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A Proposal to Rescue New York Times v. Sullivan by Promoting a Responsible Press

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A Proposal to Rescue *New York Times v. Sullivan* by Promoting a Responsible Press

Keywords

Press, First Amendment, Defamation, First Amendment Defamation, Actual malice, Actual malice standard, Constitution, Media responsibility, *New York Times v. Sullivan*

**A PROPOSAL TO RESCUE *NEW YORK TIMES*
V. *SULLIVAN* BY PROMOTING A
RESPONSIBLE PRESS**

BENJAMIN BARRON*

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INTRODUCTION

Although *New York Times v. Sullivan*¹ purported to shield the press from liability in defamation suits brought by public officers,² juries have found for plaintiffs in more than half of the cases decided under the actual malice standard.³ Damages in those cases often amount to millions of dollars,⁴ and many of the judgments are founded on dubious evidence of actual malice.⁵ Accordingly, four decades after the Supreme Court handed down the landmark decision, scholars have disparaged *Sullivan* for imposing its own chilling effect on the press through massive awards and increased litigation costs.⁶

The actual malice standard has also been criticized for inadequately protecting the reputations of plaintiffs.⁷ Victims of defamatory news reports are immediately placed in defensive

1. 376 U.S. 254 (1964).

2. *See id.* at 278–80 (establishing the rule that publications shall not be subject to liability for defamation absent a showing of actual malice, under the reasoning that any lesser standard exposing publications to greater liability would effectively restrict the press' freedom and the public's freedom to access information).

3. MEDIA LAW RESEARCH CENTER, MLRC 2004 REPORT ON TRIALS AND DAMAGES, MLRC BULLETIN 63, tbl. 5 (Feb. 2004).

4. *See id.* at 28, tbl. 8 (reporting that the average award in libel suits is more than \$2.25 million). Note that the tables do not account for settlements and cases that otherwise did not make it to trial. In this sense, they are incomplete, but the point remains that damages in cases involving the actual malice standard can, and often do, reach startling amounts. *See generally* Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 1-5 (1983) (providing an overview of the growth of mega-awards in defamation suits against media defendants).

5. *See generally* Brian C. Murchison et al., *Sullivan's Paradox: The Emergence of Judicial Standards of Journalism*, 73 N.C. L. REV. 7, 95 (1994) (discussing the use of circumstantial evidence by trial courts in contravention of *Sullivan*).

6. *See infra* notes 120–123 (describing the restrictive effect of large jury awards and litigation costs on media defendants and freedom of the press).

7. *See infra* Part I.B.

postures and cannot shield themselves from public scorn.⁸ When those plaintiffs are denied their day in court, they have little recourse to reclaim their good names. To make matters worse, reputational injuries seem inevitable following *Sullivan* because the actual malice standard does not deter the press from negligently investigating leads and reviewing stories.⁹ Indeed, *Sullivan* incentivizes practices that increase the likelihood that the press will publish injurious falsehoods.¹⁰

But hope is not lost for the actual malice standard. *Sullivan* should be rescued rather than replaced, albeit in an unconventional manner. This Article proposes to reform libel litigation by creating a summary proceeding through which media defendants can shield themselves from liability by proving that they complied with a baseline standard of responsible journalism. The proposed standard would eliminate the chilling effect on the press by substantially reducing both litigation costs and the likelihood of damage awards. For victims of defamation, the proposed standard would prevent reputational injuries by deterring negligent reporting and providing defamed individuals with outlets for counterspeech. Most importantly, the proposed standard would safeguard the fundamental constitutional interests driving the Supreme Court's jurisprudence in libel cases by ensuring that public debate is founded on information that has been thoroughly investigated and fact-checked.¹¹

Part I of this Article briefly examines *Sullivan* and the progression of modern libel law. Part II discusses the tripartite failures of the actual malice standard that necessitate its reform. Part III argues that the First Amendment requires that the Supreme Court restructure the constitutional regime of defamation law to promote a baseline standard of journalistic professionalism. Finally, Part IV proposes the creation of a summary proceeding that both resolves the three failures of the actual malice standard and furthers the constitutional

8. See, e.g., *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 46-47 (1971) (elaborating on the notion that the public is far more attentive to the defamation of a prominent individual than to any subsequent denial of the substance of the defamation, and so counterspeech is an inadequate recourse for defamed individuals).

9. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 287-88 (1964) (acknowledging that the *New York Times* engaged in negligent behavior, but still not holding the newspaper liable for those negligent practices).

10. See *infra* Part II.A.

11. See generally RESTATEMENT (SECOND) OF TORTS § 580B cmt. h (1977) (contrasting the important interest in informing the public on serious matters with the far less important interest in spreading gossip).

mandate for a responsible press.¹² This Article concludes by addressing potential objections to the proposed summary proceeding.

I. THE DEVELOPMENT OF FIRST AMENDMENT DEFAMATION JURISPRUDENCE

Until its landmark holding in *Sullivan*, the Supreme Court's construction of the speech and press clauses of the First Amendment aligned closely to early English common law.¹³ Under that conception of the First Amendment, the government was proscribed from imposing prior restraints on libels, while subsequent punishment of false speech was permitted.¹⁴ Accordingly, in a series of decisions throughout the early twentieth century, the Court repeatedly held that the First Amendment does not protect the press from defamation liability. The two most notable decisions in this line were *Chaplinsky v. New Hampshire*¹⁵ and *Beauharnais v. Illinois*.¹⁶ In *Chaplinsky*, the Court famously created a two-tier conception of the First Amendment, holding,

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been

12. See Smolla, *supra* note 4, at 84 (pointing out the diminished social utility of speech when its veracity is questionable).

13. See, e.g., *Near v. Minnesota*, 283 U.S. 697, 714–15 (1931) (affirming that the First Amendment prohibits prior restraints of the press, but refusing to decide whether it also prohibits subsequent punishment).

14. See WILLIAM BLACKSTONE, 4 COMMENTARIES *152 (discussing the elimination of the British *ex ante* licensing requirement, and stating that “where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law . . . the *liberty of the press*, properly understood, is by no means infringed or violated”). It is unclear whether the Framers intended the protections of the First Amendment to extend beyond those recognized under English common law. The version of the press clause first proposed by James Madison that provided that “the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable,” was substantially curtailed to its current form. See Leonard Levy, *The Legacy Reexamined*, 37 STAN. L. REV. 767, 790 n.107 (1985) (citing James Madison's June 8, 1789 proposal). Outside of this small amount of legislative history, there is no evidence that the first Congress debated the scope of the First Amendment's protection of the press. See *id.* at 767 (“[E]ven if the amendment had a broader reach, the ‘freedom of the press’ it originally protected was freedom from licensing, censorship, and other forms of prior restraint.”); see also David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 475–80 (1983) (discussing the division between the early Federalists and the Madisonians regarding the breadth of the First Amendment following the passage of the Sedition Act of 1798); Gerald A. Berlin, *Reviews*, 72 YALE L.J. 631, 631–38 (1963) (commenting on LEONARD W. LEVY, *LEGACY OF SUPPRESSION* (1960), and arguing that Professor Levy failed to fully account for the opposition of early colonists to the imposition of *ex post* punishment for seditious libel following the trial of John Peter Zenger).

15. 315 U.S. 568 (1942).

16. 343 U.S. 250 (1952).

thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances 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.¹⁷

In *Beauharnais*, the Court reaffirmed *Chaplinsky* and held that libel is not “within the area of constitutionally protected speech.”¹⁸

Sullivan marked a radical shift from the view propounded in *Chaplinsky* and *Beauharnais*, as it was the first case in which the Court held that the First Amendment grants limited protection from subsequent liability for the publication of defamatory statements.¹⁹ At issue in *Sullivan* was a one-page political advertisement placed in the *New York Times* (“the *Times*”) that contained false statements regarding police treatment of African Americans in Montgomery, Alabama.²⁰ The respondent, L. B. Sullivan, was an elected commissioner in Montgomery whose duties included oversight of the city’s police department.²¹ Although Sullivan was not named in the advertisement, he argued that the false statements implicitly referred to his office and thereby defamed him through his supervisory role.²²

17. 315 U.S. at 571–72. The Court in *Chaplinsky* also noted its holding in *Near* and stated that “[t]he protection of the First Amendment . . . is not limited to the Blackstonian idea that freedom of the press means only freedom from restraint prior to publication.” *Id.* at 572 n.3. Interestingly, the Court failed to explain how its view of libel as falling outside the scope of the First Amendment did not render prior restraints of defamatory speech constitutionally permissible.

18. 343 U.S. at 266. While the Supreme Court in *Sullivan* overruled *Chaplinsky* insofar as it extended First Amendment protection to libelous speech, *Chaplinsky* survived in theory. As the Court noted in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), false statements of fact have “no constitutional value” and fall under the umbrella of unprotected speech discussed in *Chaplinsky*.

19. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 291–92 (1964).

20. *Id.* at 256–58.

21. *Id.* at 256.

22. Sullivan pointed to two paragraphs of the advertisement in particular. The third paragraph stated:

In Montgomery, Alabama, after students sang ‘My Country, ‘Tis of Thee’ on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.

Id. at 257. As the Court noted, Montgomery police were not present at the demonstration. Moreover, the students were expelled not for the protest, but for demanding service of the lunch counter at the local county church. The campus dining hall was not padlocked. *Id.* at 259.

Sullivan also highlighted the advertisement’s sixth paragraph, which alleged,

Both before and after the *Times* published the advertisement, its employees engaged in questionable journalistic practices.²³ No employee of the *Times* attempted to fact-check the information in the advertisement, despite the existence of *Times* articles discussing some of the events described in the advertisement, and the presence of at least one *Times* “stringer” reporter in Alabama.²⁴ The manager of Advertisement Accountability at the *Times* approved the advertisement for publication because its text was subscribed with the names of sixty-four prominent political, religious, and cultural leaders—all of whom the manager believed were credible.²⁵ None of the individuals, however, authorized the use of their name, nor were any made aware of the advertisement prior to its publication.²⁶ The *Times* advertising editors failed to contact any of the advertisement’s supposed sponsors to confirm that they had consented to be signatories.²⁷ Sullivan notified the *Times* of the false statements shortly after they were published, but its editors refused to publish a retraction because they did not believe that the statements about Montgomery police officers’ conduct implicated Sullivan’s

Again and again the Southern violators have answered Dr. King’s peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for “speeding,” “loitering” and similar “offenses.” And now they have charged him with “perjury”—a *felony* under which they could imprison him for *ten years*.

Id. at 257-58. Sullivan argued that the use of the term “they” regarding the seven arrests referred to conduct by Montgomery police officers, and that the other uses of “they” therefore also imputed police misconduct. *Id.* at 258. Regarding this paragraph, the Court noted that Dr. King was arrested four times, and that the alleged assault was denied by one of the accused police officers. *Id.* at 259.

It was uncontroverted at trial that some of the statements in those paragraphs were false. *Id.* at 258.

23. *N.Y. Times Co. v. Sullivan*, 144 So. 2d 25, 50-51 (Ala. 1962) (noting that despite the newspaper’s own finding from an internal investigation that there was no truth to the allegations in the advertisement, the *Times* refused to publish a retraction until forced), *rev’d*, 376 U.S. 254 (1964). According to the Supreme Court of Alabama, “[i]n the face of this cavalier ignoring of the falsity of the advertisement, the jury could not have but been impressed with the bad faith of The Times, and its maliciousness inferable therefrom.” *Id.* at 51.

24. *Id.* at 46; *see id.* at 29 (explaining that the term “stringer” typically refers to an on-site news correspondent employed by another news agency, who is occasionally asked for reports).

25. *Sullivan*, 376 U.S. at 261. The signatories included Eleanor Roosevelt, Harry Belafonte, Marlon Brando, Nat King Cole, Sammy Davis, Jr., and Shelley Winters. *Heed Their Rising Voices*, N.Y. TIMES, Mar. 29, 1960, at L25, available at <http://1stam.umn.edu/archives/primary/sullivan.pdf>.

26. *Sullivan*, 376 U.S. at 260.

27. *Id.*

reputation.²⁸ Eventually, the *Times* published a retraction after receiving a complaint from the Governor of Alabama.²⁹

Following a trial in the Circuit Court of Montgomery County, a jury awarded Sullivan \$500,000 in presumed and punitive damages, which was the exact amount he sought.³⁰ The Alabama Supreme Court affirmed the judgment, holding that the statements referred to Sullivan and were libelous per se.³¹ The state high court, however, devoted little of its attention to the First Amendment and primarily discussed procedural issues.³²

On certiorari, Justice Brennan wrote the opinion for the Supreme Court, which unanimously reversed the decision of the state high court.³³ The Court noted that it could have reversed solely on the narrow ground that the references to the police in the advertisement were insufficient to establish a cause of action for the defamation of an unnamed county commissioner.³⁴ Nevertheless, the Court instead reversed on the novel ground that absent a showing that the defamatory speech was uttered with actual malice, the First Amendment prohibits a public official from recovering for allegedly defamatory statements relating to his official conduct.³⁵ To establish actual malice, the public official must prove with “convincing clarity” that the speaker uttered the statement with knowledge of its falsehood or with reckless disregard of its veracity.³⁶

The Court was primarily concerned that liability for defamation would deter the press from reporting on political matters.³⁷ Justice Brennan noted that civil liability imposes a greater chilling effect on the media than prosecution for seditious libel, as civil defendants face the possibility of massive damages.³⁸ Also, because civil defendants lack protection from double jeopardy, they may face multiple lawsuits for a single libelous statement.³⁹ Public officials could thereby impose “virtually unlimited” damages on journalists in addition to the costs of

28. *Id.* at 257, 261–62.

29. *Id.* at 261–62.

30. *Id.* at 256.

31. See *N.Y. Times Co. v. Sullivan*, 144 So. 2d 25, 49–51 (Ala. 1962) (adopting the rationale of *Johnson Publ’g Co. v. Davis*, 124 So. 2d 441 (Ala. 1960)), *rev’d*, 376 U.S. 254 (1964).

32. *Id.* at 30–39.

33. *Sullivan*, 376 U.S. at 292.

34. *Id.* at 264–65.

35. See *id.* at 269 (noting that “libel can claim no talismanic immunity from constitutional limitations”).

36. *Id.* at 285–86.

37. *Id.* at 297 (Black, J., concurring).

38. *Id.* at 277 (majority opinion).

39. *Id.* at 278.

litigating multiple lawsuits, such that they could keep the press from publishing materials critical of the government.⁴⁰ Thus, the Court held that the Constitution tolerates the dissemination of some false statements to ensure unfettered press coverage of political matters.⁴¹

The Court also moved libel law into the scope of the First Amendment to prevent courts motivated by local biases from imposing liability on the press.⁴² Although they did not discuss it in *Sullivan*, Justice Brennan and his peers were aware of evidence indicating that the trial of the *Times* was tainted with racism, as well as anger over the intrusion of a northern newspaper into local southern affairs.⁴³ Despite the judgment of the state trial court, Sullivan's reputation was probably not substantially injured by the advertisement.⁴⁴ In fact, Sullivan remained popular in Montgomery, and many Montgomery residents were outraged by the advertisement.⁴⁵ Moreover, the Court was concerned that the availability of damages for libel threatened the financial viability of newspapers.⁴⁶ By the time the case was decided, the *Times* faced five other defamation suits in Alabama, with liability potentially as high as

40. *Id.* at 278-79.

41. *See id.* at 271-72 (“[E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need to survive.’” (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963))).

42. *See id.* at 294 (Black, J., concurring) (“Montgomery is one of the localities in which widespread hostility to desegregation has been manifested. This hostility has sometimes extended itself to persons who favor desegregation, particularly to so-called ‘outside agitators,’ a term which can be made to fit papers like the *Times*, which is published in New York.”).

43. *See* W. WAT HOPKINS, ACTUAL MALICE: TWENTY-FIVE YEARS AFTER *TIMES V. SULLIVAN* 14-15 (1989); *see also* Petitioner’s Reply to Respondent’s Brief in Opposition at 3, *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (No. 609) (arguing that racial bias and community pressures led to violations of due process in the state courts); Harry Kalven, Jr., *The New York Times Case: A Note on The Central Meaning of the First Amendment*, 1964 SUP. CT. REV. 191, 200 (1964) (observing that Alabama took advantage of its opportunity to draw attention to the *Times*’ participation in the civil rights movement in the South).

