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THE PROBLEM WITH NEW YORK TIMES CO. V. SULLIVAN: AN ARGUMENT FOR MOVING FROM A “FALSITY MODEL” OF LIBEL LAW TO A “SPEECH ACT MODEL”

ASHLEY MESSENGER*

TABLE OF CONTENTS

INTRODUCTION ........................................................................................................... 173
I. THE SULLIVAN OPINION ...................................................................................... 177
II. THE PROBLEM WITH SULLIVAN ....................................................................... 180
III. WAYS COURTS HAVE USED LIBEL DEFENSES TO COVER THE “GAP” .......... 189
   A. Neutral Reportage Privilege ........................................................................... 190
   B. Fair Report Privilege ....................................................................................... 193
   C. Substantial Truth .............................................................................................. 195
   D. Third-Party Allegation Rule ............................................................................ 196
   E. Statements of Opinion ..................................................................................... 198
IV. RELEVANT PHILOSOPHICAL PRINCIPLES ....................................................... 210
   A. Propositions ...................................................................................................... 210
   B. Speech Acts: Propositions Plus “Force” ............................................................ 212
   C. The Speech Acts Relevant to Libel Law ........................................................... 213
      1. Assertions ...................................................................................................... 214
      2. Telling ......................................................................................................... 216
      3. Reporting .................................................................................................... 218
      4. Conjecture, Speculation, and Other Speech Acts ........................................ 218
   D. Constitutional Protection for Speech Acts ....................................................... 219
V ADDRESSING THE TRADITIONAL CONCERNS WITH LIBEL DEFENSES ............ 221
VI. POSSIBLE REMEDIES ........................................................................................ 224
   A. Possible Defenses or Privileges ....................................................................... 224
   B. Presumptions and Burdens .............................................................................. 229
CONCLUSION ............................................................................................................... 232
INTRODUCTION

With the fiftieth anniversary of the New York Times Co. v. Sullivan decision approaching, there will surely be much praise for what is largely regarded as one of the greatest First Amendment cases in U.S. history. And while I agree with the outcome of the case and support broad First Amendment protections in general, I think, in retrospect, that Sullivan poses a bit of a problem.

The Court’s decision was hailed as a breakthrough for First Amendment rights because it acknowledged that there should be constitutional protection for false statements in some circumstances and that the value of expression may outweigh the value of avoiding potential harm to reputation. But the Court’s opinion was based on what we might call a “falsity model” of First Amendment theory—the notion that false speech is problematic precisely because it is false. This same rationale was the basis for the Stolen Valor Act, a federal law that criminalized false statements concerning military service, and other laws that seek to curtail or punish speech that is false on its face.

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2. To be fair, the Court’s opinion in Sullivan condemns only those statements that are known to be false. In fact, the Court notes, “[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about “the clearer perception and livelier impression of truth, produced by its collision with error.” Id. at 279 n.19 (quoting JOHN STUART MILL, ON LIBERTY 15 (Oxford: Blackwell, 1947); and citing JOHN MILTON, AREOPAGITICA 561 (Yale 1959)).
4. The Stolen Valor Act was deemed unconstitutional as a violation of the First Amendment. U.S. v. Alvarez, __ U.S. ___, ___, 132 S. Ct. 2537, 2556 (2012). Justice Anthony Kennedy’s opinion supports several of the arguments made herein,
There are legitimate concerns about false speech, particularly where it rises to the level of being fraudulent. Nevertheless, I would argue that Sullivan is based on a faulty premise; namely, that all knowingly false factual assertions are devoid of constitutional value—a notion further reinforced by Gertz v. Robert Welch, Inc. Cases have since demonstrated that there are problems with this premise, and, in libel cases, the courts have wrestled with ways to protect valuable yet false statements. In a few cases, courts have regretfully imposed liability on publishers who repeat the highly newsworthy statements, resulting in the “Sullivan gap”—an absence of an effective defense in cases where there should be a recognition of “constitutional value” in the false statements. These typically involve cases where a report that is likely to be false or known to be false is nevertheless highly expressive or newsworthy and should be reported, not to demonstrate the truth of the assertion, but to show the mindset or conduct of the speaker or the existence of a controversy. For example, news organizations have quoted citizens alleging that “President Obama is a Muslim,” because the statement truthfully reflects the mindset of certain segments of society, which is having an impact on American political culture and is therefore important to report, even if the reporter knows that the proposition itself is false. Under the traditional republication rule, the reporter and news organization would be liable for repeating the statement, and Sullivan’s actual malice defense provides no protection, as the potential defendants know the statement is false. This is an example of the gap in constitutional protection due to the limits of the Sullivan rule.

particularly the notion that falsity alone—even a knowing falsity—should not be the determinative factor when First Amendment interests are present. See id. at 2539–41.

5. 418 U.S. 323, 340 (1974) ("[T]here is no constitutional value in false statements of fact."). There is an interesting conflict between this assertion in Gertz and the spirit of Sullivan’s footnote 19. See supra note 2.

6. The degree to which Americans have adopted this false belief has been well-documented. See Jon Cohen & Michael D. Shear, Poll: 1 in 5 thinks Obama is a Muslim, WASH. POST, Aug. 19, 2010 at A1, A4.

7. It is fair to ask whether the statement would be actionable, as calling someone a Muslim is not necessarily “defamatory,” which is a required element of a libel claim. However, in the context in which it is often used, the allegation tends to imply some defamatory element, i.e., that President Obama is being dishonest about his religious views, or that he secretly harbors ill will towards the United States. Thus, it is arguable that the statement could be deemed defamatory. Of course, it is
Given the limitations inherent in the “falsity model,” the Sullivan rule does not always protect statements that have expressive value, and thus, courts have applied a variety of other defenses to protect speech. I will examine some of these defenses, such as the neutral reportage privilege, the fair report privilege, and the opinion privilege, and I argue that there is a common trait among these other defenses: they reflect an acknowledgment that the statements at issue are not offered to prove the truth of the matter asserted. Instead, the statements are designed to point at some larger truth in the world or serve some other legitimate, valuable, expressive purpose. It would make sense, therefore, to rethink the basis for constitutional protection for speech in libel cases so that these valuable types of expression can receive constitutional protection.

The analysis shows that the problems stem in part from a lack of clear legal terminology for the various ways that people use words to convey information or ideas. However, the field of philosophy of language has developed a rich vocabulary for and extensive analysis of the way people use words. In this Article, I borrow terms from “speech act” theory, a subfield of philosophy of language, to illustrate and attempt to solve some of the problems in libel law. Lawyers and judges have struggled with many of these concepts over the last few decades, so the concepts are familiar. Adopting speech act terminology for the purpose of this Article provides more precise words to clarify what highly unlikely President Obama will sue over such statements, and so the media’s real “defense” is simply his lack of will to pursue a claim.

8. For the purposes of this article, when I refer to statements with “expressive value,” I am referring to statements whose primary purpose is something other than attempting to persuade the audience of the truth of the proposition contained therein. As explained throughout this paper, there are a variety of applicable alternate purposes, such as faithfully reporting what another person has said, expressing belief or state of mind, demonstrating the existence of a controversy, or otherwise conveying information that has nothing to do with the truth or falsity of the proposition contained within the statement.

9. If this phrasing sounds familiar, it should. The hearsay rule makes a similar distinction between statements that are offered to prove the truth of the matter asserted and statements that are offered for some other purpose, such as to prove motive, belief, state of mind, or a variety of other purposes that are not dependent upon the truth or falsity of the propositional content of the statement. See FED. R. EVID. 801 & 803. I have intentionally adopted the phrasing used in hearsay cases because the concept should be familiar to lawyers and judges, and I am making an analogous distinction.
courts have intuitively known and better define where the lines should be
drawn for constitutional protection of speech.

The concept of a "speech act" was introduced by philosopher
John L. Austin in the book *How to Do Things With Words.* The idea is
that people can perform acts with words; for example, a "promise" is a
specific type of speech act wherein a person commits himself to a future
act by saying words that indicate a promise. There are several kinds of
speech acts, which will be described and discussed in more detail below,
and I will argue that "libeling" is a specific kind of speech that is
parasitic on the act of "telling," which should be distinguished from other
speech acts (such as questioning, concluding, reporting, or speculating)
that deserve constitutional protection because of their expressive value.
Such a model would reflect the protection that courts have extended to
speech by distinguishing between those statements where knowingly
false factual assertions are made in an effort to "prove" the truth of the
matter asserted, as opposed to those statements that serve some other
legitimate, expressive purpose.

Part I of this Article discusses the *Sullivan* case, its logic, and its
reasoning. Part II explains why *Sullivan* is problematic because of the
gap it creates in protection for certain valuable statements. Part III
analyses ways the courts have attempted to grapple with the "*Sullivan
gap" and defenses that have been created to protect valuable, expressive
speech. Part III also argues that what these defenses all have in common
is that they protect statements that are not offered to prove the truth of
the matter asserted. Part IV applies philosophical principles—the
notions of propositions and speech acts—to explain why modern libel
law is based on tenuous assumptions and confusing definitions. Part IV
also urges the adoption of "speech act" terminology to clarify the issues
facing courts in libel cases. An incredibly complicated structure of libel
law has developed because of the lack of adequate terminology to

10. *See generally J.L. Austin, in How To Do Things With Words* (J.O.
Urmson ed. 1965).

11. I am not the first person to suggest that speech act theory can be applied to
understand the First Amendment. *See, e.g., Lawrence Byard Solum, Freedom of
Communicative Action,* 83 NW. U. L. REV. 54 (1988-89) (arguing that Jürgen
Habermas' theory of communicative action, derived from speech act theory, can
serve as the basis for interpreting the First Amendment). Solum cites other scholars
that have taken similar approaches. *Id. at 106 n.201.*
distinguish what kinds of speech should be protected from those that should not. Applying precise terms alleviates much of the confusion that has arisen over the last few decades. Part V addresses some concerns with providing greater immunity in libel cases. Part VI proposes a "speech act model," allowing for liability only where there is a "telling," to eliminate the "Sullivan gap" and provide a consistent constitutional standard to protect valuable, expressive speech, yet preserve libel as a cause of action in the cases where it is truly appropriate. The benefit of such a rule would be to greatly simplify libel doctrine.

I. THE SULLIVAN OPINION

The facts of Sullivan are well-known: Sullivan was an elected official in Montgomery, Alabama, who oversaw the city's police department. A political advertisement ran in the New York Times that criticized the conduct of the police officers who treated civil rights demonstrators badly. Sullivan sued for libel, arguing that it defamed him in his role overseeing police conduct. The Court ruled that elected officials such as Sullivan cannot prevail in a libel action unless they can prove that the defendant acted with "actual malice," defined as "knowledge that [the statement] was false or with reckless disregard of whether it was false or not." The Court correctly noted that First Amendment values should take precedence over the common law contours of libel. It relied on

13. Id. at 256-57.
14. Id. at 280.
15. The Court said:
In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet "libel" than we have to other "mere labels" of state law . . . . Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.
16. Id. at 269 (citations omitted).
four different justifications to conclude that the First Amendment required protection of the speech at issue. All four justifications are still important considerations in First Amendment jurisprudence.

First, the Court noted that freedom of expression “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” In other words, free expression is an important component of participation in society. Second, the Court endorsed what has come to be known as the “marketplace of ideas” theory; that is, the notion that truth is most likely to be discovered when ideas compete.

Third, the Court invoked Justice Louis Brandeis to reiterate that censorship does not change minds or promote truth; it merely destabilizes and delegitimizes authority. Finally, the Court did not place much importance on the quality of speech, demonstrating a willingness to protect distasteful expressions.

In taking up the topics of truth and falsity, the Court provided a lengthy discourse expressing two related ideas. First, that constitutional protection for speech should not turn solely on truth, in large part because errors are inevitable. Second, that defamatory content should not always be actionable because criticizing official conduct is an
important part of the democratic process, and criticism inherently involves speech that would injure reputation.\textsuperscript{22}

The Court also noted the chilling effect that fear of civil liability would have on publishers if they were forced to prove truth, because even when one believes a statement to be true, it can be difficult, if not impossible, to prove truth in court.\textsuperscript{23} And thus, the Court adopted the "actual malice" rule: Officials may not recover damages for libel unless they can prove that the defendant knew the statement was false or acted with reckless disregard for the truth.\textsuperscript{24}

Acknowledging that falsity should be an important component in a libel case was somewhat revolutionary. Libel law originally was concerned with defamatory statements, meaning statements that tended to lower one's esteem in the community. There was no requirement that the statement be false.\textsuperscript{25} In fact, the plaintiff's burden of proving falsity was not officially instituted until 1986, in \textit{Philadelphia Newspapers v. Hepps},\textsuperscript{26} which followed Sullivan's falsity model. Thus, historically, one could be liable for calling someone a murderer or philanderer, even if the statement were true. Of course, the defendant may have been able to escape liability if he could prove the statement was true, but it was often difficult to prove such things absent a criminal conviction.\textsuperscript{27} The

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\textit{Id.} at 272–73. The Court later noted James Madison's view that free discussion of the stewardship of public officials was a fundamental principle of the American form of government. \textit{Id.} at 275.
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\textit{Id.} at 278–79.
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\textit{Id.} at 280.
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\textit{Id.} at 267. \textit{See also ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS, § 2:1.1 (4th ed. 2012) (noting that at common law, falsity was presumed and the plaintiff was not obligated to prove it).}
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The Court specifically noted this notorious difficulty in \textit{Sullivan}. \textit{See Sullivan}, 376 U.S. at 279.
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emphasis in libel cases was on the damage to the plaintiff’s reputation, not on the truth or falsity of the statement. What the Sullivan Court (and later Court opinions) got right is the idea that truth and falsity does matter; what it missed, however, is how it matters.

To sum up the Sullivan Court’s reasoning, there are two related principles that are relevant to my discussion: (1) a person’s reputational interest must yield to the First Amendment when genuine First Amendment interests are present, and (2) errors are to be expected, but dissemination of a known falsity (or of a probable falsity) is unacceptable.

I will return to principle (1) in this Article’s conclusion, but first I will focus on principle (2). The problem with Sullivan is that principle (2) is a somewhat flawed premise. In First Amendment cases, the question should be whether there is a legitimate expressive purpose that should be protected. In most cases, it is probably true that there would be no legitimate expressive purpose in knowingly disseminating a false factual assertion. But, as this Article will show, that principle applies only in instances where the speaker is disseminating the false statement with the purpose of “proving” the truth of the matter asserted on the basis of his assertion. As history has shown, there are other purposes for disseminating false statements, but the failure to distinguish these expressive purposes has caused some strange outcomes and convoluted reasoning in subsequent cases and has done a disservice to the notion of truth. A related problem is that lower courts have accepted the logic of Sullivan as the only constitutional analysis required, in turn leading to problematic results.

