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# THE CASE AGAINST EXPANDING DEFAMATION LAW

*Yonathan A. Arbel & Murat Mungan*

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# THE CASE AGAINST EXPANDING DEFAMATION LAW

Yonathan A. Arbel & Murat Mungan\*

*It is considered axiomatic that defamation law protects reputation. This proposition—commonsensical, pervasive, and influential—is faulty. Underlying this fallacy is the failure to appreciate audience effects: the interaction between defamation law and members of the audience.*

*Defamation law seeks to affect the behavior of speakers by making them bear a cost for spreading untruthful information. Invariably, however, the law will also affect members of the audience, as statements made in a highly regulated environment tend to appear more reliable than statements made without accountability. Strict defamation law would tend to increase the perceived reliability of statements, which in some cases can have harmful effects on the reputation of the targets of the speech.*

*This unrecognized complexity of defamation law has the potential to tip the scales in First Amendment jurisprudence towards greater protection of free speech and free press. Audience effects should also be considered within the newly announced Restatement project on defamation law. Most urgently, the consequences of audience effects should give pause to the recent calls to expand libel laws to fight fake news by showing that such laws may well backfire and exaggerate the consequences of falsehoods.*

## INTRODUCTION

In *New York Times Co. v. Sullivan*, the Supreme Court famously circumscribed the tort of defamation to protect freedom of speech and press.<sup>1</sup> Now, winds blowing from Washington augur that the *Times* they are a-changin'.<sup>2</sup> Recently, Justice Thomas called on the Supreme Court to reconsider its holding in *New York Times*, seeing the scope of defamation law as a state issue, rather than one having a “constitutional status.”<sup>3</sup> In the name of fighting “fake news,” many others are now calling to erode the safeguards set out by this case and its progeny. President Donald Trump has made defamation law a repeated theme

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\* Assistant Professor of Law, the University of Alabama School of Law, and Professor of Law, George Mason University, Antonin Scalia Law School. We are grateful for the insightful comments of Jack Balkin, Oren Bar-Gill, Omri Ben-Shahar, Mark Brandon, William Brewbaker, Zachary Clopton, Shahar Dillbary, Heather Elliott, Janet Freilich, John Goldberg, Christine Jolls, Ronald Krotoszynski, Yair Listokin, Irina Manta, Benjamin McMichael, Michael Pardo, Kish Parella, Steve Shavell, and Rebecca Tushnet. We are also grateful for comments received in the Yale/Harvard/Stanford Junior Faculty Forum and Midwestern Law & Economics Conference. The editors of the *Alabama Law Review* gave many helpful and thoughtful suggestions. Katherine Johnson, Hamilton Millwee, Victoria Moffa, and Brenton Smith provided invaluable research assistance.

1. 376 U.S. 254, 277–83 (1964).

2. BOB DYLAN, THE TIMES THEY ARE A-CHANGIN' (Columbia Records 1964).

3. *McKee v. Cosby*, 139 S. Ct. 675, 682 (2019) (Thomas, J., concurring in the denial of certiorari).

of his public communications, and he promised decisive action: “We are going to take a strong look at our country’s libel laws, so that when somebody says something that is false and defamatory about someone, that person will have meaningful recourse in our courts . . . .”<sup>4</sup> At the same time, in January of 2019, the American Law Institute (ALI) announced the start of a new Restatement project for defamation law.<sup>5</sup> The confluence of political will, support on the Supreme Court, and the ALI project suggests that, indeed, writers and critics who prophesize with their pens should keep their eyes wide open, for the *Times* they are a-changin’.<sup>6</sup>

The calls to expand defamation law—by removing safeguards and increasing money damages<sup>7</sup>—are grounded in the widely held theory that *defamation law protects reputation*.<sup>8</sup> And because defamation law is believed to protect reputation,

4. Michael M. Grynbaum, *Trump Renews Pledge to ‘Take a Strong Look’ at Libel Laws*, N.Y. TIMES (Jan. 10, 2018), <https://www.nytimes.com/2018/01/10/business/media/trump-libel-laws.html>; see also David Jackson, *Donald Trump Maintains Attacks on Bob Woodward, Calls for Changes in Libel Laws*, USA TODAY (Sept. 5, 2018, 3:55 PM), <https://www.usatoday.com/story/news/politics/2018/09/05/donald-trump-maintains-attacks-bob-woodward-calls-changes-libel-laws/1199794002/>; Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 5, 2018, 6:33 AM), <https://twitter.com/realdonaldtrump/status/1037302649199177728?lang=en> (“Isn’t it a shame that someone can write an article or book, totally make up stories and form a picture of a person that is literally the exact opposite of the fact, and get away with it without retribution or cost. Don’t know why Washington politicians don’t change libel laws?”). Other figures have insinuated that the “fake news” media is so untrustworthy that it must be circumvented. See Sophia Tesfaye, *Trump’s Daughter-in-Law Pushes His Propaganda: Lara Trump Launches ‘RealNews’ Show to Praise the President*, SALON (Aug. 2, 2017, 5:03 PM), <https://www.salon.com/2017/08/02/trumps-daughter-in-law-pushes-his-propaganda-lara-trump-launches-real-news-show-to-praise-the-president/>. Despite Trump’s calls for stronger defamation laws, he himself has been a defendant in defamation suits. Jessica Levinson, *Stormy Daniels and Summer Zervos Are Using Defamation Laws to Try and Reveal the Truth About Trump*, NBC NEWS (Mar. 28, 2018, 2:18 PM), <https://www.nbcnews.com/think/opinion/stormy-daniels-summer-zervos-are-using-defamation-laws-try-reveal-ncna860851>.

5. *Restatement of the Law Third, Torts: Defamation and Privacy*, ALI, <https://www.ali.org/projects/show/torts-defamation-and-privacy/> (last visited Oct. 8, 2019).

6. DYLAN, *supra* note 2.

7. See, e.g., Hadas Gold, *Donald Trump: We’re Going to ‘Open Up’ Libel Laws*, POLITICO (Feb. 26, 2016, 2:31 PM), <https://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866> (quoting Trump’s assertion that he is “going to open up our libel laws so when [newspapers] write purposely negative and horrible and false articles, we can sue them and win lots of money”).

8. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 12 (1990) (“Defamation law developed not only as a means of allowing an individual to vindicate his good name, but also for the purpose of obtaining redress for harm caused by such statements.”); see also, e.g., PETER N. AMPONSAN, *LIBEL LAW, POLITICAL CRITICISM, AND DEFAMATION OF PUBLIC FIGURES 2* (2004) (“To protect people from injury to their reputation, societies create laws of defamation to settle issues of truth or falsehood and reputational harm that result from defamatory statements.”); DAN B. DOBBS ET AL., *HORNBOOK ON TORTS* § 37.1, at 936 (2d ed. 2015) (“Defamation law . . . aims at protecting reputation and good name against false and derogatory communications.”); RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, *CASES AND MATERIALS ON TORTS 1017* (10th ed. 2012) (describing the common law “premise that an individual’s reputation should be protected against false words”); WILLIAM K. JONES, *INSULT TO INJURY: LIBEL, SLANDER, AND INVASIONS OF PRIVACY 1, 9* (2003) (“Briefly stated, the law of defamation protects a person against falsehoods that expose him to hatred, contempt, or ridicule or cause him to be shunned by his fellows or that tend to injure him in his trade or occupation. . . . The objective of the law of defamation is to protect reputations against derogatory falsehoods.”); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 111, at 771 (5th ed. 1984) [hereinafter PROSSER AND KEETON] (“[D]efamation is an invasion of the interest in reputation and

many think that stricter defamation law means stricter protection of reputational interests. It is remarkable just how common the reputation-protection theory is. Whereas lawyers often decry the incoherency and vagaries of the common law tort of defamation,<sup>9</sup> they share what has been described as a “virtually axiomatic” belief that defamation law shields reputation from harm.<sup>10</sup> Courts, commentators, policy makers, and lay people all seem to share this common theory.<sup>11</sup> Despite decades of jurisprudence and debate, few have contested it, perhaps because of how enticing it is in its simplicity—this theory that offensive, pejorative, and vituperative comments *cause* harm to the victim’s standing in society. To prevent wrongdoers from causing this harm and to compensate victims, tort law must impose a fine on those who make statements that are found to be false. On the basis of this theory, courts will let a tort overcome a constitutional right that is right at the heart of the American ethos.<sup>12</sup>

This Article exposes the shortcomings of the reputation-protection theory by demonstrating how it fails to consider *audience effects*.<sup>13</sup> Unlike the harms from

good name.”); LAWRENCE MCNAMARA, REPUTATION AND DEFAMATION 1 (2007) (noting that “[t]he clarity of the rationale and the extent of agreement surrounding it is quite remarkable”). For further discussion, see *infra* Part I.A.

9. EPSTEIN & SHARKEY, *supra* note 8, at 1017 (“Of all the areas of tort law, defamation is perhaps the most difficult to organize and to understand.”); PROSSER AND KEETON, *supra* note 8, § 111, at 771 (“[T]here is a great deal of the law of defamation which makes no sense. It contains anomalies and absurdities for which no legal writer ever has had a kind word . . . .”); Randall P. Bezanson, *The Libel Tort Today*, 45 WASH. & LEE L. REV. 535, 543 (1988) (“[R]ecover by any plaintiff is more likely to be the product of chance than of any systematic pattern reflecting reputational interests.”); Sheldon W. Halpern, *Values and Value: An Essay on Libel Reform*, 47 WASH. & LEE L. REV. 227, 230 (1990). For an early discussion of defamation, see Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 546 (1903) (“English law of defamation . . . is a mass which has grown by aggregation . . . . [P]erhaps no other branch of the law is as open to criticism for its doubts and difficulties, its meaningless and grotesque anomalies. It is, as a whole, absurd in theory, and very often mischievous in its practical operation.”).

10. MCNAMARA, *supra* note 8, at 1. The concept of reputation in legal scholarship is quite thin. *See generally* Yonathan A. Arbel, *Reputation Failure: The Limits of Market Discipline in Consumer Markets*, WAKE FOREST L. REV. (forthcoming 2019) [hereinafter Arbel, *Reputation Failure*] (exploring the concept of reputation and arguing that systems of reputation are highly susceptible to significant bias, given the divergence between private incentives people have to share reputational information and its status as a public good).

11. *See infra* Part I.A.

12. *See, e.g.*, *Ventura v. Kyle*, 63 F. Supp. 3d 1001, 1011 (D. Minn. 2014), *rev’d in part, vacated in part*, 825 F.3d 876, 885–86 (8th Cir. 2016) (vacating the jury verdict due to a prejudicial error during trial); *Blake v. Ann-Marie Giustibelli, P.A.*, 182 So. 3d 881, 883–84 (Fla. Dist. Ct. App. 2016) (affirming \$350,000 in damages for online defamatory reviews of attorney services); *Anagnost v. Mortg. Specialists, Inc.*, No. 216-2016-cv-277, 2017 WL 7693149 (N.H. Super. Ct. Sept. 1, 2017), *aff’d*, No. 2017-0311, 2018 WL 4940850 (N.H. Sept. 25, 2018) (upholding a \$275 million judgment, *see* Jury Verdict Form, *Anagnost*, No. 216-2016-cv-277, 2017 WL 7690898, for false accusations of running a drug ring and conspiracy to murder). However, other torts often yield to constitutional protections. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 460–61 (2011) (holding that the First Amendment bars the father of a deceased soldier from recovering for intentional infliction of emotional distress due to picketing by members of the Westboro Baptist Church); *United States v. Eichman*, 496 U.S. 310, 319 (1990) (holding that a federal law prohibiting flag burning was unconstitutional and that “[p]unishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering”).

13. This statement is less bold when one considers Professor Laura Heymann’s argument that, until recently, the existence of the audience and its interests were all but neglected in both scholarship and case

traditional torts, such as assault and battery, reputational harms are not immediate. Rather, they are mediated by third parties, namely, the audience.<sup>14</sup> Reputational harm is the result of the audience believing, at least to some extent, in a negative statement. As a result, any legal analysis of defamation is incomplete without considering audience effect. As communication theorists agree, audience effects can be complex: “The modern view, informed by decades of empirical research, supports an understanding antithetical to the assumption of direct and uniform effects [of defamatory statements].”<sup>15</sup> Yet the standard model of defamation law only accounts for speakers and victims, relegating the audience to a secondary and often invisible role.<sup>16</sup>

This Article offers a framework for defamation law that accounts for audience effects. Audiences form judgments on the basis of a multitude of factors. We focus here on one important, but neglected, factor—the legal environment itself. Borrowing from the rich and well-established signaling theory,<sup>17</sup> we consider how defamation law affects audience beliefs. A key finding in this literature is that expensive signals appear more reliable than cheap signals, “cheap talk.”<sup>18</sup> This makes intuitive sense: puffery and gossip appear less reliable than a statement by a person testifying under the threat of perjury. Because stricter defamation law makes inaccurate statements more expensive (by increasing the likelihood of an adverse judgment), they make the signals appear to be more reliable. Indeed, this is why the regulation of false advertising is believed to increase consumer confidence in the marketplace.<sup>19</sup> The increased perception of the reliability of statements is salutary when the statements are indeed truth-

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law. See Laura A. Heymann, *The Law of Reputation and the Interest of the Audience*, 52 B.C. L. REV. 1341, 1341 (2011).

14. Other dignitary torts, such as intentional infliction of emotional harm or infringement of privacy, are contingent on the reaction of the victim, rather than the audience, and thus can be tortious even when they involve true statements.

15. Jeremy Cohen & Albert C. Gunther, *Libel as Communication Phenomena*, 9 COMM. & L. 9, 21 (1987).

16. See, e.g., Heymann, *supra* note 13, at 1341; Lyriisa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 801 (2010) [hereinafter Lidsky, *Rational Audience*] (“The Court rarely articulates its assumptions about the presumed audience of core speech, but its assumptions shape the outcomes of First Amendment cases.”).

