

## ACTUAL MALICE ORIGINALISM: A PRESS FUNCTION SOLUTION TO SOCIAL MEDIA CONCERNS

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*The evolution of social media not only changed how we access news and information—it shifted who provides it to us. Professional news organizations are certainly active on social media, but they are a very small group of voices amongst the 5.04 billion social media accounts worldwide. Indeed, just over sixty-one percent of the world’s population is now active on social media. These rapidly evolving social media platforms command the public’s attention as they churn out massive amounts of “news” and information from nontraditional sources that run the gamut. At least by sheer volume, social media “news” is provided primarily by individuals, not professional news organizations.*

*Where does such drastic change leave the actual malice privilege from *New York Times Co. v. Sullivan*, a First Amendment protection from defamation claims that was established by the Supreme Court in the newspaper and news broadcast dominated era of the 1960s and 1970s? Justice Gorsuch recently argued that the privilege should be repealed, not simply because he thinks it has in ways become “archaic,” but more so because he believes it provides a vast refuge for social media defamation. To Justice Gorsuch and others who share his concerns, the shift in who provides news and information (and therefore utilizes the privilege) has transformed the privilege from a primary press protection supporting an informed public to an unintended shield for billions on social media, resulting in a misinformed public. He argues that because the privilege was not intended to fit the modern media landscape, it should not survive. This Article challenges that conclusion.*

*A careful examination of *Sullivan* and its founding progeny reveals that the original design and justifications for the privilege are largely compatible with the change brought by social media. Such examination also supports a*

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*focused approach to address the privilege’s greatest modern threat to both speech and reputational interests—social media’s ability to mass produce public figures. As the movement by courts to reevaluate the privilege gains further momentum, this Article proposes a framework to address defamation and speech problems that could be compounded by the privilege’s application to social media, while avoiding the need to repeal the privilege’s original design. Though it may at first seem counterintuitive, an effort to effectively modernize the privilege so that it maintains its intended public benefit and accepted costs requires that it be refocused on its origins to serve the press function in the public figure context.*

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## INTRODUCTION

The evolution of social media not only changed how we access news and information—it shifted who provides it to us.<sup>1</sup> Professional news

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<sup>1</sup>See Amy Watson, *Frequency of Social Media News Consumption Amongst Adults in the United States from 2020-2022*, STATISTA (Jan. 4, 2024), <https://www.statista.com/statistics/263498>

organizations are certainly active on social media,<sup>2</sup> but they are a very small group of voices amongst the 5.04 billion social media accounts worldwide.<sup>3</sup> Indeed, just over sixty-two percent of the world's population is now active on social media.<sup>4</sup> These rapidly evolving social media platforms command the public's attention as they churn out massive amounts of "news" and information from nontraditional sources that run the gamut.<sup>5</sup> At least by sheer volume, social media "news" is provided primarily by individuals, not professional news organizations.

Where does such drastic change leave the actual malice privilege from *New York Times Co. v. Sullivan*,<sup>6</sup> a First Amendment protection from defamation claims that was established by the Supreme Court in the newspaper and news broadcast-dominated era of the 1960s and 1970s?<sup>7</sup>

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/use-of-social-media-for-news-consumption-among-hispanics-in-the-us/; Heather Kelly, *From TV to TikTok, How We Get the News is Changing Fast*, WASH. POST (Nov. 15, 2023), <https://www.washingtonpost.com/technology/2023/11/15/news-trends-social/>; PEW RESEARCH CENTER, *Social Media and News Fact Sheet* (Nov. 15, 2023), <https://www.pewresearch.org/journalism/fact-sheet/social-media-and-news-fact-sheet/>; Mike Vorhaus, *People Increasingly Turn to Social Media for News*, FORBES (June 24, 2020), <https://www.forbes.com/sites/mikevorhaus/2020/06/24/people-increasingly-turn-to-social-media-for-news/?sh=76962b3bcc0b>; Tom Infield, *Americans Who Get News Mainly on Social Media are Less Knowledgeable and Less Engaged*, PEW RSCH. CTR. (Nov. 16, 2020), <https://www.pewtrusts.org/en/trust/archive/fall-2020/americans-who-get-news-mainly-on-social-media-are-less-knowledgeable-and-less-engaged>.

<sup>2</sup>See, e.g., The Washington Post (@washingtonpost), X (Mar. 17, 2024), [https://twitter.com/washingtonpost/ref\\_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor](https://twitter.com/washingtonpost/ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor); The New York Times (@nytimes), X (Mar. 17, 2024), [https://twitter.com/nytimes/ref\\_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor](https://twitter.com/nytimes/ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor); New York Post (@nypost), FACEBOOK (Mar. 17, 2024), <https://www.facebook.com/NYPost/>; Los Angeles Times (@latimes), X (Mar. 17, 2024), [https://twitter.com/latimes/ref\\_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor](https://twitter.com/latimes/ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor); The Wall Street Journal (@wsj), X (Mar. 17, 2024), [https://twitter.com/WSJ/ref\\_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor](https://twitter.com/WSJ/ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor); The Economist (@theeconomist), X (Mar. 17, 2024), [https://twitter.com/TheEconomist/ref\\_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor](https://twitter.com/TheEconomist/ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor).

<sup>3</sup>Ani Petrosyan, *Number of Internet and Social Media Users Worldwide as of January 2024*, STATISTA (Jan. 31, 2024), <https://www.statista.com/statistics/617136/digital-population-worldwide/#:~:text=Worldwide%20digital%20population%202023&text=As%20of%20October%202023%2C%20there,population%2C%20were%20social%20media%20users>.

<sup>4</sup>*Id.*

<sup>5</sup>See *supra* note 1.

<sup>6</sup>376 U.S. 254 (1964).

<sup>7</sup>*Id.* at 279–80 (adopting privilege for speech and reporting about public officials in the context of a libel claim); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342–45 (1974) (confirming a framework

Should this privilege, which is recognized as a “signature accomplishment of the Warren Court”<sup>8</sup> through “one of the most important free speech decisions of all time,”<sup>9</sup> now be left behind in the same discard pile as print newspapers and magazines? Justice Gorsuch recently argued that it should, not simply because he thinks the privilege has in ways become “archaic,”<sup>10</sup> but more so because he believes the privilege provides a vast refuge for social media defamation: “What started in 1964 with a decision to tolerate the occasional falsehood to ensure robust reporting by a comparative handful of print and broadcast outlets has evolved into an ironclad subsidy for the publication of falsehoods by means and on a scale previously unimaginable.”<sup>11</sup>

To Justice Gorsuch and others that share his concerns, the shift in who provides news and information (and therefore utilizes the privilege) has transformed the privilege from a primary press protection supporting an informed public to an unintended shield for billions on social media resulting in a misinformed public.<sup>12</sup> He argues that because the privilege was not intended to fit the modern media landscape, it should not survive.<sup>13</sup> This Article challenges that conclusion. Justice Gorsuch is, of course, correct that the media landscape has fundamentally changed with its shift to the dominance of individuals on social media. And though he does not provide significant evidence that courts to date have allowed social media to overextend the privilege’s application to speech about public figures,<sup>14</sup> his concern that social media *could* push courts toward such a trend in the coming years is not unwarranted. He is, however, wrong that the original design and justifications for the privilege from *Sullivan* and its founding progeny do not fit in the modern social media world.

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for the privilege’s application in the public official and public figure contexts); *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 154–55 (1967) (extending privilege to cover reporting about public figures in the context of a libel claim); *Time, Inc. v. Hill*, 385 U.S. 374, 380–91 (1967) (extending privilege’s application to privacy claim brought by non-governmental plaintiff against the press).

<sup>8</sup>David A. Logan, *Rescuing Our Democracy by Rethinking New York Times Co. v. Sullivan*, 81 OHIO ST. L.J. 759, 761 (2020) (citing Lilian R. BeVier, *Intersection and Divergence: Some Reflections on the Warren Court, Civil Rights, and the First Amendment*, 59 WASH. & LEE L. REV. 1075, 1075 (2002)) (citation omitted).

<sup>9</sup>Erwin Chemerinsky, *False Speech and the First Amendment*, 71 OKLA. L. REV. 1, 6 (2018).

<sup>10</sup>*Berisha v. Lawson*, 141 S. Ct. 2424, 2429 (2021) (Gorsuch, J., dissenting).

<sup>11</sup>*Id.* at 2428.

<sup>12</sup>*See id.* at 2427–29.

<sup>13</sup>*See id.*

<sup>14</sup>*See id.* at 2429 (citing *Hibdon v. Grabowski*, 195 S.W.3d 48, 59, 62 (Tenn. Ct. App. 2005)).

A careful examination of these founding cases reveals that the substance of the intended privilege is largely compatible with the change brought by social media.<sup>15</sup> Such examination also supports a focused approach to address the privilege’s greatest modern threat to both speech and reputational interests—social media’s ability to mass-produce public figures.<sup>16</sup> As the movement for courts to reevaluate the privilege gains further momentum, this Article proposes a framework to address defamation and speech problems that could be compounded by the privilege’s application to social media, while avoiding the need to repeal the privilege’s original design.<sup>17</sup> Though it may at first seem counterintuitive, an effort to effectively modernize the privilege so that it maintains its intended public benefit and accepted costs requires that it be refocused on its origins to serve the press function in the public figure context.<sup>18</sup>

### I. SUMMARY OF THE ACTUAL MALICE PRIVILEGE

The Supreme Court established the actual malice privilege to protect good faith reporting and speech about government officials (hereafter “public officials”) and public figures from the chilling effect of potential damages from a defamation claim.<sup>19</sup> Though this privilege was not recognized by the First Amendment during the first two centuries of its existence, the *Sullivan* Court saw throughout such history “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . .”<sup>20</sup> With such recognition came the practical observation that this “robust” space for reporting and debate will come with “inevitable” good-faith errors from its participants.<sup>21</sup> The *Sullivan* Court connected such observation with an equally practical concern. If even a good faith erroneous statement could lead to damages from a defamation claim brought by a public official, journalists and individuals alike will self-censor or decide not to engage at all.<sup>22</sup> From such observation and concern came the substance of the

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<sup>15</sup> See *infra* Sections II.A.1, B.1.

<sup>16</sup> See *infra* Sections I.C, II.B.

<sup>17</sup> See *infra* Sections I.B–C, II.B.

<sup>18</sup> See *infra* Sections I.C, II.B.

<sup>19</sup> See *New York Times Co. v. Sullivan*, 376 U.S. 254, 270–73 (1964); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342–45 (1974).

<sup>20</sup> *Sullivan*, 376 U.S. at 270 (citations omitted).

<sup>21</sup> *Id.* at 272, 273.

<sup>22</sup> *Id.* at 279; see also *St. Amant v. Thompson*, 390 U.S. 727, 731–32 (1968) (explaining that the Supreme Court has since “emphasized that the stake of the people in public business and the

privilege: If First Amendment “freedoms of expression” are going to have any practical meaning, good faith “erroneous” statements about public officials “must be protected” from defamation claims so that such freedoms have the “‘breathing space’ that ‘they need . . . to survive.’”<sup>23</sup> Such “breathing space” was quickly extended to statements about non-governmental public figures as well.<sup>24</sup>

The privilege provides this good faith “breathing space” by requiring both a higher legal standard and burden of proof for defamation claims brought by public officials and public figures.<sup>25</sup> Under state common law, a defamation claim in most circumstances requires only that a plaintiff establish by a preponderance of the evidence that the defendant negligently published the false statement.<sup>26</sup> The privilege, however, requires that a public official or public figure plaintiff demonstrate by clear and convincing evidence that the defendant acted with the more culpable “actual malice” state of mind.<sup>27</sup> “Actual malice” means that there is clear and convincing evidence that the defendant published the false statement either: 1) knowing the statement was false; or 2) with reckless disregard as to whether the statement was false—that is, having “in fact entertained serious doubts as to the truth” of the statement.<sup>28</sup> The Supreme Court has accepted the cost of such a high standard, acknowledging that public officials and public figures are more likely to lose

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conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies”).

<sup>23</sup> *Sullivan*, 376 U.S. at 271–72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

<sup>24</sup> See *Gertz*, 418 U.S. at 335, 342–45; *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 154–55 (1967).

<sup>25</sup> *Gertz*, 418 U.S. at 342–45; see also *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 510 (1991).

<sup>26</sup> See *Pendleton v. City of Haverhill*, 156 F.3d 57, 66 (1st Cir. 1998) (“Under the taxonomy developed by the Supreme Court, private plaintiffs can succeed in defamation actions on a state-set standard of proof (typically, negligence), whereas the Constitution imposes a higher hurdle for public figures and requires them to prove actual malice.”) (citations omitted); *Brown v. Kelly Broad Co.*, 771 P.2d 406, 424–25 (Cal. 1989) (en banc) (providing survey of defamation requirements amongst the states and determining that the “near unanimous” rule is that a private figure only needs to prove negligence in support of a defamation claim) (citations omitted).

<sup>27</sup> *Masson*, 501 U.S. at 510.

<sup>28</sup> *Id.* (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)). The *Masson* court noted that this reckless disregard standard might also be described by proof that the defensed acted “with a ‘high degree of awareness of . . . probable falsity[.]’” *Id.* (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)).



defamation and libel claims, even if the statements at issue were inaccurate and harmful.<sup>29</sup>

The fact that the statement at issue in a defamation case relates to a matter of public interest does not dictate applicability of the privilege.<sup>30</sup> The privilege is about people, or rather, speech about specific categories of people.<sup>31</sup> In *Gertz v. Robert Welch, Inc.*, the Supreme Court established four categories of “figures” and explained that application of the privilege depends upon which category fits the defamation plaintiff: 1) public officials; 2) pervasively famous public figures; 3) limited purpose public figures; or 4) private figures.<sup>32</sup> The privilege will usually apply to statements made about public officials and pervasively famous public figures,<sup>33</sup> and never to statements made about truly private figures.<sup>34</sup> The more complicated (and commonly litigated) analysis relates to the potential limited purpose public figure.

A pervasively famous public figure is someone who has “achieved” such a “pervasive” level of “fame,” “notoriety,” “power,” and “influence” that it is fair to say that they have become “a public figure for all purposes and in all contexts.”<sup>35</sup> A limited purpose public figure is someone who is not famous in a general sense, but has gained attention in relation to a public controversy because she has “thrust” herself “to the forefront” (or “vortex”) of the public controversy “in order to influence the resolution of the issues involved.”<sup>36</sup> In essence, a limited purpose public figure is a private figure who has taken some significant action to step into the spotlight in order to affect public opinion on a particular public issue.<sup>37</sup> The privilege will not apply to “all aspects” of a limited purpose public figure’s life, but rather only to statements

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<sup>29</sup> *Gertz*, 418 U.S. at 342 (explaining that the privilege “administers an extremely powerful antidote to the inducement of media self-censorship of the common-law rule of strict liability for libel and slander” such that even some “deserving plaintiffs” will be unable to overcome its intentionally high standard); *see also St. Amant*, 390 U.S. at 731–32.