II. THE PROBLEM WITH SULLIVAN

The problem with New York Times, Co. v. Sullivan and its progeny is the assumption that an expression of knowing falsity is always harmful. That premise has manifested itself in two problematic ways. First, it fails to acknowledge the occasions when knowing falsity

28. Even to this day, it is possible under Massachusetts law to be liable for libel even in cases where the statement is 100% indisputably true. See Noonan v. Staples, 556 F.3d 20, 28–29 (1st Cir. 2009).

29. See for example, the discussion of Norton v. Glenn, 860 A.2d 48 (Pa. 2004), infra notes 36–52 and accompanying text.
is not necessarily a problem but is perhaps even a benefit. Second, and possibly more importantly, it fails to distinguish between the truth or falsity of a proposition and truth or falsity in the world. In many cases, both problems are present. In this section, I will focus on the first part of the problem: the failure to distinguish a harmful knowing falsity from a useful knowing falsity.

The Supreme Court has famously stated, “there is no constitutional value in false statements of fact.” This statement from Gertz perhaps contradicts the statement from Sullivan that “constitutional protection does not turn upon ‘the truth, popularity, or social utility of the ideas and beliefs which are offered.” Of course, one might distinguish between the truth of “facts,” which are presumably provable as true or false, and the truth of “ideas and beliefs,” which are presumably opinions, not subject to proof. I will argue later in this Article that the distinction is not quite so clear-cut as to justify constitutional doctrine.

At this point, however, I argue that there are nevertheless occasions when false statements—even knowing false statements—are, in fact, useful and should be afforded constitutional protection. There are occasions when repeating a knowing or probable falsity does promote First Amendment values: such a statement may help inform the public about the conduct of public officials and, ironically, promote truth. It is therefore important to distinguish a harmful knowing falsity from a useful knowing falsity.

A harmful knowing falsity is one that does not further any interest in communication, understanding, public participation, truth, or expression. It is essentially fraud. The alleged facts in the criminal libel case Ivey v. Alabama provide an example of a falsity claim. Garfield Ivey was accused of paying a former prostitute to claim, knowing that it was false, that Steve Windom (a candidate for lieutenant governor) was

30. The reliance in traditional libel law on the propositional content of a statement is highly problematic because propositions are “communicatively inert.” Nevertheless, the traditional “republication rule” presupposes that the propositional content of a statement can form the basis for liability. See the detailed discussion of propositions and speech acts, infra Part IV.
32. Sullivan, 376 U.S. at 271 (citation omitted).
33. 821 So. 2d 937 (Ala. 2001).
her client and had physically abused her. If the alleged facts were true, Ivey's speech (through his paid representative, the prostitute), was a knowing falsity that served only his own interests (harming the candidate he opposed) and created a specific, identifiable harm to listeners (who were given false information, thereby hindering their ability to choose wisely in the election) as well as to the subject (whose reputation was tarnished, at least temporarily, until the prostitute recanted). The claims of abuse could have been deemed a fraud upon the public. Most importantly, Ivey intended that the assertion be accepted as true based on the claim—i.e., the statement was offered to prove the truth of the matter asserted—and there was no other expressive purpose behind the statement. In such cases, the First Amendment need not protect the speech.

A useful knowing falsity is one that does serve some interest in communication, understanding, public participation, truth or expression; its primary purpose is not to prove the truth of the matter asserted. In some cases, the language will be offensive, crude, or poorly constructed, but the interest in expression or information nevertheless validates the speech.

34. Id. at 939. I make no claim as to whether the allegations were true or false. Ivey's conviction was overturned on appeal on the technicality that the Alabama criminal libel statute did not require proof of actual malice. Id. The court specifically stated that its opinion “cannot and should not be viewed as vindication of Ivey's version of the evidence.” Id.

35. Some harmful knowing falsities may nevertheless be protected under the First Amendment. See, e.g., U.S. v. Alvarez, ___ U.S. ___, 132 S. Ct. 2537 (2012). The question is not simply whether the speech is true or false, or even whether there is some “harm” that can be identified. There must be some other component, such as rising to the level of fraud, in order to prosecute an offender without running afoul of First Amendment principles. This Article does not provide a comprehensive look at what might qualify as “something extra” to justify prosecution, or what “harms” are remediable; it is focused on the narrow topic of what should be required when the alleged harm is damage to reputation.

36. It is possible that the speaker will subjectively believe the statement to be true and, in a derivative sense, assert its truth. This is particularly true in the case of opinion; but the expression of truth is secondary to the expression of belief. It is also possible in the case of reportage, where a reporter might subjectively be inclined to believe one version of events over another, but his primary goal is to faithfully and fairly report both sides of a dispute. In either case, the expressive purpose is primary and should be understood by the audience. For further discussion, see infra Part IV.
The most obvious example of a useful knowing falsity is a joke. Jokes often require as their premise a knowing falsity, but they nevertheless express some idea, and they do not defraud the listener. Satire, sarcasm and hyperbole are other methods of communication that rely on this same principle.37

This issue arose, albeit indirectly, in *Hustler Magazine v. Falwell.*38 In that case, Jerry Falwell sued *Hustler Magazine* for libel over an ad parody that mocked Falwell.39 Included as part of the joke was the assertion that his first sexual encounter was with his own mother in an outhouse.40 At trial, the jury found the *Hustler* ad parody could not "reasonably be understood as describing actual facts about [Falwell] or actual events in which [he] participated."41 Because the depiction was not found to be a "factual assertion" about Falwell, the Court was not required to deal with the fact that *Hustler* knew the statement was false and actual malice could otherwise have been proved.42 Nevertheless, this

37. The Supreme Court has granted First Amendment protection to these types of expression. See Old Dominion Branch No. 496, Nat’l Ass’n of Letter Carriers v. Austin, 418 U.S. 264 (1974) (applying First Amendment protection to statement that non-union members of a bargaining unit were “scabs” and “traitors”); Greenbelt Coop. Publ’g Ass’n v. Bresler, 398 U.S. 6 (1970) (overturning libel verdict based on statement at city council meeting that plaintiffs negotiating strategy was “blackmail”).
39. Id. at 46.
40. Id. “Th[e] parody was modeled after actual Campari ads that included interviews with various celebrities about their ‘first times,’ referring to the first time they sampled Campari, but playing on the sexual double entendre of the term ‘first time.’” Id. at 48. In small print at the bottom of the page, the ad contains the disclaimer, “ad parody—not to be taken seriously.” Id.
41. Id. at 57.
42. As a general principle, libel claims must be based on “factual assertions,” meaning that the statement can be understood as stating actual facts and is susceptible of being proved true or false. Milkovich v. Lorain Journal Co., 497 U.S. 1, 21 (1990). On its face, the statement that Falwell had sex with his mother in an outhouse would appear to be a factual assertion insofar as it is capable of being proved true or false. It either happened or it did not. It is not a value judgment, nor is there any use of a vague, poorly defined term. Yet, it is deemed not to be a “factual assertion,” presumably because of the context in which it appears, an ad parody. The danger, however, would arise when a jury or court did not “get” the joke and interpreted such a statement to be a factual assertion. See, e.g., New Times, Inc. v. Isaaks, 146 S.W.3d 144 (Tex. 2004). In *New Times, Inc.*, the lower Texas courts held that an article’s satirical nature was not necessarily obvious to a reader, and that the
case illustrates the principle that the actual malice standard might be inadequate to the extent that some knowingly false statements may have legitimate expressive value.

Ironically, the Hustler Court reiterated the dictum from Gertz: "False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective." Yet the Hustler case involved a knowing falsity, because that is what a joke is—it is inherent in the medium—and yet we do find value in humorous expression. The Hustler Court specifically noted the value of caricature in commenting on public figures, despite also noting that caricature, by definition, involves deliberate distortion, i.e., a knowing falsity. It is somewhat disingenuous to explain away the difference between a joke and any other knowing falsity simply by claiming that in the case of a joke, no one would believe it. It is also true that no one would believe speakers who lack credibility in other contexts, and yet liability is imposed. When considered carefully, it becomes clear that there are many kinds of statements where the statement cannot "reasonably be understood as describing actual facts," even if the syntax of the statement appears to be in the form of an assertion. In such cases, the context shows that the speaker lacks the knowledge required to convey facts, or is not attempting to prove the truth of the matter asserted.

paper published the “false statements of fact” that formed the basis of the satire with actual malice, because they knew the statements were, literally, false. Id. at 157. Fortunately, the Supreme Court of Texas eventually ruled that the Dallas Observer's satirical article was protected by the First Amendment, finding that the lower courts underestimated the reasonable reader. Id. at 157–61.


44. Id. at 53–54.

45. For an example of a case where no one believed the statement at issue and yet the plaintiff prevailed in a libel claim, see Norton v. Glenn, 860 A.2d 48 (Pa. 2004). The Norton court noted that even a private figure plaintiff is required to show actual injury resulting from the defamatory statements. Norton, 860 A.2d at 55–56 (citing Gertz, 418 U.S. at 340). Yet it is not clear that any actual injury occurred in the sense that anyone would have believed the statements to be true which would have harmed plaintiff's reputation. For a discussion of the importance of credibility and its relationship to actual injury, see infra note 123 and Parts IV.C., IV.D.

46. Hustler, 485 U.S. at 57.
Cases invoking the neutral reportage privilege are also often based on a useful knowing falsity. Although some courts have extended protection for neutral reportage, most have not.\(^47\) The most egregious example of a court's failure to protect a useful knowing falsity was in *Norton v. Glenn*.\(^48\) The facts of *Norton* are bizarre: a local newspaper published an article that detailed heated exchanges that occurred among members of the local town council.\(^49\) One councilman, William T. Glenn, Sr. ("Glenn"), made outrageous statements about Council President James B. Norton III ("Norton") and Mayor Alan M. Wolfe ("Wolfe").\(^50\) Glenn had claimed that Norton and Wolfe were homosexuals; that Glenn had observed Norton involved in a homosexual act; that Norton and Wolfe were "queers and child molesters;" and that Norton had made homosexual advances toward Glenn. Glenn had declared that he had a duty to make the public aware of this information as Norton and Wolfe had "access to children."\(^51\) The newspaper also published Norton's response to the charges: "If Mr. Glenn has made comments as bizarre as that, then I feel very sad for him, and I hope he can get the help he needs."\(^52\)

The court considered whether the article should be protected by the First Amendment pursuant to the neutral reportage privilege.\(^53\) The Second Circuit Court of Appeals had adopted the privilege in *Edwards v. National Audubon Society, Inc.*\(^54\), finding that the First Amendment mandated that protection.\(^55\) The *Norton* court undertook its own examination as to whether that privilege was truly mandated under the Supreme Court's First Amendment jurisprudence.

The *Norton* court examined *Sullivan*\(^56\) as well as other subsequent cases.\(^57\) It noted that the Court has never veered from the

\(^{47}\) See infra Part III.A.

\(^{48}\) 860 A.2d 48 (Pa. 2004).

\(^{49}\) Id. at 49–50.

\(^{50}\) Id. at 50.

\(^{51}\) Id.

\(^{52}\) Id. at 49–50.

\(^{53}\) See id. at 54; see also infra Part III.A (discussing the neutral reportage privilege more thoroughly).

\(^{54}\) 556 F.2d 113 (2d Cir. 1977).

\(^{55}\) See id. at 115.

\(^{56}\) *Norton*, 860 A.2d at 54–55 (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964)).
actual malice standard as the vanguard for First Amendment protection, and thus saw no reason to expand protection to cover neutral reportage as applied to the present facts. 58 While the court acknowledged the “visceral appeal” of applying the neutral reportage privilege to the facts of the case, it felt that its role was not to “champion what [it] perceive[d] to be good public policy.” 59 Because the U.S. Supreme Court had always


58. Specifically, the court said:

Accordingly, we conclude that the existing case law from the U.S. Supreme Court indicates that the high Court would not so sharply tilt the balance against the protection of reputation, and in favor of protecting the media, so as to jettison the actual malice standard in favor of the neutral reportage doctrine. Rather, the U.S. Supreme Court has placed a burden (albeit a minimal one) on the media to refrain from publishing reports that they know to be false or that they published with reckless disregard of whether it was false. In light of the high Court’s consistent application of the actual malice standard in these types of cases, and its cautions that free expression law should be balanced against, and not be allowed to obliterate, state law protections to reputation, we cannot logically conclude that the high Court would abandon the actual malice standard.

Furthermore, to the extent that the Media Defendants’ argument can be characterized as a plea for us to effectuate important public policy goals by charting a new course with regard to federal constitutional law, one apart from that set by the U.S. Supreme Court, we resoundingly reject it. This is not to say that the Media Defendants’ position regarding the provision of newsworthy information to the body politic does not have some visceral appeal. Yet, our role in these matters is not to champion what we perceive to be good public policy. Rather, our function, as a state supreme court examining a federal constitutional question on which the U.S. Supreme Court has not yet spoken, is to attempt to anticipate how the federal high Court would dispose of this issue. As detailed supra, our examination leads us to the conclusion that the U.S. Supreme Court will not adopt the neutral reportage doctrine.

Norton, 860 A.2d at 57.

59. Id.
applied the *Sullivan* actual malice standard, the Pennsylvania Supreme Court, too, would apply *Sullivan* as the constitutional safeguard.\(^6\)

Thus, *Norton* demonstrates the limits of *Sullivan*'s actual malice standard.\(^6\) In *Norton*, there was a useful probable falsity, and the court acknowledged the communicative value of the statement. Despite its falsity, the statement had expressive value that should have been constitutionally protected. A concurring opinion in *Norton* noted that the lack of constitutional protection for cases such as this, where a known falsity was nevertheless useful, was highly problematic:

I am concerned also with the practical difficulties the press will encounter in trying to walk the very fine line between accurately reporting public governance-related comments such as these, while avoiding liability for doing so. Absent a privilege, the newspaper may be forced to sanitize the report or resort to vagaries—highly subjective changes which inevitably will operate to mislead the public.

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60. See id.

