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Rescuing Our Democracy by Rethinking New York Times Co. v. Sullivan

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Rescuing Our Democracy by Rethinking *New York Times Co. v. Sullivan*

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> *"I think it is time for a modern War against Error. A deliberately heightened battle against cultivated ignorance, enforced silence, and metastasizing lies."*
>
> – Toni Morrison, The War on Error (2019)

TABLE OF CONTENTS

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I. INTRODUCTION

Our democracy is in trouble, awash in an unprecedented number of lies—some spewed by foreign enemies targeting our electoral processes,[1] others promoted by our leaders,[2] and millions upon millions spread by shadowy sources on the internet and, especially, via social media.[3] Chief Justice John Roberts recently warned that "[i]n our age . . . social media can instantly spread rumor and false information on a grand scale," causing harm to our democracy.[4] The internet has become our "public square,"[5] something beyond the

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[1] *See* Ellen Nakashima, *Senate Committee Unanimously Endorses Spy Agencies' Finding that Russia Interfered in 2016 Presidential Race in Bid to Help Trump*, WASH. POST (Apr. 21, 2020), https://www.washingtonpost.com/national-security/senate-committee-unanimously-endorses-spy-agencies-finding-that-russia-interfered-in-2016-presidential-race-in-bid-to-help-trump/2020/04/21/975ca51a-83d2-11ea-ae26-989cfce1c7c7_story.html [https://perma.cc/AYX4-ECHG]. The threat continues for the 2020 elections. The U.S. intelligence community's top election security official recently acknowledged that "Russia is using a range of measures to primarily denigrate former Vice President Biden," and that "some Kremlin-linked actors are also seeking to boost President Trump's candidacy on social media and Russian television." Max Boot, *A Damning New Article Reveals How Trump Enables Russian Election Interference*, WASH. POST (Aug. 8, 2020), https://www.washingtonpost.com/opinions/2020/08/08/russia-is-interfering-our-elections-again-trump-wont-let-intelligence-community-say-so/ [https://perma.cc/794R-7MLW].

[2] In his first 1,226 days in office President Trump made 19,127 false or misleading claims, an average of over 15 per day. Glenn Kessler, Salvador Rizzo & Meg Kelly, *President Trump Made 19,127 False or Misleading Claims in 1,226 Days*, WASH. POST (June 1, 2020), https://www.washingtonpost.com/politics/2020/06/01/president-trump-made-19127-false-or-misleading-claims-1226-days/ [https://perma.cc/8EG5-VU52]. He managed to include four in a single sentence. Daniel Dale, *Fact Check: Trump Makes Four False Claims in One Sentence*, CNN (Sept. 14, 2020), https://www.cnn.com/2020/09/14/politics/fact-check-trump-mccabe-clinton-mcauliffe/index.html [https://perma.cc/6CDC-6KJR]. Tracking the President's falsehoods has become a bit of a parlor game. *See, e.g.*, Tom Toles, *Time to Stop Counting Trump's Lies. We've Hit the Total for 'Compulsive Liar.'*, WASH. POST (Sept. 13, 2018), https://www.washingtonpost.com/news/opinions/wp/2018/09/13/time-to-stop-counting-trumps-lies-weve-hit-the-total-for-compulsive-liar/ [https://perma.cc/BK5C-QXWG].

[3] *See* Graham Daseler, *The Internet's Web of Lies*, AM. CONSERVATIVE (Aug. 1, 2019), https://www.theamericanconservative.com/articles/the-internets-web-of-lies/ [https://perma.cc/4SMC-QK6U] ("Facebook has 200 million monthly users in the United States . . . . In a single minute, the site receives 500,000 new comments, 293,000 new statuses, and 450,000 new photos. In the same amount of time, 400 hours of video are uploaded to YouTube, and 300,000 tweets are posted to Twitter."); *see also* Soroush Vosoughi, Deb Roy & Sinan Aral, *The Spread of True and False News Online*, SCI. (Mar. 9, 2018), https://science.sciencemag.org/content/359/6380/1146 [https://perma.cc/6LAV-XQZE] (analysis of Twitter postings from 2006–17 showed that false news reached many more people than the truth and also diffused faster than the truth).

[4] *See* JOHN G. ROBERTS, JR., 2019 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1, 2 (Dec. 2019), https://www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf [https://perma.cc/D55R-AZXJ].

[5] Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).

imagination of the Supreme Court when it issued its groundbreaking 1964 decision in *New York Times Co. v. Sullivan*.[6]

New York Times involved defamation, a narrow pocket of state tort law,[7] but the decision has come to be regarded as a signature accomplishment of the Warren Court[8] and essential to the modern understanding of the First Amendment.[9] The case is routinely described as "seminal"[10] and "iconic"[11] and is cited with favor by Justices across the ideological spectrum.[12] Most importantly, *New York Times* defanged defamation law, recognizing that our democracy needs to protect even speech that is false.[13]

But with more than half a century of perspective, it is now clear that the Court's constraints on defamation law have facilitated a miasma of misinformation that harms democracy by making it more difficult for citizens to become informed voters.[14] The time has come to ask a once heretical question: "What if *New York Times* got it wrong?"

This Article assesses *New York Times* in light of a public square radically different than that familiar to the justices a half century ago. The internet and especially social media have deeply eroded the influence of traditional media.[15]

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[6] *See generally* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

[7] Dean William Prosser regarded *New York Times* as "unquestionably the greatest victory won by . . . defendants in the modern history of the law of torts." WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 819 (4th ed. 1971); *see* R. Perry Sentelle, Jr., *Torts in Verse: The Foundational Cases*, 39 GA. L. REV. 1197, 1202, 1397 (2005) (stating that *New York Times* is one of "the truly foundational cases ordinarily studied in first year Torts").

[8] *See, e.g.*, Lillian R. BeVier, *Intersection and Divergence: Some Reflections on the Warren Court, Civil Rights, and the First Amendment*, 59 WASH. & LEE L. REV. 1075, 1075 (2002) (opining that *New York Times* is "the Warren Court's most notable First Amendment case"); Erwin Chemerinsky, *False Speech and the First Amendment*, 71 OKLA. L. REV. 1, 6 (2018) (opining that *New York Times* was "one of the most important free speech decisions of all time").

[9] *See, e.g.*, LEE C. BOLLINGER, UNINHIBITED, ROBUST, AND WIDE-OPEN: A FREE PRESS FOR A NEW CENTURY 14 (2010) (calling *New York Times* "[o]ne of the most important First Amendment decisions in the twentieth century, and perhaps of all time"); Floyd Abrams, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 18, 21 (1997) (noting that *New York Times* "is the quintessential First Amendment ruling in our history").

[10] Jud Campbell, *The Invention of First Amendment Federalism*, 97 TEX. L. REV. 517, 567 (2019); Wendy Gerwick Couture, *The Collision Between the First Amendment and Securities Fraud*, 65 ALA. L. REV. 903, 910 (2014).

[11] AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 153 (2012); KERMIT L. HALL & MELVIN I. UROFSKY, *NEW YORK TIMES V. SULLIVAN*: CIVIL RIGHTS, LIBEL LAW, AND THE FREE PRESS 201 (2011).

[12] Scott L. Nelson, Commentary, Dun & Bradstreet *Revisited—A Comment on Levine and Wermiel*, 88 WASH. L. REV. 103, 122 (2013).

[13] The link between free speech protections and democracy is discussed in detail in this Article. *See infra* notes 60–101 and accompanying text.

[14] *See infra* notes 274–316.

[15] *See* Solomon A. Ware Sr., *The Impact of Social Media on Traditional Journalism*, DAILY OBSERVER (Apr. 26, 2019), https://www.liberianobserver.com/opinion/the-impact-

The Court's hands-off approach to false speech, at the heart of *New York Times*, has been weaponized,[16] facilitating a public square rife with "fake news" and "alternative facts,"[17] which has led to a dramatic decrease in trust in our government and leaders.[18] I conclude that to save our democracy, *New York Times* should be retooled for our times.

Part II sets the stage by explaining the crucial role played by the media in the Civil Rights Movement and how segregationists tried to protect "their way of life" from challenges by "outside agitators" like reporters from national media outlets.[19] A central aspect of a multifaceted resistance strategy was intimidating the media through the filing of libel suits, one of which was presided over by a segregationist judge and decided by an all-white Alabama jury, which assessed a huge damages award that appeared to threaten the very existence of one of America's "papers of record," the *New York Times*, and thus coverage of the crucial political, legal, and social struggle unfolding in the South.[20] Part II concludes with a discussion of how the appellate lawyers for the *Times* helped shape the thinking of the Court about the link between free speech and democracy and how the justices' internal deliberations led to the landmark decision.

Part III explains in detail the many ways that *New York Times* and its progeny changed the law, and it surveys doctrinal alternatives that would have better balanced the need to promote accuracy in public debate.

Part IV then turns to three important and related developments that have magnified the adverse impact of *New York Times*: changes in journalistic

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of-social-media-on-traditional-journalism/ [https://perma.cc/59E2-M32J] ("Nowadays, most public events are screened live on Facebook, a move that is viewed by many as eroding interest in the traditional media.").

[16] *See* P.W. SINGER & EMERSON T. BROOKING, LIKEWAR: THE WEAPONIZATION OF SOCIAL MEDIA 4 (2018) (explaining how "a new kind of communication[] became a new kind of war").

[17] *See* Catherine J. Ross, *Ministry of Truth: Why Law Can't Stop Prevarications, Bullshit, and Straight-out Lies in Political Campaigns*, 16 FIRST AMEND. L. REV. 367, 371 (2018) (stating that citizens can make informed judgments about political issues only "if the internet is not full of fake news or alternative facts").

[18] Amy Mitchell, Jeffrey Gottfried, Galen Stocking, Mason Walker, & Sophia Fedeli, *Many Americans Say Made-Up News Is a Critical Problem That Needs to Be Fixed*, PEW RES. CTR. (June 5, 2019), https://www.journalism.org/2019/06/05/many-americans-say-made-up-news-is-a-critical-problem-that-needs-to-be-fixed/ [https://perma.cc/N8ZK-BN37] (showing "made-up news and information" has impacted 68% of American's "confidence in government institutions"). *See generally Trust in Government*, GALLUP, https://news.gallup.com/poll/5392/trust-government.aspx [https://perma.cc/NF69-7TZB] (showing the decrease in Americans' trust in the government from 1972 to 2020).

[19] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 294 (1964) (Black, J., concurring) ("Montgomery is one of the localities in which widespread hostility to desegregation has been manifested. This hostility has sometimes extended itself to persons who favor desegregation, particularly to so-called 'outside agitators,' a term which can be made to fit papers like the Times, which is published in New York.").

[20] See HALL & UROFSKY, *supra* note 11, at 84; *infra* Part II.

practices, the arrival of the internet (in particular, the twenty-four-hour news cycle), and the rapid rise of social media. These forces have fundamentally altered the relationship between those who govern and those who are governed, a central concern of the democracy-enhancing theory at the core of *New York Times*, throwing into question the continued wisdom of the Court's decision.

Part V examines how *New York Times* and its progeny have operated in practice by analyzing the most recent empirical data on defamation litigation. Only one conclusion can be drawn from the data: there is now what amounts to an absolute immunity from damages actions for false statements, and this evisceration of the deterrent power of defamation law has facilitated a torrent of false information entering our public square.

Finally, in Part VI, I argue that the Court's almost unrestrained embrace of free speech in *New York Times* and subsequent decisions has, contrary to the goal of improving public debate, actually impoverished it. I conclude with a brief discussion of changes that, if adopted, would enhance rather than erode our democracy.

II. THE MAKING OF A SEMINAL DECISION

A. *Defending White Supremacy by Attacking the Messenger*

Like many Deep South communities in the 1950s, Montgomery, Alabama, was struggling to adjust to the economic changes sweeping the region and a restive Black population demanding rights systematically denied them in the century since the emancipation.[21] Segregationists insisted that these demands for equality were not coming from locals, but rather were the result of "outside agitators"—a cadre of activists who came to the South with a passion for social justice—and the national media, which was giving increasing, and negative, coverage of race relations in the South.[22]

Print outlets and the relatively new technology of television beefed up their staffs in hotspots like Montgomery, and the national media regularly covered angry white mobs and their allies from the local police humiliating, beating, and hosing nonviolent demonstrators.[23] Especially powerful was television coverage that brought the vivid sights and sounds of racial brutality into America's living rooms, but the print media also captivated readers with hard-

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[21] *See* HALL & UROFSKY, *supra* note 11, at 5.

[22] David Wallace, *Piercing the Paper Curtain: The Southern Editorial Response to National Civil Rights Coverage*, 33 AM. JOURNALISM 401, 406–09 (2016). One contemporary observer sarcastically commented: "[A]s if it took someone from somewhere else to reveal to unsuspecting Alabama African[-]Americans that whites had better schools, better jobs, more opportunities, more respect, and more advantages." HARVEY H. JACKSON III, INSIDE ALABAMA: A PERSONAL HISTORY OF MY STATE 245 (2004).

[23] Wallace, *supra* note 22, at 401–02.

hitting coverage of tense confrontations between citizens and entrusted power.[24] Just as in another context it was observed that sunlight is "the best of disinfectants,"[25] canny civil rights leaders then, as now, fed tips about local injustices to reporters.[26] This, in turn, fanned southern xenophobia and convinced whites that the "southern way of life" was under assault.[27]

Segregationists responded with an array of legal tools. Of course, they defended explicitly race-based laws, like the requirement that students be separated by race in public schools.[28] They also employed indirect ways to push back that were not obviously racist: forcing civil rights groups to identify their members (which could be embarrassing or even dangerous to African-Americans), pursuing tax charges against individuals and groups, filing ethics charges against lawyers who appeared on behalf of civil rights clients and disciplinary charges against students who had the temerity to demonstrate, and using race-neutral trespass laws to frustrate peaceful efforts to integrate public accommodations.[29]

Southern anger at the media prompted another indirect strategy: filing libel lawsuits against national media organizations. Plaintiffs sought millions of dollars in damages 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*.[30] The *Times* had provoked great anger with a harsh report on the state of race relations in the South,[31] and it made itself a perfect target when

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[24] *See generally* GENE ROBERTS & HANK KLIBANOFF, THE RACE BEAT: THE PRESS, THE CIVIL RIGHTS STRUGGLE, AND THE AWAKENING OF A NATION (2006).

[25] LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914) ("Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.").

[26] For example, the Black Visions Collective in Minnesota has its own "press team." Lizzie LeBow, *Minneapolis Reporters Covering the George Floyd Protests Face Attacks, Calls for Neutral Language*, GATEWAY JOURNALISM REV. (June 23, 2020), http://gatewayjr.org/minneapolis-reporters-covering-the-george-floyd-protests-face-attacks-calls-for-neutral-language/ [https://perma.cc/64EG-8S6Q]; *see also Media Tips for Activist Groups*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/electronic-frontier-alliance/media-tips [https://perma.cc/4VGD-HB7Z].

[27] *See* Paul Finkelman, Essay, *Exploring Southern Legal History*, 64 N.C. L. REV. 77, 115–16 (1985).

[28] *See* Christopher W. Schmidt, New York Times v. Sullivan *and the Legal Attack on the Civil Rights Movement*, 66 ALA. L. REV. 293, 297–98 (2014).

[29] *Id.* at 298–304.

[30] ANTHONY LEWIS, MAKE NO LAW: THE *SULLIVAN* CASE AND THE FIRST AMENDMENT 305–06 (1991) [hereinafter LEWIS, MAKE NO LAW]; Schmidt, *supra* note 28, at 305, 328.

[31] Harrison E. Salisbury, *Fear and Hatred Grip Birmingham*, N.Y. TIMES, Apr. 12, 1960, at 1 ("Every channel of communication, every medium of mutual interest, every reasoned approach, every inch of middle ground has been fragmented by the emotional dynamite of racism, reinforced by the whip, the razor, the gun, the bomb, the torch, the club, the knife, the mob, the police and many branches of the state's apparatus."). In addition to damages actions brought by local officials, a *Times* reporter was indicted on counts of

it printed an error-filled advertisement seeking financial support for the representation of Dr. Martin Luther King Jr., who had been charged with violating Alabama law.[32] The advertisement detailed misconduct by "Southern violators of the Constitution" and alleged improper police behavior but named no specific perpetrators.[33] The *Times* did no fact-checking before publishing, relying on the illustrious names who endorsed the advertisement[34] and the signatures of four Alabama preachers, who were particular irritants to the Alabama power structure.[35]

The misstatements in the advertisement were relatively minor[36] but Alabama libel law (like that in most states) made any printed misstatement that harmed reputation not just actionable but potentially the basis for a large damages award.[37] Southern officials pounced, seeking more than $3 million in actions filed in Montgomery and an additional $3.15 million in actions filed in Birmingham, while Alabama Governor John Patterson sought another $1 million.[38] At a time when an award of $35,000 was considered large, the management of the *Times* was understandably alarmed by its liability exposure.[39] This was especially so given the paper's modest circulation in Alabama (390 on an average day, just .06% of its total circulation), which made

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criminal libel. William E. Lee, *Citizen-Critics, Citizen Journalists, and the Perils of Defining the Press*, 48 GA. L. REV. 757, 759 n.10 (2014).

[32] HALL & UROFSKY, *supra* note 11, at 15–24. While on its face an advertisement, the content could fairly be characterized as a "piece of propaganda designed to attract sympathy and money." *Id.* at 21.

[33] *See id.* at 19. The common law allowed a defamation action to be brought by a person not named if the jury could infer that the statements were "of and concerning" the plaintiff. 1 ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 2-168–71 (5th ed. 2017).

[34] HALL & UROFSKY, *supra* note 11, at 15–20.

[35] Samuel R. Pierce, Jr., *The Anatomy of an Historic Decision*: New York Times Co. v. Sullivan, 43 N.C. L. REV. 315, 319–22 (1965) (referring to Reverends Ralph D. Abernathy, Fred L. Shuttlesworth, S.S. Seay Sr., and J. E. Lowery).

[36] The most serious errors suggested that police had bombed Dr. King's home and that they tried to "starve the [student demonstrators] into submission." LEWIS, MAKE NO LAW, *supra* note 30, at 30–31.

[37] *See* Marc A. Franklin & Daniel J. Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 826 n.4 (1984) (explaining that in *N.Y. Times*, the Supreme Court acknowledged that Alabama followed the then-majority approach to defamation). Alabama law tracked the majority rules across the United States: falsity was presumed; damages were presumed; and absent some common law privilege, the plaintiff did not need to prove any fault. *See* 1 RODNEY A. SMOLLA, LAW OF DEFAMATION § 1:8 (2d ed. 2008).

[38] HALL & UROFSKY, *supra* note 11, at 31–33; LEWIS, MAKE NO LAW, *supra* note 30, at 13.

[39] *See* MARK A. PETERSON & GEORGE L. PRIEST, THE CIVIL JURY: TRENDS IN TRIALS AND VERDICTS, COOK COUNTY, ILLINOIS, 1960–1979, at ix (1982) (stating that the average jury award in 1960 was $30,000).

it hard to treat coverage of the Civil Rights Movement as simply a cost of doing business.[40]

One of the plaintiffs in the first case filed was the Montgomery commissioner in charge of the police, L.B. Sullivan.[41] The presiding judge was notoriously bigoted, and the case was heard by an all-white jury.[42] The local media stirred the racial pot.[43] The newspaper's situation was bleak, as there was no authority to support a First Amendment defense,[44] and the lawyers for the *Times* tried but failed to get the case dismissed on procedural grounds.[45] The ad admittedly contained misstatements and the *Times* had no proof that it had taken steps to verify the statements: it could only hope that the jury would conclude that, because Sullivan was not actually named, the statements were not "of and concerning" him.[46] In closing argument, a lawyer for Sullivan urged the jury to "hit them in the pocketbook" and send a message to northern media.[47] The trial judge allowed the jury to consider both compensatory and punitive damages, and it took the jury only two hours to award Sullivan $500,000, by far the largest damages award in Alabama history.[48]

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[40] HALL & UROFSKY, *supra* note 11, at 21. Up to the *New York Times* case, libel actions had not been a major concern for the *Times*, which had a policy of never settling, and it rarely lost the few claims that had made it to trial. LEWIS, MAKE NO LAW, *supra* note 30, at 23.

[41] Schmidt, *supra* note 28, at 294.

[42] *Id.* at 318. Judge Walter B. Jones had already issued a series of orders by which he hoped to thwart enforcement of civil rights laws—not surprising given that he was the author of *The Confederate Creed* and had participated in Confederate reenactments. LEWIS, MAKE NO LAW, *supra* note 30, at 25–26. Judge Jones kept the races separated in his courtroom, and in a libel case tried after Sullivan's he commented, "The case would be tried . . . 'under the laws of the State of Alabama and not under the Fourteenth Amendment,'" and he "praised 'white man's justice, a justice born long centuries ago in England, brought over to this country by the Anglo-Saxon race." *Id.* There was even an allegation that Judge Jones helped plan the wave of libel claims filed against the media. *Id.* at 26.

