

# REVIVING THE LOST TORT OF DEFAMATION: A PROPOSAL TO STEM THE FLOW OF FAKE NEWS

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*In the landmark case of New York Times v. Sullivan, the Supreme Court established the “public official” doctrine to protect the press in its reporting on government officials. Since that case, the tort of defamation, in existence for hundreds of years, has been whittled down into irrelevancy. At the same time, the traditional concept of “verification journalism” has given way to a press culture that values publishing scandal-ridden news “first” over accurate reporting of important stories. This has opened the door to the spread of “fake news,” which marked the 2016 presidential election. With Sullivan and its progeny blocking any meaningful legal recourse for those who are victims of fictitious stories, fake news represents a very real threat to democracy.*

*Part I of this Note explores the issue of fake news: what it is, who makes it, and why it is made. Part II examines the issues facing the modern media outlets, such as a decline in quality journalism, as well as the roles they play in disseminating fake news. Part III shows how Sullivan has rendered the tort of defamation meaningless—instead of promoting a strong and legitimate press corp—and causes widespread public cynicism of both the press and our elected officials. Finally, Part IV proposes scaling back the extreme protections of Sullivan in order to hold the purveyors of fake news responsible for their actions while still protecting news organizations when they commit legitimate errors.*

## TABLE OF CONTENTS

I. FAKE NEWS .....	206
A. Defining Fake News.....	207
B. Why is Fake News Produced?.....	210
1. Ideological Motivations .....	210
2. State-Sponsored Propaganda .....	211
3. Financial Gain .....	212

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4. Satire .....	212
C. How Fake News is Spread.....	213
II. MAINSTREAM MEDIA.....	214
A. Modern Media and the 24-Hour News Cycle .....	214
B. Media and the Internet.....	216
C. The Mixed-Media Culture, 24-Hour News Cycle, and the Internet Combine to Create Credibility Issues for the Mainstream Media. ....	217
III. DEFAMATION .....	219
A. Modern Tort Laws of Defamation .....	219
B. <i>Sullivan</i> 's Roots in the Civil-Rights Movement.....	221
C. Defamation after <i>Sullivan</i> .....	223
IV. SOLUTION .....	225
CONCLUSION .....	230

## I. FAKE NEWS

“Fake news” and its role in the 2016 election has been a subject of national discussion.<sup>1</sup> During the lead-up to the election, many pundits predicted a landslide victory for Hillary Clinton,<sup>2</sup> and President Trump’s victory caught many, including his own campaign, by surprise.<sup>3</sup> As many try to make sense of the results, experts have begun to investigate the role fake news may have played.<sup>4</sup> Regardless of the connection between fake news and the 2016 election, the public’s confidence in the media reporting the news “fully, accurately and fairly” has reached its lowest level in polling history.<sup>5</sup> Increasingly, Americans believe that the mainstream press is publishing fake news.<sup>6</sup>

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1. Mark Verstraete et al., *Identifying and Countering Fake News* 4 (Arizona Legal Studies, Working Paper No. 17-15, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3007971](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3007971).

2. Natalie Jackson, *HuffPost Forecasts Hillary Clinton Will Win with 323 Electoral Votes*, HUFFPOST (Nov. 7, 2016, 6:51 PM), [https://www.huffingtonpost.com/entry/polls-hillary-clinton-win\\_us\\_5821074ce4b0e80b02cc2a94](https://www.huffingtonpost.com/entry/polls-hillary-clinton-win_us_5821074ce4b0e80b02cc2a94).

3. Karen Tumulty et al., *Donald Trump Wins the Presidency in Stunning Upset Over Clinton*, WASH. POST (Nov. 9, 2016), [https://www.washingtonpost.com/politics/election-day-an-acrimonious-race-reaches-its-end-point/2016/11/08/32b96c72-a557-11e6-ba59-a7d93165c6d4\\_story.html?utm\\_term=.250043d5628c](https://www.washingtonpost.com/politics/election-day-an-acrimonious-race-reaches-its-end-point/2016/11/08/32b96c72-a557-11e6-ba59-a7d93165c6d4_story.html?utm_term=.250043d5628c).

4. Kathryn Perrott, *‘Fake News’ on Social Media Influenced US Election Voters, Experts Say*, ABC (Nov. 14, 2016), <http://www.abc.net.au/news/2016-11-14/fake-news-would-have-influenced-us-election-experts-say/8024660>.

5. Leandra Bernstein, *Poll: Mainstream Media Continues to Lose the Public’s Trust*, SINCLAIR BROADCAST GROUP (Feb. 17, 2017), <http://wjla.com/news/nation-world/main-stream-media-continue-to-lose-the-publics-trust>.

6. Sharyl Attkisson, *Americans Don’t Trust the Media, and for Good Reason*, THE HILL (Aug. 18, 2017, 11:21 AM), <http://thehill.com/blogs/pundits-blog/media/347091-americans-dont-trust-the-media-and-for-good-reason>.

As Nelson Mandela observed, a critical, independent, and investigative press is the “lifeblood” of a democracy.<sup>7</sup> If his observation is accurate, then the United States faces a serious problem as fake news threatens the legitimacy of the democratic institutions upon which the United States was founded. If the public cannot trust the stories news organizations produce, then a critical, independent, and investigative press is useless. The prospect of fake news directly affecting our civil institutions fundamental to the United States, such as our election system, is also very concerning. Therefore, this Note will examine what fake news is, the role of the modern press in society and the spread of fake news, defamation and its shortcomings in preventing fake news, and finally this Note will propose a solution to preventing fake news while still maintaining the freedom of the press.

#### A. Defining Fake News

The term *fake news* has come to encompass a number of concepts with varying definitions.<sup>8</sup> In their report on *fake news*, University of Arizona James E. Rogers College of Law faculty defined *fake news* to include various related concepts such as satire, propaganda, trolling, and hoaxes.<sup>9</sup> One study from Yale defined *fake news* as articles that are intentionally and verifiably false.<sup>10</sup> This study specifically excluded news stories that contain false facts that the study categorized as “unintentional reporting mistakes” from its definition of *fake news*.<sup>11</sup> For example, the study listed a report regarding a Martin Luther King, Jr. bust in the Oval Office as an example of an unintentional reporting mistake.<sup>12</sup> On January 20, 2017, *Time* reporter Zeke Miller reported that the Trump White House removed the bust of Martin Luther King, Jr. from the Oval Office because Miller “had looked for it and not seen it.”<sup>13</sup> A half hour later, when Miller began receiving more inquiries about the missing bust, he asked a White House staff member about the location of the bust.<sup>14</sup> The bust had been in the Oval Office the entire time.<sup>15</sup>

Buzzfeed recently published an article containing analysis and research on fake news that received much attention.<sup>16</sup> The BuzzFeed article showed that during the 2016 election, the 20 most popular fake news stories outperformed the 20 most popular real news stories based on shares, reactions, and comments on Facebook.<sup>17</sup>

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7. Nelson Mandela, *Address by Nelson Mandela to the International Press Institute Congress*, NELSON MANDELA FOUND. (Feb. 14, 1994), [http://www.mandela.gov.za/mandela\\_speeches/1994/940214\\_press.htm](http://www.mandela.gov.za/mandela_speeches/1994/940214_press.htm).

8. Verstraete et al., *supra* note 1, at 5.

9. *Id.* at 5–7.

10. Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PROSPECTIVES 211, 213 (2017).

11. *Id.* at 214.

12. *Id.*

13. Nancy Gibbs, *A Note to Our Readers*, TIME (Jan. 24, 2017), <http://time.com/4645541/donald-trump-white-house-oval-office/>.

14. *Id.*

15. *Id.*

16. Allcott & Gentzkow, *supra* note 10, at 214; Verstraete, *supra* note 1, at 6.

17. Craig Silverman, *This Analysis Shows How Viral Fake Election News Stories Outperformed Real News on Facebook*, BUZZFEED (Nov. 16, 2016),

Buzzfeed's analysis found that 17 of the top 20 most popular fake news stories were overtly pro-Donald Trump or anti-Hillary Clinton.<sup>18</sup> Another of BuzzFeed's surveys found that most Americans who remembered a fake news headline viewed the story as credible.<sup>19</sup> These facts led multiple commentators to suggest that Donald Trump won the 2016 election due to the influence of fake news.<sup>20</sup>

As such, researchers generally limit their analyses of fake news to websites dedicated to producing fictitious news articles and usually do not look at the role mainstream-media outlets have in disseminating fictitious news stories.<sup>21</sup> While fake news is generally associated with online sources,<sup>22</sup> fake news stories also find their way into more traditional and mainstream media sources.<sup>23</sup> Although websites dedicated to producing fictitious news that swayed the 2016 election have been the familiar narrative,<sup>24</sup> it is important not to discount the powerful role mainstream media plays in today's political discourse.

To begin, the digital footprint of fake news is relatively small compared with the vast amount of information on the Internet. For instance, it was widely reported that fake Facebook accounts traced to Russian sources purchased \$100,000 in political advertisements during the 2016 election.<sup>25</sup> These Facebook advertisements, numbering over 3,000, focused on divisive social issues and ran between June 2015 and May 2018.<sup>26</sup> However, during the fourth quarter of 2016, Facebook's advertising revenue was \$8.81 billion, or roughly \$96 million a day.<sup>27</sup> Together, the fake ads accounted for roughly 0.1% of Facebook's daily advertising revenue.<sup>28</sup> The \$100,000 in Russian political ads proves to be even more trivial when

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<https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook>.