44. *See* HOPKINS, *supra* note 43, at 17 (noting Sullivan’s own testimony that he did not suffer any loss in compensation or face the threat of termination).

45. *See id.* at 12-14 (detailing the testimony of six witnesses, all of whom stated that they did not believe the advertisement was true, and even if it was, they thought no less of Sullivan because of it); *see also* ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 1.2.2 (2006) (pointing out that several other libel suits were brought against the *Times* by state and local officials, such that outsiders were punished for expression of unpopular views despite no apparent harm to the public officials’ reputations).

46. *Sullivan*, 376 U.S. at 294 (Black, J., concurring) (“The half-million-dollar verdict does give dramatic proof, however, that state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials.”).

\$2 million in addition to the cost of litigating the cases hundreds of miles from New York.⁴⁷

Turning to the facts of the case, the Court held that the evidence offered at trial was insufficient to support a finding that the *Times* published the advertisement with actual malice.⁴⁸ Justice Brennan first held that the *Times*' advertising manager held a good faith and reasonable belief that the advertisement was "substantially true," and he therefore did not maliciously approve of the advertisement's publication.⁴⁹ The newspaper's failure to check the accuracy of the statements against its own stories or contact any of the advertisement's signatories was insufficient to show that the *Times* reporters and editors knew the statements were false or acted with reckless disregard of its veracity.⁵⁰ Likewise, the Court held that the newspaper's failure to retract the advertisement could not serve as retroactive evidence of malice.⁵¹ At most, the facts supported a finding of "negligence in failing to discover the misstatements," which is "constitutionally insufficient to show the recklessness that is required for a finding of actual malice."⁵²

From the outset of its holding in *Sullivan*, the Court was divided as to the extent to which the First Amendment protects libelous statements. Indeed, although *Sullivan* was a unanimous decision, only six justices supported the actual malice standard. Justices Black, Goldberg, and Douglas rejected the standard, arguing instead that the Constitution should provide absolute protection for speech about public officials.⁵³ In his concurrence, Justice Black argued,

'Malice,' even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not

47. *Id.* at 278 n.18 (majority opinion).

48. *Id.* at 287-88.

49. *See id.* at 286 (refusing to adopt the Alabama Supreme Court's conclusion that malice could be inferred from the fact that the advertising manager ignored the falsity of the advertisement).

50. The Court, however, held that the actual malice standard would be satisfied if those stories were brought to the attention of the *Times* employees responsible for the publication of the advertisement. *Id.* at 287.

51. *Id.* at 286-87.

52. *Id.* at 287-88. Professor Richard Epstein argued that this holding represented the Supreme Court's attempt to strike a balance between absolute protection for the press (i.e., a no-liability standard), and strict liability for the publication of injurious falsehoods. Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782, 801-02 (1986) in *THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS* 137-47 (Everette E. Dennis & Eli M. Noam eds., 1989).

53. *Sullivan*, 376 U.S. at 293-305 (Black, J., concurring).

measure up to the sturdy safeguard embodied in the First Amendment.⁵⁴

Moreover, he stated that determining liability remained at the whim of potentially biased factfinders, such that government officials were still capable of harassing the press.⁵⁵ Justice Goldberg separately argued that the actual malice standard would lead to juror confusion, and that the right to speak about public matters should be independent of “a probing by the jury of the motivation of the citizen or press.”⁵⁶

In the decade that followed *Sullivan*, the Supreme Court further developed the actual malice standard in a series of fractured decisions.⁵⁷ Among the first matters addressed by the Court was whether the actual malice standard sufficiently accommodates the interest in protecting plaintiffs’ reputations, and whether that interest is constitutional or state-held.⁵⁸ The Court came closest to recognizing a constitutional right to reputation in a concurrence by Justice Stewart in *Rosenblatt v. Baer*,⁵⁹ in which he famously argued,

The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.⁶⁰

A year later, Justice Harlan wrote for a plurality of the Court that the First Amendment protection of speech must be balanced against the “pervasive and strong interest in preventing and redressing attacks on reputation.”⁶¹

54. *Id.* at 293.

55. *See id.* at 294–95 (noting that invidious motivations to harass the press are not limited to racial bias).

56. *Id.* at 298 (Goldberg, J., concurring).

57. *See infra* notes 58–62.

58. *See Smolla, supra* note 4, at 33–35 (discussing the Court’s open invitation in *Gertz v. Welch, Inc.*, 418 U.S. 323, 345–46 (1974) for states to develop a suitable standard of liability in defamation suits because it would be unwise for the Court to balance constitutional claims of the press against reputational claims of plaintiffs on an ad hoc basis).

59. 383 U.S. 75 (1966).

60. *Id.* at 92 (Stewart, J., concurring).

61. *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 146–47 (1967) (plurality opinion) (quoting *Rosenblatt*, 383 U.S. at 86 (majority opinion)) (internal quotations omitted).

Despite these statements, the Court held in *Gertz v. Robert Welch, Inc.*⁶² that the state has a legitimate interest in protecting plaintiffs' reputations, but that the actual malice standard does not necessarily interfere with that interest. Writing for the Court, Justice Powell agreed that the First Amendment requires a balancing between two competing interests: the state interest in protecting plaintiffs' reputations and the press' constitutional interest in immunity from liability.⁶³ *Gertz* held that the *Sullivan* standard accommodates those interests by limiting the protection of the press to statements made about public officials and figures.⁶⁴

Justice Powell offered two arguments that the interest in the reputations of both public officials and figures are accommodated by the actual malice standard. First, individuals who enter the public limelight are subject to public scrutiny and thus, assume the risk of being the targets of defamatory statements.⁶⁵ Second, prominent individuals can use their publicity to issue counterspeech and thereby rectify the injury caused by false statements.⁶⁶ Noting that the "first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error," the Court held that private citizens are at a substantial disadvantage in remedying injuries to their reputation than are individuals in the public eye.⁶⁷ For that reason, the actual malice standard was limited in application to suits brought by public officials or figures.⁶⁸

II. THE TRIPARTITE FAILURES OF THE ACTUAL MALICE STANDARD

Just after the Supreme Court decided *Sullivan*, scholars praised the decision, in the words of Alexander Meiklejohn, as "an occasion for dancing in the streets."⁶⁹ Yet as courts struggled to apply the actual malice standard, its theoretical and practical flaws were quickly revealed. In the four decades after *Sullivan*, criticisms of the decision

62. 418 U.S. 323 (1974).

63. *See id.* at 343, 347-48 (drawing a compromise between the state interest in protecting the reputations of its citizens and the interest in protecting the press from the dangers of a strict liability standard for defamation).

64. *See id.* at 345 (reasoning that an assumption of self-exposure to the media on the part of public figures distinguishes public from private individuals in the protections from defamation they are afforded).

65. *Id.* at 344.

66. *Id.* at 345.

67. *Id.* at 344. The Court failed, however, to address why the imperative of using self-help should cut off all liability from public figures instead of merely mitigating damages.

68. *Id.* at 352.

69. Kalven, *supra* note 43, at 221 n.125 (internal quotation omitted).

have been both varied and pervasive.⁷⁰ Indeed, most articles on libel law call for its reformation, and many scholars have gone so far as to advocate the wholesale elimination of the actual malice standard.⁷¹

This Part will discuss three particular arguments against the actual malice standard that underscore the need for reform. The first argument is that the actual malice standard overprotects speech by encouraging irresponsible media practices. The second argument is that the standard, particularly as discussed in *Gertz*, underprotects the reputations of plaintiffs. The final argument, and perhaps the most common criticism of *Sullivan*, is that the standard underprotects speech because it fails to shield the press from the tremendous cost of litigating libel suits. These three criticisms, taken together, raise serious concerns about the efficacy of the actual malice standard in satisfying the First Amendment interests that compelled the Court in *Sullivan* to protect defamatory speech.

A. *The Actual Malice Standard Overprotects Speech*

The actual malice standard necessarily implicates the issue of journalistic responsibility by failing to penalize journalists who negligently publish defamatory statements. Given the Court's concern for the chilling effect of widely available damages⁷² and especially considering the local biases that affected the case,⁷³ it is understandable that the Court in *Sullivan* refused to allow the *Times* to be held liable for its negligent conduct.⁷⁴ Nevertheless, in seeking

70. See discussion *infra* Part I.A.

71. Interestingly, two types of arguments call for overturning *Sullivan*: those that claim that the First Amendment does not protect defamatory speech and those that claim that it provides absolute protection for political speech by the press. Compare Paul A. Lebel, *Reforming the Tort of Defamation: An Accommodation of the Competing Interests Within the Current Constitutional Framework*, 66 NEB. L. REV. 249, 287-97 (1987) (arguing that the press can be adequately protected through non-constitutional reformation of defamation law, and that the press should have absolute protection for speech concerning the government), and Kalven, *supra* note 43, at 221 n.125 (agreeing with Alexander Meiklejohn's characterization of the *Sullivan* decision as cause for celebration because of increased protection of the press with regard to political speech), with David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 550 (1991) (concluding that the "present law of libel is a failure"), and David A. Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CAL. L. REV. 847, 847 (1986) (declaring that "[w]e face a libel crisis"), and Epstein, *supra* note 52, at 783 (criticizing the characterization of the *Sullivan* decision as a cause for celebration).

72. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964) (noting that the judgment awarded was one thousand times greater than the maximum criminal penalty).

73. See *id.* at 294 (Black, J., concurring) (mentioning that there was widespread hostility toward desegregation in Montgomery, Alabama).

74. See *id.* at 264 (majority opinion) (reversing the \$500,000 judgment against the *Times*).

to avoid that chilling effect, the Court freed the *Times* from any liability for its negligent conduct, which included the newspaper's failure to fact-check the advertisement, contact any of its signatories, or publish a timely retraction once it discovered that the advertisement contained false statements.⁷⁵ Flawed as pre-*Sullivan* libel law may have been, widely available damages in libel suits provided journalists with a strong incentive to get the story right. By looking solely to journalists' states-of-mind, however, the only incentive provided by the actual malice standard is that they report with clean consciences, regardless of whether they act reasonably or comply with professional norms.⁷⁶

In addition to the failure of *Sullivan* to deter negligent media conduct, the actual malice standard specifically encourages certain irresponsible practices.⁷⁷ The *Sullivan* standard provides reporters with a strong disincentive from investigating news stories beyond the minimum necessary. The more a reporter investigates, the more likely it is that the reporter will discover some information that casts the veracity of the story into doubt, which would increase the likelihood of liability.⁷⁸ Simply failing to fully investigate a story,

75. See *supra* notes 22-28 (detailing the negligent conduct of the *Times*). Note, however, that an incentive remains to publish truthful statements insofar as plaintiffs will attempt to prove falsehood in order to recover damages. See Philip L. Judy, *The First Amendment Watchdog has a Flea Problem*, 26 CAP. U. L. REV. 541, 549 (1997) (remarking that this burden of proof protects the media when it reports accurately). Note also that plaintiffs may be able to indirectly hold media defendants liable for negligent conduct by introducing evidence of such conduct as circumstantial evidence. See generally Murchison, *supra* note 5, at 12 (mentioning that circumstantial evidence of journalistic behavior may be used by plaintiffs to prove a reporter's state of mind).

76. One of the first sources of this criticism came neither from academic scholarship nor from the United States. In 1991, the British Supreme Court Procedure Committee considered whether England should adopt the actual malice standard. In its report, the committee rejected *Sullivan* and rebuked American law for overprotecting "irresponsible" media conduct. The report stated, "Standards of care and accuracy in the press are, in our view, not such as to give any confidence that a *Sullivan* defense would be treated responsibly. It would mean, in effect, that newspapers could publish more or less what they like, provided they were honest." [BRITISH] SUPREME COURT PROCEDURE COMMITTEE REPORT ON PRACTICE AND PROCEDURE IN DEFAMATION 164-65 (1991); see Anderson, *supra* note 71, at 516 ("Under [*Sullivan*], constitutional protection turns not on what is published, or on the objective truth or falsity of what is published, but on defendants' knowledge or doubts with respect to falsity.").

77. See, e.g., William P. Marshall & Susan Gilles, *The Supreme Court, The First Amendment, and Bad Journalism*, 1994 SUP. CT. REV. 169, 185 ("The actual malice standard not only holds that there is no need to investigate; it suggests that it often is better not to investigate."); see also Judy, *supra* note 75, at 555 ("There is no better way to avoid knowledge of the truth than to avoid investigation.").

78. See Marshall & Gilles, *supra* note 77, at 186 (observing that although thoroughly investigated stories are most useful to the news-reading public, they are also the riskiest because investigating thoroughly increases the risk that a paper will

however, constitutes mere negligence for which the reporter cannot be held liable.⁷⁹ Similarly, editors are discouraged from extensively reviewing stories, checking the facts contained in them or recommending that a reporter conduct additional investigation, as any of these actions may be seen by a jury as evidence that the editor “entertained serious doubts as to the truth of [the] publication.”⁸⁰

Perhaps the most powerful incentive of irresponsible journalism stems from the invasive discovery available to libel plaintiffs. For example, the Supreme Court in *Herbert v. Lando*⁸¹ ruled that the “thought processes” of reporters and editors are open to discovery in defamation suits.⁸² Likewise, in *Zurcher v. Stanford Daily*,⁸³ the Court allowed the admission of evidence obtained from a search into a newspaper’s offices and files.⁸⁴ These holdings discourage reporters and editors from revealing their doubts as to the accuracy of a story and generally encourage a lack of communication between them.⁸⁵ Moreover, the liberal discovery rules in libel suits deter reporters and editors from keeping written records such as notes that can later be used against them.⁸⁶

The actual malice standard encourages irresponsible journalistic practices in two other important respects. While the media may be held liable for repeating the defamatory statements of others, the

be found to have acted with actual malice); see also Judy, *supra* note 75, at 555–59 (noting that a reporter cannot be held liable for relying solely on one source, but the reporter can be held liable for seeking out multiple sources, one of whom casts serious doubts on the story’s veracity).

79. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332 (1974). (holding that a reporter must act with a “high degree of awareness of . . . probable falsity” to establish reckless disregard for the truth).

80. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); see Judy, *supra* note 75, at 553–54 (describing the “no verification rule,” in which an editor and reporter refrain from communicating with each other because they fear that such communication will be used as evidence of actual malice).

81. 441 U.S. 153 (1979).

82. See *id.* at 191-93 (Brennan, J., dissenting) (“It would be anomalous to turn substantive liability on a journalist’s subjective attitude and at the same time to shield from disclosure the most direct evidence of that attitude.”).

83. 436 U.S. 547 (1978).

84. *Id.* at 563-67 (dismissing the argument that searches of newspaper offices for evidence will seriously threaten the ability of the press to gather, analyze, and disseminate news). Although that case concerned a police search for evidence in a separate criminal case, Justice Stevens noted in dissent that the interests at stake in *Zurcher* paralleled those in a defamation suit. *Id.* at 580-81 n.8 (Stevens, J., dissenting).

85. See Marshall & Gilles, *supra* note 77, at 183–84 (arguing that sound journalism is undermined when editors are discouraged from communicating with reporters about their work product).

86. See Judy, *supra* note 75, at 554 (arguing that the Supreme Court’s decision in *Zurcher v. Stanford Daily*, allowing searches of reporters’ offices and files, prompted reporters to avoid keeping written records).

Supreme Court in *Time, Inc. v. Pape*⁸⁷ held that the press cannot be held liable for publishing false statements made by the government.⁸⁸ That rule, however, encourages the media to heavily rely on public officials as sources, and provides no incentive to check information provided by the government.⁸⁹ Moreover, the actual malice standard encourages the press to repeat news stories that have already attracted the public's attention. Because the individuals at the focus of those stories are more likely to be deemed public figures, reporters have greater assurance that the First Amendment will protect those statements, whereas no similar guarantee exists in reporting a story that has received little coverage elsewhere.⁹⁰

B. The Actual Malice Standard Underprotects Reputation

As noted in Part I, the Court in *Gertz* held that the actual malice standard accommodates the reputational interests of public officials and figures ("public plaintiffs").⁹¹ First, Justice Powell argued that by voluntarily entering public controversies or taking on public roles, public plaintiffs know that they will face increased scrutiny and therefore assume the risk of being defamed.⁹² Second, Justice Powell argued that public plaintiffs can mitigate the reputational harm inflicted upon them by using their publicity to engage in counterspeech.⁹³ Both claims, however, are severely flawed.⁹⁴

87. 401 U.S. 279 (1971).

