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Lies, Damn Lies, and Kamikaze Lies: Protecting Falsehoods in the Name of Truth

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Lies, Damn Lies,[1] and Kamikaze Lies:[2] Protecting Falsehoods in the Name of Truth

*Doris DelTosto Brogan**

"We've been lied to and lied to, and it hurts to be lied to."[3]

Despite calls to reverse New York Times v. Sullivan*—calls offered by two Supreme Court Justices, several legal scholars, and some members of the popular press—this Article demonstrates that* Sullivan*'s protections have never been more relevant or more necessary, particularly in light of an epidemic of malicious, often strategic falsities, as well as overt assaults on the institutional press by powerful actors. Further, for* Sullivan *to do its work effectively, it must be reinforced by two other legal protections: robust Anti-SLAPP statutes and revival of the neutral reportage privilege.*

Critics' claims that Sullivan *gutted defamation law, leaving those whose reputations are damaged by defamatory falsehoods with no remedy, wildly overstate the case.* Sullivan*'s reckless disregard standard applies only to public figures involved in matters of public interest. Private plaintiffs are not subject to its high threshold. While the Court did find that the Constitution places modest requirements on private plaintiffs' defamation suits, it did so with a light touch. The Court eliminated several common law presumptions—unique to defamation law—holding that private plaintiffs must prove each element of defamation by a preponderance of the evidence,*

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* Professor of Law, and Harold Reuschlein Leadership Chair, Villanova University Charles Widger School of Law. My thanks to Villanova for the sabbatical semester that provided the time to dig into this project and the support for research and scholarship generally. I am grateful to our outstanding librarians for their smart, efficient, and always generous support, especially Amy Spare, and to my research assistants, Brittany Mann and Katie Kovalsky, for their expert and thoughtful work.

1. "Lies, damn lies, and statistics" is a phrase popularized by Mark Twain. Its original author is unknown, though many attribute it to Benjamin Disraeli. *See generally* Elaine Jervis, *Lies, Damn Lies and Statistics*, MEDIACOM (June 2019), https://www.mediacom.com/uk/think/blog/2019/lies-damn-lies-and-statistics [https://perma.cc/DFS5-Z8FB].
2. DAVID FOSTER WALLACE, INFINITE JEST 660 (1996) ("Then there are what I might call your Kamikaze-style liars. These'll tell you a surreal and fundamentally incredible lie . . . .").
3. David Foster Wallace, *David Foster Wallace on John McCain: 'The Weasel, Twelve Monkeys and the Shrub'*, ROLLING STONE (Apr. 13, 2000, 12:00 PM), https://www.rollingstone.com/politics/politics-features/david-foster-wallace-on-john-mccain-the-weasel-twelve-monkeys-and-the-shrub-194272/ [https://perma.cc/Y8VQ-D7MY].

and that they must prove at least negligence to prevail—the burden required of other tort plaintiffs.

As for the requirement that public figures prove that the defendant acted with knowledge of falsity, or reckless disregard for the truth, the Court did set a high bar, but found that such protection was essential to ensure the robust debate that forms the bedrock of a democratic society. Public figures do face a significant hurdle in bringing defamation actions, and some public figures with legitimate claims may not be able to clear that hurdle. But they are not left remediless. As the Court explained in Gertz, *public figures have far greater access to a defamation plaintiff's first and best remedy—self-help—by virtue of their access to many channels of communication. Anthony Lewis put a point on it, noting that , a public figure's "recourse is not litigation but rebuttal."*[4] *And, even with* Sullivan*'s high bar, a good number of public figures prevail in defamation suits.*

The "reckless disregard" standard does much to limit meritless litigation. And it is the threat of litigation—specifically meritless suits—that poses the most serious risk, especially now. High-profile figures declare war on the institutional press, using the threat of baseless defamation suits as a potent weapon in that war. Former President Trump boasted that he "couldn't win the suit, but brought it anyway to make a point," bragging that it cost his target a great deal of money. This echoes exactly what was going on when Sullivan *was decided. At the time, the civil rights movement had spread throughout the South, and was being met with violent backlash. The national press took the lead in telling the story, drawing the ire of segregationists. This ire spawned a strategy of filing libel suits against the national news outlets, seeking staggering sums in damages. Celebrating the state court verdict in the* Sullivan *case (overturned by the Supreme Court), one Alabama editorial boasted that the verdict would cause the "Northern press" to rethink publishing "'anything detrimental to the South.'" Former President Trump's boast echoes this strategy. The reckless disregard standard pushes back against such strategic deployment of defamation suits.*

But the Sullivan *standard can't do the work alone. Rather, it must be combined with robust Anti-SLAPP statutes that allow for early dismissal of meritless cases and provide the prompt and reliable award of attorney's fees for the successful movant to neutralize the strategy of bringing meritless suits. In addition, we need broad adaptation of the neutral reportage doctrine which protects one who republishes a defamatory statement (for the very purpose of calling out the falsity) from the impact of the repeater rule that would subject the re-publisher to tort liability.*

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4. Anthony Lewis, New York Times v. Sullivan *Reconsidered: Time to Return to "The Central Meaning of the First Amendment"*, 83 COLUM. L. REV. 603, 621 (1983).

Together, the Sullivan *standard, strong Anti-SLAPP statutes, and the neutral reportage doctrine can provide potent weapons protecting speakers who call out those in power, especially for the spread of malicious falsity.*

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INTRODUCTION

A candidate for president accuses the former United States Secretary of State Henry Kissinger and former Vice President Walter Mondale of being foreign Communist "agents of influence" and claims that the Queen of England is involved in an international drug cartel designed to bring down the United States. He adds that eastern establishment elites and environmentalists are trying to wipe out the human race. Were these accusations made in the 2020 presidential election? Or maybe the 2016 election? No, these conspiracy theories date back to the 1970s and 80s, authored by Lyndon LaRouche.[5] LaRouche made a career of running for president and garnered an international cult following as well as

5. *See generally* Associated Press, *Perennial Presidential Candidate Lyndon LaRouche Dead at 96*, WALL ST. J. (Feb. 13, 2019, 10:37 PM), https://www.wsj.com/articles/perennial-presidential-candidate-lyndon-larouche-dead-at-96-11550115473 [https://perma.cc/H3Z9-ZWA7]; Richard Severo, *Lyndon LaRouche, Cult Figure Who Ran for President 8 Times, Dies at 96*, N.Y. TIMES (Feb. 13, 2019) https://www.nytimes.com/2019/02/13/obituaries/lyndon-larouche-dead.html [https://perma.cc/Y7BT-FCM7].

substantial wealth with these lies.[6]

"Surreal and fundamentally incredible" lies[7] have been used to advance equally surreal and fundamentally incredible theories for decades—even centuries—by a range of people seeking political office, or a following, or sometimes just money.[8]

The January 6, 2021 insurrection at the Capitol marks what may be a high point of violence and devastation motivated by lies in the United

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6. *See generally* Jack Anderson & Dale Van Atta, *LaRouche, The Jailhouse Candidate*, WASH. POST (Dec. 12, 1991), https://www.washingtonpost.com/archive/sports/1991/12/19/larouche-the-jailhouse-candidate/8773b93a-8d01-4ae3-8c1b-cb8c2301ce64/ [https://perma.cc/Z3F8-PGRG]. For example, LaRouche received more than $800,000 in federal campaign financing for his 1988 campaign because he was able to raise more than $100,000 campaign contributions from donors in more than twenty states. *Id. See generally* James Doubek, *Conspiracy Theorist and Frequent Presidential Candidate Lyndon LaRouche Dies at 96*, NPR (Feb. 14, 2019, 7:09 AM), https://www.npr.org/2019/02/14/694626800/conspiracy-theorist-and-frequent-presidential-candidate-lyndon-larouche-dies-at- [https://perma.cc/ZZ4X-2QCC]; Bill Trott, *Lyndon LaRouche, Perennial U.S. Presidential Candidate, Dies at 96*, REUTERS (Feb. 13, 2019, 5:22 PM), https://www.reuters.com/article/us-people-larouche/lyndon-larouche-perennial-u-s-presidential-candidate-dies-at-96-idUSKCN1Q22Y5 [https://perma.cc/8B3V-U4CC]. LaRouche ran for president eight times between 1976 and 2008, including one time from federal prison, where he was incarcerated on felony charges. *Id.* I quite intentionally have used LaRouche for most of my examples in part to remove this discussion from the current sensationalized attention to the practices of the former president. But LaRouche, and others, also demonstrate that the current situation is not, in fact, unprecedented. LaRouche spread wild, unbelievable conspiracy theories, and attracted a large national and international following. He also raised remarkable amounts of money through his campaigns and his organization. *See* Shilpa Jindia, *Here's an Insane Story about Roger Stone, Lyndon LaRouche, Vladimir Putin, and the Queen of England*, MOTHER JONES NEWS (Dec. 21, 2018), https://www.motherjones.com/politics/2018/12/lyndon-larouche-roger-stone-russia-robert-mueller [https://perma.cc/5EDS-XNHM] (noting LaRouche's influence and connections); Joel Brinkley & Robin Toner, *Fraud Suggested in LaRouche Fund-Raising*, N.Y. TIMES (Apr. 13, 1986), https://www.nytimes.com/1986/04/13/us/fraud-suggested-in-larouche-fund-raising.html [https://perma.cc/P59F-FSE4] (demonstrating how LaRouche has defrauded people); Harvey Klehr, *Lyndon LaRouche and the New American Fascism, by Dennis King*, COMMENTARY (Aug. 1989) (book review) https://www.commentary.org/articles/harvey-klehr/lyndon-larouche-and-tne-new-american-fascism-by-dennis-king/ [https://perma.cc/T2WH-2EH5] ("[LaRouche] is serving a fifteen-year jail sentence for fraud and conspiracy.").

7. Wallace, *supra* note 2.

8. *See, e.g.*, Hillel Italie, *Lyndon Larouche's Conspiracy Mindset Lives On*, ABC NEWS (Feb. 15, 2019, 1:06 AM), https://abcnews.go.com/US/wireStory/lyndon-larouches-conspiracy-mindset-lives-61093740 [https://perma.cc/D9QM-B7V6] (explaining how LaRouche's platform of conspiracy theories amassed great influence); Cherilyn Ireton & Julie Posetti, *Introduction*, *in* JOURNALISM, "FAKE NEWS" AND DISINFORMATION: HANDBOOK FOR JOURNALISM EDUCATION AND TRAINING 14, 15 (2018) ("[Mark Antony's] political enemy Octavian launched a smear campaign against him with 'short sharp slogans written upon coins in the style of archaic Tweets.' . . . '[F]ake news had allowed Octavian to hack the republican system once and for all.'"). Some Lincoln conspiracy theorists, for example, blamed the President's assassination on the Pope. Ray Cavanaugh, *The Lincoln Assassination Conspiracies*, GEO. WASH. UNIV.: HIST. NEWS NETWORK (Apr. 5, 2015), https://historynewsnetwork.org/article/158971 [https://perma.cc/LJ6K-J2QH]. Among the most resilient conspiracy theories involves the Illuminati, a "small quasi-Masonic society active in German-speaking Europe in the late 1770s," but which eventually disbanded. Michael Barkun, *Conspiracy Theory*, 56 AM. HERITAGE 5 (Oct. 2005).

States.[9] The country still reels from the damage to our institutions and to democracy itself. We have, as Wallace observes, "been lied to and lied to,"[10] and it does hurt to be lied to. As important, it hurts to be lied *about.* Many of the worst lies circulating target individuals[11] and organizations,[12] whose reputations and lives are damaged by false statements and accusations.

In fact, a constellation of legal doctrines and technological developments, as well as cultural factors and human characteristics, coalesce to shield—and arguably even nourish—falsities and conspiracy theories.[13] Ironically, these legal doctrines and technological developments were designed to foster truth; to ensure that all citizens had access to information, including ideas and theories, within the rich,

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9. *See generally* Lauren Leatherby, et al., *How a Presidential Rally Turned into a Capitol Rampage*, N.Y. TIMES (Jan. 12, 2021), https://www.nytimes.com/interactive/2021/01/12/us/capitol-mob-timeline.html [https://perma.cc/V3Q3-NBYW].

10. Wallace, *supra* note 3.

11. *See, e.g.*, Nina Berman, *The Victims of Fake News*, COLUM. JOURNALISM REV. (Fall 2017), https://www.cjr.org/special_report/fake-news-pizzagate-seth-rich-newtown-sandy-hook.php [https://perma.cc/S453-D8HB] (chronicling the harm caused to victims of false reports and conspiracy theories).

12. *See, e.g.*, *id.* (describing the damage to local businesses Comet Ping Pong and Politics and Prose Bookstore as a result of conspiracy theories); Claire Atkinson, *Fake News Can Cause 'Irreversible Damage' to Companies—and Sink Their Stock Price*, NBC NEWS (Apr. 25, 2019, 11:54 AM), https://www.nbcnews.com/business/business-news/fake-news-can-cause-irreversible-damage-companies-sink-their-stock-n995436 [https://perma.cc/3HHH-SE6Q] (describing harm to businesses subject to false reports).

13. I intentionally *do not* use the term "fake news." It has become a cliché, devoid of meaning and weaponized by players on all sides of this controversy. *See* Erin C. Carroll, *How We Talk about the Press*, 4 GEO. L. TECH. REV. 335, 335 (2020) (detailing how the term "fake news" became a weapon, or "rhetorical bludgeon," against the press); Emma M. Savino, *Fake News: No One is Liable, and That Is a Problem,* 65 BUFF. L. REV 1101, 1103 (2017). More to the point, I am looking at this through the lens of professional journalism, in part because of my own background. In that regard, I concur with the authors of a model journalism curriculum who, in rejecting the term "fake news" say: "'[N]ews' means verifiable information in the public interest, and information that does not meet these standards does not deserve the label of news." Guy Berger, *Foreword, in* JOURNALISM, "FAKE NEWS" AND DISINFORMATION: HANDBOOK FOR JOURNALISM EDUCATION AND TRAINING, UNESCO SERIES ON JOURNALISM EDUCATION 7 (2018). They argue that "fake news" is an oxymoron that undermines the credibility of real news—information that meets the threshold of verifiability and public interest. *Id.*

diverse "marketplace of ideas."[14] *New York Times Co. v. Sullivan*,[15] heralded as the shield necessary to protect robust reporting of important truths, has been criticized as instead fostering falsity and leaving victims of "damn lies" without remedy, leading many to call for its reversal.[16]

Technology and its culture of open access promised the democratization of information through universal access to science, culture, data, political developments, and exchange of ideas that would raise the level of education and discourse.[17] But again, the reality fell short of the promise. To paraphrase a well-worn observation about battlefield reporting, truth was the first casualty.[18]

To be fair, this probably overstates the problem. In fact, technological developments, as well as protective legal doctrines and "frictionless"[19] access to distribution of information, did work as intended. They provided a rich and readily accessible store of information—but a nasty stowaway snuck through, too. Along with reliable information, disinformation swarmed media outlets, especially the Internet, like some

14. *See generally* United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) ("[The First Amendment] presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."); *see also* RonNell Andersen Jones, *The Press and the Expectation of Executive Counterspeech*, 83 MO. L. REV. 939, 944 (2018) (noting that the First Amendment supports the belief that a "free trade in ideas" is imperative in finding what is true and what is false); Jared Schroeder, *Shifting the Metaphor: Examining Discursive Influences on the Supreme Court's Use of the Marketplace Metaphor in Twenty-First-Century Free Expression Cases*, 21 COMMC'N L. & POL'Y 383 (2016) (stating that the "marketplace of ideas" is a favorite of the Supreme Court); Eugene Volokh, *In Defense of the Marketplace of Ideas/Search for Truth as a Theory of Free Speech Protection*, 97 VA. L. REV. 595 (2011) (noting that regulations of ideas would be detrimental to the discovery of truth).

15. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

16. See *infra* notes 204–209 and accompanying text.

17. *See generally* INFO. SOC'Y PROJECT & THE FLOYD ABRAMS INST. FOR FREEDOM OF EXPRESSION, FIGHTING FAKE NEWS: WORKSHOP REPORT (Mar. 7, 2017), https://law.yale.edu/sites/default/files/area/center/isp/documents/fighting_fake_news_-_workshop_report.pdf [https://perma.cc/TSK2-FKK4]; Michael Karanicolas, *Introduction-Understanding the Challenge*, in TACKLING THE "FAKE" WITHOUT HARMING THE "NEWS": A PAPER SERIES ON REGULATORY RESPONSES TO MISINFORMATION 3 (Michael Karanicolas ed., 2021).

18. The full quote is attributed to Senator Hiram Johnson: "The first casualty when war comes is truth." PHILLIP KNIGHTLEY, THE FIRST CASUALTY: FROM THE CRIMEA TO VIETNAM: THE WAR CORRESPONDENT AS HERO, PROPAGANDIST, AND MYTH MAKER 6 (1976).

19. Friction used in the world of technology refers to barriers, or extra steps users must go through to access a service. Creating frictionless interactions remains a key goal for tech designers. Shubham Agarwal, *Technology Is Easier Than Ever to Use– and It's Making Us Miserable*, DIGITALTRENDS (October 25, 2020) https://www.digitaltrends.com/web/the-frictionless-internet/ [https://perma.cc/438X-UZRS]. I use the term here to refer to the removal of barriers such as cost, editorial oversight, and even time, that burden, filter, or slow down dissemination of information.

metaphorical spotted lantern fly,[20] infesting the marketplace of ideas and threatening its health and vitality in the same way that invasive species do.[21]

In this Article, I will examine some of those legal doctrines designed to protect the marketplace of ideas, and so ensure a well-informed citizenry. I will also discuss how those doctrines, acting in concert with the technological developments and fueled by cultural and societal characteristics, may have allowed or even encouraged the epidemic of falsity that we face today. I wrestle with the collision between essential, foundational principles of free expression and the marketplace of ideas, and the instinct to restrain the unchecked swarming of dangerous, often malicious falsity. I conclude that the legal doctrines that protect speech—sometimes even false speech—are worth the cost and actually provide a critical defense against malicious lies. *Sullivan* and its progeny should not be overturned, but rather embraced and celebrated as essential—now more than ever.

Specifically, in this Article I argue that:

- *Sullivan* was rightly decided and that, given current attacks on the institutional press, *Sullivan*'s protections are more essential today than ever.
- To work effectively in neutralizing meritless attacks on the institutional press, *Sullivan* must operate in tandem with well-crafted Anti-SLAPP statutes.
- *Sullivan* and Anti-SLAPP statutes do not, as critics allege, leave defamation victims remediless. Defamation remains a viable remedy for those injured by outrageous allegations, especially private persons, but even public figures.

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20. For a discussion on the scourge of lantern flies and how they snuck in, see generally New York State Integrated Pest Management, *Spotted Lanternfly Reported Distribution Map*, CORNELL COLL. OF AGRIC. & LIFE SCIS. (last visited Feb. 1, 2022), https://nysipm.cornell.edu/environment/invasive-species-exotic-pests/spotted-lanternfly/spotted-lanternfly-ipm/introduction-native-range-and-current-range-us/#:~:text=Spotted%20lanternfly%2C%20Lycorma%20delicatula%2C%20an,altissima%2C%20or%20Tree%20of%20Heavem [https://perma.cc/Q82W-4KJF].

21. *See generally* Carroll, *supra* note 13, at 337, 348 (equating climate change and pollution with "information pollution" as among the greatest threats humans face); Karanicolas, *supra* note 17; Lisa H. Macpherson, *Addressing Information Pollution with a "Superfund for the Internet"*, YALE L. SCH. INFO. SOC'Y PROJECT: WIKIMEDIA INITIATIVE ON INTERMEDIARIES & INFO. BLOG (Mar. 2, 2021), https://law.yale.edu/isp/initiatives/wikimedia-initiative-intermediaries-and-information/wiii-blog/addressing-information-pollution-superfund-internet [https://perma.cc/K7XE-8RYY] (comparing the spread of falsity to dumping toxic chemicals). Regarding invasive species and how they arrive, see *A Floating Threat: Sea Containers Spread Pests and Diseases*, FOOD & AGRIC. ORG. OF THE U.N. (Aug. 17, 2016), http://www.fao.org/news/story/en/item/412511/icode/ [https://perma.cc/89WC-R8L6].

- The power, speed, and frictionless nature of disseminating information on the Internet, and the well-intentioned protection provided by Section 230 of the Communications Decency Act that immunizes Internet providers from liability for defamation, have certainly created an easy and consequence-free zone for the spread of dangerous false information. Nonetheless, rather than repealing Section 230 as many suggest, we must recognize that Section 230 has in fact accomplished much in terms of its goal of democratizing information. Thus, we should look to more moderate approaches for addressing abuses.
- The neutral reportage privilege should be revived and adopted widely as a constitutionally driven protection (as it was originally crafted to be), or at least as a recognized common law defense in defamation cases to be used in combination with the *Sullivan* standard and Anti-SLAPP statutes.

I. THE LAW AND FALSITY

"Neither the intentional lie nor the careless error materially advances society's interest . . . ."[22]

"Most societies have social norms against lying, and individuals may have an internal moral sense that spreading falsehoods is wrong."[23] The law agrees, and as a general matter, does not favor falsity. One can sue for misrepresentation,[24] false advertising,[25] and deceit in negotiating (at least to the extent it involves misrepresenting a current fact).[26] But these laws operate primarily in the commercial world, and at least contemplate a person to person (or business to business) transaction.

Much of the current furor over falsity falls outside the usual reach of these causes of action.[27] Such falsities range from challenges to the

22. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

23. Yonathan A. Arbel & Murat Mungan, *The Case against Expanding Defamation Law*, 71 ALA. L. REV. 454, 487 (2019).

24. *See* RESTATEMENT (SECOND) OF TORTS § 525 (AM. L. INST. 1977) (defining misrepresentation).

25. *See* 15 U.S.C. § 1125 (describing false advertisement).

26. *See generally* Cantran Grp., Inc. v. Cups, LLC, No. 18-cv-02044, 2020 WL 4873564, at *3 (C.D. Cal. Jul. 1, 2020).

27. *See Fake News and the First Amendment: Free Speech Rules (Episode 3)*, REASONTV (Apr. 10, 2019) https://reason.com/video/2019/04/10/fake-news-and-the-first-amendment-free-s/ [https://perma.cc/TAL8-WQ6Z] (describing how false information is not easily or effectively addressed under our current legal standards).

realities of the COVID-19 pandemic,[28] to theories that the container ship that ran aground in the Suez Canal was carrying trafficked persons,[29] to conspiracy theories detailing how voting machines were hacked and ballots were stolen, hidden, doctored, or flown in from South Korea (evidenced by bamboo fibers in the ballots).[30] While causing great harm, these statements do not fit the elements of most falsity causes of action because they do not occur in a business transaction (as described above), or because they cause non-specific or general harm to the public or to society.[31]

But when the lies do directly cause harm to individuals, including business entities, defamation offers a remedy. Yet many argue that the constitutionalization of the law of defamation may have blunted its power, especially with respect to matters of public interest. Thus, critics lament that pursing a defamation claim is rarely worth the paper to file a complaint.[32] I suggest that this overstates the reality. Defamation remains vital, for both private individuals who are required only to meet the burden of proof of traditional tort plaintiffs, and even the beleaguered public figure who must meet *Sullivan*'s "reckless disregard" standard. For such parties, the very reckless nature of some of the most persistent and damaging lies easily clears the *Sullivan* standard of "reckless disregard."[33] To work through this, we begin by looking at the traditional

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28. *See generally* Tanya Lewis, *Eight Persistent COVID-19 Myths and Why People Believe Them*, SCI. AM. (Oct. 12, 2020), https://www.scientificamerican.com/article/eight-persistent-covid-19-myths-and-why-people-believe-them/ [https://perma.cc/WXV3-WU9M].

29. *See generally* Rick Rouan, *Fact Check: No Evidence of Hillary Clinton Link with Ship Stuck in Suez Canal, Trafficking*, USA TODAY (Mar. 26, 2021, 4:03 PM), https://www.usatoday.com/story/news/factcheck/2021/03/26/fact-check-no-evidence-hillary-clinton-suez-canal-vessel-linked/7014647002/ [https://perma.cc/H8TR-YAWW].

30. *See generally* Jonathan Cooper & Bob Christie, *At Arizona Election Audit, Republicans Search Ballots for Watermarks, Bamboo Fibers or Any Evidence to Prove Their Conspiracy Theories Are True*, CHI. TRIB. (May 10, 2021, 6:41 AM), https://www.chicagotribune.com/nation-world/ct-aud-nw-arizona-election-audit-conspiracy-theories-20210510-vksb4ygmqvct7oxwhoxaq3wu2i-story.html [https://perma.cc/PQN4-G6RJ].

31. *See* Jill Wieber Lens, *Pushing for the Injury: Tort Law's Influence in Defining the Constitutional Limitations on Punitive Damage Awards*, 39 HOFSTRA L. REV. 595, 603 (2011) (explaining that tort law focuses on private wrongs done to an individual and on compensation for injury to legally protected interests, rather than on vindicating society's interests).

32. *See* Savino, *supra* note 13, at 1151 (explaining how defamation claims are not often pursued because of obstacles to prevailing).