18. *Id.*

19. Craig Silverman & Jeremy Singer-Vine, *Most Americans Who See Fake News Believe It, New Survey Says*, BUZZFEED (Dec. 6, 2016, 8:31 PM), <https://www.buzzfeednews.com/article/craigsilverman/fake-news-survey>.

20. Allcott & Gentzkow, *supra* note 10, at 212.

21. *Id.* at 214; Verstraete et al., *supra* note 1, at 4–7; Silverman, *supra* note 17.

22. Allcott & Gentzkow, *supra* note 10, at 217.

23. See Daniel Payne, *16 Fake News Stories Reporters Have Run Since Trump Won*, THE FEDERALIST (Feb. 6, 2017), <http://thefederalist.com/2017/02/06/16-fake-news-stories-reporters-have-run-since-trump-won/>.

24. Duncan Watts & David Rothschild, *Don't Blame the Election on Fake News. Blame It on the Media.*, COLUM. JOURNALISM REV. (Dec. 5, 2017), <https://www.cjr.org/analysis/fake-news-media-election-trump.php>.

25. Scott Shane & Vindu Goel, *Fake Russian Facebook Accounts Bought \$100,000 in Political Ads*, N.Y. TIMES (Sept. 6, 2017), <https://www.nytimes.com/2017/09/06/technology/facebook-russian-political-ads.html>.

26. *Id.*

27. Josh Constine, *Facebook Beats in Q4 with \$8.81B Revenue, Slower Growth to 1.86B Users*, TECHCRUNCH, <https://techcrunch.com/2017/02/01/facebook-q4-2016-earnings/> (last visited Jan. 21, 2019).

28. Watts & Rothschild, *supra* note 24.

compared to the \$2.65 billion spent on the presidential election and the \$6.8 billion spent on all federal elective offices.<sup>29</sup>

Buzzfeed did show that the top-20 fake news stories generated more engagement on Facebook than the top-20 real news stories.<sup>30</sup> These fake news stories generated over 8.7 million shares, reactions, and comments on Facebook from August 1, 2016 until Election Day.<sup>31</sup> However, it helps to again place these findings in perspective. Facebook had over 1.8 billion users in 2016.<sup>32</sup> If each one of these 1.8 billion users took a single action (share, like, etc.), then the 20 most popular fake stories would only account for 0.006% of user actions.<sup>33</sup>

Even outside of news stories, the impact of Russian-linked fake election news was small when compared with the vast sea of information that is on the Internet. Although there were 3,814 Kremlin-connected Twitter accounts posting almost 176,000 tweets during the 2016 election,<sup>34</sup> this is a small fraction of the 328 million active Twitter users.<sup>35</sup> Less than 1% of the U.S. population viewed the Kremlin-connected tweets.<sup>36</sup> Additionally, tweets from Russian-linked accounts represented less than 0.75% of all 2016 election-related tweets.<sup>37</sup> Fake Russian videos on YouTube received around 309,000 total views, accounting for less than a fraction of the 5 billion YouTube videos that are watched every day.<sup>38</sup> While inflammatory posts distributed by Russian agents reached 126 million users on Facebook,<sup>39</sup> this represents only 7% of Facebook's worldwide users.<sup>40</sup>

Despite all the attention paid to fake news websites, a Harvard and MIT study showed that mainstream news services like *The New York Times*, *The Washington Post*, and CNN continue to dominate the media ecosystem.<sup>41</sup> Only

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29. Jonathan Berr, *Election 2016's Price Tag: \$6.8 Billion*, CBS NEWS (Nov. 8, 2016, 5:56 PM), <https://www.cbsnews.com/news/election-2016s-price-tag-6-8-billion/>.

30. Silverman, *supra* note 17.

31. *Id.*

32. Constine, *supra* note 27.

33. Watts & Rothschild, *supra* note 24.

34. Yoree Koh, *Twitter Reveals 1,000 More Accounts Tied to Russian Propaganda Agency*, WALL ST. J. (Jan. 19, 2018, 9:20 PM), <https://www.wsj.com/articles/twitter-reveals-1-000-more-accounts-tied-to-russian-propaganda-agency-1516414856?mod=e2fb>.

35. Daniel Sparks, *How Many Users Does Twitter Have*, MOTLEY FOOL (Apr. 27, 2017, 11:06 AM), <https://www.fool.com/investing/2017/04/27/how-many-users-does-twitter-have.aspx>.

36. Koh, *supra* note 34.

37. Watts & Rothschild, *supra* note 24.

38. *Id.*

39. Mike Isacc & Daisuke Wakabayashi, *Russian Influence Reached 126 Million Through Facebook Alone*, N.Y. TIMES (Oct. 30, 2017), <https://www.nytimes.com/2017/10/30/technology/facebook-google-russia.html>.

40. Constine, *supra* note 27.

41. Rob Faris et al., *Partisanship, Propaganda, and Disinformation: Online Media and the 2016 U.S. Presidential Election*, BERKMAN KLEIN CTR. FOR INTERNET & SOC'Y HARV. U. (Aug. 16, 2017), <https://cyber.harvard.edu/publications/2017/08/mediacloud>.

Breitbart News, a far-right news and opinion website,<sup>42</sup> and the Huffington Post had a presence in the media landscape comparable to or larger than mainstream news services.<sup>43</sup>

Overall, fake news stories from websites that primarily produce fictitious news would need to be 30 times more influential than a standard TV campaign ad to account for Trump's margin of victory.<sup>44</sup> Some researchers suggest that the mainstream media, and its focus on "horserace or personal issues" rather than policy issues, was a much bigger factor in the 2016 election given the relatively minimal reach of websites and social-media accounts producing fictitious news stories.<sup>45</sup> So while websites that primarily produce fake news are problematic, any solution addressing fake news should also keep in mind the powerful role mainstream news services play in the modern media landscape. As such, this Note will use a broad definition of *fake news* to include articles or stories that are verifiably false.

### B. Why is Fake News Produced?

Fake news is produced for several reasons. Some producers are driven by political or ideological motivations.<sup>46</sup> Other producers, usually state sponsored, engage in the production of fake news for propaganda purposes.<sup>47</sup> Others are driven purely by a desire for profits or a combination of the above reasons.<sup>48</sup>

#### 1. Ideological Motivations

Some fake-news producers are driven by ideological goals. Colorado-resident Justin Coler owns a fake-news company called "Disinfomedia" and originally set out to highlight the extremism of the "alt-right."<sup>49</sup> Coler wanted to publish blatantly fictional stories that would infiltrate "the echo chambers of the alt-right" so he could denounce those stories as false and discredit right-wing media outlets.<sup>50</sup> Disinfomedia now owns many fake news websites with realistic sounding names, such as NationalReport.net, USAToday.com.co, and WashingtonPost.com.co.<sup>51</sup> One of the top-five most popular fake news stories from the 2016 election—a report that an FBI agent's investigation of Hillary Clinton's e-mails was killed in a murder-suicide—came from Disinfomedia's website

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42. Jessica Roy, *What is the Alt-Right? A Refresher Course on Steve Bannon's Fringe Brand of Conservatism*, L.A. TIMES (Nov. 14, 2016, 5:45 PM), <http://www.latimes.com/nation/politics/trailguide/la-na-trailguide-updates-what-is-the-alt-right-a-refresher-1479169663-htmlstory.html>.

43. Faris et al., *supra* note 41.

44. *Economist Calculates Impact of Fake News on Trump's Election*, NPR (Jan. 23, 2017), <https://www.npr.org/2017/01/23/511267145/economist-calculates-impact-of-fake-news-on-trumps-election>.

45. Watts & Rothschild, *supra* note 24.

46. *See infra* Subsection I.B.1.

47. *See infra* Subsection I.B.2.

48. *See infra* Subsection I.B.3.

49. Laura Sydel, *We Tracked Down a Fake-News Creator in the Suburbs. Here's What We Learned*, NPR (Nov. 23, 2016, 3:31 PM), <https://www.npr.org/sections/alltechconsidered/2016/11/23/503146770/npr-finds-the-head-of-a-covert-fake-news-operation-in-the-suburbs>.