17. See generally Rebecca Bliege Bird & Eric Alden Smith, *Signaling Theory, Strategic Interaction, and Symbolic Capital*, 46 CURRENT ANTHROPOLOGY 221 (2005); Brian L. Connelly et al., *Signaling Theory: A Review and Assessment*, 37 J. MGMT. 39 (2011); Michael Spence, *Job Market Signaling*, 87 Q.J. ECON. 355 (1973).

18. See, e.g., William Boulding & Amna Kirmani, *A Consumer-Side Experimental Examination of Signaling Theory: Do Consumers Perceive Warranties as Signals of Quality?*, 20 J. CONSUMER RES. 111 (1993).

19. Everette MacIntyre, Member, Fed. Trade Comm’n, Address Before the Better Business Division Miami-Dade County Chamber of Commerce: FTC Promotes Confidence in Advertising (July 18, 1963), [https://www.ftc.gov/system/files/documents/public\\_statements/683591/19630718\\_macintyre\\_ftc\\_promotes\\_confidence\\_in\\_advertising.pdf](https://www.ftc.gov/system/files/documents/public_statements/683591/19630718_macintyre_ftc_promotes_confidence_in_advertising.pdf). We also find a similar idea in securities law: close regulation of information streams would increase investor confidence. See, e.g., Mary Schapiro, Chairman, U.S. Sec. & Exch. Comm’n, Speech at the SIFMA Annual Conference: The Road to Investor Confidence (Oct. 27, 2009), <https://www.sec.gov/news/speech/2009/spch102709mls.htm> (noting that the way to restore investor confidence, post crisis, is through high standards and stricter enforcement of securities laws).

ful. But it can have negative and deleterious effects when the occasional statement proves to be false, as audiences are more likely to believe it to be true than they would absent strict defamation law.<sup>20</sup> Hence, we conclude that *strict defamation law may damage reputational interests*.

The framework presented here offers another dimension to standard analyses of defamation law.<sup>21</sup> In the standard bilateral-tort model, courts and commentators see expansions to defamation law as involving a simple balance between better protection of the victim's reputation and the chilling effect of such laws on speakers.<sup>22</sup> The framework here adds another player—the audience. The chilling effect in the bilateral model assumes that would-be speakers will change their behavior in response to stricter defamation laws. In the trilateral model, stricter defamation laws also affect the audience. In particular, we argue that considering the impact of defamatory statements on audiences produces a “seesaw dynamic,” where strict defamation laws chill false statements but increase the reliability and thus the harm of surviving false statements.<sup>23</sup> Using the trilateral model, courts should engage in richer balancing of the effects of defamation law, which can sometimes lead to very different conclusions than the standard analysis.

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20. A poetic illustration of some of the audience effects is encapsulated in writer Bertolt Brecht's satirical poem, *The Burning of the Books*:

When the Regime commanded that books with harmful knowledge  
Should be publicly burned and on all sides  
Oxen were forced to drag cartloads of books  
To the bonfires, a banished  
Writer, one of the best, scanning the list of the  
Burned, was shocked to find that his  
Books had been passed over. He rushed to his desk  
On wings of wrath, and wrote a letter to those in power  
Burn me! he wrote with flying pen, burn me! Haven't my books  
Always reported the truth? And here you are  
Treating me like a liar! I command you:  
Burn me!

BERTOLT BRECHT, *POEMS 1913-1956*, at 294 (1998).

21. Our paper was developed contemporaneously and independently of a similar project pursued by Professors Ariel Porat and Daniel Hemel. Both projects conclude that audience effects undermine the standard narrative of defamation law, although we differ in focus and in some of our conclusions. See Daniel Jacob Hemel & Ariel Porat, *Free Speech and Cheap Talk*, 11 J. LEGAL ANALYSIS 46 (2019).

22. See, e.g., *Petro-Lubricant Testing Labs., Inc. v. Adelman*, 184 A.3d 457, 461 (N.J. 2018) (“Defamation law balances two competing interests—an individual’s right to protect his reputation from unjustified and false aspersions and our citizens’ right to free expression and robust debate in our democratic society.”).

23. See *infra* Part II.C.

Audience effects, of the kind we identify here, do not depend on audiences being rational, sophisticated, or well versed in defamation law. Just like the well-accepted chilling effect, the key dynamics we identify here accommodate different views regarding these issues. In fact, under some conditions, greater audience ignorance and gullibility will *bolster* the harmful effect of expanding defamation law.<sup>24</sup> What we find implausible is the idea inherent in the standard model that defamation law affects speakers and their subjects but that somehow audiences are completely insulated from these effects.<sup>25</sup> As noted, it is well recognized in other domains that close regulation of the information environment would lead to increased trust by members of the audience.<sup>26</sup> Our analysis here frames the key dynamics and invites judges, policy makers, and scholars to explicitly consider these effects.

Our policy prescriptions call for a more nuanced and careful approach to the evolution of defamation law. There will be contexts wherein expansions of defamation law can be shown to be helpful, but the law's efficacy is neither self-evident nor easily supported. Lawmakers, courts, and commentators contemplating a reform or a new application of defamation law—such as President Trump's proposal—should consider the trade-off between defamation law's potential benefits and its countervailing effects. When considering the expansion of defamation law, policy makers should ask: what is the harm prevented by having fewer falsehoods, and how does it compare to the harm caused by falsehoods becoming more believable? These regulators should only expand liability if they judge that the harm prevented by the expansion is greater than the harm it creates. Indeed, this question is not always easy to answer, and there will often be some factual uncertainty about this trade-off. In such cases, we proffer a default position with a venerable history in the courts: err on the side of free speech. If one cannot prove that a new application of defamation law would result in a net benefit to reputation, then defamation's ambit should not be expanded.

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24. Audiences may easily underestimate or overestimate the strictness of defamation law. The effects of expanding defamation law depend on the audience members' starting positions and how likely and quick they are to learn about changes to the law, among other considerations. See generally Christine Jolls, *Debiasing Through Law and the First Amendment*, 67 STAN. L. REV 1411 (2015) (listing empirical evidence of how the law might correct consumer misperceptions). But see Karen Russo France & Paula Fitzgerald Bone, *Policy Makers' Paradigms and Evidence from Consumer Interpretations of Dietary Supplement Labels*, 39 J. CONSUMER AFF. 27 (2005) (finding that it is difficult to correct the misperception that the safety of certain supplements is regulated). Psychological biases and heuristics add another dimension of complexity, as audiences may react strongly to salience and repetition (even of suspected lies) or may be overly cynical as a defense mechanism. These considerations, alongside many other practical, legal, and political considerations and the findings of this paper, are relevant for the determination of the scope of defamation law. This is why it is important to abandon the simplistic bilateral model of reputation protection.

25. Perhaps in some contexts, speakers are better informed about the law than audiences. While relevant, what matters most for the analysis here is that audiences have some very general (even if mistaken) idea about the severity of the law, which is plausible given the common media coverage of libel lawsuits.

26. See *supra* note 19 and accompanying text.



We show in three Parts that the case for expanding defamation law is an uneasy one. In Part I, we provide general background on defamation law, First Amendment jurisprudence, and the protection of reputation. A central observation here is that the making of defamatory statements is already permissible in many important areas of social life, and commentators generally accept such carve outs without much alarm, presumably because audiences take assertions in these spheres more skeptically. This observation grounds our discussion and demonstrates the practicality and sensibility of limiting defamation law. In Part II, we develop our main argument using concrete examples. While we base our general analysis on a formal model,<sup>27</sup> here we use a simple, stylistic, and easy-to-follow example. We then consider a variety of limitations, qualifications, and considerations. We pay particular attention to issues such as audience sophistication, behavioral biases, reliability and accessibility of courts, and the stakes of the allegations. With a few exceptions, the dynamics we identify in Part II turn out to be general, although their strength is context-specific.

In Part III, we start to explore some of the legal implications of our analysis. We examine the proper ambit of defamation law in diverse contexts, such as employment, consumer goods, and political speech. We conclude that, first, courts should reexamine traditional balances in First Amendment jurisprudence and tilt the balance further in favor of free speech. Historically, when courts decided defamation cases, they labored under the assumption that defamation law definitively protects reputation. The upshot of our analysis is that defamation law is less protective than traditionally believed, and so the weight given by defamation law to the goal of protecting reputation should be considerably lighter. The recent announcement of a new Restatement project presents a rare opportunity to engage in such reflection.<sup>28</sup>

The second and perhaps the most urgent consequence of our analysis is that the war on fake news should not result in an expansion of libel laws. This consequence is significant, because our analysis takes the concerns of fake news seriously. Based on this premise, the analysis shows that expanding defamation law can easily backfire, resulting in the unintended consequence of *aggravating* the harm of fake publications by lulling the populace into a sense of assurance that if it's in the news, it must be true.

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27. See Yonathan A. Arbel & Murat Mungan, *Regulating Speech with Bayesian Audiences* (U. of Ala. Sch. of Law Legal Studies, Research Paper No. 3452662, 2019), <https://papers.ssrn.com/sol3/abstract=3452662>.

28. See *Restatement of Law Third, Torts: Defamation and Privacy*, *supra* note 5.

## I. DEFAMATION LAW &amp; REPUTATION

This Part explores modern defamation law, as it formed after the turbulence of the 1960s with *New York Times Co. v. Sullivan*.<sup>29</sup> This Part demonstrates how the belief in defamation law's reputation-protecting powers has shaped its doctrine, highlights how courts have relegated the role of audiences to secondary consideration, and explores some of the exceptions to defamation law. These exceptions, it is argued, are domains where audiences tend to be more critical of information.

*A. Goals & Functions of Defamation Law*

Under defamation law, a plaintiff can recover pecuniary damages from any person who makes a public, false defamatory statement against her, unless special conditions or privileges exist.<sup>30</sup> We defer discussion of doctrine until after we have examined a pressing preliminary question of why the law is needed to regulate such statements in the first place. In the United States, free speech is a core value, ethos, and right; the commitment to protecting and promoting free speech runs deep. Indeed, most forms of speech go unregulated, even if the content is inflammatory, inane, provocative, flippant, or frivolous.<sup>31</sup> Why, then, regulate defamatory speech?

Defamation law exists to protect reputation. This, at least, is the common view, one that is so broadly held and so commonsensical that it is in the small province of statements to which lawyers do not attach a footnote. Leading commentators call this idea axiomatic and universal.<sup>32</sup> Courts frequently recite the idea that “[i]n American law, defamation is . . . about protecting a good reputation honestly earned.”<sup>33</sup> Several casebooks matter-of-factly state that “[d]efamation protects an individual's interest in reputation,” omitting—for reasons of blatant obviousness—any support or authority.<sup>34</sup> Note that this justification is distinct from the related, but often confused, goal of protecting emotions or

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29. 376 U.S. 254 (1964).

30. See PROSSER AND KEETON, *supra* note 8, § 111, at 771.

31. See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (allowing Westboro Baptist Church's picketing of a soldier's funeral); *Reno v. ACLU*, 521 U.S. 844 (1997) (discussing “indecent” content on the Internet); *United States v. Eichman*, 496 U.S. 310, 319 (1990) (regarding flag burning).

32. See *supra* note 10 and accompanying text; see also *Spencer v. Kemna*, 523 U.S. 1, 24 n.5 (1998) (Stevens, J., dissenting) (“[V]indicating one's reputation is the main interest at stake in a defamation case . . . .”); *Albright v. Oliver*, 510 U.S. 266, 283 (1994) (Kennedy, J., concurring) (“[T]he interests granted historical protection by the common law of torts [include] freedom from defamation . . . .”); David J. Acheson & Ansgar Wohlschlegel, *The Economics of Weaponized Defamation Lawsuits*, 47 SW. L. REV. 335, 335 (2018) (“The law of defamation is the principal legal mechanism in both the United States and England for protecting the interest in reputation.”).

33. *Bustos v. A&E Television Networks*, 646 F.3d 762, 764 (10th Cir. 2011).

34. RUSSEL L. WEAVER ET AL., *TORTS: CASES, PROBLEMS, AND EXERCISES* 803 (2d ed. 2005).

privacy. These goals are served by other tort doctrines, such as intentional infliction of harm and privacy infringement, that are not conditioned on the mendacity of the allegation.<sup>35</sup> The Supreme Court has emphasized that emotional harm alone cannot support a defamation lawsuit but that a defamation lawsuit must rest on harm to reputation, which is, after all, its *raison d'être*.<sup>36</sup>

As to *why* reputation should be protected, there is an unsurprising difference of opinion. Rights-based accounts tend to view reputation as being part of a person's property, dignity, or honor.<sup>37</sup> In such views, reputation is something one *has*, a view which is quite dominant in the scholarship.<sup>38</sup> For such accounts, the wrongfulness of defamation consists in the *taking* and the violation of a right.<sup>39</sup> A more social view sees defamation as a replacement of the old customs of honor duels and blood feuds.<sup>40</sup> By channeling certain behaviors to the court system, defamation law is believed to serve a civilizing function—so much so that some think that “a civilized society cannot refuse to protect reputation.”<sup>41</sup>

Economic theories of reputation shift the point of view from the subject to the public. Reputation consists of an ununified mass of opinions others have of us.<sup>42</sup> Such opinions have predictive values. They help members of the community—or market participants—judge the “affinity” of a particular partner, be

35. PROSSER AND KEETON, *supra* note 8, § 111, at 771 (“Defamation is not concerned with the plaintiff's own humiliation, wrath or sorrow . . .”). In *Gertz v. Robert Welch, Inc.*, the Court took a more inclusive approach. 418 U.S. 323, 349–50 (1974) (“We need not define ‘actual injury,’ . . . Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.”).

36. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52–57 (1988).

37. See Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 693–719 (1986); see also Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782, 800–01 (1986).

38. See, e.g., David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 261, 290 (2010) (“The . . . most dominant[] conception of reputation embodied in American defamation law is that of reputation as property.”); Post, *supra* note 37, at 730 (discussing defamation “within the framework of reputation as property”).

39. See generally *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (Powell, J., plurality opinion). In common law, punitive damages are conditional on malice but in the sense of a wrongful attitude rather than in the *Sullivan* sense of a disregard for the truth. See Sheldon W. Halpern, *Of Libel, Language, and Law: New York Times v. Sullivan at Twenty-Five*, 68 N.C. L. REV. 273, 278 (1990).

