

Spring 2022

## Republication Liability on the Web

Jeffrey Standen

Follow this and additional works at: <https://scholarship.law.marquette.edu/mulr>



Part of the [First Amendment Commons](#), and the [Internet Law Commons](#)

---

### Repository Citation

Jeffrey Standen, *Republication Liability on the Web*, 105 Marq. L. Rev. 669 (2020).

Available at: <https://scholarship.law.marquette.edu/mulr/vol105/iss3/6>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact [megan.obrien@marquette.edu](mailto:megan.obrien@marquette.edu).

# REPUBLICATION LIABILITY ON THE WEB

JEFFREY STANDEN\*

*The tort of defamation evolved in an era where defamatory speech was published in books, magazines, newspapers, or other printed documents. The doctrines that are antecedent to the tort, such as publication, fault, defamation per se, presumed damages, and republication liability, similarly presumed that most defamation would appear in written form in a published work. Similarly, the significant limitations on defamation liability that were produced by a succession of Supreme Court constitutional precedent, including restrictions on prior restraint, heightened fault standards, expanded “public” classes, the “fact/opinion” dichotomy, and the “truth/substantial truth” burden shifting, also were based on a publishing world in which defamatory statements would most likely appear in traditional printed form.*

*Both the common law of defamation and its constitutional reformulations are antiquated. Neither set of doctrines adequately responds to the internet age, where defamation can take place by pushing “send” or by linking to the posts of others. The sheer speed of publication and republication and the velocity of relevant opinion-making require a complete reconsideration of the interplay between tort liability and First Amendment freedoms. The Congress’s first effort at resolving this problem, Section 230 of the Communications Decency Act, fails at both ends, neither providing publishers with the room they need to engage in protected activities nor creating adequate remedies for victims of false, defamatory statements. This Article suggests that a modified “notice and takedown” regime, already practiced on most social media websites by private agreements, forms the proper model for legislative reform.*

I. INTRODUCTION .....	670
II. THE <i>SANDMANN</i> LITIGATIONS .....	673
III. THE SPECIAL PROBLEM OF INTERNET DEFAMATION.....	679
A. The “Local” Presumption of the Common Law of Defamation...680	
B. The Uncomfortable Fit of Defamation Law with the Internet Age	
.....	687
IV. CONSTITUTIONAL PROTECTIONS DO NOT CURE THE PROBLEM .....	691
A. First Amendment Limitations on Defamation Liability .....	693

---

\* Professor of Law, Northern Kentucky University. The Author has consulted on the Sandmann litigation discussed in the Article.

B. The First Amendment in the Internet Age .....	698
i. Actual Malice .....	698
ii. Opinion.....	700
iii. Prior Restraints.....	703
V. SECTION 230.....	705
A. Section 230 Immunity.....	705
B. The Websites of Traditional Publishers and Section 230 Immunity .....	710
C. Section 230 Reform .....	718
VI. CONCLUSION.....	719

## I. INTRODUCTION

The internet has created a world with accelerated sharing of content. At common law, liability for republication is strict.<sup>1</sup> The “tale bearer” is as liable as the “tale maker.”<sup>2</sup> Thus, the content in the original statement is defamatory and liability “republication” potentially arises with each repetition.<sup>3</sup> This state of affairs can be highly problematic. It is not uncommon that the original words, although defamatory, are also newsworthy: they may have been uttered by public figures or by other, non-public people about a matter of intense public concern. Newsworthy statements seem to demand journalistic repetition. Yet the common law of defamation potentially imposes liability for their republication. Traditional print publications, aware of the intricacy of defamation law, would omit defamatory words from their publications, using circumlocutions to convey meaning to the reader.<sup>4</sup> Should the traditional print publication wish to repeat the defamatory words verbatim, they would first conduct a reasonable investigation to determine their veracity. Truth or “substantial truth” has always been a valid defense to defamation liability; alternatively, although republication liability is strict, in practice many courts

---

1. “[O]ne who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.” Restatement (Second) of Torts § 578 (Am. L. Inst. 1977).

2. “[T]ale bearers are as bad as tale makers.” See, e.g., *Barry v. Time Inc.*, 584 F. Supp. 1110, 1122–23 (N.D. Cal. 1984).

3. *Zeran v. America Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997) (citing W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen, PROSSER & KEETON ON TORTS § 113, at 799 (W. Page Keeton, ed., 5th ed. 1984) (“[E]very repetition of a defamatory statement is considered a publication.”)).

4. See Lawrence Vold, *The Basis for Liability for Defamation by Radio*, 19 MINN. L. REV. 611, 631 (1935) (reporting that a “newspaper by previous scrutiny of the copy . . . can exercise such practical control as to avoid in most instances the publication of defamatory matter.”); see also William H. Painter, *Republication Problems in the Law of Defamation*, 47 VA. L. REV. 1131, 1152 & n.77 (1961) (reporting that a republisher could “protect itself by a contract of indemnity with the news service . . .” or by purchasing liability insurance).

would interpose a negligence standard to avoid or mitigate the harsher outcomes of the strict liability standard.<sup>5</sup>

In the internet age, traditional defamation law has been stretched to its limit, or even beyond. The near-instantaneous acceleration of content around the world through the advent of widely used social media platforms and other shared spaces has curtailed or eliminated the time available for traditional journalists and publishers to investigate the truth of the matter. The ability of the publishers to engage in careful circumspection and judicious qualification of potentially defamatory content has been diminished. In the new world order, the rush to publish is ubiquitous: news publications race to break the news first, to be the first to broadcast it more widely, or to be the first to offer an opinion, either in a formal editorial or in the tone and tenor of the news reporting.<sup>6</sup> Today, traditional news outlets publish not only in print, but also on their websites, in blogs, in Twitter feeds and on other social media. Journalists rush to offer strong reactions, posting a quick “take” on noteworthy events that may literally be happening simultaneously. The pressure for speed is pronounced: a journalist who is slow to join the narrative might as well not publish. Stories that are late do not draw readers to the material, traffic to the website and, importantly, buyers to the advertising content that appear in the sidebar. Without speed, publisher revenues diminish. To an unprecedented extent, publishers are able to track with precision which articles, and therefore which of its stories and writers, contribute most heavily to the bottom line. The rush to publication, endemic in the traditional media’s desire to remain relevant and profitable in this accelerated internet environment, encourages even estimable print publications to abandon their deliberate fact-checking of articles, moving quickly to print or post newsworthy statements without adequate regard to their defamatory content.

Not only has the internet speeded up the republication process, but it has also altered the publisher’s exposure to liability in a more fundamental way. The pressure to publish first has always been part of the journalism industry, and publishers have long borne the threat of reputational damages for their defamatory publications. Yet in the recent past, before the advent of internet publishing, the scope or “reach” of the customer market for a publication essentially created a hard cap on the publisher’s potential exposure to liability, limiting the downside risk of making a mistake. The reputational effects of

---

5. See *Developments in the Law: Defamation*, 69 HARV. L. REV. 875, 904–06, 910–12 (1956) (discussing different approaches taken by jurisdictions to mitigate the harshness of the strict liability rule).

6. CLAY SHIRKY, *HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS* 81, 98 (2008) (“[f]ilter-then-publish” has been reversed to “publish-then-filter” in the internet age).

defamatory content, and thus the outer reaches of the publisher's damages, were confined to the market the publication served, and further limited to the number of readers within that market. Only a small handful of publishers served the national market, and typically those large periodicals were not under the publication pressure of a daily newspaper. In the internet age, by contrast, the "reach" of all publishers, or any content creator, no matter how local in aim or how modest in readership, is factually limitless. Defamatory statements can in mere hours can "go viral," reaching a national or even international audience. This enormous reach far outdistances the resources of all but the very largest publishing companies. Many of these "content originators," such as the anonymous social media contributor, may be practically impervious to liability, lacking the financial resources that would make them a target of a lawsuit.

For those few major publishers with the wherewithal to constitute a "collectible defendant," however, modern defamation liability is without theoretical limitation. The reach of the publication is no longer a natural limitation of damages; a single statement made on the internet can travel the world. The basic measure of damages in a defamation case is loss to reputation. Where the defamation constitutes "defamation per se," damages are "presumed," that is, determined without the aid of proof, thus empowering the jury to arrive at a verdict that it deems fair and reasonable in light of the defamation.<sup>7</sup> What once constituted an assessment of localized reputational damages caused by a localized publication has changed. Articles posted on even low-traffic websites, or even content appearing on a random Twitter comment, can today "go viral," racing through social media platforms, finding its way onto the websites or print editions of well-established media. Reputational damages can be unprecedented and nearly indescribable in their scope and duration. Google never forgets. What was said about someone in even the smallest of towns can literally have world-wide reach and can give rise to reputational injury that will never cease, following the victim around in every aspect of personal and professional life for the rest of their life, and even be attached to their name for subsequent generations. The reputational injury inflicted by the "cancel culture" can be immense; even if that infliction is by mistake, due to a published false and defamatory statement of fact, nonetheless the liability of the publisher is without practical limitation.

Defamation law developed in an era when publication by respectable outlets proceeded slowly, where "getting it right" was more important than getting it fast. Its standards of fault, liability for "republication,"<sup>8</sup> measures of

---

7. See *WJLA-TV v. Levin*, 564 S.E.2d 383, 391–92 (Va. 2002).

8. "[O]ne who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it." RESTATEMENT (SECOND) OF TORTS § 578 (Am. L. Inst. 1977).

damages, definition of truth, restrictions on standing, and careful delineation of statements of fact, presumed a journalistic environment of deliberate research, careful phrasing and editing of text, journalistic codes of ethics, accepted standards of journalistic care, and review by legal counsel. All these traditional methodologies and procedures together limited the likelihood of defamation. None of these traditional practices fits easily in the internet age. Today, it is speed, “breaking the story,” and instant and strong reactions that draw clicks, attract visitors, and generate revenue. Even worse, traditional journalistic publications today find themselves not only in competition with their traditional professional rivals, but also with the multitude of users and comment-makers who populate social media. Today, it is often “non-journalists” who break stories and drive them to viral prominence, leaving the traditional publishers to catch up.<sup>9</sup> The demise of traditional print journalism and its replacement with digital journalism means more than a mere change in the medium of communication. It has meant a fundamental change in the way news is developed and marketed. Defamation law will either provide a useful corrective to the excesses of digital journalism or will need to be modified to allow for the free-flowing exchange of information, even tortious defamatory information, that appears so much a part of contemporary internet discourse.

## II. THE *SANDMANN* LITIGATIONS

The ongoing lawsuits brought by Nicholas Sandmann bring us right to the heart of the matter.<sup>10</sup> Sandmann, a sixteen-year-old white youth, was a junior in a private high school, Covington Catholic (CovCath), located in Kentucky.<sup>11</sup> In January 2019, along with many of his classmates, Sandmann traveled by bus to Washington, D.C., on a school trip to do some sightseeing and to participate

---

9. See generally, Eugene Volokh, *Cheap Speech and What It Will Do*, 104 *YALE L.J.* 1805 (1995).

10. Sandmann has filed seven lawsuits against major media defendants. Plaintiff’s First Amended Complaint with Jury Demand at 1, *Sandmann v. WP Company LLC*, 401 F. Supp. 3d 781 (E.D. Ky. 2019) (No. 2:19-cv-00019); Plaintiff’s Complaint with Jury Demand at 1, *Sandmann v. The New York Times Co.*, No. 2:20-cv-00023 (E.D. Ky. Mar. 3, 2020); Plaintiff’s First Amended Complaint with Jury Demand at 1, *Sandmann v. NBCUniversal Media, LLC*, No. 2:19-cv-00056 (E.D. Ky. Aug. 19, 2019); Plaintiff’s Complaint with Jury Demand at 1, *Sandmann v. CBS News, Inc.*, No. 2:20-cv-00024 (E.D. Ky. Mar. 2, 2020); Plaintiff’s Complaint with Jury Demand at 1, *Sandmann v. ABC News, Inc.*, No. 2:20-cv-00025 (E.D. Ky. Mar. 2, 2020); Plaintiff’s First Amended Complaint with Jury Demand at 1, *Sandmann v. Gannett Co., Inc.*, No. 2:20-cv-00026 (E.D. Ky. Aug. 31, 2020); Plaintiff’s Complaint with Jury Demand at 1, *Sandmann v. Cable News Network, Inc.*, No. 2:19-cv-00031 (E.D. Ky. Mar. 12, 2019). These facts are a compilation of the allegations made in the plaintiff’s complaints. The Author makes no representation as to their truth or falsity.

11. Plaintiff’s First Amended Complaint with Jury Demand at 2, *Sandmann v. WP Company LLC*, 401 F. Supp. 3d 781 (E.D. Ky. 2019) (No. 2:19-cv-00019).

in the “March for Life” anti-abortion protests going on in the city that day as part of an annual observance coincident with the anniversary of the *Roe v. Wade* decision.<sup>12</sup> After the day’s activities were complete, the school children waited on the steps of the Lincoln Memorial for their buses to arrive to deliver them back to Kentucky.<sup>13</sup> Several of the students, including Sandmann, had purchased and were wearing the red “Make America Great Again” hats made famous by supporters of President Donald Trump.<sup>14</sup> While they waited, the students were approached by members of the “Black Hebrew Israelites,” an extremist group.<sup>15</sup> The Black Hebrew Israelites allegedly shouted racist and hateful epithets at the CovCath students, including in particular several students who were Black.<sup>16</sup> In response, and with the permission of school chaperones, many of the CovCath students joined in school spirit chants, apparently in an attempt to drown out the Black Israelites.<sup>17</sup>

Into the midst of this confrontation strode Nathan Phillips, a military veteran and Native American activist.<sup>18</sup> As he walked, Phillips carried a small drum and beat it rhythmically.<sup>19</sup> He was accompanied by at least one other person, also it appears a fellow political activist, who was filming Phillips as he approached the gathering.<sup>20</sup> For undisclosed reasons, Phillips walked directly to Sandmann, who until the moment Phillips neared him, was turned in the other direction, laughing with his friends.<sup>21</sup> When Sandmann turned back, Phillips stood but inches from his face, beating his drum, and staring at Sandmann.<sup>22</sup> In response, Sandmann said nothing, but smiled slightly, a rictus that some later called a smirk, others an embarrassed, frozen smile.<sup>23</sup> No direct words were exchanged between the two; no physical movements or gestures of any kind were made.<sup>24</sup> After a few long minutes of this close, face-to-face encounter, Sandmann turned, along with the other students, to proceed to their bus, which had arrived in the interim.<sup>25</sup> As the school children departed, Phillips, along

---

12. *Id.* at 6.

13. *Id.*

14. *Id.* at 6, 20.

15. *Id.* at 6.

16. *Id.*

17. *Id.*

18. *Id.* at 6, 29.

19. *Id.* at 7.

20. *Id.*

21. *Id.* at 8.

22. *Id.* at 9.

23. *Id.* at 9, 14.

24. *Id.* at 9.

25. *Id.* at 9, 34.

with his companion, did a little dance of joy, and said, “I got him . . . [w]e won . . .”<sup>26</sup> So ended the matter, it might be thought.

Within a short time, however, an edited version of the video taken by Phillips’ colleague, later termed a “video clip,” was uploaded to a fake Twitter account, and soon, through social media sharing, went “viral,” the image of Sandmann grinning just inches away from Phillips’s face comprising its quintessence.<sup>27</sup> In subsequent interviews with news media, Phillips stated that Sandmann had “blocked [his] way and wouldn’t allow [him] to retreat.”<sup>28</sup> He accused the students of saying “build that wall,” a particularly ironic statement to make to a Native American activist, and of shouting various racist statements in his direction.<sup>29</sup> Unbeknownst to Phillips and his accomplice, other videos, including the “Banyamyan Video,” was also taken of the encounter and posted on the internet.<sup>30</sup> Unedited, it contained video and audio of the entire event.<sup>31</sup> These other videos suggested that Phillips’ claims about Sandmann’s behavior and that his classmates were false. This longer, unedited video was published to the internet within a short time after the video clip, and was viewed widely, although not with the same reaction or frequency as the shorter, edited video clip.<sup>32</sup>

As the school bus rode homeward and social media churned, Sandmann, while sleeping in the back of the bus, went from a reserved high school student to an international pariah. His face, with its sheepish grin and MAGA hat, and with the incendiary racist context created by Phillips’ narrative, became the object of scorn and obloquy in numerous tweets, postings, editorials, and other published articles.<sup>33</sup> It appeared on the national evening news programs and

---

26. *Id.* at 9–10, 34.

27. *Id.* at 12, 14.

28. Cleve R. Wootson Jr., Antonio Olivo & Joe Heim, ‘It Was Getting Ugly’: Native American Drummer Speaks Out on his Encounter with MAGA-hat-wearing Teens, THE WASHINGTON POST (Jan. 22, 2019) <https://www.washingtonpost.com/nation/2019/01/20/it-was-getting-ugly-native-american-drummer-speaks-maga-hat-wearing-teens-who-surrounded-him/> [<https://perma.cc/L4CT-J82A>].  
Chris Mills Rodrigo, *Native American Elder Confronted by Teens in MAGA Hats Speaks*, The Hill (Jan. 19, 2019) <https://thehill.com/blogs/blog-briefing-room/news/426183-native-american-elder-confronted-by-teens-in-maga-hats-speaks> [<https://perma.cc/BN5E-MEKN>].

29. Plaintiff’s First Amended Complaint with Jury Demand at 34, Sandmann v. WP Company LLC, 401 F. Supp. 3d 781 (E.D. Ky. 2019) (No. 2:19-cv-00019).