50. *Id.*

51. *Id.*

DenverGuardian.com.<sup>52</sup> Although Coler claims to have a purely ideological motivation, he has built a fake-news empire that employs 20–25 writers and likely makes between \$10,000 and \$30,000 a month.<sup>53</sup>

Similarly, a Romanian named Ovidiu Drobota runs the website called “Ending the Fed” because he is an ideological supporter of Donald Trump.<sup>54</sup> Ending the Fed publishes a mix of factual articles with a partisan slant, along with entirely false articles.<sup>55</sup> The stories are often copied verbatim from other websites.<sup>56</sup> Drobota claims his website is “cracking down” on fake news, but his method entails cross-referencing against other conservative websites like InfoWars, Western Journalism, and Conservative Tribune.<sup>57</sup> Ending the Fed was responsible for three out of the top-five fake news stories ranked by engagement on Facebook during the 2016 election.<sup>58</sup>

## 2. State-Sponsored Propaganda

Government propaganda produces some of the other ideological-driven fake news sites. A British Parliament report warned that Russia and China were using their understanding of “mass psychology” to influence public opinion.<sup>59</sup> For example, the Russian government formed a cable news network called Russia Today, now known as “RT,” to improve Russia’s image abroad.<sup>60</sup> RT America, the name of RT’s U.S. operation, took on an antiestablishment leaning, covering antiglobalization, libertarian, and Occupy Wall Street movements.<sup>61</sup> RT “nudged along” existing conspiracy theories, such as Hillary Clinton’s failing health, a Google plan to rig the election for Clinton, the existence of the Illuminati, and the theory that Democratic National Committee staff-member Seth Rich was murdered because he was behind the leaked DNC emails that WikiLeaks distributed in 2016.<sup>62</sup> It is hard to refute these stories because conspiracy theories, by definition, are difficult to verify as true or false.<sup>63</sup> Regardless, the Department of Justice asked RT America to register as a foreign agent under the Foreign Agents Registration Act.<sup>64</sup>

The lack of verifiable fake news stories spread by Russian outlets in the United States is notable because Russian outlets spread such fake news stories in

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52. Silverman, *supra* note 17. BuzzFeed’s graphic shows the story had 567,000 engagements three months prior to the election. *Id.*

53. Sydell, *supra* note 49.

54. Tess Townsend, *The Bizarre Truth Behind the Biggest Pro-Trump Facebook Hoaxes*, INC. (Nov. 21, 2016), <https://www.inc.com/tess-townsend/ending-fed-trump-facebook.html>.

55. Allcott & Gentzkow, *supra* note 10, at 217.

56. Townsend, *supra* note 54.

57. *Id.*

58. Silverman, *supra* note 17.

59. Jim Rutenberg, *RT, Sputnik and Russia’s New Theory of War*, N.Y. TIMES (Sept. 13, 2017), <https://www.nytimes.com/2017/09/13/magazine/rt-sputnik-and-russias-new-theory-of-war.html>.

60. *Id.*

61. *Id.*

62. *Id.*

63. Allcott & Gentzkow, *supra* note 10, at 214.

64. Rutenberg, *supra* note 59; *see also* 22 U.S.C. § 611.

other countries. Russian government-sponsored news organizations ran stories in Germany alleging Arab migrants raped a 13-year-old Russian-German girl and that the German police were covering it up.<sup>65</sup> The stories implied that Angela Merkel, the Chancellor of Germany, refused to address immigrant-committed crimes while simultaneously opening German borders to hundreds of thousands of migrants.<sup>66</sup> This resulted in a number of protests.<sup>67</sup> Although RT America has not spread similar fake news stories in the United States, these examples are illustrative of the damage such an outlet could cause.

### 3. *Financial Gain*

Some websites are dedicated to the production of fake news articles for financial reasons.<sup>68</sup> For example, teenagers in Macedonia ran over 100 U.S. political websites promoting pro-Trump fake news stories with sensational headlines to generate ad revenue.<sup>69</sup> The Macedonians running the sites say their motive was purely financial and had nothing to do with Trump; the fractions of a cent per ad-click can add up to significant amounts of money for a teenager in Macedonia.<sup>70</sup>

### 4. *Satire*

Some fake news is produced primarily for satirical purposes.<sup>71</sup> Probably the most well-known example of this is The Onion, a website that presents factually untrue stories as a vehicle for critique and commentary.<sup>72</sup> Generally, The Onion articles are easily detected as satire, and typically only people unfamiliar with U.S. media norms take them at face value.<sup>73</sup> However, not all satirical websites are universally detected by the general public. For example, the U.S.-based satirical website “National Report” ran several fake news stories that went viral during the 2016 election.<sup>74</sup> Donald Trump’s campaign manager even tweeted a link to a

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65. *Id.*

66. *Id.*

67. *Id.*

68. Allcott & Gentzkow, *supra* note 10, at 217.

69. Craig Silverman & Lawrence Alexander, *How Teens in the Balkans Are Duping Trump Supporters with Fake News*, BUZZFEED (Nov. 3, 2016), <https://www.buzzfeed.com/craigsilverman/how-macedonia-became-a-global-hub-for-pro-trump-misinfo>.

70. *Id.*

71. Verstraete et al., *supra* note 1, at 4–5.

72. *Id.*

73. *Id.*

74. See Caitlin Dewey, *Facebook Fake-News Writer: “I Think Donald Trump Is in the White House Because of Me”*, WASH. POST (Nov. 17, 2016), [https://www.washingtonpost.com/news/the-intersect/wp/2016/11/17/facebook-fake-news-writer-i-think-donald-trump-is-in-the-white-house-because-of-me/?utm\\_term=.ff7c1c7838e3](https://www.washingtonpost.com/news/the-intersect/wp/2016/11/17/facebook-fake-news-writer-i-think-donald-trump-is-in-the-white-house-because-of-me/?utm_term=.ff7c1c7838e3) [hereinafter Dewey, *Fake-News Writer*]; Caitlin Dewey, *This Is Not an Interview with Banksy*, WASH. POST (Oct. 22, 2014), [https://www.washingtonpost.com/news/the-intersect/wp/2014/10/21/this-is-not-an-interview-with-banksy/?utm\\_term=.396131075a3b](https://www.washingtonpost.com/news/the-intersect/wp/2014/10/21/this-is-not-an-interview-with-banksy/?utm_term=.396131075a3b) (noting Paul Horner as the lead writer for the National Report).



National Report story that protestors were being paid \$3,500 to attend anti-Trump rallies.<sup>75</sup>

The problem with satire websites is that their satirical nature is not always apparent. The National Report, which lacks the notoriety of The Onion, previously labeled its website “America’s #1 Independent News Source.”<sup>76</sup> The website had a disclaimer that “all news articles contained within National Report are fiction”; however, the disclaimer was located on a separate page unlinked to its main page or the individual articles.<sup>77</sup> The same issue arose with the fake news story that the Pope had endorsed Donald Trump for president. WTOE 5 News, the now-defunct satirical website that generated the story, contained a separate “About” page warning that it was a fantasy-news website, but the article itself did not contain the disclaimer.<sup>78</sup> Ending the Fed subsequently picked up that story, which became one of the top-ten false election stories.<sup>79</sup>

### C. How Fake News is Spread

Fake news is primarily spread via social-media platforms for various reasons.<sup>80</sup> First, for websites dedicated to producing fake news, the costs are low to enter the media market via social media.<sup>81</sup> Second, social media displays content in a format favorable to fake news: thin slices of information often viewed on phones or news-feed windows make it difficult to judge the validity of an article.<sup>82</sup> Third, Facebook “friend networks” are often segregated along ideological lines, and people are more likely to read and share articles that align with their ideological positions.<sup>83</sup> These ideological networks, known as “filter bubbles,” make it harder for people to get access to accurate information.<sup>84</sup>

As a result, websites that primarily produce fake news rely on social media for over 40% of their website visits, whereas mainstream news websites rely on social media for only 10% of their visits.<sup>85</sup> The prevalence of fake news on social

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75. Dewey, *Fake-News Writer*, *supra* note 74. Interestingly, the creator of the National Report claims to hate Donald Trump. *Id.*

76. Tom McKay, *Interview with “Allen Montgomery,” Founder of the Hoax Site, National Report*, DAILY BANTER (Oct. 20, 2014), <https://thedailybanter.com/2014/10/national-report/>. The National Report has now rebranded itself “America’s Lousiest Independent News Source” on its main page. NATIONAL REPORT, <http://nationalreport.net/> (last visited Feb. 3, 2019).

77. *Disclaimer*, NATIONAL REPORT, <http://nationalreport.net/disclaimer/> (last visited Jan. 20, 2018).

78. Allcott & Gentzkow, *supra* note 10, at 217.

79. Silverman, *supra* note 17.

80. Allcott & Gentzkow, *supra* note 10, at 221.

81. *Id.*

82. *Id.*

83. *Id.* One study found the median share of friends with opposing political ideology is only 18%–20%. *Id.*

84. Kevin Delaney, *Filter Bubbles Are a Serious Problem with News, Says Gates*, QUARTZ (Feb. 21, 2017), <https://qz.com/913114/bill-gates-says-filter-bubbles-are-a-serious-problem-with-news/>.

85. Allcott & Gentzkow, *supra* note 10, at 222.

media is concerning because 62% of U.S. adults get their news from social media.<sup>86</sup> Two-thirds of Facebook users get news on that site; 59% of Twitter users get news on Twitter; and 7 in 10 users of Reddit, a social news aggregation and discussion website, get their news from that platform.<sup>87</sup>

## II. MAINSTREAM MEDIA

As discussed above, the mainstream media still holds tremendous power in the nation's political discourse. Therefore, this Note will examine the issues facing the modern media and the roles they play in the appearance of fake news stories in the mainstream media.