33. *See generally* Jonah E. Bromwich & Ben Smith, *Fox News Is Sued by Election Technology Company for Over $2.7 Billion*, N.Y. TIMES (Feb. 4, 2021), https://www.nytimes.com/2021/02/04/business/media/smartmatic-fox-news-lawsuit.html [https://perma.cc/7MTJ-CCVF]; *Lawsuits Arrive for Networks and Lawyers Who Backed Donald Trump*, ECONOMIST (Feb. 17, 2021), https://www.economist.com/united-states/2021/02/17/lawsuits-arrive-for-networks-and-lawyers-who-backed-donald-trump [https://perma.cc/4EZ3-XET8]; Alison Durkee, *Fox News, Sidney Powell, Giuliani Face Billion-*

defamation cause of action and how *Sullivan* changed the common law framework.

II. DEFAMATION

A. The Early Common Law

"Defamation, either real or supposed, is the cause of most of those combats which no laws have yet been able to suppress."[34]

The defamation action advances society's "pervasive and strong interest in preventing and redressing attacks upon reputation."[35] The quote that opens this Section provides a "keeping the peace" rationale for providing a remedy for harm to reputation, but the crucial nature of reputation provides the most compelling reason for a robust law of defamation. Yet, even those who argue most passionately for protection of reputation, and even the earliest articulations of defamation laws, recognize the tricky balance that defamation must strike: it must "protect personal character and public institutions from destructive attacks, without sacrificing freedom of thought and the benefit of public discussion."[36]

1. The Elements

At common law, the elements of defamation required the plaintiff to plead that the defendant, without privilege, published false and defamatory matter about the plaintiff.[37] The law defined a defamatory statement as one that "tends so to harm the reputation of another as to

Dollar Defamation Lawsuits Here's Who Could Be Next, FORBES (Feb. 5, 2021), https://www.forbes.com/sites/alisondurkee/2021/02/05/who-dominion-voting-smartmatic-could-sue-next-defamation-lawsuits-fox-news-sidney-powell-giuliani/?sh=5e0e10aa1a7d [https://perma.cc/2S8R-8ZZ8].

34. Garrison v. Louisiana, 379 U.S. 64, 68 (1964) (quoting Edward Livingston, A SYSTEM OF PENAL LAW FOR THE STATE OF LOUISIANA 177 (1833)). In advocating for the value of defamation law, Livingston described injury to reputation as the reason for the scourge of duels that the law seemed incapable of suppressing. *Id.* at 69.

35. Milkovich v. Lorain J. Co., 497 U.S. 1, 22 (1990); *see also* Curtis Pub. Co. v. Butts, 388 U.S. 130, 146 (1967) (quoting Rosenblatt v. Baer, 383 U.S. 75, 86 (1966).

36. Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 546 (1903); *see also Rosenblatt*, 383 U.S. at 86 ("Society has a pervasive and strong interest in preventing and redressing attacks upon reputation. But in cases like the present, there is tension between this interest and the values nurtured by the First and Fourteenth Amendments."). Despite this rhetoric, the early common law more often than not sacrificed freedom of thought and public discussion on the altar of protecting reputation, especially if the reputation was that of the sovereign. *See generally* Veeder, *supra*.

37. *See* RESTATEMENT (FIRST) OF TORTS § 558 (AM. L. INST. 1938) (listing the elements of defamation).

lower him in the estimation of the community or to deter third persons from associating or dealing with him."[38]

Of course, the statement must target the plaintiff. What is generally referred to as the "of and concerning" element required that the plaintiff be reasonably identifiable as the one being defamed.[39] This sounds simple enough, but when a statement refers generally to an institution, like the government or the police, it may be hard for an individual to assert it is "of and concerning" him.[40]

As described above, the tort of defamation sets strict standards—a demanding set of elements that the plaintiff has the burden of pleading and proving by a preponderance of the evidence. However, prior to the Supreme Court's decisions in *Sullivan* and its progeny,[41] powerful presumptions made establishing the case much easier for the plaintiff than this statement of the elements suggests. For example, while the tort required falsity as an element, falsity was presumed in many jurisdictions. The defendant could prove truth as a defense, but the plaintiff was relieved of the burden of proving falsity in the prima facie case.[42] The law explained that individuals were presumed to have good reputations. Thus, if a statement about an individual was defamatory, it must be presumptively false.[43] The presumption could be rebutted, but that burden fell on the defendant to prove truth as a defense. Damages were also often presumed, and, at times, this led to staggering verdicts, untethered to the usual requirement of providing reliable, specific

38. *Id.* § 559. The Second Restatement carries forward essentially the same definition. *See* RESTATEMENT (SECOND) OF TORTS § 559 (AM. L. INST. 1977) ("A communication is defamatory if it tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.").

39. *See* Watts-Wagner Co., Inc. v. Gen. Motors Corp., 64 F. Supp. 506, 508 (S.D.N.Y. 1945) (stating that an action for defamation exists only where the defendant has published statement "of and concerning" the plaintiff, therefore holding that "impersonal reproach of an indeterminate class is not actionable"); DeGroat v. Cooper, Civ. No. 2:13-07779, 2014 WL 1922831, at *3–4 (D. N.J. May 14, 2014) (surveying law of four states whose law might apply to the matter, and finding all require that the statement, to give rise to a defamation action, be "of and concerning" the plaintiff).

40. *See generally* New York Times v. Sullivan, 376 U.S. 254, 273–76 (1964); *Rosenblatt*, 383 U.S. at 83; Neiman-Marcus v. Lait, 13 F.R.D. 311, 317 (S.D.N.Y. 1952).

41. *See generally Sullivan*, 376 U.S.; The cases generally referred to as *Sullivan*'s "progeny" are the key United States Supreme Court cases elaborating on the holding: Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985); Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

42. *See, e.g.*, *Hepps*, 475 U.S. at 770 (noting that Pennsylvania followed common law rule that falsity was presumed); *see also* James Maxwell Koffler, *The Pre-*Sullivan *Common Law Web of Protection against Political Defamation Suits*, 47 HOFSTRA L. REV. 153, 170–171 (2018) (describing the shift in defamation law that favored defendants in defamation suits).

43. *See Hepps*, 475 U.S. at 770 ("Statements defaming [the plaintiff] are therefore presumptively false . . . .").

evidence of harm.[44]

2. The Repeater Rule

Another important aspect of the common law of defamation figures into this discussion—the repeater rule. The law holds that "one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it."[45] This rule applies even if the repeater attaches qualifiers or disavows the truth of the statement.[46] So, when a newspaper or a broadcast outlet simply publishes the defamatory words of another, the newspaper or broadcast outlet is liable for the damage to reputation (and typically has the deeper pocket).

Traditionally, booksellers and newspaper vendors were excepted from this rule, deemed mere conduits, and not really re-publishers or repeaters.[47] As technology advanced, this "bookseller/news vendor" rule was applied to telephone and telegraph companies.[48] More recently, Congress statutorily provided similar protection to Internet platforms, shielding them from liability for repeater (and other) liability in the Communications Decency Act (CDA).[49] Section 230 of the CDA (an arguably ironic location)[50] is discussed in more detail below, but in short,

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44. *See Gertz*, 418 U.S. at 349 ("The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred."). *See also* Douglas R. Matthews, *American Defamation Law: From* Sullivan, *through* Greenmoss, *and Beyond*, 48 OHIO ST. L.J. 513, 523–24 (1987) (discussing the standard of proof for damages in a defamation action).

45. RESTATEMENT (SECOND) OF TORTS § 578 (AM. L. INST. 1977); *see also* Pan. Am. Sys., Inc. v. Atl. Ne. Rails & Ports, Inc., 804 F.3d 59, 64 (1st Cir. 2015) ("[O]ne who repeats a defamatory statement may be as liable as original defamer."); *see also* Flowers v. Carville, 310 F.3d 1118, 1128 (9th Cir. 2002) (citing RODNEY A. SMOLLA, LAW OF DEFAMATION § 4:87, at 4:136.3–136.4 (2d ed. 2001)) ("[A] person who repeats a defamatory statement is generally as liable as the one who first utters it."); *see also* PROSSER & KEETON ON THE LAW OF TORTS § 113, at 799 (5th ed. 1984) (commenting that repetition of defamation is a publication itself).

46. *See Flowers*, 310 F.3d at 1128 ("Lability for repetition of a libel may not be avoided by the mere expedient of adding the truthful caveat that one heard the statement from somebody else."); *see also* Cianci v. New Times Pub. Co., 639 F.2d 54, 60–61 (2d Cir. 1980) (citing Hoover v. Peerless Pubs., Inc., 461 F. Supp. 1206, 1209 (E.D. Pa.1978)). However, the disclaimer may help to limit the damages to the extent it affects what the recipient of the utterance believes.

47. *See* RESTATEMENT (SECOND) OF TORTS § 581 (AM. L. INST. 1977) (explaining defamation liability for third parties).

48. *See* Michael I. Meyerson, *Authors, Editors, and Uncommon Carriers: Identifying the "Speaker" within the New Media*, 71 NOTRE DAME L. REV. 79, 88 (1995) ("Even if a telegraph company is aware that a message is false and defamatory, the company will not be held responsible unless it 'knows or has reason to know that the sender is not privileged to publish it.'").

49. *See generally* 47 U.S.C. § 230 (2012).

50. As the name implies, the Communications Decency Act was originally proposed to protect

it carves out Internet providers from liability under the repeater rule.[51]

3. The Remedy

Given the nature of the harm defamatory communications inflict, the question of appropriate remedy can be troublesome. Money damages do not necessarily restore a party's reputation, although they can help compensate for actual losses, such as loss of a job or business. Nonetheless, money damages do constitute the usual remedy and a powerful one at that.[52] In rare cases, injunctions that prohibit the defendant from continuing to publish the defamation have been imposed. However, many question the constitutionality of prohibiting speech, especially since these injunctions by definition constitute prior restraints, which the Supreme Court examines with special skepticism.[53] In addition, a good number of jurisdictions provide for publication of a retraction when a plaintiff prevails or specify that publication of a retraction either prevents the plaintiff from bringing suit at all, or bars certain remedies otherwise available.[54] Other possible remedies include requiring correction or clarification.[55] While requiring retractions probably doesn't violate the First Amendment, going any further, such as

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children from indecent content on the Internet, *see* Savino, *supra* note 13, at 1138, but many of the provisions addressing this purpose were struck down as unconstitutional. *See* Savino, *supra* note 13, at 1133, 1156–58 (discussing the detriments of eliminating the CDA). The irony, of course, is that § 230 shields the party most easily identified and accessible to legal action, so it immunizes much of the very content the CDA sought to address.

51. *See generally infra* notes 177–190 and accompanying text.

52. *See* Wannes Vandenbussche, *Rethinking Non-Pecuniary Remedies for Defamation: The Case for Court-Ordered Apologies*, 9 J. INT'L MEDIA & ENT. L. 109, 111, 125 (2020) (detailing various defamation remedies); *see also* Elad Peled, *Constitutionalizing Mandatory Retraction in Defamation Law*, 30 HASTINGS COMMC'NS & ENT. L.J. 33, 34 (2007) (defining retraction); *see also* Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 SYRACUSE L. REV. 157, 170 (2007) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 348–49 (1964)) (explaining that defamation remedies can be limited); *see, e.g.*, Sindi v. El-Moslimany, 896 F.3d 1, 20–22 (1st Cir. 2018) (affirming damage award of $400,000 against one defendant and $100,000 against second defendant).

53. *See* Chemerinsky, *supra* note 52, at 157–58, 163–68 (2007) (detailing the relationship between injunctions on speech and the First and Fourteenth Amendments); *see, e.g.*, *Sindi*, 896 F.3d at 28–30 (issuing a permanent injunction in defamation case but noting that Supreme Court has never directly addressed the issue).

54. *See* Vandenbussche, *supra* note 52, at 126–27 (discussing retraction as a remedy to defamation); *see also* Peled, *supra* note 52, at 34–35 ("Retraction, it has been argued, is a highly efficient way to settle disputes between the media and the subjects of false defamatory reports."); *see generally* John C. Martin, *The Role of Retraction in Defamation Suits*, 1993 U. CHI. LEGAL F. 293, 293–294 (1993); *see generally* RESTATEMENT (SECOND) OF TORTS, ch. 27, special note (AM. L. INST. 1977).

55. *See* Vandenbussche, *supra* note 52, at 126–27 ("Whereas retraction signifies that the defendant revokes a false and misleading statement, rectifications means an acknowledgement of the untruthfulness of the defamatory material and a correction of the facts by including further information).

requiring publication of a rebuttal or response or arguably even a correction, might run afoul of the Supreme Court's decision in *Miami Herald Publ'g Co. v. Tornillo*.[56] There, the Court struck down a Florida statute requiring newspapers to give political candidates equal space to respond to critics, holding that forcing a newspaper to publish material was an unconstitutional burden on freedom of the press, and constituted an unconstitutional intrusion on the editorial process.[57] The Court did not address retraction statutes, although in his concurrence, Justice Brennan stated that the Court's holding did not implicate anything with respect to the constitutionality of retraction statutes.[58] Complicating matters, corrections or clarifications, and even retractions, because they necessarily refer to or even recite the original defamation, and especially if voluntarily undertaken, may constitute republication, subjecting the publisher to increased liability.[59]

B. The Constitutional Tsunami

"The First Amendment requires that we protect some falsehood in order to protect speech that matters."[60]

The previous Section sets out what the defamation landscape looked like for hundreds of years. Then, in the tumultuous 1960s, everything changed. To call *New York Times v. Sullivan* a landmark case wildly understates its impact. The case, and those that followed, not only changed the law, but constitutionalized it—galvanizing those changes with the joined power of the highest court in the land (the United States Supreme Court) applying the supreme law of the land (the Constitution). When the Constitution applies, it is paper to rock, scissors to paper, and rock to scissors against any other source of authority.[61] So when the Court in *Sullivan*, *Gertz*, *Hepps*, and the string of cases that followed, held that the Constitution required certain things with respect to the elements and the burden of proof in defamation, it transformed the tort.[62]

56. *See generally* 418 U.S. 241, 258 (1974).

57. *Id.* at 256–58.

58. *Id.* at 258–59. The *Tornillo* case was part of a sweeping constitutionalization of defamation law described in more detail in the next section.

59. *See* W. Wat Hopkins, *Defamation, Actual Malice and Online Republication: Lessons Learned from* Eramo v. Rolling Stone et al., 17 APPALACHIAN J.L. 127, 146–47 (2018) (explaining how news media handle corrections and retractions).

60. Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).

61. *See generally* U.S. CONST art. VI, cl. 2.

62. *See* Victoria C. Duke, *Calumnious News Reporting: Defamatory Law Is More Than Sticks and Stones for Civic-Duty Participants*, 93 NEB. L. REV. 690, 706 (2015) ([*Sullivan*] reshaped the

Although most lawyers know the *Sullivan* case, and it has been the subject of countless articles, books, symposia, and presidential tweets, it is more complicated than the caricature often presented. The legal rules that emerged are intricate. Further, the Court's reasoning, the contours and the impacts of its holdings, and the historical context provide essential background necessary to understanding the path forward. So, *Sullivan* and its progeny merit a carful walk-through here.

In *New York Times v. Sullivan*, the Supreme Court reviewed a defamation verdict arising from an advertisement run in the *New York Times* that criticized the Montgomery, Alabama police and the city generally for their handling of civil rights protesters. Sullivan, an elected Montgomery Commissioner who had, among his duties, supervision of the Montgomery police and fire departments, sued based on what were mostly minor inaccuracies in the ad.[63]

As is true for so many landmark cases, the moment in history when *New York Times v. Sullivan* was decided, while not essential to the holding, illuminates what was at stake and enriches our understanding of the case itself. This background also demonstrates vividly the currency of the case in *this* moment, against the background of the politics and social upheavals we are experiencing today. It brings into sharp focus the importance of the case's holdings and establishes that it was never more relevant than it is today, given the fragility of the institutional press,[64] the critical issues up for public debate, and the irrational rage and campaign of threats and intimidation waged against the institutional press by the former president and other public officials.[65] Thus, we turn to a bit of history.

At the time the *Sullivan* case was decided, the civil rights movement

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traditional requirements of defamation law into an enormously multifaceted and demanding set of constraints . . . ."); *see also* Susan Dente Ross & R. Kenton Bird, *The Ad that Changed Libel Law: Judicial Realism and Social Activism in* New York Times Co. v. Sullivan, 9 COMMC'N L. & POL'Y 489, 490 (2004) ([*Sullivan* is] "widely acknowledged as having revolutionized libel law"); *see also* Sheldon W. Halpern, *Of Libel, Language, and Law:* New York Times v. Sullivan *at Twenty Five*, 68 N.C. L. REV. 273, 284–86 (1990) (explaining that *Sullivan* and its progeny "encompass[ed] all of defamation"); *see also* Price v. Viking Penguin, Inc., 881 F.2d 1426, 1430 (8th Cir. 1989) ("As the Bill of Rights became applicable to the states, the first amendment became increasingly viewed as a limit on state defamation law.").

63. New York Times Co. v. Sullivan, 376 U.S. 254, 258–59 (1964).

64. See generally Luke Morgan, The Broken Branch: Capitalism, the Constitution, and the Press, 125 PENN ST. L. REV. 1, 13 (2020); see generally RonNell Andersen Jones & Sonja R. West, The Fragility of the Free American Press, 112 NW. U. L. REV. 567, 576–577 (2017).

65. *See generally* Jones & West, *supra* note 64, at 568–72; *see generally* Peter Rathmell, *"The Enemy of the People": Suppressive Government Speech and Prior Restraint in the Era of Social Media*, 94 TUL. L. REV. 129, 130 (2019); *see generally* Stephen Behnke & Corey Artim, *Stop the Presses: Donald Trump's Attack on the Media*, 44 U. DAYTON L. REV. 443, 447 (2019); *see generally* Morgan, *supra* note 64, at 4.

had spread throughout the South, challenging de facto and de jure segregation, and the sustained efforts to block Black voting rights.[66] Black activists were demanding rights guaranteed by the both the Constitution and federal legislation—rights that had been systematically denied them in the century since emancipation. White segregationists were engaged in all-out efforts to resist desegregation and prevent Black citizens from voting—efforts that often took the form of violence.[67] While some journalists in the South covered some of the worst behavior and reported on the activities of civil rights movement, with a few even advocating for the cause of equality, these local newspapers were more vulnerable to punishing pressure, both financial and often personal, from powerful members of the community.[68] Thus, it was national press—frequently headquartered in Northern metropolitan cities—that took the lead in telling the story by publishing reports of the worst of what was happening.[69] They dealt from a strong hand, or so it seemed.

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66. To be clear, the North was not blameless when it came to racism and de facto segregation. The North engaged in less explicit, less government sanctioned but equally institutionalized and effective racial exclusion and discrimination with equally devastating (some would say even more devastating) effect. *See generally* Thomas J. Sugrue, Opinion, *It's Not Dixie's Fault*, WASH. POST (July 17, 2015), https://www.washingtonpost.com/opinions/its-not-dixies-fault/2015/07/17/7bf77a2e-2bd6-11e5-bd33 395c05608059_story.html [https://perma.cc/WW6Q-7PY7]; *see also* James Cobb, *What the State of the American South a Half-Century Ago Revealed about the Whole Country's Future*, TIME (July 26, 2018), https://time.com/5349793/south-special-issues-history/ [https://perma.cc/AZD7-4GDF] (noting that racial intolerance was not exclusive to the South). Indeed, this no doubt contributed to the hostility of Southern leaders to the Northern press's attention to Southern matters and the hypocrisy it may have evidenced.

67. *See, e.g.*, Christopher W. Schmidt, New York Times v. Sullivan *and the Legal Attack on the Civil Rights Movement*, 66 ALA. L. REV. 293 (2014) (discussing the "legal counteroffensive" by those who advocated for racial segregation); Melvin I. Urofsky, New York Times Co. v. Sullivan *as a Civil Rights Case*, 19 COMMC'N L. & POL'Y 157, 158 (2014) (explaining how the civil rights movement created the backdrop that led to the *Sullivan* case); Kermit L. Hall, *"Lies, Lies, Lies": The Origins of* New York Times Co. v. Sullivan, 9 COMMC'N L. & POL'Y 391, 399-404 (2004) (describing Lester Bruce Sullivan political career leading up to the *Sullivan* case).

68. *See* Ross & Bird, *supra* note 62, at 500 (describing print media in the South in the mid-1950s); *see generally* Morgan, *supra* note 64, at 1; *see also* Penny Muse Abernathy, *Why Local News Matters, and What We Can Do to Save It*, 91-DEC N.Y. ST. B.J. 8 (Dec. 2019) (discussing the importance of newspapers to a community). Research shows that the decline of local news coverage contributes to polarization within communities. *See generally* Karl Bode, *The Death of Local News Is Making Us Dumber and More Divided*, VICE (Feb. 21, 2019), https://www.vice.com/en/article/panqb8/the-death-of-local-news-is-making-us-dumber-and-more-divided [https://perma.cc/7PSZ-GFNZ] (citing Gregory J. Martin & Joshua McCrain, *Local News and National Politics*, 113 AM. POL. SCI. REV. 372 (2019)); *see generally* Joshua P. Darr, Matthew P. Hitt, & Johanna L. Dunaway, *Home Style Opinion: How Local Newspapers Can Slow Polarization*, CAMBRIDGE ELEMENTS POL. & COMMC'N. A full discussion of threat to local news outlets is beyond the scope of this Article but does underscore why the institutional press deserves protection; *see also* Macpherson, *supra* note 21 (citing studies that show people trust local news but do not trust national news).

69. *See generally* Ross & Bird, *supra* note 62, at 499-500.

Newspapers were experiencing significant growth in readership and advertising revenue, and ownership began to consolidate in nationwide chains. This provided the resources to go after stories—even difficult or controversial ones. The *Times* became what observers called "the most influential paper not only in the country but in the world."[70]

The *Times*, among other publishers, devoted significant resources to covering the civil rights movement in the South, drawing the ire of segregationists who viewed the press, especially the national (often Northern) press, as stirring up trouble and insinuating itself into matters that were none of its business.[71] They counted the national press among the hated "outside agitators"[72] unnecessarily stirring the pot. The press was criticized as biased and was accused of distorted reporting that exploited the circumstances unfairly for financial gain.[73]

This ire spawned a strategy of filing libel suits against the national news outlets, seeking staggering sums in damages.[74] "Plaintiffs sought millions of dollars in damages" (at a time when a million dollars represented a simply breathtaking amount of money)[75] "from CBS News, the *Saturday Evening Post*, and *Ladies' Home Journal*, but the primary target was the 'national paper of record,' the *New York Times*."[76] One Alabama editor, infuriated by the ad that spawned the *Sullivan* case,

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70. *Id.* at 497 (internal quotations omitted); *see also* Paul Horwitz, *Institutional Actors in* New York Times Co. v. Sullivan, 48 GA. L. REV. 809, 814 (2014) (describing the role of the press in *Sullivan*).

71. *See* Jeffery Omar Usman, *Finding the Lost Involuntary Public Figure,* 2014 UTAH L. REV. 951, 955 (detailing the relationship between the *Times* and the Alabama political establishment); *see generally* Ross & Bird, *supra* note 62 at 496–97.

72. During the civil rights movement, segregationists often pointed to what they called "outside agitators"—activists from outside the South, primarily the Northeast and primarily metropolitan areas—who insinuated themselves inappropriately into the affairs of the South. David A. Logan, *Rescuing Our Democracy by Rethinking* New York Times Co. v. Sullivan, 81 OHIO STATE L.J. 759, 763–64 (2020) (noting that the media's coverage of white violence led the segregationists to utilize legal tools to defend race-based laws); *see, e.g.*, Usman, *supra* note 71, at 955 (describing the tension).

73. *See* John B. Lewis & Bruce L. Ottley, New York Times v. Sullivan *at 50: Despite Criticism, the Actual Malice Standard Still Provides "Breathing Space" for Communications in the Public Interest*, 64 DEPAUL L. REV. 1, 5–6 (2014) (establishing that the civil rights movement and the media had a tense relationship).

74. *See generally* Logan, *supra* note 72, at 764.

75. Using an inflation calculator as an example, the sum of $1 million in 1964 would equal more than $9,574,451 in 2022. CPI Inflation Calculator, https://www.in2013dollars.com/us/inflation/1964?amount=1000000 [https://perma.cc/P444-W93F].

76. Logan, *supra* note 72, at 764 (citing ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE & THE FIRST AMENDMENT, 305–06 (1991)). The *Sullivan* case was one of five lodged against the *Times* for the ad that was the subject of the *Sullivan* suit, and was one of a large number of such suits against media outlets across the South. *See* Horwitz, *supra* note 70, at 820 (discussing the judgment award).

wrote an editorial entitled "Lies, Lies, Lies" in which he "invited everyone in Alabama to sue the *New York Times*."[77] Celebrating the state court verdict in the *Sullivan* case, another Alabama editorial explicitly reveled in the fact that the huge verdict would cause the "Northern press" to rethink publishing "anything detrimental to the South . . . ."[78] Yet another, under a headline that exclaimed "State Finds Formidable Legal Club to Swing at Out-of-State Press," celebrated that local officials now had a "legal bludgeon to swing at out-of-state newspapers whose reporters cover racial incidents in Alabama."[79] No effort was made to disguise the strategy and, most telling in at least two of the quotes, the writer dropped the façade of decrying inaccuracies, stating flat out that the goal was to stop coverage of what was going on in the South.

