THE CERTAINTY PRINCIPLE AS JUSTIFICATION FOR THE GROUP DEFAMATION RULE

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Defamation presents a paradox. As a category of expression, it is universally scorned even by champions of free speech.¹ At the same time, courts have erected a formidable array of obstacles to plaintiffs alleging false assertions harmful to their reputations. Beginning with its landmark decision in *New York Times Co. v. Sullivan*,² the Supreme Court has fashioned a series of constitutional safeguards aimed at striking “the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment.”³ Even before *New York Times*, however, the common law’s otherwise strict regime⁴ afforded shelter to libel defendants under certain circumstances.

Among the most conspicuous and persistent of the common law protections has been the group defamation rule. Under the rule, a member of a defamed group may not recover unless the defamatory statement can be reasonably understood to refer specifically to that individual.⁵ Despite the rule’s various formulations and corollaries, its essence remains clear and generally unexceptionable. It is in translating this principle into operative standards that courts and commentators have divided. The most widely invoked version of the rule is articulated in the *Restatement (Second) of Torts*:

One who publishes defamatory matter concerning a group or class of persons is subject to liability to an individual member of it if, but only if,

(a) the group or class is so small that the matter can reasonably be understood to refer to the member, or

¹ See, e.g., *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (declaring that “the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected”). The Court’s opinion in *Garrison* was authored by Justice Brennan, widely recognized as a staunch defender of the First Amendment’s protection of speech.


⁵ See *Beznos v. Nelson*, 155 N.W.2d 241, 243 (Mich. App. 1967): (stating that “if defamatory words are used broadly in respect to a class or group, there is no cause of action unless the words can be made to apply to a single member of that group or to every member of the group” (citations omitted)); *Hospital Care Corp. v. Commercial Cas. Ins.*, 9 S.E.2d 796, 800 (S.C. App. 1940) (stating that “where defamatory statements are made against an aggregate body of persons, an individual member not specifically imputed or designated cannot maintain an action.”).
(b) the circumstances of publication reasonably give rise to the conclusion that there is particular reference to the member.\(^6\)

In addition, the notion of a group size beyond which collective libel could not ordinarily imply a “reasonable personal application”\(^7\) to the plaintiff was famously infused with numerical precision by Prosser’s pronouncement that “[t]he rule has been applied quite uniformly to comparatively large groups or classes of a definite number, exceeding, say twenty-five persons.”\(^8\) That figure gained added authority from the Restatement’s observation that “the cases in which recovery has been allowed usually have involved numbers of 25 or fewer.”\(^9\)

The dominant approach toward group defamation reflected by the *Restatement* has generated significant criticism.\(^10\) Admittedly, the approach presents an inviting target; on the surface, it can appear arbitrarily mechanical in pegging actionability to a random number and vague about the treatment of statements involving groups below this size. This Article contends, however, that the *Restatement* standard represents a sensible manifestation of a philosophy that tacitly informs much of defamation doctrine: viz., the certainty principle. Properly understood as a strong presumption, the 25-member threshold gives practical expression to this principle while avoiding both the complications of multi-factor standards and the rigidity of more mathematically rigorous tests. Part I situates the group defamation rule within modern defamation doctrine and describes proposed alternatives to the *Restatement* model. Part II describes the certainty principle and argues that the *Restatement*’s method of dealing with group defamation is more congruous with that principle than are others. Part III explains how the certainty principle illuminates the appropriate resolution of particular recurring circumstances of the group libel problem.

**I. THE GROUP DEFAMATION RULE: EVOLUTION AND VARIATIONS**

The group defamation\(^11\) rule has a long lineage in American libel law. As courts have confronted the problem of collective disparagement in various contexts, the “rule”

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\(^6\) *RESTATEMENT (SECOND) OF TORTS* § 564A (1977).
\(^8\) *Id.*
\(^9\) *RESTATEMENT, supra* note 6, at § 564A cmt. b; see Alexis v. District of Columbia, 77 F.Sup.2d 35, 44 (D.D.C. 1999) (describing Restatement as “suggest[ing] that 25 members is the *de facto* maximum group size” for individual members to sue on basis of group defamation). The 25-member limit is further discussed at notes 58-66 *infra* and accompanying text.
\(^10\) See I-C *infra*.
has unfolded as a broad proposition to be adapted to particular circumstances. At its core, however, is the distinction between large and small classes of defamed individuals embodied in Restatement §564A(a).

A. The Rise of the Group Defamation Rule

While recognition of the problem of group defamation can be found in older English reports, two New York cases from the early nineteenth century supply markers for the path that American doctrine would take. In issuing its 1815 decision in Sumner v. Buel, the New York Court of Appeals announced that “[a] writing which inveighs against…a particular order of men, is no libel, nor is it even indictable. It must descend to particulars and individuals, to make it a libel.” Over two decades later, the court elaborated: “[I]n the case of libels, … all the external facts to show the application of the libellous matter must be spread upon the declaration, to enable the court to see that it must have been applied to the plaintiff as an individual, and not to a class of persons merely, when he sues for a personal libel on himself.” By 1906, the policy reflected by these passages had been sufficiently embraced and broadened that the court could declare as “well settled” the distinction between actionable defamatory statements aimed at “an individual” and statements “censuring or satirizing an entire class or body of individuals law,” which would be immune from suit.

In the decades that followed, resistance to suits seeking relief for generalizations, with an attendant emphasis on the size of the group charged with misconduct, pervaded decisions in this area. Three leading cases exemplify this theme. In Service Parking Corp. v. Washington Times Co., a newspaper article about a “Parking Lot Racket Probe” had reported authorities’ efforts to “halt the chiseling of parking lot owners and garages.” Upholding a directed verdict against one of the approximately dozen complaining owners of downtown parking lots, the appellate court explained:

[T]he appellant’s case clearly failed…to prove that the article referred to him. … [T]he article could not reasonably be said to concern more than downtown parking lots and their owners as a class. There is no language referring ‘to some ascertained or ascertainable person.’ Nor is the

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14 Id. at 477.
16 Weston v. Commercial Advertiser Ass’n, 77 N.E. 660, 661 (N.Y. 1906); see also MARTIN L. NEWELL, THE LAW OF DEFAMATION, LIBEL AND SLANDER IN CIVIL AND CRIMINAL CASES: AS ADMINISTERED IN THE COURTS OF THE UNITED STATES OF AMERICA 258 (1st ed. 1890) (stating that “where defamatory matter is published against a class or aggregate body of persons, an individual member not specifically included or designated cannot maintain an action”).
17 92 F.2d 502 (D.C. Cir. 1937).
18 Id. at 503.
in downtown class so small…as to cause defamation of it to defame the appellant.\textsuperscript{19}

In \textit{Louisville Times v. Stivers},\textsuperscript{20} a Kentucky appeals court elaborated on the crucial role of size in an oft-quoted observation: “As the size of the group increases, it becomes more and more difficult for the plaintiff to show he was the one at whom the article was directed, and presently it becomes impossible.”\textsuperscript{21} The court noted this phenomenon in the context of a newspaper article critical of a feud between the “Stivers clan” and another family over a period of fifty years.\textsuperscript{22} Given the presumptively numerous family members encompassed by this reference, the court found the defamed class simply too large to sustain an individual suit.\textsuperscript{23}

Probably most influential in shaping developments that would culminate in the \textit{Restatement} framework were the mixed results of \textit{Neiman-Marcus v. Lait}.\textsuperscript{24} The case arose from a book purporting to offer an exposé of Neiman-Marcus’s Dallas department store. The court disallowed a suit based on the book’s characterization of the store’s saleswomen as call girls.\textsuperscript{25} Relying on the “widely accepted” proposition that “[w]here the group or class libelled is large, none can sue even though the language used is inclusive,”\textsuperscript{26} the court determined that the 382 saleswomen unquestionably constituted such a group.\textsuperscript{27} In light of the much smaller (twenty-five) contingent of salesmen, however, the court permitted a suit over the book’s assertion that “most of the sales staff” in the men’s section were “‘fairies.’”\textsuperscript{28} The decision thus helped to entrench the general bar to individual claims stemming from defamation of large groups.\textsuperscript{29} Perhaps by the fortuity of the size of Neiman-Marcus’s men’s department, the specific benchmark of twenty-five members gained credence as well.\textsuperscript{30}

Moreover, the \textit{Neiman-Marcus} court’s assertion that no reasonable person would “conclude from the publication a reference to any individual saleswoman”\textsuperscript{31} reflects the central rationale for the group defamation rule. A fundamental tenet of defamation law is

\textsuperscript{19} \textit{Id.} at 506 (citation omitted).
\textsuperscript{20} 68 S.W.2d 411 (Ky. App. 1934).
\textsuperscript{21} \textit{Id.} at 412.
\textsuperscript{22} \textit{Id.} at 411.
\textsuperscript{23} \textit{Id.} at 413.
\textsuperscript{24} 13 F.R.D. 311 (S.D.N.Y. 1952).
\textsuperscript{25} “The salesgirls are good, too [like “some Neiman models” that the book had described as “call girls” in the preceding passage]–pretty, and often much cheaper--twenty bucks on the average.” \textit{Id.} at 313.
\textsuperscript{26} \textit{Id.} at 315.
\textsuperscript{27} \textit{Id.} at 316.
\textsuperscript{28} \textit{Id.} at 313.
\textsuperscript{31} 13 F.R.D. at 316.
that an actionable statement must be “of and concerning” the plaintiff. The very possibility of individual suits based on group defamation demonstrates, as the Restatement affirms, that “[i]t is not necessary that the plaintiff be designated by name; it is enough that there is such a description of or reference to him that those who hear or read reasonably understand the plaintiff to be the person intended.” Still, an early commentator recognized that this requirement “presents special difficulty when the imputation is directed against a group of persons designated by a collective description alone.” It is therefore not surprising that judicial explanations for dismissal of suits grounded in group libel routinely invoke failure to meet the “of and concerning” requirement or the equivalent criterion that the defamatory words refer to “some ascertained or ascertainable person.”


33 RESTATEMENT, supra note 6, at § 564 cmt. b; see also Croixland Properties Ltd. P’ship v. Corcoran, 174 F.3d 213, 217 (D.C. Cir. 1999), cert. denied 120 S. Ct. 531 (1999); Taj Mahal Travel, Inc. v. Delta Airlines, Inc., 164 F.3d 186, 189 (3d Cir. 1998); Berry v. Safer, 293 F. Supp.2d 694, 701 (S.D. Miss. 2003); Wolfson v. Kirk, 273 So.2d 774, 779 (Fla. Dist. Ct. App. 1973) (declaring that a “defamed person need not be named in the defamatory words if the communication as a whole contains sufficient facts or references from which the injured person may be determined by the persons receiving the communication”); Cole Fischer Rogow, Inc. v. Carl Ally, Inc., 288 N.Y.S.2d 556, 561 (N.Y. App. Div. 1968) (stating that “where a libel does not name the plaintiff, he may give evidence of all the surrounding circumstances and other extraneous facts which will explain and point out the person to whom the allusion applies”); Gonzalez v. Sessom, 137 P.3d 1245, 1248 (Okla. 2006) (recognizing that “[i]t is not necessary that the plaintiff be designated by name” “there is such a description of or reference to him that those who hear or read reasonably understand the plaintiff to be the person intended”); Wildes v. Prime Mfg. Corp., 465 N.W.2d 835, 838 (Wis. Ct. App. 1991) (noting that defamatory statement is actionable if it “refers to a person whose identity is ascertainable”).

34 Note, Liability for Defamation of a Group, 34 COLUM. L. REV. 1322, 1322 (1934); see also 2 ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER & RELATED PROBLEMS §2.9.4.1, at 138 (3d ed. 1999) (describing group defamation as presenting “thorny questions” about whether the statement is “of and concerning” the plaintiff); see also Joseph H. King, Jr., Reference to the Plaintiff Requirement in Defamatory Statements Directed at Groups, 35 Wake Forest L. Rev. 343, 349 (2000) (noting that where defamatory statement is not tied to plaintiff, “it would be impossible to conclude that his [the plaintiff’s] reputation has been impaired or harmed”).


The Restatement thus registers a consensus\(^{37}\) that defamation of a relatively large group leaves the required link to a specific individual presumptively meager. For the most part, this view is rooted in the intuitive sense that a broad defamatory brush obscures any focus on particular persons encompassed by its taint. As one court explained, “the larger the collectivity named in the libel, the less likely it is that a reader would understand it to refer to a particular individual.”\(^{38}\) Even where a reader or listener might ascribe the putative group characteristic to some identifiable members, it is thought that “as the target group increases in size, the harmful effect of the statement on any individual member must be diluted, until at some point the harm falls below the threshold of legal recognition.”\(^{39}\) This perspective represents the obverse of more generous provision for suits when the statement tarnishes a small group, an approach derived from the belief that “where the group is small there is a great likelihood that others will understand that the defendant intended to attribute certain qualities, beliefs, or acts to each member.”\(^{40}\) In addition, skepticism toward the credibility of generalizations about large classes of people has informed resistance to suits arising out of classwide derogation. In such instances, courts are likely to “presume that no reasonable reader would take the statements as literally applying to each individual member.”\(^{41}\)

Additional justifications for the group libel rule have rested on the feared impact of permitting suits by members of large groups. A single remark might trigger a multitude of claims, with the potential for massive damages “severely out of proportion to the harm the speakers have actually inflicted.”\(^{42}\) Even if means could be devised for consolidating claims and containing damages, the very availability of suits to recover for statements about broad classes of people could encourage the proliferation of these actions.\(^{43}\) Widespread litigation of this nature would not only burden the judicial system but also, more importantly, threaten to inhibit public discussion of important issues. Indeed, from the early period to the present, much discussion of the group libel principle has expressly or implicitly acknowledged its First Amendment overtones. In the 1840 case of *Ryckman v. Delavan*,\(^{44}\) the court asserted:

\(^{37}\) But see RICHARD A. EPSTEIN, TORTS 489 (1999) (characterizing as “genuine puzzle” common law view that defamation of sufficiently large group be treated as “defamation of none”).