### A. Modern Media and the 24-Hour News Cycle

Prior to the 24-hour news cycle that emerged in the 1980s, most Americans received their news from a handful of sources; usually, a handful of daily newspapers and weekly news magazines.<sup>88</sup> Wealthy families primarily owned the main newspapers with an altruistic mission beyond merely turning a profit.<sup>89</sup> These news organizations had relatively significant amounts of time, 24 hours or a week, between publications to reach conclusions about the validity and significance of stories to be published.<sup>90</sup> Beginning in the 1960s, Americans increasingly turned to broadcast media for their news.<sup>91</sup> However, most outlets were not even expected to turn a profit, being run at a loss in profits to promote the rest of the network.<sup>92</sup> By 1980, 90% of television viewers tuned into nightly news broadcasts by ABC, CBS, or NBC for their news.<sup>93</sup>

In 1980, Ted Turner launched an upstart news service called the Cable News Network that became the first news channel in the world to offer 24-hour news coverage.<sup>94</sup> Initially, other news executives, who felt the news was “best served up at fixed points of the day in heavily crafted and refined news broadcasts,” wrote off the concept.<sup>95</sup> However, in 1991, CNN scored a major journalistic victory when it broadcasted the bombing of Iraq live from Baghdad.<sup>96</sup> Other news services, and even

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86. Jeffrey Gottfried & Elisa Shearer, *News Use Across Social Media Platforms 2016*, PEW RES. CTR. (May 26, 2016), <http://www.journalism.org/2016/05/26/news-use-across-social-media-platforms-2016/>.

87. *Id.*

88. David A. Logan, *All Monica, All of the Time: The 24-Hour News Cycle and the Proof of Culpability in Libel Actions*, 23 U. ARK. LITTLE ROCK L. REV. 201, 201–02 (2000).

89. James Fallows, *Rush from Judgment*, AM. PROSPECT (Mar.–Apr. 1999), <https://prospect.org/article/rush-judgment-0>.

90. Logan, *supra* note 88, at 202.

91. *Id.*

92. Fallows, *supra* note 89.

93. Douglas Hindman & Kenneth Wiegand, *The Big Three's Prime-Time Decline: A Technological and Social Context*, 52 J. BROADCASTING & ELECTRONIC MEDIA 119, 119 (2008).

94. Chris Cramer, *Why the World is Watching CNN*, CNN (2005), [http://www.cnn.com/services/opk/cnn25/cnns\\_impact.htm](http://www.cnn.com/services/opk/cnn25/cnns_impact.htm).

95. *Id.*

96. Howard Rosenberg, *'Baghdad': When CNN Was the News*, L.A. TIMES, (Dec. 6, 2002), <http://articles.latimes.com/2002/dec/06/entertainment/et-howard6>.

the then-Secretary of Defense Dick Cheney, turned to CNN for up-to-date information about the Gulf War.<sup>97</sup> CNN received the highest ratings of all the networks during the Gulf War and demonstrated that 24-hour news coverage was more than just a market niche.<sup>98</sup> Fox, MSNBC, and other networks soon copied the 24-hour news cycle.<sup>99</sup>

This new 24-hour news cycle replaced the traditional journalism culture that favored verification with what has been deemed a “mixed media culture.”<sup>100</sup> Mixed-media culture is marked by several characteristics: (1) a never-ending news cycle in which the need to fill hundreds of hours and thousands of pages per week results in reports of allegations without the traditional concern for verification; (2) a race to the ethical bottom where lower standards from fringe journalists, such as gossip websites, push mainstream-news organizations to report on allegations or otherwise lose viewers and the revenue that comes with them; and (3) a desire for news organizations to report “blockbuster” stories containing large doses of scandal.<sup>101</sup>

This mixed-media culture is also promoted by the fact that news organizations are increasingly woven into larger conglomerates or large corporations that own numerous companies involved in mass-media production and distribution. In 1983, about 50 media conglomerates controlled more than half of all news organizations.<sup>102</sup> By 1986, that number had shrunk to 29 conglomerates.<sup>103</sup> As of 2000, ten multinational media conglomerates dominated most American news organizations.<sup>104</sup>

As large conglomerates gobble up news organizations, they become just another profit center within that conglomerate.<sup>105</sup> As a result, many news organizations are competing head-to-head with tabloids and entertainment news services (*People*, *Entertainment Weekly*, etc.) in an industry with falling market shares.<sup>106</sup> Competing with tabloids for market shares is likely to perpetuate the mixed-media culture, which forces mainstream-news organizations to abandon traditional journalism ethics of story verification.<sup>107</sup>

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97. *Id.*

98. Logan, *supra* note 88, at 202.

99. *Id.*

100. BILL KOVACH & TOM ROSENSTIEL, *WARP SPEED: AMERICA IN THE AGE OF MIXED MEDIA* 6–8 (1999).

101. *Id.*

102. Paul Wellstone, *Growing Media Consolidation Must be Examined to Preserve Our Democracy*, 52 FED. COM. L.J. 551, 552 (2000).

103. *Id.*

104. *Id.*

105. Logan, *supra* note 88, at 204.

106. Fallows, *supra* note 89.

107. *See* KOVACH & ROSENSTIEL, *supra* note 100, at 6–8.

### *B. Media and the Internet*

Like almost all industries, the Internet has radically altered the environment in which reporters and editors work.<sup>108</sup> As Andrew Glass, a correspondent for Cox Broadcasting, observed:

In the old days, on the first day we would report what happened. On the second day, we would tell what the reaction was. On the third day, we would analyze what it means. Now CNN tells you what happened and five minutes later some Professor from Fordham University is telling you what it means.<sup>109</sup>

Widespread use of the Internet now puts numerous news websites at the fingertips of consumers.<sup>110</sup> When news occurs, the Internet serves as a primary means for seeking information because of its accessibility, convenience, breadth of data, and ability for the end-user to control specificity and customization of the news.<sup>111</sup> The Internet has become the ultimate extension of the 24-hour news cycle: news is no longer a finite product delivered at a set time to your house via newspaper or television; news is now an “infinite, continual source that can be accessed on demand.”<sup>112</sup>

The Internet also poses a series of issues for reporters about breaking news.<sup>113</sup> Traditionally, news organizations were able to rely on the wire-service doctrine when dealing with breaking news.<sup>114</sup> The wire-service doctrine protects local news organizations from defamation claims if they reproduced, without substantial change or knowledge of falsity, a wire release by a reputable news-gathering agency.<sup>115</sup>

This doctrine would probably not protect republishing information found on a social-media site, blog, or personal webpage.<sup>116</sup> First, an internet website or posting would probably not qualify as a “reputable wire service.”<sup>117</sup> Second, because the news organization is choosing what information to republish, it would not meet the requirement of “absolute non-involvement with the underlying broadcast.”<sup>118</sup> However, this doctrine is helpful in containing the spread of fake news because it

108. Logan, *supra* note 88, at 203.

109. John Herbers & James H. McCartney, *The New Washington Merry-Go-Round*, AM. JOURNALISM REV. (Apr. 1, 1999), <http://ajrarchive.org/Article.asp?id=3269>.

110. Paul Sagan & Tom Leighton, *The Internet & the Future of News*, DAEDALUS, 119, 120 (Spring 2010).

111. *Id.*

112. *Id.*

113. See Fallows, *supra* note 89.

114. Layne v. Tribune Co., 146 So. 234, 237–38 (Fla. 1933).

115. Howe v. Detroit Free Press, Inc., 555 N.W.2d 738, 740–41 (Mich. Ct. App. 1996).

116. See Matthew D. Bunker & Clay Calvert, *Defamation Live: The Confusing Legal Landscape of Republication in Live Broadcasting and a Call for a Breaking News Doctrine*, 39 COLUM. J.L. & ARTS 497, 501 (2016).

117. See Appleby v. Daily Hampshire Gazette, 478 N.E.2d 721, 724–25 (Mass. 1985).

118. *In re Med. Lab. Mgmt. Consultants*, 931 F. Supp. 1487, 1492 (D. Ariz. 1996).

forces news organizations to vet stories they come across on the Internet before republishing them.

***C. The Mixed-Media Culture, 24-Hour News Cycle, and the Internet Combine to Create Credibility Issues for the Mainstream Media***

The 24-hour news cycle, mixed-media culture, and the Internet came crashing together on January 18, 1998 when Matt Drudge sent out an e-mail alleging *Newsweek* had halted the publication of a story about President Clinton having an affair with a White House intern.<sup>119</sup> Matt Drudge had never attended college and was working as a manager at the gift shop of CBS studios.<sup>120</sup> Using a Packard-Bell computer his father bought him in 1994, Drudge began to send out an e-mail—called “the Drudge Report”—to friends containing CBS studio gossip and right-wing politics.<sup>121</sup> By 1995, the Drudge report had 1,000 e-mail subscribers, and by 1997 that number had grown to 85,000 subscribers.<sup>122</sup> Today, the Drudge Report, now a website, receives almost 1.5 billion pageviews per month, slightly less than MSN.com.<sup>123</sup> Drudge is now arguably the single most powerful individual in the digital-news business.<sup>124</sup> The Drudge Report has inspired others, notably Arianna Huffington’s “Huffington Post,” to adopt an online news-aggregation business model.<sup>125</sup>

Drudge’s Clinton story was quickly carried by ABC and picked up by the *Washington Post* and *Los Angeles Times*.<sup>126</sup> Within a week, almost every major news organization reported the story.<sup>127</sup> However, at this time the only source for this story was an anonymous person who claimed to have heard portions of a surreptitiously obtained tape recording of conversations with Monica Lewinsky.<sup>128</sup> *Newsweek* had not “killed” the story; rather, it had delayed releasing it to continue fact checking it.<sup>129</sup> By the next Sunday, the Clinton–Lewinsky scandal dominated the airwaves,

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119. KOVACH & ROSENSTIEL, *supra* note 100, at 12.