[43] LEWIS, MAKE NO LAW, *supra* note 30, at 10–11. For example, in the run-up to the trial a leading Montgomery newspaper described the advertisement in the Times as a "big lie" from "abolitionist hellmouths." Kermit L. Hall, *Justice Brennan and Cultural History:* New York Times v. Sullivan *and Its Times*, 27 CAL. W. L. REV. 339, 350 (1991); Grover Hall, *Will They Purge Themselves?*, *Montgomery Advertiser*, Apr. 7, 1960, at 4-A.

[44] *See infra* notes 60–65 and accompanying text.

[45] *See* HALL & UROFSKY, *supra* note 11, at 47–51.

[46] *See* LEWIS, MAKE NO LAW, *supra* note 30, at 27–28, 32–33.

[47] HALL & UROFSKY, *supra* note 11, at 63.

[48] CLIFTON O. LAWHORNE, THE SUPREME COURT AND LIBEL 28 (1981); Bruce L. Ottley, John Bruce Lewis, & Younghee Jin Ottley, New York Times v. Sullivan*: A Retrospective Examination*, 33 DEPAUL L. REV. 741, 763 (1983). The judgment was against the *Times* and the four ministers. HALL & UROFSKY, *supra* note 11, at 88. In a remarkably cruel move, Judge Jones gave the ministers the choice of paying the full amount or posting a $1 million bond. *Id.* When they resisted, a local sheriff seized their bank accounts, seized Reverend Abernathy's car, and sold a plot of land that he owned. *Id.*

This award, the equivalent of more than $4 million today,[49] was understood by all concerned to be a shot across the bow of the national media. For example, one Alabama newspaper argued that the jury's decision could make the national media "re-survey . . . their habit of permitting anything detrimental to the South and its people to appear in their columns."[50] Another ran the headline "State Finds Formidable Legal Club to Swing at Out-of-State Press."[51] An experienced observer, noting that Sullivan's award likely presaged a string of similar huge awards, questioned whether the *Times* could survive[52] and predicted that the verdict might prompt the *Times* to decide that it was simply too risky for its reporters to even set foot in Alabama and instead rely on wire service reports.[53] This existential threat fueled the *Times*'s appeal.[54]

B. *Forging a New Understanding of the First Amendment*

From the beginning of the litigation, the leadership of the *Times* vowed to spare no cost to defend the case,[55] and the legal team assembled for the appeal to the Alabama Supreme Court included former Attorney General of the United States Herbert Brownell Jr. and Professor Herbert Wechsler from Columbia Law School.[56] The initial focus was again on jurisdiction because a First Amendment defense ran counter to statements of the Supreme Court, albeit in dicta, that libels were not protected speech.[57] The Alabama Supreme Court affirmed Sullivan's award, rejecting the jurisdictional challenge and dismissing the First Amendment argument with a single sentence, forthrightly acknowledging that its decision was intended to have both a specific and general deterrent effect on the media.[58]

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[49] *Value of $500,000 in 1960*, SAVING.ORG, https://www.saving.org/inflation/inflation.php?amount=500,000&year=1960 [https://perma.cc/U28S-PTNW].

[50] LEWIS, MAKE NO LAW, *supra* note 30, at 34.

[51] *Id.* at 35.

[52] *Id.* Within the next four years, $300 million worth of libel claims were filed against the media for coverage of the Civil Rights Movement. *See id.* at 36.

[53] HALL & UROFSKY, *supra* note 11, at 84.

[54] Recent scholarship has unearthed almost forty such claims that were "weaponizing . . . libel [actions] against activists and the media . . . ." AIMEE EDMONSON, IN *SULLIVAN'S* SHADOW: THE USE AND ABUSE OF LIBEL LAW DURING THE LONG CIVIL RIGHTS STRUGGLE 7–8 (2019).

[55] LEWIS, MAKE NO LAW, *supra* note 30, at 24.

[56] HALL & UROFSKY, *supra* note 11, at 100.

[57] *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (holding that libel is not "within the area of constitutionally protected speech"); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous . . . .") (footnote omitted).

[58] N.Y. Times Co. v. Sullivan, 144 So. 2d 25, 40, 49 (Ala. 1962), *rev'd*, 376 U.S. 254 (1964). Needless to say, all the justices on the Alabama Supreme Court were white. HALL & UROFSKY, *supra* note 11, at 114.

The *Times* decided to seek certiorari and Wechsler, a seasoned advocate in the High Court, took full control of the litigation and focused on the First Amendment challenge.[59] It was not an easy road. In addition to the unpromising judicial statements that a libel was not protected speech, there was little constitutional basis for a reversal because the case did not involve a prior restraint.[60] Nevertheless, Wechsler was confident that properly framed, Sullivan's judgment would directly raise a question that the Court had not yet considered: whether a damages award arising out of a statement critical of official conduct was consistent with the First Amendment.[61] More specifically, he wanted to focus on the constitutionality of the Sedition Act of 1798, the brazen effort by Federalists to punish their Republican opponents.[62] There is disagreement about the extent to which the statute actually chilled criticism of public officials,[63] but it was roundly condemned at the time by many, including Framers Thomas Jefferson and James Madison, and when Jefferson became President the law expired, and he pardoned all those convicted under it.[64]

A frontal constitutional attack was a bold gambit, and even though Wechsler was by no means a reflexive civil libertarian,[65] he understood that if Sullivan's

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[59] LEWIS, MAKE NO LAW, *supra* note 30, at 103–06.

[60] *See id.* at 102–05, 114. *See generally* Near v. Minnesota, 283 U.S. 697 (1931) (discussing prior restraint and establishing it as a constitutional basis for reversal).

[61] *See* HALL & UROFSKY, *supra* note 11, at 106–09.

[62] The Sedition Act of 1798, ch. 74, § 2, 1 Stat. 596, 596-97 (expired 1801), made it a crime to "write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States . . . with intent to defame . . . ." The Act largely codified English sedition law, which was a potent addition to press licensing as a tool to repress speech critical of the government. *See* David Jenkins, *The Sedition Act of 1798 and the Incorporation of Seditious Libel into First Amendment Jurisprudence*, 45 AM. J. LEGAL HIST. 154, 154 (2001).

[63] *Compare* NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL 265 (1986) (opining that the Sedition Act turned out to be a "relatively flimsy legal tool" against the Federalists' Jeffersonian opposition), *with* David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 515 (1983) [hereinafter Anderson, *Origins*] (opining that "the Sedition Act was no idle threat").

[64] David A. Logan, *Tort Law and the Central Meaning of the First Amendment*, 51 U. PITT. L. REV. 493, 500 (1990) [hereinafter Logan, *Tort Law*]; *Sedition Act Expires*, FIRE, https://www.thefire.org/sedition-act-expires/#:~:text=Congress%20lets%20the%20Sedition%20Act,malicious%E2%80%9D%20writings%20against%20the%20government [https://perma.cc/HM28-7MDZ]. Indeed, the common law of libel was even more draconian than the Sedition Act: in a civil action, presumptions about falsity and maliciousness were available, but absent from the federal criminal statute. Logan, *Tort Law*, *supra*, at 500–04. Defendants in a civil suit also had fewer due process protections than in a criminal prosecution, such as double jeopardy, the right to be free from compulsory self-incrimination, and the need to prove facts beyond a reasonable doubt. *See* Brief for the Petitioner at 49, N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (No. 39).

[65] Wechsler had been critical of the Court's decisions in a string of landmark civil rights cases, beginning with *Brown v. Board of Education*, 347 U.S. 483 (1954). *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31–34 (1959) (stating that the Court's decisions striking down state segregation laws failed to

judgment stood, it would represent a grave danger to vigorous debate on important issues.[66] The *Times*'s legal team filed a brief that ran for 102 pages[67] (more than twice the length allowed under the Court's rules),[68] providing an analytical roadmap that the Court would eventually follow.[69]

Wechsler opened by arguing that the Court's past statements about libel law were mere dicta because no previous case had involved a civil judgment arising out of criticism of the official conduct of a public official.[70] He pointed to an array of freedom of speech and freedom of religion decisions that had provided increasingly broad protection to free expression and that recognized that false statements were not always unprotected.[71] He emphasized that the *Times*'s misstatements implicated the hallowed principle that a free press "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[72] Citing Justice Oliver Wendell Holmes, Jr., Justice Louis Brandeis, and Harvard law professor Zechariah Chafee Jr., Wechsler argued that unfettered political speech was essential to a democracy.[73] He characterized the Civil Rights struggle as "the major issue of our time"[74] and analogized Sullivan's award to a prosecution under the Sedition Act.[75]

This was a bold line of argument, as few people had thought that the First Amendment prohibited the Sedition Act, let alone an award of damages in a

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reflect "neutral principles," an essential characteristic of sound law). He also, for decades, defended the internment of Japanese-Americans during World War II, a position that he successfully urged on the Court while counsel for the government in *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944) (upholding the internment of Americans of Japanese ancestry during World War II).

[66] For a fascinating dissection of Wechsler's deft handling of the *Times* appeal, including his ability to weave technical arguments into a broader constitutional attack, see David A. Anderson, *Wechsler's Triumph*, 66 ALA. L. REV. 229, 232 (2014) [hereinafter Anderson, *Wechsler's Triumph*] ("Wechsler had bad facts and bad law.").

[67] Brief for Petitioner, N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (No. 39).

[68] RULES OF THE SUPREME COURT OF THE UNITED STATES, R. 33 (2019).

[69] This was Wechsler's goal: "[A] Supreme Court brief should be a document that a Supreme Court justice can use in writing an opinion favorable to the briefer." LEWIS, MAKE NO LAW, *supra* note 30, at 114.

[70] Brief for Petitioner, *supra* note 67, at 40–41 ("The statements cited meant no more than that the freedom of speech and of the press is not a universal absolute and leaves the States some room for the control of defamation. None of the cases sustained the repression as a libel of expression critical of governmental action or was concerned with the extent to which the law of libel may be used for the protection of official reputation.").

[71] *E.g.*, Brief for Petitioner, *supra* note 67, at 30 (citing Bridges v. California, 314 U.S. 252, 272–73 (1941)) (holding that criticism of a judge is protected by the First Amendment even if the statement is false); *id.* at 67 (citing Cantwell v. Connecticut, 310 U.S. 296, 310 (1940)) (stating that false statements are a necessary byproduct of vigorous debate about "political belief").

[72] Brief for Petitioner, *supra* note 67, at 29 (citing Roth v. United States, 354 U.S. 476, 484 (1957)).

[73] Brief for Petitioner, *supra* note 67, at 47–48, 56.

[74] *Id.* at 31.

[75] *Id.* at 49.

civil action.[76] In Wechsler's view, the negative reaction to the Act while it was in effect "crystallized a national awareness of the central meaning of the First Amendment" which "was the central lesson of the great assault on the short-lived Sedition Act of 1798, which the verdict of history has long deemed inconsistent with the First Amendment."[77] Because Alabama libel law required that all statements about a public official to be true and allowed a jury to award damages for untrue statements about the public performance of public officials, it, like the Sedition Act, impermissibly chilled the lifeblood of a democracy: political speech.[78]

Wechsler recognized that a majority of the Court might not accept the broadest implications of his position—that people were absolutely free to publish false statements about public officials—let alone overturn centuries of state common law.[79] There were available, however, narrower First Amendment attacks. One possibility was striking the generous common law damages rules that allowed Sullivan to recover $500,000 without any proof that the misstatements caused him any harm.[80] Wechsler also argued that a false statement that did not name a public official should not be actionable.[81] Finally, Wechsler argued that Sullivan's award could be invalidated by changing the strict liability nature of libel to require that a public official prove that the defendant knew the statement was "unfounded," in other words, to require proof of "actual malice," essentially adopting as a constitutional rule a broad version of the common law privilege of fair comment.[82]

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[76] LEWIS, MAKE NO LAW, *supra* note 30, at 118.

[77] Brief for Petitioner, *supra* note 67, at 30, 45–46.

[78] *Id.* at 50–51 (opining that Alabama libel law could make "the daily dialogue of politics . . . utterly impossible"). Wechsler's focus on seditious libel also allowed the Court to leave for another day whether the First Amendment also protects misstatements made about well-known people who are not affiliated with the government (later termed "public figures"), the private conduct of public officials, or people who are neither "public officials" nor "public figures" ("private plaintiffs").

[79] *See* Brief for Petitioner, *supra* note 67, at 52 ("If this submission overstates the scope of constitutional protection, it surely does so only in denying that there may be room for the accommodation of the two 'conflicting interests' represented by official reputation and the freedom of political expression.").

[80] *Id.* at 66. For example, the Court could have limited public officials to damages if there was proof of "actual, proved financial injury." LEWIS, MAKE NO LAW, *supra* note 30, at 607. After raising this possibility in the brief, Wechsler did not pursue it. *See* Anderson, *Wechsler's Triumph*, *supra* note 66, at 235 ("Wechsler approached the no-harm [damages] argument warily. . . . He made no further mention of the issue.").

[81] *See* Anderson, *Wechsler's Triumph*, *supra* note 66, at 234, 236.

[82] Brief for Petitioner, *supra* note 67, at 31, 53–55. The majority of states provided defendants a privilege when they published a defamatory comment if the underlying facts were true. In such cases, the plaintiff could then "defeat the privilege" by proof of "malice" toward the plaintiff, that is, that the defendant was guilty of "bad faith." The minority rule provided the privilege when both the comment and the underlying facts were false, again, as long as there was no ill-will toward the plaintiff. Wechsler urged the Court to adopt the more speech-protective minority position but he added an important twist absent from the case

Wechsler's brief was well received by the Court[83] and oral argument reflected the justices' deep unease with the huge award and the risk that the common law of libel unduly chilled discussion of public affairs.[84] It was also clear, though, that the justices were concerned with the broad implications of Wechsler's positions.[85] When the justices met in conference, there was a consensus that the verdict would not stand, but deep disagreement about how to get to that result.[86] At the end of the initial conference, all that was clear was that Sullivan's verdict had to be reversed.[87]

Chief Justice Earl Warren assigned Associate Justice William Brennan the task of drafting a majority opinion.[88] Over the next month, Brennan produced eight drafts that drew the support of five other justices but only concurrences from the remaining three, who argued for an absolute privilege.[89] Wechsler's brief greatly influenced Brennan's draft opinions, which featured extended discussion of the Sedition Act[90] and the centrality of political speech to the meaning of the First Amendment.[91] Recognizing, as Wechsler had, the danger

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law: the privilege would be lost upon proof of the defendant's bad attitude toward the truth (that is, that the defendant published despite knowing that the statement was false). Anderson, *Wechsler's Triumph*, *supra* note 66, at 240–42 (Wechsler's "reading of the common law rule was important, if not entirely ingenuous . . . ").

[83] *See* Anderson, *Wechsler's Triumph*, *supra* note 66, at 245. Indeed, on the day of oral argument, Justice Arthur Goldberg spotted Dr. King in the courtroom and had an assistant get him an autograph. LEE LEVINE & STEPHEN WERMIEL, THE PROGENY: JUSTICE WILLIAM J. BRENNAN'S FIGHT TO PRESERVE THE LEGACY OF *NEW YORK TIMES V. SULLIVAN* 12 (2014).

[84] *See* LEWIS, MAKE NO LAW, *supra* note 30, at 134–35.

[85] *See id.* at 130–35.

[86] Anderson, *Wechsler's Triumph*, *supra* note 66, at 245. Because only justices attend conference, there are no transcripts of the discussions. However, historians have access to the notes kept by some justices, and other justices have on occasion shared their recollections. Kathryn A. Watts, *Judges and Their Papers*, 88 N.Y.U. L. REV. 1665, 1668–69 (2013).

[87] HALL & UROFSKY, *supra* note 11, at 162–64. For a thorough analysis of Wechsler's lawyering, see generally Anderson, *Wechsler's Triumph*, *supra* note 66.

[88] Warren apparently thought that Brennan could build a consensus on the Court, a role he would come to play throughout his career. SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 223–24 (2010) ("Warren . . . knew that Brennan could build and hold on to a majority—a unanimous one if possible—in a way that he or other justices could not.").

[89] Brennan's effort to build consensus is ably discussed in LEVINE & WERMIEL, *supra* note 83, at 17–27.

[90] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273–76 (1964); *see* Anderson, *Wechsler's Triumph*, *supra* note 66, at 245.

[91] *N.Y. Times*, 376 U.S. at 269–72; *see also* Anthony Lewis, New York Times v. Sullivan *Reconsidered: Time to Return to the "Central Meaning of the First Amendment*," 83 COLUM. L. REV. 603, 603 (1983) [hereinafter Lewis, New York Times v. Sullivan] ("It takes nothing from Justice Brennan to recognize, as anyone who looks into it must, that his transforming analysis of what that libel judgment meant for freedom of expression was based on the brief and argument of Professor Wechsler.").

to robust political debate presented by the common law of libel,[92] Brennan zeroed in on one of the options suggested by Wechsler—eliminating strict liability, and adopted a rule that made a public official suing for misstatements concerning his official conduct prove "actual malice"—that is, that the defendant published the statement "with knowledge that it was false or with reckless disregard of whether it was false or not."[93] Brennan also agreed with Wechsler on the much narrower ground that the judgment could not stand because the advertisement did not name Sullivan.[94]

Brennan also proposed procedural shields that had been discussed among the justices. One was requiring Sullivan to prove his case with "convincing clarity" (rather than the typical standard of preponderance of the evidence).[95] Also, Brennan was concerned that the inflamed environment in Alabama made the same result on retrial inevitable,[96] so he added two more constitutional rules: libel verdicts on behalf of public officials for misstatements arising out of their official conduct would no longer be reviewed with the deference typically accorded jury determinations of fact and that the Court would perform an independent review of the record.[97] With this mix of substantive and procedural changes, the Court concluded that Sullivan's evidence was deficient as a matter of constitutional law.[98] In sum, in this one remarkable opinion, the Court struck down centuries of libel law and put in place multiple protections to encourage public debate about public issues.[99]

The decision was saluted for its path-breaking recognition that political speech is at the heart of the First Amendment and that a free press needs robust protections to survive, let alone thrive.[100] The opinion was "a bold thrust forward,"[101] "significant,"[102] and even "revolutionary."[103] University of

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[92] *N.Y. Times*, 376 U.S. at 271–72, 277–79.

[93] *Id.* at 279–80. This was a position urged in Wechsler's brief. *See* Brief for Petitioner, *supra* note 67, at 53–54.

[94] *N.Y. Times*, 376 U.S. at 288–89.

[95] *Id.* at 285–86; C. Thomas Dienes & Lee Levine, *Implied Libel, Defamatory Meaning, and State of Mind: The Promise of* New York Times Co. v. Sullivan, 78 IOWA L. REV. 237, 259 (1993).

[96] HALL & UROFSKY, *supra* note 11, at 178–79.

[97] *Id.*

[98] *N.Y. Times*, 376 U.S. at 284–92.

[99] *Id.* at 292 ("Raising as it does the possibility that a good-faith critic of government will be penalized for his criticism, the proposition relied on by the Alabama courts strikes at the very center of the constitutionally protected area of free expression."). Three Justices concurred arguing for an absolute privilege. *Id.* at 293 (Black, J., joined by Douglas, J., concurring); *id.* at 298 (Goldberg, J., concurring in result).

[100] *See* Lewis, New York Times v. Sullivan, *supra* note 91, at 608.

[101] ARCHIBALD COX, THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM 102 (1968).

[102] Barry Mason, Comment, *Defamation of Public Officials—Free Speech and the New Constitutional Standard*, 12 UCLA L. REV. 1420, 1421 (1965).

[103] Samuel Gray McNamara, Note, *Recent Developments Concerning Constitutional Limitations on State Defamation Laws*, 18 VAND. L. REV. 1429, 1455 (1965).

Chicago law professor Harry Kalven, Jr., wrote that the decision "may prove to be the best and most important [opinion the Court] has ever produced in the realm of freedom of speech"[104] and "[t]he theory of the freedom of speech clause was put right side up for the first time."[105] Political philosopher Alexander Meiklejohn considered the decision "an occasion for dancing in the streets."[106] For his part, Justice Brennan later recognized that by grounding First Amendment protections in political democracy the Court could anchor free speech and free press law on a more conceptually and historically accurate ground than the "clear and present danger" and "balancing" tests that had dominated the landscape for decades.[107]

Keen observers at the time made an additional point. Because *New York Times* was based upon a commitment to robust debate about public affairs, subsequent cases could extend First Amendment protections beyond the confines of libel claims brought by public officials like Sullivan.[108] As Professor Kalven wrote, the opinion presented an "invitation to follow a dialectic progression from public official to government policy to public policy to matters in the public domain, like art, [that] seems to me to be overwhelming."[109] He was correct, as the next decade saw the Court decide an array of cases applying constitutional principles well beyond damages actions arising out of false statements directed at the official conduct of top government officials, reaching criminal libel cases,[110] as well as civil claims brought by low-level public employees,[111] well-known people not government officials ("public figures"),[112] candidates for elective office,[113] and even people who are not well-known and have no affiliation with the government ("private figures").[114]

In retrospect, *New York Times* seems like an easy case for constitutional intervention: an enormous jury award for minimally harmful statements about an unnamed public official regarding a critical issue facing our country, especially with multiple similar claims in the pipeline that threatened a major

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[104] Harry Kalven, Jr., *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment*", 1964 SUP. CT. REV. 191, 194 (1964).