30. *Id.* at 15.

31. *Id.* at 15.

32. *Id.* at 47.

33. *Id.* at 34.

was the object of ridicule on late-night talk programs.<sup>34</sup> Even Sandmann's own church, the Diocese of Covington, piled on, "condemning" the CovCath students and apologizing to Phillips.<sup>35</sup> It was the perfect storm in a politically divided nation: a white, Catholic, MAGA-hatted, anti-abortion protestor acting disrespectfully if not belligerently toward a peaceful, veteran, minority activist who was only trying to proceed up the steps of the Lincoln Memorial softly beating his ceremonial drum. In so many unspoken ways, it triggered the reaction of those who despised the President and all that he was thought to represent.<sup>36</sup> Nicholas Sandmann became Trump's surrogate: the face that provided the proverbial punching bag in a time when the President seemed immune from attack. Sandmann was "doxxed," his personal contact information spread on the web.<sup>37</sup> Sandmann received numerous texts, voicemails, emails, and other communications that contained threats to his life, vile recriminations, and angry catcalls.<sup>38</sup> His home was threatened.<sup>39</sup> CovCath was picketed by protestors.<sup>40</sup> Even recently, at the start of his college career, he has been subject to student and faculty protests and calls for expulsion.<sup>41</sup> Sandmann, they say, does not properly represent the values of a Kentucky college devoted to liberal education.<sup>42</sup>

Despite the public reaction, all of Phillips' statements, and indeed the entire public narrative on which the hostile reaction is based, are false according to

---

34. See LibertyPen, *Real Evidence of Fake News: Nick Sandmann & The Covington Boys*, YOUTUBE (Dec. 17, 2021), <https://www.youtube.com/watch?v=ZIQ3tXuhz0E> [<https://perma.cc/KH3R-CY7K>].

35. Compl. at 48, Sandmann v. WP Company LLC, (No. 2:19-cv-00019).

36. See generally Complaints cited *supra* note 10 (detailing news articles and social media posts drawing connections between the Covington kids, Trump, and racism).

37. *Kentucky Approves Bill to Make 'doxing' Illegal after Covington Student's Online Backlash*, ASSOCIATED PRESS, (Mar. 7, 2019), <https://www.nbcnews.com/news/us-news/kentucky-approves-bill-make-doxing-illegal-after-covington-student-s-n980416> [<https://perma.cc/RN6N-R7K8>].

38. Compl. at 18, Sandmann v. WP Company LLC, (No. 2:19-cv-00019).

39. *Id.*

40. Frances Stead Sellers & Kevin Williams, *Death Threats and Protests: Kentucky Town Reels from Fallout Over Lincoln Memorial Faceoff*, THE WASHINGTON POST (Jan. 22, 2019), [https://www.washingtonpost.com/national/death-threats-and-protest-kentucky-town-reels-from-fallout-over-lincoln-memorial-face-off/2019/01/22/dfefef74-1e63-11e9-9145-3f74070bbdb9\\_story.html](https://www.washingtonpost.com/national/death-threats-and-protest-kentucky-town-reels-from-fallout-over-lincoln-memorial-face-off/2019/01/22/dfefef74-1e63-11e9-9145-3f74070bbdb9_story.html) [<https://perma.cc/2Z2V-MSEG>].

41. Nick Givas, *Report: ACLU Staffer Fumes at Transylvania University for Accepting Nick Sandmann*, FOX NEWS (Sept. 9, 2020), [https://www.wdrb.com/news/national/report-aclu-staffer-fumes-at-transylvania-university-for-accepting-nick-sandmann/article\\_00a35110-f28f-11ea-880f-6b9ad5244288.html](https://www.wdrb.com/news/national/report-aclu-staffer-fumes-at-transylvania-university-for-accepting-nick-sandmann/article_00a35110-f28f-11ea-880f-6b9ad5244288.html) [<https://perma.cc/V65A-SJGH>].

42. *Id.*

the Complaints.<sup>43</sup> The longer form of the video record suggests, and the independent investigation commissioned by the Diocese concludes that none of the statements or actions Phillips described happened: none of the schoolchildren said “build that wall,” no racist invectives were aimed at Phillips by the CovCath students, Phillips was not blocked, his path forward was not impeded, and his escape was not inhibited.<sup>44</sup> Yet his statements conveyed a distinct narrative: what might, without narration, appear to be a weird, yet non-confrontational encounter, became in the public eye a visual representation of aggression, privilege, racism, and insensitivity, all embodied in Nicholas Sandmann. The edited video clip was interpreted on social media through the lens of Phillips’ statements; the false narrative that it was thought the video communicated raced through the internet.<sup>45</sup>

Soon after, news accounts published in outlets more traditional than social media described the encounter, adopting the “story” of the video clip and Phillips’ statements without qualification, assuming them to be a true account of the incident.<sup>46</sup> Indeed, Phillips’ statements accusing Sandmann of “blocking” his path and preventing his escape appeared particularly newsworthy.<sup>47</sup> Phillips was an immediate and vital participant in an encounter that had gone viral, capturing for a time the attention of the nation, and his interpretation of events appeared to be important and relevant to an incident of public concern. Newspapers would be interested in reporting such statements, and might be inclined to accept the public narrative, that of the privileged MAGA teenager disrespecting the Native protestor, as the true narrative according to the Complaints. The very ubiquity of the public narrative lent it the presumption of truth. But it was allegedly untrue, as appears plausible from the longer videographic tape and the independent investigation.<sup>48</sup> A more cautious journalistic publisher might reasonably have taken more time to check on the available evidence. A Google search on the topic would have turned up the longer video on the first page. A Google search of “Nathan Phillips” would have revealed allegations, according to the Complaint,<sup>49</sup> that he has in the past

---

43. Compl. at 20, Sandmann v. WP Company LLC, (No. 2:19-cv-00019). All claims about the truth or falsity of statements or accuracy of opinions rely on the Complaints. This Article takes no position on this matter.

44. *Id.* at 19.

45. *Id.* at 13, 26, 75 (depicting various tweets pushing the false narrative).

46. *Id.* at 34–39.

47. *Id.* at 2.

48. Complaint at 16, Sandmann v. WP Company LLC, (No. 2:19-cv-00019). In the federal district court case, the several defendants have yet to file summary judgment motions. The parties are conducting discovery on the relevant factual issues.

49. *Id.* at 87.

made false accusations to further his political agenda.<sup>50</sup> Even a superficial investigation would have led a prudent reporter to reconsider, if not wholly revise, the public narrative.

The internet waits for no one. Not one of the major news companies, including some of the leading journalistic brands in the nation, such as The New York Times, Gannett, CNN, ABC, NBC, The Washington Post, and CBS, appears to have conducted a thorough investigation into the truth of the Sandmann-Phillips encounter. They all accepted the public narrative as the true narrative, and within a few hours of the viral event, published or broadcasted accounts that conveyed the false description of the encounter and contained the direct, questionable quotes from Phillips.<sup>51</sup> According to Sandmann, they all printed or posted defamatory statements.<sup>52</sup> Phillips' statements were newsworthy, concerned what had become a matter of public importance, and were pertinent to a salient controversy. But they may have been false. Newspapers and other journalistic media are responsible for what they publish. They cannot publish or re-publish defamatory falsehoods without risking liability for defamation.

The newsworthy encounter between Sandmann and Phillips created a dilemma for online publications, a "publish or perish" dilemma that is endemic to the new age of internet journalism: publish and risk liability, or not publish and therefore perish by failing to report newsworthy information. This dilemma is amplified by the nature of internet reporting, where speed of publication means relevance and web visitors, while careful deliberateness leads to delay, obscurity, and failure. Along a legal dimension, the dilemma also pits the policies of the First Amendment in free speech and a free press against the interests of the tort victim in avoiding, or seeking to remedy, false and defamatory statements of fact.

The interplay between First Amendment considerations and defamation law does not chart a clear path forward for publishers to resolve this quandary. The complicated mix of constitutional doctrines, state common law, and federal and state statutes leaves internet publishers with a problem without existing

---

50. *Id.* at 30–32.

51. *See generally* Complaints cited *supra* note 10.

52. *Id.* A statement is defamatory if it is false, factual, and subjects a person to public hatred, ridicule, contempt, or disgrace. *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 793 (Ky. 2004); *Disabled American Veterans v. Crabb*, 182 S.W.3d 541, 547 (Ky. App. 2005). Phillips' statement that Sandmann "blocked [his] way and wouldn't allow [him] to retreat" allegedly meets all three criteria. Whether it is false or not will be a question addressed on summary judgment; it appears to be factual, as the District Court found in resolving motions to dismiss, *Sandmann v. WP Company, LLC*, 401 F. Supp. 3d 781, 788, 792, 797 (E.D. Ky. 2019), and by all appearances the claim that Sandmann blocked Phillips, in the context, subjected Sandmann to sustained public obloquy.

solutions. One putative solution, Congress's grant of immunity to social media platforms<sup>53</sup> contained in Section 230 of the Communications Decency Act,<sup>54</sup> likely does not apply to traditional journalists or publishers who happen to post some or all of their content online. Likewise, defamation law of most states provides no clear exception or strong defense.<sup>55</sup> The importation by federal courts, most particularly the Supreme Court, of federal constitutional standards under the First Amendment provides some plausible safe harbors for publishers,<sup>56</sup> but none of them responds adequately to the acute problem of publishing in the internet age. In short, the old saw of "publish or perish" has taken on a more pointed contemporary meaning. Internet websites that publish or re-publish the defamatory statements of others face potentially devastating and nearly limitless defamation liability, yet they "must" publish such material to report on newsworthy events and remain relevant and financially viable.

This Article will discuss this dilemma, showing how the intersection of state tort laws and constitutional doctrines makes liability probable, yet provides no easy way out. These doctrines respond to a world that no longer exists. None of the common law defenses nor Section 230 salvage the situation. Traditional journalistic publications that post content on their website have two paths forward: they can conform to traditional journalistic standards of care in all their products, including posts, blogs, or tweets; or they can re-position themselves as platforms rather than content-originators to try to fit within the parameters of Section 230. Neither solution adequately solves the publish-or-perish dilemma faced by traditional media publishers in the internet era.

The Sandmann case is the canary in the coal mine. The canary has died. A new era in defamation law is upon us.

### III. THE SPECIAL PROBLEM OF INTERNET DEFAMATION

The tort of defamation is a creation of the common law.<sup>57</sup> Despite the ongoing constitutionalization of its elements and defenses, it remains

---

53. Many judicial opinions have treated the social media platforms as providers of "interactive computer service[s]." *Taylor v. Twitter, Inc.*, No. CGC-18-564460 (Sup. Ct. Cal. 2019); *Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874, 888 (N.D. Cal. 2017); *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1121, 1129 (N.D. Cal. 2016), *aff'd* 881 F.3d 739 (9th Cir. 2018); *Marshall's Locksmith Service Inc. v. Google, LLC*, 925 F.3d 1263, 1268 (D.C. Cir. 2019).

54. 47 U.S.C. § 230.

55. *See infra* notes 92–101 and accompanying text.

56. *Snyder v. Phelps*, 562 U.S. 443, 451 (2011) (holding that the Free Speech Clause of the First Amendment can serve as a defense in some tort suits, including those suits for intentional infliction of emotional distress).

57. Daniel Hemel & Ariel Porat, *Free Speech and Cheap Talk*, 11 J. LEGAL ANALYSIS 46, 52 (2019).

substantially a matter of state law, with considerable variation among states.<sup>58</sup> Its elements and defense grew from that common-law background.<sup>59</sup> They are built on the assumption of locality: of local conditions, local parties, and local assessments of damages. The advent of the internet has brought about, to an unprecedented degree, the democratization of speech. Topics of discussion are often national in scope, if not worldwide. Opposite from the decidedly local emphasis of defamation law, internet defamation happens in a diffuse, undefinable context, with narratives appearing on numerous sites, with varied sources, and unimaginable impact. Yet the standards of defamation law, designed for local conditions, remain the primary means of policing illegal content.<sup>60</sup>

It is not a good fit. Defamation law presumes a world that no longer exists. Its elements and defenses are not easily adaptable to internet defamation: they fail to allow victims of defamation to recover permissible redress; they also fail to provide adequate room for speakers and publishers to comment freely without undue fear of liability. The constitutional protections for speech are likewise antiquated, having little more than theoretical applicability to defamation in the internet age. Congress' response to speech on the internet, Section 230 of the Communications Decency Act, does not speak adequately to the general problem.

#### A. *The "Local" Presumption of the Common Law of Defamation*

Defamation law<sup>61</sup> is built on a premise of thorough journalistic investigation. To avoid liability, especially if the publisher has serious doubt about the truth, the publication must be preceded by investigation.<sup>62</sup> Even erroneous and defamatory statements, if preceded by adequate or reasonable pre-publication investigation, are not actionable.<sup>63</sup> Investigation requires time, access to data and witnesses, and editorial review. Each of the several elements to a defamation cause of action, and the limited common-law or statutory

---

58. *Id.*

59. *Id.* at 53.

60. Lyrisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 885–87 (2000).

61. Defamation is the general term for a legal claim involving injury to reputation stemming from a false statement of fact. Hemel & Porat, *supra* note 57, at 46. It includes both libel, which is defamation in written or fixed form, and slander, which is spoken defamation. *Id.* It is a cause of action created by state law. *Id.*

62. *Time, Inc. v. Pape*, 401 U.S. 279, 291–92 (1971).

63. *Walker v. Wanner Eng'g, Inc.*, 867 F. Supp. 2d 1050 (D. Minn. 2012); *Jones v. U-Haul Co. of District of Columbia, Inc.*, 169 Fed. Appx. 590 (D.C. Cir. 2005).

defenses available for defamation, presume and are responsive to the supposition of journalistic investigation.

Central to defamation law is the element of falsehood. Historically, falsehood was the only required element of proof:<sup>64</sup> publication of a falsehood sufficed for defamation liability, without the need to prove fault.<sup>65</sup> Falsehood implies the existence of truth; that is, for there to be things that are not true, there must also be things that are true. It also implies that truth is accessible: that what is true is knowable, ascertainable, and within a speaker's grasp to determine. The "falsehood" requirement also suggests that the speaker has a choice to either publish the truth or publish the falsehood. Like truth, falsehood also presumes a certain degree of access: that the speaker or publisher can access information, be it documentary or testimonial, that will show the speaker the truth or create the truth against or contrary to which the falsehood is uttered.

Before the internet, as a practical matter this access to the truth had to be local, with local reporters familiar with local conditions investigating local

---

64. Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 63 (1983).

65. Joel D. Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1353 (1975). It is common today for defamation claims to be accompanied by claims for intentional infliction of emotional distress, unfair trade practices, fraud, and tortious interference with business relationships, all arising out of the same false statements. Usually, these parallel claims are subject to the same limitations, proof requirements, privileges, and defenses as the defamation claim. See *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46 (1988) (applying defamation standards, including actual malice, to an emotional distress claim). Subsequently, other courts have held that plaintiffs cannot evade constitutional and state law privileges and defenses for speech by recasting their defamation claims as different theories of tort. *Yohe v. Nugent*, 321 F.3d 35, 44 (1st Cir. 2003) ("[A] plaintiff cannot evade the protections of the fair report privilege merely by re-labeling his claim."); *Tierney v. Vahle*, 304 F.3d 734, 743 (7th Cir. 2002) ("To evade the constitutional limitations on defamation suits by charging the alleged defamer with participation in a conspiracy, which is to say just by relabeling the tort, cannot be permitted."); *Chaiken v. VV Pub. Corp.*, 119 F.3d 1018, 1034 (2d Cir. 1997) ("[T]he Chaikens cannot avoid the obstacles involved in a defamation claim by simply relabeling it as a claim for intentional infliction of emotional distress."); *Brown v. Hearst Corp.*, 54 F.3d 21, 27 (1st Cir. 1995) ("it is not imaginable that [a false light claim] could escape the same constitutional constraint as [a] defamation claim."); *Beverly Hills Foodland, Inc. v. United Food and Commercial Workers Union, Local 655*, 39 F.3d 191, 196 (8th Cir. 1994) ("[T]he malice standard required for actionable defamation claims during labor disputes must equally be met for a tortious interference claim based on the same conduct or statements. This is only logical as a plaintiff may not avoid the protection afforded by the Constitution . . . merely by the use of creative pleading.") (citations omitted); see also *Correllas v. Viveiros*, 572 N.E.2d 7, 13 (1991) ("A privilege which protected an individual from liability for defamation would be of little value if the individual were subject to liability under a different theory of tort."). Arguably, invasion of privacy torts (except for false light claims), although often founded on false statements of fact, should not be subject to stringent defamation standards, as invasion of privacy responds to the revelation of personal information, not its falsity.

events.<sup>66</sup> The only way speakers in one location could access events in another was through reporting from journalists stationed in that other area. Journalism was highly decentralized. Local newspapers reported mostly local content; local television stations featured local news. This decentralized structure implied a measure of familiarity with background, events, and sources, helping publishers determine “the truth” before committing their reporting to print or broadcast.

