts unmanageable."208 Concluding that "an ad hoc resolution of the competing interests at stake in each particular case is not feasible,"209 the Gertz Court instead elected to "lay down broad rules of general application."210

These same objections apply with equal force to privacy cases. The unpredictability and uncertainty feared by Justice Powell is well-illustrated by Justice Breyer's approach in Bartnicki. Although Justice Breyer identifies multiple factors to be balanced, as several scholars have noted, "precise weights are never assigned to any of the factors . . . [n]or are we even sure that the quantities being measured are commensurate," or even how the absence of one factor, or the presence of a new factor, would affect the result.211 Thus a lawyer, advising a

writing for the majority in Bartnicki, acknowledges that he was adopting a balancing approach: "[i]n these cases, privacy concerns give way when balanced against the interest in publishing matters of public importance." Bartnicki v. Vopper, 532 U.S. 514, 534 (2001). See Dorf, supra note 70, at 118 (commenting that "in Bartnicki, none of the Justices objected to balancing"). Cf., Coleman, supra note 187, at 582–83 (arguing that the majority is "drifting closer and closer to a categorical test" and advocating a "pure balancing approach"). Professor Dorf views both Justices Stevens and Breyer as engaged in balancing. See Dorf, supra note 70, at 118. I would agree, but argue that while Breyer's is an ad hoc approach, the majority engage in the definitional balancing (announcing a rule for publication of matters of public concern, although not for matters of private concern).

205. The distinction between "definitional" and "ad hoc" balancing was first proffered by Professor Nimmer. See Nimmer, supra note 173.

206. 418 U.S. at 343.

207. Id.

208. Id.

209. Id.

210. Id. at 343–44.

211. See Dorf, supra note 70, at 116. See also Hilmert, supra note 184, at 659 (arguing that "other than listing three factors, [Justice Breyer's test] left the lower federal courts no reasonably applicable standard and consequently left the First Amend-
media client who proposed to publish a true story concerning private information about a public figure, would be reduced to opining that maybe there would be liability.\textsuperscript{212} Such uncertainty of result is all the more troubling, since, under the First Amendment, one of the Court's acknowledged goals is to reduce the chilling effect that tort law has on true speech.\textsuperscript{213} The more uncertain the law, the greater the fear of potential liability, and the greater the chill on the speaker.\textsuperscript{214}

In contrast, if the Court were to adopt a definitional balancing approach in privacy, as it has in libel law, greater clarity of advice can be offered.\textsuperscript{215} For instance, presuming liability rules like those set out above were adopted by the Court, a lawyer could advise a client that since the subject of the story is a public figure, recovery will not be permitted if the information is true. Or, if the potential plaintiff is a private person and the story is on a matter of public concern, the lawyer can advise that the press will have to prove the information was legally obtained and is on a matter of public concern. It is true that uncertainty remains (for instance will a court find the plaintiff a public figure?\textsuperscript{216} or conclude that the matter is of public concern?),\textsuperscript{217} but
the presence of rules permits a greater degree of predictability than an individualized, *ad hoc* approach where each case is treated as unique.

Justice Powell’s second objection, that an *ad hoc* approach makes appellate review unmanageable, is a significant concern. Justice Powell opined that an *ad hoc* approach would “render [the Court’s] duty to supervise the lower courts unmanageable.” Gertz v. Robert Welch, Inc., 418 U.S. 323, 343 (1974).

In contrast, libel law teaches that, under a definitional balancing approach, the appellate courts play a considerable role in preserving free speech. Studies have shown that appellate courts exercising independent review reverse, in whole or in part, approximately seventy percent of pro-plaintiff libel judgments.

Another significant procedural protection would be lost if the Court were to adopt an *ad hoc* approach: summary judgment. In libel law, summary judgment is a powerful and relatively cheap device, that eliminates a vast number of claims that cannot meet the constitutional requirements laid out by the Court. Yet, if an *ad hoc* approach is adopted, its requirement of an individualized weighing of all the facts makes summary judgment almost impossible to obtain.

In sum, Justice Breyer’s approach increases the unpredictability and uncertainty that constitutional law seeks to eradicate, and will destroy the effectiveness of the procedural safeguards that a definitional approach can provide. In addition, there are three distinct advantages to adopting a definitional, rather than *ad hoc*, approach to a public figure doctrine in privacy cases. First, it would decrease the confusion of litigants, lawyers and the courts if there were one, rather than two, public figure doctrines in constitutional media law. Second, a majority on the current Court may well be comfortable with

---


219. *Id.* at 343 (pointing out that an “*ad hoc* resolution of . . . each particular case is not feasible”).


221. *Id.* at 1774 (reporting that studies have consistently found that between seventy and eighty percent of defense motions for summary judgment are granted).

222. Justice Breyer characterizes his test as asking if the “balance” drawn is “reasonable” in light of the competing concerns. *Bartnicki*, 532 U.S. at 536. Yet reasonableness, the classic negligence standard, is almost always one for the jury and not appropriate for summary judgment. *See* DAN B. DOBBS, THE LAW OF TORTS § 148, at 355 (observing that “[b]ecause part of the jury’s role is to make normative decisions or value judgments, courts do not normally grant summary judgment on negligence issues, even if the facts are undisputed”).

223. The *ad hoc* approach to public/private figures in common-law tort, discussed *supra* section III.B, would perhaps remain, although the confusion of the state courts as to whether the public figure doctrine is part of tort law or constitutional law might lead state courts to simply follow any clear lead provided by the Supreme Court.
such an approach. It is an approach the Court has lived with for over fifty years in libel,\textsuperscript{224} and it is an approach that may meet the interest of all three groups on the current Court. It goes some way, though not as far as they would like, to increase protection of privacy that the dissenters in \textit{Bartnicki} demand.\textsuperscript{225} It would include public figure analysis, albeit in a different manner, as the concurrence demands.\textsuperscript{226} And, in setting out at least some rules, it may appeal to the four voters in the majority who adopted the \textit{Daily Mail} test,\textsuperscript{227} especially if, as I suggested \textit{supra}, the \textit{Daily Mail} test is adopted as one of the rules.\textsuperscript{228} Finally, such an approach would not require a reversal of existing precedent. The Court could adopt such a public figure approach without overturning its prior holdings in the privacy area.\textsuperscript{229}

\textbf{VI. CONCLUSION}

This tale of the public figure doctrine and privacy law has no ending; or at least, the Supreme Court has not written it yet. This Article proposes that if the Court is, as I predict, going to incorporate some form of a public figure test into privacy law, it should employ definitional balancing as it has in libel law, and not its inferior cousin, the \textit{ad hoc} approach, advocated by Justice Breyer.

\begin{footnotesize}
\textsuperscript{224} See \textit{supra} Part II (discussing the public figure doctrine in libel law).
\textsuperscript{225} See \textit{supra} section IV.D (discussing the dissent).
\textsuperscript{226} See \textit{supra} section IV.C (discussing the concurrence).
\textsuperscript{227} See \textit{supra} section IV.B (discussing the majority opinion).
\textsuperscript{228} See \textit{supra} subsection V.B.2 (discussing a definitional balancing approach that incorporates the \textit{Daily Mail} test).
\textsuperscript{229} As noted \textit{supra}, the Court has never expressly rejected a "public figure" approach and has always been careful to rule only on the facts before it, leaving the door open to adopt a more generalized test. See \textit{supra} section V.A (discussing the privacy precedent). Moreover, if the rules the Court adopts are those I suggest in section V.B, \textit{supra}, the result in none of its prior cases would need to be overruled. See \textit{supra} note 199, for a discussion of the relevant cases.
\end{footnotesize}