120. Philip Weiss, *Watching Matt Drudge*, N.Y. MAG. (Aug. 24, 2007), <http://nymag.com/news/media/36617/>.

121. *Id.*

122. *Blumenthal v. Drudge*, 992 F. Supp. 44, 47 (D.D.C. 1998) (citing Plaintiff’s Complaint).

123. Hadas Gold, *More Than Two Decades Old, the Drudge Report Hits a New Traffic High*, POLITICO (Aug. 15, 2016), <https://www.politico.com/blogs/on-media/2016/08/more-than-two-decades-old-the-drudge-report-hits-a-new-traffic-high-227008>.

124. Henry Blodget, *It’s Time People Realized That The Drudge Report is a Major Media Property Worth Hundreds of Millions of Dollars*, BUSINESS INSIDER (Oct. 10, 2012, 12:32 PM), <http://www.businessinsider.com/drudge-report-is-worth-2012-10>. Part of what provides Drudge with so much power in the digital-news business is his low overhead: his page, which is produced solely by him, simply links to other news sites; therefore, most of his income is profit. *Id.*

125. Arianna Huffington, BIOGRAPHY, <https://www.biography.com/people/arianna-huffington-21216537> (last visited Jan. 10, 2018). Huffington started the Huffington Post as a liberal counter to the right-wing Drudge Report. *Id.*

126. KOVACH & ROSENSTIEL, *supra* note 100, at 13.

127. *See id.* at 13–15.

128. *Id.* at 14.

129. *Id.* at 11.

yet at this point, all the news organizations relied on a single confidential source who had only heard portions of the recorded conversation.<sup>130</sup>

It is estimated that by the end of the first week, 41% of reportage on the Clinton–Lewinsky scandal was not factual but actually journalists’ own opinions or speculation, and another 12% consisted of reports attributed to other news organizations and was unverified by the outlet repeating the report.<sup>131</sup> Although the Clinton–Lewinsky scandal might not be the best example of the dangers of the 24-hour news cycle, given that the allegations were found to be true, it shows how the modern media culture enables the potential for inaccurate information to be rapidly repeated as truth.

Since the Clinton–Lewinsky scandal, the ability for fake news to spread through the mainstream media and its mixed-media culture has only increased. For example, in 2016, Politico published a shocking article claiming the bank of Secretary of the Treasury nominee Steve Mnuchin had foreclosed on a 90-year-old woman after a 27-cent payment error.<sup>132</sup> The report received widespread coverage and was even brought up two months later at Mr. Mnuchin’s confirmation hearing.<sup>133</sup> However, key factors about the story were later discovered to be incorrect. Mnuchin’s bank never foreclosed on the homeowner nor did it bring the foreclosure proceeding; Mnuchin had already sold his bank by that time and had nothing to do with the proceedings.<sup>134</sup> Lawyer and political activist Ted Frank was able to uncover the discrepancy by simply checking the docket for Polk County, Florida; he claims “4 minutes of fact-checking” would have alerted the Politico writer to the falsehood.<sup>135</sup>

Another example of a fictitious, scandalous story spreading through the mainstream media was the report that President Trump handed German Chancellor Angela Merkel a \$378 billion bill for Germany’s failure to meet NATO’s defense-spending goals.<sup>136</sup> Like with the Clinton–Lewinsky scandal, outlets did not take the time to verify the facts and simply based their stories upon the article put out by *The*

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130. *See id.* at 14–15.

131. *Id.* at 17.

132. Lorraine Woellert, *Trump Treasury Pick Made Millions After His Bank Foreclosed on Homeowners*, POLITICO (Dec. 1, 2016, 5:14 AM), <https://www.politico.com/story/2016/12/trump-treasury-foreclosed-homes-mnuchin-232038>; *see Payne, supra* note 23.

133. Chris Isidore, *Trump Treasury Pick: ‘I Have Been Maligned,’* CNN (Jan. 19, 2017, 4:44 PM), <http://money.cnn.com/2017/01/19/news/economy/mnuchin-treasury-confirmation-hearing/index.html>.

134. *Fact Check: Did Treasury Nominee’s Bank Foreclose on a 90-Year-Old Widow?*, FOX NEWS (Jan. 27, 2017, 3:52 PM) <http://insider.foxnews.com/2017/01/27/fact-check-did-treasury-nominee-foreclose-90-year-old-woman-over-27-cents>.

135. Ted Frank (@tedfrank), TWITTER (Jan. 19, 2017, 2:24 PM), <https://twitter.com/tedfrank/status/822208255321669633>.

136. *Trump Handed Merkel \$374B NATO Bill During Talks – Report*, FOX NEWS (Mar. 27, 2017), <http://www.foxnews.com/politics/2017/03/27/trump-handed-merkel-374b-nato-bill-during-talks.html>.

*Sunday Times*, a London newspaper.<sup>137</sup> The story played well with, and was repeated by, those who felt the President was a “petulant child.”<sup>138</sup> However, both the U.S.<sup>139</sup> and German governments have denied such a bill was presented.<sup>140</sup>

These are but three of many examples of how the mixed-media culture, the 24-hour news cycle, and the Internet have combined to reduce trust in the nation’s press and have allowed the circulation of fake news articles under the banner of respectable news organizations.

### III. DEFAMATION

The tort of defamation was the traditional legal defense to fake news. A presumption existed that when a newspaper published false information about someone, regardless of its severity, the newspaper harmed that person’s reputation.<sup>141</sup> However, the landmark decision of *New York Times Co. v. Sullivan* started a process by which the courts would whittle away at the tort of defamation until it practically became void.<sup>142</sup> While *Sullivan* protected the press, it also led to increased cynicism directed at news organizations, encouraged frivolous lawsuits against news organizations, and produced a loss of respect for politicians who are the subject of defamatory stories.<sup>143</sup>

#### A. Modern Tort Laws of Defamation

Despite independence from Britain, the American legal system adopted English common law, and many legal principles remained the same. Many states considered libel a strict-liability tort.<sup>144</sup> The law presumed harm to reputation when newspaper articles contained factual errors, even if they were minor or inconsequential.<sup>145</sup> However, over time, the standard has become more forgiving.

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137. See *id.*; Daniel Politi, *Trump Reportedly Handed Merkel a \$374 Billion Invoice for NATO*, SLATE (Mar. 26, 2017, 2:10 PM), [http://www.slate.com/blogs/the\\_slateist/2017/03/26/trump\\_reportedly\\_handed\\_merkel\\_a\\_374\\_billion\\_invoice\\_for\\_nato.html](http://www.slate.com/blogs/the_slateist/2017/03/26/trump_reportedly_handed_merkel_a_374_billion_invoice_for_nato.html).

138. See Jack Moore, *Donald Trump Invents Innovative New Way to Piss Off an Important Ally*, GQ (Mar. 27, 2017), <https://www.gq.com/story/donald-trump-angela-merkel-bill>.

139. Sonam Sheth, *White House Disputes Report that Trump Gave Merkel a \$374 Billion Bill to Honor NATO Agreement*, BUSINESS INSIDER (Mar. 26, 2017), <http://www.businessinsider.com/300bn-nato-bill-germany-merkel-trump-white-house-2017-3>.

140. Cynthia Kroet, *Germany Didn’t Receive NATO Invoice from Trump: Government*, POLITICO (March 27, 2017), <https://www.politico.eu/article/germany-didnt-receive-nato-invoice-from-trump-government/>.

141. Rick Schmitt, *Window to the Past: New York Times Co. v. Sullivan*, WASH. LAW. (Oct. 2014), <https://www.dcb.org/bar-resources/publications/washington-lawyer/articles/october-2014-nyt-sullivan.cfm>.

142. David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 488 (1991); see also *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

143. David A. Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CAL. L. REV. 847, 861–62 (1986).

144. Schmitt, *supra* note 141.

145. *Id.*

The modern tort of defamation has four elements: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm, or the existence of special harm caused by the publication.<sup>146</sup> A communication is defamatory if it tends to harm the reputation of another so as to lower him in the estimation of the community or deter third persons from associating or dealing with him.<sup>147</sup> While seemingly straightforward, the application of defamation to the press is beset with a number of privileges designed to enable reporters to effectively do their jobs. Among the privileges most likely to hinder efforts to prevent fake news is the public-official doctrine.<sup>148</sup>

In *Sullivan*, the Supreme Court moved to protect the press from defamation suits by creating an “actual malice” standard, required for public officials to recover damages.<sup>149</sup> The Court found that constitutional protections for speech and press require a public official to prove the defendant made the false statement with actual malice in order to recover damages.<sup>150</sup> In order to meet the actual-malice standard, the defendant must have known the statement was false or made the statement with reckless disregard as to whether it was false.<sup>151</sup> The plaintiff has the burden to show that the defendant had entertained serious doubts about the truth of the publication.<sup>152</sup>

Although the courts have clarified some parts of the actual-malice rule, they have not altered the rule significantly since *Sullivan*. As a matter of law, a court must determine whether the plaintiff is a public official.<sup>153</sup> Although every public employee is a “public official” in some sense, the legal term has a much narrower definition.<sup>154</sup> The designation applies, at the very least, to those among the hierarchy of government who have substantial responsibility or control over the conduct of governmental affairs.<sup>155</sup> In 1989, the Court held that failure to investigate allegations before publishing them will not support a finding of actual malice, but purposeful avoidance of the truth may support such a finding.<sup>156</sup> As a result of *Sullivan* and its progeny, public officials face a daunting uphill battle in any defamation suit.