Prior to the Supreme Court’s decision in *New York Times v. Sullivan*,<sup>67</sup> liability for defamation was strict; the plaintiff need not prove fault.<sup>68</sup> In time, the concept of “fault” crept into the law of defamation, providing an additional safeguard for publishers.<sup>69</sup> The fault standard exonerated even false statements where the speaker had first conducted a reasonable, non-negligent investigation.<sup>70</sup> The fault standard required that the publisher act reasonably, without negligence, to investigate the truth of claims before making them.<sup>71</sup> The fault element too was premised on and responded to the idea that journalism was essentially a localized trade.<sup>72</sup> Reasonable investigation in most situations could only be carried out locally; an adequate investigation that took place prior to publication precluded liability.

Along with the doctrines of fault and reasonable investigation, the third element of the common law of defamation also suggests a localized tort. This element pertains to the character of the false statement: to constitute defamation, the statement itself must be “defamatory.”<sup>73</sup> It must subject the

---

66. For discussions of the changes in journalism brought about by the rise of the internet and social media, see THE FUTURE OF JOURNALISM: DEVELOPMENTS AND DEBATES (Bob Franklin 2013); STEPHEN A. BANNING, JOURNALISM STANDARDS OF WORK TODAY: USING HISTORY TO CREATE A NEW CODE OF JOURNALISM ETHICS (2020); JEREMY IGGERS, GOOD NEWS, BAD NEWS: JOURNALISM ETHICS AND THE PUBLIC INTEREST (1998).

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

68. See *Holtzscheiter v. Thomson Newspapers, Inc.*, 506 S.E.2d 497, 503 (S.C. 1998) (“At common law, defamation was a ‘strict liability’ tort, but where the constitution is involved, the common law rules are altered.”); Robert A. Leflar, *Radio and TV Defamation: “Fault” or Strict Liability?*, 15 OHIO ST. L.J. 252, 254 (1954) (“The law of libel and slander . . . is ordinarily thought of as a body of law grounded on ‘absolute liability.’”).

69. See *New York Times Co.*, 376 U.S. at 279–83; *Lewis v. Time, Inc.*, 83 F.R.D. 455, 463 (E.D. Cal. 1979) (“The common thread in these cases is that there can be no liability absent scienter. The requirement of scienter comports with the traditional rule that a republisher cannot be held liable unless he had knowledge of the defamatory content . . . and satisfies the federal constitutional rule against liability without fault.”).

70. See *New York Times Co.*, 376 U.S. at 279–83.

71. *Id.*

72. See THE FUTURE OF JOURNALISM, *supra* note 66; See BANNING, *supra* note 66; See IGGERS, *supra* note 66.

73. See RESTATEMENT (SECOND) OF TORTS § 559 (Am. L. Inst. 1977).

plaintiff to the scorn, ridicule, or obloquy of others.<sup>74</sup> But those “others” were local: the legal standard is whether or not the plaintiff’s friends and neighbors, or business associates or community members, would consider the statement of the character that would diminish or demean their neighbor’s reputation.<sup>75</sup> It was an explicitly local standard that measured an impact depending on the reach of the publication.<sup>76</sup>

In similar fashion, the measure of damages available for defamation responded to the pervasive focus of the tort on locality. A jury would be asked to award damages based on the harm to the plaintiff’s reputation, but that harm was limited to the injury in the local community.<sup>77</sup> Only members of that community, who presumably might know something of a plaintiff’s reputation, could plausibly assess its diminishment in light of the defamatory statement. Although local in nature, damages for defamation at common law nonetheless could be substantial. Compensatory damages for defamation could include harm to reputation, psychological injury, and monetary losses, such as lost sales, that were proximately caused by the defamation.<sup>78</sup> Presumed damages were awardable for defamation “per se,” where the defendant falsely accused the plaintiff of committing a crime or adultery, if the plaintiff could establish fault.<sup>79</sup> In cases of defamation per se, the jury would be entitled to award presumed damages based on what the jury might reasonably think to be the likely impact of the defamation to the plaintiff’s reputation in the community.<sup>80</sup> Punitive damages were available for actual malice.<sup>81</sup> Damages can be highly punitive, deterring speech.<sup>82</sup> Injunctions against defamation, one type of a

---

74. The statement must tend to lower one’s estimation in the community or deter others from associating with them. See RESTATEMENT (SECOND) OF TORTS § 559 (Am. L. Inst. 1977); Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1092 (4th Cir. 1993) (statement must “make the plaintiff appear odious, infamous, or ridiculous”).

75. See generally, David A. Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747 (1984).

76. Laughland v. Beckett, 365 Wis. 2d 148, 870 N.W.2d 466, 476 (Wis. Ct. App. 2015) (“The nonpecuniary injury that damages in defamation cases compensate for include: impairment to reputation and standing in the community, personal humiliation, and mental anguish and suffering.”).

77. *Id.*

78. See Beasley v. Consolidation Coal Co., 2012 WL 2798805, at \*12 (W.D. Va. June 13, 2012); Laughland, 870 N.W.2d at 476.

79. See WJLA-TV v. Levin, 564 S.E.2d 383, 391 (Va. 2002).

80. Statements that state or imply criminal acts of moral turpitude, contagious disease, unfitness for office or employment, or acts prejudicial to one’s profession or trade are defamatory per se. See, e.g., Fleming v. Moore, 275 S.E.2d 632, 635 (Va. 1981).

81. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 348–50 (1974); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–61 (1985); Gov’t Micro Res., Inc. v. Jackson, 624 S.E.2d 63, 70 (Va. 2006).

82. See Lidsky, *supra* note 60.

“prior restraint,”<sup>83</sup> were and are disfavored;<sup>84</sup> nevertheless, many cases award injunctions against speech, particularly when the legality of that speech had been fully adjudicated prior to the issuance of the injunction.<sup>85</sup> Most state courts,<sup>86</sup> but not all,<sup>87</sup> refuse to enjoin defamation.<sup>88</sup>

Even the strong preference for damages as a remedy for defamation, and the equally strong disapproval of injunctions against speech, presumes a measure of “locality” as a functional matter. Compensable injuries require collectible defendants, and a defamation injury requires that the defendant be identifiable and subject to jurisdiction. These conditions to collectability were likely less a problem at the common law, with personal jurisdiction over the neighbor or community publication obtainable, and with the speaker of the defamation both local and identifiable.

The privileges and defenses available at the common law were also responsive to the presumption of localized defamation. Privileges create

---

83. *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697 (1931); *Citizens United v. Schneiderman*, 882 F.3d 374, 386–87 (2d Cir. 2018) (describing the “two traditional types of prior restraint: (1) preventing the printed publication of disfavored information . . . and (2) a facially-neutral law that sets up an administrative apparatus with the power and discretion to weed out disfavored expression before it occurs . . .”).

84. *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539 (1976) (press coverage of a murder trial); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (leaked government documents).

85. *Freedman v. Maryland*, 380 U.S. 51, 59 (1965) (injunction against obscene expression upheld, provided that there is an adjudication of obscenity prior to the injunction, or, if later, after the “shortest fixed period compatible with sound judicial resolution”); *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 390 (1973) (upholding an order to stop printing help-wanted ads that segregated “male” and “female” jobs; “The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment.”); *Aaron v. Securities & Exchange Commission*, 446 U.S. 680, 688–89 (1980) (upheld prior restraint involving securities fraud); *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374, 377, 392–95 (1965) (misleading advertising); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33–34 (1984) (failure to keep secret as promised).

86. *Willing v. Mazzocone*, 393 A.2d 1155 (Pa. 1978).

87. *Balboa Island Village Inn, Inc. v. Lemen*, 156 P.3d 339, 343–49 (Cal. 2007) (injunction against repetition of defamatory statements); *O’Brien v. University Community Tenants Union, Inc.*, 327 N.E.2d 753, 755 (Ohio 1975); *Retail Credit Co. v. Russell*, 218 S.E.2d 54 (Ga. 1975); *Advanced Training Systems, Inc. v. Caswell Equipment Co., Inc.* 352 N.W.2d 1 (Minn. 1984); *Sid Dillon Chevrolet-Oldsmobile-Pontiac, Inc. v. Sullivan*, 559 N.W.2d 740, 747 (Neb. 1997); *Auburn Police Union v. Carpenter*, 8 F.3d 886 (1st Cir. 1993); *Lothschuetz v. Carpenter*, 898 F.2d 1200 (6th Cir. 1990).

88. See David S. Ardia, *Freedom of Speech, Defamation, and Injunctions*, 55 WM. & MARY L. REV. 1 (2013) (identifying fifty-six cases enjoining speech, thirty-one since 2000; nearly half involving online speech); Doug Rendleman, *The Defamation Injunction Meets the Prior Restraint Doctrine*, 56 SAN DIEGO L. REV. 615 (2019).

protected zones for communications and can be either absolute or qualified.<sup>89</sup> Privileges can be destroyed by communications that are sent outside the protected zone for each privilege. Most of those protected zones are typically local, such as statements made by a former employer to a potential employer concerning an employee's job performance, or statements made by spouses, or statements made in judicial proceedings. None of the common law privileges contemplates statements made on matters of public concern in publications global in reach. In addition, the defamation privileges implied a degree of intimacy between the subject of the report and the reporter. The "fair report" privilege for providing accounts of government proceedings, for example, or the "common interest" privilege concerning the former employer, implied intimate, first-hand knowledge on the part of the speaker: an employer would have personal knowledge about her employee, and a reporter relaying the facts about a government hearing would likely have attended it in person.

The common law defenses also implied a considerable measure of local familiarity and control. The foremost defense is truth. Although termed a defense, it functionally meant that the plaintiff had failed to carry the burden to establish falsehood.<sup>90</sup> Nonetheless, truth as a defense implied a knowable reality and statements that were capable, with effort, to be established as true. In most situations, determining truth would demand local investigation. Common law defenses also showed sensitivity to the limits of local reporting. Stories written in the national press typically focused on stories of national interest, including large economic trends, foreign affairs, and political developments from the nation's capital. Two defenses to defamation liability arose to meet the needs of local publishers to include national stories in their newspaper and news programs. One of these defenses, recognized in several states, is the "wire-service" defense,<sup>91</sup> termed the "conduit" defense when

---

89. See RESTATEMENT (SECOND) OF TORTS §§ 586, 611 (Am. L. Inst. 1977).

90. RESTATEMENT (SECOND) OF TORTS § 581A cmt. b (Am. L. Inst. 1977) ("It has been consistently held that truth is an affirmative defense which must be raised by the defendant and on which he has the burden of proof. The practical effect of this rule has been eroded, however, by [*New York Times v. Sullivan*, which] requires a finding of fault on the part of the defendant regarding the truth or falsity of the communication."). Although inexact, usually "truth" is treated as an affirmative defense in the case of a private-figure plaintiff, but as an element of the cause of action for a public-figure plaintiff, effectively imposing the burden of proving falsehood on the plaintiff.

91. *Layne v. Tribune Co.*, 146 So. 234, 237 (Fla. 1933) ("Those are numerous authorities, most of them of early date, which are to the effect that one who hears a slander has a legal right to repeat it, if he does so in the same words, and at the same time gives his authority for the statement, because of the rebuttal of any presumption of malice in such cases."); *Rakofsky v. The Washington Post*, 971 N.Y.S.2d 74 (N.Y. Sup. Ct. 2013) (recognizing wire service defense for a plaintiff who published summaries of news stories); *Nelson v. Associated Press, Inc.*, 667 F. Supp. 1468, 1476 (S.D. Fla. 1987)

applied to common carriers.<sup>92</sup> It exonerates local publishers who re-publish a news item from “a reputable news agency” without knowledge that the information in the item was false, as long as the news item on its face does not indicate any reason to doubt its veracity.<sup>93</sup> This defense protected local publications who reprinted stories purchased from its affiliated wire service provider.<sup>94</sup> Any substantial alteration of the news item, however, negated the defense.<sup>95</sup> The other defense, adopted in few states,<sup>96</sup> is the “neutral reportage” privilege.<sup>97</sup> It holds that, in reporting on matters of public interest, where a prominent individual or organization makes a serious charge on a matter of public interest against another prominent individual or organization, the publisher of the statement is not liable, as long as the statement is accurately and “neutrally” reported.<sup>98</sup> Most courts, however, have refused to recognize the neutral reportage privilege.<sup>99</sup>

---

(holding that Newsweek magazine was entitled to the wire service defense); *Appleby v. Daily Hampshire Gazette*, 478 N.E.2d 721, 725 (Mass. 1985); *MacGregor v. Miami Herald Pub. Co.*, 119 So. 2d 85 (Fla. Dist. Ct. App. 1960).

92. RESTATEMENT (SECOND) OF TORTS § 612(1), cmt. g (Am. L. Inst. 1977) (A public utility under a duty to transmit messages is privileged to do so, even though it knows the message to be false and defamatory, unless (a) the sender of the message is not privileged to send it, and (b) the agent who transmits the message knows or has reason to know that the sender is not privileged to publish it.).

93. *Layne*, 146 So. at 238.

94. *Id.*

95. *Med. Lab. Mgmt. Consultants v. ABC, Inc.* 931 F. Supp. 1487, 1492 (D. Ariz. 1996) (“absolute non-involvement [by the local publisher] with the underlying broadcast’ is required.”); *Merco Joint Venture v. Kaufman*, 923 F. Supp. 924, 929–30 (recognizing conduit liability in granting summary judgment to defendant TV station for broadcasting a program with defamatory content).

96. Only two states, New York and California, and the U.S. Court of Appeals for the Eighth Circuit, recognize this privilege. *See Edwards v. National Audubon Society, Inc.*, 556 F.2d 113 (2d Cir. 1977); *Barry v. Time, Inc.*, 584 F. Supp. 1110 (N.D. Cal. 1984); *Price v. Viking Penguin, Inc.*, 881 F.2d 1426 (8th Cir. 1989). Other courts have rejected the defense; *see, e.g., Dickey v. CBS Inc.*, 583 F.2d 1221 (3d Cir. 1978).

97. *Edwards*, 556 F.2d at 113; *see generally* Ray W. Campbell, *The Developing Privilege of Neutral Reportage*, 69 VA. L. REV. 853 (1983).

98. *Edwards*, 556 F.2d at 120 (where a seemingly “responsible” individual or entity “makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter’s private views regarding their validity”); *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1122–24 (N.D. Cal. 1984) (“a republisher who accurately and disinterestedly reports certain defamatory statements made against public figures is shielded from liability, regardless of the republisher’s subjective awareness of the truth or falsity of the accusation.”).

99. *See Dickey v. CBS Inc.*, 583 F.2d 1221 (3d Cir. 1978); *Norton v. Glenn*, 797 A.2d 294, 298 (Pa. Super. Ct. 2002) (“We find the neutral reportage privilege was borne out of a misconception of *Time, Inc. v. Pape*, and we are not persuaded to adopt this privilege in the Commonwealth of Pennsylvania.”); *McCall v. Courier-Journal and Louisville Times Co.*, 623 S.W.2d 882, 886–87 (Ky. 1981); *Postill v. Booth Newspapers, Inc.*, 325 N.W.2d 511, 517–18 (Mich. App. 1982).

The doctrine of republication liability stands in contrast to the defenses to defamation that protected local publishers. Under this theory, the publisher of any defamatory material steps into the shoes of those whom the publisher quotes or republishes.<sup>100</sup> The publisher who repeats a defamatory statement is as liable as the originator of the statement.<sup>101</sup> The republication standard requires each successive publisher to conduct a reasonable investigation into the veracity of the statements it intends to make, or to risk liability for reliance on the previous publisher.<sup>102</sup> Like ordinary defamation liability, republication liability presumes that each successive publisher has the means, by reasonable investigation, to determine the truth or falsity of potentially defamatory statements.<sup>103</sup> Even statements by public figures accusing other public figures of misdeeds or malfeasance must, in the great majority of states that have rejected the neutral reportage defense, be investigated by successive publishers.<sup>104</sup> The publisher of those statements must refrain from repeating them if they contain untrue, defamatory content. Liability for defamatory republication obtains even if the re-publisher lacked the means or access to investigate the truthfulness of statements made by people in distant locations.

### *B. The Uncomfortable Fit of Defamation Law with the Internet Age*

The decentralized, local focus of investigation and reporting implicit in the falsehood and fault elements of defamation law have changed significantly in the internet age. Most notable is the dramatic and ongoing consolidation in the industry. Few local magazines remain, except for “city” magazines serving the largest urban areas. Many local newspapers have folded or diminished their pages markedly. Of the local newspapers that remain, many are local in name only: they retain their historic title, tying the paper to a city, but publish only a few pages devoted to local news, sports, and weather. Their ownership is

---

100. “[T]ale bearers are as bad as tale makers.” See, e.g., *Flowers v. Carville*, 310 F.3d 1118, 1128 (9th Cir. 2002) (internal citations omitted); *Barry v. Time*, 584 F. Supp. 1110, 1122–23 (N.D. Cal. 1984).

101. E.g., *Barry*, 584 F. Supp. at 1122–23 (citing RESTATEMENT (SECOND) OF TORTS § 578 (1977)); see also RESTATEMENT (SECOND) OF TORTS § 581A cmt. e. (1977) (“When one person repeats a defamatory statement that he attributes to some other person, it is not enough for the person who repeats it to show that the statement was made by the other person. The truth of the defamatory charges that he has thus repeated is what is to be established.”).

102. See *Flowers*, 310 F.3d at 1129–30.

103. Hyperlinks in an online article may not count as “republication.” *Biro v. Condé Nast*, 95 N.Y.S.3d 799 (N.Y. App. Div. 2019) (“Contrary to plaintiff’s contention, the email sent by defendant to New Yorker magazine subscribers . . . containing a hyperlink . . . does not constitute republication of the article.”) (internal citations omitted).

