



Destroying Defamation

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ABSTRACT

Fake News is destroying defamation. The recent proliferation of rushed journalism, online conspiracy theories that almost every news story is, in fact, “Fake News,” have created a desert of veracity. Widespread public skepticism about even the most mainstream Internet reporting means plaintiffs will have difficulty convincing jurors that third parties believed any reported statement to be true. Without such proof, it is almost impossible for a plaintiff to prove the elements of defamation.

To establish defamation, a plaintiff must show defendant published an assertion of fact that is false and damages the plaintiff’s reputation. Hyperbolic language or other indications that a statement was not meant to be taken seriously are not actionable. Today’s understanding that everything on the Internet is susceptible to manipulation is destroying defamation.

This article explains the unforeseen consequence of labeling news as “fake.” This article begins with a historical review of Fake News, concluding with an understanding of the phenomenon in its current iteration. It follows with a discussion of the tort of defamation. It explores the uniqueness of proving online statements as libel or slander. This article illustrates how plaintiffs bringing defamation claims for Internet statements will have difficulty persuading a judge that the message was factual and not merely hyperbole. Even if the judge finds a statement to be fact, allowing the

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issue to move to the jury, a plaintiff in today's Fake News climate is unlikely to convince a jury that a reasonable person would find the statement defamatory. The abundance of fake news, the media's rush to publish, and external attacks on credible journalism have created a heightened sense of questionable reporting among members of society. The potential for defamatory harm is minimal when the veracity of any news story is questionable. This paper argues that the presence of Fake News is a blight on this cause of action that threatens to destroy the tort of defamation.

I. INTRODUCTION

Fake News is destroying defamation. The recent proliferation of rushed journalism, online conspiracy theories that almost every news story is in fact "Fake News," have created a desert of veracity. Widespread public skepticism about even the most mainstream Internet reporting means plaintiffs will have difficulty convincing jurors that third parties believed any reported statement to be true. Without such proof, it is almost impossible for a plaintiff to prove the elements of defamation.

To establish defamation, a plaintiff must show that a defendant published an assertion of fact that is false and damages the plaintiff's reputation.² The proof required differs depending on the status of the plaintiff. When a public figure sues individuals or media for defamation, they must prove that the defendant made a false statement knowing it was false, or with a reckless disregard for whether it was true.³ Statements made regarding those who do not have a public presence are actionable upon showing that the statement was false.⁴ In either instance, the plaintiff must prove that the defendant's comments were a statement and not an opinion.

The fact/opinion dichotomy has been troublesome for centuries.⁵ The Supreme Court, when faced with this issue, acknowledged that hyperbolic

² See *id.* Restatement (Second) of Torts § 577 cmt. a (Am. L. Inst. 1965). ("Any act by which the defamatory matter is intentionally or negligently communicated to a third person is a publication."); see also *Reese v. Barton Healthcare Systems*, 693 F.Supp.2d 1170, 1189 ("Publication, which may be written or oral, is defined as a communication to some third person who understands both the defamatory meaning of the statement and its application to the person to whom reference is made.").

³ See generally *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding that public officials cannot recover damages for defamation without proving that the defendant made the statement with actual malice).

⁴ See generally *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (holding that private figures do not need to prove actual malice to recover compensatory damages).

⁵ See Rodney W. Ott, *Fact and Opinion in Defamation: Recognizing the Formative Power of Context*, 58 FORDHAM L. REV. 761, 761 (1990).

language or other indications that a statement was not meant to be taken seriously are not actionable.⁶ Generally, judges, not fact finders, are tasked with deciding whether a potentially defamatory statement is a fact or an opinion.⁷ However, where the statement is ambiguous, the determination of whether a statement is fact or opinion is left to the jury.⁸ Today, courts tend to label statements on the Internet as opinions rather than facts, given the general understanding that such statements often reflect hyperbole rather than the kind of contemplative, edited thought that had been the hallmark of print media.⁹

Once the judge labels the defendant's words as fact, a jury is responsible for assessing whether the publication of that fact caused harm.¹⁰ Proving

⁶ See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 2 (noting “protection for statements that cannot reasonably be interpreted as stating actual facts about an individual. . . provid[ing] assurance that public debate will not suffer for lack of imaginative expression or the rhetorical hyperbole which has traditionally added much to the discourse of our Nation.”) (internal quotation marks omitted).

⁷ See *Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 432 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 757 (1990) (“At the outset, we must also consider whether the challenged statements are opinion and therefore absolutely protected This is a question of law.”); *Ollman v. Evans.*, 750 F.2d 970, 978 (D.C. Cir. 1984) (*en banc*), *cert. denied*, 471 U.S. 1127 (1985) (“In formulating this analysis, we agree with the overwhelming weight of post-*Gertz* authority that the distinction between opinion and fact is a matter of law.”); *Rinaldi v. Holt, Rinehart & Winston*, 366 N.E.2d 1299, (1977), *cert. denied*, 434 US 969 (1977) (“Whether a particular statement constitutes fact or opinion is a question of law.”); *Michel v. NYP Holding, Inc.*, 816 F.3d 686, 698 (11th Cir. 2016); *Rinsley v. Brandt*, 700 F.2d 1304, 1309 (10th Cir.1983).

⁸ See, e.g., *Flowers v. Carville*, 310 F.3d 1118, 1128 (9th Cir. 2002) (“[I]f a statement is ‘susceptible of different constructions, one of which is defamatory, resolution of the ambiguity is a question of fact for the jury.’” (quoting *Posadas v. City of Reno*, 851 P.2d 438, 442 (Nev. 1993))); *Hi-Tech Pharmaceuticals, Inc. v. Cohen* 277 F. Supp. 3d 236, 244 (“The determination whether a statement is one of fact or opinion is generally considered a question of law, at least where the statement unambiguously constitutes either fact or opinion. Where the statements at issue could have been understood by the average reader in either sense, however, the issue must be left to the jury’s determination.” (internal quotation marks and citations omitted)).

⁹ See, e.g., *Sandals Resorts Intern. Ltd. v. Google Inc.*, 925 N.Y.S.2d 407, 415 (N.Y. App. Div. 2011); *Kaufman v. Islamic Soc. of Arlington.*, 291 S.W.3d 130, 146–47 (Tex. App. 2009); *Doe v. Cahill*, 885 A.2d 451, 467 (Del. 2005); *Bauer v. Brinkman.*, 954 N.W.2d 778, 4 (Iowa Ct. App. 2020); *Rollins Ranches, LLC v. Watson.*, No. 0:18-cv-03278-SAL, 2021 WL 5355650, at *10 (D.S.C. Nov. 17, 2021).

¹⁰ See *McLaughlin v. Rosanio, Bailets & Talamo, Inc.*, 751 A.2d 1066, 1071 (N.J. Super. Ct. App. Div. 2000).

harm, however, is problematic in the Fake News Era. The widespread public skepticism about even the most mainstream Internet reporting means plaintiffs will have difficulty convincing jurors that third parties actually believed any reported statement to be true. Without such proof, it is almost impossible for a plaintiff to prove the kind of harm necessary to bring a successful defamation claim.

This article examines the unforeseen consequence of Fake News as it relates to proving defamation. Part I explores the rise of Fake News, concluding with an understanding of fake news in its current iteration.¹¹ Part II presents an overview of defamation.¹² This section traces the history of defamation, including three relevant Supreme Court decisions and surveys how courts resolve challenged internet posts and comments.¹³ Part III measures the likelihood of a plaintiff's success when bringing a defamation case in the era of Fake News.¹⁴ This section acknowledges that plaintiffs bringing defamation claims for Internet statements will first have difficulty persuading a judge that the message was factual, and not an opinion.¹⁵ Even where the issue does make it to a jury, a plaintiff in today's Fake News climate is unlikely to succeed. The abundance of fake news, the media's rush to publish, and external attacks on credible journalism has created a problematization of truth among members of society. The potential for defamatory harm is minimal when the veracity of every news story is questioned. Ultimately, this paper argues that the presence of Fake News is a blight on this cause of action, which, like the credibility of present-day news organizations, threatens to erode defamation to the point of irrelevance.

II. FAKE NEWS

Fake News journalism is not new. Newspapers have published false stories since the days of the printing press.¹⁶ In the mid-1700s, seditionists posted fake news concerning King George's ill health to destabilize England's government.¹⁷ Since the mid-1800's newspapers and other media

¹¹ See discussion *infra* Part I.

¹² See discussion *infra* Part II.

¹³ See discussion *infra* Part II.

¹⁴ See discussion *infra* Part III.

¹⁵ See discussion *infra* Part III.

¹⁶ See *A Brief History of Fake News*, CTR. FOR INFO. TECH. AND SOC'Y AT UC SANTA BARBARA, <https://perma.cc/D9JW-RZT9> (last visited Mar. 5, 2023) ("False and distorted news material isn't exactly a new thing. It's been a part of media history long before social media, since the invention of the printing press.").

¹⁷ Barbara J. Starmans, *The Social Historian*, available at <https://perma.cc/D9JW-RZT9> Historians trace false news stories back to 13 BCE. See WILLIAM

outlets have relied on fake news to sell their journalistic efforts.¹⁸ In 1835, *The New York Sun*, published “The Great Moon Hoax,” a news article asserting that an alien civilization lived on the moon.¹⁹ The story catapulted the paper to its status as the leading media outlet of its time.²⁰

Fake News refers to any journalistic story that knowingly and intentionally includes untrue factual statements.²¹ It is fabricated content that mimics news media information.²² Oxford English Dictionary defines the term as a verb, meaning “to discredit media reports regarded as partisan or untrustworthy.”²³ Under this definition, fake news means an untruthful story.

Today, many speak of Fake News as a noun. During the 2016 election, then-presidential candidate, Donald Trump, elevated and transformed the term into its current iteration with a series of Tweets criticizing mainstream media outlets by labeling their stories as ‘Fake News.’²⁴ In tweets such as, “Wow, so many Fake News stories today. No matter what I do or say, they will not write or speak truth. The Fake News Media is out of control!”

WEIR, HISTORY’S GREATEST LIES: THE STARTLING TRUTHS BEHIND WORLD EVENTS OUR HISTORY BOOKS GOT WRONG, 28–41 (Fair Winds Press 2009) (examining lies and myths that have persisted throughout history and exposing the true story).

¹⁸ See *supra* A Brief History of Fake News, (noting the emergence of “yellow journalism” during the Spanish-American War).

¹⁹ See *id.*

²⁰ See *id.*

²¹ Fake News, OXFORD ENG. DICTIONARY (3d ed. 2019) (defining fake news as “news that conveys or incorporates false, fabricated, or deliberately misleading information. . .”). Fake news is broadly defined. Media outlets including The Onion News Paper and The Daily Show intentionally publish fake news as parodies. See Brief for The Onion as Amici Curiae Supporting Petitioner, *Novak v. City of Parma, Ohio, et al.*, 932 F.3d 421 (6th Cir. 2019) (No. 22-293) (urging the Court to hear *Novak v. City of Parma*, which challenges prosecution for publishing a Facebook page parodying the Parma Police Department website). This article contemplates news that is not published with the intention of falsity or parody.

²² See A Brief History of Fake News, *supra* note 15.

²³ Fake News, *supra* note 21.

²⁴ See Chris Cillizza, *Here’s Donald Trump’s Most Lasting, Damaging Legacy*, CNN (Aug. 30, 2021, 7:06 PM), <https://perma.cc/C7S3-3VWY> (last visited Mar. 5, 2023). Trump labeled “fake news” as the reporting of uncomplimentary things that seemed distracting or insignificant, and especially reports that portrayed him in a negative light instead of highlighting successes that he thought should have been made more prominent. See Jane E. Kirtley, *Getting to the Truth: Fake News, Libel Laws, and “Enemies of the American People”*, A.B.A., <https://perma.cc/C7S3-3VWY> (last visited Sept. 23, 2022) (“[Trump has applied the label of fake news to virtually any media—the “failing” New York Times, NBC, ABC, CBS, CNN, among others—he disagrees with or doesn’t like.”).