<sup>30</sup> *Gertz*, 418 U.S. at 345–47.

<sup>31</sup> *See id.*

<sup>32</sup> *Id.* at 343–48, 351–52.

<sup>33</sup> *Id.* at 343–45, 351–52.

<sup>34</sup> *Id.* at 345–48; *see also, e.g., Talley v. Time, Inc.*, 923 F.3d 878, 898 n.20 (10th Cir. 2019) (noting that the Supreme Court held in *Gertz* that “the actual malice standard applies to public figures but does not apply in cases brought by private-figure plaintiffs”).

<sup>35</sup> *Gertz*, 418 U.S. at 345, 351–52.

<sup>36</sup> *Id.*

<sup>37</sup> *See id.*

that are relevant to her participation in debate about the issue or controversy.<sup>38</sup>

### A. A Growing Movement Against the Privilege

The Supreme Court recently denied review of a limited purpose public figure case out of the Eleventh Circuit in *Berisha v. Lawson*.<sup>39</sup> Justice Gorsuch, however, issued a lengthy dissenting opinion to the denial order, which called for the Supreme Court to consider repealing the privilege.<sup>40</sup> Though he began by expressing criticism of the privilege from a more traditional originalist perspective, given its adoption long after the First and Fourteenth Amendments,<sup>41</sup> his central argument was a practical one that related to intent *at the time of the privilege's adoption*.<sup>42</sup> He argued that the original privilege has been rendered outdated—and even harmful—by the rise of social media.<sup>43</sup>

Justice Gorsuch built his argument upon an assumption that the *Sullivan* Court primarily had the professional news media of the 1960s in mind for the entire privilege.<sup>44</sup> The media context for the *Sullivan* case in 1964, and its progeny throughout the 1960s and 1970s, was a landscape controlled by professional news organizations with the resources to print and distribute newspapers, produce expensive broadcasts that required licensing, and employ “legions of investigative reporters, editors, and fact-checkers.”<sup>45</sup> Professional news organizations were the ones that provided the public with news and information, and were protected by the privilege in doing so.<sup>46</sup> As such, he argued that the volume of false statements the *Sullivan* Court contemplated the privilege would abide was likely justified in part “because other safeguards existed to deter the dissemination of defamatory falsehoods

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<sup>38</sup> See *id.* at 351–52; see also *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1298 (D.C. Cir. 1980).

<sup>39</sup> 141 S. Ct. 2424 (2021).

<sup>40</sup> See *id.* at 2425–30 (Gorsuch, J., dissenting).

<sup>41</sup> See *id.* at 2425–26 (Gorsuch, J., dissenting).

<sup>42</sup> See *id.* at 2427–28 (Gorsuch, J., dissenting).

<sup>43</sup> See *id.* at 2427–29 (Gorsuch, J., dissenting).

<sup>44</sup> See *id.* (Gorsuch, J., dissenting).

<sup>45</sup> *Id.* at 2427 (Gorsuch, J., dissenting) (citing Logan, *supra* note 8, at 794–95).

<sup>46</sup> See *id.* (Gorsuch, J., dissenting).

and misinformation” given that “many major media outlets employed fact-checkers and editors . . . .”<sup>47</sup>

Now, because of social media, “virtually anyone in this country can publish virtually anything for immediate consumption virtually anywhere in the world.”<sup>48</sup> This introduces an entirely different dynamic where individuals and other nonprofessional news entities—who do not necessarily have the same incentives or resources for accuracy—command most of the media landscape.<sup>49</sup> Whereas the privilege was born into “a world with comparatively few platforms for speech,” especially unpopular speech and reporting, we now live “in a world in which everyone carries a soapbox in their hands.”<sup>50</sup>

The shift to individuals dominating the media landscape through social media has brought with it a social media misinformation problem.<sup>51</sup> Justice Gorsuch referenced a 2018 study published by *Science Magazine* which, in addition to observing a substantial amount of false news stories/information on social media, found that false posts were simply more successful on social media: “‘falsehood and rumor dominated truth by every metric, reaching more people, penetrating deeper . . . and doing so more quickly than accurate statements.’”<sup>52</sup>

At the same time that social media has been growing exponentially, Justice Gorsuch argued that the news media has been changing for the worse.<sup>53</sup> He noted reduced numbers for newspapers, periodicals, and network news broadcasts, which he believes are being replaced by “the rise of 24-hour cable news and online media platforms that ‘monetize anything that garners clicks.’”<sup>54</sup> The American public is now in “a new era where the old economic

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<sup>47</sup> *Id.* at 2427–28 (Gorsuch, J., dissenting) (citing Logan, *supra* note 8, at 795).

<sup>48</sup> *Id.* at 2427 (Gorsuch, J., dissenting) (citing Logan, *supra* note 8, at 803).

<sup>49</sup> *See id.* (Gorsuch, J., dissenting).

<sup>50</sup> *Id.* (Gorsuch, J., dissenting).

<sup>51</sup> *See id.* at 2427 (Gorsuch, J., dissenting).

<sup>52</sup> *Id.* (Gorsuch, J., dissenting) (quoting Logan, *supra* note 8, at 804 n.302) (citing Vosoughi et al., *The Spread of True and False News Online*, *SCI. MAG.*, Vol. 359, Issue 6380, 1146–51 (Mar. 9, 2018)).

<sup>53</sup> *See id.* at 2427–28 (Gorsuch, J., dissenting).

<sup>54</sup> *Id.* at 2427 (Gorsuch, J., dissenting) (quoting Logan, *supra* note 8, at 800) (citing Elizabeth Greico, *Fast Facts About the Newspaper Industry’s Financial Struggles as McClatchy Files for Bankruptcy*, PEW RSCH. CTR. (Feb. 14, 2020), <http://www.pewresearch.org/fact-tank/2020/02/14/fast-facts-about-the-newspaper-industrys-financial-struggles/>; *Network Evening News Ratings*, PEW RSCH. CTR. (Mar. 13, 2006), [https://www.supremecourt.gov/opinions/URLs\\_Cited/OT2020/](https://www.supremecourt.gov/opinions/URLs_Cited/OT2020/)

model that supported reporters, fact-checking, and editorial oversight is disappearing.”<sup>55</sup> The sum of all this “means that ‘the distribution of disinformation’—which ‘costs almost nothing to generate’—has become a ‘profitable’ business while ‘the economic model that supported reporters, fact-checking, and editorial oversight’ has ‘deeply erod[ed].’”<sup>56</sup>

The shift to a social media-dominated landscape and the corresponding rise of the misinformation problem only have significance in relationship to the actual malice privilege if there is evidence to suggest that courts apply the privilege to protect defamation on social media at a high rate. Justice Gorsuch focused such a potential connection on the public figure category.<sup>57</sup> He observed that “[n]ow, private citizens can become ‘public figures’ on social media overnight.”<sup>58</sup> Moreover, “[i]ndividuals can be deemed ‘famous’ because of their notoriety in certain channels of our now-highly segmented media even as they remain unknown in most.”<sup>59</sup>

Justice Gorsuch cites only one state court of appeals case in support of these two rather broad propositions.<sup>60</sup> However, his point perhaps is to express a more general concern about the future of actual malice jurisprudence if more and more individuals qualify as pervasively famous public figures by virtue of large social media followings, and otherwise if the limited purpose public figure definition is strictly applied to large numbers of private citizens that can now attract public attention by “thrust[ing] themselves” to the forefront of debate about public issues by posting online.<sup>61</sup> The result would be a correspondingly vast number of individuals whose false posts about these private-turned-public figures would receive protection from the privilege, which could embolden factually questionable comments and posts.<sup>62</sup> This could also in turn chill other individuals from engaging on social media about public issues for fear that they could be deemed a public figure (at least a limited purpose public figure) and therefore have to

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<sup>55</sup> *Id.* at 2428 (Gorsuch, J., dissenting).

<sup>56</sup> *Id.* at 2427 (Gorsuch, J., dissenting) (citing Logan, *supra* note 8, at 800).

<sup>57</sup> *Id.* at 2429 (Gorsuch, J., dissenting).

<sup>58</sup> *Id.* (Gorsuch, J., dissenting) (citing *Hibdon v. Grabowski*, 195 S.W.3d 48, 59, 62 (Tenn. Ct. App. 2005)).

<sup>59</sup> *See id.* (Gorsuch, J., dissenting).

<sup>60</sup> *See id.* (Gorsuch, J., dissenting) (citing *Hibdon*, 195 S.W.3d at 59, 62).

<sup>61</sup> *See id.* (Gorsuch, J., dissenting).

<sup>62</sup> *See id.* (Gorsuch, J., dissenting).

overcome the privilege in a defamation claim attempting to challenge a false attack against them online.<sup>63</sup>

Justice Gorsuch was not a lone dissenter in *Berisha*.<sup>64</sup> Justice Thomas also argued that the Supreme Court should remove the privilege entirely, though he reserved particular scorn for its application to statements about public figures.<sup>65</sup> In fact, Justice Thomas' dissent in *Berisha* was just one of four instances in recent years where he issued an opinion in a case where review was denied so that he might argue for removal of the privilege.<sup>66</sup> Justice Thomas's other opinions primarily focused on removing the privilege because it was not contemplated by the drafters and ratifiers of the First and Fourteenth Amendments.<sup>67</sup> In *Berisha*, however, he also argued that the privilege should be removed because "of the doctrine's real-world effects" since "lies impose real harm" for an individual regardless of whether she is a "[p]ublic figure of private."<sup>68</sup>

Justice Gorsuch punctuated his invitation for reconsideration of the privilege with a list of Justices who have also critiqued the privilege throughout its history.<sup>69</sup> Notably, this list included citation to a previous article written by Justice Kagan which expressed concerns about the real-world effects of the privilege.<sup>70</sup> By "adding [his] voice to theirs," Justice

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<sup>63</sup> See *id.* (Gorsuch, J., dissenting).

<sup>64</sup> See *id.* at 2424–25 (Thomas, J., dissenting).

<sup>65</sup> *Id.* at 2424 (Thomas, J., dissenting).

<sup>66</sup> See *Blankenship v. NBCUniversal, LLC*, 144 S. Ct. 5 (2023) (Thomas, J., concurring); *Coral Ridge Ministries Media, Inc. v. S. Poverty L. Ctr.*, 142 S. Ct. 2453 (2022) (Thomas, J., dissenting); *McKee v. Cosby*, 139 S. Ct. 675 (2019) (Thomas, J. concurring).

<sup>67</sup> See *Blankenship*, 144 S. Ct. 5 (Thomas, J., concurring); *Coral Ridge*, 142 S. Ct. 2453 (Thomas, J., dissenting); *McKee*, 139 S. Ct. 675 (Thomas, J. concurring).

<sup>68</sup> *Berisha*, 141 S. Ct. at 2425 (Thomas, J., dissenting) (noting examples, both real and hypothetical, where false accusations may cause a person to lose job opportunities or experience threats and violence) (citing Merrit Kennedy, "Pizzagate" Gunman Sentenced to Four Years in Prison, NPR (June 22, 2017), <https://www.npr.org/sections/thetwo-way/2017/06/22/533941689/pizzagate-gunman-sentenced-to-4-years-in-prison>; Kashmir Hill, *A Vast Web of Vengeance*, N.Y. TIMES, (Jan. 30, 2021), <https://www.nytimes.com/2021/01/30/technology/change-my-google-results.html>; Erik Wemple, *Bloomberg Law Tried to Suppress Its Erroneous Labor Dept. Story*, WASH. POST (Sept. 6, 2019), <https://www.washingtonpost.com/opinions/2019/09/06/bloomberg-law-tried-suppress-its-erroneous-labor-dept-story>).

<sup>69</sup> *Berisha*, 141 S. Ct. at 2429–30. (Gorsuch, J., dissenting) (citations omitted).

<sup>70</sup> *Id.* (citing Elena Kagan, *A Libel Story: Sullivan Then and Now*, 18 L. & SOC. INQUIRY 197, 205, 209 (1993)).

Gorsuch has provided concrete momentum for reconsideration of the privilege.<sup>71</sup>

### *B. A Press-Function Refocused Proposal*

The context for this Article is a climate where courts are faced with growing concerns about the privilege, including social media defamation and its effects on the public.<sup>72</sup> Ideologically, many First Amendment advocates would not, in the abstract, propose categorical changes to who might be able

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<sup>71</sup>*Id.*; see also *infra* note 72.