40. See PROSSER AND KEETON, *supra* note 8, § 111, at 772. It is puzzling what social function duels had; after all, the ability to win a duel is not correlated with the veracity of the offending statement. See generally Ben Merriman, *Duels in the European Novel: Honor, Reputation, and the Limits of a Bourgeois Form*, 9 CULTURAL SOC. 203 (2015) (rooting duels in a system of honor, dispute resolution, and diffusion of conflict).

41. David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 490 (1991).

42. RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 272 (1981) (“A person's reputation is other people's valuation of him as a trading, social, marital, or other kind of partner. It is an asset of potentially great value which can be damaged both by false and by true defamation.”); Christian Hahn et al., *Social Reputation: A Mechanism for Flexible Self-Regulation of Multiagent Systems*, 10 J. ARTIFICIAL SOCIETIES & SOC. SIMULATION ¶ 3.1 (Jan. 31, 2007), <http://jasss.soc.surrey.ac.uk/10/1/2/2.pdf> (treating reputation as a form

it in a social, romantic, or transactional setting.<sup>43</sup> How trustworthy is a potential business partner? How good is a specific product? How loyal is a potential date? In economic parlance, reputation is a signal about past behavior that is predictive of future behavior;<sup>44</sup> it is a “shadow of the future”<sup>45</sup> that helps economize search costs.<sup>46</sup>

Defamation law is thought to promote the protection of reputation in three ways. One idea, perhaps the most prominent, is deterrence. By imposing a sanction on false allegations, defamation law disincentivizes such wrongful behavior *ex ante*.<sup>47</sup> Prospective liars would worry that lying exposes them to civil liability and so would likely refrain from falsely defaming others.<sup>48</sup> A second way is through redress; by offering compensation to victims of defamation, defamation law protects their reputation against wrongful attacks.<sup>49</sup> The Supreme Court has declared both of these goals to be important.<sup>50</sup> A third way, although less commonly articulated, is vindication.<sup>51</sup> The idea of vindication focuses on the legal process. By being able to bring a lawsuit, a victim gains access to a procedure that allows for a public determination of truth—either through the outcome of the case or through information revealed in the litigation process.<sup>52</sup> Thus, victims can clear their names against nefarious allegations and have court judgments as records of their innocence.

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of “symbolic capital”); Roy Shapira, *Reputation Through Litigation: How the Legal System Shapes Behavior by Producing Information*, 91 WASH. L. REV. 1193, 1203–04 (2016).

43. POSNER, *supra* note 42, at 272.

44. Ardia, *supra* note 38, at 264 (describing reputation as “a heuristic for predicting the behavior of others”).

45. *Id.* (quoting ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 126 (1984)).

46. POSNER, *supra* note 42, at 287.

47. AMPONSAH, *supra* note 8, at 2; Stanley Ingber, *Defamation: A Conflict Between Reason and Decency*, 65 VA. L. REV. 785, 792 (1979) (“[A] successful defamation suit can act as a public rebuke and as an economic penalty for the publishers of defamatory statements. Anticipation of such suits presumably will deter individuals from making false statements that cause ridicule and loss of reputation.”). See LAURENCE H. ELDREDGE, *THE LAW OF DEFAMATION* § 3, at 6 (1978); see also RODNEY A. SMOLLA, *LAW OF DEFAMATION* § 1:26 (2d ed. 2019) (“The law of defamation serves an important social interest as a deterrent on the publication of false and injurious speech.”).

48. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (describing punitive damages in defamation suits as “private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence”).

49. AMPONSAH, *supra* note 8, at 2.

50. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 12 (1990).

51. *Id.* at 23 (“[A]n action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored.” (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 93 (1966) (Stewart, J., concurring))).

52. Shapira, *supra* note 42, at 1211–23.

By design, defamation law falls short of protecting these goals—it does not deter all falsehoods, compensate all victims, or vindicate all claims. There are both institutional and substantive reasons for these limitations. On the institutional side, it is widely understood that courts cannot always identify falsehoods, the judicial process is expensive and affords limited access, offenders are sometimes judgment-proof, and courts have limited jurisdiction.<sup>53</sup> On the substantive side, First Amendment considerations,<sup>54</sup> concerns about chilling speech,<sup>55</sup> and aversion to the idea that state courts should declare what is true and what is false<sup>56</sup> have led courts to approach defamation lawsuits with a willingness to err on the side of unfettered speech.<sup>57</sup> This is summed up by the idea that defamation law must give “breathing space” to free speech<sup>58</sup> and that some degree of abuse is to be tolerated in a free society.<sup>59</sup> As such, courts have shown reluctance to award injunctions.<sup>60</sup> They have also required heightened standards of proof,<sup>61</sup> and in some cases, they have even struck down prohibitions on false speech motivated by ill-intent.<sup>62</sup>

In closing, it should be noted that the idea that defamation protects reputation is not some impractical abstraction; it has significant constitutional and legal ramifications. Starting in the 1960s—surprisingly late—courts started to

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53. See generally Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855 (2000).

54. *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) (“[T]o insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones.”).

55. See generally Gary L. Lee, Comment, *Strict Liability Versus Negligence: An Economic Analysis of the Law of Libel*, 1981 BYU L. REV. 398, 400 (“[F]alse defamatory statements are properly viewed as an unavoidable cost of publishing true defamatory statements.”).

56. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) (warning that “juries [might] punish unpopular opinion[s]”).

57. *Id.* at 341 (“The First Amendment requires that we protect some falsehood in order to protect speech that matters.”).

58. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988).

59. See *Gertz*, 418 U.S. at 341; see also *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989))); James Madison, Report on the Virginia Resolutions, reprinted in 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 546, 571 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co. 2d ed. 1891) (1800) (“Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.”).

60. See, e.g., *Kramer v. Thompson*, 947 F.2d 666, 677 (3d Cir. 1991) (“[T]he maxim that equity will not enjoin a libel has enjoyed nearly two centuries of widespread acceptance at common law.”); *Konigsberg v. Time, Inc.*, 288 F. Supp. 989, 989 (S.D.N.Y. 1968) (“A court of equity will not, except in special circumstances, issue an injunctive order restraining libel or slander or otherwise restricting free speech. To enjoin any publication, no matter how libelous, would be repugnant to the First Amendment to the Constitution, and to historic principles of equity.” (citations omitted)).

61. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 15 (1990) (“The Court has also determined that both for public officials and public figures, a showing of *New York Times* malice is subject to a clear and convincing standard of proof.”).

62. *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612–16 (2003).

recognize the tension between defamation law and freedom of expression.<sup>63</sup> In the seminal case *New York Times Co. v. Sullivan*, the Supreme Court held that protection of reputation should sometimes cede to First Amendment considerations and that a defamation lawsuit by public officials cannot proceed without a showing of actual malice.<sup>64</sup> This holding cemented the idea that protecting reputation and freedom of expression requires balancing antagonistic considerations.<sup>65</sup> First Amendment considerations could be overcome, even if narrowly, when limitations on speech are *required* to protect reputation. Epstein summarized this idea: “Everyone agrees that the central task of the modern law of defamation is to reconcile the interest in reputation with that in freedom of speech.”<sup>66</sup>

### B. *Defamation Law: Doctrine, Nature of Reputation, and the Audience*

Defamation has been on the books for a little longer than there have been books. First came the moral exhortations. Ancient Sumerian cuneiform tablets admonish him who would associate with a slanderer.<sup>67</sup> The Bible reproves “speaking guile”<sup>68</sup> and “spread[ing] a false report.”<sup>69</sup> At some unknown point in history, defamation transitioned from the improper to the illegal. One early example comes from the Frankish *Lex Salica* (dated to around 500 C.E.) which imposes a three-shilling penalty on him who calls another a “wolf” or a “hare,”

63. See generally Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 348 (1978); Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 10 (1990); *id.* at 12 (“The First Amendment was a late entrant into the fields of public employee speech and defamation law and has never held full sway within the two areas.”). On this tension, see AMPONSAH, *supra* note 8, at 2; Epstein, *supra* note 37, at 783.

64. *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964). Confusingly, malice refers not to attitude towards the subject but rather to the making of a statement while knowing its falsity or with reckless disregard for its veracity. See Halpern, *supra* note 39, at 278.

65. See ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 1:1 (3d ed. 2009) (“Even though reputation may be seriously injured by defamation . . . courts concluded that on balance the damage [to free speech due to chilling effects was] too great to permit the defamed person to recover.”); J. M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 403–04; Ingber, *supra* note 47, at 789 (“The tort interest of protecting the individual—the interest of decency—may circumscribe the ambit of free debate. How should this conflict be resolved?” (footnote omitted)); Gerald R. Smith, *Of Malice and Men: The Law of Defamation*, 27 VAL. U. L. REV. 39, 40 (1992) (“The Court has struggled to find a reasonable balance between protecting reputation and protecting free speech by fashioning rules of general applicability in order to provide certainty and predictability and to avoid chilling free speech.”).

66. EPSTEIN & SHARKEY, *supra* note 8, at 1022.

67. *The Instructions of Shuruppak: Translation*, ELEC. TEXT CORPUS OF SUMERIAN LITERATURE §§ 65–66, <http://etcsl.orinst.ox.ac.uk/section5/tr561.htm> (last visited Oct. 10, 2019) (“The eyes of the slanderer always move around as shifflily as a spindle. You should never remain in his presence . . .”).

68. *Psalms* 34:13.

69. *Exodus* 23:1.

or a forty-five shilling penalty if one calls a woman a “harlot.”<sup>70</sup> In common law, defamation made its debut in the latter half of the sixteenth century.<sup>71</sup> In England, two different doctrines coevolved: slander (spoken defamation) and libel (written defamation).<sup>72</sup> Each of these doctrines evolved within its own venues—ecclesiastical or common courts—and consequently developed different rules, remedies, and procedures.<sup>73</sup> For a period of time, defamation coupled with sedition to form the much-maligned offense of “seditious libel” (speech meant to criticize the government).<sup>74</sup> Only in modernity did the common law fuse the disparate torts of libel and slander into what is now known as defamation, although remnants of this distinction still persist.<sup>75</sup>

The modern doctrine of defamation has a misleadingly simple structure. To prevail, the plaintiff must show that the defendant has made (i) a public statement<sup>76</sup> that is (ii) false and (iii) may diminish the plaintiff’s reputation.<sup>77</sup> In practice, applying these tests proves Herculean, with little in the way of an organizing theory.<sup>78</sup> Here, we explicate some aspects of these doctrinal requirements, as their application is based on some fundamental assumptions about the nature of defamation, reputation, and audiences.

For a statement to be defamatory, it must be “published” in the very expansive sense of being communicated to any other person besides the subject.<sup>79</sup> This distinction separates defamation law from emotional or dignitary harms because those can arise even in private communications, as is the case with racist or vituperative comments. By imposing a publicity requirement, courts have taken the position that defamation is not about protecting victims from emotional harm resulting from offensive speech per se, but rather defamation

70. PACTUS LEGIS SALICAE, tit. XXX, reprinted in KATHERINE FISCHER DREW, *THE LAWS OF THE SALIAN FRANKS* 59, 94 (1991). For the history of the Lex Salica, see generally DREW, *supra*.

71. ELDREDGE, *supra* note 47, § 3, at 5.

72. EPSTEIN & SHARKEY, *supra* note 8, at 1051–53.

73. On the origins of defamation in English law, see generally PAUL MITCHELL, *THE MAKING OF THE MODERN LAW OF DEFAMATION* (2005); Veeder, *supra* note 9.

74. WEAVER ET AL., *supra* note 34, at 803.

75. The law once distinguished between oral defamation (slander) and written defamation (libel) and afforded stronger protection from the latter. This led to absurd outcomes, with a public address to 3,000 people considered to be less harmful than a private written letter. See ELDREDGE, *supra* note 47, § 12, at 77. This distinction still reverberates in modern law, and California, for example, still has different rules for libel and slander. Compare CAL. CIV. CODE § 45 (West 2018) (defining libel), with CAL. CIV. CODE § 46 (defining slander).

76. JONES, *supra* note 8, at 19 (“[I]f the denunciation is not communicated to third persons, it is not an actionable defamation.”).

77. See RESTATEMENT (SECOND) OF TORTS §§ 558–59 (AM. LAW INST. 1977).

78. See Nat Stern, *The Certainty Principle as Justification for the Group Defamation Rule*, 40 ARIZ. ST. L.J. 951, 970 n.114 (2008) (collecting commentary condemning defamation law as “confusing and even incoherent”).

79. See RESTATEMENT (SECOND) OF TORTS §§ 558–59; see also Lambert v. Whiting Turner Contractor, No. 1:15-cv-958-GBL-MSN, 2016 WL 2946176, at \*6 (E.D. Va. May 19, 2016) (“[A] defamatory statement must be ‘communicated to a third party ‘so as to be heard and understood by such person.’” (quoting Katz v. Odin, Feldman & Pittleman, P.C., 332 F. Supp. 2d 909, 915 (E.D. Va. 2004))).

is something that is inextricably tethered to the existence of an audience, i.e., harm to reputation. But this observation should not be overstated; courts do not place any quantitative requirements on what counts as “public.”<sup>80</sup> A statement made to even one other person could be considered defamatory, although the damages will be conditioned in part on the scope of audience exposure to the defamatory statement.<sup>81</sup>

The statement, or at least its “gist,” must be false.<sup>82</sup> Historically, the veracity of statements was a defense in common law.<sup>83</sup> It was generally presumed that statements were false unless the defendant could prove otherwise.<sup>84</sup>

In 1964, the Court decided the landmark case of *New York Times & Co. v. Sullivan*.<sup>85</sup> This case famously involved an advertisement of allegations made against the police department of Montgomery, Alabama, for abusing their powers to suppress the Civil Rights movement.<sup>86</sup> The Court held that in defamation lawsuits by public officials, the plaintiff must show actual malice in order to prevail.<sup>87</sup> This led to the “constitutionalization” of defamation law and to the broader protection of speech, even when the subject is not strictly a public official.<sup>88</sup> For example, the assertion that a restaurant fails to meet sanitation standards may involve a broader interest in public health, and as such, the speech may be protected.<sup>89</sup> Another large effect is that today, in contrast to the past, truth is treated by most courts as an absolute bar to liability.<sup>90</sup>

An important qualification on the meaning of truth and falsity is in order. Recall Justice Jackson’s famous insight that “[courts] are not final because [they] are infallible, but [they] are infallible only because [they] are final.”<sup>91</sup> In a like

80. Huegerich v. IBP, Inc., 547 N.W.2d 216, 221 (Iowa 1996) (“Publication . . . simply means a communication of statements to one or more third persons.”); RESTATEMENT (SECOND) OF TORTS § 577 cmt. b.