The huge damage requests were made possible by the fact that in many states, including Alabama, damages were presumed in defamation cases, freeing the plaintiff of the obligation to prove the actual dollar amount of his injury, untethering potential verdicts.[80] The stakes, indeed, were high.[81]

The Alabama state court judge hearing the *Sullivan* case found that the particular false statements were defamatory per se, instructing the jurors that, if they found the *Times* had published the advertisement, and that the statements were of and concerning Sullivan "from the bare fact of publication itself," falsity and damages could be presumed, an instruction consistent with the general understanding of the common law at the time.[82] The jury returned a verdict for the plaintiff of $500,000, which was affirmed by the Alabama Supreme Court.[83] The United States Supreme Court granted certiorari,[84] reversed the decision below, and proceeded to dismantle much of traditional defamation law in the opinion that followed.[85]

The Court shot the opening salvo with a constitutional blunderbuss: "[T]he rule of law applied by the Alabama courts is constitutionally

77. Usman, *supra* note 71, at 955 (internal quotations omitted).

78. Schmidt, *supra* note 67, at 306 (internal quotations omitted).

79. *Id.*

80. *See generally infra* note 105 and accompanying text.

81. *See* Zachary N. Zaharoff, *Defaming the Prince: Why the Media is Entitled to Immunity from a Presidential Defamation Suit*, 27 KAN. J.L. & PUB. POL'Y 48, 51 (2017) ("If the Alabama city officials vindicated their claims in court, they would have a powerful tool for suppressing negative media portrayals of the South and police brutality.").

82. New York Times Co. v. Sullivan, 376 U.S. 254, 262 (1964).

83. New York Times Co. v. Sullivan, 273 Ala. 656, 664, 687 (1962). The judgment was by far the largest libel award in Alabama at the time. Logan, *supra* note 72, at 764 (citing ANTHONY LEWIS, MAKE NO LAW: THE *SULLIVAN* CASE & THE FIRST AMENDMENT, 305–06 (1991)).

84. New York Times Co. v. L. B. Sullivan., 371 U.S. 946 (1963).

85. *Sullivan*, 376 U.S. at 305.

deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments . . . ."[86]

First, and critically important, the Court dispatched the argument that whatever defamation law does or doesn't do has nothing to do with the First Amendment. Of course it does, the Court retorted. The argument alleged that the First Amendment provision—"Congress shall make no law . . . abridging the freedom of speech, or of the press"[87]—refers to laws prohibiting or criminally punishing speech. The Court made clear that the defamation cause of action amounted to the government acting on speech.[88] The Constitution's prohibition referred not only to laws criminalizing speech, but also included civil causes of action created by state law that imposed sanctions (civil damages) enforced by recourse to the civil courts:

> What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute.[89]

This theme that fear of legal consequences would inhibit the free press from doing its job would echo throughout the opinion, providing the rationale for its most controversial holdings. Indeed, the Court set the stage in no uncertain terms, saying: "we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[90] From this foundation, the Court worked through the elements of defamation, focusing on the constitutional infirmities in how the Alabama court had applied them.

Early on, the Court rejected the argument that because the communication in question was a paid advertisement, it constituted commercial speech, which at the time was thought to be unprotected by the First Amendment.[91] The Court held that the fact that it was an

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86. *Id.* at 264.
87. U.S. Const. amend. I.
88. *See id.* at 265, 277 (with respect to whether the First Amendment even applied to states, the Court explained that while the reference is to Congress, the Fourteenth Amendment applied the First Amendment to the states).
89. *Id.* at 265, 277.
90. *Id.* at 270.
91. *See Sullivan*, 376 U.S. at 265–66 ("Any other conclusion would discourage newspapers from

advertisement and paid for did not matter.[92] Rather, the content of the advertisement was what mattered, and that content qualified unquestionably as First Amendment speech.[93]

The Court also dispatched the notion, argued by the defendants and suggested in dicta in some other cases, that the First Amendment is simply never implicated in a libel case.[94] "[L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."[95] The Court then wove the constitutional implications into the very statement of the question for review: whether the law of defamation, as interpreted and applied by the Alabama court "to an action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments."[96] This laid the groundwork for its later conclusions about falsity where the Court struck its most controversial blow.

Building on its determination that the advertisement was in fact First Amendment speech, the Court went further and located it on the most hallowed First Amendment ground, characterizing it as *core* First Amendment speech: "an expression of grievance and protest on one of the major public issues of our time," and specifically one involving criticism of the government.[97] The Court drew on precedent after precedent to build the foundation for its holdings, citing cases that enshrined the "unfettered interchange of ideas," "vigorous advocacy," the privilege "to speak one's mind although not always with perfect good taste" on matters of public concern—especially when they relate to the

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carrying 'editorial advertisements' of this type, and so might shut off an important outlet for the promulgation of information and ideas . . . ."); *see also* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (finding that the Constitution imposes no restraint on government regulation of purely commercial advertising). The Court in later cases held that commercial speech in fact is protected by the First Amendment, although less strictly. *See* Va. St. Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) (listing which types of commercial speech can be regulated as examples); *see also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 563 (1980) ("The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.").

92. *Sullivan*, 376 U.S. at 265–66 ("That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold.").

93. *Id.* at 266 ("It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern."). For a fascinating history of advocacy advertising and its impact, *see* Ross & Bird, *supra* note 62, at 492–95.

94. *Sullivan*, 376 U.S. at 269.

95. *Id.*

96. *Id.* at 268.

97. *Id.* at 271.

government—as essential to the security of the Republic.[98] The Court's rationale drew on the Meiklejohnian marketplace-of-ideas theory of free speech.[99] The Court put the finish on this foundation with Judge Learned Hand's familiar rhetoric: "The First Amendment, said Judge Learned Hand, 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.'"[100]

The Court then joined the issue, asking whether the advertisement must be found to forfeit the protection of the First Amendment because of "the falsity of some of its factual statements and by its alleged defamation of respondent."[101] The short answer: an emphatic NO.

Reasoning that the "erroneous statement is inevitable in free debate," and that these false statements must be protected so free debate has the "'breathing space'" needed to survive[102] and to avoid creating a timorous press that would engage in self-censorship, the Court held:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[103]

This "reckless disregard for the truth or falsity" requirement sets the bar high, especially since the Court held that reckless disregard must be proven with "convincing clarity."[104] The Court applied its new rule to the facts of the case and concluded that the evidence presented simply could not support such a finding of reckless disregard. The Court found no reckless disregard even though the *Times* might have discovered the

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98. *Id.* at 269–70.

99. *See Sullivan*, 376 U.S. at 279–80. *See also* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE, 73–74 (1965) (quoting Abrams v. United States, 250 U. S. 616, 630 (Holmes, J., dissenting)) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.")); Tim Wu, *Disinformation in the Marketplace of Ideas*, 51 SETON HALL L. REV. 169, 169 (2020) ("[T]hat one clause from Oliver Wendell Holmes's *Abrams* dissent breathed life into a metaphor . . . whose lasting power is undeniable. . . . Yes, it may be incomplete, inaccurate, and possibly cribbed from John Stuart Mill, but the metaphor matches something we all see. Ideas and ideological programs are out there looking for adherents or 'buyers.'"). For discussions of the marketplace of ideas theories, see *supra* note 14 and accompanying text.

100. *Id.*

101. *Id.* at 271.

102. *Id.* at 271–72 (citing N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963)).

103. *Id.* at 279–80 ("[D]ebate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").

104. *Sullivan*, 376 U.S. at 285–86.

inaccuracies if it had checked its own morgue; and even though the *Times* own secretary confessed that he entertained some doubts about the accuracy of some of the allegations (again, minor discrepancies); even though the *Times* explained that ultimately it depended on the reputation of those submitting the advertisement; and even though the *Times* refused to retract the statements at Sullivan's request, but did so later at the Governor's request.[105]

While the Court called the standard "actual malice" (muddying the waters considerably), it later held that mere ill will, how we traditionally think of malice, was not enough to constitute reckless disregard—and that what is required is either actual subjective awareness of falsity, that the defendant knew what he was saying was false—or that it was published with a "high degree of awareness of . . . probable falsity."[106] The Court seemed to have set up what amounted to an insurmountable threshold—at least for a suit against institutional journalism as we then understood it. After *Sullivan*, many assumed that once a plaintiff is labeled a public figure, the plaintiff's access to a defamation suit simply evaporated.[107] As discussed below, this is not necessarily so.[108]

Despite this sweeping holding, the Court was not quite done with its dismantling of the Alabama court's decision. It turned to yet another constitutional infirmity and foreshadowed what would eventually transpire—that virtually every element of defamation would be subject to constitutional scrutiny.[109]

Regarding the "of and concerning element" in *Sullivan*, the Court found the evidence relied upon by the Alabama court "constitutionally defective."[110] Sullivan was not referred to by name or even position in

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105. *Id.*

106. St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (citing Garrison v. Louisiana, 379 U.S. 64, 74 (1964)) ("[T]he necessity for a showing that a false publication was made with a 'high degree of awareness of probable falsity.'"); *see also Garrison*, 379 U.S. at 78–79 (stating that knowledge of falsity is required); *see also* Curtis Publishing v. Butts, 388 U.S. 130, 153 (1967) ("[The *Sullivan*] officials [would have been] permitted to recover in libel only when they could prove that the publication involved was deliberately falsified, or published recklessly despite the publisher's awareness of probable falsity."). The Court went on to hold that on the record, they could not meet this burden. *Id.*

107. *See generally* Logan, *supra* note 72, at 775, 777; *see generally* Editorial Board, Opinion, *Reconsidering* Times v. Sullivan, WALL ST. J. (Mar. 22, 2021, 7:03 PM), https://www.wsj.com/articles/reconsidering-times-v-sullivan-11616454219 [https://perma.cc/7PX2-V724]; *see also* Lewis & Ottley, *supra* note 73, at 22–27 (explaining the malice test and standard).

108. *See infra* notes 314–318 and accompanying text.

109. *See* Logan, *supra* note 72, at 761 ("Most importantly, *New York Times* defanged defamation law, recognizing that our democracy needs to protect even speech that is false.); *see also* Lewis & Ottley, *supra* note 73, at 1 (stating that *Sullivan* had a profound impact on defamation law).

110. *Sullivan*, 376 U.S. at 288.

the ad. To establish "of and concerning," Sullivan had relied on the testimony of witnesses who stated that they understood the allegations to refer to Sullivan by virtue of his official position—"the bare fact that he was overall in charge of the [p]olice" and that the ad criticized the police.[111] But the Court found that these oblique references to general government actions "could not reasonably be read as accusing respondent of personal involvement in the acts in question."[112] And more important, the Court found that to allow such a leap, specifically in the context of matters involving government, would create "disquieting implications for criticism of government[] . . . ."[113] Again, the Court found that this was among the most essential speech the First Amendment protects.[114] In short, the Court held that where the individual is not named, and the speech amounts only to impersonal attacks on general government actions, the Constitution prohibits inferring that the comments were of and concerning any individual for the purpose of imposing liability for defamation.

New York Times v. Sullivan wrought a flurry of later cases extending and interpreting its meaning and reach, creating a cottage industry of law review articles examining, extolling, and excoriating its holding, its reasoning, and its impact.[115]

In one of the first cases that followed, the Court extended the requirement of reckless disregard to public figures, not just public officials.[116] In *Curtis Publishing v. Butts*, two plaintiffs were deemed public figures: Wally Butts, the athletic director at the University of Georgia, who was alleged to have given inside play-book information to Georgia's football rival, the University of Alabama, resulting in a staggering defeat for Georgia;[117] and Edwin Walker, a retired army general, who held no formal position but was an outspoken critic of

111. *Id.* at 289.

112. *Id.* at 288–89.

113. *Id.* at 291.

114. *Id.* at 269, 292.

115. *See, e.g.*, Roy S. Gutterman, *Actually . . . A Renewed Stand for the First Amendment Actual Malice Defense*, 68 SYRACUSE L. REV. 579, 580 (2018); *see generally* Ronald A. Cass, *Weighing Constitutional Anchors:* New York Times Co. v. Sullivan *and the Misdirection of First Amendment Doctrine*, 12 FIRST AMEND. L. REV. 399 (2014); *see also* Paul Horwitz, *Introduction: Still Learning from* New York Times v. Sullivan, 66 ALA. L. REV. 221, 227–28 (2014) (commenting on how the structure of the First Amendment impacts the press); *see also* Lewis & Ottley, *supra* note 73, at 2 (explaining the significance of *Sullivan*); *see generally* Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782 (1986).

116. Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967).

117. *Id.* at 136–37. Although the University of Georgia was a state university, Butts was not a university employee. The position of Athletic Director was funded by a private entity. Thus, Butts could not be deemed a public official, although he would have been so labeled during his legendary tenure as University of Georgia football coach. *See id.*

segregation and was alleged to have been involved in the riots that surrounded federal action to enforce a court decree ordering the admission of James Meredith, an African American, to the University of Mississippi.[118] While conceding that neither Butts nor Walker were public officials, the Court found that the public's interest in the matters involved, i.e., education, desegregation, and collegiate athletics, "justifie[d] constitutional protection of discussion of persons involved in it, equivalent to the protection afforded discussion of public officials."[119] The public figure designation includes those who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large."[120]

In the next major case, *Gertz v. Robert Welch*,[121] the Court appeared to be backtracking a bit in its march to reengineer defamation. But, as Tom Waits cautions, "the large print giveth and the small print taketh away."[122] In the large print of the case, the Court placed a hard stop on the expansion of who was covered by the reckless disregard standard, holding that a private individual, even if involved in a matter of public interest, was not a public figure and so was not required to prove reckless disregard to prevail in a defamation action.[123] The Court explained that drawing this line sets an equitable boundary designed to balance the legitimate state interest in avoiding self-censorship by press with "the legitimate state interest in compensating private individuals for injury to reputation . . . ."[124]

Elmer Gertz was a well-known local lawyer who represented the family of a man killed by a police officer in the family's civil suit against the police.[125] An article that appeared in a magazine published by the right-wing John Birch Society[126] accused Gertz of having a lengthy

118. *Id.* at 144. Walker had taken a high-profile public position in opposition to segregation, frequently speaking out on the radio. *Id. See also* Usman, *supra* note 71, at 966 (detailing Walker's background).

119. *Curtis*, 388 U.S. at 146.

120. *Id.* at 164 (Warren, C.J., concurring).

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

122. Tom Waits, *Step Right Up*, http://www.tomwaits.com/songs/song/322/Step_Right_Up/ [https://perma.cc/EV6Q-UVSD].

123. *Gertz*, 418 U.S. at 343–46 ("The extension of the *New York Times* test [to private figures involved in public matters] as proposed by the *Rosenbloom* plurality would abridge this legitimate state interest to a degree that we find unacceptable.").

124. *Id.* at 348. While a private figure plaintiff was relieved of the reckless disregard standard generally, *Gertz* held that even a private-figure plaintiff was required to show actual malice in order to recover presumed or punitive damages. *Id.* at 348–50.

125. *Id.* at 325–26 (detailing the facts of the case).

126. *See generally*, David A. Walsh, *How the Right Wing Convinces Itself that Liberals Are Evil*, WASH. MONTHLY (July 15, 2018), https://washingtonmonthly.com/2018/07/15/how-the-right-wing-convinces-itself-that-liberals-are-evil/ [https://perma.cc/KR4L-DCZY].

criminal record, of being involved with Communist organizations, and being part of a conspiracy to discredit law enforcement.[127] These allegations were false.[128] Gertz sued for defamation and the defendant moved for dismissal of the suit, arguing among other things that Gertz was a public figure and could not meet the *Sullivan* standard.[129]

Gertz had taken no part in the criminal prosecution of the police officer involved (who was convicted of second degree murder in the criminal trial), nor did he speak out to the media about this matter.[130] The Court found that Gertz was not a public figure.[131] In distinguishing between public and private figures, the Court noted that the first remedy for defamation is self-help.[132] Public officials and public figures have greater access to the media to counter defamation—to invoke self-help and refute the lie.[133] Related, applying what could be seen as an assumption of the risk rationale, the Court noted that unlike a private individual who might be drawn into a matter unwillingly, public officials and true public figures have voluntarily thrust themselves into the vortex of public debate and attention.[134] Private individuals at once are more vulnerable, have less access to recourse, and are "more deserving of recovery."[135]

The Court here explicitly applied language it had used to justify the extension to public figures in *Butts* in order to help draw the lines differentiating public figures from private figures.[136] This line stopped short of a private person involved in a matter of public interest, such as Elmer Gertz, because he had not "thrust himself into the vortex" of the controversy, and because he had no easy access to the media to correct the lie.[137] So, with *Gertz*, *Sullivan*'s forward motion stopped—right?

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127. *Gertz*, 418 U.S. at 325–26.
128. *Id.* at 326.
129. *Id.* at 327.
130. *Id.* at 325, 352.
131. *Id.* at 352.
132. *Gertz*, 418 U.S. at 344 (noting that self-help includes finding opportunities to contradict the lie).
133. *Id.* at 363.
134. *Id.* at 345–46.
135. *Id.* at 345.
136. *Id.* at 323; *see also* Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967) (explaining that while Butts was a public figure because of his position, Walker's prominent activities in speaking out on important political and social issues, amounted to "purposeful activity" through which he thrust himself into the vortex of an important public controversy, thus, both had sufficient access to media to counter falsehoods).
137. *Gertz*, 418 U.S. at 352. The Court sought to establish a more meaningful distinction between a public and private figure by "looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation," explaining that "[a]bsent clear evidence

Well, not exactly. Though Gertz was not a public figure, and the Court stood up to vindicate the important interest in protecting a cause of action for injury to reputation, the Court also quietly held that the Constitution did apply to the basic elements of defamation as well as the standards of proof required in defamation cases.

The Court in *Gertz* once again modified traditional defamation law by holding that, while private figures need not prove that the defendant acted with reckless disregard for the truth, they must prove that the defendant acted with at least negligence.[138] Further, the Court held that the traditional approach allowing damages to be presumed—that is, imposed without a showing of evidence of actual loss—also fell short of constitutional requirements.[139] At least where the private figure is involved in a matter of public concern, plaintiffs must show actual injury, which the Court indicated encompassed more than merely out of pocket loss and would include "customary types of actual harm" such as injury to reputation, personal humiliation, and mental anguish.[140] So, while the Court in *Gertz* held the line on who was subject to the reckless disregard standard, it also made clear that the Constitution touched essentially the whole of defamation law.

Further reinforcing both the importance and the impact of the *Sullivan* standard, beginning with *Bose Corp. v. Consumers Union of United States*,[141] and reaffirmed in by the Court in *Harte-Hanks*,[142] the Court held that the question whether the evidence was sufficient to establish reckless disregard was a question of law, and that the Constitution required judges to make an independent determination of whether the facts were sufficient to establish reckless disregard with convincing clarity.[143] Thus, when juries render verdicts in favor of the public figure plaintiffs, the judges must review the facts and the jury's conclusions and

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of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life." *Id.*

138. *Id.* at 350.

139. *Id.*

140. *Id. See also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. 472 U.S. 749, 761 (1985) (holding, in a fractured plurality opinion, that where the communication involved a private figure plaintiff involved in a matter of purely private concern, the Constitution did not prohibit a state rule that permitted presumed damages).

141. 466 U.S. 485, 514 (1984).

142. *See, e.g.,* Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 685–87 (1989) (affirming the standard).

143. *Bose*, 466 U.S. at 514; *see also Harte-Hanks*, 491 U.S. at 685 (finding that the question of sufficient evidence is a matter of law). Recall that the Court in *Sullivan* did just that, finding that the Time's missteps did not amount to reckless disregard. New York Times Co. v. Sullivan, 376 U.S. 254, 288 (1964).

decide for themselves whether the facts established reckless disregard.[144]

Finally, in *Philadelphia Newspapers, Inc. v. Hepps*, the Court addressed the issue of falsity.[145] *Sullivan* and the cases that followed clarified the reckless disregard standard and focused on fault. Apparently overlooked was how that fault requirement interacted with the falsity element. While the tort of defamation imposes liability for false and defamatory statements injuring an individual, the common law in many jurisdictions did not require the plaintiff to bear the burden of proving falsity. An individual's reputation was presumed to be sterling, and so falsity was presumed from the very defamatory meaning of the communication. The defendant could defend by proving truth, but falsity was initially presumed.[146] *Hepps* jettisoned that common law presumption and held that all plaintiffs bore the burden of proving falsity as a constitutionally required element of the cause of action, and that public officials and public figures must do so by clear and convincing evidence.[147]

The precise contours of "public figure" and "matter of public interest" proved difficult for courts to trace,[148] but are critically important because they can powerfully affect the decision to publish or not.[149] The Supreme Court did make it clear that more than top-level government officials were considered public officials, and more than government activities were considered matters of public interest. For example, courts applying the standard have extended the category to include lower-level public employees, including police officers and teachers.[150]

But the mere fact that the public might be interested in information

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144. *See Bose*, 466 U.S. at 514 (noting that judges have the duty to decide the threshold of actual malice); *see also Harte-Hanks*, 491 U.S. at 686 (citing *Bose*, 466 U.S. at 511) ("'[J]udges, as expositors of the Constitution,' have a duty to 'independently decide whether the evidence in the record is sufficient to cross the constitutional threshold . . . .'").

145. 475 U.S. 767 (1986).

146. *See id.* at 770 (explaining that Pennsylvania followed the common law's presumption of falsity, imposing on the defendant the burden of proving truth as an absolute defense).

147. *Id.* at 775–77; *see, e.g.*, Herbert v. Lando, 441 U.S. 153, 172 (1979).

148. *See generally* Erwin Chemerinsky, *Keynote Address: Fake News, Weaponized Defamation and the First Amendment*, 47 SW. L. REV. 291, 293–94 (2018) ("The Court has not defined with any precision who constitutes a public figure."); *see also* Usman, *supra* note 71, at 975, 982–83 (noting that even the question of who a "public official" is has been unclear). In *Hutchinson v. Proxmire*, in dicta, buried in a footnote, the Court stated that the public official category "cannot be thought to include all public employees . . . ." 443 U.S. 111, 119, n. 8 (1979); *see also* Usman, *supra* note 71, at 977 (stating that even the lower courts have been divided over the issue).

149. *See* Lorain J. Co. v. Milkovich, 474 U.S. 953, 954 (1985) (Brennan, J., dissenting) (noting that these decisions can have a powerful impact on what the press decides to publish).

150. *See* Usman, *supra* note 71, at 977 ("[P]ublic official now embraces virtually all persons affiliated with the government, such as most ordinary civil servants, including public school teachers and policemen.") (internal quotations omitted).

about an individual was not enough to make that individual a public figure.[151] So, for example, Mary Alice and Russel Firestone, Palm Beach socialites and members of the well-known, wealthy industrialist Firestone family, were held not to be public figures in the context of their high-profile divorce, a proceeding which contained scintillating allegations of misbehavior on both sides.[152] The Court conceded that the details of the Firestones' marriage and divorce, including the trial judge's assessment of the couple's "lack of domestication," might be interesting, and even a "cause célèbre,"[153] but just because the public is interested in a particular story does not make it a matter of public interest that warrants the protection of the *Sullivan* standard.[154] Again, the Court emphasized that the focus should be on the action of the plaintiff—whether she voluntarily thrust herself into the limelight.[155] Here, the Court observed that Mrs. Firestone did not assume a prominent role (other than perhaps in Palm Beach society), and even more compelling, she did not voluntarily make her marriage public, but rather was "compelled to go to court by the State in order to obtain legal release from the bonds of matrimony."[156]

Although not a defamation case, *United States v. Alvarez* bears consideration here because of its focus on false speech.[157] In *Alvarez*, the Court for the first time explicitly said that sometimes false speech itself "fall[s] within the ambit of the First Amendment," at least if it does no real harm and arises in the context of content-based criminal prosecution.[158] The case involved criminal prosecution under the Stolen Valor Act that made it a crime to falsely represent oneself as having received military honors.[159] In a fractured decision, the Court struck down the Act, but at least six members of the Court enthusiastically embraced the market place of ideas rationale to justify protecting falsity in limited circumstances.[160]

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151. *See* Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976) (noting that a "public controversy" is not equal to controversies in which the public has an interest).

152. *Id.* at 450.

153. *Id.* at 454, 458.

154. *See id.* at 454–55 (finding that the petitioner was not a public figure).

155. *Id.* at 454.

156. *Time, Inc*, 424 U.S. at 454

157. 567 U.S 709 (2012).

158. Cass R. Sunstein, *Falsehoods and the First Amendment*, 33 HARV. J.L. & TECH. 387, 391 (2020) (discussing U.S. v. Alvarez, 567 U.S. 709 (2012)).

159. 18 U.S.C.A. § 704 (West 2019).

160. *See* Sunstein, *supra* note 158, at 392 ("[S]ix members of the Court expressed an enthusiastic commitment to the 'marketplace of ideas.'").

III. TECHNOLOGY

"It's the end of the world as we know it."[161]

Technology changes everything. As one commentator put it, this "rapid development . . . aroused . . . a keen sense of the danger of this new method of diffusion of ideas."[162] Was it the release of the Internet for public use, followed by the creation and growth of big tech and relatively universal availability of technology—first personal computers, then iPads and smart phones—that at lightning speed can access reams of information and with a key stroke or finger touch unleash that information around the world? Was this the development that aroused the keen sense of danger referred to in the quote? No. Fill in the ellipsis and we see that the quote refers to the development of the printing press.[163] Each technological development, especially in the realm of communication, has spawned cries that the law as we know it cannot possibly manage the impact and implications that new technology will bring.[164] And, indeed, technology does challenge existing legal rules and structures. Today's systems allow anyone to post anything and transmit it globally in virtually no time, at virtually no cost, and with virtually no gatekeepers.[165] Traditional limitations—column inches in a print

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161. R.E.M., *It's the End of the World as We Know It (And I Feel Fine)*, https://genius.com/Rem-its-the-end-of-the-world-as-we-know-it-and-i-feel-fine-lyrics [https://perma.cc/USZ3-PDWJ].