88. *See id.* at 292 (holding that a newspaper did not act with reckless disregard for the truth when it omitted the word "alleged" from an article citing a government report on police brutality); *see also* *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 13-15 (1970) (holding that a newspaper was not liable for speech that accurately reflected statements made at an official city council meeting).

89. *See* *Marshall & Gilles*, *supra* note 77, at 189-92 (noting that the *Pape* rule essentially allows the government to set the media's news agenda). In his concurring opinion in *N.Y. Times Co. v. United States*, Justice Black declared that "paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell." 403 U.S. 713, 717 (1971) (Black, J., concurring). To the extent that the Supreme Court has encouraged the press to cease examining government speech with a critical eye, the actual malice standard promotes a breach of journalists' central duty.

90. *See* *Marshall & Gilles*, *supra* note 77, at 192-93 (suggesting that Supreme Court jurisprudence may encourage reporters to "jump on the bandwagon and be protected, [rather than] report on a new issue and risk liability").

91. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342-43 (1974).

92. *Id.* at 344-45 (arguing that individuals must accept certain consequences of their involvement in public affairs).

93. *Id.* at 344.

94. *See, e.g.*, *Judy*, *supra* note 75, at 584 (questioning Justice Powell's reasoning on the grounds that a public plaintiff may not have assumed the risk of being defamed, and also might lack the capability to adequately combat false statements).

The actual malice standard forecloses nearly all access to damages for public plaintiffs, yet public plaintiffs do not have equal access to effective counterspeech, nor do they equally assume the risks attendant to media scrutiny. For example, the extensive list of public officials identified in post-*Sullivan* libel actions includes police officers,⁹⁵ professors at public universities,⁹⁶ private nursing homes licensed by states,⁹⁷ and probation officers.⁹⁸ These individuals or entities have less access to public counterspeech and assume the risk of defamation to a reduced degree than major public officials like the President or federal legislators. Nevertheless, the actual malice standard treats them in exactly the same manner.⁹⁹ Stated otherwise, the problem is that the ability of public plaintiffs to anticipate and mitigate reputational harm varies depending on the prominence of the plaintiff, yet the actual malice standard almost entirely cuts off liability to them as though their ability to do either was on equal footing.¹⁰⁰ Moreover, public officers such as policemen are no better at foreseeing or redressing reputational harm than private citizens, yet the latter group is far more likely to receive damages for libel.¹⁰¹

Accordingly, public plaintiffs may not be able to issue counterspeech that can reach the same audience—quantitatively or qualitatively—as major media outlets. *Sullivan* is an apt example of this problem. Because the *Times* was a prominent newspaper, to the extent that the advertisement at the heart of the case actually

95. *E.g.*, Coughlin v. Westinghouse Broad. & Cable, Inc., 780 F.2d 340, 342 (3d Cir. 1985); McKinley v. Baden, 777 F.2d 1017, 1021-22 (5th Cir. 1985).

96. *See, e.g.*, Grossman v. Smart, 807 F. Supp. 1404, 1408 (C.D. Ill. 1992) (granting summary judgment to the defendants because the two plaintiff professors failed to show that the defendants acted with actual malice).

97. *See, e.g.*, Doctor's Convalescent Ctr., Inc. v. E. Shore Newspapers, Inc., 244 N.E.2d 373, 377-78 (Ill. App. Ct. 1968) (ruling that the plaintiff's nursing home was a public official for the purposes of *Sullivan* analysis).

98. *E.g.*, Britton v. Koep, 470 N.W.2d 518 (Minn. 1991).

99. *See, e.g., id.* (requiring a public official plaintiff to prove actual malice).

100. In *Gertz's* defense, Justice Powell recognized the disadvantages of creating a broad standard as opposed to purely deciding libel cases on a case-by-case basis. The Court upheld the actual malice standard, however, because a case-by-case evaluation of defamation claims would lead to "unpredictable results and uncertain expectations" and would hamstring the Court's ability to supervise lower courts. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342-43 (1974). This argument is somewhat unsatisfying, however. While the need for a broad standard is clear, the fact remains that some plaintiffs deemed public officials have virtually no access to public counterspeech, nor can it realistically be said that they invited media scrutiny. However, note that this objection does not apply as easily to public figures. Because their status as public figures turns in part on the extent to which they *voluntarily* enter a public controversy, they should be able to foresee scrutiny concerning that controversy and issue counterspeech to reporters seeking comment from them.

101. *Cf. Judy, supra* note 75, at 584 (positing that private figures, such as actors or athletes do not necessarily assume the risk of defamation by rising to the top of their professions).

referred to Sullivan, its statements about him were published on a wide stage. But because the Court recognized that the actual malice standard does not require newspapers to retract false statements,¹⁰² Sullivan's ability to issue counterspeech on a national stage was limited to the willingness of the *Times* or another prominent newspaper to publish his reply. Absent that circumstance, Sullivan could not resort to self-help. Moreover, as a county commissioner, Sullivan assumed the risk of defamation at most from the local press. It is far less tenable that he also assumed the risk of being defamed in the national press.

A further problem is that the Internet has provided avenues of communication that can reach considerably larger audiences than those available when *Gertz* was decided.¹⁰³ *Sullivan* and *Gertz* were concerned with a world where only an exclusive few newspapers or broadcasters could publish information broadly to the public.¹⁰⁴ Today, however, the media has expanded to include web logs ("blogs"), online news and opinion publications, and message boards.¹⁰⁵ The potential damage inflicted by defamatory Internet speech is substantially magnified, as Internet publications are open to a global audience and available for a longer, sometimes permanent duration.¹⁰⁶ Whereas only 394 copies of the *Times* were circulated in Alabama at the time of *Sullivan*, access to *Times* articles is now solely limited by an individual's ability to use a computer or get to a newsstand.¹⁰⁷

The prevalence of Internet speech undermines the viability of Justice Powell's claims. It is arguable that a public officer invites the scrutiny of traditional news outlets, which are run by professional journalists and are businesses that prize their reputations for

102. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 286-87 (1964).

103. See, e.g., Miniwatts Marketing Group, World Internet Usage Statistics News and Population Stats, <http://www.internetworldstats.com/stats.htm> (reporting that almost 1.2 billion people have access to the internet) (last visited Aug. 25, 2007).

104. See Aaron Perzanowski, Comment, *Relative Access to Corrective Speech: A New Test for Requiring Actual Malice*, 94 CAL. L. REV. 833, 848-54 (2006) (arguing that the Court in *Sullivan* and *Gertz* was concerned with a "one-to-many" media archetype, but that the Internet has shifted the media archetype to a "many-to-many" model).

105. See *id.* (noting that today the average citizen enjoys a potential global audience on the Internet through the use of web sites, blogs, and Usenets).

106. A recent article in *The Washington Post* aptly highlighted this problem. According to the article, law students' summer jobs are put at risk because of the availability of postings on an online message board notorious for spreading malicious rumors. See Ellen Nakashima, *Harsh Words Die Hard on the Web*, WASH. POST, Mar. 7, 2007, at A1 (reporting that gossip about law students was posted on Internet chat threads, which became widely accessible through Google searches).

107. See *Sullivan*, 376 U.S. at 260 n.3 (noting that total circulation for the *Times* that day was 650,000).

accuracy.¹⁰⁸ However, most public officers do not assume the risk of being defamed by an anonymous blogger or in a message board posting. More importantly, the expansion of outlets for mass communication has diluted the effectiveness of public plaintiffs' counterspeech.¹⁰⁹ While a large portion of the media is likely to cover statements made by a public plaintiff of major prominence, such as a senator or movie star, counterspeech made by many, if not most, other public plaintiffs will reach a smaller and less concentrated audience.¹¹⁰

In response to the problem of unequal access to counterspeech, it has been suggested that the Court replace the public plaintiff categories with one that turns on a plaintiff's "relative access" to counterspeech.¹¹¹ However, this response does not resolve a further problem with Justice Powell's arguments, which he briefly discussed in *Gertz*: that "an opportunity for rebuttal seldom suffices to undo [the] harm of defamatory falsehood" because "the truth rarely catches up with a lie."¹¹² That is, once a defamatory statement has been published, the defamed individual is immediately placed in a defensive posture and is therefore at a disadvantage in curing the reputational harm.¹¹³

108. *Compare* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-45 (1974) ("An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case."), *with* *Judy*, *supra* note 75, at 584 (questioning whether private citizens who achieve the status of public figures truly assume the risk associated with their fame).

109. *See* Owen Fiss, *In Search of a New Paradigm*, 104 *YALE L.J.* 1613, 1614-15 (1995) (arguing that the expansion of the media requires the Court to consider the implications of the "technological revolution" on the First Amendment); Perzanowski, *supra* note 104, at 853 (discussing the effect of the Internet in disbursing publications to a more scattered audience).

110. *See* *Gertz*, 418 U.S. at 363 (Brennan, J., dissenting) (questioning whether news outlets give "[d]enials, retractions, and corrections" enough prominence to counteract the harm inflicted by the original story).

111. *See* Perzanowski, *supra* note 104, at 860-71 (advocating that courts should only apply the actual malice standard where the plaintiff's access to corrective counterspeech is sufficient to protect their reputational interests).

112. *Gertz*, 418 U.S. at 344 n.9 (majority opinion).

113. This argument was eloquently made by Justice Brennan in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 46-47 (1971):

[I]t is the rare case where the denial overtakes the original charge. Denials, retractions and corrections are not "hot" news, and rarely receive the prominence of the original story. When the public official or public figure is a minor functionary, or has left the position that put him in the public eye . . . the argument loses all of its force. In the vast majority of libels involving public officials or public figures, the ability to respond through the media will depend on the same complex factor on which the ability of a private individual depends: the unpredictable event of the media's continuing interest in the story. Thus the unproved, and highly improbable, generalization that an as yet undefined class of "public figures" involved in

Despite recognizing this problem, Justice Powell asserted that the availability of counterspeech satisfies the public plaintiff's reputational interest regardless of the adequacy of the counterspeech.¹¹⁴ This response is unsatisfying. Justice Powell premised the public/private distinction in large part on public plaintiffs' ability to mitigate reputational harm through counterspeech.¹¹⁵ Yet almost immediately thereafter, he recognized that counterspeech is "seldom" effective in achieving that very end.¹¹⁶ In other words, his argument is that a public plaintiff's reputation does not warrant special protection because that plaintiff can resort to self-help that is almost always inadequate.

In arguing that counterspeech is constitutionally sufficient regardless of its potency, Justice Powell implied that ineffective counterspeech is an inevitable consequence of any rule that protects press speech. There are, however, two scenarios in which a public plaintiff's counterspeech can be considerably more effective in rebutting false statements than the counterspeech envisioned by Justice Powell. First, counterspeech can be contemporaneous with the defamatory utterance when reporters seek and publish responses from would-be plaintiffs. Second, where the press retracts false statements, the public counterspeech comes not from the plaintiff, but from a more reliable speaker—the source of the false statement. A retraction is also more likely to reach the same audience as the defamatory statement, as a public plaintiff's counterspeech would otherwise be made in a different outlet with a different audience. Consequently, counterspeech would be bolstered by a rule requiring or encouraging the press to publish concurrent responses and subsequent retractions.

C. *The Actual Malice Standard Underprotects Speech*

The third criticism of the actual malice standard, which is made throughout much of the literature on libel law, is that the standard fails to shield the press from the chilling effect feared by the Court.¹¹⁷

matters of public concern will be better able to respond through the media than private individuals also involved in such matters seems too insubstantial a reed on which to rest a constitutional distinction.

114. *Gertz*, 418 U.S. at 344 n.9 ("But the fact that the self-help remedy of rebuttal, standing alone, is inadequate to its task does not mean that it is irrelevant to our inquiry.").

115. *Id.* at 344.

116. *Id.* at 344 n.9.

117. See, e.g., Anderson, *supra* note 71, at 514 (noting that plaintiffs are likely to ask for, and juries are likely to award, punitive damages in defamation cases); Barrett, *supra* note 71, at 856 ("juries may well perceive . . . that they are charged with

Ironically, *Sullivan* had the effect of substantially increasing the cost of litigating libel cases by expanding the scope of discovery needed by plaintiffs.¹¹⁸ The *Sullivan* standard turns on the defendant's state-of-mind, thus requiring plaintiffs to inquire into the defendants' editorial processes and to seek internal documents.¹¹⁹ Under a standard that merely turns on the falsity of a published statement, information about the internal conduct of a media defendant would be largely irrelevant.

Additionally, plaintiffs who are successful in libel litigation often receive tremendous damages awards, which in many cases total in the millions.¹²⁰ Although damages are often reduced following trial, the press bears the costs of appeal.¹²¹ The magnitude of jury awards for libel has sparked a dramatic spike in litigation costs faced by the press. The size of awards compels other would-be plaintiffs to bring lawsuits because of the prospects of receiving favorable settlements.¹²² That escalation of lawsuits, combined with the prospect of incurring tremendous liability and litigation costs, in turn spurs the press to

judging the media's responsibility. Libel juries, no longer merely providing recompense to the plaintiff, are imposing punishment for the defendant's irresponsible conduct.").

118. See Russell L. Weaver & Geoffrey Bennett, *Is the New York Times "Actual Malice" Standard Really Necessary? A Comparative Perspective*, 53 LA. L. REV. 1153, 1154-55 (1993) (arguing that the actual malice standard encourages plaintiffs to seek costly discovery because discovery is the only way to determine whether a defendant acted recklessly or knowingly).

119. See *Herbert v. Lando*, 441 U.S. 153, 175 (1979) (holding that plaintiffs can use discovery to inquire into the editorial process); RODNEY A. SMOLLA, LAW OF DEFAMATION § 1:26 (2d ed. 2006) (theorizing that the actual malice standard's true effect was to invite greater public scrutiny upon the press' practices).

120. See Anderson, *supra* note 71, at 514 n.130 (providing examples of multi-million dollar awards that have been handed down by juries); Weaver & Bennett, *supra* note 118, at 1153-54 (noting that there were "virtually no recoveries" in libel suits following *Sullivan*, yet the number of libel suits grew in the years that followed it and plaintiffs eventually won massive awards); see also Barrett, *supra* note 71, at 865-67 (attributing the large damages to incommensurability between monetary damages and psychic, reputational harm).

121. See Weaver & Bennett, *supra* note 118, at 1181 (remarking that most libel defendants lost at trial but eventually win after a costly appeal). Moreover, the availability of remittitur does not undo the hefty costs of providing discovery. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 774 (1985) (White, J., concurring) (remarking that regardless of the scope of awards won by successful plaintiffs, media defendants must bear the cost of providing pre-trial discovery).

122. See Smolla, *supra* note 4, at 7 ("The prospect of such lucrative awards is likely to entice more potential defamation plaintiffs to bring suit despite the fact that their claims do not meet the legal standards that appellate courts are struggling to impose."). Smolla attributes the rise in huge awards to a cultural desire to protect mental well-being. *Id.* at 17.

seek preventative legal advice, insurance, and more expensive legal services.¹²³

III. THE CONSTITUTIONAL MANDATE TO PROMOTE A RESPONSIBLE PRESS

At the crux of *Gertz* is the notion that *Sullivan* balanced two competing interests: the state's interest in protecting reputation and the constitutional interest in avoiding a chilling effect on the press.¹²⁴ Yet the creation of the actual malice standard, as opposed to the absolute protection standard advocated by the concurring justices in *Sullivan*,¹²⁵ reveals that a third interest was also at play in the decision. After all, a standard constructed to satisfy only the two interests discussed in *Gertz* would appear similar to the protection advocated in the *Sullivan* concurrences.¹²⁶ Under the standard advocated in the concurrences, there would be absolute protection for the press, but that protection would be limited to suits brought by public plaintiffs, whose reputational injuries are mitigated by counterspeech and waived by the assumption of risk tied to attaining public prominence.¹²⁷

123. See Ronald A. Cass, *Principle and Interest in Libel Law After New York Times: An Incentive Analysis*, in *THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS* 103 (Everette E. Dennis & Eli M. Noam eds., 1989) (arguing that these litigation costs "consume a large portion of the savings conferred by the more press-protective rule"); see also Epstein, *supra* note 52, at 145 (arguing that legal expenses increase the uncertainty of libel litigation, thereby making newspapers more risk averse in reporting).