81. See RESTATEMENT (SECOND) OF TORTS § 621 (limiting damages to compensation for “the proved, actual harm”).

82. *Id.* §§ 558–59.

83. Truth is mostly an “absolute” defense, but a sizable minority of states still allow recovery even for truthful defamatory statements if they were made with bad intentions. See, e.g., FLA. CONST. art. 1, § 4. (“If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted . . .”); DEL. CODE ANN. tit. 10, § 3919 (2017) (noting that truth could be a defense in libel only if the information was “published properly for public information, and with no malicious . . . motives”).

84. PROSSER AND KEETON, *supra* note 8, § 116, at 84 (noting that it is “[o]ut of a tender regard for reputations [that] the law presumes in the first instance that all defamation is false”).

85. 376 U.S. 254 (1964).

86. *Id.* at 257–58.

87. *Id.* at 283.

88. See, e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323, 345–50 (1974).

89. See, e.g., Journal-Gazette Co. v. Bandido’s, Inc., 712 N.E.2d 446 (Ind. 1999).

90. See SACK, *supra* note 65, § 3.3.2, at 3–7. But see Noonan v. Staples, Inc., 707 F. Supp. 2d 85, 90–92 (D. Mass. 2010) (holding that a Massachusetts firm that sent its employees a truthful but embarrassing recount of the reasons why the plaintiff was fired may be held liable under Massachusetts law and thus allowing recovery for malicious truthful defamatory speech).

91. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).



manner, most courts treat their finding of falsity with humility, recognizing that their findings constitute a “legal” truth rather than an ontological one.<sup>92</sup> The determinations in defamation lawsuits are not the result of exhaustive investigative work by the judge but rather the determination of whether the evidence presented supports the allegation.

The third and last requirement is for the speech to be defamatory—i.e., capable of harming one’s reputation, esteem, good name, or standing in society.<sup>93</sup> Here, courts do not normally articulate a clear understanding of reputation. Still, it seems like one reducible part of reputation is that it consists of beliefs: A person held in high esteem, good standing, or well repute is *believed* to be of high prestige, high trust, or high value.<sup>94</sup> Understood this way, it is easier to see how defamatory speech harms reputation—the allegation leads people to negatively update their opinions so that they will be less willing to trade, socialize, or partner with its subject.

This understanding of reputation seems to suggest a concern with a person’s actual standing in the community. Courts, however, have treated reputation as a *normative* concept, focusing on an imagined, normative audience.<sup>95</sup> According to various rulings in this area, harm to reputation requires showing only that the statement “*would tend to hold the plaintiff up to scorn, hatred, ridicule or contempt.*”<sup>96</sup> That is, there is no need to show that any member of the audience actually changed her mind about the plaintiff in response to the allegations. Moreover, courts sometimes limit attention only to “the minds of any considerable *and respectable* segment in the community.”<sup>97</sup> Hence, not even all segments of the imagined public are relevant, only those that reason as a “respectable”

92. See also SACK, *supra* note 65, § 3:12 (noting the tension and suggesting truth in this context would be understood narrowly, as the product of a legal process rather than an ontological truth).

93. See RESTATEMENT (SECOND) OF TORTS § 559 (AM. LAW INST. 1977) (“A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”).

94. See sources cited *supra* note 42.

95. Because the effect on the actual audience figures into the calculation of damages, the determination of defamatory nature seems to be inconsequential. If no one found the statement to be defamatory, the scope of damages would be zero. Speculating on why this filter is even used, two possible reasons emerge. First, courts may use it to economize on litigation costs (if damages are likely to be zero, dismissing the case for failing to meet the normative standard avoids the need for a trial). Alternatively, courts recognize that damages are speculative and juries may compensate individuals even when they did not suffer any harm. Such a preliminary screen thus protects against such outcomes, as the trier of fact will not be permitted to consider cases that fail to meet the normative threshold. See Note, *The Community Segment in Defamation Actions: A Dissenting Essay*, 58 YALE L.J. 1387, 1388 (1949) (arguing that “[t]he emphasis is usually on normalcy: the eccentric or ‘wrong-thinking’ segments [of the audience] albeit of considerable size, are disregarded”).

96. See *Phelan v. May Dep’t Stores Co.*, 819 N.E.2d 550, 553 (Mass. 2004) (emphasis added) (quoting *Stone v. Essex Cty. Newspapers, Inc.*, 330 N.E.2d 161, 165 (Mass. 1975)).

97. *Id.* (emphasis added) (quoting *Stone*, 330 N.E.2d at 165); SIR P.H. WINFIELD, A TEXT-BOOK OF THE LAW OF TORT § 72, at 242 (5th ed. 1950) (stating that “[d]efamation [consists of] statement[s] which tend[] to lower a person in the estimation of right-thinking members of society generally; or which tends to make them shun or avoid that person”).

person, which supposedly means that they are rational. Note, also, that the “considerable . . . segment” requirement here is different from the one under the publication requirement, which only requires a single third party.<sup>98</sup> For an example of the operation of this rule, a demeaning fake interview in *Hustler* magazine with Andrea Dworkin was held not libelous.<sup>99</sup> The ruling was not the result of testimony from any reader of *Hustler* but rather the result of the court’s assessment that the interview’s ludicrous nature made it unbelievable.<sup>100</sup> The Ninth Circuit expressed confidence “that the outrageous and the outlandish will be recognized for what they are,” without consulting any actual reader of the magazine.<sup>101</sup> If the court believes the statement is believable, it will not help the defendant to bring contrary evidence; such questions, courts hold, might mitigate damages but will not undermine the existence of defamation.<sup>102</sup>

### C. *Where Defamation Law Ends*

Our analysis here demonstrates the complexity involved in trying to protect reputation through stricter defamation law. This complexity belies some established positions on defamation law, which tend to support an *absolute* relationship between defamation law and reputation protection. For example, Richard Epstein warns that failing to protect against defamation would result in “a world with too much defamation, too much misinformation—in a word, too much public fraud.”<sup>103</sup> Similarly, Justice White warned in *Gertz v. Robert Welch, Inc.* that limiting defamation law would “frustrate th[e] search [for truth]” and contribute to “assaults on individuality and personal dignity.”<sup>104</sup>

Fortunately, such concerns are assuaged by the fact that defamatory speech is already unregulated in broad domains, such as statements of opinions; defamatory statements regarding public officials; and group-based slander, or the online hosting of defamatory statements made by third parties.<sup>105</sup> In addition to the legal exceptions to defamation law, there are important practical ones. Litigation costs, judicial inaccuracy, jurisdictional limits on foreign speech, and

98. See *Phelan*, 819 N.E.2d at 553 (quoting *Stone*, 330 N.E.2d at 165).

99. *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1195–96 (9th Cir. 1989).

100. *Id.* at 1194.

101. *Id.*

102. *Luster v. Retail Credit Co.*, 575 F.2d 609, 615 (8th Cir. 1978) (deciding under Arkansas law that “[e]ven if the statement is disbelieved . . . damages may be mitigated, but nevertheless awarded”); *Roeben v. BG Excelsior Ltd. P’ship*, 344 S.W.3d 93, 98 (Ark. Ct. App. 2009).

103. Epstein, *supra* note 37, at 799. In fact, Epstein shrewdly recognizes that audiences in this world will be less credulous, but he sees that distrust as a negative: “The influence of the press will diminish as there will be no obvious way to distinguish the good reports from the bad . . .” *Id.* at 800.

104. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 392, 400 (1974) (White, J., dissenting).

105. See Communications Decency Act of 1996, 47 U.S.C. § 230 (2012); SACK, *supra* note 65, §§ 1.4–1.5.

anonymous speech all make it very difficult to pursue even meritorious actions.<sup>106</sup> These considerations have led some to think that even in the domains where defamation law applies, it is so ineffectual that its “[a]bolition would leave victims of defamation little worse off than they are today.”<sup>107</sup>

In all of these diverse and broad contexts, false defamatory statements do not result in legal liability. If defamation law was necessary to protect reputation, we would expect to see broad discussions of how audiences are led astray by expressions of opinions and political discussions—which clearly tend to include hyperbole and falsehoods. Yet we find broad consensus that protection of opinions should continue.<sup>108</sup> The reasons for this protection are varied. Some courts ground the distinction in liberty: “[T]he freedom to speak one’s mind is . . . an aspect of individual liberty—and thus a good unto itself . . .”<sup>109</sup> Others look more broadly at the social and democratic good brought about by the unhampered discussion of opinions.<sup>110</sup> Still others suggest that allowing lawsuits for expressions of opinion would bring about an unworkable deluge of litigation.<sup>111</sup> Consequently, the Restatement provides that opinions are completely immune unless the opinion implies some facts that are false and defamatory.<sup>112</sup> These views take a very pragmatic approach, seeing audiences as able to filter and discount some falsities, and we observe the lack of serious pressure by courts, lawmakers, and the public to reform this rule.

\* \* \*

Defamation law, we saw, is understood as a bulwark against harm to reputation. The doctrine itself is haphazard and confused, but the consensus on the law’s aspirations is broad and deep. It is not surprising, then, that some harbor anxieties about deregulation of speech, worrying that it would lead to the wanton disregard of the truth and the trampling of individual rights. At the same time, the existence of large pockets of unregulated speech in diverse areas is,

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106. See generally Lidsky, *supra* note 53.

107. Anderson, *supra* note 41, at 490.

108. See, e.g., PROSSER AND KEETON, *supra* note 8, § 113A, at 813 (“The distinction [between opinions and facts] is a necessary and important one.”); SACK, *supra* note 65, § 4:1, at 4–3.

109. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 503 (1984).

110. Curtis Pub. Co. v. Butts, 388 U.S. 130, 149 (1967).

111. Wun-ee Chelsea Chen, Note, *Pinning Opinion to the First Amendment Mat*, 11 LOY. ENT. L.J. 567, 601–03 (1991) (responding to the *Milkovich* decision that loosened the protections of opinion in defamation suits by predicting the courts “will be highly susceptible to a flood of litigation”).

112. RESTATEMENT (SECOND) OF TORTS § 566 (AM. LAW INST. 1977). As one court explains, “A statement couched as an opinion that presents or implies the existence of facts which are capable of being proven true or false can be actionable.” *Levinsky’s, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 127 (1st Cir. 1997). The line between opinions and facts is fine. For example, some courts have held that a statement indicating that a person did not pay for goods he owned is not defamatory but that a person refuses to pay a debt is defamatory. Compare *Sim v. Stretch* [1936] 2 All E.R. 1237, with *Neaton v. Lewis Apparel Stores, Inc.*, 48 N.Y.S.2d 492, 495 (N.Y. App. Div. 1944).

hopefully, an effective anxiolytic. We now turn to develop the main argument of this Article, that defamation law can actually undermine reputational interests.

## II. DEFAMATION & AUDIENCES

The typical defamation case involves a charge that a speaker cast a false aspersion on another person and, because of this statement, that person lost his esteem, which led to a loss of business, social, and romantic opportunities.<sup>113</sup> This is a simple narrative and one that is common to many actions in tort: a tortfeasor-wrong-harm model. The application of the model is deceptively simple: a wrongdoer committed a wrong (false aspersion) that was the proximate cause of an identifiable injury (loss of social standing).

The problem with this account is that it obscures the individual capacity of audience members to judge the truth. In other torts, the harm is either direct or mediated by objects: an aggressive assailant hits the victim with an iron pipe; a reckless woodcutter fells a tree that falls on the victim's house; a distracted driver runs his car over the victim; an obsessed ex-lover hacks his partner's email account and exposes private information. In defamation, the harm does not follow immediately from the wrongful act itself but is rather mediated by the audience of the offending speech. For speech to be harmful, it must be believed.

The bilateral model of speaker-victim treats audiences deterministically, as if they immediately believe whatever they hear. This dim view of audiences is unpersuasive. Members of the public are not perfect reasoners, but neither are they opiated masses.<sup>114</sup> Regarding political speech, the Supreme Court has refused to judge audiences according to their lowest possible denominator.<sup>115</sup> Professor Lyrissa Lidsky powerfully notes that “[d]emocratic theory demands faith in the rationality of citizens, and several members of the founding generation, steeped in the ideals of the Enlightenment, publicly professed this faith.”<sup>116</sup> Even in the commercial-speech context, the Supreme Court noted that the states could not ban advertising just because they mistrust their citizens' abilities to reach the “right” conclusions.<sup>117</sup> In advertising, courts permit “mere

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113. See *supra* Part I.B. We focus on “retail”-level defamation—i.e., defamation by individuals against individuals or businesses. While much of what we have to say applies to libel by media outlets as well, addressing that rich context will needlessly muddle the discussion.

114. Lidsky, *Rational Audience*, *supra* note 16, at 815 (“First Amendment doctrines rely on a model of the audience as rational, skeptical, and capable of sorting through masses of information . . .”).