162. Veeder, *supra* note 36, at 561.

163. *See id.* ("Thus stood the law when the rapid development of the art of printing aroused the absolute monarchy to a keen sense of the danger this new method of diffusion of ideas [posed] . . . [t]he invention of printing, however, gave a new impulse to composition.").

164. *See, e.g.*, Gregoire v. G. P. Putnam's Sons, 81 N.E.2d 45, 47 (N.Y. 1948) (discussing "radical changes" resulting from technological development in the context of the single publication rule's eventual evolution); *see also* Joseph Kutten, *Radio Defamation--Libel or Slander*, 23 WASH. U. L. Q. 262, 263 (1938) ("Radio communication today furnishes a new instrument for the ancient art of defamation. It is a powerful weapon for 'character destruction.' While the legal theories underlying rights and liabilities are well defined, their application to this novel situation is not clear-cut."); *see also* Andrea Slane, *Tales, Techs, and Territories: Private International Law, Globalization, and the Legal Construction of Borderlessness on the Internet*, 71 LAW & CONTEMP. PROBS. 129, 133 (2008) ("Cyberspace is thereby understood as . . . an exciting possibility for a new frontier fundamentally outside the reach of existing laws and regulations."); *see also* David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1367 (1996) (describing how cyber communications create a "new realm of human activity" and undermine the legitimacy of laws based on borders by creating new boundaries and developing its own law and legal institutions).

165. DERIK WILDING, PETER FRAY, SACHA MOLITORISZ, & ELAINE MCKEWON, THE IMPACT OF DIGITAL PLATFORMS ON NEWS AND JOURNALISTIC CONTENT 12 (2018), (explaining consumers as content producers); *see also* Michal Lavi, *Publish, Share, Re-Tweet, and Repeat*, 54 U. MICH. J.L. REFORM 441, 443 (2021) ("Within seconds, a message or a post can travel around the world and be viewed by thousands of users."). *But see id.* at 486–87 (arguing that the intermediaries, the platforms themselves, serve as a form of gatekeeper by the way algorithms and other technology control the flow of information and affect its dissemination).

publication, the cost of self-publishing, layers of editors, and related prepublication best-practices policies that traditionally were adhered to—vanished in cyberspace, and frictionless, instantaneous publication became possible.[166]

The Internet and all that followed promised to democratize access to information and to the means of disseminating information—a utopian Wiki universe[167] that would deliver on the promise that greater truth will come from many voices in a free, robust, open, marketplace of information.[168] The optimism that launched the Wiki revolution may have miscalculated who would be populating that marketplace of information. Advocates assumed that everybody is "more or less [] a scholar in his/her specific field" and could develop or contribute to an article on that field, and so contribute to building the greatest open access compilation of information in history.[169] Reality has not played out quite that way.

One commentator noted, "[s]ometimes, a trip down the information superhighway can be just as infuriating as a drive through downtown during rush hour."[170] Which, he pointed out, "is not to say . . . that the Internet has completely degenerated into a wasteland devoid of useful content."[171] To be sure, it is a vibrant resource for commerce, a "vast pool" for research, and a place that provides a fertile platform for

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166. *See* WILDING, FRAY, MOLITORISZ, & MCKEWON, *supra* note 165, at 11, 13, 15 (describing how technology has fundamentally changed the consumption, distribution, and production of news); *see also* Carroll, *supra* note 13, at 337 ("[C]ontent is infinite and gatekeepers are few."); Maria D. Molina, S. Shyam Sundar, & Thai Le, *"Fake News" Is Not Simply False Information: A Concept Explication and Taxonomy of Online Content*, AM. BEHAV. SCI. (Oct. 14, 2019) (explaining that unlike the gatekeeping function in traditional journalism, the social media ecosystem changed from a vertical to a horizontal relationship, so that everyone can create and disseminate content); *see also* MATTHEW HINDMAN, *One. The Internet and the Democratization of Politics*, in THE MYTH OF DIGITAL DEMOCRACY 2–3 (2009) ("[T]he power of elites to determine what [is] news via a tightly controlled dissemination system [has been] shattered.").

167. *See* Badan Barman, *Wiki and Its Different Facets*, INFLIBNET'S INST'L REPOSITORY 109, 109–10 (2006), https://ir.inflibnet.ac.in:8443/ir/handle/1944/1198?mode=full [https://perma.cc/9274-QFBA] (noting that Ward Cunningham first described the concept of wiki as "the simplest online database that could possibly work" and named it after Honolulu Airport's shuttle buses).

168. *See* Hindman, *supra* note 166, at 1–2 (noting that the Internet could provide a voice to those who previously felt voiceless); *see also* Harrison W. Inefuku, *Globalization, Open Access, and the Democratization of Knowledge*, EDUCAUSE REV. (July/Aug. 2017). *See* Barman, *supra* note 167 (stating that the wiki concept promised a way to develop private/public knowledge bases by collaborative contribution).

169. Barman, *supra* note 167, at 110.

170. Ryan M. Hubbard, *How I Learned to Stop Worrying and Love the Communications Decency Act*, 2007 U. ILL. J.L. TECH. & POL'Y 345, 345 (2007).

171. *Id.* at 345–46.

political, legal, social, and scientific information.[172] The frustration comes from the unlimited supply of "contaminants" that clog the channels with noisy, useless, often dangerously false, incompetent information and, more recently, personally hurtful material published by what, at best, can be described as amateurs—it is "a stage on which anyone can perform and a rostrum open to every debate" and every opinion and every expression, founded or not, and every screed, maliciously false or not.[173] Again, in some ways exactly what was intended, but with the inevitable unintended consequences—a robust and uninhibited venue for misinformation, dangerous rhetoric, and, most relevant for our purposes, baseless, false, and defamatory accusations against individuals that inflict real harm.

Compounding the effect of the elimination of gatekeepers (i.e., editors) and removal of the obstacles of cost, space, or time limitations, the law took steps to offer special protections designed to nurture the Internet and ensure that it would fulfill its promise. Section 230 of the Communications Decency Act[174] stands as the most important and, frankly, the most controversial of these legal protections.[175] It vests the Internet with a kind of exceptionalism that "'diverge[s] from regulatory precedents in other media.'"[176]

Section 230 was embedded in the Communications Decency Act.[177] The CDA was originally enacted to restrict the ready availability, especially to children, of obscene or indecent material, and represented the first attempt by Congress to regulate speech over the Internet.[178] Ironically, First Amendment challenges effectively gutted most of the

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172. *Id.* at 346.

173. *Id.* (noting that the Internet becomes clogged by those who "abuse the free flow of communication").

174. *See* 47 U.S.C. § 230(c) (2021) (protecting Internet service providers).

175. *See* Thomas Ryan, *Is Truth Hanging on by a Thread?*, 54 UIC J. MARSHALL L. REV. 315, 324 (2021) (citing JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET*, at 7 (2019)); *see also id.* (noting that some commentators have quipped (only slightly hyperbolically) that the twenty-six words of Section 230 of the CDA actually created the Internet).

176. Lavi, *supra* note 165, at 446 (citing Eric Goldman, *The Third Wave of Internet Exceptionalism*, TECH. & MKTG. L. BLOG (Mar. 11, 2009), https://blog.ericgoldman.org/archives/2009/03/the_third_wave.htm [https://perma.cc/2QRH-VUML]).

177. *See* Christopher Cox, *The Origins & Original Intent of Section 230 of the Communications Decency*, RICH. J.L. & TECH. BLOG (Aug. 27, 2020), https://jolt.richmond.edu/2020/08/27/the-origins-and-original-intent-of-section-230-of-the-communications-decency-act [https://perma.cc/XH7Y-D58F] (stating that section 230 is part of the Communications Decency Act).

178. *See* Lorraine Mercier, *The Communication Decency Act, Congress' First Attempt to Censor Speech over the Internet*, 9 LOY. CONSUMER L. REP. 274, 275 (1997) (describing the CDA's stated purpose to protect children from indecent materials and "clean up the Internet").

CDA's provisions aimed at protecting children from indecent content.[179] But among the provisions that remained standing was Section 230. Section 230 effectively makes the repeater rule, which, as noted above, holds the repeater of defamation as responsible as the originator of defamation, inapplicable to Internet platforms such as Facebook and YouTube, which the statute labels interactive computer services.[180]

In adopting Section 230, Congress made explicit findings regarding the importance of the Internet to the nation's future, noting that the development of the Internet provides "an extraordinary advance in the availability of educational and informational resources to our citizens" and offers a "forum for a diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[181] Based on these findings, Congress concluded that "[i]t is the policy of the United States" to promote the Internet's development and to preserve the "vibrant and competitive free market that [] exists for the Internet . . . ."[182]

The operative language specifies that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[183] That is, it creates a binary classification system—"interactive computer service" (immune from the repeater rule) or "content provider" (subject to the repeater rule and other liability resulting from publication)—and defines Internet platforms as computer service providers, even when they take steps to moderate certain inappropriate content.[184] In short, the provider is simply a conduit—more like the bookseller or newsstand—when it comes to operation of the repeater rule. And this is true even if the provider steps out of the neutral conduit role and makes modest content decisions. In an effort to encourage platform providers to take action against particularly dangerous or offensive material, the "good Samaritan" provision protects Internet platforms that take action to restrict certain content (e.g., lewd, obscene, or harassing), specifying that

179. *See* Savino, *supra* note 13, at 1133, 1156–58; Jeff Kosseff, *What's in a Name? Quite a Bit, If You're Talking About Section 230*, Lawfare (Dec. 19, 2019), https://www.lawfareblog.com/whats-name-quite-bit-if-youre-talking-about-section-230 [https://perma.cc/N8CX-X8CQ] (arguing that the court rulings took a hands-off approach while there was a perceived problem with "cyberpornography").

180. *See* 47 U.S.C.A. § 230(c)(1) (West 2018) (stating that no provider shall be treated as the publisher or speaker of information when the content is provided by another provider).

181. 47 U.S.C.A. § 230(a) (West 2018). *See also* Cox, *supra* note 177 (noting advancements in computer technology).

182. 47 U.S.C.A. § 230(b) (West 2018).

183. 47 U.S.C.A. § 230(c)(1) (West 2018).

184. *See* Agnieszka McPeak, *Platform Immunity Redefined*, 62 WM. & MARY L. REV. 1557, 1563 (2021) (explaining that providing access to a computer network is immune from liability).

such action does not transform the platform into a "content provider."[185]

Alas, the unintended consequence of this rather remarkable protection, as noted above, was not only to provide a new marketplace of ideas, but also a free ride for false information generally, and to furnish "a new instrument for the ancient art of defamation . . . a powerful weapon for character destruction," as one commentator observed (although describing the advent of radio).[186]

In short, Internet providers do not need the protection of *Sullivan*. They are effectively immune from suit for defamation.[187] Many have argued that Section 230 should be repealed or at least modified.[188] A full discussion of this issue is beyond the scope of this Article; I tentatively align with those who are not ready to jettison Section 230 completely, but rather suggest a more moderate approach. For example, requiring greater transparency in how platforms attract and curate content and how they use algorithms to determine who sees what would go a long way toward minimizing harm.[189] But for now, the platforms that host—platforms that many critics charge actually use algorithms to turbocharge the current frenzy of malicious falsity—live in a safe zone. To be clear, the actual authors of the falsity are not protected by Section 230. They are content providers, defined outside Section 230's reach, and so subject to defamation laws. But they are often hard to identify, to reach, and are frequently judgment proof.[190]

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185. 47 U.S.C.A. § 230(c)(2) (West 2018). This provision was added in response to a New York trial court decision that found a platform that attempted to moderate content to eliminate offensive, harassing, and insulting (to maintain its self-described character as a family friendly platform) was a content provider and so not protected by Section 230 immunity. *See* Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710, at *5 (N.Y. Sup. Ct. May 24, 1995) ("[I]t is argued that these features, coupled with the power to censor, triggered the duty to censor. That is a leap which the Court is not prepared to join in.").

186. Kutten, *supra* note 164, at 263 (internal quotations omitted).

187. *See* 47 U.S.C.A. § 230(c)(1) (West 2018) (stating that no provider or user of a computer service shall be treated as the publisher of information provided by another content creator).

188. *See* Patrick Zurth, *The German NetzDG as Role Model or Cautionary Tale? Implications for the Debate on Social Media Liability*, 31 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1084, 1100 (2021) (noting legislators and scholars who have called for reform and offering the example of Germany's NetzDG as a comparison to the U.S. approach); Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1600, 1614 (2018) (detailing the need for some reform and summarizing scholars who have called for reform).

189. *See* Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age*, 91 B.U. L. REV. 1435, 1457 (2011) (suggesting transparency); David McGraw, a *New York Times* newsroom lawyer, also advocates for transparency instead of regulation or elimination of Section 230's protections, at least as a first step. *See* David McCraw, *Lies and Liberty: The Future of Free Speech in a Divided America*, CRESTED BUTTE PUB. POL'Y F. (July 2021).

190. *See* Savino, *supra* note 13, at 1110 (explaining that it can be hard to locate authors of fake news online when they post anonymously).

IV. PROTECTING FALSITY IN THE NAME OF TRUTH?

"Information wants to be free, but so does misinformation."[191]

Returning to where this Article began, we do face an epidemic of falsity masquerading as truth. Much has been written about the spread of dangerously false information and the threats it poses.[192] Indeed, the epidemic of falsity—especially the oxymoronic "false facts," or as one scientist put it, falsity "misappropriating the language of 'fact'"[193]—and our inability to manage it, threaten to upend our democracy. And by undermining the essential nature of truth, including especially scientific truth[194] and factual or historic truth,[195] these lies threaten to disrupt

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191. Lavi, *supra* note 165, at 444.

192. *See generally id.*; Sunstein, *supra* note 158, at 390 (explaining how lies go viral shockingly fast and pose a serious threat to democracy); Udo Fink & Ines Gillich, *Fake News As A Challenge for Journalistic Standards in Modern Democracy*, 58 U. LOUISVILLE L. REV. 263, 264 (2020); Brynne Morningstar, *From Credibility Issues to Collusion with Russia: The Dangers Posed by the Spread of "Fake News" and What We Can Do About It*, 22 PUB. INT. L. REP. 82 (2017) ("[R]ecent events in the U.S. have demonstrated how dangerous misinformation can be."); Lauren E. Beausoleil, *Free, Hateful, and Posted: Rethinking First Amendment Protection of Hate Speech in a Social Media World*, 60 B.C. L. REV. 2101 (2019); Sandra D. Mitchell, *The Ill-Logic of Alternative Facts (Sic)*, EQUATION: THE UNION OF CONCERNED SCIS. (June 7, 2017), https://blog.ucsusa.org/science-blogger/the-ill-logic-of-alternative-facts-sic/ [https://perma.cc/4GFD-5XKW]; Jonathan Foley, *The Administration's War on Facts Is a War on Democracy Itself*, SCI. AM. (May 1, 2017), https://www.scientificamerican.com/article/the-administration-rsquo-s-war-on-facts-is-a-war-on-democracy-itself/ [https://perma.cc/6LSJ-SH6R].

193. Mitchell, *supra* note 192.

194. *See* Foley, *supra* note 192. For example, one psychologist described "many alternative facts that are . . . absurd from an empirical point of view but widely endorsed nonetheless: that dinosaurs once coexisted with humans; that humans appeared on Earth in their current form; that the sun revolves around the Earth; that vaccines cause autism . . . that humans are not responsible for climate change." Andrew Shtulman, *In Public Understanding of Science, Alternative Facts are the Norm*, NPR: COSMOS & CULTURE, COMMENT. ON SCI. AND SOC'Y (May 29, 2017), https://www.npr.org/sections/13.7/2017/05/29/527892222/in-public-understanding-of-science-alternative-facts-are-the-norm [https://perma.cc/K25D-FYS8].

195. For example, former President Trump lied about irrefutably verifiable facts, such as the crowd size at his inauguration, that he actually won the 2020 election, and that Ted Cruz's father was involved in President Kennedy's assassination. *See* Zachary Jonathan Jacobson, *Many Are Worried About the 'Big Lie.' They're Worried About the Wrong Thing*, WASH. POST (May 21, 2018), https://www.washingtonpost.com/news/made-by-history/wp/2018/05/21/many-are-worried-about-the-return-of-the-big-lie-theyre-worried-about-the-wrong-thing/ [https://perma.cc/46TK-R7DX]; Megan Garber, *The First Lie of the Trump Presidency*, ATLANTIC (Jan. 13, 2019), https://www.theatlantic.com/politics/archive/2019/01/the-absurdity-of-donald-trumps-lies/579622/ [https://perma.cc/G2XG-BS2V] (describing how President Trump's claim that the crowd at his inauguration was the "largest . . . ever" was easily refuted). *See* Emma Green, *The World Is Full of Holocaust Deniers*, ATLANTIC (May 14, 2014), https://www.theatlantic.com/international/archive/2014/05/the-world-is-full-of-holocaust-deniers/370870/ [https://perma.cc/HR7W-5HLW] (noting that more than seventy-five years after

society and culture.

It will not do to call this fake news—a term that bastardizes the word news, oversimplifies the problem, and minimizes its danger.[196] One taxonomy used by social scientists includes terms such as disinformation, misinformation, and malinformation to describe the mess.[197] But in the end, to quote Tom Wicker describing Nixon's lies about the Cambodian bombing campaign, "[t]he proper word for [these deceptions] is not dissembling or deceiving or protective reaction or cover story. The proper word is lying."[198]

To be sure, it is important that we address the overarching issues—how to identify falsity, how to prevent its spread, how to educate citizens to approach information thoughtfully and critically, and how to equip ourselves with the tools to detect malicious falsehoods without inhibiting the marketplace of ideas. Fortunately, many scholars from many disciplines are tackling this crucial work.[199]

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the liberation of Auschwitz a staggering number of people around the world still do not believe the Holocaust even happened). *See also* Samantha Schmidt & Lindsey Bever, *Kellyanne Conway Cites "Bowling Green Massacre" That Never Happened*, WASH. POST (Feb. 3, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/02/03/kellyanne-conway-cites-bowling-green-massacre-that-never-happened-to-defend-travel-ban/ [https://perma.cc/GWT7-TAF4] (describing how counselor to the then-president claimed people did not know of an alleged massacre in Bowling Green because media did not cover it when in fact it never happened). And while it seems epidemic now, lying about verifiable facts is not new. In 1972 and into 1973, the Pentagon and the White House lied about the fact that the United States had begun bombing in Cambodia, "repeatedly insist[ing] that Cambodian neutrality was being respected," while in fact in "3,630 raids American B-52's had dropped more than 100,000 tons of bombs on Cambodia." Tom Wicker, *The Big Lie Requires Big Liars*, N.Y. TIMES (July 24, 1973), https://www.nytimes.com/1973/07/24/archives/the-big-lie-requires-big-liars-in-the-nation-why-should-majorsand.html [https://perma.cc/MHV8-TBDM]. *See also* Piers Brendon, *Death of Truth: When Propaganda and 'Alternative Facts' First Gripped the World*, GUARDIAN (Mar. 10, 2017), https://www.theguardian.com/media/2017/mar/11/death-truth-propaganda-alternative-facts-gripped-world [https://perma.cc/W8ZE-646D] ("[Stalin] insisted that the truth was what he said it was, endorsing the bogus science . . . denouncing [a] mathematician . . . and killing astronomers for taking a non-Marxist line on sunspots."); Jeff Nilsson, *8 of History's Most Destructive Lies*, SATURDAY EVENING POST (May 14, 2018), https://www.saturdayeveningpost.com/2018/05/8-historys-destructive-lies/ [https://perma.cc/8AWQ-7D8V] (describing how in the 1930s, Stalin claimed, and western news outlets published, that there was no famine or starvation in Ukraine when in fact between two and four million people starved in Ukraine because Russia commandeered grain and other food).

196. *See* Carroll, *supra* note 13, at 336, 347 (stating that the use of "fake news" is often uncritical).

197. *Id.* at 347.

198. Wicker, *supra* note 195.

199. *See* Alexandra Witze, *How to Detect, Resist and Counter the Flood of Fake News*, SCI. NEWS (May 6, 2021), https://www.sciencenews.org/article/fake-news-misinformation-covid-vaccines-conspiracy [https://perma.cc/EUL4-4X6A]; Bruce L. Miller, *Science Denial and COVID Conspiracy Theories Potential Neurological Mechanisms and Possible Responses*, JAMA NETWORK (Nov. 2, 2020), https://jamanetwork.com/journals/jama/fullarticle/2772693

I propose, however, to focus more directly on the individuals and entities harmed by these lies, and on whether, given the constitutionalization of the law of defamation, the law still provides remedies in at least the most extreme cases. I take the position that it does. However, in addition to offering remedies to individuals harmed by falsities, to effectively combat the epidemic of falsity the law must provide robust protection to the reliable information sources—protections that will enable and encourage these sources to challenge the lies and call out those who spread them.

V. *NEW YORK TIMES V. SULLIVAN*, NOW MORE THAN EVER

"Journalism can never be silent: that is its greatest virtue and its greatest fault. It must speak, and speak immediately, while the echoes of wonder, the claims of triumph and the signs of horror are still in the air."[200]

As described above, defamation offers those whose reputations are injured by serious falsehoods a civil cause of action to seek remedies, typically a money judgment.[201] But many have argued that the *Sullivan* case and those that followed have gutted defamation law, leaving no real remedy for those whose reputations have been damaged.[202] In 2021, the

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[https://perma.cc/7H6P-ZKB4]; Shadi Shahsavari, Pavan Holur, Tianyi Wang, Timothy R. Tangherlini, & Vwani Roychowdhury, *Conspiracy in the Time of Corona: Automatic Detection of Emerging COVID-19 Conspiracy Theories in Social Media and the News*, J. COMPUTATIONAL SOC. SCI. (Oct. 28, 2020); Keith Brannon, *The Best Way to Fight a Conspiracy Theory Isn't With Facts*, TULANE NEWS (Oct. 9, 2020), https://news.tulane.edu/news/expert-best-way-fight-conspiracy-theory-isnt-facts [https://perma.cc/3DU2-PEVM]; Peter Lor, Bradley Wiles, & Johannes Britz, *Re-Thinking Information Ethics: Truth, Conspiracy Theories, and Librarians in the COVID-19 Era*, 71 LIBRI INT'L J. LIBRS. & INFO. STUD. 1 (2021), https://www.degruyter.com/document/doi/10.1515/libri-2020-0158/ [https://perma.cc/UQ35-99SP]; Kara Manke, *New Technology Helps Media Detect "Deepfakes"*, U. CALIFORNIA NEWS (June 20, 2019), https://www.universityofcalifornia.edu/news/new-technology-helps-media-detect-deepfakes [https://perma.cc/57NZ-66Z2].

200. Chris Riotta, President, Society of Professional Journalists, Address to Columbia School of Journalism (Oct. 6, 2020) (quoting Henry Anatole Grunwald), http://spj.jrn.columbia.edu/2020/10/06/a-message-from-your-new-spj-president/ [https://perma.cc/R6X3-XG9D].

201. *See supra* notes 54–60 and accompanying text (recalling that defamation is a civil action offered to those who experience injury to their reputation).

202. *See* Berisha v. Lawson, 141 S. Ct. 2424, 2426–27 (2021) (Gorsuch, J., dissenting) (explaining how the actual malice standard has evolved from a high bar to effective immunity from liability); Eugene Volokh, *Justices Thomas and Gorsuch Criticize* New York Times v. Sullivan, REASON: THE VOLOKH CONSPIRACY (July 2, 2021), https://reason.com/volokh/2021/07/02/justices-thomas-and-gorsuch-criticize-new-york-times-v-sullivan/ [https://perma.cc/V8KV-YNDJ] (adding the justices' voices to the members of the Court

Supreme Court heard arguments in two cases asking the Court to grant cert to consider overturning *Sullivan*.[203] The Court denied cert in both cases without opinions,[204] but with two strong dissents by Justices Thomas and Gorsuch in the *Berisha* case—dissents that called for reconsideration of *Sullivan*.[205] Critics from Supreme Court Justices and federal judges,[206] to legal scholars,[207] to the popular press,[208] and to the former president call for *Sullivan* to be overturned.[209] But they are wrong. The *Sullivan* holding, and the cases that have applied and interpreted it, serve their stated purpose well—a purpose more critical today than ever—and do so without gutting the defamation cause of action.

A. The Sullivan *Standard*

Without turning this Article into a diatribe on the former president, Mr. Trump provides a current and vivid illustration of the need to protect

questioning *Sullivan*); Glenn Harlan Reynolds, *Rethinking Libel for the Twenty-First Century*, 87 TENN. L. REV. 465, 474 (2020) (proving actual malice will often be difficult); David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 488 (1991) (explaining libel law provides little protection for reputation); Zaharoff, *supra* note 81, at 48–49 (opining that defamation suits are hard to win under *Sullivan*).

203. *See* Floyd Abrams, *Supreme Court Faces Huge Test on Libel Law*, N.Y. TIMES (Oct. 22, 2021), https://www.nytimes.com/2021/10/22/opinion/supreme-court-libel-news-media.html [https://perma.cc/8S3U-DHHJ] (showing that the Supreme Court was scheduled to consider appeals on two libel cases in 2021).

204. *See Berisha*, 141 S. Ct. at 2424–25 (denying the petition for a writ of certiorari); Tah v. Glob. Witness Publ'g, Inc., 142 S. Ct. 427 (2021).