104. RESTATEMENT (SECOND) OF TORTS § 578(c); Dorothy A. Bowles, *Neutral Reportage as a Defense Against Republishing Libel*, 11 COMM. & L. 3, 4 (1989).

distant, and most of the stories these local dailies print come from a centralized source. The website for Gannett, Inc., for example, owner of the USA TODAY network of newspapers, states that it also owns “hundreds of local media outlets in 46 U.S. states.”<sup>105</sup> Gannett does, it appears, assign individual reporters to these local papers, but their number is far fewer than was the case when the paper was locally owned and operated. Local journalism has diminished, and thus the ability of publications to conduct local investigations has likewise waned.

The advent of the internet has also changed the character and accessibility of the damages remedy for defamation. A great deal of online content, and a disproportionate volume of its putative defamation, comes from anonymous sources, or from “non-collectible” defendants. Defamatory statements may be published on blogs, websites, social media, and in the ubiquitous “comments” section appended to many posted articles. They may come from competitors, customers, disgruntled employees, or rogue trolls, any of whom may be hiding behind fake or anonymous names. The First Amendment protects anonymous speech.<sup>106</sup> More particularly, the First Amendment protects internet speech.<sup>107</sup> As a result, identifying internet defendants can be difficult and expensive.

This is not to say that liability for internet defamation is impossible to impose, only that it is difficult. The process by which defamation plaintiffs can even identify internet “John Doe” defamation defendants can be taxing.<sup>108</sup> Sometimes, expert examination may unmask John Doe, using forensic and digital review on the content, timing, and method of the defamatory statement to reveal Doe’s identity. Information such as a unique username or internet handle, or other recognizable words and phrases may provide clues; Doe may have left an internet-protocol address or geographical locator in the online message. If forensic and digital examination fails, the plaintiff may file a defamation suit against “John Doe” or use applicable pre-suit discovery processes to serve subpoenas on those who might know Does’ identity, such as internet service providers, website hosts, or domain name registrars. Before courts will enforce those subpoenas, however, the plaintiff must establish notice

---

105. GANNETT, <https://www.gannett.com/> [<https://perma.cc/A5NR-L6MK>].

106. *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 342 (1995); *Talley v. California*, 362 U.S. 60, 64–65 (1960).

107. *Reno v. ACLU*, 521 U.S. 844, 885 (1997); *See also* *Packingham v. North Carolina*, 137 S.Ct. 1730, 1737 (2017) (“These [social media] websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to ‘become a town crier with a voice that resonates farther than it could from any soapbox.’”) (quoting *Reno*, 521 U.S. at 870).

108. *See* Lidsky, *supra* note 60.

and demonstrate proof of a claim against Doe.<sup>109</sup> The “unmasking” test differs by state and sometimes even within federal circuits.<sup>110</sup> Even where efforts to unmask the John Doe defendant fails, the plaintiff may proceed to discover evidence of malice or negligence yet respect anonymity.<sup>111</sup>

Defamation on the internet also presents special problems of personal jurisdiction<sup>112</sup> and choice of law.<sup>113</sup> Applicable statute of limitations are in most states just one year,<sup>114</sup> and many states refuse to apply the “discovery rule” to lengthen the time.<sup>115</sup> Republication can lengthen the limitations period,

---

109. *In re Subpoena Duces Tecum to America Online, Inc.*, 52 Va. Cir. 26, \*7–8 (Fairfax 2000), *rev'd on other grounds sub nom. America Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001); *Solers v. Doe*, 977 A.2d 941, 954–55 (D.C. 2009) (evidence sufficient to defeat summary judgment motion); *Independent Newspapers, Inc. v. Brodie*, 966 A.2d 432, 456–57 (Md. 2009) (prima facie evidence plus balancing of First Amendment anonymity interests); *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 1172 (2008) (prima facie evidence); *In re Does 1–10*, 242 S.W. 3d 805, 821–22 (Tex. App. 2007) (evidence sufficient); *Dendrite International, Inc. v. Doe No. 3*, 775 A.2d 756, 760–61 (N.J. Sup. Ct. App. Div. 2001) (prima facie evidence plus First Amendment balancing of anonymity interests).

110. See Savanna L. Shuntich & Kenneth A. Vogel, *Doe Hunting: A How-To Guide for Uncovering John Doe Defendants in Anonymous Online Defamation Suits*, 50 Md. B.J. 48, 52 (2017); Ethan B. Siler, Comment, *Yelping the Way to a National Statutory Standard for Unmasking Internet Anonymity*, 51 WAKE FOREST L. REV. 189, 189 (2016); Laura Rogal, *Anonymity in Social Media*, 7 PHOENIX L. REV. 61, 63 (2013).

111. See *In re Anonymous Online Speakers*, 661 F.3d 1168, 1177–78 (9th Cir. 2011) (protective order for disclosure of Doe’s identity to attorneys only may still safeguard First Amendment anonymity rights); *Art of Living Found. v. Does 1–10*, 2011 U.S. Dist. LEXIS 129836, at \*28 n.7 (N.D. Cal. Nov. 9, 2011) (deposition on written questions or telephonic deposition may safeguard First Amendment anonymity rights).

112. Although statements made online are viewable in all fifty states, courts have imposed limitations on personal jurisdiction under state long-arm statutes and the constitutional requirement of due process. Some states have specific carve-outs in the long-arm statute that limits the ability of defamation plaintiffs to hale non-domiciliaries into court. See N.Y. C.P.L.R. 302(a) (MCKINNEY 2021); GA. CODE ANN. § 9-10-91(2) (2021).

113. *Wells v. Liddy*, 186 F.3d 505, 528 (4th Cir. 1999) (online defamation “is a tort for which the *lex loci delicti* rule fails to reach a satisfactory result . . .”). The “most significant relationship” test of the Restatement usually results in the defendant’s domicile. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 150(2) (AM. L. INST. 1971).

114. VA. CODE ANN. § 8.01-247.1 (2021); D.C. CODE § 12-301(4) (2021); MD. CODE ANN., CTS. & JUD. PROC. § 5-105 (LexisNexis 2021); 42 PA. CONS. STAT. § 5523(1) (2021); W. VA. CODE ANN. § 55-2-12(c) (LexisNexis 2021).

115. Several courts have refused to apply the discovery rule, which tolls the statute of limitations, to internet defamation. *Thanh v. Ngo*, 2016 U.S. Dist. LEXIS 96260, at \*31 (D. Md. July 22, 2016) (rejecting discovery rule for widely available online magazine statements); *Mullin v. Wash. Free Wkly. Inc.*, 785 A.2d 296, 299 (D.C. 2001) (rejecting discovery rule in defamation cases involving mass media publications).

restarting the time to sue,<sup>116</sup> especially when the republication contains additional material and reaches a larger or different audience.<sup>117</sup> On the other hand, the “single publication” rule can shorten the limitations period significantly.<sup>118</sup> Taken together, these considerations contribute substantially to the difficulty of recovery for plaintiffs in internet defamation cases.<sup>119</sup>

The expansive, uncontrolled environment of the internet has rendered most of the common law of defamation practically obsolete. Local reporting after local investigations into local matters seems quaint, if not obsolete. Even the idea of a local matter itself is contestable if not anachronistic: local matters are often of interest mostly to the extent that they either generate or partake in a more national controversy or narrative. Defenses and privileges also appear increasingly irrelevant as the movement of labor and the sweep of narratives

---

116. See RESTATEMENT (SECOND) OF TORTS § 577A(4) (Am. L. Inst. 1977). See *WJLA-TV v. Levin*, 564 S.E.2d 383, 390 (Va. 2002) (“[G]enerally subsequent republications of such a [defamatory] statement are separate torts.”); *Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681, 689 (4th Cir. 1989) (“It is well settled that the author or originator of a defamation is liable for republication or repetition thereof by third persons, provided it is the natural and probable consequence of his act, or he has presumptively or actually authorized or directed its republication . . . .”) (quoting *Weaver v. Beneficial Fin. Co.*, 98 S.E.2d 687, 690 (Va. 1957)).

117. *Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862, 879 (W.D. Va. 2016) (“The republication exception is meant to give plaintiffs an additional remedy when a defendant edits and retransmits the defamatory material or redistributes the material with the goal of reaching a new audience.”); *Clark v. Viacom Int’l Inc.*, 617 F. App’x 495, 504–06 (6th Cir. 2015).

118. “As to any single publication, (a) only one action for damages can be maintained; (b) all damages suffered in all jurisdictions can be recovered in the one action; and (c) a judgment for or against the plaintiff upon the merits of any action for damages bars any other action for damages between the same parties in all jurisdictions.” RESTATEMENT (SECOND) OF TORTS § 577A(4) (Am. L. Inst. 1977); see also *Petro-Lubricant Testing Labs., Inc. v. Adelman*, 184 A.3d 457, 461–62 (N.J. 2018) (applying single publication rule to review website reports but finding disputed issues on whether later reports were substantively different than earlier reports—i.e., new republications that would re-start limitations period).

119. Of concern to any defamation plaintiff, regardless of whether the defamation was published in printed form or online, are state Anti-SLAPP laws. These statutes vary by state in their breadth, procedures, and remedies. A significant question has emerged in the federal courts: Are these state laws substantive, and therefore apply in a diversity case, or are they procedural rules that conflict with and do not supersede federal civil procedural rules? Some courts have ruled that the Anti-SLAPP laws are substantive. *Wynn v. Chanos*, 685 F. App’x 578, 579 (9th Cir. 2017); *Godin v. Schencks*, 629 F.3d 79, 81 (1st Cir. 2010). See generally William J. Seidleck, Comment, *Anti-SLAPP Statutes and the Federal Rules: Why Preemption Analysis Shows They Should Apply in Federal Diversity Suits*, 166 U. PA. L. REV. 547 (2018). Other courts have held that the laws do not apply in federal cases, treating the Anti-SLAPP statutes as procedural state law in conflict with federal rules or the Seventh Amendment right to trial by jury. See *Klocke v. Watson*, 936 F.3d 240, 245–46 (5th Cir. 2019); *Los Lobos Renewable Power, LLC v. AmeriCulture, Inc.*, 885 F.3d 659, 668–69 (10th Cir. 2018); *Abbas v. Foreign Pol’y Grp., LLC*, 783 F.2d 1328, 1333–36 (D.C. Cir. 2015); *Unity Healthcare, Inc. v. Cnty. of Hennepin*, 308 F.R.D. 537, 548–49 (D. Minn. 2015).

renders inapplicable defenses and privileges built on a premise of personal knowledge.

But one common law doctrine remains robust and may be more applicable than ever: republication liability. It punishes those who unknowingly reprint defamation. It mandates as a legal matter that the republisher step into the shoes of the original speaker, answering fully for any defamatory content, as if the republisher had originated the statement itself.<sup>120</sup> It has always been a harsh doctrine. Perhaps the blow was softened at common law, as publishers could make republication decisions selectively, most likely well aware of the status and reputation of the original publisher. Interest in local stories would less frequently arise beyond the local market. Quite the opposite conditions obtain today. Journalism in the internet age drives narratives that are of national interest. The demise of the locally owned and operated newspaper and its replacement with, on the one hand, ubiquitous, anonymous “democratized” speakers, and on the other with highly centralized and corporatized mainstream media, has made republication fraught with danger. One would think that the major media publications could rely on each other for careful journalistic investigations and measured, non-defamatory public statements. As discussed below, the palpable pressures of internet journalism and the precarious financial condition of traditional journalism invite mistakes. When one of the reliable publishers makes that mistake, through republication liability they all do. Localized injury to victims stemming from local defamation now takes on national dimension, causing immeasurable injury. Republication liability on the internet is unprecedented.

#### IV. CONSTITUTIONAL PROTECTIONS DO NOT CURE THE PROBLEM

The Supreme Court’s extended foray into defamation law stemmed from its concern that states not unduly infringe on First Amendment rights, notably the free press clause.<sup>121</sup> Through a series of decisions, the Court carved out broad safe harbors for journalistic freedom, holding that the First Amendment “can serve as a defense in state tort suits.”<sup>122</sup> Its First Amendment jurisprudence

---

120. Henry H. Perritt Jr., *Tort Liability, the First Amendment, and Equal Access to Electronic Networks*, 5 HARV. J.L. & TECH. 65, 95 (1992). See also Zeran, 129 F.3d at 332; Leflar, *supra* note 68, at 254 (“The law of libel and slander . . . is ordinarily thought of as a body of law grounded on ‘absolute liability.’”). Such standards apply widely not only to standard reporting, but also to opinion pieces and even fictional works. See *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 21 (1990).

121. U.S. CONST. amend. I. The First Amendment safeguards the “freedom of speech . . . [and] of the press.”

122. *Snyder v. Phelps*, 562 U.S. 443, 451 (2011); *City of Keene v. Cleveland*, 118 A.3d 253, 261 (N.H. 2015) (tortious interference claim asserted against political activists barred by First Amendment).

created obstacles for plaintiffs that focused both on the identity of the plaintiff and on the character of the defamatory statement. With respect to the identity of the plaintiff, the Court provided a significantly more difficult burden of proof for public officials or other public figures, requiring them to satisfy, by clear and convincing evidence,<sup>123</sup> the “actual malice” standard for fault, thereby exculpating negligent defamation.<sup>124</sup> Other decisions focused on the character of the statement itself, as the Court held that defamatory statements made about matters of “public concern” were not actionable, even for private-citizen plaintiffs.<sup>125</sup> The Court held that statements of “opinion” or “rhetorical hyperbole” were constitutionally protected,<sup>126</sup> and that the defense of “truth” was to include “substantial truth,”<sup>127</sup> giving even broader protection for even statements that were defamatory, untrue, and uttered intentionally.<sup>128</sup>

Despite the vigor and breadth of the Supreme Court’s numerous decisions establishing new obstacles for the defamation plaintiff, they are ill-fitting and anachronistic in the new era of internet-based defamation. The Court’s jurisprudence responds to an environment where journalism was practiced by professionals, with publication preceded by investigation, with articles measured in vocabulary, careful in commentary, and focused primarily on matters of public concern. None of these conditions remain. Internet speech is highly decentralized, democratized, and characterized by offhand opinion, supported by little or no research or investigation, careless in its grammar, vocabulary, and substance, and often brutally *ad hominem*. It can concern matters of the largest public importance or of no public importance at all. It is very often defamatory. These defamatory statements are made with little or likely no regard for prevailing legal standards. Yet their utterance can be highly damaging to personal reputations. If these defamatory statements migrate from internet chat rooms and comment sections to the pages of traditional journalists who post content online, as they did in the Sandmann litigation, then because of republication liability, these traditional journalists are vulnerable for all the

---

123. *New York Times Co. v. Sullivan*, 376 U.S. 254, 285–86 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 323 (1974).

124. *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. at 279–84; *Gertz*, 418 U.S. at 323; *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 160 (1967); *St. Amant v. Thompson*, 390 U.S. 727, 733 (1968); *Herbert v. Lando*, 441 U.S. 153, 169 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448, 455 (1976). *See* Marc A. Franklin & Daniel J. Bussel, *The Plaintiff’s Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 836 (1984).

125. *See Snyder*, 562 U.S. at 458.

126. *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 20–21 (1990).

127. *Block v. Tanenhaus*, 867 F.3d 585, 590 (5th Cir. 2017) (citing *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991)).

128. *Masson*, 501 U.S. at 517 (ultimate question is whether the statement had a different effect on the mind of the reader than the pleaded truth would have produced).

damages caused by their mistake. The carefully devised constitutional protections will not help them.

*A. First Amendment Limitations on Defamation Liability*

The most famous of the Court's First Amendment decisions modified the fault standard used at the common law. "Actual malice" became the new, constitutionally required standard of fault for plaintiffs who constitute public figures.<sup>129</sup> The Court divided plaintiffs into one of three categories: "general purpose" public figures<sup>130</sup> or public officials,<sup>131</sup> "limited purpose" public figures,<sup>132</sup> and private figures.<sup>133</sup> The traditional negligence standard found in state law now applied only to the latter.<sup>134</sup> Public figures and "limited purpose" public figures were to be treated the same.<sup>135</sup> An otherwise private person who took steps to thrust themselves into a matter of public concern, such as opining publicly on a voting referendum or other public controversy, became a limited purpose public figure as to that particular controversy,<sup>136</sup> yet remained a private

---

129. *New York Times Co. v. Sullivan*, 376 U.S. at 254.

130. All-purpose public figures are private individuals who occupy "positions of such persuasive power and influence that they are deemed public figure for all purposes . . . they invite attention and comment." *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 345 (1974). For these individuals, the actual malice standard extends to virtually all aspects of their lives.

131. The "public officials" category includes politicians and high-ranking governmental figures, but also extends to government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs. Courts have interpreted these criteria broadly, extending the public figure classification to civil servants far down the government hierarchy. For example, the supervisor of a county recreational ski center was held to be a "public official" for purposes of defamation law. *Rosenblatt v. Baer*, 383 U.S. 75, 87 (1966). Some courts have even extended the protection to all individuals engaged in matters of public health, such as hospital staff, given the importance of health issues for the general public. *See Hall v. Piedmont Publ'g Co.*, 266 S.E.2d 397, 399–400 (N.C. App. 1980); *see also Young v. Gannett Satellite Info. Network, Inc.*, 734 F.3d 544, 550 (6th Cir. 2013) (discussing whether or not a rank-and-file police officer constitutes a "public official" for First Amendment purposes).