124. See *supra* note 63 (mentioning that the Court accommodated both interests by limiting the protection of the press to statements made about public officials).

125. See *supra* notes 65-68 (explaining the *Gertz* Court's rationale for imposing the actual malice standard).

126. Based solely on the Court's discussion of the importance of political speech in *Sullivan*, it certainly seemed that such protection would be granted. After discussing the importance of political speech generally, the Court stated, "If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964). The Court did not explain why the constitutional limitation on defamation liability extends solely to intentional or reckless defamatory statements.

127. Ironically, the Court in *Gertz* recognized that a constitutional protection of press speech, standing alone, would be absolute:

The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and infeasible immunity from liability for defamation. Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation.

Instead of providing this protection, the Court also refused to protect intentional or reckless publications of false statements. However, neither the interest in avoiding a chilling effect on the press nor the interest in protecting plaintiffs' reputations justifies or requires that limitation. The remaining conclusion is that *Sullivan* was also grounded on the third supposition that the First Amendment does not protect the press when it intentionally or recklessly lies to the public.¹²⁸ In sum, the Court in *Sullivan* was concerned with balancing three interests: (1) the need to protect plaintiffs' reputations (a compelling interest held by the state), (2) the need to protect the press's speech (an interest spawned from the Constitution), and (3) the need to ensure that the press is honest.¹²⁹

Essentially, the Court in *Sullivan* engaged in quality control of political speech in creating the actual malice standard. The Court did not explain whether this limitation stemmed from prudential or constitutional grounds. It is conceivable that the Court merely balked at protecting an individual who lies, even when the lies concern political matters at the "core" of First Amendment protection. Alternatively, the Court may have created the actual malice standard under the tacit belief that an honest press facilitates a broad-based discussion of important matters, and that the Constitution therefore does not protect falsehoods that are intentionally or recklessly published.

The remaining issues, then, are the source and breadth of the interest in an honest press, to the extent that such an interest exists at

Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) (internal citations omitted). The Court, however, did not notice the gaping hole in this claim: where the limitation of press liability to statements made with actual malice fit into its scheme of bilateral competing interests.

128. It might be argued that a second possible conclusion is that the state has a legitimate interest in protecting every plaintiff, public or not, from falsehoods uttered with actual malice. The arguments in *Gertz*, however, apply just as much to false statements that are uttered with actual malice as to those that are negligently uttered. First, the impact of public counterspeech in alleviating reputational injury does not turn on the speaker's motive or intent. Second, there is no reason to believe that a public plaintiff does not also assume the risk of bearing the brunt of malicious lies in addition to mistaken falsehoods.

129. In his plurality opinion in *Curtis*, Justice Harlan recognized that *Sullivan* was moved by this third interest:

[T]o take the rule found appropriate in *New York Times* to resolve the 'tension' between the particular constitutional interest there involved and the interests of personal reputation and press responsibility . . . would be to attribute to this aspect of *New York Times* an unintended inexorability at the threshold of this new constitutional development.

Curtis Publ'g Co. v. Butts, 388 U.S. 130, 148 (1967) (plurality opinion) (internal citation omitted).

all.¹³⁰ It stands to reason that because *Sullivan* and *Gertz* did not discuss that interest, examining it may expose the need for a new standard to govern the constitutional regime of libel law. The argument of this Part is that the interest in an honest press is derived from the Constitution, and that the First Amendment requires a standard that deters negligent media conduct. To reach that conclusion, it is necessary to examine the interplay between the press and the interests that serve as the cornerstone of the First Amendment.

A. *The Relationship Between the First Amendment and the Press*

Although scholars have identified multiple interests that underlie the First Amendment, two have surfaced most frequently throughout the Court's free speech jurisprudence: the interest in advancing democracy-enhancing speech and the interest in promoting the marketplace of ideas.¹³¹ Both interests are social insofar as they focus on the role of speech in promoting some collective good, be it the assurance of an effective government or the ascertainment of truth.¹³² The press uniquely furthers both interests by disseminating information and by providing a forum for public debate. The press is also capable of devoting time, resources, and reporting experience

130. Of course, it is also possible that the third interest does not actually exist, such that the Court was wrong in turning the protection on the speaker's state-of-mind in the first place. If it does not, the semi-absolute protection discussed above would be warranted, and the press would be absolutely protected when speaking about a public plaintiff. The discussion of the press's role in facilitating the fundamental First Amendment interests, however, reveals that there is in fact an interest in an honest press.

131. See, e.g., Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878-89 (1963) (advocating that the freedom of expression is necessary to: (1) assure individual self-fulfillment, (2) attain the truth, (3) secure participation by society in the political process, and (4) maintain the balance between stability and change in society).

132. Another interest frequently discussed throughout First Amendment literature is that free speech maximizes individual self-fulfillment. That is, by debating and discussing ideas, people are more capable of forming their normative beliefs and acquiring knowledge. See Emerson, *supra* note 131, at 879-81 (arguing that every person has the right to form and express their own beliefs and opinions); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 594-95 (1982) (arguing that the interest in self-realization is the primary interest underlying the First Amendment). While this interest has received a great deal of attention from scholars, it has played a relatively minor role in discussions of the freedom of the press or of defamation generally. Because the primary role of the press is to facilitate debate and the dissemination of ideas among the masses, it has a more substantial effect on the social interests of the First Amendment (i.e., the marketplace of ideas and democratic speech interests) than the private interest of self-fulfillment.

toward the investigation of stories, thereby enabling it to provide information that most individuals cannot acquire alone.¹³³

1. *Democracy-enhancing speech and the marketplace of ideas*

Sullivan was largely premised on the view that the Constitution protects free speech “to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”¹³⁴ Justice Brandeis famously expressed this view of the First Amendment as fostering the dissemination of political speech in his oft-cited concurrence in *Whitney v. California*:¹³⁵

Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.¹³⁶

Consequently, free speech is not an end in itself but rather a means toward advancing self-governance by fostering individual political decision-making.¹³⁷ When free speech is protected, individuals can acquire the information necessary to develop their political notions. Conversely, individuals are also free to communicate their views to others and to seek to persuade them.¹³⁸

By allowing for widespread debate, speech cultivates the development of social consensus on political matters and the formation of groups with common political goals.¹³⁹ In this sense,

133. See Marshall & Gilles, *supra* note 77, at 170 (discussing the importance of news investigation and reporting for the furtherance of First Amendment interests).

134. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (citing *Roth v. United States*, 354 U.S. 476, 484 (1957)).

135. 274 U.S. 357 (1927).

136. *Id.* at 375–76, cited in *Sullivan*, 376 U.S. at 270.

137. See Heather Maly, *Publish at Your Own Risk or Don't Publish at All: Forum Shopping Trends in Libel Litigation Leave the First Amendment Un-Guaranteed*, 14 J.L. & POL'Y 883, 889 (2006) (“Free speech is respected as a necessity to democratic self-government and is prized for its protection of the free exchange of ideas.”).

138. See Emerson, *supra* note 131, at 882–84 (noting that freedom of communication is essential to democratic governments because it allows constituents to voice their opinions to their elected representatives).

139. See *id.* at 882–84 (describing how the freedom of expression allows people to participate in democratic decision-making through a process of open communication available to all members of the community).

political parties are a product of a society that tolerates speech, as they require unfettered ability to advance platforms. Speech also allows individuals to directly communicate their views and needs to the government. Demonstrations, letters to congressmen and op-eds in newspapers provide the public with access to the ears of their representatives and thereby shape government action.¹⁴⁰

The Court has also long recognized a second interest underlying the First Amendment: that a debate free of governmental restraint is necessary for the ascertainment of truth. Justice Holmes encapsulated this notion in his metaphor of the marketplace of ideas:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundation of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market¹⁴¹

Underlying this interest is a conception of truth as relativistic or at least as difficult to pin down, such that no official or individual can serve as sole arbiter of accepted fact.¹⁴² Thus, as with the interest in democracy-enhancing speech, free expression is once again viewed as a process for the attainment of a social good. Here, that social good is the development of a general canon of truth.

2. *The role of a responsible press in facilitating First Amendment interests*

i. *Democracy-enhancing speech*

The press plays a key role in effectuating the fundamental First Amendment interests of promoting democracy-enhancing speech and the marketplace of ideas. As noted, both interests are social in nature and, therefore, require mass communication and a common source of information from which political views can be developed and truth can be ascertained.¹⁴³ Moreover, to use Alexander Meiklejohn's metaphor, the press serves as a kind of town hall in

140. See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975). (declaring that the information provided by the press enables citizens to vote intelligently and form well-reasoned opinions on the administration of government).

141. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

142. Judge Learned Hand eloquently made this point: “[Free expression] presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.” *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

143. See, e.g., Emerson, *supra* note 131, at 883 (advocating that every democracy “must have some process for feeding back to it information concerning the attitudes, needs and wishes of its citizens”).

which political debate can occur.¹⁴⁴ Both the Court and the Framers have extensively noted the unique service provided by the press in supplying a forum for public debate and facilitating communication between citizens and government.¹⁴⁵

The press also creates democracy-enhancing speech when it reports on political affairs. As far back as the founding of the United States, the press has been viewed as a watchdog of the government, charged with ensuring that politicians do not abuse their power and that government runs efficiently and effectively.¹⁴⁶ Vincent Blasi famously argued that the First Amendment protects free expression to ensure that the public retains a “checking power” on the government’s exercise of authority.¹⁴⁷ Because of its independence from government and its ability to investigate stories and quickly spread information, the press retains a near monopoly on the checking power.¹⁴⁸ Private individuals seeking to expose corruption turn to the press to get the story out, and reporters frequently investigate other public and private malfeasance. Accordingly, in *Times-Picayune Publishing Co. v. United States*,¹⁴⁹ the Court declared that “[t]he daily newspaper . . . [is] essential to the effective functioning

144. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 26–27 (1960).

145. See, e.g., *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 667-68 (1990) (commenting on the “unique role” of the press in informing and educating the public and providing a public forum for debate); *Minneapolis Star & Trib. Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 583-84 (1983) (examining the important role served by the press during the American Revolution); *Cox Broad. Corp.*, 420 U.S. at 491-92 (discussing the role of the press in communicating with the government to provide full and accurate information to the public); *Craig v. Harney*, 331 U.S. 367, 383 (1947) (Murphy, J., concurring) (“A free press lies at the heart of our democracy and its preservation is essential to the survival of liberty.”); *Associated Press v. United States*, 326 U.S. 1, 28 (1945) (Frankfurter, J., concurring) (“A free press is indispensable to the workings of our democratic society.”); Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 *THE WRITINGS OF JAMES MADISON* 103, 103 (Gaillard Hunt ed., 1910) (“A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.”); Thomas Jefferson, *Democracy* 150-51 (Saul K. Padover ed., 1939), quoted in *Dyson v. Stein*, 401 U.S. 200, 208 n.6 (1971) (Douglas, J., dissenting) (“[O]ur liberty depends on the freedom of the press, and that cannot be limited without being lost.”).

146. See *supra* Part III.A (explaining how the press’ role in bringing information to the public allows the public to engage in more efficient political decision-making); see also C. Edwin Baker, *The Media that Citizens Need*, 147 U. PA. L. REV. 317, 348–50 (1998) (noting the watchdog role of the press is based on the idea that providing information to the public to facilitate self-governance promotes wise decision-making from elected leaders).

147. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 534–35 (1977).

148. See *id.* at 601–03 (explaining the unique importance of newsgathering and investigation in maintaining a checking power).

149. 345 U.S. 594 (1953).

of our political system” because it seeks to “vigilantly scrutiniz[e] the official conduct of those who administer the state” and serves “as a potent check on arbitrary action or abuse.”¹⁵⁰ In addition to its role in reporting on political corruption, the press bolsters the effectiveness of government by ensuring that politicians exercise good and informed judgment, act in good faith, and are capable of fulfilling their representative duties.¹⁵¹

Because it scrutinizes political activity and promotes good governance, the press has long been viewed as holding a special place within the constitutional framework. This view of the press is encapsulated in its traditional epithet as the “Fourth Estate” or “fourth branch of government” that provides a check upon the government at all levels.¹⁵² The Court has ascribed to the view that the Framers intended the press to oversee the entirety of government. Writing for the Court in *Mills v. Alabama*,¹⁵³ Justice Black argued:

The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs [T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.”¹⁵⁴

The press therefore has a “constitutionally designated” duty to spread information to the public.¹⁵⁵ As Justice Potter Stewart argued, the Framers consequently intended the press to hold a privileged role within the First Amendment scheme.¹⁵⁶

150. *Id.* at 602.

151. See Emerson, *supra* note 131, at 882–84 (asserting that freedom of the press is not simply beneficial to the political process, but rather is a crucial component of a successful democracy).

152. See Amanda S. Reid & Laurence B. Alexander, *A Test Case for Newsgathering: The Effects of September 11, 2001 on the Changing Watchdog Role of the Press*, 25 LOY. L.A. ENT. L. REV. 357, 360 (2005) (“The traditional watchdog role of the press developed the Fourth Estate function, where the press served as a check on the three branches of government.”); Justice Potter Stewart, “Or of the Press,” Address at the Yale Law School Sesquicentennial Convocation (Nov. 2, 1974), in 26 HASTINGS L.J. 631, 634 (1975) (opining that just as the primary purpose of establishing three branches of the federal government was to promote checks and balances, the guaranteeing freedom of the press was a means of preventing autocracy).

153. 384 U.S. 214 (1966).

154. *Id.* at 219 (emphasis added) (internal citation omitted).

155. See *Zurcher v. Stanford Daily*, 436 U.S. 547, 571–72 (1978) (Stewart, J., dissenting) (arguing that unannounced police searches of a student newspaper violated the constitutional protections given to the press).

156. See Stewart, *supra* note 152, at 634 (“The primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches.”).

This view of the press as an independent, quasi-constitutional entity—or at least one necessary for the free flow of democracy-enhancing speech—sheds light on the relationship of the government and press in facilitating constitutional interests. Cass Sunstein argued that the First Amendment, although framed as a negative right, in fact has positive elements.¹⁵⁷ Professor Sunstein used the example of the hostile audience scenario, wherein the government is obligated to restrain a hostile audience to ensure that a speaker can communicate its message.¹⁵⁸ In this respect, the First Amendment contains a normative component: it does not merely proscribe the government from restraining speech, but it seeks to maximize speech and even requires that speech be subsidized.¹⁵⁹ To the extent that the press serves as a unique facilitator of the spread of democratic ideas and political debate, it is necessary for the fulfillment of the positive vision of the First Amendment recognized by Professor Sunstein. That is, the Framers saw the protection of free expression as a means of maximizing democracy-enhancing speech and the press as integral to the fruition of that vision.¹⁶⁰

Because the press has a monopoly on speech impacting one of the core concerns of the First Amendment, it is imperative that reporters and editors responsibly exercise that power. Following *Sullivan*, the Court solely approached defamation litigation as though it were an indirect form of seditious libel, through which private individuals could impose a chilling effect on press speech.¹⁶¹ However, the Court has not taken the inverse perspective and focused on the ways that press coverage can impact good governance and political discourse.¹⁶² Simply put, when the press spreads false information—negligently or

157. See Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 273–74 (1992) (asserting that while the First Amendment is framed as protecting citizens from government incursions, it also includes government obligations to provide certain services to citizens as well).

158. See *id.* (explaining that the governmental protection from physical harm at the hands of an angered audience represents a positive element to the right to free speech).

159. See *id.* at 274 (arguing that libel requires public plaintiffs to sacrifice their reputations as a subsidy for a free press).