\(^{40}\) *Developments in the Law--Defamation*, 69 HARV. L. REV. 875, 894 (1956); see EPSTEIN, supra note 37, at 490 (noting “rough empirical judgment” that “the more focused the attack, the greater the potential reputational harm”).

\(^{41}\) Barger v. Playboy Enterprises, Inc., 564 F.Supp. 1151, 1153 (N.D.Cal.1983), aff’d, 732 F.2d 163 (9th Cir.1984), cert. denied, 469 U.S. 853 (1984); see Irving Wilner, *The Civil Liability Aspects of Defamation Directed Against a Collectivity*, 90 U. PA. L. REV. 414, 419 (1942); see also EPSTEIN, supra note 37, at 489 (tracing group libel rule in part to perception that “most people have already formed their baseline opinions about large groups of individuals and are, therefore, unlikely to be swayed by general denunciations that run counter to their own opinions).


\(^{44}\) 25 Wend. 186 (N.Y. 1840).
It is far better for the public welfare that some occasional consequential injury to an individual, arising from general censure of his profession, his party, or his sect, should go without remedy, than that free discussion on the great questions of politics, or morals, or faith, should be checked by the dread of embittered and boundless litigation.\(^{45}\)

Nearly a century-and-a-half later, another court couched this constitutional dimension in more direct terms, explaining the group libel rule as “designed to encourage frank discussions of matters of public concern under the First Amendment guarantees.”\(^{46}\) The theme of shielding speech on matters of public concern from the specter of rampant litigation has been similarly prominent in other opinions rejecting suits based on references to relatively large groups.\(^{47}\)

**B. Permutations of the Group Defamation Principle**

The core inquiry generated by group defamation is always “whether the plaintiff was in fact defamed, although not specifically designated.”\(^{48}\) While the *Restatement* reflects the overriding emphasis placed on group size in making this determination,\(^{49}\) the problem arises in a number of contexts. Each of these settings implicates its own distinct calculus of considerations.

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\(^{45}\) *Id.* at 199.


\(^{48}\) *Note, Defamation of a Group*, supra note 34, at 1323; see *Bromme, supra* note 12, at 623 (describing plaintiff’s problem in group defamation case as “the defendant’s failure to identify specifically any individual”).


On the whole, the most conspicuous and most readily dismissed complaint is attempted recovery for a sweeping reference to a broad category of persons. Whatever uncertainty exists over the precise line beyond which a group is no longer deemed “small,” representatives of undeniably large groups can expect virtually summary rejections of their claims. The proposition that “general statements about a large class of people are not actionable by individual members of the class” has been frequently echoed and routinely applied. In the oft-cited reasoning of Prosser, words defaming a

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50. Note, Libel and Slander: Right of a Member of a Defamed Group to Recover in a Civil Action, 29 CALIF. L. REV. 83, 84 (1940) (noting “uncertain area” between the “extremes of small related, and large, more or less unrelated groups”).


52. See, e.g., Gintert v. Howard Publications, Inc., 565 F. Supp. 829, 832 (N.D. Ind. 1983) (declaring as well-settled legal principle that “defamation of a large group gives rise to no cause of action on the part of an individual member of that group unless he can show special application of the defamatory matter to himself”; National Nutritional Foods Ass’n v. Whelan, 492 F. Supp. 374, 380 (S.D.N.Y. 1980) (stating that “[w]here the group disparaged is a large one, absent circumstances pointing to a particular plaintiff as the person defamed, no individual member has a cause of action”); Lins v. Evening News Association, 342 N.W. 2d 573, 577 (Mich. App. 1983) (citing “general rule” that “Where a defamatory publication affects a class of persons without any special personal application, no individual of that class can maintain an action for the publication” (citation omitted)); Whiteside v. United Paramount Network, 2004 WL 323183, *3 (Ohio App.) (stating that “defamation of a large group does not give rise to an action on the part of an individual member unless he can show special application of the defamatory matter to himself”); Farrell v. Triangle Pubs., 159 A.2d 734, 736 (Pa. 1960) (stating unavailability of cause of action where defamatory statement “is directed toward a class or group whose membership is so numerous that no one individual member can reasonably be deemed an intended object of the defamatory matter”); Ewell v. Boutwell, 121 S.E. 912, 915 (Va. 1924) (stating that “[i]f defamatory words are used broadly in respect to a general class of persons, and there is nothing that points, or by colloquium or innuendo can be made to apply, to a particular member thereof, such member has no right of action” (citation omitted)); RESTATEMENT, supra note 6, at § 564 cmt. a (stating as “general rule” that “no action lies for the publication of defamatory words concerning a large group or class of persons”)

very large group “are considered to have no application to anyone in particular, since one might as well defame all mankind.”

Also well-established is the general principle governing defamatory statements about the whole membership of a small group. The Restatement expresses this approach in this language: “When the group or class defamed is sufficiently small, the words may reasonably be understood to have personal reference and application to any member of it so that he is defamed as an individual.” Numerous courts have adopted the Restatement prescription, while others have endorsed essentially the same concept in somewhat different words. Thus, suits based on categorical references to groups below the presumptive 25-member ceiling are regularly allowed to proceed. Where extended

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54 PROSSER, supra note 7, at 750.
55 RESTATEMENT, supra note 6, at § 564A cmt. b.
57 See, e.g., Louisville Times v. Stivers, 68 S.W.2d 411, 412 (Ky. App. 1934) (stating that “if the language employed is directed toward a comparatively small group of persons, or a restricted or local portion of a general class, and is so framed as to make defamatory imputations against all members of the small or restricted group it seems that any member thereof may sue”); Lins v. Evening News Association, 342 N.W.2d 573, 578 (Mich. App. 1983) (acknowledging possibility of suit by individual member of defamed class where statement applies to all members of class, “particularly where the statement is directed toward a comparatively small group of persons or a restricted portion of a general class” (citation omitted)); Smith v. UAW-CIO Federal Credit Union, 728 S.W. 2d 679, 682 n.1 (Mo. App. 1987) (stating that “[w]here a specific defamatory statement is directed at a group small enough that its individual members are readily identified as those to whom the statement referred, a cause of action exists for each individual in the group”); Brady v. Ottaway Newspapers, Inc., 445 N.Y.S.2d 786, 790 (App. Div. 1981) (stating that “an individual belonging to a small group may maintain an action for individual injury resulting from a defamatory comment about the group, by showing that he is a member of the group”); Simpson v. Steen, 127 F. Supp. 132, 138 (D.C. Utah 1954) (stating that “[w]here a class is so small that immediate identification of each member thereof reasonably follows from the statement, a right of action is usually given as a matter of law, or at least the applicability of the statement is left for the jury”); Dean v. Town of Elkton, No. CL00-11958, 2001 WL 184223 (Va. Cir. Ct. February 21, 2001), at *3 (“But if the language is employed toward a comparatively small group of persons, or a restricted or local portion of a general class, and is so framed as to make defamatory imputations against all members of the small or restricted group, any member thereof may sue” (citations omitted)), aff’d 541 S.E.2d 686 (Va. 2002).
58 E.g., Yoder v. Workman, 224 F.Supp.2d 1077, 1079 (S.D. W.Va. 2002) (allegedly defamatory statements about “stable” of six lawyers held sufficient for suit by individual lawyer); Handelman v. Hustler Mag., 469 F. Supp. 1048, 1050-51 (S.D.N.Y. 1978) (permitting suit arising from attack on lawyers involved in an estate); Smallwood v. York, 173 S.W. 380, 382 (Ky. App. 1915) (finding that statement that a jury had returned a verdict that they knew to be wrong furnished grounds for complaint by individual jurors) (dismissed on other grounds); Smith v UAW-CIO Federal Credit Union, 728 S.W. 2d 679, 682 & n.1 (Mo. App. 1987) (holding actionable allegations of misconduct by unnamed members of 3-member credit group); Weston v. Commercial Advertiser Ass’n, 77 N.E. 660, 661-62 (N.Y. 1906) (statement permissibly construed as ascribing graft to city’s coroner’s physicians, of which there were four at relevant time, giving rise to claim by individual physician); De Witte v Kearney & Trecker Corp., 60 N.W.2d 748, 751 (Wis. 1953) (accusation of misconduct by union’s officers, of whom there were four, deemed sufficient for suit); see also General Products Co. v. Meredith Corp., 526 F. Supp. 546, 550 (E.D. Va. 1981) (permitting suit
consideration of such suits occurs, it is often over the interpretive question of whether the 
defamatory statement can be reasonably regarded as referring to the entire group.\textsuperscript{59}

Defamation of an indeterminate segment of a small group, on the other hand, 
raises thornier questions.\textsuperscript{60} Some courts have indicated that reference to a portion of a 
group cannot support a defamation claim.\textsuperscript{61} As befits a phenomenon that assumes a 
variety of forms, however,\textsuperscript{62} a more nuanced approach has generally prevailed in this 
area. The \textit{Restatement} captures the willingness to undertake an individualized 
assessment of statements tarnishing less than all of a small group: “Even when the 
statement made does not purport to include all of the small group or class but only some 
of them, . . . it is still possible for each member of the group to be defamed by the 
suspicion attached to him by the accusation.”\textsuperscript{63} The \textit{Restatement}’s explanatory example 
contrasts the “degree of suspicion” attached to members of a group by an accusation 
against one unnamed person out of a group 25 with a similar accusation leveled against 
“all but one” of that group.\textsuperscript{64} This illustration reflects the commonsense notion that the 
proportion of the group targeted by a defamatory statement should weigh heavily in the 
determination of whether a member of the group can reasonably feel implicated by the 

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\textsuperscript{59} Hansen v. Stoll, 636 P.2d 1236, 1240-41 (Ariz. App. 1981) (jury permitted to find that accusation of 
perjury against seven Drug Enforcement Administration agents included two agents not specifically 
named); Lins v. Evening News Association, 342 N.W.2d 573, 578 (Mich. App. 1983) (ruling that 
reference to “thugs who run Local 299” of union could give rise to claims by the seven leaders of Local); 
Weston v. Commercial Advertiser Ass’n, 77 N.E. 660, 661-62 (N.Y. 1906) (article that mentioned 
coroner’s physicians in course of describing illegal practices in coroner’s office, and which stated that 
“most of the graft goes, not to the underlings, but to those higher up,” held susceptible to interpretation that 
each of city’s four coroner’s physicians was charged with unlawful behavior); Boyce & Isley, PLLC v. 
Cooper, 568 S.E.2d 893, 900 (N.C. App. 2002), cert. denied, 124 S. Ct. 431 (2003) (determining that 
defamatory reference to “Dan Boyce’s law firm” were “of and concerning” all four attorneys in firm; De 
Witte v. Kearney & Trecker Corp., 60 N.W.2d 748, 751 (Wis. 1953) (finding that statement concerning 
“misconduct of the small group of officers” of union “denotes the entire group or all the officers” where 
number of officers was four).

\textsuperscript{60} See Neiman-Marcus v. Lait, 13 F.R.D. 311, 315 (S.D.N.Y. 1952) (observing that “[c]onflict arises when 
the publication complained of libels \textit{some or less than all} of a designated group”).

\textsuperscript{61} See, e.g., Arcand v. Evening Call Pub. Co., 567 F.2d 1163, 1164 (1st Cir. 1977); Golden N. Airways v. 
Tanana Publ’g Co., 218 F.2d 612, 620 (9th Cir. 1954) (stating that where an article does not refer to 
all members of a group, “no person in the group can bring an action for libel”); Nat’l Nutritional Foods Ass’n v. 
Ct. App. 1934); Harvest House Publishers v. Local Church, 190 S.W.3d 204 (Tex. App. 2006) cert. denied 
127 S. Ct. 2987 (2007) (stating that to be actionable, defamatory statement “must create the inference that 
all members of the group have participated in the activity that forms the basis of the libel suit”); Wright v. 
Rosenbaum, 344 S.W.2d 228, 231 (Tex. Civ. App. 1961) (characterizing as apparent majority rule that 
slanderous statements “directed impersonally against an undesigned portion of a group…are not 
slanderous of any particular person”).

\textsuperscript{62} For a taxonomy of defamatory references to less than all of a small group, see Mason C. Lewis, 
Comment, \textit{The Individual Member’s Right to Recover for a Defamation Leveled at the Group}, 17 MIAMI 

\textsuperscript{63} \textit{RESTATEMENT}, \textit{supra} note 6, at § 564A cmt. c.

\textsuperscript{64} \textit{Id}. 

based on statements about indefinite number of manufacturers and sellers of air-insulated triple-wall 
chimneys to proceed on rationale that “the group appears to be a relatively small one”).
charge. Judicial responses to claims provoked by defamatory references that do not encompass the whole group, however, have not developed a uniform, coherent framework for addressing this problem.