61. For a similarly egregious case, see Little v. Consolidated Publ’g Co., No. CV-09-900147, 2010 WL 4910858 (Ala. Civ. App. Dec. 3, 2010), reh’g granted, 83 So.3d 517 (Ala. Civ. App. 2011). *Little* also involved an allegedly defamatory statement made by one city councilman against another. The court rejected the notion that the paper should be protected because it truthfully reported what transpired at the city council meeting and applied the actual malice standard. Unfortunately, the court’s interpretation of actual malice was improperly broad. The evidence showed that the reporter did not know the statement was false. Nevertheless, the court initially found that the paper acted with actual malice because it knew that the councilmen disliked each other and it knew that the subject had denied the allegation. This is a completely unreasonable standard, as many politicians dislike each other and subjects of allegations generally deny them, regardless of their veracity. Holding reporters liable under such circumstances would eviscerate the protection intended by *Sullivan* for statements concerning public officials. Fortunately, on rehearing, the court reconsidered its interpretation of “actual malice” and found that the plaintiff had not proven that the paper acted with actual malice. *Little*, 83 So.3d at 524. But more relevant to the discussion herein, the statements should also be protected because, regardless of the truth of the allegation, the fact that one city councilman is lodging the accusation against the other is important in itself and thus has value that should be constitutionally recognized. The reporting of the councilman’s allegation was not to prove the truth of the assertion but to inform the community about the councilman’s mindset and behavior, regardless of the assertion’s truth.
as to the seriousness or rashness of the accusations. Moreover, by forcing newspapers to recharacterize what actually occurred, the absence of a privilege essentially requires the substitution of editorial opinion for accurate transcription. Such a transformation of the actual event inevitably alters its context and content. In addition to being inaccurate, news reports altered for fear of litigation would be of far lesser value to the general public in learning of and passing upon the appropriateness of the public behavior of their elected officials. Such a stilted reporting regime would contravene the United States Supreme Court’s seminal statement that “debate on public issues should be uninhibited, robust, and wide-open, and... may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”

The reporting of Glenn’s statements served an important purpose that would typically be protected by the First Amendment: it conveyed information about the behavior and judgment of a public official. While the proposition was superficially about Norton, the statement did not practically convey information about Norton; rather it conveyed information about Glenn. Reporting his statements helped the public understand what transpired at the city council meeting, and also conveyed useful information about Glenn’s mindset and behavior. Surely, voters would want to know what kind of councilman Glenn is, and his outrageous outburst informs the public as to his own behavior. Although the statements were most likely false, reporting them conveyed important information aside from the truth or falsity of the proposition.

Now that brings us to the second manifestation of the flaw in Sullivan: that the courts have failed to distinguish the truth of a proposition from the broader truth of the state of affairs in the world.


63. This problem has been recognized by others who have called for some additional constitutional privilege. See Jonathan Donnellan & Justin Peacock, Truth & Consequences: First Amendment Protection for Accurate Reporting on
In Norton, the proposition was false, but the statement nevertheless reflected a larger truth about what transpired at the city council meeting and about a city councilman’s mindset and behavior. Courts have struggled with addressing this flaw in a variety of ways.

III. WAYS COURTS HAVE USED LIBEL DEFENSES TO COVER THE “GAP”

Given the foregoing, it should be apparent that there is a “Sullivan gap:” instances where speakers may know a proposition is false, thus losing protection under the actual malice standard, even though there is a legitimate expressive interest in conveying the statement. Not all cases that might fall into the gap go unprotected, however. Courts have developed a rich body of law that seems to stem intuitively from the appeal of protecting speech that is potentially (or even likely to be) false because they nevertheless recognize the expressive value of the communication, even if the proposition reflects negatively on the subject of the speech. As discussed below, courts have taken various approaches to this issue. Each approach has its limits. Moreover, each approach has something in common with the others, even if the courts have not explicitly recognized the similarity. In all of

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*Government Investigations*, 50 N.Y.L. SCH. L. REV. 237, 268 (2005) (arguing for a “First Amendment-based limit on the republication doctrine when the press is providing accurate reports on government accusations and investigations”); Matthew J. Donnelly, Note, *A Newsworthiness Privilege for Republished Defamation of Public Figures*, 94 IOWA L. REV. 1023, 1043 (2009) (arguing for a newsworthiness privilege for media defendants). I agree with the Donnellan & Peacock analysis in particular, but think that the underlying problem is much broader than the reporting problems they address. I would prefer a more fundamental approach that protects a broader range of speech based on the same theory that, in real life, truth is broader than the propositional content of any statement. Also, the test I propose is not dependent on the status of the defendant as a “media defendant,” as courts have generally been reluctant to provide greater protection to the press than is granted to the general public.

the cases, the protected statements are not offered as proof of the matter asserted. They are made for some expressive purpose other than proving the truth of the statement. This commonality may justify a new approach to constitutional protection in libel cases.

A. Neutral Reportage Privilege

The neutral reportage defense was established by the Second Circuit Court of Appeals in Edwards v. National Audubon Society. In Edwards, the editor of the National Audubon Society's publication, American Birds, wrote that scientists who advocated the use of DDT were "paid to lie." Specifically, he said, "[a]ny time you hear a 'scientist' say the opposite [of the position that DDT is harmful], you are in the presence of someone who is being paid to lie, or is parroting something he knows little about." The editor testified that he never intended to portray anyone in particular as a liar; he "merely expressed his belief that many supporters of DDT use were spokesmen for the pesticide industry." The New York Times published an article about the controversy and repeated the editor's allegations. The article also named certain scientists that the editor thought were spokesmen for the pesticide industry. The trial court instructed the jury that the plaintiffs were public figures, but that the Times could be liable under Sullivan's actual malice test if the writer had serious doubts about the truth of the allegations, even if he were accurately describing the allegations. The jury found the paper liable.

The Second Circuit reversed, finding that the First Amendment required protection of the newspaper:

At stake in this case is a fundamental principle. Succinctly stated, when a responsible, prominent organization . . . makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those events.

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65. 556 F.2d 113 (2d Cir. 1977).
66. Id. at 117.
67. Id.
68. Id.
69. See id.
70. See id. at 119.
charges, regardless of the reporter’s private views regarding their validity. *What is newsworthy about such accusations is that they were made.* . . . The public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them.  

Some courts have since adopted this neutral reportage privilege in one form or another in an effort to make a distinction between false facts disseminated for the purpose of intentional distortion and false facts disseminated for some other “useful” purpose, such as to inform the public about important controversies. In virtually all of these cases, the courts recognize that the important fact is that the statement was made,

71. *Id.* at 120 (emphasis added) (referencing Time, Inc. v. Pape, 401 U.S. 279 (1971); Medina v. Time, Inc., 439 F.2d 1129 (1st Cir. 1971)).

72. The defense has been accepted in numerous cases. See, e.g., Sunshine Sportswear & Elecs., Inc. v. WSOC Television, Inc., 738 F. Supp. 1499, 1510 (D.S.C. 1989) (stating that a television station that reported allegations of store’s deceptive merchandizing practices and included store’s denials is protected by neutral reportage privilege); *In re UPI*, 106 B.R. 323, 329–331 (D.D.C. 1989) (finding the neutral reportage doctrine protected a reporter who neutrally reported allegations that politician was involved in organized crime; the fact that the accuser was not prominent or responsible was irrelevant; the key factor is the neutrality of the report); Barry v. Time, Inc., 584 F. Supp. 1110, 1126–27 (N.D. Cal. 1984) (applying neutral reportage privilege to a report of allegations by player that a coach had behaved improperly; fact that player was not “trustworthy” was irrelevant; the important factor was that allegations were made by one participant in a controversy against another participant); Celebrezze v. Netzley, Nos. 53864, 10 WL 87566, at *9–10 (Ohio Ct. App. Aug. 4, 1988) (upholding summary judgment for newspaper on the basis of neutral reportage where paper neutrally reported allegations made in a campaign brochure by Republican official against a Democratic state supreme court justice), rev’d on other grounds, 554 N.E.2d 1292 (Ohio 1990).

The concept of neutral reportage has also been adopted by the Canadian Supreme Court as a factor to be considered in the newly established defense of “responsible communication on a matter of public interest.” See *Grant v. Torstar*, [2009] 3 S.C.R. 640, __ (Can.) (opining that reportage may be responsible and protected speech “(1) if the report attributes the statement to a person, preferably identified, thereby avoiding total unaccountability; (2) the report indicates, expressly or implicitly, that its truth has not been verified; (3) the report sets out both sides of the dispute fairly; and (4) the report provides the context in which the statements were made”).
not whether the statement is true. The statements are not repeated as proof of any assertion, but rather to show that the existence of the assertion is itself a fact in the world—regardless of whether it is true.

Some of the cases rejecting the neutral reportage privilege reasoned that the defense was not required because the defendants were adequately protected by the Sullivan actual malice standard. In such cases where the plaintiffs were unable to prove that the defendants had acted with actual malice, there was no compelling reason to adopt the neutral reportage as an additional defense. In other cases rejecting the privilege, it is not clear that the report at issue was of the type envisioned to be protected by the privilege. The Norton case, however, stands out as an example of the "Sullivan gap;" the story is clearly newsworthy;

73. Even the Pennsylvania Supreme Court, rejecting the neutral reportage privilege, acknowledged that these types of reports are important to the public. See Norton v. Glenn, 860 A.2d 48, 59 (Pa. 2004) (Castille, J., concurring) ("'What is newsworthy about such accusations is that they were made.'" (quoting Edwards v. Nat'l Audubon Soc'y, 556 F.2d 113, 120 (2d Cir. 1977))).

74. See Dickey v. CBS Inc., 583 F.2d 1221, 1225–29 (3d Cir. 1978) (rejecting neutral reportage defense because it was not clear whether it was reconcilable with Supreme Court precedent, but nevertheless ruling in favor of media defendant because plaintiff had not demonstrated that defendant had acted with actual malice); Postill v. Booth Newspapers, Inc., 325 N.W.2d 511, 516–19 (Mich. App. 1982) (rejecting neutral reportage, but nevertheless reversing a libel judgment because the plaintiffs had not demonstrated that the defendants acted with actual malice).

75. See, e.g., McCall v. Courier-Journal, 623 S.W.2d 882, 885 (Ky. 1981). In McCall, a newspaper reported that an attorney may have violated ethical rules by offering a client a contingency arrangement in a criminal case and hinting that he may use improper influence with a judge to affect the outcome of his client's case. The newspaper relied upon direct quotes from the attorney that had been secretly recorded and characterized the attorney's actions as potentially unethical. Id. at 884–85. It is not clear to me that this is the kind of case for which the neutral reportage defense was intended to provide protection, because the paper was not relying primarily on allegations made by a third party, nor was it attempting to explain a controversy or demonstrate the state of mind of any speaker. The paper seems to be a participant in making the allegations. Whether the report was substantially true or not, and, whether the article should have been protected by the First Amendment for other reasons, are separate questions.

76. The circumstances of Norton are not as rare as one might think. See Dan Laidman, When Slander is the Story: The Neutral Reportage Privilege in Theory and Practice, 17 UCLA ENT. L. REV. 74, 77 (2010) (demonstrating that situations in which the neutral reportage privilege would be needed are more common than the case law suggests).
the truth of the statement is irrelevant; the fact that the statement was made is important for public understanding of government action; and yet the court rejected the neutral reportage privilege because it had not yet been endorsed by the U.S. Supreme Court.\footnote{See supra notes 36–52 and accompanying text.}

\textbf{B. Fair Report Privilege}

The fair report privilege is another defense that potentially protects the dissemination of false statements, but it is limited in scope and should be distinguished from the neutral reportage privilege.\footnote{The reasoning behind the fair report privilege and the neutral reportage privilege is similar, but the defenses are different. The primary difference is that fair report applies only to government records and proceedings, whereas neutral reportage could apply to other controversies, including to allegations made by private parties without any official government action. The jurisdictions that have rejected the neutral reportage doctrine nevertheless accept the fair report privilege, largely because it is accepted that the government is subject to scrutiny. See, e.g., Norton, 860 A.2d at 50. The trial court in \textit{Norton} had incorrectly ruled that neutral reportage was the equivalent of the fair report privilege, which protects reports of official proceedings, and in which the knowledge of falsity is irrelevant. On appeal, however, a concurring opinion noted that, even if the neutral reportage privilege were not adopted, the fair report privilege might apply to the facts of this case. \textit{Id.} at 61–64 (Castille, J. concurring). The question, though, was whether all of the statements at issue were part of the “official proceeding.” Justice Ronald Castille noted that the trial court should make the determination as to whether the statements made immediately after the public meeting had ended would fall within the scope of the privilege. \textit{Id.} at 63. It is possible that under some states’ interpretations of the fair report privilege, the statements would not be protected. It is also worth noting that fair report is a common law qualified privilege, and neutral reportage, where recognized, is a constitutional defense. See \textit{supra} note 25, \S 7:3.2.2.2.}

The privilege generally protects republication of statements contained in official government reports or court proceedings, as long as the republication fairly and accurately describes the report and properly attributes the source of the statement. The policy behind the privilege is that even though the statements contained in the report may be false, they should be protected because the fact that they exist is an important part of the government record.\footnote{SACK, \textit{supra} note 25, \S 7:3.2.2.2.} An alternate rationale is that because the document is a public record, anyone could read it, and a news organization should not be punished for publishing what anyone could
read.\textsuperscript{80} In either case, the important fact is not whether the allegation is true or false, but the fact that the allegation was made. In essence, the courts acknowledge that this is a "useful" dissemination of a potential falsity because it enhances understanding of a court proceeding or other government activity.\textsuperscript{81}

The fair report privilege does not apply to all allegations. The privilege is defined by state law, and the scope of the privilege varies by state. Some states may restrict the privilege to the news media.\textsuperscript{82} Some states have applied the privilege to "unofficial" statements,\textsuperscript{83} whereas other states limit the privilege to "official" statements.\textsuperscript{84} Some courts have applied the privilege to reports by foreign governments,\textsuperscript{85} but others have deemed foreign reports too unreliable to be covered by the privilege.\textsuperscript{86} And finally, in some states, the privilege may be overcome if there is evidence of actual malice;\textsuperscript{87} thus, the privilege may not be effective in minimizing the "Sullivan gap." Such discrepancies leave defendants who publish nationally (a category that includes national newspapers, magazines, cable news, broadcast networks, and syndicated radio, as well as everything published online) in a position where they cannot reliably count on the fair report privilege to protect a particular

\textsuperscript{80} Id.
\textsuperscript{81} Id. § 7:3.2.2.1.
\textsuperscript{83} Chapin v. Knight-Ridder, Inc., 993 F.2d 1087 (4th Cir. 1993) (applying privilege to unofficial public statements of a member of Congress).
\textsuperscript{84} Massachusetts, for example, has distinguished protected official statements from unprotected, unofficial statements. See Jones v. Taibbi, 512 N.E.2d 260, 267 (Mass. 1987). One case held that witness reports to police were not covered by the privilege if the police did not take official action. See Reilly v. Associated Press, 797 N.E.2d 1204, 1215 (Mass. App. Ct. 2003). Such a rule can lead to obvious problems when the fact that a witness made a statement to police is an important fact in itself, aside from the truth of the allegation.
report in cases where state laws differ as to whether the report would be protected.

