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## Group Defamation, Power, and a New Test for Determining Plaintiff Eligibility

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### Cover Page Footnote

Editor-in-Chief, Fordham Intellectual Property, Media & Entertainment Law Journal, Volume XXIX; J.D. Candidate, Fordham University School of Law, 2019; B.S., Neuroscience and Behavioral Biology, Emory University, 2006. I would like to thank Benjamin Zipursky for his patient guidance during the writing process, the staff and editors of the IPLJ, and in particular Jillian Roffer for countless rounds of edits. A special thanks to my parents Anna and Ronald, friends, and Laura who provided support and useful comments throughout.

# Group Defamation, Power, and a New Test for Determining Plaintiff Eligibility

Jeffrey I. Greenwood\*

*In the fall of 2014, Rolling Stone Magazine published an article describing the rape of a woman at a University of Virginia fraternity house. The story turned out to be false, and members of the fraternity sued for defamation. The suit raises an interesting question: under what circumstances may anonymous individual members of the fraternity recover? This Note describes the case, related common and constitutional law, as well as differences in group defamation doctrine across jurisdictions. After detailing problems with the existing paradigm, the Note proposes a new method for performing the analysis.*

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\* Editor-in-Chief, *Fordham Intellectual Property, Media & Entertainment Law Journal*, Volume XXIX; J.D. Candidate, Fordham University School of Law, 2019; B.S., Neuroscience and Behavioral Biology, Emory University, 2006. I would like to thank Benjamin Zipursky for his patient guidance during the writing process, the staff and editors of the *IPLJ*, and in particular Jillian Roffer for countless rounds of edits. A special thanks to my parents Anna and Ronald, friends, and Laura who provided support and useful comments throughout.

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## INTRODUCTION

For oh, 'twas nuts to the Father of Lies  
 (As this wily fiend is named in the Bible)  
 To find it settled by laws so wise,  
 That the greater the truth, the worse the libel!<sup>1</sup>

In November of 2014, *Rolling Stone Magazine*<sup>2</sup> published an online article entitled “A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA” (“the Article”).<sup>3</sup> The Article, written as an exposé of rape culture at the University of Virginia (“UVA”) generated worldwide attention, with its webpage receiving nearly three million views in the weeks following publication.<sup>4</sup> The story contained a graphic and violent scene, describing the brutal gang rape<sup>5</sup> of a freshman named Jackie during a Phi Kappa Psi<sup>6</sup> (“PKP”)

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<sup>1</sup> 8 THOMAS MOORE, *A Case of Libel*, in THE POETICAL WORKS OF THOMAS MOORE: COLLECTED BY HIMSELF 221, 224 (1841). Defamation law encompasses both written or durable expressions known as “libel” and spoken/ephemeral expressions or “slander.” See *infra* Section I.C.

<sup>2</sup> *Rolling Stone* is a biweekly magazine founded in 1967 that reports on music, culture, and politics. *Rolling Stone*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Rolling-Stone> [<https://perma.cc/4ELA-5QL7>] (last updated Aug. 24, 2018).

<sup>3</sup> *Elias v. Rolling Stone LLC (Elias II)*, 872 F.3d 97, 102 (2d Cir. 2017).

<sup>4</sup> *Id.* The article went “viral,” attracting more viewers than any non-celebrity article ever published by Rolling Stone. Sheila Coronel, Steve Coll & Derek Kravitz, *Rolling Stone’s Investigation: ‘A Failure That Was Avoidable,’* COLUM. JOURNALISM REV. (Apr. 5, 2015), [https://www.cjr.org/investigation/rolling\\_stone\\_investigation.php](https://www.cjr.org/investigation/rolling_stone_investigation.php) [<https://perma.cc/YZ33-23BH>].

<sup>5</sup> Rape committed by two or more people against the same victim in the same or sequential criminal episodes. *Gang Rape*, BLACK’S LAW DICTIONARY (10th ed. 2017). When large numbers of attackers are involved, it is also termed *mass rape*. *Id.*

<sup>6</sup> Phi Kappa Psi (“PKP”) is a national collegiate fraternity, founded at the College of Charleston in 1904. *About*, PHI KAPPA PSI, <http://www.pikapp.org/content.aspx?id=402> [<https://perma.cc/7KZG-ANTT>] (last visited Apr. 20, 2018).

date party in the fall of 2012.<sup>7</sup> Jackie, who served as the primary source for the Article, described being thrown through a glass table and raped at the hands of seven fraternity members while others watched.<sup>8</sup> The story described onlookers encouraging attackers by exclaiming “[d]on’t you want to be a brother?” and “[w]e all had to do it, so you do, too.”<sup>9</sup> The Article’s author Sabrina Erdely<sup>10</sup> reported that UVA responded inappropriately,<sup>11</sup> given that two other women confided that they too had been gang-raped at PKP, and that a rape occurred there in 1984.<sup>12</sup> In a podcast for *Slate* magazine (the “Podcast”),<sup>13</sup> the Article’s author commented that the behavior she described “seem[ed] to indicate . . . some kind of initiation ritual,” and that it appeared “impossible that [fraternity members] didn’t know about [the rapes].”<sup>14</sup>

The Article ignited a national debate as well as sizeable protests on UVA’s campus, with PKP becoming the subject of

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<sup>7</sup> *Elias II*, 872 F.3d at 102; Bill Wyman, *5 Takeaways from the Rolling Stone Defamation Verdict*, COLUM. JOURNALISM REV. (Nov. 29, 2016), [https://www.cjr.org/analysis/rolling\\_stone\\_verdict\\_defamation\\_case.php](https://www.cjr.org/analysis/rolling_stone_verdict_defamation_case.php) [<https://perma.cc/TG9K-VCF3>].

<sup>8</sup> *Elias II*, 872 F.3d at 102.

<sup>9</sup> *Id.* at 102–03.

<sup>10</sup> Sabrina Erdely, a journalist for the *Rolling Stone* and named defendant in related law suits, authored the Article and collaborated with *Slate* to produce a podcast about the Article’s content. *Id.* at 97.

<sup>11</sup> The Article named Dean Nicole Eramo as being complicit in a system that failed to adequately respond to rape on campus. *Id.* at 103. Dean Eramo brought a separate suit in Virginia against *Rolling Stone* and Erdely. *Eramo v. Rolling Stone*, 209 F. Supp. 3d 862, 867 (W.D. Va. 2016).

<sup>12</sup> *Elias II*, 872 F.3d at 103. A rape occurred at the PKP house in 1984 per the confession of William Beebe twenty-one years later. Liz Seccuro, *A History of Violence: Not Hugely, but the University of Virginia*, HUFFINGTON POST, [https://www.huffingtonpost.com/liz-seccuro/a-history-of-violence-not\\_b\\_592208.html](https://www.huffingtonpost.com/liz-seccuro/a-history-of-violence-not_b_592208.html) [<https://perma.cc/6GXB-QWRR>] (last updated May 25, 2011). Members of the fraternity implicated in the confession invoked the Fifth Amendment when questioned about the incident and never faced charges. Liz Seccuro, *I Was Gang Raped at a U-VA Frat 30 Years Ago, and No One Did Anything*, THE DAILY BEAST (Dec. 16, 2014, 5:55 AM), <https://www.thedailybeast.com/i-was-gang-raped-at-a-u-va-frat-30-years-ago-and-no-one-did-anything> [<https://perma.cc/2BCP-NG38>].

<sup>13</sup> *Slate* magazine interviewed Sabrina Erdely for a podcast (“the Podcast”) related to the Article on November 20, 2014. *Elias II*, 872 F.3d at 102–03, 110. *Slate* is a daily online magazine founded in 1996 covering politics, news, business, technology, and culture. *About Us*, SLATE, [http://www.slate.com/articles/news\\_and\\_politics/slate\\_fare/2006/08/about\\_us.html](http://www.slate.com/articles/news_and_politics/slate_fare/2006/08/about_us.html) [<https://perma.cc/L6XF-9HQH>] (last visited Apr. 20, 2018).

<sup>14</sup> *Elias II*, 872 F.3d at 103.

vilification, vandalism, and ultimately suspension.<sup>15</sup> Yet, just weeks after the Article's publication, journalists investigating the incident from the Washington Post, Slate, and other publications began to question the story.<sup>16</sup> The scrutiny revealed Erdely never verified any of Jackie's account, sought out the perpetrators, or spoke to relevant school officials about the incident.<sup>17</sup> When investigators and journalists followed up with Jackie,<sup>18</sup> the inconsistencies in her story became too large to ignore.<sup>19</sup> *Rolling Stone's* managing editor issued a public apology: citing "discrepancies in Jackie's account," he concluded "that our trust in [Jackie] was misplaced."<sup>20</sup> By late March of 2015, the Charlottesville Virginia police department concluded their investigation, stating that "[t]here is no substantive basis to support the account alleged in the [Article]."<sup>21</sup> *Rolling Stone* retracted the Article just days later in April,<sup>22</sup> concurrent to self-publication of a

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<sup>15</sup> T. Rees Shapiro, *Key Elements of Rolling Stone's U-Va. Gang Rape Allegations in Doubt*, WASH. POST (Dec. 5, 2014), [https://www.washingtonpost.com/local/education/u-va-fraternity-to-rebut-claims-of-gang-rape-in-rolling-stone/2014/12/05/5fa5f7d2-7c91-11e4-84d4-7c896b90abdc\\_story.html?noredirect=on&utm\\_term=.770fb4b98e3e](https://www.washingtonpost.com/local/education/u-va-fraternity-to-rebut-claims-of-gang-rape-in-rolling-stone/2014/12/05/5fa5f7d2-7c91-11e4-84d4-7c896b90abdc_story.html?noredirect=on&utm_term=.770fb4b98e3e) [https://perma.cc/89HT-7Q4P].

<sup>16</sup> *Elias II*, 872 F.3d at 103; see Allison Benedikt & Hanna Rosin, *The Missing Men: Why Didn't a Rolling Stone Writer Talk to the Alleged Perpetrators of a Gang-Rape at the University of Virginia?*, SLATE (Dec. 2, 2014), [http://www.slate.com/articles/double\\_x/doublex/2014/12/sabrina\\_rubin\\_erdely\\_uva\\_why\\_didn\\_t\\_a\\_rolling\\_stone\\_writer\\_talk\\_to\\_the\\_alleged.html](http://www.slate.com/articles/double_x/doublex/2014/12/sabrina_rubin_erdely_uva_why_didn_t_a_rolling_stone_writer_talk_to_the_alleged.html) [https://perma.cc/2SUD-4RBS]; T. Rees Shapiro, *Key Elements of Rolling Stone's U-Va. Gang Rape Allegations in Doubt*, WASH. POST (Dec. 5, 2014), [http://wapo.st/1vnF3ed?tid=ss\\_mail&utm\\_term=.770fb4b98e3e](http://wapo.st/1vnF3ed?tid=ss_mail&utm_term=.770fb4b98e3e) [https://perma.cc/89HT-7Q4P].

<sup>17</sup> Bill Wyman, *5 Takeaways from the Rolling Stone Defamation Verdict*, COLUM. JOURNALISM REV. (Nov. 29, 2016), [https://www.cjr.org/analysis/rolling\\_stone\\_verdict\\_defamation\\_case.php](https://www.cjr.org/analysis/rolling_stone_verdict_defamation_case.php) [https://perma.cc/WVV6-JWAB].

<sup>18</sup> T. Rees Shapiro, *Key Elements of Rolling Stone's U-Va. Gang Rape Allegations in Doubt*, WASH. POST (Dec. 5, 2014), [https://www.washingtonpost.com/local/education/u-va-fraternity-to-rebut-claims-of-gang-rape-in-rolling-stone/2014/12/05/5fa5f7d2-7c91-11e4-84d4-7c896b90abdc\\_story.html?utm\\_term=.9945e3f4634a](https://www.washingtonpost.com/local/education/u-va-fraternity-to-rebut-claims-of-gang-rape-in-rolling-stone/2014/12/05/5fa5f7d2-7c91-11e4-84d4-7c896b90abdc_story.html?utm_term=.9945e3f4634a) [https://perma.cc/89HT-7Q4P]. Jackie stuck to her story throughout the ordeal. *Id.*

<sup>19</sup> *Id.* For example, Jackie was initially unable to provide and later to spell the name of a man involved in the attack. Coronel et al., *supra* note 4.

<sup>20</sup> *Elias II*, 872 F.3d at 103.

<sup>21</sup> Coronel et al., *supra* note 4 ("This finding, said Police Chief Timothy Longo, 'doesn't mean that something terrible didn't happen to Jackie that night.'").

<sup>22</sup> *Id.*

report detailing the erroneous journalistic practices that led to publication.<sup>23</sup>

Even before the conclusion of formal investigations and *Rolling Stone's* retraction, the Article induced public speculation as to who could recover in tort for damages resulting from publication.<sup>24</sup> As it turned out, a variety of plaintiffs sued Erdely and *Rolling Stone*, and many of the resulting suits settled out of court.<sup>25</sup> However, the claims of three individual fraternity members would test the limits of which defamation claims were actionable. Initially, U.S. Southern District Judge P. Kevin Castel held that the students did not have a claim.<sup>26</sup> The court accepted the defense argument that individuals cannot sue when the defamatory statement simply casts aspirations on a group of which the plaintiffs were members.<sup>27</sup> Surprisingly, the Second Circuit reversed the lower court and, taking a bold doctrinal step, held that the student plaintiffs successfully stated a claim.<sup>28</sup>

*Elias v. Rolling Stone LLC* therefore stands as an emblem of the problem of group libel: under what circumstances should courts permit claims to proceed?<sup>29</sup> Can the size of the group determine whether a plaintiff should be permitted to recover? What if the plaintiff is not named, but can be identified by people familiar with the circumstances? In deciding this question of law, what factual evidence should be weighed to make the determination? Relatedly, how should courts reconcile the need to set right the victims of group defamation with the need to protect speech about groups?

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<sup>23</sup> *Id.* The report, commissioned by *Rolling Stone* and conducted by the Dean of the prestigious Columbia University School of Journalism, outlined the journalistic and editorial failures resulting in the publication of the Article's account. *Id.*

<sup>24</sup> See Eugene Volokh, *Libel Law and the Rolling Stone / UVA Alleged Gang Rape Story*, WASH. POST, (Dec. 6, 2014), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/06/libel-law-and-the-rolling-stone-uva-alleged-gang-rape-story/?utm\\_term=.6b5678419492](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/06/libel-law-and-the-rolling-stone-uva-alleged-gang-rape-story/?utm_term=.6b5678419492) [https://perma.cc/YL37-CELC].

<sup>25</sup> See *infra* Section II.D.

<sup>26</sup> *Elias v. Rolling Stone LLC (Elias I)*, 192 F. Supp. 3d 383, 392–99 (S.D.N.Y. 2016), *aff'd in part, rev'd in part*, 872 F.3d 97 (2d Cir. 2017).

<sup>27</sup> *Id.*

<sup>28</sup> See *Elias II*, 872 F.3d 97, at 105–11 (2d Cir. 2017).

<sup>29</sup> *Id.*



In considering these questions, defamation law generally limits claims brought by individuals following the defamation of their group.<sup>30</sup> Two approaches have developed for resolving when to make an exception and permit individual recovery following defamation of groups and anonymous group members. The Second Circuit's decision in *Elias*<sup>31</sup> calls to attention the two competing approaches. The majority<sup>32</sup> of states adhere to the Restatement (Second) of Torts ("the Restatement") position, which contains a presumptive requirement that groups contain twenty-five or fewer members for individuals to recover.<sup>33</sup> New York and Oklahoma reject the Restatement approach for a more plaintiff-friendly standard called the "Intensity of Suspicion" test.<sup>34</sup>

In *Elias*, the Second Circuit applied the Intensity of Suspicion test in a manner that would permit every member of PKP to recover individually,<sup>35</sup> where the defamatory material named none of the plaintiffs directly.<sup>36</sup> Because the number of group members

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<sup>30</sup> RESTATEMENT (SECOND) OF TORTS § 564A cmt. a (AM. LAW INST. 1977) ("As a general rule no action lies for publication of defamatory words concerning a large group or class of persons."); see also ROBERT D. SACK, SACK ON DEFAMATION § 2:9.4, at 2-160 (5th ed. 2017) (describing policy reasons for the rule, namely that permitting members of groups to recover with no restriction would cause proliferation of unwarranted litigation, with resultant damage to the free speech).

<sup>31</sup> *Elias II*, 872 F.3d at 108-09. In *Elias II*, the Second Circuit overturned the Southern District of New York's decision in *Elias I*, 192 F. Supp. 3d 383 (S.D.N.Y. 2016) to dismiss the plaintiff's defamation case on a 12(b)6 motion. *Id.* at 111. The suit and appeal arose as the result of the Article's content.

<sup>32</sup> The author researched current law at the time this Note was written in April of 2018. In some states adopting the Restatement position, there has been discussion, but never application or adoption of the alternative "intensity of suspicion" approach. See, e.g., *Pratt v. Nelson*, 164 P.3d 366, 383 (Utah 2007) (rejecting the notion that the size of the group bars a claim and discussing the intensity of suspicion test in footnote 114 of the case). See *Granger v. Time, Inc.*, 568 P.2d 535, 539 (Mont. 1977) (evaluating and rejecting a claim concerning a group of approximately 200 persons based on the number of group members).

<sup>33</sup> RESTATEMENT (SECOND) OF TORTS § 564A cmt. b; see *infra* Section II.B. for a discussion of the Restatement position and the presumptive limit of twenty-five group members.

<sup>34</sup> The Intensity of Suspicion test, while considering group size, does not apply the Restatement's twenty-five-person limit. See *infra* Section II.C.

<sup>35</sup> *Elias II*, 872 F.3d at 110 ("Because the [defamatory material] plausibly implied that all fraternity brothers knew about the alleged rapes, Plaintiffs sufficiently alleged that they were defamed because they were members of the fraternity at the relevant time.").

<sup>36</sup> *Id.* at 101, 108.

in *Rolling Stone* exceeded twenty-five, it is very unlikely that such a claim would succeed in any of the states adopting the majority Restatement (Second) position.<sup>37</sup> Such a result illustrates the argument that defamation law's complexity promotes inconsistent outcomes, and invites a discussion of how to best address group defamation cases.<sup>38</sup>

This Note examines both the Restatement position and the Intensity of Suspicion Test, ultimately concluding that neither is completely satisfactory. Part I discusses defamation law generally. Part II discusses the two competing approaches to group defamation, then narrows to a discussion of the *Elias* decision. Finally, Part III proposes a novel test ("the Test") for resolving group defamation problems and associated First Amendment concerns, and applies the analysis to *Elias*.

## I. A CONCISE BACKGROUND OF DEFAMATION LAW

American defamation law arises from the interplay between state-level common law and constitutional restrictions on liability developed following the Supreme Court's decision in *New York Times Co. v. Sullivan*.<sup>39</sup> The resulting body of law, notorious for inconsistencies and complexity, is the topic of the following sections.<sup>40</sup> Section I.A describes the early features of American defamation law. Section I.B provides an overview of the constitutional aspects of the tort. Modern common law elements

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<sup>37</sup> See *infra* Section II.B.

<sup>38</sup> See SACK, *supra* note 30, at li–liv.

<sup>39</sup> 376 U.S. 254 (1964); see generally ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1st ed. 1991).

<sup>40</sup> RODNEY A. SMOLLA, *LAW OF DEFAMATION*, § 1:1 (2d ed. 2017). Barron Pollock described defamation as "perplexed with minute and barren distinctions." SIR FRANCIS POLLOCK, *THE LAW OF TORTS* 220 (5th ed. 1895). Prosser notes that "there is a great deal in the law of defamation which makes no sense." W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 771, § 111 (5th ed. 1984). Prosser, a famous legal scholar, developed strict products liability in addition to publishing *The Law of Torts*, a widely recognized and authoritative work on the subject of torts. See generally WILLIAM L. PROSSER, *THE LAW OF TORTS* (4th ed. 1971) [*hereinafter* PROSSER'S TORTS]; William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 *YALE L. J.* 1099 (1960). Prosser also served as Reporter for the Restatement (Second) of Torts. See RESTATEMENT (SECOND) OF TORTS at v.

are discussed in Section I.C. Finally, Section I.D covers the “of and concerning” element and its First Amendment implications.