132. "Limited-purpose" public figures are individuals who "have thrust themselves to the forefront of particular controversies in order to influence the resolution of the issues involved." *Gertz*, 418 U.S. at 323. They are the individuals who deliberately shape debate on particular public issues, especially those who use the media to influence that debate.

133. *Gertz*, 418 U.S. at 323 (a well-known lawyer and civic leader engaged in a very public trial involving police brutality constituted a private citizen); *Time, Inc., v. Firestone*, 424 U.S. 448, 454–55 (1976) (socialite going through a divorce who both collected press clippings on herself and held press conferences regarding the divorce was a private citizen); *Pring v. Penthouse International Ltd.*, 695 F.2d 438 (1982) (Penthouse Pet for purposes of parody was a private citizen).

134. *See Gertz*, 418 U.S. at 343, 347.

135. *See id.* at 343.

136. One key aspect is whether or not the plaintiff was forced into the public light, or instead chose to engage in the public debate. *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 166 (1979).

figure for other matters.<sup>137</sup> For public figures, the need to prove actual malice<sup>138</sup> meant that the defendant had to either know the statement they were about to make to be false, yet choose to publish it anyway, or that they had “reckless disregard” about whether the statement was true or not.<sup>139</sup> This heightened standard requires plaintiff to produce clear and convincing evidence that the defendant actually knew the information was false or entertained serious doubts as to the truth of the publication.<sup>140</sup> In assessing this proof, the court is to examine the defendant’s state of mind, considering also the defendant’s efforts in researching, editing, and fact checking their work.<sup>141</sup>

The Court also tried, but later seemed to abandon, another tack in its efforts to balance defamation law and constitutional law. Along with differentiating between categories of plaintiffs and holding that “public figure” plaintiffs had to carry a severely heightened burden to prove actual malice, the Court also differentiated between categories of statements. Those statements that pertained to matters of “public concern” also were to be protected by the new

---

137. See generally *Secord v. Cockburn*, 747 F. Supp. 779 (D.D.C. 1990) (retired general who advocated on national security issues constituted limited-purpose public figure); *Pauling v. Globe-Democrat Publ’g Co.*, 362 F.2d 188 (8th Cir. 1966) (scientist who was prominent and outspoken in his opposition to nuclear tests was limited-purpose public figure); *Curtis Publ’g Co. v. Butts*, 388 U.S. 130 (1967) (nationally-known college football coach accused of fixing a football game was limited-purpose public figure); *James v. Gannett Co.*, 353 N.E.2d 834 (N.Y. 1976) (professional belly dancer for matter related to her performance was a limited-purpose public figure); *Vitale v. Nat’l Lampoon, Inc.*, 449 F. Supp. 442 (E.D. Pa. 1978) (Playboy Playmate for purpose of parody was a limited-purpose public figure).

138. Actual malice means with knowledge of falsity or in reckless disregard of the truth, proven by clear and convincing evidence. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

139. Subsequent federal court decisions interpreted “reckless disregard” to mean that the defendant knew the statement was false yet was reckless in regard to the decision to publish it. This interpretation of reckless disregard rendered it practically indistinguishable from the “actual malice” requirement. See *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989).

A ‘reckless disregard’ for the truth, however, requires more than a departure from reasonably prudent conduct. ‘There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.’ The standard is a subjective one—there must be sufficient evidence to permit the conclusion that the defendant actually had a ‘high degree of awareness of . . . probable falsity’ . . . . In a case such as this involving the reporting of a third party’s allegations, ‘recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.’

*Id.* at 688 (internal citations omitted).

140. Reckless disregard means a “high degree of awareness of . . . probable falsity” or “purposeful avoidance of the truth.” *Id.* at 688, 692.

141. Reliance on biased or anonymous sources, threats, other negative statements, ill will, hostility, rivalry, and the defendant’s state of mind may reflect actual malice. See *Id.* at 668; *Herbert v. Lando*, 441 U.S. 153, 160, 164 n.12, 165 n.15 (1979).

“actual malice” standard of fault.<sup>142</sup> Thus, for a time, defamation plaintiffs had to circumnavigate both “plaintiff-centered” speech protections and “statement-centered” speech protections. Subsequently, however, the Court seemed to relegate considerations of the nature or topic of the statement to the sideline, instead focusing on the status of the plaintiff exclusively.<sup>143</sup>

In its continuing efforts to promote freedom of the press in the face of state defamation liability,<sup>144</sup> the Court also created a new category of speech it termed “opinion,” to be distinguished from “fact.”<sup>145</sup> Both the context and content of the statement separate opinion and fact.<sup>146</sup> For example, statements made in certain contexts, even if apparently factual in content, such as statements appearing in comment sections on websites and blogs, are usually considered opinion.<sup>147</sup> The common law courts had not made this distinction: any false statement, even statements that appeared to be matters of opinion, was actionable.

It is arguable, however, that the Court’s introduction of the “fact/opinion” distinction has not altered or reduced the scope of liability for journalists. Although the opinion defense was not available at common law, it was difficult, if not semantically impossible, for an opinion to meet the requirement of “falseness” in the sense of verifiable truth. Opinions might be better or worse, but not true or false. Even the Court’s addition of the “opinion” defense is limited: the Court divided all statements into three categories: pure opinion,

---

142. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 48, 50 (1971); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985).

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

144. *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986) (The First Amendment “requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law.”).

145. To be actionable, the statement must be “sufficiently factual to be susceptible of being proved true or false.” *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 21 (1990).

146. *Compare Milkovich*, 497 U.S. at 21 (general tenor of statements implying plaintiff lied under oath did not negate impression that writer was maintaining that plaintiff indeed committed perjury), with *Greenbelt Coop. Publ’g Ass’n v. Bresler*, 398 U.S. 6, 14 (1970) (context of isolated use of the word “blackmail” to describe plaintiff’s negotiation style was obvious hyperbole to “even the most careless reader”).

147. *See, e.g., Bajardi v. Pincus*, 2019 WL 3521847, at \*18 (N.J. Super. Ct. App. Div. Aug. 2, 2019) (holding statements to be opinion and noting that debate and commentary on the internet “is often crude, contentious, and opinion rather than fact based.”); *Sandals Resorts Int’l Ltd. v. Google, Inc.*, 925 N.Y.S.2d 407, 415 (N.Y. App. Div. 2011) (recognizing that, “[t]he culture of Internet communications, as distinct from that of print media such as newspapers and magazines, has been characterized as encouraging a ‘freewheeling, anything-goes writing style’”) (internal citation omitted); *Doe No. 1 v. Cahill*, 884 A.2d 451, 467 (Del. 2005) (“Read in the context of an internet blog, these statements do not imply any assertions of underlying objective facts.”).

mixed opinion, and fact.<sup>148</sup> Only the first, pure opinion, was constitutionally exempt from defamation liability.<sup>149</sup> The middle category, mixed opinion, could be actionable if the statements of opinion implied false facts that themselves are defamatory and undisclosed.<sup>150</sup> If the factual basis for the mixed opinion is fully disclosed, then the opinion is protected under the First Amendment and is not actionable as defamation.<sup>151</sup> The Court eventually abandoned the “opinion defense” as a formal matter.<sup>152</sup> Nonetheless, courts continue to speak of opinion as a defense because it is a useful heuristic: the very concept of falsehood implies a statement that is factual, not opinion, in the sense that it is susceptible to being true or false. As a result, the requirement of falsehood necessarily excludes opinion, which by its nature cannot be proven true or false.<sup>153</sup> Despite the common view, cautionary or qualifying language is not determinative of the opinion versus fact issue.<sup>154</sup>

The Supreme Court also added to the protection for the press by broadening the notion of “truth.”<sup>155</sup> Historically, the idea of truth as a defense was merely another way of describing the failure of the plaintiff to establish falsehood. It

---

148. *Jewell v. NYP Holdings, Inc.*, 23 F. Supp. 2d 348, 377 (S.D.N.Y. 1998) (quoting *Steinhilber v. Alphonse*, 501 N.E.2d 550, 552–53 (N.Y. 1986)).

149. “Pure expressions of opinion, not amounting to ‘fighting words,’ cannot form the basis of an action for defamation.” *Chaves v. Johnson*, 335 S.E.2d 97, 101 (Va. 1985).

150. RESTATEMENT (SECOND) OF TORTS § 566 (1977).

151. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

152. *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 21 (1990).

153. For example, see *Leidholdt v. L.F.P. Inc.*, 860 F.2d 890, 894 (9th Cir. 1988) (statements in the “Asshole of the Month” column in *Hustler Mag.* that described a feminist leader as a “pus bloated walking sphincter,” “wacko,” and someone who suffers from “bizarre paranoia” were protected opinion because the context of the magazine and column made it clear that the statements were “understood as ridicule or vituperation” and “telegraph to a reader that the article presents opinions, not allegations of fact.”); *Jewell v. NYP Holdings, Inc.*, 23 F. Supp. 2d 348, 381 (S.D.N.Y. 1998) (statement in the *New York Post* that referred to the plaintiff as a “fat, failed, former sheriff’s deputy” was protected opinion because it was hyperbole and had an “alliterative quality” with a “rhetorical effect indicative of a statement of opinion.”); *Seelig v. Infinity Broad. Corp.*, 119 Cal. Rptr. 2d 108, 117–18 (Cal. Ct. App. 2002) (statements on a radio talk show that described the plaintiff as a “chicken butt,” “local loser” and “big skank” were not defamatory because they were “too vague to be capable of being proven true or false” and had “no generally accepted meaning.”); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 46, 50 (1988) (cartoon of a noted evangelist leader fornicating drunk in an outhouse with his mother constituted protected opinion because the parody was so outrageous it could not “reasonably be understood as describing actual facts” about Falwell or events in which he participated).

154. See *Milkovich*, 497 U.S. at 19 (“[It] would be destructive of the law of [defamation] if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words ‘I think.’”) (internal citations omitted); *Simoni v. Swan*, 2019 Ca. App. Unpub. LEXIS 7123, at \*14–15 (Cal. Ct. App. Oct. 25, 2019) (“[T]he mere fact that a statement appears on a review website and uses fiery rhetoric does not establish, as a matter of law, the statement is a nonactionable opinion.”).

155. See *Koniak v. Heritage Newspapers, Inc.*, 499 N.W.2d 346, 348 (Mich. Ct. App. 1993).

was a misnomer to term “truth” a defense because it implied the defendant had to plead it affirmatively and carry the burden of proof to establish it. The broadening of “truth” changed this categorization. Truth or what the Court termed “substantial truth” now provides an absolute defense against defamation liability.<sup>156</sup> Under the substantial truth doctrine, minor factual inaccuracies do not matter as long as these inaccuracies do not materially alter the substance or impact of what is being communicated.<sup>157</sup> In other words, only the “gist” or “sting” of a statement must be truthful for the defendant to enjoy this defense. Even where the plaintiff can cite to intentional inaccuracies in direct quotations, as long as the gist of the statements is true or substantially true, then liability does not attach.<sup>158</sup>

In a series of decisions, the Court also limited the remedies available for defamation, limiting or prohibiting injunctions against speech, what it termed “prior restraints.”<sup>159</sup> This propensity to deny plaintiffs equitable relief left them no alternative but to suffer reputational injury from the defamation and subsequently sue for damages.

---

156. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Time Inc. v. Hill*, 385 U.S. 411 (1967).

157. *Cobb v. Time Inc.*, 24 Media L. Rep. 1585, 1590–91 (M.D. Tenn. 1995) (statement that a boxer tested positive for cocaine, when actually he had tested positive for marijuana, is substantially true); *People for Ethical Treatment of Animals v. Berosini*, 895 P.2d 1269, 1277 (Nev. 1995) (statement that an animal trainer beat his animals with steel rods, when actually he had beaten them with wooden rods, substantially true); *Koniak*, 499 N.W.2d at 348 (statement that a father sexually assaulted his stepdaughter 30–50 times, when the stepdaughter testified he had done so only 8 times, was substantially true); *Stevens v. Indep. Newspapers, Inc.*, 15 Media L. Rep. 1097, 1099 (Del. Super. Ct. 1988) (finding that a newspaper article reporting that a man drove seventy-two miles to work each day rather than the actual fifty-five miles was substantially true); *Nichols v. Moore*, 396 F. Supp. 2d 783, 792 (E.D. Mich. 2005) (statement that Terry Nichols was arrested after the Oklahoma City Bombing, when actually he had only been held as a material witness, substantially true); *Rouch v. Enquirer & News of Battle Creek*, 487 N.W.2d 205, 217 (Mich. 1992) (statement that a man was charged with sexual assault, when actually he had only been arrested but not arraigned, was substantially true).

158. *Masson v. New Yorker Mag. Inc.*, 501 U.S. 496, 517 (1991). The plaintiff also argued that the inaccuracies, because they were intentional, were evidence of actual malice. *Id.* The Court rejected this argument. *Id.* “We conclude that a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity [to prove actual malice,] unless the alteration results in a material change in the meaning conveyed by the statement.” *Id.* at 496.

159. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983) (“[A]s a general matter, ‘the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.’”) (quoting *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972)); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (the First Amendment promotes the “free flow of ideas and opinions on matters of public interest”).

*B. The First Amendment in the Internet Age*

Historically, the Court's decisions creating First Amendment protections for defamatory statements provided significant room for journalistic freedom. Those protections, however, do not fit easily into the era of online discourse.

i. Actual Malice

The "actual malice" standard of fault<sup>160</sup> is unresponsive to the realities of internet defamation. Actual malice requires a higher degree of fault than negligence, which was the historical standard for defamation liability, and which still applies with respect to "non-public" plaintiffs.<sup>161</sup> Both fault standards presume a certain degree of pre-publication investigation and editorial control.<sup>162</sup> Negligence requires that the journalist conduct a "reasonable investigation" and comport with internal fact-checking policies and journalistic ethics.<sup>163</sup> Actual malice requires that the plaintiff prove that the writer either knew the truth, yet chose to publish a falsehood, or that the writer acted in reckless disregard of the truth.<sup>164</sup> In short, both fault standards presume that "truth" exists, that it is discoverable with at a minimum reasonable investigation, and that a writer can make a conscious decision to state it or not. The aim of "actual malice" was to give greater latitude for speech on matters of public interest or public concern.<sup>165</sup> It made sense when most speech on matters of public concern was generated in print newspapers and magazines, or in broadcast media such as television and radio. At the time the *New York Times v. Sullivan* standard was created, major media outlets dominated the national discourse on matters of widespread public concern. Contemporary public discourse, to the contrary, is heavily engaged in by online commentators, most of whom are non-professionals, writing on social media without editorial oversight or publisher control. These commentators conduct little or no investigation, outside perhaps of the content they may have just read or viewed. Even if they were inclined to discern the truth, they likely have no plausible means of accessing it, writing from distant locations. Their comments may not

---

160. See above, Section II.A.

161. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974).

162. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 512 (1984) (the actual malice standard focuses on the defendant's subjective state of mind at the time of publication); see also *Silvester v. Am. Broad. Cos., Inc.*, 839 F.2d 1491, 1498 (11th Cir. 1988) (subjective standard of actual malice).

163. E.g., *Newell v. Field Enters., Inc.*, 415 N.E.2d 434, 450 (Ill. App. Ct. 1980) (holding that a reporter's failure to make a reasonable investigation into the truth of an article was a relevant factor in determining the reporter's negligence).

164. See *Harte-Hanks Comm'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989).

165. See *Gertz*, 418 U.S. at 340-42.

even be aimed to recite or reveal the truth, instead constituting a form of performance, as the commentator takes a position, trolls for responses, or just makes a comment in order to participate in the conversation. These are not reporters, and the legal standards designed for reportage have no clear applicability to internet commentary.

Although the requirement of actual malice insulates negligent journalists from liability, it does not respond adequately or effectively to the special problem presented by defamation over the internet. The danger of internet defamation stems from the statements or pictorial representations made by non-professionals that are repeated or forwarded on social media sites or republished in more traditional publications. Like “fake news,” such statements or other representations can be wholly fictitious, inaccurate, and flatly wrong. They can be uttered or created maliciously by anonymous internet speakers. Yet when they become the accepted truth and find their way into mainstream media outlets, they subject the mainstream outlet to republication liability. Traditionally, republication liability is strict: the mainstream or traditional outlet “steps into the shoes” of the original speaker for legal purposes.<sup>166</sup> The outlet, even one lacking malice or ill-will, is liable for the malice or carelessness of the original speaker.<sup>167</sup> In the case of the anonymous internet speaker, such as the disguised fake Twitter account that published the misleading Sandmann video clip, that malice can only be presumed from the speaker’s statement that belies an obvious reality. The speaker’s very anonymity challenges the plaintiff to satisfy the actual malice standard, even as it leaves the defendant liable for the speaker’s animus. Thus, the plaintiff and the defendant are left to circumstantial arguments about the malicious intent of a speaker who is a stranger to them both: the plaintiff to establish malice; the defendant to deny it. In addition, a great deal of internet defamation concerns private citizens, who need only prove simple negligence to establish liability.<sup>168</sup> In a republication case, the plaintiff must prove the anonymous speaker’s failure to conduct a reasonable investigation; the defendant is liable for the journalistic failings of someone who is unlikely to be a trained journalist and was unlikely to conduct significant investigation, if any, prior to publication.<sup>169</sup>

Even in a publication case, where the mainstream publication is liable for its own journalistic failings and not for republication, reliance on the statements of people to whom the journalist did not speak directly is problematic: internet speakers will fabricate quotations, leaving the professional journalist holding

---

166. See *Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681, 689 (4th Cir. 1989).

167. See above, footnote 19 and accompanying text.

168. *Gertz*, 418 U.S. at 343, 347.