<sup>72</sup>See e.g., *Counterman v. Colorado*, 600 U.S. 66, 105 (2023) (Thomas, J., dissenting); *Blankenship*, 144 S. Ct. 5 (Thomas, J., concurring); *Berisha*, 141 S. Ct. at 2425, 2426 (2021) (Thomas, J., dissenting) (Gorsuch, J. dissenting); *Coral Ridge*, 142 S. Ct. 2453 (Thomas, J., dissenting); *McKee*, 139 S. Ct. 675 (Thomas, J. concurring); *Tah v. Glob. Witness Pub., Inc.*, 991 F.3d 231, 251 (D.C. Cir. 2021) (Silberman, J., dissenting) (calling for repeal of the privilege); *Trump v. Cable News Network*, No. 22-61842, 2023 WL 4845589, at \*3 n.3 (S.D. Fla. July 28, 2023); *Dershowitz v. Cable News Network, Inc.*, No. 20-61872, 2023 WL 4851704, at \*6 (S.D. Fla. Apr. 4, 2023) (explaining that *Sullivan*'s privilege, "while laudable in a different era," had no relationship to history or text of the Constitution) (citation omitted); *Blankenship v. Trump*, No. 2:19-cv-00549, 2023 WL 2728727, at \*3 n.7 (S.D. W. Va. Mar. 30, 2023) (noting that *Sullivan* "has been subject to recent criticism and calls for reconsideration . . .") (citations omitted); *Ralston v. Garabedian*, 623 F. Supp. 3d 544, 603 (E.D. Pa. 2022) ("These facts exemplify why we join several jurists in questioning the continued viability of the actual malice doctrine requiring private persons to adduce clear and convincing evidence of actual malice by a non-media speaker to recover damages absent reputational harm.") (citations omitted); *Colborn v. Netflix, Inc.*, 541 F. Supp. 3d 888, 900 n.4 (E.D. Wisc. 2021) (noting that "[i]ndeed, some recent decisions have suggested the Court's imposition of the 'actual malice' standard in *New York Times v. Sullivan* may itself have gone too far") (citations omitted); *Reighard v. ESPN, Inc.*, 991 N.W.2d 803, 825–26 (Mich. Ct. App. 2022) (Boonstra, P.J., concurring) (explaining that he "join[s] Justice Thomas and Justice Gorsuch in calling for the United States Supreme Court to take a fresh look at the jurisprudence in this area" because he has "serious concerns about the state of the law in this area, both with regard to its progressive deviation from the historical underpinnings of both the common law of defamation and the constitutional jurisprudence of the First Amendment, and with regard to its continuing applicability in the modern world"); *Mastandrea v. Snow*, 333 So.3d 326, 328 (Fla. Ct. App. 2022) (B.L. Thomas, J., concurring) ("But I agree with Justice Clarence Thomas, Justice Neil Gorsuch, Judge Lawrence Silberman, and others, that *New York Times* was wrongfully decided and was not grounded in the history or text of the First Amendment."); *ACLU, Inc. v. Zeh*, 864 S.E.2d 422, 428 n.5 (2021) (noting that "two Justices on that Court have recently called for reconsideration of [the *Sullivan*] line of precedent.") (citations omitted); *Balliet v. Kottamasu*, 175 N.Y.S.3d 678, 684 n.18 (2022) (N.Y. Civ. Ct., Aug. 9, 2022) (explaining that Justice Thomas's recent opinion signals a "pendant for reversal of 60 years of First Amendment precedent which may likewise indeed go by way of recently overturned 50 year *Roe v. Wade* precedent, given the present SCOTUS' majority conservative court's emboldened judicial activist proclivities to discard historical landmark stare decisis . . .").

to utilize the privilege in defense of a defamation claim. However, the practical reality is that courts are actively considering whether the privilege must be reevaluated (in whole or in part) given the modern landscape's capability to allow anyone to spread defamation immediately and globally.<sup>73</sup> For purposes of courts determined to consider their options, this Article proposes a framework for the privilege which would retain its original purposes without the need to entirely repeal the privilege either in relation to public officials or public figures.

The Supreme Court has always approached the privilege's application categorically based upon the status of the defamation plaintiff, i.e., public official or public figure.<sup>74</sup> As will be explained throughout the analysis sections, this starting place continues to make sense because there are fundamentally distinct speech, reporting, and reputational interests related to public officials and public figures.<sup>75</sup> This Article's proposal similarly takes these categories in turn.

First, the privilege should remain applicable to speech and reporting about public officials by everyone, that is, with no distinction between whether the defamation defendant is part of the press. The second section of this Article will demonstrate that the Supreme Court established protection for criticism of public officials as the central purpose of the privilege (and First Amendment generally) for both individuals and the press because of its direct connection to the democratic process.<sup>76</sup> The original scope of the privilege's application in the public official context should be recognized as so entrenched in the intended purpose of the privilege (and democratic "duty" of every citizen under the First Amendment) that it cannot be susceptible to repeal because of the rise of social media—at least not without compelling evidence that the substance of the privilege is inconsistent with such a broad landscape dominated by individuals.<sup>77</sup> This Article argues that the modern dominance of individuals on social media does not ruin the original design or justifications for the privilege because: 1) public officials have always accepted a distinct scrutiny from the *entire* public by virtue of taking public office; and 2) social media cannot expand the scope of public officials that

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<sup>73</sup> See *supra* note 72.

<sup>74</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 336–39, 342–48; see also *infra* Sections II.A.1, II.B.1.

<sup>75</sup> See *infra* Sections II.A.1, II.B.1.

<sup>76</sup> See *infra* Section II.A.1.

<sup>77</sup> See *id.*

qualify for application of the privilege because social media cannot manufacture more public officials.<sup>78</sup>

Second, the privilege should only apply to reporting about public figures that is published by those that qualify as press, and also by extension, to those individuals that act as press-sources for the report at issue in the lawsuit. The second section of this Article demonstrates how the Supreme Court focused upon protection of the press specifically when it established the privilege in the public figure context.<sup>79</sup> The intended purpose of the privilege in the public figure context is to protect reporting about the: 1) involvement of public figures in governmental affairs (including influence on public officials); and 2) conduct of public figures for purposes of allowing the public to consider credibility issues when determining how much influence to afford such public figures.<sup>80</sup>

The next section of this Article extensively addresses the hesitation by many courts to limit the privilege to press defendants because of the perceived difficulty of defining who may qualify as being part of “the press.”<sup>81</sup> This Article proposes a press test that would apply the privilege to those that truly satisfy the press function: any individual/entity that regularly engages in firsthand factual investigation and reporting of information to the public about public figure conduct and/or public figure involvement with governmental affairs such that it is reasonable to conclude that they seek to serve the press function in this area.<sup>82</sup> And again, this Article also proposes that the privilege should extend to individuals that act as sources for the report at issue in the lawsuit.<sup>83</sup> This press test *at least* covers the traditional professional press (which is the primary category intended in this area by the Supreme Court), while allowing courts flexibility to also apply the privilege to other individuals/nontraditional news entities that reasonably serve the same intended press function. This kind of test is not unreasonable, or even unusual, for the privilege context.<sup>84</sup> Categorical tests for who qualifies as a public official, pervasively famous public figure, and limited purpose public figures for the privilege all cover a fairly definite core target without

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<sup>78</sup> See *infra* Section II.A.2.

<sup>79</sup> See *infra* Section II.B.1.

<sup>80</sup> See *id.*

<sup>81</sup> See *infra* Section II.B.2.

<sup>82</sup> See *infra* Sections II.B.1–2.

<sup>83</sup> See *id.*

<sup>84</sup> See *id.*



providing “precise lines” for boundaries so that courts have flexibility to apply the substance of the test to varying circumstances.<sup>85</sup>

Those individuals and entities that would qualify as press have the access, resources, and central function to continue to make them the most conducive public agent to serve the intended purpose of the privilege in the public figure context.<sup>86</sup> Critically, limiting the privilege to the press (and press-sources) in the public figure context functionally prevents an overextension of the privilege to billions of social media posters who comment about a potentially limitless number of persons that may qualify as public figures through online activity.<sup>87</sup> The proposed press test would also disqualify those new era media entities that Justice Gorsuch believes have abandoned the pursuit of firsthand factual investigation in order to “monetize anything that garners clicks.”<sup>88</sup> Individuals and entities that *only* aggregate reports, information, and stories from other news media outlets or individuals will not qualify.<sup>89</sup> Meanwhile, journalists and news media outlets are incentivized to maintain the factual investigation component of reporting that has always defined the press.<sup>90</sup>

Though proponents of an expansive actual malice privilege may believe this partial focus (or limitation) of the privilege’s application in the public figure context is tough medicine, it provides courts that may consider removal of the privilege entirely with a practical compromise that addresses the most challenging concerns from the social media shift while allowing the privilege to continue in that context to serve the privilege’s core purpose.

## II. ANALYSIS

### A. *The privilege should remain applicable to speech and reporting about public officials from everyone.*

1. The privilege should not be removed or limited in the public official context because the core of the privilege (and First Amendment generally) has always been to provide protection

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<sup>85</sup> See *infra* Section II.B.2.e.i.

<sup>86</sup> See *infra* Sections II.B.1.d.iii, II.B.2.e.ii.

<sup>87</sup> See *id.*

<sup>88</sup> See *infra* Section II.B.2.e.ii.

<sup>89</sup> See *id.*

<sup>90</sup> See *id.*

for all speech and reporting about public officials.

*a. The Sullivan Court established both that: 1) criticism of public officials is the central purpose of the First Amendment; and 2) the privilege is necessary to protect both individuals and the press in this context.*

The privilege was established by the *Sullivan* Court in 1964 only to provide heightened protection for statements about public officials.<sup>91</sup> In *Sullivan*, the Commissioner of Public Affairs for Montgomery, Alabama (who acted as head of the police department) filed libel claims against *The New York Times* and individual civil rights leaders stemming from a full page advertisement because the Commissioner believed it accused him of threats and violence against Dr. Martin Luther King, Jr.<sup>92</sup> A showing of actual malice was required for punitive damages under Alabama law; however, the trial judge refused to instruct the jury that it must be “convinced” of an actual intent to harm or recklessness, and otherwise held that the verdict was not even required to “differentiate between compensatory and punitive damages.”<sup>93</sup> The trial judge rejected argument that such “rulings abridged the freedoms of speech and of the press that are guaranteed by the First and Fourteenth Amendments.”<sup>94</sup> The jury issued a verdict in favor of the Commissioner and awarded him the full \$500,000 he requested.<sup>95</sup> On appeal, “the Supreme Court of Alabama sustained the trial judge’s rulings and instructions in all respects,” including a “brief statement[]” which simply explained “that ‘The First Amendment of the U.S. Constitution does not protect libelous publications . . . .’”<sup>96</sup>

Justice Brennan delivered the opinion of the Supreme Court, which found that the Alabama rule on damages for libel actions was “constitutionally deficient” because it failed to provide necessary “safeguards” to protect both free speech and free press rights related to statements about government officials.<sup>97</sup> Specifically, the Alabama rule did not provide adequate protection within the context of a “libel action brought by a public official against critics

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<sup>91</sup>New York Times, Co. v. Sullivan, 376 U.S. 254, 280–83 (1964).

<sup>92</sup>*Id.* at 256, 258.

<sup>93</sup>*Id.* at 262.

<sup>94</sup>*Id.* at 262–63.

<sup>95</sup>*Id.* at 256.

<sup>96</sup>*Id.* at 264 (quoting New York Times Co. v. Sullivan 144 So.2d 25, 40 (Ala. 1962)).

<sup>97</sup>*Id.*

of his official conduct.”<sup>98</sup> The First Amendment required “a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>99</sup>

Justice Brennan built towards the Court’s adoption of this privilege by way of an extensive examination of the fundamental importance of both free debate and reporting about governmental issues.<sup>100</sup> Since defamation law pertains to speech about people, and not general issues or governmental institutions, the focus of this discussion was the right to criticize public officials with respect to their official conduct.<sup>101</sup> The entire case was framed “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>102</sup> The Court ultimately found that the freedom to criticize public officials outweighed considerations of potential harm that protection of erroneous statements may cause to “official reputation.”<sup>103</sup>

At the heart of the Court’s analysis was a lengthy discussion about the Court’s belief that a libel suit brought by a public official created the same kind of self-censorship as the infamous Alien and Sedition Act of 1798, which made it a crime to publish false statements about federal officials.<sup>104</sup> Though the Act was “never tested” by the Supreme Court, Congress later repaid fines levied under the Act and President Jefferson issued pardons (as well as fine remittance) because of the Act’s conflict with free speech and free press principles.<sup>105</sup> Several Justices also expressly assumed the Act’s invalidity, which “views reflect[ed] a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials,

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 279–80.

<sup>100</sup> *See id.* at 270–83.

<sup>101</sup> *See id.*

<sup>102</sup> *Id.* at 270 (citing *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949)); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937)) (emphasis added).

<sup>103</sup> *Id.* at 271–73.

<sup>104</sup> *Id.* at 272–80.

<sup>105</sup> *Id.* at 276 (citations omitted).

was inconsistent with the First Amendment.”<sup>106</sup> In what would become an important statement for future courts, Justice Brennan explained that it was this “great controversy over” the Act “which first crystallized a national awareness of the *central meaning* of the First Amendment.”<sup>107</sup>

The Court punctuated its analysis with an observation that the privilege was necessary to place individual speech and reporting on equal-footing with speech from public officials.<sup>108</sup> The “citizen-critic of [the] government” should be entitled to the same “actual malice” defamation standard enjoyed by most public officials regarding statements made in the discharge of their official duties.<sup>109</sup> “It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves.”<sup>110</sup> Justice Brennan concluded the Court’s adoption of the privilege by going so far as to elevate criticism of public officials from right to duty: “It is as much [the citizen’s] duty to criticize as it is the official’s duty to administer.”<sup>111</sup>

The *Sullivan* Court’s analysis regarding the necessity and purpose of the privilege precludes Justice Gorsuch’s thesis that the *Sullivan* Court only (or even primarily) had the professional news media in mind in the public official context. Indeed, the *Sullivan* Court adopted the privilege in large part because it is *every citizen’s* “duty” to criticize public officials if he or she in good faith believes it is warranted (even if erroneously).<sup>112</sup> This was the very reason why it was important to provide each and every “citizen-critic of [the] government” with a privilege that was on equal footing with the public official’s own speech.<sup>113</sup> There was no indication in *Sullivan* that a privilege designed to protect such reporting and speech about public officials could be vulnerable to the emergence of a broadened media landscape dominated by individuals (rather than news media organizations), even if such expansion came with a higher volume of inevitable erroneous statements. Though individuals in 1964 did not have the social media tool to express their

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<sup>106</sup> *Id.* (citing *Beauharnais v. Illinois*, 343 U.S. 250, 288–89 (1952) (Jackson, J. dissenting)); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (other citations omitted).

<sup>107</sup> *Id.* at 273 (emphasis added); *see also infra* 127–129.

<sup>108</sup> *See Sullivan*, 376 U.S. at 282.

<sup>109</sup> *See id.*

<sup>110</sup> *Id.* at 282–83.

<sup>111</sup> *Id.* at 282.

<sup>112</sup> *See id.*

<sup>113</sup> *See id.* at 282–83.

criticisms and accusations about public officials, the *Sullivan* Court contemplated that every “citizen-critic of the government” would be protected in whatever means they chose to publish such statements to meet their regular “duty” to criticize public officials.<sup>114</sup>

*b. Courts have consistently recognized the central purpose of the privilege (and the First Amendment generally) is to protect reporting and speech about public officials because of its fundamental importance to the democratic process.*

Since the *Sullivan* case involved a high-ranking city official, the Court explained in a footnote that it had “no occasion . . . to determine how far down into the lower ranks of government employees the ‘public official’ designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included.”<sup>115</sup> The Supreme Court decided another privilege case that involved a public official only two years later in *Rosenblatt v. Baer*.<sup>116</sup> Justice Brennan again delivered the opinion of the Court.<sup>117</sup> One potential purpose for the Court’s review could have been to provide further guidance on the scope of public officials that might be subject to the privilege from *Sullivan*.<sup>118</sup> Justice Brennan explained however that “[n]o precise lines need be drawn” to resolve the *Rosenblatt* case and instead focused the Court’s emphasis on the importance of the general “motivating force” underlying the privilege from *Sullivan*: “We expressed ‘a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that (such debate) may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.’”<sup>119</sup>

Justice Brennan explained that this general principle was “twofold.”<sup>120</sup> “There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues.”<sup>121</sup> Again, since

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<sup>114</sup> *See id.*

<sup>115</sup> *Id.* at 283 n.23.