Finally, a kind of catchall category has long existed to provide for those instances in which an ostensible reference to a group functionally amounts to singling out a particular member of the group. Thus, even when a defamed group is large, “a member of the group may have a cause of action if some particular circumstances point to the plaintiff as the person defamed.” In some cases, the broader context of the defendant’s comments supplies the link between the nominal collectivity and the specific member. In *Kennedy v. Children's Service Society of Wisconsin*, a defendant’s remarks that some members of a religious organization used mind control and isolated themselves from society was perceived as referring to the plaintiffs because the statements “arose solely in a discussion of the [plaintiffs’] suitability as adoptive parents.” In addition, the juxtaposition of the defendant’s defamatory group reference with readily obtainable information about applicable individual members can lead an audience to those members. One of the most obvious occurrences of this sort occurs when the defendant, while airing an allegation in group terms, provides a document detailing the identities of the individuals encompassed by the charge. In *Ball v. Taylor*, a company executive

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65 See King, *supra* note 34, at 374 (asserting that “[a]s the percentage of members of a group who are encompassed within a statement increases, the prospects for establishing the reference to the plaintiff element improve”).

66 See id. at 374-77 (canvassing holdings). This question is discussed further at III-D infra.

67 See, e.g., Wofford v. Meeks, 130 So. 625, 628 ( Ala. 1900) (noting “‘rule’” that, “‘although the libelous publication is directed against a particular class of persons or a group, yet any one of that class or group may maintain an action, upon showing that the words apply especially to him’’”); *see also* Van Ingen v. Mail & Express Pub. Co., 50 N.E. 979, 981 (N.Y. 1898) (stating the plaintiff who was not named in libel “may give evidence of all the surrounding circumstances and other extraneous facts which will explain and point out the person to whom the allusion applies”).

68 Neiman-Marcus v. Lait, 13 F.R.D. 311, 316 (S.D.N.Y. 1952) (dicta); *see* Price v. Viking Press, Inc. 625 F. Supp. 641, 646 (D. Minn 1985) (noting that member of defamed large group may have cause of action if “the context of publication raises a reasonable presumption of personal allusion”); Kilpatrick v. Edge, 88 A. 839, 840 (N.J. 1913) (permitting suit based on apparent defamation of class “if the descriptions in such matter are capable of being, by innuendo, shown to be directly applicable to any one individual of that class”); L & D of Oregon, Inc. v. American States Ins. Co., 14 P.3d 617, 621 n.3 (Or.App.,2000) (recognizing that defamatory statement about group can be actionable by group member when “‘the words are reasonably understood by the hearers or readers to be directed individually at him,’’” (quoting PROSSER, supra note 7, at 784)); *RESTATEMENT*, *supra* note 6, at § 564A cmt. d (stating that for some defamation of a large group or class, “there may be circumstances that are known to the readers or hearers and which give the words such a personal application to the individual that he may be defamed as effectively as if he alone were named”).

69 17 F.3d 980, 982 (7th Cir. 1994).

70 Id. at 983; *see* Lorillard Tobacco Co. v. American Legacy Foundation, 903 A.2d 728, 739-40 (Del. 2006) (finding that series of advertisements critical of practices of tobacco companies referred to plaintiff company in light of appearance of company’s name in an ad) (dismissed on other grounds); Metcalf v. KFOR-TV, Inc., 828 F.Sup. 1515, 1524 (W.D.Okla.1992) (determining that statements about breast augmentation surgeons in television news series, “taken as a whole, when considered in the context of the entire publication,” referred to plaintiff) (dismissed on other grounds).

71 416 F.3d 915 (8th Cir. 2005) (per curiam); *see also* Pratt v. Nelson, 2007 WL 1452648, *11-12 (Utah May 18, 2007) (holding that reference to, *inter alia*, the “organization,” and “leaders of the Kingston Organizational,” could be regarded as identifying plaintiffs where defendants at press conference provided complaint naming plaintiffs).
publicly announced that over one hundred unnamed employees had filed fraudulent
disability claims for hearing loss. Since the executive also distributed a complaint
containing the names and addresses of those employees, the court ruled that the executive
had effectively referred to each of them individually. In other situations, identification
of the plaintiff may be less immediately apparent but sufficiently confirmed by extrinsic
information to sustain the suit. Modest investigation may demonstrate, for example,
that a facially sweeping reference to a broad class of individuals is actually confined to a
small group of identifiable persons. Of course, the absence of adequate extrinsic
evidence tying a collective reference to the plaintiff can serve to defeat a suit. In
particular, although a photograph accompanying an article can convey the impression that
the article’s group characterization has particular reference to the member pictured,
courts often greet this theory with skepticism. Still, where the question of pointed
application to the plaintiff is ambiguous, courts have exhibited reluctance to usurp the
jury’s role in determining how a statement can be reasonably understood.

C. Alternative Analyses of the Group Defamation Problem

Both courts and commentators have questioned the prevailing framework for
dealing with group defamation. Proposed alternatives have largely focused on means to

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72 Id. at 917-18; Perhaps comparably obvious is the illustration offered by the Restatement: uttering “All
lawyers are shysters” in the presence of a lone attorney where the previous conversation or other context
indicates that the speaker is referring specifically to that attorney. RESTATEMENT, supra note 6, at § 564A cmt. d.
not anticipate that certain employee “would have access to extrinsic facts from which she could identify”
plaintiff as subject of defamatory communication).
74 See, e.g., Grove v Morgan, 576 P.2d 1155, 1157 (Okla. 1978) (article’s referring to named official and
“all of the other people indicted by the federal grand jury recently” when only two others were indicted);
Marr v. Putnam, 246 P.2d 509, 519 (Ore. 1952) (article’s alleging unsavory activity by radio repairmen
operating in particular manner where only plaintiffs were only two repairmen conducting business this way).
75 See, e.g., Clark v. Maurer, 824 F.2d 565, 566 (7th Cir.1987) (holding that press release announcing that
24 garbagemen were fired for bribing city timekeeper where press release did not name dismissed
employees); Dennison v. Murray State University, 465 F.Supp.2d 733, 751 (W.D. Ky. 2006); Fornshill v.
General Motors Corp., 64 F. Supp. 506, 508 (S.D.N.Y. 1945) (noting plaintiff’s failure to plead “extrinsic
facts and circumstances” in finding that reference to nationwide “army of racketeers” did not specifically
apply to plaintiff); Newspapers, Inc. v. Matthews, 339 S.W.2d 890, 893-94 (Tex. 1960).
inclusion of plaintiff taxi operator’s photograph in article criticizing city’s taxi drivers); Jackson v.
Consumer Publications, Inc., 11 N.Y.S.2d 462, 464 (App. Div. 1939) (stating that “one may be libeled by
having his picture printed...as effectively as one may be libeled by words directly referring to him by
(sustaining suit by one of two guards who had guarded Al Capone on train where televised drama portrayed
single guard who accepted bribe during transport).
Cir. 2004); Brewer v. Hearst Publishing Co., 185 F.2d 846, 848 (7th Cir. 1950); Robinson v. Guy Gannett
78 See, e.g., Church of Scientology of California v. Flynn, 744 F.2d 694, 697 (9th Cir. 1984); Kilpatrick v Edge,
undertake individualized but principled assessments of whether a defamatory group reference can realistically be viewed as accusing particular individuals. One notable commentary, however, argues for reliance on specific numerical criteria.

In the courts, the principal challenge to an overriding emphasis on the size of the relevant group has emanated from the “intensity of suspicion” test. Although first suggested in a 1934 law review note, this standard gained visibility from its later adoption by the Oklahoma Supreme Court in *Fawcett Publications, Inc. v. Morris.* The case grew out a magazine article that appeared to accuse the University of Oklahoma football team of taking amphetamines. The article did not specifically name the plaintiff or any other member of the team. Instead, after a discussion of the widespread use of amphetamines among athletes, the article reported that during the 1956 season “several physicians observed Oklahoma players being sprayed in the nostrils with an atomizer.” After the plaintiff proved that the substance sprayed was “spirits of peppermint,” a harmless substance used for the relief of dry mouth, the trial court issued a directed verdict for the plaintiff. In upholding the verdict, the Oklahoma Supreme Court discounted the significance of the number of players—sixty to seventy—on the team. The court asserted its unwillingness to accept that “size alone should be conclusive.” Rather, it quoted approvingly the 1934 note’s assertion that since “even a general derogatory reference to a group does affect the reputation of every member,” courts should adopt as their test “the intensity of suspicion cast upon the plaintiff.” The court has continued to adhere to the intensity of suspicion approach, emphasizing that factors besides numerical size, such as the plaintiff’s prominence in the group, must be considered.

Beyond Oklahoma, judicial support for the intensity of suspicion test has come principally from New York courts. In *Brady v. Ottaway Newspapers, Inc.*, the court rejected an “absolute limit on size” as “unduly restrictive” and “arbitrary.” Endorsing *Fawcett*’s approach, the *Brady* court recited factors besides size that should be considered: the “definiteness in number and composition of the group,” the degree of the group’s organization, the group’s prominence, and the plaintiff’s prominence within the group. Underscoring the flexibility of the intensity of suspicion standard, the court emphasized that the enumerated factors were not exhaustive in light of the various types of groups that exist.

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79 See Note, *Defamation of a Group,* supra note 34, at 1324-25.
80 377 P.2d 42 (Okla. 1962).
81 *Id.* at 47. The article has earlier “nasal spray” as a means of administering amphetamines. *Id.*
82 *Id.*
83 *Id.* at 51.
84 *Id.* at 52 (quoting Note, *Defamation of a Group,* supra note 34, at 1324-25).
85 See McCullough v. Cities Service Co., 676 P. 2d 833, 837 (Okla. 1984); see also Gaylord Entertainment Co. v. Thompson, 958 P.2d 128, 147 (Okla. 1998) (describing the intensity of suspicion cast upon plaintiff as “the true test in determining a plaintiff’s right to maintain a personal action for group libel!”).
87 *Id.* at 792-93.
88 *Id.* at 793.
89 *Id.*; see Excellus Health Plan, Inc. v. Tran, 287 F.Supp.2d 167, 175 (W.D.N.Y. 2003) (recognizing *Brady*’s “intensity of suspicion” test as standard applicable in New York).
Fawcett as a potential “landmark” in American libel law and another praised the “more sophisticated approach” embodied by the intensity of suspicion test. Oklahoma and New York have remained lonely enclaves of official embrace of the test. Elsewhere, group size has generally served as the dominant element, not one of several factors, in determining whether to authorize claims by individual members.

Nevertheless, other multi-factor approaches have been advanced as alternatives to what has been characterized as “slavish reliance upon the general rule which relies upon numbers alone.” Under one proposal, a member of a defamed group who could satisfy the general requirements of defamation law could pursue a claim irrespective of the size of the group. In determining whether to permit a suit to proceed, a court would weigh a number of considerations: viz., the defamatory statement’s capacity to inflict harm, the degree to which the statement distinctly implicates particular group members rather than representing a generalization about the group, the size and fluidity of the group's membership as well as how easily individual members can be identified, and the adequacy of evidence of injury to the plaintiff’s reputation. Another, more elaborate analysis prescribes the role of a range of factors: the nature of the defamation, the credibility of the defamer, the group’s structure and the plaintiff’s position within the group, the popularity of the group, and the extent to which the defamatory statement implicates a public issue.

By contrast, one scholar rejects multi-factor approaches altogether in favor of a rule that would categorically bar all claims based on defamation of a group whose membership exceeds twenty-five persons. Under this model, a member of a group falling below this limit would also have to satisfy other conditions. The plaintiff would

91 See Bromme, supra note 12, at 597; see also SMOLLA, supra note 32, at § 4:69, at 4-112.0.17 & n.1 (citing Oklahoma and New York cases in support of reference to “growing judicial sensitivity to the notion that the size of the group should not be the sole determinative factor in assessing liability to individuals”); Lewis, supra note 62, at 536 (arguing that size of group and other considerations should be subordinated to “the ultimate proposition— the intensity of the suspicion cast upon the plaintiff”).
92 See King, supra note 34, at 367 (observing that intensity of suspicion test “has not had much impact nationally”).
93 See King, supra note 34, at 358 & n.77.
95 See Marcus, supra note 42, at 1550.
96 Id. at 1552.
97 See Bromme, supra note 12, at 608-12. In particular, the author states that the more heinous an accusation, the more willing a court should be to permit the suit to go forward. Id. at 609.
98 See id. at 612-13 (assuming that credible defamer’s statements are more likely to be believed and to draw public’s attention to individual plaintiff in defamed group).
99 See id. at 614-16 (arguing that arguing that clear membership requirements for well-organized groups and plaintiff’s deriving notoriety from membership militate in favor of allowing claim to proceed).
100 See id. at 616-17 (asserting that group’s clear popularity with relevant audience tends to make audience skeptical of defamation and therefore undermines plaintiff’s cause of action).
101 See id. at 617-19. While conceding that the interest in free discussion of public issues has no direct bearing on whether the plaintiff has been defamed, id. at 608, the author reasons that the presence of a public issue should make a court more hesitant to recognize a cause of action, id. at 619.
102 King, supra note 34, at 381. The author clarifies that his model would be confined to the problem of “pure group defamation,” thereby excluding instances in which a group member can demonstrate that the group reference was effectively targeted specifically at that member. Id. at 356. The latter circumstance is discussed at text accompanying notes 67-78.
be required to show either that the defamatory statement referred to everyone in the group, or that three criteria were met: the statement applied to over half of the group’s members, the statement was literally false with respect to all members encompassed by the statement, and the defendant was at least negligent in stating the falsity. According to the rule’s proponent, such a fixed numeric limit has the “virtue of simplicity” that stands in contrast to the “unacceptable level of uncertainty” inherent in multi-factor standards.