205. *See Berisha*, 141 S. Ct. 2424 (Thomas, J, dissenting) (Gorsuch, J, dissenting) (explaining that the Court should reconsider *Sullivan*).

206. *See id.* (Thomas, J, dissenting) (Gorsuch, J., dissenting) (calling for a reconsideration of *Sullivan*); McKee v. Cosby, 139 S. Ct. 675 (2019) (Thomas, J., concurring) (stating that *Sullivan* was policy-driven rather than stemming from constitutional law); *Tah*, 991 F.3d at 251–56 (Silberman, J., dissenting in part) (urging the Court to overrule *Sullivan*).

207. *See* Sunstein, *supra* note 158, at 389, 401, 412–17; Reynolds, *supra* note 202, at 474; Elaine W. Shoben, *Uncommon Law and the Bill of Rights: The Woes of Constitutionalizing State Common-Law Torts*, 1992 U. ILL. L. REV. 173 (1992) (stating that nobody is satisfied with complex constitutionalization of defamation law); Anderson, *supra* note 202 (explaining how the actual malice standard does not protect either speech or reputation).

208. *See* Editorial Board, *supra* note 107 (arguing that journalists have an interest in *Sullivan*).

209. Adam Liptak & Eileen Sullivan, *Trump, Angry over Woodward Book, Renews Criticism of Libel Laws*, N.Y. TIMES (Mar. 30, 2017), https://www.nytimes.com/2017/03/30/us/politics/can-trump-change-libel-laws.html [https://perma.cc/XW5T-P4TF]; David Jackson, *Trump Invokes Changing Libel Laws in Feud with New York Times*, USA TODAY (Mar. 30, 2017), https://www.usatoday.com/story/news/politics/2017/03/30/donald-trump-new-york-times-libel-laws/99820218/ [https://perma.cc/FSX5-W52W]; Zaharoff, *supra* note 81, at 48, 50 (describing the former president as "notoriously litigious"); Hadas Gold, *Donald Trump: We're Going to 'Open Up' Libel Laws*, POLITICO (Feb. 26, 2016), http://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866 [https://perma.cc/N45C-VZR7].

reliable information sources, especially the institutional press.[210] His fusillade of threats and meritless suits, and his declaration that the institutional press is the enemy of the people,[211] echo exactly what was going on when *Sullivan* was decided—a frontal attack on the press in an effort to quash critical oversight and to silence dissenters.[212] The former president pushed his staff to pull credentials and block access by reporters he considered "disrespectful" or who asked what he deemed "impertinent questions."[213] During his time as president, a watchdog group

210. I use the terms "press," "journalist," "journalism," and "news" rather than "media" intentionally. It seems that at some point, perhaps in order to be more precise (or more inclusive) and ensure broadcast and eventually including other electronic journalists, the term "media" became fashionable. *Cf.* Michael Schudson, *The Fall, Rise, and Fall of Media Trust,* COLUM. JOURNALISM REV. (Winter 2015) https://www.cjr.org/special_report/the-fall-rise-and-fall-of-media-trust.php [https://perma.cc/MM5T-W7DR]. It was always inaccurate (overinclusive and underinclusive) and now must be understood to include pure entertainment and social media, conflating reporting of news with everything else. Mort Rosenblum, *Why Media Is Not Journalism,* GLOB. GENEVA (Feb. 24, 2017), https://global-geneva.com/why-media-is-not-journalism/ [https://perma.cc/9PJU-WKWU] ("Everything is lumped together as 'the media,' whether it is an eyewitness report from besieged Mosul, insight from a correspondent who has spent a lifetime on the road, or guesswork from a kibitzer in his bedroom an ocean away."). I am comfortable that the word "press," understood to refer to news-gathers and reporters serves the purpose, especially since it is the word used in the First Amendment. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."). Journalism also serves that purpose and contemplates standards and best practices that set journalism apart from the larger universe of the media.

211. *See* Michael M. Grynbaum, *Trump Calls the News Media the "Enemy of the American People"*, N.Y. TIMES (Feb. 17, 2017), https://www.nytimes.com/2017/02/17/business/trump-calls-the-news-media-the-enemy-of-the-people.html [https://perma.cc/PWE8-PG4Q] (explaining President Trump's discontent with the news media); Eric Wemple, *Opinion: Trump Called the Media "The Enemy of the People." He Means It,* WASH. POST (Mar. 20, 2020), https://www.washingtonpost.com/opinions/2020/03/20/trump-called-media-enemy-people-he-means-it/ [https://perma.cc/UU3G-VWM7] (noting "torrents" of attacks on media based on "factless presidential eructations"); Philip Rucker, John Wagner & Greg Miller, *Trump, in CIA Visit, Attacks Media for Coverage of His Inaugural Crowds,* WASH. POST (Jan. 21, 2017), https://www.washingtonpost.com/politics/trump-in-cia-visit-attacks-media-for-coverage-of-his-inaugural-crowds/2017/01/21/f4574dca-e019-11e6-ad42-f3375f271c9c_story.html [https://perma.cc/4P43-SWT8] ("On his first full day in office . . . . Trump declared, 'I have a running war with the media. They are among the most dishonest human beings on earth, right?'"); Marisa Kellam & Elizabeth A. Stein, *Trump's War on the News Media Is Serious. Just Look at Latin America,* WASH. POST (Feb. 16, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/16/trumps-war-on-the-news-media-is-serious-just-look-at-latin-america/ [https://perma.cc/E44D-PLW5] ("The president frequently rails against the 'dishonest' press, and his chief strategist, Stephen Bannon, told the media to 'keep its mouth shut.'").

212. *See supra* notes 69–82 and accompanying text (recalling the events attempting to silence dissenters while *Sullivan* was decided); *see also* DAVID E. MCCRAW, TRUTH IN OUR TIMES, 27–28 (2019) (noting President Trump's threat to sue Tim O'Brien).

213. Philip Rucker, Josh Dawsey, & Ashley Parker, *Venting about Press, Trump Has Repeatedly Sought to Ban Reporters over Questions,* WASH. POST (July 27, 2018), https://www.washingtonpost.com/politics/venting-about-press-trump-has-repeatedly-sought-to-ban-reporters-over-questions/2018/07/27/0e73a068-91a9-11e8-8322-b5482bf5e0f5_story.html [https://perma.cc/N2Y3-WGN8].

documented press intimidation, noting "increased prosecutions of news sources, libel suits and harassment of journalists in the field and at U.S. border crossings . . . ."[214]

According to a meticulous study undertaken in 2016, Mr. Trump, as a private citizen, had filed at least seven separate defamation suits against individuals and media outlets and had sent "countless [] cease and desist letters to journalists . . . ."[215] The study identified 4,000 other lawsuits filed over thirty years by Trump and his companies.[216] In addition to suits actually filed, the former president makes a practice of threatening suits to intimidate coverage he dislikes. In 2016, the *Columbia Journalism Review* reported:

> Trump has threatened to sue the *Daily Beast* for reporting that his ex-wife Ivana once used the word "rape" to describe a 1989 incident between them; *The Washington Post* for reporting on his bankrupt Taj Mahal casino; and *The Associated Press* for reporting on efforts by the Trump Ocean Club's directors to oust managers installed by Trump. He announced that his lawyers wanted to sue *The New York Times* for 'irresponsible intent,' and one such lawyer threatened to sue the *Times* for publishing some of Trump's tax records, all before Trump threatened to sue the *Times* for reporting on claims that he inappropriately touched two women.[217]

For decades, Mr. Trump has used litigation and threats of litigation as a tactic—as leverage or intimidation. An ultimate win is not necessarily his goal.[218] He admits this, and even brags about it. Regarding a libel suit against business reporter Timothy O'Brien, Mr. Trump stated that he knew he "couldn't win the suit but brought it anyway to make a point, [adding] 'I spent a couple of bucks on legal fees, and they spent a whole

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214. Peter Cobus, *Trump's Attacks on Press Effective, New Study Finds*, VOICE OF AM. (Apr. 17, 2020), https://www.voanews.com/a/press-freedom_trump-attacks-press-effective-new-study-finds/6187774.html [https://perma.cc/3N7H-ZPT7].

215. Susan E. Seager, *Donald J. Trump Is a Libel Bully but also a Libel Loser*, 32 COMMC'NS LAW.: J. MEDIA, INFO., & COMMC'NS L. (2016), https://www.americanbar.org/content/dam/aba/publications/communications_lawyer/fall2016/cl32-3.pdf [https://perma.cc/TL5H-7EX6]; *see also* Susan E. Seager, *Donald J. Trump Is a Libel Bully, but also a Libel Loser*, MEDIA L. RES. CTR. (Nov. 2016), https://medialaw.org/donald-j-trump-is-a-libel-bully-but-also-a-libel-loser-2/ [https://perma.cc/2FYF-FER3]. His defamation lawsuits included suits against an architecture critic and his newspaper; a book author and his publisher; a political commentator; a former student at Trump University; two labor unions; a network executive; and a beauty contest contestant. *Id.*

216. Seager, *supra* note 215. To be sure, these were not all defamation suits, but provide dramatic evidence of Mr. Trump's willingness to use the threat of litigation as leverage and more troubling to intimidate.

217. Peters, *supra* note 215 (internal citations omitted).

218. *See* McCraw, *supra* note 212, at 28 (noting Trump often threatened libel suits he would not bring and could not win"); *see* Zaharoff, *supra* note 81, at 48, 63–64 ("[E]vidence suggests that the ultimate resolution of the disputes was not his motivation for bringing them.").

lot more. I did it to make his life miserable, which I'm happy about.'"[219] Again, this echoes the strategy undertaken by the southern power structure against the national press covering segregation and the civil rights movement at the time *Sullivan* was decided. Recall the rallying cries cited above.[220] After the plaintiffs' initial trial court victory in *Sullivan*, members of the southern power structure "invited everyone in Alabama to sue the *New York Times*,"[221] and celebrated the fact that the huge verdict would cause the "Northern press" to rethink publishing "'anything detrimental to the South.'"[222] They hailed the fact that local officials now had, as one headline put it, a "'formidable legal bludgeon to swing at out-of-state newspapers whose reporters cover racial incidents in Alabama.'"[223] Defamation suits provided the "bludgeon" that would be used to intimidate the press from reporting on what was going on, and to silence any dissent. The Supreme Court, as David McCraw observed, understood this.[224] Justice Blackmun, concurring in *Sullivan*, specifically referred to the multiple multi-million-dollar suits pending against the *Times* in southern states as a "technique for harassing and punishing a free press . . . ."[225]

The strategy can work. Look no further than the American Bar Association (ABA). The ABA effectively pulled an article reporting on the study of Mr. Trump's lawsuits referred to above—a study it had commissioned—because it feared a possible lawsuit by the former president.[226] The article chronicled Mr. Trump's "history of threatening meritless lawsuits."[227] Thus, the ABA wanted to make what it described as "minor edits" designed to soften potentially "sharp language" before publishing.[228] But the author, and others, including former chairs of the ABA's media law committee, dispute that the edits would have been minor. The report's author, Susan Seager, noted that one of the edits

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219. Paul Farhi, *What Really Gets under Trump's Skin? A Reporter Questioning His Net Worth*, WASH. POST (March 2016), https://www.washingtonpost.com/lifestyle/style/that-time-trump-sued-over-the-size-of-hiswallet/2016/03/08/785dee3e-e4c2-11e5-b0fd-073d5930a7b7_story.html [https://perma.cc/RXL8-35TK].

220. *See supra* notes 78–82 and accompanying text.

221. Usman, *supra* note 71, at 955; Logan, *supra* note 72, at 764.

222. Schmidt, *supra* note 78, at 306.

223. *Id.*

224. *See* McCraw, *supra* note 212, at 30 (noting that the Supreme Court acknowledged defamation suits potentially could be used to silence dissenters).

225. New York Times, Co. v. Sullivan, 376 U.S. 254, 295 (1964) (Blackmun, J., concurring).

226. *See* Adam Liptak, *Fearing Trump, Bar Association Stifles Report Calling Him a 'Libel Bully'*, N.Y. TIMES (Oct. 24, 2016), https://www.nytimes.com/2016/10/25/us/politics/donald-trump-lawsuits-american-bar-association.html [https://perma.cc/K8TJ-ZVE6] ("[T]he bar association refused to publish the report, citing 'the risk of the A.B.A. being sued by Mr. Trump.'").

227. Peters, *supra* note 215.

228. Liptak, *supra* note 226.

would have cut the statement that Donald Trump is a libel bully, which she explained stated the very conclusion of the report.[229] The ABA did not dispute the author's rigorous research, which was meticulously documented and supported by reference to court records. Rather, a spokesman admitted that while the ABA was confident any suit targeting the article would be meritless, it did not want to risk the cost of a potential lawsuit.[230] Reflecting the irony of the turn of events, Seager observed that the decision to pull the article proves that the former president's threats work. "'The A.B.A. took out every word that was slightly critical of Donald Trump . . . . It proved my point.'"[231] This is the very sort of timorousness that the *Sullivan* opinion sought to avoid.

Sullivan does not prevent meritless suits entirely; rather it carves out partial—significant—protection for publication of information about a public official or a public person regarding matters relating to their public role, and less protection for publication of information about private individuals. As described above, public figures or officials wishing to sue for defamation must be able to allege not just that the publisher made a mistake—published something false—they must also show, with convincing clarity, that the publisher either knew the material was false or published with reckless disregard—a high degree of awareness—that the matter might be false.[232] By contrast, in the case of a private person, the publisher had to be at least negligent with respect to the truth or falsity of the matter.[233] In setting the fault bar high for matters of public concern, the Court gave those who publish this information a margin for error. McCraw summed it up, saying that through *Sullivan*, the Supreme Court sent journalists a message: "[B]e brave, take chances, pursue the hard ones."[234] *Not*, be careless, or irresponsible, or malicious. Rather,

229. *Id.*

230. *See id.* (noting that the report included eighty-one footnotes and that those responsible for managing the financial risk to the ABA were reasonably worried about a potential lawsuit). The ABA also stated that it was concerned it could be accused of electioneering, prohibited for a 501(c)(3) organization like the ABA. Casey Sullivan, *Trump 'Libel Bully' Article Was Never Rejected, Says ABA*, BLOOMBERG LAW (Nov. 3, 2016), https://news.bloomberglaw.com/business-and-practice/trump-libel-bully-article-was-never-rejected-says-aba [https://perma.cc/E8AS-X9AW]. *See* Seager, *supra* note 215.

231. Liptak, *supra* note 226. The report was first published by the Media Law Center, a membership trade organization. *See* Susan E. Seager, *President Trump Is a Libel Bully Again and It's Worse: He's Suing from the White House*, MEDIA L. RES. CTR. https://medialaw.org/president-trump-is-a-libel-bully-again-and-its-worse-hes-suing-from-the-white-house/ [https://perma.cc/L6XM-G6LB]. The ABA contests that it pulled the article, explaining rather that it was negotiating edits when the author withdrew the article. Sullivan, *supra* note 230.

232. *See supra* notes 99–104 and accompanying text.

233. *See* Gertz v. Robert Welch, 418 U.S. 323, 345–46 (1974) (explaining why a private individual suing for libel does not need to satisfy as high a burden of proof as a public individual).

234. McCraw, *supra* note 212, at 32.

just don't be afraid to take on important but difficult matters. A timorous press won't call out the big lie—and now more than ever—we need the press *especially* to be brave and to report when the emperor has no clothes. *Sullivan* has worked to protect publishers—not just the press, but all who disseminate crucial information—in several ways.

First, of course, it allowed for what might be called honest—even careless—mistakes. In *Sullivan* itself, the falsity pleaded amounted to minor mistakes that had little to do with the essence of the message: Were they singing "My Country, 'Tis of Thee" or the national anthem?[235] Did law enforcement "ring" the campus or were they deployed nearby?[236]

Allowing for mistakes matters because, while care and verification are critical responsibilities of professional journalism,[237] the equally compelling need to get information out promptly because of strong public interest reasons often prevents absolute, irrefutable verification of every fact. This should be distinguished from the significant but less lofty pressure of the scoop.[238]

The Court in *Sullivan* recognized that mistakes happen, noting that "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space'

235. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 258–59 (1964) (explaining that there were minor discrepancies between what happened and what was reported to have happened at the protest).

236. *Id.* at 259.

237. *See* BILL KOVACH & TOM ROSENSTIEL, THE ELEMENTS OF JOURNALISM: WHAT NEWSPEOPLE SHOULD KNOW AND THE PUBLIC SHOULD EXPECT 99 (2001) (distinguishing journalism from entertainment, propaganda, fiction, or art because journalism focuses on the process employed in order to get the accurate facts).

238. Scoop, used to describe either an exclusive or the first out of the gate report, has been traced to 1870s American newspaper rivalries. Ben Zimmer, *Newspaper Rivalry Bred Modern Use of "Scoop"*, WALL ST. J. (Dec. 28, 2016), https://www.wsj.com/articles/newspaper-rivalry-bred-the-modern-use-of-scoop-1482946285 [https://perma.cc/9HVM-66H3]; *See* Amy Sullivan, *Who Reported It First? Who Cares?*, NEW REPUBLIC (July 9, 2012), https://newrepublic.com/article/104754/amy-sullivan-who-reported-it-first-who-cares [https://perma.cc/Z9FY-29HQ] ("[A] genuine scoop [is]—a report that wouldn't have otherwise come to light . . . ."). While some suggest scoops, as they were once understood, matter mostly as a means of keeping score among journalists, the outlet that consistently lags behind in getting the story out will lose readers and revenue. *See* Amy Gahran, *Why the Scoop Mentality is Bad for News*, KNIGHT DIGIT. MEDIA CTR. (Aug. 31, 2011, 4:33PM), http://www.knightdigitalmediacenter.org/blogs/slaffert/2011/08/why-scoop-mentality-bad-news.html [https://perma.cc/PWF7-8X6M] (explaining how prioritizing being first on a story can be a disservice to readers); Ellen Hume, Resource Journalism: A Model for New Media, Address at the Democracy and Digital Media Conference at MIT (May 17, 1998), https://web.mit.edu/m-i-t/articles/hume.html [https://perma.cc/SY5E-Q5YU] ("Scoops matter only to other journalists, as a way of keeping score."); Ellen Hume, *Resource Journalism: A Model for New Media*, *in* DEMOCRACY AND NEW MEDIA 335 (Henry Jenkins & David Thorburn, eds. 2004) (stating that scoops no longer matter to the audience but are used by journalists to keep score).

that they 'need . . . to survive.'"[239] Thus, it is not the error that is protected, it is the need to get the information out promptly without being paralyzed into checking, rechecking, verifying, and reverifying every fact and every statement and failing absolute verification, dumping the story. Verification matters,[240] and truth lies at the heart of a journalist's mission,[241] but time matters as well. Sitting on a story until every single fact can be verified as absolutely, reliably true would cause the system to seize. As in so many things, absolutes can't always hold. When imperatives collide (the commitment to verification and the need to publish promptly), one, or both, must give way a little, or even a lot.

News reporting requires editors to make quick decisions under pressure—"pressures of time, of competition and, frequently, pressures of having incomplete information."[242] So, there will be times when a publisher cannot immediately verify the accuracy of every aspect of a report, but where there exist important reasons to get the information out. Sometimes this will arise in an emergent situation, other times when the urgency is more nuanced. To repeat what *Times* editor Henry Anatole Grunwald explained, journalism "must speak, and speak immediately, while the echoes of wonder, the claims of triumph and the signs of horror are still in the air."[243] Hodding Carter put it another way, describing journalism's role in holding government accountable, Carter said: "'If given three days without serious challenge [from the press], the government will have set the context for an event and can control public perception of that event.'"[244] Accuracy matters and is most difficult to achieve in these contexts, but getting the available information out also matters, and creates a precarious path to navigate.

In 1963, President Johnson, who had just assumed the presidency after President Kennedy's assassination, did not trust what he was hearing about the progress of the Vietnam War. He sent Defense Secretary Robert McNamara to Saigon to assess the situation.[245] Upon his return,

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239. New York Times Co. v. Sullivan, 376 U.S. 254, 271–72 (1964) (quoting N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963)).

240. *See* KOVACH & ROSENSTIEL, *supra* note 237, at 97–136 ("[T]he discipline of verification . . . separates journalism from entertainment, propaganda, fiction, or art.").

241. *See id.* at 47–68. "Journalism's first obligation is to the truth." *Id.* at 44.

242. Ronald J. Ostrow, *Richard Jewell Case Study*, COLUM. UNIV. (June 13, 2000), http://www.columbia.edu/itc/journalism/j6075/edit/readings/jewell.html [https://perma.cc/KW5D-BQ83].

243. Riotta, *supra* note 200.

244. KOVACH & ROSENSTIEL, *supra* note 237, at 59 (quoting an interview with Hodding Carter, journalist and assistant secretary of state for public affairs during the Carter Administration).

245. *See* Benjamin Bradlee, *A Free Press in a Free Society*, *in* 47 NEIMAN REPORTS, THE EMERGING PRESS IN EASTERN EUROPE 9, 10 (1990), https://niemanreports.org/wp-

McNamara spoke publicly about the situation in Vietnam in press conferences, reporting that things were going well—good progress was being made, South Vietnamese forces were stepping up.[246] But in his secret briefing with President Johnson, he reported that things were bad—really bad. The Vietcong were gaining strength; more U.S. troops, not fewer, would be needed; "the situation with the enemy 'has been deteriorating . . . since July to a far greater extent than we realized.'"[247] Some journalists on the ground were reporting facts that would contradict McNamara's optimistic public statements and were more consistent with the secret briefing. But the information came from sources that insisted on anonymity, which undercut their power and arguably their reliability.[248] Newspapers were faced with contradictory information: McNamara's optimistic descriptions and the grimmer assessments from in-country reporters who were relying on sources—anonymous sources—that might give an editor pause.

The war was controversial and divisive. The Johnson administration needed public support to maintain or escalate U.S. involvement.[249] Public opinion matters in foreign affairs involving engagement in military conflict and the potential commitment of U.S. troops to combat abroad. And President Johnson was especially concerned about public support of or resistance to the war.[250] Thus, it was important for the press to provide the public with as much information as possible and from sources other than the official sources, even if the reports that contradicted what the government was saying could not be absolutely, positively verified.

Of course, eight years later, the Pentagon Papers broke and revealed that the on-the-ground reporters had it right, and indeed, McNamara's report to Johnson outlined a situation more grave than even most of the reporters on the ground had described.[251] Reflecting on the Pentagon

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content/uploads/2014/04/Special-1990_150.pdf [https://perma.cc/59U6-UWRV] (explaining that President Johnson sent McNamara on a special trip to Vietnam to find out "what in hell was going on").

246. *See id.* (detailing two press conferences McNamara gave where he described the trip as encouraging, claimed that "things were looking up," and that much progress had been made).

247. KOVACH & ROSENSTIEL, *supra* note 237, at 48.

248. *Id.* at 49.

249. *See* Sidney Verba, et al., *Public Opinion and the War in Vietnam*, 61 AM. POL. SCI. REV. 317, 317–33 (1967) (describing public opinion pertinent to foreign policy decisions, especially in context of foreign wars).

250. *See generally id.*

251. *See* Bradlee, *supra* note 245 ("Buried in these documents, which so few people actually read, was the substance of what McNamara in fact reported to the President: things were going to hell in a handbasket; Vietcong reinforcements were outpacing Vietcong casualties. More American troops were going to be needed, not less.").

Papers episode, Ben Bradlee, *Washington Post* editor, commented, "what might have happened had the truth emerged in 1963 instead of 1971[?]"[252] What might have happened? Already shifting public support for the war might have collapsed, and almost a decade of pointless fighting and lost lives might have been avoided. So, while conscious deception by the government prevented American citizens from knowing the real truth of McNamara's evaluation, the press had information that might have shifted the paradigm. It did its job in getting what information it had to the public—even though it might not be absolutely verified and air-tight. And, while not the blockbuster punch that publication of the Pentagon Papers delivered, this reporting was crucial and certainly influenced a significant portion of the public in what became growing opposition to the war.

The nuclear accident at Three Mile Island provides an example of the more urgent need for prompt reporting. At 4:00 A.M. on March 28, 1979, a malfunction—either electrical or mechanical—at the Three Mile Island Nuclear Plant (TMI) near Middletown, Pennsylvania, caused the pumps that supplied water used to cool the reactor core to fail. Part of the system shut down, pressure began to rise, a valve stuck open, multiple instruments gave inadequate or misleading information to on-site operators, who, working with insufficient information and confusing protocols, took steps to resolve the problem. Alas, operating essentially in the dark, they were unaware that many of the actions they took were wrong, eventually causing the water level in the containment vessel to drop dangerously low, which caused the nuclear core to overheat, threating an uncontrolled nuclear meltdown.[253] This remains, the worst nuclear accident in U.S. history.[254] News first broke at 8:25 A.M.[255] While an official emergency notification system was in place, it was not triggered, in part because information about what was actually going on

252. *Id.*

253. *See Backgrounder on the Three Mile Island Accident*, U.S. NUCLEAR REGUL. COMM'N LIBR. (last updated June 21, 2018), https://www.nrc.gov/reading-rm/doc-collections/fact-sheets/3mile-isle.html [https://perma.cc/SA9H-BVDY] (describing the events that led to the Three Mile Island Accident).