C. Substantial Truth

The substantial truth doctrine has been used to protect allegedly false speech in cases where a proposition is allegedly false, but the proposition is presented in a context that conveys a larger truth. This doctrine expressly acknowledges the difference between the truth of a proposition and the larger truth expressed by an assertion.

In *Global Relief Foundation, Inc. v. New York Times Co.*, the Seventh Circuit affirmed the trial court’s ruling that the statements that an Islamic charity was “suspected” of having terrorist ties were “substantially true.” Whether the charity, the Global Relief Foundation (“GRF”), actually had ties to terrorists was irrelevant. The trial court ruled that the “gist” or “sting” of the articles was that the federal government was investigating GRF for possible links to terrorism and was considering freezing its assets. The appellate court concurred and found that the articles were substantially true because the government investigation was truly occurring, regardless of whether GRF was actually guilty.

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88. 390 F.3d 973 (7th Cir. 2004).
89. *Id.* at 980.
90. *Id.* at 986–87.
91. *Id.* The appellate court also noted that the substantial truth doctrine as interpreted under Illinois law had been applied in cases involving private figures. *Id.* at 987–89 (citing *Vachet v. Cent. Newspapers, Inc.*, 816 F.2d 313, 313–14 (7th Cir. 1987) (involving a paper that reported that Vachet had been arrested on a warrant for harboring a fugitive; the court found statement was substantially true even though warrant had never been issued because he was arrested and was associated with the fugitive); *Gist v. MaconCnty. Sherriff’s Dep’t*, 671 N.E.2d 1154, 1154–55 (Ill. App. 1996) (finding the sheriff’s department not liable for posting a “most wanted” flier for plaintiff because the gist of the claim that he was wanted on an arrest warrant was substantially true); *Sivulich v. Howard Publ’ns, Inc.*, 466 N.E.2d 1218, 1220 (Ill. App. 1984) (regarding a newspaper that reported that battery “charges” were filed against plaintiff because claim was substantially true; the fact that civil charges were filled rather than criminal charges was immaterial because the whole context of the article made clear that it was a civil case). Another jurisdiction has applied the same reasoning. *See Bryant v. Cox Enters, Inc.*, 715 S.E.2d 458, 467 (Ga. App. 2011) (holding that the estate of Richard Jewell, the security guard who was...
that a statement reflects a true state of affairs in the world, regardless of whether the propositional content of the statement was true or not.

This interpretation of the substantial truth doctrine has not been widespread because it is contrary to the common law republication rule, which holds a publisher liable for repeating false statements. But, like neutral reportage and fair report, the substantial truth defense has been applied in cases where a statement was offered for some reason other than to prove the truth of the proposition. In *Global Relief*, the speaker was not trying to prove that GRF had ties to terrorists; the speaker was trying to inform the public that the government was undertaking such an investigation. It is a case where there is a true fact in the world that necessarily contains a (potentially false) defamatory implication. A reasonable listener must distinguish between what the speaker could know (that the investigation exists) from what the speaker could not know and could not reasonably attempt to convey (whether GRF is guilty). In short, the statements could not reasonably be understood to convey actual facts about guilt or innocence or be offered to prove the truth of the underlying matter asserted.

D. The Third-Party Allegation Rule

Texas has adopted a principle similar to the above-described interpretation of the substantial truth doctrine, called the “third-party allegation rule.” Under the rule, “a media defendant can establish the substantial truth of a publication reporting that third parties are asserting or alleging facts by proving that the allegations were made and accurately reported, without regard to whether the underlying allegations being reported are themselves true or false.”

Plaintiffs have argued that this interpretation is contrary to the common law rule that a publisher is liable for republishing false

investigated as a suspect following the 1996 Atlanta Olympics bombing, cannot recover for libel because the statements about the FBI's investigation were substantially true, even if he was not actually guilty).

92. *See Global Relief Found.*, 390 F.3d at 989.

defamatory statements made by others.\textsuperscript{94} However, the Texas courts have noted that, absent the third-party allegation rule, the media would risk liability when reporting allegations of misconduct:

> Otherwise, the media would be subject to potential liability every time it reported an investigation of alleged misconduct or wrongdoing by a private person, public official or public figure. Such allegations would never be reported by the media for fear an investigation or other proceeding might later prove the allegations untrue, thereby subjecting the media to suit for defamation. Furthermore, when would an allegation be proven true or untrue for purposes of defamation? After an investigation? After a court trial? After an appeal? Undoubtedly, the volume of litigation and concomitant chilling effect on the media under such circumstances would be incalculable. First Amendment considerations aside, common sense does not dictate any conclusion other than the one we reach today.\textsuperscript{95}

The Texas courts have relied on this interpretation of substantial truth to protect a wide variety of reports.\textsuperscript{96} Upon review, it seems that the media benefits from the third-party allegation rule mostly in cases where private

\textsuperscript{94} See id. at 918 (quoting Jacobs v. McLlvain, 759 S.W.2d 467, 469 (Tex. App. 1988), rev'd, 794 S.W.2d 14 (Tex. 1990) ("Although [defendants'] argument of 'truth' as a complete defense has much to commend it, the law does not generally immunize the propagation of defamatory statements. It is no defense to say, 'It is alleged that . . . .'"))

\textsuperscript{95} KTRK Television v. Felder, 950 S.W.2d 100, 106 (Tex. App. 1997) (applying third party allegation rule and granting summary judgment to media defendants in case involving media report of allegations that a teacher had abused students).

\textsuperscript{96} See Neely, 331 S.W.3d at 919–20 (citing Grotti v. Belo Corp., 188 S.W.3d 768 (Tex. App. 2006); Associated Press v. Boyd, No. 05-04-01172-CV, 2005 Tex. App. LEXIS 3715 (Tex. App. May 16, 2005); UTV of San Antonio, Inc. v. Ardmore, Inc., 82 S.W.3d 609 (Tex. App. 2002); ABC, Inc. v. Gill, 6 S.W.3d 19 (Tex. App. 1999)). See also, Green v. CBS, 286 F.3d 281 (5th Cir. 2002) (finding that a report in a \textit{48 Hours} segment was "substantially true" under Texas law because it accurately reported the allegations that were made, without regard to the underlying truth of the allegations).
parties are involved. After all, in cases involving allegations of wrongdoing against public officials or public figures, the actual malice standard would generally protect the media. However, we know that the actual malice standard fails to protect the media in some important cases, such as *Norton*, where the allegations made were clearly untrue, and yet the reporting of the allegations was nevertheless newsworthy and important to the community. The third-party allegation rule, therefore, eliminates much of the uncertainty that publishers otherwise face with respect to liability and attempting to determine whether newsworthy statements will be protected under the existing constitutional protections. Again, in all of these cases, as with all of the cases discussed in the sections above, the media was not making assertions to prove the truth of the proposition. The statements were made for some other purpose—to show belief, motive, or the existence of a controversy.

The Texas Supreme Court is currently considering whether to affirm the third-party allegation rule as a principle of Texas law. It is possible that the court will decide that the rule is too broad or that it is not quite ready to abandon the common law republication rule. Nevertheless, the existence of the third-party allegation rule is important because it shows that people are becoming aware that the actual malice standard is inadequate as the sole vehicle for constitutional protection in libel cases. There are cases where the actual malice standard does not apply, and yet the speech should be protected. It may be the case that the third-party allegation rule is not adequately refined. Even if it is overturned, a court might consider adopting a test more like the one I propose herein, which gives greater protection to speech in the cases where the actual malice rule does not apply but does not necessarily allow any and all republication.

**E. Statements of Opinion**

At first glance, the protection courts have granted to statements of opinion may seem different from the defenses above. The defenses of neutral reportage, fair report, substantial truth, and third-party allegations are all applied to “factual assertions,” which libel law treats as different

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from “opinions.” However, in many cases, opinions share a characteristic with the assertions protected by the other defenses: they are often not offered to prove the truth of the matter asserted. They are offered for another purpose—to express the belief, viewpoint, or motive of the speaker.

More importantly, the distinction between a “factual assertion” and an “opinion” is fuzzy, and many courts have acknowledged the difficulty distinguishing the two. “Categorizing a defendant’s statements as either fact or opinion . . . is often not an easy task. As one commenter has noted, ‘[n]o area of modern libel law can be murkier than the cavernous depths of this inquiry.’”98 Much of the difficulty involves the very issue I raise: when is the statement offered to prove the truth of the matter asserted, and when is it offered for some other purpose, such as to express the viewpoint of the speaker? A large part of the confusion stems from the fact that people generally express opinions because they believe them to represent the true state of affairs; they have “opinions” about “facts” in the world.99 People have, for example, opinions about whether former President George W. Bush lied about Iraq or whether O.J. Simpson is guilty of killing his wife. An expression of opinion on such topics is generally understood to be an opinion, largely because reasonable people understand that no one (other than Bush or Simpson) has inside knowledge about whether Bush lied or O.J. Simpson murdered anyone, and thus it would not be reasonable for the audience to adopt the opinion of the speaker merely because the statement was made. Such statements are not offered—and could not reasonably be interpreted—as proof of the matter asserted.100 Statements like “Bush lied” or “O.J.

98. Levin v. McPhee, 119 F.3d 189, 196 (2d Cir. 1997) (quoting BRUCE W. SANFORD, LIBEL AND PRIVACY, § 5.1 (1997)).

99. The other large part of the problem is the dual nature of “assertion” as a speech act. Assertions attempt to show how things are, i.e. to state facts, but they also require belief as a sincerity condition, and thus they also serve to express belief, which is often interpreted as opinion. For further discussion, see infra Part IV.C.1.

100. To borrow phrasing from Hustler, the statements cannot be reasonably understood as conveying actual facts because it is obvious that the speaker would not have access to the facts. The only reasonable interpretation is that the statements are a conclusion, and conclusions are usually protected as a form of opinion. See, e.g., Riley v. Harr, 292 F.3d 282 (1st Cir. 2002) (discussing a book about toxic tort litigation that gave mixed information, but allowed readers to draw their own conclusions); Moldea v. N.Y. Times Co., 22 F.3d 310 (D.C. Cir. 1994) (holding that
Simpson is guilty" are factual assertions in terms of semantic content, but upon reflection must be considered "opinions," because they obviously reflect the belief of the speaker.

The Supreme Court addressed the issue of whether opinions should receive constitutional protection in Milkovich v. Lorain Journal, Co. Milkovich arose from a sports column in which the author said that Maple Heights High School wrestling coach Michael Milkovich "lied."

Milkovich’s team had been involved in an altercation at a wrestling match; his team was placed on probation and deemed ineligible for the state tournament. There was a subsequent hearing that resulted in the overturning of the probation and eligibility orders. In response to that outcome, J. Theodore Diadiun wrote a column with the heading "Maple beat the law with the 'big lie.'" It featured Diadiun’s photograph and "the words ‘TD Says,’” with a carryover headline reading, “. . . Diadiun says Maple told a lie.” The column said, in pertinent part:

When a person takes on a job in a school, whether it be as a teacher, coach, administrator or even maintenance worker, it is well to remember that his primary job is that of educator. There is scarcely a person concerned with school who doesn’t leave his mark in some way on the young people who pass his way—many are the lessons taken away from school by students which weren’t learned from a lesson plan or out of a book. They come from personal experiences with and observations of their superiors and peers, from watching actions and reactions. Such a lesson was learned (or relearned) yesterday by the student body of Maple

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a book review accusing author of "sloppy journalism" was a conclusion supported by stated facts).

102. Id. at 4–5.
103. Id. at 4.
104. Id.
105. Id.
106. Id.
Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8. A lesson which, sadly, in view of the events of the past year, is well they learned early. It is simply this: If you get in a jam, lie your way out. If you’re successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened. The teachers responsible were mainly head Maple wrestling coach, Mike Milkovich, and former superintendent of schools H. Donald Scott. Last winter they were faced with a difficult situation. Milkovich’s ranting from the side of the mat and egging the crowd on against the meet official and the opposing team backfired during a meet with [Mentor], and resulted in first the Maple Heights team, then many of the partisan crowd attacking the Mentor squad in a brawl which sent four Mentor wrestlers to the hospital. Naturally, when Mentor protested to the governing body of high school sports . . . the two men were called on the carpet to account for the incident. But they declined to walk into the hearing and face up to their responsibilities, as one would hope a coach of Milkovich’s accomplishments and reputation would do, and one would certainly expect from a man with the responsible position of superintendent of schools. Instead they chose to come to the hearing and misrepresent the things that happened . . . attempting not only to convince the board of their own innocence, but, incredibly, shift the blame of the affair to Mentor. I was among the 2,000-plus witnesses of the meet . . . and I also attended the hearing . . . so I was in a unique position of being the only non-involved party to observe both the meet itself and the Milkovich-Scott version presented to the board.
"I can say that some of the stories told to the judge sounded pretty darned unfamiliar," said Dr. Harold Meyer, commissioner of the OHSAA, who attended the hearing. "It certainly sounded different from what they told us." Nevertheless, the judge bought their story, and ruled in their favor. Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth. But they got away with it. Is that the kind of lesson we want our young people learning from their high school administrators and coaches? I think not.107

Superintendent Scott had also sued for defamation, and his case reached the Ohio Supreme Court first.108 The court in Scott’s case ruled that the statements were opinion, following the test set forth in Olman v. Evans.109 The Olman test used four factors to determine whether a statement was fact or opinion: "(1) the specific language used; (2) whether the statement is verifiable; (3) the general context of the statement; and (4) the broader context in which the statement appeared."110

In Scott v. News-Herald, the court determined that, even though the first two factors suggested the statements were factual assertions, they were outweighed by the second two factors, which indicated that the statement was opinion.111 The court found that "the large caption 'TD Says'... would indicate to even the most gullible reader that the article was, in fact, opinion."112 The court also ruled that the "broader context" was a sports page, "a traditional haven for cajoling, invective, and

107. Id. at 5 n.2.
108. Id. at 8.
109. Id. (citing Olman v. Evans, 750 F.2d 970 (D.C. Cir. 1984)). Prior to Milkovich, Olman was probably the most influential court ruling on the topic of distinguishing factual assertions from opinions.
110. Id. at 9 (internal quotations omitted).
111. Id. at 8.
112. Id. (quoting Scott v. News-Herald, 496 N.E.2d 699, 707 (Ohio 1986)).
Thus, the court felt that a reader would interpret the article as a whole as opinion; and while Diadiun may have made up his mind, the reader was free to come to an alternate conclusion. Moreover, a reader would not expect a sports columnist to be an expert in perjury law, and thus any legal conclusions in the context of a sports column would be interpreted as opinion.