160. See Marshall & Gilles, *supra* note 77, at 170 (observing that the First Amendment's goals of promoting self-government and checking the state's power are dependent upon a news media that addresses issues of public importance).

161. See Blasi, *supra* note 147, at 574–78 (arguing that the Supreme Court sought to prevent a chilling effect on the checking power of the press in the line of defamation cases in the decade following *Sullivan*); see also *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964) (comparing the imposition of defamation liability to the Sedition Act of 1798).

162. See Blasi, *supra* note 147, at 574–75 (positing that the key concept of the *Sullivan* decision was the analogy to the crime of seditious libel, not self-government).

intentionally—it inhibits the public’s ability to make informed political choices. Moreover, because the press has the virtually exclusive ability to oversee the entirety of the government, an irresponsible press fails to fulfill its role as the sole independent watchdog of the government.

If we push the metaphor of the press as the fourth branch of government to its literal end and take seriously the magnitude of the press’s importance in facilitating the democratic process, then as with any governmental body, the power of the press should be subject to its own checks. It is understandable that the Court is hesitant to allow any such oversight. If the government regulated the press, then it might abuse that authority and seek to limit the press’s checking power.¹⁶³ If private individuals can indirectly check the press through defamation suits, then the Court’s fear of a self-imposed chilling effect could be realized.¹⁶⁴ Yet regardless of whether any specific form of regulation is desirable, the point remains that a press that lies to the public or negligently publishes falsehoods vitiates its role in facilitating democracy-enhancing speech and thereby harms the populace’s ability to effectively govern itself.¹⁶⁵ Thus, to the extent that it is feasible, the implementation of a regulatory scheme or constitutional standard that maximizes the truth-telling of the press and avoids sacrificing the press’s independence would best serve the democracy-enhancing ends of the First Amendment.

ii. The marketplace of ideas

The metaphor of the marketplace of ideas is just as apt in illustrating the importance of a responsible press. Owen Fiss argued that economic theory concerning the marketplace of goods is applicable to First Amendment theory concerning the marketplace of

163. See Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 56 (“If courts permit reformers to alter the first amendment’s traditional role as a limitation on governmental authority so as to authorize affirmative government action to apportion access rights to the marketplace, the judiciary unwittingly may create a massive censorship system masquerading as marketplace reform.”).

164. See Judy, *supra* note 75, at 562-63 (providing conflicting evidence as to whether libel suits affect the media’s conduct); see also Weaver & Bennett, *supra* note 118, at 1189-90 (noting that editors consult defamation attorneys and alter articles because of liability concerns, but concluding that this chilling effect is minimal, and may even be beneficial).

165. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 400 (1974) (White, J., dissenting) (“It is not at all inconceivable that virtually unrestrained defamatory remarks about private citizens will discourage them from speaking out and concerning themselves with social problems. This would turn the First Amendment on its head.”).

ideas.¹⁶⁶ Just as the government must create economic regulations to prevent market failures, failures of the media can be ameliorated through government intervention.¹⁶⁷ Professor Fiss pointed to two failures of the media as evidence of the need for such regulation. First, he argued that the media privileges select groups over others and thus does not provide equal access to or equal coverage of information.¹⁶⁸ Second, Professor Fiss argued that the media seeks profit rather than the furtherance of the marketplace of ideas, and it therefore might provide false information or information that does not facilitate the truth-seeking end of the First Amendment.¹⁶⁹

Negligent or intentionally false reporting constitutes a third market failure: the public cannot succeed in ascertaining truth if its discourse rests upon false premises. Moreover, if the press has free reign to spread falsehoods or to negligently report, the public may lose confidence in the integrity of the conclusions derived from the marketplace of ideas.¹⁷⁰ Thus, any constitutional standard that allows the press to negligently or intentionally spread false information hampers the First Amendment goal of fostering a truth-seeking public interchange of conjecture and debate.

166. See Owen Fiss, *Why the State?*, 100 HARV. L. REV. 781, 787-88 (1987) (arguing that the market constrains the presentation of matters of public interest in two ways: (1) the market privileges select groups by making programs responsive to their needs, and (2) the market incentivizes editorial and programming decisions that may be based more on profitability than on the public's needs). Professor Fiss made this point in response to an article by Professor Coase. In that article, Professor Coase made the opposing argument that the laissez faire view of the marketplace of ideas should be applied to economic markets. See R.H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. EC. REV. 384 (1974) (arguing that in the market for ideas, government regulation is undesirable and should be strictly limited).

167. See Fiss, *supra* note 166, at 787 (pointing out that "competition among [media] institutions is far from perfect, and some might argue for state intervention on a theory of market failure"); see also Ingber, *supra* note 163, at 5 (positing that market failures might need to be cured by state intervention).

168. Fiss, *supra* note 166, at 787-88.

169. *Id.* at 788 ("[T]here is no necessary, or even probabilistic, relationship between making a profit . . . and supplying the electorate with the information they need to make free and intelligent choices . . ."). An apt example of this problem arose following the Columbine shootings, when there was an increased call for scrutiny of depictions of violence in the media. To the extent that those depictions are socially harmful and of little value in ascertaining truth, they may be deemed a substantial market failure. See generally Ronald D. Rotunda, *Current Proposals for Media Accountability in Light of the First Amendment*, in FREEDOM OF SPEECH 269 (Ellen Frankel Paul et al. eds., 2004).

170. See *supra* note 165 and accompanying text (remarking that untrue, defamatory statements made by the press may discourage citizens from participating in government decision-making).

The notion that an unencumbered marketplace of ideas leads to the discovery of truth¹⁷¹ is founded on the premise that the process of freely discussing ideas is the best available means of discovering truth. However, there is no reason to believe that a completely open forum of discussion is better than any other means of ascertaining truth.¹⁷² An alternative process that maximizes truth-telling by the press would better facilitate the marketplace of ideas by ensuring to the greatest extent possible that it is not corrupted by lies or negligent falsehoods.

Even if it is impossible to know the truth of a proposition, it is possible to identify regulations of speech that reduce the intentional or negligent spread of falsehoods. When a newspaper lies, we know that the marketplace of ideas is tainted with a falsehood. Just the same, when a newspaper acts negligently in reporting a story, we know that it is more likely that the marketplace is similarly tainted. A constitutional standard that reduced media negligence would consequently bolster the public's ability to ascertain truth and thereby facilitate the constitutional interest in maintaining an otherwise free marketplace of ideas. In this respect, it is possible to optimize the process by which the marketplace of ideas functions while remaining neutral to its contents.¹⁷³

B. *The Need to Reform the Actual Malice Standard*

Unlike other tort actions, the interests at stake in libel suits are not bilateral.¹⁷⁴ That is, they are not limited to the reputation of the

171. See Emerson, *supra* note 131, at 882 (“Since facts are discovered and opinions formed only by the individual, the system demands that all persons participate.”).

172. See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 19–29 (1982) (questioning whether knowledge is more likely to be gained in a society in which views are freely expressed); see also LEE BOLLINGER, *IMAGES OF A FREE PRESS* 133–45 (1991) (arguing that the Supreme Court should move away from its hands-off attitude toward modern mass media).

173. Justice Harlan expounded upon this view in his plurality opinion in *Curtis*:

Impositions based on misconduct can be neutral with respect to content of the speech involved, free of historical taint, and adjusted to strike a fair balance between the interests of the community in free circulation of information and those of individuals in seeking recompense for harm done by the circulation of defamatory falsehood.

Curtis Publ'g Co. v. Butts, 388 U.S. 130, 153 (1967) (plurality opinion).

The notion that the marketplace of ideas can be “improved” through regulations of the press is not a new one. See, e.g., *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389–90 (1969) (upholding the FCC imposition of a “fairness doctrine” on broadcasted statements that bear on a controversial issue or matter of public importance because broadcast waves are a limited resource and the First Amendment does not prohibit the government from requiring broadcasters to act as public trustees). See generally CASS SUNSTEIN, *DEMOCRACY & THE PROBLEM OF FREE SPEECH* (1993) (approving of regulations of the media for the purpose of improving the marketplace of ideas).

174. See Sunstein, *supra* note 157, at 269–70 (stating that the interests at stake in defamation suits are both private and public ones).

plaintiff and the potential chilling effect on the defendant. Rather, the public has an interest in a press that does not merely report in good faith, but which also comports to a standard of conduct that maximizes truth-telling in news reports.¹⁷⁵ *Sullivan* concluded that the First Amendment interest in democracy-enhancing speech is compromised when the Court underprotects the media, as plaintiffs could indirectly chill the speech of media defendants.¹⁷⁶ Just the same, however, that interest is compromised when the Court overprotects media speech and shields the press from any liability for negligent conduct.¹⁷⁷ When the press is overprotected, it is more likely to engage in irresponsible conduct, and as noted, to impede democracy-enhancing and truth-seeking speech. What is needed, then, is not a glut of protection but a new standard that at once accommodates the interests in avoiding a chilling effect and in maximizing media truth-telling, as well as in protecting plaintiffs' reputations.

Thus, the Court must amend the actual malice standard to require or encourage responsible journalistic practices. As argued above, the interest in a responsible press is constitutional, or it is at least necessary for the fulfillment of other fundamental constitutional interests.¹⁷⁸ This is not a novel claim—its roots extend to numerous First Amendment decisions and the writings of many of the Framers.¹⁷⁹ Because the Supreme Court is the primary arbiter of constitutional meaning and dictates,¹⁸⁰ it is the obligation of the Court to create a new standard that eliminates the perverse incentives spurred by the actual malice standard.

175. See Ingber, *supra* note 163, at 4 (arguing that free expression provides aggregate benefits to society).

176. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 278–79 (1964).

177. This point is aptly made in one of the only articles to discuss the overprotection of the actual malice standard:

[T]he way in which journalism is practiced has significant implications for First Amendment theory. The viability of the First Amendment's goals of fostering self-governance and checking the power of the state, for example, depends upon the existence of a news media that is engaged in serious coverage and investigation of issues of public import. Therefore, the extent to which the Court creates incentives and disincentives for journalists to act in furtherance of these goals is of considerable First Amendment interest.

Marshall & Gilles, *supra* note 77, at 169–70.

178. See *supra* Part III (arguing that a responsible press fulfills the constitutional interests of promoting democracy-enhancing speech and sustaining a marketplace of ideas).

179. See *supra* Parts I.A, III.B.

180. See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 18–19 (4th ed. 2003) (discussing three views regarding the Supreme Court's authority to interpret the Constitution).

One might argue that the interest in a responsible press is a state interest rather than a constitutional interest, such that the Court should leave regulation of the press to state legislatures. The obvious objection to that claim is that handing regulatory power over the press to state legislatures would allow governments to directly chill press speech. Additionally, even if legislatures could be trusted to regulate the press, the constitutional standard created by the Court in *Sullivan* would continue to generate the perverse incentives that defeat the purported state interest.¹⁸¹ The actual malice standard would therefore obstruct states' ability to act upon their interest in promoting responsible media conduct, if such an interest exists. Absent a constitutional amendment, the Court is the only body capable of reforming the actual malice standard.¹⁸² Thus, even if the interest in a responsible press is not held by the states, it is incumbent upon the Court to either fashion a new standard that does not generate perverse incentives, or to allow the states to fashion their own standard.¹⁸³

IV. A PROPOSAL FOR THE CREATION OF A SUMMARY PROCEEDING THAT PROMOTES MEDIA RESPONSIBILITY, REMEDIES REPUTATIONAL HARM, AND REDUCES LITIGATION COSTS

Gertz implied that the constitutional standard governing libel law should accommodate all the interests at stake in defamation suits. Ironically, *Sullivan* failed to sufficiently accommodate any of them.

181. See *supra* Part II.A.

182. Professor Anderson argued that the *Sullivan* standard has so permeated the regime of libel law that any political constituency for statutory reform has been effectively crowded out by the Supreme Court.

[The Court] has created not merely a few constitutional limitations on state tort rules, but a matrix of substantive principles, evidentiary rules, and de facto innovations in judge-jury roles and other procedural matters. These are all constitutionally based and can only be changed by those who have the power to change constitutional rules.

Anderson, *supra* note 71, at 554.

183. One might also argue that there is neither a constitutional nor state interest in a responsible press—that is, that no such interest exists at all. Through the arguments in the above discussion, I attempted to show that the Framers and the Court envisioned the press as holding a special role within the First Amendment framework, and that negligent reporting frustrates that role. Moreover, the First Amendment bears positive elements insofar as it seeks to maximize the spread of democracy-enhancing and truth-seeking speech. It follows that at the very least, the government bears a normative duty to regulate the press to ensure that both types of speech are in fact maximized, which requires the minimization of false speech to the extent possible. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (holding that falsehoods have “no constitutional value” and fall under the *Chaplinsky* category of unprotected speech); BOLLINGER, *supra* note 172, at 139 (arguing that the Supreme Court should allow the regulation of press speech to deter “biases that skew, distort, and corrupt” discussion of public issues).

As argued above, the actual malice standard underprotects speech because it forces the press to bear substantial litigation costs. At the same time, it overprotects speech by failing to deter media negligence and providing the press with incentives to engage in irresponsible conduct. Lastly, the actual malice standard underprotects the reputations of plaintiffs because it allows many reputational injuries to go wholly unremedied based on the flawed premises that public plaintiffs waive their reputational interests and can mitigate reputational harm. This Part will examine how other scholars and jurisdictions have grappled with the problem of balancing these three competing interests in libel suits and will conclude by proposing a reform that supplements rather than replaces the actual malice standard.

A. *Alternative Approaches to Defamation Liability*

1. *Recent proposals for reform*

Having recognized the failure of *Sullivan* to accommodate the competing interests underlying libel suits, scholars have proposed reforms of the actual malice standard to strike a better balance between them.¹⁸⁴ One popular proposal is to allow courts to issue declaratory judgments that specified statements are false, which would rectify injured reputations without imposing liability on media defendants.¹⁸⁵ An assessment of the veracity of a published statement does not turn on the state-of-mind of the media defendant, and accordingly no discovery is required to successfully bring a declaratory judgment action.¹⁸⁶ Likewise, if declaratory judgments

184. See *infra* notes 185 & 195; see also Anderson, *supra* note 71, at 552 (suggesting that a drastic approach to reforming libel law would be for the Court to “retrench” its holdings in libel law by abandoning the actual malice standard altogether).

185. See, e.g., H.R. 2846, 99th Cong., (1985), reprinted in 74 CAL. L. REV. 809, 832 (1986) (proposing a declaratory judgment proceeding as a new cause of action for defamation exercisable at the option of defendants); see also Sam Conner et al., *Model Communicative Torts Act*, 47 WASH. & LEE L. REV. 1, 8–9 (1990) (demonstrating the substance of a model provision that would impose liability for injury to reputation in an action either for declaratory judgment or special damages, and presuming reputational harm in any action for declaratory judgment). But see Barrett, *supra* note 71, at 852–53 (explaining the differences between the declaratory judgment alternative proposed in H.R. 2846, and the alternative proposed by Professor Franklin); Marc A. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CAL. L. REV. 809, 812–19 (1986) (introducing a parallel version to H.R. 2846, but departing from it by limiting the availability of the declaratory judgment remedy to plaintiffs).

186. See Barrett, *supra* note 71, at 876 (noting that discovery into the editorial process would be avoided entirely if defendants win under the declaratory judgment alternative); Franklin, *supra* note 185, at 812 (proposing that “[a]ny person who is the subject of any defamation may bring an action in any court of competent

wholly replace suits for monetary awards, the pecuniary incentive for bringing libel suits would be eliminated.¹⁸⁷ To the extent that a court decree of a statement's falsity serves as an adequate remedy for a defamatory statement, declaratory judgments would also avoid the underprotection of plaintiffs' reputations.¹⁸⁸

The declaratory judgment proposal, however, would exacerbate irresponsible media conduct by failing to address it altogether. Granted, replacing the actual malice standard would eliminate the incentives pushing against fully investigating stories or communicating concerns regarding a story's accuracy. Yet where media defendants have no fear of liability, they have little reason to ensure the factual accuracy of their reports.¹⁸⁹ A major newspaper may hope to foster a reputation for accuracy, but the same cannot be said for smaller news organizations, particularly those that do not seek profit, have a monopoly over a small market, or are published on the Internet.¹⁹⁰ Furthermore, *Sullivan* revealed that even the employees of prominent news organizations might fail to diligently check the accuracy of their publications.¹⁹¹ The *Times* and other

jurisdiction for a declaratory judgment," and that such an action should not require proof of the defendant's state of mind); see also James H. Hulme, *Vindicating Reputation: An Alternative to Damages as a Remedy for Defamation*, 30 AM. U. L. REV. 375, 389-90 (1980-81) (recognizing that because declaratory judgment actions brought by plaintiffs are motivated not by damages, but rather by vindication and the desire to clear one's name, the sole issue is the veracity of the defamatory material).