<sup>116</sup> 383 U.S. 75 (1966).

<sup>117</sup> *Id.* at 77.

<sup>118</sup> *See id.*

<sup>119</sup> *Id.* at 85 (quoting *Sullivan*, 376 U.S. at 270).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

defamation pertains to reporting and speech about people, the *Rosenblatt* court again placed a heightened importance on the criticism of public officials.<sup>122</sup> “Criticism of government is at the very center of the constitutionally protected area of free discussion.”<sup>123</sup> This is because “[c]riticism of those responsible for government operations must be free, lest criticism of government itself be penalized.”<sup>124</sup> It was this emphasis that led the Court to explain that “[i]t is clear, therefore, that the ‘public official’ designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.”<sup>125</sup>

Courts reflecting back upon the landmark holding in *Sullivan* have also explained that its purpose was to confirm free speech and reporting about public officials as the very center of both the First Amendment and *Sullivan* privilege.<sup>126</sup> Relying upon *Sullivan*, federal circuit courts have exclaimed that “[t]he right of an American citizen to criticize public officials and policies and to advocate peacefully ideas for change is ‘the central meaning of the First Amendment.’”<sup>127</sup> Others have compared such right from *Sullivan* as the beating “heart of the First Amendment’s right of free speech.”<sup>128</sup> And others,

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<sup>122</sup> *See id.*

<sup>123</sup> *Id.* (emphasis added).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *See infra* notes 127–129.

<sup>127</sup> *Glasson v. City of Louisville*, 518 F.2d 899, 904 (6th Cir. 1975) (emphasis added) (citing *New York Times, Co. v. Sullivan*, 376 U.S. 254, 273 (1964)); *see generally* ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1965); *see also* *Weise v. Casper*, 593 F.3d 1163, 1171 (10th Cir. 2010) (Holloway, J., dissenting) (quoting *Sullivan*, 376 U.S. at 273) (“The right of an American citizen to criticize public officials and policies and to advocate peacefully ideas for change is ‘the central meaning of the First Amendment.’”); *Johnston v. City of Houston*, 14 F.3d 1056, 1061 (5th Cir. 1994) (quoting *Sullivan*, 376 U.S. at 269) (“The right of an American citizen to criticize public officials and policies and to advocate peacefully ideas for change is the central meaning of the First Amendment.”); *FEC v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 54 (2d Cir. 1980) (Kaufman, C.J., concurring) (citing *Sullivan*, 376 U.S. at 270) (explaining that the “Supreme Court had emphasized that freedom to criticize public officials and oppose or support their continuation in office constitutes the ‘central meaning’ of the First Amendment”).

<sup>128</sup> *Wilbur v. Mahan*, 3 F.3d 214, 215 (7th Cir. 1993) (citing *Sullivan*, 376 U.S. 254); *see also* *Kaluczky v. City of White Plains*, 57 F.3d 202, 210 (2d Cir. 1995) (citing *Sullivan*, 376 U.S. at 282) (“The right to criticize public officials is at the heart of the First Amendment’s right of free speech.”); *Brewer v. Town of Eagle*, 663 F. Supp. 3d 909, 923 (E.D. Wis. 2023) (citing *Sullivan*,

when considering the relative protection provided for different categories of speech and reporting, have explained that statements relating to the “alleged abuse of public office on the part of an elected official” are considered “a matter traditionally occupying the highest rung of the hierarchy of First Amendment values.”<sup>129</sup> And as Justice Brennan would again reiterate in an opinion issued two decades after *Sullivan*: “A citizen who criticizes a public official is shielded by the Speech and Press Clauses because ‘[i]t is as much his *duty* to criticize as it is the official’s duty to administer.’”<sup>130</sup>

It is not surprising that courts would continue to maintain this component of the First Amendment and privilege at the height of constitutional protection for both press and individual citizens. It is inherent within the very fabric of what it means to have a free democratic republic. As Justice Black provided in his own concurring opinion in *Sullivan*:

For a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it.<sup>131</sup>

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376 U.S. at 269–70) (“It is well established that the right to criticize public officials is at the heart of the First Amendment.”).

<sup>129</sup>*O’Connor v. Steeves*, 994 F.2d 905, 915 (1st Cir. 1993) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)); *see also* *Dougherty v. Sch. Dist. of Phila.*, 772 F.3d 979, 991 (3d Cir. 2014) (explaining that the *Philadelphia Inquirer’s* report “exposing [the government official’s] alleged misconduct is the archetype of speech deserving the highest rung of First Amendment protection.”); *Stump v. Richland Twp.*, 278 F. App’x 205, 206 (3d Cir. 2008) (“Speech that purports to expose wrongdoing by public officials occupies the highest rung of First Amendment protection.”); *Barnard v. Jackson Cnty.*, 43 F.3d 1218, 1225 (8th Cir. 1995) (citing *Steeves*, 994 F.2d at 915) (“Speech disclosing allegations of criminal activity allegedly committed by elected public officials and allegations of official misconduct by an incumbent elected official are matters occupying ‘the highest rung of hierarchy of First Amendment values.’”); *Stilp v. Contino*, 743 F. Supp. 2d 460, 469 (M.D. Pa. 2010) (citations omitted) (“At the heart of First Amendment freedom of speech is the ability to comment on the conduct of public officials and thereby reasonably influence government action. . . . Such political speech is afforded the highest protection available under the First Amendment.”).

<sup>130</sup>*McDonald v. Smith*, 472 U.S. 479, 489 (1985) (Brennan, J., concurring) (citing *Sullivan*, 376 U.S. at 282).

<sup>131</sup>*Sullivan*, 376 U.S. at 297 (Black, J., concurring) (citation omitted) (quoting 1 TUCKER, BLACKSTONE’S COMMENTARIES (1803)).

Or as Justice Goldberg explained:

The theory of our Constitution is that *every citizen* may speak his mind *and every newspaper* express its view on matters of public concern and may not be barred from speaking or publishing because those in control of government think that what is said or written is unwise, unfair, false, or malicious. In a democratic society, one who assumes to act for the citizens in an executive, legislative, or judicial capacity must expect that his official acts will be commented upon and criticized. Such criticism cannot, in my opinion, be muzzled or deterred by the courts at the instance of public officials under the label of libel.<sup>132</sup>

In sum, the *Sullivan* Court established that the right to report and speak about public officials is the defining characteristic of the First Amendment.<sup>133</sup> The actual malice privilege is necessary to protect such right for both the press and individual “citizen-critics” precisely because the right is so important and the cost of undue self-censorship so high.<sup>134</sup> The original scope of the privilege in the public official context should therefore be recognized as so entrenched in the core purpose of the First Amendment (and democratic duties of every citizen) that it cannot be susceptible to repeal because of the rise of social media—at least not without compelling evidence that the substance of the privilege is inconsistent with a broad landscape dominated by individuals. *Sullivan* also precludes such a showing.

2. The rise of an individual-dominated social media landscape does not conflict with the substance of *Sullivan*’s privilege in the public official context.

*a. The modern public official accepts the same invitation for public scrutiny.*

In *Sullivan*, Justice Goldberg identified a key justification for the privilege as it pertains to public officials: “In a democratic society, one who assumes to act for the citizens in an executive, legislative, or judicial capacity

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<sup>132</sup>*Id.* at 298–99 (Goldberg, J., concurring) (emphasis added).

<sup>133</sup>*See id.* at 273 (majority opinion).

<sup>134</sup>*Id.* at 282.



must expect that his official acts will be commented upon and criticized.”<sup>135</sup> And while the *Rosenblatt* court refused to provide “precise lines” for just how far down the government ladder the privilege would reach, Justice Brennan explained that the “position must be one which would *invite* public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.”<sup>136</sup> This specific justification for the privilege, which is unique to the public official, was reaffirmed in *Gertz v. Robert Welch, Inc.* when the Court explained why the privilege would continue to apply to statements about public officials, but not to truly private figures:

More important than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. 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. And society’s interest in the officers of government is not strictly limited to the formal discharge of official duties. As the Court pointed out in *Garrison v. Louisiana* [(in 1964)] the public’s interest extends to ‘anything which might touch on an official’s fitness for office. . . . Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official’s private character.’”<sup>137</sup>

This consideration remains the same whether a person obtained public office when newspapers dominated the media in 1964, or in 2024 when public officials are scrutinized by individuals on Facebook or TikTok. In accepting public office, the public official has always accepted the invitation for closer scrutiny, reporting, and speech from the *entire* public. While the *volume* of published comments and reports about public officials has increased with social media, the actual *scope or reach* of the public official’s invitation for scrutiny has not changed.

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<sup>135</sup> *Id.* at 299 (Goldberg, J., concurring).

<sup>136</sup> 383 U.S. 75, 86 n.13 (1966) (emphasis added).

<sup>137</sup> 418 U.S. 323, 344–45 (1974) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964)).

*b. Social media cannot broaden the scope of the privilege with respect to reporting and speech about public officials because it cannot manufacture more public officials.*

It is noteworthy that Justice Gorsuch's strongest free speech concern about the shift to a social media landscape dominated by individuals relates to the potential chilling effect that a private figure may experience through fear that she could be transformed into a public figure by virtue of online posting or engagement on public issues.<sup>138</sup> An obvious, yet important, point is that social media cannot widen the *scope or reach* of the privilege with respect to reporting or speech about public officials because social media cannot manufacture more public officials in the way that it might manufacture more public figures. Again, at least theoretically, courts may eventually trend towards finding that more and more private figures qualify as public figures through online followings and engagement on social media. However, a private figure only becomes a public official by obtaining public office through public election, appointment, or employment. Social media cannot expand the scope of persons qualifying as public officials and therefore cannot broaden the reach of the privilege beyond what was substantively intended by the *Sullivan* Court.

*B. The privilege should be retained for reporting about public figures by the press and extended to individual sources for the report at issue.*

1. The founding cases which extended the privilege to the public figure context focused upon protection of the press function.

*a. Curtis Pub. Co. v. Butts: Focus upon the press function because of a substantively different need for a privilege regarding public figures.*

After *Sullivan*, the Supreme Court rather quickly turned to consideration of whether the privilege should extend in some way to speech and reporting about non-governmental persons.<sup>139</sup> In 1967, the Court considered this issue

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<sup>138</sup> See *Berisha v. Lawson*, 141 S. Ct. 2424, 2429 (2021) (Gorsuch, J., dissenting).

<sup>139</sup> See *Time, Inc. v. Hill*, 385 U.S. 374, 380–91 (1967); *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 154 (1967).

in both *Time, Inc. v. Hill*<sup>140</sup> and *Curtis Pub. Co. v. Butts*.<sup>141</sup> In *Hill*, the Court found that the actual malice privilege should apply to a statutory false light/right of privacy claim brought by a private figure when the subject of the false light claim was a matter of public interest.<sup>142</sup> The Court then held in *Butts* that the privilege should also apply in libel cases when the plaintiff is a “public figure[.]”<sup>143</sup>

Though the Supreme Court’s opinion in *Hill* predated *Butts* by six months, the *Butts* case is considered the founding case in the public figure context because “the majority opinion in [*Hill*] was limited to the consideration of nondefamatory matter.”<sup>144</sup> The *Butts* case was a consolidated appeal which involved two libel cases brought against news organizations.<sup>145</sup> Wallace Butts, the University of Georgia Athletic Director (though not a government employee because he was employed by a private association), sued the Associated Press for a report that accused Butts of fixing a college football game against rival University of Alabama.<sup>146</sup> General Edwin Walker, a retired Army general with political aspirations, sued the Curtis Publishing Company for a report which accused him of encouraging rioters (who were rioting against court ordered desegregation at the University of Mississippi) “to use violence” against federal and university authorities.<sup>147</sup> General Walker had made “strong” statements against federal intervention in desegregation which had “received wide publicity” and created “his own following.”<sup>148</sup>

*Butts* was decided by plurality opinions, all of which concluded that a privilege should be extended to reporting about public figures by the press.<sup>149</sup> Justice Harlan delivered the initial opinion introducing the Court’s judgments.<sup>150</sup> He introduced the case by noting that a “sharp division” existed amongst courts about whether the privilege should apply “only in actions

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<sup>140</sup> 385 U.S. at 380–91.

<sup>141</sup> 388 U.S. at 154.

<sup>142</sup> 385 U.S. at 380–91.

<sup>143</sup> 388 U.S. at 154.

<sup>144</sup> *Id.* at 148 n.11.

<sup>145</sup> *Id.* at 134–40.

<sup>146</sup> *Id.* at 135–40.

<sup>147</sup> *Id.* at 140–42.

<sup>148</sup> *Id.* at 140.

<sup>149</sup> *See id.* at 154–55, 162–65, 170–71, 172–73.

<sup>150</sup> *Id.* at 133.

brought by public officials. . . .”<sup>151</sup> In order to potentially expand the privilege beyond statements made about public officials, the Court had to first consider the categorical scope of the First Amendment itself.<sup>152</sup> Justice Harlan explained that the First Amendment is not confined to “political expression or comment upon public affairs” and that the “freedom of discussion ‘must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.’”<sup>153</sup> “This carries out the intent of the Founders who felt that a *free press* would advance ‘truth, science, morality, and arts in general’ as well as responsible government.”<sup>154</sup> Since the First Amendment was not only concerned about protection of political speech and reporting, there was at least the possibility that the privilege should apply to speech and reporting about non-governmental persons.<sup>155</sup>

At the same time however, Justice Harlan acknowledged that the Court simply could not ignore that the *Sullivan* Court adopted the privilege specifically to protect criticism of public officials.<sup>156</sup> He noted that it would be improper “[t]o take the rule found appropriate” in *Sullivan*—which was established to “resolve the ‘tension’ between” the right to report/speak about public officials and the official’s interest in her official reputation—and apply such rule “throughout the realm of the broader constitutional interest. . . .”<sup>157</sup> This would impute “an unintended inexorability” for the privilege “at the threshold of this new constitutional development.”<sup>158</sup>

In fact, Justice Harlan recognized that “*none* of the particular considerations involved in [*Sullivan*] is present” in a public figure case.<sup>159</sup> A libel suit brought by a non-governmental person “cannot be analogized to prosecutions for seditious libel.”<sup>160</sup> Additionally, a non-governmental person does not have a “special privilege protecting his utterances” in the way which a public official does, so there is no need for an additional privilege to place

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<sup>151</sup> *Id.* at 134 (emphasis added).

<sup>152</sup> *See id.* at 147–49.