[105] *Id.* at 208.

[106] *Id.* at 221 n.125.

[107] *See* William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 14–15 (1965); Kalven, *supra* note 104, at 213–18.

[108] See Gertz v. Robert Welch, Inc., 418 U.S. 323, 335–37 (1974) (noting that later opinions extended application to criticism of "public figures" and "to defamatory falsehoods relating to private persons").

[109] Kalven, *supra* note 104, at 221.

[110] *See* Garrison v. Louisiana, 379 U.S. 64, 67–74 (1964).

[111] *See* Rosenblatt v. Baer, 383 U.S. 75, 83–87 (1966).

[112] *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 154–55 (1967).

[113] *See* Monitor Patriot Co. v. Roy, 401 U.S. 265, 271 (1971).

[114] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 337, 351–52 (1974).

publisher with crippling damages awards.[115] In the next decade the Court went much further, constitutionalizing virtually all of the state law of defamation[116] and although there was some flagging of enthusiasm as Court personnel changed (at one point three justices even questioned the core "actual malice" holding),[117] by 1988, all justices had come to view *New York Times* and its progeny as bedrock free speech law.[118]

With defamation law largely unchanged in the years since,[119] now is a good time to take stock of this revolutionary law reform effort. The next section details the doctrinal rules that the Court adopted and identifies a number of alternatives that the Court could have adopted, many of which would have encouraged robust speech while better deterring lies and thus better protecting our democracy.

III. WHAT *NEW YORK TIMES* DID (AND WHAT IT COULD HAVE DONE)

The common law of defamation was very protective of reputations: in many circumstances, a jury could award substantial damages without the plaintiff proving that the offending statement was false, that the defendant was guilty of some degree of fault, or that the misstatement actually caused the plaintiff any harm.[120] *New York Times* and its progeny stripped plaintiffs of these protections and remade defamation law in a dizzying array of ways.

A. *Changes to the Substantive Law of Defamation*

The best-known substantive change to defamation law is the core holding of *New York Times*: a public official could no longer recover damages absent proof of a high degree of culpability on the part of the publisher.[121] With this

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[115] John C. P. Goldberg, *Judging Reputation: Realism and Common Law in Justice White's Defamation Jurisprudence*, 74 U. COLO. L. REV. 1471, 1476–78 (2003); Cass R. Sunstein, *Hard Defamation Cases*, 25 WM. & MARY L. REV. 891, 891–92 (1984).

[116] *New York Times* also became the basis for extending First Amendment protections to other torts, "including false light invasion of privacy, publication of private facts, the right of publicity (or appropriation), and [the] intentional infliction of emotional distress." Rodney A. Smolla, *The Meaning of the "Marketplace of Ideas" in First Amendment Law*, 24 COMM. L. & POL'Y 437, 458 (2019).

[117] *See* SACK, *supra* note 33, at 1–20.

[118] Chief Justice Rehnquist's opinion in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), is virtually a paean to *New York Times*. *See* Sheldon W. Halpern, *Of Libel, Language, and Law:* New York Times v. Sullivan *at Twenty-Five*, 68 N.C. L. REV. 273, 274 (1990) (stating that the Chief Justice's opinion for the Court was an "unequivocal affirmation of the vitality of *Sullivan*," as he "took pains to reaffirm a broad reading of *New York Times v. Sullivan* and its progeny") (footnotes omitted).

[119] SACK, *supra* note 33, at 1-2.

[120] DAN B. DOBBS, PAUL T. HAYDEN, & ELLEN M. BUBLICK, HORNBOOK ON TORTS 986 (2d ed. 2016).

[121] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964). The Court's decisions have left unclear whether any of the constitutional protections apply when the plaintiff is a

holding, the Court went well beyond the common law privilege of "fair comment," deeming it insufficient for the "breathing space" needed to protect speech closely linked to self-governance.[122] This meant that plaintiffs who were considered "public officials" had to prove that the defendant published the falsehood with "actual malice,"[123] a very demanding standard.[124] The "actual malice" standard is satisfied only when a defendant publishes a misstatement intentionally or with reckless disregard for whether the statement was truthful, a proof requirement later extended to claims brought by "public figures."[125]

While the Court set the culpability bar very high for claims brought by "public plaintiffs," it viewed the balance of policies differently when a claim was brought by "private plaintiffs," who were allowed to recover upon proof of mere negligence.[126]

The Court also read the First Amendment as prohibiting liability for statements "that cannot be proved false" or that "cannot 'reasonably [be] interpreted as stating actual facts.'"[127] Finally, *New York Times* and subsequent decisions made it clear that a public official identified only by job title or membership in a group cannot recover for defamation because a criticism of the government generally cannot be the basis for a defamation claim by an individual.[128]

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private plaintiff and the suit involves a matter not of "public concern," brought against a non-media defendant. *See* SACK, *supra* note 33, at 1-22 to 1-23.

[122] *See N.Y. Times*, 376 U.S. at 271–72, 278–83, 292.

[123] Cantrell v. Forest City Publ'g Co., 419 U.S. 245, 251–52 (1974) (stating that "actual malice" is a "term of art" in defamation law).

[124] Randall P. Bezanson & Gilbert Cranberg, *Institutional Reckless Disregard for Truth in Public Defamation Actions Against the Press*, 90 IOWA L. REV. 887, 917 (2005) (stating that "actual malice" is a "demanding" standard); *accord* Grzelak v. Calumet Publ'g Co., 543 F.2d 579, 582 (7th Cir. 1975); *see also* McCoy v. Hearst Corp., 727 P.2d 711, 727 (Cal. 1986) (stating that "actual malice" is a "formidable barrier").

[125] SACK, *supra* note 33, § 5:5.1.

[126] Gertz v. Robert Welch, Inc., 418 U.S. 323, 342–43 (1974). The Court did not specify a negligence standard, rather allowing the states to set their own level of culpability: "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard . . . for a publisher . . . of defamatory falsehood injurious to a private individual." *Id.* at 347. Most states have adopted a negligence standard. SACK, *supra* note 33, at 6-2.

[127] SACK, *supra* note 33, at 1-41. This is similar, but not identical, to the notion that there is a "wholesale defamation exception for [any statement] that might be labeled 'opinion,'" a position the Court rejected in *Milkovich v. Lorain Journal Co*., 497 U.S. 1, 18 (1990). *See* David A. Logan, *Of "Sloppy Journalism," "Corporate Tyranny," and Mea Culpas: The Curious Case of* Moldea v. New York Times, 37 WM. & MARY L. REV. 161, 163–66 (1995) ("[B]y 1990 every federal circuit and the courts of at least thirty-six states and the District of Columbia recognized that a statement of opinion was absolutely protected.").

[128] SMOLLA, *supra* note 37, § 4:40:50 (noting that a criticism of government "may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations. The Court in *Rosenblatt* thus reaffirmed that '[t]here must be evidence showing that the attack was read as specifically directed at the plaintiff'").

1. *The Flawed "Actual Malice" Standard*

There have been many criticisms of the substantive changes wrought by *New York Times* and its progeny, but three are the most powerful.

First is concern with the sweep of *New York Times*, which in a single opinion constitutionalized the "of and concerning" element of a defamation case, imposed scienter requirements where the common law imposed none, and created a constitutional requirement of proof of "actual malice" instead of adopting the doctrine of common law malice.[129] Later decisions further gutted the common law with little solicitude for the historical work of the common law courts,[130] let alone federalism concerns.[131] As Justice White wrote in his dissent in *Gertz*, looking back on *New York Times* and its progeny, the Court erred when it "federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 States,"[132] while "scuttling the libel laws of the States in such wholesale fashion."[133] Simply stated, the Court could have mitigated the free speech concerns implicated by libel judgments against public officials, not to mention avoided adopting principles that have been rejected in other democracies,[134] by

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[129] *Id.* at 2-191. The Court claimed that "actual malice" was recognized by a number of states, but later decisions make clear that federal "actual malice" is only distantly related to any state law analogue. *See* David A. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 427, 429 (1975). Besides failing to adopt the common law malice rule, the Court, unfortunately, selected a term that had a different meaning in the common law. SACK, *supra* note 33, at 5-86, n.487. The Court has recognized that its terminology has caused unnecessary confusion. *See* Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 510–11 (1991) (warning against the confusing "common law" malice and "actual malice"); *see also* Harte-Hanks Commuc'ns. v. Connaughton, Inc., 491 U.S. 657, 666 n.7 (1989) (noting that "actual malice" is a confusing term because "it has nothing to do with bad motives or ill will").

[130] *See generally* James Maxwell Koffler, *The Pre*-Sullivan *Common Law Web of Protection Against Political Defamation Suits*, 47 HOFSTRA L. REV. 153 (2018) (surveying hundreds of lower court decisions that provided protection from libel claims within the context of common law doctrine).

[131] *See* Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782, 786 (1986) ("If the tort of defamation represents a delicate balance [between free speech and the need to protect reputations] then the Supreme Court should tread carefully where so many common law judges have trodden before."); Jonathan C.P. Goldberg & Benjamin C. Zipursky, *The Supreme Court's Stealth Return to the Common Law of Torts*, 65 DEPAUL L. REV. 433, 441 (2016) ("Nonetheless, during an era in which arguments grounded in federalism are supposedly taken seriously, the virtual absence of any serious criticism of the Court's First Amendment torts decisions [since *New York Times*] is startling.").

[132] Gertz v. Robert Welch, Inc., 418 U.S. 323, 370 (1974) (White, J., dissenting).

[133] *Id.*

[134] *See* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 902 (2006) (explaining that the Court adopted "the extraordinarily press-protective and plaintiff-restrictive 'actual malice' rule, a rule endorsed by no country in the world in the ensuing forty years").

adopting a more surgical substantive standard, one that better balanced free speech concerns with the need to deter falsehoods.[135]

The primary focus of critics is the requirement that all public plaintiffs prove "actual malice."[136] The Court was clear that it wanted to deter defamation actions by making "actual malice" hard to prove,[137] but by doing so the Court excessively devalued the important state interest in protecting reputations, as well as harming the social cohesion of the community at large, which is protected by defamation law.[138] Requiring that plaintiffs prove "actual malice" created an "open season" for targeting the reputations of individuals who choose

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[135] The Court's internal deliberations initially focused on overturning the Alabama decision on the narrow basis that the plaintiff was not named in the offending publication. *See* LEWIS, MAKE NO LAW, *supra* note 30, at 120–21, 172–81. Alternatively, the Court could have required proof of "actual malice" only when the plaintiff is a public official, not "public figures" more generally. *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 154–55 (1967) (suggesting that because claims by public figures do not implicate seditious libel concerns, they should be able to prevail upon proof of the lesser standard of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers"). Or, the *New York Times* Court could have circumscribed jury misbehavior by imposing limits on the availability of "presumed" or punitive damages, a step the Court eventually took in *Gertz*, 418 U.S. at 349 (holding that a plaintiff cannot recover presumed or punitive damages absent proof of "actual malice"). The Court's changes to damages remedies are discussed at *infra* notes 195–212 and accompanying text. Finally, the Court could have changed the requirement that plaintiffs prove falsity as part of their prima facie case, a position the Court eventually took in *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 778 (1986). *See infra* notes 228–29 and accompanying text.

[136] Despite the Court's extensive deliberations, there was "an arresting quiet at the center of the case—specifically, in the Justices' failure during deliberations to criticize, debate, or question the . . . adoption of the actual malice standard." *See, e.g.*, Elena Kagan, *A Libel Story:* Sullivan *Then and Now*, 18 L. & SOC. INQUIRY 197, 201 (1993) (reviewing ANTHONY LEWIS, MAKE NO LAW: THE *SULLIVAN* CASE AND THE FIRST AMENDMENT (1991)).

[137] W. WAT HOPKINS, ACTUAL MALICE: TWENTY-FIVE YEARS AFTER *TIMES V. SULLIVAN* 8 (1989) (opining that *New York Times* imposes "a near-impossible burden of proof"); Lackland H. Bloom, Jr., *Proof of Fault in Media Defamation Litigation*, 38 VAND. L. REV. 247, 255–56 (1985) (noting that plaintiffs bear a heavy burden in public plaintiff defamation cases).

[138] *See* Epstein, *supra* note 131, at 798, 801 (arguing that a good reputation is a property right); *see also* Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age*, 91 B.U. L. REV. 1435, 1440 (2011) (identifying a need to "secure robust and responsible participation" and "norms of respectful, vigorous engagement" in public life); Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 693 (1986) (explaining that libel law protects not just individual reputations but also a "good and well-ordered society"). *See generally* Michael Passaportis, Note, *A Law and Norms Critique of the Constitutional Law of Defamation*, 90 VA. L. REV. 1985 (2004) (arguing that *New York Times* and its progeny have harmed social welfare by discouraging cooperative behavior, causing "democratic distortion").

to participate in public life.[139] Because "actual malice" is a subjective standard,[140] *New York Times* "immunizes those who publish charges they believe to be true even if the charges turn out to be false, [as well as those] who publish charges they (subjectively) believe to be true even if a reasonable person upon reasonable investigation would (objectively) not believe those charges to be true."[141] Simply stated, this standard "incentivizes practices that increase the likelihood that the press will publish injurious falsehoods."[142]

Proving "actual malice" is so daunting that it amounts to near immunity from liability and thus a license to publish falsehoods.[143] As discussed in Part V, the data show that very few public plaintiffs recover substantial damages because the "actual malice" standard is extremely difficult to satisfy, especially on appeal.[144] This has resulted in little deterrence of liars and a systematic under-protection of the right to an unsullied reputation.

The "actual malice" standard also creates perverse incentives. To recover, the plaintiff must prove that the defendant knew the statement was false or was subjectively certain of its falsity. This puts publishers to a hard choice: publishing without verification is the safest legal route, as an attempt to verify that turns up contrary information before publication can constitute reckless disregard for the truth and support liability. As a result, publishers are incentivized to do little or no fact-checking, confident that the more slipshod their investigation, the less likely they are to be guilty of "actual malice."[145] In short, under an "actual malice" regime, ignorance is bliss.[146]

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[139] BRUCE W. SANFORD, LIBEL AND PRIVACY 7-11 (2d ed. 2019) (noting that public officials complained that *New York Times* and its progeny gave the press "a virtual license to defame public servants who, in turn, were virtually defenseless"). *See generally* RUSSELL L. WEAVER, ANDREW T. KENYON, DAVID F. PARTLETT, & CLIVE P. WALKER, THE RIGHT TO SPEAK ILL: DEFAMATION, REPUTATION, AND FREE SPEECH (2006) (stating that *New York Times* and its progeny have "effectively ended" civil defamation litigation by public officials).

[140] Harte-Hanks Commc'ns., Inc. v. Connaughton, 491 U.S. 657, 688 (1989); *see also* Herbert v. Lando, 441 U.S. 153, 160 (1979) ("actual malice" "focus[es] on the conduct and state of mind of the defendant").

[141] Fredrick Schauer, *Slightly Guilty*, 1993 U. CHI. LEGAL F. 83, 93 (1993) [hereinafter Schauer, *Slightly Guilty*].

[142] Benjamin Barron, *A Proposal to Rescue* New York Times v. Sullivan *by Promoting a Responsible Press*, 57 AM. U. L. REV. 73, 75 (2007).

[143] *See* Schauer, *Slightly Guilty*, *supra* note 141, at 94 (noting that "at least as to public officials and public figures, there is little room between the actual malice rule and a 'no liability' rule").

[144] *See infra* notes 318–38and accompanying text.

[145] *See* 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, 409–10 (2014). Stated differently, "[t]he more a reporter investigates, the more likely it is that the reporter will discover some information that casts the veracity of the story into doubt, which would increase the likelihood of liability." Barron, *supra* note 142, at 85.

[146] *See* William P. Marshall & Susan Gilles, *The Supreme Court, the First Amendment, and Bad Journalism*, 1994 SUP. CT. REV. 169, 185 (1994) ("The actual malice standard not

It can also be argued that the "actual malice" requirement discourages investigation of the accuracy of stories that have already been published when the individuals named in the stories have attracted public attention and become "public figures," increasing the chance that the daunting "actual malice" requirement will be triggered.[147] A similar disincentive to investigate before publishing comes from the Court's recognition that competitive pressures in the news marketplace allow a defendant to cite deadline concerns as a justification for failing to investigate.[148] This is especially pernicious with the rise of the twenty-four-hour news cycle[149] and the fevered hothouse that is social media.[150]

"Actual malice" may also be a faulty standard from an economic perspective. First, "actual malice" is expensive to litigate. The parties must engage in extensive pretrial discovery to establish the defendant's state of mind and this often requires disruptive forays deep into the editorial process.[151] The "actual malice" requirement also incentivizes defendants, especially those who are insured, to pull out all the stops to avoid a crushing award.[152] And scholars from a broad range of perspectives have questioned whether requiring "actual

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only holds that there is no need to investigate; it suggests that it often is better not to investigate.").

[147] Barron, *supra* note 142, at 87.

[148] Bloom, *supra* note 137, at 267–70.

[149] *See* David A. Logan, *All Monica, All of the Time: The 24-Hour News Cycle and the Proof of Culpability in Libel Actions*, 23 U. ARK. L. REV. 201, 211–13 (2000) [hereinafter Logan, *All Monica*].

[150] Luis W. Tompros, Richard A. Crudo, Alexis Pfeiffer, & Rachel Boghossian, *The Constitutionality of Criminalizing False Speech Made on Social Networking Sites in a Post-*Alvarez*, Media-Obsessed World*, 31 HARV. J.L. & TECH. 65, 67 (2017) ("Hyperbole, embellishment, practical jokes, rumors, catfishing, and even malicious lies and threats are not uncommon on social media. Indeed, it is well documented that social media led to a more cavalier attitude about the truth; social media's veil of actual (or perceived) anonymity allows subscribers to more aggressively spread falsehoods."); Benedict Cary, *How Fiction Becomes Fact on Social Media*, N.Y. TIMES (Oct. 20, 2017), https://www.nytimes.com/2017/10/20/health/social-media-fake-news.html [https://perma.cc/MY9W-YJPY] (detailing how the "interaction of the technology with our common, often subconscious psychological . . . makes so many of us vulnerable to misinformation").

[151] *See* Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1667–69 (2013) (stating that *New York Times* "interposed an extremely fact-intensive, discovery-intensive—which is to say, very costly—standard into defamation litigation"); Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 917 n.323 (2000) (stating that the Court's focus on the defendant's state of mind results in expensive and intrusive discovery and results in undue judicial interference with the editorial process).

[152] *See* David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 515–16 (1991) [hereinafter Anderson, *Libel Law*] (stating that legal fees constitute almost 80% of the legal costs of libel litigation).

malice" makes sense from an efficiency standpoint[153] as it protects the publishers least concerned with accuracy.[154]

Besides creating a disruptive and expensive litigation process, the "actual malice" requirement undoubtedly affects plaintiffs' ability to retain competent counsel: few experienced lawyers will take a contingent-fee case when the odds of a successful outcome are as poor as they are in modern defamation law, further reducing the chance that defamation law deters the publication of falsehoods.[155]

Most importantly, the Court's sweeping protection of defendants imposes costs beyond the inability to protect reputations: by inadequately deterring false speech, the ability of citizens to effectively self-govern is compromised.[156] Justice White, who became a critic of the "actual malice" rule, put it bluntly:

> The *New York Times* rule . . . countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods. . . . In terms of the First Amendment and reputational interests at stake, these seem grossly perverse results.[157]

Faced with torrents of misinformation, citizens risk reaching ill-informed decisions about the wisdom of policies or the credibility of leaders. As Richard Epstein presciently observed,

> The level of discourse over public issues is not simply a function of the total amount of speech. It also depends on the quality of the speech. If there is no law of defamation, then the mix between truthful and false statements will shift. More false statements will be made. The public will then be required to discount the information that it acquires because it can be less sure of its pedigree. The influence of the press will diminish as there will be no obvious

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[153] *See* Kendrick, *supra* note 151, at 1680 (summarizing economic critiques of various libel regimes).

[154] *See* Ronald A. Cass, *Principle and Interest in Libel Law After* New York Times*: An Incentive Analysis*, *in* THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS 69, 100–02 (Everette E. Dennis & Eli M. Noam eds., 1989).

[155] *Id.* at 83 (suggesting that the "actual malice" requirement "alters the attractiveness of contingency fee arrangements [and] should cause attorneys to decline more cases that might be fair bets to be remunerative," resulting in fewer plaintiffs being "able to secure representation"); *see also* Jonathan Garret Erwin, *Can Deterrence Play a Positive Role in Defamation Law?*, 19 REV. LITIGATION 675, 695 (2000) (stating that "actual malice" is "especially difficult to prove [with the result that] the prospect of recovery is so slim that lawyers will be reluctant to take the case").