Trump used the term to dismiss stories that did not, in his opinion, serve him.²⁵

“Pizzagate,” one of the most well-known present-day Fake News stories, illustrates the potential hazards of Fake News.²⁶ During the 2016 United States presidential election, users of 4chan, an Internet forum known for its extreme content, began speculating that former First Lady, Secretary of State, and presidential candidate Hillary Clinton, together with other prominent Democratic political figures, was coordinating a child trafficking ring out of Comet Ping Pong, a Washington, DC pizzeria.²⁷ Edgar Madison Welch, a 28-year-old man, read the story, which was widely circulated on Facebook, and drove from his hometown of Salisbury, North Carolina to Comet Ping Pong with an assault weapon and a rifle.²⁸ Welch, a self-described vigilante, shot open a locked door at Comet Ping Pong pizzeria with his AR-15.²⁹ Welch acted in response to a “news” story he read on Facebook

²⁵ See Chris Cillizza, *Donald Trump just accidentally revealed something very important about his ‘fake news’ attacks*, CNN (May 9, 2018, 10:50 AM), <https://perma.cc/AHN4-ZUEP> (“The point can be summed up in these two words from Trump: ‘negative (Fake).’ To Trump, those words mean the same thing. Negative news coverage is fake news. Fake news is negative news coverage.”). Interestingly enough, Trump claimed that he “coined the term Fake News.” See Michael Schaub, *Trump’s Claim to Have Come Up With the Term ‘Fake News’ is Fake News*, Merriam-Webster Dictionary Says, L.A. TIMES (Oct. 9, 2017), <https://perma.cc/72TB-9LSP>. He did not. See *id.* In response to the suggestion that he did, @merriam-webster.com tweeted: “Our research traces ‘fake news’ back to at least 1890. But we won’t be adding the term to the dictionary. . .yet.” See *id.*; see also Merriam-Webster (@MerriamWebster), TWITTER (Oct. 8, 2017, 10:42 AM).

²⁶ Michael E. Miller, *Pizzagate’s Violent Legacy*, WASH. POST, (Feb. 16, 2021), <https://perma.cc/R7DE-MSPZ> (“Pizzagate was an early warning of how misinformation can lead to violence.”).

²⁷ See Kate Samuelson, *What to Know About Pizzagate, the Fake News Story With Real Consequences*, TIM, (Dec. 5, 2016, 12:08 PM), <https://time.com/4590255/pizzagate-fake-news-what-to-know/>.

²⁸ See Press Release, USADC, North Carolina Man Sentenced to Four-Year Prison Term For Armed Assault at Northwest Washington Pizza Restaurant (Jun. 22, 2017), <https://perma.cc/A4Q3-ZK3N>.

²⁹ See *id.* Welch was arrested and pled guilty. Sentenced to 4 years in prison and had to pay \$5,744 in restitution for property damage he caused during the incident. See *id.* Fake news stories have persisted throughout the past decade. There have been claims that Senator Ted Cruz is the Zodiac Killer since early 2013. See Jack Moore, *More Evidence Ted Cruz Might be the Zodiac Killer*, GQ (Mar. 17, 2016) <https://perma.cc/75D6-YBT6>. There were reports that people casted votes for the gorilla that was killed at the Cincinnati Zoo, Harambe, in the presidential election. See Doug Criss, *No, Harambe Didn’t Get 11,000 Votes for President*, CNN (Nov. 10,

A Colorado study published in the Human Condition report declared that “Facebook is a central conduit for the transfer of Fake News.”³⁰ While the most prevalent, Facebook is not the only vehicle for the dissemination of fake news.³¹ Twitter is another channel by which fake news is spread. A study by three MIT scholars found that false news stories spread faster on Twitter than true stories, with the former being 70% more likely to be retweeted than the latter.³² Statista, a statistics portal, found that, as of 2020, almost 40% of those polled had accidentally shared fake news stories.³³

Sometimes verifiable news spawns such overwhelming Fake News response that it shifts the conversation to a point where accurate reporting is ancillary. Consider the recent defamation trial in which actor Johnny Depp, sued model, Amber Heard, alleging that she defamed him in a 2018 Washington Post op-ed.³⁴ The trial played out concurrently in the courtroom and

2016, 1:44 PM), <https://perma.cc/X473-L8SW>. One of the most popular stories circulated in 2019 was that representative Alexandria Ocasio-Cortez (AOC) proposed a nationwide ban to motorcycles. See Samantha Putterman, *Says Alexandria Ocasio-Cortez is proposing a “nationwide motorcycle ban.”* POLITIFACT (Jun. 28, 2019), <https://perma.cc/N6DE-2CKN>. While many fake news stories are about politicians, there are many fake news stories circulating that are not. In October of 2014, the National Reporter published an article claiming that the town of Purdon, Texas had been quarantined after a local family tested positive for Ebola. See Nsikan Akpan, *The Very Real Consequences of Fake News Stories and Why Your Brain Can't Ignore Them*, PBS, (Dec. 5, 2016, 6:06 PM), <https://perma.cc/DF92-MJTW>. The story was shared 330,000 times on Facebook, despite the story being satire because satire began resembling legitimate news sources. See *id.*

³⁰ Toby Hopp et al, *Why Do People Share Ideologically Extreme, False, and Misleading Content on Social Media? A Self-Report and Trace Data-Based Analysis of Countermedia Content Dissemination on Facebook and Twitter*, 46 HUM. COMMUN. RSCH. 357, 378 (2020).

³¹ The Colorado study suggested that more fake news is spread on Facebook as opposed to Twitter. See *id.* at 377. Further, the type of news shared among the platforms is different. There is a positive correlation between the sharing of fake news on Facebook and ideological extremity. See *id.* at 370. Further, the less a person trusts mainstream news media, the more likely they are to share a fake news story on Facebook. See *id.* at 371. Individuals who share fake news on Twitter, however, are more likely to have less social trust. See *id.* at 370-71.

³² See Soroush Vosoughi et al., *The Spread of True and False News Online*, 359 SCI. 1146, 1149 (2018).

³³ See *Share of people who have ever accidentally shared fake news or information on social media in the United States as of December 2020*, STATISTA, <https://perma.cc/6PTZ-W9T4> (last visited Mar. 5, 2023). Between 5-10% were unsure whether they had ever shared a false story. See *id.*

³⁴ Depp v. Heard, CL-2019 02911(Cir. Ct. Fairfax Co. March 1, 2019). See, Depp v. Heard CL—2019 02911(Cir. Ct. Fairfax Co. Aug. 10, 2019)(counter-

on social media platforms.³⁵ During the trial, an unusually large number of “Fake News” reports circulated across social media platforms, particularly TikTok, Twitter, and YouTube, attacking Ms. Heard at a disproportionality larger rate than Mr. Depp.³⁶ Prior to the jury verdict, and with acknowledgement to the vitriolic “reports” legal commentators seemed to agree that Ms. Heard had presented a strong case and was likely to win “despite the strong social media presence against her.”³⁷ Ms. Heard, however, lost at trial.³⁸ And while there is no proof that the intensity of these social media

claim by Amber Heard). See, e.g., Amber Heard, Opinion, *Amber Heard: I Spoke Up Against Sexual Violence – And Faced Our Culture's Wrath. That Has To Change.*, WASH. POST (Dec. 18, 2018, 5:59 P.M.), https://www.washingtonpost.com/opinions/ive-seen-how-institutions-protect-men-accused-of-abuse-heres-what-we-can-do/2018/12/18/71fd876a-02ed-11e9-b5df-5d3874f1ac36_story.html. Heard countersued. See Kallhan Rosenblatt, *Johnny Depp and Amber Heard Defamation Trial: Summary and Timeline*, NBC NEWS (Apr. 17, 2022, 3:13 P.M.), <https://www.nbcnews.com/pop-culture/pop-culture-news/johnny-depp-amber-heard-defamation-trial-summary-timeline-rcna26136>.

³⁵ See, e.g., Danielle Braff, *How Social Media Hijacked the Depp v. Heard Defamation Trial*, 108 ABA J. 24 (2022); Anne Marie Tomchak, *Amber Heard Has Called Out the ‘Unfair’ Role of Social Media in the Defamation Case—Here’s How Algorithms Shaped Our Views During the Trial*, GLAMOUR (June 15, 2022), <https://www.glamourmagazine.co.uk/article/johnny-depp-amber-heard-trial-social-media-algorithms>; Neal Rothschild & Sara Fischer, *America More Interested in Depp-Heard Trial than Abortion*, AXIOS (May 17, 2022), <https://bit.ly/3P44ovg> [<https://perma.cc/CR58-HWM9>] (“The defamation trial between actors and former spouses Johnny Depp and Amber Heard quickly amassed more online attention than some of the country’s biggest and most pressing news stories, including the leaked Supreme Court decision and Russia’s war in Ukraine.”); Julia Jacobs, *Amber Heard: I “Stand by Every Word” of Testimony in the Defamation Trial*, N.Y. TIMES, (June 14, 2022) <https://www.nytimes.com/2022/06/14/movies/amber-heard-today-show.html> (acknowledging the immense negative chatter during the trial).

³⁶ See e.g., Manasa Narayan, *The Daily Wire Spent Thousands of Dollars Promoting Anti-Amber Heard Propoganda*, VICE (May 19, 2022), <https://www.vice.com/en/article/3ab3yk/daily-wire-amber-heard-johnny-depp>; James Creedon, *Truth or Fake: Fake news from the Johnny Depp-Amber Heard Defamation Trial*, FRANCE 24 (May 15, 2018), <https://www.france24.com/en/tv-shows/truth-or-fake/20220518-fake-news-from-the-johnny-depp-amber-heard-defamation-trial>.

³⁷ Anastasia Tsioulcas & Ayesha Rascoe, *On Social Media, Johnny Depp is Winning Public Sympathy Over Amder Heard*, NPR LAW (May 23 2022), <https://www.npr.org/2022/05/23/1100685712/on-social-media-johnny-depp-is-winning-public-sympathy-over-amber-heard>.

³⁸ Julia Jacobs & Adam Bednar, *“Johnny Depp Jury Finds That Amber Heard Defamed Him in Op-Ed”*, N.Y. TIMES (June 1, 2022), <https://www.nytimes.com/2022/06/01/arts/depp-heard-trial.html>.

Fake News stories impacted the jury, the way many learned about the trial points to an area of online influencing that goes beyond ‘disinformation’.

Social media is not the only culprit for the spread of false news stories. Consider the Great Canada Hoax. In May 2021, hundreds of news agencies, including The New York Times,³⁹ NPR,⁴⁰ The Vancouver Sun, and The Washington Post,⁴¹ reported the discovery of a mass grave of indigenous children in Canada. The story created a media frenzy. According to the reports, which were made via print, broadcast, and social media, ground penetrating radar had uncovered the remains of 215 school-age children at a former Residential School for Indigenous Children.⁴² In fact, this event never happened. Academics and journalists debunked the story the following year.⁴³

The mistrust caused by the phenomenon of Fake News goes hand-in-hand with partisan politics.⁴⁴ A 2020 Pew Research Center study revealed that partisan polarization in the use and trust of media sources has widened over the past five years.⁴⁵ The 2020 study compared user trust with a similar study it had conducted in 2015 and found that Republicans have grown increasingly alienated from most of the more established news sources, while Democrats’ confidence in those sources remains stable, and, in some cases,

³⁹ See Ian Austen, ‘Horrible History’: Mass Grave of Indigenous Children Reported in Canada, N.Y. TIMES (May 28, 2021), <https://perma.cc/53VE-757W>.

⁴⁰ See *More Graves Found at New Site, Canadian Indigenous Group Says*, NPR, (July 1, 2021, 8:15 AM), <https://perma.cc/44VD-AJ6K>.

⁴¹ See Amanda Coletta, *Remains of 215 Indigenous Children Discovered at Former Canadian Residential School Site*, WASH. POST (May 28, 2021, 1:19 PM), <https://perma.cc/Y4DQ-754K>.

⁴² See Austen, *supra* note 36.