<sup>153</sup> *Id.* at 147 (quoting *Time, Inc. v. Hill*, 385 U.S. at 388 (1967)).

<sup>154</sup> *Id.* (emphasis added).

<sup>155</sup> *Id.* at 147–48.

<sup>156</sup> *Id.* at 148 (citing *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966)).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 154 (emphasis added).

<sup>160</sup> *Id.*

individuals or the press on equal footing in this context.<sup>161</sup> Though speech and reporting interests exist with respect to public issues involving non-governmental persons, such interests are simply not the same.<sup>162</sup> The Court had to “undertake a parallel evaluation” to determine whether the privilege should also provide added protection for statements made about non-governmental persons.<sup>163</sup>

In contrast to the *Sullivan* Court’s dual emphasis on the interests of individual citizens and the press, Justice Harlan framed the Court’s resolution of the privilege’s application to statements about public figures as a balancing of protection for the press specifically:

The resolution of the uncertainty in this area of libel actions requires, at bottom, some further exploration and clarification of the relationship between libel law and the freedom of speech and press, lest the New York Times rule become a talisman which *gives the press* constitutionally adequate protection only in a limited field, or, what would be equally unfortunate, one which goes far to *immunize the press* from having to make just reparation for the infliction of needless injury upon honor and reputation through false publication.<sup>164</sup>

Justice Harlan rooted First Amendment rights in a “guarantee to individuals of their personal right to make their thoughts public and put them before the community . . . as it is a social necessity required for the ‘maintenance of our political system and an open society.’”<sup>165</sup> Though individuals and press shared these rights, he provided a quote which emphasized the press function in this context: “History shows us that the Founders were not always convinced that unlimited discussion of public issues would be ‘for the benefit of all of us’ but that they firmly adhered to the proposition that the ‘*true liberty of the press*’ permitted ‘every man to public his opinion.’”<sup>166</sup>

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<sup>161</sup> *Id.*

<sup>162</sup> *See id.* at 148, 154–55.

<sup>163</sup> *Id.* at 148.

<sup>164</sup> *Id.* at 135. (emphasis added).

<sup>165</sup> *Id.* at 149.

<sup>166</sup> *Id.* (quoting *Respublica v. Oswald*, 1 U.S. (1 Dall.) 319, 325, 1788 WL 179 (Pa. 1788)) (emphasis added).

As Justice Harlan proceeded to weigh the countervailing “legitimate interests of others” that might be affected by such freedoms, he focused entirely upon potential limitations of the professional press.<sup>167</sup> He led such discussion with the point that “[a] business ‘is not immune from regulation because it is an agency of the press.’”<sup>168</sup> Moreover, “[t]he publisher of a newspaper has no special immunity from the application of general laws” and otherwise “has no special privilege to invade the rights and liberties of others.”<sup>169</sup> However, as the *Sullivan* case makes clear, the fact that “protected activity” might “in some respect be subject to sanctions, it “is not open to all forms of regulation.”<sup>170</sup> Justice Harlan stressed a focus on a core protection of the press in this context again by explaining that “[t]he guarantees of freedom of speech and press were not designed to prevent ‘the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential . . . .’”<sup>171</sup> The “touchstones” of such protections were explained as core press protections:

[A]cceptable limitations [of First Amendment rights] must neither affect “the impartial distribution of news” and ideas[,] nor because of their history or impact constitute a special burden on the press[,] nor deprive our free society of the stimulating benefit of varied ideas because their purveyors fear physical or economic retribution solely because of what they choose to think and publish.”<sup>172</sup>

Justice Harlan ultimately concluded that some privilege should extend to the press specifically because “the public interest in the circulation of the materials here involved, and publisher’s interest in circulating them, is not less than that involved in [*Sullivan*].”<sup>173</sup> He provided justification for application against the plaintiff “public figures” in the case because of their

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<sup>167</sup> See *id.* at 150–51.

<sup>168</sup> *Id.* at 150 (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132–33 (1937)).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* (quoting 2 COOLEY, CONSTITUTIONAL LIMITATIONS 886 (8th ed. 1927)) (emphasis added).

<sup>172</sup> *Id.* at 150–51 (quoting *Associated Press*, 301 U.S. at 133; *Grosjean v. Am. Press Co. Inc.*, 297 U.S. 233 (1936)).

<sup>173</sup> *Id.* at 154.

intentional role in the public sphere.<sup>174</sup> Butts, an athletic director at a major university, “may have attained that status by position alone,” while General Walker attained this status “by his purposeful activity amounting to a thrusting of this personality into the ‘vortex’ of an important public controversy. . . .”<sup>175</sup>

Importantly, Justice Harlan’s opinion provided different language for the privilege’s standard in the public figure context than had been established by the *Sullivan* Court for public officials.<sup>176</sup> While *Sullivan*’s legal standard for statements about public officials was expressly applicable to individuals and press, Justice Harlan’s standard with respect to statements about public figures was entirely tailored for use by the press:

We consider and would hold that a ‘public figure’ who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.<sup>177</sup>

Indeed, the sole citation provided by Justice Harlan for this standard was to a treatise regarding “Freedom of the Press from Hamilton to the Warren Court . . . .”<sup>178</sup>

Chief Justice Warren issued an opinion concurring in the result.<sup>179</sup> He summarized that all members of the Court agreed “that the basic considerations underlying the First Amendment require that some limitations be placed on the application of state libel laws to ‘public figures’ as well as ‘public officials.’”<sup>180</sup> He explained that, since the World War II era, “there has been a rapid fusion of economic and political power, a merging of science, industry and government, and a high degree of interaction between the intellectual, governmental, and business worlds.”<sup>181</sup> “This blending of

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<sup>174</sup> *Id.* at 155.

<sup>175</sup> *Id.*

<sup>176</sup> *See id.*

<sup>177</sup> *Id.* (citing Sulzberger, *Responsibility and Freedom*, in HAROLD L. NELSON, *FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT* 409, 412 (Harold L. Nelson ed. 1967)).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 162 (Warren, C.J., concurring).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 163.

positions and power has also occurred in cases of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions, or by reason of their fame, shape events in areas of concern to society at large.”<sup>182</sup> His conclusion was that “[o]ur citizenry has a legitimate and substantial interest in the conduct of such persons, and *freedom of the press* to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of ‘public officials.’”<sup>183</sup>

Chief Justice Warren’s only substantive disagreement about the privilege in the public figure context was that the language of the same actual malice privilege standard from *Sullivan* should apply to the privilege in the public figure context because it is a “manageable standard, readily stated and understood, which also balances to a proper degree the legitimate interests traditionally protected by the law of defamation.”<sup>184</sup> He did not however express objection to the sentiment of Justice Harlan’s proposed standard which applied the privilege specifically to the press.<sup>185</sup>

Justice Black also issued a concurring opinion, which agreed with the privilege established by Justice Harlan’s opinion, but dissented in the Court’s decision to find that the privilege’s standard was met in the libel case against Butts.<sup>186</sup> As he had explained in his opinions in *Sullivan* and *Rosenblatt*, Justice Black believed that the First Amendment should provide an absolute privilege for the press: “I think it is time for this Court to abandon [*Sullivan*] and adopt the rule to the effect that the First Amendment was intended to leave the press free from the harassment of libel judgments.”<sup>187</sup>

*b. Time, Inc. v. Hill: The free press right is protected “for the benefit of all of us.”*

The *Hill* case involved a relatively narrow issue with respect to the privilege’s application to a New York statute that had provided a cause of action to preclude the unauthorized use of a person’s name or picture in advertising.<sup>188</sup> The statute had “been held in some circumstances to authorize

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<sup>182</sup> *Id.* at 163–64.

<sup>183</sup> *Id.* at 164 (emphasis added).

<sup>184</sup> *Id.*

<sup>185</sup> *See id.* at 163–64.

<sup>186</sup> *Id.* at 170–72 (Black, J., concurring & dissenting).

<sup>187</sup> *Id.* at 172.

<sup>188</sup> *See* 385 U.S. 374, 380–84 (1967).



a remedy against the press and other communications media which publish the names, pictures, or portraits of people without their consent,” including “a right of action when [the plaintiff’s] name, picture or portrait is the subject of a ‘fictitious’ report or article.”<sup>189</sup> *Hill* involved a rather strange set of facts in which a father (Hill) sued the publisher of *Life* magazine for its use of the photograph of a “reenactment” of a play that the magazine reviewed in the subject article.<sup>190</sup> The play was based upon a novel, which was inspired by the real story of Hill’s family being held hostage in their home for days by three escaped convicts in 1952.<sup>191</sup> Hill’s problem with the photograph was that *Life* had taken the play’s actors to Hill’s former home for the photoshoot (the scene of the hostage situation) and depicted the father and daughter actors physically fighting their captives.<sup>192</sup> Hill argued that the photograph gave a false impression of the family’s actual experience as the family maintained that the convicts had “treated the family courteously” and “had not been at all violent.”<sup>193</sup>

Justice Brennan delivered the opinion of the Court on the privilege issue.<sup>194</sup> The Court’s opinion was important in the sense that it explained that the protected interests of free speech and a free press extend beyond “political expression” to public issues that do not strictly pertain to the government.<sup>195</sup> Justice Brennan noted that the “principles pronounced in [*Sullivan*] guide[d]” the Court to its conclusion that “constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.”<sup>196</sup> He explained however that the holding was limited to the “discrete context” of the application of the New York statute to cases “involving private individuals,” and that different considerations would be necessary for a libel action brought by a public individual on a public issue.<sup>197</sup>

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<sup>189</sup> *Id.* at 382, 384.

<sup>190</sup> *Id.* at 377–79.

<sup>191</sup> *Id.* at 376–77.

<sup>192</sup> *Id.* at 377–78.

<sup>193</sup> *Id.* at 378.

<sup>194</sup> *Id.* at 376.

<sup>195</sup> *Id.* at 388.

<sup>196</sup> *Id.* at 387–88, 389–90.

<sup>197</sup> *See id.* at 390–91.

It is noteworthy that the *Hill* court also focused upon the press when describing the danger that would result if the substance of the privilege from *Sullivan* was not applied to the case.<sup>198</sup> Justice Brennan concluded that:

[W]e create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, particularly as related to nondefamatory matter.<sup>199</sup>

If the burden of proof on the plaintiff here was left to a “negligence test,” such result “would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait.”<sup>200</sup> He again observed that allowing “sanctions against either innocent or negligent misstatement would present a grave hazard of discouraging the press from exercising the constitutional guarantees.”<sup>201</sup> Justice Brennan emphasized a principle that is crucial to fully understanding the free press right, in that such right is “not for the benefit of the press so much as for the benefit of all of us” since a “broadly defined freedom of the press assures the maintenance of our political system and an open society.”<sup>202</sup>

c. *Gertz v. Robert Welch, Inc.: Confirmation of a press-focused privilege with respect to public figures.*

The development of a figure-based privilege (public official/public figure) took an unexpected turn four years later in *Rosenbloom v. Metromedia*, where a plurality opinion led by Justice Brennan sought to expand the privilege's application to include any statements related to a matter of public interest regardless of whether the defamation plaintiff was a public official or public figure.<sup>203</sup> Justice Brennan argued that “[i]f a matter is a subject of public or general interest, it cannot suddenly become less so

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<sup>198</sup> *See id.* at 388–89.

<sup>199</sup> *Id.* at 389.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> 403 U.S. 29, 34–35, 43–44 (1971), *overruled by* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

merely because a private individual is involved, or because in some sense the individual did not voluntarily choose to become involved.”<sup>204</sup> Under *Rosenbloom*, a private individual would have to overcome the privilege if the defamatory statements related to a public issue.<sup>205</sup>

*Rosenbloom* was overturned three years later in *Gertz v. Robert Welch, Inc.*<sup>206</sup> Elmer Gertz was a lawyer that represented a family in their lawsuit against the Chicago police officer that shot their son.<sup>207</sup> Criminal charges were also separately brought against the police officer.<sup>208</sup> Robert Welch, Inc. (RWI) published a monthly magazine called the “American Opinion.”<sup>209</sup> RWI issued a number of articles that claimed there was a national conspiracy to discredit law enforcement in support of a Communist takeover of the United States.<sup>210</sup> As part of this series, RWI published an article that falsely claimed that Gertz had been the “architect” behind a plot to “frame” the police officer for the shooting as “part of the Communist campaign against the police.”<sup>211</sup> The article also falsely claimed that Gertz had a criminal record.<sup>212</sup>

Gertz filed a libel suit against RWI.<sup>213</sup> The jury returned a verdict in favor of Gertz which did not include an application of the actual malice privilege because the jury did not believe Gertz was a public figure.<sup>214</sup> The district court however issued a judgment in favor of RWI, explaining that the actual malice privilege should have applied to Gertz regardless of his status because RWI’s article related to an issue of public concern.<sup>215</sup> On appeal, the Supreme Court held that the *Rosenbloom* plurality had incorrectly “abjured” the “distinction between public officials and public figures on the one hand and private individuals on the other.”<sup>216</sup> The Court confirmed application of the actual malice privilege to “public officials” and “public persons” as

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<sup>204</sup> *Id.* at 43.

<sup>205</sup> *Id.*

<sup>206</sup> 418 U.S. at 332.

<sup>207</sup> *Id.* at 325.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 325–26.

<sup>212</sup> *Id.* at 326.

<sup>213</sup> *Id.* at 327.

<sup>214</sup> *Id.* at 328–29.

<sup>215</sup> *Id.* at 329.

<sup>216</sup> *Id.* at 337.

established by *Sullivan* and *Butts*.<sup>217</sup> However, the Court held that the First Amendment does not similarly require application of the privilege to defamation claims brought by truly private figures.<sup>218</sup>

Similar to Justice Harlan's opinion in *Butts*, the *Gertz* court framed the "principal issue" for the case solely upon the press function: "whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements."<sup>219</sup> Upon reviewing the purpose of the privilege adopted in *Sullivan* and extended in *Butts*, the Court explained that "our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship."<sup>220</sup> "Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties."<sup>221</sup>

Also similar to Justice Harlan's opinion in *Butts*, the *Gertz* court weighed the countervailing interest of the defamation plaintiff only against that of the press in rejecting an "absolute protection for the communications media" because it would require "a total sacrifice of the competing value served by the law of defamation" in compensating "individuals for the harm inflicted on them by defamatory falsehood."<sup>222</sup> The Court concluded that "[s]ome tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury."<sup>223</sup> After reciting the actual malice standard for the privilege, the *Gertz* court concluded that it was "correct" for the Court to have established that "protection of the [*Sullivan*] privilege should be available to publishers and broadcasters of defamatory falsehood concerning public officials and public figures."<sup>224</sup>

The *Gertz* court rejected the potential inconsistencies that were inherent in a "theoretical" option of simply weighing "the balance between the needs

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<sup>217</sup> *Id.* at 343.