[156] Cass R. Sunstein, *The Dark Side of* New York Times v. Sullivan, BLOOMBERG OPINION (Mar. 25, 2014), https://www.bloomberg.com/opinion/articles/2014-03-25/the-dark-side-of-new-york-times-v-sullivan [https://perma.cc/U97U-2K4A].

[157] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 769 (1985) (White, J., concurring).

> way to distinguish the good reports from the bad, in part because no one can ever be held legally accountable for their false statements.[158]

A similar concern was expressed by then-Professor Elena Kagan, who questioned whether "uninhibited defamatory comment [is] an unambiguous social good" and expressed concern that the Court's post-*New York Times* decisions served to "distort public debate" and thus harm "public discourse" and the "democratic process."[159]

This concern is borne out by troubling evidence that people respond to uncertainty about the veracity of news sources by disengaging from civic life altogether. Almost two-thirds of U.S. adults report that fabricated news stories create confusion about current issues and events.[160] As a result, millions of Americans now find it is difficult to know whether the information they encounter is accurate,[161] which creates voter confusion.[162] All told, the requirement of proof of "actual malice" may actually be at cross-purposes with the link between free speech and democracy, harming the quality of debate in the modern public square.[163]

"Actual malice" is no longer a democracy-enhancing doctrine and as a result it should be replaced by an alternative that better balance reputations with the need to deter false statements in our public debate. The most familiar alternative to "actual malice" would be to require that public plaintiffs prove that the defamatory statement was published with fault or negligence; this is the scienter

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[158] *See* Epstein, *supra* note 131, at 799–800; *see also* Barron, *supra* note 142, at 101–02 (the publication of false information "inhibits the public's ability to make informed political choices"). *See generally* James A. Gardner, Comment, *Protecting the Rationality of Electoral Outcomes: A Challenge to First Amendment Doctrine*, 51 U. CHI. L. REV. 892 (1984) (arguing that democracy requires voters to have access to accurate information about public affairs and political candidates).

[159] Kagan, *supra* note 136, at 206; *see also* LEE BOLLINGER, IMAGES OF A FREE PRESS 26–39 (1991).

[160] Michael Barthel, Amy Mitchell, & Jesse Holcomb, *Many Americans Believe Fake News Is Sowing Confusion*, PEW RES. CTR. (Dec. 15, 2016), https://www.journalism.org/2016/12/15/many-americans-believe-fake-news-is-sowing-confusion/ [https://perma.cc/UBU3-4WT8].

[161] Nicholas Riccardi & Hannah Fingerhut, *AP-NORC/USAFacts Poll: Americans Struggle to ID True Facts*, ASSOCIATED PRESS (Nov. 14, 2019), https://news.yahoo.com/ap-norc-usa-facts-poll-132439294.html [https://perma.cc/F7GK-4JNU] (47% believe it is difficult to know whether the information they encounter is true, and almost 60% say they regularly see conflicting accounts of the same set of facts).

[162] Sabrina Tavernise & Aidan Gardnier, '*No One Believes Anything': Voters Worn Out by Fog of Political News*, N.Y. TIMES (Nov. 18, 2019), http://www.nytimes.com/2019/11/18/us/polls-media-fake-news.html [https://perma.cc/7QVP-ZXPR] ("Just when information is needed most, to many Americans it seems the most elusive. The rise of social media; the proliferation of information online, including news designed to deceive; and a flood of partisan news are leading to a general exhaustion with news itself.").

[163] These harms are accentuated by the explosive growth of social media, a phenomenon discussed in more detail *infra* notes 279–335, and accompanying text.

standard used in some defamation cases[164] and in the vast majority of personal injury actions.[165] The concept of negligence, like intent (and unlike "actual malice"), is deeply imbedded in the common law and familiar to judges, so its adoption would have avoided much of the litigation (and client uncertainty) caused by the whole-cloth nature of "actual malice."[166] In particular, pegging the defamation system to negligence would harness the "wisdom of crowds," hastening the development of professional norms (also called "journalistic ethics") that synthesize the behavior of thousands of similarly situated reporters. This would help courts identify, and juries apply, journalistic norms based on an external, industry-wide standard, just as is done in medical malpractice actions.[167]

However, it is not surprising that the Court did not adopt a negligence regime. Most basically, a negligence standard would not have protected the *New York Times* from the wrath of the Alabama jury;[168] by failing to do any investigation of the advertisement, almost any jury anywhere would have found the newspaper liable, and thus subject to a potentially huge damages award. More broadly, a negligence standard would provide publishers too little "breathing space"—the central goal of the Court in *New York Times*—because it may be too easy to prove, especially when the trial involves a popular local plaintiff and an unpopular defendant.[169] Thus, a negligence standard risks unduly chilling speech that has the most value—statements about public officials involved in a matter of public concern—and would have been unacceptable to the justices. Indeed, a negligence regime apparently was never even considered by counsel or the Court.[170]

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[164] Negligence on the part of the publisher could nullify a defendant's claim of conditional privilege. *See* SACK, *supra* note 33, at 9-55–9-57.

[165] "Negligence claims represent the great majority of tort claims presented, brought, or tried today." DOBBS, HAYDEN, & BUBLICK, *supra* note 120, at 187.

[166] In fact, the Court adopted such a compromise position in *Gertz* when it required that private plaintiffs prove "at least fault." SACK, *supra* note 33, at 9-55, 56 n.244.

[167] *See* Brian C. Murchison et al., Sullivan*'s Paradox: The Emergence of Judicial Standards of Journalism*, 73 N.C. L. REV. 7, 18 (1994). It is unclear that constitutional protections should be extended to defamation claims brought against "citizen journalists." *See also* Adam Cohen, *The Media That Need Citizens: The First Amendment and the Fifth Estate*, 85 S. CAL. L. REV. 1, 44-48 (2011).

[168] *See* Mary-Rose Papandrea, *The Story of* New York Times v. Sullivan, *in* FIRST AMENDMENT STORIES 229, 230 (2012) (Richard W. Garnett & Andrew Koppelman eds., 2012) (suggesting the Court's decision "may have been an overreaction to a particularly bad set of facts in a charged political atmosphere").

[169] SACK, *supra* note 33, at 9-55 (stating that a negligence standard risks "hindsight judgments that are unlikely to give a hesitant speaker the confidence for him or her to speak out"); *accord* Marc A. Franklin & Daniel J. Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 841–43 (1984) (identifying how a negligence standard provides insufficient protection).

[170] *See* LEVINE & WERMEIL, *supra* note 83, at 18–30 (discussing the justices' debates about changing the strict liability nature of defamation law with no justice urging a negligence standard).

Instead of requiring either "actual malice" or negligence, the Court could have achieved a better balance by adopting a scienter requirement of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[171] This approach, or the analogous test used under New York law—"gross irresponsibility"[172]—is more objective than the "actual malice" standard, which solely focuses on state of mind and whether the publisher knowingly lied.[173] A "highly unreasonable" standard could drive down the time and expense associated with discovery[174] and lessen the intrusiveness into the editorial process.[175] Such an adjustment would also facilitate accurate decision-making by juries, which would be directed to consider whether the defendant conformed to "journalistic standards," something not important under an "actual malice" regime.[176] Similarly, if liability were pegged to a less demanding standard than "actual malice," verdicts could be based on examples of extreme departures from the journalistic norm, such as a total failure to investigate, which would give publishers an incentive to take at least minimal steps to confirm accuracy

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[171] This was the position urged by Justice Harlan in cases involving public figures, as opposed to public officials, because it would "balance with fair precision the competing views at stake." Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 63 (1971) (Harlan, J., concurring). Justice Harlan summarized his proposed approach as supporting liability if an "investigation . . . was grossly inadequate in the circumstances." Curtis Publ'g Co. v. Butts, 388 U.S. 130, 156 (1967).

[172] The Court's decision in *Gertz* allowed states to set the basis for liability in private figure cases as long as they do not impose strict liability. Some states, including New York, require proof that the defendant published with "gross irresponsibility." Chapadeau v. Utica Observer-Dispatch, 341 N.E.2d 569, 572 (N.Y. 1975). This standard is considered the equivalent of the "highly unreasonable conduct" standard proposed by Justice Harlan but never adopted by a majority of the Court. *See* Murchison, *supra* note 167, at 18. The New York approach is discussed in detail in David E. McCraw, *Press Freedom and Private People: The Life and Times (and Future) of* Chapadeau v. Utica Observer-Dispatch, 74 ALB. L. REV. 841 (2010–11).

[173] *See* SACK, *supra* note 33, at 5-82 (stating that "actual malice" is "virtually unrelated to 'recklessness' in the ordinary sense: gross negligence or 'wanton behavior'") (footnotes omitted).

[174] Murchison, *supra* note 167, at 18 (suggesting that unlike with "actual malice," the plaintiff could prove liability by comparing the defendant's conduct to the practices of competent journalists); *accord* Bloom, *supra* note 137, at 345–46 (suggesting that courts that apply a "gross irresponsibility" standard will require proof of "a greater departure from the standard of due care in the journalism profession than will simple negligence jurisdictions because the term 'gross irresponsibility,' on its face, suggests error of a more egregious nature than mere negligence").

[175] Anderson, *Libel Law*, *supra* note 152, at 516–21 (discussing the many ways the "actual malice" requires inquiry into the editorial process).

[176] Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 667–68 (1989) (stating that although a deviation from professional journalistic standards is not required to prove "actual malice," such a deviation may be admissible).

rather than publish first and (maybe) verify later.[177] In sum, the Court should have adopted a scienter requirement located between fault and "actual malice" to better balance the competing interests at play and lessen the flow of falsehoods into our public debate.

2. *The Excessive Sweep of the "Actual Malice" Requirement*

The second main critique of the "actual malice" standard involves the range of people saddled with proving "actual malice." In *New York Times*, the Court imposed the "actual malice" requirement on plaintiffs who were "public officials." The Court's justification for this change was largely based on its view that the Sedition Act of 1798, a law that applied only to top federal officials, was unconstitutional.[178] While the Court has stated that the "actual malice" requirement "cannot be thought to include all public employees,"[179] the sweep of the rule has been very broad and protects defendants from claims brought by a host of government employees far removed from the powerful targets of the Sedition Act.[180] For example, the "public official" category includes candidates for any office, based on the view that by running they voluntarily places their character and behavior before the public for consideration.[181] This creates disincentives for citizens to enter the electoral process and also makes public service less attractive to those already serving in government.[182]

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[177] Eramo v. Rolling Stone, LLC, 209 F. Supp. 3d 862, 871 (W.D. Va. 2016) ("[I]t is well settled that failure to investigate will not alone support a finding of actual malice."); *see also* SACK, *supra* note 33, § 5:5.2[A] at 5-94 (listing cases describing the myriad ways to establish evidence of actual malice); *id.* § 5:5.2[B] at 5-95 (identifying evidence that is insufficient to show actual malice).

[178] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273–77 (1964) (explaining how the "attack upon its validity has carried the day in the court of history").

[179] Hutchinson v. Proxmire, 443 U.S. 111, 119 n.8 (1979) (dictum); *see also* SMOLLA, *supra* note 37, at 2-87–90 (stating that "there are relatively few examples of government-related defamation plaintiffs who are held not to be public officials subject to the *New York Times* standard . . . usually [those who] have a peripheral or transient connection to governmental activity, or are extremely low in the organizational hierarchy").

[180] Halpern, *supra* note 118, at 280 ("Had the boundaries of constitutionalization of defamation been left where *Sullivan*'s Sedition Act concerns put them—at the outer perimeter of official conduct of broadly defined public officials—it is possible that the case development over the succeeding years would have produced a coherent body of judicial thought from which a sound doctrine of 'constitutional malice' might have emerged.").

[181] Monitor Patriot Co. v. Roy, 401 U.S. 265, 271–72 (1971) ("And if it be conceded that the First Amendment was 'fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people,' then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.").

[182] SACK, *supra* note 33, at 5–7; *see* NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL 251 (1986) (tracing the colonial roots of this justification for the common law of libel). President Richard Nixon made a similar argument. ROSENBERG, *supra*, at 251.

In decisions following *New York Times*, the Court extended the "actual malice" requirement to "public figures," plaintiffs who are well-known but not affiliated with the government. This means that publishers are free to publish false stories about many people who have no direct connection to public policy with scant fear of liability, and with a concomitant shrinking of the scope of protection of reputation, solely because the targets happen to have a degree of notoriety.[183] This is a serious disconnect from the seditious libel justification for *New York Times*.[184]

Critics have also assailed the many decisions that have defined who is a "public figure,"[185] and especially the justifications for imposing the full array of constitutional requirements upon a plaintiff considered a "pervasive" or "all-purpose" "public figure" (a person who is famous but not involved in debates about public policy).[186] There is also the unfairness that results from treating as "public figures" those who get swept up in a matter of public interest involuntarily, but who because of the Court's decisions, suffer damage to their reputations with scant opportunity to win a libel claim.[187]

Finally, critics have lamented the requirement that "private figures" (plaintiffs who are neither "public officials" nor "public figures") cannot take advantage of the strict liability nature of the common law of libel because they

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[183] Curtis Publ'g Co. v. Butts, 388 U.S. 130, 154 (1967) (plurality opinion) ("[Suits by public figures] cannot be analogized to prosecutions for seditious libel. Neither plaintiff has any position in government which would permit a recovery by him to be viewed as a vindication of governmental policy. Neither was entitled to a special privilege protecting his utterances against accountability in libel.").

[184] *See* Goldberg & Zipursky, *supra* note 131, at 438 ("[*New York Times* involved] a transparent effort by a government official, aided by sympathetic state judges, to use civil litigation to punish a newspaper for publishing criticisms of official actions and policies. . . . The notorious common law crime of seditious libel was alive and well.").

[185] SACK, *supra* note 33, at 5-22 ("The law pursuant to which courts determine who is and who is not a 'public figure,' . . . is chaotic."); Joseph H. King, Jr., Deux ex Machina *and the Unfulfilled Promise of* New York Times v. Sullivan*: Applying the Times for All Seasons*, 95 KY. L.J. 649, 657 (2006-2007) ("[T]he boundaries and outlines of the public figure classification have been formless and ill-defined."). The classic formulation of this dilemma is "defining public figures is much like nailing a jellyfish to the wall." Rosanova v. Playboy Enters., 411 F. Supp. 440, 443 (S.D. Ga. 1976).

[186] James Corbelli, Comment, *Fame and Notoriety in Defamation Litigation*, 34 HASTINGS L.J. 809, 829 (1983) ("In most instances, any connection between the fame of the plaintiff and an actual relinquishment of the interest in an unsullied reputation is tenuous at best.").

[187] Commentators and courts have severely criticized the notion of "involuntary public figures." *See, e.g.*, Christopher Russell Smith, *Dragged into the Vortex: Reclaiming Private Plaintiffs' Interests in Limited Purpose Public Figure Doctrine*, 89 IOWA L. REV. 1419, 1421 (2004) (arguing that courts should eliminate the involuntary limited purpose public figure category). Concern with the law applicable to public figures prompted Justice Clarence Thomas to recently urge reconsideration of the *New York Times* regime. *See* McKee v. Cosby, 139 S. Ct. 675, 676 (2019) (Thomas J., concurring in denial of a writ of certiorari) (criticizing the court of appeals decision, *McKee v. Cosby*, 874 F.3d 54 (1st Cir. 2017), which held that the victim of an alleged sexual assault by comedian Bill Cosby was a public figure).

now have to prove "at least negligence" to prevail.[188] Besides concerns with the wisdom of uprooting centuries of state common law,[189] the Court inadequately balanced the relevant policies in play. In *Gertz v. Robert Welch*, the Court distinguished public from private plaintiffs because of the "compelling normative consideration" that a private plaintiff has not assumed the risk of calumny.[190] This contention is flawed because it ignores the requirement of "actual voluntariness" central to the tort defense of assumption of the risk.[191] Also, by requiring that all defamed plaintiffs, even those with no connection to government and without a public profile, prove fault in defamation actions, the Court imposed a form of tax on innocent people for the perceived greater good of unfettered discussion.[192]

The *Gertz* Court further justified its changes to the common law by the fact that private plaintiffs lacked access to channels of communication for rebuttal.[193] If that was true when *Gertz* was decided in 1974, it is not true today, when a defamed person can often engage in self-help by mounting a defense on the internet.[194]

B. *Changes to the Remedies for Defamation*

Consistent with its zealous protection of reputations, the common law provided plaintiffs with very generous damages rules that were fundamentally

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[188] *Gertz* held that states were free to set the culpability standard for private plaintiffs, "so long as they do not impose liability without fault." Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

[189] *See supra* notes 117–22 and accompanying text.

[190] *See Gertz*, 418 U.S. at 344 ("[An individual who seeks government office] runs the risk of closer public scrutiny than might otherwise be the case.").

[191] *See* Susan M. Gilles, *From Baseball Parks to the Public Arena: Assumption of the Risk in Tort Law and Constitutional Libel Law*, 75 TEMP. L. REV. 231, 237–60 (2002). The concept of assumption of the risk makes even less sense when applied to claims brought by "pervasive" or "general purpose public figures," who may be well-known in general but who may not have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved*." Id*. at 252. For example, should the fact that millions of people recognize the name of NBA star LeBron James strip him of the right to effectively protect his reputation from falsehoods?

[192] *See* Epstein, *supra* note 131, at 798 ("Defamation suits impose a price on those who make false statements about others. Repeal of the law of defamation dramatically reduces that price, given that all administrative and injunctive remedies have already been ruled out of bounds.").

[193] *Gertz*, 418 U.S. at 344.

[194] Arguments that are grounded in a lack of access to opportunities to rebut a false statement make little sense in a world of easy access to the internet and, especially, social media. *See* Barron, *supra* note 142, at 88–90; *see also* SACK, *supra* note 33, at 5-23 ("An interesting avenue of inquiry would be whether the advent of the Internet and the growth of the importance of social media affects or should affect the constitutionally based law of defamation.").

inconsistent with general tort principles: as Justice Powell observed, the common law remedies for defamation were "an oddity of tort law."[195]

Specifically, juries had great latitude to fix compensatory damages. If the plaintiff could prove that the defendant had printed a defamatory statement about the plaintiff, the jury was free to assess substantial damages without any proof of harm to the plaintiff's reputation, economic interests, or emotional state (and the amount awarded may be substantial, as was the case in in *New York Times*).[196] The reasoning was that such harms were likely to flow from defamation but were difficult to prove,[197] so the jury should be allowed to "presume damages"[198]—awarding whatever amount the jury thought fair and appropriate in the circumstances.[199] This doctrine created a presumption of injury that for all intents and purposes was irrebuttable[200] and thus was both unfair and illogical.[201]

The common law also allowed the plaintiff to recover punitive damages upon proof that the false statement was motivated by malice (in the sense of ill will toward the plaintiff), again without any evidence of harm.[202] In sum, the

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[195] *Gertz*, 418 U.S. at 349.

[196] *See* DOBBS, HAYDEN & BUBLICK, *supra* note 120, at 998; *see also* SMOLLA, *supra* note 37, § 9:17 ("Presumed damages are by no means merely nominal. They may at times be quite substantial."). Of course, if the plaintiff had evidence of actual harm to reputation, the plaintiff was free to introduce if for the jury's consideration. SACK, *supra* note 33, at 10-11.

[197] SACK, *supra* note 33, at 10-10; *see also* David A. Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747, 764 (1984) [hereinafter Anderson, *Reputation*].

[198] DAN B. DOBBS, DOBBS LAW OF REMEDIES: DAMAGES–EQUITY–RESTITTUTION § 7.2(3) (2d ed. 1993).

[199] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) (recognizing "[t]he largely uncontrolled discretion of juries to award damages").

[200] *See* JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE: EVIDENCE IN TRIALS AT COMMON LAW § 2491 (4th ed. 1985); *see also* Post, *supra* note 138, at 698 (noting that a plaintiff can recover damages absent proof of any damage; even if there was evidence of no harm to reputation, the plaintiff could still prevail—that is, damages are conclusively presumed).

[201] Anderson, *Reputation*, *supra* note 197, at 749–50 ("Judges cannot give meaningful instructions when the substantive law concedes that 'there is no legal measure of damages for these wrongs. The amount which the injured party ought to recover is referred to the sound discretion of the jury.' As a result, the process of fixing an amount of presumed damages is inherently irrational."); *see also* Post, *supra* note 138, at 706 (suggesting that "the common law presumption of damages, which in a market society is simply an undeserved windfall to the plaintiff, can be conceived as empowering juries to pursue the 'noncompensatory' end of vindicating the plaintiff's honor in the community").