#### A. *Common Law Origins*

Historically, American culture relegated defamation law to relative obscurity.<sup>41</sup> Disdain for feudalistic concepts of honor and nobility, a lack of remedy for emotional injury at tort law, and fundamental appreciation of free speech contributed to its lack of preeminence.<sup>42</sup> Despite societal ambivalence, courts of the pre-constitutional<sup>43</sup> era were quite receptive to claims, in what was essentially a strict liability tort.<sup>44</sup>

The original Restatement (First) of Torts, published in 1938, proposed that “[t]o create liability for defamation there must be an unprivileged publication of false and defamatory matter of another . . . .”<sup>45</sup> The First Restatement defined any statement that “tends [] 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” as defamatory.<sup>46</sup> Damages were presumed, and no showing of harm to reputation was necessary, only that the statement “tend[s] to have such an effect.”<sup>47</sup> A plaintiff needed to demonstrate only that the speech was defamatory, and that the defendant published it, to plead a prima facie case.<sup>48</sup> The falsity of the statement was also presumed, and truth was an affirmative defense that the defendant needed to assert and prove.<sup>49</sup> Constitutional developments would eventually dispense with or modify much of the permissive common law framework of the early twentieth century.<sup>50</sup>

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<sup>41</sup> SMOLLA, *supra* note 40, § 1:4.

<sup>42</sup> *Id.*

<sup>43</sup> “Pre-constitutional,” meaning prior to the Supreme Court’s Decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>44</sup> SMOLLA, *supra* note 40, § 1:4.

<sup>45</sup> RESTATEMENT (FIRST) TORTS § 558 (AM. LAW INST. 1938).

<sup>46</sup> *Id.* § 559.

<sup>47</sup> *Id.* § 559, cmt. d.

<sup>48</sup> SMOLLA, *supra* note 40, § 1:8.

<sup>49</sup> *Id.*

<sup>50</sup> *See infra* Sections I.B., II.B.

### B. First Amendment Law

Defamation law's protections of reputation necessarily encroach on the unfettered right to speak, write, and otherwise express oneself.<sup>51</sup> Accordingly, American defamation law cannot be understood without an overview of First Amendment principles elaborated by the Supreme Court over the past sixty years. Current law developed over the course of four 'waves' of seminal rulings, discussed below<sup>52</sup>: the first placed a restriction on defamation claims brought by public officials,<sup>53</sup> the second expanded restrictions to public figure plaintiffs,<sup>54</sup> the third described new standards for private plaintiffs,<sup>55</sup> and the fourth reversed some protections developed by the first three.<sup>56</sup> Following an overview of each decision, this Section considers the definition of important terms<sup>57</sup> described in these cases as well as standards for the burden of proof.

*New York Times Co. v. Sullivan*<sup>58</sup> placed the first constitutional restrictions on defamation law in 1964. The controversy arose at the height of the civil rights movement.<sup>59</sup> At the time, *The New York Times*, having a circulation of just 400 subscribers in Alabama, ran an advertisement designed to elicit sympathy for civil rights demonstrators facing violent repression across the

<sup>51</sup> SACK, *supra* note 30, § 1:1–2. “Whatever is added to the field of libel is taken from the field of free debate.” *Id.* (quoting *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C. Cir. 1942), *cert. denied*, 317 U.S. 678 (1942)).

<sup>52</sup> SMOLLA, *supra* note 40, § 1:16.

<sup>53</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 264 (1964); *see also infra* Section I.B, notes 58–70 and accompanying text.

<sup>54</sup> *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967); *Associated Press v. Walker*, 389 U.S. 28 (1967); *see infra* notes 71–78 and accompanying text for a discussion of these cases.

<sup>55</sup> *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 343–47 (1974).

<sup>56</sup> *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759–61 (1985); *see infra* notes 107–13 and accompanying text. The extent to which First Amendment protections were actually rolled back remains a matter of debate. *See* SACK, *supra* note 30, § 1:2.7, at 1–23.

<sup>57</sup> The relevant terms include “public figure,” “public official,” “public controversy,” “public issue,” and “actual malice.” *See* SACK, *supra* note 30, §§ 1:2.7, 1:4, 1:5; *see also infra* notes 67–69, 90–93 and accompanying text.

<sup>58</sup> 376 U.S. at 256, 279–80, 283.

<sup>59</sup> *See* Leland Ware, *Civil Rights and the 1960s: A Decade of Unparalleled Progress*, 72 MD. L. REV. 1087, 1088–92 (2013) (describing major civil rights events of the era which would serve as the backdrop to *New York Times*).

south.<sup>60</sup> Statements in the advertisement were either exaggerated or outright wrong.<sup>61</sup> Mr. Sullivan, the Commissioner of Public Affairs for the City of Montgomery, brought suit for defamation in Alabama, and a jury awarded damages of \$500,000.<sup>62</sup> In essence, *New York Times* considered the (arguably obvious) use of defamation law to suppress unpopular speech.<sup>63</sup>

*New York Times* declared that the need for “free political discussion . . . is a fundamental principle of our constitutional system,” and that criticism of the government cannot be punished by defamation law.<sup>64</sup> Further, discussion of individual public officials<sup>65</sup> must remain protected, even in the face of “vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>66</sup> Justice Brennan’s opinion for the Court declared that defamation suits brought by public officials must be supported by “actual malice,” a term of art.<sup>67</sup> Actual malice is defined as “knowledge that [the defamatory expression] was false or reckless disregard of whether it was false or not,”<sup>68</sup> and must be proven to the standard of “convincing clarity.”<sup>69</sup> In addition, the Court found that Commissioner Sullivan failed to present sufficient

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<sup>60</sup> See LEWIS, *supra* note 39 for a history of the events surrounding *New York Times*.

<sup>61</sup> *Sullivan*, 376 U.S. at 258–59.

<sup>62</sup> *Id.* at 256. At the time, the Supreme Court was aware that there were “eleven libel suits by local and state officials against the Times seeking \$5,600,000” and other similar suits against the press. *Id.* at 278 n.18, 294–95 (Black, J., concurring).

<sup>63</sup> See *id.* at 270–71.

<sup>64</sup> *Id.* at 254, 269 (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

<sup>65</sup> The definition of “public official” has been refined, to some extent, in *Hutchinson v. Proxmire*, so as to include most, but not all, public employees. 443 U.S. 111, 119 n.8 (1989); see also *Cox v. Hatch*, 761 P.2d 556, 560 (Utah 1988) (holding that not all public employees are “public officials” and that those who are “public officials” do not have that legal status for every kind of defamation, and noting that “[t]he employee’s position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.” (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 86 n.13 (1966))).

<sup>66</sup> *Sullivan*, 376 U.S. at 270 (citing *Terminello v. Chicago*, 337 U.S. 1, 4 (1949); *DeJonge v. Oregon*, 299 U.S. 353, 365 (1937)).

<sup>67</sup> *Id.* at 279–80.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 285–86. “Convincing clarity” is substantially more rigorous than the “by preponderance evidence” previously employed, but less than the “beyond a reasonable doubt” standard used in criminal proceedings. See SMOLLA, *supra* note 40, § 2:3.

evidence that the defamation concerned him, a concept central to group defamation, discussed below in Section I.D.<sup>70</sup>

Just three years after *New York Times*, the Supreme Court considered two companion cases, *Curtis Publishing Co. v. Butts*<sup>71</sup> and *Associated Press v. Walker*.<sup>72</sup> Both cases involved the review of large libel verdicts in which the plaintiffs were well known but were not government or public officials.<sup>73</sup> The Court weighed whether to decide such public figure<sup>74</sup> cases by elevated standards akin to those devised for public officials in *New York Times*.<sup>75</sup> The ruling answered affirmatively, adding another class of plaintiff to those required to make an elevated showing of fault.<sup>76</sup> Justice Harlan wrote for the plurality, attempting to establish a slightly different standard for public figures, but his position never achieved controlling status.<sup>77</sup> *Gertz v. Robert Welch, Inc.* resolved ambiguity created by Justice Harlan's unique public figure standard.<sup>78</sup>

*Gertz*<sup>79</sup> established modern standards for defamation by affirming the "actual malice" standard for public persons<sup>80</sup> and resolving, at least for a time, whether the "actual malice" requirement applied in private figure cases.<sup>81</sup> The ruling was

<sup>70</sup> "[T]he evidence was constitutionally defective in another respect: it was incapable of supporting the jury's finding that the allegedly libelous statements were made 'of and concerning' respondent." *Sullivan*, 376 U.S. at 288.

<sup>71</sup> 388 U.S. 130 (1967).

<sup>72</sup> 389 U.S. 28 (1967).

<sup>73</sup> Wally Butts was a college football coach and General Walker was a political activist. See *Curtis Publ'g Co.*, 388 U.S. at 135–36, 140.

<sup>74</sup> The definition of public figures evolved over a series of cases, discussed below in notes 89–91 and the accompanying text.

<sup>75</sup> See *Curtis Publ'g Co.*, 388 U.S. at 146; see also *Sullivan*, 376 U.S. at 279–80.

<sup>76</sup> *Curtis Publ'g Co.*, 388 U.S. at 155.

<sup>77</sup> Justice Harlan's plurality position caused confusion, since the standard describing "a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting" is significantly different from the "actual malice" standard described in *New York Times*. See *Curtis Publ'g Co.*, 388 U.S. at 155.

<sup>78</sup> *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 343–44 (1974). The *Gertz* court held that public figures and public officials would both be held to the "actual malice" standard. *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> "Public persons" includes both public figures and public officials. See *supra*, notes 65–76 and accompanying text.

<sup>81</sup> *Gertz*, 418 U.S. at 346.

complex. Writing for the court, Justice Powell rejected the defendant's contention that the "actual malice" standard applies *whenever* the statement involved an issue of public concern, regardless of whether the plaintiff was a private figure.<sup>82</sup> The ruling did not, however, leave private figure cases unaffected by the First Amendment.<sup>83</sup> Instead, Powell held that a minimum negligence requirement must be satisfied in private figure actions,<sup>84</sup> agreeing with the defendant's argument that strict, or faultless, liability available at common law did not meet American constitutional standards.<sup>85</sup> Adding further complexity, *Gertz* declared that even in private plaintiff cases, the recovery of presumed or punitive damages was prohibited without proof of "actual malice," and, indeed, that absent a showing of "actual malice," proof of "actual harm"<sup>86</sup> was required in such cases.<sup>87</sup>

With so much riding on the public figure/private figure distinction, courts put forward number of attempts to differentiate public from private persons, with one describing the analysis as "trying to nail a jelly fish to the wall."<sup>88</sup> The *Gertz* court described two categories of public figures: universal public figures,<sup>89</sup> and limited purpose or vortex public figures.<sup>90</sup> Universal, or all-purpose public figures occupy "positions of persuasive power and influence" and must meet the "actual malice" requirement for

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 347–48.

<sup>84</sup> *Id.* at 348. The *Gertz* court never actually used the word "negligence," but instead prohibited liability "without fault." *Id.* at 347. Lower courts have generally interpreted this term to mean "negligence." See *Troman v. Wood*, 340 N.E.2d 292, 299 (Ill. 1975). This ruling left states free to set their own standards, provided that private-figure-plaintiffs now proved, at a minimum, that a defendant had acted with some degree of fault. *Gertz*, 418 U.S. at 347–48.

<sup>85</sup> *Gertz*, 418 U.S. at 345–48.

<sup>86</sup> Defined as including, but not limited to, special or pecuniary damage, which includes general damage to reputation, personal anguish, humiliation, and suffering. *Id.* at 349–50; see also *infra* notes 155–56 and accompanying text.

<sup>87</sup> *Gertz*, 418 U.S. at 351–52. This, as well as other restrictions, would be significantly diminished in *Dun & Bradstreet, Inc.* See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759–61 (1985); see also *infra* notes 107–14 and accompanying text.

<sup>88</sup> *Rosanova v. Playboy Enterprises, Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978).

<sup>89</sup> Such figures are "universally" subject to the *New York Times* standard and include persons generally recognized by the public as celebrities. SMOLLA, *supra* note 40, § 2:77.

<sup>90</sup> *Gertz*, 418 U.S. at 345, 352.

nearly all subject matters.<sup>91</sup> While a ‘a larger than life’ celebrity fits the archetypical definition of the universal public figure,<sup>92</sup> courts have also treated corporations,<sup>93</sup> universities,<sup>94</sup> and individuals who attain the necessary status within their communities as universal public figures.<sup>95</sup> Vortex public figures must meet the “actual malice” requirement only where defamed in connection to public controversies in which they participate.<sup>96</sup> Public interest<sup>97</sup> alone does not define a public controversy: the matter must achieve open debate in the public forum and have foreseeable and significant consequences for nonparticipants.<sup>98</sup> Whether the plaintiff voluntarily participated in the controversy also plays a role in determining limited public figure status.<sup>99</sup>

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<sup>91</sup> *Id.* Courts have found famous surfers, political candidates, and pornographic actresses to be universal public figures. See *Manzari v. Associated Newspapers Ltd.*, 830 F.3d 881, 888–89 (9th Cir. 2016); *Chapman v. Journal Concepts, Inc.*, 528 F. Supp. 2d 1081, 1095 (D. Haw. 2007), *aff’d on other grounds*, 401 F. App’x 243 (9th Cir. 2010); *Dolcefino v. Turner*, 987 S.W.2d 100, 110 (Tex. App. 1998), *aff’d sub nom. Turner v. KTRK Television, Inc.*, 38 S.W.3d 103 (Tex. 2000).

<sup>92</sup> SMOLLA, *supra* note 40, § 2.77.

<sup>93</sup> *Reliance Ins. Co. v. Barron’s*, 442 F. Supp. 1341, 1347–48 (S.D.N.Y. 1977).

<sup>94</sup> *Ithaca Coll. v. Yale Daily News Publ’g Co.*, 433 N.Y.S.2d 530, 533–34 (N.Y. Sup. Ct. 1980), *aff’d on other grounds*, 445 N.Y.S.2d 621 (N.Y. App. Div. 1981).

<sup>95</sup> *Williams v. Pasma*, 202 Mont. 66, 74, 656 P.2d 212, 216 (1982); see also *Lluberes v. Uncommon Prods., LLC*, 663 F.3d 6, 20 (1st Cir. 2011) (commenting that “some courts . . . have extrapolated . . . that a general-purpose public figure need not attain ‘nationwide fame,’ only ‘notoriety where he was defamed . . .’”).

<sup>96</sup> See *Gertz*, 418 U.S. at 345; SMOLLA, *supra* note 40, § 2:16.

<sup>97</sup> Public interest is defined as “[t]he general welfare of a populace considered as warranting recognition and protection.” *Public Interest*, BLACK’S LAW DICTIONARY (10th ed. 2017). Public interest is, however, relevant to the analysis, as the defamatory statement must concern a matter of public interest to qualify for the requirement of negligence at trial. See *infra*, notes 107–13 and accompanying text.

<sup>98</sup> *Waldbaum v. Fairchild Publ’ns, Inc.*, 627 F.2d 1287, 1297 (D.C. Cir. 1980).

<sup>99</sup> See *Hutchinson v. Proxmire*, 443 U.S. 111, 134–36 (1979) (finding that plaintiff was not a vortex public figure despite “voluntarily” applying for public funding of his research, which the defendant ridiculed); *Wolston v. Reader’s Digest Ass’n, Inc.*, 443 U.S. 157, 166–69 (1979) (reasoning that plaintiff was not a vortex public figure because his participation was involuntary and there was no controversy); *Time, Inc. v. Firestone*, 424 U.S. 448, 454–55 (1976) (finding that socialite plaintiff was neither a universal public figure nor a vortex public figure for “voluntarily” entering a controversy by initiating litigation); see also *Contemporary Mission, Inc. v. N.Y. Times Co.*, 842 F.2d 612, 617 (2d Cir. 1988) (explaining that in order to receive public figure treatment, plaintiff must “(1) successfully invite[] public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily inject[] himself into a public controversy related to the subject of the litigation; (3)



Nevertheless, courts have found involuntary participants to be limited purpose public figures in certain circumstances.<sup>100</sup>

Whether and when groups qualify as public figures presents an intriguing question.<sup>101</sup> In the case of vortex public figures, courts have generally found numerous groups that involved themselves in controversies pertinent to the defamation to be public figures.<sup>102</sup> The issue has been, at least tangentially, addressed as courts evaluate how to treat corporations, which have received varied treatment.<sup>103</sup> Some courts always subject corporations to the *New York Times* standard on the grounds that they have no personal reputation, anytime the defamation addresses a relevant matter of public interest.<sup>104</sup> Others reject this approach and seek to determine

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assume[] a position of prominence in the public controversy; and (4) maintain[] regular and continuing access to the media”).

<sup>100</sup> Gertz notes that “it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974); see *Street v. Nat’l Broad. Co.*, 645 F.2d 1227, 1234–35 (6th Cir. 1981), *cert. granted*, 454 U.S. 815 (1981), *cert. dismissed*, 454 U.S. 1095 (1981) (finding a victim in a notorious rape case who gave press interviews and promoted her version of the story to be a public figure); *Dameron v. Wash. Magazine, Inc.*, 779 F.2d 736, (D.C. Cir. 1985) (finding an air traffic controller on duty when an airplane crashed held to be a public figure, despite his not seeking attention); see also *Waldbaum*, 627 F.2d at 1297–98 (establishing three factors for determining public figure status: 1. Is there a public controversy? 2. Has the plaintiff played a sufficiently central role in the controversy? and 3. Is the alleged defamatory statement relevant to the plaintiff’s participation in the controversy? The court also noted that that “unless [the involuntary participant] rejects any role in the debate, he too has ‘invited comment’ relating to the issue at hand.”). A central reason for recognizing involuntary public figures is to prevent an “end run” around constitutional protections. See, e.g., *Brewer v. Memphis Publ’g Co.*, 626 F.2d 1238, 1257–58 (5th Cir. 1980), *cert. denied*, 426 U.S. 962 (1981) (holding that Elvis Presley’s ex-girlfriend and her husband were public figures for the purposes of a defamatory article, despite her husband’s involuntary and attenuated connection to the public controversy). *But cf.* *Wells v. Liddy*, 186 F.3d 505 (4th Cir. 1999), *cert. denied*, 528 U.S. 1118 (2000) (holding that the plaintiff’s bad luck of being wiretapped by the Watergate burglars did not qualify her as a public figure even while accepting the possibility, generally, of an involuntary public figure).

<sup>101</sup> See, e.g., SACK, *supra* note 30, § 5:3.5 (listing a brokerage, a private corporation in charge of corrections centers, Trump University, a law school, and various organizations as being found to be limited purpose public figures).

<sup>102</sup> *Id.*

<sup>103</sup> See *id.* § 5:3.7.

<sup>104</sup> *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947, 955 (D.D.C. 1976).

whether the corporation is itself “public” by querying whether the company engaged in the promotion and sale of securities.<sup>105</sup> Still others look to case specific factors, such as whether the corporation sought publicity, as in the case of advertisements, in making the determination.<sup>106</sup> Overall, authorities provide little clarity in the public/private figure determination when resolving how to treat groups.

A more recent chapter in the development of Supreme Court defamation jurisprudence significantly altered First Amendment protections. The Court’s decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders*<sup>107</sup> effectively did away with the “actual malice” requirement where statements “do not involve matters of public concern.”<sup>108</sup> The issue before the court was whether a business inaccurately reported as bankrupt by a credit service needed to prove “actual malice” in order to recover.<sup>109</sup> While the *Gertz* court would answer in the affirmative, the *Dun & Bradstreet* court answered in the negative, reasoning that the report did not address a matter of public concern.<sup>110</sup> The ruling left unanswered whether *Gertz*’s prohibition of liability without fault applies when statements are not of public concern,<sup>111</sup> and how to define such

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<sup>105</sup> See, e.g., *Ampex Corp. v. Cargle*, 27 Cal. Rptr. 3d 863, 869 (Cal. Ct. App. 2005) (holding that the determination rests on whether the corporation is (1) publicly traded, (2) the number of investors, and (3) whether the company promoted itself via press releases).