⁴³ See Dana Kennedy, ‘Biggest Fake News Story in Canada’: Kamloops Mass Grave Debunked by Academics, N.Y. POST, (May 22, 2022, 7:20 AM), <https://perma.cc/UJ5J-QZU7>.

⁴⁴ See *Fake News*, *supra* note 21 (noting that the current iteration of fake news targets stories, “which serve a particular political or ideological purpose”). A 2014 report from the Pew Research Center demonstrates that the number of Americans who express consistently conservative or consistently liberal opinions has doubled over the past two decades from 10% to 21%. See *Political Polarization in the American Public*, PEW RSCH. CTR. (June 12, 2014), <https://perma.cc/UJ5J-QZU7>. Additionally, the study noted that partisan animosity has also increased. See *id.* In each political party, the number of people with a highly negative view of the opposing party has more than doubled since 1994. See *id.* “Most of these intense partisans believe the opposing party’s policies ‘are so misguided that they threaten the nation’s well-being.’” See *id.*

⁴⁵ See Mark Jurkowitz et al., *U.S. Media Polarization and the 2020 Election: A Nation Divided*, PEW RSCH. CTR. (Jan. 24, 2020), <https://perma.cc/H8VX-R2U6>.

has strengthened.⁴⁶ Of the 36 news sources the report asked about, Republicans mistrusted 24.⁴⁷ Democrats, however, tended to trust more sources.⁴⁸

Fake News is a bi-partisan problem.⁴⁹ People from all sides of the political spectrum agree that Fake News is bad for democracy.⁵⁰ According to the Pew findings, 64% of those surveyed believe Fake News presents a risk of reading fabricated stories.⁵¹ The potential for false information leaves

⁴⁶ See *id.* (“Overall, Republicans and Republican-leaning independents view many heavily relied on sources across a range of platforms as untrustworthy. At the same time, Democrats and independents who lean Democratic see most of those sources as credible and rely on them to a far greater degree. . .”).

⁴⁷ See Amy Mitchell et al., *Political Polarization & Media Habits*, PEW RSCH. CTR. (Oct. 21, 2014), <https://perma.cc/Y565-DQHY>.

⁴⁸ See *id.* (“[T]hose with consistently liberal views. . . [e]xpress more trust than distrust of 28 of the 23 news outlets in the survey.”). When considering trustworthiness, 65% of Republicans put their trust in Fox News. See Jurkowitz, *supra* note 42 (noting that after Fox, ABC earns the next level of trust, with 33% of republicans). CNN is the news source for Democrats, with 67% of Democrats trusting the media outlet.

⁴⁹ See Amelia Tate, *Fake News is a Problem for the Left, Too*, THE NEW STATESMAN (Feb. 11, 2017), <https://perma.cc/8W3R-CV5L>.

⁵⁰ See *id.* In 2020, The Pew Research Center, spurred by the 2016 election and Covid-19 pandemic, conducted another study on how American’s navigated fake news in our society. See Amy Mitchell et al., *How Americans Navigated the News in 2020: A Tumultuous Year in Review*, PEW RSCH. CTR. 1 (Feb. 22, 2021), <https://perma.cc/5TBQ-VN4L>. The report found that news consumers who consistently turned only to outlets with right-leaning audiences were more likely to hear about and believe in certain fake news claims. See *id.* at 21. The study also found “made-up news and misinformation have become labels applied to pieces of news and information that do not fit into people’s preferred worldview or narrative – regardless of whether the information was actually made up.” *Id.* The Pew Report suggested a strong bias based on political persuasion. According to the report, 60% of U.S. adults overall said they felt made-up news had a major impact on the outcome of the 2016 election, and an additional 26% said it had a minor impact. See *id.* at 22. Republicans were more likely than Democrats to say it had a major impact (69% vs. 54%). See *id.* In addition, nearly three-quarters of U.S. adults overall (72%) said they had come across at least “some” election news that seemed completely made up, though far fewer – 18% – felt the made-up news they saw was aimed directly at them. See *id.* Democrats who relied on only news outlets with left-leaning audiences were the most likely group (67%) to say that voter fraud has not been a problem associated with mail-in ballots. See *id.* However, the percentage decreased to 43% when compared to democrats who relied on some of these sources but also others. See *id.* Democrats who didn’t rely on any of the major news outlets with left-leaning audiences expressed greater uncertainty on this issue than other Democrats at 32%. See *id.*

⁵¹ See Michael Barthel et al., *Many Americans Believe Fake News is Sowing Confusion*, PEW RSCH. CTR. (Dec. 15, 2016), <https://perma.cc/E77U-NYPV>; see also *AllSides Media*

readers with an unsettled feeling. The threat of Fake News, arguably, dilutes readers' trust in whether what they read about someone is actually true.

Fake News is not only problematic where politics is concerned. Data proves that misinformation and false narratives have proliferated when it comes to Covid-19 stories.⁵² Facebook users shared a video over 27,000 times proclaiming the Covid-19 vaccine contains a tracking microchip that will be injected into those receiving the inoculation.⁵³ Others assert Sinophobic and anti-Semitic theories, asserting that the disease was a bioweapon created by disenfranchised groups.⁵⁴

Fake News, in its current iteration, is polarizing, provocative, and problematic.⁵⁵ In 2017, Tim Berners-Lee, credited as one of the World Wide Webs creators, sees Fake News, both the journalistic stories and the label, as a disturbing trend that could destroy the Internet.⁵⁶ He cites social media's prevalence and the increasing trend among journalists to circulate news stories they don't realize are false as issues creating the threat.⁵⁷ Whether one circulates a false news article, or a label designating an accurate story as false, the specter of Fake News creates and widens a credibility gap among readers, leaving them questioning everything they read.

Bias Chart, ALLSIDES, <https://perma.cc/G8R7-T28G> (last visited Oct. 2, 2022) (noting the ratings bias of social media organizations).

⁵² See, e.g., *Misinformation Accompanies U.S. Expansion of Boosters*, FIRST DRAFT, (Nov. 22, 2021), <https://perma.cc/G4LM-7TWZ> ("As the United States is poised to roll out its Covid-19 vaccine booster program for all adults, misleading information on social media around this latest development is likely to become the focal point of the next round of vaccine misinformation."); Raymond Biesinger, *Fake News and Distrust of Science Could Lead to Global Epidemics*, WIRED (Sept. 1, 2018, 8:00 AM), <https://perma.cc/8K4V-QDHL>, (observing in 2018 that distrust in the news could result in a worldwide pandemic).

⁵³ Reuters Staff, *Fact check: RFID microchips will not be injected with the COVID-19 vaccine, altered video features Bill and Melinda Gates and Jack Ma*, December 4, 2020 at <https://perma.cc/D4BT-FN2X>.

⁵⁴ ADL, *Coronavirus: Prominent Conspiracies*, <https://perma.cc/QV7R-UPA4>.

⁵⁵ See Shelley Hepworth, *Tracking Trump-Era Assault on Press Norms*, COLUM. JOURNALISM REV. (May 25, 2017), <https://www.cjr.org/watchdog/tracking-trump-assault-press-freedom-media-attack.php> ("The fear among some press freedom experts is that even small incidents can erode the media's power to do its job, and create a trickle-down effect in which Trump's words embolden others at the state and local levels.").

⁵⁶ See *World Wide Web Creator Tim Berners-Lee Targets Fake News*, BBC, (Mar. 12, 2017), <https://www.bbc.com/news/technology-39246810>.

⁵⁷ See *id.*

III. DEFAMATION

Truth is at the core of every defamation cause of action. For a plaintiff that means proving that the reader believed a false statement to be true enough to change their opinion of the plaintiff in a way that caused the plaintiff economic or emotional harm.⁵⁸ For a defendant, that means using truth as a defense.⁵⁹ However, proving the truth is problematic in a society conditioned to question the veracity of any post or news story by this Fake News era. The shadow of Fake News that permeates most reports dilutes the likelihood that third parties will unequivocally believe the falsehood spoken against a plaintiff.

A. *The Elements of Defamation*

The Restatement (Second) of Torts defines defamation as “an unprivileged false and defamatory statement concerning another.”⁶⁰ The tort provides a remedy for those who suffer reputational or emotional damage from a third-party communication.⁶¹ At its core, “communication is defamatory if it so harms the reputation of another as to lower them in the estimation of the community or to deter a third person from associating or dealing with them.”⁶²

⁵⁸ See *Ringler Assocs. Inc. v. Maryland Cas. Co.*, 80 Cal.Rptr.2d 136, 149 (Cal. Ct. App. 2000) (“In all cases of alleged defamation, whether libel or slander, the truth of the offensive statements or communications is a complete defense against civil liability.” (quoting *Smith v. Maldonado*, 85 Cal.Rptr.2d 397, 403 (Cal. Ct. App. 1999))).

⁵⁹ See Peter B. Kutner, *What is Truth?: True Suspects and False Defamation*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 4 (2008) (“It is fundamental to the common law of defamation that truth is a complete defense to liability. There is no liability for publication of matter that is found to be true in its defamatory meaning or meanings.”).

⁶⁰ RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977). To create liability for defamation there must be:

- (a) a false and defamatory statement concerning another;
- (b) an unprivileged publication to a third party;
- (c) fault amounting at least to negligence on the part of the publisher [with respect to the act of publication]; and
- (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

⁶¹ See *id.* §§ 621-22.

⁶² *Id.* § 559.

Historically, courts divided defamation into libel, which is written, and slander,⁶³ which is spoken. The difference between the actions for slander and libel is predicated on the notion that slander is spoken and therefore fleeting, soon forgotten and therefore less likely to permanently injure.⁶⁴ Libel is more contemplative and, therefore, according to Justice Cardozo, “deliberate and more malicious, more capable of circulation in distant places, and consequently more likely to be permanently injurious.”⁶⁵

Where defamatory posts are concerned, American courts have taken a normative approach to the libel/slander distinction on the Internet. As a general rule, Internet postings that injure one’s reputation are libel, in large part because they appear on computer screens.⁶⁶ Posts made on Twitter, Facebook, Snapchat, and other platforms are representations “to the eye.”⁶⁷ Although they may be easily deleted and modified, these posts are much more fixed than the spoken word because individuals may preserve messages just by printing them. As the California Supreme Court observed, “the only difference between the publications [on Internet chat boards] and traditionally libelous publications is the defendants’ choice to disseminate the writings electronically.”⁶⁸

Courts are not as decided as to whether challenged videos, as opposed to a post, constitute libel or slander. The Iowa Supreme Court has focused on the video as a fixed medium.⁶⁹ For this reason, it ruled that videos fall under the libel category of defamation.⁷⁰ In contrast, a Ninth Circuit district court allowed a slander challenge to proceed against a defendant who posted potentially defamatory videos on a city’s official social media channel.⁷¹

Many courts, however, have chosen to discard the libel/slander distinction where videos are concerned, instead considering whether the posted content is defamatory without assigning the wrongful social media torts to one of the tort’s subsets. In *Gilmore v. Jones*, a case in which the plaintiff

⁶³ See Leslie Y. Garfield Tenzer, as Leslie Yalof Garfield, *The Death of Slander*, 35 Colum. J.L. & Arts 17, 19 (2011).

⁶⁴ See *id.*

⁶⁵ *Tonini v. Cevasco*, 46 P. 103, 104 (Cal. 1896). See also *id.* at 23.

⁶⁶ See *Varian Med. Sys., Inc. v. Delfino*, 6 Cal. Rptr. 3d 325 (Cal. Ct. App. 2003), *rev’d*, 106 P.3d 958 (Cal. 2005) (noting that Internet postings are classified as libel); see also Garfield, *supra* note 67, at 29 (discussing the opinion in *Varian* and noting that it was one of the first cases to consider how Internet communication should be treated).

⁶⁷ See Garfield, *supra* note 60, at 29.

⁶⁸ See *id.* at 29–30 (citing *Varian Med. Sys., Inc.*, 6 Cal. Rptr. 3d at 343).

⁶⁹ *Hoffman v. Clark*, 975 N.W.2d 656 (Iowa. 2022).