115. See, e.g., *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007).

116. Lidsky, *Rational Audience*, *supra* note 16, at 811.

117. *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 769–70 (1976).

puffery” because they believe that the public can sort between factual statements and vapid boasting.<sup>118</sup> Interestingly, members of the public show healthy skepticism of speech in contexts where it is shielded from defamation law. For example, a study of the credibility of news stories found that stories based on anonymous sources were seen as far less credible than those with identifiable sources.<sup>119</sup> When individuals browse the web for information, they tend to screen information given by unknown sources.<sup>120</sup> To emphasize, both the Founding Fathers and courts have recognized that people can be deceived and misled.<sup>121</sup> Overall, much of our understanding of the public involves the idea that people, with differing degrees of ability, attempt to discern truth from falsehoods.<sup>122</sup>

In what follows, we seek to tease out the implications of the basic insight that audiences are also involved in reputational harms. We add to the bilateral model of speaker–victim a third agent, the audience, and investigate the implications of various defamation law rules on all the relevant stakeholders. To develop an intuitive explanation of our ideas, we use a stylistic example, but our conclusions are general in nature, subject to a few caveats that we explore later.<sup>123</sup>

#### A. Basic Example

Consider a case where 100 individuals each own a restaurant that advertises its exclusive use of organic ingredients (or that it observes kosher, halal, or hygienic norms, or any other facts that would make patrons more likely to patronize the restaurant). That is, we assume a situation where a person would like others to believe certain favorable facts about her for owning such a restaurant, as these would make others more likely to engage with her.

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118. See generally David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395 (2006); Adi Osovsky, *Puffery on the Market: A Behavioral Economic Analysis of the Puffery Defense in the Securities Arena*, 6 HARV. BUS. L. REV. 333 (2016).

119. Miglena Mantcheva Sternadori & Esther Thorson, *Anonymous Sources Harm Credibility of All Stories*, NEWSPAPER RES. J., Sept. 1, 2009, at 54; see also Ivanka Pjesivac & Rachel Rui, *Anonymous Sources Hurt Credibility of News Stories Across Cultures: A Comparative Experiment in America and China*, 76 INT’L COMM. GAZETTE 641, 654 (2014) (finding that both American and Chinese audiences found stories citing anonymous sources less credible than those using identified sources).

120. Miriam J. Metzger et al., *Social and Heuristic Approaches to Credibility Evaluation Online*, 60 J. COMM. 413, 416 (2010).

121. Lidsky, *Rational Audience*, *supra* note 16, at 811–17.

122. See, e.g., *Abrams v. United States*, 250 U.S. 616, 629–30 (1919) (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas . . .”).

123. For a formal general analysis of this model, see Arbel & Mungan, *supra* note 27.

For reputation to have any meaning, differences between restaurants must exist that are not immediately apparent to a casual observer. If casual inspection were sufficient, reputation would not play such an important role in our lives in choosing which restaurant to attend, which product to buy, whom to trade with, and even whom to date.<sup>124</sup> Thus, suppose that 80% of the restaurants are high quality—i.e., they really do, as they claim, serve organic food, maintain sanitary standards, and refrain from mixing trans fats in their ingredients—and that 20% of the restaurants that claim to do so actually do not, making them low quality.

Next, we consider the existence of an audience. Suppose that 100 different patrons each contemplate going to a different restaurant. The patrons do not know whether the restaurant they are about to attend is high or low quality. At best, they can estimate that twenty of these restaurants are low quality.<sup>125</sup> Because we are interested in the effect of defamatory speech, we assume that, despite the risk, all patrons have already formed an intention to visit a restaurant. In particular, we assume that patrons are willing to attend a restaurant as long as the risk of it being low quality does not exceed 40%. That patrons, and more generally individuals, are willing to bear some risk in real life is self-evident.<sup>126</sup> In this case, since only 20% of restaurants are low quality, patrons judge this risk acceptable and, thus, would choose to attend all 100 restaurants.

The last element of this hypothetical is the speaker. Suppose that, while on the way to the restaurant, each patron meets an ex-employee of the restaurant. After exchanging pleasantries, the patron tells the employee that she is headed to the restaurant and asks for his opinion. The ex-employee is privy to the internal workings of the restaurant, so he knows whether the owner adheres to high- or low-quality standards. The employee can respond by either giving a positive or negative review of the quality standards of the restaurant. As the quality standards are a factual matter, such an assertion can be actionable. For simplicity, we will denote a favorable review by “thumbs-up” and a negative review by “thumbs-down.”<sup>127</sup>

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124. See generally Luís M B Cabral, *The Economics of Trust and Reputation: A Primer* (June 2005) (unpublished manuscript) (on file with the New York University Library Systems), [http://pages.stern.nyu.edu/~lcabral/reputation/Reputation\\_June05.pdf](http://pages.stern.nyu.edu/~lcabral/reputation/Reputation_June05.pdf).

125. It is not important for our general argument that patrons accurately gauge the distribution since we are interested in how their perceptions change with different defamation regimes.

126. Consider risks associated with choosing where to dine (food poisoning), whom to date (infidelity), and whom to lend money (default). In all of these cases, there tends to be some threshold level beyond which the risk is unacceptable.

127. Reviews, such as a thumbs-up, tend to be protected. See, e.g., *Browne v. Avvo, Inc.*, 525 F. Supp. 2d 1249, 1251–53 (W.D. Wash. 2007) (holding that a rating is constitutionally protected if it results from a subjective interpretation of facts, even if it claims to be based on objectively verifiable criteria); see also *Aviation Charter, Inc. v. Aviation Research Grp./US*, 416 F.3d 864, 868–71 (8th Cir. 2005) (applying Minnesota law to a ratings system), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), *as recognized in Syngenta Seeds, Inc. v. Bunge N. Am., Inc.*, 773 F.3d 58 (8th Cir. 2014).

Defamation law exists because sometimes people choose to lie.<sup>128</sup> If all employees were honest, each patron would trust the employee's statement and know for sure whether the restaurant she hopes to attend is high or low quality. Unfortunately, this is not the case. Instead, to allow for the possibility of false defamatory statements, we assume that some employees are prone to lying to varying degrees.<sup>129</sup> We capture the propensity to defame by thinking of ex-employees as deriving some value from denouncing their former employers, which we denote by " $v$ ." Specifically, ex-employees belong to one of three subgroups. One subgroup of, say, sixty employees derives no value (i.e., "zero  $v$ ") from besmirching its ex-employers; we will call such employees "honest." Another twenty ex-employees benefit slightly from besmirching their former employers ("low  $v$ "), and the remaining twenty are disgruntled and thus derive intense pleasure or value from badmouthing their former employers ("high  $v$ "). We will call all positive  $v$  employees "dishonest" because they may want to lie by presenting a high-quality restaurant as low-quality. Note also that employees' values for  $v$  could very well be on a continuum rather than partitioned into the discrete groups provided above, but this distinction does not matter for the analysis.<sup>130</sup> Figure 1 summarizes these basic assumptions. The stage is now set to analyze the possible consequences of introducing defamation law into this hypothetical.

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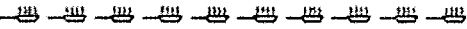
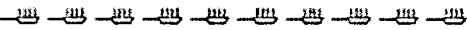
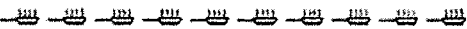
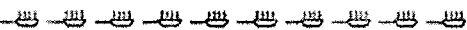

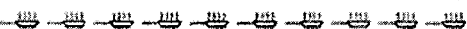
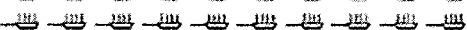
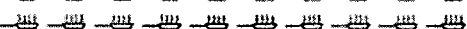
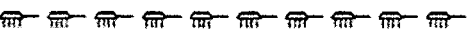
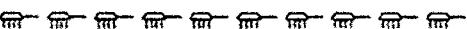
Here we consider factual assertions such as "they never use organic materials" or "the kitchen is infested with rats."

128. Why people lie is a complicated question. See generally Arbel, *Reputation Failure*, *supra* note 10, at 18–21 & 28–29.


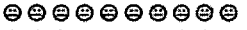





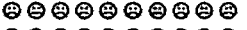

129. We take into account only false disparaging statements and table the discussion of "positive defamation."

130. Indeed, each subgroup could be understood as comprised of heterogeneous employees who have a value of " $v$ " below or above the threshold (above zero or above "low").

Figure 1. Basic Setup

Quality Distribution		Total
Restaurant Quality		
High		80
		
		
		
		
		
		
		
Low		20
		

Employees' Type Distribution		Total
$v$		
Zero $v$		60
		
		
		
		
Low $v$		20
		
High $\hat{v}$		20
		

B. Analysis

Imagine, first, a world with very lax defamation law, which we denote as  $D_0$ . One can think of this world as one where it is too costly to file a lawsuit, where damages are too low, or where standards of proof are too high. In  $D_0$ , victims of defamation have no recourse.<sup>131</sup> How would restaurant owners, employees, and, ultimately, patrons behave in this world?

In answering this question, it is useful to start first with the restaurant owner and work backward towards the patron's choice of whether to dine at the restaurant. The owner's choice without defamation law is nonexistent: even if she is the unfortunate subject of a false aspersion, she cannot file a lawsuit.

131. As argued *supra* Part I.C, there are various areas today that are outside of defamation law's ambit.



She can only insist that her restaurant really uses fresh ingredients but so can the owner of a low-quality restaurant. Thus, her protestations would not be very credible.<sup>132</sup>

Next is the employee. He meets with the prospective patron and decides whether to tell the truth. If he is honest, this decision is automatic: if the patron is headed to a high-quality restaurant, the employee will give a thumbs-up; otherwise, he will give a thumbs-down. In both cases, the review will be factually correct. If, on the other hand, the employee is a positive *ν* person, i.e., he derives some benefit from besmirching his former employer, his decision-making will be modified. Whether the restaurant is high or low quality, he will want to give a thumbs-down to punish his former employer. The absence of defamation law means that the employee will not be subject to liability; therefore, he can do as he wishes—in this case, give a negative review regardless of the actual quality of the restaurant. In other words, the employee will lie if the restaurant is high quality or tell the truth if it is low quality.











Because there are 100 restaurants (eighty high-quality and twenty low-quality) and 100 employees (sixty honest and forty dishonest), we can assume the following pairings of employees to restaurants.<sup>133</sup> The sixty honest employees will be matched with sixty restaurants, forty-eight high-quality and twelve low-quality. The dishonest employees will be matched with forty restaurants, thirty-two high-quality and eight low-quality. Because honest employees tell the truth, they will give forty-eight thumbs-ups and twelve thumbs-downs. The dishonest employees always give a thumbs-down, meaning they will give a thumbs-down in forty cases (for a total of fifty-two thumbs-downs). Table 1 below summarizes the ex-employees' ratings.

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132. For defamation to be relevant, accusations must “stick.” Of course, if the restaurant owner can open her kitchen for all to see and the veracity of her claims can be checked, then the harm from defamation may be negated, but reputation also becomes less important in the first place.

133. For simplicity of exposition, the matching is uniform with the same proportion of high- and low-quality restaurants for honest and dishonest employees.

Table 1.

Restaurant Quality	Employee Behavior in $D_0$		
	Employee is	Review	Number of Reviews
High Quality	Zero $v$ (Honest)		48
	Low $v$		16
	High $v$		16
Subtotal	 = 48	 = 32	80
Low Quality	Zero $v$ (Honest)		12
	Low $v$		4
	High $v$		4
Subtotal	 = 0	 = 20	20

Finally, we consider the patron. Recall that we assume the patron is willing to attend a restaurant so long as the risk of it being low quality falls under 40%. Before meeting with the employee, she assesses the risk at 20%, as she estimates that there are only twenty low-quality restaurants out of 100 restaurants. She finds the risk acceptable and plans to attend. Stopped on the way, she meets the employee, who in forty-eight cases gives a thumbs-up and in fifty-two cases gives a thumbs-down. The patron then tries to assess the probability that a restaurant is low quality given the review she hears.



If the patron receives a positive review, it is likely to come from an honest employee because disgruntled employees will want to paint their former employers negatively.<sup>134</sup> Hence, she knows she can trust a positive review to be true and can dine at the restaurant with confidence. This will occur in forty-eight cases, as described in Table 2 below. When she hears a negative review, however, she finds it more difficult to assess its validity. She can tell that, in the absence of defamation law, falsehoods are prevalent. Of the fifty-two negative statements she expects to receive, only twenty can be true, because there are only twenty low-quality restaurants. In other words, if she hears a negative review, there is a twenty in fifty-two, or a 38%, chance that it is accurate and that the restaurant is low quality.<sup>135</sup> Now, because the patron's risk tolerance is 40%, the patron should still be willing to attend a negatively reviewed restaurant—she will simply reason that falsehoods are so prevalent in this harsh  $D_0$  world

134. In the example, the only positive reviews come from honest employees. This is because no dishonest employees would want to spread *favorable* lies. As we noted *supra* note 129, we table issues of “positive defamation,” as they fit more naturally under discussion of false advertising.

135. As noted *supra* note 125, the example makes the admittedly strong assumption that patrons have a good sense of the distribution of low- and high-quality restaurants, but the analysis and theses developed here apply even when patrons have inaccurate estimates.

that it is difficult to trust negative statements; so, she will discount the negative review accordingly. This is not to say that negative reviews are not informative at all; before hearing the negative review, she only considered 20% of restaurants to be low quality, and now she realizes that she cannot identify those 20% from negative reviews since a negatively reviewed restaurant has a 38% chance of being low quality. Still, such negative reviews are insufficiently trustworthy to make her abandon her plan to attend the restaurant. Hence, she might choose to undertake the risk of attending a negatively reviewed restaurant in a  $D_0$  world.

Table 2.

Review Valence	Patron Dilemma in $D_0$			
	True	False	Total	Odds Review is True
	48	0	48	$\frac{48}{48} = 100\%$
	20	32	52	$\frac{20}{52} = 38\%$
Patron Risk Tolerance	< 40 %			

We move now to examine an alternative world,  $D_1$ , where defamation law is very strict. In reality, the difference between  $D_0$  and  $D_1$  can be quite gradual; it can simply be the difference between low and high damages; low and high burdens of proof; lax and strict enforcement; or broad and narrow privileges. In every case, we are contemplating an expansion of defamation law. For now, however, let us maintain the clear distinction between these two “worlds.”