In light of its ruling in Scott, the Ohio Supreme Court ruled that Milkovich's case was likewise meritless. The U.S. Supreme Court then granted certiorari.

The Supreme Court stated that the dictum from Gertz, that "there is 'no such thing as a false idea,'" was not intended "to create a wholesale defamation exemption for anything that might be labeled 'opinion.'" In fact, the Court took a rather dim view of "opinion:")

If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar." As Judge Friendly aptly stated: "[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory

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113. Id. (quoting Scott, 496 N.E.2d at 708).
114. Id. at n.3 (citing Scott, 496 N.E.2d at 707–10).
115. Id. at n.4 (citing Scott, 496 N.E.2d at 708).
116. Id. at 10.
117. Id.
118. Id. at 18 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974)).
119. Id. (quoting Gertz, 418 U.S. at 339).
The Court also rejected the notion that the statements could be opinion in context. It drew a distinction between statements like, “[i]n my opinion Mayor Jones is a liar,” which implied facts, and “[i]n my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin,” which “would not be actionable.” The Court noted that “the Bresler-Letter Carriers-Falwell line of cases provides protection for statements that cannot ‘reasonably [be] interpreted as stating actual facts’ about an individual,” but declined to find that Diadiun’s statements were of that nature. Thus, the Court concluded:

We are not persuaded that, in addition to these protections, an additional separate constitutional privilege for “opinion” is required to ensure the freedom of expression guaranteed by the First Amendment. The dispositive question in the present case then becomes whether a reasonable factfinder could conclude that the statements in the Diadiun column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding. We think this question must be answered in the affirmative . . . . This is not the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that petitioner committed the crime of perjury. Nor does the general tenor of the article negate this impression.

The difficulty with Milkovich is that the speaker’s use of the term “liar” can be interpreted as either a factual assertion or an opinion, depending on context. My reading of the case is that the Court interpreted Diadiun’s column to be an assertion of fact because, it believed, he was making the statement to prove the truth of the matter asserted. The Court

120. *Id.* at 18–19 (citations omitted). I think the Court’s analysis was flawed, as explained infra Sections IV & V.
121. *Id.* at 20.
122. *Id.* (internal citation omitted) (referencing Greenbelt Coop. Publ’g Ass’n v. Bresler, 398 U.S. 6 (1970) and Letter Carriers v. Austin, 418 U.S. 264 (1974)).
123. *Id.* at 21.
concluded that a jury could find that Diadiun implied that he did have particular knowledge as to whether Milkovich lied (unlike my example given above where someone claims that “Bush lied”).

It should have been possible to express the belief that Milkovich lied in a manner that would be interpreted as an “opinion,” if the tone had been different.

The lesson drawn by many courts from Milkovich is not that opinions cannot be protected, but that where there is ambiguity about whether the statement is a factual assertion or opinion, the courts should err on the side of finding the statement to be a factual assertion if the statement seems to imply particular knowledge of unstated facts. Many courts, however, still employ a test examining the context of the statement to determine whether it is a factual assertion or opinion.

The Ninth Circuit has said:

124. Id. at 6. Also, compare the outcome of Milkovich to Edwards, where the statement at issue referred to scientists as “liars.” See supra notes 65–71 and accompanying text. In Edwards, it was clear that the speaker was not claiming to have particular knowledge of any untruth; he was merely reporting the existence of a controversy, to which the public had access to the same facts as the author.

125. The Court referred to the common law “fair comment” privilege and did not reject the notion that “fair comment” should legitimately be protected. Milkovich, 497 U.S. at 13–14, 19. However, the Court noted limitations on what was “fair,” affirming that any express or implied false factual assertion could be actionable. Id. at 19. It was not Diadiun’s belief that was actionable, but the manner in which he expressed it.

126. For a good discussion of the consequences of Milkovich, see Nat Stern, Defamation, Epistemology, and the Erosion (But Not Destruction) of the Opinion Privilege, 57 TENN. L. REV. 595 (1990). For a concise critique of Milkovich and its logical inconsistencies, see Leonard M. Niehoff, Opinions, Implications, and Confusions, 28 COMM’NS LAWYER 3 (Nov. 2011). Niehoff notes that the courts have been inconsistent in their “views about how human beings process and experience what they view and hear.” Id. For example, the fair comment privilege embodies an optimistic view: people are rational; they spot faulty arguments; they know when conclusions do not follow from premises; and they challenge unfair accusations. The doctrine of defamation by implication embodies a pessimistic view: people are suckers; they mistake innuendo for evidence; they make snap judgments; and they are seduced by innuendo. Id. In reality, I suspect some humans are rational and others are suckers. Nevertheless, I would argue that an important goal of the law should be to set an example of what we expect of our fellow humans, and we should expect them to aspire to be rational. Intellectual sloppiness should be met with disdain and correction, rather than legal affirmation.
To determine whether an alleged defamatory statement implies a factual assertion, we examine the "totality of the circumstances" in which the statement was made. We look at the statement both "in its broad context," considering "the general tenor of the entire work, the subject of the statements, the setting, and the format of the work," and in its "specific context," noting the "content of the statements," the "extent of figurative or hyperbolic language used," and "the reasonable expectations of the audience in that particular situation."\(^{127}\)

The Second Circuit employs a similar test: A court must analyze statements "in the context of the entire communication," including the circumstances in which it was written, and its tone and apparent purpose.\(^{128}\) The Second Circuit considers:

- (1) an assessment of whether the specific language in issue has a precise meaning which is readily understood or whether it is indefinite and ambiguous;
- (2) a determination of whether the statement is capable of being objectively characterized as true or false;
- (3) an examination of the full context of the communication in which the statement appears; and
- (4) a consideration of the broader social context or setting surrounding the communication including the existence of any applicable customs or conventions which might signal to readers or listeners that what is being read or heard is likely to be opinion.\(^{129}\)

127. Rodriguez v. Panayiotou, 314 F.3d 979, 986 (9th Cir. 2002) (internal citations omitted) (citing Underwager v. Channel 9 Australia, 69 F.3d 361, 366 (9th Cir. 1995) (concerning pop singer George Michael making a music video parodying his arrest; statement that police officer masturbated in front of him was a "factual assertion" and not "opinion" in context).


129. Id. at *34–35.
The Second Circuit also considers certain characteristics that may distinguish factual assertions from opinions. Statements made early in an investigation, for example, are likely to be opinion, as opposed to statements made after exhaustive research.3 The court also considers "rhetorical indicators" such as the use of "appeared to be," "might well be," "could well happen," or "should be."131 Such phrases signal presumptions or predictions rather than factual assertions.132 Finally, an opinion may be speech characterized as "rhetorical hyperbole, parody, or loose or figurative" speech.133

Such tests make sense because, as noted above, people often hold and express "opinions" about "facts" in the world, and thus it is necessary to decipher whether the statement is offered merely to express belief, which should be protected, or whether the assertion is intended to serve as proof of the matter asserted.

This distinction—between a statement offered as "proof" of an assertion versus as an expression of belief—was highlighted in a recent decision by a New York appellate court, Sandals Resorts International Ltd., v. Google, Inc. Sandals involved an anonymous email that was forwarded to "undisclosed recipients," the gist of which was that Sandals receives subsidies from the Jamaican government, funded by Jamaican taxpayers, yet the resorts hire only foreigners for management positions and will hire Jamaicans only for low-paying, menial positions.135 Large portions of the email were written in ALLCAPS, and included spelling and grammatical errors.136 The court found that several factors contributed to its conclusion that the email was protected opinion and not actionable,137 including the fact that anonymous email, by its nature,
should not be taken seriously. The most important factor, however, was that the statements were offered to express concern, to ask questions, and to express a viewpoint:

Considering the e-mail in question here as a whole, we find that it is an exercise in rhetoric, seeking to raise questions in the mind of the reader regarding the role of Jamaican nationals in the Sandals resorts located in Jamaica. It is replete with rhetorical questions, asked either in relation to a link to an article about Sandals' companies or executives or in relation to a link to a photograph from the resorts' on-line public relations materials. Its apparent purpose is not to characterize Sandals Resorts as racist. It is to call to the reader's attention the writer's belief that the native people of Jamaica, specifically the taxpayers, are providing financial support for the resorts on their island, but are not reaping commensurate financial rewards for that investment.

The tone of the e-mail, as well, indicates that the writer is expressing his or her personal views, in that it reflects a degree of anger and resentment at the idea that travel agents make money from the success of Sandals, and foreign nationals earn large salaries from the resorts, while native Jamaicans benefit financially only by being hired for service jobs at the resorts.

To the extent the e-mail suggests that Sandals' hiring of native Jamaicans is limited to menial and low-paying jobs, a reasonable reader would

138. The court noted that the "culture of Internet communications, as distinct from that of print media such as newspapers and magazines, has been characterized as encouraging a "freewheeling, anything-goes writing style" and thus readers give less credence to defamatory statements made on the Internet. Id. at 43. Anonymity also indicates that the reader will view the material with skepticism. Id. at 44.
understand that as an allegation to be investigated, rather than as a fact.

Nor does the e-mail imply that it is based upon undisclosed facts; on the contrary, each remark is prompted by or responsive to a hyperlink, that is, it is “accompanied by a recitation of the facts upon which it is based,” and therefore qualifies as “pure opinion...”

These expressive purposes were apparent to the court and therefore deemed worthy of protection. However, in many jurisdictions, the protection extended to “opinion” is guaranteed only where it is clear that the statement represents the opinions or mindset of the speaker. If the statement appears to be an assertion, then courts may take the approach of the Milkovich Court and rule that the statement is an actionable factual assertion.

Thus, it should be apparent that the law surrounding the protection of opinion is murky, at best. As I will argue in more detail below, the Milkovich standard does not fully consider the range of expressive possibility between “factual assertions” and “opinions,” and the failure to do so perpetuates the confusion about what kind of statements should receive constitutional protection. What I am arguing for is a better, more consistent standard in libel cases: To evaluate whether the statement is offered for the purpose of proving the proposition contained therein.

139. Id. at 42–43 (citations omitted). It should be noted that the court also acknowledged that New York law extends greater protection to speech than the protection granted by the Supreme Court in Milkovich. Id. at 40.

140. There is also some risk that jokes, usually protected as not expressing factual assertions, may not be protected if the court believes the statements assert facts. See Martin v. Mun. Publ’ns, 510 F. Supp. 255, 258 (E.D. Pa. 1981) (permitting “Mummer” to sue magazine for humorous caption under photo); see also Ford v. Rowland, 562 So.2d 731, 734–35 (Fla. Dist. Ct. App. 1990) (permitting city official to sue for satirical poem mocking an election and possibly referring to candidate as a “hooker”).
An important premise of this Article is that there is a significant difference between statements offered to prove the truth of the matter asserted and statements that are made for some other expressive purpose. Unfortunately, lawyers and judges have not developed adequate terminology for making the distinction between different kinds of expressive purposes.

Philosophers, however, have written extensively on what is called "philosophy of language," an effort to better understand the world by understanding how we use language and the effect it has. They have developed terminology and ideas that are particularly relevant to the issues in libel cases. I will therefore explain some of the concepts and terms used by philosophers because they will help clarify the issues that have perplexed libel lawyers and courts.

A. Propositions

Unfortunately, there is no simple definition of a proposition.\textsuperscript{141} For the purposes of this Article, I am using the term to refer to the content of a statement, and I can best explain the concept by example. Consider the following sentences:

(1) President Obama is a Muslim.

(2) John says that President Obama is a Muslim.

Both statements contain the same proposition: the proposition is that President Obama is a Muslim. But sentence (2) is a more complex statement that contains that proposition within a larger proposition—that John says it. The two statements have different "truth conditions." Statement (1) is true if and only if President Obama actually is a Muslim. Sentence (2) is true if and only if John says that he is. The proposition contained within the sentence (that President Obama is a Muslim) may be false. Yet the sentence as a whole may represent a true state of affairs in the world: namely, that John says that President Obama is a Muslim.

It may be true that John says that, even if the contained proposition is not true.

This illustrates a practical conflict between the principles of libel law and the way the world works: people often believe things that are not true. The false beliefs that seem to be fairly common range from believing your spouse to be faithful or unfaithful; that your boss, co-worker, teacher, or whomever is out to get you; that you are smarter, prettier, or more important that you really are; or that other people are more horrible than they truly are.

The existence of such false beliefs is an important fact in itself, though. False beliefs are part of the truth of the way the world is, and knowing that John holds a false belief tells you something about John, even if it tells you nothing about the fact believed. The Court has, on occasion, made oblique references to the importance of “the ascertainment of truth,” which seems to indicate a broader appreciation for truth as a state of affairs in the world, as opposed to the truth of a particular proposition. Nevertheless, the focus in many libel cases has been on the truth of a statement’s propositional content, not on whether it reflects a larger truth. Such a focus has contributed to the “Sullivan gap.” The focus should be shifted away from the truth or falsity of a proposition and towards a consideration of the overall expressive value of the statement.


143. See, e.g., Milkovich v. Lorain Journal Co., 497 U.S. 1, 18–19 (1990) (explaining that the expression, “[i]n my opinion, John Jones is a liar,” should be interpreted as an assertion that the propositional content of the statement—that John Jones is a liar—is true). The Milkovich Court does not address the potential complexity of interpreting statements for their expressive value. The statement, “[i]n my opinion, John Jones is a liar,” could be interpreted as reflecting the larger state of affairs in the world, namely, that the speaker has a particular mindset that causes him to subjectively believe that John is a liar, regardless of whether that is a well-founded opinion. The audience would need to know whether the speaker’s opinions were credible before it would be reasonable to adopt the belief as one’s own; but more importantly, the statement would have to be made in a context where it would be reasonable for the audience to take the statement as proof of the propositional content. The statement could very well be made in a context where it is obviously not an assertion but reflecting a valid difference of opinion or used as rhetorical hyperbole.
Philosophers have long recognized that propositions themselves are "communicatively inert." A proposition must come in some context that conveys its meaning to the audience. That context is called "illocutionary force"—the qualitative nature that communicates the speaker's point. The concept of illocutionary force is crucial to deciding what "speech act" is performed by the speaker.