⁷⁰ *Id.*

⁷¹ *Nicita v. Holladay*, 2021 WL 8363204.

charged radio host Alex Jones with posting social media videos accusing the plaintiff of joining a “deep state” coup, the District Court for the Western District of Virginia ruled that the plaintiff stated a defamation claim against the defendant.⁷² The Nevada Supreme Court considered whether videos posted on a video-sharing website constitutes defamation without acknowledging the libel/slander distinction.⁷³

Although libel is sometimes considered the more serious wrong because of its permanence, both libel and slander create a defamation cause of action proof of which grants plaintiffs a remedy.⁷⁴ Defendants, however, can claim truth as a complete defense to either type of defamation. A statement need not be absolutely true in every detail to protect a defendant from liability⁷⁵. In *Curtis Publishing Co. v. Butts*, the Supreme Court ruled that so long as the defendant can show that it “substantially portrayed”⁷⁶ the truth in an article, a libel suit could not stand.⁷⁷ Substantial truth overlooks minor inaccuracies and focuses upon the meaning conveyed by a published statement. Under this rationale, a mother lost her libel suit against the Chicago Sun-Times, after the paper had reported that she had kidnapped her child, because kidnapping was substantially similar to the type of crime for which she could be charged.⁷⁸ A weapons manufacturer lost its claim against a national news reporter who had suggested the manufacturer sold “high pow-

⁷² *Gilmore v. Jones*, 370 F.Supp. 630 (W.D. Va. 2019). *See also* *McKnight v. McKnight*, 2021 WL 2020077 (considering whether the father’s post of a video on his social media account in which he falsely accused his daughter of having sex with a relative constitutes defamation).

⁷³ *Smith v. Zilverberg*, 481 P.3d 1222 (Nev. 2021). *See* *Spero v. Vestal Cent. Sch. Dist.*, 427 F. Supp. 3d 294 (N.D.N.Y. 2019) (failing to distinguish between libel and slander when considering whether a snapchat post was defamatory.)

⁷⁴ *Lent v. Huntoon*, 470 A.2d 1162 (Vt. 1983). *See*, Lisa A. Pruitt, *Her Own Good Name: Two Centuries of Talk about Chastity*, 63 Md. L. Rev. 401 (2004). At common law, libel and slander per se presumed that harm flowed from defamatory comments. In such cases, a court could award damages without any proof of actual harm to reputation. Unlike libel and slander per se, pure slander required that plaintiff prove that actual harm resulted from the impact of the slander on his or her reputation. *See generally*, L. ELDREDGE, *THE LAW OF DEFAMATION* § 3 (1978).

⁷⁵ *See* *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993); *Smith v. Des Moines Pub. Sch.*, 259 F.3d 942, 156 (8th Cir. 2001); *Hildebrant v. Meredith Corp.*, 63 F. Supp. 3d 732 (E.D. Mich. 2014).

⁷⁶ *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 138 (1967).

⁷⁷ *See id.* at 155.

⁷⁸ *Harrison v. Chicago Sun-Times, Inc.*, 793 N.E.2d 760 (Ill. App. 2003).

ered” weapons.⁷⁹ In fact, the manufacturer sold the ingredients to make weapons, which were only effective once the consumer mixed them together.⁸⁰ The plaintiff-manufacturer claimed the report was false and defamatory for suggesting it sold fully capable weaponry, including bombs.⁸¹ The court rejected the plaintiff’s claim, holding that the fact that the ingredients could be combined to create a deadly hazard made the article “substantially true,” providing the defendant with a defense.⁸²

If truth is a publisher’s defense to a defamation claim, the First Amendment is its shield. For more than half a century, the Supreme Court has recognized certain First Amendment protections apply to those who publish false statements about another. In *New York Times v. Sullivan*, the Supreme Court reversed an Alabama Supreme Court decision upholding a defamation claim filed by Montgomery Police Commissioner, L.B. Sullivan, and two other public officials.⁸³ Sullivan, then Commissioner of the Montgomery Public Safety Commission sued The Times for mistakes appearing in a civil rights advertisement entitled “Heed Their Rising Voices.” The advertisement protested the the Montgomery Police Department’s treatment of Rev. Martin Luther King Jr.⁸⁴ Sullivan was not named in the advertisement, but argued that its criticism of the actions of the police hurt his reputation because it was his duty to supervise the police department.⁸⁵ The Alabama judge instructed the jury that the statements were libelous *per se*, meaning that the jury only needed to find that the statements were made of and concerning Sullivan to hold the Times liable.⁸⁶ The Times defended the claim arguing that the paper did not reference Sullivan by name and therefore it was unclear to whom the advertisement, which included certain falsities, pertained.⁸⁷ The lower court rejected this argument and a jury awarded Sullivan \$500,000 in damages.⁸⁸ A unanimous Court reversed, holding that the advertisement’s inaccuracies did not remove its First Amendment pro-

⁷⁹ See *Tannerite Sports, LLC v. NBCUniversal News Grp.*, 864 F.3d 236, 240 (2nd Cir. 2017).

⁸⁰ See *id.* at 241.

⁸¹ See *id.*

⁸² See *id.* at 243–44.

⁸³ *New York Times Co. v. Sullivan*, 376 U.S. 254, 292 (1964).

⁸⁴ See *id.* 256

⁸⁵ See *id.* at 258.

⁸⁶ See *id.* at 262

⁸⁷ See *id.* at 287–88.

⁸⁸ See *id.* at 256.

tections.⁸⁹ The Constitution, they found, affords journalists some leeway in their publishing decisions, thereby allowing immunity from publishing some negligent misstatements.⁹⁰ Further, the “debate on public issues should be uninhibited, robust and wide-open.”⁹¹

The Supreme Court made clear that the balance between one’s First Amendment right and an individual’s right against defamation tips in favor of free speech.⁹² Writing for the majority, Justice Brennan opined that in a world of journalistic deadlines, which sometimes makes it impossible to guarantee absolute truth, even libel must receive some constitutional protection to avoid paralyzing the press; any other conclusion would “shackle the First Amendment.”⁹³ To protect open debate, the Court held that public figures alleging defamation must prove that the offending statements were made with “actual malice” – that is, with knowledge that the statement “was false or with reckless disregard of whether it was false or not.”⁹⁴ By

⁸⁹ See *id.* at 271–72 (“[E]rroneous statement is inevitable in free debate, and that it must be protected if the freedoms of express are to have the breathing space that they need to survive.”) (internal quotation marks omitted).

⁹⁰ See *id.* at 272.

⁹¹ See *id.* at 270.

⁹² See *id.* at 272 (“The interest of the public here outweighs the interest of appellant or any other individual.”).

⁹³ *Id.* at 266.

⁹⁴ *Id.* at 280. The standard may be high. For example, a federal district court in Georgia wavered in determining whether Cardi B., a Grammy award-winning rapper with nearly 17 million YouTube subscribers, 18 million Twitter followers, and 94.8 million Instagram followers, was a public or a limited purpose public person. See *Almánzar v. Kebe*, 2021 WL 5027798, at *6–7 (N.D. Ga. 2021). In *Almánzar v. Kebe*, the court held that it didn’t matter whether plaintiff Cardi B. was a limited or all-purpose public figure because she is able to establish that the defendant acted with actual malice. See *id.* at *7. Plaintiff won \$2.5 million in damages in a defamation action against YouTuber Tasha K, when the jury found Tasha K acted with actual malice in calling Cardi B. a “prostitute” and stating that she had “Herpes.” See Jury Verdict, *Almánzar v. Kebe*, 2022 WL 863033 (N.D. Ga. 2022). However, because the malice standard is a high burden, it can also be a powerful defense for a defendant. For example, in *McKee v. Cosby* the plaintiff, an actress who had accused renowned actor William Cosby of rape also sued Cosby for defamation after a letter Cosby’s attorney wrote attacking the plaintiff’s credibility was published in the Daily News. See *McKee v. Cosby*, 847 F.3d 54, 58 (1st Cir. 2017). On appeal the plaintiff asserted her dispute with Cosby was “purely a matter of private concern.” *Id.* at 62. The plaintiff then, relying on the Supreme Court’s decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, asserted she only needed to plead that Cosby acted with negligent intent toward her. See *id.* In his defense, Cosby asserted the plaintiff was a limited purpose public figure because she was an actress with a 50-year acting career who had sought attention from his public sexual scandal. See *id.* at 61. Therefore, any libel he may be guilty of had to have been done maliciously.

raising the “intent” threshold for those publishing articles about public persons, the Court guaranteed journalists wide latitude in reporting. The opinion identified two rationales for heightening the burden for public figures. First is the importance of preserving the “national commitment to the principle that debate on public issues should be uninhibited.”⁹⁵ Second is the fact that public figures enjoy “equal if not greater access than most private citizens to media of communication.”⁹⁶

New York Times Co. v. Sullivan clearly articulated the meaning of “actual malice” for purposes of defamation.⁹⁷ Public persons suing for defamation must prove that the defendant acted with actual knowledge that the published statement is false or published with a reckless disregard for the truth.⁹⁸ The case, however, failed to define “public figures.” It also left open the question of whether the “actual malice” standard also applied to private citizens. Its failure to clarify the meaning of public person, as the Court perceived it ten years after *Sullivan*, led to the “general problem of

See id. The Appellate Court agreed with Cosby. *See id.* at 62. It held the plaintiff by thrusting herself into the “forefront” of Cosby’s sexual controversy and coming forward with her rape accusations became a limited purpose public figure with the burden of having to plausibly plead with either “‘knowledge’ that there was a false or ‘reckless disregard’ for their truth or falsity.” *See id.* A standard, she ultimately could not meet.

The line between a limited purpose public figure and a private person is hazy at best. Social media has become a platform for private individuals to garner attention and transform that attention into on-line public careers. In *Flynn v. Cable News Network*, the plaintiffs sued CNN when the news network displayed an image of the plaintiff captioned with a graphic alleging the plaintiff was a QAnon follower. *See Flynn v. Cable News Network, Inc.*, 2021 WL 6290046, 1 (S.D.N.Y. 2022). CNN argued the plaintiff, an individual employed at a seafood factory who had never held public office or a civic position, but who owned a popular Twitter account was a public person because of their “substantial social media following.” *Id.* at *11. The court disagreed, holding that although the plaintiff had a significant following, they did not use their twitter account to specifically gain access to the media or to gain celebrity status, therefore they were a private individual entitled to their first amendment rights. *See id.* at 12. As such, the plaintiff only needed to claim CNN acted with negligence. *See id.*

⁹⁵ *See id.* at 270. This rationale, which was heavily discussed by Justice Brennan in the majority, “reflects a theory of the First Amendment grounded in democratic self-governance.” *See* Thomas E. Kadri & Kate Klonick, *Facebook v. Sullivan: Public Figures and Newsworthiness in Online Speech*, 93 S. CAL. L. REV. 37, 44 (2019). The focus is the notion that the public, as the electorate, needs to have all the necessary information to engage in self-government. *See id.*

⁹⁶ *See Id.* 305–06 (Goldberg, J., concurring).

⁹⁷ *Id.* at 280.

⁹⁸ *See id.*

reconciling the law of defamation with the First Amendment.”⁹⁹ In *Gertz v. Robert Welch, Inc.*, the Court took up this public figure/private figure distinction and held that those who do not fall into the category of a public person or public official need only demonstrate that the defendant acted negligently.¹⁰⁰

Gertz concerned an attorney, Elmer Gertz, who had been hired in a civil case to represent the family of a boy killed by Richard Nuccio, a police officer.¹⁰¹ A year after the family retained Gertz, a right-wing magazine, John Birch Society, published an article that included a reference to Gertz as a “communist-fronter,” “Leninist,” and participant in Marxist Activities, all of which were highly objectionable at the time.¹⁰² None of these statements were true, and Gertz sued the publishing company that produced the magazine for defamation, arguing that the article had injured his reputation as a lawyer.¹⁰³ The lower courts applied the actual malice standard set out in *Sullivan*. The Supreme Court reversed, ruling that Gertz was not a public person, relieving him of *Sullivan*’s higher burden of proof.¹⁰⁴ According to the Court, ordinary citizens should be allowed more protection from libelous statements than individuals in the public eye.¹⁰⁵ Public officials had more resources available to them to counter false statements, while private citizens did not have that advantage.¹⁰⁶ Further, public officials have voluntarily exposed themselves to a greater risk of defamatory statements being made regarding them, but private citizens have not.¹⁰⁷

The *Gertz* standard defines a public person as one who “invite[s] attention and comment.”¹⁰⁸ The Court acknowledged that this could take several forms. Those who assume roles of special prominence in society are public persons.¹⁰⁹ Those who hold government office are also considered public

⁹⁹ See *id.* at 333.