Starting again with the restaurant owner, she now has the option of bringing a lawsuit against the ex-employee. Here, we must make some assumptions about the relative costs and benefits of a defamation lawsuit; we assume for now that a lawsuit is brought whenever an employee gives a false negative review. This assumption is fairly innocuous; if the statement were positive, there would be no incentive to bring a lawsuit, even if the statement were false. When a statement is negative, there may be an incentive to bring a lawsuit, and our assumption means that courts are sufficiently competent such that a plaintiff will only consider it worthwhile to sue if the negative statement was false.<sup>136</sup>

How would employees behave in  $D_1$ ? An honest employee is not expected to change her behavior. As we just analyzed, the restaurant owner is unlikely to

136. To be clear, it is not assumed that a meritorious lawsuit will always succeed but that the expected recovery in such a case—given the probability of losing—is sufficient to motivate the restaurant owner to file a lawsuit.

bring a lawsuit because true communications are always protected, meaning that the employer would tend to lose in court. Of course, there is some chance that the employer would win—some courts make mistakes, and some lawsuits are brought strategically—but omitting these considerations *favours* defamation law, so we can table them for the time being.<sup>137</sup> Hence, we again expect a total of forty-eight thumbs-ups and twelve thumbs-downs produced by honest employees. If the employee is dishonest and the restaurant is low quality, the analysis will again remain unchanged. After all, a truthful negative review generally is not actionable—that fact does not change even if the motivation is malicious.<sup>138</sup>

The main change from  $D_0$  will be with respect to dishonest employees matched with high-quality restaurants. Here, we will assume—in line with the Court’s reasoning and reality—that it is impossible to deter all falsehoods.<sup>139</sup> Because some people will still make false allegations, defamation law as a deterrent will be imperfect. Therefore, we assume that the potential cost of a lawsuit (i.e., the combination of the risk of losing with the eventual money judgment) is enough to dissuade some employees from lying but not others. Specifically, we will assume that the costs of a lawsuit are enough to dissuade the low  $\nu$  group but not the high  $\nu$  group, which may include disgruntled employees or those who moved to work for a competitor. Here, there would be sixteen low  $\nu$  employees matched with high-quality restaurants. Although they would want to say something negative, they will worry about the prospects of a lawsuit and thus truthfully provide a positive review instead.<sup>140</sup> The high  $\nu$  employees will remain unperturbed and continue to defame, despite the risk of a lawsuit. Table 3 below summarizes the employees’ behavior.

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

137. In other words, these effects imply a chilling effect on truthful speech, which is a strong reason to limit defamation law.

138. See SMOLLA, *supra* note 47, § 5:1. *Contra* MASS. GEN. LAWS ch. 231, § 92 (2018); Noonan v. Staples, Inc., 556 F.3d 20, 28 (1st Cir. 2009) (“[U]nder Massachusetts law, even a true statement can form the basis of a libel action if the plaintiff proves that the defendant acted with ‘actual malice.’”).

139. See *supra* notes 53–59 and accompanying text.



140. Disgruntled employees might choose not to endorse the business but rather remain silent; however, it will become apparent that their silence means that they would like to lie but are afraid to do so. In other words, silence will suggest that the quality is actually high.

Table 3.

Restaurant Quality	Employee Behavior in $D_1$		
	Employee is	Review	Number of Reviews
High Quality	Zero $v$ (Honest)		48
	Low $v$		16
	High $v$		16
Subtotal	 = 64	 = 16	80
Low Quality	Zero $v$ (Honest)		12
	Low $v$		4
	High $v$		4
Subtotal	 = 0	 = 20	20

Finally, let us consider the patron. In this case, there are sixty-four thumbs-ups, and these are reliable measures of quality. Hence, the patron can safely attend these sixty-four restaurants. In contrast, there are thirty-six thumbs-downs. The patron will realize that some of these reviews are likely false despite the presence of defamation law. Because there are only twenty low-quality restaurants, the probability that any negatively reviewed restaurant is indeed low quality is twenty out of thirty-six, or 55%. In other words, negative reviews become stronger indicators that the restaurant is indeed low quality. Because this risk greatly exceeds 40%, the patron will be reluctant to attend any negatively reviewed restaurant.<sup>141</sup> Table 4 below summarizes the patron's analysis:

Table 4.

Review Valence	Patron Dilemma in $D_1$			
	True	False	Total	Odds Review is True
	64	0	64	$\frac{64}{64} = 100\%$
	20	16	36	$\frac{20}{36} = 55\%$
Patron Risk Tolerance	< 40%			

141. The threshold of 40% is an arbitrary choice; the actual threshold in any specific case may be different. But this will not change the point we make here. If, in this example, the risk tolerance was 50%, patrons would still avoid the restaurant, as the perceived risk (55%) exceeds their threshold. Indeed, if we were to imagine an even higher risk tolerance of, say, 80%, the result would change—patrons would assume the risk in both  $D_0$  and  $D_1$ . But this only demonstrates that the value and credibility of speech are lower when people care less about its content.

*C. Audience Effects: Evaluation & Generalization*

Based on the stylized example above, we can now analyze the effects of expanding defamation law by comparing the (extreme) move from a world where defamation law is effectively nonexistent ( $D_0$ ) to a world with it ( $D_1$ ).<sup>142</sup>

The primary lesson from this analysis is that *defamation law can harm owners of high-quality goods*. In the baseline case, where the patron does not encounter any employee, the patron judges the risk that a specific restaurant is low quality to be small (20%). Therefore, the patron assumes the risk and attends all restaurants—including all eighty high-quality restaurants. As we saw, the encounter with the employee in  $D_0$  does not change this conclusion.<sup>143</sup> Here, patrons meet employees, and some of the employees indeed say negative things. However, the flood of false negative reviews reduces the reliability of each negative review. Hence, patrons—while still finding negative reviews useful—will not find them to be sufficiently indicative of low quality. As a result, the risk of a negatively reviewed restaurant being low quality is still low, even if it is somewhat higher than the baseline case. And so, in  $D_0$ , patrons will continue to attend all eighty high-quality restaurants.

The shift to  $D_1$ —the introduction of strict defamation law—changes these results quite drastically. There are now fewer negative reviews overall, because some employees are deterred by the prospect of being sued for falsely defaming their previous employer. The decrease in quantity means that each negative review is now more credible than it was when there was a greater quantity of false negative reviews. As such, patrons feel much more confident in relying on these negative reviews and are reluctant to attend any negatively reviewed restaurant. This outcome is benign when the restaurant is indeed low quality, but the increased credence is problematic for those honest owners of high-quality restaurants who are besmirched. Patrons who previously used their discretion and discounted negative reviews are now more trusting and are misled into avoiding some high-quality restaurants.

Let us focus on the interpretation of this key result before offering qualifications. The expansion of defamation law makes “false signals” more costly.<sup>144</sup> The speaker would be more likely to face liability for false statements. This leads to a decline in the frequency of such statements, as speakers worry about the specter of civil liability. With the decline of false signals, audiences will learn either from experience or from observing the legal norms that statements are

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142. See *infra* Part II.D.

143. See *supra* Part II.A.

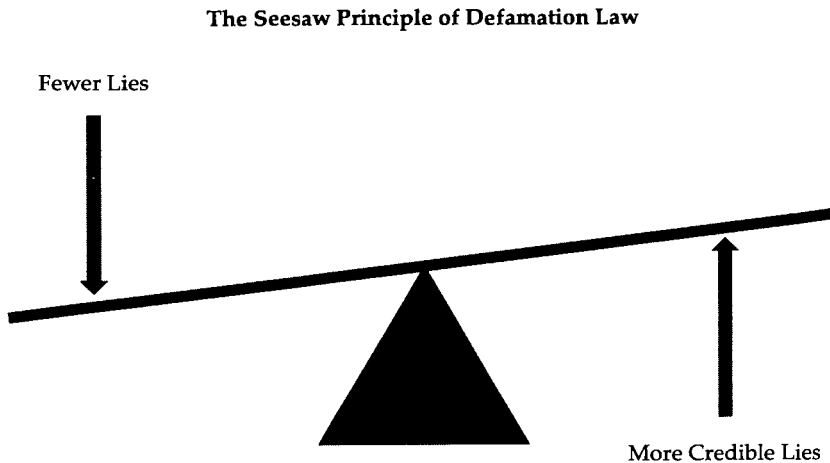
144. More accurately, “false signals” are signals the speaker knows to be untrue. But the veracity of statements is often a matter of belief; a statement may communicate a strong conviction or a weak one. Stronger defamation law could also cull statements that are likely to be true but for which the speaker lacks conclusive evidence.

generally reliable and will come to rely on them more often. The greater trust the public places in statements, based on common-sense reasoning, the more this makes victims susceptible to attacks, as the higher trust people place in statements amplifies the pernicious effects of false aspersions and unfounded statements.<sup>145</sup> In this sense, stricter defamation law may *undermine* reputation interests.

To illustrate, in the stylized example, the reputational harm to some owners of high-quality restaurants is caused by the introduction of strict defamation law ( $D_1$ ). Stated differently, without strict defamation law, lies are drowned out by their own noise. When defamation law is expanded, falsehoods become rarer and thus more harmful, as their rarity makes audiences more trusting.

A more general way to describe this result is by looking at signaling theory again. Strict defamation law increases the cost of false statements; hence, it strengthens the credibility of the signal a speaker sends. The greater credibility of statements makes audience members more likely to act upon them. And when the statement proves to be false, the audience is more easily deceived than they otherwise would be. In sum, then, consideration of audience effects reveals a basic trade-off, a “seesaw dynamic,” according to which *reducing the number of falsehoods increases their credibility*.

Figure 2.



145. In the model, some speakers may have intentionally lied; however, statements of fact of which the speakers are uncertain can be equally damaging, and no bad faith is required.

#### D. *Qualifications & Richer Considerations*

Our analysis of audience effects has shown that stricter defamation law could, in some cases, result in weaker protection of reputational interests. We now move to consider a few important qualifications regarding the scope of audience effects.

The most immediate qualification is that stricter defamation law does not always harm reputational interests. In some cases, defamation law will harm reputational interests, and in others, it will protect them, although to a lesser extent than scholars have previously assumed. The key point is not that defamation law invariably undermines reputation but that the “virtually axiomatic” understanding of defamation law, which holds that defamation law unambiguously protects reputation, is erroneous.<sup>146</sup> The trilateral model calls for a more nuanced examination than the standard bilateral model admits.

Another important qualification is that our discussion so far is only focused on estimating behavioral effects, not social welfare. Like the courts, we restrict attention only to whether defamation law protects reputation, not whether defamation law is, on net, desirable.<sup>147</sup> But of course, the net social effect of expanding or restricting defamation law is of paramount importance. Investigating these issues is complex, as it requires consideration of all the relevant stakeholders—victims, audience members, and speakers. In terms of the restaurant example, the investigation would involve an assessment of the harm suffered by patrons from attending a low-quality restaurant measured against the gains from attending a high-quality one. Then, the analysis would need to evaluate the potential costs imposed on speakers, taking into account their risk aversion and the value they place on speaking, truthfully or otherwise. From there, the analysis should account for the potential victims, the restaurant owners, by measuring their increased losses in terms of business volume. Finally, and outside our basic model, one might worry about the incentive to tell the truth and the supply of ideas to the market. Even that, however, will not conclude the investigation, because the expansion of defamation law will also have *ex ante* effects. These effects may be wide-ranging, from the decision of whether to invest in restaurant quality to the pricing of entrees or how to treat ex-employees. In conducting such an analysis, different commentators will place different weights on deterrence, redress, and vindication. Engagement with these questions is also context dependent, so we do not make any categorical statements besides rejecting the court’s supposition that defamation law is good because it protects reputation.<sup>148</sup> The effect of defamation law is nuanced, complex, and, at times, self-contradictory. We shall address the meta question of

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146. See *supra* notes 9–10.

147. For further reflections on social effects and social welfare, see *infra* Part III.

148. See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 344 n.9 (1974)).



how we think courts should deal with this uncertainty, but for now, let us just highlight our conclusion that even from the internal perspective of defamation law, having stricter defamation law does not necessarily lead to better protection of reputation.

A third, related qualification is that there are other benefits associated with strict defamation law—ones rarely recognized by the courts. In particular, there can be some value in increasing the perceived reliability of statements. If, in  $D_0$ , the patrons were hesitant to attend any restaurant,  $D_1$  would make speech more credible and may persuade some patrons to attend some of the high-quality restaurants. More generally, if one takes the view that audiences are overly cynical and skeptical, defamation law will have more value than the examples imply. This qualification is important where the most pressing imperative is fighting public skepticism. Inasmuch as the national context today is one of concern that people are *too* trusting and reliant on fake news, we believe that there is a good reason to be concerned with the credibility of falsehoods.

With these qualifications in mind, we now move to examine more closely some of the assumptions used in the example. As we hope to show, the trilateral model is applicable in broad settings. While the conclusions will differ based on one's assumptions, the framework itself continues to be useful under broad settings.

### 1. *Ignorant Audiences*

People are sometimes ignorant, confused, or indifferent regarding the content of any law—and defamation law in particular. Therefore, it is possible that members of the audience will erroneously think that a statement in a given domain is protected when it is not (“in my opinion, she is a deadbeat”) or unprotected when it actually is (“she is good for nothing”).<sup>149</sup> The possibility of ignorance of the law seems especially germane with respect to changes in defamation law: would audiences know and react to the expansion (or contraction) of defamation law?

On reflection, ignorance of the law is less consequential than it appears. Audience effects will continue to be important even when people only have a very vague idea of the law. The only necessary trigger for the seesaw dynamics is a vague (and possibly even erroneous) belief among audience members that defamation law has changed. We believe that such a lax assumption is well within reason; some libel cases receive considerable media coverage, and libel policy is at the center of some political campaigns. More generally, defamation law reformers essentially agree on this point: expanders believe that by making

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149. Opinions that impute facts are actionable. RESTATEMENT (SECOND) OF TORTS § 566 (AM. LAW INST. 1977); see also DOBBS, *supra* note 8, at 1113–14.

defamation law more strict, members of the public will be restrained from making negative statements,<sup>150</sup> whereas free-speech advocates worry that strict laws will chill prospective speakers.<sup>151</sup> Both sides agree, however, that legal reform can translate to different behavioral responses by the public. We only extend these behavioral effects to members of the public as listeners rather than speakers. We do not deny the possibility that, in some cases, audiences will be completely unaware of changes in the law—in which case audience effects would be negligible. But whether that is the case requires analysis and empirical support. Consideration of audience effects is warranted, then, even in these domains.