<sup>106</sup> *Nat’l Found. for Cancer Research, Inc. v. Council of Better Bus. Bureaus*, 705 F.2d 98, 101–02 (4th Cir. 1983), *cert. denied*, 464 U.S. 830 (1983); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264 (3d Cir. 1980).

<sup>107</sup> *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985). See SACK, *supra* note 30, § 5:3.3 for a discussion of when the “vortex” or “limited purpose” public figure standard applies.

<sup>108</sup> *Dun & Bradstreet*, 472 U.S. at 751, 763. The *New York Times* “actual malice” standard applies to public officials, and public figures, but only when the statements are about “issues of public concern.” *Id.*

<sup>109</sup> *Id.* at 751, 757.

<sup>110</sup> The dissent in *Dun & Bradstreet* highlights the difficulty of sorting cases based on the “matters of public concern” criterion: Justice Brennan (dissenting) wrote that because the credit report concerned a public corporation, the false information was in fact a matter of public concern. *Id.* at 787.

<sup>111</sup> See SMOLLA, *supra* note 40, §§ 1:20, 3:17. Smolla interprets *Dun & Bradstreet* as suggesting that the plurality would endorse a return to strict liability in private figure cases not involving matters of public concern. *Id.* The First Circuit noted that the First Amendment does not protect all defamation cases. *Galarneau v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 504 F.3d 189, 199 (1st Cir. 2007).

statements. Later rulings established that statements involve matters of public concern when they relate to keeping the community informed on important civic and social issues.<sup>112</sup> Determining whether speech addresses a matter of public concern depends on “content, form and context,” accounting for important linguistic and social considerations.<sup>113</sup>

While discussions of torts best explain the cause of action with an initial disclosure of the elements, defamation law’s unique constitutional aspects limit the value of such an approach.<sup>114</sup> To summarize, the constitutional features of defamation law change requirements for the plaintiff based on four factors: the identity of the defendant,<sup>115</sup> the identity of the plaintiff, the character of the defamatory statement, and requirements of the jurisdiction whose law applies.<sup>116</sup> Where circumstances do not call for the imposition of minimum standards of fault and proof, states are free to establish their own.<sup>117</sup> Nevertheless, many states, as well as the Restatement (Second) of Torts (the “Restatement”), incorporate

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<sup>112</sup> Specifically, matters of public concern are “any matter of political, social, or other concern to the community.” *Connick v. Myers*, 461 U.S. 138, 146 (1983).

<sup>113</sup> *Id.* at 147–48.

<sup>114</sup> SACK, *supra* note 30, § 2:1.

<sup>115</sup> Courts are divided on whether *Gertz* applies to suits against non-media defendants, with the *Dun & Bradstreet* opinion seeming to eschew such a distinction. *Dun & Bradstreet*, 472 U.S. at 772–74, 781 (White, J., concurring) (Brennan, J., dissenting). *See, e.g.*, *Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1284, 1290–91 (9th Cir. 2014) (applying *Gertz* to a blog post).

<sup>116</sup> “A defamation case does not putter along as a state law case in its earliest stages, only to suddenly acquire First Amendment implication upon the tender of an affirmative defense . . . . [The Supreme] Court [has] infused the state common law of defamation with a constitutional dimension . . . .” *Hatfill v. N.Y. Times Co.*, 427 F.3d 253, 254–55 (4th Cir. 2001) (Wilkinson, J., dissenting from denial of rehearing *en banc*), *cert. denied*, 547 U.S. 1040 (2006) (internal citations and quotation marks omitted).

<sup>117</sup> The Supreme Court has not decided whether fault is required for recovery in private plaintiff cases concerning statements outside of public concern. *See Dun & Bradstreet*, 472 U.S. at 773–74 (White, J., concurring) (presenting the view that *Gertz*’s requirement would be inapplicable in private concern, private figure cases); *see also Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (mentioning in dicta that the [fault] requirement does not apply to private plaintiffs unless the matter is of public concern).

aspects of the Court's jurisprudence into the law regardless of whether they are technically required.<sup>118</sup>

### *C. Elements of the Modern Tort*

Bearing in mind the influence of First Amendment restrictions on recovery,<sup>119</sup> the elements of defamation detailed below provide a useful checklist of issues to be addressed. The Restatement describes the following components, common to many jurisdictions,<sup>120</sup> as necessary for defamation actions:

- (a) A false and defamatory statement concerning another;
- (b) An unprivileged publication to a third party;
- (c) Fault amounting at least to negligence on the part of the publisher; and
- (d) Either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.<sup>121</sup>

The first element contains three important terms, including that the statement be false,<sup>122</sup> defamatory, and concerning another. Falsity is frequently required at common law, and a prerequisite

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<sup>118</sup> See, e.g., RESTATEMENT (SECOND) OF TORTS § 558(c) (AM. LAW. INST. 1977) (requiring fault at a minimum, a standard absent from the common law and previous Restatement (First) of Torts, described in Section I.A.).

<sup>119</sup> Restrictions on recovery include elevated fault/proof standards for public persons and a minimum fault standard for private persons where statements concern public matters. See *supra* Section I.B. "Because the common law of defamation, federal constitutional law, and the constitutional law of the various states reflect many of the same underlying principles and adopt similar propositions, it is often unclear to what extent a court decision relies on each." *TMJ Implants, Inc. v. Aetna, Inc.*, 498 F.3d 1175, 1182 (10th Cir. 2007).

<sup>120</sup> The Restatement (Second) elements share much in common with those devised statutorily or at common law in each state. See SACK, *supra* note 30, § 2:1, at 2–6.

<sup>121</sup> RESTATEMENT (SECOND) OF TORTS § 558.

<sup>122</sup> Because opinion cannot be proven false, the court must determine whether the defamatory material conveys fact or non-actionable opinion. SMOLLA, *supra* note 40, § 4:38 ("It is, after all, the court's responsibility to distinguish non-actionable 'obscenities, vulgarities, insults, epithets, name-calling . . . verbal abuse . . . and statements of rhetorical hyperbole' from true defamatory language.") (citing *McCausland v. City of Atlantic City*, 2006 WL 1451060 (N.J. Super. Ct. App. Div. 2006)) (internal quotations omitted).

for recovery as a matter of constitutional law.<sup>123</sup> Originally, the falsity of the statement was presumed, and the burden rested with the defendant to prove its truth.<sup>124</sup> While presumed falsity remains available in some jurisdictions for some private figure plaintiffs,<sup>125</sup> all cases governed by elevated First Amendment requirements place the burden of proving falsity on the injured party.<sup>126</sup> In addition to falsity, the first element also requires that the statement be defamatory. Defamation deals with expressions<sup>127</sup> that tend to injure reputation.<sup>128</sup> The precise definition and extent to which a statement must be capable of damaging reputation<sup>129</sup> varies by

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<sup>123</sup> See *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

<sup>124</sup> SMOLLA, *supra* note 40, § 1:8.

<sup>125</sup> See *supra* note 49 and accompanying text.

<sup>126</sup> This includes the majority of cases, specifically when there are public-figure plaintiffs, public-official plaintiffs, or private plaintiffs when suing media defendants over matters of public concern. Many courts reject the media/non-media distinction. See *supra* notes 51–116 and accompanying text. Notice that private plaintiffs may not be governed by *Gertz* if the defendant is not a member of the media or the statement is too far removed from the factors that give the plaintiff public status. *Garrison v. Louisiana*, 379 U.S. at 74 (1964); see SACK, *supra* note 30, §§ 2:1.1, 5:2–5:3.10; see also *supra* Section I.B.

<sup>127</sup> While defamatory statements are usually words, nonverbal communication such as a drawing or photograph may also be defamatory. See *Braun v. Flynt*, 726 F.2d 245, 247, 250–51 (5th Cir. 1984) (finding that a photograph is capable of defamatory meaning when published in an erotic magazine); *Burton v. Crowell Publ'g Co.*, 82 F.2d 154, 155–56 (2d Cir. 1936) (finding that an advertisement with a photo containing optical illusions and graphics is capable of defamatory expression).

<sup>128</sup> RESTATEMENT (SECOND) OF TORTS § 559 (AM. LAW INST. 1977) (defining defamatory communication as that which “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”).

<sup>129</sup> As a threshold matter, the judge determines whether a statement may sustain defamatory meaning. RESTATEMENT (SECOND) OF TORTS § 614 (“(1) The court determines (a) whether a communication is capable of bearing a particular meaning, and (b) whether that meaning is defamatory.”); SMOLLA, *supra* note 40, § 4:38; see also *Biro v. Condé Nast*, 883 F. Supp. 2d 441, 456 (S.D.N.Y. 2012) (citing *Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 177 (2d Cir. 2000) (internal citation omitted). The factfinder must ultimately decide whether the communication was understood by its actual recipient as defamatory. RESTATEMENT (SECOND) OF TORTS § 614 (“(2) The jury determines whether a communication, capable of a defamatory meaning, was so understood by its recipient.”); see also *Levin v. McPhee*, 119 F.3d 189, 195 (2d Cir. 1997) (citing *James v. Gannett Co.*, 353 N.E.2d 834, 837–38 (N.Y. 1976)). When there is ambiguity about the meaning and effect of the words, the question is for the jury. SMOLLA, *supra* note 40, § 4:38; see *Golden Bear Distrib. Sys. of Texas, Inc. v. Chase Revel, Inc.*, 708 F.2d 944, 948

jurisdiction.<sup>130</sup> Interestingly, this element requires inquiry into whether the statement would *tend* to injure the plaintiff, not whether it actually caused injury.<sup>131</sup> A showing that the statement tends to injure substitutes for proof of a causal link between harmful behavior and injury commonly required in other torts.<sup>132</sup> Finally, the first element requires that the statement concern the plaintiff, a concept central to group defamation discussed in Section I.D below.

The second element, unprivileged publication, pertains to whether the defamatory thoughts are expressed purposely or negligently to a third party.<sup>133</sup> Every distinct publication gives rise to a new cause of action.<sup>134</sup> A plaintiff does not need to prove publication with respect to specific recipients, only that third

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(5th Cir. 1983) (“If a defamatory meaning *may* exist, then the statement or article is considered ambiguous, and the court must allow the jury to determine whether an ordinary reader would perceive the statement as defamatory.”) (internal citations omitted).

<sup>130</sup> In New York, defamation is defined as “words which tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or to induce an evil opinion of on in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society.” *Kimmerle v. N.Y. Evening Journal, Inc.*, 186 N.E. 217, 218 (N.Y. 1933). Others have defined defamatory statements as those which “expose[] a person to hatred, contempt, ridicule, or obloquy, or which cause[] him to be shunned or avoided, or which has a tendency to injure him in his occupation.” *Madison v. Yunker*, 589 P.2d 126, 130 (Mont. 1978) (quoting *Lewis v. Reader’s Digest Ass’n*, 512 P.2d 702, 705 (Mont. 1973)).

<sup>131</sup> This idiosyncrasy originates from both the difficulty of proving actual damage to reputation and reflects that some jurisdictions allow recovery for non-reputational (emotional) injury. SACK, *supra* note 30, §§ 2:4.1–2:4.17.

<sup>132</sup> See David A. Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747, 751 (1984).

<sup>133</sup> In other parts of this Note, the third party may be referred to as the “consumer” or “reader” of the defamatory material. Merely thinking, writing down, or sharing defamatory thoughts with the defamer’s target (or his agent, in some jurisdictions) cannot give rise to a defamation claim, since such private insults cannot result in harm to reputation. *Mims v. Metro. Life Ins. Co.*, 200 F.2d 800, 802 (5th Cir. 1952), *cert. denied*, 345 U.S. 940 (1953); *Turner v. Boy Scouts of Am.*, 856 N.E.2d 106, 111 (Ind. Ct. App. 2006).

<sup>134</sup> See *Pruis v. Bosse*, 912 F. Supp. 104, 106 (S.D.N.Y. 1996) (quoting *Barber v. Daly*, 586 N.Y.S.2d 398, 400 (N.Y. App. Div. 1992)). Republications must be distinct, and identical ones are treated as a single publication to prevent the statute of limitations from tolling, for example, with each sale of a book. See SMOLLA, *supra* note 40, §§ 4:91–4:93.50.

parties received and understood it.<sup>135</sup> The manner of publication, aside from determining whether libel or slander,<sup>136</sup> does not usually prevent liability: courts have found drawings, gestures,<sup>137</sup> and other communicative media<sup>138</sup> capable of carrying defamatory meaning.

The third element, fault, determines legal responsibility,<sup>139</sup> and is central to the Supreme Court's rulings.<sup>140</sup> When the plaintiff is a public figure or official he or she must prove "actual malice" to "convincing clarity,"<sup>141</sup> a standard falling somewhere between a "preponderance of evidence"<sup>142</sup> and "beyond a reasonable doubt."<sup>143</sup> Cases involving matters of public concern require negligence proven by a "preponderance of the evidence."<sup>144</sup> If the case does not pertain to a public plaintiff or a matter of public concern, the degree of fault and standard of proof remain issues for state legislators and courts, with negligence being the most common standard.<sup>145</sup> Since fault remains difficult to prove with

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<sup>135</sup> See *Armenian Assembly of Am., Inc. v. Cafesjian*, 597 F. Supp. 2d 128, 137 (D.D.C. 2009).

<sup>136</sup> See *infra* notes 155–168 and accompanying text (discussing the libel/slander distinction).

<sup>137</sup> See *Caldor, Inc. v. Bowden*, 625 A.2d 959, 970 (Md. 1993) (finding that leading plaintiff through store in handcuffs qualifies as defamatory).

<sup>138</sup> See *David L. Aldridge Co. v. Microsoft Corp.*, 995 F. Supp. 728, 742 (S.D. Tex. 1998) (finding that on-screen messages are capable of a defamatory meaning).

<sup>139</sup> Fault is defined as "an error or defect of judgment or of conduct; any deviation from prudence or duty resulting from inattention, incapacity, perversity, bad faith, or mismanagement." *Fault*, BLACK'S LAW DICTIONARY (10th ed. 2017). Fault is a "traditional element in determining legal responsibility . . ." in both civil and criminal cases. *Id.*

<sup>140</sup> See Section I.B.

<sup>141</sup> *New York Times v. Sullivan*, 376 U.S. 254, 279–80, 285–86 (1964); see also *supra* Section I.B. for a discussion of the cases elaborating these standards.

<sup>142</sup> A "preponderance of the evidence" is defined as "[t]he burden of proof in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be." *Preponderance of Evidence*, BLACK'S LAW DICTIONARY (10th ed. 2017).

<sup>143</sup> *Bose Corp. v. Consumers Union of U.S., Inc.*, 692 F.2d 189, 195 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984); *Yiamouyiannis v. Consumers Union of U.S., Inc.*, 619 F.2d 932, 940 (2d Cir. 1980), *cert. denied*, 449 U.S. 839 (1980).

<sup>144</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 366 (1974).

<sup>145</sup> RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1977) ("fault amounting at least to negligence on the part of the publisher"). Each jurisdiction sets its own standard. See SACK, *supra* note 30, §§ 6:1–6:4.

regard to defamation,<sup>146</sup> and speaks to the extent of a defendant's culpability, fault and standards of proof act as an adjustable balancing point between the competing interests of tort law<sup>147</sup> and society's interest in free discourse.<sup>148</sup>

The final element of defamation in the Restatement dictates that the plaintiff must show that either the defamation is actionable without proof of "special harm,"<sup>149</sup> that is, it is actionable "per se,"<sup>150</sup> or that the publication caused such harm.<sup>151</sup> Special harm or damages often refers only to pecuniary loss,<sup>152</sup> but may also include intangible injury such as psychological or reputational harm in some jurisdictions.<sup>153</sup> Interestingly, the need to prove special damages acts as a checkpoint rather than a limit on recovery: once this element is satisfied, plaintiff may recover special, actual, putative, and unproven presumed damages.<sup>154</sup>

The distinction between libel and slander<sup>155</sup> remains important at common law because of differences in the need to show "special

<sup>146</sup> See *McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1308 (D.C. Cir. 1996) ("The standard of actual malice is a daunting one.").

<sup>147</sup> This balancing includes providing recourse for injury and preventing harmful behavior, and it speaks to establishing normative standards of conduct. See *Blanks v. Fluor Corp.*, 450 S.W.3d 308, 373 (Mo. Ct. App. 2014) (citing *Elam v. Alcolac, Inc.*, 765 S.W.2d 42, 176 (Mo. Ct. App. 1988)).

<sup>148</sup> See SMOLLA, *supra* note 40, §§ 1:25–1:27.

<sup>149</sup> The Restatement (Second) refers to "special damages" as "special harm." See RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1977); SMOLLA, *supra* note 40, § 7:2.

<sup>150</sup> This term often causes confusion, since there exist both libel *per se* and slander *per se*, with each ascribing a different meaning to "per se." See SACK, *supra* note 30, §§ 2:8–2:8.3. As used in this Note, "per se" means that the defamation is actionable without proving special damages. *Id.*

<sup>151</sup> See RESTATEMENT (SECOND) OF TORTS § 558; SMOLLA, *supra* note 40, §§ 7:1–7:5.

<sup>152</sup> See, e.g., *Franklin Prescriptions, Inc. v. N.Y. Times Co.*, 424 F.3d 336, 343 (3d Cir. 2005) (defining "special damages" as monetary or out of pocket losses).

<sup>153</sup> *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 793–94 (Ky. 2004), *overruled on other grounds by Toler v. Sud-Chemie, Inc.*, 458 S.W.3d 276 (Ky. 2014) (including reputational harm as within "special damages").

<sup>154</sup> SACK, *supra* note 30, § 2:8. Proving special damages, however, becomes the "rock" on which many suits "founder." *Id.* § 2:8.5. However, in order to obtain presumed or putative damages in media defendant cases where the statement at issue is about a matter of public interest, the plaintiff must prove the charge to the "actual malice" standard. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 755–56 (1985).

<sup>155</sup> Defamation subsumes both of these concepts, with libel being written defamation and slander being spoken defamation. SMOLLA, *supra* note 40, § 1:10.



harm,” as described in the fourth element of the Restatement.<sup>156</sup> Libel, traditionally in writing,<sup>157</sup> remains a tort with lower burdens<sup>158</sup> on the plaintiff than spoken slander, because the written word was thought to “leave a more indelible blot” on plaintiff’s reputation, as well as potentially reaching a larger audience.<sup>159</sup> In essence, a slander plaintiff has the additional burden of demonstrating “special harm,”<sup>160</sup> unless the slander falls into four “per se” categories, including: 1) imputation of a serious crime involving moral turpitude; 2) possessing a loathsome disease; 3) an attack on business, trade or professional competency; and 4) sexual misconduct or depravity.<sup>161</sup> The significance of the libel/slander distinction has diminished, due to the development of a constitutional overlay to the common law,<sup>162</sup> and definitional problems associated with the emergence of widespread electronic and mixed media communications.<sup>163</sup>

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<sup>156</sup> RESTATEMENT (SECOND) OF TORTS § 558D.

<sup>157</sup> Courts generally include all forms of “published” defamations in the libel category, including radio and televised broadcasts. SACK, *supra* note 30, § 2:3.

<sup>158</sup> There is no need to show “special harm” for libel in jurisdictions adopting the Restatement (Second) position. RESTATEMENT (SECOND) OF TORTS § 569. Other jurisdictions require a showing of “special damages” for libel where the statement’s defamatory meaning is libelous only in light of extrinsic facts. *See, e.g., Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 695 (9th Cir. 1998) (citing CAL. CIV. CODE § 45a). In *Newcombe*, a California court dismissed a claim brought by a professional athlete and former alcoholic depicted in a beer advertisement because his former alcoholism was external to the defamatory material and he had not pled special damages. *Id.*

<sup>159</sup> SMOLLA, *supra* note 40, § 1:13. The libel/slander distinction dates back to ancient times. Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 558–73 (1903).

<sup>160</sup> Typically, “special harm” required a showing of pecuniary loss and is also referred to as “special damages” discussed in the fourth element of the Restatement (Second). *See* RESTATEMENT (SECOND) OF TORTS § 558D; SMOLLA, *supra* note 40, §§ 7:1–7:5.