<sup>218</sup> *See* *Talley v. Time, Inc.*, 923 F.3d 878, 898 n.20 (10th Cir. 2019) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345–48 (1974)).

<sup>219</sup> *Gertz*, 418 U.S. at 332.

<sup>220</sup> *Id.* at 340.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 341.

<sup>223</sup> *Id.* at 342.

<sup>224</sup> *Id.* at 343 (citations omitted).

of the press and the individual's claim to compensation from wrongful injury . . . on a case-by-case basis."<sup>225</sup> The Court stuck with the premise of *Sullivan* and *Butts* in focusing upon "defamation plaintiffs," namely, limitation of the privilege to plaintiffs that qualified as public officials or public figures.<sup>226</sup> Beyond the fundamental interest in protecting the ability of a free press to report on these figures, the privilege was justified by two characteristics of such plaintiffs: 1) they usually "enjoy significantly greater access" for self-help to respond to defamatory statements through the press; and 2) they have accepted or assumed a role which invites "closer public scrutiny."<sup>227</sup>

As described in Section I(A), the *Gertz* court outlined the three categories of persons to which the actual malice privilege would apply: 1) the government official; 2) the pervasively famous public figure; and 3) the limited purpose public figure.<sup>228</sup> Though Justice Harlan's plurality in *Butts* had proposed a privilege standard using language tailored to the press,<sup>229</sup> the *Gertz* court confirmed Chief Justice Warren's proposal that the language of the standard from *Sullivan* (falsity or reckless disregard of truth) should apply to a defamation claim brought by a public figure.<sup>230</sup> The Court found that while *Gertz* had attained some notoriety as a local attorney, he simply did not have a "general fame" or influence what was great enough to qualify him as a pervasively famous public figure.<sup>231</sup> The Court found that *Gertz* otherwise did not qualify as a limited purpose public figure because he did not engage with the news media about the pending lawsuit or criminal charges involving the police officer.<sup>232</sup> Though *Gertz* was involved in a matter that was newsworthy, he "plainly did not thrust himself into the vortex of this public issue" and did not "engage the public's attention in an attempt to influence its outcome . . . ."<sup>233</sup> The actual malice privilege did not apply for his libel claim against RWI.<sup>234</sup>

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<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 343–44.

<sup>227</sup> *Id.* at 344–45.

<sup>228</sup> *Id.* at 343–45, 351–52.

<sup>229</sup> *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 155 (1967).

<sup>230</sup> *Gertz*, 418 U.S. at 342.

<sup>231</sup> *Id.* at 350–51.

<sup>232</sup> *Id.* at 352.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

Though the *Gertz* court confirmed a framework for the privilege going forward, subsequent courts have noted that its analysis and emphasis with respect to the press left an open question about whether the privilege is equally applicable to nonpress defendants.<sup>235</sup> Several federal circuit courts have however held that the privilege's application should not distinguish between press and nonpress defendants, largely because of the perceived difficulty in making such distinction.<sup>236</sup> A minority of courts have however disagreed and have denied application of the privilege to a nonpress defendant.<sup>237</sup>

*d. Application of the founding principles to this Article's proposal that the press should retain the privilege for reporting about public figures.*

- i. Some application of the privilege must remain because public figures assert an ever-increasing influence in governmental affairs and the public's resolution of important public issues.

The key observation for the privilege's extension to the public figure context was made by Chief Justice Warren in *Butts* regarding the influence of the modern public figure.<sup>238</sup> There are many non-governmental persons

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<sup>235</sup> See *Hutchinson v. Proxmire*, 443 U.S. 111, 133 (1979) (explaining that, within the context of a non-governmental plaintiff case, the Supreme Court had not yet specifically answered the question of whether the privilege applies to an individual defendant as it had to the press); *Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1284, 1290 (9th Cir. 2014).

<sup>236</sup> See *Cox*, 740 F.3d at 1290–91; *Snyder v. Phelps*, 580 F.3d 206, 219 n.13 (4th Cir. 2009) (“Any effort to justify a media/nonmedia distinction rests on unstable ground, given the difficulty of defining with precision who belongs to the ‘media.’”); *Flamm v. Am. Ass’n of Univ. Women*, 201 F.3d 144, 149 (2d Cir. 2000) (“[A] distinction drawn according to whether the defendant is a member of the media or not is untenable.”); *In re IBP Confidential Bus. Documents Litig.*, 797 F.2d 632, 642 (8th Cir. 1986); *Garcia v. Bd. of Educ.*, 777 F.2d 1403, 1410 (10th Cir. 1985); *Avins v. White*, 627 F.2d 637, 649 (3d Cir. 1980); *Davis v. Schuchat*, 510 F.2d 731, 734 n.3 (D.C. Cir. 1975).

<sup>237</sup> See, e.g., *Harris v. Quadracci*, 856 F. Supp. 513, 521 (E.D. Wis. 1994) (citing *Denny v. Mertz*, 318 N.W.2d 141, 152–53 (1982) (“[T]he Wisconsin Supreme Court declined to read *Gertz* as affording First Amendment protection to nonmedia defendants and held that the nonmedia defendant's liability for the statement at issue in that case be determined according to the state's common law of defamation.”)); *Bussie v. Larson*, 501 F. Supp. 1107, 1111 (M.D. La. 1980) (holding that the *Sullivan* privilege applies only to press defendants); *Lowell v. Wright*, 512 P.3d 403, 422 (Or. 2022) (same).

<sup>238</sup> *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring).

who hold such power that they become “intimately involved” in how governmental officials resolve “important public questions,” or are otherwise so famous that they “shape events in areas of concern to society at large.”<sup>239</sup> The *Gertz* court carried this observation into a formal public figure category if the non-governmental person achieves “such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts” (pervasively famous public figures).<sup>240</sup> Because these pervasively famous public figures have such a concrete influence on the resolution of public issues (including by direct influence upon public officials themselves), the public “has a legitimate and substantial interest” in being informed about their involvement with government affairs, as well as other conduct for purposes of determining credibility.<sup>241</sup> Though this public interest is different in kind from the interest described in the public official context, it is “as crucial as it is in the case of ‘public officials.’”<sup>242</sup>

As powerful as such figures may have been in the era when *Hill* and *Gertz* were decided, it must be acknowledged that the power and influence of pervasively famous public figures has increased immensely with the growth of social media.<sup>243</sup> Whereas pervasively famous public figures used to be able to spread their views only by virtue of interviews or public speaking appearances, such figures can now immediately circulate their views to the world in an unfiltered and unlimited fashion through their social media accounts. Some pervasively famous public figures have hundreds of millions of direct followers, which may then forward such posts further and further.<sup>244</sup> This massive increase in the influence provided to these public figures by social media makes the need for some retention of the privilege paramount.

The same is true for limited purpose public figures in the focused context of their influence. A person who has achieved notoriety and influence in the “vortex” of a particular public controversy wields a comparable modern power through social media’s immediacy, reach, and unlimited opportunity for comment.<sup>245</sup> Take for example the retired General Walker from the *Butts*

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<sup>239</sup> *Id.* at 163–64.

<sup>240</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974).

<sup>241</sup> *Butts*, 388 U.S. at 164 (Warren, C.J., concurring).

<sup>242</sup> *Id.*

<sup>243</sup> See Stacy Jo Dixon, *Instagram Accounts with the Most Followers Worldwide as of July 2023*, STATISTA (Aug. 30, 2023), <https://www.statista.com/statistics/421169/most-followers-instagram/>.

<sup>244</sup> *Id.*

<sup>245</sup> See generally *Butts*, 388 U.S. at 140–41.

case, who had been publicly speaking against federal intervention in desegregation (and gaining a large personal following as a result) before he personally attended and encouraged the riot at the University of Mississippi.<sup>246</sup> General Walker would now have the ability to continually influence *anyone* interested in that important public issue through an active social media effort. The public's need for a privilege to cover reporting about General Walker would be even greater in today's media landscape than it was when *Butts* was decided.

- ii. It is *less* critical that *individuals* retain the privilege in the public figure context than it is in the public official context.

Though it is vital that some privilege remain to protect dissemination of information to the public about public figures, it is less important that individuals retain a privilege in this area than it is for their speech about public officials. As Justice Harlan makes clear in *Butts*, the individual citizen's interest in the public official context is fundamentally different because it is connected to their ability to participate in the democratic process by speaking out about public officials.<sup>247</sup> The privilege exists within the public official context specifically to protect against a chilling effect similar to that of a sedition law, which prevents criticism in a democratic system that depends upon (and is defined by) its very ability to criticize and vote-out public officials.<sup>248</sup> It cannot be understated that the privilege's existence in the public official context is tied to the "citizen-critic's" fundamental "duty" to speak about public officials.<sup>249</sup> This direct connection to the democratic process does not exist between the individual and another non-governmental person who qualifies as a public figure.

Additionally, the individual does not face an uneven playing field with a public figure in terms of privileged speech. Whereas the *Sullivan* Court emphasized the need to arm "citizen-critics" with a similar privilege that exists for public officials speaking about issues pertaining to their duties, a public figure does not have such a privilege generally.<sup>250</sup> In fact, in a social media age where individuals now have powerful tools to spread comments

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<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 153–55.

<sup>248</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273–76 (1964); *Butts*, 388 U.S. at 153–54.

<sup>249</sup> *Sullivan*, 376 U.S. at 282; *Butts*, 388 U.S. at 154.

<sup>250</sup> *Sullivan*, 376 U.S. at 282.



about public figures, it is the public figure who might argue that it is unfair that she does not carry an equal privilege to respond to such individuals.

iii. The press retains the privilege in this context “for the benefit of all of us.”

Though individuals would lose an added protection from defamation claims for their own statements about public figures under this Article’s proposal, the public would not lose the intended benefit of the privilege in the public figure context—to learn about public figure involvement in government affairs and public figure conduct as it may bare upon credibility.<sup>251</sup> While billions of individuals have the ability to defame a public figure on social media, the vast majority of such individuals are not able to provide non-public, newsworthy information about public figures, especially pervasively famous public figures.<sup>252</sup> And those that can, often do so as sources for the press, since the press still carries a greater sense of legitimacy amongst the vast majority of adults in the United States than social media.<sup>253</sup>

In comparison to the vast majority of individuals, it is the traditional professional press that most consistently devotes necessary resources and time to the rigorous (and expensive) tasks of factual investigation, source building, vetting, and regular reporting about public figures to the public.<sup>254</sup> Indeed, one of the distinguishing characteristics of a public figure is his or her access to the press for self-help to respond to defamation.<sup>255</sup> The flipside

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<sup>251</sup> *Butts*, 388 U.S. at 164 (Warren, C.J., concurring).

<sup>252</sup> See *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting) (“For most citizens the prospect [sic] of personal familiarity with newsworthy events is hopelessly unrealistic.”).

<sup>253</sup> Anna Fleck, *Americans Turn to Social Media for News, Despite Lower Trust*, STATISTA (Feb. 16, 2023), <https://www.statista.com/chart/29327/share-of-people-that-use—and-trust-different-news-sources>; Jacob Liedke & Jeffrey Gottfried, *U.S. Adults Under 30 Now Trust Information from Social Media Almost as Much as from National News Outlets*, PEW RESEARCH CENTER (Oct. 27, 2022), <https://www.pewresearch.org/short-reads/2022/10/27/u-s-adults-under-30-now-trust-information-from-social-media-almost-as-much-as-from-national-news-outlets/>.

<sup>254</sup> *Herbert v. Lando*, 441 U.S. 153, 189 (1979) (Brennan, J., dissenting) (explaining that it is the press that have proven to consistently gather and report the news for the public because that is the press’ central function); *Saxbe*, 417 U.S. at 863 (Powell, J., dissenting) (observing that it is “hopelessly unrealistic” for “most citizens” to personally gather news).

<sup>255</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974); *Wells v. Liddy*, 186 F.3d 505, 531–32 (4th Cir. 1999) (“Justice Powell, writing for the majority, distinguished between public figures and private figures and justified their different requirements for proof of defendant’s fault on two

of such observation is that the press also have access to such public figures in a way that private individuals do not.<sup>256</sup> Though the press are not the only contributors to public reporting, “the ‘press and broadcast media’ have played a *dominant and essential* role in serving the ‘informative function’ protected by the First Amendment.”<sup>257</sup>

The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.<sup>258</sup>

Most individuals rely upon the press as an agent of this all-important First Amendment function for the practical reason that they cannot obtain such news themselves:

An informed public depends on accurate and effective reporting by the news media. No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities. For most citizens the prospect [sic] of personal familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news the press therefore acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government. By enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the First Amendment.<sup>259</sup>

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grounds: first, the greater ability of public figures to resort to self-help on account of their better access to the media and channels of communication . . .”) (citing *Gertz*, 418 U.S. at 344).

<sup>256</sup> See *Gertz*, 418 U.S. at 344.

<sup>257</sup> *Herbert*, 441 U.S. at 188–89 (Brennan, J., dissenting) (quoting *Gertz*, 418 U.S. at 343; *Branzburg v. Hayes*, 408 U.S. 665, 705 (1972)) (emphasis added) (citations omitted).

<sup>258</sup> *Id.* at 189 (quoting *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936)).

<sup>259</sup> *Saxbe*, 417 U.S. at 863 (Powell, J., dissenting).

It appears that the Supreme Court focused upon the press in explaining the constitutional interests and limitations of the privilege in *Hill*, *Butts*, and *Gertz* in large part because the press plays such a consistent role in reporting the news about public figures.<sup>260</sup> As Justice Brennan explained when describing the need to extend the privilege to the press in the *Hill* case, the press exercises its “constitutional” freedom “not for the benefit of the press so much as for the benefit of all of us.”<sup>261</sup>

Indeed, because the privilege arises so often in the context of the press being sued for pursuit of the press function, the privilege is continually referred to by courts as a press privilege.<sup>262</sup> As one district court explains, “[b]ecause of the paramount importance of First Amendment protection for the media, the showing that a public figure must make to hold a media defendant liable for slander or libel is very high.”<sup>263</sup> Others recognize that the primary balance at issue in the public figure context is between the press and the public figure: “The actual malice requirement is the court’s attempt to achieve a balance between a free press and individual protection from libel and defamation.”<sup>264</sup> This is not due to the press being a special class, but rather because of the special protection afforded to the public benefit that comes from the press function: “In other words, the right of the public to be informed by a free press lies at the center of *New York Times* First Amendment concerns.”<sup>265</sup> “The exposure of wrongdoing by individuals, and especially by public individuals, is one of the highest functions of the press

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<sup>260</sup> See *Gertz*, 418 U.S. at 332, 339–42; *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 148–52, 153 (1967); *Time, Inc. v. Hill*, 385 U.S. 374, 388–89 (1967).