## 2. *Audience Rationality & Sticky Falsehoods*

A related issue is audience rationality. Insofar as individuals diverge from the model of a perfectly rational agent, they may treat suspect assertions with either too much or too little trust. Of the two, there may be a particular reason to worry that individuals will be overly trusting, i.e., that falsehoods will be “sticky” even when they are clearly dubious. Such a concern is motivated in part by the psychological phenomenon of “anchoring,” where individuals are said to react to irrelevant information in a way contrary to what rational decision theory would predict.<sup>152</sup> Experiments suggest negotiations, for example, may be influenced by introducing numbers and figures that have little bearing on the issue.<sup>153</sup> Moreover, one study found that telling subjects that a speaker is likely to lie because of a financial incentive made them *more* likely to believe the speaker.<sup>154</sup>

If falsehoods are completely sticky, then audience effects are unimportant. It is more urgent to control the quantity of false statements, and the perceived reliability of false statements can be neglected, as they are, by assumption, very reliable.

However, it is highly unlikely that falsehoods are completely sticky and that they hopelessly captivate individuals.<sup>155</sup> Political campaigns frequently involve a stream of lies, misstatements, and spurious allegations.<sup>156</sup> Many marketing

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150. See *supra* notes 4–11 and accompanying text.

151. See *supra* notes 54–59 and accompanying text.

152. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1100–02 (2000).

153. See, e.g., Adam D. Galinsky & Thomas Mussweiler, *First Offers as Anchors: The Role of Perspective-Taking and Negotiator Focus*, 81 J. PERSONALITY & SOC. PSYCHOL. 657, 658 (2001).

154. George Loewenstein et al., *The Limits of Transparency: Pitfalls and Potential of Disclosing Conflicts of Interest*, 101 AM. ECON. REV. 423, 425–26 (2011).

155. Higher stakes might make lies more sticky, a point we develop *infra* Part III.A.1.

156. See generally Jacob Rowbottom, *Lies, Manipulation and Elections—Controlling False Campaign Statements*, 32 OXFORD J. LEGAL STUD. 507 (2012).

campaigns involve deception, puffery, and images of people cheerfully laughing while taking a payday loan.<sup>157</sup> Even socializing and dating involve dissembling, white lies, and putting on appearances.<sup>158</sup> It is impossible to survive the modern world without an ability to dismiss hyperbole and discount patent falsehoods.<sup>159</sup> Importantly, even those who are concerned with the stickiness of lies would take those concerns to their logical conclusion and support the imposition of prior restraints, criminalization of lies, and agency review of media articles.<sup>160</sup>

The stickiness of falsehoods, then, is a matter of degree. And when falsehoods are not completely sticky, audience effects continue to be important. One corollary of the seesaw dynamic is that if it can be shown that a lie is especially sticky, or that a certain type of falsehood is especially hard to refute, then there is a stronger case for preferring to decrease the number of lies rather than control their credibility. And the obverse is also true: if some lies are simply “hot air,” “bullshit,” or “puffery” and easily dismissed, the priority should be reducing their credibility.

### 3. *Imperfect and Costly Enforcement, Litigation, and Execution*

Enforcement is one of the biggest problems in law<sup>161</sup>: it is costly, emotionally draining, and lengthy to pursue a lawsuit; winning the case may turn on luck; damages may undercompensate the victim; and collecting the judgment is always risky.<sup>162</sup> All of these considerations make it less likely that a victim will bring a lawsuit against the defaming party. Now, if it were possible to correct these issues—i.e., to punish defamers with full expropriation of their wealth or even to exact corporal punishment at all costs—then it is theoretically possible to completely eliminate the incentive to lie. In such a world, the seesaw dynamic would disappear: people could safely rely on statements, as all statements would be truthful and none would dare to mislead. But because such a policy is neither

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157. See, e.g., *Payday Lender Withdraws Ad that Encourages 'Worry-Free' Borrowing*, GUARDIAN (July 23, 2014, 5:13 AM), <https://www.theguardian.com/money/2014/jul/23/pounds-to-pocket-payday-lender-withdraws-advert-borrowing>.

158. See generally Irina D. Manta, *Tinder Lies*, 54 WAKE FOREST L. REV. 207 (2019) (exploring various lies used in the dating context).

159. Indeed, part of the tragedy of individuals suffering from neurodegeneration is that they start falling prey to manipulations that they would otherwise avoid. See Tal Shany-Ur et al., *Comprehension of Insincere Communication in Neurodegenerative Disease: Lies, Sarcasm, and Theory of Mind*, 48 CORTEX 1329, 1335 (2012) (documenting the loss of the ability to detect deception by patients with neurodegenerative diseases).

160. See *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (holding that even advocacy of violence, unless it presents an imminent threat, is protected by the First Amendment).

161. See generally Yonathan A. Arbel, *Adminization: Gatekeeping Consumer Contracts*, 71 VAND. L. REV. 121 (2018) (analyzing the difficulty of enforcement in the context of private credit contracts).

162. See generally Yonathan A. Arbel, *Shielding of Assets and Lending Contracts*, 48 INT'L REV. L. & ECON. 26 (2016) (analyzing the ways debtors can circumvent creditors and the circumstances under which asset shielding is most likely).

plausible nor advisable, under any feasible policy, there will always be *some* lies. Thus, the seesaw principle is relevant.<sup>163</sup>

Still, audience effects bear on changes to the enforceability of defamation lawsuits. Any removal of practical limitations to enforcement is equivalent to increasing the scope of defamation law. Fewer practical hurdles mean more lawsuits, increased litigation means an increase in potential defamation law enforcement, and increased enforcement creates further disincentives to keep speakers from lying. Per the seesaw dynamics, more efficient enforcement would lead to fewer, but more harmful, falsehoods and misstatements. Hence, we can draw a broad conclusion regarding a host of interventions—cheaper enforcement methods; larger or punitive judgments; fee-shifting arrangements; subsidies to support plaintiffs; lower proof thresholds; or speedier legal processes. In all of these cases, despite important nuances, audience effects would lead to similar seesaw dynamics.

#### 4. *Social and Moral Norms*

Most societies have social norms against lying, and individuals may have an internal moral sense that spreading falsehoods is wrong. How does the presence of such norms change the audience effects on defamation law?

Generally speaking, internalization of norms, social or moral, increases the proportion of honest people. And if all men were angels, defamation law would become obsolete.<sup>164</sup>

Of course, any discussion of defamation law rests on the recognition that some people lie. And with this assumption, norms naturally fit into the trilateral model. Recall that in the example, some individuals were assumed to be honest (i.e., zero *v*). This honest attitude could be a matter of outside preference—perhaps the example employees bear no ill will towards their ex-employers—or it could be the result of more innate preferences—such as from internalizing the norm against lying. Whatever the reason, some individuals could be expected to tell the truth independent of the law. As the proportion of such employees rises, consideration of audience effects reveals that *all* statements will be viewed, on average, as more credible. In other words, the proportion of honest speakers affects the baseline level of credibility of statements, independent of any specific defamation law regime. Changing defamation law would only change the reliability of statements relative to this baseline.

This observation highlights the importance of considering audience effects when making decisions regarding the scope of defamation law. The common approach—assuming a simple relationship between stricter defamation law and

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163. In Arbel & Mungan, *supra* note 27, we explain that overly strict defamation laws would also deter truth speaking, rendering speech uninformative to audiences.

164. In terms of our analysis, this is equal to the possibility that enforcement is perfect.

greater protection of reputation—fails to account for the prevalence of such background norms.

### *E. Would Expanding Defamation Law Advance Its Goals?*

Having surveyed audience effects and some of their qualifications, we can now evaluate the outcomes of expanding defamation law on the basis of three main goals of the law—deterrence, redress, and vindication.

#### *1. Protecting Reputation Through Deterrence*

Defamation law is often justified on the belief that it protects reputation by deterring individuals from falsely besmirching others. The consideration of audience effects adds an important qualification. While defamation law deters some false statements—just as advertised—it also increases the perceived reliability of undeterred statements.

The discussion of the example focused on this point exactly. On the positive side, defamation law reduced the thirty-two lies in  $D_0$  to only twenty-four in  $D_1$ , or a 25% reduction. But, on the other hand, the false negative reviews in  $D_0$  are less believable precisely because there are more lies. In this construct, negative reviews are split between twenty truthful to thirty-two false, a truth-to-lie ratio of 0.625. In  $D_1$ , there are, again, twenty truthful negative reviews but only twenty-four false reviews, a higher truth-to-lie ratio of 0.833. As a result, every negative statement in  $D_1$  is more credible (i.e., the diagnosticity of negative reviews is higher). If lies are more credible, people are more likely to trust and act on them, as the patrons do in the example, hence enhancing their social harm. In conclusion, the deterrent effect of defamation law can undermine reputation, contrary to the literature on the topic.<sup>165</sup>

#### *2. Protecting Reputation Through Redress*

The second goal of defamation law is to provide redress to victims, a function that the Court emphasized in *Milkovich*.<sup>166</sup> Justice Rehnquist's narrative highlights that defamation law is not only about protecting reputation but also compensating injured victims of the false allegations.<sup>167</sup> It is widely understood that current defamation law often leads to under-compensation of victims.<sup>168</sup> With that in mind, would the expansion of defamation law not better protect victims?

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165. See *supra* Part I.A.

166. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 12 (1990).

167. See *id.*; see also ELDREDGE, *supra* note 47, § 3, at 5–6.

168. On the intentional imperfection of defamation law, see *supra* notes 54–59 and accompanying text.

We believe that it is illogical to think about redress without considering audience effects. The underlying assumption of the redress argument is that a harm already exists and the law needs to allocate compensation. This argument, however, ignores the effect that offering compensation will have on the creation of the harm. Consider again the restaurant example. There, shifting from  $D_0$  to  $D_1$  led to reputational harm to all owners of high-quality restaurants because falsehoods became more reliable. In other words, one reason why owners of some high-quality restaurants suffered a commercial loss—for which they would seek redress—was defamation law itself.

A vivid illustration of some problems with the redress argument is a recent spat on Twitter. Elon Musk, the outspoken billionaire, engaged in a heated debate on Twitter with a British citizen, Vernon Unsworth.<sup>169</sup> Angrily, Musk tweeted to his 22 million followers an accusation that Unsworth was a pedophile: “Sorry pedo guy, you really did ask for it.”<sup>170</sup> Critically, no evidence was presented to support this devastating allegation. Six weeks later, with still no evidence being adduced, Musk tweeted a response to an inquiry made by a Twitter user going by the handle “@yoda”<sup>171</sup>:



Musk used the *absence* of a lawsuit as positive evidence of Unsworth’s guilt. It is because a lawsuit was *not* brought that any member of the audience could surmise that Unsworth had something to hide. Rather than the standard narrative of defamation law protecting reputation, defamation law was effectively used here as a sword to undo it. This Tweet seems to have worked, and it “set off a chain reaction on Twitter and in the media,” leading many members of the public to accept Musk’s statement as true and greatly tarnish Unsworth’s

169. *Elon Musk in New Rant at Thai Cave Rescuer*, BBC (Sept. 5, 2018), <https://www.bbc.com/news/world-us-canada-45418245>.

170. Elon Musk (@elonmusk), TWITTER (July 15, 2018, 10:10 AM), <https://i.imgur.com/kNzmBOJ.png>. The original tweet has since been deleted.

171. Elon Musk (@elonmusk), TWITTER (Aug. 28, 2018, 12:41 PM), <https://twitter.com/elonmusk/status/1034481160783585280>, <https://i.imgur.com/xmXZMlD.png>.

reputation.<sup>172</sup> A lawsuit was eventually filed,<sup>173</sup> but one worries that it was too late to reverse the harm. In other words, the harm that redress wishes to solve can, in some cases, be exacerbated by the existence of financial compensation.

At the same time, we recognize some countervailing considerations in favor of the redress argument. While defamation law may exacerbate the harm, it is not the only reason why harm exists. It is possible that even in the absence of any defamation law, falsehoods would have some negative effects. Moreover, redress offers a venue for compensation for at least some victims, even if not all sue. These are two important points, but they should not detract from the existence of other considerations. When considering such effects, it is still critical to evaluate whether they are sufficiently strong to overcome the negative effect that some victims will suffer from more expansive defamation law. However one chooses to answer this question, it must involve a consideration of audience effects.

### 3. *Protecting Reputation Through Vindication*

The last justification for defamation law is that victims of defamation can vindicate their good names by proving the falsity of the allegation. The importance of vindication goes beyond judicial remedies. Defamation, after all, involves the audience and one's esteem in the community. Through the process of adjudication, individuals are able to redeem themselves in the eyes of others and regain their former esteem.

Much like redress, we start by highlighting that even proponents of defamation law would agree that vindication is limited.<sup>174</sup> Courts are not perfect truth finders, and the costs and difficulties of bringing a lawsuit mean that some innocent victims will not be able to vindicate their good names. So, again, we are contemplating the imperfect fulfillment of this goal.

Beyond this preliminary concern, vindication suffers from three previously unrecognized flaws: "circularity," "entrenchment," and "antivindication." Like its circularity in providing redress, defamation law may be the reason why vindication is needed in the first place—i.e., defamation law self-perpetuates the harm it attempts to remedy. The more audiences believe falsehoods, the more important it becomes to offer victims a way to vindicate their good names. Conversely, if falsehoods are not believed (as is possible under  $D_0$ ), then there is much less to vindicate. The need for vindication is predicated on audiences believing the statement, and while audiences may believe statements for reasons

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172. Complaint at 14, *Unsworth v. Musk*, No. 2:18-cv-8048, 2018 WL 4403350 (C.D. Cal. Sept. 17, 2018); see also *id.* at 18–20 (arguing that the tweet was harmful to the plaintiff's reputation).

173. *Id.* at 1.

174. See generally Anderson, *supra* note 41, at 509.

that are independent of the existence of defamation law, the availability of defamation law may *exacerbate* the problem.