¹⁰⁰ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974) (holding that private figures do not need to prove actual malice to recover compensatory damages).

¹⁰¹ See *id.* at 325.

¹⁰² *Id.* at 326.

¹⁰³ See *id.* at 326–27.

¹⁰⁴ See *id.* at 352.

¹⁰⁵ See *id.* at 343–44.

¹⁰⁶ See *Gertz*, 418 U.S. at 344.

¹⁰⁷ See *id.* at 350 (“In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.”).

¹⁰⁸ *Id.* at 345

¹⁰⁹ See *id.*

figures for purposes of proving defamation.¹¹⁰ Finally, there are instances in which a person is not so prominent that they are easily known, but rather they “thrust themselves to the forefront” of controversies to influence the resolution of the issues involved.¹¹¹ Thus, some persons are deemed public figures for all purposes,¹¹² whereas others are considered a limited public person. However, both must prove malice.¹¹³ When a plaintiff is not a public figure for all purposes, courts must look to the nature and extent of the plaintiff’s participation in the particular controversy giving rise to the defamation to determine whether to impose the additional burden of proving actual malice.¹¹⁴

In addition to wrestling with the public-private distinction, the *Gertz* opinion also weighed in on the opinion-fact distinction. Observers suggested that the Court’s dicta suggested a constitutional privilege for opinion.¹¹⁵ In 1990, the Supreme Court announced the limits of *Gertz*’s decision as it related to the opinion-fact distinction.¹¹⁶ That year, the court considered whether a newspaper’s opinions enjoyed constitutional protection.¹¹⁷ The case stemmed from a newspaper article about Michael Milkovich, a high school wrestling coach.¹¹⁸ Milkovich testified at a hearing concerning a fight that had occurred at a wrestling match between rival schools.¹¹⁹ Reporter Theodore Diadiun published an article in a local newspaper about the fight and subsequent hearings writing, “anyone who attended the meet. . . knows in his heart that Milkovich. . . lied at the hearing.”¹²⁰

¹¹⁰ See *id.* at 344.

¹¹¹ See *id.* at 345.

¹¹² See *id.*

¹¹³ See *id.*

¹¹⁴ See *id.* at 352.

¹¹⁵ See *id.* at 339–40 (“Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.”).

¹¹⁶ See *supra* notes 75–106 and accompanying text. However, the Supreme Court did decide other defamation cases during this time. See, e.g., *Curtis Publishing Co. v. Butts* 388 U.S. 130 (1967) (holding that public officials asserting a defamation claim must show actual malice); *Rosenblatt v. Baer*, 383 U.S. 75 (1966) (holding that government officials have to prove actual malice); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (holding that the actual malice standard applies to private individuals if the matter involved is a discussion of public interest).

¹¹⁷ See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 3 (1990).

¹¹⁸ See *id.*

¹¹⁹ See *id.*

¹²⁰ *Id.* at 5.

Milkovich sued Diadiun for libel, and Diadiun defended on the ground that the statement in the article was his opinion.¹²¹ The Court considered whether a reasonable factfinder could conclude that Diadiun's authored piece implied an assertion of fact that Milkovich had perjured himself.¹²² Analyzing this question, the Supreme Court emphasized that Diadiun's failure to use "loose, figurative, or hyperbolic language" and the article's "general tenor" would indicate to a reader that Diadiun "was seriously maintaining that [Milkovich] committed the crime of perjury."¹²³ The Court further concluded that Diadiun's perjury claim could be proved true or false based on a comparison of Milkovich's testimony before the athletics association and his testimony before the Court.¹²⁴ The Court concluded that Milkovich had stated a claim against Diadiun because Diadiun's statement purporting that Milkovich had committed perjury was not opinion.¹²⁵ Further, the Court declined to recognize a "wholesale defamation exemption for anything that might be labeled 'opinion,'"¹²⁶ noting that "expressions of 'opinion' may often imply an assertion of objective fact."¹²⁷ The Court, instead, recognized constitutional protection from a defamation claim for "imaginative expression" and "loose, figurative, [and] hyperbolic language."¹²⁸

Critics of the *Milkovich* decision observe that it failed to leave guidance or a bright line test to discern the difference between opinion and fact.¹²⁹ There is a consensus among both state and lower federal courts that the crucial difference between statements of fact and opinion is whether a reasonable person "would be likely to understand it as an expression of the speaker's or writer's opinion, or as a statement of existing fact."¹³⁰ How-

¹²¹ See *id.* at 3.

¹²² See *id.* at 21.

¹²³ See *id.* at 21.

¹²⁴ *Id.*

¹²⁵ See *id.* ("[T]he connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false.")

¹²⁶ *Id.* at 18.

¹²⁷ *Id.*

¹²⁸ *Id.* at 20–21.

¹²⁹ See, e.g., Seth P. Robert, *Post-Milkovich Defamation: Is Everyone Still Entitled to Their Opinion?*, 65 ST. JOHN'S L. REV. 1105, 1108 (1991) (noting that the Supreme Court found that "no bright line exists between fact and opinion.").

¹³⁰ *Schwartz v. American College of Emergency Physicians*, 215 F.3d 1140, 1146 (10th Cir. 2000) (citing New Mexico law) (there are a ton of cases that say this – will make this a string cite)

ever, “loose, hyperbolic language and its general tenor” remain unactionable per the Supreme Court.¹³¹

Lower courts agree that the question of whether a statement is opinion or fact is one for the judge and not the jury.¹³² The Constitution protects expressions of opinion and, thus, the trial judge must act as a gate keeper for the defendant’s constitutional rights. Some courts, however, will send the question to the jury if the statement is ambiguous enough that it could be interpreted as fact.¹³³

¹³¹ *Seaton v. TripAdvisor*, 728 F.3d 592, 594-595 (6th Cir. 2013) (including hotel in list of 2011 Dirtiest Hotels not actionable as a statement of fact).

¹³² *See, e.g., Bindrim v. Mitchell*, 155 Cal. Rptr. 29, 39, *cert. denied*, 444 U.S. 984 (1979) (“Where the statements are unambiguously fact or opinion, . . . the court determines as a matter of law whether the statements are fact or opinion.”); *Handberg v. Goldberg*, 831 S.E.2d 700, (Va. 2019) (“[W]hether an alleged defamatory statement is one of fact or opinion is a question of law to be resolved by the trial court.”) (quoting *Tharpe v. Saunders*, 737 S.E.2d 890 (2013)); *Hyland v. Raytheon Technical Services Co.*, 670 S.E.2d 746 (2009) (“Expressions of opinion, however, are constitutionally protected and are not actionable as defamation. Therefore, before submitting a defamation claim to a jury, a trial judge must determine as a matter of law whether the allegedly defamatory statements contain provably false factual statements or are merely statements of opinion.”).

¹³³ *See Slaughter v. Friedman*, 649 P.2d 886 (1982); *Aldoupolis v. Globe Newspaper Co.*, 500 N.E.2d 794, (1986); *Nevada Independent Broadcasting Corp. v. Allen*, 664 P.2d 337 (1983); *see also Marchiondo v. Brown*, 649 P.2d 462, 472 (1982) (“Where statements are unambiguously fact or opinion, the court determines as matter of law whether statements are fact or opinion. However, where alleged defamatory remark could be determined either as fact or opinion, and the court cannot say as matter of law that statements were not understood as fact, there is triable issue of fact for jury.”).

For an example of jury instructions, see Jury Instructions, *Atzen v. Atzen*, No. LACL127382, 2014 WL 7208822 (Iowa Dist. Oct. 16, 2014) (“Defendant claims that statements were her opinion. Opinion is absolutely protected under the First Amendment To determine whether a statement is opinion or a statement of fact you may consider the following factors: (1) the precision and specificity of the statement or whether it is indefinite and ambiguous; (2) whether the statement can be objectively proved or disproved; (3) The literary context or social context in which the statement was made. This factor focuses on the category of the statement, the style of writing, and the intended audience. . . . If you find the statements were defendant’s opinion, defendant is not liable.”).

In *Branda v. Sanford*, the Supreme Court of Nevada reversed finding that the allegedly defamatory statements regarding the plaintiff being a “bitch” were susceptible to more than one construction and the trial court erred in not allowing the jury to resolve the ambiguity. *See Branda v. Sanford*, 637 P.2d 1223, 1225 (Nev. 1981). The court found that the words did “not exist in isolation” and that “where ‘bitch’ has been modified by ‘low-lived’ and ‘whoring’ that is “at least susceptible of a defamatory construction.” *Id.* at 1226.

Although the Court decided *Sullivan*, *Gertz* and *Milkovich* prior to today's online culture, these holdings continue to govern.¹³⁴ Those who have placed themselves in the public eye must prove that the defendant acted with malice. Ordinary citizens need not prove this higher intent level. Plaintiffs bringing a defamation claim must show that the published content was fact not opinion. And in any event, the statement must be false.

The element of fact versus opinion is the most problematic for many of today's plaintiffs considering the characteristics of Internet posts, which are often unreflective thoughts and unedited, spontaneous statements. Those charged with determining whether the challenged language is fact or opinion tend to recognize Internet posts as hyperbole or personal rants, and therefore not meeting the fact element of defamation. Judges are more likely to rule that a defendant's speech is opinion rather than fact.¹³⁵ Consequently, plaintiffs find it more difficult to sustain a defamation cause of action when the alleged defamatory statement appears online, rather than in print.

B. Online Defamation

Online statements typically do not possess the hallmarks of traditional defamatory remarks, which include editing and thoughtfulness. Those who post online tend to do so in a quick, non-reflective, and passing nature. Reporters no longer take the time to compose a report, instead, they rush to Twitter. This brisk, and often thoughtless, "writing" differs from the reflective, reviewed, and contemplated untruthful publications that generally supported defamation claims.¹³⁶

While courts are clear that online defamation is libel and not slander,¹³⁷ they are less clear in their judgments on whether language published online is categorically opinion rather than fact. The trend among New York courts is to view the culture of Internet communications as distinct from that of print media.¹³⁸ Unlike the reflective, highly edited content that characterizes books, magazines and newspapers, the Internet "encourage[s] free-

¹³⁴ *But see* *Berisha v. Lawson*, 973 F.3d 1304, *cert. denied*, 141 S. Ct. 2424, 2429 (2021) (Gorsuch, J., dissenting) (calling into question the relevance of actual malice in the Internet age).

¹³⁵ *See e.g.*, *DeFrancesco v. Brooks*, 2022 WL 17975047 (Pa. Sup. Ct. 2022); *Anick v. Bonsante*, 2022 WL 17574578 (Minn. Ct. App. 2022); *Golan v. Daily News, L.P.*, 175 N.Y.S.3d 871 (N.Y. Sup. Ct. 2022).

¹³⁶ *See supra* at notes 65–67.

¹³⁷ *See supra* notes 67–72 and accompanying text.