The terminology may sound technical or intimidating, but the concepts are quite simple. Locution is simply an utterance. A locutionary act is making a sentence, putting words together. An illocutionary act is a locutionary act plus "force." The illocutionary force of a sentence is the characteristic that indicates whether the speaker is making an assertion, asking a question, expressing desire, reporting the thoughts of a third party, guessing, or engaging in some other type of expressive act. Writing "President Obama is a Muslim" is a locutionary act, and it becomes an illocutionary act only if I put assertive force into it to transform it into an assertion. Alternately, I could be joking, asking a question, reporting what John said, or guessing as to his religion. (Technically, in this case, I am engaging only in a locutionary act, putting no force whatsoever into those words. I use them without any force and only as a collection of words to illustrate the point that those words could convey various ideas depending on the force someone might use if they so choose.) The same utterance can be interpreted differently, depending on the illocutionary force behind the statement.

It may be the case that a statement's illocutionary force is ambiguous. For example, if a person says, "you'll be more punctual in the future," it may be either a prediction or a command. It is therefore appropriate for the audience to ask the speaker what he or she means if the meaning is unclear.

145. See AUSTIN, supra note 10, at Lecture VIII.
146. See id.
147. Green, supra note 144, § 2.1.
148. Green acknowledges that the force of the utterance is not always clear: "This is why it would be appropriate for someone who doesn't know the force of my utterance, to ask, 'do you mean that as an assertion, a conjecture, a guess, or
A perlocutionary act is one in which the hearer's reaction matters. Persuading, for example, is a type of perlocutionary act. A speaker cannot persuade a hearer that President Obama is a Muslim merely by asserting it; the hearer must have a reaction in which the hearer comes to believe the propositional content. The problem with some interpretations of libel law is that it attempts to create liability for mere locutionary acts. Libeling, I will argue, requires perlocutionary effects and should require a particular illocutionary force: telling, which essentially means that the speaker is attempting to prove the truth of the matter asserted.

C. The Speech Acts Relevant to Libel Law

There are many types of speech acts, but I will restrict my discussion to the few that are most relevant to libel claims, such as asserting, conjecturing, guessing, reporting, and telling.
1. Assertions

Libel law has traditionally made a distinction between “factual assertions” and “opinions,” despite long-standing acknowledgment that it is extremely difficult to distinguish the two.\footnote{152 Levin v. McPhee, 119 F.3d 189, 196 (2d Cir. 1997).} The reason that it has been difficult is precisely the nature of assertion. Philosophers generally agree that assertion is an attempt to state how things are—in other words, to state facts. However, assertions also express belief,\footnote{153 Belief is the “sincerity condition” for an assertion.} and we often interpret belief as opinion.\footnote{154 See supra notes 98–101 and accompanying text discussing “Bush lied” or “OJ Simpson is guilty,” statements we deem to be opinions even though, on the surface, they purport to state how things are. Green also cites examples of statements that have expressive meaning (and which I suspect would be likely to be protected as “opinion” by the courts) yet also have semantic content: “Idiot,” “knucklehead,” “pinhead,” and “moron” all have a semantic meaning that the object is not intelligent. Green, supra note 148, at 149. However, they also have an expressive meaning, which is to express an attitude of condescension towards the object’s intelligence. Id. See also Hopewell v. Vitullo, 701 N.E.2d 99, 105 (Ill. App. 1998) (stating “we note that in one sense all opinions imply facts; however the question of whether a statement is actionable is one of degree . . . .” and finding that a statement that someone was fired for being “incompetent” was too vague to be actionable). Philosophers, however, generally describe “opinion” as something unverifiable or unprovable.” See Stern, supra note 126, at 614 (citing DICTIONARY OF PHILOSOPHY 236 (D. Runes, ed. 1983); DICTIONARY OF PHILOSOPHY AND RELIGION (W. Reese ed. 1987)). While the legal field also embraces this definition of opinion, see, e.g., Seelig v. Infinity Broad., 119 Cal. Rptr. 2d 108 (Cal. App. 2002) (finding that a reference to the plaintiff as “skank” is an unverifiable opinion, not a fact), it also uses the term “opinion” more broadly to apply to conclusions, as long as it is clear how the speaker came to his conclusion. See, e.g., Riley v. Harr, 292 F.3d 282, 289 (1st Cir. 2002) (discussing a book about toxic tort litigation that gave mixed information, but allowed readers to draw their own conclusions, even if the author had a viewpoint); Moldea v. N.Y. Times Co., 22 F.3d 310, 317 (D.C. Cir. 1994) (holding that a book review accusing an author of “sloppy journalism” was a conclusion supported by stated facts). Thus, the fuzzy line between facts and opinions is due to the nature of “assertion” as having dual uses, and the lack of articulation in certain terms used by lawyers to reflect different kinds of expression.} It is therefore impossible to parse assertions from opinions in a pure sense; we can only use the context of
the statement to decipher whether the speaker is expressing some idea that the courts wish to protect, thereby rendering the nomination “opinion” more of a conclusion than a distinct category of speech.\footnote{155}

What is missing from the analysis in libel cases is how assertions are used. Assertions are sometimes used to state how things are, and sometimes they are used to express belief. The expression of belief should be constitutionally protected activity—what courts deem to be “opinion”—even if it comes in the linguistic form of an “assertion.” We must therefore distinguish between assertions made for an expressive purpose, such as to show one’s sincere belief or state of mind,\footnote{156} from assertions made for the purpose of urging others to adopt as fact the matter asserted (which is “telling,” described in the section below).

It is worth noting that there are several subcategories of assertion. The concept of assertion represents a continuum of speech, ranging from guesses to conclusions to predictions to insults, and each kind of assertion has its own norms. Philosophers have long recognized the distinctions. Courts have made some distinctions, protecting, for example, conjecture, conclusions, or insults. But courts have not yet noted the distinction between telling (another subcategory of assertion) and the expression of belief. It is, however, an important distinction. People generally recognize that there is a difference between: (a) stating belief but acknowledging that the thing one believes is a disputed fact and others may not believe it; (b) stating belief and asserting that the

\footnote{155. This notion is also expressed by Stern, \textit{supra} note 126, at 595.}

\footnote{156. Making a statement can be a form of self-expression. \textsc{Green}, \textit{supra} note 148, at 26 (“\textit{S}tatements themselves have an expressive component: a statement purports to be an expression of belief, and if it is sincere it is such an expression.”). \textit{See also John Locke, An Essay Concerning Human Understanding in Focus, Book III, Chapter X} (Gary Fuller et al. eds., 2000) (“[W]e should have a great many fewer disputes in the world, if words were taken for what they are, the signs of our ideas only; and not for things themselves.”). A contemporary example from a libel case can be found in \textit{Piscatelli v. Smith}, 35 A.3d 1140, 1146 (Md. 2012), where a newspaper was sued for reporting on a murder. The paper included statements from the victim’s mother concerning her belief about who might have had a motive to kill her son. \textit{Id.} at 1149–50. The statements should be protected because they show the mother’s belief or state of mind and cannot be reasonably construed to convey actual facts about who murdered the son, since no one knows who the murderer was. The Court of Appeals of Maryland found that the paper was protected under a combination of the fair report privilege and the opinion privilege. \textit{Id.} at 1150, 1152–54.}
thing one believes is a fact but understanding the audience will examine the facts on its own; and (c) stating that there is a state of affairs and expecting the audience to adopt it as fact because the speaker said it.157

The difficulty is that all three intents, (a), (b), and (c), may be expressed with the same statement, and it will be up to the audience to determine which intent is most likely (or to ask for clarification).158 For example, suppose someone says, “God exists.” Such a statement could be made in any of the three contexts above, but the circumstances surrounding the statement will indicate which one. A scenario where a person is in a debate with an atheist about the existence of God will probably fall into category (a) or (b), whereas the Pope giving a sermon and making the same statement would likely fall into category (c).

2. Telling

It is useful here to distinguish “asserting” from “telling.” Example (c) above, where the speaker asserts for the purpose of having the audience adopt the truth of the assertion based upon the speaker’s assertion is a specific kind of speech act termed “telling.” To illustrate the point, Professor Mitch Green refers to the story of Herod presenting Salome with St. John’s severed head on a charger:

Herod is not telling Salome anything . . . . Salome does not have to take his word for anything. She can see the severed head for herself if she can bring

157. "It is important, perhaps crucial, to communication that we take the words of others, often though of course not always, at face value." GREEN, supra note 148, at 59 (recognizing that “telling” and “promising” would be hamstrung if we could not rely on others’ words, but acknowledging that there are cases where speakers do not always intend to have others rely upon their word; for example, when “a person who takes an unpopular stand, espousing her beliefs without any intention that her audience will come to agree with her”). The difference between “asserting” (options (a) and (b)) and “telling” (option (c)) is discussed below.

158. See Randall P. Bezanson & Kathryn L. Ingle, Plato’s Cave Revisited: The Epistemology of Perception in Contemporary Defamation Law, 90 DICK. L. REV. 585, 597 (1985–86) (stating that “the textual content of the words should not be determinative, especially if the range of possible meanings of the text is broad, and, consequently, the communicator’s subjective intention cannot be governed reasonably by a single meaning of the text”); see also id. at 606 (arguing that the facts of Bose Corp. v. Consumers Union of the U.S., 466 U.S. 485 (1984), “[render] unhelpful trivial distinctions between fact and opinion, and truth and falsity”).
herself to look. By contrast, . . . telling requires a speaker to intend to convey information (or alleged information) in a way that relies crucially upon taking her at her word.159

Thus, we should be able to discern the difference between “I think Milkovich lied,” which expresses belief but recognizes your option to disagree, and “I’m telling you, Milkovich lied,” which indicates that the speaker wants you to believe the proposition because the speaker told you. The former should be an expressive use that is constitutionally protected, whereas the latter may be actionable, assuming all other elements of a libel claim are met and no other defenses apply.

One crucial aspect of telling is that the speaker must have some credibility in order for the telling to be successful. In the example given above of the Pope telling his audience that God exists, he is likely to succeed in persuading the audience of the truth of his statement only if the audience believes he has the credibility to convey such information—presumably, such credibility comes with the job title of “Pope,” at least to a certain segment of society. In the case of stating that Milkovich lied, the question is whether the speaker has the credibility to cause the audience to believe that Milkovich committed perjury on the stand. In libel cases, then, libel can be committed only if the speaker is “telling” the audience a (false) fact and the speaker has sufficient credibility to cause a reaction in the hearer’s mind where he comes to believe the fact is true. If the speaker lacks credibility—or clearly lacks the knowledge of the underlying facts—then a hearer cannot reasonably believe that the speaker can convey any knowledge to him, and thus, there should be no libel.160

159. GREEN, supra note 148, at 56 (citing Paul Grice, Meaning, 66 PHIL. REV. 377, 382 (1957)).

160. There is a field of philosophy called epistemology that studies how knowledge is conveyed. There is a sub-field of philosophy that studies the epistemology of testimony, which examines how one might come to have knowledge based solely on the statements of others. It is crucial to the conveyance of knowledge that a speaker both intends to “tell” a fact and has the credibility to do so effectively. See, e.g., ELIZABETH FRICKER, Testimony and Epistemic Autonomy, in THE EPISTEMOLOGY OF TESTIMONY 229 (Jennifer Lackey & Ernest Sosa eds., 2006) (“[T]here must be a proposition which the teller intends by her action to present as true . . . .”). Although there are certainly disputes among philosophers about what is required, the main principle is that a speaker cannot convey knowledge that he
3. Reporting

It is also necessary to distinguish "asserting" from "reporting." Reporting is a separate, specific kind of speech act. In reporting, one is not committing to the truth of the proposition reported; one is committing to the accurate and truthful conveyance of what was said. Thus, if one states that "John claims" some proposition P, then the speaker is committing to the truth that John claimed P, but not to the truth of P. Philosophers have no trouble seeing this distinction, but it has not yet been widely accepted in legal circles. The few jurisdictions that have adopted neutral reportage or the third-party allegation rule, or that have interpreted the substantial truth doctrine broadly, have implicitly recognized this important distinction between reporting and asserting, but the failure to adopt such defenses as a matter of constitutional privilege greatly contributes to the "Sullivan gap." In legal minds, the distinction is often blurred.

4. Conjecture, Speculation, and Other Speech Acts

Other speech acts such as "conjecture," "speculation," "concluding," or "hypothesizing" are distinct from "asserting," and are generally recognized as such by the courts as protected forms of speech. In most cases, the courts find that these types of speech acts

himself does not have. If we were to carry this notion over to libel law, it would mean, quite reasonably, that a libel claim cannot be based on a statement made by someone who clearly lacks the knowledge of underlying facts. See, e.g., the discussion of Global Relief, supra Part III.C.

161. GREEN, supra note 148, at 167.
163. One of the criticisms of the Sullivan actual malice standard is that the emphasis on subjective belief of truth or falsity does a disservice to the ethical mandate among journalists that one strive for truth. See JOHN WATSON, JOURNALISM ETHICS BY COURT DECREES (Melvin l. Urofsky, ed., 2008). While I concur that such an ethical aspiration exists, I would argue that it is important to distinguish between the truth of a proposition and the truth of a report or of a sincere expression of belief. As noted many times herein, false statements are not always valueless if they point to some larger truth.
164. See, e.g., Madison v. Frazier, 539 F.3d 646, 655 (7th Cir. 2008) (finding that the statement "[m]aybe he planned to run for some sort of political office or was trying to obtain a politically connected employment opportunity" was non-actionable
qualify as "opinion," or at least, that they fail to constitute a "factual assertion." One reason why these forms of speech are generally protected is that the context of the statement is usually unambiguous with respect to illocutionary force, or the context makes clear that the speaker has no special knowledge of facts. Even without expressly adopting a speech acts model, the courts have implicitly recognized that these kinds of statements convey expressive value that is worthy of constitutional protection.

D. Constitutional Protection for Speech Acts

It should be apparent from the foregoing explanation that a statement should not be evaluated on semantic content alone. A speaker's sentence should be interpreted based on the illocutionary force behind it—in other words, depending on what kind of speech act is performed. For the purposes of libel law, I argue that we should abandon the false distinction between "factual assertions" and "opinions." These are not the only two kinds of statements; rather there is a continuum with a wide range of kinds of speech that straddle the concept of assertion and belief. There are gradations of assertion, each with its own norms and levels of responsibility undertaken by the speaker. We should also stop conflating the truth of a statement with the truth of a proposition. Instead, we should focus on whether the statements at issue serve some expressive purpose or are offered to prove the truth of the matter asserted.