169. See *Newell v. Field Enters., Inc.*, 415 N.E.2d 434, 450 (Ill. App. Ct. 1980).

the proverbial bag. The constitutional fault standards that were designed to protect the press will not avail. They presume some level of investigation prior to publication: both the negligence standard for private-figure plaintiffs and the “reckless disregard” aspect of actual malice for public plaintiffs require that the publication have taken some reasonable steps to make itself aware of the truth prior to publication.<sup>170</sup> Investigation requires time and access to information, and access in most cases presumes some proximity to the documents and witnesses that would establish the factual basis for the statement. The internet has eroded if not obliterated the concept of locality. News reports that once were thought to “travel fast” would have taken days to cross time zones. Today, videos and other content can “go viral” within hours.<sup>171</sup> The very idea that each publisher of content could undertake a reasonable investigation of the truth prior to publication seems unrealistic. Most likely, each publisher relies on prior publications, as the original story grows virally into a national one. In the internet environment, where speed of publication is necessary to maintain relevance, all pretense of prior journalistic investigation disappears. The false social media statements about the edited Sandmann video clip appeared in mainstream publications within hours of their first utterance. Journalists face a clear tension between maintaining relevance while engaging in proper journalistic practices.

## ii. Opinion

The constitutional protection for opinion, created in *Gertz*<sup>172</sup> and *Rosenbloom*,<sup>173</sup> and re-stated in *Milkovich* as “rhetorical hyperbole,”<sup>174</sup> likewise seems mostly irrelevant in the internet context. A great deal of what anonymous users post online or in a comment section likely constitutes protected opinion;<sup>175</sup> the very forum for such contributions suggests it will be filled with statements that do not comprise factual assertions in the eyes of the

---

170. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989) (citing *St. Amant v. Thompson*, 390 U.S. 727, 731, 733 (1968)) (failure to investigate a defamatory statement does not suffice, alone, to comprise actual malice).

171. See Stephen G. Perlman, *Rearden LLC v. Vox Media, Inc.*, 2015 WL 5724838, at \*5 (Del. Ch. Sep. 30, 2015) (describing speed and duration of spread of defamatory statements through social media); *Laughland v. Beckett*, 870 N.W.2d 466, 473 (Wis. Ct. App. 2015).

172. *Gertz*, 418 U.S. at 340.

173. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 (1971).

174. *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 20 (1990).

175. *Glob. Telemedia Int'l, Inc. v. Doe 1*, 132 F. Supp. 2d 1261, 1266–67 (C.D. Cal., 2001) (“If the statements are opinion rather than fact, then they are not actionable.”).

law.<sup>176</sup> This strong presumption of opinion, however, does not obtain with regard to articles authored by professional journalists that are posted on online web pages. These writers are not anonymous, and the posting of the article, the insertion of an author byline, the assumption of editorial control, and the appearance on the website provide an implicit publisher's endorsement of the content of the contribution. Publishers are liable for the content they publish. The owners of websites affiliated with traditional media companies cannot easily hide, and their investigative practices can be interrogated in litigation. Indeed, with the availability of digital footprints and digitally stored internal communications, it is easier than before to precisely determine the extent to which the defendant conducted an investigation prior to publishing. Any statements that cross over from anonymous commentary to professional publication lose the protection provided by the context of the original statement: although a false statement of fact may be considered opinion if it resides in a chat room, blog post, comment section, or other offhand social media forum, it becomes non-opinion if it migrates to an article written under the banner of the publisher's website. The constitutional protection for opinions is simply not very helpful in the internet age. It was conceived in a context of deliberate publication processes.

In addition, the opinion defense is infeasible as a practical matter. It constitutes an ambiguous standard that has proven to be highly resistant to summary judicial review and disposition, particularly with regard to opinions that imply facts that themselves may be defamatory. The nebulous line between opinion and fact might have served adequately when articles were heavily edited and reviewed by counsel. But today, given the massive volume of published commentary to be found on social media platforms such as Twitter, Facebook, and Instagram, the numerous websites with comment sections, and the blogs, Reddit posts and comments, slack channels, list-serves, and other fora, easily separating statements of fact from opinion is problematic. One can

---

176. The court in *Glob. Telemedia Int'l, Inc.*, 132 F. Supp. 2d at 1267, in describing online posts on a financial bulletin board site, stated:

Here, the general tenor, the setting and the format of . . . [the] statements strongly suggest that the postings are opinion. The statements were posted anonymously in the general cacophony of an Internet chat-room in which about 1,000 messages a week are posted about [the company]. The postings at issue were anonymous as are all the other postings in the chat-room. They were part of an on-going, free-wheeling and highly animated exchange about [the company] and its turbulent history. . . . Importantly, the postings are full of hyperbole, invective, short-hand phrases and language not generally found in fact-based documents, such as corporate press releases or SEC filings.

*Id.* The court concluded that "the general tone and context of these messages strongly suggest that they are the opinions of the posters." *Id.*

plausibly argue that all statements about reality comprise mere opinion; the claim “I smell smoke” could be highly subjective. Yet no more elemental words can be found to describe what smoke smells like, and thus such a statement is essentially factual. On the other extreme, even claims that are obviously opinions, such as “the shooting was accidental” or “the bump was unintentional” appear fully grounded in observed facts that cannot easily be described outside of the conclusory summation of “accidental” or “unintentional.” Rather than forming a clear line of demarcation to create room for free speech, the “fact/opinion” dichotomy is either needless, as it restates the common law requirement of “falseness” in an unhelpful manner, or is actually unhelpful, as it shifts focus away from the bedrock concerns of defamation law of falsity and injury to an examination of the form of the statements themselves.

A more straightforward method of separating defamatory content from non-defamatory content would be helpful.<sup>177</sup> One clearer standard is the idea of defamation itself: the notion of statements that subject one to scorn, ridicule, or opprobrium constitute unlawful defamation is more easily grasped.<sup>178</sup> Indeed, restrictions on the content of speech, rather than its form, provide the basis for codes of conduct and speech codes in many workplaces, universities, and other communal settings.<sup>179</sup> Adding the opinion defense to the basic consideration of defamation adds nothing substantively, as it speaks only to the form of the statement, and not as directly to its content. It is an unworkable standard to assess internet statements. Moreover, the distinction between fact and opinion is a matter of state law, not constitutional law. Although the opinion defense has been constitutionalized, it reaches little farther than does the common law. When identifiable and collectible publishers repeat internet claims that have gone viral, that people assume to be true but are not, those publishers “step into the shoes of those whom the publisher quotes or re-publishes.”<sup>180</sup> No defense found at the common law or devised by constitutional interpretation saves them. When Nathan Phillips uttered allegedly factually untrue and defamatory statements about Nicholas Sandmann, and Phillips’ statements were quoted by

---

177. “Opinion” as a protected category of speech is ahistorical.

178. Whether it is easier to determine if a statement is defamatory in character, as opposed to fact vs. opinion, is a matter of judgment. See *Farmers Educ. & Coop. Union v. WDAY*, 360 U.S. 525, 530 (“Whether a statement is defamatory is rarely clear. Whether such a statement is actionably libelous is an even more complex question, involving as it does, considerations of various legal defenses . . .”).

179. E.g., Kelly Sarabyn, *Free Speech at Private Universities*, 39 J.L. & EDUC. 145, 149–50 (2010) (reporting that seventy out of 110 U.S. private universities surveyed in 2009 maintained policies that “substantially restricted speech.”).

180. See *Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681, 689 (4th Cir. 1989).

well-regarded news outlets, in the view of the law those outlets became Phillips, as if they themselves had made those untrue accusations about Sandmann. Phillips is presumably judgment-proof; these major media outlets are clearly not.

### iii. Prior Restraints

Even the rule against prior restraints<sup>181</sup> seems antiquated in regard to the defamation on the web. Defamatory speech is not constitutionally protected speech in most cases.<sup>182</sup> As the Court stated in *Gertz v. Robert Welch, Inc.*:

[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues. [False statements of fact] belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'<sup>183</sup>

Although defamatory speech is of "no constitutional value," it can be immensely injurious to reputation. The "no prior restraint" doctrine means that victims of defamation may not enjoin the speech that injures them. For some courts, the doctrine is not absolute: instead, it meant no restraint prior to adjudication.<sup>184</sup> Once speech has been fully adjudicated and determined to be defamatory, no constitutionally protectable interest remains in the speech, and thus no valid reason not to enjoin its repetition. Yet the expansion of the "no prior restraint" doctrine to include all restraints, even where the speech has been adjudicated to be unprotected, has had the undesirable effect of relegating the plaintiff to monetary damages to remedy the defamation.<sup>185</sup> Relegating the

---

181. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983) ("[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.") (quoting *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972)); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (the First Amendment promotes the "free flow of ideas and opinions on matters of public interest").

182. *Coplin v. Fairfield Pub. Access Television Comm.*, 111 F.3d 1395, 1401 n.2 (8th Cir. 1997) (speech constituting a state-law tort is not necessarily unprotected speech).

183. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–41 (1974) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

184. See above, footnote 31 and accompanying text.

185. The imposition of civil liability, including money damages, is treated no less stringently than direct regulation on speech. *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 193 F.3d 781, 792 (3d Cir. 1999); see also *Higgins v. Ky. Sports Radio, LLC*, 2019 WL 1290870, at \*10 (E.D. Ky. Mar. 20, 2019), *aff'd*, 951 F.3d 728 (6th Cir. 2020).

plaintiff to damages was a plausible alternative when damages provided a real deterrent and real compensatory remedy: specifically, where the defendant was ascertainable, answerable to suit, and had sufficient assets to satisfy a substantial judgment. None of these conditions typically obtains with regard to internet defamation. Speakers are anonymous, perhaps in distant or foreign jurisdictions, and do not likely have assets to constitute a collectible party. The internet is a free-for-all, where defamation is literally free for all who utter it. Importing constitutional considerations devised in the era of print journalism to the contemporary internet world in effect renders even abject, malicious defamation without remedy. With damages unavailable as a practical matter, the “no prior restraint” doctrine in effect relegates victims to suffer their injuries without legal recourse.

Prior restraints seem less objectionable in the contemporary context. It is common for websites and social media platforms to exercise prior restraints by “taking down” offending content; the Congress even immunized social media platforms for their decisions to employ a prior restraint on speech.<sup>186</sup> Internet users seem to have adapted themselves to a medium in which their content may be taken down and their use “blocked,” at least temporarily. With no other remedy available as a practical matter, courts should be willing to adjudicate the legality of speech and, if found defamatory, issue injunctions ordering its removal or “take-down” and prohibiting its re-publication. Indeed, as a financial matter, major media publishers should actually desire that the informal rule against prior restraints be abrogated. As the Sandmann case illustrates, the political activists and the anonymous internet commentators, all of whom uttered defamatory falsehoods against the plaintiff, will likely never suffer legal recourse. On the other hand, the identifiable publishers who made the mistake of believing irresponsible or fictitious claims about Sandmann are the ones for whom the damages remedy will have real significance. Had the plaintiff had the opportunity, early in the chain of events, to request an injunction to put an end to the fiction that Sandmann, not Phillips, acted aggressively in the encounter, then the major media companies might have known not to rely on these claims and could have either avoided repeating the defamation entirely, or at the minimum taken steps to mitigate the defamation’s effects. In issuing an injunction, even on the basis of a preliminary hearing assessing the likelihood of success, a court is essentially providing media publishers with a free and unassailable legal opinion as to the legality of their intended conduct. A prior restraint does them a favor.

---

186. See discussion on Section 230, below.

## V. SECTION 230

Congress has not been unmindful of the particular problem posed by combination of defamation law and the internet.<sup>187</sup> Title V of the Telecommunications Act of 1996, commonly known as the Communications Decency Act (“CDA”),<sup>188</sup> represents Congress’ primary response. The CDA was passed in 1996 in an attempt to limit the exposure of children to internet pornography and indecency.<sup>189</sup> Few of its provisions remain; the Supreme Court has struck down most of the statute.<sup>190</sup> The one provision that remains in full effect, however, and indeed has received robust and expansive judicial enforcement,<sup>191</sup> is Section 230.<sup>192</sup>

*A. Section 230 Immunity*

Section 230, the “Good Samaritan” provision, shields social media platforms from liability for content shared by users.<sup>193</sup> Section 230(c)(1) states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>194</sup> Under the widely accepted three-part test, immunity applies if (1) the defendant is a provider or user of an “interactive computer service,” (2) the relevant information was provided by another information content provider, and (3) the claim seeks to hold the defendant liable as the publisher or speaker of that information.<sup>195</sup> If these conditions are met, Section 230(c)(2) immunizes platforms for editorial decisions:

---

187. Along with Section 230, Congress’ other effort to adapt to the internet is the Digital Millennium Copyright Act, a 1998 statute that, in relevant part, exempts internet service providers and other intermediaries from liability for copyright infringement.

188. 47 U.S.C. § 230.

189. *CDA 230: Legislative History*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/cda230/legislative-history> [<https://perma.cc/L2YP-CYAJ>].

190. *Reno v. ACLU*, 521 U.S. 844, 846 (1997).

191. *See Marshall’s Locksmith v. Google LLC*, 925 F.3d 1263, 1266, 1272 (D.C. Cir. 2019) (Section 230 immunity precludes suits under Lanham Act, Sherman Act, civil conspiracy, defamation, and other possible claims).

192. 47 U.S.C. § 230(c)(1) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”).

193. *See, e.g., Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, 591 F.3d 250, 260 (4th Cir. 2009) (operator of website hosting consumer reviews immune from suit concerning allegedly defamatory posts by users of website). *See generally* David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOYOLA L. REV. 373 (2010).

194. 47 U.S.C. § 230(c)(1).

195. *Sikhs for Justice “SFJ”, Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1092–93 (N.D. Cal. 2015), *aff’d sub nom. Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 F. App’x 526 (9th Cir. 2017).

No provider or user of an interactive computer service shall be held liable on account of—(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to [information provided by another information content provider].<sup>196</sup>

These provisions grant significant latitude to interactive computer services<sup>197</sup> to block or screen materials the provider considers objectionable. It is a direct response to the problem of republication liability:<sup>198</sup>

In passing Section 230, Congress sought to spare interactive computer services this grim choice [to either delete all defamatory material or be responsible for it] by allowing them to perform some editing on user-generated content without thereby becoming liable for all defamatory or otherwise unlawful messages that they didn't edit or delete. In other words, Congress sought to immunize the *removal* of user-generated content, not the *creation* of content.<sup>199</sup>

The immunity is qualified, subject to the requirement that the platform have acted “in good faith.”<sup>200</sup> Thus, Section 230 would likely not preclude a claim of an intentional tort,<sup>201</sup> although the fact that Section 230(c)(1) does not include

---

196. The exemption provided in § 230(c)(2) on its terms precludes “liability.” The heading of the subsection, although technically not part of the statute, refers only to “civil liability.” The statute subsequently at § 230(e) states that the exemption will have no effect on criminal laws, intellectual property law, communications privacy law, or sex trafficking law, thus limiting its scope.

197. The terms “interaction computer service” has been held to include social media platforms. *Zeran v. America Online*, 129 F.2d 327, 332 (4th Cir. 1997); *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1121 (N.D. Cal. 2016), *aff'd*, 881 F.3d 739 (9th Cir. 2018).

198. *But see* *Ardia*, *supra* note 193, at 480 (“[M]any of the intermediaries that invoked section 230 likely would not have faced liability under the common law because they lacked knowledge of and editorial control over the third-party content at issue in the cases.”).

199. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008) (italics in original).

200. *Darnaa, LLC v. Google, Inc.*, No. 15-cv-03221, 2016 WL 6540452, at \*3 (N.D. Cal. Nov. 2, 2016); *Spy Phone Labs LLC v. Google Inc.*, No. 15-cv-03756, 2016 WL 6025469, at \*6 (N.D. Cal. Oct. 14, 2016).

201. Intentional infliction of emotional distress requires that the defendant act intentionally or recklessly. With a defamation claim, the issue is closer. Defamation requires publication that results from negligence or malice. Certain defendants enjoy qualified privileges to speak in good faith, believing their statements to be true. The typical defendant who enjoys a qualified immunity would

a “good faith” requirement is suggestive of broader immunity.<sup>202</sup> Claims based on anti-discrimination statutes might be exempt, although not found so to date;<sup>203</sup> civil rights claims might have more traction, especially if those claims are based on political affiliation.<sup>204</sup>

Section 230 allows “[t]he Internet and other interactive computer services [to] offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”<sup>205</sup> Yet its scope remains unclear and contested.<sup>206</sup> The U.S. Supreme Court has yet to

---

be a media company. It would be an issue of fact whether or not social media platforms can employ a qualified immunity defense to a defamation action. Although section 230(c)(1) states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider,” this exemption from defamation liability would not preclude liability of the provider for the provider’s own statements. CBS News, *Posting a Negative Review Online Can Get You Sued*, CBS NEWS (July 22, 2019), <https://www.cbsnews.com/news/posting-a-negative-review-online-can-get-you-sued/> [<https://perma.cc/D6HR-Y8WF>] (consumers are being sued by businesses for posting negative reviews online).

202. Section 230(e)(3), in reference to state law, provides:

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

47 U.S.C. § 230(e)(3).

203. *Sikhs for Justice “SFJ”, Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1095–96 (N.D. Cal. 2015) (Section 230 barred claim under Title II of the Civil Rights Act of 1964 alleging that Facebook was motivated solely by unlawful discrimination in blocking access to plaintiff’s Facebook page in India).