¹³⁸ *See* *Sandals Resort Int'l. Ltd. v. Google, Inc.*, 925 N.Y.S.2d 407, 415 (N.Y. App. Div. 2011).

wheeling, anything-goes writing style.”¹³⁹ In *Bauer v. Brinkman*, an Iowa court found that a statement labeling the defendant a “slum lord” in the comments section of a Facebook post was hyperbole and opinion.¹⁴⁰ Conversely, a Delaware court found calling a defendant a “slum lord” was sufficient to sustain a defamation suit when the words appeared in a news article.¹⁴¹ As in *Bauer*, many courts have concluded that reasonable readers would not consider on-line statements factual in the way they would if the same statement appeared in traditional print.¹⁴²

1. The Intent of a Casual “Poster”

When considering a statement’s legal potency, courts will look to the context in which the challenged language appears. In *Boulger v. Woods*, for example, a district court for the Southern District of Ohio found that Twitter’s limitation of 140 characters left a publisher with “insufficient [space] to surround . . . thought[s] with context and nuance.”¹⁴³ *Boulger* concerned a tweet that the actor James Woods posted about Trump rally attendee Portia Boulger.¹⁴⁴ Woods’ post accompanied the picture of the attendee with the caption, “So-called #Trump ‘Nazi’ is a #BernieSanders agitator/operative?”¹⁴⁵ Boulger received hundreds of harassing messages because of the tweet and sued Woods for defamation.¹⁴⁶ The court granted Woods’ motion to dismiss noting that the “nature of a tweet” did not lend itself to the single interpretation of the statement as defamatory.¹⁴⁷

A musical promotion company lost its defamation claim against famed singer Mariah Carey for her tweet that read, “Devastated my shows in Chile,

¹³⁹ See *id.* (holding the content and tone of the defendant’s alleged slanderous e-mail was opinionative in nature akin to an on-line message board).

¹⁴⁰ See *Bauer v. Brinkman*, 958 N.W.2d 194, 197 (Iowa 2021).

¹⁴¹ See *Rumunno v. Cawley*, 705 A.2d 1029, 1031 (Del. Sup. 1997) (holding defendant’s use of the word “slumlord” at a community meeting could be interpreted as a factual defamatory statement due to the written context in which it appeared).

¹⁴² See, e.g., *id.*; *Kaufman v. Islamic Soc’y. of Arlington*, 291 S.W. 3d 130 (Tex. Ct. App. 2009); *Doe v. Cahill*, 885 A.2d 451, 467 (Del. 2005); *Bauer v. Brinkman*, No. 20-0563, 2020 WL 7021558, at *4 (Iowa Ct. App. Nov. 20, 2020); *Rollins Ranches, LLC v. Watson*, No. 0:18-cv-03278-SAL, 2021 WL 5355650, at *10 (D.S.C. Nov. 17, 2021).

¹⁴³ *Boulger v. Woods*, 306 D. Supp. 3d 985, 1002 (S.D. Ohio 2018).

¹⁴⁴ See *id.* at 997.

¹⁴⁵ See *id.* at 999 (holding it was unclear whether the social media context of the defendant’s tweet indicated it was an fact or opinion).

¹⁴⁶ See *id.* at 990.

¹⁴⁷ See *id.* at 1002.

Argentina & Brazil had to be canceled. My fans deserve better than how some of these promoters treated them.”¹⁴⁸ The tweet was linked to an E! Entertainment report that suggested the South American arm of her tour had been canceled due to promoter negligence.¹⁴⁹ Promoters argued that the tweet suggested they were unfit to promote future concerts and, as a result, the tweet had caused them harm.¹⁵⁰ The appellate court looked to the context of the comment and concluded that Carey’s tweet was opinion.¹⁵¹ What Carey’s fans “deserve” and whether they “deserve better” than how some promoters “treated them” is conjectural and vague. “[It] may mean different things to different people, and [is] not capable of being proven true or false because of [its] subjective, relative meaning.”¹⁵² The court determined that Carey’s tweet was an expression of her “abstract desire” that her fans deserved to attend her concerts.¹⁵³

In *Jacobus v. Trump*, a New York state trial court observed that courts have consistently interpreted words in online forums as opinions rather than fact.¹⁵⁴ That case concerned a tweet then-candidate Donald Trump posted about a political strategist, suggesting the strategist begged the candidate for a job.¹⁵⁵ The court found the false statement of fact that the plaintiff “begged us for a job” was not actionable, since it was posted in a space where the reader would anticipate audience would reasonably anticipate the use of “epithets, fiery rhetoric or hyperbole.”¹⁵⁶ Following this same reasoning, a federal district court in California ruled, and the Ninth Circuit agreed, that adult film actress Stormy Daniels could not sustain a successful defamation claim against former President Trump for a tweet he posted about her.¹⁵⁷ In that tweet, Trump claimed Daniels lied about a warning she received to stay away from Trump.¹⁵⁸ The court ruled that Trump’s tweet,

¹⁴⁸ See *Rumunno v. Cawley*, 705 A.2d 1029, 1031 (Del. Sup. 1997) (holding defendant’s use of the word “slumlord” at a community meeting could be interpreted as a factual defamatory statement due to the written context in which it appeared).

¹⁴⁹ See *id.* at 31.

¹⁵⁰ See *id.*

¹⁵¹ See *id.* at 37

¹⁵² *Id.*

¹⁵³ *Id.* at 38.

¹⁵⁴ See *Jacobus v. Trump*, 51 N.Y.S.3d 330, 339 (NY Sup. Ct. 2017).

¹⁵⁵ *Id.* Trump. Posted “@cherijacobus begged us for a job. We said no and she went hostile. A real dummy!”

¹⁵⁶ *Id.* at 340.

¹⁵⁷ See *Clifford v. Trump*, 339 F. Supp. 3d 915, 926–27 (C.D. Cal. 2018), *aff’d*, 818 Fed. Appx. 746, 747 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1377 (2021).

¹⁵⁸ See *id.* at 926.

“A sketch years later about a nonexistent man. A total con job, playing the Fake News Media for Fools (but they know!)”¹⁵⁹ constituted rhetorical hyperbole and was not actionable as defamation.¹⁶⁰ Tweets, many courts have found, convey an opinion and not a fact to the reasonable reader.¹⁶¹ The same is thought of content posted to Facebook. In *Mucerino v. Martin*, a District Court for the Middle District of Tennessee ruled that “the vague nature of Facebook post[s] and the lack of any extenuating context. . . proved fatal to plaintiff’s claims for defamation.”¹⁶²

In *Ganske v. Mensch*, a case in the Southern District of New York, the court ruled against a journalist who sued an Internet blogger for defamation.¹⁶³ The plaintiff argued that he had suffered harm to his reputation and lost his employment when the defendant’s tweet accused him of being “xenophobic.”¹⁶⁴ The court first considered the platform on which the statement was made, in this case Twitter.¹⁶⁵ Similarly to *Boulger*, the New York district court held that Twitter is an informal forum of opinions and that no reader would conclude that the defendant’s tweet was factual.¹⁶⁶ Furthermore, the court held that “xenophobic,” in the context of the disputed tweet, could not be verified and thus was a “classic opinion that amounts to an ‘epithet[], fiery rhetoric, [and] hyperbole.’”¹⁶⁷ Despite the defendant linking the tweet to the plaintiff’s employer (the AP), which resulted in the plaintiff’s loss of employment, the statement was held to be a non-defamatory opinion, in large part, because it was posted on Twitter.¹⁶⁸

¹⁵⁹ *Id.* at 922 n.3.

¹⁶⁰ *See id.* at 926.

¹⁶¹ *See, e.g., Id., Mirage Entertainment, Inc. v. FEG Entretenimientos S.A.*, 326 F. Supp.3d 26, 32 (S.D.N.Y. 2018); *Sandals Resorts Int. Ltd v. Google, Inc.* 86 A.D.3d 32, 42-43 (2011)(“so-called social media, such as Facebook and Twitter, is increasingly deemed to attract less credence to allegedly defamatory remarks than other context); Garfield, *supra* note 60, at 19.

¹⁶² *See Mucerino v. Martin*, No. 3:21-cv-00284, 2021 WL 558637 (M.D. Tenn. Nov. 20, 2021) (dismissing developer’s claim against homeowner who posted statements on Facebook regarding developer’s faulty business practices including that the developer ‘intends to file for bankruptcy’ and no plans to fix (estate problems) and plans to move out of state.’”).

¹⁶³ *See Granske v. Mensch*, 480 F. Supp. 3d 542, 545 (S.D.N.Y. 2020).

¹⁶⁴ *See id.* at 553 (finding the defendant’s tweet was hyperbole).

¹⁶⁵ *Id.* at 552.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 553. (quoting *600 West 115th St. Corp. v. Von Gutfeld*, 603 N.E.2d 930 (1992))

¹⁶⁸ *See id.* (noting that statements made in the context of an Internet forum are more likely to be found to be opinion due to the “generally informal and unedited nature of these communications”).

When made in the context of online reviews, posters enjoy an elevated level of exclusion from the threat of defamation claims. Reviews posted on Yelp are almost categorically opinion.¹⁶⁹ In *Woodbridge Structured Funding, LLC v. Pissed Consumer*, a New York trial court ruled that disgruntled words that appeared in the context of an online complaint website required dismissal of plaintiff's defamation claim.¹⁷⁰ A hotel owner was unsuccessful in his defamation suit against TripAdvisor, which placed his hotel on its list of Dirtiest Hotels.¹⁷¹ Readers, the court held, could not reasonably conclude that the websites list was asserting a fact.¹⁷²

The same is true for comments made in chat rooms.¹⁷³ A New York Supreme Court ruled that, under the First Amendment, "protected opinions" and "matters of public interest" based on an honest opinion enjoy First Amendment protection.¹⁷⁴ Congress has gone so far as to protect individuals' right to post criticisms and potentially defamatory comments about companies: The Consumer Review Fairness Act (CRFA) provides immunity to individuals who share comments about a business's products, services, or conduct, in any forum, including social media.¹⁷⁵

Courts consider Internet and social media posts conjecture and vague, resulting in judges designating these posts as opinions rather than facts. In

¹⁶⁹ See *Glasser v. Berzner*, No. SACV 21-661, 2021 WL 4352809 at *3 (C.D. Cal. June 23, 2021) (reviewing of a jazz club on Yelp led to a defamation action); See also *Levin v. Abramson*, No. 18-cv-1723, 2020 WL 2494649 (N.D. Ill. May 15, 2020) (reviewing of a law firm on Yelp led to a defamation action). But see, *Lowell v. Wright*, 512 P.3d 403, 409 (Or. 2022) ("The Supreme Court has not abolished the media/non media distinction in the context of defamation actions.").

¹⁷⁰ *Matter of Woodbridge Structured Funding, LLC. V. Pissed Consumer*, 6 N.Y.S.3d 2, 2 (N.Y. App. Div. 1st Dep't. 2015) (denying claim against individual who posted statements stating that defendant "lies to their clients" and will "forget about you and . . . all the promises they made to you.").

¹⁷¹ *Seaton v. TripAdvisor LLC*, 728 F.3d 592, 594 (6th Cir. 2013).

¹⁷² *Id.* at 599–600.

¹⁷³ See, e.g., *Doe v. Cahill*, 884 A.2d 451, 465 (Del. 2005) ("Blogs and chat rooms tend to be vehicles for the expression of opinions; by their very nature, they are not a source of facts or data upon which a reasonable person would rely."); *Marczeski v. Law*, 122 F.Supp.2d 315, 327 (D. Conn. 2000).

¹⁷⁴ U.S. CONST. amend. I; See also *Yelp Lawsuit Defamation—Questions Answered*, YELP, <https://donotpay.com/learn/yelp-lawsuit-defamation/> (last visited Oct. 5, 2022) (Yelp is not classified as a publisher, so they are not legally liable for reviews posted by third parties who use their services under the communications decency act of 1996).