The differences among the various tests that have been adopted or proposed for resolving group defamation claims should not be exaggerated. Even approaches that reject numeric caps often acknowledge the pervasive significance of size in assessing such claims. By the same token, courts that do not formally embrace Fawcett’s intensity of suspicion test commonly recognize that the determination of this issue rests fundamentally on the “magnitude of the suspicion cast on each person in the group.” As a practical matter, then, application of any of these standards will commonly produce the same outcome. Nevertheless, Fawcett itself demonstrates the potential for occasional liability in a suit whose theory would have been thwarted by a numeric limitation. Moreover, even where defendants would ultimately prevail under either type of standard, the threshold burden imposed on plaintiffs to show a plausible link between group reference and individual taint is appreciably lower where size has been discounted as a factor. Accordingly, the flexibility offered by multi-factor approaches is accompanied by greater resistance to defendants’ summary judgment motions, and therefore the costs associated with permitting more claims to proceed.

II. THE MEANING AND RELEVANCE OF THE CERTAINTY PRINCIPLE

103 Id. at 386.
104 Id. at 384.
105 Id. at 382. Among the costs of uncertainty that he identifies are the probability of increased claims, additional litigation expenses, absence of notice to potential defendants, insufficient guidance to courts, and resulting self-censorship. See id. at 382-84.
106 See, e.g., SMOLLA, supra note 32, at § 4:69, at 4-112.0.17 (acknowledging, notwithstanding indication of support for intensity of suspicion test, that group size “is certainly an enormously important factor and at times a conclusive one”); Brady v. Ottaway Newspapers, Inc., 445 N.Y.S.2d 786, 793 (App. Div. 1981) (adopting intensity of suspicion test but recognizing that “the probability of recovery diminishes with increasing size”); Marcus, supra note 42, at1552 (1983) (including size and fluidity of group’s membership as consideration under proposed multi-factor approach).
107 See, e.g., Arcand v. Evening Call Publishing Co., 567 F.2d 1163, 1164 (1st Cir.1977) (stating that recovery arising from defamation of part of group can occur “only if a high degree of suspicion is indicated by the particular statement”) (quoting RESTATEMENT, supra note 6, at § 564A cmt. c)); Action Auto Glass v. Auto Glass Specialists, 2001 WL 1699205 *8 (W.D.Mich.) (quoting W. PAGE KEETON ET AL., THE LAW OF TORTS, 784 § 111 (5th ed.1984) (footnotes omitted)).
108 An illustration of this commonality of result can be found in Anyanwu v Columbia Broadcasting System, 887 F. Supp. 690 (S.D.N.Y. 1995). The plaintiff brought suit as a member of a class of over five hundred Nigerians who were engaged in international business with United States citizens and allegedly defamed by the defendant’s broadcast. The court ruled that that “[b]ased on size alone” the group was too large to support the plaintiff’s action. Id. at 693. Additionally taking note of New York courts’ use of the intensity of suspicion test, the court determined that the broadcast aroused an insufficient degree of individualized suspicion. Thus, the court found that “[a]pplying either test, the claim must be dismissed.” Id.
109 See supra notes 80-84 and accompanying text.
110 See King, supra note 34, at 371 (noting increased attorney’s fees generated by prolonged litigation).
Neither a rigid numerical formula nor an unpredictable ad hoc multi-factor approach improves upon the balance between fairness and predictability struck by the *Restatement* model. If not treated as an absolute bar, the model’s 25-member benchmark serves as a valuable device for distinguishing presumptively invalid from potentially viable group libel claims. The model would better serve its purpose, however, if it were consciously informed by the certainty principle that pervades much of defamation doctrine. This section describes the constitutional regime under which defamation doctrine operates, the prominent role that the certainty principle plays within that framework, and the value of that principle to an understanding of the group libel rule.

**A. Defamation’s Constitutional Framework**

Defamation doctrine comprises a welter\(^{111}\) of constitutional directives and the common law rules that survived them. Prior to *New York Times Co. v. Sullivan*,\(^ {112}\) the Supreme Court had relegated defamation to the realm of “low-level”\(^ {113}\) speech undeserving of First Amendment recognition.\(^ {114}\) Libel defendants thus found themselves exposed to the prevailing standard of strict liability for defamatory statements, generally excused only by proof that the statement was true or privileged.\(^ {115}\) *New York Times* resoundingly ended defamation’s status as a pariah to the First Amendment.\(^ {116}\) Under the decision’s “actual malice” requirement, a public official could recover damages for a defamatory falsehood unless upon a showing that the defendant either knew that the...
statement was false or acted with reckless disregard of whether it was false.\textsuperscript{117} Making this barrier to recovery even more daunting was the holding’s requirement that the official establish actual malice with “convincing clarity” rather than by a mere preponderance of the evidence.\textsuperscript{118}

The decision also embarked the Court on the construction of an elaborate structure of constitutional defamation law. In the period immediately following the case, the Court’s rulings by and large augmented the protective thrust of \textit{New York Times}. The Court, for example, deflected attempts to broaden the meaning of actual malice beyond knowledge of falsity or conscious indifference to the truth of the publication. Thus, neither proof that the defendant acted out of hostility toward the plaintiff\textsuperscript{119} nor persuasive evidence that a reasonably prudent person would have refrained from publishing the defamatory statement without additional investigation\textsuperscript{120} would suffice to meet the actual malice requirement. Moreover, the requirement that the statement be “of and concerning” the plaintiff--conferred constitutional stature in \textit{New York Times}\textsuperscript{121}--was reaffirmed and enforced to bar liability based on equivocal references.\textsuperscript{122} The Court also extended the cloak of First Amendment protection to harsh accusations that, viewed in context, were better understood as rhetorical hyperbole than literal charges of heinous misconduct.\textsuperscript{123} Finally, in a dramatic extension of the reach of \textit{New York Times}'s specific holding, the Court imposed the burden of proving actual malice on public figures as well as public officials.\textsuperscript{124}

With its ruling in \textit{Gertz v. Robert Welch, Inc.},\textsuperscript{125} however, the Court began to assign greater weight to the state’s interest in protecting individual reputation.\textsuperscript{126} Overturning an earlier decision,\textsuperscript{127} the \textit{Gertz} Court held that plaintiffs designated as private figures need not demonstrate actual malice to recover damages.\textsuperscript{128} Instead, a private figure could establish liability by showing that the defendant had acted with negligence in publishing or broadcasting the defamatory falsehood; proof of actual malice would be required only when the plaintiff sought presumed or punitive damages.\textsuperscript{129} The scope of protection for defendants sued by private figures was further narrowed in \textit{Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.},\textsuperscript{130} where the Court announced that presumed or punitive damages for defamatory speech not involving a

\begin{verbatim}
\textsuperscript{117} Id. at 279-80.
\textsuperscript{118} Id. at 285-86.
\textsuperscript{119} Garrison v. Louisiana, 379 U.S. 64, 72-73 (1964).
\textsuperscript{120} St. Amant v. Thompson, 390 U.S. 727, 731-32 (1968).
\textsuperscript{121} 376 U.S. at ___ [R-10A] .
\textsuperscript{125} 418 U.S. 323, 341 (1974).
\textsuperscript{126} See id. at 341 (stating that Court “would not lightly require the State to abandon” libel law’s purpose of providing compensation for harm inflicted by defamatory falsehoods).
\textsuperscript{127} Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43-44 (1971) (Brennan, J., plurality opinion) (applying actual malice standard to all expression “involving matters of public or general concern”).
\textsuperscript{128} \textit{Gertz}, 418 U.S. at 347.
\textsuperscript{129} Id. at 349.
\textsuperscript{130} 472 U.S. 749 (1985).
\end{verbatim}
matter of public concern would not hinge on a showing of actual malice.\textsuperscript{131} Even where the plaintiff’s status triggered the actual malice requirement, media defendants found that shield compromised by the Court’s authorization of vigorous inquiry into their editorial processes.\textsuperscript{132}

Developments in constitutional defamation doctrine since \textit{Gertz} have not entirely favored plaintiffs. The Court ruled that a defendant is entitled to summary judgment when a public figure’s opposing affidavit fails to support a reasonable inference of actual malice by clear and convincing evidence.\textsuperscript{133} private figures who seek damages against media defendants for speech of public concern bear the burden of demonstrating falsity,\textsuperscript{134} and determinations of actual malice at trial receive independent appellate review.\textsuperscript{135} Moreover, two other holdings, while reviving the plaintiff’s suit in each case, did not tilt defamation litigation against defendants generally. In \textit{Milkovich v. Lorain Journal Co.},\textsuperscript{136} the Court explicitly rejected a separate constitutional privilege for statements of opinion,\textsuperscript{137} but reaffirmed existing doctrine protecting statements that did not “contain a provably false factual connotation” or could not be “reasonably interpreted as stating actual facts.”\textsuperscript{138} Similarly, in \textit{Masson v. New Yorker Magazine, Inc.},\textsuperscript{139} the Court overturned the lower court’s decision excusing a series of altered quotations of remarks made by the plaintiff,\textsuperscript{140} while holding that deliberate alteration of a plaintiff’s language does not amount to knowledge of falsity “unless the alteration results in a material change in the meaning conveyed by the statement.”\textsuperscript{141}

\textbf{B. The Certainty Principle in Defamation Doctrine}

While the Court’s First Amendment rulings have not wholly superseded state libel law,\textsuperscript{142} the project of constitutionalization launched by \textit{New York Times} has sparked the


\textsuperscript{132} \textit{See} Herbert v. Lando, 441 U.S. 153, 175 (1979) (holding that the First Amendment does not create an evidentiary privilege for editorial processes).


\textsuperscript{135} Bose Corp. v. Consumers Union, 466 U.S. 485, 514 (1984); \textit{see also} Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988) (prohibiting public figure's recovery of damages for intentional infliction of emotional distress without showing of actual malice).

\textsuperscript{136} 497 U.S. 1 (1990).

\textsuperscript{137} \textit{Id.} at 21. Previously, lower courts had widely distinguished between actionable statements of fact and immune statements of opinion. \textit{E.g.}, Price v. Viking Penguin, Inc., 881 F.2d 1426, 1431 (8th Cir. 1989); Redco Corp. v. CBS, Inc., 758 F.2d 970, 972 (3d Cir. 1985); Ollman v. Evans, 750 F.2d 970, 974-75 (D.C. Cir. 1984).

\textsuperscript{138} \textit{Id.} at 20 (citation omitted). \textit{Milkovich} is discussed further at text accompanying notes 162-66 \textit{infra}.


\textsuperscript{141} 501 U.S. at 517.

\textsuperscript{142} For example, the Court has not disturbed the requirement of publication as a basic element of a defamation cause of action. Publication in this context means the defendant’s communicating the allegedly
dominant problems of modern defamation law. Legions of suits, for example, have revolved around the question of the plaintiff’s status as a public or private figure,\(^\text{143}\); likewise, defamation litigants routinely wrangle over whether the defendant’s allegedly defamatory statement should be interpreted as conveying a provably false factual assertion.\(^\text{144}\) In addition, however, a more pervasive theme transcends the issues generated by these distinct disputes. To a major extent, defamation doctrine has come to be governed by the certainty principle.\(^\text{145}\) In a broad sense, the certainty principle represents the degree of confidence in a belief that is required before that belief may serve as a basis for liability. More specifically, liability under the certainty principle requires that each actor whose perception is implicated in resolving a claim display reliable assurance of the knowledge ascribed to that actor. Of course, the burden of proof that must be met to prevail in any action--preponderance of the evidence, proof beyond a reasonable doubt--involves the certainty principle. Defamation suits are unusual, however, in the range of perspectives examined for the purpose of assessing whether the requisite certainty exists. As defamation jurisprudence has evolved, the epistemological states of the defendant, the plaintiff, the judge, the jury, and even hypothetical observers have all become crucial elements.

At a general level, the very notion of affording any constitutional shelter to defamatory expression emanates from the certainty principle. After all, as the Court famously pronounced in \textit{Gertz}, “there is no constitutional value in false statements of fact.”\(^\text{146}\) Nevertheless, the \textit{Gertz} Court acknowledged that the First Amendment grants “strategic protection” to defamatory falsehood in order to “assure to the freedoms of speech and press that ‘breathing space’ essential to their fruitful exercise.”\(^\text{147}\) Earlier, the Court had voiced a similar rationale in \textit{New York Times} to justify the practical immunity that some false speech would enjoy under the actual malice rule. Absent such a rule, critics of official conduct might refrain from expressing their criticism “because of doubt whether it can be proved in court or fear of the expense of having to do so,” and would therefore “tend to make only statements which ‘steer far wider of the unlawful zone.’”\(^\text{148}\) In the realm of defamation, then, the Court has recognized that speech cannot be


\(^{144}\) See id. at 19, A19 tbl. 16.

\(^{145}\) The idea of a certainty principle coloring much of defamation doctrine should be distinguished from the theory that “certainty principles” shape the credibility of witnesses’ testimony at trial. See Nancy Pennington & Reid Hastie, \textit{A Cognitive Theory of Juror Decision Making: The Story Model}, 13 \textit{CARDOZO L. REV.} 519, 527-28 (1991) (describing principles of “coverage,” the extent to which witness’s story accounts for evidence presented to jury; “coherence,” based on story’s internal consistency and congruence with jurors’ knowledge of world; and “uniqueness,” the absence of alternative coherent explanations for the evidence.

\(^{146}\) \textit{Gertz}, 418 U.S. at 339-40.


\(^{148}\) \textit{New York Times}, 376 U.S. at 279 (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)); See also \textit{LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW} 863-64 (2d ed. 1988) (noting that “a great danger of self-censorship arises from the fear of guessing wrong-the fear that the trier of fact, proceeding by formal processes of proof and refutation, will after the event, reject the individual's judgment of truth”).
conditioned on infallible certainty in the accuracy of one’s belief without doing unacceptable damage to the system of expression contemplated by the First Amendment.