204. *Freedom Watch, Inc., et al., v. Google, Inc.*, 358 F. Supp. 3d 30 (D.D.C. 2019). Although no federal anti-discrimination law appears relevant, a few states include “political affiliation” or the equivalent on its list of categories protected by state anti-discrimination laws. The laws of the District of Columbia and California prohibit discrimination on the ground of political affiliation; New York prohibits discrimination on the ground of political activity; *see, e.g.*, The District of Columbia Human Rights Act, D.C. CODE § 2-1402.31(a) (2021). Citizens would enjoy the protection of these statutes both in the workplace and in any place of “public accommodation.” *Freedom Watch*, 358 F. Supp. 3d at 39. That court held that social media platforms do not constitute places of public accommodation. *Id.* “[T]he alleged place of public accommodation must be a physical location.” *Id.* Although anti-discrimination statutes were created to prevent denial of access to physical spaces, primarily for disabled people, increasingly non-physical spaces, including websites, have been found to be a place of public accommodation. *Haynes v. Dunkin’ Donuts LLC*, 741 Fed. Appx. 752, 754 (11th Cir. 2018) (access to website for blind user, even though the services provided are intangible); *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 903 (9th Cir. 2019) (American with Disabilities Act applies to websites).

205. 47 U.S.C. § 230(a)(3).

206. *See, generally*, Eric Goldman, *Section 230 Preempts Unfair Competition Law Claim—Taylor v. Twitter*, TECHNOLOGY & MARKETING LAW BLOG (Mar. 2019), <https://blog.ericgoldman.org/archives/2019/03/section-230-preempts-unfair-competition-law-claim-taylor-v-twitter.htm> [<https://perma.cc/S687-RQR3>].

interpret it.<sup>207</sup> One line of decisions in lower federal and in state courts holds that the aim of Section 230, reading sections one and two together, is to preclude liability of the platforms when they act as a “publisher.”<sup>208</sup> Publishers are responsible for the content they publish, and for their decisions to alter or withdraw content. Thus, both subsections one and two describe the work of a publisher, and specifically exempt the platforms from publisher liability.<sup>209</sup> Other courts have adopted more narrow readings of Section 230.<sup>210</sup> The court’s parsing of the statute in *Barnes* is instructive:

Bringing these two subsections [§ 230(c)(1) and § 230(e)(3)] together, it appears that subsection (c)(1) only protects from liability (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider.<sup>211</sup>

The key question is whether or not a court would limit Section 230 immunity to causes of action that in effect seek to hold the platform liable for user content, and not include immunity for the platforms’ own decisions or statements. The weight of authority is that Section 230 protects platforms against liability for publishing activity, including the decision not to publish.

---

207. See e.g., *Enigma Software Group USA LLC v. Malwarebytes Inc.*, 2017 WL 5153698 (2017), *rev'd and remanded*, 946 F.3d 1040 (9th Cir. 2019), *cert. denied*, 592 U.S. \_\_\_\_ (2020) (“This petition asks us to interpret a provision commonly called § 230, a federal law enacted in 1996 . . . [a]nd in the 24 years since, we have never interpreted this provision”).

208. The immunity provisions under Section 230 “have been widely and consistently interpreted to confer broad immunity against defamation liability for those who use the Internet to publish information that originated from another source.” *Hassell v. Bird*, 420 P.3d 776, 800 (Cal. 2018) (take-down order against non-party Yelp for an adjudicated defamatory statement violates Section 230).

209. See *Taylor v. Twitter, Inc.*, No. CGC-18-564460 (Sup. Ct. Cal. Mar. 8, 2019) (“[Section] 230 precludes courts from entertaining claims that would place a computer service provider in a publisher’s role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—*such as deciding whether to publish, withdraw, postpone or alter content*—are barred.”) (italics in original, quoting order of Court of Appeal); *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1124 (N.D. Cal. 2016) (“[T]he decision to furnish an account, or prohibit a particular user from obtaining an account, is itself publishing activity.”); *Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140, 157 (E.D.N.Y. 2017) (same).

210. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009) (“[I]t appears clear that neither [§ 230(c)(1)] nor any other declares a general immunity from liability deriving from third-party content”); *Doe v. Internet Brands*, 824 F.3d 846, 851 (9th Cir. 2016) (in failure to warn claim, not holding defendant liable for information provided by user).

211. *Barnes*, 570 F.3d at 1100.

Section 230 immunizes websites from liability for the unlawful speech of third parties,<sup>212</sup> protecting social media platforms from liability for publishing posts by users that are defamatory,<sup>213</sup> or from liability from engaging in good-faith efforts to remove defamatory content but who fail.<sup>214</sup> Websites remain liable if the website operator is itself an information content provider who “is responsible, in whole or in part, for the creation or development” of the post,<sup>215</sup> apparently even if the site assists with the wording of advertisements.<sup>216</sup> Section 230 expressly preempts State law,<sup>217</sup> and grants “immunity from suit rather than a mere defense to liability.”<sup>218</sup> Courts therefore apply Section 230 “at the earliest possible stage of the case,” often on a motion to dismiss, because such immunity would be “effectively lost” if defendants were subject to costly litigation.<sup>219</sup> Section 230 bars suit where (1) the defendant provides an “interactive computer service”; (2) the complained-of statements were made by “another information content provider”; and (3) the claim “seek[s] to treat Defendant as publisher or speaker of [that] third party content.”<sup>220</sup> The law was designed to foster a “true diversity of political discourse.”<sup>221</sup>

---

212. 47 U.S.C. § 230(c)(1) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”).

213. This immunity “prevent[s] lawsuits from shutting down websites,” *Batzel v. Smith*, 333 F.3d 1018, 1027–28 (9th Cir. 2003), *reh’g denied by* 351 F.3d 904, (9th Cir. 2003), because “[t]he specter of tort liability in an area of such prolific speech would have an obvious chilling effect,” *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

214. 47 U.S.C. § 230; *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 965 (N.D. Ill. 2009).

215. 47 U.S.C. § 230(f)(3). *See also* *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008) (loss of immunity if provider or user “materially contribut[es] to its alleged unlawfulness”); *Gilmore v. Jones*, 370 F. Supp. 3d 630, 661–62 (W.D. Va. 2019) (court will look at “totality of the circumstances” to determine if website operator was not “passive” but went beyond “normal editorial functions” such as by actively deciding to publish, withdraw, or modify third party content).

216. *Doe No. 1 v. Backpage.com*, 2018 WL 1542056, at \*2 (D. Mass. Mar. 29, 2018); *Florida Abolitionist v. Backpage.com*, 2018 WL 1587477, at \*5 (M.D. Fla. Mar. 31, 2018).

217. 47 U.S.C. § 230(e)(3) (“No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”).

218. *Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (quoting *Brown v. Gilmore*, 278 F.3d 362, 366 n.2 (4th Cir. 2002)).

219. *Id.* at 255. *See also, e.g.*, *AdvanFort Co. v. Cartner*, No. 1:15-cv-220, 2015 WL 12516240, at \*5 (E.D. Va. Oct. 30, 2015); *M.A. ex rel. P.K. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1058–59 (E.D. Mo. 2011); *Gibson v. Craigslist, Inc.*, No. 08 Civ. 7735, 2009 WL 1704355, at \*5 (S.D.N.Y. June 15, 2009).

220. *Gibson*, 2009 WL 1704355, at \*3.

221. 47 U.S.C. § 230(a)(3).

*B. The Websites of Traditional Publishers and Section 230 Immunity*

The statute is broad.<sup>222</sup> Section 230 permits these interactive computer services to exercise “traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content.”<sup>223</sup> The apparent aim of this provision was to empower social media sites to edit or remove offensive content with impunity,<sup>224</sup> immunized by Section 230.<sup>225</sup> “[A] central purpose of the Act was to protect from liability service providers and users who take some affirmative steps to edit the material posted.”<sup>226</sup>

Although not free from doubt, traditional print or media news outlets likely fall outside the immunity protections of Section 230. The statute defines an interactive computer service as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet . . . .”<sup>227</sup> The paradigmatic interactive computer service, and the one the Congress apparently had in mind, is the social media website that consists almost entirely of content provided by third-party posters, such as Facebook.<sup>228</sup> Courts have “adopt[ed] a relatively expansive definition of ‘interactive computer service,’”<sup>229</sup> and have stated that “the most common

---

222. 47 U.S.C. § 230(c)(1) (“[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”).

223. *Dowbenko v. Google Inc.*, 582 F. App’x 801, 805 (11th Cir. 2014) (quoting *Zeran*, 129 F.3d at 330); *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008) (en banc) (Congress sought in passing Section 230 “to immunize the removal of user-generated content”).

224. *Fair Hous. Council of San Fernando Valley*, 521 F.3d at 1163. *See also* *Batzel*, 333 F.3d at 1031 (9th Cir. 2003) (“[A] central purpose of the Act was to protect from liability service providers and users who take some affirmative steps to edit the material posted.”); *Shiamili v. Real Estate Grp. of New York, Inc.*, 17 N.Y.3d 281, 289, 952 N.E.2d 1011, 1017 (2011) (recognizing that Section 230 protects from “liability for third-party content”).

225. Immunity applies under Section 230 if (1) the defendant is a provider or user of an interactive computer service, (2) the alleged defamatory statement is information provided by another information content provider, and (3) plaintiff seeks to hold defendant liable as the publisher or speaker of that information. *Sikhs for Justice “SFJ”, Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1092–93 (N.D. Cal. 2015), *aff’d sub nom. Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 F. App’x 526 (9th Cir. 2017).

226. *See Batzel*, 333 F.3d at 1031.

227. 47 U.S.C. § 230(f)(2).

228. *Sikhs for Justice*, 144 F. Supp. 3d at 1094; *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014); *Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056, 1065 (N.D. Cal. 2016) (Facebook “provides or enables computer access by multiple users to a computer service”); *Federal Agency of News LLC v. Facebook, Inc.*, 395 F. Supp. 3d 1295, 1305 (N.D. Cal. 2019).

229. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003); *see also Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 501 n.6 (E.D. Pa. 2006) (same).

interactive computer services are websites.”<sup>230</sup> Although social media platforms are “websites” that fit into Section 230, it is unlikely that the Congress meant to include all websites within the scope of the grant of immunity. The aim of Section 230 was “interactive computer services”; the Congress could have referred to ordinary “websites” had the Congress desired to provide blanket defamation immunity to all digital content. Thus, the better conclusion is that the websites of traditional media publications do not constitute “interactive computer services” immunized under Section 230.

Even assuming, however, that traditional media companies that have websites enjoy Section 230 immunity, it is clear that Section 230 established immunity only for third-party content.<sup>231</sup> Online publishers remain liable for their own content, for when they act as an “information content provider.”<sup>232</sup> Thus, a website may be immune from liability for some of the third-party content it publishes but not immune for the content that it is responsible for as a creator or developer.<sup>233</sup> In short, immunity under the CDA depends on “the pedigree of the content at issue.”<sup>234</sup> Online publishers are careful with the “pedigree of their content,” arguing that the writers who make contributions to

---

230. *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1268 (9th Cir. 2016) (citation omitted); *see also Collins v. Purdue Univ.*, 703 F. Supp. 2d 862, 878 (N.D. Ind. 2010) (holding that “websites [that publish third party content] are under the umbrella of protection of” Section 230).

231. *Seaton v. TripAdvisor LLC*, 728 F.3d 592, 599 n.8 (6th Cir. 2013) (recognizing that § 230(c)(1) provides immunity); *see also Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006) (“The majority of federal circuits have interpreted the CDA to establish broad ‘federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.’”) (internal citations omitted); *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010); *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008); *Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008); *Universal Comm’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418–19 (1st Cir. 2007); *Batzel v. Smith*, 333 F.3d 1018, 1026–30 (9th Cir. 2003); *Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003); *Ben Ezra, Weinstein & Co. v. Am. Online Inc.*, 206 F.3d 980, 984–85 (10th Cir. 2000); *Zeran v. AOL*, 129 F.3d 327, 328 (4th Cir. 1997).

232. An “information content provider” is defined as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” 47 U.S.C. § 230(f)(3). A website operator can simultaneously act as both a service provider and a content provider. If a website displays content that is created entirely by third parties, then it is only a service provider with respect to that content—and thus is immune from claims predicated on that content. But if a website operator is in part responsible for the creation or development of content, then it is an information content provider as to that content—and is not immune from claims predicated on it. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) (“Under the statutory scheme, an ‘interactive computer service’ qualifies for immunity so long as it does not also function as an ‘information content provider’ for the portion of the statement or publication at issue.”).

233. *See Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162–63 (9th Cir. 2008); *see also Batzel*, 333 F.3d at 1033.

234. *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 409 (6th Cir. 2014).

the website constitute the third parties contemplated in the statute.<sup>235</sup> By describing professional journalists as “contributors” or “guest writers” for the site or publication, and not employing them directly, the website can argue that its website is hosting “third-party content” for which it is not responsible.<sup>236</sup> For example, the HuffPost, an online news aggregator and website owned by Oath, Inc., which also owns Yahoo! News, denotes many of its articles as authored by “contributors” and “guest writers.”<sup>237</sup> For the casual reader, these contributor-authored articles appear indistinguishable from ordinary articles: they feature headlines, are linked to within the site, have author bylines, “pull-quotes” highlighted within the body of the article, and “about the author” post-scripts. In its Terms of Service, HuffPost claims that it is “not responsible for . . . the opinions expressed by [such] content contributors.”<sup>238</sup> Yet these contributors are compensated, either directly pursuant to a contract with HuffPost or through some sharing of advertising revenue.<sup>239</sup> Section 230 “protects websites from liability . . . for material posted on their websites by someone else.”<sup>240</sup> HuffPost, and media websites more generally, could assert that they are not the “information content provider” for these articles authored by contributors.

A website, however, is not entitled to protection from claims based on the publication of information if it is “responsible, in whole or in part, for the creation or development of [the] information.”<sup>241</sup> It would seem facile for websites to enjoy immunity from defamation liability by the simple expedient of classifying selected writers as independent contractors. The professional status of writers might appear along a continuum. On the one side are statements made by non-professional users or readers in the “comment” section that typically appears at the foot of an article or post published online. At the

---

235. See *Page v. Oath, Inc.*, C.A. No. S20C-07-030 CAK, at \*18–19 (Sup. Ct. Del. 2021).

236. See Brief in Support of Motion to Dismiss, *Page v. Oath, Inc.*, No. S20C-07-030 CAK (Sup. Ct. Del. 2021).

237. HuffPost identifies these writers as “freelance” in the “about the author” post-scripts to its stories. Its solicitations from its readers refers to the opportunity to “publish” articles on HuffPost, provides submission guidelines, and a contact mechanism for sending in a “pitch.”

238. *Page v. Oath, Inc.*, C.A. No. S20C-07-030 CAK, at \*16 (Sup. Ct. Del. 2021) (quoting HuffPost Terms of Service).

239. In its guidelines for submissions by guest writers, HuffPost states that “[a]ll published contributors are paid for their work.” How to Pitch HuffPost, HUFFPOST.COM, <https://www.huffpost.com/static/how-to-pitch-huffpost> [<https://perma.cc/H5D2-RNB9>].

240. *Perlman v. Vox Media, Inc.*, No. CVN19C07235PRWCCLD, 2020 WL 3474143, at \*2 n. 24 (Del. Super. Ct. June 24, 2020); *Shiamili v. Real Estate Grp. of New York, Inc.*, 17 N.Y.3d 281, 289, 952 N.E.2d 1011, 1017 (2011) (recognizing that Section 230 protects from “liability for third-party content”).

241. 47 U.S.C. § 230(f)(3).

other end of the spectrum are those articles authored by full-time, paid professional writers, correspondents, or editors under formal employment agreements with the publisher. Clearly the website is responsible for the latter and not the former. Just as clearly, Section 230 would immunize websites for exercising editorial control over the comment section, removing those statements that violate the site's community standards, terms of service, or that constitute defamation.<sup>242</sup> Websites protected under Section 230 may also delegate that editorial function to third-parties.<sup>243</sup> A website's failure to delete defamatory user comments also falls within the immunity of Section 230.<sup>244</sup> Although user comments are typically brief, some of them are clearly not, as users enjoy their moment on the soapbox to give a full explication of their perspectives. Somewhere in between the typical user comment and the employee-authored article is the freelance or invited contribution.

In the *Dirty World* case,<sup>245</sup> the "Dirty" website published content provided by its users.<sup>246</sup> The content, however, was arguably "developed" by the website insofar as its users were provided specific guidelines and encouraged to post "dirt" on local citizens; the website selected contributions from among the thousands of daily offerings and published those, along with its own added comments appearing to ratify or adopt the published offerings as truthful.<sup>247</sup> In holding that *Dirty World* enjoyed immunity under Section 230, the Sixth Circuit held that "development" requires "something more involved than merely displaying or allowing access to content created by a third party."<sup>248</sup> In another case, the Ninth Circuit described the reach of Section 230's use of "development" more specifically,<sup>249</sup> holding that a website that "contribut[es] to [the statement's] alleged unlawfulness" forfeits its immunity.<sup>250</sup>

The first court to address the issue of independent journalists providing articles for websites appears to be the Delaware Superior Court in the ongoing lawsuit brought by former foreign policy advisor Carter Page against Oath, Inc.,

---

242. 47 U.S.C. § 230(c)(2)(A).