The second issue is “entrenchment.” Judges and juries are limited in their ability to determine factual truth.<sup>175</sup> Given that, a world where the courts are used as the final arbiters of truth—as the vindication argument assumes—is a world where the stakes of judicial mistakes are dramatic. If an innocent victim brings a lawsuit and—erroneously—loses the case, then this will entrench the allegations against her in the public eye. After all, courts play a key role in creating reputational information.<sup>176</sup>

Third, consider the problem of “antivindication.” Recall the Elon Musk example.<sup>177</sup> There, the fact that a lawsuit was *not* brought was evidence that the allegation was true—and in the court of public opinion, it was the *only* piece of evidence. Antivindication is the (rational) inference that failure to litigate is evidence of the veracity of the allegations, which is an acute problem if the victim chooses not to bring a lawsuit for other reasons, such as funding, time, or availability of evidence. This is also troubling on the macro level, as stronger defamation law may engender an environment, a social equilibrium, where failure to bring suit is a signal that the allegation is true, thus inviting extensive litigation.

Taken together, circularity, entrenchment, and antivindication undermine the claim that defamation law can be *unambiguously* justified on the basis of protecting reputation through vindication. While there might be cases where vindication could justify an expansion of defamation law, this justification is not general in nature and requires domain-specific analysis.

### III. DEFAMATION LAW & AUDIENCE EFFECTS

#### A. *The Desirable Scope of Defamation Law*

Beyond critique, the trilateral model of defamation offers a new way of thinking about the proper scope of defamation law. In what follows, we offer a preliminary sketch of how such an analysis will proceed, although we emphasize that we are not engaging in a full social-welfare analysis here. We follow this analysis by showing how it sheds new light on defamation law doctrine by evaluating political defamation.

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175. See Frederick F. Schauer, *Language, Truth, and the First Amendment: An Essay in Memory of Harry Cantor*, 64 VA. L. REV. 263, 279 (1978).

176. The legal process also reveals important reputational information not through case outcomes but through the process itself. See Kishanthe Parella, *Reputational Regulation*, 67 DUKE L.J. 907, 910 (2018).

177. See *supra* Part II.E.2.



### 1. *Defamation Law in Employment*

Defamation doctrine has special rules that apply more strictly in the context of employment than in any other context. In employment cases, a libelous statement is actionable per se (i.e., without the need to prove special damages) as long as it is likely to “injure a man in his profession and calling.”<sup>178</sup> This added protection is exceptional and is only afforded outside the employment context against false criminal allegations or assertions that the victim suffers from a “loathsome disease.”<sup>179</sup> But the reason why these special protections apply is poorly understood. Why is it more exigent to protect employment than, say, social standing in the community? Should such a distinction be maintained? Our framework resolves this puzzle.

In the context of employment, a perennial concern is that a vindictive employer may defame an ex-employee.<sup>180</sup> While an employer may have valid complaints about the ex-employee, the employer is also incentivized to besmirch the employee. This may be done to prevent talent from defecting to the competition; to send a warning message to current employees that they will face difficulties in finding another place of employment; or to protect brand image or save face.<sup>181</sup>

From the employee’s perspective, false allegations by a former employer can be especially disastrous. In our society, employment is important not only as a source of income but also as a matter of fulfillment and social status. But prospective employers are likely to deny employment based on even a small risk of employee malfeasance, as a single bad employee can cost the organization dearly.<sup>182</sup> Putting aside embezzlement and other criminal activities, undesirable employee traits such as tardiness, insubordination, and poor attitude can cost a business significant resources and production efficiencies. Perhaps the clearest example is that of a nanny for whom any allegations of abuse can ruin any chance of ever finding employment again.<sup>183</sup>

In such circumstances, even a low probability that an allegation against an employee is true can lead to denial of future employment. Thus, the reliability of the allegation is a secondary concern to the existence of an allegation. The

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178. See, e.g., *Lega Siciliana Soc. Club, Inc. v. St. Germaine*, 825 A.2d 827, 832 (Conn. App. Ct. 2003) (quoting *Proto v. Bridgeport Herald Corp.*, 72 A.2d 820, 825 (Conn. 1950)).

179. See, e.g., *Lent v. Huntoon*, 470 A.2d 1162, 1168 (Vt. 1983).

180. See, e.g., *Frank B. Hall & Co. v. Buck*, 678 S.W.2d 612, 630 (Tex. App. 1984) (affirming an award of \$1.9 million for a wrongful reference). Note, however, that most states provide immunity to employers who write letters of reference. See Markita D. Cooper, *Job Reference Immunity Statutes: Prevalent but Irrelevant*, 11 CORNELL J.L. & PUB. POL’Y 1, 11 (2001).

181. This context is also marked by a relatively unique form of liability for *favorable* false reviews, but we leave this topic for future investigation.

182. See Cooper, *supra* note 180, at 2.

183. Insurance policies are unlikely to cover loss of employment due to loss of reputation.

focus should be on limiting the supply of false allegations. As the seesaw dynamics demonstrate, this goal can be achieved by making defamation law stricter. This is why *per se* protection in such cases may be justified.

Interestingly, this logic may also explain the other special exceptions of *per se libel*, allegations of crime or a “loathsome disease.”<sup>184</sup> These are both contexts where the small probability of the truth of the allegation can lead to ex-communication or loss of critical social opportunities and the credibility of allegations is a less pressing concern. Hence, limiting the supply of false allegations can be more important than controlling their credibility—given that even a small probability of truth is sufficiently damaging.

## 2. *Defamation Law in Consumer Markets*

Reputation for quality plays a key role in consumer markets. In this context, reputational information is usually manifested through product and business reviews and ratings. This information is then used by consumers to comparatively evaluate different products. In consumer markets, having a robust reputation usually supplants more direct regulatory measures.<sup>185</sup> In this context, defamation lawsuits usually contend that a spiteful consumer lied or that a competing business faked a review.<sup>186</sup> Importantly, such lawsuits are rarely successful.<sup>187</sup>

The analysis suggests that the case for defamation law is weaker in the context of consumer transactions. First, the distribution of reviews tends to follow a “j-shaped” distribution with a small mass of negative reviews, very few middling reviews, and an overwhelming mass of positive reviews.<sup>188</sup> Positive reviews are obviously not sponsored by competitors; they may be the result of either organic consumer reaction or deliberate attempts by the firm to bolster its own reputation. If most of these positive reviews are from honest reviewers, then the stakes for defamation law are low, as false reviews by disgruntled consumers can be overwhelmed by the volume of positive reviews. There is another reason to question the relevancy of defamation law in this context. There is good reason to worry about the accuracy of judicial determinations in this area because most reviews are based on intimate and not easily verifiable interactions

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184. See *Lent*, 470 A.2d at 1168.

185. See Yonathan A. Arbel & Roy Shapira, *Consumer Activism: From the Informed Minority to the Crusading Majority*, 69 DEPAUL L. REV. (forthcoming 2019) (discussing reputational pressures as a mode of consumer governance).

186. See generally Yonathan A. Arbel & Roy Shapira, *Theory of the Nudnik: The Future of Consumer Activism and What We Can Do to Stop It*, 73 VAND. L. REV. (forthcoming 2020) (evaluating how idiosyncratically motivated consumers can enforce market norms).

187. See *id.*; see also Lidsky, *supra* note 53, at 883 n.144.

188. See Arbel, *Reputation Failure*, *supra* note 10.

between a consumer and a product or between a consumer and a service provider. It is not an accident that most cases resolve in favor of the consumer, albeit after protracted and costly litigation. Lastly, and outside our model, it is unclear what benefits consumers receive from sharing opinions, and the imposition of large costs—in the form of litigation risks—may deter many from producing this public good.<sup>189</sup>

These considerations, although preliminary in nature, suggest a presumption against liability or, at the very least, against the expansion of defamation liability for consumer reviews. Elsewhere, one of us advocated the use of a consumer-review privilege for different reasons, and the analysis presented here is consistent with this recommendation.<sup>190</sup>

### 3. *Political Speech*

For political speech, the general rule is no liability under defamation law absent a showing of some hard-to-prove conditions.<sup>191</sup> Is this a wise rule? This question is especially timely now due to the commonly heard allegation of “fake news” and the President’s attempts to expand the reach of defamation law.<sup>192</sup>

Ironically, it is the very salience of the fake news debate that abates the risk of fake news. Under the standard bilateral-tort model, a deluge of fake news would provide a compelling reason to expand libel laws.<sup>193</sup> However, under the trilateral model presented here, which accounts for how audiences process information, it is clear to see that one way to combat the harmful effect of fake news is to educate the public about the phenomenon. Now that the message is out and it is widely recognized that some stories are outright fake or otherwise politically biased, some—although not all—of the harm of fake news is mitigated. That this conclusion is not surprising suggests the practical relevance of our main argument—one cannot think about the behavioral effects of laws without accounting for how they affect beliefs. In any case, given the competing considerations at play in this context—the importance of public speech, the danger of letting the government decide what is politically true, and the importance of free press—the default position should be for defamation law to genuflect to free speech.

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189. *See id.*

190. *See id.*

191. *See supra* Part I.B.

192. *See supra* note 4 and accompanying text.

193. *See supra* Part II.D.2.

*B. Some Constitutional Ramifications*

The application of constitutional protections to defamation law dates back to the seminal 1964 decision in *New York Times Co. v. Sullivan*.<sup>194</sup> The body of constitutional law evolving from this decision has been built on one central dilemma: How does one balance freedom of expression against the protection of reputation? In the case law, one finds a careful balancing of these two competing interests, with reputation prevailing in some cases and speech in the rest.<sup>195</sup>

The analysis presented here has the potential to upend some parts of this standard constitutional analysis. We currently view defamation law as a trade-off between free speech and reputation, but in fact, the protection of reputation is much weaker than traditionally recognized, and stronger defamation law may undermine some reputational interests. As the seesaw dynamic highlights that from the internal viewpoint of protection of reputation, the inevitable trade-off is between fewer but more credible lies versus a greater number of lies of lesser credibility. Whether one effect is deemed more important than the other is a matter of analysis and cannot be ignored when considering the constitutionality of expanding defamation law.

In many of the Supreme Court decisions, a media outlet was involved.<sup>196</sup> Liability for defamation in this context raises more difficulties, as reporters would often have less than full certainty about the accuracy of their own stories. This difficulty is compounded by the problem of exposing sources. While our focus here was on defamation between private parties, audience effects are also relevant to the examination of regulation of libel by the media.

Without engaging in a full analysis, audience effects suggest that tighter regulation of the media would have the salutary effect of increasing the credibility of reports, the undesirable effect of chilling the dissemination of some information, and mixed effects on the reputation of the subjects of the reports. As we have already noted, in the context of reporting about political figures, it is the case today that the media has little exposure to defamation law. And indeed, it would seem that the public treats political reporting with a greater degree of suspicion.<sup>197</sup>

Doctrinally, courts should consider this trade-off in every case involving a potential expansion—or contraction—of defamation law: would having fewer falsehoods outweigh the cost of having more harmful falsehoods? Courts should only adjust defamation law doctrine if the answer is a net positive. Only then can a court appropriately balance protecting reputation against other values.

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194. 376 U.S. 254 (1964).

195. See, e.g., *Petro-Lubricant Testing Labs., Inc. v. Adelman*, 184 A.3d 457, 461 (N.J. 2018).

196. E.g., *New York Times Co.*, 376 U.S. at 256.

197. Kathleen M. McGraw et al., *The Pandering Politician of Suspicious Minds*, 64 J. POL. 362, 365 (2002).

Even if one thinks that the net effect of defamation law is positive—i.e., that defamation law tends to protect reputation more than it harms it—it is still critical to understand that the net effect is smaller than the gross effect of defamation law. Today, judges think of defamation law in terms of its gross effect (protection of reputation), without recognizing that there is an internal trade-off due to the seesaw principle, which makes the net effect of defamation law on reputation smaller. Realizing the difference, even in cases where the net effect is positive, is important when judges purport to balance free speech against reputational interests. That the net effect is smaller has especially acute implications for all of these cases where judges declared that the cases involved a close call.<sup>198</sup> If the net effect is smaller, it means that the close call was only reached by overweighing the perceived importance of defamation law. Realizing this, the case no longer becomes a close call and may, indeed, come out the other way.

Assessing the net effects of defamation law is not always straightforward, and in some cases, there will be considerable uncertainty. Such difficulties are common when policy changes are contemplated. However, in the context of defamation law, the significance of these difficulties is quite limited, because freedom of speech and the press are constitutionally protected. Consequently, if there is uncertainty over whether the restrictions of these freedoms will result in a benefit, such restrictions are unwarranted. In other words, if there is real doubt whether expanding defamation law would provide any benefit, courts should err on the side of free speech.

#### CONCLUSION

Defamation law is a feature of most modern systems of law. In the United States, it challenges values enshrined in the First Amendment. Courts and scholars have battled over the proper balance between truth finding, freedom of speech, and protection of reputation. But despite the perennial struggle over these issues, a fundamental idea was uncritically accepted—that defamation law is necessary for the protection of reputation. But the idea that defamation law protects reputation is misguided. Due to the failure to properly evaluate audience effects, courts failed to notice that stricter defamation law can actually undermine reputational interests.

To properly account for audience effects, one has to recognize that defamatory speech necessarily involves a thinking, autonomous audience whose willingness to believe any given proposition is not divorced from the legal rules. In a world with no defamation law, the cost of sending false signals—misstatements of fact—is low. Audiences would, therefore, tend to be more skeptical and cautious. This skepticism, however, guards against the harmful effects of

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198. See, e.g., *Petro-Lubricant Testing Labs, Inc.*, 184 A.3d 457.

falsehoods. With defamation law, individuals would be much more willing to believe statements of unknown veracity because they would believe that the threat of legal liability would deter many from misstating the truth. The greater credulity would make any residual falsehoods much more pernicious.

We imagine future work that seeks to establish and test the limits of these ideas empirically, alongside work that seeks to deepen the investigation in the context of tort doctrines and related First Amendment scholarship—expanding it to adjacent fields, such as privacy law and advertisement law. We think there is good reason to pause and reflect on the necessity of this costly social institution in the age of anonymous and untraceable online speech. For the time being, however, our greatest hope is that our analysis will encourage the explicit consideration of audience effects in the jurisprudence of defamation law.