<sup>261</sup> *Hill*, 385 U.S. at 389.

<sup>262</sup> See e.g., *Celle v. Filipino Rep. Ent., Inc.* 209 F.3d 163, 176 (2d. Cir. 2000) (“If the plaintiff is a public official or public figure suing a media defendant, the First Amendment requires actual malice.”) (citing *Butts*, 388 U.S. at 155; *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80; *Gertz*, 418 U.S. at 347).

<sup>263</sup> *Lohrenz v. Donnelly*, 223 F. Supp. 2d 25, 45 (D.D.C. 2002).

<sup>264</sup> *Medure v. N.Y. Times Co.*, 60 F. Supp. 2d 477, 486 (W.D. Pa. 1999) (citing *Gertz*, 418 U.S. at 342); see also *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 270 (1971) (“The rule of *New York Times* was based on a recognition that the First Amendment guarantee of a free press is inevitably in tension with state libel laws designed to secure society’s interest in the protection of individual reputation.”); *Dun & Bradstreet, Inc. v. C.R. Grove*, 404 U.S. 898, 901 (1971) (Douglas, J., dissenting) (“Thus for the first time after it had become clear that First Amendment freedoms were incorporated into the Fourteenth, this Court considered the extent to which awarding libel damages had to yield to the protection of a free press.”).

<sup>265</sup> *Warren v. Junction City*, 207 F. Supp. 2d 1216, 1222 (D. Kan. 2002).

in our society.”<sup>266</sup> The “interest” that “is protected by the [*Sullivan*] actual malice standard” is that “[n]ewspapers provide a vital service by acting as watchdog for the public.”<sup>267</sup> “Freedom of the press and the public’s right to be informed by a free press lie at the heart of *Sullivan*’s First Amendment concerns.”<sup>268</sup>

Given the Supreme Court’s focus on this press function for the privilege in the public figure context, there is also a strong argument for extension of the privilege to an individual that acts as a source for the press member/organization that publishes the report. Such extension would encourage those individuals who might actually have non-public, newsworthy information about a public figure to share such information with the public. Extension of the privilege to individual sources is also critical to the ability of the press to gather and report meaningful news from persons who have firsthand information.<sup>269</sup>

iv. Because of social media, the balance of interests between the press and public figures is more conducive to the public benefit for the privilege in the public figure context.

As explained throughout the analysis above, the Supreme Court has always justified the privilege by a balancing of interests between the privilege holder (speaker) and the category of defamation plaintiff.<sup>270</sup> If the intended benefit of the privilege in the public figure context is protection of reporting about the involvement of public figures in governmental affairs and public figure conduct, then the press’ interest in regularly delivering news to the public about public figures is more conducive to such benefit than the interests of the vast majority of individuals that might publish statements

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<sup>266</sup>*Tavoulaareas v. Piro*, 759 F.2d 90, 121 n.39 (D.C. Cir. 1985), *vacated in part on other grounds by* 763 F.2d 1472 (D.C. Cir. 1985) (en banc).

<sup>267</sup>*Id.*

<sup>268</sup>*Baden v. Koch*, No. 79-Civ-4296-CSH, 1984 WL 664, at \*3 (S.D.N.Y. Jul. 25, 1984).

<sup>269</sup>*See* *Gilbert v. Allied Chem. Corp.*, 411 F. Supp. 505, 508 (E.D. Va. 1976) (“Information lost to the press is information lost to the public; unnecessary impediments to a newsman’s ability to gather facts, follow leads, and assimilate sources can restrict the quality of our news as effectively as censorship activities.”); *Democratic Nat. Comm. v. McCord*, 356 F. Supp. 1394, 1396 (D.D.C. 1973) (“What is involved here is the right of the press to gather and publish, and that of the public to receive news, from widespread, diverse and oftentimes confidential sources.”).

<sup>270</sup>*See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343–45 (1974); *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 135, 149–51, 153 (1967); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 272–73 (1964).

about public figures on social media. Or to put it another way, the interest of the press weighs more heavily against the public figure's interest than the interests of the vast majority of individuals on social media.

This is another likely reason why the *Hill*, *Butts*, and *Gertz* courts rely so heavily upon the press function in balancing the need for the privilege against the privacy and reputational interests of the public figure.<sup>271</sup> Even when describing a joint speech interest in this context being held by press and individual citizens, the Court so often describes such interest in these cases as working itself out by publication through the press.<sup>272</sup> This again also provides further support for extension of the privilege retained by the press to the individual source(s) for the report at issue. Such extension retains the heart of the individual's joint interest in providing newsworthy information to the public about public figures, which should be balanced more heavily against the public figure's reputational interest in the same way as the press.<sup>273</sup>

## 2. Addressing the hesitation of courts to distinguish between press defendants and nonpress defendants.

### a. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*<sup>274</sup>

Some of the Justices provided relevant *dicta* discussion about the potential distinction between press defendants and nonpress defendants under the privilege within opinions issued for the *Dun & Bradstreet* case in 1985.<sup>275</sup> In *Dun & Bradstreet*, the defendant credit reporting agency provided false credit reports to five of its subscribers (who were required to keep the report confidential) which indicated that the plaintiff construction contractor had filed for bankruptcy.<sup>276</sup> The construction contractor sued the credit agency for libel and won "\$50,000 in compensatory or presumed damages

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<sup>271</sup> See *Gertz*, 418 U.S. at 332, 339–42; *Butts*, 388 U.S. at 148–52, 153; *Time, Inc. v. Hill*, 385 U.S. 374, 388–89 (1967).

<sup>272</sup> See *Gertz*, 418 U.S. at 332, 339–42; *Butts*, 388 U.S. at 148–52, 153; *Hill*, 385 U.S. at 388–89.

<sup>273</sup> See *Gertz*, 418 U.S. at 332, 339–42; *Butts*, 388 U.S. at 148–52, 153; *Hill*, 385 U.S. at 388–89.

<sup>274</sup> 472 U.S. 749 (1985).

<sup>275</sup> *Id.* at 771–75 (White, J., concurring); *Id.* at 783 (Brennan, J., dissenting).

<sup>276</sup> *Id.* at 751.

and \$300,000 in punitive damages” without having to prove actual malice.<sup>277</sup> The credit agency challenged the award, arguing that *Gertz* precluded any recovery of presumed or punitive damages for libel without showing actual malice.<sup>278</sup> Since the construction contractor was neither a public official or public figure, the credit agency did not contend that the construction contractor must show actual malice to obtain compensatory damages.<sup>279</sup> The Vermont Supreme Court found that *Gertz* did not apply to protect the nonmedia credit reporting agency, holding “that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions.”<sup>280</sup>

The Supreme Court took the case “recognizing disagreement among the lower courts about when the protections of *Gertz* apply,” but issued a plurality decision affirming the inapplicability of *Gertz* “for reasons different from those relied upon by the Vermont Supreme Court.”<sup>281</sup> Justice Powell issued the initial opinion announcing the judgment of the Court, ruling that “permitting recovery of presumed and punitive damages in defamation cases absent a showing of ‘actual malice’ does not violate the First Amendment when the defamatory statements do not involve matters of public concern.”<sup>282</sup> The credit agency’s statement about the construction contractor’s alleged bankruptcy, which was disseminated to only five subscribers (who could not spread such information), was not of public concern because it “was speech solely in the individual interest of the speaker and its specific business audience.”<sup>283</sup>

As such, the case did not provide precedential guidance on whether *Gertz*’s focus on the press in its analysis meant that the privilege was available only to press defendants. Though there was ample opportunity to strike down a distinction between the privilege’s application to press and nonpress defendants, Justice Powell’s opinion did not even consider the issue.<sup>284</sup> Neither did Chief Justice Burger in his concurring opinion.<sup>285</sup>

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<sup>277</sup> *Id.* at 752.

<sup>278</sup> *Id.* (citing *Gertz*, 418 U.S. at 349).

<sup>279</sup> *Id.*; see also *id.* at 781 (Brennan, J., dissenting).

<sup>280</sup> *Id.* at 753 (quoting *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 461 A.2d 414, 417 (Vt. 1983)).

<sup>281</sup> *Id.* at 753.

<sup>282</sup> *Id.* at 763.

<sup>283</sup> *Id.* at 762.

<sup>284</sup> See *id.* at 751–63.

<sup>285</sup> See *id.* at 763–64 (Burger, C.J., concurring).

Interestingly, Justice White (who fundamentally disagreed with the need for the privilege in the first place) explained that protection of the press against the threat of libel awards was the primary consideration for the privilege in *Sullivan* and *Gertz*:

The constitutional interest in the flow of information about public affairs was thought to be very strong, and discovering the truth in this area very difficult, even with the best of efforts. These considerations weighed so heavily that those who write and speak about public affairs were thought to require some breathing room—that is, they should be permitted to err and misinform the public as long as they act unknowingly and without recklessness. If the press could be faced with possibly sizable damages for every mistaken publication injurious to reputation, the result would be an unacceptable degree of self-censorship, which might prevent the occasional mistaken libel, but would also often prevent the timely flow of information that is thought to be true but cannot be readily verified. The press must therefore be privileged to spread false information, even though that information has negative First Amendment value and is severely damaging to reputation, in order to encourage the full flow of the truth, which otherwise might be withheld.

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In any event, the *New York Times* standard was formulated to protect the press from the chilling danger of numerous large damages awards.<sup>286</sup>

Justice White however was glad that Justice Powell did “not rest his application” of the privilege “on a distinction drawn between media and nonmedia defendants.”<sup>287</sup> Without providing any specific reference to the Court’s analysis in *Sullivan* or *Gertz* (or any other privilege-specific case), Justice White argued that the Court has not historically “afford[ed]” such a distinction under the First Amendment and had rather “rejected it at every turn.”<sup>288</sup> He otherwise cited to *Sullivan* and *Garrison* (public official plaintiff

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<sup>286</sup>*Id.* at 770, 772 (White, J., concurring).

<sup>287</sup>*Id.* at 773.

<sup>288</sup>*Id.* at 773 n.4 (citations omitted) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 705 (1972) (“[T]he informative function asserted by representative of the organized press’ to justify greater

cases) as two examples where the Court had in fact applied the privilege to nonpress defendants.<sup>289</sup>

Justice Brennan wrote for the dissent.<sup>290</sup> He explained that the *Sullivan* Court “held that the First Amendment shields all who speak in good faith from the threat of unrestrained libel judgments for unintentionally false criticism of a public official.”<sup>291</sup> The *Gertz* court “settled on a rule requiring actual malice as a prerequisite to recovery only in suits brought by public officials or public figures.”<sup>292</sup> Though not necessary to rebut the other opinions issued by the Court, Justice Brennan addressed the Vermont Supreme Court’s interpretation of *Gertz* by explaining that a “distinction” between applicability for press and nonpress defendants was “irreconcilable with the fundamental First Amendment principle that ‘[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.’”<sup>293</sup> He argued that the Court’s broader cases protecting the press do so to “ensure the vitality of the First Amendment guarantees” without an implicit “endorsement of the principle that speakers other than the press deserve lesser First Amendment protection.”<sup>294</sup> “This guarantee also protects the rights of listeners to ‘the widest possible dissemination of information from diverse and antagonistic sources.’”<sup>295</sup> He otherwise was concerned about the “difficulties” that might “lurk in the definitional questions such an approach would generate,” i.e., who would qualify as press for purposes of the privilege.<sup>296</sup> As noted above, the federal circuit courts that have rejected

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privileges under the First Amendment was also ‘performed by lecturers, political pollsters, novelists, academic researchers, and dramatists.’”); (citing *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 782 (1978) (explaining that the organized press does not have a monopoly on the First Amendment or on the ability to enlighten); *Pell v. Procunier*, 417 U.S. 817 (1974) (explaining that the press has no independent right of access to prisons)).

<sup>289</sup>*Id.* (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 254 n.286 (1964); citing *Garrison v. Louisiana*, 379 U.S. 64 (1964)).

<sup>290</sup>*Id.* at 774 (Brennan, J., dissenting).

<sup>291</sup>*Id.* at 776.

<sup>292</sup>*Id.* at 777 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344–46 (1974)).

<sup>293</sup>*Id.* at 781 (quoting *Bellotti*, 435 U.S. at 777).

<sup>294</sup>*Id.* at 783 (citations omitted).

<sup>295</sup>*Id.* (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

<sup>296</sup>*Id.* at 782.



a distinction between press and nonpress defendants also largely did so because of the perceived difficulty in defining the press.<sup>297</sup>

*b. A fundamentally different starting point for consideration of a press/nonpress distinction given the social media defamation problem.*

It must again be noted at the outset of this analysis that this Article does not propose a distinction between press and nonpress in the abstract for all First Amendment purposes. The distinction is proposed in the very specific context of courts determined to reevaluate whether the actual malice privilege should survive at all given the modern social media defamation problem.<sup>298</sup> The opinions from Justice White and Justice Brennan in *Dun & Bradstreet* were published more than a decade before the advent of the internet,<sup>299</sup> and two decades before the beginnings of the social media revolution.<sup>300</sup> They simply did not consider the distinction from this same starting point. Even the more recent opinions of those federal circuit courts that rejected a distinction between press and nonpress defendants did so in the context of whether such distinction should be made generally, not in the context of a court determined to consider potential limitation for the privilege to address the growing social media defamation problem as an alternative to removal of

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<sup>297</sup> See *Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1284, 1290 (9th Cir. 2014); *Snyder v. Phelps*, 580 F.3d 206, 219 n.13 (4th Cir. 2009) (“Any effort to justify a media/nonmedia distinction rests on unstable ground, given the difficulty of defining with precision who belongs to the ‘media.’”); *Flamm v. Am. Ass’n of Univ. Women*, 201 F.3d 144, 149 (2d Cir. 2000) (“[A] distinction drawn according to whether the defendant is a member of the media or not is untenable.”); *In re IBP Confidential Bus. Documents Litig.*, 797 F.2d 632, 642 (8th Cir. 1986); *Garcia v. Bd. of Educ.*, 777 F.2d 1403, 1410 (10th Cir. 1985); *Avins v. White*, 627 F.2d 637, 649 (3d Cir. 1980); *Davis v. Schuchat*, 510 F.2d 731, 734 n.3 (D.C. Cir. 1975).

<sup>298</sup> *Supra* note 72.