<sup>161</sup> *Id.* § 570.

<sup>162</sup> Unless “actual malice” is proven, *Gertz* requires proof of damages “supported by competent evidence” representing “actual injury” and cannot be presumed or putative damages in disguise. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349–50 (1974). *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* lifted the restriction for private figure plaintiffs on matters of private concern. 472 U.S. 749, 757–63 (1985). Effectively, the *Gertz* requirement for proving “actual injury” subsumes proving “special damages” in many cases. SACK, *supra* note 30, § 2.8.7(A), at 2–149 (noting that this conclusion may be an oversimplification).

<sup>163</sup> SACK, *supra* note 30, § 2:3.

The basic elements of defamation claims discussed above provide a useful background for understanding defamation. In *Elias*, as in many group defamation claims, the analytic focus shifts to one element in particular: whether the defamatory expression was “of and concerning” the plaintiff, discussed in detail below.<sup>164</sup>

*D. Of and Concerning, the First Amendment, and Group Defamation*

In order to succeed in a litigation, the first element of the Restatement<sup>165</sup> dictates that the plaintiff must successfully show the defamatory statement was “of and concerning” him or her.<sup>166</sup> The rule requires that a nexus exists between the defamatory material and the plaintiff.<sup>167</sup> As such, this element weighs whether a third party understood that the defamation was about the plaintiff,<sup>168</sup> and in the case of group defamation, whether such an understanding conceivably leads to harm.<sup>169</sup> Because there are many ways in which a defamatory communication may be vague

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<sup>164</sup> *Elias II*, 872 F.3d 97, 104–11 (2d Cir. 2017); see *infra* Section I.D.

<sup>165</sup> See *supra* notes 120–32 and accompanying text.

<sup>166</sup> See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 288–89 (1964); *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 398 (2d Cir. 2006) (citing *Julian v. Am. Bus. Consultants, Inc.*, 2 N.Y.2d 1, 137 N.E.2d 1 (1956)); SACK, *supra* note 30, § 2:9; W. PAGE KEETON ET AL., *supra* note 40, § 113, at 802. Although the “of and concerning” element of libel claims generally presents a factual question for the jury, a court may dismiss an action for failure to state a claim, where the statements are incapable of supporting a jury’s finding that the libel refers to the plaintiff. Rule 12(b)(6). See, e.g., *Diaz v. NBC Universal, Inc.*, 536 F. Supp. 2d 337 (S.D.N.Y. 2008), *aff’d*, 337 F. App’x 94 (2d Cir. 2009); *Fernicola v. Farrar, Straus & Cudahy, Inc.*, 208 N.Y.S.2d 305, 308 (N.Y. Sup. Ct. 1960). *But see* *In re Houbigant, Inc.*, 182 B.R. 958 (Bankr. S.D.N.Y. 1995) (holding that “whether the complaint alleges facts sufficient to demonstrate a connection between the plaintiff and the alleged libel is a question for the court”) (citing *Cardone v. Empire Blue Cross and Blue Shield*, 884 F. Supp. 838, 847 (S.D.N.Y. 1995)).

<sup>167</sup> *Fernicola*, 208 N.Y.S.2d at 308. This connection, akin to causation in other torts, assures that the plaintiff and the injurious action are, in fact, related.

<sup>168</sup> *Kirch*, 449 F.3d at 398.

<sup>169</sup> In group defamation, only the plaintiff’s group is identified and the link to plaintiff’s individual reputation arises from his or her membership in the disparaged group. See *infra* Part II.

as to the identity of the plaintiff,<sup>170</sup> the requirement significantly limits the eligibility of those who may recover.<sup>171</sup>

Originally, a publisher did not need to intentionally target the plaintiff, nor was a showing of negligence necessary.<sup>172</sup> To satisfy the “of and concerning” element, a fact finder only needed to conclude that the recipient of the defamation correctly, or mistakenly but reasonably believed<sup>173</sup> that the publication referred to the plaintiff.<sup>174</sup> For example, the *Washington Post* found itself liable for printing an article about a criminal, because of a local man’s coincidentally similar name and profession.<sup>175</sup> The D.C. Circuit did not require that the plaintiff, a Washington D.C. lawyer, prove that the *Post* acted negligently or with wrongful motive; only

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<sup>170</sup> For example, it is possible to defame somebody without naming them directly, as either the circumstances or additional publicly known information makes identification possible. *See, e.g., Doe v. Hagar*, 765 F.3d 855, 862 (8th Cir. 2014); *Ball v. Taylor*, 416 F.3d 915, 917 (8th Cir. 2005). In *Elias II*, plaintiffs Elias and Fowler were identified in such a manner. *Elias II*, 872 F.3d 97, 105–06 (2d Cir. 2017); *see infra* Section II.E. It is also possible to defame by imputation, for example, if the defamatory connection is implied. *See SACK, supra* note 30, § 2:4.5. On the other hand, vicarious defamation, or defamation of one’s family, friends, associates, company or other affiliates, generally does not give rise to liability. *See id.* § 2:9.5. Group defamation cases exemplify vague plaintiff identity. *See infra* Part II.

<sup>171</sup> *See Kirch*, 449 F.3d at 399–400 (finding that the “of and concerning” element of the tort “stands as a significant limitation on the universe of those who may seek a legal remedy for communications they think to be false and defamatory and to have injured them”).

<sup>172</sup> “The test is not whom the story intends to name, but who a part of the audience may reasonably think is named— ‘not who is meant but who is hit.’” *Sims v. Kiro, Inc.*, 580 P.2d 642, 645 (Wash. Ct. App. 1978) (quoting PAUL ASHLEY, SAY IT SAFELY 30 (3d ed. 1966)); *see also Dalbec v. Gentleman’s Companion, Inc.*, 828 F.2d 921, 925 (2d Cir. 1987); *Wash. Post Co. v. Kennedy*, 3 F.2d 207, 207–08 (D.C. Cir. 1925).

<sup>173</sup> Circumstances dictate whether a communication may be reasonably understood to be “of and concerning” a plaintiff. *Stanton v. Metro Corp.*, 438 F.3d 119, 128 (1st Cir. 2006). Historically, if a plaintiff was not identified by name, it was necessary to plead the extrinsic circumstantial facts, called the “colloquium,” that identified her as the defamed party. *SACK, supra* note 30, § 2:9.1 n.618 and accompanying text. Such facts are not necessary at the pleading stage in most modern courts but could be useful in cases of group defamation. *See, e.g., Elias II*, 872 F.3d at 104–08 (considering in its decision, while not called the “colloquium,” evidence of information identifying the plaintiffs not included in the defamation); *SACK, supra* note 30, § 2:9.1 n.618.

<sup>174</sup> RESTATEMENT (SECOND) OF TORTS § 564 (AM. LAW INST. 1977). It is necessary that the recipient of the defamatory communication understand it as intended to refer to the plaintiff. *Id.* § 564 cmt. a.

<sup>175</sup> *Kennedy*, 3 F.2d at 208.

that readers understood the article to be about him.<sup>176</sup> The standard requires that some number of recipients, and not the public at large, understood the defamation was “of and concerning” the plaintiff.<sup>177</sup> The significance of this permissive common law standard would come under scrutiny in two Supreme Court cases.

In addition to elevating fault requirements for public officials,<sup>178</sup> *New York Times* brought the “of and concerning” element into the purview of First Amendment protections.<sup>179</sup> Other courts increasingly recognize the constitutionally gravity of the “of and concerning” element.<sup>180</sup> Commentators agree that “treatment of the ‘of and concerning’ doctrine, a threshold requirement of the First Amendment itself, is sound constitutional law.”<sup>181</sup> The “of and concerning” requirement represents a “basic cornerstone”<sup>182</sup> of defamation doctrine, reflecting another checkpoint balancing two competing interests: protecting reputation from falsehood on one hand, and freedom of expression on the other.<sup>183</sup>

The “of and concerning” element’s constitutional aspects become important to discussions of group defamation problems, since these seek to resolve whether individual group members

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<sup>176</sup> *Id.*

<sup>177</sup> Ultimately, a court must determine that “the libel designates the plaintiff in such a way as to let those who knew [the plaintiff] understand that he was the person meant. It is not necessary that all the world should understand the libel.” *Dalbec*, 828 F.2d at 925 (quoting *Fetler v. Houghton Mifflin Co.*, 364 F.2d 650, 651 (2d Cir. 1966)) (internal citations omitted).

<sup>178</sup> *See supra* Section I.B.

<sup>179</sup> *New York Times* “constitutionalized” the previously unfettered common law tort of defamation, holding that the First Amendment requires a connection (the “of and concerning” element) between the defamation and the plaintiff. *New York Times Co. v. Sullivan*, 376 U.S. 254, 288–91 (1964) (holding that statements in a defamatory advertisement were too far removed from Commissioner Sullivan to support that the statements were “of and concerning” him); *see also supra* Section I.B.

<sup>180</sup> *See SMOLLA, supra* note 40, § 4:5.50 (citing *QSP, Inc. v. Aetna Cas. & Sur. Co.*, 773 A.2d 906 (Conn. 2001)); *see also* *Art of Living Found. v. Does*, No. 10-5022, 2011 WL 2441898, at \*6 (N.D. Cal. June 15, 2011) (“The First Amendment requires a plaintiff to establish that the statement on which the defamation claim is based is ‘of and concerning’ the plaintiff.”) (citing *Blatty v. New York Times Co.*, 728 P.2d 1177 (Cal. 1986)).

<sup>181</sup> SMOLLA, *supra* note 40, § 4:5.50; *see also* SACK, *supra* note 30, § 2:9.1, at 2–155.

<sup>182</sup> SMOLLA, *supra* note 40, § 4:5.50.

<sup>183</sup> Fault represents a similar checkpoint established by the Supreme Court. *See supra* Section I.B; *see also supra* notes 139–48 and accompanying text.

satisfy the element.<sup>184</sup> In fact, the plaintiff in *New York Times* was himself in charge of a group of police, as an elected Commissioner of the City of Montgomery, Alabama.<sup>185</sup> The defamatory statements never reference the Commissioner by name or title, asserting only that “truckloads of police armed with shotguns and tear-gas ringed the . . . [c]ampus,” and that “[police] have bombed his home almost killing [Dr. Martin Luther King’s] wife and child.”<sup>186</sup> While *New York Times* never discussed group defamation explicitly,<sup>187</sup> the Supreme Court prohibited the inferential leap made in the Alabama holding, where the court had concluded that “in measuring the performance or deficiencies of groups, praise or criticism is usually attached to the official in complete control of the [group].”<sup>188</sup>

In *Rosenblatt v. Baer*<sup>189</sup> the Court again contemplated the “of and concerning” element and group defamation, confirming their importance to First Amendment jurisprudence.<sup>190</sup> In its decision, the Court held that jury instructions permitting recovery for libel of government were constitutionally defective.<sup>191</sup> Decided in shortly after *New York Times*, the controversy arose when a jury in New Hampshire awarded damages to a public ski area supervisor, where a news columnist had imputed that embezzlement and mismanagement occurred during his tenure.<sup>192</sup> The publication did not name Baer explicitly, but in New Hampshire, recovery was possible on a group defamation theory provided that “imputation

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<sup>184</sup> Because each unnamed individual member of a defamed group must satisfy the “of and concerning element” to pass constitutional and common law muster, this common law protection has become intertwined with First Amendment protections of speech. See *infra* Part II for a discussion of group defamation. Note that if a court holds that the defamation was “of and concerning” unnamed group members, this holding necessarily allows all unnamed group members to recover. See *Elias II*, 872 F.3d 97, 111 (2d Cir. 2017); see also *infra* Section II.A.

<sup>185</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964).

<sup>186</sup> *Id.* at 257.

<sup>187</sup> It was discussed implicitly, however, since only the unnamed Commissioner and not individual members of the police brought suit. See *id.*

<sup>188</sup> *Id.* at 273–76 (emphasis added).

<sup>189</sup> 383 U.S. 75 (1966).

<sup>190</sup> *Id.* at 75.

<sup>191</sup> *Id.* at 83.

<sup>192</sup> *Id.* at 91.

of impropriety . . . cast suspicion upon all” group members.<sup>193</sup> Brennan wrote that where the defamatory meaning is inferred and no specific reference to the defendant can be demonstrated, no recovery is possible.<sup>194</sup>

The precise impact of *Rosenblatt* and *New York Times* on group defamation claims remains debated but should not be overlooked. The reach of *New York Times* with regard to the “of and concerning” element in the context of group defamation has been questioned by the First Circuit, particularly where the plaintiff is not a public official.<sup>195</sup> One scholar has suggested that the decisions essentially reject claims where the defamation concerns collective group failure, and permits them where the failure can reasonably be traced to individual failures by, or blameworthy characteristics of, group members.<sup>196</sup> Regardless of how broadly or narrowly *New York Times* and *Rosenblatt* are read, the “of and concerning” element and group defamation law should be evaluated with First Amendment protections in mind.<sup>197</sup> Both cases prohibit an inferential leap analogous to an inference that occurs in some form any time individuals are permitted to recover when only their group is defamed.<sup>198</sup> Therefore, in seeking to understand and resolve group defamation problems, *New York*

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<sup>193</sup> *Id.* at 77.

<sup>194</sup> *Id.* at 83.

<sup>195</sup> See *Emerito Estrada Rivera-Isuzu de P.R., Inc. v. Consumers Union of U.S., Inc.*, 233 F.3d 24 (1st Cir. 2000) (limiting the applicability of the *New York Times*’ “of and concerning” principles to cases brought by public officials on the grounds that the doctrine was developed to prevent back door actions for seditious libel or defamations of the government). *But see* *Mich. United Conservation Clubs v. CBS News*, 485 F. Supp. 893, 900 (W.D. Mich. 1980), *aff’d sub nom.* 665 F.2d 110 (6th Cir. 1981) (indicating that First Amendment values are relevant to the “of and concerning” element generally).

<sup>196</sup> Joseph H. King, Jr., *Reference to the Plaintiff Requirement in Defamatory Statements Directed at Groups*, 35 WAKE FOREST L. REV. 343, 351–53 (2000).

<sup>197</sup> See *Schuster v. U.S. News & World Report, Inc.*, 459 F. Supp. 973, 978 (D. Minn. 1978), *aff’d*, 602 F.2d 850 (8th Cir. 1979) (finding that group defamation does in fact have a constitutional element, and that “[t]o hold that statements commenting generally on the [] controversy are of and concerning individuals prominent in the controversy would chill heated public debate . . . .” and would be incompatible with the First Amendment); see also *Church of Scientology Int’l v. Time Warner*, 806 F. Supp. 1157, 1160 (S.D.N.Y. 1992).

<sup>198</sup> See *infra* Part II.

*Times* and *Rosenblatt* call to attention values and reasoning important to the discussion.

## II. GROUP DEFAMATION, TWO POSITIONS AND A RETURN TO *ELIAS* *V. ROLLING STONE, LLC*

When persons within a group<sup>199</sup> that has been defamed<sup>200</sup> wish to bring individual claims, difficult questions arise as to whether the defamatory material is “of and concerning” the aggrieved parties.<sup>201</sup> Part II begins with an introduction and brief history of group defamation doctrine in Section II.A. A presentation of two competing group defamation models follows, including the majority Restatement (Second) position in Section II.B, and the minority Intensity of Suspicion test in Section II.C. Finally, Section II.D returns to the Second Circuit’s application of group defamation rules to *Elias* and details problems associated with the current approaches.

### A. Group Defamation, Background and History

The group defamation rule<sup>202</sup> remains one of the most intriguing common law protections that plaintiffs must overcome to meet defamation pleading requirements.<sup>203</sup> In general, the rule requires that “[a]n individual plaintiff must be clearly identifiable [in the allegedly defamatory statement] to support a claim for

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<sup>199</sup> A group is defined as “a number of individuals assembled together or having some unifying relationship.” *Group*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/group> [<https://perma.cc/2W8L-562U>] (last visited Mar. 5, 2018). The characteristics of a group play an important role in the legal consequences of defamation. *See infra* Sections II.B–C.

<sup>200</sup> There are many ways in which a group, as compared to an individual, may be defamed. If the plaintiff is specifically named, the group defamation doctrine’s evaluations of group characteristics does not apply and recovery is permitted irrespective of group traits. *Pratt v. Nelson*, 164 P.3d 366, 383 (Utah 2007). The group defamation problem arises whenever defamation concerns the group generally, that is, without naming specific individuals. *Id.* In general, racial slurs, insults and epithets against groups do not support a cause of action. *Id.* at 381.

<sup>201</sup> SACK, *supra* note 30, §§ 2:9–2:9.1.

<sup>202</sup> Generally prohibiting individual recovery for defamation of a group, except for certain qualified circumstances. *See infra* Section II.B–C.

<sup>203</sup> *See generally* Nat Stern, *The Certainty Principle as Justification for the Group Defamation Rule*, 40 ARIZ. ST. L.J. 951 (2008).

defamation.”<sup>204</sup> When making the assessment as to whether a member of a group has a cause of action, courts employ tests that consider several aspects of the circumstances.<sup>205</sup> When claims fail to meet group defamation requirements, the connection between the defamatory material and the individual is too attenuated to support a claim, either for practical<sup>206</sup> and procedural<sup>207</sup> reasons or because constitutional protections of speech prohibit such claims.<sup>208</sup>

The determination as to whether members of a defamed group may recover individually evolved over time.<sup>209</sup> Early American courts developed group defamation rules while considering aspects of the situation such as the size of the group and whether individual members were identifiable.<sup>210</sup> A series of cases from the nineteenth century proposed that no group member, unless specifically or individually named, would have a cause of action regardless of group size.<sup>211</sup> This approach did not remain in favor, and several cases in later decades permitted groups composed of fewer than twenty members to proceed without remarks identifying

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<sup>204</sup> See *Algarin v. Town of Wallkill*, 421 F.3d 137, 139 (2d Cir. 2005) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 288–89 (1964)).

<sup>205</sup> See Sections II.B and II.C for a discussion of the Restatement and Intensity of Suspicion tests; see also SACK, *supra* note 30, § 2:9.4.

<sup>206</sup> For example, when defamatory material alleged that an unidentified individual policeman out of a department of twenty-one (who each brought suit) locked himself and a female companion in the back of a police cruiser, the court dismissed the claim. *Arcand v. Evening Call Pub. Co.*, 567 F.2d 1163, 1164 (1st Cir. 1977) (dismissed on the grounds that defaming a single unidentified policeperson did not sufficiently impact the reputation of all twenty-one group members). If dismissal in such cases was not justified, virtually every complaint of group libel would present a jury issue. *Id.* at 1165.

<sup>207</sup> From a procedural perspective, the cases and controversies component of the Constitution requires that the plaintiff suffer actual harm related to actions taken by the defendant. *DaimlerChrysler Corp v. Cuno*, 547 U.S. 332, 344 (2006); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

<sup>208</sup> See *supra* Section I.B.

<sup>209</sup> For a history of English and American group defamation cases see Jeffrey S. Bromme, *Group Defamation: Five Guiding Factors*, 64 *TEX. L. REV.* 591, 598, 602 (1985).

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

<sup>211</sup> See *White v. Delavan*, 17 *Wend.* 49 (N.Y. Sup. Ct. 1837), *rev'd*, *Ryckman v. Delavan*, 25 *Wend.* 186 (N.Y. 1840); *Sumner v. Buel*, 12 *Johns.* 475 (N.Y. Sup. Ct. 1815).



all members.<sup>212</sup> Where there was a discussion of group size, it was often present only to suggest that the group was not too large.<sup>213</sup>

By the dawn of the twentieth century, the policy behind the group defamation rule had been well established, with courts allowing claims to proceed where defamation targeted an individual, and denying them where statements censured or satirized “an entire class or body of individuals.”<sup>214</sup> In the decades that followed, discussions increasingly centered around the size of the group.<sup>215</sup> In *Service Parking Corp. v. Washington Times Co.*<sup>216</sup> the court described that the “class [was not] so small . . . as to cause defamation of it to defame the appellant.”<sup>217</sup> In *Louisville Times v. Stivers*,<sup>218</sup> an appellate court commented that increasing group size attenuates the connection between the defamation and the plaintiff.<sup>219</sup> These rulings set the groundwork for how modern courts evaluate group defamation problems.