187. Under Professor Franklin's reform proposal, the declaratory judgment is only an optional source of recourse for a plaintiff. Thus, the proposal does not fully avoid the underprotection of media speech because the possibilities of large jury awards and litigation costs remain. Professor Franklin's proposal does provide, however, that prevailing plaintiffs at the declaratory judgment phase are barred from later seeking damages. Franklin, *supra* note 185, at 813.

Professor Barrett's proposal would avoid this problem by giving *defendants* the option of going to declaratory judgment. This would allow defendants to avoid litigation expenses. Barrett, *supra* note 71, at 864-65. However, media defendants that intentionally publish false statements would almost always turn to declaratory judgments for a simple reason: the state-of-mind of its reporters would not be exposed in a declaratory judgment proceeding. Thus, the declaratory judgment provides little disincentive to newspapers that intentionally lie to the public, whereas the actual malice standard (to the extent that liability under *Sullivan* is accurately determined) provides exactly that.

188. See Hulme, *supra* note 186, at 389-90 (arguing that a formal court determination as to the falsity of a defamatory statement "vindicating" the reputational injury of the statement).

189. See Franklin, *supra* note 185, at 839 (criticizing the declaratory judgment action proposed in H.R. 2846 as removing the deterrent effect of libel law on irresponsible publishing).

190. Indeed, if Professor Fiss's comments on media market failures reveal anything, it is that publishing some false statements might increase a news organization's popularity and hence, also increase its revenue stream. See Fiss, *supra* note 166, at 787-88 (asserting that the media market, though diversified within itself, moves collectively in one direction and is limited by market reach).

191. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 260-61 (1964).

major media organizations have greater incentive to oversee their employees' conduct where those organizations are threatened with liability for negligent reporting. Finally, the declaratory judgment proposal can promote recklessness on the part of news organizations seeking to get a "hot" story out without adequately reviewing it, as the absence of any liability undercuts the need for caution before releasing damaging statements.

The source of these flaws in the declaratory judgment proposal is that the interest in a responsible press is procedural rather than substantive.¹⁹² In other words, the interest does not concern the mere falsehood of media statements. Instead, it focuses on the conduct leading to the publication of falsehoods.¹⁹³ As the Court has recognized, the publication of falsehoods is inevitable in any society that protects free expression.¹⁹⁴ Irresponsible media conduct, however, is not. At least in theory, negligent journalism can be deterred with an appropriate standard of liability, and consequently, fewer instances of defamatory speech would accrue.¹⁹⁵

Alternative reform proposals would provide absolute protection to the press for specified categories of speech.¹⁹⁶ While these proposals would extirpate the chilling effect on the press, they would also promote media irresponsibility and would fail to sufficiently remedy reputational injuries. Conversely, courts could allow for increased liability against the press or, in the extreme case, impose strict liability

192. See Blasi, *supra* note 147, at 586 (noting that the "shortcoming of contemporary journalism concerns not the *subject matter* of reportage but the *manner*").

193. See *id.* (expressing concern that there is not enough active, in-depth press coverage of the government, especially because it is easy for the media to rely on the government's self-issued press releases instead of conducting independent investigations).

194. *Sullivan*, 376 U.S. at 271.

195. A related proposal would create a no-money, no-fault trial by which a jury could render judgments on the truth of allegedly defamatory publications. See Pierre N. Leval, *The No-Money, No-Fault Libel Suit: Keeping Sullivan in its Proper Place*, 101 HARV. L. REV. 1287 (1987-88) (advancing an alternative type of libel action, in which no damages would be awarded). This no-money, no-fault proposal is problematic for the same reasons as is the declaratory judgment alternative, but with the added flaw of increasing litigation costs.

196. See *Sullivan*, 376 U.S. at 295 (Black, J., concurring) (asserting that the Constitution granted the press an "absolute immunity for criticism of the way public officials do their public duty"); *id.* at 298 (Goldberg, J., concurring) (supporting an "absolute, unconditional privilege to criticize official conduct"). But see Lillian Bevier, *The Invisible Hand of the Marketplace of Ideas*, in ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 233-35 (Lee Bollinger & Geoffrey Stone eds., 2002) (arguing that the press should be held "accountable for the harms that defects in its products cause").

for the publication of false statements.¹⁹⁷ It might at first seem that a strict liability standard, which could turn on the substance of a statement or the procedures followed in publishing it, might impact media responsibility by prompting the press to create and adhere to its own codes of conduct that maximize truth-telling. However, that standard would open the doors to litigation before potentially biased juries and generate the self-imposed chilling effect feared by the Court.¹⁹⁸

This examination of potential reforms reveals that there is an inherent tension between the interests at play in libel suits. Increasing liability for defamation would deter irresponsible reporting, yet any recourse that involves monetary awards risks chilling press speech.¹⁹⁹ Similarly, replacing the *Sullivan* standard with a pretrial procedure or a no-fault action may avoid a chilling effect, yet in addition to the under-deterrence of media negligence that would result, it is far from clear that a court determination of the veracity of speech vindicates reputational injury. The result is a lose-lose situation, since either awarding or failing to award monetary damages cannot fully accommodate the competing interests at stake in libel suits.

One might conclude from this tension that it is impossible to adequately balance the three interests, and that the *Sullivan* standard may simply represent the best of a slew of unsatisfying options. This conclusion is premature. The shortcomings of the aforementioned reform proposals reveal that the solution to the *Sullivan* conundrum will not arise from tinkering with the types and degree of remedies available to plaintiffs.²⁰⁰ That is, the ideal balance between the competing interests may be struck by working outside the box of remedies and standards of liability. Before attempting to meet that

197. See, e.g., Epstein, *supra* note 52, at 148–49 (arguing for a return to common-law principles of strict liability to determine liability, a proposition that would eliminate punitive damages since money should be secondary to restoration of reputation); Susana Frederick Fischer, *Rethinking Sullivan: New Approaches in Australia, New Zealand, and England*, 34 GEO. WASH. INT'L L. REV. 101, 107–08 (2002) (arguing against a broad constitutional standard and in favor of an extension of common-law qualified privilege).

198. Professor Anderson raises another point: by eliminating the actual malice standard, the Court would also reduce uniformity in defamation liability, which could have its own chilling effect on the media. See Anderson, *supra* note 71, at 553 (recognizing that non-uniformity is especially dangerous in libel law due to the inherent interstate mobility of speech).

199. While the media's efforts to avoid liability might appear to be a step toward more responsible journalism, these restraints create their own chilling effects on the press. See *infra* notes 217–221 and accompanying text.

200. See *supra* notes 185–198 and accompanying text (elaborating on how efforts to protect one interest seem to exacerbate the underprotection of another interest).

challenge, it is instructive to examine the way that Britain has addressed defamation liability.

2. *Recent trends in British libel law*

In *Reynolds v. Times Newspapers Ltd.*,²⁰¹ the House of Lords initiated a radical change in British law by recognizing a new standard of defamation liability that turns on the responsibility of a media defendant's conduct. Albert Reynolds, the former Irish Taoiseach, initiated the suit in response to an article published by *The Sunday Times* in 1994 that claimed that Reynolds lied to and withheld important information from the Irish government.²⁰² Reynolds argued that *The Sunday Times* engaged in irresponsible conduct in reporting the story; specifically, the sole source of the article was one of Reynolds's political opponents and the article failed to report on the explanation Reynolds provided the Irish government regarding the alleged malfeasance.²⁰³

The newspaper argued that the court should impose a standard similar to *Sullivan*, wherein a speaker would be protected from liability for speech related to "political information" unless the speech was uttered with actual malice.²⁰⁴ The House of Lords disagreed. In the decision, Lord Nicholls argued that the proposed malice standard insufficiently remedies reputational harm because that standard is "notoriously difficult to prove" and would protect newspapers in pursuit of a scoop that release defamatory statements "based on the slenderest of materials."²⁰⁵

Instead, the House of Lords created an "elastic" ten-factor balancing test that looks to the public importance of the speech's subject matter and the reasonableness of the speaker's conduct.²⁰⁶ Those ten factors, as presented by Lord Nicholls, are:

- (1) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
- (2) The nature of the information, and the extent to which the subject matter is a matter of public concern.

201. [2001] 2 A.C. 127 (H.L.).

202. *Id.* at 191.

203. *Id.*

204. *See id.* at 200 (arguing for a standard based solely on the subject matter of the publication).

205. *Id.* at 201.

206. *Id.* at 204.

- (3) The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
- (4) Steps taken to verify the story
- (5) The status of the information. The allegation may have already been the subject of an investigation which commands respect.
- (6) The urgency of the matter. News is often a perishable commodity.
- (7) Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
- (8) Whether the article contained the gist of the plaintiff's side of the story.
- (9) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
- (10) The circumstances of publication, including the timing.²⁰⁷

Because *The Sunday Times* failed to publish Reynolds's explanation for his conduct, used an unreliable source, and presented the allegation as a hard fact, the House of Lords found that the newspaper failed the balancing test.²⁰⁸

Despite creating a test that focuses on the defendant's negligence, Lord Nicholls described the decision as merely seeking to accommodate the interests in reputation and avoiding a chilling effect on the press.²⁰⁹ Given the factors in the balancing test, however, it appears that Lord Nicholls was primarily concerned with the interest in promoting a responsible press. Thus, it comes as no surprise that in *Jameel v. Wall Street Journal Europe SPRL*,²¹⁰ a recent decision that reaffirmed the ten-part test, the House of Lords

207. *Id.* at 205.

208. *Id.* at 206.

209. *Id.* at 205. Lord Nicholls implied that the need for a responsible press is built into the plaintiff's interest in an uninjured reputation. Under this view, the interest of responsible journalism is in fact a private interest held by the plaintiff. That is, the only interest held by the plaintiff is that damaging statements about the plaintiff are made in compliance with the *Reynolds* standard of fair reporting. Nevertheless, it is impossible to escape the conclusion that the interest in a responsible press is, to at least some degree, social. This is revealed by the fact that Lord Nicholls discussed at length the importance of free expression in facilitating political matters. *Id.* at 204–06.

210. [2006] UKHL 44, [2007] 1 A.C. 359 (appeal taken from Eng.), available at <http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd061011/jamee.pdf>.

described *Reynolds* as having created a “test of responsible journalism.”²¹¹ Lord Bingham also noted that the House of Lords in *Reynolds* accepted that the publication of false statements is inevitable in a society that protects speech and therefore sought to ensure that a “publisher is protected if he has taken such steps as a responsible journalist would take to try and ensure that what is published is accurate and fit for publication.”²¹²

Less than a decade following *Reynolds*, it remains unclear how strong an impact the decision will have on British law.²¹³ For the time being, British libel law remains far more plaintiff-friendly than its American counterpart, given that the burden remains on British defendants to establish the veracity of allegedly defamatory statements.²¹⁴ *Reynolds* and *Jameel* are certainly signs that British law is shifting toward greater protection of media defendants, yet the House of Lords in *Jameel* emphatically underscored that such protection is available only to a responsible press.²¹⁵ The scope of protection for the press therefore turns on the meaning of “responsibility,” which will not be fully identified until the *Reynolds* test is refined by lower courts in the years to come.²¹⁶ If the House of Lords deems the *Reynolds* test a success, it is conceivable that the test

211. See *id.* at 32, [2007] 1 A.C. 359, 377 (interpreting the *Reynolds* test as a general guiding principle, rather than a series of individual criteria in order to promote veracity and truthfulness in publications concerning the public interest); see also *Bonnick v. Morris*, [2002] UKPC 31, [23], [2003] 1 A.C. 300, 309 (“Stated shortly, the *Reynolds* privilege is concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern.”).

212. *Jameel*, [2006] UKHL 44, 32, [2007] 1 A.C. 359, 377.

213. For example, Alan Rusbridger, the editor of the *Guardian*, stated in response to *Jameel* that “[the decision] will lead to a greater robustness and willingness to tackle serious stories.” Sarah Lyall, *High Court in Britain Loosens Strict Libel Law*, N.Y. TIMES, Oct. 12, 2006, at A10; see DAVID PRICE & KORIEH DUODU, DEFAMATION: LAW, PROCEDURE AND PRACTICE 110–11 (3d ed. 2004) (discussing applications of the Lord Nicholls’ test in the years after *Reynolds* was decided, noting in particular that neutral reporting weighs heavily in favor of a finding of responsible journalistic conduct).

214. See Anderson, *supra* note 71, at 504–05 (discussing the importance of placing the burden of establishing falsity on plaintiffs in American libel suits). Scholars have questioned whether *Reynolds* provided enough protection for media defendants. See Weaver & Bennett, *supra* note 118, at 1156 (arguing that while the British media appears “robust,” the press remains vulnerable to a chilling effect stemming from Britain’s liberal standards of liability in defamation suits).

215. Baroness Hale argued that Britain “need[s] more such serious journalism,” and to that end “our defamation law should encourage rather than discourage it.” *Jameel*, [2006] UKHL 44, at 150, [2007] 1 A.C. 359, 409.

216. Lord Nicholls emphasized in *Reynolds* that the lower British courts must refine the relatively open-ended standard of responsible journalism as they apply it to cases. See *Reynolds v. Times Newspapers Ltd.*, [2001] 2 A.C. 127, 205 (H.L.) (rationalizing that a judge is better equipped to interpret the criteria than a jury). In *Jameel*, Lord Hoffman compared this process to the development of any professional standards of reasonable conduct within common law. [2006] UKHL 44, at 55, [2007] 1 A.C. 359, 383.

will be expanded to cover statements beyond those of public importance.²¹⁷

While the *Reynolds* test will certainly compel newspapers to adhere to a minimum standard of responsible conduct, it fails to reduce litigation costs and therefore risks imposing a chilling effect on the press.²¹⁸ As scholars and journalists have noted, *Reynolds* sets forth a vague and highly discretionary test that leaves news organizations incapable of predicting the outcome of defamation suits.²¹⁹ The indeterminacy of the *Reynolds* test has left litigious plaintiffs with an incentive to roll the dice at trial or to threaten suit in pursuit of a settlement. Additionally, British news organizations have incurred tremendous costs to comply with the *Reynolds* factors.²²⁰ For example, it is not uncommon for major newspapers to retain a legal editorial staff to ensure that stories comply with responsible procedures.²²¹ While the goal of promoting a responsible press is certainly noble, its

217. See SMOLLA, *supra* note 119, at § 1:9.50 (arguing that recent decisions portend more acceptance of free speech defenses in the U.K.); see also Amber Melville-Brown, *The Impact of Reynolds v. Times Newspapers*, 18 COMM. LAW. 25, 28–29 (2001) (reiterating the views of prominent British lawyers that the *Reynolds* decision was “potentially revolutionary” and would “open[] up a distinct privilege for investigative journalism,” despite concerns that such flexible standards would be difficult to apply) (quotations omitted).

Even if the *Reynolds* standard does not expand within British law, it has certainly expanded to other commonwealth countries. All of them have rejected *Sullivan* and most have recognized standards of liability that turn at least in part on responsible journalism. See *Lange v. Atkinson*, [2000] 3 N.Z.L.R. 385, 400-01 (C.A.) (holding that a defendant that engages in careless journalism and acts “without considering or caring whether it was true or false” can be held liable) (citation omitted); *Lange v. Austl. Broad. Corp.* (1997) 189 C.L.R. 520, 532-33, 546 (Austl.) (holding that qualified privilege extended to a communication made to the public on a government or political matter, but only where the defendant’s actions were reasonable); *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 (Can.) (refusing to create a standard of liability in the mold of *Sullivan*, declaring that “[t]he law of defamation is not [so] unduly restrictive or inhibiting”).