[202] W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON, & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 845 (W. Page Keeton ed., 5th ed. 1984) (noting that a substantial punitive award need not be supported by any damage to the plaintiff's reputation).

damages rules for defamation claims were considerably more pro-plaintiff than those provided by tort law generally.[203]

The *New York Times* line of cases saw the Court significantly limit the remedies available to defamation plaintiffs who prove liability. In *New York Times* itself, the Court recognized that the combination of strict liability and the generous common law damages rules constituted "a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law."[204] A decade later, the Court focused on the question of remedies, concerned that the risk of large damages awards without any proof of injury created an unacceptable risk of stealth attacks on unpopular defendants.[205] In *Gertz v. Robert Welch, Inc*., the Court held that if "private figure" plaintiffs could prove only fault (as opposed to "actual malice"), they could no longer recover presumed damages; going forward, such a plaintiff's compensatory award had to be supported by proof of "actual harm."[206] However, if the plaintiff could prove "actual malice," plaintiffs could take advantage of the common law rule of presumed damages.[207] The Court also cast a skeptical eye on punitive damages, recognizing that "jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship."[208] As a result, the First Amendment now requires that an award of presumed or punitive damages be supported by proof of "actual malice," regardless of whether the plaintiff is a private or public plaintiff.[209]

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[203] *See* Post, *supra* note 138, at 706; *see also* Anderson, *Libel Law*, *supra* note 152, at 513 (distinguishing libel claims from most civil actions, where "the facts of the case impose some finite ceiling on potential damages").

[204] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 278 (1964) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 59 (1963)).

[205] Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) ("[T]he doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact."); *see also* Anderson, *Reputation*, *supra* note 197, at 750 (suggesting that "presumed damages may be more pernicious than punitive damages" because "punishment in the guise of presumed compensatory damages is entirely subterranean and, therefore, difficult to identify and control").

[206] *Gertz*, 418 U.S. at 350. This was an argument raised by Wechsler in his *New York Times* brief but not picked up on by the Court at the time. *See supra* note 79 and accompanying text. The *Gertz* Court declined to define the new damages rule but did say: "Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Gertz*, 418 U.S. at 350; *see also* SACK, *supra* note 33, § 10.3.4.

[207] A private plaintiff may be able to recover presumed damages, even without proof of "actual malice," if the claim is against a non-media defendant (for example, a credit report company) and involved a misstatement about a matter not of "public concern" (such as the financial affairs of a privately held company). Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985).

[208] *Gertz*, 418 U.S. at 350.

[209] Because public plaintiffs already had to prove "actual malice," *Gertz* only changed the damages rules for private figure plaintiffs. SACK, *supra* note 33, at 10-6.

Limiting punitive damages in claims brought by private plaintiffs was not the only option available to the Court, especially given the chill created by the possibility of a significant award of punitive damages in any defamation action.[210] The Court could have gone further and totally banned punitive damage awards in defamation actions, a position advocated by Justice Marshall.[211] This would have allowed plaintiffs to recover damages for actual harm to reputation but minimized the chilling effect on reporting on public affairs caused by the threat of large and essentially unconstrained punitive damage awards.[212]

C. *Changes to Procedural Defamation Law*

Finally, in its sweeping uprooting of the common law, the *New York Times* Court adopted two "sensitive tools" that fundamentally altered the procedural rules for defamation litigation.[213] In the typical civil action, the plaintiff must prove factual assertions by a preponderance of the evidence, and once the fact finder (typically a jury) decides that the scales tip that way, the evidence is sufficient to support liability.[214] Not so in defamation cases post-*New York Times*: a defamation plaintiff now must convince the fact finder by a new standard of proof, "clear and convincing evidence,"[215] which is more demanding than the preponderance-of-the-evidence standard usually applied in

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[210] *See* Jerome A. Barron, *Punitive Damages in Libel Cases—First Amendment Equalizer?*, 47 WASH. & LEE L. REV. 105, 107 (1990) (discussing the how punitive damages in defamation actions can chill free speech and how the Supreme Court has failed to adjust constitutional doctrine to reflect this danger).

[211] Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 84 (1971) (Marshall, J., dissenting). Restricting the availability of punitive damages was also addressed by scholars. Barron, *supra* note 142, at 105. *See generally* Michael Coenen, *Of Speech and Sanctions: Toward a Penalty-Sensitive Approach to the First Amendment*, 112 COLUM. L. REV. 991 (2012) (arguing that courts should focus on the available remedies in assessing First Amendment violations).

[212] The Court did come to recognize both substantive and procedural due process limits on punitive damage awards in all civil actions. *See* Jim Gash, *The End of an Era: The Supreme Court (Finally) Butts Out of Punitive Damages for Good*, 63 FLA. L. REV. 525, 530 (2011).

[213] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964) (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).

[214] Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437, 443–44 (2004).

[215] *Compare New York Times*, 376 U.S. at 285–86, *with* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 490 (1984) (holding that the clear and convincing standard was a necessary adjunct to the substantive doctrine of requiring "actual malice"), *and* Dienes & Levine, *supra* note 95, at 260 ("The Court has fashioned a set of ancillary doctrines governing pretrial motions and appellate review that protect against unjustified liability and the threat of costly libel litigation. *New York Times*, for example, requires that actual malice be established with 'convincing clarity,' rather than the preponderance of the evidence standard typically invoked in tort cases.").

civil actions (but not as demanding as the beyond-a-reasonable-doubt standard used in criminal prosecutions).[216] The Court extended the reach of this elevated standard to dispositive pretrial motions, like summary judgment and directed verdict.[217]

The second procedural change involves judicial review of jury fact-finding, which in the typical civil action is subject to a "clearly erroneous" standard.[218] Judicial deference to lower court findings of fact is buttressed by the Reexamination Clause of the Seventh Amendment, which limits federal appellate court reversal of jury findings.[219] Under this system, judges generally must defer to jury fact-finding, on the view that laypeople are better suited than judges to evaluate evidence, especially the credibility of witnesses and the state of mind of the defendant (issues central to tort law in general).[220]

The Court dramatically broke with this precedent in *New York Times*. After reversing the decision of the lower court and announcing the new "actual malice" requirement, the typical next step would have been to remand for a new trial, the result of which could be appealed.[221] However, the Court was concerned that if the case was remanded, the racial animus infecting the Alabama judicial system would result in the same outcome—a huge jury award

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[216] Bose Corp. v. Consumers Union of the U.S., Inc., 692 F.2d 189, 195 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984); *see also* Anderson, *Origins*, *supra* note 63, at 494–99 (discussing how procedural changes to the standard of proof and "independent appellate review" came to be recognized as distinct constitutional doctrines).

[217] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986) (holding that a plaintiff must prove "actual malice" by "clear and convincing" evidence, regardless of whether the judge is considering motions pretrial or post-trial).

[218] Federal Rule of Civil Procedure Rule 52(a)(6) provides that "[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed. R. Civ. P. 52(a)(6). This means that an appellate court will "hesitate less to reverse the finding of a judge than that of an administrative tribunal or of a jury, [and] will nevertheless reverse it most reluctantly and only when well persuaded." United States v. Aluminum Co. of Am., 148 F.2d 416, 433 (2d Cir. 1945) (L. Hand, J.); *see also* Anderson v. City of Bessemer, 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

[219] U.S. CONST. amend. VII ("[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."); *see* Debra Lyn Basset, *"I Lost at Trial—In the Court of Appeals!": The Expanding Power of Federal Appellate Courts to Reexamine Facts*, 38 HOUS. L. REV. 1129, 1136–40 (2001) (discussing the history of the "reexamination clause").

[220] Henry P. Monaghan argued that "law is for the judge/facts are for the jury" is a false dichotomy. Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 229 n.8, 233 (1985) ("[A]ny distinction posited between "law" and "fact" does not imply the existence of static, polar opposites. Rather, law and fact have a nodal quality; they are points of rest and relative stability on a continuum of experience."). As an example, he cites the determination of whether an actor was guilty of negligence as an example of a third category, that of "law application." *Id.* at 236.

[221] 5 C.J.S. *Appeal & Error* § 1121 (2020).

that would be affirmed by hostile state courts—chilling reporting on the Civil Rights Movement for at least the duration of another round of appeals.[222] Citing the need for "effective judicial administration,"[223] the Court broke with precedent and undertook a painstaking review of the record, which resulted in the conclusion that "the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands."[224] The Court entered judgment as a matter of law for the defendants.

This significant procedural deviation has become known as the "independent appellate review" doctrine, and later cases have made clear that the final determination of "actual malice" is an issue of law for judges to decide.[225] This exacting standard of review—essentially de novo evaluation of facts—has become bedrock constitutional doctrine in the context of cases that implicate First Amendment concerns.[226]

The final procedural uprooting of the common law involved the burden of proof. Before *New York Times*, a defamatory statement was presumed to be false, which meant that the defendant had to prove its truth.[227] The Court flipped this; now a plaintiff must prove that the offending statement was false.[228]

Critics have raised various concerns about the changes to the procedures for litigating defamation actions.

First there is uncertainty about whether the "clear and convincing" standard of proof is comprehensible to lay jurors, who may struggle to appreciate the difference between a "preponderance of the evidence" and "clear and convincing evidence." This distinction may be relatively easy for lawyers and judges to comprehend, but it is likely not so for laypeople.[229] And uncertainty

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[222] This concern was justified given the racially charged atmosphere in which Sullivan's claim was tried and the risk that Alabama judges would have resisted federalizing its common law even if directed to do so by the Supreme Court of the United States. LEWIS, MAKE NO LAW, *supra* note 30, at 23–36. Justice Black's concurrence in *New York Times* emphasized this risk, along with that presented by the copycat cases that would follow, magnifying the threat to free speech. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 294–95 (1964) (Black, J., concurring).

[223] *N.Y. Times*, 376 U.S. at 284–85.

[224] *Id.* at 285–86. The Court engaged in a similar searching review of the record and found no evidentiary support for a finding that the offending publication was "of and concerning" the plaintiff, who had not been named in the advertisement. *Id.* at 288.

[225] SMOLLA, *supra* note 37, § 12:86.

[226] Ann Zobrosky, Note, *Constitutional Fact Review: An Essential Exception to* Anderson v. Bessemer, 62 IND. L.J. 1209, 1243 (1987) (discussing whether independent appellate review is limited to First Amendment cases). Whether independent appellate review is the same as de novo review is unclear. Susan M. Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation*, 58 OHIO ST. L.J. 1753, 1771–74 (1998) [hereinafter Gilles, *First Amendment*].

[227] SACK, *supra* note 33, at 3-2.

[228] Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 769 (1986); *see also* SACK, *supra* note 33, at 1-38-39.

[229] SACK, *supra* note 33, § 5-142, 5-143.

exists even about whether trial judges will decide dispositive motions under a "clear and convincing" standard in a consistent manner.[230]

Critics have assailed the "independent review" doctrine as a "radical departure"[231] because it did violence to the traditional duty of juries to evaluate witness credibility, draw inferences from the evidence, and resolve conflicting evidence.[232] The Court brushed aside this concern, even while admitting that "actual malice"—that is, actual knowledge of falsity or subjective reckless disregard for falsity—is a close analog to mens rea, which juries typically decide.[233] This new doctrine is also inconsistent with the protection of jury fact-finding enshrined in the Seventh Amendment,[234] a concern that the Court glossed over in a footnote.[235]

Another dramatic procedural reform was rejecting the centuries-old rule that truth is an affirmative defense to a defamation action.[236] This break with the common law was a surprise to some observers on the view that allegations of defamation are analogous to criminal charges brought by the state and therefore should proceed on the assumption that the person about whom the offending

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[230] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986) (citing United States v. Taylor, 464 F.2d 240 (2d Cir. 1972) (a criminal case)).

[231] Marc E. Sorini, *Factual Malice: Rediscovering the Seventh Amendment in Public Person Libel Cases*, 82 GEO. L.J. 563, 590–91 (1993).

[232] Eric Schnapper, *Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts*, 1989 WIS. L. REV. 237, 265–98 (1989); *see also* Nathan S. Chapman, *The Jury's Constitutional Judgment*, 67 ALA. L. REV. 189, 237 (2015) ("The jury has a unique capacity as a popular and legal institution to increase constitutional law's democratic legitimacy; to incorporate the political morality of a wide variety of Americans, not just a professional class, into constitutional law; and to provide a unique opportunity for laypeople to learn about and participate in American constitutionalism. Additionally, trusting the jury to apply constitutional law is consistent with the jury's enduring role in the American legal system as a source of normative content in ordinary negligence cases.").

[233] Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 498 (1984) ("It surely does not stretch the language of the Rule to characterize an inquiry into what a person knew at a given point in time as a question of 'fact.'"); *see also* Martin H. Redish & William D. Gohl, *The Wandering Doctrine of Constitutional Fact*, 59 ARIZ. L. REV. 289, 290 (2017) (stating that "the constitutional fact doctrine has since wandered, often inexplicably, into areas in which, given its core rationale, it has no business going").

[234] *See* U.S. CONST. amend. VII ("[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

[235] *Bose*, 466 U.S. at 508 n.27. Ignoring traditional scope-of-review doctrines made even less sense for the cornerstone of the Court's opinion—the imposition of an "actual malice" requirement—than for the "of and concerning" issue, because the new scienter requirement had not been on the parties' radar in the lower courts, so there had been no opportunity to present evidence and create a record on that issue. Scott M. Matheson, Jr., *Procedure in Public Person Defamation Cases: The Impact of the First Amendment*, 66 TEX. L. REV. 215, 270–73 (1987).

[236] Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986). The Court declined to answer whether this change was applicable to all defamation cases or only those against a media defendant that involve a topic that does not involve public concern. SACK, *supra* note 33, at 3-12-3-16.

statement was made should be deemed "innocent until proven guilty," so to speak.[237] Shifting the burden of proof on this issue matters greatly in cases in which the plaintiff has proven that the defendant is highly culpable, and it creates perverse incentives. As Dean Smolla has observed,

> In theory, [the Court] invites the unscrupulous publisher who does not believe in the truth of the story but is confident that at any trial the truth would ultimately prove to be unknowable to go ahead and publish. . . . Realistically, . . . [the Court] does surely provide safe harbor for at least some sloppy, unprofessional journalism.[238]

In sum, the Court made significant procedural changes but failed to provide sufficient guidance as to "when and how courts should further substantive values by deviating from procedures commonly applied to all types of cases."[239]

Finally, it is useful to consider the entire package of procedural innovations adopted by the Court in light of the statistics, which reveal a very high rate of reversal by appellate courts.[240] This data shows that even though the new procedural regime has been in place for decades, lower courts are not yielding decisions that are accurate (that is, in which the established facts satisfy constitutional requirements for the verdict reached), a problem exacerbated by the fact that a litigation process that necessitates appellate review is "costly and slow."[241]

IV. THE CHANGED PUBLIC SQUARE

When *New York Times* was decided in 1964, the organized (or "mass") media was the public's primary source of information about public affairs. Almost every city had at least one daily newspaper, with robust circulation and income streams (primarily from advertising) sufficient for national outlets to have reporters on the ground beyond their immediate metro area and, in some cases, around the globe.[242] Weekly magazines had strong circulations;

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[237] SMOLLA, *supra* note 37, § 5:13. Stated differently, the accuser should "put up or shut up." *Id.*

[238] *Id.* at 5-18, 19.

[239] Matheson, *supra* note 235, at 235; *see also* Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381, 2421 (1999) (the jury serves as the "conscience of the community" when it decides fact issues (including what is reasonable care in the circumstances) and determines witness credibility in tort cases).

[240] *See infra* Part V and accompanying text.

[241] Gilles, *First Amendment*, *supra* note 226, at 1794 (opining that the Court's package of procedural reforms have "severely failed"); *see also* Cass, *Principle and Interest*, *supra* note 154, at 103 (arguing that these litigation costs "consume a large portion of the savings conferred by the more press-protective rule"); Epstein, *supra* note 131, at 808–10 (arguing that the costs of litigation makes newspapers more risk averse in reporting).

[242] C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097, 2104 (1992) (explaining that advertising often provided three-fourths of a newspaper's revenue).

"weeklies" like *Time*, *Newsweek*, and *U.S. News & World Report*, took "a universal approach to the news, covering hard news items plus lifestyle, sport, arts, culture, and entertainment topics as well."[243]

By 1964, the three broadcast networks had built public affairs programming around their dinnertime news programs, which became "must-watch TV" for many Americans; news "anchors" became not just household names but also trustworthy presences invited into American living rooms.[244] These networks and a handful of conglomerates of radio stations provided important news coverage.[245]

This model had a number of important characteristics. First, while citizens could always attend public meetings and discuss the affairs of the day with friends and family, the mass media exercised an outsized influence on what information American citizens got about public affairs and thus could facilitate an informed electorate—a core function of the robust press recognized by *New York Times* as essential to an effective democracy. The practical impediment of high entry barriers to becoming a media outlet—as journalist A.J. Liebling once quipped, "freedom of the press is guaranteed only to those who own one"[246]—meant that the mass media of the era could broadly disseminate information far better than denizens of the local coffee shop or even the "lonely pamphleteer" and thus broadly and deeply influence public affairs.[247]

Second, newspapers and magazines had relatively predictable deadlines for finalizing a story. Magazines had almost a week, and in some cases almost a month, for reporters to dig for facts and for editors to review stories for accuracy.[248] Broadcast media (especially television) and daily newspapers also had a fixed production schedule; although they had a shorter time frame in

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[243] ALISON DAGNES, POLITICS ON DEMAND: THE EFFECTS OF 24-HOUR NEWS ON AMERICAN POLITICS 31 (2010).

[244] RonNell Andersen Jones & Sonja R. West, *The Fragility of the Free American Press*, 112 NW. UNIV. L. REV. 567, 580–81 (2017); *see also* STEVE M. BARKIN, AMERICAN TELEVISION NEWS: THE MEDIA MARKETPLACE AND THE PUBLIC INTEREST 35–45 (2003) (describing an "era of network dominance" from 1963 to the 1980s).

[245] DAGNES, *supra* note 243, at 45 (stating that most Americans got at least some of their information about public affairs from radio).

[246] A.J. Liebling, *The Wayward Press: Do You Belong in the New Journalism?*, NEW YORKER, May 14, 1960, at 105.

[247] *See* Branzberg v. Hayes, 408 U.S. 655, 704 (1972) (stating that "the liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher").

[248] Logan, *All Monica*, *supra* note 149, at 201–02; *see also* Susan Curie Sivek & Sharon Bloyd-Peshkin, *Where Do Facts Matter? The Digital Paradox in Magazines' Fact-Checking Practices*, 12 JOURNALISM PRAC. 400, 404 (2018) ("The practice of meticulous fact-checking spread to other American magazines—some because they were owned by the same parent company as one of these fact-checking progenitors, others because these highly regarded magazines set the expectation that fact-checking should be part of the editorial process at reputable magazines."). *The New Yorker* magazine in particular had a "sterling reputation for accuracy and . . . [a] fabled fact-checking department . . . ." Masson v. New Yorker Magazine, Inc., 960 F.2d 896, 902–03 (9th Cir. 1992).

which to work, they nevertheless typically had a meaningful opportunity to exercise care in reporting.[249] The existence of a block of time before publication also allowed for the exercise of judgment by editors,[250] seasoned journalists who curated and checked stories, trained reporters, organized complex investigations, and inculcated the institution's ethics in subordinates.[251]

Third, there was relative economic stability in the media marketplace. Newspapers were often owned by wealthy families with deep ties to their home communities, so they could be relatively impervious to pressures to return a robust profit for shareholders.[252] As a result, print media's "legacy outlets" were able to survive and thrive despite the rise of broadcast news stations, which competed for customers with the advantage of the immediacy and immersion provided by sound and video.[253] Broadcast outlets could operate without a relentless focus on the bottom line; they treated their news divisions as "loss leaders," which promoted quality programming.[254] These outlets could also afford to provide on-the-job training (later replaced by college degrees in journalism) that created reporters with expertise on the topics and people they covered on their "beats."[255]

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[249] *See* Logan, *All Monica*, *supra* note 149, at 202.

[250] "Journalistic mediation," is the work of selecting, combining, translating, and presenting different pieces of information in a news story. Tomasso Venturini, *Confessions of a Fake News Scholar or "on the Study of Subjects"*, TOMASSOVENTURINI.IT (May 28, 2018), http://www.tommasoventurini.it/wp/wp-content/uploads/2018/05/Venturini_Fake News_PaperICA.pdf [https://perma.cc/D34Q-6BQK]; *see also* DAGNES, *supra* note 243, at 10 (describing "gatekeeping" and "framing" as essential characteristics of traditional journalism); Jonathan Rauch, *The Constitution of Knowledge*, NAT'L. AFF. (Fall 2018), https://nationalaffairs.com/publications/detail/the-constitution-of-knowledge [https://perma.cc/VZ5X-CR4N] ("The distinguishing characteristic of journalism is professional editing, and its institutional home is the newsroom, which curates and checks stories, trains reporters, organizes complex investigations, inculcates professional ethics, and more.").

[251] Rauch, *supra* note 250, at 134; *see also* Raymond J. Pingree et al., *Checking Facts and Fighting Back: Why Journalists Should Defend Their Profession*, 13 PLOS ONE e0208600 (2018) ("Fact checking is a crucial function of journalism in a healthy democracy because of its theoretical potential to hold elites accountable and keep the national debate grounded in shared facts.").

[252] *See* Cristina Carmody Tilley, *Tort, Speech, and the Dubious Alchemy of State Action*, 17 U. PA. J. CONST. L. 1117, 1171 (2015) (citations omitted) ("Historically, newspapers and local television and radio stations were organized as closely held corporations, often owned by local families for many generations. These news institutions were as concerned with civic welfare as they were with news coverage.").