Among the most illustrative modern cases leading to the current majority position was *Neiman-Marcus v. Lait*.<sup>220</sup> The case’s influence stems from a pleasant, reasoned division of groups based on their sizes.<sup>221</sup> A former employee of Neiman Marcus published a book with defamatory remarks concerning three distinct groups within the company, each with a different size and

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<sup>212</sup> See Bromme, *supra* note 209, at 603.

<sup>213</sup> Courts of the nineteenth century were “not very articulate” in explaining their reasoning. *Id.*

<sup>214</sup> *Weston v. Commercial Advertiser Ass’n*, 77 N.E. 660, 661 (N.Y. 1906); Stern, *supra* note 203, at 954.

<sup>215</sup> Stern, *supra* note 203, at 954.

<sup>216</sup> 92 F.2d 502 (D.C. Cir. 1937). In *Service Parking*, a parking lot owner from Washington D.C. brought suit following publication of allegations that he had engaged in a “parking lot racket,” possibly “conducting an illegal business” and “obtaining money under false pretenses.” *Id.* at 503. At the time of the article’s publication in the *Post*, the complaint stated that twenty or thirty lots (group members) operated in the downtown neighborhood. *Id.* This was contrasted with a New York case, where a group of four coroners were permitted to recover. *Id.* at 505 (citing *Weston*, 77 N.E. at 662).

<sup>217</sup> *Id.* at 506.

<sup>218</sup> 68 S.W.2d 411 (Ky. 1934).

<sup>219</sup> “As the size of the group increases, it becomes more and more difficult for the plaintiff to show he was the one at whom the article was directed, [until] it becomes impossible.” *Id.* at 412.

<sup>220</sup> 13 F.R.D. 311 (S.D.N.Y. 1952).

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

specificity of allegation.<sup>222</sup> The book identified *all* of nine models and *most* of the 382 saleswomen as “call girls.”<sup>223</sup> Further, the book described *most* of the store’s twenty-five salesmen as “fairies.”<sup>224</sup> The U.S. District Court for the Southern District of New York described the importance of size, as well as the all/some distinction, and dismissed only the saleswomen’s claim.<sup>225</sup> The court reasoned that the disparagement only concerned the saleswomen as a group, rather than as individuals because they were too numerous to have suffered individual harm.<sup>226</sup> Interestingly, the court noted that no legal distinction exists between the defamation of *some* salesmen and *all* models, likely because the small size of these groups made the difference in the fraction of the group implicated irrelevant.<sup>227</sup> The cases described, as well as constitutional developments<sup>228</sup> influence both of the modern approaches to group defamation outlined below.

#### *B. Majority, Restatement Position*

The Restatement (Second) of Torts lays out the most widely invoked<sup>229</sup> version of the group defamation rule:

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<sup>222</sup> *Id.* at 313.

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

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 316 (citing *Service Parking Corp. v. Wash. Times Co.*, 92 F.2d 502 (D.C. Cir. 1937) (instructing that when groups are large, no one can sue even if the language is inclusive); *see also* *Latimer v. Chicago Daily News, Inc.*, 71 N.E.2d 553 (Ill. App. Ct. 1947) (holding that when less than all of the members are defamed, no cause of action exists); *Montgomery Ward & Co. v. Skinner*, 25 So. 2d 572 (Miss. 1946) (holding that even when only a number of members are targeted in a group defamation, all may recover); *Weston v. Commercial Advertiser Ass’n*, 77 N.E. 660 (N.Y. 1906) (instructing that where a group is small, and each member is referred to, then any individual member can recover).

<sup>226</sup> *Neiman-Marcus*, 13 F.R.D. at 317.

<sup>227</sup> *Id.* at n.1 (“[I]t is difficult to perceive a legalistic distinction between the statements that ‘some Neiman models are call girls’ and ‘most of the sales staff are fairies.’”). Nevertheless, both the Restatement and the Intensity of Suspicion analyses rely, in part, on what fraction of the group the defamation implicates. *See infra* Sections II.B, II.C.

<sup>228</sup> *See supra*, Section I.B.

<sup>229</sup> *McCullough v. Cities Serv. Co.*, 676 P.2d 833, 835 (Okla. 1984) (describing the “majority rule” of the Restatement); *see* DAVID ELDER, *DEFAMATION: A LAWYER’S GUIDE* § 1:32 (2017). In general, the majority of states do not permit recovery for groups larger than twenty-five. *Id.*; *see also infra* Section II.C. (explaining the minority position).

One who publishes defamatory matter concerning a group or class of persons is subject to liability to an individual member of it if, but only if, the group or class is so small that the matter can reasonably be understood to refer to the member, or the circumstances of publication reasonably give rise to the conclusion that there is particular reference to the member.<sup>230</sup>

Courts adopting the majority, Restatement position favor a presumptive limit of twenty-five group members, above which recovery is not usually available.<sup>231</sup> While group size plays a prominent role in all formulations of the rule,<sup>232</sup> the majority position's emphasis on a specific size crystallized following Prosser's<sup>233</sup> pronouncement that the rule bars recovery "quite uniformly" where group size exceeds twenty-five persons.<sup>234</sup> The Restatement's commentary reinforces the numerical guideline, deeming recovery available for individual members of groups "number[ing] 25 or fewer."<sup>235</sup> The Restatement leaves unanswered questions as to how to count group members, tasking the plaintiff

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<sup>230</sup> RESTATEMENT (SECOND) OF TORTS § 564A (AM. LAW INST. 1977).

<sup>231</sup> See *O'Brien v. Williamson Daily News*, 735 F. Supp. 218, 223–24 (E.D. Ky. 1990), *aff'd*, 931 F.2d 893 (6th Cir. 1991); *Webb v. Sessions*, 531 S.W.2d 211, 213 (Tex. Civ. App. 1975).

<sup>232</sup> See *Bujol v. Ward*, 00-1393 (La. App. 5 Cir 1/31/01), 778 So. 2d 1175, 1178, *writ denied*, 2001-0555 (La. 4/27/01), 791 So. 2d 117 (stating that "most authorities agree" that the group size shouldn't exceed twenty-five); *Fawcett Publ'ns, Inc. v. Morris*, 377 P.2d 42 (Okla. 1962) (rejecting absolute limits on size while adopting the intensity of suspicion test, which considers size); see also SHELDON W. HALPERN, *THE LAW OF DEFAMATION, PRIVACY, PUBLICITY AND "MORAL RIGHTS"* 35 (Anderson Pub. Co. ed.1988) (observing that the "size of the group will determine whether the statement is defamatory of the individual member"); King, *supra* note 196, at 394 (asserting that group size has been the most influential factor affecting group defamation claims and that it is often outcome determinative); Bromme, *supra* note 209, at 595 (1985) (suggesting that most courts rely heavily on size); Note, *Defamation*, 69 HARV. L. REV. 875, 894 (1956) (mentioning that the size of a group is the most important variable in group defamation claims).

<sup>233</sup> See *supra* note 40 and accompanying text.

<sup>234</sup> PROSSER'S TORTS, *supra* note 40, at 750.

<sup>235</sup> RESTATEMENT (SECOND) OF TORTS § 564A cmt. b. The Restatement references the number "twenty-five" a total of four times in the two pages dedicated to group defamation. *Id.* § 564A.

and courts with making the determination.<sup>236</sup> In addition to allowing small group members to recover, the Restatement also permits recovery where evidence tends to show that the statement and circumstances identify the individual plaintiff.<sup>237</sup>

In addition to group size, the Restatement also encourages courts to consider how many members of the group the defamatory statement implicates.<sup>238</sup> For groups numbering fewer than twenty-five, the commentary to the Restatement suggests that not all group members need to be named.<sup>239</sup> Where fewer than all members are implicated, the commentary suggests that the proportion of parties implicated within a group determines the extent of suspicion that the defamation caused.<sup>240</sup> Only statements that generate a high degree of suspicion, for example those containing language implicating a majority of the group, permit recovery.<sup>241</sup>

The Restatement view invites recovery if the defamed group does not exceed twenty-five in number and where the defamation applies to a large fraction of the cohort.<sup>242</sup> However, the numerical size and proportion of the group implicated associated with the

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<sup>236</sup> *See id.*

<sup>237</sup> *See, e.g.,* Ball v. Taylor, 416 F.3d 915 (8th Cir. 2005); RESTATEMENT (SECOND) OF TORTS § 564A cmt. b. The alternative Intensity of Suspicion Test suggests, and the author of this Note believes, that such identification pulls the plaintiff out of the group defamation analysis entirely. *See infra* Part III.

<sup>238</sup> RESTATEMENT (SECOND) OF TORTS § 564A cmt. c.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* Notice that while the Restatement mentions the “degree of suspicion,” this refers to the fraction of persons within the small (fewer than twenty-five person) group that the defamatory material concerns, a concept similar to, but distinct from, the Intensity of Suspicion test discussed below in Section II.C. *Id.* (“Even when the statement made does not purport to include all of the small group or class but only some of them, as in the case of ‘Some of A’s children are thieves,’ it is still possible for each member of the group to be defamed by the suspicion attached to him by the accusation. In general, there can be recovery only if a high degree of suspicion is indicated by the particular statement. Thus, the assertion that one man out of a group of 25 has stolen an automobile may not sufficiently defame any member of the group, while the statement that all but one of a group of 25 are thieves may cast a reflection upon each of them.”)

<sup>241</sup> *Id.*

<sup>242</sup> DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, DOBBS’ LAW OF TORTS § 531 (2d ed.) *But see* ELDER, *supra* note 229, § 1:32 (2017) (detailing cases where groups smaller than twenty-five were denied claims).

Restatement position, described as a “strong presumption,”<sup>243</sup> do not necessarily bar recovery if the group is larger than twenty-five or if less than a majority is implicated by the statement.<sup>244</sup> Nevertheless, jurisdictions adopting the majority position seldom, if ever, allow plaintiffs to recover for defamation of groups larger than the twenty-five person limit.<sup>245</sup>

The majority position has found substantial support from both courts and commentators. With the exception of New York and Oklahoma, every state employs some variant of the framework.<sup>246</sup> The Restatement position assures that a court can be “certain”<sup>247</sup> that the group member has been defamed, a principle arguably congruent with other aspects of defamation law.<sup>248</sup> One article suggests that the Restatement strikes a functional balance between “rigid numerical formula[s]” and “unpredictable ad hoc multifactor approach[es].”<sup>249</sup> Another article fully embraces the simplicity of

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<sup>243</sup> The Restatement qualifies its twenty-five-person guideline by stating that “definite limits” are not practical. RESTATEMENT (SECOND) OF TORTS § 564A cmt. b; *see also* Stern, *supra* note 203, at 952.

<sup>244</sup> *See, e.g.,* Ball v. Taylor, 416 F.3d 915 (8th Cir. 2005) (applying Iowa law and describing a case where fifty-eight plaintiffs were allowed to recover, but only because evidence that connected them to the defamation individually was present); *see also* DOBBS ET AL., *supra* note 242, § 531.

<sup>245</sup> The author of this Note, as of April 2018, was unable to find a single definitive example within jurisdictions adopting the majority Restatement position, where members of groups larger than twenty-five were permitted to recover. One case, *Ball v. Taylor*, applied the Restatement approach and permitted fifty-eight plaintiffs to recover. Ball, 416 F.3d at 917–18. However, each of the plaintiffs in *Ball* were, in fact, individually named in a document issued concurrent to the defamation. *Id.* As such, this would logically take the case outside of the scope of the group defamation doctrine. *See* Pratt v. Nelson, 164 P.3d 366, 383 (“When statements explicitly refer to individuals by name . . . a party cannot rely on the group defamation rule as a defense.”).

<sup>246</sup> *See infra* Section II.C.

<sup>247</sup> *See* Golden N. Airways, Inc. v. Tanana Publ’g Co., 218 F.2d 612, 621–22 (9th Cir. 1954) (elaborating upon what the Ninth Circuit called the “rule of certainty,” that is, that it must be “certain” that the plaintiff was the person defamed); *see also* Brewer v. Hearst Publ’g Co., 185 F.2d 846 (7th Cir. 1950) (rejecting plaintiff’s argument that statements concerned him individually, “unless the publication can be said with certainty to include every member of the group”); Stern, *supra* note 203 (proposing that defamation law calls for certainty).

<sup>248</sup> Stern, *supra* note 203, at 953.

<sup>249</sup> *Id.* at 969. The author further proposes that the Restatement model would be best served if it were consciously informed by the “certainty principle” he describes as pervasive in defamation law: that the law demands certainty as to the falsehood of the statement, certainty as to the meaning of what was said as fact rather than opinion, and, in

the numerical guidepost suggested by the Restatement, and proposes a solution that would bar any claim with groups of more than twenty-five.<sup>250</sup>

Nevertheless, several jurisdictions and scholars have called into question the prevailing model for considering group defamation claims. A method for addressing the problem employed by New York<sup>251</sup> and Oklahoma,<sup>252</sup> called the Intensity of Suspicion test, presents an alternative focused on evaluating evidentiary factors.<sup>253</sup> While group size and fraction implicated are relevant in these jurisdictions, these are only two of several variables considered, rather than the predominant criteria.<sup>254</sup>

### *C. The Intensity of Suspicion Test*

#### 1. Origins of the Intensity of Suspicion Test

A law review note from 1934 (the “note”) first proposed the Intensity of Suspicion test while discussing the problem of group defamation.<sup>255</sup> The note acknowledges the difficulties presented by group defamation, specifically that “formulation of definite rules governing liability seems impossible.”<sup>256</sup> The authors rejected

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the case of media defendants speaking on matters of public interest, certainty as to their culpability. *Id.*

<sup>250</sup> King, *supra* note 196, at 347 (arguing that the proposed solution “would categorically disallow all claims by individuals to the extent they were based on statements targeting a group unless the group totaled twenty-five or fewer members”).

<sup>251</sup> See *Brady v. Ottaway Newspapers, Inc.*, 445 N.Y.S.2d 786, 792–93 (1981) (adopting the intensity of suspicion test); see also *Elias II*, 872 F.3d 97, 107–10 (2017) (applying *Brady*).

<sup>252</sup> See *Fawcett Publ’ns, Inc. v. Morris*, 377 P.2d 42 (Okla. 1977); see also *McCullough v. Cities Serv. Co.*, 676 P.2d 833, 835–37 (Okla. 1984) (applying the intensity of suspicion test and rejecting a claim from statements concerning nearly 20,000 physicians).

<sup>253</sup> See *infra* Section II.B.

<sup>254</sup> *Id.*

<sup>255</sup> Note, *Liability for Defamation of a Group*, 34 COLUM. L. REV. 1322, 1325 (1934). This proposal predates the Restatement (First) of Torts (1938) which also allows group members to recover if the reader could identify that the individual or the group was sufficiently small. RESTATEMENT (FIRST) OF TORTS § 564(c) (AM. LAW INST. 1938). The Restatement (First) never precisely defines “sufficiently small,” but suggests, in examples, that the members of a school board and city council could recover. *Id.*

<sup>256</sup> Note, *supra* note 255, at 1325.

existing standards prohibiting individual recovery,<sup>257</sup> and proposed an analysis calling for “a purely factual inquiry” as to whether the plaintiff was actually defamed.<sup>258</sup> The note enumerated three parameters to be considered during the inquiry.<sup>259</sup> First, size would be evaluated<sup>260</sup>: as the size of the group increases, probability of recovery would decrease, and vice versa.<sup>261</sup> A sufficiently small group would negate the need for analysis, since reference to the plaintiff would be “obvious.”<sup>262</sup> Second, the analysis weighs definiteness in the number and composition as well as group organization.<sup>263</sup> A reader would more likely assign the material’s meaning to an individual belonging to a well-organized group with relatively static membership and numerosity.<sup>264</sup> Finally, the analysis considers the fraction of the group implicated.<sup>265</sup>

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<sup>257</sup> *Id.* at 1324–25. The note declared that *Sumner v. Buel* misinterpreted dictum from an earlier English case, resulting in the general prohibition of recovery for group defamation in America. *Id.* at 1332 (citing 12 Jons. 475 (N.Y. 1815)). Courts of the time struggled with whether to allow individual claims, because readers could infer that the defamatory statements did not concern some group members. *Id.* at 1324. The usual test, permitting recovery only when “special allusion has been made, either directly or as inferable from extrinsic circumstances,” is purely a legal fiction, “since no member is [actually] singled out of the group.” *Id.* The note proposed that the test should be whether the plaintiff was actually defamed, even when unnamed. *Id.* at 1323.

<sup>258</sup> *Id.* at 1325 n.20. The note comments that subjective tests, seeking to divine whether statements identify the persons defamed, were inferior and declining in favor of an objective test, namely, whether a reasonable man, upon hearing or reading the publication, would regard the plaintiff as one of those maligned. *Id.*

<sup>259</sup> *Id.* at 1325–26.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 1325.

<sup>262</sup> *Id.* at 1326 (citing *Commercial Tribune Pub. Co. v. Haines*, 15 S.W.2d 306 (Ky. 1929); *Barron v. Smith*, 101 N.W. 1105 (S.D. 1904)). The note’s authors refer to these two cases when referring to sufficiently small groups: *Commercial Tribune* concerned the only two motorcycle policemen in town and *Barron* concerned two high ranking officials of a miners’ union. *Haines*, 15 S.W.2d at 307; *Barron* at 101 N.W. at 1107–08.

<sup>263</sup> Note, *supra* note 255, at 1326.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 1326–27. The note comments that a cause of action has been “uniformly denied” where fewer than all members are named “because of uncertainty as to the identity of the persons at whom the statement is aimed,” and that such a result is unjust unless “the number accused is so small in proportion to the size of the [group] that the injury . . . is inconsiderable.” *Id.* at 1327.

2. *Fawcett Publications, Inc. v. Morris*: From Note to Practice

In 1962, the Oklahoma Supreme Court considered a football player's claim against *True Magazine*, for an article entitled "The Pill That Can Kill Sports."<sup>266</sup> The plaintiff was a fullback on the Oklahoma University football team, and the article alleged that "substantially all"<sup>267</sup> of the sixty to seventy-person team had been using performance enhancing narcotics.<sup>268</sup> The substance turned out to be peppermint spray, administered to alleviate the athlete's dry mouths.<sup>269</sup>

In determining whether the material defamed the unnamed player, the Oklahoma court developed and applied the Intensity of Suspicion test.<sup>270</sup> The court rejected absolute numerical limits, or that size alone should determine the plaintiff's right to recover.<sup>271</sup> The decision considered the implications of the article: that readers would know of the plaintiff's team membership due to its prominence within the community.<sup>272</sup> Additionally, the ruling stressed that the reader, if a fan of sports, would also know the plaintiff's identity and necessarily conclude that he used illegal drugs.<sup>273</sup> Importantly, the Oklahoma court distinguished *Fawcett* from a prior, unsuccessful group defamation case on the grounds that the defamation in the *True Magazine* article imputed that all members of the group used an illicit substance.<sup>274</sup>

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<sup>266</sup> *Fawcett Publ'ns, Inc. v. Morris*, 377 P.2d 42, 51–52 (Okla. 1962).

<sup>267</sup> *Cf. Owens v. Clark*, 6 P.2d 755 (Okla. 1931) (Distinguish *Fawcett* from *Owens*, a case in which judges made defamatory remarks about only some members of the Oklahoma Supreme Court).

<sup>268</sup> *Fawcett*, 377 P.2d at 47.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 52 (citing Note, *supra* note 255, at 1322).

<sup>271</sup> *Id.* at 51 ("[W]e have found no substantial reason why *size* alone should be conclusive. We are not inclined to follow such a rule where, as here, the complaining member of the group is as well-known and identified in connection with the group as was the plaintiff in this case.").

<sup>272</sup> *Id.* at 52.

<sup>273</sup> *Id.* ("[T]he average lay reader who was familiar with the team, and its members, would necessarily believe that the regular players, including the plaintiff, were using an amphetamine spray as set forth in the article . . .").