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146. Restatement (Second) of Torts § 558 (AM. LAW INST. 1977).

147. Restatement (Second) of Torts § 559 (AM. LAW INST. 1977).

148. See Verstraete, *supra* note 1, at 14. “In order for a public figure to succeed in a defamation claim, the person must prove that the writer or publisher acted with actual malice (knowledge of the falsity of the information, or reckless disregard as to falsity), which is exceptionally difficult.” *Id.*

149. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

150. *Id.* at 279.

151. *Id.* at 280.

152. *Desnick v. Am. Broad. Cos. Inc.*, 233 F.3d 514, 517 (7th Cir. 2000).

153. *Mandel v. Boston Phoenix Inc.*, 322 F. Supp. 2d 39, 41–42 (D. Mass. 2004).

154. *Kassel v. Gannett Co.*, 875 F.2d 935, 939 (1st Cir. 1989) (holding that a Veterans’ Affairs psychologist was not a public official for the purposes of libel law).

155. *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

156. *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 693 (1989).



### ***B. Sullivan's Roots in the Civil-Rights Movement***

The Court created the public-official doctrine as a response to a pressing problem of the time. America, especially the South, was rocked by desegregation battles in the late 1950s and 1960s. In the spring of 1960, officers arrested 35 students from Alabama State College at a sit-in at a whites-only snack bar.<sup>157</sup> This led to widespread protests by 800 more students at the state capital.<sup>158</sup> Furthermore, Alabama authorities charged Martin Luther King, Jr. with tax evasion and perjury.<sup>159</sup>

The Committee to Defend Martin Luther King, Jr. and the Struggle for Freedom in the South published a full-page advertisement in the *New York Times* (the *Times*) pleading for financial support of the student movement and the legal defense of Dr. Martin Luther King, Jr.<sup>160</sup> The advertisement contained a number of minor misstatements, such as claiming protesting students sang “My Country, Tis of Thee” when they actually sang the National Anthem, claiming the school expelled the leaders of the protesting students for the singing when they were actually expelled for the sit-in, and stating that officers arrested Martin Luther King, Jr. seven times when they had only arrested him four times.<sup>161</sup> Sullivan, a Montgomery city commissioner, sued the *Times* under the theory that the ad’s false description of police action could be imputed to him.<sup>162</sup>

Alabama law required the *Times* to prove the truth of the statements because the law presumed the statements to be false.<sup>163</sup> However, the defense of truth was unavailable if the article contained even minor or inconsequential misstatements.<sup>164</sup> The trial judge found the statements were libelous per se, and the only matters for the jury were if the *Times* had published the advertisement and if the statements were made concerning Sullivan.<sup>165</sup> After two hours of deliberations, the jury found for Sullivan and awarded him \$500,000.<sup>166</sup>

The ruling threatened to derail the civil-rights movement. A recent labor strike had left the *Times* financially weak, and the verdict was pushing it toward financial ruin.<sup>167</sup> Spurred by the *Sullivan* ruling, other southern officials brought nearly \$300 million in defamation actions against press outlets covering the civil-rights movement.<sup>168</sup> Justice Brennan worried that if the Court did not restrain defamation suits against the press, the progress made toward desegregation would be harmed.<sup>169</sup> Civil rights appeared to be on minds of all the Supreme Court Justices;

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157. Schmitt, *supra* note 141.

158. *Id.*

159. *Id.*

160. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 257 (1964).

161. *Id.* at 258–59. The Court highlighted seven instances of false statements in the advertisement. *Id.*

162. *Id.* at 260.

163. Schmitt, *supra* note 141.

164. *Id.*

165. *Sullivan*, 376 U.S. at 262.

166. Schmitt, *supra* note 141.

167. *Id.*

168. *Id.*

169. LEE LEVINE & STEPHEN WERMIEL, *THE PROGENY: JUSTICE WILLIAM J. BRENNAN’S FIGHT TO PRESERVE THE LEGACY OF New York Times v. Sullivan* 21 (2014).

Justice Goldberg “abandoned any pretense of impartiality” and had Martin Luther King, Jr., who was in the gallery for oral arguments, sign Goldberg’s copy of *Stride Towards Freedom*.<sup>170</sup>

All nine Justices voted to reverse the trial-court decision; five formed the majority in creating the public-official doctrine, and four justices concurred in the result but wrote that citizens should have an absolute right to criticize official conduct.<sup>171</sup> Some argue that only the special circumstances of the case, namely the concern for civil rights and desegregation, achieved this level of consensus.<sup>172</sup> The Justices understood that a split decision would be a severe blow to the civil-rights movement.<sup>173</sup> They were concerned that a 5–4 decision would signal that they had not firmly decided the matter, and states like Alabama would be free to continue to pursue libel actions against news organizations and civil-rights leaders.<sup>174</sup>

The Court’s unusual departure in procedure, by requiring the lower court to dismiss the case when it remanded the case back to the Alabama Supreme Court, shows that the overriding concern in *Sullivan* was the civil-rights movement. After creating a new legal rule, the Court would normally vacate the judgment and return it to the lower court for a new trial applying the new rule.<sup>175</sup> However, in *Sullivan* the Court took the unusual steps of evaluating the evidence in the case and deciding the new outcome.<sup>176</sup> The Court found the evidence did not support a finding of actual malice and left the Alabama Supreme Court with no other option but to dismiss the case.<sup>177</sup>

Justices Brennan and Goldberg were both concerned that an Alabama trial-court judge would “bend” the new rule so a new jury would arrive at the same outcome as did the jury in the original trial.<sup>178</sup> The original trial judge, Walter B. Jones, had been a devoted segregationist and a “devotee of the Confederacy and the Southern way of life.”<sup>179</sup> Seating in his courtroom was segregated, and at a subsequent libel trial against the *Times*, Jones praised “white man’s justice, a justice born long centuries ago in England, brought over to this country by the Anglo-Saxon race.”<sup>180</sup> The unusual steps taken by the Court to ensure the protections of the *Times* and civil-rights leaders *Sullivan* targeted show that the driving force behind the *Sullivan* decision was a concern for protecting the civil-rights movement.

Justice Brennan, the author of the *Sullivan* opinion, later became concerned that courts interpreted the standard of actual malice as requiring animus or hostility

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170. *Id.*

171. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 305 (1964).

172. Schmitt, *supra* note 141.

173. KERMIT HALL & MELVIN UROFSKY, *NEW YORK TIMES V. SULLIVAN: CIVIL RIGHTS, LIBEL LAW, AND THE FREE PRESS* 161 (2011).

174. *Id.*

175. *Id.* at 167.

176. *Sullivan*, 376 U.S. at 283.

177. *Id.* at 288.

178. HALL & UROFSKY, *supra* note 173, at 168.

179. Schmitt, *supra* note 141 (quoting ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1991)).

180. *Id.*

rather than reckless disregard of the truth.<sup>181</sup> When Brennan used the phrase “actual malice” in *Sullivan*, he did so as if it already had an accepted meaning.<sup>182</sup> However, at the time, the phrase’s legal meaning varied widely from state to state.<sup>183</sup> The meanings were only similar in that they referred to the state of mind of the publisher.<sup>184</sup>

At the end of his career, Justice Brennan admitted that the phrasing was misleading.<sup>185</sup> “I wish I had never used the word ‘malice,’” he stated.<sup>186</sup> “I have only confused things with that because people think of malice with its ordinary connotations, not with the special definition I gave it in *Times v. Sullivan*.”<sup>187</sup> Brennan conceded that using the term “malice” was a mistake.<sup>188</sup> Regardless, *Sullivan* would have a substantial impact on the future of defamation lawsuits.

### C. Defamation after Sullivan

Current defamation law offers substantial protection for speech but provides little protection for the reputation of public officials.<sup>189</sup> After *Sullivan*, the remedies that libel laws can provide public figures are “largely illusory.”<sup>190</sup> Because the constitutional issues raised in *Sullivan* are implicated in seven out of eight libel suits,<sup>191</sup> and because the chances of winning a defamation suit against the press are so low, some scholars question if libel still exists as a viable tort.<sup>192</sup>

*Sullivan* discourages many public officials who are defamed from filing defamation suits.<sup>193</sup> In the early 1980s, an average of 30 libel cases filed against news organizations went to trial each year,<sup>194</sup> with 266 defamation trials taking place in that decade.<sup>195</sup> By 1990, the number of libel cases tried each year had been reduced to about 15,<sup>196</sup> with only 192 trials taking place during that decade.<sup>197</sup> In

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181. LEVINE & WERMIEL, *supra* note 169, at 342.