[253] DAVID HALBERSTAM, THE POWERS THAT BE 407–15 (1979) (stating that radio and television broadcasting brought a new immediacy to reporting, with substantial corporate resources devoted to harder-hitting, adversarial reporting).

[254] James Fallows, *Rush from Judgment*, AM. PROSPECT (Nov. 16, 2001), https://prospect.org/article/rush-judgment-0 [https://perma.cc/55FD-BXCY].

[255] Gene Policinski, *Setting the Docket: News Media Coverage of Our Courts — Past, Present and an Uncertain Future*, 79 MO. L. REV. 1007, 1008 (2014) ("Where once 'beat' reporters developed over time the knowledge, sources, and trusted contacts in courthouses to improve their reports, reporters now 'parachute' into courthouses with little preparation

Fourth, polls reflected significant public confidence in the trustworthiness of the press,[256] certainly when compared to the perception of the largely partisan press in earlier eras.[257] This coincided with popular books and movies lionizing the work of intrepid journalists who helped democracy by uncovering evidence of public misconduct.[258]

For a number of reasons, these verities began to change in the late 1960s. First, Americans began to lose confidence in all institutions, including the media.[259] Distrust of government skyrocketed with an increasingly unpopular war in Vietnam and revelations of widespread misconduct by President Richard Nixon and high-ranking members of his administration.[260] The decline in public confidence in a broad range of institutions has accelerated in recent years[261] and

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and no opportunity to cultivate relationships and perspective."); Kenneth L. Woodward, *Neither 'Objective' nor 'Post-Modern'*, 19 NOTRE DAME J.L., ETHICS & PUB. POL'Y 719, 724 (2005) ("That is why reporters are not skipped from one beat to another day after day, but are actually, after a basic apprenticeship, given beats so they become experts in particular fields.").

[256] *See* Jones & West, *supra* note 244, at 580 (stating that more than two-thirds of Americans reported that they had trust and confidence in the mass media in the 1970s).

[257] Baker, *supra* note 242, at 2129–31 (stating that census data from 1850 found that 95% of U.S. newspapers were politically affiliated, and it took the growth of revenue from commercial advertising to prompt a move toward objective journalism). *See generally* JIM A. KUYPERS, PARTISAN JOURNALISM: A HISTORY OF MEDIA BIAS IN THE UNITED STATES (2013).

[258] Carl Bernstein & Bob Woodward's *All the President's Men* (1974), a best-selling book followed by an award-winning movie of the same name (Warner Bros. 1976), detailed the dogged journalism that helped expose the Watergate scandal, which led to the only resignation of a U.S. president. *The Post*, released by 20th Century Fox in 2017, received nineteen major nominations, including Best Picture. *The Post: Awards*, IMDB, https://www.imdb.com/title/tt6294822/awards [https://perma.cc/798W-VM2H]. It dramatized the difficult decision of the *Washington Post* to publish the Pentagon Papers in the face of threats from the highest levels of government; it is instructive that this 2017 movie was set in 1971. Mahita Gajanan, *The True Story Behind* The Post, TIME (Dec. 26, 2017) https://time.com/5079506/the-post-true-story/ [https://perma.cc/8NHM-LC3Y].

[259] Michael Schudson, *The Fall, Rise, and Fall of Media Trust*, COLUM. JOURNALISM REV. (2019), https://www.cjr.org/special_report/the-fall-rise-and-fall-of-media-trust.php [https://perma.cc/5ZZS-MM3W]. President Nixon's vice president, Spiro Agnew, relentlessly attacked reporters as, among other things, "nattering nabobs of negativism." Lili Levi, *Real "Fake News" and Fake "Fake News"*, 16 FIRST AMEND. L. REV. 232, 235 n.13 (2018) [hereinafter Levi, *Real "Fake News"*].

[260] For his part, President Nixon deeply distrusted journalists and insisted on using the term "the media" (rather than "the press") because it had a "manipulative, Madison Avenue, all-encompassing connotation," and because he thought that "the press hated it." WILLIAM SAFIRE, BEFORE THE FALL: AN INSIDE VIEW OF THE PRE-WATERGATE WHITE HOUSE 351 (1975). Also contributing to declining trust in government was the rise of conservative talk radio in the 1990s, and more recently, partisan cable news and online partisan opinion sites. *See* Pingree et al., *supra* note 251.

[261] Michael Dimock, *An Update on Our Research into Trust, Facts and Democracy*, PEW. RES. CTR. (June 5, 2019), https://www.pewresearch.org/2019/06/05/an-update-on-our-research-into-trust-facts-and-democracy/ [https://perma.cc/G83G-DY9C] ("Faith in

confidence in the press is at its lowest ebb in the history of the Gallup Poll.[262] Even more troubling is evidence that Americans are split when asked if the media is actually an enemy of democracy.[263]

The economic model available to the media through the 1980s featured a steady stream of revenue from advertising, which in turn supported the labor-intensive work of reporting, fact-checking, and editing.[264] Now, the lion's share of advertising has migrated to the internet.[265] There are regular reports of

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expertise and institutions has declined, cynicism has risen, and citizens are becoming their own information curators."); *see Public Trust in Government: 1958-2019*, PEW RES. CTR. (Apr. 11, 2019), https://www.pewresearch.org/politics/2019/04/11/public-trust-in-government-1958-2019/ [https://perma.cc/977C-7XDT] ("Public trust in the government remains near historic lows. Only 17% of Americans today say they can trust the government in Washington to do what is right 'just about always' (3%) or 'most of the time' (14%).").

[262] Megan Brenan, *Americans' Trust in Mass Media Edges Down to 41%*, GALLUP (Sept. 26, 2019), https://news.gallup.com/poll/267047/americans-trust-mass-media-edges-down.aspx [https://perma.cc/S9M6-MWQF]. Republicans are far more likely to distrust the media than Democrats. *Id.*; *see* Jeffrey Gottfried, Mason Walker, & Amy Mitchell, *Americans' Views of the News Media During the COVID-19 Outbreak*, PEW RES. CTR. (May 8, 2020), https://www.journalism.org/2020/05/08/americans-views-of-the-news-media-during-the-covid-19-outbreak/ [https://perma.cc/NNV9-T3EZ].

[263] *See* Jones & West, *supra* note 244, at 581. This change in public trust in the media is unsurprising, given President Trump's "nonstop attacks on the media" as "enemies of the people." *See* Erik Wemple, *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/G9P8-2AKN]. The President has referred to reporters as "scum,' 'slime, sick', and 'lying, disgusting people,' and often accused them of 'treason.'" ERIC ALTERMAN, LYING IN STATE: WHY PRESIDENTS LIE—AND WHY TRUMP IS WORSE 312 (2020). The Committee to Protect Journalists has identified a number of anti-press strategies employed by President Trump, including characterizing credible reporting as "fake news," and concluded that the result is harm to democracy in the United States and abroad. Paul Farhi, *New Study Says Trump Has 'Dangerously Undermined Truth' with Attacks on News Media*, WASH. POST (Apr. 16, 2020), https://www.washington post.com/lifestyle/media/new-study-says-trump-has-dangerously-undermined-truth-with-attacks-on-news-media/2020/04/15/4152f81c-7f2d-11ea-9040-68981f488eed_story.html [https://perma.cc/YPL7-4WCF].

[264] *See* Baker, *supra* note 242, at 2104; *see also* Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMEND. L. REV. 200, 202–03 (2018) (lamenting "the demise of the economic model that supported newspapers and news reporting. The economic collapse of the (especially local) newspaper industry thanks to the rise of cheap speech is already having negative consequences for American democracy, with the worst likely yet to come").

[265] *See* Fernando Polo, *The Painful Decline of the Advertising Industry (and What Marketers Should Do About It)*, GOOD REBELS (Sept. 8, 2017), https://medium.com/@goodrebels/the-painful-decline-of-the-advertising-industry-and-what-marketers-should-do-about-it-be826e319569 [https://perma.cc/24CV-9LYC]; Derek Thompson, *The Print Apocalypse and How to Survive It*, ATLANTIC (Nov. 3, 2016), https://www.theatlantic.com/business/archive/2016/11/the-print-apocalypse-and-how-to-survive-it/506429/ [https://perma.cc/6WFL-BSFK]; *see also* MARGARET SULLIVAN, GHOSTING THE NEWS: LOCAL JOURNALISM AND THE CRISIS OF AMERICAN DEMOCRACY 40 (2020) (most digital advertising has flowed to Google and Facebook and not newspapers and broadcast outlets).

venerable newspaper closing shop,[266] and many smaller cities and towns are unable to support even a weekly news presence covering local government.[267] The number of one-paper communities has escalated[268] and there has been a significant decrease in the number of working journalists,[269] accelerated by media conglomerates scooping up struggling outlets at bargain prices.[270] This has especially harmed coverage of local news, which has decreased dramatically in recent years,[271] a crisis recently accelerated by the collapse of advertising

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[266] *See* Jill Lepore, *Does Journalism Have a Future?*, NEW YORKER (Jan. 21, 2019), https://www.newyorker.com/magazine/2019/01/28/does-journalism-have-a-future [https://perma.cc/BL7M-RPXX] (noting that between 1970 and 2016 "five hundred or so dailies went out of business; the rest cut news coverage, or shrank the paper's size, or stopped producing a print edition, or did all of that, and it still wasn't enough" to stop the hemorrhaging); *see also* Michael Barthel, *Despite Subscription Surges for Largest U.S. Newspapers, Circulation and Revenue Fall for Industry Overall*, PEW RES. CTR. (June 1, 2017), https://www.pewresearch.org/fact-tank/2017/06/01/circulation-and-revenue-fall-for-newspaper-industry/ [https://perma.cc/8PAP-U9GJ] (noting that total newspaper circulation declined twenty eight years in a row).

[267] Erin Keane, *The U.S. Newspaper Crisis is Growing: More Than 1 in 5 Local Papers Have Closed Since 2004*, SALON (Oct. 16, 2018), https://www.salon.com/2018/10/16/the-u-s-newspaper-crisis-is-growing-more-than-1-in-5-local-papers-have-closed-since-2004/ [https://perma.cc/P5D6-DUKV] (a report from the University of North Carolina shows that there are an increasing number of "news deserts"—communities that lack a local newspaper—and that many of the newspapers that remain lack the resources to effectively cover their communities).

[268] From 2004 to 2015 the U.S. newspaper industry has lost over 1,800 print outlets. SULLIVAN, *supra* note 265, at 17.

[269] Robert W. McChesney, *Journalism Is Dead! Long Live Journalism?: Why Democratic Societies Will Need to Subsidise Future News Production*, 13 J. MEDIA BUS. STUD. 128, 129–30 (2016) ("We are witnessing the collapse of journalism before our eyes at breathtaking speed," with "one-third to 40% as many working reporters as there were 25 years ago"); *see also* BARKIN, *supra* note 244, at 5 (noting the "painful process of job eliminations, the closing of foreign bureaus, and a new, stricter financial accountability for reporters, editors, and producers").

[270] For example, the corporate owner of USA Today, Gannett, now owns more than 260 daily newspapers across the country. Marc Tracy, *Gannett, Now Largest U.S. Newspaper Chain, Targets 'Inefficiencies*', N.Y. TIMES (Nov. 19, 2019), https://www.nytimes.com/2019/11/19/business/media/gannett-gatehouse-merger.html [https://perma.cc/F4XW-8L4H]. Corporate ownership doesn't just lead to job losses and cost-cutting: it may mean less local news and a more conservative slant of the news that is covered. The outlets that have managed to survive "are mere shadows of their former selves." Edmund L. Andrews, *Media Consolidation Means Less Local News, More Right Wing Slant*, STAN. GRADUATE SCH. BUSINESS (July 30, 2019), https://www.gsb.stanford.edu/insights/media-consolidation-means-less-local-news-more-right-wing-slant [https://perma.cc/6XMC-86D5].

[271] *See* Jonathan O'Connell, *Ghost Papers and News Deserts: Will America Ever Get its Local News Back?*, WASH. POST (Dec. 26, 2019), https://www.washingtonpost.com/business/economy/ghost-papers-and-news-deserts-will-america-ever-get-its-local-news-back/2019/12/25/2f57c7d4-1ddd-11ea-9ddd-3e0321c180e7_story.html [https://perma.cc/8STB-5PXV] (reporting that from 2008–2018 America lost a quarter of its journalists, the vast majority of them covering local news and that more than 2,100 newspapers closed in that time, seventy of them dailies). Those papers that do survive are greatly diminished, or

revenues due to the COVID-19 pandemic.[272] This is not just a problem for a sector of the economy: when local news outlets shrink or disappear, the result is a range of harms to public life, including evidence that people are less willing to actively participate in democracy by running for office.[273] It also becomes harder for the press to serve its important "checking function,"[274] making it less likely that governments will be held accountable for police brutality and other official misconduct.[275]

Most fundamentally, there has been what Jonathan Rauch has termed a "systematic attack, emanating from the very highest reaches of power, on our collective ability to distinguish truth from falsehood."[276] A functioning democracy must have a basic consensus on what is real and what is fake and the way to reach such determinations.[277] This is something that was recognized by

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"ghost papers." Lara Takenaga, *More Than 1 in 5 U.S. Papers Has Closed: This Is the Result.*, N.Y. TIMES (Dec. 21, 2019), https://www.nytimes.com/2019/12/21/reader-center/local-news-deserts.html [https://perma.cc/SH4T-FMM6].

[272] Marc Tracy, *News Media Outlets Have Been Ravaged by the Pandemic*, N.Y. TIMES (Apr. 10, 2020), https://www.nytimes.com/2020/04/10/business/media/news-media-coronavirus-jobs.html [https://perma.cc/9N4J-3Q9P] (discussing how the pandemic has triggered an onslaught of pay cuts, layoffs, and shutdowns at many news outlets, as the economy, and thus advertising, cratered due to the pandemic). "USA TODAY owner Gannett reported a net loss of about $437 million in the second quarter [of 2020]" as the "journalism industry is grappling with a sharp reduction in advertising due to COVID-19." Nathan Bomey, *Gannett Posts Decline in Second-Quarter Revenue, Expenses as COVID-19 Takes Toll*, USA TODAY (Aug. 6, 2020), https://www.usatoday.com/story/money/2020/08/06/gannett-second-quarter-earnings-2020/3298459001/ [https://perma.cc/ZU75-E87G].

[273] *See* Joshua Benton, *When Local Newspapers Shrink, Fewer People Bother to Run for Mayor*, NIEMANLAB (Apr. 9, 2019), https://www.niemanlab.org/2019/04/when-local-newspapers-shrink-fewer-people-bother-to-run-for-mayor/ [https://perma.cc/25XD-5JX4] (summarizing research that has shown that local newspapers "increase voter turnout, reduce government corruption, make cities financially healthier, make citizens more knowledgeable about politics and more likely to engage with local government, force local TV to raise its game, encourage split-ticket (and thus less uniformly partisan) voting, [and] make elected officials more responsive and efficient").

[274] *See* Sonja R. West, *"The Press," Then & Now*, 77 OHIO. ST. L.J. 49, 68–69 (2016) (the most important "structural role" of the press is for it to be on the lookout for "government malfeasance").

[275] *See* SULLIVAN, *supra* note 265, at 15 (quoting Tom Rosenstiel, executive director of the American Press Institute: "If we don't monitor power at the local level, there will be massive abuse of power at the local level"); *see, e.g.*, Margaret Renkl, *In Memphis, Journalism Can Still Bring Justice*, N.Y. TIMES (May 25, 2020), https://www.nytimes.com/2020/05/25/opinion/memphis-journalism.html [https://perma.cc/YNN4-NRTY] ("Ethics, fairness, accuracy, social-justice reporting, journalists who hold public officials to account—all of these public goods are harder and harder to come by these days. . . . Such losses are particularly acute in places where no other media outlets are covering news that affects poor residents . . . .").

[276] Rauch, *supra* note 250, at 126.

[277] *Id.* at 127–28; *accord* SULLIVAN, *supra* note 265, at 20 ("When local news fails, the foundations of democracy weaken. The public, which depends on accurate, factual information in order to make good decisions, suffers.").

the Framers of the Constitution and remains true today, but this consensus is fast crumbling.[278]

Our marketplace of ideas is being battered by a perfect storm of technological, economic, and political changes. First, social media platforms distribute disinformation that costs almost nothing to generate and then use sophisticated algorithms and granular data gathering to fine-tune and effectively target specific messages.[279] Platforms like Facebook and Google monetize anything that garners clicks, meaning that the distribution of disinformation is profitable while deeply eroding the economic model that supported reporters, fact-checking, and editorial oversight.[280]

Despite cascades of public criticism, internet platforms have for years refused to serve as "arbiters of truth" by monitoring the tidal wave of calumny that was posted and tweeted on their platforms,[281] although intense economic and political pressure has recently prompted some changes.[282]

Social media facilitate the rapid and inexpensive spread of misinformation, which gives new resonance to the old adage, "The truth never catches up with a

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[278] *See* MICHIKO KAKUTANI, THE DEATH OF TRUTH: NOTES ON FALSEHOOD IN THE AGE OF TRUMP 173 (2018).

[279] Kevin Munger, *The Rise and Fall of the Palo Alto Consensus*, N.Y. TIMES (July 10, 2019), https://www.nytimes.com/2019/07/10/opinion/internet-democracy.html [https://perma.cc/VR7U-CC3P] ("We can now evaluate how this technology affects politics and the public sphere. More information has been flowing, circumventing traditional media, political and cultural establishments. But the result hasn't been more democracy, stronger communities or a world that's closer together.").

[280] Rauch, *supra* note 250, at 133.

[281] *See* Tom McCarthy, *Zuckerberg Says Facebook Won't Be 'Arbiters of Truth' After Trump Threat*, GUARDIAN (May 28, 2020), https://www.theguardian.com/technology/2020/may/28/zuckerberg-facebook-police-online-speech-trump [https://perma.cc/QP39-UYSR].

[282] Twitter and Facebook have recently taken steps to identify postings that are deemed to promote violence, undercut confidence in elections, or promote hate. *See, e.g.*, Jordan Freiman, *Facebook and Twitter Remove Video of Trump Falsely Claiming Children Are "Almost Immune" to the Coronavirus*, CBS NEWS (Aug. 6, 2020), https://www.cbsnews.com/news/facebook-twitter-trump-video-misinformation-removal-children-immune-coronavirus/ [https://perma.cc/EN6W-QP87]. These changes, especially at Facebook, were in response to a boycott by major advertisers, Shannon Bond, *In Reversal, Facebook to Label Politicians' Harmful Posts as Ad Boycott Grows*, NPR (June 26, 2020), https://www.npr.org/2020/06/26/883941796/unilever-maker-of-dove-soap-is-latest-brand-to-boycott-facebook [https://perma.cc/G6W3-AJVF], which in a single day cost the company $56 billion, and CEO Mark Zuckerberg to lose $7 billion. Audrey Conklin, *Mark Zuckerberg Loses $7 Billion as Companies Drop Ads*, FOX BUS. (June 27, 2020), https://www.foxbusiness.com/money/mark-zuckerberg-loses-7-billion-as-advertisers-drop [https://perma.cc/LQH3-M34W]. However, it appears that the boycott ultimately had little impact on Facebook's revenue. Tiffany Hsu & Eleanor Lutz, *More Than 1,000 Companies Boycotted Facebook. Did It Work?*, N.Y. TIMES (Aug. 1, 2020), https://www.nytimes.com/2020/08/01/business/media/facebook-boycott.html [https://perma.cc/9N8K-VL7L] (noting the boycott may have caused more damage to the company's reputation than to its bottom line).

lie."[283] This danger is exacerbated by the enormous pressure that digital delivery puts on all outlets to publish first and verify later.[284] Falsehoods circulating on social media don't just harm our politics: they have caused what the World Health Organization has characterized as an "infodemic" of falsehoods about coronavirus that is "just as dangerous as the disease itself."[285]

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[283] My use of the term "fake news" refers to the deliberate spread of misinformation. The phrase has another meaning in the current political context: "fake news" is any report that is inconsistent with the speaker's world view. *See* Greg Weiner, *The Towering Lies of President Trump*, N.Y. TIMES (Sept. 11, 2020), https://www.nytimes.com/2020/09/11/opinion/sunday/trump-woodward-coronavirus-vaccine.html [https://perma.cc/792T-4RWV] ("Everything that benefits Mr. Trump is true and everything that inconveniences is false."). Cries of "fake news" is neither a new, nor a uniquely American, phenomenon. Timothy Snyder, *How Hitler Pioneered 'Fake News'*, N.Y. TIMES (Oct. 16, 2019), https://www.nytimes.com/2019/10/16/opinion/hitler-speech-1919.html [https://perma.cc/9RYT-B3GK] (describing how Nazis made their fellow citizens reject "a rational, factual world," and reserved "particular fury for newspapers, demanding that they be replaced by propaganda organs that spoke to German emotions . . . Hitler and the Nazis found the simple slogan they repeated again and again to discredit reporters: 'Lügenpresse' . . . fake news").There is also the sibling "alternative facts," which suggests that there is a different reality than that described by the speaker. *See* Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175, 177–78 (2018) (noting that "fake news" and "alternative facts" actually "point to the same phenomenon: In today's political dialogue, we believe what we want to believe. Objective facts—while perhaps always elusive—are now endangered species").