<sup>274</sup> *Compare Owens v. Clark*, 6 P.2d 755, 755 (Okla. 1931) (finding it not libelous to defame some members of the Oklahoma Supreme Court), *with Fawcett*, 377 P.2d at 42 (holding that a statement regarding all members of the football team was sufficient to



*Fawcett* was met with approval by courts<sup>275</sup> and commentators.<sup>276</sup> In Oklahoma, *McCullough v. Cities Serv. Co.* applied the Intensity of Suspicion test and found that a defamatory statement disparaging all of the osteopaths in United States could not sustain an individual action.<sup>277</sup> New York courts later adopted the Intensity of Suspicion analysis.<sup>278</sup> Recently, a Utah court discussed the Intensity of Suspicion test seen in *Fawcett* with approval.<sup>279</sup> The court declined to apply it, however, because individuals within the polygamous cult alleging defamation had been specifically named by the defendant.<sup>280</sup> The Intensity of

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defame), and *Elias II*, 872 F.3d 97, 97 (2d Cir. 2017) (finding that a defamatory article implicating all members of a fraternity permits individual claims).

<sup>275</sup> See *McCullough v. Cities Serv. Co.*, 676 P.2d 833, 836 (Okla. 1984). In *McCullough*, an osteopath brought a libel action against defendant company, alleging that the defendant libeled him and all other osteopaths in the United States by publishing a statement that medical doctors received better training than osteopaths. *Id.* The action was not sustainable, but the court approved the “intensity of suspicion” test in principle and commented that the “failure in every reported case [in] our attention to announce the precise numerical dividing line between groups which are ‘too large’ and groups which are ‘small’ enough to permit a plaintiff to recover, demonstrates the weakness of slavish reliance upon the general rule which relies upon numbers alone.” *Id.* See also *Grove v. Morgan*, 576 P.2d 1155, 1157 (Okla. 1978). In *Grove*, plaintiffs were members of a group of the only two people indicted by a Federal Grand Jury and established that the libel was of and concerning them by way of the intensity of suspicion test. *Id.*

<sup>276</sup> See L. ELDREDGE, *THE LAW OF DEFAMATION* § 10, at 58 (1978) (opining that *Fawcett* may become a ‘landmark’ in American defamation law); W. PAGE KEETON ET AL., *supra* note 40, at 784 (commenting on Intensity of Suspicion favorably); Ellyn Marcus, *Group Defamation and Individual Actions: A New Look at an Old Rule*, 71 CALIF. L. REV. 1532 (1983) (noting with approval that the *Fawcett* court refused to be bound by the size-oriented test).

<sup>277</sup> *McCullough*, 676 P.2d at 835. The statement in question “does not disparage the Plaintiff’s standing within his profession or business. It is the Plaintiff’s profession or business itself which is assailed. In other words, Plaintiff’s standing or reputation as a D.O. is not impugned by the publication, nor is a group of D.O.’s of which sub-group the plaintiff is a member impugned.” *Id.*

<sup>278</sup> See *infra* Section II.B.3.

<sup>279</sup> *Pratt v. Nelson*, 164 P.3d 366, 382 n.114 (Utah 2007). *Pratt* cites section 546(a) of the Restatement (Second) of Torts and 50 American Jurisprudence 2d *Libel and Slander* § 349 (2006), comparing these to the Intensity of Suspicion test, with which they ultimately agree. *Id.*

<sup>280</sup> *Pratt*, 164 P.3d. at 379 The court explicitly declines to apply the Intensity of Suspicion test, implying that the analysis would be appropriate in this jurisdiction if necessary. *Id.* at 383.

Suspicion test continues to find favor with scholars and courts years after its inception.<sup>281</sup>

### 3. *Brady* and Beyond: Importing the Intensity of Suspicion Test to New York

In 1981, the Supreme Court of New York applied the Intensity of Suspicion test in *Brady v. Ottaway Newspapers, Inc.*<sup>282</sup> In *Brady*, the plaintiffs brought suit following printed allegations that a group of unindicted police officers were complicit or had knowledge of the corrupt and criminal activities of their accused colleagues.<sup>283</sup> The group of unindicted policemen numbered fifty-three, twenty-seven of whom brought suit.<sup>284</sup> Notably, the article in question defamed all of the unindicted policemen by accusing them of having participated in the malfeasance of their accused colleagues.<sup>285</sup>

The *Brady* court emphasized that the size of the group should not govern the group defamation doctrine.<sup>286</sup> Invoking *Fawcett*, the *Brady* court proposed that the original Intensity of Suspicion factors were non-exclusive, and that other aspects of the circumstances could and should be evaluated.<sup>287</sup> *Brady* concluded that the small-town police force was sufficiently small,<sup>288</sup> well-

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<sup>281</sup> See *infra* Sections II.C.3, II.D.

<sup>282</sup> 445 N.Y.S.2d 786, 793 (N.Y. App. Div. 1981) (adopting the Intensity of Suspicion test, but deciding to “add[] refinement to the underlying concept” by incorporating the prominence of the group *and* the plaintiff within the community).

<sup>283</sup> *Id.* at 787 (The newspaper printed that “[t]he department was in a shambles in 1972 after 18 officers, including Chief Humbert Capelli, were indicted on charges of burglary, planting of evidence and other misdeeds . . . . We said at the time, and we still believe, that the entire department was under a cloud. It is inconceivable to us that so much misconduct could have taken place without the guilty knowledge of the unindicted members of the department. If so, they all were accessories after the fact, if not before and during.”)

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* at 791 (“This analysis demonstrates that size is too narrow a focus to determine the issue of individual application in group defamation.”).

<sup>287</sup> *Id.* at 792–95 (citing Note, *supra* note 255, at 1325 and *Fawcett Publ’ns, Inc. v. Morris*, 377 P.2d 42, 42 (Okla. 1962)).

<sup>288</sup> The *Brady* court compared the size of the fifty-three-man group favorably to the group of 382 saleswomen and twenty-five salesmen in *Neiman-Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952) and the 600,000,000 Muslims in *Mansour v. Fanning*, 506 F. Supp.

defined, and prominent within the community to permit the suit to proceed.<sup>289</sup> The fact that individual plaintiffs were also prominent, having worn police uniforms, further suggested that they would face elevated suspicion of wrongdoing within the community.<sup>290</sup> Adopting the Intensity of Suspicion test, the court concluded that individual unindicted policemen satisfied the “of and concerning”<sup>291</sup> requirement despite membership in a group larger than twenty-five.<sup>292</sup>

A paucity of applications and constitutional problems call into question the actual success of the Intensity of Suspicion test. Despite adoption of the Intensity of Suspicion test<sup>293</sup> in *Brady*, New York courts declined to apply the test to allow recovery prior to *Elias*.<sup>294</sup> In *Three Amigos SJL Rest., Inc. v. CBS News Inc.*,<sup>295</sup> several subcontractors responsible for managing a New York strip club brought suit against CBS News for reporting that the club was run by the mob.<sup>296</sup> The court rejected the claim, reasoning that the Intensity of Suspicion test would apply, but not under the facts as plead, because the defamation referred only to the establishment and not to a group of people.<sup>297</sup> In *Anyanwu*, the court applied the test and found that a claim for statements potentially concerning

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186 (N.D. Cal. 1980). *Brady*, 445 N.Y.S.2d at 791, 794. The court commented that “[w]e are not the only court to find size limitations unduly restrictive.” *Id.* at 792.

<sup>289</sup> *Id.* at 793–95. The court also determined that the group of unindicted police were better defined than the twenty-five salesmen in *Neiman-Marcus* and the parking lot owners in *Service Parking Corp.* *Id.* at 791.

<sup>290</sup> *Id.* at 794–95.

<sup>291</sup> *See supra* Section I.D.

<sup>292</sup> *Brady*, 445 N.Y.S.2d at 788–95.

<sup>293</sup> In *Lindor v. Palisades Collection, LLC*, a court even applied the test in the context of a negligence claim, during a duty analysis where a debt collector negligently damaged a plaintiff’s credit. 914 N.Y.S.2d 867, 868 (N.Y. Sup. Ct. 2010).

<sup>294</sup> Research completed as of April 2018. *See, e.g.*, *Three Amigos SJL Rest., Inc. v. CBS News Inc.*, 65 N.E.3d 35 (N.Y. 2016); *Anyanwu v. Columbia Broad. Sys., Inc.*, 887 F. Supp. 690 (S.D.N.Y. 1995).

<sup>295</sup> 28 N.Y.3d 82 (2016).

<sup>296</sup> *Id.* at 85 (“Cheetahs advertises exotic women and the . . . federal authorities say it is run by the mafia.”).

<sup>297</sup> *Id.* at 87 (citing *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 398 (2d Cir. 2006)). The *Three Amigos* court noted that defamation claims against businesses do not invoke the group defamation analysis. *Id.* This distinction is interesting and seemingly strained, since businesses would certainly otherwise qualify as exclusive groups and are often prominent within the community.

over 500 Nigerian businessmen could not give rise to individual claims.<sup>298</sup>

A recent, and important implicit challenge to *Brady* comes from *Dean v. Dearing*, where the Virginia Supreme Court denied a cause of action for criticism of a small police force on constitutional grounds.<sup>299</sup> The mayor accused the police of stealing, intimidating witnesses, and harassment, among other crimes.<sup>300</sup> When one of the eight members of the force brought suit, the Virginia Supreme Court dismissed the claim as protected criticism of the government.<sup>301</sup> Despite these challenges, the Intensity of Suspicion test provides a flexible analysis free from the injustice of arbitrary numerical limits imposed by the majority position.<sup>302</sup>

#### D. Analysis of the Existing Methods

First, consider what makes the group defamation problem difficult in all cases. Defamation claims ask the court to determine facts of perception about false statements.<sup>303</sup> Such perception is ultimately a subjective enterprise, as our understanding and appreciation of language varies widely. Just as two readers of the same poem may come away with different interpretations,<sup>304</sup> so

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<sup>298</sup> *Anyanwu*, 887 F. Supp. at 693. The plaintiffs brought suit following statements made during an airing of the television show 60 Minutes describing Nigerian businessmen as “fraudulent and deceitful” and Nigeria as the “center of fraud in the world.” *Id.* at 692. While invoking *Brady* and the Intensity of Suspicion test, the court also noted that the “parties have not identified any cases where individual members of groups larger than sixty have been permitted to go forward.” *Id.* at 693.

<sup>299</sup> 561 S.E.2d 686 (Va. 2002). The action concerned statements made by the mayor accusing unnamed police of “intimidating witnesses, stealing property, harassment, misappropriation of money, and improperly disposing of drug and gun evidence.” *Id.* at 688.

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> See *Brady v. Ottaway Newspapers, Inc.*, 445 N.Y.S.2d 786, 792–93 (N.Y. App. Div. 1981).

<sup>303</sup> See *supra* Sections II.A–C.

<sup>304</sup> Robert Frost’s “The Road Not Taken” is famously interpreted by some as celebrating independent thinking and not following the crowd, when it actually comments on people finding meaning in arbitrary decisions. Christina Sterbenz, *Everyone Totally Misinterprets Robert Frost’s Most Famous Poem*, BUS. INSIDER (Mar. 26, 2014, 6:43 PM), <http://www.businessinsider.com/frosts-road-not-taken-poem-interpretation-2014-3> [https://perma.cc/CZ8H-SCBU]. “Various quotes from Frost’s correspondence suggest []

may audiences of a defamatory statement. The problem is compounded by the potential falsity of the statements, for which humans have both innate and learned defenses<sup>305</sup> that operate with varying degrees of success.<sup>306</sup> Such ambiguity creates a tension with legal principles of consistency and justice, which are more readily served by easily categorized facts that fall neatly into rules.<sup>307</sup> Finally, the group dynamic changes the nature of the damages suffered by the defamed parties, because groups offer unique protection from emotional harm associated with defamation.<sup>308</sup>

The Restatement position appears simultaneously more restrictive and more permissive than the Intensity of Suspicion analysis. Courts have interpreted Restatement (Second) of Torts §564A's "if . . . the group is so small" to mean generally fewer than twenty-five.<sup>309</sup> This restrictive aspect of the analysis effectuates a quasi-*per-se* rule, which prohibits most plaintiffs who are members of larger groups from recovering individually.<sup>310</sup> In

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he knew [that] people would misunderstand the meaning," and even found their confusion amusing. *Id.*

<sup>305</sup> One example, widely taught in primary education, is critical literacy, which encourages students to actively analyze texts and other media in a search for the author's biases, distortions and hidden meanings. *See, e.g.,* Allan Luke, *Critical Literacy: Foundational Notes*, 51(1) THEORY INTO PRACTICE 4, 4–11 (2012).

<sup>306</sup> A meta-analysis of police detection of lies found that accuracy varied from eighty-eight to forty-five percent across more than thirty published experiments using the same methodology. Maureen O'Sullivan, Mark G. Frank, Carolyn M. Hurley & Jaspreet Tiwana, *Police Lie Detection Accuracy: The Effect of Lie Scenario*, 33 LAW & HUM. BEHAV. 530, 531 (2009). These results suggest that the process of truth finding in the face of deception is complex and inconsistent. *Id.*

<sup>307</sup> *See* Jay W. Stein, *The Hobgoblin Doctrine: Identifying "Foolish" Consistency in the Law*, 29 TEX. TECH L. REV. 1017–21 (1998) (commenting on the virtue and pitfalls of achieving consistency in the law).

<sup>308</sup> The extent to which such protection exists is uncertain, but evidence from studies suggests persons are better able to cope with stressful events when doing so in a group. *See generally* R. J. Corsini & B. Rosenberg, *Mechanisms of Group Psychotherapy: Processes and Dynamics*, 51(3) J. OF ABNORMAL AND SOC. PSYCH. 406, 406–11. (1955).

<sup>309</sup> *See supra* Section II.A–B for a discussion of the history and application of the Restatement position, adopted by a majority of courts.

<sup>310</sup> To clarify, a *per-se* rule would prohibit all individual members of groups larger than twenty-five, as proposed by King, *supra* note 196. A quasi-*per-se* rule as seen embodied in courts' application of the Restatement analysis usually prohibits claims for groups greater than twenty-five, but this bar remains only a "strong presumption." *See supra* notes 242–45 and accompanying text.

another respect, the Restatement test is more permissive, in that it provides almost no guidance as to how a court should determine whether the statement made personal reference to group members.<sup>311</sup> This lack of guidance, save for a few examples in the comments to the Restatement,<sup>312</sup> allows courts wide latitude in determining how to apply the test.<sup>313</sup>

The advantages and disadvantages of the Restatement become apparent when applying and considering the test. The twenty-five-person presumptive limit appears arbitrary, not only because the Restatement provides no rational justification for it,<sup>314</sup> but also because the context of each defamation can vary so widely.<sup>315</sup> A numerical rule of thumb may provide a useful guideline in a complex area of law, but also implies that courts could dismiss claims without considering important aspects of the defamation.<sup>316</sup> Additionally, the Restatement's lack of guidance for analyzing the

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<sup>311</sup> Comment A of The Restatement (Second) of Torts (1977) proposes the statement “[a]ll lawyers are shysters’ cannot ordinarily be taken to have personal reference to any [group member].” RESTATEMENT (SECOND) OF TORTS § 564A cmt. a (AM. LAW INST. 1977). Comment B provides an example where the same statement, uttered at a social gathering with only one lawyer present is defamatory to an individual lawyer. *Id.* § 564A cmt. b.

<sup>312</sup> *Id.*

<sup>313</sup> See ELDER, *supra* note 229 (describing cases where courts applying the Restatement have disallowed claims for groups that meet the twenty-five-person limit, for example, because the group was too poorly defined, a justification absent from the Restatement and its comments).

<sup>314</sup> Rules of thumb, that is, rules derived from practice rather than reason, have long been subject to criticism. Static, precise rules face increasing scrutiny as “[t]he pace of an industrial civilization, its ongoing regroupings of interest, people, and problem, have presented new states of fact too rapidly for knowledge to keep up with them.” KARL LLEWELLYN, *THE THEORY OF RULES* 79 (1968).

<sup>315</sup> See, e.g., RESTATEMENT (SECOND) OF TORTS § 564A cmt. a, b. Characteristics of the group, the plaintiff, the defendant, and the defamation itself all impact whether the defamation of the group reaches the individual. See *supra* Section II.C; see also Bromme, *supra* note 209, at 592–96 (1985) (arguing that many factors influence the holdings in group defamation).

<sup>316</sup> Consider *Fawcett*, *Brady*, and *Elias* where larger groups would not permit such claims to proceed under the Restatement analysis, yet courts have found otherwise under the Intensity of Suspicion test.

context of the defamation lays the groundwork for inconsistent applications of the rule.<sup>317</sup>

The Intensity of Suspicion test appears to present a more practical alternative at first glance. Free from unjustified emphasis on numerical guidelines,<sup>318</sup> the test begins to probe the totality of circumstances surrounding the defamation in an organized manner.<sup>319</sup> As a practical matter, the availability of the test has not resulted in a deluge of cases where plaintiffs from large groups have been permitted to proceed. In fact, only three “large group”<sup>320</sup> cases have been documented since the test was first described over eighty years ago.<sup>321</sup> Each of the cases involved a media defendant with “substantiated” accusations of criminal or unlawful activity by all or most members of the group.<sup>322</sup> The Intensity of Suspicion test’s adaptability and evidentiary basis provide an appealing starting point for solving group defamation problems.

The Intensity of Suspicion test’s advantages do not absolve it of its faults. Constitutional problems loom large.<sup>323</sup> The test does not provide a consistent and rationally satisfactory method for making the determination.<sup>324</sup> In *Fawcett*, the analysis weighed all

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<sup>317</sup> The Restatement does not address social circumstances of the defamation, such as whether the defamatory material played into existing reader bias. RESTATEMENT (SECOND) OF TORTS § 564A; *see also infra* Section III.B.

<sup>318</sup> *See supra* note 271 and accompanying text.

<sup>319</sup> The Intensity of Suspicion test explicitly considers group definiteness, prominence within the community, and individual prominence within the group. *See, e.g., Fawcett Publ’ns, Inc. v. Morris*, 377 P.2d 42 (Okla. 1977); *see also* Section II.C.

<sup>320</sup> Cases concerning more than twenty-five group members.

<sup>321</sup> *See Elias II*, 872 F.3d 97 (2d Cir. 2017); *Brady v. Ottaway Newspapers, Inc.*, 445 N.Y.S.2d 786 (N.Y. App. Div. 1981); *Fawcett*, 377 P.2d 42.

<sup>322</sup> In *Elias II*, the Rolling Stone article and related podcast alleged that some members of a fraternity committed rape, and suggested that all of them were either complicit or had participated. *Elias II*, 872 F.3d at 112. The publication in *Brady* concerned police officers who were not indicted as part of a corruption investigation, labelling them accessories to the crimes of their colleagues. 445 N.Y.S.2d at 787. In *Fawcett*, the article detailed use of illegal narcotics by members of a football team. 377 P.2d 42. In all cases, the defamatory material was published as a newspaper or magazine exposé, allegedly as the product of investigative journalism.

<sup>323</sup> The Intensity of Suspicion test developed prior to *New York Times* and subsequent decisions. *New York Times v. Sullivan*, 376 U.S. 254 (1964); *see supra* notes 299–301 and accompanying text.

<sup>324</sup> Of the three documented “large group” defamation cases, only the *Brady* decision was unanimous. *Brady*, 445 N.Y.S.2d at 797. In *Elias II*, the dissent called *Brady* a “thin

of the factors except for group size in favor of the plaintiff, but the ruling left unanswered just how the factors are evaluated relative to one another, only concluding that the average reader would know the plaintiff.<sup>325</sup> Restrictive aspects of the test prevent courts from examining the totality of the situation—only the enumerated parameters are certain to be considered, leaving judges with somewhat narrowed discretion.<sup>326</sup> The test’s reliance on the all or some distinction for groups of larger sizes<sup>327</sup> creates an additional complication, as illustrated by *Elias*.<sup>328</sup> The question becomes difficult when a statement only implies that all of the group members were complicit, without specifically accusing every member.<sup>329</sup>

The interdependence of each Intensity of Suspicion element jeopardizes the objectivity and efficacy of the test. Size is a frequently debated aspect of the Intensity of Suspicion test,<sup>330</sup> likely because the acceptable size of the group depends on other variables. Generally, the size of the group cannot grow to a point where the connection between defamation and plaintiff strains credulity, but courts employing the Intensity of Suspicion test have only precedent for a guideline.<sup>331</sup> The prominence of the individual

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reed” and argued that the article could not be read as concerning all of the fraternity brothers. *Elias II*, 872 F.3d at 113. The dissent concluded, “It is not at all clear that [plaintiff’s group defamation] claim can survive even under our lenient plausibility standard.” *Id.* at 112. See King, *supra* note 196 and Bromme *supra* note 209 for proposed alternatives.