254. *See* Marie Cusick, *40 Years after a Partial Nuclear Meltdown, A New Push to Keep Three Mile Island Open*, NPR (Mar. 28, 2019, 5:00AM) https://www.npr.org/2019/03/28/707000226/40-years-after-a-partial-nuclear-meltdown-a-new-push-to-keep-three-mile-island-o [https://perma.cc/GSR2-YFP7] (describing the accident as the "most serious nuclear accident in U.S. history"); DEP'T OF JUST., "THREE MILE ISLAND", REMARKS OF ATTY GEN. DICK THORNBURG AT NAT'L PRESS CLUB 2 (Mar. 28, 1989) ("[T]he worst accident in the history of commercial nuclear power in the United States . . . ."); Mitchell Stephens & Nadyne G. Edison, *News Media Coverage during the Accident at Three Mile Island*, JOURNALISM Q. 199 (Summer 1982) ("Three Mile Island was . . . labeled the worst nuclear accident in history.").

255. Dan Nimmo, *TV Network News Coverage of Three Mile Island: Reporting Disasters as Technological Fables*, INT'L J. MASS EMERGENCIES AND DISASTERS, 115 (1984).

was lacking. Local emergency plans were uneven, inconsistent, and of varying quality. This was compounded by the overlap of multiple jurisdictions that would be involved in a radiation event.[256] In short, the response to the developing crisis was bungled.

Area residents looked to the news, primarily broadcast news, for information about what was happening and, in fact, for "hints on whether to flee."[257] But journalists were handicapped, faced with reporting on a highly complex, technical area with little background, and no time for research—indeed, no real available sources of background information.[258] More significant, initial briefings were characterized by efforts to minimize (if not cover up) the seriousness of the event by the utility.[259] Further, many who were briefing the press lacked the technical expertise to explain what was happening or to answer questions. Ongoing confusion, among even the scientists, regarding the details of what had actually happened and the use of jargon muddled the information provided. And, in an effort to cut down on inconsistent information, officials limited the press's access to only selected spokespersons, a reasonable strategy, but one that undercut "the long tradition of the press of checking facts with multiple sources" to verify information.[260] As one author put it, "press briefings were tense and at times intentionally obscure, the sources often hostile and tight-lipped; and complex occurrences, for which scientists themselves were unprepared, had to be assimilated under the most intense deadline pressure."[261] Speed mattered; so, to be sure, did accuracy. How to navigate between the two? News outlets published what they had—sometimes inconsistent, sometimes incomplete—and threaded the needle between providing current information while avoiding causing unnecessary panic.[262]

256. THE NEED FOR CHANGE: THE LEGACY OF TMI, REP. OF THE PRESIDENT'S COMM'N ON THE ACCIDENT AT THREE MILE ISLAND (1979) https://www.google.com/books/edition/The_Need_for_Change_the_Legacy_of_TMI/YexSAAAAMAAJ?hl=en&gbpv=0 [https://perma.cc/A53P-8HH8] (analyzing the handling of the emergency).

257. Stephens & Edison, *supra* note 254, at 199; REP. OF THE PUB.'S RIGHT TO INFO. TASK FORCE, STAFF REP. TO THE PRESIDENT'S COMM'N ON THE ACCIDENT AT THREE MILE ISLAND 219 (1979), https://play.google.com/books/reader?id=UqG6vGqOY7kC&pg=GBS.PP1&hl=en [https://perma.cc/42LT-WDFB].

258. *See id.* (noting that many of the reporters were young and inexperienced, that they relied heavily on other news sources, and that employees had to work extra shifts).

259. *See* REP. OF THE PRESIDENT'S COMM'N, *supra* note 256, at 18 ("On the first day of the accident, there was an attempt by the utility to minimize its significance, in spite of substantial evidence that it was serious.").

260. *Id.*

261. Stephens & Edison, *supra* note 254, at 199.

262. *See* REMARKS OF ATTY GEN. DICK THORNBURG, *supra* note 254, at 19–23 (advising

Indeed, nobody emerged from the TMI crisis unscathed. The press was criticized for failing to prepare to cover the emerging nuclear energy industry by educating themselves about this new, complex science, for being too cozy with the industry, and for perhaps playing it too safe in terms of the threat TMI posed at the height of the situation.[263]

Kovach and Rosenstiel, in their influential book, *The Elements of Journalism*, state that journalism's first and most important obligation is to truth,[264] adding that "the essence of journalism is a discipline of verification."[265] Recognizing the realities of reporting in less than ideal circumstances, they offer what they call "spirit of transparency" as a necessary method of the discipline of verification that serves the goal of truth.[266] Journalists, they argue, must "be honest and truthful with their audiences . . . about what they know and what they don't."[267] They must also be forthcoming with information about their methods and their sources.[268] Applied to the TMI crisis, the reporters should have been more candid about their own lack of expertise, about conflicting information, about whether their sources had direct knowledge or not, and especially about whether any of their sources had biases. Transparency done right engages the audience in evaluating the information and its credibility (which, by the way, represents the most important weapon to combat the epidemic of falsity we lament). Kovach and Rosenstiel compare transparency to the scientific method, explaining that it requires journalists to consider what the audience needs to know to "evaluate this information for itself."[269] It also requires journalists to evaluate whether there is anything about how the material is treated and presented that requires explanation, and, finally, it requires the journalists to be candid about "questions they cannot answer."[270]

Kovach and Rosenstiel use Richard Jewell and the Atlanta Olympic bombing story as a cautionary tale, and an example of how their

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decision-makers and media members to verify information before publishing to avoid inaccurate reporting on major news stories); *see also* STAFF REP. TO THE PRESIDENT'S COMM'N ON THREE MILE ISLAND, *supra* note 257, at 215–29 (depicting trends in reporting that lead to inaccurate news stories, a dependency on wire services, and a fear of spreading panic).

263. *See* STAFF REP. TO INFO. TASK FORCE COMM'N, *supra* note 257, at 215–29 (explaining the public's outrage at journalists' reporting about the Three Mile Island accident).

264. *See* KOVACH & ROSENSTIEL, *supra* note 237, at 47 (highlighting primary tenet of journalism).

265. *Id.* at 98.

266. *See id.* at 114 (introducing a method of verification for reaching the truth while reporting).

267. *Id.*

268. *See id.* (illustrating how important it is for journalists to disclose their sources and reporting methods).

269. *See* KOVACH & ROSENSTIEL, *supra* note 237, at 117.

270. *Id.*

transparency and verification approach might work. In the Jewell case, law enforcement officials, who wished to remain anonymous, disclosed that Jewell, who had been hailed as a hero for sounding the alarm about the bomb, might actually have planted it—an important story. The *Atlanta Journal-Constitution*, as the major local newspaper, was covering the story intensely. The *Journal* had an internal rule prohibiting the use of anonymous sources, so, in reporting the suspicions about Jewell, the information was not attributed to the anonymous source, but rather reported as the reporters' "own understanding of the facts."[271] The Jewell story took off nationally and Jewell went from hero to vilified suspect.[272]

Three months later, the U.S. Attorney handling the case confirmed that Jewell was no longer a target of the investigation.[273] Five years later, a North Carolina police officer arrested Eric Rudolph, who eventually pleaded guilty to the Atlanta bombing and three others.[274] Had the *Atlanta Journal-Constitution* followed the transparency method, they would have couched their report in less certainty. They would have reported first that their sources insisted on remaining anonymous (not a disqualifier, but a cause for injecting a little more skepticism into the report). They would have reported all the things the police *did not know* and how the scenario they were suggesting did not add up; law enforcement had not interviewed Jewell, had no physical evidence, and had not attempted to work out a timeline to determine whether Jewell could have planted the bomb and still called in the tip. In short, had the reporters been transparent about how shaky, even unfounded, law enforcement's focus on Jewell was, the story might not have taken off as it did, and might not have done such harm to Jewell. Readers would have been better able to evaluate for themselves what to believe.[275]

Both the Vietnam War episode and the TMI accident demonstrate the importance of timely publication of information, even if incomplete, or perhaps in some aspects inaccurate. The Jewell case is harder to evaluate. While perhaps not rising to the level of the widespread global impact of the Vietnam War, or the emergent crisis of TMI, the idea of a bomber on

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271. *Id.* at 118.

272. *See* Scott Freeman, *Presumed Guilty*, ATLANTA MAG. (Dec. 1, 1996), https://www.atlantamagazine.com/great-reads/presumed-guilty/ [https://perma.cc/Z4NX-946E] (providing an example of how non-transparent reporting methods can impact and harm the subject of a major news story and result in other collateral effects).

273. *See id.* (describing when the U.S. attorney told Jewell's defense lawyer that Jewell was no longer a suspect).

274. *See* FBI NAT'L PRESS OFF., STATEMENT OF ATT'Y. GEN. JOHN ASHCROFT REGARDING THE ARREST OF ERIC ROBERT RUDOLPH, (May 31, 2003) (naming actual culprit of the bombing).

275. *See* KOVACH & ROSENSTIEL, *supra* note 237, at 118 (arguing that transparent reporting would enable an audience to reach its own conclusions about the shaky information and lessen the impact of the *Journal-Constitution*'s reporting on Jewell).

the loose, especially one with ties to law enforcement, was an important story, especially to the citizens of Atlanta. And it appears that in all three examples, Kovach and Rosenstiel offer a strategy—a means to qualify the information—to give notice to the audience of the nature of the information—warnings that would put the stories in context and allow readers to critically evaluate the information and cautions that indicate there might be reason to doubt the veracity.

But while it assists readers in assessing the reliability of the information, does the transparency approach, by virtue of including a warning or qualification regarding the reliability of the information, protect publishers from legal actions should information published turn out to be false? No. Not under the common law and not if *Sullivan* is overturned. As noted above, the repeater rule, followed by virtually every jurisdiction, holds the repeater just as responsible for defamation as the originator, even if the repeater qualifies the statement. That's where *Sullivan* comes in. *Sullivan* recognizes that it is often important to publish information, even if it cannot be absolutely verified as accurate, and even if the publisher entertains some doubts. *Sullivan* protects the publisher of information about matters of public concern, as long as the publisher did not actually know the information was false or did not publish with reckless disregard for the truth or falsity. Here, the publisher must walk a fine line—entertaining some doubts, even acknowledging them—does not rise to reckless disregard; but evidence that the publisher in fact had serious doubts as to the truth, where there were obvious reasons to doubt the veracity of the information published, or where the material was inherently improbable, could satisfy the standard.[276] *Sullivan* provides essential protection by shielding those who communicate important information from staggering judgments, and as important, allowing dismissal of frivolous suits even before final judgment.

The importance of the *Sullivan* standard's impact on limiting frivolous suits cannot be overstated. As one commentator put it, the real threat of defamation is "the harm caused by threats and bullying in the shadow of the law," pointing specifically to the costs of litigation regardless of outcome: "Arguably, the feature of defamation law that most effectively allows plaintiffs to weaponize claims against media organizations is the

276. *See* St. Amant v. Thompson, 390 U.S. 727, 731–32 (1968) (clarifying that there must be sufficient evidence that a defendant flouted truth); *accord* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 512–13 (1984) (discussing the fact standard designed to avoid undue self-censorship); Time, Inc. v. Pape, 401 U.S. 279, 281–90 (1971) (holding that the deliberate choice of one of several interpretations, despite reflecting a misinterpretation does not rise to the level of malice).

high cost of litigation."[277] And while the Court has consistently held that the Constitution does not give any special procedural rights to defendants in defamation actions,[278] it *has* held that when considering a defamation defendant's motion for summary judgment, the judge must determine the sufficiency of the plaintiff's evidence of reckless disregard in light of the "clear and convincing evidence" requirement.[279] Thus, some meritless suits may be cut off before trial, although even then, substantial litigation costs will have been expended.

In this regard, ironically, the *Sullivan* standard standing alone probably increases both the costs and non-economic burdens of defamation litigation, especially at the discovery stage. As the Court noted in *Herbert v. Lando*, the inquiry required to establish actual malice will cause "costs and other burdens [to] . . . escalate and become much more troublesome for both plaintiffs and defendants."[280] And the "other burdens" the Court referred to include an especially troublesome one: inquiry into the editorial process itself—long considered sacrosanct, but called into play by the *Sullivan* standard itself.[281] But as the Court in *Lando* explained, this inquiry was mandated by the *Sullivan* standard.[282] This is where Anti-SLAPP statutes come in.

B. Anti-SLAPP Statutes

While the Court has said that the First Amendment does not require any special procedures—that is, no right to either a lower threshold or speedier consideration of defamation defendants' First Amendment-based summary judgment motions—Anti-SLAPP statutes do provide that remedy. Anti-SLAPP statutes take aim at what is perceived as a growing use of strategic, meritless lawsuits used to inhibit public participation in matters of public concern—that is, to prevent what were labeled Strategic

277. David J. Acheson & Dr. Ansgar Wohlschlegel, *The Economics of Weaponized Defamation Lawsuits*, 47 SW. L. REV. 335, 356 (2018); *see also* Anderson, *supra* note 202, at 516 (noting that litigation costs cause a greater chilling effect than potential judgments).

278. *See, e.g.*, Calder v. Jones, 465 U.S. 783, 790–91 (1984); *accord* Herbert v. Lando, 441 U.S. 153, 176 (1979) (no constitutional bar to inquiry into editorial process); Hutchinson v. Proxmire, 443 U.S. 111, 120, n.9 (1979) (stating that the Constitution requires no special rules to apply for summary judgment in defamation actions).

279. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986).

280. *Lando*, 441 U.S. at 176.

281. *See, e.g.*, Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974) (holding that the First Amendment imposes strong barriers against government intrusion on editorial judgment); *see also* Columbia Broad. Sys., Inc. v. Democratic Nat. Comm., 412 U.S. 94, 120–21 (1973) (protecting journalistic independence under the First Amendment).

282. *See* Lando, 441 U.S. at 175–77 (citing *Sullivan* as original precedent for inquiry).

Lawsuits Against Public Participation (SLAPPs).[283] They allow defendants faced with meritless suits aimed at their exercise of First Amendment rights to move for early dismissal of the suits and sometimes recovery of litigation costs.[284] Many Anti-SLAPP statutes focus primarily on citizen participation in government through public meetings. But others cast a broader net and protect the press, an approach advocated by the Society of Professional Journalists,[285] the ABA,[286] and the Uniform Law Commissioners.[287] A well-crafted Anti-SLAPP statute, such as the model act proposed by the Society of Professional Journalists,[288] would protect any statements made involving matters of public interest (and so shield the press covering news), and would balance both parties' rights by providing a process, early in the litigation, to quickly and effectively assess the merits of the suit, and to put bite into the determination that a suit is meritless by providing for recovery of attorney's fees by the moving party if successful. As described by the Uniform Law Commissioners, a model act should include five key mechanisms, drawn from an overview of enacted statutes:

> 1. Crea[te] specific vehicles for filing motions to dismiss or strike early in the litigation process;
>
> 2. Requir[e] the expedited hearing of these motions, coupled with a stay or limitation of discovery until after they're heard;
>
> 3. Requir[e] the plaintiff to demonstrate the case has some degree of merit;

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283. *See* Shannon Hartzler, *Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant*, 41 VAL. U. L. REV. 1235, 1236 (2007) (defining the purpose of Anti-SLAPP statutes in mitigating the use of meritless suits to suppress speech); *see also* TARAH GRANT ET AL., SOC'Y OF PRO. JOURNALISTS & BAKER & HOSTETLER LLP, SLAPP BACK: HOW THE MEDIA CAN TAKE ADVANTAGE OF STATE LAWS TO WIN EARLY DISMISSAL OF MERITLESS LIBEL LAWSUITS 1, 5–7 (Oct. 1999), https://www.spj.org/pdf/pkr1999.pdf [http://perma.cc/6HFU-TT3Y] (showing the effect SLAPP lawsuits have on the public).

284. *See id.* at 10 (highlighting benefits of the statute for defendants, such as the ability to seek early dismissal in frivolous lawsuits).

285. *See id.* (expounding on the protections afforded by Anti-SLAPP statutes).

286. *See* AM. BAR. ASS'N, RESOLUTION: ADOPTED BY THE HOUSE OF DELEGATES (Aug. 6–7, 2012), https://www.americanbar.org/content/dam/aba/administrative/crsj/committee/aug-12-free-speech.authcheckdam.pdf [https://perma.cc/MSU6-FS7F] (encouraging passage of Anti-SLAPP statutes at the state and federal level).

287. *See* UNIF. PUB. EXPRESSION PROT. ACT (NAT'L CONF. OF COMM'RS OF UNIF. STATE L. 2020), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=46a646fa-5ef6-8dd0-7b0a-ce95c59f0d14&forceDialog=0 [http://perma.cc/HW3Y-BGWN] (containing the text of the proposed Act).

288. *See* SOC'Y OF PROF. JOURNALISTS & BAKER & HOSTETLER LLP, A UNIFORM ACT LIMITING STRATEGIC LITIGATION AGAINST PUBLIC PARTICIPATION, https://www.spj.org/pdf/antislapp.pdf. [https://perma.cc/A3E4-68EL] (containing text of the proposed Act).

4. Impos[e] cost-shifting sanctions that award attorney's fees and other costs when the plaintiff is unable to carry its burden; and
5. Allow[] for an interlocutory appeal of a decision to deny the defendant's motion.[289]

Dovetailing with the protections of *Sullivan* and its progeny, such an Anti-SLAPP statute would allow a press defendant who is the target of an arguably meritless, retaliatory suit by a public figure to seek summary judgment regarding the *Sullivan* standard early in the process. The court would assess the sufficiency of the plaintiff's allegations to determine whether the plaintiff has a likelihood of success on the merits generally[290] and the likelihood the plaintiff will be able to prove by clear and convincing evidence[291] that the defendant published the piece at issue with knowledge of falsity or reckless disregard for the truth or falsity.

As significant as early review and potential dismissal of meritless suits can be, the specter of having to pay the defendant's litigation costs may be even more important in that it likely will cause those considering filing a suit for the sole purpose of intimidation to think twice and refrain from doing so.[292] Thus, the attorney's fees provision is crucial to an effective statute.

As of July 2020, thirty-two states and the District of Columbia have adopted Anti-SLAPP statutes, although they vary widely, especially in terms of whether the definition of who is covered would include journalists.[293] Related, federal courts struggle with whether an Anti-SLAPP statute is substantive or procedural for *Erie* purposes.[294] Thus, many make a persuasive case for adoption of a federal Anti-SLAPP

289. UNIF. PUB. EXPRESSION PROT. ACT, *supra* note 287, at 2–3.

290. *See* Hartzler, *supra* note 283, at 1271 (suggesting likelihood of success on the merits standard).

291. *See* St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (stating clear and convincing evidence requirement); *see also* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 514 (1984) (reaffirming independent appellate review of evidence of reckless disregard); Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 686 (1989) (restating that it is a judge's duty to review sufficiency of evidence of reckless disregard); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986) (stating that it was implicit that appellate review of reckless disregard be in the judge's hands).

292. *See* UNIF. PUB. EXPRESSION PROT. ACT, *supra* note 287, § 10 cmt. 1 ("States that do not impose a mandatory award upon dismissal of a cause of action will become safe havens for abusive litigants.").

293. *Id.* at 1.

294. *See* Tyler J. Kimberly, *A SLAPP Back on Track: How Shady Grove Prevents the Application of Anti-SLAPP Laws in Federal Courts*, 65 CASE W. RES. L. REV. 1201, 1212 (2015) ("Determining when to apply substantive law and procedural law has created problems for federal courts since *Erie*'s inception."); Colin Quinlan, *Erie and the First Amendment: State Anti-SLAPP Laws in Federal Court after Shady Grove*, 114 COLUM. L. REV. 367, 369 (2014) (analyzing conflicts between federal and state law for Anti-SLAPP laws).

statute, although this initiative has languished.[295]

C. Striking the Right Balance

Some suggest that the *Sullivan* standard itself creates an unfair barrier for plaintiffs, especially because it has been applied to an increasingly broad category of public figures, [296] and even more so when used in conjunction with Anti-SLAPP statutes.[297] Others suggest that the *Sullivan* standard creates a moral hazard creating an incentive for intentionally sloppy reporting.[298] These critics assume that journalists will eschew careful investigation either because it is easier[299] (a very cynical assumption) or, according to the more thoughtful analysis offered by Eugene Volokh, among others, for fear of discovering material that would create doubt about the veracity of their reporting and so provide evidence of reckless disregard.[300] These criticisms miss the mark.

1. Getting it Right Matters

David McCraw, vice president and deputy general counsel to the *Times*, counters the somewhat cynical notion that it pays not to research or investigate head on:

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295. *See* Daniel A. Horwitz, *The Need for a Federal Anti-SLAPP Law*, N.Y.U. J. LEGIS. & PUB. POL'Y QUORUM (Jun. 15, 2020) (preventing circumvention of state Anti-SLAPP laws); *accord* Josephine Petrick & Breana Burgos, *Federal Anti-SLAPP Law Year in Review—2019 Roundup*, APP. INSIGHT (April 2020), https://www.appellateinsight.com/2020/03/31/federal-anti-slapp-law-year-in-review-2019-roundup/ [http://perma.cc/K3GE-DJ3T] ("The lack of national uniformity encourages forum-shopping when plaintiffs reasonably anticipate that their complaints may be regarded as SLAPPs."); Los Lobos Renewable Power, LLC, v AmeriCulture Inc., 885 F.3d 659, 673 (10th Cir. 2018) (calling for a more nuanced *Erie* analysis toward Anti-SLAPP laws); AM. BAR. ASS'N, *supra* note 286, at 1 (protecting citizens of all states).

296. *See* Sunstein, *supra* note 158, at 411; *accord* Reynolds, *supra* note 202, at 474 (2020); Benjamin Barron, *A Proposal to Rescue* New York Times v. Sullivan *by Promoting a Responsible Press*, 57 AM. U. L. REV. 73, 75 (2007); Anderson, *supra* note 202, at 488; We the People, *Should the Supreme Court Reconsider* NYT v. Sullivan?, NAT'L CONST. CTR., at 1:58 (Jul. 22, 2021), https://constitutioncenter.org/interactive-constitution/podcast/should-the-supreme-court-reconsider-nyt-v-sullivan [http://perma.cc/3YXS-T9CE] (remarks of David A. Logan).

297. Justin W. Aimonetti & M. Christian Talley, *How Two Rights Made A Wrong:* Sullivan, *Anti-SLAPP, and the Underenforcement of Public-Figure Defamation Torts*, 130 YALE L.J. F. 708, 713 (2021); *see also* Alyssa R. Leader, *A "SLAPP" in the Face of Free Speech: Protecting Survivors' Rights to Speak Up in the "Me Too" Era*, 17 FIRST AMEND. L. REV. 441, 443 (2019).

298. The concept of moral hazard is well-developed in insurance scholarship. One author described the most simplistic understanding as follows: "if I have health insurance, I'm not going to bother to wear my sweater like my mother always told me . . . because it is OK, the insurance will pay for my cold to be treated." Mark V. Pauly, Policy Brief, *The Truth about Moral Hazard and Adverse Selection*, 7 CTR. POL'Y RSCH. 2 (2007). Of course, this overlooks the instinct to avoid the downside of being sick.

299. *See* Barron, *supra* note 296, at 84–86 (assuming journalists will not verify or investigate before publishing).

300. *See id.*; Volokh, *supra* note 202 ("Under the actual malice regime as it has evolved, 'ignorance is bliss.'").

> No lawyer here has ever reviewed a story draft, concluded it was a factual wreck and then declared it was good to go because the reporter didn't have a reckless disregard for the truth. Whatever the Supreme Court may have said in *Sullivan*, getting it right is still what matters.[301]

I suggest that editors and reporters would agree—no journalist averts their eyes to further investigation in order to avoid tripping over reckless disregard.[302] As noted above, Kovach and Rosenstiel call truth journalism's first obligation, and refer to verification as its most critical discipline, spending two full chapters on these principles.[303] Most institutional journalists adhere to a code of ethics that requires journalists to consider truth as essential—the paramount goal.[304] Truth matters, and journalism does take getting it right seriously.[305]

Here I am describing journalism—not necessarily any speaker. I am referring to journalism as distinguished from "communications" or "media" or "entertainment," and journalism defined as an activity as distinct from a journalist as a person or entity.[306] Kovach and Rosenstiel avoid identifying who is and who is not a journalist and focus instead on what is or is not journalism. They ask whether particular material

301. David McCraw, *How a* Times *Court Decision Revolutionized Libel Law*, N.Y. TIMES (Nov. 30, 2018), https://www.nytimes.com/2018/11/30/reader-center/libel-law-explainer.html [https://perma.cc/5FXX-FS47].

302. *See generally Code of Ethics*, SOC'Y PROF. JOURNALISTS, https://www.spj.org/pdf/spj-code-of-ethics.pdf [https://perma.cc/D8A4-CLDF].

303. *See* KOVACH & ROSENSTIEL, *supra* note 237, at 47–68, 97–136 (reiterating the essential purpose of journalism).

304. *See generally* SOC'Y PROF. JOURNALISTS, *supra* note 302; *Ethical Journalism: A Handbook of Values and Practices for the News and Opinion Departments*, N.Y. TIMES (Sept. 2004), https://www.nytimes.com/editorial-standards/ethical-journalism.html# [https://perma.cc/MEC9-K7KT]; *Standards & Values*, REUTERS, https://www.reutersagency.com/en/about/standards-values/ [https://perma.cc/T5RJ-BTUG]; Doris Del Tosto Brogan, *Expungement, Defamation, and False Light: Is What Happened Before What Really Happened or Is There a Chance for a Second Act in America?*, 49 LOY. U. CHI. L.J. 1, 50 (2017) (citing *The Washington Post Standards and Ethics*, AM. SOC'Y NEWS EDITORS, http://asne.org/content.asp?contentid=335 (last visited Sept. 7, 2017)).