<sup>299</sup> See Julian Ring, *30 Years Ago, One Decision Altered the Course of Our Connected World*, NPR (Apr. 30, 2023, 7:00 AM), <https://www.npr.org/2023/04/30/1172276538/world-wide-web-internet-anniversary#:~:text=Live%20Sessions,The%20World%20Wide%20Web%20became%20available%20to%20the%20broader%20public,with%20graphics%2C%20audio%20and%20hyperlinks>. (“On April 30, 1993, something called the World Wide Web launched into the public domain.”).

<sup>300</sup> Esteban Ortiz-Ospina, *The Rise of Social Media*, OUR WORLD IN DATA (Sept. 18, 2019), <https://ourworldindata.org/rise-of-social-media#:~:text=MySpace%20was%20the%20first%20social,media%20as%20we%20know%20it>. (“MySpace was the first social media site to reach a million monthly active users – it achieved this milestone around 2004).

the entire privilege.<sup>301</sup> Such difference in the starting point of this analysis is critical where the very lack of a distinction between press and nonpress in the public figure context is the root of the concern.

*c. This Article does not propose a blanket distinction for press/nonpress defendants which would also apply to the public official context.*

It is also important to note that the opinions from Justice White and Justice Brennan in *Dun & Bradstreet* were pushing back upon a distinction between press and nonpress defendants under the privilege for all cases, that is, cases brought by both public officials and public figures. Justice White cited to *Sullivan* and *Garrison* as two examples where the Court had in fact applied the privilege to nonpress defendants in support of his rejection of such distinction.<sup>302</sup> Both of these cases involved public official plaintiffs.<sup>303</sup> Similarly, Justice Brennan anchored his argument in a fundamental assertion that the *Sullivan* Court “held that the First Amendment shields *all* who speak in good faith from the threat of unrestrained libel judgments for unintentionally false criticism of a *public official*.”<sup>304</sup> This Article does not propose a distinction between press and nonpress in the public official context. Indeed, this Article leads its analysis with extensive argument that the privilege must still apply to everyone in the public official context.

*d. The limited distinction proposed is based upon function, not “worth.”*

Justice Brennan rejects a distinction between press and nonpress in a general sense because it is “irreconcilable” with the First Amendment’s tenant that the “inherent worth” of the speech to “inform[] the public does

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<sup>301</sup> See *Obsidian*, 740 F.3d at 1290; *Snyder*, 580 F.3d at 219 n.13 (“Any effort to justify a media/nonmedia distinction rests on unstable ground, given the difficulty of defining with precision who belongs to the ‘media.’”); *Flamm*, 201 F.3d at 149 (“[A] distinction drawn according to whether the defendant is a member of the media or not is untenable.”); *In re IBP*, 797 F.2d at 642; *Garcia*, 777 F.2d at 1410; *Avins*, 627 F.2d at 649; *Davis*, 510 F.2d at 734 n.3.

<sup>302</sup> *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 773 n.4 (1985) (White, J., concurring) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 254 n.286 (1964); citing *Garrison v. Louisiana*, 379 U.S. 64 (1964)).

<sup>303</sup> *Garrison*, 379 U.S. at 64; *Sullivan*, 376 U.S. at 256.

<sup>304</sup> *Dun & Bradstreet*, 472 U.S. at 776 (Brennan, J., dissenting) (emphasis added).

not depend upon the identity of its source . . . .”<sup>305</sup> Of course, this Article does not propose limitation of individual citizens’ broader First Amendment rights in the public figure context generally. Instead, in the face of billions of individuals constantly making statements of all kinds about public figures on social media, and a growing movement that considers removal of the privilege in its entirety,<sup>306</sup> this Article attempts to focus the privilege’s added protection against defamation claims brought by public figures upon its core intended *function*.

Whereas those billions of individuals on social media have an endless variety of interests in speaking about public figures (both good and bad), the press continues to have at least a central *function* to inform the public about how public figures impact governmental affairs and public issues, and otherwise about public figure conduct that may be newsworthy for the public’s consideration. Though this ground was covered as well with additional case law in Section II(B)(1)(d)(iii), it bears emphasis again that the Supreme Court has recognized that “the ‘press and broadcast media’ have played a *dominant and essential* role in serving the ‘informative *function*’ protected by the First Amendment.”<sup>307</sup> Though nonpress individuals have always contributed to public reporting, the Supreme Court’s “press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate.”<sup>308</sup> Importantly, this Article also proposes an extension of the privilege to individuals that choose to step into the role as a source for press reporting about public figures. Such extension recognizes that an individual’s contribution to this *function* is of equal worth and deserving of equal protection.

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<sup>305</sup> *Id.* at 781.

<sup>306</sup> *Supra* note 72.

<sup>307</sup> *Herbert v. Lando*, 441 U.S. 153, 189 (1979) (Brennan, J., dissenting) (first quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974), and then quoting *Branzburg v. Hayes*, 408 U.S. 665, 705 (1972)) (internal citations omitted) (emphasis added).

<sup>308</sup> *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 781 (1978).

*e. The press test fits with other categorical tests for the privilege and would not be unreasonably difficult to apply to achieve the privilege's intended purpose.*

i. The proposed press test is substantively similar to the other categorical tests for application of the privilege in the public figure context.

Again, this Article proposes a press test that would apply the privilege to any individual/entity that regularly engages in firsthand factual investigation and reporting of information to the public about public figure conduct and/or public figure involvement with governmental affairs such that it is reasonable to conclude that they seek to serve the press function in this area. This Article also proposes that such privilege should extend to individuals that act as sources for the report at issue in the lawsuit.

As is explained throughout Section II(B)(1), it is clear that, *at a minimum*, the Supreme Court had the traditional professional press in mind when analyzing and justifying application of the press to public figures.<sup>309</sup> The task of establishing a basic press test which at least preserves the privilege for the kind of professional press that the Supreme Court contemplated is not insurmountable. Nor is it impossible to make such test flexible enough to allow courts room to consider whether individuals or entities that do not work for (or as) traditional news media outlets also qualify as press for purposes of the privilege's intended function in the public figure context.

A standard which defines the primary target for the category, while largely leaving its boundaries flexible, is not novel for application of the privilege. It is important here to remember that the *Rosenblatt* court rejected the need to provide a strictly defined test for the scope of a public official plaintiff that would qualify for purposes of the privilege.<sup>310</sup> "No precise lines need be drawn" in that case to protect the *primary* intended category of public official: "It is clear, therefore, that the 'public official' designation applies *at the very least* to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."<sup>311</sup> This approach wisely ensured protection of the core intended public official, while still allowing courts

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<sup>309</sup> See *supra* Section II(B)(1).

<sup>310</sup> See *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

<sup>311</sup> *Id.*

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room to consider application of the substantive definition to those government officials that were more difficult to define.

This is especially the case in the public figure context. The *Gertz* court's definition of both the pervasively famous public figure and limited purpose public figure provided the core substantive definition of the type of figure the Court sought to cover while allowing a significant amount of flexibility for varying circumstances.<sup>312</sup> A critic of this Article's proposed test for the press would likely have the very same type of criticism of these public figure categories from *Gertz*. Exactly how famous and influential does a person have to be to qualify as "pervasively famous" for all purposes?<sup>313</sup> And exactly when does a private figure go far enough in his or her conduct so that it can be fairly said that they have "thrust" themselves into the "vortex" of a public issue or controversy?<sup>314</sup> As one district court famously observed just after the *Gertz* case was decided:

How and where do we draw a line between public figures and private individuals? They are nebulous concepts. Defining public figures is much like trying to nail a jellyfish to the wall.<sup>315</sup>

Jellyfish hyperbole aside, it is important to acknowledge that the *Gertz* public figure categories avoided precise lines and allowed significant room for courts to develop such categories at their edges. Equally important is the point that the *Gertz* court provided enough substance to protect the core target of the category it had in mind for application of the privilege. The basic press test proposed by this Article for purposes of reporting about public figures is not at all unreasonable or novel in this area. And it is certainly a preferred option over loss of the privilege entirely with respect to public figures.

- ii. The proposed press test would not be difficult to apply in protecting the vast majority of individuals and entities that serve the press function.

Note that the proposed press test incorporates the two pillar characteristics of Justice Harlan's originally proposed privilege standard for the press in *Butts* to include "*investigation* and *reporting* ordinarily adhered

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<sup>312</sup> See *Gertz*, 418 U.S. at 345, 351–52.

<sup>313</sup> See *id.*

<sup>314</sup> See *id.*

<sup>315</sup> *Rosanova v. Playboy Enter. Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976).

to by responsible publishers.”<sup>316</sup> The key to the proposed test’s distinction between the press and nonpress is its requirement for regular firsthand factual investigation which leads to reporting about public figures. The proposed test will not be difficult to apply to the traditional professional press, who have a primary function to perform firsthand factual investigations and develop firsthand relationships with sources to gather the news. The test will also not be overly difficult to apply to nontraditional individuals and entities that regularly engage in this same function.

On the flipside, it should not be difficult to disqualify the vast majority of the billions of individuals and entities on social media who comment about public figures, but do not have the resources or interest in such firsthand factual investigation. As noted above, Justice Powell explained that the vast majority of the public relies upon the traditional professional press precisely because they cannot meaningfully engage in such factual newsgathering.<sup>317</sup> “For most citizens” the prospect of “personal familiarity with newsworthy events is hopelessly unrealistic.”<sup>318</sup> Such distinction would also disqualify those new era media entities which Justice Gorsuch believes have abandoned the pursuit of firsthand factual investigation in order to “monetize anything that garners clicks.”<sup>319</sup> Individuals and entities that *only* aggregate reports, information, and stories from other news media outlets or individuals will not qualify. Meanwhile, journalists and news media outlets are incentivized to maintain the factual investigation component of reporting that has previously defined the press.

*f. The proposed press distinction does not provide a free pass to the press.*

Because this Article’s analysis focuses upon on the threshold question of who should qualify for use of the privilege in defense of a defamation claim, it is important to remember that the proposed press test does not itself provide for dismissal of the public figure’s defamation claim. A public figure plaintiff can still succeed against a press defendant under the proposed framework by satisfying the actual malice standard of falsity or reckless disregard for the truth.<sup>320</sup> As such, the qualifying press under the proposed press test still only

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<sup>316</sup>Curtis Pub. Co. v. Butts, 388 U.S. 130, 155 (1967) (emphasis added).

<sup>317</sup>Saxbe v. Wash. Post Co., 417 U.S. 843, 863 (1974) (Powell, J., dissenting).

<sup>318</sup>*Id.*

<sup>319</sup>Berisha v. Lawson, 141 S.Ct. 2424, 2427 (2021) (Gorsuch, J., dissenting).

<sup>320</sup>Masson v. New Yorker Mag., Inc., 501 U.S. 496, 510 (1991).

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have added protection for good faith errors made in their reporting about public figures.

*g. Individuals and entities retain the same First Amendment rights regarding speech about public figures.*

Focusing the privilege on reporting by the press does not strip the individuals and entities that do not qualify as press of any First Amendment rights. Though they lose the *added protection* for factual claims about public figures, the nonpress public does not at all lose protection for their expression of ideas and opinions about public figures, or otherwise their ability to criticize and debate matters involving public figures.<sup>321</sup> As the *Gertz* court emphasizes:

Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.<sup>322</sup>

“[A]lthough there is no categorical constitutional defense for statements of ‘opinion,’ the First Amendment will fully protect ‘statements that cannot [be] interpreted as stating actual facts’ about an individual.”<sup>323</sup> “This provides assurance that public debate will not suffer for lack of ‘imaginative expression’ or the ‘rhetorical hyperbole’ which has traditionally added much to the discourse of our Nation.”<sup>324</sup>

## CONCLUSION

The Supreme Court cases that established the actual malice privilege’s application in both the public official and public figure contexts demonstrate that the intended privilege is largely compatible with the change brought by

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<sup>321</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974); *Weyrich v. New Republic, Inc.*, 235 F.3d 617, 624 (D.C. Cir. 2001) (“[T]he First Amendment provides protection for ‘statements that cannot ‘reasonably [be] interpreted as stating actual facts’ about an individual.’”) (quoting *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 20 (1990)); *Snyder v. Phelps*, 580 F.3d 206, 218 (4th Cir. 2009) (same) (quoting *Milkovich*, 497 U.S. at 20).

<sup>322</sup> *Gertz*, 418 U.S. at 339–40.

<sup>323</sup> *Snyder*, 580 F.3d at 218 (quoting *Milkovich*, 497 U.S. at 20); see also *Weyrich*, 235 F.3d at 624 (same).

<sup>324</sup> *Horsley v. Rivera*, 292 F.3d 695, 701 (11th Cir. 2002) (quoting *Milkovich*, 497 U.S. at 20).

social media. The substance of these founding cases also supports the framework proposed by this Article to address the concern about social media's ability to mass produce public figures and thereby overextend the scope of the privilege throughout the modern media landscape.

The privilege should remain applicable to speech and reporting about public officials by everyone because the privilege's application in the public official context should be recognized as so entrenched in the intended purpose of the privilege (and democratic "duty" of every citizen under the First Amendment) that it cannot be susceptible to repeal. Regardless, there is no compelling reason to do so. The modern dominance of individuals on social media does not ruin the original design or justifications for the privilege because: 1) public officials have always accepted a distinct scrutiny from the *entire* public by virtue of taking public office; and 2) social media cannot expand the scope of public officials that qualify for application of the privilege because social media cannot manufacture more public officials.

The privilege should however only apply to reporting about public figures that is published by those that qualify as press, and also by extension, to those individuals that act as press-sources for the report at issue in the lawsuit. Such focus in the public figure context allows the privilege to continue to satisfy its intended function to protect reporting about the: 1) involvement of public figures in governmental affairs (including influence on public officials); and 2) conduct of public figures for purposes of allowing the public to consider credibility issues when determining how much influence to afford such public figures. Limiting the privilege to the press (and press-sources) in the public figure context functionally prevents an overextension of the privilege to billions of social media posters who comment about a potentially limitless number of persons that may qualify as public figures through online activity. The proposed press test would also disqualify those new era media entities that have abandoned the pursuit of firsthand factual investigation. At the same time, the press test would incentivize journalists, news media outlets, and individual sources to maintain the firsthand factual investigation component of reporting that has always defined the press.

The First Amendment's actual malice privilege does not need to be repealed to address the modern challenges that social media presents to both speech and reputational interests. Though a press focus for the privilege's application in the public figure context would bring change, it is not a change that conflicts with the original intent of the privilege. To the contrary, such focus allows for the privilege to maintain its intended public benefit and



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accepted costs in the public figure context amidst a vast and evolving chorus of voices across the social media terrain.