<sup>325</sup> See *Fawcett*, 377 P.2d at 51–52.

<sup>326</sup> While some courts, including *Fawcett*, have considered aspects of the circumstances separate from the original three enumerated by note, such as the plaintiff’s prominence within the community, it is unclear whether these rulings demand such evaluations in future cases. *Id.*

<sup>327</sup> See *supra* note 274 and accompanying text.

<sup>328</sup> See *Elias II*, 872 F.3d at 112 (citing *Algarin v. Town of Walkill*, 421 F.3d 137, 140 (2d Cir. 2005) (distinguishing and rejecting a claim relying on *Brady*, because the defamatory statement did not indicate all of the group members)); see *infra* Section II.E. for a detailed discussion of this issue.

<sup>329</sup> See *infra* Section II.E.

<sup>330</sup> Compare Bromme, *supra* note 209 (suggesting size alone should not be determinative), and Marcus, *supra* note 276, at 1551 (rejecting size constraints of the group defamation rule), with King, *supra* note 196 (embracing numerical limits fully).

<sup>331</sup> Precedential limits may be just as arbitrary as those set forth in the Restatement. For example, the difference between a group of fifty persons as seen in *Brady* and eighty persons as seen in the original *Elias I* complaint is not readily apparent. See *Elias I*, 192



within the group, the group within the community, and the notoriety of the individual's membership all play a role.<sup>332</sup> Group exclusivity and organization also contribute.<sup>333</sup> Whether the statement concerned all, most, or only some of the group members further relates to whether the consumer of the material would view the plaintiff in a dim light.<sup>334</sup> Defamatory harm can occur in cases where statements lack complete inclusivity of all members—allegations of certain egregious acts or knowledge thereof<sup>335</sup> may prejudice the reader against an individual group member, despite ambiguous language. As group size grows, the fraction of the group defamed must remain high or total to support a theory of individual harm from defamation of the group.<sup>336</sup> The interdependence of each of these aspects invites an evaluation of whether the inferences drawn by the reader are sufficiently strong to satisfy the “of and concerning” element.<sup>337</sup>

The Restatement and Intensity of Suspicion approaches share many common features. Numerical guideline aside, both evaluate whether the size of the group dilutes the defamatory effect beyond actionable, individual injury. If a group is so large that “there is no likelihood that a reader would understand the article to refer to any particular member of the group,” it is not libelous of individuals.<sup>338</sup> In addition, both examine what fraction of the group the

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F. Supp. 3d at 394; *Brady v. Ottaway Newspapers, Inc.* 445 N.Y.S.2d 786, 788 (N.Y. App. Div. 1981).

<sup>332</sup> See *supra* notes 230–90 and accompanying text.

<sup>333</sup> Exclusive groups support the inference that the defamation concerned a definite set of individuals. Groups with a tightly knit social structure favor the plaintiff, as this feature facilitates imputation of the defamatory accusation onto the individual.

<sup>334</sup> *Elias II*, 872 F.3d at 108 (citing *Algarin v. Town of Wallkill*, 421 F.3d 137, 139–40 (2d Cir. 2005); *Brady*, 445 N.Y.S.2d at 794–95).

<sup>335</sup> Publishers are generally liable for defamation by imputation but proving such to the “actual malice” standard becomes a difficult proposition. See SACK, *supra* note 30, § 2:4.5.

<sup>336</sup> The Intensity of Suspicion balancing process suggests such a tradeoff. See *supra* Section II.C. The incorporation of an arbitrary limit, such as the twenty-five-person Restatement guideline, could be reasonable where any larger group would require the implication of all group members. See *supra* Section II.B.

<sup>337</sup> See, e.g., *Brady*, 445 N.Y.S.2d at 794 (balancing a group's size against its prominence within the community and whether it was a definite group before the defamatory statement).

<sup>338</sup> *Kennedy v. Children's Serv. Soc'y of Wis.*, 17 F.3d 980, 983 (7th Cir. 1994); *Golden N. Airways, Inc. v. Tanana Publ'g Co.*, 218 F.2d 612, 618–20 (9th Cir. 1954).

defamation reaches: whether the defamation implicates all, most, or some of the group members also weighs for or against recovery.<sup>339</sup> Restatement jurisdictions have relied on the “group definiteness” requirement of the Intensity of Suspicion test.<sup>340</sup> Both permit recovery where individual plaintiffs can be identified through extrinsic information.<sup>341</sup> Finally, while the Restatement position developed after the Supreme Court’s landmark defamation decisions,<sup>342</sup> neither test completely addresses important questions of First Amendment law.<sup>343</sup> Such commonality suggests that the approaches are not mutually exclusive and could effectively be merged into a universal standard.

The majority Restatement position and the Intensity of Suspicion test have desirable characteristics in addition to substantial shortcomings. The Intensity of Suspicion test provides flexibility and an evidentiary approach, while delivering inconsistent and constitutionally troubling results. The Restatement delivers a degree of consistency at the expense of flexibility and a reliance on arbitrary numerical guidelines. Application of the group defamation analysis to real world fact patterns illustrates the need for clarity with regard to constitutional aspects of the doctrine, as well as a consistent analytical methodology.

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<sup>339</sup> For example, the Oklahoma Supreme Court held that a statement concerning *some* members of a court was not defamatory. *Owens v. Clark*, 6 P.3d 755, 760. However, the same court later found that it was defamatory to implicate *all* of the members of much larger football team. *Fawcett Publ’ns, Inc. v. Morris*, 377 P.2d 42, 49–50, *cert. denied*, 376 U.S. 513 (1964).

<sup>340</sup> *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1015–16 (3d Cir. 1994), *reh’g and reh’g en banc denied* (Nov. 15, 1994) (rejecting a claim because the group was poorly defined). Without explicitly mentioning “definiteness,” a Restatement’s example prohibits claims where a group’s name could apply to many interrelated families. RESTATEMENT (SECOND) OF TORTS § 564A cmt. a (AM. LAW INST. 1977).

<sup>341</sup> *See Elias II*, 872 F.3d 97, 105 (2d Cir. 2017); *Pratt v. Nelson*, 164 P.3d 366, 383; RESTATEMENT (SECOND) OF TORTS § 564A(b).

<sup>342</sup> The Intensity of Suspicion test predates constitutional developments. *See supra* Section II.C.

<sup>343</sup> The authors of the Restatement (Second) would have been aware of developments through *Gertz* and indeed incorporated negligence—an element previously unlisted in the Restatement (First). RESTATEMENT (SECOND) OF TORTS § 558(C); RESTATEMENT (FIRST) OF TORTS § 558 (AM. LAW INST. 1938). Nevertheless, the Restatement (Second) does not address the defamation of groups differently, other than suggestions as to the definition of “sufficiently small,” despite the *New York Times*’ effect on the “of and concerning” element. RESTATEMENT (SECOND) OF TORTS § 564A; *see also supra* Section I.D.

*E. Elias v. Rolling Stone LLC*

Three members of Phi Kappa Psi, George Elias IV (“Elias”), Ross Fowler (“Fowler”), and Stephen Hadford (“Hadford”) filed suit on July 29, 2015, claiming that statements in the Article as well as Erdely’s statements in the *Slate* podcast defamed them.<sup>344</sup> In 2016, the district court dismissed the suit in its entirety, for failure to state a claim.<sup>345</sup> The decision to dismiss the case as a matter of law rested on two findings: first, that none of the plaintiffs alleged sufficient facts to show that the statements were “of and concerning” them, and also that the Podcast remarks were non-actionable opinion.<sup>346</sup>

The plaintiffs appealed to the Second Circuit.<sup>347</sup> When a trial court determines that a statement fails to satisfy the requirements for a defamation action as a matter of law, appellate courts review the matter de novo.<sup>348</sup> Reviews of Rule 12(b)(6) motions<sup>349</sup> are performed by liberally interpreting the complaint, accepting the pleaded allegations as true, and drawing all inferences in the plaintiff’s favor.<sup>350</sup> For the plaintiffs to succeed, the Second Circuit would need to find that the plaintiffs meet pleading requirements<sup>351</sup>

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<sup>344</sup> *Elias II*, 872 F.3d at 104 (referencing *Elias I*, 192 F. Supp. 3d 383 (S.D.N.Y. 2016)). Plaintiffs voluntarily dropped their claim for negligent infliction of emotional distress. *Id.*

<sup>345</sup> *Id.*

<sup>346</sup> *Id.*; see also *supra* Section I.D for a discussion of the “of and concerning” element.

<sup>347</sup> *Elias II*, 872 F.3d 97.

<sup>348</sup> See SMOLLA, *supra* note 40, § 4:38 (citing *Jordan v. Kollman*, 612 S.E.2d 203, 207 (Va. 2005)).

<sup>349</sup> For a detailed overview of motions to dismiss for failure to state a claim, FED. R. CIV. P. 12(b)(6), see 5B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1357 (3d ed. 2018).

<sup>350</sup> See *Elias II*, 872 F.3d at 105 (quoting *Chase Grp. All. LLC v. City of N.Y. Dep’t of Fin.*, 620 F.3d 146, 150 (2d Cir. 2010)) (internal quotation marks omitted).

<sup>351</sup> “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007))). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’” *Ashcroft*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557 (2007)).

for the “of and concerning” element<sup>352</sup> with or without the materials contained in the Podcast.<sup>353</sup>

The Second Circuit applied New York law to the case on appeal.<sup>354</sup> In New York, “[d]efamation is ‘the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society.’”<sup>355</sup> To successfully state a claim, a complaint must allege the unauthorized publication of a false statement to a third party that causes harm, unless the statement is actionable without a showing of injury.<sup>356</sup> In addition, the plaintiff must prove that the material was “of and concerning” him or her.<sup>357</sup> The “of and concerning” element, central to *Elias*, requires that the plaintiff allege that the defamatory statement was about him, specifically that a reasonable recipient of the expression would connect the defamation to the aggrieved party.<sup>358</sup>

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<sup>352</sup> See *supra* Sections I.B, II.C, II.E.

<sup>353</sup> Because the Southern District of New York had found that the Podcast was “non-actionable opinion,” it was not originally considered part of the defamation. *Elias II*, 872 F.3d at 104 (referencing *Elias I*, 192 F. Supp. 3d 383 (S.D.N.Y. 2016), *aff’d in part, rev’d in part*, No. 16-2465-CV, 2017 WL 4126956 (2d Cir. Sept. 19, 2017), and *aff’d in part, rev’d in part, and remanded*, 872 F.3d 97 (2d Cir. 2017)). The Second Circuit would revisit the issue and hold that the Podcast materials could and should be considered in determining whether all of the fraternity members were defamed, while agreeing that the Podcast itself was non-actionable speculation and hypothesis. *Id.* at 109–11.

<sup>354</sup> *Id.* “Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.” *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

<sup>355</sup> *Elias II*, 872 F.3d at 104 (quoting *Stepanov v. Dow Jones & Co.*, 987 N.Y.S.2d 37, 41 (N.Y. App. Div. 2014) (internal quotations omitted)).

<sup>356</sup> *Elias II*, 872 F.3d at 104; see also *supra* Section I.C.

<sup>357</sup> *Elias II*, 872 F.3d at 104; see also *supra* Section I.D.

<sup>358</sup> The plaintiff must show “that ‘[t]he reading public acquainted with the parties and the subject would recognize the plaintiff as a person to whom the statement refers.’” *Elias II*, 872 F.3d at 104–05 (quoting *Carlucci v. Poughkeepsie Newspapers, Inc.*, 442 N.E.2d 442, 443 (1982)). Whether the plaintiff satisfies this requirement can be resolved during the pleading stage as a matter of law. *Id.* at 105 (citing *Church of Scientology Int’l v. Behar*, 238 F.3d 168, 173 (2d Cir. 2001). See also *Three Amigos SJL Rest., Inc. v. CBS News Inc.*, 15 N.Y.S.3d 36, 41 (N.Y. App. Div. 2015), *aff’d*, 65 N.E.3d 35 (2016) (citing *Springer v. Viking Press*, 458 N.E.2d 1256 (N.Y. 1983)); see also SACK, *supra* note 30, § 2:9.3.

The plaintiffs, George Elias IV (“Elias”), Ross Fowler (“Fowler”), and Stephen Hadford (“Hadford”), graduated from the University of Virginia in 2013.<sup>359</sup> All were active fraternity members during 2012, the timeframe relevant to Jackie’s accusations.<sup>360</sup> The plaintiffs can be distinguished as follows: Elias lived in the first bedroom at the top of the stairs in the PKP on-campus house,<sup>361</sup> Fowler was rush chair for the fraternity, and an avid swimmer at the university aquatic facility,<sup>362</sup> and Hadford rode his bike on campus after having graduated.<sup>363</sup> Each of the distinguishing characteristics purportedly tied the plaintiffs to the Article’s story in some way.<sup>364</sup>

In *Elias*, the Second Circuit found that the complaint met the “of and concerning” pleading requirement for two of the plaintiffs individually: Elias and Fowler.<sup>365</sup> The ruling describes the finding as a “close call,” but that it was plausible a reader familiar with the plaintiffs would identify each as the subject of the statements.<sup>366</sup> For Elias, the court concluded that the events depicted in the Article were sufficiently detailed and descriptive of his living circumstances to pass muster.<sup>367</sup> The Article implicated Fowler individually because it described one rapist as a lifeguard, as well as suggesting that the rape was a part of initiation, which he would

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<sup>359</sup> *Elias II*, 872 F.3d at 101.

<sup>360</sup> *Id.*

<sup>361</sup> The location of Elias’ room becomes relevant because the narrative in the Article describes taking a staircase up to a bedroom without mention of crossing a locked security door. *Id.* Only Elias’ room fits such an account. *Id.*

<sup>362</sup> *Id.* at 102. The “rush chair” oversees the new member recruitment and initiation process. *Id.*

<sup>363</sup> Hadford’s propensity to ride his bicycle on campus after graduating potentially linked him to the Article because Jackie reported that one of the rapists fit such a description. *Id.* at 107. The Second Circuit would affirm that this connection to the defamation was too speculative to state that the defamation was “of and concerning” Hadford individually. *Id.*

<sup>364</sup> See *supra* notes 361–63 and accompanying text.

<sup>365</sup> *Elias II*, 872 F.3d. at 105.

<sup>366</sup> *Id.*

<sup>367</sup> *Id.* at 106. “Considering that Elias was a member of Phi Kappa Psi; he graduated in 2013 (the year that the alleged perpetrators graduated); he lived in the fraternity house in the only bedroom on the second floor that was both large enough to fit the description of the alleged location of the rape and easily accessible by non-residents; and he was in fact identified by others as one of the alleged attackers, Elias has sufficiently pled that the Article was ‘of and concerning’ him.” *Id.*

have overseen as rush chair.<sup>368</sup> Following publication, both Elias and Fowler allegedly experienced scorn from peers, co-workers, and reporters.<sup>369</sup> While the Article did describe one of the rapists as bicycling through campus after graduating, these facts were “merely consistent” with defendant liability<sup>370</sup>—to recover, the court would need to connect Hadford to the statement in another way.

Group defamation doctrine arose to address the “of and concerning” element where defamation of a group caused individual injury, but could not be connected to the individual specifically, as in the case of Hadford.<sup>371</sup> Applying the Intensity of Suspicion test, the Second Circuit considered group size, the fraction of the group implicated, and the prominence of both the group and its members in the community.<sup>372</sup> Weighing these factors,<sup>373</sup> the majority found that the Article contained statements “of and concerning” all of the fraternity members, including Hadford.<sup>374</sup> The complaint alleged that the fraternity contained fifty-three members during the relevant time period,<sup>375</sup> which met

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<sup>368</sup> *Id.* at 106. Fowler’s involvement in the fraternity recruitment process would have placed him in a position to have intimate knowledge of a gang-rape initiation ritual, and the Article also described one of the rapists as a swimmer.

<sup>369</sup> *Id.* at 105, 107. For example, “Fowler . . . received harassing texts, emails, and comments from peers, co-workers, and reporters.” *Id.* at 107.

<sup>370</sup> *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007))). *Twombly* and *Iqbal* established that pleadings need to demonstrate more than facts “merely consistent” with liability. *See supra* note 351.

<sup>371</sup> *See supra* Part II.

<sup>372</sup> *Elias II*, 872 F.3d at 108 (quoting *Brady v. Ottaway Newspapers, Inc.*, 445 N.Y.S.2d 786, 794–95 (N.Y. App. Div. 1981); *Algarin v. Town of Wallkill*, 421 F.3d 137, 139–40 (2d Cir. 2005)).

<sup>373</sup> The *Elias II* court held that each element of the intensity of suspicion test was satisfied by the circumstances: the size of the fraternity was not prohibitively large, the defamation concerned all members, and the social circumstances permitted easy identification of group members within the community. *Id.* at 107–10.

<sup>374</sup> *Id.* at 110.

<sup>375</sup> Interestingly, the number reported in the complaint varies. Sack reports, and the initial decision mentions, over eighty fraternity members. *See SACK, supra* note 30, § 2:9.4, at 2–162. This number was later amended to fifty-three. *See Elias II*, 872 F.3d at 108.

New York's precedential standard.<sup>376</sup> The Second Circuit overturned the district court's determination that the statement did "not expressly or impliedly state that the fraternity required all initiates to participate in a rape, or impute any knowledge of such a requirement to plaintiffs," thus failing to satisfy the "of and concerning" element.<sup>377</sup> The majority relied on statements suggesting that the rape was part of an initiation ritual<sup>378</sup> and testimony from other women who had been raped at the fraternity as facilitating the inference that the Article accused every group member.<sup>379</sup> At a minimum, the Second Circuit's holding proposed that the Article and Podcast described all of the fraternity members as aware of the sexual violence of their colleagues.<sup>380</sup>

The dissent in *Elias* took issue with several aspects of the ruling.<sup>381</sup> While finding that the complaint sufficiently alleged that the Article was "of and concerning" Elias and Fowler, the dissent asserts that the majority applied group defamation doctrine and the Intensity of Suspicion test beyond precedential and rational limits.<sup>382</sup> The dissenting judge emphasized that to rely on *Brady*,<sup>383</sup> the defamatory material would necessarily implicate *all* of the fraternity members – a fact that was unclear from the Article and Podcast.<sup>384</sup> In addition, the dissent argued that the fraternity and member's prominence in the community failed to satisfy the

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<sup>376</sup> *Brady*, 445 N.Y.S.2d at 788. In *Brady*, members of a fifty-three-person group filed suit. *Id.*

<sup>377</sup> *Elias II*, 872 F.3d at 108.

<sup>378</sup> Specifically, the Second Circuit relied on quotes from the Article and the Podcast, such as a fraternity member asking "[d]on't you want to be a brother?" during the rape, to mean that the rape was "some kind of initiation ritual." *Id.* (quoting the Article and the Podcast). If gang rape were part of an initiation ritual, these statements would suggest that all members of the group either performed or were conspirators to gang rape. *Id.*

<sup>379</sup> *Id.* at 109.

<sup>380</sup> *Id.* at 109–10.

<sup>381</sup> *Id.* at 111. Judge Raymond Lohier dissented from the majority opinion of Forrest and Cabranes. *Id.* at 100–11.

<sup>382</sup> *Id.* at 112.