Some speech acts serve legitimate expressive purposes. Reporting, for example, is what the newspaper in Norton was doing when it informed its readership of Councilman Glenn's absurd statements.\textsuperscript{165} The paper truthfully reported Glenn's statements not to prove the truth of the proposition (that the mayor was a "queer" or "child

molester"), but to demonstrate Glenn's outlandish behavior.\textsuperscript{166} Such reporting has value to the audience, who can reasonably discern that the proposition is not necessarily true merely because it was said, and can understand that the existence of the statement demonstrates some larger truth about the city council meeting.

Expressions of belief should also be protected when the existence of the belief is an important fact in itself, even if the belief might not be true. The fact that segments of society believe that President Obama is a Muslim,\textsuperscript{167} for example, conveys important information about the beliefs of American voters, regardless of whether the President is or is not a Muslim. Protecting expressions of belief requires an understanding that "assertions" play a dual role, and courts will have to determine whether the statement is primarily an expression of belief or whether it rises to the level of "telling."

"Telling" is the one speech act that could legitimately serve as the basis of a libel claim. If a speaker's primary purpose is to state facts, to represent them as true, to urge the audience to adopt those facts as true on the basis of the speaker's statement, the speaker plausibly has the credibility to know the truth, and is successful in creating the desired perlocutionary effect in the hearer, then the speaker may be liable if it turns out that the statement was false (particularly if it were known to be false). Such a case differs from those where there is some other expressive purpose worthy of constitutional protection. In a telling, the speaker presents himself as knowing the information;\textsuperscript{168} this is distinguishable from other cases.

While it may be difficult in some cases to discern the speaker's purpose, courts are equipped to deal with evidence of intent; in fact, courts have been examining intent since \textit{Sullivan}, as the actual malice standard typically requires an inquiry into the subjective state of mind of the publisher. In many cases, the illocutionary force of a statement is apparent, if only the courts would consider the range of speech acts and their purposes, rather than limiting the analysis to the imprecise concept of "assertions."

\textsuperscript{166} \textit{Id. at} 60.
\textsuperscript{167} See Cohen & Shear, \textit{supra} note 6, at A1, A4.
\textsuperscript{168} It would not make sense to impose liability in a case where no knowledge is conveyed, and knowledge is conveyed only in limited circumstances. See \textit{infra} note 170.
Opponents of broad libel defenses generally argue that there is a danger in providing a defense to anyone who repeats a rumor or other unfounded allegation: the allegation will gain traction and perceived credibility if its dissemination is protected. I agree that it does a disservice to the pursuit of truth to enhance a false allegation’s credibility. But it also does a disservice to the pursuit of truth to punish discussions of false allegations. The existence of false allegations can be a legitimate part of the whole truth. Thus, the remedy should not be to prohibit all mention of false allegations. The remedy should allow for the acknowledgement of false allegations in a manner that does not improperly enhance the allegations’ credibility. A speech act model would be ideal because it expressly acknowledges the limits of what can reasonably be known or conveyed by a statement, and it accommodates the distinction between the truth of a proposition and the larger truth of what state of affairs exist in the world.

Another traditional concern is that even if no one in the immediate audience believes the allegation, it is possible that someone in a different territory or at a different time will see the allegations and lack the contextual information to understand that it is unlikely to be true. However, that also seems like an insufficient justification for imposing liability because the courts typically provide First Amendment protection to jokes, even though jokes have been misinterpreted by those not in the original, intended audience.

Any potential harm to reputation may derive from a problem with social convention. As a matter of good reasoning, audiences should not automatically assume that propositions are true merely because statements are made. A reader or hearer should bear the obligation of

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weighing all relevant evidence and withholding judgment until the weight of evidence indicates that a proposition is true or false. The republication rule in libel law is based on the opposite premise—that a person should and will take any proposition at face value.

Such a premise is flawed. Speech always reflects upon the speaker, but it does not always reflect the truth. An assertion may be made to assert the truth of a proposition, but it is not necessarily so. As demonstrated by the many cases cited above, speech is not always about the truth of a proposition. In many cases, speech serves an expressive purpose aside from the truth of the proposition. The expressive purpose may be to reflect the speaker’s belief, motive, or state of mind; or it may be to dutifully report the beliefs, motives or state of mind of another or demonstrate a controversy. While serving truth is a noble goal and should be encouraged as an ethical and moral matter, we must also recognize as a practical matter that stating the truth of a proposition is only one of many purposes for which humans legitimately use speech. Speech is expressive, and it is this expressive value of speech that the First Amendment was designed to and should protect. Because of that

171. A speaker risks his own reputation when he speaks. Green has written on the issue of credibility as a handicap to a speaker. He argues that humans value status, and that credibility is a form of status. See Mitchell S. Green, Speech Acts, the Handicap Principle and the Expression of Psychological States, 24 Mind & Language 139, 152–54 (2009). Failing to accurately convey information or the degree of one’s commitment to a proposition will harm a speaker’s credibility and therefore acts as a deterrent to abusive speech. See id.

172. Regarding the “value” of speech, it is important to note that speakers and hearers may value it differently. See, e.g., Henry P. Monaghan, Some Comments on Professor Neuborne’s Paper, 55 Brook. L. Rev. 65 (1989–90) (describing speaker-centered and hearer-centered theories of the First Amendment, and how speakers and hearers may value speech differently). While I agree that speakers and hearers value speech differently, I think there is an objective value to speech that is often overlooked. To a speaker, his speech always has value. Whatever he says, he says for a reason. His speech is meaningful to him, whether because he believes it to be true, or is trying to communicate an idea, or is expressing his beliefs, or is otherwise fulfilling some motive on his part. (The motive may be simple and unrelated to the content of the speech, such as when someone is engaged with in “small talk” with a stranger at an event; the speaker may not think that the content of his statement about the weather or the Red Sox or whatever is of as much value as the mere fact he has said something, anything, to avoid an awkward silence. The speech’s existence has value to him even if the exact content is less important.) A hearer, however, tends to value the speaker’s speech according to the hearer’s own needs. Does it
principle, we should interpret speech accordingly, to reflect first and foremost the speaker's expressive purpose.

As a practical matter, humans do interpret speech to reflect upon the speaker. The principle was noted in a Harvard Law Review commentary on Norton: "When a politician makes an outlandish accusation—especially one that is outlandish because it is clearly defamatory—that accusation is newsworthy because of what it says about the speaker, not the accused." 173

Academic studies, moreover, have shown that speech reflects on a speaker in ways that have nothing to do with the truth of the statements made. One study found that women who gossip at work are viewed as "less emotionally warm" than others. 174 The study did not focus on convey valuable information? Is it offensive to the hearer's views? Is the speaker simply too loud or annoying? The hearer might prefer silence to small talk, explaining the divergent opinions of air travelers over the propriety of speaking to fellow travelers. Speech, however, has a value to a hearer that is often ignored. Speech is valuable precisely because of the intrinsic value to the speaker. A speaker's speech will inform the hearer of something about the speaker; it will convey the speaker's views, beliefs, or motives. Even if they are unpopular or unwanted, the fact of their existence may nevertheless be conveyed. That information is useful in itself because it allows the hearer to better understand the speaker. Interpersonal understanding is generally undervalued as an important aspect of speech in First Amendment theory or doctrine. Theorists tend to place more emphasis on democratic self-governance or the quest for truth. See, e.g., Robert Post, Reconciling Theory and Doctrine in First Amendment Jurisprudence, 88 CALIF. L. REV. 2353 (2000). I would argue, however, that neither of these goals is achievable without interpersonal understanding. Our ability to function collectively and self-govern as a nation requires an understanding of the needs, interests, opinions, and perspectives of our fellow citizens. Our ability to seek truth requires an understanding of how others view the world. Thus, understanding the speaker's view, belief or motive is of value to a hearer, even if there is no other obvious informational or emotional interest in the speech.


whether hearers believed the gossip, but concluded that the act of gossiping reflected on the speaker. Another study found that speakers who argue “aggressively” are viewed as less credible and have fewer valid arguments credited to them, aside from the content of the arguments.¹⁷⁵ Such findings support the claim that hearers learn something about the speaker aside from learning anything about the truth or falsity of a statement; thus, one risks one’s own reputation when speaking, which should act as a deterrent to the gratuitous spread of false information.¹⁷⁶

Humans do understand the different contexts in which statements are presented and the importance of the credibility or standing of the speaker. And yet libel doctrine currently lacks such nuance. What is needed is a recognition by the Supreme Court that statements must be evaluated carefully to determine if they deserve constitutional protection. Such a normative standard is best promoted by strong First Amendment protection of speech based on the philosophy that (1) the truth of a statement is not necessarily the same as the truth of the proposition contained therein, (2) statements should not be presumed to reflect the truth of a proposition absent indicia of intent to “tell” the truth, and (3) statements are primarily expressive and reflect first and foremost on the speaker.

VI. POSSIBLE REMEDIES

There are a variety of measures courts could take to minimize the “Sullivan gap” and clarify the nature of statements that would be constitutionally protected for their expressive value. There are several good policy reasons for the courts to adopt one or more of these measures.

A. Possible Defenses or Privileges

Many commentators have urged the courts to adopt a neutral reportage defense, or a close variation thereof, as a matter of

¹⁷⁶. See also GREEN, supra note 148.
Such a defense would be helpful in protecting "reporting" as a speech act, although it is not clear that such a defense would always be helpful. One ambiguity is whether the charges reported must come from a credible or reputable source. While Edwards applied the neutral reportage doctrine to public figures, protection may not be extended to reports about private figures.

Alternately, courts might adopt the Illinois/Seventh Circuit interpretation of the substantial truth doctrine or the Texan variant, the "third-party allegation rule." This, too, would protect the speech act of "reporting," although there is a question about whether this defense would be available only to the "media" and how "media" would be defined.

Adopting defenses that protect "reporting," moreover, would not solve the problem of distinguishing factual assertions from opinions. To have a consistent principle applied in libel cases would require courts to acknowledge the different uses of assertions, and to distinguish expressions of belief from "telling." Thus, I would argue that it is time to make a fundamental change to the analysis in libel cases.

The Supreme Court should establish a comprehensive test that accounts for the wide range of speech acts, eliminates the "Sullivan gap," and acknowledges the importance of providing constitutional protection to statements with an expressive purpose by adding a step to the constitutional scrutiny applied in libel cases. The Court should rule that a court must first inquire into the expressive value of the statement and ask whether the statement was offered to prove the truth of the proposition or whether it was offered for some expressive purpose, such as to explain events, demonstrate a conflict, reflect the speaker's belief or state of mind, or convey the fact that that statement was made apart from endorsing of the truth of the underlying propositional content. In other

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178. See supra note 61; see also Keith C. Buell, Note, "Start Spreading the News": Why Republishing Material from "Disreputable" News Reports Must be Constitutionally Protected, 75 N.Y.U. L. REV. 966, 969–70 (2000).

words, a court should determine the nature of the speech act made by the speaker. \(^{180}\) A libel claim should be permitted only in cases where the statement is made primarily to prove the truth of the matter asserted, i.e., where the speaker is telling rather than reporting, conjecturing, asserting a belief, or engaging in other forms of expressive activity. \(^{181}\) No libel claims would be permitted where the statement is most reasonably construed as having an expressive purpose other than proving the truth of the matter asserted, primarily conveying expressive value apart from the truth of the underlying propositional content. \(^{182}\) Once this initial inquiry is made, a court would proceed with its common law analysis and applying the Sullivan or Gertz standards of fault where appropriate. \(^{183}\)

Such a test would not completely gut the common law republication rule. In cases where the republisher intends to persuade the audience that it should adopt a proposition as true, the republisher would be as equally liable for false, defamatory content as the original speaker. But in cases where the republisher’s goal is to draw attention to a viewpoint or point to a broader truth and does not necessarily adopt the truth of the underlying propositional content, the republisher would be

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180. This inquiry would, ideally, be a threshold issue of law for a court to decide.

181. To have a libel claim, the following requirements should be met: the speaker must be “telling” (i.e., the speaker’s primary purpose must be to state facts, represent them as true and urge the audience to adopt those facts as true on the basis of the speaker’s statement), the speaker must have credibility (meaning it is reasonable to believe the speaker knows the truth), and the speaker must be successful in creating the desired perlocutionary effect in the hearer. All three components should be required to create the act of “libeling.”

182. In addition to the positive expressive purposes listed, it is entirely possible that a speaker’s expressive purpose is to be cruel, demeaning, insulting, or otherwise offensive. Such purposes, while not endorsed, are nevertheless legitimate expressive purposes and should be protected by the First Amendment. The penalty in such cases is the negative light into which the speaker will be cast by virtue of his apparent motives. Such statements still convey valuable information about the speaker, even if they do not reflect any truth about the subject.

183. The test proposed herein would protect knowingly false statements of fact only in cases where there is some expressive value, such as in Hustler or Norton. See supra notes 38–63 and accompanying text. It would not protect knowing falsities that people try to “tell” others, which is what libel law should truly be targeting. Such a standard would eliminate the “Sullivan gap.”
immune from liability. In such cases, a plaintiff would still have recourse against the originator of the libelous statement, if otherwise permitted by libel law and the Sullivan or Gertz standards.

What this adds up to is a rethinking of what it means to "publish" a "factual assertion" for the purposes of libel law. Common law principles require the plaintiff to prove that a defamatory "factual assertion" was "published." The Supreme Court should acknowledge the importance of providing constitutional protection to statements with an expressive purpose by narrowing the field of "factual assertions."

Such a test would incorporate the concerns intermittently addressed by courts that have applied the fair report privilege, neutral reportage privilege, opinion privilege, substantial truth doctrine, or third-party allegation rule in an effort to accommodate protection of statements that express some larger truth even where the truth of the underlying propositional content is suspect. It would also alleviate the hypocrisy of Hustler to acknowledge that there are a wide range of statements that superficially appear to be assertions, and yet, upon closer inspection, cannot reasonably be construed to state actual facts. A comprehensive test of this nature would override the need for the varied tests that have been applied over time and across jurisdictions, and provide consistency and clarity for speakers and subjects alike.