305. *See* Ivor Shapiro et al., *Verification as a Strategic Ritual: How Journalists Retrospectively Describe Processes for Ensuring Accuracy*, 7 JOURNALISM PRAC. 657, 673 (2013) (describing a concerted quest for accuracy seen by many journalists as central to their professional identity); *see also* Margaret Sullivan, *Getting It First or Getting It Right*, N.Y. TIMES (Dec. 22, 2012), https://www.nytimes.com/2012/12/23/public-editor/getting-it-first-or-getting-it-right.html [https://perma.cc/QY9A-6JUG] ("[*New York Times* practices] would not ensure that errors are not made; that's not possible. But it would guard against and minimize them"); Craig Silverman, *Eight Simple Rules for Doing Accurate Journalism*, COLUM. JOURNALISM REV. (Sept. 16, 2011), https://archives.cjr.org/behind_the_news/eight_simple_rules_for_doing_a.php [https://perma.cc/R4WY-UNWX] ("The goal is to equip participants with tools, tips, and knowledge to get things right, and weed out misinformation and hoaxes before they spread them.").

306. KOVACH & ROSENSTIEL, *supra* note 237, at 3, 6, 9.

qualifies as journalism, making the determination by examining whether the material lives up to what they call journalism, defined by a comprehensive set of fairly universal elements set out in their book.[307] They detail principles, practices, methodologies, and objectives that "underlie the production of responsible journalism . . . ."[308] This gets it right. Efforts to make distinctions based on where, how, and by whom material is published have never worked. Yet in today's communications driven culture, the distinction between journalism and all other communication matters, and a functional definition based on adherence to common principles and a rigorous methodology works.

The reality is, few speakers, not just journalists, subscribe to a "what you don't know can't hurt you" approach. Most good-faith speakers, journalists or not, do try to achieve accuracy in what they say. Instead, the real problem with damage from false publication is not some hypothetical speaker who eschews investigating to avoid being accused of reckless disregard, but rather those whose very purpose is to do harm, not to inform—falsity or truth simply don't figure in, or if they do, falsity is the goal. For the rest of us, there really is no percentage in avoiding discovering the truth, again, assuming the purpose is to inform and not to simply fill space with speech, regardless of its value, or to do calculated harm with intentional falsity.

2. Defamation Actions Remain Viable

As for the argument that defamation as a cause of action is dead,[309] these criticisms wildly overstate the actual situation.

First, *Sullivan*'s reckless disregard standard applies only to public persons involved in matters of public interest.[310] A private individual involved in a matter that is not of public interest need only establish the elements of defamation and prove each element by a preponderance of the evidence.[311] The only impact *Sullivan* had on private litigants was to

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307. *See id.* at 8–9 (laying out the elements of journalism); *see also* Erin C. Carroll, *How We Talk about the Press*, 4 GEO. L. TECH. REV. 335, 336 (2020) ("[T]he press's power and freedom are derived from customs and norms.").

308. KOVACH & ROSENSTIEL, *supra* note 237, at 15.

309. *See* Aimonetti & Talley, *supra* note 297, at 714–19 (explaining that the *Sullivan* standard is impossible to satisfy on its own and that states have adopted even tougher standards); *see also* Leader, *supra* note 297, at 442–43 (explaining that speaking out may be costly depending on the state in which litigation occurs).

310. *See supra* notes 103, 121–137 and accompanying text (explaining that *Sullivan*'s reckless disregard standard applies to public officials and public figures, but not to private figures).

311. Some jurisdictions have opted to apply the *Sullivan* standard to private plaintiffs. *See* RESTATEMENT (SECOND) OF TORTS § 580B (AM. L. INST. 1977) (noting the elements of defamation of a private person); William F. Cuozzi & Lee Sporn, *Private Lives and Public Concerns: The*

place them in the same position as other tort plaintiffs—that is, placing the burden of proof, by a mere preponderance of the evidence for each element, on the plaintiff. The common law presumption that a defamatory statement was false was stricken,[312] and the plaintiff now must show some level of fault—at least negligence—to prevail.[313] This places the defamation plaintiff on par with other tort plaintiffs—hardly an unfair or insurmountable burden.

And, while *Sullivan* places a heavy burden on public figures engaged in matters of public interest and does result in dismissal of some suits for failure to meet the reckless disregard standard, public figure plaintiffs do succeed in overcoming motions to dismiss and often recover significant damages.[314] For example, in the mideighties, Kathy Keeton, common law wife of *Penthouse* publisher Bob Guccione, won a $2 million verdict against *Hustler* and publisher Larry Flynt.[315]

More recently, *Rolling Stone* was hit with a $3 million jury verdict in a case involving allegations of a rape culture at the University of Virginia (UVA).[316] The reporter who wrote the article alleged that school administrators had done little to address rape culture among UVA athletes. She had relied on the narrative of one alleged victim, never

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Decade Since Gertz v. Robert Welch, Inc., 51 BROOK. L. REV. 425, 428, n.12, 454–55 (1985) (noting that six states have adopted the "public interest" test). However, this is not required by the *Sullivan* holding or rationale which applies only to public figures. New York Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) (holding public officials must prove actual malice to prevail in defamation cases). This was extended to public persons by *Curtis*, Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967), but the Court refused to extend the rule to private persons in *Gertz*. Gertz v. Robert Welch, 418 U.S. 323, 343–45 (1974). *See also* notes 104–115, 119–140.

312. *See* Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 768–69 (1986) (holding that defamation plaintiff must bear the burden of proving falsity and striking common law presumption).

313. *See Gertz*, 418 U.S. at 347 (holding that private person defamation plaintiffs must prove at least negligence with respect to each element).

314. *See, e.g.*, Van Liew v. Eliopoulos 84 N.E.3d 898, 913 (Mass. App. 2017) (upholding public figure jury verdict of $2.9 million); Armstrong v. Shirvell, No. 11-CV-11921, 2012 WL 4059306 (Ed. Mich. 2012) (returning a jury verdict of $500,000 for defamation with malice of a public figure); Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 682–83, 692–93 (1989) (affirming jury verdict awarding damages to public figure judicial candidate); Curtis Pub. Co. v. Butts, 388 U.S. 130, 157–58 (1967) (affirming jury verdict for public figure plaintiff); Sindi v. El-Moslimany, 896 F.3d 1, 16–19 (1st Cir. 2018) (affirming $400,000 damage award for public figure scientist); *see also* Lewis, *supra* note 4, at 608 (citing a sampling of cases, including one where a jury awarded over $2 million to the president of the Mobil Oil Corporation for a story stating that he had influence to "set up his son" in shipping management).

315. *See* United Press Int'l, *'Penthouse' Exec Wins Libel Suit against 'Hustler'*, S. FLA. SUN SENTINEL, (Aug. 8, 1986) https://www.sun-sentinel.com/news/fl-xpm-1986-08-08-8602170031-story.html [https://perma.cc/6SYH-3HYB] (providing an example of a public figure who overcame a motion to dismiss and received significant monetary damages).

316. Bill Wyman, *5 Takeaways from the Rolling Stone Defamation Verdict*, COLUM. JOURNALISM REV. (Nov. 29, 2016) https://www.cjr.org/analysis/rolling_stone_verdict_defamation_case.php [https://perma.cc/2WKB-QCS6].

interviewed the alleged attackers, and did not seek out documents that may or may not have corroborated the events. UVA's associate dean sued and won.[317]

In what is perhaps the most high-profile public figure defamation litigation in recent memory, Sandy Hook plaintiffs have won two staggering verdicts against Alex Jones for his disinformation campaign targeting the families of those who perished in the Sandy Hook mass shooting. In Texas, the plaintiffs won $4.1 in compensatory damages, and a whopping $45.2 million in punitive damages in their suit against Steve Bannon for his persistent campaign of publishing malicious falsity about the massacre at Sandy Hook Elementary School.[318] Later in Connecticut, the jury awarded a different group of Sandy Hook plaintiffs just short of $1 billion in total damages.[319]

Indeed, there is significant evidence that public figure defamation suits are increasing in number and generating sizable damage awards.[320] Further, and important given the current crisis of maliciously false information that we now lament, many of those injured by some of the most outrageous falsehoods of the past several years have turned to defamation to vindicate their reputations and to call out those spreading lies and have found success, including as noted above, the Sandy Hook plaintiffs.[321] The "Big Lie" has generated several defamation suits that challenge false allegations of voter fraud and tampering and shine the light on the dark false narrative about the 2020 election.

Dominion Voting Systems sued lawyer Sidney Powell and her law firm, lawyer Rudolph Giuliani, and My Pillow CEO Michael Lindell, alleging each defendant knowingly or recklessly made false, defamatory statements about Dominion and its related entities by charging that Dominion engaged in massive election fraud in the 2020 election and is

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317. *Id.*

318. The Daily, *The Alex Jones Verdict and the Fight Against Disinformation*, N.Y. TIMES (Aug. 8, 2022), https://www.nytimes.com/2022/08/08/podcasts/the-daily/alex-jones-sandy-hook-defamation-damages.html [https://perma.cc/WV8E-7DYU].

319. Elizabeth Williamson, 'We Told the Truth': Sandy Hook Families Win $1 Billion from Alex Jones, N.Y. TIMES (October 12, 2022), https://www.nytimes.com/2022/10/12/us/politics/alex-jones-sandy-hook-damages.html [https://perma.cc/M3RR-LVUN]. A third Sandy Hook case is pending against Jones. *Id.*

320. *See generally* Alexandra M. Gutierrez, *The Case for a Federal Defamation Regime*, 131 YALE L.J. FORUM 19, 30–31 (2021) (citing MLRC 2018 REPORT ON TRIALS AND DAMAGES, MEDIA L. RES. CTR. BULL., 54–55 (Apr. 2018), https://www.medialaw.org/images/stories/MLRC_Bulletin/2018/damagesurvey2018.pdf [https://perma.cc/C9HH-7A45]).

321. See *infra* note 361 and accompanying text.

seeking damages in the billions of dollars.[322] Eric Coomer, Dominion's Director of Product Strategy and Security, has also sued the Trump campaign, Powell, Giuliani, and others affiliated with Trump, alleging that the defendants falsely reported that he was involved in election fraud, and that he was part of Antifa activities.[323] Smartmatic, Corp., another election technology company, sued Fox News, on-air personalities Maria Bartiromo, Jeanne Pirro, Giuliani, and Powell for defamation, seeking $2.7 billion based on false reports that Smartmatic was controlled by Venezuelan dictators and was part of a conspiracy to commit election fraud by switching votes in their machines.[324]

3. Rebuttal: A Public Figure's First and Best Remedy

To be fair, public figures do face a daunting hurdle in bringing defamation actions, and a good number of public figures with legitimate claims and genuine injuries may not be able to clear that hurdle. But they are not left without remedies. As *Gertz* explained in striking the public/private plaintiff distinction by virtue of their public position, public figures have significantly greater access to defamation's first defense: self-help. Public figures typically have easy access to the institutional media as well as other channels of communication.[325] Anthony Lewis noted, *Sullivan* assumes that the public figure's "recourse

322. *See* U.S. Dominion, Inc. v. Powell, 554 F. Supp. 3d 42, 49 (D.D.C. Aug. 11, 2021). The judge noted that the defendants made statements too numerous to summarize in its opinion, confining its discussion to examples necessary to decide the defendants' motion for summary judgment. *Id.* at 50–51. Even this "summary" of statements spanned four pages of the court's opinion. *Id.* at 50–55.

323. Complaint, at 2–5, Coomer v. Donald J. Trump for President, Inc., No. 2020CV034319, 2022 WL 12611311 (Colo. Dist. Ct., Dec. 22, 2020), https://wp-cpr.s3.amazonaws.com/uploads/2020/12/Complaint-2020-12-221-Eric-Coomer-Suit-Filed-Stamped.pdf [https://perma.cc/6ULW-H7QY]. The word Antifa stands for anti-fascist. Antifa has been described as a loosely organized group of activists who opposes "actions they view as authoritarian, homophobic, racist or xenophobic." Nicholas Bogel-Burroughs & Sandra E. Garcia, *What is Antifa, The Movement Trump Wants to Declare a Terror Group?*, N.Y. TIMES (Sept. 28, 2020), https://www.nytimes.com/article/what-antifa-trump.html [https://perma.cc/W5RZ-BMKX].

324. Complaint at 2–4, Smartmatic USA Corp. v. Fox Corp., No. 151136/2021, 2022 BL 117569 (N.Y. Sup. Ct., Mar. 2022).

325. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974) (noting that unlike public figures, public individuals often do not have "effective opportunities" to rebut defamatory statements). The Court in *Gertz* pulled its punch a bit, opining in a footnote that rebuttal doesn't necessarily undo the harm completely. *Id.* at 344, n. 9; *see also* Aaron Perzanowski, *Relative Access to Corrective Speech: A New Test for Requiring Actual Malice*, 94 CALIF. L. REV. 833, 845 (2006) (noting corrective speech as a remedy for defamation is consistent with American jurisprudence's preference for self-help); Lewis, *supra* note 4, at 621–22 (noting the difference between public and private individuals).

is not litigation[,] but rebuttal."[326] At least some research indicates rebuttal works.[327] And this is even more true today as barriers to publication have evaporated, opening up almost unfettered opportunities to engage in rebuttal,[328] especially for public figures who have access to vast audiences on a range of social media platforms.[329]

The *Sullivan* standard, especially when it can be considered in the procedural posture of a well-crafted Anti-SLAPP statute, serves its purpose well, a purpose that may be even more crucial now than when it was first announced. Those familiar with this type of litigation report that *Sullivan*, in combination with a well-crafted Anti-SLAPP statute, does not result in inappropriate dismissal of meritorious suits, but rather provides for a clear, reliable process that can be invoked early enough in litigation to prevent a defendant from being saddled with significant

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326. Lewis, *supra* note 4, at 621; *see also* Reuber v. Food Chem. News, Inc., 925 F.2d 703, 708–09 (4th Cir. 1991), *cert. denied*, 501 U.S. 1212 (1991) ("The inquiry into access to channels of communication proceeds on the assumption that public controversy can be aired without the need for litigation and that rebuttal of offending speech is preferable to recourse to the courts.").

327. *See* Clay Calvert, *Harm to Reputation: An Interdisciplinary Approach to the Impact of Denial of Defamatory Allegations*, 26 PAC. L.J. 933, 938 (1995) (detailing research indicating publication of denial, especially repeated denial and especially if in same article, significantly mitigates or reduces harm to reputation). Anthony Lewis notes, in discussing the notorious defamation case General William Westmoreland brought against CBS, *Westmoreland v. CBS, Inc.*, 596 F. Supp. 1170 (S.D.N.Y. 1984), that Westmoreland gave his critics "as good as he got," denouncing the CBS documentary that charged him with manipulating casualties during the Vietnam war on many prominent platforms. Lewis, supra note 4 at 621. According to Lewis, "[h]e succeeded to the point that the public may well have thought better of him after than it did before the documentary. He did not need a legal forum." *Id.* at 621–22.

328. *See supra* notes 165–169 and accompanying text; *see also* Cory Batza, *Trending Now: The Role of Defamation Law in Remedying Harm from Social Media Backlash*, 44 PEPP. L. REV. 429, 462–64 (2017) (noting that the average person has computer access that allows for social media interaction); *Digital Media and Society: Implications in a Hyperconnected Era*, WORLD ECON. F., https://reports.weforum.org/human-implications-of-digital-media-2016/benefits-and-opportunities/ [https://perma.cc/W459-GL4R] ("Digital media gives people a voice . . . ."); Ashley Messenger & Kevin Delaney, *In the Future, Will We All Be Limited-Purpose Public Figures?*, 30 COMMC'NS LAW. 4, 5–6 (Mar. 2014) ("[E]verybody will be world famous for fifteen minutes—but everybody won't necessarily be a limited-purpose public figure"); Ann E. O'Connor, *Access to Media All A-Twitter: Revisiting* Gertz *and the Access to Media Test in the Age of Social Networking*, 63 FED. COMM. L.J. 507, 510 (2011) ("The effect of such universal access and networking should not go unnoticed by courts when they are considering an individual who is claiming defamation . . . .").

329. *See Gertz*, 418 U.S. at 344 (noting that public figures and officials have greater access to the public). *See, e.g.*, O'Connor, *supra* note 328, at 533. This overlooks the other significant justification advanced in *Gertz*—one that the Court found even more important—that public figures thrust themselves into the controversies, taking on the risk of the fray and the consequences that necessarily follow. *See generally* Messenger & Delaney, *supra* note 328, at 1–2. An argument can be made that even non-public figures have access to the digital media, so perhaps the distinction should be abandoned, since all have access to the self-help of rebuttal.

litigation costs.[330]

In short, in today's hyper-charged atmosphere of malicious falsity, we need *Sullivan* more than ever, especially if combined with a robust Anti-SLAPP statute. But the law may offer one more important antidote to the spread of wildly malicious falsity. The neutral reportage doctrine first emerged in 1977, but never really caught hold. Now may be a good time to revive the doctrine.

VI. NEUTRAL REPORTAGE

"All of the true things I am about to tell you are shameless lies."[331]

The *Sullivan* reckless disregard standard protects false utterances, not because falsity itself deserves protection, but rather to allow breathing room for truth—to ensure that discussion we deem essential to a functioning democracy and a healthy society is open, and robust, and not chilled by fear of making a mistake. In short, *Sullivan* does not seek to protect untruthful statements themselves or their intrinsic value, but rather, to protect debate and prevent those engaging in the marketplace of ideas from timorous self-censorship. That being said, should we ever protect republication of what the re-publisher knows is false information? Isn't that exactly what *Sullivan* held falls outside the protection of its rule? What possible good would that do? The neutral reportage doctrine makes a case for just that—protecting the republication (or repetition) of utterances the repeater knows are untrue but for a purpose. The case is persuasive, especially as a way of dealing with the current culture of rampant, poisonous, dangerous falsity masquerading as truth.

Recall that the repeater of false, defamatory material is just as liable as the originator of the statement, even if the repeater qualifies the statement by saying that they do not believe it.[332] The repeater rule applies the principle that republication causes just as much harm to reputation as the

330. *See* Harry W. R. Chamberlain & Lisa M. Chait, *The "Nuts and Bolts" of Anti-SLAPP: What Every Lawyer Should Know About Anti-SLAPP Motions Under Code of Civil Procedure § 425.16*, 1–2, https://www.buchalter.com/wp-content/uploads/2017/06/The-Nuts-and-Bolts-of-Anti-SLAPP.pdf [https://perma.cc/6TU9-4CCH] ("While most SLAPP suits are ultimately unsuccessful in enforcing any valid legal right on behalf of the plaintiff, they often 'succeed' in other areas."); Felix Shafir & Jeremy B. Rosen, *California's Anti-SLAPP Law Is Not Systematically Abused*, LAW 360 (June 30, 2016, 4:07 PM), https://www.horvitzlevy.com/R5FD3S351/assets/files/News/2016-06-30%20FS_JBR%20-%20California's%20Anti-SLAPP%20Law%20Is%20Not%20Systematically%20Abused%20-%20Law360.pdf [https://perma.cc/33QD-2Y4K] (surveying court records applying California's expansive Anti-SLAPP statute and finding no systemic problem of abuse or dismissal of meritorious suits).

331. KURT VONNEGUT JR., CAT'S CRADLE 16 (Delacorte Press 1st ed. 1963).

332. *See supra* notes 45–51 and accompanying text.

original publication.[333] And, of course, if the repeater does say, "Lyndon LaRouche said Secretary of State Henry Kissinger is a Soviet mole, but we don't believe it," that would easily clear the onerous *Sullivan* standard and seal the hypothetical plaintiff-Kissinger's defamation claim. We shorthand *Sullivan* to "reckless disregard," but in fact, the full statement of what the Court meant by the term actual malice is that the defamatory statement is published with "knowledge that it was false or with reckless disregard of whether it was false or not."[334] Qualifying a false statement with the comment that "we don't believe it" confesses judgment on knowledge of falsity.

Enter the neutral reportage privilege, which would immunize some repeaters under certain circumstances for publishing statements that they know are false.[335] Why? Because sometimes the point of reporting a falsehood—especially an outrageous or ridiculous falsehood—is not to communicate the truth of the statement, but to communicate that it was said and by whom and that it was false (often wildly so).[336] When former serial presidential candidate Lyndon LaRouche said, for example, that journalist/comedian Paul Krassner "was recruited to the stable of pornographers and 'social satirists' created and directed by the British Intelligence's chief brainwashing facility, the Tavistock Institute, to deride and destroy laws and institutions of morality and human decency," and a publication reported this in its coverage of LaRouche, also reporting that it was not true and indeed could not be true,[337] under the repeater

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333. *See* Flowers v. Carville, 310 F.3d 1118, 1128 (9th Cir. 2002) (citing 1. R. Smolla, *Law of Defamation* § 4:87, at 4–136.3 to –136.4 (2d ed. 2001)); PROSSER AND KEETON ON THE LAW OF TORTS § 113, at 799 (5th ed. 1984); Condit v. Dunne, 317 F. Supp. 2d 344, 363 (S.D.N.Y. 2004) (citing PROSSER AND KEETON ON THE LAW OF TORTS § 113, at 799 (5th ed. 1984)).

334. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (emphasis added).

335. *See* Edwards v. Nat'l Audubon Soc'y, Inc., 556 F.2d 113, 120 (2d Cir. 1977), *cert. denied*, 434 U.S. 1002 (1977). The *Edwards* case is generally credited with establishing the neutral reportage doctrine. *See* Ray Worthy Campbell, *The Developing Privilege of Neutral Reportage*, 69 VA. L. REV. 853, 854 (1983) (defines the "privilege of neutral reportage" as a shield from liability when publishing known libels of public figures). What is required to invoke the privilege differs from jurisdiction to jurisdiction, with those adopting the privilege of the *Edwards* court's formulation among the most restrictive. *Id.* at 854–55.

336. *See Edwards*, 556 F.2d at 120 ("The public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report . . . ."). In this, it is analogous to how we think of hearsay: Is the statement offered for the truth of the matter asserted (hearsay)? Or is it offered for some other reason, in this case for the purpose of showing only that it was said (not hearsay)? *See* DiSalle v. P.G. Publ'g Co., 544 A.2d 1345, 1361 (Pa. Sup. Ct. 1988), *abrogated by* Bd. of Supervisors of Willistown Twp. v. Main Line Gardens, Inc., 155 A.3d 39 (Pa. 2017) (noting the "public's need to know" rationale employed by the *Edwards* Court).

337. This is the gist of an article published in Reason. *See generally*, Paul Krassner, *The Wild Rise of Lyndon LaRouche,* REASON (Dec. 2018), https://reason.com/2018/11/11/the-wild-rise-of-

rule and *Sullivan*'s knowledge of falsity standard, Krassner could sue for defamation and presumably win. But what the neutral reportage privilege recognizes is that the fact that a person who aspired to the presidency would put forth such a bizarre (and detailed) conspiracy story speaks to the fitness of that candidate for the office. As such, it represents the very kind of exchange of information the *Sullivan* standard seeks to protect, indeed encourages—fearless, unfettered examination of information about matters of public interest, especially about those who serve in or seek public office.[338]

Second Circuit Judge Irving Kauffman, writing for a panel that included retired Supreme Court Justice Thomas Clark, was the first to explicitly describe a privilege protecting a publisher who knowingly repeats defamatory information the publisher knows is false from liability for libel—the neutral reportage privilege.[339] The facts of *Edwards* did not rise to quite the sensational level of some of today's false reports (or even the wild allegations of LaRouche). The case arose in the context of the DDT controversy. Environmentalists, among them the National Audubon Society, pointed to scientific evidence that DDT harmed bird populations.[340] This was countered by the pesticide industry that repeatedly pointed to steadily rising bird population numbers in the Audubon Society's own yearly bird count.[341] Increasingly alarmed about what it considered the persistent misuse by the pesticide industry of its data in the intensifying DDT debate, Robert S. Arbib, Jr., editor of the Audubon Society's annual report, stated in its introduction that "segments of the pesticide industry and certain paid 'scientist-spokesmen'" were distorting the facts for "the most self-serving of reasons," adding, "[a]ny

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lyndon-larouc/ [https://perma.cc/3MGK-L29H]. In fact, in this instance, because Krassner wrote the article himself, no defamation suit will lie. *See* McMichael v. James Island Charter Sch., No. 18-CV-00816, 2019 WL 11624205, at *6 (D.S.C. July 23, 2019), *aff'd*, 840 Fed. App'x 723 (4th Cir. 2020) ("Self-publication by the person defamed will not support a defamation action against the originator of the statements.").

338. *See Sullivan*, 376 U.S. at 269–70 ("The constitutional safeguard . . . was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.") (internal quotations and citation omitted).

339. *See Edwards*, 556 F.2d at 115 (noting democracy can only survive if people are given information to form their own judgments). Justice Clark was sitting by designation, as was Senior District Court Judge William Jamison. *See also* James E. Boasberg, *With Malice Toward None: A New Look at Defamatory Republication and Neutral Reportage*, 13 HASTINGS COMMC'N. & ENT. L.J. 455, 465 (1991) (noting that neutral reportage was first introduced in *Edwards*); Alan Ashman, *What's New in the Law*, 63 A.B.A. J. 1138, 1141–42 (1977) ("[T]he Second Circuit concluded, there was not enough evidence in [the *Edward*'s] case to demonstrate 'actual malice' on the part of the *Times*.").