More specifically, the classification scheme that the Court has developed to fix a defamation defendant’s degree of exposure to liability is rooted in considerations of diligence and belief. While every cause of action includes a certain level of intent, defamation law contains a variable intent standard that powerfully shapes the plaintiff’s prospects for recovery. In holding that private figures are not obligated to show actual malice, Gertz assigned enormous stakes to the determination of a plaintiff’s status. A stark gap lies between the frequently satisfied standard of negligence and the virtually insuperable obstacle of the actual malice requirement. Although the Court formally recognized three categories of public figures, litigation on this question has overwhelmingly centered on whether the plaintiff qualifies as a voluntary limited public figure. To receive this designation, plaintiffs must have injected themselves into a public controversy “in order to influence the resolution of the issues involved.”

Thus, this single component of defamation law implicates the certainty principle at a number of levels. Under the actual malice standard, even a defendant’s weak or casual belief in the truth of a minimally plausible statement does not establish liability; only a high degree of certainty in the statement’s falsity or thoroughgoing lack of confidence in its truth will suffice. Conversely, under the negligence standard, the defendant’s failure to exercise enough care to support reasonable certainty about the statement’s truth will expose the defendant to damages. Moreover, the pivotal function of summary judgment determinations in this area invites judges to gauge their own confidence in a series of propositions. Before permitting the suit to proceed, the judge must be satisfied that the plaintiff did not deliberately seek to affect the outcome of the controversy on which the defamatory statement bore; or if the plaintiff did so, that the

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149 See Ty Camp, Dazed and Confused: The State of Defamation Law in Texas, 57 Baylor L. Rev. 303, 310 (2005); Danno Farrington, Evidence? We Don’t Need No Evidence! Proof of Negligence in Private Defamation Suits, Comm. & Law, June 1997, at 9, 10, 22, 42-44. Not only does characterization as a private figure place the plaintiff in a far superior position with respect to threshold liability, but also Gertz’s expansive notion of damages enhances the likelihood of a generous award. See Gertz, 418 U.S. at 350 (including in description of harms inflicted by defamatory falsehoods “impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering”); David A. Anderson, Libel and Press Self-Censorship, 53 Tex. L. Rev. 422, 472 (1975) (asserting that “the jury surely will infer the existence, nature, and extent of [emotional] injuries from the nature of the defamatory statement”).


151 Gertz, 418 U.S. at 344-45 (recognizing all-purpose public figures, limited public figures, and involuntary public figures).

152 See Tracy A. Bateman, Annotation, Who is “Public Figure” for Purposes of Defamation Action, 19 A.L.R.5th 1, §2(b) (1994); Erik Walker, Comment, Defamation Law: Public Figures – Who Are They?, 45 Baylor L. Rev. 955, 960, 960 nn.51, 56, 968-69, 968 n. 74, 972 (1993).

153 Gertz, 418 U.S. at 345.


plaintiff has failed to assert facts from which a reasonable inference of actual malice could be drawn with clear and convincing clarity, and that substantial evidence has been offered that the statement was indeed false. If the plaintiff’s claim survives this gauntlet, the jury will take its turn at probing the defendant’s mindset to examine whether the knowledge possessed by the defendant, and the efforts made to obtain it, could sustain the level of confidence in the truth of the defamatory statement needed to avoid liability. Should the jury’s verdict rest on the presence of actual malice, a fresh assessment of the basis for this finding awaits in light of de novo appellate review to determine whether the record in fact establishes actual malice with convincing clarity.

At every stage, then, an examination of the strength and foundation of the defendant’s belief, conducted by a decisionmaker sensitive to the quality of its own perceptions, determines the course of the suit. While these considerations are not absent from other litigation, defamation suits call for a heightened self-consciousness about the capacity for knowledge and its limits in the evaluated and evaluator alike.

Another central feature of defamation doctrine that can be usefully conceived in terms of the certainty principle is the determination of meaning. The interpretation of what is actually conveyed by an allegedly defamatory statement can fix the fate of the plaintiff’s claim even more decisively than the gulf between the actual malice and negligence standards. While plaintiffs can occasionally overcome even the imposing barrier of the actual malice requirement, the conclusion that a statement does not assert a provably false fact effectively terminates a suit. Nor should the Milkovich Court’s rejection of a “wholesale defamation exemption for anything that might be labeled ‘opinion’” obscure the importance of this determination. Although courts may apply Milkovich in somewhat different manners, the Court’s holding did not fundamentally upset existing principles governing the analysis of expression for actionable content.


156 See supra note 133 and accompanying text.
157 See supra notes 122 and 135-37, and accompanying text.
158 See supra notes 122 and 135-37, and accompanying text.
159 See supra note 133 and accompanying text.
160 E.g., Harte Hanks Commc’ns v. Connaughton, 491 U.S. 657, 693(1989); Cantrell v. Forest City Publ’g Co., 419 U.S. 245, 252-53 (1974); Babb v. Minder, 806 F.2d 749, 756 (7th Cir. 1986).
161 See supra notes 122 and 135-37, and accompanying text.
162 Milkovich, 497 U.S. at 18. The Court was largely concerned that categorical immunity for statements classified as opinion could enable speakers whose expression of “opinion” strongly implied a defamatory fact to evade liability. See id. at 18-19.
164 See Joliff v. NLRB., No. 06-2434, 2008 WL 169556, at *10 (6th Cir. January 22, 2008); Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724, 727 (1st Cir.) (stating that “Milkovich did not depart from the multi-factored analysis that had been employed for some time by lower courts seeking to distinguish between actionable fact and nonactionable opinion”), cert. denied, 504 U.S. 974 (1992); NBC Subsidiary (KCNC-TV), Inc v. Living Will Center, 879 P.2d 6, 10 (Colo. 1994) (finding strong support for conclusion that “the factors identified in [the court’s contextual test predating Milkovich] remain applicable under Milkovich”), cert. denied 514 U.S. 1015 (1995); Yates v. Iowa West Racing Ass’n, 721
Indeed, numerous state courts that consider the protection afforded by *Milkovich* inadequate have construed their own constitutions to confer a privilege for statements of opinion. Thus, however the question is cast and the test articulated, the outcome of much defamation hinges on resolution of whether the statement at issue is deemed essentially factual.

Ultimately, this characterization of litigated expression rests on a delicate, layered examination of the beliefs and perceptions of a number of actors. First, intrinsic in a finding that a disputed statement projects a false factual assertion is the premise that the statement induced a demonstrably wrong belief about the plaintiff in third parties. For the statement to exert this impact, the relevant audience must believe that the defendant had knowledge of the putative factual proposition and believed it to be true. In the absence of an objectively precise way to measure whether this dynamic occurred, a process has evolved to determine whether it can be said with sufficient assurance that the statement had the prohibited effect. Both before and since *Milkovich*, courts have been charged with initially determining as a matter of law whether a factfinder could plausibly construe a statement as implying a defamatory fact about the plaintiff.

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N.W.2d 762, 771 (Iowa 2006); SACK, supra note 34, at § 4.2.4.2, 4-17 (concluding that “most courts considering opinion since *Milkovich* have reached the results they likely would have reached before”); Nat Stern, *Defamation, Epistemology, and the Erosion (but Not Destruction) of the Opinion Privilege*, 57 TENN. L. REV. 595, 613-16 (1990) (arguing that *Milkovich* did not substantially alter existing approaches by lower courts).


consistently, courts have undertaken this inquiry by seeking to discern the statement’s impression on the hypothetical average reasonable reader or listener. Should the court find the statement susceptible to reasonable interpretation as bearing a factual defamatory meaning, the matter is then submitted to the jury for its verdict on the bundle of belief, knowledge, and perception conveyed by the statement in the context of all the evidence. Nor does this elaborate process of weighing competing understandings of these matters end if the jury finds that the statement contains the false factual content contended for by the plaintiff. The Milkovich Court affirmed that “in cases raising First Amendment issues ... an appellate court has an obligation to “make an independent examination of the whole record” in order to make sure that “the judgment does not constitute a forbidden intrusion on the field of free expression.” Thus, de novo review may result in overturning the jury’s interpretation if the appellate court concludes that the jury has unreasonably ascribed a false factual character to the defendant’s expression.

C. The Group Libel Rule as a Function of the Certainty Principle

While no intrinsic sanctity attaches to the precise figure of twenty-five members, the predominant approach to the group libel problem tacitly incorporates the epistemic underpinnings of defamation doctrine. As a corollary of the “of and concerning”
requirement, the group libel rule shares the focus placed by Milkovich and other Court decisions on attributing the proper meaning to a disputed statement. In particular, the 25-member ceiling on presumptive references to specific individuals reflects intuitive premises about the capacity for knowledge and propensity to belief. It is simplistic and even conclusory to say that generalizations about a large group will not be taken as referring to particular members merely because of the group’s size. Rather, the persuasiveness of the group libel rule, and understanding of appropriate occasions for departing from its presumption, rest in significant part on appreciation of the rule’s manifestation of the certainty principle. First, at its most basic level, the group libel problem itself is often framed by courts in terms of the need for certainty in identifying the object of the defamation. Rejecting the plaintiff’s apparent theory that he was distinctly affected by an attack on the group to which he belonged, the court in Brewer v Hearst Publishing Co. explained that this theory could not be applied unless “the publication can be said with certainty to include every individual within the group.” Similarly, one of an organization’s at least 162 officials to whom Communist sympathies were collectively imputed was told in Noral v. Hearst Publications that this type of accusation could not be deemed actionable “unless there be a certainty as to the individuals accused.” Other claims stemming from defamatory expression whose sweep did not specifically target the plaintiff have also foundered on the perception that, as one court put it, “it is uncertain of whom the words were spoken.”

Moreover, as with the threshold decision of whether a statement represents a factual assertion, courts must assess whether a jury could legitimately extract a specific reference from the group defamation; “it is for the court, in the first instance, to determine if the alleged libel is reasonably capable of bearing an application to the plaintiffs.” In undertaking this inquiry, a court must carefully evaluate the rationality of belief that a collective reference has distinct application to a particular member.

172 See supra notes 32-36 and accompanying text.
173 See supra notes 136-41 and accompanying text.
174 185 F.2d 846, (7th Cir. 1950).
175 Id. at 849.
177 Id. at 350.
178 Gintert v. Howard Publications, Inc., 565 F. Supp. 829, 833 (N.D. Ind. 1983); see also Shallenberger v. Scripps Pub. Co., 1909 WL 720, at*3 (Ohio Com. Pl.) (dismissing suit based on criticism of unspecified majority of 16 judicial candidates because “it is uncertain as to the individual or individuals so included and so excluded”); Harris v. Santa Fe Townsite Co., 125 S.W. 77, 80 (Tex. Civ. App. 1910) (stating that where words “contain no reflection upon any particular individual,” innuendo “‘cannot make the person certain which was uncertain before’” (citation omitted)); Helmicks v. Stevlingson, 250 N.W. 402, 402 (Wis. 1933) (rejecting indefinite reference to member of category to which plaintiff belonged while noting that defamation action requires “‘certainty as to the person who is defamed’”). Ogren v. Employers Reinsurance Corp., 350 N.W.2d 725, 727-28 (Wis. App. 1984) (finding permissible reference to plaintiffs where article’s words “make certain” that reference to suicide’s “family” included suicide’s parents and siblings). A similar idea of required assurance is conveyed by courts’ insistence, when confronted by group defamation claims, that a person reading the defamatory statement be able to “readily identify” the plaintiff as an object of the defamation, Golden North Airways v. Tanana Pub. Co., 218 F.2d 612, 618 (9th Cir.1954), or that the plaintiff’s identity be “more readily discernible” than that of a general group member, Friends of Falun Gong v. Pacific Cultural Enterprise, Inc., 288 F. Supp.2d 273, 284 (E.D.N.Y. 2003).
Courts have repeatedly emphasized that a claim will fail unless the group defamation can be “reasonably understood” as constructively pointing to the plaintiff. At the same time, consistent with the certainty principle, courts permit the inference that a collective term applies to specific individuals if the inference derives from knowledge possessed by a likely audience for the defamatory expression. Courts have thus taken into account the audience’s familiarity with the plaintiff or with the circumstances surrounding the defamatory statement.

Viewed in light of this series of epistemic contingencies, the Restatement gloss on the group defamation rule sensibly addresses the uncertainties inherent in the group defamation problem itself. Appropriately, its 25-member touchstone is set forth as a presumption rather than a hard ceiling; the comment concedes that “[i]t is not possible to


181 AIDS Counseling & Testing Centers v. Group W Television, Inc., 903 F.2d 1000, 1005 (4th Cir.1990) (construing publication “‘in the sense in which hearers or readers of common and reasonable understanding would ascribe to [it]’” (quoting Goldborough v. Orem & Johnson, 64 A. 36, 40 (Md. App. 1906)); Barger v. Playboy Enterprises, Inc., 564 F.Supp. 1151, 1153 (N.D.Cal.1983), aff’d, 732 F.2d 163 (9th Cir.1984), cert. denied, 469 U.S. 853 (1984) (generally rejecting claims based on defamation of large group on presumption that “no reasonable reader would take the statements as literally applying to each individual member”); id. at 1155 (refusing to credit asserted meaning of group term “not accessible to the uninitiated reader” of defendant’s article); Gonzalez v. Sessom, 137 P.3d 1245, 1248 (Civ. App. Okla. 2006) (analogizing to group defamation analysis); Harvest House Publishers v. Local Church, 190 S.W.3d 204, 214 (Tex. App. 2006) (undertaking objective inquiry of what “hypothetical reasonable reader” would believe); Sellards v Express-News Corp., 702 S.W.2d 677, 679 (Tex. App. 1985) (examining whether statement is libelous to plaintiff “from the point of view [statement] would have on the mind of ordinary reader”).