218. See Russell L. Weaver et al., *Defamation Law and Free Speech: Reynolds v. Times Newspapers and the English Media*, 37 VAND. J. TRANSNAT’L L. 1255, 1263 (2004) (conceding that the costs of litigating defamation lawsuits routinely outstrip the damages a litigant might receive).

219. See *id.* at 1291, 1303 (arguing that the *Reynolds* test has caused uncertainty amongst the English media because it remains unclear how certain conduct will be judged under the criteria); PRICE & DUODU, *supra* note 213, at 110 (noting that the ambit of the *Reynolds* test was left largely undetermined, such that the test would “give rise to an undesirable element of uncertainty”).

220. See Weaver, *supra* note 218, at 1291–97 (describing *Reynolds*’ impact on the editorial processes, including the purchase of defamation insurance to reduce litigation costs, and the hiring of attorneys to review articles for compliance with the *Reynolds* factors).

221. See Weaver & Bennett, *supra* note 120, at 1172 (noting that the newspapers’ actual purpose is not to strengthen the veracity of published stories, but rather to ensure that the editors will have legally admissible evidence to reduce liability in defamation suits).

high price tag may chill the media's willingness to report on potentially defamatory matters or litigious individuals.²²²

B. *The Proposal*

The three competing interests in defamation suits can be almost perfectly accommodated by blending the declaratory judgment proposal and the *Reynolds* test.²²³ That is, a media defendant should have the option of avoiding defamation liability by obtaining a pre-trial determination that it adhered to responsible journalistic procedures. Under this summary proceeding, the defendant would have the burden of establishing that it satisfied a baseline standard of reasonable press conduct. If successful, the suit would terminate, and the defendant would avoid liability altogether. If unsuccessful, the litigation would proceed under the actual malice standard.

The standard of responsible media conduct would be similar to the test created in *Reynolds*, but with some important differences. First, the *Reynolds* factors focus too heavily on the circumstances of publication and too little on the procedures used in publishing the allegedly defamatory statement.²²⁴ That is, while the circumstances of the publication should bear on the level of scrutiny a statement receives, the *Reynolds* test fails to sufficiently promote reporting procedures that would optimize the output of truthful statements. Second, the *Reynolds* test fails to account for a media defendant's behavior after the publication of a false statement. That is, it does not consider whether and to what extent a news organization publishes a retraction to a defamatory statement.

Accordingly, the ideal set of factors considered in the summary proceeding would be as follows:

- (1) The amount of investigation—the number of reporters and time spent reporting—weighed against the public importance of the statement and magnitude of foreseeable reputational harm inflicted.

222. See Weaver, *supra* note 218, at 1282, 1288-90 (discussing the impact of *Reynolds* on newspapers' willingness to report on litigious individuals and contentious matters).

223. This proposal refers specifically to Professor Barrett's version of the declaratory judgment proposal. See Barrett *supra* note 71, at 863 (advancing the strengths of declaratory judgment in that it targets the source of tension and focuses primarily on accuracy).

224. For example, four of the ten *Reynolds* factors focus on the importance of the information, the status of the information, the urgency of the story, and the timing of publication. *Reynolds v. Times Newspapers Ltd.*, [2001] 2 A.C. 127, 205 (H.L.).

- (2) The degree to which the allegedly defamatory statements were fact-checked, weighed against the reliability of the information's sources.
- (3) The number of editors attached to the story and amount of time spent reviewing it.
- (4) The time-sensitivity of the story, relative to its public importance. Merely seeking to get a scoop is not sufficient grounds for failing to adequately check a story.
- (5) Whether comment from the plaintiff was timely requested in a manner that was reasonably tailored to reach the plaintiff, and whether the publication fairly and accurately reflected those comments.
- (6) Whether the newspaper retracted the story, and whether the retraction was sufficient relative to the prominence of the story's original publication and the magnitude of reputational harm inflicted. For example, a defamatory statement published on the front page of a newspaper should be retracted on the front page.
- (7) Whether the circumstances of the case or the evidence provided suggest that the newspaper was aware of the falsity of its statement upon publishing it.²²⁵ While the plaintiff may offer evidence of actual malice, the plaintiff will have no access to discovery from the defendant.

The first four factors relate to the procedures used in reporting and editing the story. Those factors do not specify the procedures that news organizations must adopt, but rather focus on whether the procedures implemented were reasonable in light of the public importance and time-sensitivity of the story. The first factor concerns the adequacy of the reporting itself, the second and third with the adequacy of editorial review, and the fourth with the degree of scrutiny warranted in evaluating the reasonableness of the defendant's conduct. The fifth and sixth factors protect the reputations of the injured plaintiffs from libelous speech by

225. For a similar suggestion in cases involving questions of fact that turn on the defendants' state-of-mind, see David A. Sonenshein, *State of Mind and Credibility in the Summary Judgment Context: A Better Approach*, 78 NW. U. L. REV. 774, 795 (1983) (arguing that "when the movant offers evidence demonstrating innocent motive or lack of intent, summary judgment should be granted unless the non-movant offers substantial probative evidence contradicting the evidence provided by the movant"); see also Martin B. Louis, *Summary Judgment and the Actual Malice Controversy in Constitutional Defamation Cases*, 57 S. CAL. L. REV. 707, 715-18 (1984) (arguing for a reduced burden of proof in defamation summary judgment proceedings to allow for the burden to be shifted to plaintiffs to provide *prima facie* evidence of actual malice).

providing opportunities for counterspeech both during and after publication.

The final factor is essential to ensure that a defendant, to the greatest extent possible without infringing on the other two interests, does not escape liability for publishing defamatory statements that are intentionally or recklessly published. Evidence presented by the plaintiff or, in rare cases, the circumstances of the publication may suggest that the defendant acted with actual malice.²²⁶ In the rare cases where such evidence outweighs the six other factors, the judge may refuse to find for the defendant, and the case will proceed. In arguing that a defendant acted with actual malice, the plaintiff will not have access to discovery as to the state of mind of the reporters or editors attached to the story. While obtaining sufficient evidence of actual malice may be difficult absent some measure of discovery, allowing discovery would enable plaintiffs to impose substantial litigation costs on media defendants.²²⁷ Plaintiffs retain the option of conducting their own investigations, such as obtaining statements from the individuals quoted in an article.

While the exclusion of discovery may allow some defendants to avoid liability for false statements published with actual malice,²²⁸ the summary proceeding largely eliminates the likelihood of that outcome. That is, a plaintiff may persuade a judge that the defendant relied on too few sources in publishing a story or that the sources used were unreliable. Even if a defendant relied on a sufficient number of sources, the plaintiff may establish that the defendant manipulated their comments. Moreover, the defendant may have failed to adequately discuss or investigate mitigating

226. See, e.g., *Reynolds*, 2 A.C. at 206 (placing particular weight on the defendant's failure to include the plaintiff's version of story on a simple hunch, rather than conducting his own investigation).

227. Skeptics may argue that eliminating discovery will be unfair to plaintiffs, who will find it difficult to establish actual malice or to rebut a media defendant's evidence of responsible journalism. Although it is certainly not necessary to completely cut off discovery, there must be strictly enforced limits to discovery to avoid imposing the litigation costs on media defendants that the proposed summary proceeding is tailored to circumvent. However, as this Article argues, discovery is not wholly necessary. Evidence of irresponsible practices or, in rare cases, of actual malice can be established through evidence obtained through plaintiffs' own investigations. Additionally, plaintiffs will have access to reporters' and editors' notes and any other evidence of their states-of-mind that are presented by defendants to establish their responsible conduct.

228. See, e.g., *Herbert v. Lando*, 441 U.S. 153, 176 n.25 (1979) (noting that the discovery generated nearly 3,000 pages and 240 exhibits as well as sustaining substantial legal fees); Anderson, *supra* note 71, at 517 (depicting the actual malice standard as a complex factual issue that sometimes requires large amounts of discovery to prove).

evidence brought to its attention by a source. Thus, the very fact that the summary proceeding promotes responsible media conduct substantially limits media defendants' ability to escape liability for reporting in bad faith.

The sixth factor, concerning the retraction of a defamatory statement, should be given more weight than the others. Through that factor, a media defendant almost always has an escape hatch from litigation. Unless the defendant is found to have egregiously violated the other factors, it can guarantee an end to further proceedings by admitting that a published statement was false and retracting a story. More importantly, a newspaper has the option of retracting a statement following the summary proceeding. That is, a judge can find that the defendant negligently reported a story but explicitly leave open a window to publish a sufficient retraction that thereby allows the defendant to terminate the litigation.

C. *Advantages*

The proposed summary proceeding accommodates all the interests at stake in defamation suits, and it avoids the underprotection of reputation in three important respects. First, it encourages the press to seek comment from the targets of potentially defamatory statements, thereby allowing them to mitigate reputational harm concurrent to the publication of false statements. Second, it provides strong incentive for defendants to retract false statements in a manner reasonably tailored to reach the same readership as the original publication. Third, by promoting reporting procedures that optimize truth-telling, it prevents the occurrence of reputational harms in the first place.

The proposed proceeding avoids the under- and over-protection of speech by ensuring that libel suits are quickly and efficiently concluded in a manner that promotes optimized reporting procedures.²²⁹ That is, it allows defendants to avoid both liability and litigation costs by complying with a basic standard of responsible journalism. The elimination of litigation costs is thus held out as a carrot that compels journalists to alter their behavior. The speedy

229. See Susan M. Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation*, 58 OHIO ST. L.J. 1753, 1784 (1998) (arguing that the First Amendment contains a procedural guarantee for "accuracy, speed and efficiency" in disposing of defamation suits).

nature of the proceeding and prohibition of discovery further minimizes media defendants' legal costs.²³⁰

The absence of discovery also provides media defendants with a means of protecting their privacy.²³¹ The proposed proceeding allows defendants to present whatever evidence they choose in arguing that they complied with the standard of responsible journalism. Defendants are not obligated to turn over any notes or the identity of any source.²³² Indeed, defendants have the option of refusing to initiate the pre-trial proceeding altogether.

While the proposed proceeding is less vague than the *Reynolds* test, any standard of media responsibility will be vulnerable to some degree of vagueness and thus will ultimately be at the judge's discretion.²³³ Yet two points are worth noting. Because British libel law is considerably plaintiff-friendly, the cost of failing the *Reynolds* test far exceeds that of failing the proposed proceeding.²³⁴ Under the proposal, if a defendant fails to establish that it acted responsibly, the course of litigation continues as it would have otherwise, and actual malice will remain difficult to establish. In other words, where less is

230. See *Anderson v. Stanco Sports Library, Inc.*, 542 F.2d 638, 641 (4th Cir. 1976) (noting that the use of summary judgment in libel cases would avoid chilling speech by avoiding the litigation of meritless cases); *Bon Air Hotel v. Time, Inc.*, 426 F.2d 858, 865 (5th Cir. 1970) (“[T]he failure to dismiss a libel suit might necessitate long and expensive trial proceedings, which, if not really warranted, would themselves offend the principles enunciated in *Dombrowski v. Pfister*, 380 U.S. 479 (1965) . . . because of the chilling effect of such litigation.”) (citation omitted); see also *Edgartown Police Patrolmen’s Ass’n v. Johnson*, 522 F. Supp. 1149, 1152 (D. Mass. 1981) (“The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself.”) (citation omitted).

231. The Supreme Court has recognized that increasing grants of summary judgment would avoid requiring media defendants to comply with intrusive discovery. See *Herbert*, 441 U.S. at 180 n.4 (Powell, J., concurring) (holding that courts should delay ordering defendants to comply with discovery requests where issues pertinent to those requests can be avoided through summary judgment).

232. Naturally, relying on an unnamed source should provide a newspaper with less protection than a named source, though Lord Nicholls did not seem to think so. See *Reynolds v. Times Newspapers Ltd.*, [2001] 2 A.C. 127, 205 (H.L.) (adding that journalists often do not have the benefit of hindsight when meeting publication deadlines).

233. This is due to the flexible nature of the proposed standard, which mimics the flexibility envisioned by Lord Nicholls. See *Reynolds*, 2 A.C. at 204-05 (granting discretion to judges to interpret and apply the ten factors); see also Russell L. Weaver & David F. Partlett, *International and Comparative Perspectives on Defamation, Free Speech, and Privacy: Defamation, Free Speech, and Democratic Governance*, 50 N.Y.L. SCH. L. REV. 57, 76 (2006) (commenting that the large number of *Reynolds* factors, coupled with the few decisions interpreting those factors, has not provided the media with clear signals on how to act under the new framework).

234. This assessment does not even consider the costs associated with preventing libel suits, which have increased for British media outlets since *Reynolds*. See Weaver & Partlett, *supra* note 233, at 77 (calculating the media’s increased legal costs as they retain more lawyers to “Reynoldize” the stories).

at stake in enforcing the standard of responsible journalism, a degree of uncertainty is tolerable.

Additionally, the proposed standard provides a tremendous benefit to the press at no additional cost. Beyond the obvious benefit of providing a strong defense to defamation liability, the vagueness of the standard is itself an asset for the press. That is, it allows the media to create its own codes of conduct that shield it from liability, as long as those codes satisfy the baseline threshold of responsibility. Moreover, because defendants may refuse to initiate the summary proceeding, they can circumvent the standard of responsible journalism altogether if it concerns them.

Although summary-judgment proceedings are currently available in defamation suits, basing liability on a state-of-mind test has made it difficult to dispose of cases before trial.²³⁵ A standard of reasonableness—while fact-sensitive—is objective, and thus highly amenable to pre-trial determination. Moreover, as the House of Lords recognized in *Reynolds*, turning liability on a list of factors allows for the development of a body of precedent upon which judges can rely.²³⁶ The use of a summary proceeding will therefore provide greater consistency to defamation suits. Likewise, the proposed proceeding is advantageous because it takes the fate of media defendants out of the hands of potentially biased jurors, who render factual determinations in a black box. Judges' decisions must be openly justified, and biased decisions are checked by the availability of appeal. Accordingly, the expanded availability of pre-trial disposal will make defamation suits more predictable, which should further decrease media defendants' legal expenses.

D. Remaining Issues

1. Should courts create a standard of responsible journalism?

The Supreme Court has twice implicitly held that courts should not create standards of conduct for journalists: first in *Sullivan*, and then

235. See *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979) (noting that a finding of actual malice is not easily arrived at during the summary judgment stage); *Sonenshein*, *supra* note 225, at 786-87 (noting that courts are inconsistent in assessing state-of-mind evidence at summary judgment); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254-55 (1986) (holding that clear and convincing evidence is required to succeed on summary judgment in defamation suits); *Anderson*, *supra* note 71, at 498-99 (arguing that *Anderson* made it easier to win on summary judgment only insofar as it requires that key factual issues be resolved through discovery).

236. [2001] 2 A.C. at 205 (acknowledging that deferring to the judge is a doctrinally sound established practice).

in *Curtis Publishing v. Butts*.²³⁷ By shielding the press from defamation liability, *Sullivan* sought to substantially limit judicial supervision of the press.²³⁸ Three years later, in *Curtis*, Justice Harlan advocated for the reformation of the actual malice standard to promote responsible journalism.²³⁹ Under Justice Harlan's standard, defendants would be held liable for engaging in "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."²⁴⁰ In the plurality opinion, Chief Justice Warren provided the deciding vote in a separate concurrence but refused to backtrack from the *Sullivan* standard.²⁴¹ The question the Court has failed to definitively answer is whether judges should engage in creating a standard of responsible journalism, if they are even capable of doing so.

In an obvious sense, the actual-malice standard is itself a baseline constitutional limit on acceptable press conduct. That is, by refusing to protect statements made with knowledge or reckless disregard of falsity, the Court determined that the First Amendment does not tolerate the bad-faith publication of false statements.²⁴² *Sullivan* thus established the functional equivalent of a standard of professional conduct. Additionally, as discussed above, neither the interest in avoiding a chilling effect on the press, nor the interest in plaintiffs' reputations, is sufficient to serve as the theoretical foundation of the actual malice standard.²⁴³ The Court in *Sullivan* therefore appears to have been motivated at least in part by the normative conclusion that the press should not lie to the public.