340. *See Edwards*, 556 F.2d at 117 (noting that the article accused the plaintiffs of being "paid liars" regarding the use of insecticide DDT).

341. *See id.* at 116 (noting industry use of the rise in bird count).

time you hear a 'scientist' say the opposite, you are in the presence of someone who is being paid to lie, or is parroting something he knows little about."[342] *New York Times* reporter John Devlin picked up the story, writing an article reporting the Audubon Society's allegations, naming the scientists, and including the scientists' denials of the accusations. The scientists called Arbib's statements "hysterical," "unfounded," and "almost libelous," and Devlin included these denials in his article.[343] The scientists sued the *Times*, the Audubon Society, and others, and won in the district court. The district court judge denied the defendants' motion for a judgment notwithstanding the verdict, explaining that the jury's verdict reflected "the jury's belief that, although Devlin had accurately reported the information received from Arbib, he had been 'reckless' in failing to investigate further after the responses from [the scientists] placed him on notice of the defamatory potential of his proposed article."[344] On appeal, the Second Circuit reversed the judgment. Judge Kauffman characterized Devlin's article as an effort to report on an important controversy among prominent players, presenting both sides neutrally.[345] As such, he reasoned, it called into play fundamental First Amendment principles, adding that "[w]hat is newsworthy about such accusations is that they were made," and based on this, announced a constitutionally based neutral reportage privilege.[346] Judge Kauffman sympathized with the harm to the plaintiff's reputation that could be caused by the repetition, but reasoned that the legitimate interest in protecting reputation must be balanced against the importance of open discussion of a controversy, explaining the interest in protecting "reputation cannot be allowed to obstruct that vital pulse of ideas and intelligence on which an informed and self-governing people depend."[347] He went on, "if we are to enjoy the blessings of a robust and unintimidated press, we must provide immunity from defamation suits where the journalist believes, reasonably and in good faith, that his report accurately conveys the charges made."[348] Again, the point being that what is being communicated is not the truth of the defamatory statement, but rather the fact that the originator in fact said it.

Judge Kauffman formulated a fairly narrow neutral reportage privilege, although it is not clear whether he intended to set his

342. *Id.* at 116–17.
343. *Id.* at 117–18.
344. *Id.* at 119.
345. *Edwards*, 556 F.2d at 119 (noting that Devlin had reported accurately what was said).
346. *Id.* at 120.
347. *Id.* at 122.
348. *Id.*

description as hard limits or was just crafting his proposal of the privilege in the context of the facts before him. As described in *Edwards*, the privilege would apply to an accurate and disinterested report of an utterance made in the context of a newsworthy controversy where the defamatory statement was made by a responsible and prominent organization or individual, and provided that the report is neutral—accurate, disinterested, and not endorsed or embellished, and (although this is not clearly a separate requirement) it must relate to a public controversy.[349]

Some courts have refused to adopt the neutral reportage doctrine, other courts have adopted the privilege as set out in *Edwards*, and some have expanded its reach. Although Judge Kauffman set out a constitutional privilege, the United States Supreme Court has neither approved nor rejected the doctrine,[350] and at least one court suggested it might be a common law rather than a constitutionally compelled privilege.[351]

A good number of courts that have rejected the privilege do so based on its requirement that the statement be made in reference to a newsworthy matter. They rely on the Supreme Court's holding and reasoning in *Gertz*.[352] In *Gertz*, the Court refused to extend the *Sullivan* standard to a private figure who was involved in a matter of general public interest.[353] The Court expressed concern that using a general public interest standard (often shorthanded to "newsworthiness") to determine

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349. *See id.* at 120 (describing the neutral reportage privilege as constitutionally required); *see also* Coliniatis v. Dimas, 965 F. Supp. 511, 519 (S.D.N.Y. 1997) (summarizing the *Edwards* privilege); Boasberg, *supra* note 339, at 466 (stating that the case suggests important limitations).

350. *See* Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 694 (1989). The Court explained in a footnote that it was not taking up the neutral reportage doctrine even though the court below had found the privilege inapplicable, because the petitioner had abandoned that argument, *id.* at 660 n.1, a decision Justice Blackmun found puzzling in his concurrence. *Id.* at 694–95 (Blackmun, J., concurring).

351. *See* Fogus v. Cap. Cities Media, Inc., 444 N.E.2d 1100, 1102 (Ill. App. Ct. 1982) (finding if neutral reportage privilege exists, it is more likely special common law privilege than constitutional privilege).

352. *See* Barry v. Time, Inc., 584 F. Supp. 1110, 1124 (N.D. Cal. 1984) (adopting the neutral reportage doctrine but noting that the most common reason for rejecting neutral reportage was concern that the 'newsworthiness' requirement conflicted with the Court's rejection in *Gertz* of *Rosenbloom*'s newsworthiness test). For cases rejecting neutral reportage on the basis of the newsworthiness requirement, *see* Newell v. Field Enters., Inc., 415 N.E.2d 434, 452 (Ill. App. Ct. 1980) (rejecting *Edwards* as inconsistent with *Gertz*, and reading the privilege to apply to all publications that are either newsworthy or concern public issues); *accord* Dickey v. CBS, Inc., 583 F.2d 1221, 1226 n.5, (3d Cir. 1978) (noting that according to *Edwards*, it is whether the defendant is "newsworthy"); Hogan v. Herald Co., 84 A.D.2d 470, 478 (N.Y. App. Div. 1982). It is worth noting that *Hogan* was decided by a New York state court, the jurisdiction whose substantive law Judge Kauffman was applying in *Edwards*.

353. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974) (introducing a seminal case that interpreted the *Sullivan* standard).

the applicability of constitutional protections would inappropriately entangle judges in making ad hoc decisions about which publications "address issues of 'general or public interest' and which do not," something the Court concluded was unwise.[354] Applying this language many courts reject the neutral reportage privilege, reasoning that the *Edwards* requirement that the statement involve a matter of public concern or interest runs afoul of the Court's reluctance to inject judges into deciding what constitutes a matter of public concern or interest.[355]

But this may not present as serious a problem as these courts suggest. First, while the Court in *Gertz* did eschew drawing judges into dissecting the content of speech to determine what is a matter of public interest and so entitled to First Amendment protection, the neutral reportage doctrine approaches the question from a different perspective and with a different purpose. As the court in *Barry* noted, the inquiry "does not call into play the kind of *ad hoc* determinations of 'newsworthiness' that concerned the *Gertz* court,"[356] explaining that under *Gertz*, courts already must determine whether an individual is a public figure and whether the subject matter is a public controversy. All that neutral reportage adds is whether the original defamer is a "party to the controversy."[357] The inquiry focuses not on the content of the publication to determine its newsworthiness or not, but rather on whether a controversy exists (this makes it a matter of public concern for neutral reportage purposes), and whether the defamed and the defamer were parties to the controversy.

Further, the Court itself then seemed to step back from this cautious stance a little over ten years later in *Greenmoss Builders*.[358] In a case involving a false credit report about a building business, the Court held that the *Gertz* constitutional prohibition on presumed damages did not apply to a private figure (in this case a business) if the matter involved was not one of public concern.[359] This, of course, requires judges to determine what is a matter of public concern—essentially what is a matter

354. *Id.* The Court threw this understanding of its aversion to requiring judges to gauge newsworthiness into confusion a little over ten years later in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, when it held that *Gertz*'s constitutional prohibition on presumed damages did not apply to a private figure if the matter involved was not one of public concern (requiring judges to make determine what is a matter of public concern). 472 U.S. 749, 763 (1985).

355. *See, e.g.*, *Newell*, 415 N.E.2d at 452 (rejecting *Edwards* as inconsistent with *Gertz*, and reading the privilege to apply to all publications that are either newsworthy or concern public issues); *Hogan*, 84 A.D.2d at 478 (highlighting the *Hogan* court's reticence toward *Edwards* when the Supreme Court has not adopted the standard); *Dickey*, 583 F.2d at 1226 n.5 ("Even if *Edwards* and *St. Amant* were reconcilable, we are doubtful the *Edwards* theory is consistent with [*Gertz*].").

356. *Barry*, 584 F. Supp. at 1125.

357. *Id.*

358. *See generally Dunn & Bradstreet, Inc.*, 472 U.S. at 763.

359. *Id.* at 763.

of public interest.

At least one court rejected the privilege because it concluded that immunizing publication of defamatory material the publisher knows is false runs contrary to the Supreme Court's language in *St. Amant v. Thompson*, which gave as an example of conduct meeting the reckless disregard standard: "either deliberate falsification or reckless publication 'despite the publisher's awareness of probable falsity' . . . ."[360] In fact, this misses the point of the privilege, which comes into play only when the repeater meets *St. Amant*'s criteria of republishing falsity knowingly or with awareness of probable falsity.[361] It is not, as the court seemed to understand, some appendage to or expansion of the *Sullivan* standard; rather, it applies as a privilege exactly when it appears that the republisher is alleged to have breached the knowing/reckless disregard standard.[362] That is precisely when it is needed.

Another court, in rejecting the privilege, did so based on what can best be described as a misstatement of the privilege's application, characterizing it as granting "absolute immunity from liability for accurately reporting 'newsworthy statements,' regardless of the press'[s] belief about the truth of the statements."[363] On this basis, the court rejected the privilege out of hand.[364] In fact, this oversimplified description clearly does not describe the privilege as outlined in *Edwards*, nor does it capture the contours and nuance of the privilege as adopted by even the most generous interpretations.[365] Again, the privilege does not protect publication of material known to be false for the purpose of communicating it as truth; rather it allows publication of known falsity for the very purpose of demonstrating its falsity and outing the speaker for making the false statement.

Still, other courts have rejected the privilege on the grounds that the broad protections granted by *Sullivan* and its progeny provide more than

360. St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

361. Boasberg *supra* note 339, at 468.

362. *Id.*

363. McCall v. Courier-J. & Louisville Times Co., 623 S.W.2d 882, 886 (Ky. 1981), *cert. denied*, 456 U.S. 975 (1982) (noting the doctrine has not been approved by the Supreme Court).

364. *Id.* at 886–87.

365. *See* Floyd Abrams, *The First Amendment in the Second Circuit: Reflections* on Edwards v. National Audubon Society, Inc., *the Past and the Future*, 65 ST. JOHN'S L. REV. 731, 736 (1991) ("*Edwards* itself was limited in its protective scope to charges made by a 'responsible prominent organization' against public figures."); *accord* Boasberg, *supra* note 339, at 466 (stating the *Edwards* case set a several important limitations); Martin v. Wilson Publ'g Co., 497 A.2d 322, 330 (R.I. 1985) (noting that the privilege set out by *Edwards* applies only in "extremely limited" situations); Janklow v. Viking Press, 378 N.W.2d 875, 880 (S.D. 1985) (noting that *Edwards* indicated the privilege was limited in scope—requiring careful examination of facts when applied).

sufficient protection for free speech,[366] with one adding its prediction that the Supreme Court, if faced with the decision, would not adopt it.[367] While the Supreme Court has not adopted the privilege, it has not rejected it. And the argument that the *Sullivan* line of cases provides sufficient protection of speech is countered eloquently by Judge Kauffman in *Edwards*: sometimes the fact that a prominent person makes a particular statement or accusation raises serious concerns and this should be reported.[368]

Despite these criticisms, a good number of courts have embraced the privilege, echoing Judge Kaufman's words and reasoning—the privilege protects free and robust debate necessary to an informed citizenry and a functioning democracy by providing crucial information about an important aspect of public engagement.[369] But there is disagreement among the courts regarding the contours of the privilege, some holding it to the limitations Judge Kauffman described in *Edwards*, others expanding it beyond what Judge Kauffman outlined.[370]

The Second Circuit itself holds the privilege closely to Judge Kaufman's description, with at least one court indicating some discomfort with how broadly the privilege might be read to apply. In *Cianci v. New Times Publishing Co.*, an en banc panel of the Second Circuit cautioned that:

> [t]he need for the careful limitation of a constitutional privilege for fair reportage is demonstrated by the breadth of that defense, which confers immunity even for publishing statements believed to be untrue. Absent the qualifications set forth by Chief Judge Kaufman in *Edwards*, all elements of the media would have absolute immunity to espouse and concur in the most unwarranted attacks . . . .[371]

366. *See* Postill v. Booth Newspapers, Inc., 325 N.W.2d 511, 518 (Mich. Ct. App. 1982) ("[P]ress is adequately protected by the burden of proof required in *Sullivan*."); *see also* Norton v. Glenn, 860 A.2d 48, 57 (Pa. 2004), *cert. denied*, 544 U.S. 956 (2005) ("Having determined that the First Amendment does not mandate adoption of the neural reportage privilege . . . ."); *Janklow*, 378 N.W.2d at 881 (noting that the court declined to adopt the privilege of neutral reporting).

367. *See Norton*, 860 A.2d at 57. The court in *Norton* predicted the Supreme Court would not adopt the neutral reportage doctrine, citing the Court's decision in *Harte-Hanks Commc'ns, Inc. v. Connaughton*, where the Court in a footnote stated it was not addressing the neutral reportage doctrine. 491 U.S. 657, 660 n.1 (1989).

368. *See* Edwards v. Nat'l Audubon Soc'y, Inc., 556 F.2d 113, 120 (2d Cir. 1977) (providing a countervailing opinion toward sufficiency of the *Sullivan* standard).

369. *See, e.g.*, Barry v. Time, Inc., 584 F. Supp. 1110, 1124 (N.D. Cal. 1984) (noting that many courts have adopted the privilege under Judge Kaufman's reasoning).

370. *See* Abrams, *supra* note 366, at 736–37 (noting elements of *Edwards* have led to a debate of their own).

371. Cianci v. New Times Pub. Co., 639 F.2d 54, 69–70 (2d Cir. 1980). In a twist, fascinating to a conflict of laws professor (which I am—and we *are* fascinated by such odd riddles), some New

In *Krauss v. Champaign News Gazette, Inc.*, the Illinois court embraced the privilege with more enthusiasm than the court in *Cianci*, echoing Judge Kaufman's impassioned First Amendment rhetoric: "A robust and unintimidated press is a necessary ingredient of self-government. Since the ultimate sovereign in this country is an informed citizenry, we must have information available of and about public issues and about public figures."[372] But even in its enthusiasm, the court stuck to Judge Kauffman's outline, requiring that all the limitations set out in *Edwards* must be met if the privilege is to apply.[373]

Other courts wrestle with both the requirement that the originator be responsible or prominent, and the requirement that the matter involved be a matter of public interest or, as some describe it, a raging controversy.

Courts requiring that the originator be responsible or prominent (or in some cases, both) reason that this serves the essential nature of the privilege, by ensuring that the republished defamation is worthy of being discussed—that it adds to the public debate, and is not just scurrilous gossip—and that it has indicia of reliability.[374] As one court explained, the requirement "acts as a proxy for determining when the very fact that allegations are made is itself newsworthy, . . . as well as an indication that a report is likely to be reliable to ensure that an irresponsible republisher of unsupported allegations cannot hide behind the aegis of the privilege."[375] The court's reference to the potential of an irresponsible re-publisher hiding behind the privilege also evidences the concern that many courts wrestling with neutral reportage feel regarding the potential reach of the doctrine, the underlying discomfort with gutting the repeater

York State courts have rejected the neutral reportage doctrine—necessarily finding it is a matter of state substantive law for Erie purposes. *See* Hogan v. Herald, 84 A.D.2d 470, 479, *aff'd*, 58 N.Y.2d 630 (N.Y. App. Div.1982) (noting that while other cases cite *Edwards*, they do not recognize the privilege); *see also* Weiner v. Doubleday & Co., 549 N.E.2d 453, 456 (N.Y. 1989), *cert. denied*, 495 U.S. 930 (1990) ("We leave for another day, however, the question of whether 'opinion' protection should be enlarged to encompass the type of work that is the focus of the present controversy."). It is an *Erie* riddle. Whose law applies? To the extent neutral reportage is a constitutional privilege, federal courts determine the rule under the Supremacy Clause. *See* U.S. CONST. art. VI, cl. 2. (explaining the constitutional basis for the *Erie* analysis). But to the extent it is interpreted as a common law privilege (the court so suggested in *Fogus*), the Constitution, and *Erie*, direct the federal court, sitting in diversity, to apply the state tort law. *See* U.S. CONST. art. III, § 2, cl. 2 (showing the constitutional basis for courts sitting in diversity to apply state law); Erie R. Co. v. Tompkins, 304 U.S. 64, 71, 78 (1938) (citing the principal case supporting the aforementioned proposition).

372. Krauss v. Champaign News Gazette, Inc., 375 N.E.2d 1362, 1363 (Ill. App. Ct. 1978).

373. *Id.*

374. *See, e.g.*, Martin v. Wilson Publ'g Co., 497 A.2d 322, 330 (R.I. 1985) ("Absent the qualifications set forth by Chief Judge Kaufman in *Edwards*, all elements of the media would have absolute immunity to espouse and concur in the most unwarranted attacks . . . .").

375. Coliniatis v. Dimas, 965 F. Supp. 511, 520 (S.D.N.Y. 1997) (internal citations omitted).

rule, and the protection defamation law offers individuals. In *Edwards* itself, Judge Kauffman acknowledged this, noting, "the federal courts have steadfastly sought to afford broad protection to expression by the media, without unduly sacrificing the individual's right to be free of unjust damage to his reputation."[376]

But other courts have argued persuasively that requiring the originator be responsible or reliable injects an irrelevant requirement and more important, misses a significant purpose of the privilege. Because the privilege protects publication of statements known by the re-publisher to be false, the reliability of the originator does not matter—it is totally irrelevant and requiring it undermines one of the most important goals of the privilege. Often the republication seeks to precisely communicate the very *unreliability* of the originator—that is the point. Thus, several courts, expanding the scope of the privilege, do not require a responsible originator.[377] This gets it right.

The requirement of neutrality has also created some controversy.[378] Pure neutrality would require republication without any comment at all—just the facts—no editorializing. And this makes sense at first pass—indeed, the privilege is called neutral reportage. But the better reasoning focuses not on requiring the repeater to take an absolutely neutral stance, but rather requiring that the repeater not endorse the statement.[379] Requiring that the repeater not endorse, espouse, or concur in the defamatory statement serves the essential purpose of the neutral reportage privilege (what is important is not truth of the repeated defamation's meaning, but rather that the originator said this, and in many cases that what was said is untrue, unsubstantiated, or outrageous), and it preserves at least some of the purpose of the repeater rule (limiting the impact of spreading the defamation by allowing the re-publisher to demonstrate that the statement is untrue, unsubstantiated, or outrageous, thus helping to restore the defamed person's reputation). In short, the purposes of both doctrines are advanced by allowing the repeater to report that the statement is false or outrageous and demonstrating how and why. David McCraw's explanation illuminates this by parsing the two potential aspects of falsity:

376. Edwards v. Nat'l Audubon Soc'y, Inc., 556 F.2d 113, 115 (2d Cir. 1977).

377. *See, e.g.*, In re United Press Int'l, 106 B.R. 323, 329 (D.D.C. 1989) ([T]his Court is of the view that such a limitation to the reiteration only of statements of 'responsible' or 'prominent' 'defamers' is inconsistent with the *raison d'etre* of the doctrine."); *see also* Barry v. Time, Inc., 584 F. Supp. 1110, 1126 (N.D. Cal. 1984) "[None of the cases] advance a cogent policy reason for differentiating among defamers on the basis of their trustworthiness or credibility.").

378. *See Barry*, 584 F. Supp. At 1127 ("[I]t is the neutrality of the report which is critical.").

379. *See* Sunshine Sportswear & Elecs., Inc. v. WSOC Television, Inc., 738 F. Supp. 1499, 1510 (D.S.C. 1989) (noting that it is more important that the repeater not endorse the statement).

> In republication cases, there are two tiers of truth or falsity[:] . . . the truth or falsity of the defamatory remark itself [the content or substance of the statement] and . . . the truth or falsity of the report of the defamatory remark [whether the republication accurately report what was said by the originator.][380]

That is, properly understood, the neutrality function requires only that the report is accurate (i.e., the republication reports the originator's defamatory statement correctly) and that the report does not endorse or add credence to the original defamation. Neutrality does not require that the reporter refrain from demonstrating the original statement is unreliable or patently false and providing evidence to that effect. As McCraw explained:

> [A] well-tailored neutral reportage privilege would require more than inclusion of denials and a clear indication to the readers that the statements are unilateral accusations, not established facts. It would also accurately reflect the reporter's knowledge about the validity of the accusations in areas such as the absence of proof, evidence casting doubts on the credibility of the accuser, and facts illuminating the accuser's perspective such as political affiliations or previous differences with the accused. In short, neutral reportage should not mean mindless neutrality, but instead fair, full, and accurate accounting not only of the allegation but also of the allegation's context.[381]

While the privilege explicitly does not, and should not, require the re-publisher to investigate and report all versions of the defamatory material reported, or all sides of the story, or all denials and counter narratives,[382] it should not prohibit the re-publisher, who knows or strongly suspects that the statement is false or unreliable, to include that in the report. Neutrality should be read to require only that the re-publisher does not endorse or concur in the defamation—does not make it worse by substantiating or enhancing it or "launch[ing] a personal attack of his own . . . ."[383]

Courts agree on the requirement that the republication accurately report the defamation.[384] Again, if the point is to report that a particular

380. David McCraw, *The Right to Republish Libel: Neutral Reportage and the Reasonable Reader*, 25 AKRON L. REV. 335, 356 (1991).

381. *Id.* at 360.

382. *See* Edwards v. Nat'l Audubon Soc'y, Inc., 556 F.2d 113, 120 (2d Cir. 1977) (stating press need not "take up cudgels against dubious charges" for privilege to apply).

383. *See, e.g.*, *id.* (stating privilege protects accurate and disinterested reporting of charges regardless of the reporter's views regarding validity); *Barry*, 584 F. Supp. at 1124 (illustrating the Court's accession to Judge Kauffman's words).

384. *See, e.g.*, *Edwards*, 556 F.2d at 120 (stating privilege protects accurate and disinterested reporting of charges regardless of the reporter's views regarding validity); *accord Barry*, 584 F.

defamatory statement was made, it is essential that it does so accurately.

The neutral reportage privilege works hand-in-hand with the *Sullivan* standard, especially in battling outrageous falsity and outing its authors. Ideally, it would be recognized as a constitutional privilege, as Judge Kauffman did in *Edwards*.[385] But it is unlikely the Court as now composed would take this step. State courts could adopt the privilege as required by their own state constitutions, or even a common law defense. This is less than ideal because of the patchwork nature of the protection that would be provided, especially in light of how easy it would be for a plaintiff to select a jurisdiction that does not recognize the privilege, but may in fact be the most attainable option.

CONCLUSION

"There can be no higher law in journalism than to tell the truth and shame the devil."[386]

While the essence of this Article applies to all speakers, it applies most critically to journalism—to the institutional press. And despite all the rhetoric—all the criticisms, sarcastic comments, and all the bad jokes—we need the institutional press. We need "professionals . . . to sort through what government officials, important private persons, [and] witnesses . . . say; people who are more committed to learning the truth of significant events and to reporting them accurately."[387] Our democracy needs this.

But the press faces a crisis of survival due in part to rapidly changing technologies[388] and the economic realities of a marketplace paradigm that simply doesn't fit how the press works,[389] but also due to the sort of threats and bullying the segregationists of the 1960s and former President

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Supp. at 1125 (stating it is essential to applicability of the privilege that the report is accurate); In re United Press Int'l, 106 B.R. 323, 328 (D.D.C. 1989) (finding the First Amendment protects the accurate and disinterested reporting of those charges); *Sunshine Sportswear & Elecs., Inc.*, 738 F. Supp. at 1510 (holding a re-publisher who accurately and disinterestedly reports defamatory statements is shielded from liability); Cianci v. New Times Publ'g Co., 639 F.2d 54, 68 (finding the First Amendment protects accurate and disinterested reporting from charges of defamation); April. v. Reflector-Herald, Inc., 546 N.E. 2d 466, 470 (Ohio Ct. App. 1988) (holding accurate publication requires only that a journalist reasonably and in good faith believe report correctly conveys charges made).

385. *Edwards*, 556 F.2d at 120 (2d Cir. 1977).

386. WALTER LIPPMANN, LIBERTY AND THE NEWS 13 (Harcourt, Brace and Howe 1920).

387. MICHAEL DAVIS, *Why Journalism Is a Profession*, *in* JOURNALISM ETHICS: A PHILOSOPHICAL APPROACH 101 (2010).

388. *See supra* notes 167–190 (reciting prior information to support the proposition that traditional journalism is struggling to find its way amid the constantly evolving technological landscape).

389. *See* Morgan, *supra* note 64, at 7 (noting that the market model cannot sustain journalism).

Trump masterfully deployed. The assault on free and robust exchange of information and ideas threatens not just the speaker, but it threatens democracy itself. And so, we need a vital, robust, diverse, and most important, a brave press. But bravery alone won't do it. We must protect the marketplace of information. We need speakers—individuals as well as the institutional press—to dig out information and publish it in a timely fashion, to ferret out falsity whether nuanced or outrageous, and to tell us when the emperor has no clothes.

In short, we need the *Sullivan* standard now more than ever. And to be effective, we must supplement the *Sullivan* standard with strong Anti-SLAPP laws and revive the neutral reportage doctrine. Together, these doctrines, which may appear to protect falsity, actually empower the search for truth—at once more challenged and more crucial than ever before.