182 See, e.g., Excellus Health Plan, Inc. v. Tran, 287 F.Supp.2d 167, 175 (W.D.N.Y. 2003) (upholding suit where facts upon which to base conclusion attacking medical practice group referred to individual physicians were “known to those who read the publication”).

183 See, e.g., Louisville Times Co. v. Emrich, 66 S.W.2d 73, 75 (Ky. App. 1933) (finding it “sufficient that those who know plaintiff can make out that he is the person meant,”” (citation omitted)); In re Houbigant, Inc., 182 B.R. 958, 972 (Bkrtcy. S.D.N.Y. 1995): (describing test as whether “the libel designates the plaintiff in such a way as to let those who knew him understand that he was the person meant’”); Marr v. Putnam, 246 P.2d 509, 521 ( Ore. 1952) (permitting recovery if defamatory words “were understood as referring to [plaintiff] by persons who knew him”).

184 See, e.g., Hansen v. Stoll, 636 P.2d 1236, 1241 (Ariz. App. 1981) (upholding defamatory references to alleged conduct of “federal agents” in connection with incident, though information connecting references to plaintiffs was not “possessed by the average reader” of defendant’s statements, because knowledge of plaintiffs’ involvement with incident existed within law enforcement organizations); Marr v. Putnam, 246 P.2d 509, 521 (Ore. 1952) (allowing suit to proceed because “persons with a knowledge of the circumstances” could have understood article as referring to plaintiffs).

185 See supra note 9 and accompanying text.
set definite limits as the size of the group of class” beyond which collective defamation can be understood to have reference to a particular member. Ordinarily though not inevitably, then, a defamatory generalization about a group larger than this size will lack the combination of certainties needed for a member to claim appreciable harm to individual reputation. In this circumstance, a court will typically entertain disqualifying doubt about one or more foundations of an actionable claim: whether the statement specifically attributes the adverse trait to each individual nominally encompassed by the generalization; whether the speaker could be thought to have enough nonpublic information about the group’s members to make the characterization credible; whether, even if some credence attached, the impact on any individual member would be so diluted by the size of the class affected as to be considered de minimis; and whether the average reader or listener would have sufficient assurance on all these matters as to reasonably conclude that the complaining member had been perceptibly struck by the statement. Conversely, each of these factors becomes more compelling as the size of the defamed group falls to a range in which speaker and audience alike can realistically have knowledge of individual members who suffer distinctive impact from the statement. Of course, the group libel problem appears in settings other than categorical attacks on the entire membership of a large or small group. As will be discussed, however, these too can be usefully analyzed through the lens of the certainty principle.

By creating a presumptive safe harbor for references to groups with more than 25 members, the Restatement standard largely avoids the costs associated with multi-factor approaches such as the intensity of suspicion test. Prominent among these costs is the inhibiting effect on speech of unpredictably applied ad hoc balancing tests; avoidance of this deterrent impact accounts in substantial part for the development of categorical rules in First Amendment jurisprudence. Admittedly, the challenge of overcoming the presumption against liability for references to groups above the 25-member threshold could discourage some plaintiffs from proceeding with potentially persuasive claims. However, the greater gain in encouraging protected expression is comparable to the “strategic” protection afforded some defamatory falsehoods by the generally insurmountable actual malice requirement. In both instances, the importance of giving speakers a substantial measure of certainty that their speech will be protected is deemed to outweigh the need to penalize every unworthy utterance.

Viewed through the lens of the certainty principle, the problematic permissiveness of the intensity of suspicion test is highlighted by the two cases with which it is most prominently associated. As noted earlier, the Fawcett court found that a magazine’s insinuation of amphetamine use by unnamed members of the University of Oklahoma football team cast sufficient suspicion on the plaintiff, a player on the team, to support a

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186 RESTATEMENT, supra note 6, at § 564A cmt. b.
187 See III-C,D,E infra.
188 See supra note 104.
189 See Frederick Schauer, Categories and the First Amendment: A Play in Three Acts, 34 VAND. L. REV. 265, 299-305 (1981). The appeal of stability and predictability has similarly motivated the development of categorical approaches outside the First Amendment. In the realm of equal protection, for example, the Court has rejected individualized balancing schemes in favor of a three-tiered system of scrutiny in which the level to a given classification typically determines the outcome. See City of Cleburne v. Cleburne Living Ctr. 473 U.S. 432, 446 (1985); Stylianos-Ioannis G. Koutnatzis, Affirmative Action in Education: The Trust and Honesty Perspective, 7 TEX. F. ON C.L. & C.R. 187, 203-04 (2007).
verdict in his favor. The court reasoned that the article “unequivocally informed [readers] that the members of the team illegally used amphetamine” and therefore “libels every member of the team, including the plaintiff, although he was not specifically named.” This characterization, however, considerably overstates the degree of knowledge and belief communicated by the article. A typical reader would not “necessarily believe that the regular players, including the plaintiff, were using an amphetamine spray.” Rather, the reader could reasonably infer simply that the article’s author suspected that an unspecified portion of the team had done so. Moreover, the article accurately described the foundation of the suspicion; players were indeed observed “being sprayed in the nostrils with an atomizer.” While the reader might come to share the author’s suspicion about the contents of the atomizer, or even believe that many of the team’s players had used this substance, these reactions would not derive from the author’s representation of personal knowledge of use by specific players. In particular, the article hardly transmits confidence from author to reader that the plaintiff, a fullback on the alternate squad during the season in question, had used amphetamines. This tenuous basis for extrapolating an accusation of the plaintiff would almost certainly have failed under a presumption against finding a specific reference to an individual member of this large a group. The intensity of suspicion test, however, with its open-ended standard and makeshift considerations, leaves a much wider range of commentary vulnerable to ad hoc determinations of liability. The test thus carries an unpredictability that inhibits speech shielded and therefore encouraged by the Restatement’s more intelligible approach.

The Brady court’s opinion similarly illustrates the hazards of the intensity of suspicion test’s indeterminate approach. The action sustained in that case was provoked by an editorial’s comment on corruption in the city’s police department that led to the indictment of eighteen officers seven years earlier. After recounting the episode, the editor stated: “It is inconceivable to us that so much misconduct could have taken place without the guilty knowledge of the unindicted members of the department.” At least 53 officers within the department had not been indicted. Thus, under the Restatement standard as commonly construed, an actionable claim would have required a demonstration that the average reader would understand the editorial to assert as fact the guilt of each member of the department who was untouched by the indictments. However, such a theory would fail that standard, as informed by the certainty principle, in a number of ways. First, on its face, the editor’s belief in the officers’ “guilty knowledge” does not purport to be grounded in additional data in the editor’s private

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190 See supra notes 79-83 and accompanying text.
191 Fawcett, 377 P.2d at 48.
192 Id. at 52 (emphasis added).
193 Id.
194 Id. at 47.
195 Id.
196 The Fawcett court relied heavily on the observation that the plaintiff, though a backup, “played in nine out of eleven all victorious games in one season” and therefore would “not be overlooked by those who were familiar with the team.” Id. at 52. It is difficult to see what guidance this analysis provides to later would-be reporters on the activities of large groups.
197 See supra notes 85-88 and accompanying text.
198 Brady, 445 N.Y.S. 2d at 787.
199 Id. at 794.
possession. Contrary to the court’s perception of an “inference that the newspaper had access to special information,” the editor presents his own inference of culpable awareness from publicly known circumstances. Such open speculation—especially when framed in conditional terms and appearing in the context of an editorial commentary—militates against the likelihood that a reader would ascribe this connivance to identifiable individual officers on the authority of the editor’s knowledge. Considered from the perspective of the certainty principle, it would make more sense to begin with the assumption that the editor did not represent that he possessed firsthand knowledge of the consciousness of each of the 53 unindicted officers. In addition, the court’s theory is further strained by the shift in composition of the force during the interval between the events referred to and the editorial’s reflection on them. This blurring in the public mind of the group in question, combined with the fading impression of the seven-year-old episode and the broad conjectural nature of the disputed statement, should have left the plaintiffs with a substantial burden to show the existence of an unequivocal charge with personal application to them. Instead, under the malleable and subjective intensity of suspicion test, the suit was allowed to proceed.

Though flawed in its indeterminacy, the intensity of suspicion test flows from a valid impulse: viz., that group size alone should not operate as an absolute bar in instances where a collective characterization could reasonably be thought to have particular reference. Accordingly, the Restatement’s strong presumption against individual actions involving groups of over 25 members strikes a more appropriate balance than a rigid numerical limit. It defies both experience and the certainty principle to categorically deny that a speaker’s charge against a group of more than twenty-five persons could ever be based on perceived familiarity with the circumstances of each. In some instances, an organization might maintain records of its members on which a speaker might be perceived to base a defamatory statement. In a more plausible variation of Fawcett, for example, an article might report that the author had access to information showing a professional football team’s rampant use of steroids. While a player on such a team should bear a significant burden of demonstrating harm to individual reputation, a suit should not be wholly precluded by the team’s size. On the contrary, conditioning a group libel claim on an unalterable maximum number of members could encourage cynical smears tailored to evade the rigid constraint.

III. THE OPERATION OF THE CERTAINTY PRINCIPLE IN VARIATIONS ON THE GROUP DEFAMATION PROBLEM

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200 Id. at 795.
201 After the disputed declaration, the editorial continued: “If so, they all were accessories after the fact, if not before and during.” Id. at 787 (emphasis added).
203 See 445 N.Y.S. 2d at 794.
204 See id. at 792 (rejecting rule that hinges actionability on “‘the number of persons who may be libelled’” as “‘unjust and arbitrary’” (quoting Sumner v. Buel, 12 Johns. 475, 482 (1815) (Van Ness, J., dissenting)); see also supra note 34, at 1325 (stating that because of “great variation” in types of groups that may be defamed, “the formulation of definite rules governing liability seems impossible”).
The problem of collective references is not a single issue. Rather, group defamation is a multifaceted phenomenon that presents different considerations in distinct recurring situations. Each of these scenarios, however, in some way displays the operation of the certainty principle.

A. The Easy Case of Massive Classes

A consensus has long existed that charges against a vast class of individuals, however derogatory, do not give rise to individual claims by members of the class. Thus, suits arising from broad attacks on racial or ethnic groups, members of a particular faith, those engaged in a certain profession or business, advocates of a given viewpoint, participants in a hobby or sport, and other groups sharing a distinctive trait but otherwise varied and dispersed have regularly been dismissed virtually out of hand. Indeed, it is in large part because of the notorious futility of bringing such claims that some have urged criminal prohibition of vicious attacks on certain kinds of large groups.

While the immunity of these assaults appears well-settled, the basis on which it rests is less apparent. Much of the justification offered centers around the notion that suits brought in reaction to such sweeping generalizations must falter on the “of and concerning” requirement; for a variety of reasons, it is felt that no member of the attacked

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205 See Developments, supra note 40, at 898 (describing defamation law as “afford[ing] little relief to unorganized groups of individuals who constitute a ‘class’ because of a common characteristic”); see also MacAulay v. Bryan, 339 P.2d 377, 378-79 (Nev. 1959) (stating that public slander of a race, business, profession or nation is not actionable).


212 See Note, supra note 40, at 899; see generally supra note 11.
group can reasonably feel that the defamatory falsehood falls directly on him or her.\textsuperscript{213} While this may typically be true,\textsuperscript{214} it is not inherently so. In some instances, for example, there may be little reason to doubt the sincerity of one who avers a categorically harsh view of a particular race or religious group. Moreover, it is demonstrably untrue that individual members are incapable of experiencing the sting of such pejorative generalizations.\textsuperscript{215}

Rather, a more thorough explanation is that liability for ascribing a repugnant trait to legions of diverse individuals will invariably fail the certainty principle. Whether the defamatory statement applies to millions of religious adherents or thousands of professional practitioners, the foundation of knowledge and certainty concerning the individual circumstances of each member of the derogated group will be manifestly lacking. Thus, it does not matter if the speaker truly believes and intends to communicate the universal deficiency of the targeted group, and is understood by the proverbial average reasonable recipient of the communication as harboring this belief and intent. For the reasonable reader or listener will also understand that the speaker is proceeding from speculation--or in many cases simple animosity--rather than information in the speaker’s peculiar possession. Thus, even if the defendant meant to attribute abhorrent practices to every single licensed hunter within a state,\textsuperscript{216} the blanket charge will not convey the sense that the statement was the product of an investigation of all these persons. Indeed, the law must presume that any reader or listener who accepts such a charge acts on the basis of preexisting disposition, not a supportable belief that the accusation supplies documented data about specific individuals.

\section*{B. Large but Bounded Groups}

\textsuperscript{213} See supra notes 37-41 and accompanying text; see also Golson v. Hearst Corp., 128 F.Supp. 110, 112 (S.D.N.Y. 1954) (stating that “language which would be read seriously if written as to an individual might not be capable of serious application to each member of a large group”); Farrell v. Triangle Publs., 159 A.2d 734, 736 (Pa. 1960) (stating that no cause of action can arise from defamation of “a class or group whose membership is so numerous that no one individual member can reasonably be deemed an intended object of the defamatory matter”); Eric M. Stahl, Note & Comment, Can Generic Products Be Disparaged? The “Of and Concerning” Requirement After Alar and the New Crop of Agricultural Disparagement Statutes, 71 WASH. L. REV. 517 (1996) (arguing that speech generally critical of a generic product cannot meet the “of and concerning” requirement in product disparagement claims).