237. 388 U.S. 130 (1966) (plurality opinion).

238. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1963) (discussing the need for an open and robust press, despite the possibility of attacks on government and public officials); Murchison, *supra* note 5, at 10 ("Journalism was to be free from the supervision of libel law; only a calculated lie would endanger that freedom.").

239. See *Curtis*, 388 U.S. at 135 (desiring a standard that would give the press sufficient constitutional protection without immunizing them from irresponsibly hurting the reputations of others).

240. *Id.* at 155.

241. See *id.* at 164-65 (Warren, C.J., concurring) (affirming the importance of the *Sullivan* standard as a necessary protection for the rights of public officials and the press).

242. See Susan M. Gilles, *The Image of "Good Journalism" in Privilege, Tort law and Constitutional Law*, 32 OHIO N.U. L. REV. 485, 497 (2006) ("The constitutional libel law cases also reveal that the Court has created a code of good journalism practices. This was not, perhaps, a conscious decision.").

243. See *supra* notes 75-76, 95-101 and accompanying text (criticizing the actual malice standard as releasing the press from any incentive to report reasonably as long as their conscience is clean and giving certain individuals less access to public counterspeech than more prominent officials and thus making it less likely for them to receive damages for libel).

Sullivan also indirectly led to a court-created standard of responsible journalism by allowing plaintiffs to use circumstantial and behavioral evidence to prove media defendants' states of mind.²⁴⁴ That was the conclusion of a 1994 study by a group of defamation scholars who examined all state and federal defamation suits following *Sullivan*.²⁴⁵ They found that lower court decisions in the decades after *Sullivan* "spawned a *de facto* set of judge-made standards that covers all aspects of journalistic behavior," including the investigation, writing and editing of news stories.²⁴⁶

As the authors of the study argued, the piecemeal method by which lower courts created *de facto* standards of responsible journalism has led to a chilling effect on speech by opening the door to increased findings of liability against the press.²⁴⁷ The haphazard creation of the *de facto* standards has also led to complex litigation, which has increased costs for media defendants.²⁴⁸ The proposed summary proceeding would avoid these problems by allowing courts to explicitly demarcate baseline journalistic norms, an enterprise in which they are already covertly engaged. As a result, courts would be more consistent in developing the standard of responsible journalism, media defendants would have greater notice about the substance of that standard, litigation costs would be curtailed, and appellate courts would be better capable of overseeing lower court decisions.

Moreover, there is no reason to believe that courts are incapable of overseeing journalistic conduct. Courts have already created baseline standards of professional conduct through the development of common-law malpractice torts.²⁴⁹ Judges should find it easier to create and apply a standard of conduct governing journalism than

244. See Murchison, *supra* note 5, at 11–12 (criticizing the *Sullivan* standard because by allowing circumstantial behavior, such as use of sources and quality of writing, the Court imposed greater judicial supervision, rather than reducing it).

245. See *id.* (remarking that the press seemed to have little inclination to question the new defamation paradigm due to the lack of understanding of *Sullivan's* true implications).

246. *Id.* at 12.

247. See *id.* at 14 (lamenting that *Sullivan's* paradoxical logic imposes "an increasingly comprehensive and intrusive set of behavioral standards for the press"). The *de facto* standards are akin to the *Reynolds* test, insofar as liability itself turns on having satisfied baseline requirements of responsible journalism.

248. See *id.* at 10 (discovering that while the number of judgments against the press may have decreased since *Sullivan*, the media has incurred substantially greater costs).

249. See Robert E. Drechsel, Essay, *The Paradox of Professionalism: Journalism and Malpractice*, 23 U. ARK. LITTLE ROCK L. REV. 181, 193 (2000) (observing the "obvious linkage between many of the principles of American libel law and professional standards").

those concerning other, more technical professions like medicine. Doctors must make highly specialized decisions, often while under severe time constraints. Journalists, on the other hand, require no specialized licensing and act under relatively artificial deadlines.²⁵⁰ Indeed, just as courts have extensive precedent upon which they can rely in malpractice suits, the evaluation of journalistic conduct will not occur on a blank slate. Beyond the de facto standards of conduct already created by lower courts, the majority of state courts apply a negligence standard to defamation cases involving private plaintiffs.²⁵¹ Both should serve as apt resources in developing the standard of responsible journalism.

The Supreme Court has already shown that it is not averse to overtly recognizing baseline standards of professional conduct under the Constitution. In *Strickland v. Washington*,²⁵² the Court held attorney performance in criminal cases to a reasonableness standard, citing the Sixth Amendment right to a fair trial.²⁵³ Nevertheless, the Court refused to delineate “specific guidelines” of acceptable conduct, choosing instead to rely on “the legal profession’s maintenance of standards sufficient to justify the law’s presumption that counsel will fulfill the role in the adversary process that the Amendment envisions.”²⁵⁴ In reaching this conclusion, Justice O’Connor argued,

No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.²⁵⁵

Journalism, however, is not an adversarial profession; reporters do not make nearly the same kind or magnitude of strategic decisions as attorneys.²⁵⁶ Thus, while the Supreme Court cannot practicably

250. See Geoffrey R. Stone, *Why We Need a Federal Reporter’s Privilege*, 34 HOFSTRA L. REV. 39, 47 (2005) (lambasting the idea of requiring licensing for journalists because it would defy more than 200 years of constitutional traditions).

251. See SMOLLA, *supra* note 119, at § 3:30 (cautioning that the practical application of defamation liability in several states resembles more of an actual malice standard than a negligence standard).

252. 466 U.S. 668 (1984).

253. See *id.* at 687-88 (holding that attorney performance must comply with a standard of “reasonably effective assistance”).

254. *Id.* at 688.

255. *Id.* at 688-89.

256. Moreover, while news organizations may face pressing time constraints with some stories, they presumably have substantial leeway to extend deadlines for many

determine ex ante which conduct constitutes effective assistance of counsel, it can prescribe specific procedures that are likely to optimize the accuracy of news reports.

Additionally, the interests underlying the First Amendment require the Court to lay down marginally specific guidelines for journalists. The *Strickland* Court's refusal to establish specific guidelines ensured that the right to a fair trial was not overprotected, because ineffective assistance in one criminal case may be good strategy in another.²⁵⁷ The same type of open-ended reasonableness standard, however, would impede the First Amendment interest in promoting a responsible press by providing little notice regarding what constitutes responsible conduct. Loosening ex ante control over the standard of responsible journalism would also risk creating a chilling effect on the press by increasing error costs at the pre-trial stage.²⁵⁸

The proposed standard and *Strickland* are both apt examples of experimentalist regulations, which courts are capable of implementing.²⁵⁹ Under an experimentalist system, a primary regulatory body creates flexible norms that are then developed and refined by lower bodies through continual, transparent negotiation with institutional stakeholders.²⁶⁰ Experimentalist systems avoid cumbersome, top-down oversight by disbursing regulatory power and limiting it with broad goals or guidelines.²⁶¹ *Strickland* was unwittingly experimentalist: it created an open standard of attorney reasonableness that was then developed by lower courts with deference to already-existing professional norms.²⁶² Likewise, as

others. Unless they can obtain continuances, lawyers are bound by the schedules set by courts and thus act under fixed time constraints.

257. One might also argue that the lack of specific guidelines serves criminal defendants' interest in a fair trial by failing to restrict the arguments available on appeal regarding the unreasonableness of an attorney's conduct.

258. Cf. Barrett, *supra* note 71, at 858 (viewing the rise in defamation insurance premiums and shift of reporters to the legal staff as a result of fear over losing libel suits).

259. See, e.g., Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1021-22 (2004) (highlighting the shift away from command-and-control injunctive regulation toward a more experimentalist intervention in litigation concerning education, mental health, prisons, police, and housing).

260. See *id.* at 1019 (distinguishing command-and-control regulation, which requires strong central authority and a comprehensive regime of rules, from experimentalist regulation, which is more flexible).

261. See *id.* at 1015, 1061-62 (advocating the experimentalist approach's ability to modify and adapt to new ideas and norms).

262. See Ivan K. Fong, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 STAN. L. REV. 461, 481 (1987) (critiquing the Court in *Strickland* for creating two seemingly conflicting standards: one that insists on a fair trial and one that relinquishes autonomy to the attorney's judgment).

noted, because the proposed standard of responsible journalism is moderately open-ended, journalists will retain substantial control in fashioning their own codes of conduct. That power will be shaped in part by the constitutional limits recognized by the Supreme Court and with the cooperation and oversight of trial judges at the pre-trial stage.

The proposed standard can therefore be viewed as a limited, constitutionally mandated structural reform, and meritorious defamation suits are, in this sense, small-scale instances of structural reform that partially destabilize media defendants. The press remains substantially shielded from public control under the First Amendment, but it is guided by courts toward the adoption of professional norms that meet a baseline standard of responsibility. Thus, the proposed standard represents a set of performance goals for the press—the kind of determination that courts are capable of making under experimentalist structural reforms. For example, the standard does not instruct reporters on how to investigate articles, but it instead informs them that they must create and adhere to a standard that meets a threshold reasonableness requirement.

As a final matter, it should be noted that the judiciary is the body best situated to regulate the press. Because judges are insulated from direct public control and political pressure, they have the least incentive to manipulate the press toward their own ends.²⁶³ Additionally, the proposed summary proceeding stems from the Constitution and is therefore almost entirely shielded from the control of legislative and executive branches at the state and federal level. Even if government officials bring defamation actions against the press, judges rendering pre-trial determinations retain ultimate control over the checking power on the press.

2. *Will individuals bring defamation actions if there is even less chance of receiving financial recovery than under the actual malice standard?*

As noted above, the proposed summary proceeding will prevent many reputational injuries from occurring.²⁶⁴ Even after a

263. Although state judges are often elected and therefore less shielded from external influence, their decisions remain reviewable by the Supreme Court, not to mention state appellate judges that are less susceptible to public influence.

264. For example, the fifth factor asks whether the press reasonably received comments from the injured plaintiff, and the sixth factor allows media defendants the ability to retract a defamatory statement. These criteria provide opportunities for counterspeech and the chance to reclaim reputation. See Steven J. Heyman, *Righting the Balance: An Inquiry Into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1360 (1998) (acknowledging that harm to a public official's reputation is not as severe when it comes from good-faith criticism because such criticism

reputational harm has occurred, however, the proposed standard of responsible journalism affords plaintiffs far greater protection than would be available solely under the *Sullivan* standard. Because the proposal provides media defendants with a strong incentive to retract false statements, defamed individuals are likely to bring falsehoods to the media's attention or to threaten litigation. Inasmuch as people prefer repairing their damaged reputations to receiving monetary awards, this outcome is a tremendous boon to those harmed by the publication of false statements.²⁶⁵

The availability of an inexpensive and speedy summary proceeding will also substantially reduce plaintiffs' pre-trial litigation costs and provide a free glimpse at the editorial procedures underlying the publication of alleged falsehoods. Plaintiffs therefore retain financial incentive to bring defamation actions against media defendants at least up to the pre-trial stage. The result of the proposed proceeding should be an increase in pre-trial litigation, but a substantial decrease in cases that survive it. Should the defendant lose at the pre-trial stage, the plaintiff can then reassess the viability of continuing the defamation action. In that event, the plaintiff may deem his or her prospects for success at trial or at receiving a settlement more likely, and accordingly may maintain the suit. Either way, the proposed proceeding will allow more plaintiffs to have their day in court, even if it does not expand the number of plaintiffs who receive monetary awards.

3. *How does the proposal account for the distinction between media and non-media defendants?*

Because this Article has focused on the need for a responsible press, it has deliberately refrained from discussing the distinction between media and non-media defendants. It is difficult, if not impossible, to determine what entities fall under the rubric "media," especially following the advent of the Internet.²⁶⁶ Yet that distinction

enables self-governance, and because those public officials can engage in counterspeech).

265. See Randall P. Bezanson et al., *The Economics of Libel: An Empirical Assessment*, in *THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS* 22 (Everette E. Dennis & Eli M. Noam eds., 1989) (arguing that defamation plaintiffs "are often not motivated chiefly by money; that [plaintiffs'] actions are not based on economically rational decisions about the prospects of financial recovery in litigation; and that the economic calculus that governs negotiation in libel cases has 'surprisingly little relation to the rules of defamation liability'").

266. See, e.g., Perzanowski, *supra* note 104, at 835, 851-52 (observing that the ease and frequency of individual contributions to the marketplace of ideas has allowed private citizens to act as both the audience and the source for information regarding public figures).

is unnecessary under the proposed summary proceeding. Given the need for an optimized marketplace of ideas and political discourse founded on truthful premises, the public is better off if the individuals and entities reporting facts are capable of doing so under a baseline standard of diligence. Those who choose to disseminate information at the heart of either the marketplace of ideas or of political discourse should be capable of checking facts, investigating leads and publishing retractions that can reasonably alleviate reputational injury.

Thus, as a normative matter, defamation liability should deter individuals incapable of responsibly reporting from publishing injurious facts about others. If the standard of responsible journalism is universally applied, people will be more likely to turn damaging information over to individuals or entities with access to greater investigative resources.²⁶⁷ Holding individuals like bloggers to a standard of responsible reporting also increases the likelihood that they are certain of the accuracy of the statements they publish and that they conduct whatever investigation they can prior to releasing harmful information.

CONCLUSION

The irony of *Sullivan* is that the *Times* would have avoided liability if it had satisfied any of the proposed criteria of responsible journalism. Editors at the *Times* could have contacted the signatories of the political advertisement, checked the facts with their Alabama reporter or against their own articles, or published a timely correction. Each was a cheap and easy option. The *Times* employees acted in good faith, yet they wantonly brought the litigation upon the newspaper by failing to adhere to a baseline standard of professionalism.

Indeed, the *Sullivan* standard itself, although fashioned with the objective of protecting press speech, needlessly sacrifices the best interests of the public, not to mention the reputations of individuals harmed by the spread of falsehoods. Justice White eloquently noted this outcome:

The *New York Times* rule thus countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been

267. *But see* Franklin, *supra* note 185, at 838 (acknowledging that some determined publishers might still disseminate false material in an effort to build audiences).

avoided with a reasonable effort to investigate the facts. In terms of the First Amendment and reputational interests at stake, these seem grossly perverse results.²⁶⁸

Justice White recognized that what is at stake in libel suits far exceeds the promotion of an abstract, albeit compelling, need for a fearless press.

When the public lacks confidence in the competence of the institutional press, it effectively loses the sole independent watchdog of public representations.²⁶⁹ People are bombarded with messages from interested parties on a daily basis: government officials hold news conferences, organizations issue press releases, and companies advertise their products. During an election campaign, candidates air myriad commercials promoting their platforms or lambasting opponents. All of those representations are vital to the functionality of the political process and economic market. Those representations cannot achieve either end, however, if the press is inept in overseeing them or if there is no external incentive for the press to proficiently do so.²⁷⁰ What the *Sullivan* Court failed to recognize is that it is not just a fearless press that is imperative; the public needs, and the First Amendment requires, a competent press as well.

This Article has argued that the tripartite interests in defamation suits are not mutually exclusive. By using litigation costs to induce responsible journalism, the Court can encourage practices that at once protect plaintiffs' reputations, shield the press from liability and maximize media truth-telling. The result will be streamlined libel litigation and an optimized, independent source of information. All parties that have a stake in efficient and effective libel litigation are thus bettered by the proposed summary proceeding, including the referents of media speech, the public, the government, and, certainly, the press itself.

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

269. *See, e.g., Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 667-68 (1990) (recognizing the unique role the press plays in informing and educating citizens on matters of public concern); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 583-84 (1983) (discussing the role of the press in contributing to the rise of independence during the Revolution); *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (championing the press as a check against the abuses of power by government officials and a means for keeping public officials responsible for their actions).

270. *See supra* Part II.A for a full discussion on how the actual malice standard promotes sloppy reporting because all a journalist needs to do to avoid liability is show his or her state of mind and not the quality of work, and *see supra* Part II.B for a full discussion on how excessive litigation costs unduly tie the hands of the media.