243. 47 U.S.C. § 230(c)(2)(B).

244. 47 U.S.C. § 230(c)(2).

245. *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398 (6th Cir. 2014).

246. *Id.* at 402, 409.

247. *Id.* at 402–03.

248. *Id.* at 410. (instances of development may include some functions a website operator may conduct with respect to content originating from a third party).

249. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1167–68 (9th Cir. 2008) (we interpret the term "development" as referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness. In other words, a website helps to develop unlawful content, and thus falls within the exception to Section 230, if it contributes materially to the alleged illegality of the conduct).

250. *Id.* at 1168.

owner of the HuffPost, currently pending before the Delaware Supreme Court.<sup>251</sup> Page seeks to hold HuffPost responsible, as the publisher, for seven articles posted on its website that Page alleges were defamatory.<sup>252</sup> Each of the articles were written by non-employee “contributors.”<sup>253</sup> According to the Complaint, each of the contributors, who are mostly comprised of well-known writers,<sup>254</sup> were allegedly solicited and were paid for their articles.<sup>255</sup> Each article appeared in headline form, with a brief description and image, on the front page of the HuffPost site.<sup>256</sup> The author by-line and biographical summary identified the writer as a “guest writer”; in the HuffPost’s Terms of Service is the disclaimer that it is “not responsible for . . . the opinions expressed by content contributors.”<sup>257</sup> Each of the “contributor” articles appears alongside other content, and was highlighted for salience.

The Delaware trial judge who addressed this matter on a motion to dismiss provided only a brief discussion.<sup>258</sup> The judge concluded that, because the literal terms of Section 230 immunize the host from liability for third-party content, the defendant HuffPost was not responsible for any defamation in these contributed articles as a matter of law.<sup>259</sup> A more purposive analysis of Section 230 might yield a different outcome. The intent of the Congress in enacting Section 230 was to form part of the Communications Decency Act: along with proscribing certain content, the Act authorized the “interactive computer service[s]” to take any action “in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.”<sup>260</sup> The aim was to give the services a strong editorial hand to police their sites.<sup>261</sup> It would be counter to that purpose to conclude that, instead of a strong hand, the website could in

---

251. Page v. Oath, Inc., C.A. No. S20C-07-030 CAK (Sup. Ct. Del. 2021).

252. *Id.* at \*4.

253. Page v. Oath, Inc., C.A. No. S20C-07-030 CAK, at \*10 (Sup. Ct. Del. 2021).

254. Among the “contributors” who wrote allegedly defamatory articles about Page were Richard North Patterson, a widely published fiction writer and political commentator; Amanda Terkel, formerly Deputy Research Director for the Center for American Progress (and now the Washington Bureau Chief for the HuffPost); author Amica Graber; and others. See Compl. 8–10, Page v. Oath, Inc., C.A. No. S20C-07-030 CAK, 54 (Sup. Ct. Del. 2021).

255. How to Pitch HuffPost, HUFFPOST.COM, <https://www.huffpost.com/static/how-to-pitch-huffpost> [<https://perma.cc/4CKQ-NZS6>].

256. Compl. 8–10, Page v. Oath, Inc., C.A. No. S20C-07-030 CAK (Sup. Ct. Del. 2021).

257. Page v. Oath, Inc., C.A. No. S20C-07-030 CAK, at \*16 (Sup. Ct. Del. 2021) (quoting HuffPost Terms of Service).

258. Page v. Oath, Inc., C.A. No. S20C-07-030 CAK, at \*16–119.

259. *Id.* at \*19.

260. 47 U.S.C. § 230(c)(2)(A).

261. Fair Hous. Council, San Fernando v. Roomates.com, 521 F.3d 1157, 1175 (9th Cir. 2008).

effect avoid all editorial obligations by denoting its paid writers as “third parties” for whom the website had no control, and over whom they would not wish to assert control lest they be deemed “information content providers” responsible for the content of the articles. Unlike anonymous users hitting “enter” on their keypads, these paid contributors are completely under publisher control, both as to the subject and content of the article, and as the decision to publish. A more purposive analysis, beyond the mere formalism of the contractual relationship, suggests that media publishers like HuffPost are responsible for the content of these “independent” contributions.

More generally, the claim that traditional media publishers fit within Section 230 does not comport with the historical structure of defamation liability. The common law divided operators of communications systems into three categories: publishers, distributors, and platforms.<sup>262</sup> “Publishers,” such as a newspaper, magazine, or broadcast station, are liable for material they publish the same way they are liable for their own speech.<sup>263</sup> “Distributors,” such as bookstores or libraries, are businesses that distribute the works that have been created and printed by others. Distributors are held liable on a “notice and take-down” standard.<sup>264</sup> Finally, “platforms” include telephone companies and municipalities whose services or spaces might be used for libelous conduct. Platforms are not liable at all.<sup>265</sup> The key distinction among publishers, distributors, and platforms is the exercise of editorial control: publishers exercise complete control over what is communicated, and therefore can be held liable for published statements; platforms are mere passive vehicles for people’s uninvited content, have no editorial control, and thus no liability.<sup>266</sup>

---

262. Kean J. DeCarlo, *Tilting at Windmills: Defamation and the Private Person in Cyberspace*, 13 GA. ST. U. L. REV. 547, 551–59 (1997).

263. A newspaper could be sued for libel in a letter to the editor, for instance. In practice, there was some difference between liability for third parties’ speech and for the company’s own, especially after the Supreme Court required a showing of negligence for many libel cases (and knowledge of falsehood for some); a newspaper would be more likely to have the culpable mental state for the words of its own employees. Nonetheless, publishers remain broadly liable, and must be careful in choosing what to publish. See RESTATEMENT (SECOND) OF TORTS § 578.

264. A bookstore, for instance, was not required to have vetted every book on its shelves, the way that a newspaper was expected to vet the letters it published. But once it learned that a specific book included some specific likely libelous material, it could be liable if it failed to remove the book from the shelves. See RESTATEMENT (SECOND) OF TORTS § 581.

265. *Lunney v. Prodigy Servs. Co.*, 94 N.Y.2d 242, 249 (N.Y. 1999) (email system).

266. See Eric Goldman, *Why Section 230 Is Better Than the First Amendment*, 95 NOTRE DAME L. REV. ONLINE 33, 38–40 (2019) (arguing Section 230 is better than distributor liability under the common law).

Prior to the passage of the CDA, a New York trial court applied the common law distinctions to internet service providers.<sup>267</sup> The court held that service providers that exercise no editorial control over publicly posted materials would be treated as a “distributor,” with limited “notice and take-down” liability, but that service providers that exercised some editorial control, for instance, by removing vulgarities, would be treated as publishers.<sup>268</sup> A publisher is liable for what it publishes, including defamation liability for the posts of others.

Section 230 commands courts to treat interactive computer services as “platforms,”<sup>269</sup> with their categorical immunity, and not as publishers or distributors. Section 230 specifically provides these interactive services with two immunities: one for publishing users’ speech and one for censoring users’ speech. First, it provides immunity with regard to “information provided by another information content provider,” stating that the interactive computer service is not to be “treated as the publisher or speaker” of this information.<sup>270</sup> Second, Section 230 provides immunity for actions taken by social media platforms that “restrict access” to materials submitted by other providers or users.<sup>271</sup> In addition, Section 230 also extends this latter immunity for social media platforms when they empower other companies to restrict access on their behalf.<sup>272</sup>

Neither of these immunities conclusively applies to an ordinary journalistic website. It makes no literal sense to grant immunity to a website immunity for acts that “restrict access” to its own content: a publisher can restrict access to its own materials without the need to worry about liability to third parties. The other immunity, for information provided by “another” content provider, also contemplates a separation between the website and the content provider. With

---

267. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, at \*4 (N.Y.S.2d 1995).

268. *Id.* at \*3.

269. With respect to the publication of material in violation of copyright laws, Congress decided to treat the internet service companies as distributors, subject to liability only if they fail to take down copyrighted material after receiving notice. The Digital Millennium Copyright Act of 1998, 17 U.S.C. § 512.

270. Section 230(c)(1) states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”

271. “No provider or user of an interactive computer service shall be held liable on account of— (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.” 47 U.S.C. § 230(c)(2).

272. Section 230 (c)(2) states that no platform will be held liable for “any action taken to enable or make available to information content providers or others the technical means to restrict access to material [provided by another information content provider].”

respect to content the website controls, as either authored by its employees or by contractees, the website would need again no immunity, as it controls the decision to publish.

Even if Section 230 were extended beyond social media platforms and applied to the websites of traditional media outlets, several exceptions or limitations on the immunity provisions would curtail their immunity. First, the interactive computer services identified in Section 230 are empowered to restrict access to or not publish defamatory content contributed by third parties, but only for content that is “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.”<sup>273</sup> This last phrase has been given generous judicial interpretation, and would impliedly include defamatory speech.<sup>274</sup> Nonetheless, it is arguable, under the statutory interpretive canon of “ejusdem generis,” that “otherwise objectionable” should be limited to content that is similar in character to the preceding terms. If so, the websites in editing the content of third-party or independent contributors for matters outside of obscene content would not be acting as “publisher,” and thus immune from liability, but instead would be acting as an “information content provider” who is liable for defamatory content.

Second, Section 230(c)(2) requires that the defendants’ acts to restrict access be taken in “good faith.”<sup>275</sup> Intentional torts, such as defamation or intentional infliction of emotional distress, are by definition not actions taken in good faith. Arguably, this subsection should not create immunity against suits alleging an intentional tort. Nonetheless, several lower federal courts have rejected this theory, reading the immunity of Section 230 as broadly as possible.<sup>276</sup> Third, Section 230(e)(3) states, “Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought, and no liability may be imposed under any State or local law that is inconsistent with this section.”<sup>277</sup> A suit alleging a common law claim for republication liability under state law would arguably be outside of the immunity of Section 230.

---

273. Section 230 (c)(2).

274. In *Circuit City Stores Inc., v. Adams*, 532 U.S. 105, 114–15 (2001), the Supreme Court defined ejusdem generis as a situation in which “general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.”

275. 47 U.S.C. § 230.

276. See above notes 231 and accompanying text.

277. 47 U.S.C. § 230(e)(3).

### C. Section 230 Reform

To create a meaningful remedy more responsive to the internet age, the Congress could amend Section 230 to maintain protection for interactive service providers, yet to lessen the absolute immunity that has effectively precluded all defamation liability. Prior to the passage of the Communications Decency Act, it appeared web platforms were liable for user content as “publishers.”<sup>278</sup> A publisher carries all the liability of the writer. Section 230 renders the internet companies mere “platforms” which bear no responsibility. This “platform” status represents the lowest liability status. In between “publisher” and “platform” is the “distributor,” a status carried by bookstores and libraries. A distributor bears “notice and takedown” liability: where notice is provided of defamatory content, the distributor is immune from liability if it “takes down” offending content.<sup>279</sup> This is the behavior currently practiced by all the major social media sites under their Terms of Service. It is the industry standard. The Congress could amend Section 230 to reflect this reality, and by doing so provide victims of defamation a genuine remedy against defamatory content.<sup>280</sup> They could notify the platforms of defamation, and then seek a remedy should the platform refuse to remove defamatory content.<sup>281</sup> Notably, notice-and-takedown practices are standard remedies in other areas of law.<sup>282</sup>

---

278. *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710, at \*5 (N.Y.S.2d 1995).

279. See Ann Bartow, *Online Harassment, Profit Seeking, and Section 230*, 95 B.U.L. REV. ANNEX 101, 102–03 (2015); Julio Sharp-Wasserman, Note, *Section 230(c)(1) of the Communications Decency Act and the Common Law of Defamation: A Convergence Thesis*, 20 COLUM. SCI. & TECH. L. REV. 195, 227–29 (2018).

280. Although it dealt with the plaintiff’s “right to reply” and did not address retraction statutes, the decision in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974), would limit, if not preclude, on First Amendment grounds any statute that assumed editorial control over a media publication.

281. See *Bartnicki v. Vopper*, 532 U.S. 514, 530 n.13 (2001) (speech at issue “considered of minimal value”); *but see*, *Zeran v. America Online*, 129 F.2d 327, 333 (4th Cir. 1997) (“liability upon notice reinforces service providers’ incentives to restrict speech.”).

282. Under the Digital Millennium Copyright Act, 17 U.S.C. §§ 101 et seq. (1998), websites are obliged to take down materials for which they receive notice of copyright or other intellectual property violations. See Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PENN. L. REV. 1869, 1931 n.227 (2009). For an unfavorable description of the success of that act, see Ben Depoorter & Robert Kirk Walker, *Copyright False Positives*, 89 NOTRE DAME L. REV. 319, 320–21 (2013); Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 86 n.238 (2006) (notice-based liability invites opportunistic use of notice); Note, *Section 230 as First Amendment Rule*, 131 HARV. L. REV. 2027, 2038 (2018) (notice would be used to target politically controversial speech and unfavorable business reviews).

## VI. CONCLUSION

The court in *Packingham v. North Carolina*<sup>283</sup> described the cyber age as a revolution of historic proportions, noting that “we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be.”<sup>284</sup> Writing for the majority, Justice Kennedy said cyberspace, and social media in particular, was among the “most important places . . . for the exchange of views.”<sup>285</sup> He compared the internet to a public forum, akin to a public street or park. Although not a “public forum” protected by the First Amendment,<sup>286</sup> it is clear that the internet, and social media websites in particular, have become the new town square. Section 230, the “twenty-six words that created the internet”<sup>287</sup> by abrogating defamation liability, has both generated and protected the hugely diverse expression of content across numerous platforms and websites. For better or worse, it has enabled an era in which scandalous rumors and coarse content permeate the online world. Because of its anonymity, the internet offers an avenue for speakers to defame with relative impunity. Because of its open access and stunning democratization of public speech, the internet has created a forum for many speakers who also presumably lack the financial means to constitute “collectible” tort defendants. In short, Section 230 has created an unregulated forum for the creation and widespread dissemination of defamation: false statements of fact that subject someone to the scorn, ridicule, and opprobrium of her community.<sup>288</sup> In the modern age, the “community” can be the entire nation, if not more.

In the midst of this vortex of defamation and viral speed stand traditional media publishers. They compete for attention and market share not just with each other, but with the multitude of non-professional social media posters and

---

283. 137 S.Ct. 1730, 1736 (2017).

284. *Id.*

285. *Id.*

286. *Id.* (“[T]he Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium.”).

287. JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* (2019).

288. The internet has led to a cottage industry of defamation lawsuits arising from intemperate online expression. For example, a federal district court in California recently reasoned that the president did not defame Stormy Daniels, an adult film actress who claimed she engaged in an intimate relationship with Trump in 2006. Daniels, whose real name is Stephanie Clifford, claimed that in 2011 she faced threats from an unknown man who said she must leave Trump alone. Daniels worked with a sketch artist to produce a picture of the man after Trump was elected president. Trump tweeted: “A sketch years later about a nonexistent man. A total con job, playing the Fake News Media for Fools (but they know!)” Daniels sued the president for defaming her, but the U.S. District Court for the Central District of California in *Clifford v. Trump* (2018) dismissed the suit, explaining that Trump had engaged in protected rhetorical hyperbole rather than unprotected speech.

content creators who seek to become “influencers,” or who have a political cause to advance, or who post just for the enjoyment of contributing to the public discussion. For these posters and users, defamation liability is irrelevant. For those media websites who participate in the public discussion, who seek to be relevant to the social media world, they play a dangerous game, fraught with the potential of massive defamation liability. These companies are not anonymous, and they comprise collectible defendants who will draw the attention of the plaintiffs’ bar. Ordinary citizens using social media will make untrue statements and will post misleading, highly edited videos and faked photographs, particularly when those citizens are politically involved, as was Nathan Phillips. Traditional media companies who re-publish such statements or rely on such videos or photos will expose themselves to liability. Section 230 immunity will not apply to them; the “actual malice” standard behind which they have stood for forty years will not save them; the limited common-law defenses to republication liability will not exculpate them, even in the few states that have adopted them. The publisher steps into the shoes of those whom the publisher quotes.<sup>289</sup> Nathan Phillips allegedly defamed Nicholas Sandmann with false claims about offensive conduct.<sup>290</sup> As did The Washington Post, CNN, CBS, and many other mainstream, traditional journalistic publications.<sup>291</sup>

The journalistic websites have no easy way forward. Asking the Congress to expand Section 230 to include websites more generally, thus expanding the reach of immunity beyond social media platforms, would effectively abrogate the tort of defamation as it pertains to digital content, making a meaningless distinction between print and digital publication. Alternatively, the traditional journalists could maintain traditional standards, conducting careful review of all facts, including facts it quotes from others, before publication. This approach properly adheres to journalistic tradition and ethics, but likely renders professional journalism at a profound disadvantage to the blinding speed of unchecked social media. To be late is, for many publications and broadcasters, to be irrelevant. To be relevant, on the other hand, journalistic websites will inevitably run the risk of defamation liability. The apparent success of the Sandmann litigations, resulting so far in two settlements and five cases surviving dispositive motions, represents not a relic of the past, of the common law tort of defamation, but portends its future. The Sandmann litigations are, ironically, newsworthy. People are paying attention.

---

289. *See supra*, note 100 and accompanying text.

290. Plaintiff’s Complaint at 4, Sandmann v. WP Company LLC, (No. 2:19-cv-00019).

291. Plaintiff’s Complaint at 18–19, Sandmann v. WP Company LLC, (No. 2:19-cv-00019).