[284] *See* Mathew Ingram, *Twitter and the Incredible Shrinking News Cycle*, GIGAOM (Feb. 13, 2012), https://gigaom.com/2012/02/13/twitter-and-the-incredible-shrinking-news-cycle/ [https://perma.cc/S6PT-SNRS] (lamenting the loss of time to verify sources and accuracy before reporting); Logan, *All Monica*, *supra* note 149, at 201 (observing the twenty-four-hour news cycle prompts journalists to "get the news first and fast rather than first and right").

[285] For example, in April 2020, the top health misinformation websites received four times the Facebook views than did the websites for the C.D.C., the W.H.O., and other reputable sources. Seema Yasmin & Craig Spencer, *'But I Saw It on Facebook': Hoaxes Are Making Doctors' Jobs Harder*, N.Y. TIMES (Aug. 28, 2020), https://www.nytimes.com/2020/08/28/opinion/sunday/coronavirus-misinformation-faceboook.html [https://perma.cc/Q52V-MQTR]. Studies show that conservative news sources fostered confusion about the seriousness of the virus via a "media ecosystem that amplifies misinformation, entertains conspiracy theories and discourages audiences from taking concrete steps to protect themselves and others." Infection and mortality rates were actually higher in places where Fox News star Sean Hannity, who downplayed the severity of the disease, reaches his largest audiences. Christopher Ingraham, *New Research Explores How Conservative Media Misinformation May Have Intensified the Severity of the Pandemic*, WASH. POST (June 25, 2020), https://www.washingtonpost.com/business/2020/06/25/fox-news-hannity-coronavirus-misinformation/ [https://perma.cc/3GSH-EG79]. Researchers from Cornell University analyzed over 38 million English-language articles and concluded that President Trump "was the single largest driver of misinformation around Covid." Tommy Beer, *Trump Is 'Single Largest Driver' of Covid-19 Misinformation, Cornell Study Finds*, FORBES (Oct. 1, 2020), https://www.forbes.com/sites/tommybeer/2020/10/01/trump-is-single-largest-driver-of-covid-19-misinformation-cornell-study-finds/#7b48370e6d70 [https://perma.cc/5QS6-TZ8Y].

Indeed, technology is advancing so quickly that it is facilitating the creation of "deepfakes," which depict people doing things they have never done and saying things they have never said.[286] There is even more risk of misinformation from "dumbfakes," which, while less convincing than "deepfakes," can be easily created by manipulating video speed or selective editing,[287] and the technology is advancing at a rapid pace.[288] While there are inconsequential uses for such technology,[289] a "deepfake" could compromise national security, when every second counts, or distort outcomes if released on the eve of an election,[290] and we have already seen them used to vilify political opponents.[291]

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[286] Rob Toews, *Deepfakes Are Going to Wreak Havoc on Society. We Are Not Prepared.*, FORBES (May 25, 2020), https://www.forbes.com/sites/robtoews/2020/05/25/deepfakes-are-going-to-wreak-havoc-on-society-we-are-not-prepared/#49c1c1447494 [https://perma.cc/K7RX-BWQU]. The technology to create them is outrunning the technology to detect them, *id.*, and the cost to create them is minimal, Timothy B. Lee, *I Created My Own Deepfake—It Took Two Weeks and Cost $552*, ARS TECHNICA (Dec. 16, 2019), https://arstechnica.com/science/2019/12/how-i-created-a-deepfake-of-mark-zuckerberg-and-star-treks-data/ [https://perma.cc/QJA4-XLTC].

[287] *See* Beatrice Dupuy & Barbara Ortutay, *Deepfake Videos Pose a Threat, but 'Dumbfakes' May Be Worse*, AP (July, 19, 2019), https://apnews.com/e810e38894bf4686ad9d0839b6cef93d [https://perma.cc/W49L-2YGK] (reporting on a "dumbfake" that made House Speaker Nancy Pelosi appear to be drunk).

[288] Cade Metz, *Internet Companies Prepare to Fight the 'Deepfake' Future*, N.Y. TIMES (Nov. 24, 2019), https://www.nytimes.com/2019/11/24/technology/tech-companies-deepfakes.html [https://perma.cc/G56A-9SEQ].

[289] *See, e.g.*, Jessica Schladebeck, *President Trump's Social Media Pages Post Altered Photos that Make Him Look Thinner*, N.Y. DAILY NEWS (Jan. 22, 2019), https://www.nydailynews.com/news/national/ny-news-trump-social-media-edits-images-thinner-20190122-story.html (on file with the *Ohio State Law Journal*) (reporting that President Trump's social media pages contained photos altered to make him look thinner).

[290] Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1776–77, 1783–84 (2019) (identifying risks from "deepfakes," including "distortion of democratic discourse, manipulation of elections, eroding trust in institutions, exacerbating social divisions, and undermining journalism"). This phenomenon is not unique to the United States. Russia is conducting a sophisticated disinformation and propaganda "ecosystem" consisting of "official government communications, state-funded global messaging, cultivation of proxy sources, weaponization of social media and cyber-enabled disinformation." Jennifer Hansler, *US Accuses Russia of Conducting Sophisticated Disinformation and Propaganda Campaign*, CNN (Aug. 5, 2020), https://www.cnn.com/2020/08/05/politics/state-department-russian-disinformation-report/index.html [https://perma.cc/7C7M-WVN4].

[291] *See, e.g.*, Ashley Parker, *Trump and Allies Ratchet Up Disinformation Efforts in Late Stage of Campaign*, WASH. POST (Sept. 6, 2020), https://www.washingtonpost.com/politics/trump-disinformation-campaign/2020/09/06/f34f080a-eeca-11ea-a21a-0fbbe90cfd8c_story.html [https://perma.cc/Q6VC-UDYZ] ("[T]he Trump campaign . . . [is] disseminating falsehoods and trafficking in obfuscation at a rapid clip, through the use of selectively edited videos, deceptive retweets and false statements."). Researchers attribute the rapid rise of fakes in recent years in part to President Trump's regular use of them as a communications tool. Drew Harwell, *Doctored Images Have Become a Fact of Life for Political Campaigns. When They're Disproved, Believers 'Just Don't Care'*, WASH. POST (Jan. 14, 2020),

Our current media environment would have been totally unrecognizable to the members of the Supreme Court a half-century ago.[292] There are today almost four billion "active users of social media" worldwide, with the vast majority loyal to Facebook (their stories are viewed by 600 million viewers per day);[293] false information about the 2016 elections reached more than 100 million people on Facebook alone.[294] Social media is now a dominant player in our political discussions, enabling politicians—President Trump has more than eighty million followers on Twitter[295]—to communicate directly with the public, unfiltered by the traditional media.[296]

Anyone with Internet access can now see text, pictures, and sound designed to be attention-getting, even addictive.[297] Where television organized its news coverage around the motto, "if it bleeds it leads,"[298] social media outlets are

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htts://www.washingtonpost.com/technology/2020/01/14/doctored-political-images/ [https://perma.cc/25LZ-YPLP]. Recent research points out that even if doctored images don't change minds they reinforce existing beliefs and make people less willing to consider alternative verities. *Id.*

[292] *See* Lili Levi, *Social Media and the Press*, 90 N.C. L. REV. 1531, 1533–34 (2012) (detailing how newsrooms in the traditional media changed in response to the digital age).

[293] *Facebook Statistics and Facts*, MARKET.US (Aug. 4, 2020), https://market.us/statistics/social-media/facebook/ [https://perma.cc/7KB9-B4D8].

[294] Miles Parks, *Social Media Usage Is at an All-Time High. That Could Be a Nightmare for Democracy*, WUSF PUB. MEDIA (May 27, 2020), https://www.wusf.org/social-media-usage-is-at-an-all-time-high-that-could-mean-a-nightmare-for-democracy/ [https://perma.cc/6LGW-WMWF].

[295] Jonathan Garber, *Twitter 'Came Up with a Separate Set of Rules' for Trump*, FOX BUSINESS (May 27, 2020), https://www.foxbusiness.com/markets/twitter-rules-different-for-trump [https://perma.cc/TF6W-N255].

[296] *See, e.g.*, Frank Newport, *Deconstructing Trump's Use of Twitter*, GALLUP (May 16, 2018), https://news.gallup.com/poll/234509/deconstructing-trump-twitter.aspx [https://perma.cc/RL4X-PPU3] ("In June 2017, Trump tweeted: 'The FAKE MSM [mainstream media] is working so hard trying to get me not to use Social Media. They hate that I can get the honest and unfiltered message out.'").

[297] *See* M. Rex Miller, *The Digital Dynamic: How Communications Media Shape Our World*, FUTURIST, May–June 2005, at 31, 33, https://www.questia.com/magazine/1G1-131858886/the-digital-dynamic-how-communications-media-shape0 (on file with the *Ohio State Law Journal*) ("Digital media combine text, graphics, sound, and data . . . [that is] multi-sensory, multimedia, and multi-networked."); Sean Keane, *Facebook, Twitter Are Designed to Act Like 'Behavioural Cocaine'*, CNET (July 4, 2018), https://www.cnet.com/news/facebook-twitter-are-designed-to-be-like-behavioural-cocaine-for-users-insiders [https://perma.cc/43WZ-83QU] ("It's as if they're taking behavioural cocaine and just sprinkling it all over your interface and that's the thing that keeps you . . . coming back and back and back. Behind every screen on your phone, there are . . . literally a thousand engineers that have worked on this thing to try to make it maximally addicting.") (quoting Aza Raskin, founder of Mozilla); *see also* Luke Darby, *Facebook Knows It's Engineered to "Exploit the Human Brain's Attraction to Divisiveness"*, MSN (May 27, 2020), https://www.msn.com/en-us/news/technology/facebook-knows-its-engineered-to-exploit-the-human-brains-attraction-to-divisiveness/ar-BB14FPxB [https://perma.cc/49R5-K93M].

[298] Deborah Serani, *If It Bleeds, It Leads: Understanding Fear-Based Media*, PSYCHOL. TODAY (June 7, 2011), https://www.psychologytoday.com/us/blog/two-takes-depression/

exponentially more likely to sensationalize and use sophisticated algorithms to separate users by ideology, amplifying one side of a story and creating echo-chambers laced with falsehoods, with scant fact-checking, let alone contextualizing.[299] This invidious process doesn't even need human beings: automated "bots" amplify misinformation while masquerading as the handiwork of human beings.[300] This facilitates decentralized, swarm-based attacks on the sources of accurate information, and can create artificial copies to spread lies to millions.[301]

As but one example, a 2018 study published in *Science* found that on Twitter, falsehood and rumor dominated truth by every metric, reaching more people, penetrating deeper into social networks, and doing so more quickly than accurate statements.[302]

And even if this blizzard of plainly, demonstrably, and factually false statements is rebutted by reliable sources of information, "they persist, and . . . belief in these and many other falsehoods appears to increase without regard to the actual truth of the matter."[303] While consumers of digital information may not actually believe all of the false assertions they encounter,

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201106/if-it-bleeds-it-leads-understanding-fear-based-media [https://perma.cc/V4XQ-QK4A] ("In previous decades, the journalistic mission was to report the news as it actually happened, with fairness, balance, and integrity. However, capitalistic motives associated with journalism have forced much of today's television news to look to the spectacular, the stirring, and the controversial as news stories.").

[299] Chris Meserole, *How Misinformation Spreads on Social Media—And What to Do About It*, BROOKINGS (May 9, 2018), https://www.brookings.edu/blog/order-from-chaos/2018/05/09/how-misinformation-spreads-on-social-media-and-what-to-do-about-it/ [https://perma.cc/5T6Y-HD63] ("Human biases play an important role: Since we're more likely to react to content that taps into our existing grievances and beliefs, inflammatory tweets will generate quick engagement . . . [social media can be a] kind of confirmation bias machine, one perfectly tailored for the spread of misinformation."); Katherine J. Wu, *Radical Ideas Spread Through Social Media. Are the Algorithms to Blame?*, PBS (Mar. 28, 2019), https://www.pbs.org/wgbh/nova/article/radical-ideas-social-media-algorithms/ [https://perma.cc/6ZWZ-2HNC] ("[T]he spread of misinformation was an unintended consequence of the deployment of algorithms to maximize engagement. Social media platforms—very understandably—followed the money trail. . . . [But they also] ensure that 'garbage floats to the top.'").

[300] *See, e.g.*, Andrew Solender, *Bot Army Behind 'Reopen America' Push on Social Media, Study Finds*, FORBES (May 22, 2020), https://www.forbes.com/sites/Andrewsolender/2020/05/22/bot-army-behind-reopen-america-push-on-social-media-study-finds/#1fd034ce39b2 [https://perma.cc/5GUT-G38C].

[301] Chesney & Citron, *supra* note 290, at 1754 ("The marketplace of ideas already suffers from truth decay as our networked information environment interacts in toxic ways with our cognitive biases."); Rauch, *supra* note 250, at 130.

[302] Robinson Meyer, *The Grim Conclusions of the Largest-Ever Study of Fake News*, ATLANTIC (Mar. 8, 2018), https://www.theatlantic.com/technology/archive/2018/03/largest-study-ever-fake-news-mit-twitter/555104/ [https://perma.cc/7PDS-Q9MS].

[303] Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 898 (2010).

misstatements nevertheless sow confusion and erode trust,[304] undermining the very possibility of a socially validated reality.[305] And, of course, there is the evidence that published lies played a role in the outcome of the 2016 presidential election.[306]

Unlike ordinary lies and propaganda, "deepfakes" and the broader category of disinformation erode belief in anything.[307] Perhaps most alarming is the impact they have on the willingness of citizens to trust what they see or hear, creating a nihilistic and disengaged electorate that is unable to appreciate accurate information when it is presented to them.[308]

The result of all of this is a political system under siege, since modern democracies need to both identify and circulate agreed-upon facts.[309] Indeed, as political philosopher Hannah Arendt pointed out decades ago, "[t]he ideal subject of totalitarian rule is not the convinced Nazi or convinced Communist,

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[304] Paul Horwitz, *The First Amendment's Epistemological Problem*, 87 WASH. L. REV. 445, 472 (2012) (stating that false claims of fact have "become cascades, gaining adherents at dramatically increased rates and distorting politics, public discussion, and public policy itself").

[305] Rauch, *supra* note 250, at 131; *see also* Chesney & Citron, *supra* note 290, at 1785 (describing the "liars' dividend," which prompts people to disbelieve accurate information).

[306] Levi, *Real "Fake News*", *supra* note 259, at 250 n.65 (listing articles that discuss Russian influence on the 2016 presidential election by the promulgation of false news about Hillary Clinton in swing states); *see also* Jeremy Herb, Marshall Cohen, & Katelyn Polantz, *Bipartisan Senate Report Details Trump Campaign Contacts with Russia in 2016, Adding to Mueller Findings*, CNN (Aug. 20, 2020), https://www.cnn.com/2020/08/18/politics/senate-intelligence-report-russia-election-interference-efforts/index.html [https://perma.cc/P5D9-25MM] (Senate report details how the Trump campaign welcomed Russian meddling in 2016 election).

[307] As Steve Bannon, a close friend and political advisor to President Trump, observed, "[T]he way to deal with [the media] is to flood the zone with shit." Rauch, *supra* note 250, at 129.

[308] Sabrina Tavernise & Adrian Gardiner, *'No One Believes Anything': Voters Worn Out by a Fog of Political News*, N.Y. TIMES (Nov. 18, 2019), https://www.nytimes.com/2019/11/18/us/polls-media-fake-news.html [https://perma.cc/7QVP-ZXPR]. There has been pushback, as "fact-checking" websites, like FactCheck.org (sponsored by the Annenberg Public Policy Center), https://www.factcheck.org/, have attempted to correct the record, and there is even a new peer-reviewed journal, The Harvard Kennedy School Misinformation Review, https://misinforeview.hks.harvard.edu/, but there is reason to question their efficacy. Research suggests that the very act of seeing a headline, even if it is flagged as false by the platform or fact-checker, can still contribute to belief in the underlying claim. Parks, *supra* note 294.

[309] SOPHIA ROSENFELD, DEMOCRACY AND TRUTH: A SHORT HISTORY 1–2 (2019) ("Truth . . . has been touted as a key democratic value from the get-go. Republics, and, later, modern democracies have long prided themselves on both building on and generating truths . . . ."); Barron, *supra* note 142, at 101 ("[A] press that lies to the public or negligently publishes falsehoods vitiates its role in facilitating democracy-enhancing speech and thereby harms the populace's ability to effectively govern itself.").

but people for whom the distinction between fact and fiction . . . and the distinction between true and false . . . no longer exist."[310]

We can point to many factors that play a role in this crisis, including the spread of post-modern theories about the contingent nature of truth from campuses to the mainstream,[311] the rise of cable news and the twenty-four-hour news cycle,[312] and the technological strides in both hardware and software that facilitated the rapid rise of the internet and social media.[313] These platforms have produced an abundance of "cheap speech," in both senses of the term: information that is inexpensive to provide and often of scant value.[314] This unremitting flow of information was lauded by champions of the online world for its power to democratize the marketplace of ideas, not foreseeing that the deluge could also swamp public discussion.[315] We now know better.[316]

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[310] HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 474 (1966); *see also* Michele Goldberg, *Trump's Claims About Biden Aren't 'Unsupported,' They're Lies.*, N.Y. TIMES (Sept. 30, 2019), https://www.nytimes.com/2019/09/30/opinion/trump-ukraine-republican.html [https://perma.cc/E7E3-692N] ("[T]rump's weaponized disinformation is corrosive to democracy . . . and erode[s] the political salience of reality."); Peter Wehner, *Trump Has Made Alternative Facts a Way of Life*, N.Y. TIMES (June 13, 2020), https://www.nytimes.com/2020/06/13/opinion/trump-has-made-alternative-facts-a-way-of-life.html [https://perma.cc/9SCM-TYGR] ("But epistemological anarchy is a mortal threat to a free nation. If there are no knowable truths to appeal to, no common set of facts we can agree on, no shared reality that binds us together, then everything is up for grabs.").

[311] ROSENFELD, *supra* note 309, at 140–42 ("All [of] which ostensibly explains why Roger Stone and Jacques Derrida have recently been showing up in articles together. This is a story about philosophy run amuck, topped with a dollop of karmic justice."); *see also* KAKUTANI, *supra* note 278, at 160–61 ("Deconstruction . . . is deeply nihilistic, implying that the efforts of journalists and historians—to ascertain the best available truths through the careful gathering and weighing of evidence—are futile.").

[312] ROSENFELD, *supra* note 309, at 146–47; *see also* Alterman, *supra* note 263, at 256 (describing an "echo chamber" of right wing media outlets that "successfully set the agenda" for the 2016 election, using "decontexturalized truths, repeated falsehoods, and leaps of logic [to] create a fundamentally misleading view of the world").

[313] ROSENFELD, *supra* note 309, at 149.

[314] *See* Hasen, *supra* note 264, at 201 ("No doubt cheap speech has increased convenience, dramatically lowered the costs of obtaining information, and spurred the creation and consumption of content from radically diverse sources. But the economics of cheap speech also have undermined mediating and stabilizing institutions of American democracy including newspapers and political parties, with negative social and political consequences.").

[315] ROGER MCNAMEE, ZUCKED: WAKING UP TO THE FACEBOOK CATASTROPHE 92 (2019). Employees at Google, Facebook, or Twitter likely never imagined that their products would harm democracy, but the "systems they built are doing just that [by] manipulating attention, isolating users in filter and preference bubbles, and leaving them vulnerable to invasions of privacy, loss of agency, and even behavior modification." Roger McNamee, *Facebook Is a Threat to Democracy—and the US Has a Responsibility to Rein It In*, PROMARKET (Feb. 6, 2019), https://promarket.org/2019/02/06/facebook-is-a-threat-to-democracy-and-the-us-has-a-responsibility-to-rein-it-in/ [https://perma.cc/B5ZS-K65P].

[316] Joseph Bernstein, *Alienated, Alone And Angry: What the Digital Revolution Really Did to Us*, BUZZFEED NEWS (Dec. 17, 2019), https://www.buzzfeednews.com/article/joseph

Despite this depressing situation, there are isolated situations in which truth can win out even with a playing field that is dramatically tipped in favor of protecting the purveyors of lies because of *New York Times* and its progeny. For example, successful lawsuits have been brought against provocative media personality Alex Jones and others who claimed that the mass murder of school children in Newtown, Connecticut, never happened.[317] But even in this context, the *New York Times* rules required that grieving parents, who became "public figures" by advocating for gun control, prove "actual malice" by "clear and convincing evidence" if they were to protect their reputations, mental tranquility, and safety. These high constitutional barriers fail to adequately or fairly balance the needs to protect reputations and promote an adequately informed electorate with concerns that defamation law will lead to a timorous press.[318]

V. CURRENT DATA ON LIBEL LITIGATION

In *New York Times*, Justice Brennan raised the specter of libel actions putting newspapers out of business, writing, "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which

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bernstein/in-the-2010s-decade-we-became-alienated-by-technology [https://perma.cc/X5VK-A4AW] ("The feelings of powerlessness, estrangement, loneliness, and anger created or exacerbated by the information age are so general it can be easy to think they are just a state of nature . . . .").