182. HALL & UROFSKY, *supra* note 173, at 167.

183. *Id.*

184. *Id.*

185. LEVINE & WERMIEL, *supra* note 169, at 342.

186. *Id.*

187. *Id.*

188. *Id.* (“It’s confused everybody. ‘Malice’ as I defined it is a very different thing. Oh well, you have to make some mistakes.”).

189. Jonathan Garret Erwin, *Can Deterrence Play a Positive Role in Defamation Law?*, 19 REV. LITIG. 675, 692 (2000).

190. Anderson, *supra* note 142, at 488.

191. Barrett, *supra* note 143, at 855.

192. Schmitt, *supra* note 141; see also Randall P. Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 230 (1985).

193. See John Koblin, *The End of Libel?*, OBSERVER (June 9, 2010, 1:23 AM), <http://observer.com/2010/06/the-end-of-libel/>. Several other theories were also advanced for the decline in defamation suits including the use of the Internet to make quick corrections or for defamed plaintiffs to issue their own responses. *Id.*

194. Alex Jones, *News Media’s Libel Costs Rising, Study Says*, N.Y. TIMES (Sept. 26, 1991), <https://www.nytimes.com/1991/09/26/us/news-media-s-libel-costs-rising-study-says.html>.

195. Koblin, *supra* note 193.

196. Jones, *supra* note 194.

197. Koblin, *supra* note 193.

2009, only nine defamation suits went to trial.<sup>198</sup> In 2010, the Media Law Resource Center, a non-profit membership association for media-content providers and their attorneys,<sup>199</sup> stopped its yearly tracking of libel suits against news organizations due to the lack of cases.<sup>200</sup> As an attorney for the *Times* observed, “50 years after the *Sullivan* decision, plaintiff’s lawyers have come to grips with the fact that libel suits are hard to win, and it might not be worth the time and effort to spend in fighting.”<sup>201</sup>

A study by the Libel Defense Resource Center found that even if plaintiffs are filing defamation suits, about 90% of libel actions against the news media are dropped, settled, or dismissed before going to trial.<sup>202</sup> Courts grant close to 70% of defendants’ motions for summary judgment in libel cases against news organizations.<sup>203</sup> The Iowa Libel Research Project found that only 10% of public-official plaintiffs win their suits, and a similar proportion settle their suits, usually without monetary compensation.<sup>204</sup>

Even when a plaintiff wins at trial, the verdict is often reversed on appeal.<sup>205</sup> Prior to *Sullivan*, federal appeals courts reversed about 20% of libel decisions; however, that rate jumped up to 70% after *Sullivan*.<sup>206</sup> According to a study of libel appeals filed between 1984 and 1994, defendants obtained an outright reversal in 41.3% of plaintiffs’ trial-court victories.<sup>207</sup> An additional 14.1% of appeals resulted in reversal and remand for a new trial.<sup>208</sup> Even when the plaintiffs’ verdicts were not reversed, an additional 16.3% saw damages reduced.<sup>209</sup> Only 28% of appealed verdicts remained intact.<sup>210</sup> Another study in the early 1980s showed appellate courts only upholding just 5%–10% of damage awards in libel suits.<sup>211</sup>

Despite their slim chances of winning, *Sullivan* actually encourages public officials to file frivolous defamation actions.<sup>212</sup> *Sullivan* reduces the risk that a case will be decided by a jury; therefore, the public official need not worry that a jury’s

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198. *Id.*

199. *About MLRC*, MEDIA L. RESOURCE CENTER, <http://www.medialaw.org/about-mlrc> (last visited Jan. 9, 2018).

200. Koblin, *supra* note 193 (“The number of libel cases going to trial has dropped to the point where it’s not worth doing the survey on an annual basis,” said Sandy Baron, the executive director.”).

201. *Id.*

202. Jones, *supra* note 194.

203. Marc A. Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RES. J. 455, 492 (1980).

204. Bezanson, *supra* note 192, at 229.

205. Anderson, *supra* note 142, at 514–15.

206. *New Challenge to Press Freedom*, N.Y. TIMES (Jan. 29, 1984), [www.nytimes.com/1984/01/29/magazine/new-challenge-to-press-freedom.html](http://www.nytimes.com/1984/01/29/magazine/new-challenge-to-press-freedom.html).

207. *Ten Years of Appellate Review in Defamation Cases from Bose to Connaughton to Present*, LIBEL DEFENSE RESOURCE CENTER BULLETIN, (April 30, 1994), <http://www.medialaw.org/images/stories/files/publications/bulletin/B1994-2.pdf>.

208. *Id.*

209. *Id.*

210. *Id.*

211. Barrett, *supra* note 143, at 855.

212. *Id.* at 862.

verdict would validate the defendant's statements as true.<sup>213</sup> When the defendant wins on summary judgment, as often happens, the plaintiff is free to continue to claim that what was published or said was false and can also claim that the defendant won the legal case on a technicality.<sup>214</sup> As such, the public-official doctrine encourages the abuse of the courts and allows public officials to use the stature of legal proceedings to discredit truthful reports about them.

Many public-official plaintiffs feel filing a defamation action is a powerful reply and vindication to disparaging stories.<sup>215</sup> The public is likely to believe the plaintiff's allegations of defamation contained in a complaint because of widespread distrust of the institutional press.<sup>216</sup> The Iowa Libel Research Project found that because a defamation suit is such a powerful reply, the vast majority of public-official plaintiffs who filed defamation actions and lost would sue again, even knowing that they would lose.<sup>217</sup> Of course, the general public may not even remember the original issue in controversy, as the average time spent on pretrial litigation issues in libel cases is four years.<sup>218</sup>

The *Sullivan* decision has removed the issue of a report's truthfulness from libel actions involving public officials.<sup>219</sup> The issue of libel now centers on what was known by the reporter and editor at the time of publication—something difficult for the plaintiff to prove.<sup>220</sup> As a result, modern-day libel law generates huge social costs in the form of increased public cynicism.<sup>221</sup> While *Sullivan* protected the press from one threat, it has also resulted in lost credibility for news organizations. Additionally, political leaders and public figures have lost respect due to libelous stories, and the legal system is viewed as having elevated technicality over principle.<sup>222</sup>

#### IV. SOLUTION

Although the execution of *Sullivan* may have had unintended consequences, the central tenet of the case remains true as ever:

The maintenance of the opportunity for free political discussion to the end that the government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.<sup>223</sup>

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213. *Id.*

214. Bezanson, *supra* note 192, at 230.

215. *Id.* at 228.

216. Barrett, *supra* note 143, at 862.

217. Bezanson, *supra* note 192, at 229.

218. *Id.* at 231.

219. *Id.* at 230.

220. *Id.*

221. Barrett, *supra* note 143, at 861.

222. *Id.* at 861–62.

223. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1939)).

The Supreme Court acknowledged that a commitment to the principle of free debate on public issues may include “vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>224</sup>

Protecting the civil-rights movement factored heavily into the *Sullivan* Court’s decision-making process.<sup>225</sup> As such, the *Sullivan* Court may have overreached in its quest to protect the budding civil-rights movement of the 1960s. While the *Sullivan* actual-malice standard may have been the right decision at that time, new societal issues that the Court could not have foreseen have emerged, and the law must be prepared to adapt to issues caused by new problems. Therefore, the standard for defamation of public officials should leave intact protections for the press and public discourse but should be altered to bolster the tort of defamation to encourage accurate reporting on government officials.

In *Curtis Publishing Co. v. Butts*, Justices John Harlan, Tom Clark, Potter Stewart, and Abe Fortas suggested a new defamation standard for public figures who were not public officials.<sup>226</sup> In their plurality opinion, they said that a public figure should only recover for defamation upon a showing of “highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by reasonable publishers.”<sup>227</sup> This standard strikes a better balance that is needed for a free society. The high standard gives news organizations room for legitimate errors when reporting on public officials, while still ensuring a check against the fake news stories that have degraded our faith in the nation’s news organizations and public discourse.

This new standard would require establishing a baseline conduct of a “reasonable publisher.” This is not unusual as courts often employ industry standards to determine reasonable conduct: reasonable suspicion is examined through the lens of a “reasonable officer;”<sup>228</sup> persons performing professional services must exercise a “reasonable degree of skill and care, as determined by the degree of skill and care ordinarily employed by their respective professions under similar conditions;”<sup>229</sup> and medical professionals must exercise a “degree of care, skill, and proficiency which is commonly exercised by ordinary careful, skillful, and prudent” physicians.<sup>230</sup> One might argue that the practice of those professions does not implicate any constitutional rights, so the courts should not adopt such a standard. However, the purposed standard of deviation provides far more protection to reporters than it does to professionals in the above situations. Whereas a lawyer who deviates from a reasonable degree of skill and care subjects himself to liability, a news organization would have to engage in highly unreasonable conduct that constitutes an extreme departure from industry norms. Thus, news organizations

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224. *Id.* at 270.

225. *See supra* Section III.C.