¹⁷⁵ The Consumer Review Fairness Act of 2016, 15 U.S.C. § 15(b); See also *Consumer Review Fairness Act: What Businesses Need to Know*, F.T.C., <https://www.ftc.gov/business-guidance/resources/consumer-review-fairness-act-what-businesses-need-know> (last visited Oct. 3, 2022).

so doing, judges preclude juries from considering the plaintiffs' defamation claims. Today's general trend toward immediate, online speech has led to a sharp decline in jury awards for defamation claims.¹⁷⁶ As Justice Gorsuch recently observed, "[s]tatistics show that the number of trials involving defamation. . . claims has declined dramatically over the past few decades [T]hose rare plaintiffs able to secure a favorable jury verdict often have their awards reversed on appeal."¹⁷⁷

2. The Reporter's Prerogative

Present-day online journalism has led courts to define a contextual difference from traditional print or broadcast. Reporters no longer take the time to compose their reports; instead, they rush to Twitter. Journalists race to get a story out ahead of their competitors, leaving them without time to confirm their facts.¹⁷⁸ The idea of rushing to get the story out has contributed to the Fake News phenomenon. For example, immediately after news broke regarding the 2021 shootings at Sandy Hook elementary school, CNN reported that the shooter was Ryan Lanza, a 24-year-old living in Hoboken, N.J.¹⁷⁹ Other reputable news agencies including the N.Y. Times and Fox News reported the same facts, some outlets posted Ryan Lanza's picture on their website.¹⁸⁰ In fact, the shooter was Adam Lanza, Ryan's brother. The incident prompted these organizations to admit their "rush to publish" prompted their journalism error.¹⁸¹

¹⁷⁶ See *Berisha v. Lawson*, 141 S. Ct. 2424, 2426 (2021) (Thomas, J., dissenting); see also *infra* notes 176–80 and accompanying text.

¹⁷⁷ *Id.* at 2428.

¹⁷⁸ See, e.g., Jack Murtha, *In a Rush to be First, Mets Reporter Tweets too Soon*, COLUM. JOURNALISM REV. (Aug. 4, 2015), https://www.cjr.org/analysis/baseball_insiders_called_it_one.php (noting that a journalist tweeted too soon that a trade between the New York Mets and Milwaukee Brewers had gone through, and the deal ended up falling through).

¹⁷⁹ See Rebecca Greenfield, *How the Interent Got the Wrong Lanza*, THE ATLANTIC (Dec. 14, 2012), <https://www.theatlantic.com/national/archive/2012/12/adam-lanza-ryan-lanza-facebook-profile/320458/>.

¹⁸⁰ See Kashmir Hill, *Blaming The Wrong Lanza: How the Media Got it Wrong in Newtown*, FORBES (Dec. 17, 2012), <https://www.forbes.com/sites/kashmirhill/2012/12/17/blaming-the-wrong-lanza-how-media-got-it-wrong-in-newtown/?sh=5a8b268d7601>.

¹⁸¹ See, e.g., Margaret Sullivan, *"Getting it First or Getting it Right?"*, N.Y. TIMES (Dec. 22, 2012) <https://www.nytimes.com/2012/12/23/public-editor/getting-it-first-or-getting-it-right.html> ("But on the first day, The Times reported on its Web site that the gunman was Ryan Lanza, attributing that information to other news

In 2022, former vice-presidential candidate Sarah Palin sued the New York Times for publishing an opinion piece that she claimed defamed her.¹⁸² The author of the piece “facing a tough and self-imposed deadline” made a late-day post that alleged that the former Alaskan governor’s political action committee was somehow connected to a shooting that had made national headlines.¹⁸³ Palin sued the Times arguing that the post was an example of the “lamestream media” getting its facts wrong.¹⁸⁴ Both the jury and trial judge rejected Palin’s claim, finding the reporting an honest mistake.¹⁸⁵ Further, in *Clark v. Viacom International Inc.*, the Sixth Circuit ruled in favor of online news sites that wrongly stated the reasons for the dismissal of two American Idol contestants.¹⁸⁶ In *Fairbanks v. Roller*, the District Court for the District of Columbia ruled that a journalist’s retweet of an allegedly defamatory photo lacked the level of intent necessary to sustain a defamation claim since the journalist posted the photo to continue public debate on the matter.¹⁸⁷

Even Supreme Court Justices have recognized the relative lack of responsible reporting in the iInternet age as it relates to defamation. In *Berisha v. Lawson*, Justices Thomas and Gorsuch questioned the implications of contemporary publications in the context of Fake News and journalistic integrity.¹⁸⁸ Citing the need to revisit *Sullivan’s* actual malice standard, Justice Gorsuch observed that “publishing without investigation, fact-checking, or

organizations. It was actually his brother, Adam Lanza. Mistakes don’t get much worse.”).

¹⁸² See David Folkenflik, *Sarah Palin Loses Defamation Case Against ‘The New York Times’*, NPR (Feb. 15, 2022, 3:14 PM), <https://www.npr.org/2022/02/15/1080804339/nyt-sarah-palin-loses-lawsuit>.

¹⁸³ See *id.*

¹⁸⁴ See *id.*

¹⁸⁵ See *id.*

¹⁸⁶ See *Clark v. Viacom International Inc.*, 618 Fed. Appx. 495, 511 (6th Cir. 2015).

¹⁸⁷ See *Fairbanks v. Roller*, 314 F.Supp.3d 85, 93 (D.D.C. 2018) (holding that plaintiff journalist did not act with actual malice in publishing a photo depicting defendant making a hand gesture with caption “just two people doing a white power hand gesture” on social media because there was public debate about whether the specific hand gesture meant ‘okay,’ or whether it was a symbol of the white power movement, and given the social media posts, including those from activist herself, it could have been concluded that Plaintiff “intended her photo and hand gesture to provoke, or troll, people like [defendant]—whether because gesture was actually offensive or because they would think it was offensive.”).

¹⁸⁸ See *Berisha v. Lawson*, 973 F.3d 1304, *cert. denied*, 141 S. Ct. 2424 (2021) (denying certiorari on the issue of whether plaintiff was a public figure).

editing” has become the norm for today’s online journalists.¹⁸⁹ Justice Gorsuch further noted that “business incentives fostered by our new media world” stack the deck “against those with traditional (and expensive) journalistic standards.”¹⁹⁰ Citing several Fake News reports, including Pizzagate, Justice Thomas noted the proliferation of falsehoods in online reporting and the real harm these lies can create.¹⁹¹

The Internet has exacerbated the lack of accuracy in the world of journalistic deadlines, a problem about which Justice Brennan raised concern in *Sullivan*.¹⁹² Today’s readers tolerate journalists’ mistakes in exchange for instant reporting. This kind of forgiveness plays into the narrative of acceptable misinformation. Consequently, stories with potentially defamatory misinformation lose their potency because of readers’ tacit understanding that, in a rush to publish, journalists forgo their responsibility to ensure that every fact in a story is accurate.

Case law suggests a presumption against finding Internet posts defamatory. Courts have described internet forums as informal forums of opinion. Opinions, according to the Supreme Court, are not actionable as defamation.

¹⁸⁹ See *Berisha* 141 S. Ct. at 2428 (Gorsuch, J., dissenting) (emphasis omitted); see also *id.* at 2427 (“No doubt, this new media world has many virtues—not least the access it affords those who seek information about and the opportunity to debate public affairs. At the same time, some reports suggest that our new media environment also facilitates the spread of disinformation.”).

¹⁹⁰ See *id.*

¹⁹¹ See *id.* at 2425 (Thomas J., dissenting) (“The lack of historical support for this Court’s actual-malice requirement is reason enough to take a second look at the Court’s doctrine. Our reconsideration is all the more needed because of the doctrine’s real-world effects. Public figure or private, lies impose real harm. Take, for instance, the shooting at a pizza shop rumored to be ‘the home of a Satanic child sex abuse ring involving top Democrats such as Hillary Clinton,’ Kennedy, ‘Pizzagate’ Gunman Sentenced to 4 Years in Prison, NPR (June 22, 2017), www.npr.org/section/thetwo-way/2017/06/22/533941689/pizzagate-gunman-sentenced-to-4-years-in-prison. Or consider how online posts falsely labeling someone as ‘a thief, a fraudster, and a pedophile’ can spark the need to set up a home-security system. Hill, A Vast Web of Vengeance, N. Y. TIMES (Jan. 30, 2021), www.nytimes.com/2021/01/30/technology/change-my-google-results.html. Or think of those who have had job opportunities withdrawn over false accusations of racism or anti-Semitism. See, e.g., Wemple, Bloomberg Law Tried To Suppress Its Erroneous Labor Dept. Story, WASHINGTON POST (Sept. 6, 2019), www.washingtonpost.com/opinions/2019/09/06/bloomberg-lawtried-suppress-its-erroneous-labor-dept-story. Or read about Kathrine McKee—surely this Court should not remove a woman’s right to defend her reputation in court simply because she accuses a powerful man of rape.” (citation omitted)).

¹⁹² See *supra* notes 76–81 and accompanying text.

Even statements that look like fact are immune from liability.¹⁹³ Courts have denied defamation challenges to Yelp and TripAdvisor reviews, finding the statements protected opinions and matters of public interest.¹⁹⁴

Potentially defamatory journalist posts enjoy a level of protection when their stories appear on the internet. In at least three instances, a judge ruled in favor of journalists that posted incorrect, and potentially defamatory content, noting that the instantaneous demands of their audience justify misstating online content, even if the content is potentially defamatory.¹⁹⁵

In his dissent in *United States v. Ressam*, Justice Breyer observed, “[N]owhere. . . can words alone explain every nuance of their intended application. Context matters.”¹⁹⁶ The trier of fact must consider the general context of the statement when deciding whether words are defamatory.¹⁹⁷ Defamation, in the context of the Internet, is very hard to prove.

IV. DEFAMATION’S SLIPPERY SLOPE TOWARD OBSOLESCENCE

The Internet has eroded defamation to its barest bones. Courts tend to treat thoughtless tweets and reflexive posts as libel rather than slander, even though they lack the kind of contemplative reflection that was historically a hallmark of libel at common law.¹⁹⁸ Those seeking redress for allegedly defamatory social media content are less likely to prevail than those with the same type of claims through traditional media outlets.¹⁹⁹ Although the elements of defamation remain the same regardless of whether the statements

¹⁹³ See *supra* at notes 142–144.

¹⁹⁴ See *supra* at notes 171–174.

¹⁹⁵ See *Palin v. N.Y. Times Co.*, 588 F. Supp. 3d 375, 408–10 (S.D.N.Y. 2022); *Clark v. Viacom Int’l Inc.*, 618 Fed. Appx. 495, 511 (6th Cir. 2015); *Fairbanks v. Roller*, 314 F. Supp. 3d 85, 83 (D.D.C. 2018).

¹⁹⁶ *United States v. Ressam*, 533 U.S. 272, 283 (2008) (Breyer, J., dissenting); see also *Stanton v. Metro Corp.*, 438 F.3d 119, 125 (1st Cir. 2006) (“[W]e must examine the article in its totality in the context in which it was uttered or published and consider all words used, not merely a particular phrase or sentence”) (citing *Amrak Productions, Inc. v. Morton*, 410 F.3d 69, 73 (1st Cir. 2005) (internal quotation marks omitted); *Hogan v. Winder*, 762 F.3d 1096, 1106 (10th Cir. 2014) (quoting *O’Connor v. Burningham*, 165 P.3d 1214, 1222 (Utah 2007)) (“[D]efamatory meaning is a matter of context. ‘A reviewing court can, and must, conduct a context-driven assessment of the alleged defamatory statement and reason an independent conclusion about the statement’s susceptibility to a defamatory interpretation.’”).

¹⁹⁷ See, e.g., *Boulger v. Woods*, 306 D. Supp.3d 985, 1001 (S.D. Ohio 2018)

¹⁹⁸ See *Garfield*, *supra* note 60, at 29.

¹⁹⁹ See generally section III.B1.

are made online or in print, “Internet plaintiffs” have a *de facto* higher hurdle to jump in order to prevail on their claims.²⁰⁰

Because the factuality of a statement is a question of law, a plaintiff must first convince a judge that the offending statement is fact and not opinion.²⁰¹ In most instances, courts find that Internet and social media statements are hyperbole or opinion.²⁰² If a plaintiff succeeds in persuading the judge, then the issue of whether the statement defamed the plaintiff heads to the jury.²⁰³ A jury faced with a defamation claim must determine whether the statement of fact harmed the defendant’s reputation or livelihood to the extent that it caused the plaintiff to incur damages.²⁰⁴ The prevalence of Fake News creates another layer of difficulty for the Internet plaintiff, who must convince the jury that the statement was true.