A constitutional privilege distinguishing a statement made for an expressive purpose from a statement made to prove the truth of the proposition would not be a huge logical leap for the justice system. U.S. courts have made the distinction between the truth of a proposition and broader truth when considering the admissibility of evidence, specifically with respect to hearsay. Courts ask whether a statement is made to prove the truth of the matter asserted (i.e., whether the proposition is true) or whether the statement is made to demonstrate some other point (i.e., whether the statement, true or false, illustrates some broader truth about the speaker's or hearer's mindset or beliefs). This distinction is made because if the statement is offered to prove the truth of the proposition, then the courts demand that the speaker testify in court so that he may be

184. See generally Bernard S. Jefferson, The Hearsay Rule - Determining When Evidence is Hearsay or Nonhearsay and Determining its Relevance as One or the Other, 30 UWLA L. REV. 135 (1999).
185. See supra notes 38–44 and accompanying text.
186. See Jefferson, supra note 184.
cross-examined and his credibility tested. If the statement is offered for some other purpose, then the speaker's presence is less important, as the truth of the statement is secondary to the other expressive purpose. Thus, courts already recognize that statements can be used for a purpose other than conveying the truth of a proposition, and that those other purposes are legitimate and worthy of consideration. The same reasoning should apply in libel cases. If a statement is made for an expressive purpose, the emphasis should be placed on the speaker's expression and be given First Amendment protection. A person's statement should not be taken as an assertion of truth in all circumstances, as it may be offered for another purpose. When it is offered to prove the truth of the proposition asserted, then the speaker is subject to examination and to having his credibility tested.

Moreover, such an analysis would be akin to the analysis used in cases involving threats: courts must distinguish between true threats (i.e., where the threat is made to prove the truth of the matter asserted—that the speaker intends to carry out the threat) and statements that could be interpreted as threats on the face of the statement, but are offered for some expressive purpose, not to indicate an actual threat of harm. Courts evaluate tone, context, and convention to determine the purpose for which the statement is made. It may therefore be appropriate for the courts to consider the expressive purpose of an "assertion" in libel cases as well.


188. See supra Part III.

189. Compare Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam) (ruling statement by Vietnam War protester was political hyperbole and not a true threat), with United States v. Dinwiddie, 76 F.3d 913, 925 (8th Cir. 1996) (finding that abortion protester made "true threats" to abortion doctor when she told abortion doctor "[t]his [murder] could happen to you . . . " and noted her approval of killing abortion doctors). The fact that an expressive use test is applied does not necessarily mean the determinations are easy. See Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058 (9th Cir. 2002) (en banc) (noting varying decisions about whether an anti-abortion website constituted a "true threat"). Nevertheless, courts are equipped to make such determinations. What is important, from a First Amendment standpoint, is that the test used by the courts accounts for legitimate expressive value and does not focus solely on the semantic content of the statement.
B. Presumptions and Burdens

An unanswered question remains: even if the Court were to rule that courts should differentiate among speech acts in libel cases, what burden of proof would be required to determine which kind of speech act is made?

It may be difficult in many cases to determine whether a statement is meant as a report, an assertion, or as a telling. Law often sorts out difficult questions with presumptions and burdens: from which presumption do we begin, and who has the burden of proof to persuade us otherwise? The courts could begin with the presumption that a statement is a “telling” unless the defendant can show otherwise, but such a presumption would be inconsistent with the general tendency to protect expressive value when First Amendment interests are at stake. Alternatively, the courts could choose not to presume anything about the statement and examine the context, tone, and other indicators to see whether the intent of the speaker is clear. However, there will certainly be cases where the statement seems ambiguous and it will be necessary to choose one interpretation or another. Thus, the courts should establish, as a matter of constitutional principle, the presumption that a statement is offered for an expressive purpose rather than to prove the truth of the propositional content of the statement, unless there is some evidence to indicate otherwise. Some conventions might always lead the audience and the courts to presume that the statements at issue are not offered to prove the truth of the matter asserted. For example, news reporting may be presumed to be a “report” rather than a “telling” or an “assertion.” 190 Opinion columns may be presumed to be expressions of belief, rather than fact. Since it is notoriously difficult to distinguish between speech acts, and because most speakers’ primary purpose is to express belief, opinions, state of mind, or experience, such a presumption would best secure First Amendment protection for expressive statements. 191

190. See Green, supra note 148, at 167 (explaining that reporting is not a commitment to the truth of a proposition, but rather to the truth of describing what was said).
191. Nat Stern has argued that courts have implicitly considered a spectrum of epistemic certainty in First Amendment cases: they tend to allow more regulation of speech in areas where there is ample evidence to adduce the truth of a proposition,
It is particularly important to protect the expression of belief, even if it must come across in the form of an “assertion.” Belief has “no facial, or any other behavioral, signature: there is no characteristic way that a person looks or otherwise behaves when she believes something.” Because humans have no other way to convey their beliefs, their internal states or mindsets without making statements that might look on the surface like “assertions,” the courts must leave breathing room for such expression.

Unfortunately, there is also no accepted indicator in our culture to discern when someone is making an assertion to acknowledge the truth of the proposition asserted. Gottlob Frege, a German mathematician and philosopher, proposed a logically correct language that included an “assertion sign,” which was used for this purpose. The closest sign we have in contemporary language are parentheticals, such as “I think,” “I believe,” or “I suppose,” to indicate the level of commitment one is making to a proposition. It would be incredibly burdensome, however, to require speakers to always include a parenthetical in every expression. It would hinder creativity and

but tend to provide greater protection to speech where the government lacks the knowledge or experience to claim itself as the undisputed arbiter of truth. Stern, supra note 126, at 607–12. “Whatever formal ‘test’ courts have ultimately adopted, epistemologically the crucial point is that the majority approach has generally been undergirded by an attitude of extreme skepticism and humility that errs on the side of finding nonactionability.” Id. at 611. The notion of “humility” is crucial to First Amendment protection. It is imperative for speakers and audiences alike to distinguish between one’s own beliefs and or opinions, and matters of established fact. Although one may believe a particular assertion with all one’s heart, the assertion may not, in fact, be true. The discernment of truth can be difficult, particularly in light of the fact that human expression is diverse and complex, where words may have multiple meanings, and context can change the interpretation of a statement in its entirety. It is therefore important to maximize protection for the expressive value of speech and err on the side of non-actionability.

192. GREEN, supra note 148, at 92.
193. See id. at 99, 150.
194. Id. at 150.
195. Nor is it clear that such a requirement would immunize a defendant from liability under current law; in Milkovich, the Court specifically rejected the notion that the parenthetical “in my opinion” would adequately modify an assertion. Milkovich v. Lorain Journal Co., 497 U.S. 1, 18–19 (1990). Absent the kind of expressive use test proposed herein, citizens cannot be sure that the expression of
require a level of literalness that is not conducive to expressing the range of human experience. It makes more sense to look to context, as courts do, to determine the intent of the speaker. And although it would "behoove speakers to employ a force-elucidating device whose own illocutionary status is not itself up for question," it certainly should not be a legal requirement. On the contrary, we should presume a statement to be expressive, and therefore protected speech, unless the evidence shows otherwise.

Another option would be to impose a procedural requirement on libel plaintiffs: a plaintiff must demand a clarification of intent from the speaker before filing any action. As Green noted, it is acceptable, and sometimes necessary, to ask what a person means (what speech act is being performed) when meaning is ambiguous. It is therefore fair to require an aggrieved person to ask the speaker what he intends to convey by his statement and give the potential defendant an opportunity to clarify what he intended to convey. No claim should be permitted if a plaintiff fails to request a clarification or if the statement is clarified to convey some form of protected speech. However, a defendant who

their beliefs or state of mind will be protected speech, even if they attempt to modify the context of their statements with an appropriate parenthetical.

196. GREEN, supra note 148, at 162.
197. Even Green admits that "[i]t is not clear that there are, or even could be, any strong [illocutionary force indicators] in an actual or possible language." Id. at 163. While there may be "weak" indicators, see id. at 165–70, we should also appreciate the wide range of ways humans can express themselves. "We thus cannot infer, from the premise that an expression has semantic content, to the conclusion that it can't also be a device of self-expression." Id. at 170. Moreover, the remedy is the loss of credibility that accrues when a speaker fails to properly convey his intent and level of commitment to a statement. See id.
198. See GREEN, supra note 148.
199. An example of how this might work is illustrated by Dan Snyder's lawsuit against the Washington City Paper, arising from an article titled The Cranky Redskins Fan's Guide to Dan Snyder. Dave McKenna, The Cranky Redskins Fan's Guide to Dan Snyder, WASH. CITY PAPER, Nov. 19, 2010. The story was a sarcastic look at the ways in which Snyder alienated football fans in the D.C. area; some of the statements were false (and knowingly false) if read literally, but the statements were intended to be hyperbolic. See id. Although many readers may have found the article to be a hilarious and accurate portrayal of why Snyder is not beloved by Redskins fans (for example, a popular bumper sticker in the DC area says, "Impeach Snyder"), Snyder did not find the article to be funny. Snyder sued the paper based on certain statements in the story, but later withdrew his lawsuit. A statement by
refuses to clarify his intent might be subject to a stricter burden (for example, a court might presume the statement was a "telling," and place the burden on the defendant to prove otherwise).

CONCLUSION

_Sullivan_ was a watershed case that has served important First Amendment interests. However, time has shown that there is a "_Sullivan_ gap," a lack of legal protection for socially important speech that falls outside the scope of the limited protection _Sullivan_ offers. Moreover, the courts have struggled with ways to protect expressive speech in a variety of contexts, using a mishmash of defenses in an effort to preserve expressive freedom for "assertions." The problem is not one of principle, but of terminology and approach.

Borrowing the concept of a "speech act" goes a long way towards clarifying what kinds of statements should be protected because of their strong expressive value. Establishing such protection as a matter of constitutional principle would eliminate the uncertainty faced by national publishers who risk liability because of variations among state laws. When publishers determine in good faith that a statement is newsworthy and contains expressive value and is likely to be protected,

Snyder’s spokesperson said that the lawsuit was withdrawn because “the [Washington City Paper] and its writer have admitted that certain assertions contained in the article that are the subject of the lawsuit, were, in fact, unintended by the defendants to be read literally as true. Therefore, we see nothing further to be gained at this time through continuing the lawsuit.” Erik Wemple, _Why did Dan Snyder want to sue Washington City Paper?_, WASH. POST OPINIONS BLOG (Sept. 13, 2011), http://washingtonpost.com/blogs/erik-wemple. Although it can be argued that Snyder should never have filed the lawsuit in the first place, his stated reason for withdrawing the suit is consistent with my argument. Assuming he truly believed that the illocutionary force of the statement was in question, it was appropriate for him to demand that the paper/writer clarify it. Did the defendants mean a statement to be read literally or as a joke? Once the speaker’s intent is clarified, there should be no libel claim if the statement is not intended to _tell_ the audience anything; and the speech should be constitutionally protected if it has some useful expressive value, such as jokingly conveying why Snyder is an unpopular owner. The clarification in Snyder’s case rendered the libel claim moot because, once the clarification was made, the statement certainly could not be reasonably understood as conveying actual facts, and the audience could not reasonably have the perlocutionary effect of being persuaded to believe a false fact.
reasoning that the allegation is important because it was made without regard to the truth of proposition, they should not face liability merely because the plaintiff chooses to sue in a jurisdiction that happens to reject—or more strictly define—defenses that are available in other jurisdictions. The expressive value—and the constitutional value—of such statements does not vary across jurisdictions even if the law does.

Such an analysis would greatly simplify libel doctrine. Myriad defenses have arisen because of the lack of clarity in the way speech is used. Courts have intuitively recognized the concepts presented herein—for example, that some statements are simply not understood as representing actual facts even if the semantic content of the sentence superficially appears to be an “assertion,” or that conclusions and speculation are different from “telling,” or that expressions of belief should be protected even if they have no way of presenting themselves but through a statement—but there has been no unifying idea explaining why some statements are protected and others are not. This Article, at its heart, presents a unifying concept that should eliminate confusion and streamline the analysis in libel cases.

This new approach would be more consistent with other aspects of First Amendment doctrine. Typically, restrictions on content-based speech are subject to strict scrutiny; there must be a compelling government interest in restricting the speech, and the restriction must be narrowly tailored so as to not restrict more speech than necessary to protect that interest.\(^{200}\) Libel law serves as a restriction on content-based speech, and yet the courts have struggled to create tailored doctrines that permit liability only where there is a compelling interest. The government arguably has a compelling interest in preventing fraud and intentional deception, two types of knowing falsities. But the “actual malice” rule is not narrowly tailored because it captures speech that has expressive value and is neither calculated nor likely to perpetuate a false belief, as illustrated by Norton. The larger question is whether the government has a compelling interest in defending the reputation of

\(^{200}\) See, e.g., Near v. Minnesota, 283 U.S. 697 (1931). In Near, the Court struck down a state law that regulated “scandalous newspapers” as nuisances. Id. at 722-23. Prosecutors attempted to enjoin publication of The Saturday Press as a nuisance because of its anti-Semitic content. Id. at 706.
individuals. But even if one were to answer that in the affirmative, *Sullivan* makes clear that reputational interests must yield to the First Amendment when legitimate First Amendment interests are present.

Any interest in protecting reputation must be approached in a limited manner so that speech with expressive value is not encompassed within the restrictions. Requiring the courts to first determine whether there is expressive value in the statement would limit libel suits only to those cases where there is a compelling interest in preventing the harm caused by "telling," and would serve the long-recognized purpose of the First Amendment in protecting socially valuable expression.

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201. Reputation has proved to be a complex topic with practical realities that have changed over time. There are now reputation management services that can promote "positive" views of a person and attempt to "hide" negative news online. Furthermore, as a cultural matter, there are rarely negative consequences to those with poor reputations. Bad behavior is now rewarded with reality television shows, money, invitations to high profile events, and fame and its attendant benefits. Moreover, reputation is no longer static. Scandal-plagued celebrities like Michael Milken or Hugh Grant have successfully rehabilitated their images, lessening any "harm" from negative assertions about them. Given the lack of social strictures and the private mechanisms available for protecting reputation, it is fair to ask whether or not there is a compelling interest in using government resources to "protect" reputation. This question is aside from the question of whether reputation is an objective thing that can be controlled and protected or whether it consists solely of subjective interpretations that are not subject to external control. See Gerald Ferris et al., *Personal Reputation in Organizations*, in *Organizational Behavior: The State of the Science* 215 (Jerald Greenberg, ed., 2003) (noting observations on reputations: that they are perceptual in nature, they can be influenced by deliberate or chance events, they are sometimes manageable and sometimes unmanageable, and they are the result of continuous processes).

202. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 272 (1964). As promised, I return to principle (1) discussed in Section I. The analysis proposed herein would also be consistent with the statement in *Sullivan* that constitutional protection does not depend on truth. *Id.* at 271–72. Constitutional protection should depend on expressive purpose.