\textsuperscript{214} See, e.g., Brewer v. Hearst Publishing Co., 185 F.2d 846, 848-49 (7th Cir. 1950) (rejecting attacks on vivisectionists as grounds for vivisectionist’s defamation claim because it could not “be said with certainty to include every individual within the group” of people who participate in and support vivisection).

\textsuperscript{215} In a sense, the Supreme Court’s holding in Brown v. Bd. of Ed., 347 U.S. 483 (1954), is rooted in a theory of the harm inflicted by a pejorative view of a racial group. In striking down state-mandated racial segregation in public schools as violating the Equal Protection Clause, the Court took into account that the state’s forced separation of African-American schoolchildren “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” \textit{Id.} at 494. See, e.g., Brown v. Bd. of Ed., 347 U.S. 483, 494 (1954) (stating that state-mandated racial segregation in public schools “generates a feeling of inferiority as to [African-American schoolchildren’s] status in the community that may affect their hearts and minds in a way unlikely ever to be undone”); see also Paul Brest, Foreword: In Defense of the Antidiscrimination Principle, 90 HARY. L. REV. 1, 9-10 (1976); Kevin Brown, \textit{The Hypothetical Opinion in Grutter v. Bollinger From the Perspective of the Road Not Taken in Brown v. Board of Education}, 36 LOY. U. CHI. L.J. 83, 89-90 (2004).

Defamation of large but less sprawling groups, especially when a precise number can be assigned to their membership, might appear to offer a more appealing case for amenability to individual suits. In practice, however, such claims typically confront the same objections presented by the certainty principle as those that invariably bar actions by members of massive groups. Wisely, then, courts generally invoke the powerful presumption against such claims to dismiss these suits rather than construct an elaborate framework anew each time to determine their viability.

Thus, as the number of the group assailed approaches or exceeds 1000, courts routinely deem the group’s size as too large to sustain individual claims. In *Weatherhead v. Globe Intern. Inc.*,[217] for example, an article entitled “America’s Dog ‘Death Camps’” had alleged that a group of dog-breeding farms--ultimately determined to number 955--had raised their dogs under cruel conditions. With little discussion, the court endorsed the lower court’s conclusion that 955 was simply “too large to afford relief.”[218] This outcome is buttressed by the certainty principle in the obvious sense that a reader could not know if the article was alluding to the practices of specific segment of this group.[219] In addition, however, even a categorical condemnation of the farms--absent a serious representation that all had been investigated--would not reasonably be understood as grounded in the writer’s familiarity with the operations of each. The same logic applies to claims arising from the alleged defamation of more than a thousand Falun Gong practitioners based in New York,[220] over 5000 Kentucky Fried Chicken outlets,[221] some 2000 residents of a lake community,[222] and about 3,125 waitresses working in the Northern Mariana Islands. [223] That some members of these groups experienced resentment and even residual fallout to their reputation is likely. The proposition that readers would have regarded the offending statements as resting on specific knowledge of individual members, however, is too precarious to permit claims based on that theory.

Defamation of groups at the next level below, with fewer than 1000 members but well above the 25-member threshold, might in theory give courts more pause. The realities of reported cases, however, suggest the value of treating claims of this nature as presumptively invalid. In a sense, the court’s analysis of the 382 disparaged saleswomen in *Neiman-Marcus* furnishes the template for this scenario. While conceding that the defendants’ insinuation of prostitution by the entire group was “unqualified,” the court ruled that no reasonable person would “conclude from the publication a reference to any individual saleswoman.”[225] This sensible conclusion should not hinge on rejection of the

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217 832 F.2d 1226 (10th Cir.1987).
218 Id. at 1228.
219 See id. at 1228-29 (noting that “smaller subset” of 955 farms “could not be identified by the text of the article”).
221 See Kentucky Fried Chicken of Bowling Green, Inc. v. Sanders, 563 S.W.2d 8, 8-9 (Ky.1978) (per curiam).
222 See Gintert v. Howard Publications, Inc., 565 F. Supp. 829, 837 (N.D. Ind.1983) (holding that language at issue “regards such a large group that it does not give rise to any civil claim on the part of any individual”).
224 See supra notes 24-27 and accompanying text.
225 Neiman-Marcus, 13 F.R.D. at 316.
possibility that the authors meant to paint with a broad brush, or even that the description cast a shadow on a significant number of saleswomen. Rather, given the overtly flimsy foundation of the authors’ observation, the reasonable reader would not interpret the passage as asserting definite knowledge of the behavior of everyone in the group. Similarly, two Florida courts separately rejected complaints by hundreds of commercial net fishermen that television advertisements attacking the practices of their profession had defamed them. Each court emphasized the absence of a specific reference to the plaintiffs. Also crucial, however, was the tacit premise that the advertisements did not project the sponsor’s acquaintance with the operations of each fisherman. A reasonable viewer might well come away with a disturbing suspicion about pervasive practices among Florida’s fishermen, but that reaction would not stem from confidence that the advertiser was reporting facts from an exhaustive investigation of the industry. In other cases as well involving comparable numbers of group members, the suits’ dismissal can be understood in terms of the plaintiffs’ failure to show that the defendant had represented possession of comprehensive knowledge of the group. Moreover, in some instances where suits were dismissed but no specific figure provided, the allegedly defamed class appears to be sufficiently numerous that a reader would not perceive the publisher as having represented a familiarity with the conduct of each member.

C. Conflation of the Group Libel Rule and the Requirement of a Factual Assertion

The inherent unlikelihood that a derogatory description of a very large group will be seen as conveying knowledge of each member suggests a kinship between this application of the group libel rule and the requirement that an actionable statement have a factual core. In this sense, the central deficiency of almost all claims of this type is that the generalization will not reasonably be understood as expressing a known fact about the complaining member. Dismissal of these claims thus shares roots in the uncertainty principle that lies at the heart of the Milkovich standard and related doctrines.

227 See Thomas, 699 So.2d at 805; Adams, 699 So.2d at 557.
230 See supra notes 136-38 and 162-66, and accompanying text.
231 See supra notes 167-71 and accompanying text.
In other instances, the two doctrines are even more intertwined in that dismissal under a group libel rationale may operate as a substitute for the fatal absence of a provably false factual assertion. This dynamic is especially evident when the offending language consists of epithets or other invective. As the *Milkovich* Court acknowledged, this kind of vigorous hyperbole--unlikely to be taken literally--cannot form the basis of liability.\(^{232}\) In *Riss & Co. v Association of American Railroads*,\(^{233}\) for example, the defendant had charged that an action taken by approximately a hundred railroad operators was “tantamount to treason.”\(^{234}\) While the sizable number of targeted operators supplied the court with grounds for invoking the group libel rule,\(^{235}\) a suit arising from the same charge against even a single railroad would almost certainly have warranted dismissal due to the obviously non-literal import of “treason” in this context.\(^{236}\) Likewise, many other claims that have foundered on statements’ lack of reference to the plaintiff might well have been rejected instead as objections to subjective, and therefore unfalsifiable, insults.\(^{237}\) Resort to the group libel rationale seems especially optional where the disputed statements were plainly intended for satirical or comedic effect.\(^{238}\) Obvious expressions of viewpoint\(^ {239}\) and of speculative conclusions\(^ {240}\) can be similarly disposed of without a determination of whether the statement targeted the plaintiff.

\(^{232}\) See *Milkovich*, 497 U.S. at 16-17; see also Levinsky's, Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122, 128 (1st Cir. 1997); Sanders v. Smitherman, 776 So.2d 68, 75 (Ala. 2000); Ward v. Zelikovsky, 643 A.2d 972, 979-80 (N.J. 1994).


\(^{234}\) Id. at 325.

\(^{235}\) See id. at 325-26.

\(^{236}\) See Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 284 (1974) (stating that defendant’s use of “traitor” in describing plaintiff “cannot be construed as representations of fact.”).


\(^{239}\) See, e.g., McGee v. Collins, 100 So. 430, 435 (La. 1924) (involving claim based on article “call[ing] attention to the consensus of opinion of bankers and others in favor of life insurance”; Owens v Clark, 6 P.2d 755, 760 (Okla. 1931) (relying on statement’s absence of specific reference to plaintiff and “the right of citizens to criticize the official acts of their servants” in suit by judge who participated in opinion described by defendant as, e.g., “an attempted outrage of the people’s rights”).
D. Portions of Groups

Even when the group in question is decidedly small, the uncertainty principle may preclude an action grounded in the group defamation rule. In particular, many derogatory statements refer only to an unspecified portion of the group rather than to its entirety. In this context, the certainty principle typically operates in its most obvious dimension, generally barring suits for too little assurance that the statement refers to the complaining member. However, the cases also reveal a continuum of plausibility for the viability of claims based on defamation of a proportion of the group; thus, this type of statement may be actionable in limited circumstances.

One of the more readily resolvable statements of this type is a charge leveled against a single, unidentified member of a group. Such statements will generally convey uncertainty as to the member to which the defendant meant to refer, and often as to the defendant’s own knowledge of the member’s identity as well. Accordingly, claims provoked by a statement that misconduct was committed by “one of” the members of a group,241 “someone” among the group,242 or a lone generically classified group member243 have been invalidated.244 At the same time, however, consciousness of the

241 E.g., Cohn v. Brecher, 192 N.Y.S.2d 877, 878-79 (N.Y. Sup. 1959) (defendant’s declaration to three employees that “One of you is a crook” deemed incapable of sustaining action by one of employees); Wright v. Rosenbaum, 344 S.W.2d 228, 231-34 (Tex. Civ. App. 1961) (statement by store owner to three women that “One of you has stolen this dress” not entitling any of women to recovery); but see Columbia Sussex Corp. v. Hay, 627 S.W.2d 270, 274-75 (Ky. App. 1981) (upholding claim based on defendant’s assertion that either plaintiff or one of her subordinates had committed hotel robbery). The Columbia Sussex decision appears to be a dubious result under the certainty principle. While the president of the defendant corporation felt that either Hay or one of the employees working under her had performed the robbery, his uncertainty as to which of these individuals was allegedly responsible was demonstrated by his having them all subjected to a polygraph test. See id. at 272-73. Some of the opinion’s language suggests that the court’s approach partook of the “intensity of suspicion” test, see id. at 274 (describing pivotal question as whether plaintiff “was sufficiently identified as the target of suspicion”), and may therefore be susceptible to the criticisms of that standard, see supra notes 187-202 and accompanying text. At best, the court may have regarded the totality of the president’s statements as open to the interpretation of charging all members of the group with wrongdoing. See id. at 274-75 (noting exception to group libel rule for “defamatory imputations against all members” of small group).
242 Chapman By and Through Chapman v. Byrd, 475 S.E.2d 734, 737 (N.C.App. 1996) (holding that statement that “someone” working at restaurant had contracted AIDS could not support suit by any of nine employees who worked at restaurant).
243 Arcand v. Evening Call Publishing Co., 567 F.2d 1163, 1165 (1st Cir.1977) (dismissing suit based on newspaper’s question whether it was “true that a Bellingham cop locked himself and a female companion in the back of a cruiser in a town sandpit and had to radio for help” where plaintiff was part of 21-man police force); Beznos v Nelson, 155 N.W.2d 241, 243 (Mich. App. 1967) (rejecting claim arising out of reference to alleged intentions of unnamed “area [real estate] broker” in light of presence of twenty realty companies that fell into plaintiff’s class); Helmicks v. Stevlingson, 250 N.W. 402, 402-03 (Wis. 1933) (derogatory reference to bank’s “former cashier” not justifying suit where description applied to cashiers employed by bank over period of twenty-seven years); but see Thompson v. Farley, No. 656, 1964 WL
certainty principle counsels against an absolute prohibition of such claims. Special circumstances may sometimes exist suggesting the likelihood that a particular member of the group had been singled out in the mind of both the defendant and the audience. For example, an accusation of theft directed at “one of” three people, accompanied by a gesture strongly indicating one of them, might furnish grounds for submitting the question of identification to the jury.\textsuperscript{245} Similarly, while allegations of wrongdoing framed in the alternative as committed by either of two persons are usually deemed insufficient\textsuperscript{246} a particular context might project the definite impression that the culprit was probably the plaintiff.\textsuperscript{247}

A recurring scenario that evokes varying judicial reactions is defamation of an indefinite portion of a small group. Some courts have announced strict adherence to the view that defamation of less than the whole group creates no cause of action in the absence of circumstances that would point specifically to the plaintiff.\textsuperscript{248} Others have endorsed the Restatement's position that statements encompassing only part of a small class may be actionable if the statement generates a “high degree of suspicion” of each member of the class: e.g., “Some of A’s children are thieves.”\textsuperscript{249} While the two approaches offer an interesting theoretical contrast, courts in practice appear to be guided

\textsuperscript{244} See King, supra note 34, at 378 (reasoning that claims based on statement targeting less than majority of group could not meet preponderance of evidence standard).

\textsuperscript{245} See Montgomery Ward & Company et al. v. Skinner, 25 So.2d 572, 578 (Miss. 1946).

\textsuperscript{246} Cohn v. Brecher, 192 N.Y.S.2d 877, 879 (N.Y. Sup. 1959) (stating that “if the words reflect impartially on either A. or B. … and there is nothing to show which one was meant, no one can sue” (citation omitted)); Bull v. Collins, 54 S.W.2d 870, 870 (Tex. Civ. App. 1932) (stating that “[w]ords importing an accusation that either A or B stole money, without indicating whether the one or the other, are not sufficient to charge that A stole the money”).