[317] Parents of children murdered at Sandy Hook Elementary School, as well as an FBI agent who investigated the shootings, sued Jones and his website InfoWars for defamation because of the assertions that the shootings were staged by government-backed "gun grabbers" that used actors who pretended to be grieving parents. Elizabeth Williamson, *Truth in a Post-Truth Era: Sandy Hook Families Sue Alex Jones, Conspiracy Theorist*, N.Y. TIMES (May 23, 2018), https://www.nytimes.com/2018/05/23/us/politics/alex-jones-trump-sandy-hook.html [https://perma.cc/J5DU-HMRZ]. The presiding judge also ordered Alex Jones and Infowars to pay $100,000 in legal fees. Neil Vigdor, *Judge Orders Alex Jones and Infowars to Pay $100,000 in Sandy Hook Legal Fees*, N.Y. TIMES (Dec. 31, 2019), https://www.nytimes.com/2019/12/31/us/Alex-Jones-sandy-hook.html [https://perma.cc/EAG5-JF2Y]. Bereaved parents also sued other hoaxers. *See* Susan Svrluga, *First, They Lost Their Children. Then the Conspiracy Theories Started. Now, the Parents of Newtown Are Fighting Back.*, WASH. POST (July 8, 2019), https://www.washingtonpost.com/local/education/first-they-lost-their-children-then-the-conspiracies-started-now-the-parents-of-newtown-are-fighting-back/2019/07/08/f167b880-9cef-11e9-9ed4-c9089972ad5a_story.html?utm_term=.aeb39477d179 [https://perma.cc/8FUA-ZFZ6] (describing how, to prove that the conspiracy theories were false, the parents had to hand the presiding judge their son's death certificate, "with its raised seal, to disprove the allegation in the book that images of the certificate had been altered or faked").

[318] *See generally* W. Wat Hopkins, *The Involuntary Public Figure: Not So Dead After All*, 21 CARDOZO ARTS & ENT. L.J. 1 (2003) (opining that it is unfair and illogical to make a person who is drawn in to a public controversy satisfy the demands of the current defamation law).

the First Amendment freedoms cannot survive."[319] As detailed in previous sections, the Court responded to this threat with a broad and deep array of constitutional protections for the publishers of false and defamatory speech.[320] The entire *New York Times* regime has been in place for more than five decades, so it is now an appropriate time to evaluate whether the Court has realized its goal of deterring large damage awards in defamation actions.

The Media Law Resource Center (MLRC)[321] began tracking litigation against the media in the early 1980s and its data are considered the gold standard for assessing the frequency of defamation litigation as well as ancillary claims against the media, such as invasion of privacy and false light.[322] When the tracking began, libel litigation had reached crisis proportions as the result of "a dramatic proliferation of highly publicized libel actions brought by well-known figures who seek, and often receive, staggering sums of money."[323] From this dire assessment by a leading scholar, one could conclude that that the *New York Times* regime had failed to provide the intended robust protection. However, the most current data suggest a very different landscape, one in which the pendulum has swung so far toward defendants that defamation law gives little redress to the victims of falsehoods and provides virtually no deterrence of falsehoods.

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[319] New York Times Co. v. Sullivan, 376 U.S. 254, 278 (1964). Justice Black was even more blunt in his concurrence: "The half-million-dollar verdict does give dramatic proof, however, that state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials." *Id.* at 294 (Black, J., concurring).

[320] *See supra* notes 113–235 and accompanying text.

[321] The MLRC is a trade group "founded in 1980 by leading American publishers and broadcasters to assist in defending and protecting free press rights under the First Amendment. Today, MLRC is supported by over one hundred and fifteen members, including leading publishers, broadcasters, and cable programmers, internet operations, media and professional trade associations, and media insurance professionals in America and around the world." *About MLRC*, MEDIA L. RESOURCE CTR., http://www.medialaw.org/about-mlrc [https://perma.cc/3S9L-V6X8]. The MLRC was formerly known as the Libel Defense Resource Center (LDRC).

[322] MLRC data is regularly relied upon by leading scholars. *See, e.g.*, RonNell Anderson Jones, *Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media*, 93 MINN. L. REV. 585, 614 n.171 (2008); Leslie Kendrick, *Speech Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1676–77 (2013). While informative, the MLRC data are not complete because tracking filed claims and their disposition cannot capture all of the relevant data. For example, MLRC figures do "not reveal how many plaintiffs were defamed but never realized it, or knew of the calumny but were unwilling to shoulder the pecuniary and psychological cost of litigation that puts the plaintiff's reputation center-stage, open to the prying eyes of civil discovery, and, perhaps, the community at large." *See* David A. Logan, *Libel Law in the Trenches*: *Reflections on Current Data on Libel Litigation*, 87 VA. L. REV. 503, 518 (2001) [hereinafter Logan, *Libel Law in the Trenches*].

[323] Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 1 (1983). The MLRC does not track damages claims brought against individuals but does report on such cases anecdotally.

One important datum is that the number of trials arising out of media publications has "declined dramatically."[324] Indeed, there has been a "steady decline" in trials since the 1980s, which saw an average of twenty-seven trials per year;[325] there were only three trials in the entire country in the most recent year studied.[326]

Media defendants prevailed in 40% of the defamation trials from 1980–2017, with that rate climbing to 50% through 2017, the most recent period studied.[327] The median jury award from 1980 to 2017 was $350,000 and the mean was just under $3.4 million.[328] Defamation awards over $1 million increased from 2010 to 2017,[329] but it is likely that at least some of the huge awards reflected juries "sending a message" to corporate defendants generally rather than animus directed at the media[330]—the concern that animated *New York Times*.[331]

The MLRC data show that the success rate of media defendants climbs steeply when post-trial motions and appeals are factored in. Since 2010, post-trial motions have led to reduction of the jury award in 11.5% of the cases and to the elimination of the entire award in an additional 19% of the cases.[332] Media defendants also had great success on appeal, with only 9.5% of awards that were

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[324] MEDIA LAW RES. CTR., MLRC 2018 REPORT ON TRIAL AND DAMAGES 5 (Apr. 2018) [hereinafter MLRC 2018 REPORT]. The organization tracks trials because "[a]s a practical matter, it is very difficult to obtain accurate data on complaints filed against the media." *Id.* at 3. Of the data collected, 73.3% came from defamation claims, with another chunk (9.1%) coming from false light claims, *id.* at 25, a close cousin of defamation in which defendants can also raise First Amendment defenses grounded on *New York Times*. *See* G. Edward White, *Falsity and the First Amendment*, 72 SMU L. REV. 513, 522 (2019).

[325] MLRC 2018 REPORT, *supra* note 324, at 3. Of course, this phenomenon of the "vanishing trial" has been documented more generally. *See generally* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004). The literature discussing this phenomenon is voluminous. *See* Sarah Staszak, *Procedural Change in the First Ten Years of the Roberts Court*, 38 CARDOZO L. REV. 691, 692 n.1 (2016) (listing articles).

[326] MLRC 2018 REPORT, *supra* note 324, at 23.

[327] *Id.* at 25.

[328] *Id.* at 36. This most recent mean is skewed upward by the inclusion of a single $140 million verdict (the second largest ever entered against a media defendant) entered against the website Gawker, but the case involved an invasion of privacy claim and not defamation, *id.* at 1, the focus of this Article. After removing the Gawker case, the mean award from 2010 to 2017 is lower ($2.4 million), and of course median awards are a more reliable assessment of risk because the mean can be skewed by a single large award that "blows the bell-curve." *Id.* at 3–4.

[329] *Id.* at 6.

[330] Amanda Bronstad, *'Jurors Want to Punish': Why a Jury Verdict Goes 'Nuclear'*, LAW.COM (Oct. 17, 2019), https://www.law.com/2019/10/17/jurors-want-to-punish-why-a-jury-verdict-goes-nuclear/ [https://perma.cc/7HZC-F6CN] (discussing why juries award mega-verdicts against corporate defendants).

[331] *See supra* notes 42–47 and accompanying text.

[332] MLRC 2018 REPORT, *supra* note 324, at 45.

appealed being affirmed.[333] The total amount awarded dropped precipitously after post-trial motions and appeals: plaintiffs lost 86% of what juries had awarded.[334] Most significantly, plaintiffs were able to entirely shield only 19% of the verdicts from some form of judicial intervention, while in another 6.7% of cases the plaintiff held on to part of the initial award.[335] This is all powerful evidence that the combination of substantive, remedial, and procedural protections imposed by *New York Times* and its progeny are having the intended prophylactic effect.[336]

These data show that as an empirical matter, libel actions against media defendants are rarely litigated, and even more rarely do they ultimately yield substantial payouts. At first blush, this trend is surprising considering the massive amount of false information circulating in all forms of media, and especially on the internet. Even beyond the cesspool that is social media, there are millions of opportunities for the publication of false statements in "hard news," let alone on sports pages and in book reviews and obituaries.[337] This all adds up to a world that is "bristling with opportunities for error, and thus liability for libel,"[338] but which, because of *New York Times* and its progeny, results in precious few legal consequences for the defamer. In sum, the threat that defendants today face from libel litigation is virtually nil.

VI. RECONSIDERING *NEW YORK TIMES*

A functioning, let alone thriving, democracy requires a number of fundamental characteristics that are increasingly elusive in our country: that people are telling the truth most of the time, that truth is distinct from falsehood, and that we can tell the difference.[339] These assumptions are not holding up under the assault in our "post-truth" society[340] in which many citizens are

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[333] *Id.* at 47.

[334] *Id.* at 50.

[335] *Id.* at 62–63.

[336] *See supra* note 102 and accompanying text.

[337] *See* Logan, *Libel Law in the Trenches*, *supra* note 322, at 520.

[338] *Id.* Even if defendants prevail in litigation, the cost of liability insurance may have a deterrent effect regarding publication of falsehoods. *Id.* at 528.

[339] ROSENFELD, *supra* note 309, at 17–18. The proliferation of falsehoods also hurts the economy by creating an atmosphere of mistrust in the marketplace. Robert J. Schiller, *How Lying and Mistrust Could Hurt the American Economy*, N.Y. TIMES (Nov. 8, 2019), https://www.nytimes.com/2019/11/08/business/how-lying-and-mistrust-could-hurt-the-american-economy.html [https://perma.cc/2Z9P-XQSC]; *see also* John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1565–66 (2006) (arguing that the most compelling rationale for imposing securities fraud liability is the "impact of fraud on investor confidence and thus the cost of equity capital" throughout the economy).

[340] ROSENFELD, *supra* note 309, at 15; *see also* Alex Johnson, *'Post-Truth' Is Oxford Dictionaries' Word of the Year for 2016*, NBC NEWS (Nov. 16, 2016), https://www.nbcnews.com/news/us-news/post-truth-oxford-dictionaries-word-year-2016-n685081 [https://perma.cc/SP6A-5CFH].

convinced that there is no such thing as impartial, consensual facts and truth is increasingly being defined as "a matter of subjective feeling and taste."[341]

To be sure, our dysfunctional public square is not solely the result of Supreme Court decisions. The Court didn't cause the technological revolution of recent decades, which has altered not just the news business, but the very ways in which citizens interact. Congress has also played a crucial role in the diminished quality of public debate by passing the Communications Decency Act (CDA), which shields internet service providers from responsibility for what appears on their platforms, making the mass circulation of falsehoods virtually risk-free,[342] but with both Congress[343] and newly-elected President Joe Biden favoring significant narrowing of its protections,[344] there may soon be legislative changes that would amplify the rollback of defamation law that is urged in this Article.[345]

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[341] ROSENFELD, *supra* note 309, at 9.

[342] A core purpose of the CDA is "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation[.]" 47 U.S.C. § 230(b) (2012). The law granted online platforms broad immunities from liability for what users posted on their sites. *See* Julio Sharp-Wasserman & Evan Mascagni, *A Federal Anti-SLAPP Law Would Make Section 230(c)(1) of the Communications Decency Act More Effective*, 17 FIRST AMEND. L. REV. 367, 367 (2019). While the protection made sense in the 1990s, to allow fledgling Internet-based businesses to be free of almost all government regulation of content, there is a growing consensus that this laissez-faire approach is no longer justified. Facebook, Twitter, and the like, are not just "natural platforms" but rather powerful curators of the information that most Americans rely upon to learn about the world around them. *See generally* Joan Donovan & Danah Boyd, *Stop the Presses? Moving from Strategic Silence to Strategic Amplification in a Network Media Ecosystem*, AM. BEHAV. SCIENTIST 1 (2019) (emphasizing that platforms "curate news media alongside user generated content" and so are "responsible for content moderation on an enormous scale").

[343] Nandita Bose & David Shepardson, *Senators Propose Reform to Key U.S. Tech Liability Shield*, US NEWS (June 24, 2020), https://www.usnews.com/news/technology/articles/2020-06-24/senators-to-propose-reform-to-key-us-tech-liability-shield [https://perma.cc/N6JB-P3XL].

[344] Isobel Asher Hamilton, *Here's What Could Happen to Section 230—the Internet Law Donald Trump Hates—Now that Democrats Have Both Houses*, BUS. INSIDER AUSTL. (Jan. 10, 2021), https://www.businessinsider.com.au/future-of-section-230-democrats-both-houses-2021-1 [https://perma.cc/BUS2-LN2B].

[345] President Trump has long championed libel law reform, Michael M. Grynbaum, *Trump Renews Pledge to 'Take a Strong Look' at Libel Laws*, N.Y. TIMES (Jan. 10, 2018), https://www.nytimes.com/2018/01/10/business/media/trump-libel-laws.html [https://perma.cc/HZJ2-KAHS], perhaps because he has had scant success when he has pursued libel claims. *See* Susan E. Seager, *Donald J. Trump Is a Libel Bully but also a Libel Loser*, MEDIA L. RES. CTR., https://www.medialaw.org/component/k2/item/3470-donald-j-trump-is-a-libel-bully-but-also-a-libel-loser [https://perma.cc/G57B-GRGR] (recounting Trump's history of failed defamation claims). This lack of success has apparently not had a deterrent effect. Tucker Higgins, *Trump 2020 Campaign Sues CNN for Libel Over Opinion Article, Following Suits Against Times and Post*, CNBC (Mar. 6, 2020), https://www.cnbc.com/2020/03/06/trump-2020-campaign-sues-cnn-for-libel-over-opinion-article.html [https://perma.cc/3BUJ-588Q]

But the fact that there are multiple aspects to the problem[346] does not mean that the Court should be unwilling to revisit constitutional doctrines that it created and that have facilitated our dysfunctional public square.[347] The Court's many constitutional protections made sense in the 1960s, when libel judgments threatened hard-hitting reporting done by major news organizations, but there is scant evidence suggesting that that is a risk in the current environment.[348] In short, these sweeping constitutional protections are harming our democracy rather than protecting it, as the *New York Times* Court hoped.

The Court could start with the low-hanging fruit by narrowing the range of victims of defamation who must satisfy the daunting "actual malice" requirement. For example, the Court could make it clear that a person is not a "public figure," and thus has to prove "actual malice," without proof of a truly "voluntary" and meaningful effort to engage public attention.[349] A broader and more meaningful reform could be a return to the seditious libel justification for *New York Times*, by imposing stiff scienter requirements only when the plaintiffs are high enough up in government that they make, rather than implement, public policy.[350]

The Court might bolster the search for truth, and thus our democracy, by revisiting the array of procedural modifications that the Court has imposed,

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(recounting defamation claims recently filed against the *New York Times*, *Washington Post*, and CNN).

[346] There is also a role for state legislatures, which could provide better strategic lawsuits against public participation (SLAPP) protections for those who are sued for libel without any basis in fact. These claims, if successful, can provide damages and attorneys' fees. *See generally* Sharp-Wasserman, *supra* note 342.

[347] *See* David Cole, *Foreword*, *in* FIGHT OF THE CENTURY: WRITERS REFLECT ON 100 YEARS OF LANDMARK ACLU CASES xxvii, xxi (Michael Chabon & Ayelet Waldman eds., 2020) (noting that "cases are just part of a larger campaign for justice, one that occurs in multiple forums outside the Supreme Court, including Congress, the White House, state legislatures and courts . . . ").

[348] The only recent example of a civil action shuttering a media defendant involved a claim was for an invasion of privacy and not defamation. In *Gawker Media. LLC v. Bollea*, 170 So. 3d 125 (Fla. Dist. Ct. App. 2015), the plaintiff was the celebrity with the stage name "Hulk Hogan." He sued the defendant, a website that had played sex tapes that involved the celebrity. A jury awarded $140 million and rather than appeal, the defendant declared bankruptcy. Sydney Ember, *Gawker, Filing for Bankruptcy After Hulk Hogan Suit, Is for Sale*, N.Y. TIMES (June 10, 2016), https://www.nytimes.com/2016/06/11/business/media/gawker-bankruptcy-sale.html [https://perma.cc/TG7Y-3PCQ]. Besides not involving defamation, this case is not a justification for avoiding a much-needed revisiting of defamation law: a sleazy website that published accurate information about the sex life of a celebrity bears little resemblance to the risk facing the national media if Alabama juries in the 1960s could impose huge awards for minor errors in reporting on the crucial news of the day.

[349] This is a position supported by Justice Clarence Thomas. *See supra* note 187.

[350] *See supra* notes 164–77 and accompanying text.

changes that upended longstanding practices respecting the role of juries as fact finders and that have created a complicated and expensive appellate regime.[351]

The Court could consider reforms promoted by knowledgeable observers, like the Annenberg Center, that would allow a plaintiff to secure a judgment of falsehood in return for giving up a claim for damages.[352] Such a change would allow defamed individuals to vindicate their reputations at far less cost to the parties (and to the civil justice system), while lessening the chill to free speech that the common law of defamation represents.

And finally, the most significant step would be revisiting the daunting "actual malice" requirement itself. For example, the Court should consider replacing "actual malice" with a less demanding standard, like proof of a defendant's "highly unreasonable conduct."[353]

In sum, the data presented in this Article conclusively show that *New York Times* and its follow-on decisions have effectively immunized all but a handful of purveyors of falsehoods from civil liability. This has contributed to a debased public debate and harmed American democracy.

VII. CONCLUSION

When asked what kind of government would result from the Constitutional Convention, Benjamin Franklin presciently replied "a republic . . . if you can keep it."[354] Over two hundred years later, we find our republic at a critical juncture, beset by falsehoods and deep mutual distrust. Congress could help by eliminating the immunity provided by the CDA and states could improve their own statutory law, for example by making it easier to pursue claims against plaintiffs who abuse the civil justice system by filing groundless libel suits.[355] We can also hope for fresh thinking from the American Law Institute's recently-announced "restatement" of defamation law, which provides a unique opportunity to address many of the concerns raised in this Article, as the

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[351] *See supra* notes 189–215 and accompanying text.

[352] The "Libel Reform Project" of the Annenberg Washington Program in Communications Policy Studies of Northwestern University proposed replacing traditional libel suits with a declaratory judgment action that only considered whether the statement was false and that limited remedies to retraction or recovery of damages for actual injury. *See* Rodney A. Smolla & Michael J. Gaertner, *The Annenberg Libel Reform Proposal: The Case for Enactment*, 31 WM. & MARY L. REV. 25, 26, 32–35 (1989); *see also* Robert M. Ackerman, *Bringing Coherence to Defamation Law Through Uniform Legislation: The Search for an Elegant Solution*, 72 N.C. L. REV. 291, 291, 294 (1994) (discussing the Uniform Correction or Clarification Act, proposed by the Uniform Law Commission, which would also have broadly restricted punitive damage awards).

[353] *See supra* notes 171–77 and accompanying text.

[354] 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 85 (Max Farrand ed., 1911).

[355] *See* Sharp-Wasserman, *supra* note 342, at 401 (discussing SLAPP suits).

Institute's work has often proved influential to courts.[356] But at the end of the day, decisions of the Supreme Court helped create the mess so it is imperative that the Court be involved in fixing it. This crisis requires the wisdom and courage to reconsider the constitutional icon that is *New York Times v. Sullivan*. In the meantime, our democracy hangs in the balance.

[356] Richard L. Revesz, *Completing the Restatement Third of Torts*, AM. LAW INST. (Apr. 4, 2019), https://www.ali.org/news/articles/completing-restatement-third-torts/ [https://perma.cc/77JQ-LLY3]. State and federal courts cited ALI projects as authority 2,600 times in the past year, a dozen times by the Supreme Court of the United States in its 2019 term. *ALI in the Courts*, AM. LAW INST. (July 23, 2020), https://www.ali.org/news/articles/ali-courts/ [https://perma.cc/798U-9ESX].