Traditionally, newsrooms and journalists were institutions one turned to for objective reality. Today, the Fake News label has destroyed journalistic credibility. Indeed, it has destroyed the credibility of most things posted on the Internet.²⁰⁵ Consequently, few believe what they read on the Internet to be true. If most do not believe the statement is true, they cannot find that it caused reputational harm.

A. *A Slow and Steady Erosion*

Since the 1960s, the judiciary has limited plaintiffs’ ability to succeed in defamation claims. The decisions in *Sullivan* and *Gertz* increased the difficulty for public figures, and those with limited public figure status, to succeed by requiring them to prove actual malice against a defendant, a

²⁰⁰ See, e.g., *Sandals Resort Int’l. Ltd. v. Google, Inc.*, 925 N.Y.S.2d 407, 415 (N.Y. App. Div. 2011); *Kaufman v. Islamic Soc’y. of Arlington*, 291 S.W. 3d 130 (Tex. Ct. App. 2009); *Doe v. Cahill*, 885 A.2d 451, 467 (Del. 2005); *Bauer v. Brinkman*, No. 20-0563, 2020 WL 7021558, at *4 (Iowa Ct. App. Nov. 20, 2020); *Rollins Ranches, LLC v. Watson*, No. 0:18-cv-03278-SAL, 2021 WL 5355650, at *10 (D.S.C. Nov. 17, 2021).

²⁰¹ See *Price v. Viking Penguin, inc.*, 881 F.2d 1426, 432 (8th Cir. 1989), *cert denied*, 110 S. Ct. 757 (1990); *Ollman v. Evans*, 750 F.2d 970, 978 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985); *Michel v. NYP Holding, Inc.*, 816 F.3d 686, 698 (11th Cir. 2016).

²⁰² See *supra* notes 120–35 and accompanying text.

²⁰³ See RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977).

²⁰⁴ See *generally* *New York Times Company v. L.B. Sullivan*, 376 U.S. 254 (1964); *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, (1974); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 3 (1990).

²⁰⁵ See *supra* at note 57.

standard higher than the mere negligence standard allowed for individuals who are not of community interest.²⁰⁶

The rise of Internet use, particularly social media, presents plaintiffs with yet another hurdle.²⁰⁷ The malice standard differentiated public and private plaintiffs, however, both shared the responsibility of proving that the challenged statement was a fact, not an opinion, a question decided as a matter of law by the judge.²⁰⁸ As *Boulger*, *Jacobus*, *Ganske* and other cases illustrate, judges have tended to find that statements made on the Internet are opinions and not facts.²⁰⁹ Courts have characterized these statements as hyperbole, attitude, or posturing.²¹⁰ Even where the statements seem more likely to appear as facts, courts look to their context, ruling often that statements made on the Internet are rarely meant to be factual.²¹¹

Regardless of where in the procedural process plaintiffs fall short, the evidence is clear that the combined effect of Supreme Court limitations on proof and the increased belief that social media posts are mostly opinion has limited the plaintiff's ability to succeed in a defamation claim.

²⁰⁶ See generally *New York Times Company v. L.B. Sullivan*, 376 U.S. 254 (1964); *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 3 (1990).

²⁰⁷ Defamation lawsuits are on the decline generally. In *Berisha v. Lawson*, 141 S.Ct. 2424 (Memorandum 2021), Justice Gorsuch wrote that “[s]tatistics show that the number of trials involving defamation. . . claims has declined dramatically over the past few decades. . . . [T]hose rare plaintiffs able to secure a favorable jury verdict often have their awards reversed on appeal.” *Id.* at 2426. In the 1980s, there were, on average, 27 per year; in 2017, there were 3. See David A. Logan, *Rescuing Our Democracy by Rethinking* *New York Times Co. v. Sullivan*, OHIO ST. L.J., 759, 808–10 (2020) (surveying data from the Media Law Resource Center). Four decades ago, defamation actions were brought against media companies with relative frequency; there were over 27 federal defamation trials in the 1980s; in 2017 there were three. See *Berisha*, 141 S. Ct. at 2428 (Thomas, J., dissenting). Michael Norwick, writing for the Media Law Center, suggests that this statistic is due in large part to defendants’ ability to succeed on their motions to dismiss. See Logan, *supra* note, note 179, at 808–10. (citing MLRC 2018 Report on Trials and Damages (“MLRC 2018 Report”)); see also Michael Norwick, *Chapter 3: The Empirical Reality of Contemporary Libel Litigation*, in *NEW YORK TIMES v. SULLIVAN: THE CASE FOR PRESERVING AN ESSENTIAL PRECEDENT*, MEDIA L. RESOURCE CTR. (Mar. 2022), https://medialaw.org/chapter-3-the-empirical-reality-ofcontemporary-libel-litigation/#_ftn3ZQW.

²⁰⁸ See *supra* at notes 62–64.

²⁰⁹ See generally *Boulger v. Woods*, 306 D. Supp.3d 985 (S.D. Ohio 2018); *Jacobus v. Trump*, 51 N.Y.S.3d 330 (NY Sup. Ct. 2017); *Granske v. Mensch*, 480 F.Supp.3d 542 (S.D.N.Y. 2020).

²¹⁰ See *supra*, notes 124–35 and accompanying text.

²¹¹ See *supra*, notes 136–61 and accompanying text.

B. Destroying Defamation

If the Supreme Court and social media have eroded defamation, Fake News has destroyed it. Today, convincing a jury that a false statement purporting to be fact has defamed a plaintiff is difficult given the dual issues of society's objective mistrust of the media and the understanding that information on the Internet is generally opinion, not fact. Fake News sows confusion and makes it almost impossible for jurors to believe that any statement has the level of credibility necessary to cause harm.²¹²

To be clear, in some instances fake news is so intolerable that a jury will, in fact, find for the plaintiffs. A Connecticut jury found conspiracy theorist Alex Jones liable for defamation based on his assertion that the government had faked the Sandy Hook shootings.²¹³ But often, plaintiffs are unsuccessful where the challenged language is conflated with untruths. Fox News successfully defended itself against a lawsuit claiming that it had aired false and deceptive content about the coronavirus,²¹⁴ even though its reporting was, in fact, untrue.²¹⁵ In a similar case, a federal judge dismissed a defamation case against Fox News for Tucker Carlson's report that the plaintiff had extorted then President Donald Trump. In reaching its conclusion, the judge observed that Carlson's comments were rhetorical hyperbole and that the reasonable viewer "'arrive[s] with the appropriate amount of skept-

²¹² *But see*, Lafferty v. Jones, 246 A.3d 429 (Conn. 2020), *cert. denied*, 141 S. Ct. 2467 (2021) (holding defendant Alex Jones responsible for defamation based on "fake news" that parents lied about the Sandy Hook shooting).

²¹³ *See* Cecilia Lenzen, *Jury Awards Parents of Sandy Hook Shooting Victim \$4.1 Million in Defamation Case Against Alex Jones*, TEX. TRIB. (Aug. 4, 2022, 4:00 PM), <https://www.texastribune.org/2022/08/04/alex-jones-sandy-hook-trial/>.

²¹⁴ *See* Wash. League for Increased Transparency & Ethics v. Fox, No. 81412-1, 2021 WL 3910574 at *1 (Wash. Ct. App. Aug. 30, 2021) (dismissing claim against Fox news despite having published fake news regarding the Covid-19); *see also* Christine Hauser, *Alex Jones Retracts Chobani Claims to Resolve Lawsuit*, N.Y. TIMES (May 17, 2017), <https://www.nytimes.com/2017/05/17/us/alex-jones-chobani-lawsuit.html> (retracting comments that Chobani's Idaho factory "was connected to the 2016 sexual assault of a child and a rise in tuberculosis cases.").

²¹⁵ *See* Wash. League for Increased Transparency & Ethics, 2021 WL 3910574 at *3 ("[Plaintiff] . . . argues that Fox's statements regarding the coronavirus and the disease it causes, COVID-19, made during a global pandemic, are not protected because they are false. We reject this contention because the challenged statements implicate matters of public concern and thereby fall squarely within First Amendment protections.").

ticism.’”²¹⁶ Reports of media success in defending against defamation claims further fuels media mistrust.

The current polarization caused by identity politics is furthering the about the tendency for Americans to mistrust the media. Sarah Palin announced that the goal of her recent defamation case against The New York Times was to reveal that the “lamestream media” publishes “fake news.”²¹⁷ Because of the “Big Lie,” a story about the legitimacy of the 2020 Presidential election that continues to dominate the news, one in three voters believe the election was stolen.²¹⁸ Misinformation and false narratives have proliferated when it comes to Covid-19 stories.²¹⁹ Pew Research Center studies reveal the high degree to which individuals mistrust the news. According to the Center, 71% of American journalists and 50% of U.S. adults say that fake news is a very big problem.²²⁰ An article in the *Journal of Communications Inquiry* noted that most teens reject journalistic objectivity.²²¹

If jurors believe that no reasonable person could credit a challenged statement as true, they cannot find that the statement the plaintiff asserts is

²¹⁶ *McDougal v. Fox News Network, LLC*, 489 F.Supp.3d 174, 184 (S.D.N.Y. 2020) (quoting *600 West 115th St. Corp. v. Von Gutfeld*, 603 N.E.2d 930, 936 (N.Y. 1992)).

²¹⁷ See Folkenflik, *supra* note 172.

²¹⁸ See, e.g., *Misinformation Accompanies U.S. Expansion of Boosters*, FIRST DRAFT (Nov. 22, 2021), <https://firstdraftnews.org/articles/misinformation-accompanies-us-expansion-of-boosters/> (“As the United States is poised to roll out its Covid-19 vaccine booster program for all adults, misleading information on social media around this latest development is likely to become the focal point of the next round of vaccine misinformation.”); Raymond Biesinger, *Fake News and Distrust of Science Could Lead to Global Epidemics*, WIRED (Sept. 1, 2018, 8:00 AM), <https://www.wired.co.uk/article/how-fake-news-could-lead-to-epidemics> (observing in 2018 that distrust in the news could result in a worldwide pandemic).

²¹⁹ See, e.g., *Misinformation Accompanies U.S. Expansion of Boosters*, FIRST DRAFT (Nov. 22, 2021), <https://firstdraftnews.org/articles/misinformation-accompanies-us-expansion-of-boosters/> (“As the United States is poised to roll out its Covid-19 vaccine booster program for all adults, misleading information on social media around this latest development is likely to become the focal point of the next round of vaccine misinformation.”); Raymond Biesinger, *Fake News and Distrust of Science Could Lead to Global Epidemics*, WIRED (Sept. 1, 2018, 8:00 AM), <https://www.wired.co.uk/article/how-fake-news-could-lead-to-epidemics> (observing in 2018 that distrust in the news could result in a worldwide pandemic).

²²⁰ See Jeffrey Gottfried et al., *Journalists Sense Turmoil in Their Industry Amid Continued Passion for Their Work*, PEW RSCH. CTR. (June 14, 2022), <https://www.pewresearch.org/journalism/2022/06/14/journalists-highly-concerned-about-misinformation-future-of-press-freedoms/>.

²²¹ See generally Regina Marchi, *With Facebook, Blogs, and Fake News, Teens Reject Journalistic ‘Objectivity’*, 36 J. COMM’N INQUIRY 246, 256 (2012).

defamatory caused harm. An essential element of defamation is that the defendant's remarks damaged the plaintiff's reputation. The large number of people who believe news is fake, the media's rush to publish, and external attacks on credible journalism have created a problematization of truth among members of society. The potential for defamatory harm is minimal when every news story is questionable. Ultimately, this paper argues that the presence of Fake News is a blight on the tort of defamation and, like the credibility of present-day news organizations, will erode it to the point of irrelevance.

V. CONCLUSION

Fake News is destroying defamation claims. The purpose of defamation is to compensate people for damage to their reputations caused by statements that were untrue. Plaintiffs must demonstrate that they were hurt by a false statement which was accepted as true. The insidious infiltration of Fake News labels on traditional journalistic efforts has meant that jurors are unlikely to find that members of society believe a false statement to be true in a way that sufficiently caused harm to the plaintiff. The present-day mockery of objective truth has further eroded the ancient tort of defamation.