\textsuperscript{247} A notable instance of such circumstances formed the basis of the suit upheld in American Broadcasting-Paramount Theatres v. Simpson, 126 S.E.2d 873 (Ga. App. 1962). There, a television drama portrayed an actual event in which Al Capone was transported by train from one prison to another. In the televised version, Capone was attended by a single guard who was portrayed as accepting a bribe; in fact, two guards had worked shifts during the transfer. The court indicated its willingness to accept a theory of alternative defamation permitting both the plaintiff and other guard to sue. See id. at 880-81. However, the more persuasive theory—also embraced by the court—was that the plaintiff might be able to demonstrate by extrinsic facts that the manner in which the guard was depicted would point to the plaintiff as the alleged recipient of the bribe. See id.

\textsuperscript{248} E.g., Crosby v Time, Inc., 254 F.2d 927, 930 (7th Cir. 1958) (refusing recovery union official’s suit over article about “top Western officials” of union in absence of “a showing that all of such officials were accused of wrongdoing”); Latimer v Chicago Daily News, Inc., 71 N.E.2d 553, 554-55 (Ill. App. 1947); Ledig v. Duke Energy Corp., 193 S.W.3d 167, 180 (Tex. App. 2006) (denying claim where statement is “directed to…less than all of the group when there is nothing to single out the plaintiff” (quoting Eskew v. Plantation Foods, Inc., 905 S.W.2d 461, 462 (Tex.App. 1995)); Harvest House Publishers v. Local Church, 190 S.W.3d 204, 213 (Tex. App. 2006) (stating that if statement “refers to some, but not all members of the group, and does not identify to which members it refers, it is not a statement of and concerning the plaintiff”).

by the certainty principle’s overwhelming presumption that reference to an unspecified segment of a group will not instill readers with firm belief that particular members suffer from the alleged shortcoming. Thus, in the oft-cited case of *Eskew v. Plantation Foods, Inc.*, the court disallowed a suit over a CEO’s assertion that “some of those we let go, we think, were involved” in irregularities in the company’s maintenance department. While the plaintiffs unquestionably belonged to the group of workers dismissed in the wake of an investigation into these irregularities, the court ruled the statement nonactionable as “clearly referable only to an unidentified portion of a group.” Suits based on defendants’ accusations against unspecified portions of groups like a company’s “senior management,” “union officials,” a high school’s faculty, and a town’s police force have similarly evoked dismissals. Even where a statement refers to a more precise proportion of the group, courts generally deny the claim when assurance that the defendant intended to tar particular members is lacking.

Admittedly, claims have sometimes been allowed to proceed for statements that target neither an entire small group nor a readily identifiable subset. These cases, however, are typically subject to criticism under the certainty principle. Perhaps the best-known instance of a suit’s proceeding on this basis occurred in *Farrell v. Triangle Publications, Inc.* The plaintiff, a township commissioner, brought suit over a newspaper’s report that “a number of township commissioners and others” had participated in an improper deal and that the district attorney’s office intended to “question the [then] 13 commissioners.” Conceding that the article did not state that

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250 905 S.W.2d 461 (Tex. App. 1995).
251 Id. at 461 (court’s emphasis removed).
252 Id. at 463; *see also* Dedé v. Silver, No. 80-267, 1980 WL 335998, at *2 (R.I. Super. June 19, 1980) (missing suit based on reference to “some” correctional officers among group of 400).
256 *See* Algarin v. Town of Wallkill, 421 F.3d 137 (2nd Cir. 2005); Pigg v. Ashley County Newspaper, Inc., 489 S.W. 2d 17 (Ark. 1973).
257 *See, e.g.*, Kenworthy v. Journal Co., 93 S.W. 882, 885 (Mo. App. 1906) (involving report of probability that three among seven named witnesses would be arrested for giving perjured testimony); Shallenberger v. Scripps Pub. Co., 1909 WL 720, at *3-4 (Ohio Com.Pl.) (claim arising from disparagement of qualifications of “majority” of sixteen candidates seeking judgeship in primary election). These cases can be distinguished from the holdings in *Gross v. Cantor*, 200 N.E. 592 (N.Y. 1936), and *Carter v King*, 94 S.E. 4 (N.C. 1917), both of which involved accusations directed against eleven members of a group of twelve. *See Cantor*, 200 N.E. at 593 (defendant’scommenting that “[t]here is but one person [out of twelve] writing on radio in New York City who has the necessary background, dignity and honesty of purpose”); *Carter* 94 S.E. at 5 (letter’s declaring that only one man on a jury was not bribed). A charge of misconduct against 11/12 of a group is nearly the functional equivalent of ascribing the behavior to the entire group; immunizing such statements would encourage carefully crafted libel. Moreover, in both of these cases evidence existed as to the identity of the member whom the speaker intended to exempt from censure, *see* 200 N.E. at 593; 94 S.E. at 5, so that the statements might be viewed as categorically attacking a group of eleven.
259 Id. at 736.
all the commissioners were involved in the deal, the court nevertheless authorized the suit on the rationale that readers might “reasonably conclude that the plaintiff was one of the commissioners referred to as being corrupt.”

This conclusion seems doubly dubious. First, the leap from a report that an unspecified number of commissioners may have participated in a wrongful transaction to readers’ belief in the plaintiff’s corruption appears no more compelling than the connection urged and rejected in other cases involving this theory. The tenuousness of the claim is compounded by the article’s own acknowledgement of the limitations on its information; the newspaper did not purport to know which of the commissioners had been part of a corrupt bargain. Comparable claims sustained by courts are vulnerable to similar criticism.

On the other hand, some decisions sustaining claims by part of a group can be justified as really hinging on determination of the relevant group. A recurring example of this problem can be found in accusatory statements about a “family.” One court confronted with such a statement noted that “family” can commonly mean either “‘[a] group of persons of common ancestry’” or “‘the basic unit of society having as its nucleus two or more adults living together and cooperating in the care and rearing of their own or adopted children.’”

The first would presumably be disqualified under the group defamation rule; the second could warrant consideration as defamation of the entirety of a small group. The assignment of one of these or other meanings where a charge is mounted that a family engaged in unsavory conduct will hinge on the way that it is framed and the context in which it is made. Thus, an accusation that a man’s suicide resulted from his abandonment by this family might reasonably be understood to point to his parents and perhaps his siblings as well. Similar, a broadcast about a man named Emmett Cahill referring to the attitude of the “entire Cahill Family” was deemed susceptible to the interpretation that Cahill’s son was included. Conversely, in the well-known case of *Louisville Times v. Stivers*, a comment critical of “the Stivers clan”

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260 Id. at 739.
261 In Ball v. White, 143 N.W.2d 188, 190 (Mich. App. 1966), for example, the court permitted claims based on a statement to a contractor that “there is no question about the disappearance [of a friend’s missing watch] occurring through some of your workmen.” The court’s logic appears similar to that employed in Sussex Corp. v. Hay, see supra note 240, and similarly dubious under the certainty principle. The letter in question, while expressing no doubt that one or more workmen had stolen the watch, made clear that this was an inference drawn from the correlation of the workers’ presence at the watch owner’s home and the subsequent disappearance of the watch. See Ball, N.W.2d at 189. Moreover, the letter was reporting the belief of the owner and her husband, who conceded were “not certain of the exact individual” responsible for the presumed theft. Id. In Sovik v. Healing Network, 665 N.Y.S.2d 997 (4th Dep’t 1997), the court found actionable a statement that “scores of women have been sexually coerced and exploited by Swami Rama and other senior teachers” of an institute. The court emphasized that there were only fifteen “senior teachers” in the United States. See id. at 1000. The opinion, however, relies heavily on Brady v. Ottaway Newspapers, Inc., 445 N.Y.S.2d 786 (App. Div. 1981), see Sovik, 665 N.Y.S. 999-1000, whose “intensity of suspicion” approach raises serious concerns about its compatibility with the certainty principle.

263 See id. at 728; see also Fenstermaker v. Tribune Pub. Co., 45 P. 1097 (Utah Terr. 1896), aff’g 43 P. 112 (Utah Terr. 1895) (allowing suit where statement allegedly charged “[t]he Fenstermakers” with abandonment and neglect of child).
265 68 S.W.2d 411 (Ky. App. 1934).
was held to encompass a whole generation of Stivers family members and therefore was nonactionable as concerning a “presumptively large” class.266

E. The Illusory Government Libel “Exception”

That the defamation of groups is ultimately governed by the certainty principle rather than another facet of defamation doctrine is demonstrated by the way in which the principle applies—or should apply—to attacks on governmental bodies. Passages from two Supreme Court opinions, taken from context, can be read to indicate that criticism of government bodies is categorically immune from group defamation liability. The immunity that such attacks often receive, however, is due to the manner in which the certainty principle operates in this area rather than to its suspension.

Both New York Times v. Sullivan267 and Rosenblatt v. Baer268 contain language that could be stretched to automatically invalidate attempts to invoke group defamation reasoning on behalf of governmental officials. In addition to famously promulgating the actual malice rule,269 the New York Times Court overturned the verdict in favor of City Commissioner Sullivan on the separate ground that the advertisement’s statements could not be reasonably interpreted as “of and concerning” him.270 The newspaper advertisement in question had criticized the actions of the “police” in Montgomery, Alabama, for actions toward civil rights demonstrators in that city. Although Sullivan argued that readers would attribute misconduct to him as supervisor of the Police Department, the Court emphasized that the statements did not “make even an oblique reference to [Sullivan] as an individual.”271 In the Court’s view, to allow liability on Sullivan’s theory would have the effect of “transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence personal criticism, of the officials of whom the government is composed.”272 Similarly, in Rosenblatt, the Court rejected the claim of a former county commissioner that an article critical of the commission’s performance could reasonably be construed as specifically charging the plaintiff with misconduct. According to the Court, the jury’s verdict rested upon a finding that the plaintiff “was one of a small group acting for an organ of government, only some of whom were implicated, but all of whom were tinged with suspicion.”273 Such a theory, said the Court, violated the principle of New York Times that “an otherwise impersonal attack on governmental operations cannot be utilized to establish a libel of those administering the operations.”274

A careful reading of these opinions indicates no intention to impose a blanket prohibition on suits by public officials arising from defamation of the bodies on which they sit. In New York Times, the Court emphasized that the putative link between Sullivan and the actions alleged by the advertisement at issue hinged on “the bare fact of

266 Id. at 413.
269 See supra note 117 and accompanying text.
270 See id. at 288.
271 Id. at 289.
272 Id. at 292.
273 383 U.S. at 82.
274 Id. at 80.
[Sullivan’s] official position.” On its face, the Court’s reasoning did not preclude liability in instances where more elaborate circumstances might connect reference to a particular government entity to conduct by one of its members. In *Rosenblatt*, the Court decisively characterized the disputed statement as “an impersonal discussion of government activity.” The opinion does not embrace wholesale disapproval of the group libel rationale in this context. On the contrary, the Court disavowed any suggestion that the fact that more than one person is libeled by a statement is a defense to suit by a member of the group.” In particular, the Court assumed that had the defendant expressly charged the management group of which Baer was a part with corruption, “any member of the identified group might recover.” The opinion thus appears to rest in large part on the Court’s assessment of the challenged statement’s doubtfully defamatory nature as of its target. At best, then, preservation of vigorous comment on government counsels interpreting truly ambiguous references as pertaining to government itself, rather than ignoring the possibility that ostensible attacks on government entities may sometimes be understood as specifically implicating certain of its members.

It therefore exaggerates the holdings in *New York Times* and *Rosenblatt* to declare flatly, as did the Virginia Supreme Court, that “the use of the ‘small group theory’ alone as the basis for satisfying the ‘of and concerning’ element of a common law defamation action against a governmental actor does not survive constitutional scrutiny.” While government officials’ attempts to invoke group defamation theory have often been rejected, dismissal has not required a sweeping principle of per se invalidation. Instead, the ordinary operation of group defamation analysis and its underpinnings in the certainty principle have sufficed to explain the inadequacy of the claim. In many instances, the reference to a public body could not reasonably be viewed as accusing either its whole membership or particular members. In other cases, the size of the category of officials triggered the presumption against suits by individual

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275 376 U.S. at 289-90/  
276 383 U.S. at 82.  
277 *Id.* at n.6.  
278 *Id.* at 81.  
280 See TRIBE, *supra* note 148, at 863 (describing *New York Times* as holding that “because critical discussion of government ordinarily involves attacks on individual officials as well as impersonal criticisms of government policy, all defamation claims of aggrieved public officials must be examined closely in order to close what would otherwise be a back door to official censorship”).  
members of maligned large groups. Conversely, decisions upholding suits by members of small public bodies to which wrongdoing has been expressly and broadly imputed are not undermined by the bar against claims arising from impersonal criticism of government conduct. With respect to the underlying considerations of the certainty principle, such claims are fundamentally similar in character to permissible suits by members of small defamed private boards. Just as libel “can claim no talismanic immunity from constitutional limitations,” neither can defamation of small groups that happen to comprise public officials claim “talismanic immunity” from liability.

CONCLUSION

Because critics do not always precisely describe their targets, the treatment of group defamation is an inevitably recurring problem. A single mechanical formula does not seem capable of comprehensively addressing the various forms and contexts of this phenomenon. At the same time, indeterminate multi-factor approaches offer insufficient guidance to potential speakers. The predominant approach embodied by the Restatement standard represents a sensible compromise between arbitrary rigidity and amorphous flexibility. That standard would be more appreciated and effectively applied, however, by conscious recognition of the manner in which it rests on the certainty principle that governs so much of defamation doctrine. Judicial disposition of group defamation issues has generally, though not invariably, produced outcomes consistent with the operation of the certainty principle. Explicit reliance on the certainty principle that undergirds the Restatement standard would lead to even more reassuring results.