226. 388 U.S. 130, 155 (1967). Ultimately, Justices Black, Douglas, Brennan, and White joined Chief Justice Warren in extending the actual-malice standard to public figures. *Id.* at 163.

227. *Id.* at 155.

228. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

229. *See Hous. Auth. v. Greene*, 383 S.E.2d 867, 868 (Ga. 1989) (discussing the duty imposed upon architects).

230. *Vergara ex rel. Vergara v. Doan*, 593 N.E.2d 185, 186 (Ind. 1992).

retain a robust shield that ensures defamation claims resulting from actual mistakes do not infringe on the freedoms of the press.

Most importantly, this new standard would place a reasonable obligation on journalists to verify stories when appropriate but still allow them to publish news stories without further research when the situation dictates. Ideally, journalism is a discipline of verification: seeking out multiple witnesses and asking all sides for comment.<sup>231</sup> Ensuring news stories are vetted when appropriate would move news organizations away from the mixed-media culture that currently permeates the modern news industry.

For example, Politico's story claiming President Trump's pick for Secretary of the Treasury foreclosed on a 90-year-old woman after a 27-cent payment error in 2014 was published because the author did not spend the "four minutes" needed to verify the story on the court's public docket.<sup>232</sup> The author, knowing she could be held liable for an extreme departure of standards of investigation, may have been more likely to take the time to investigate the allegations, instead of rushing to press with a two-year-old story. However, if the author had taken the time to verify the story but lacked the legal skills or know-how to find or understand the exculpatory information, she would still be protected from liability. Similarly, a duty to adhere at least somewhat to the standards of reasonable publishers might have enticed *Times* reporter Zeke Miller to ask a White House official (because he was in the White House) about the status of the Martin Luther King, Jr. bust before publishing a story saying it had been removed.<sup>233</sup>

Of course, this standard is not without complications. One of its significant weaknesses is that the current industry standard is what has allowed fake news to spread.<sup>234</sup> However, there are a number of avenues through which American journalism has attempted to regulate itself, such as trade publications, education, training, think tanks, and advisory bodies.<sup>235</sup> In the past, these institutions have been limited to the "power of embarrassment" of outlets that breach good journalistic standards.<sup>236</sup> An industry-standard doctrine would force news organizations to take such institutions, and their standards, much more seriously as they may be the very expert witnesses testifying at an organization's defamation trial. These self-regulating institutions, empowered by a new standard, could become catalysts for change within the news industry even without significant judicial intervention.

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231. BILL KOVACH & TOM ROESENSTIEL, *THE ELEMENTS OF JOURNALISM: WHAT NEWSPEOPLE SHOULD KNOW AND THE PUBLIC SHOULD EXPECT* 99 (3rd ed. 2013).

232. *See supra* Section II.C.

233. *See supra* Section I.A.

234. *See supra* Section II.C.

235. *See* Everette E. Dennis, *Internal Examination: Self-Regulation and the American Media*, 13 *CARDOZO ARTS & ENT. L.J.* 697, 698 (1995). For example, the *Columbia Journalism Review* has been critical of the media's coverage of the 2016 election in relation to fake news. Watts & Rothschild, *supra* note 24.

236. *See* Dennis, *supra* note 235, at 700.

Another concern that arises is the fact that many purveyors of fake news may be judgment-proof or beyond the reach of the U.S. court system.<sup>237</sup> However, many of those producers have only a minimal footprint within the realm of the American media.<sup>238</sup> Furthermore, many of the largest producers of fake news, such as Disinfomedia, operate in the United States with significant financial assets.<sup>239</sup> Additionally, mainstream-media outlets, where the majority of Americans still get their news,<sup>240</sup> are vulnerable to large judgments and will likely want to reduce their exposure to such liability by avoiding publishing fake news. While a new standard for defamation may not eliminate all fake news, it is likely to inhibit the most egregious producers.

In looking for a solution to fake news, it must be acknowledged that the law cannot eliminate fake news. Because this proposed standard only imparts liability for “highly unreasonable” conduct, fake news stories will inevitably enter the national debate. However, to impart a standard of strict liability onto the press would run counter to the spirit of the First Amendment: “That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have breathing space that they need to survive.”<sup>241</sup> As James Madison said, “some degree of abuse is inseparable from the proper use of everything; and in no instance, is this more true than in that of the press.”<sup>242</sup>

The causes of fake news are many and extend beyond the decline of defamation liability.<sup>243</sup> As such, changing the standard for defamation liability is unlikely to immediately curb the spread of fake news and restore America’s confidence in its news organizations. However, it is likely to blunt the spread of fake news into our mainstream media, as discussed above, and it can be part of a multifaceted approach to ending fake news. A new standard for defamation can be a starting point from which we can push for a better media.

Finally, modification of the standard for defamation remains an issue. The American legal system operates on the principle of *stare decisis*, which dictates that courts should abide by precedent.<sup>244</sup> As such, the holding in *Sullivan* would seem to represent a difficult obstacle in implementing a change in the standard of defamation. However, such a change is not without precedent.

For example, in *Arizona v. Gant*, the Supreme Court changed 30 years of legal precedent established by *New York v. Belton* when it held that an officer could not search a vehicle after arresting one of its occupants except in narrow

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237. See Patrick Reevell, *Will Russians Indicted by Special Counsel Face Extradition? Don’t Hold Your Breath*, ABC NEWS (Feb. 19, 2018, 8:25 PM), <http://abcnews.go.com/International/russians-indicted-special-counsel-face-extradition-hold-breath/story?id=53198448>.

238. See *supra* Section I.A.

239. See *supra* Subsection I.B.1.

240. See *supra* note 41 and accompanying text.

241. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1961).

242. *Id.* at 271.

243. See *supra* Section I.B.

244. *Stare decisis*, BLACK’S LAW DICTIONARY (6th ed. 1990)



circumstances.<sup>245</sup> The *Gant* Court noted the importance of *stare decisis* but stated that “it does not compel us to follow a past decision when its rationale no longer withstands ‘careful analysis.’”<sup>246</sup>

The Court has also stated that the doctrine of *stare decisis* is at its weakest when the Court interprets the Constitution because “our interpretation can be altered only by constitutional amendment or by overruling our prior decisions.”<sup>247</sup> In *Planned Parenthood v. Casey*, the Court stated that “changed circumstances may impose new obligations . . . to overrule a prior case as a response to the Court’s constitutional duty.”<sup>248</sup> Today’s journalistic landscape is radically different than that of the *Sullivan* era,<sup>249</sup> and the changed circumstances require that the Court take a fresh look at the public-official doctrine.

Additionally, the proposed standard in *Curtis* does not necessarily contravene the holding in *Sullivan*. The Court noted that the *Times* published the false advertisement without verifying its accuracy; however, the Court found it reasonable that the *Times* relied upon the good reputation of those who sponsored the advertisement.<sup>250</sup> This reasoning is more in line with the *Curtis* standard because the Court analyzed it in terms of reasonable publishing policies.<sup>251</sup> As such, the *Curtis* standard is able to be incorporated into the actual-malice standard of *Sullivan* while still respecting the doctrine of *stare decisis*.

Just as *Sullivan*’s effect on journalism took decades to develop,<sup>252</sup> a new standard will need time to assert its influence in our national discussion, and both the courts and journalists will need to watch and shape it along the way. My proposed standard, and its reasonable obligation to verify stories, is designed to strike a balance between being too ineffective against journalistic malpractice and not posing a threat to the freedom of the press. However, it is impossible to set out a new legal standard for defamation with certainty that it will strike the appropriate balance. Some public officials, such as President Trump, have already threatened to use new libel laws to silence their critics in the media.<sup>253</sup> Care must be taken not to allow accountability to change into abuse. Therefore, the new standard, and its effect on the journalistic landscape, would need to be monitored, adjusted, and if necessary, repealed in order to strike the appropriate balance between freedom and responsibility.

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245. *Arizona v. Gant*, 556 U.S. 332, 344 (2009).

246. *Id.* at 348. The Court did attempt to reconcile the two cases. *Id.* at 348–51.

247. *Janus v. Am. Fed’n of State, Cty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018).

248. 505 U.S. 833, 864 (1992).

249. *See supra* Section II.A.

250. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 287 (1964). The Court has relied upon this passage to support the doctrine that failure to investigate a story does not constitute “actual malice.” *See St. Amant v. Thompson*, 390 U.S. 727, 732–33 (1968).

251. *Sullivan*, 376 U.S. at 287–88.

252. *See supra* Section III.C.

253. Michael M. Grynbaum, *Trump Renews Pledge to ‘Take a Strong Look’ at Libel Laws*, N.Y. TIMES (Jan. 10, 2018), <https://www.nytimes.com/2018/01/10/business/media/trump-libel-laws.html>.

### CONCLUSION

In *Sullivan*, the Supreme Court sought to protect the civil-rights movement and ensure a free press. However, the actual-malice standard has created problems that the Court could not have foreseen in 1964 and should therefore be amended to correct those problems. Holding news organizations and others liable when they engage in “highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by reasonable publishers”<sup>254</sup> balances society’s need to have a free press with its need to have a reliable press and stems the tide of fake news.

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254. See *supra* Section IV.