<sup>383</sup> *Brady v. Ottaway Newspapers, Inc.*, 445 N.Y.S.2d 786, 792–95 (N.Y. App. Div. 1981) (discussing the intensity of suspicion test). *Brady* is important to New York defamation jurisprudence because it represents the court's first adoption of the intensity of suspicion test. *Id.*

<sup>384</sup> *Elias*, 872 F.3d at 112.

relevant part of the Intensity of Suspicion analysis.<sup>385</sup> The dissent proposed that the appropriate solution, in this context, should have been to certify the issue to state court,<sup>386</sup> so that New York courts could properly decide an important policy matter.<sup>387</sup> The dissent concluded that the majority and plaintiffs “rely on an interpretation that is untenable (and yes, implausible) when the statements are examined in the context of the article.”<sup>388</sup>

*Elias* and fallout from the Article’s publication have important consequences, particularly for news and media organizations.<sup>389</sup> In litigation related to the Article’s release, a district court returned a verdict awarding another plaintiff, Dean Eramo, \$3,000,000 for her depiction in the Article, although she would later settle for an undisclosed amount while awaiting appeal.<sup>390</sup> In the summer of 2017 the UVA chapter of Phi Kappa Psi reached a settlement with *Rolling Stone* and the Article’s author totaling \$1,650,000.<sup>391</sup>

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<sup>385</sup> The *Elias II* dissent questioned whether fraternity brothers on a college campus were, by analogy, as recognizable as members of a police force in a small town, as seen in *Brady. Id.* The dissent proceeded to question whether a plaintiff’s prominence within the community and intimacy of the community would even be considered a part of the intensity of suspicion test by native New York courts. *Id.*

<sup>386</sup> Certification to state court is the procedure by which a federal court of appeals defers deciding a novel or difficult question of state law by certifying the question to the highest court of the state. *Certification to State Court*, BLACK’S LAW DICTIONARY (10th ed. 2017).

<sup>387</sup> *Elias II*, 872 F.3d at 113.

<sup>388</sup> *Id.* at 114.

<sup>389</sup> In his dissent, Judge Lohier advised publishers to “beware” until New York courts have the opportunity to “correct[]” the error. *Id.* at 112.

<sup>390</sup> *Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862 (W.D. Va. 2016), *reconsideration granted*, No. 3:15-CV-00023, 2016 WL 5942328 (W.D. Va. Oct. 11, 2016). Dean Eramo alleged that the article depicted her as a villain, ineffective and indifferent to the Jackie’s plight following the assault. *Id.* See also Doreen McCallister, ‘Rolling Stone’ Settles Defamation Case with Former U. Va. Associate Dean, NPR (Apr. 12, 2017), <https://www.npr.org/sections/thetwo-way/2017/04/12/523527227/rolling-stone-settles-defamation-case-with-former-u-va-associate-dean> [https://perma.cc/J86P-UPZY].

<sup>391</sup> T. Rees Shapiro, *Fraternity Chapter at U-Va. To Settle Suit Against Rolling Stone for \$1.65 Million*, WASH. POST (June 13, 2017), [https://www.washingtonpost.com/local/education/fraternity-chapter-at-u-va-to-settle-suit-against-rolling-stone-for-165-million/2017/06/13/35012b46-503d-11e7-91eb-9611861a988f\\_story.html?utm\\_term=.b1fcbcb00ae3](https://www.washingtonpost.com/local/education/fraternity-chapter-at-u-va-to-settle-suit-against-rolling-stone-for-165-million/2017/06/13/35012b46-503d-11e7-91eb-9611861a988f_story.html?utm_term=.b1fcbcb00ae3) [https://perma.cc/968F-64VH].



*Rolling Stone* settled with the fraternity member plaintiffs for an undisclosed amount in the final months of 2017.<sup>392</sup>

*Elias* highlights an important area of law, not only because of financial considerations for publishers and the standards to which defamation cases are decided, but also for First Amendment issues generally.<sup>393</sup> The Article's coverage of sexual abuse and the culture surrounding it places it at the forefront of discussions important to public interest. In addition, a group's unique position of power calls to attention whether unnamed, anonymous plaintiffs should be permitted to recover as private persons. Finally, the Second Circuit's decision highlights challenges presented by the application of group defamation doctrine. Had *Elias* been decided in a majority Restatement jurisdiction, it is very unlikely that Hadford could recover.<sup>394</sup> Issues and inconsistencies arising from group defamation support the notion that defamation law fails to achieve efficient results or establish reliable protections of speech and reputation.

### III. GROUP DEFAMATION, POWER AND THE FIRST AMENDMENT

Defamation law seeks to strike a balance between the protection of reputation on one hand, and freedom of expression on the other.<sup>395</sup> The group defamation doctrine stands to benefit from the development of an analysis devised with First Amendment values in mind. Further, existing methods for determining whether group members may recover contain arbitrary obstacles, fail to

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<sup>392</sup> Eriq Gardner, *Rolling Stone Settles Last Remaining Lawsuit Over UVA Rape Story*, HOLLYWOODREPORTER.COM (Dec. 21, 2017), <https://www.hollywoodreporter.com/thr-esq/rolling-stone-settles-last-remaining-lawsuit-uva-rape-story-1069880> [https://perma.cc/BYT7-S5JE].

<sup>393</sup> See Section I.B, *supra* note 33.

<sup>394</sup> Because the group exceeded the presumptive limit of twenty-five members, Hadford would be disqualified from Restatement (Second) § 564A's exception (a), where the "group or class is so small that the matter can reasonably understood to refer to the member." RESTATEMENT (SECOND) OF TORTS § 564A(a) (AM. LAW INST. 1977). Similarly, Hadford did not meet the standard set by Restatement (Second) § 564A(b), where "circumstances of publication reasonably give rise to the conclusion that there is particular reference to the member." *Id.* § 564A(b); see also *supra* Section II.B.

<sup>395</sup> See *supra*, Section I.B.; see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 325 (1974).

account for important considerations, and are inconsistently applied across and occasionally within jurisdictions.<sup>396</sup> Part III of this Note proposes a methodology (“the Test”) addressing these issues. Section III.A considers the constitutional underpinnings of modern group defamation doctrine and proposes that the power of the defamed should inform the standard, as described in part one of the Test. Section III.B introduces part two of the Test, a flexible standard based on existing methodologies. Section III.C returns to *Elias* and applies the proposed standards. Finally, Section III.D comments on the proposed Test.

*A. Test Part One: Constitutional Law, Power and the Standard for Individual Group Members*

Lessons from First Amendment jurisprudence should inform discussions of group defamation, because of the “of and concerning” element’s close ties to constitutional law,<sup>397</sup> and because speech about groups presents unique issues.<sup>398</sup> First Amendment protections developed by the Supreme Court address society’s need for free and open discussion in particularly sensitive areas: defamation law disfavors the use of civil suits to silence discussion of public officials, public figures, and matters of public concern.<sup>399</sup> These areas of especially protected speech reflect the spirit of the First Amendment and American values.<sup>400</sup> Such

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<sup>396</sup> See *supra*, Section II.C–D.

<sup>397</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 291 (1964). In its discussion of the Alabama court’s error, the Supreme Court found it unacceptable that the court’s reasoning “would sidestep this obstacle by transmuted criticism of [a] government [group], however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed.” *Id.* at 292.

<sup>398</sup> See *supra* Section III.A.

<sup>399</sup> See *supra* Section I.C.

<sup>400</sup> See *Whitney v. California*, 274 U.S. 357, 375 (1927), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (“Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public

protections permit vigorous discussion of powerful persons and entities, which, at least in theory, acts as a check on corrupt, ethically unsound, or illegal actions.<sup>401</sup>

To inform an analysis for group defamation, consider the Supreme Court's rulings protecting speech against the powerful. In *New York Times*, the Court found restrictions on speech concerning the government itself illegal,<sup>402</sup> and severely limited the ability of government officials to sue for defamation.<sup>403</sup> *Rosenblatt* affirmed these aspects of the holding, in particular that speech that merely imputes wrongdoing to anonymous government officials should be protected, and where speech is directed at specific office-holders, "actual malice" must be proven.<sup>404</sup>

Extending protections beyond statements about the government, the *Gertz* court described two reasons why the law denies public figures and officials the same protection from defamation as private citizens.<sup>405</sup> These include the ability of such

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discussion is a political duty; and that this should be a fundamental principle of the American government.").

<sup>401</sup> *Id.* The constitutional protections for speech and press were fashioned to assure unfettered interchange of ideas for bringing about political and social changes desired by the people. *Sullivan*, 376 U.S. at 269.

<sup>402</sup> Justice Brennan's opinion described the Sedition Act of 1798, which prohibited criticism of the government, as unconstitutional under the First Amendment: "For good reason, 'no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence.'" *Sullivan*, 376 U.S. at 291-92 (quoting *City of Chicago v. Tribune Co.*, 139 N.E. 86, 88 (Ill. App. Ct. 1923)).

<sup>403</sup> *Id.* at 279-80. In *Garrison v. Louisiana*, the Court broadly defined the scope of protected comment on public officials as including commentary that speaks to dishonesty, malfeasance, or improper motive, which may also affect the official's private character. *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964) ("Manifestly a candidate must surrender to public scrutiny and discussion so much of his private character as affects his fitness for office, and the liberal rule requires no more." (quoting *Coleman v. MacLennan*, 98 P. 281, 291 (Kan. 1908))). Quoting Madison, the *New York Times* opinion proposed that the Constitution created the American government such that "[t]he people, not the government, possess the absolute sovereignty." The structure of the government dispersed power in reflection of the people's distrust of concentrated power, and of power itself at all levels." *Sullivan*, 376 U.S. at 274 (quoting 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 569-70 (1876)).

<sup>404</sup> *Rosenblatt v. Baer*, 383 U.S. 75, 77, 82-84, 86 (1966).

<sup>405</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).

parties to defend themselves from defamation<sup>406</sup> and the assumption of risk.<sup>407</sup> Such abilities stem from public persons' access to power and resources.<sup>408</sup> As such, the Supreme Court's restrictions on defamation require careful examination of the person or entity defamed.<sup>409</sup>

Groups possess characteristics similar to those of public officials or public figures, and often involve themselves in matters of public concern. Many groups possess resources similar or greater than those of individual public figures or public officials, making them capable of defending themselves from harmful, false statements.<sup>410</sup> For example, *Rolling Stone's* Article faced nearly immediate censure from investigations by media and the police,

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<sup>406</sup> *Id.* (“The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.”). In *Rosenbloom v. Metromedia, Inc.*, an opinion delivered prior to *Gertz*, Brennan disagreed with the “access to self-help” reasoning, stating that it was “unproved[] and highly improbable” that public persons possess a superior ability to respond to falsehoods—he would extend protection to all statement of public interest irrespective of the nature of the plaintiff. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 46–47 (1971), *abrogated by* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). For criticism of the “access to media” argument, see *Clawson v. Longview Publ'g Co.*, 589 P.2d 1223, 1226 (Wash. 1979).

<sup>407</sup> *Gertz*, 418 U.S. at 345 (“[Speakers] are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual.”). Again, prior to *Gertz*, Brennan’s opinion in *Rosenbloom* made the argument that “assumption of risk” “bears little relationship either to the values protected by the First Amendment or to the nature of our society . . .” *Rosenbloom*, 403 U.S. at 47–48.

<sup>408</sup> The very definition of the two types of public figures in *Gertz* speaks to the power of the defamed party: universal public figures are those who “occupy positions of such persuasive power and influence that they are deemed public figures for all purposes,” and vortex or limited purpose public figures who “have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.” *Gertz*, 418 U.S. at 345, 351.

<sup>409</sup> See *supra* Section I.C–D.

<sup>410</sup> Notice that the *Rolling Stone* Article prompted a robust defense from individuals in the group, as well as the national fraternity itself. See *supra* Introduction, Section II.E. Groups in other cases, such as the football players in *Fawcett* and the police department in *Brady* had considerable resources at their disposal. See generally *Fawcett Publ'ns, Inc. v. Morris*, 377 P.2d 42; *Brady v. Ottaway Newspapers, Inc.*, 445 N.Y.S.2d 786 (N.Y. App. Div. 1981).

likely with encouragement from offended group members.<sup>411</sup> In the same way that public persons assume risk, joining a group could easily pass for assuming the risk that some of the group's reputation may be imputed to the individual.<sup>412</sup> While it might be unfair to burden all group members with risk created by the activities of other group members, individuals usually investigate and weigh such risk when joining a group, and are otherwise free to leave if they feel membership could jeopardize their standing in the community.<sup>413</sup>

Groups possess powers beyond those of public persons that both reduce the risk of individual harm from false statements and make speech about them pertinent to protected public discourse.<sup>414</sup> Group defamation doctrine directly addresses the passive, anonymizing effect of increasing group size.<sup>415</sup> Importantly, groups may actively or passively act to obscure bad behavior, as well as the identity of bad actors themselves.<sup>416</sup> One example of active obfuscation from American politics includes the concept of engineering plausible deniability for group members.<sup>417</sup> In fact,

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<sup>411</sup> See *supra* notes 16–19 and accompanying text.

<sup>412</sup> Cf. *Gertz*, 418 U.S. at 344.

<sup>413</sup> *Id.*

<sup>414</sup> Defamation doctrine generally seeks to balance the interests of the individual with the interests of the public at large. *Id.* at 341–42 (“Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury.”).

<sup>415</sup> See *supra* notes 232–37, 261 and accompanying text.

<sup>416</sup> Take for example the concept of “omerta,” known widely as the Mafia’s oath of silence and non-cooperation with authorities. See Henry Biggs & Pietro Festorazzi, *Fuhgeddaboutit: Trying Times for Trying the Mafia Under RICO and 416-bis*, 42 N.C. J. INT’L L. 823, 825, 842 (2017). Another relevant example includes the cover-up of sexual abuse by clergy. See, e.g., Marci A. Hamilton, *The Waterloo for the So-Called Church Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-Up*, 29 CARDOZO L. REV. 225, 227–28 (2007) (“[W]hat does distinguish the religious institutions is a pattern of covering up child abuse, which includes (1) not going to authorities when abuse is reported to the institution; (2) imposing secrecy requirements on clergy and victims; (3) shifting perpetrators throughout the religious organization, both geographically and by specific house of worship; (4) asking law enforcement and newspapers to look the other way when they learn of individual cases; and, most important for this essay, (5) insisting on autonomy from the tort and criminal law for the organization’s role in the furtherance of the abuse.”).

<sup>417</sup> This term emerged in the 1970s, where political or paramilitary operatives would deliberately exclude certain persons from knowledge or connection to questionable

the very issue that *Rolling Stone's* discredited Article attempted to address pertained to cultural and institutional indifference to the needs of campus rape victims—a phenomenon which ostensibly exists because of collective behavior motivated by a shared interest in suppressing unpleasant realities.<sup>418</sup>

Groups often act in a capacity that would expose an individual to constitutionally elevated<sup>419</sup> standards for defamation claims, even if none of the group members harmed by the defamation behaved in such a manner. In addition, groups are in a unique position of power in our society and are often involved in matters of public interest. This Note proposes that the group defamation analysis should consider whether the relevant group possessed and wielded power in such a capacity. If so, individuals bringing claims stemming from group defamation should be held to the appropriate, elevated standard without regard to individual characteristics. This follows from the notion that if individuals are permitted to recover from a defamation directly addressing only the plaintiff's group,<sup>420</sup> they should be held to the standard that the group would be, if it were acting as an individual.

### 1. Elevated Requirements for Groups of Public Officials

With the goal of protecting speech critical of power in line with constitutional principles, the first part of the Test would proceed as follows: Recovery for group defamation claims brought by members of governmental organizations would not be permitted.<sup>421</sup> This stems from the idea that criticism of groups of government officials is effectively criticism of the government, an offense for which there should be no criminal or civil penalty in American law.<sup>422</sup> Where the identity of the public official plaintiff could be

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activity such as assassination plots, with the goal that the activity would ultimately be non-attributable. *See* S. REP. NO. 94-465, at 11 (1975).

<sup>418</sup> *See supra* notes 2–15, and *infra* notes 491–92 and accompanying text.

<sup>419</sup> *See supra* Section I.B. “Constitutionally elevated” means that the plaintiff must satisfy the “actual malice” standard as described in *New York Times* and the discussion in Section I.B.

<sup>420</sup> *See supra* Sections II.A–C.

<sup>421</sup> Declaratory and injunctive relief could remain available, as well as recovery of litigation costs. This would permit governmental organizations recourse for false statements without significantly impeding the free exchange of ideas.

<sup>422</sup> *See supra* notes 382–403.

deduced by a recipient of the publication, but some degree of uncertainty remains, the Test's rule would favor the presumption that the defamatory material is inactionable speech about government.<sup>423</sup> Where a public official plaintiff is named directly,<sup>424</sup> the *New York Times* standard would apply as usual. In addition, putative and unproven damages without proof of "actual harm" would be prohibited. Public officials "must surrender to public scrutiny" any and all aspects of their character as relates to their fitness.<sup>425</sup> In the rare case that the speech is immaterial to the plaintiff's fitness for office, the Test would permit all types of recovery after the public official meets the "actual malice" standard.

## 2. Elevated Requirements for Private Individuals in Powerful Groups

The Test would then evaluate whether private individual members of a defamed group warrant the application of elevated protections.<sup>426</sup> The Test would not apply in cases where the individual identity of private members may be readily deduced, inferred, or determined through publicly available information.<sup>427</sup> Such cases render the Test unnecessary, since the legal fiction or inferential leap demanded by group defamation analysis is not needed to connect the statement to the plaintiff.<sup>428</sup> Thus, the Test's

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<sup>423</sup> Such a policy is consistent with prohibitions on claims stemming from criticism of the government as espoused by *New York Times* and elsewhere. *See supra* notes 51–69, 244–54, 402–03 and accompanying text; *see also* *Dean v. Dearing*, 561 S.E.2d 686, 688–89 (Va. 2002).

<sup>424</sup> To be named directly, the plaintiff would need to show that the defamation unambiguously identifies him or her.

<sup>425</sup> *See Garrison v. Louisiana*, 379 U.S. 64, 77 (1964).

<sup>426</sup> Individuals with public figure status already face elevated requirements, obviating the need for the analysis. *See supra* Section I.B.

<sup>427</sup> In jurisdictions applying the Restatement, this would cover persons exempt from the prohibition on group defamation under Restatement (Second) § 564A(b). RESTATEMENT (SECOND) OF TORTS § 564A(b) (AM. L. INST. 1977). In jurisdictions applying the intensity of suspicion approach taken by the *Elias* court, such persons already fall outside the scope of the group defamation doctrine. *See Elias II*, 872 F.3d 97, 106–07 (2d Cir. 2017).

<sup>428</sup> The "legal fiction" behind all group defamation claims is that the defamation of the group constitutes a defamation of the individual. Put differently, a statement "of and concerning" a group will also concern the plaintiff individually. *See supra* Section I.C.

analysis continues only where plaintiffs are unidentified, private figure individual members.<sup>429</sup>

To impose elevated requirements on private individuals, the Test requires that the group qualify as a voluntary public group by satisfying three criteria. The first considers whether the group exhibits prominence within the community, as considered by the Intensity of Suspicion test.<sup>430</sup> Further, whether to impose elevated standards for unnamed group members would rest on two additional considerations derived from *Gertz* and subsequent cases.<sup>431</sup> The second evaluates whether the group possesses the resources to refute the statement,<sup>432</sup> and the third asks whether membership was a voluntary endeavor.<sup>433</sup> The satisfaction of all three criteria indicates that the group has achieved a status within the community akin to that of public persons, and that the member has assumed the risk of reputational harm inherent to membership in a powerful group. Voluntary, anonymous members of public groups proceeding on a group defamation theory would be required to satisfy the “actual malice” standard and would not be permitted to recover putative or unproven damages without a showing of “actual harm.”

*B. Test Part Two: Bias and the Perception of Truth as an Extension of Existing Methods*

While both the Restatement and Intensity of Suspicion test provide good starting points for the second part of the Test, they leave much to be desired.<sup>434</sup> The manner in which a third party<sup>435</sup>

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<sup>429</sup> Group members who qualify as public persons already face elevated fault requirements when the defamation relates to a matter of public concern. *See supra* notes 65–90 and accompanying text.

<sup>430</sup> *See supra* Section II.C.

<sup>431</sup> *See supra* Section I.B.

<sup>432</sup> Group size, degree of organization, and access to media all speak to such an ability.

<sup>433</sup> This requirement is congruent to the “assumption of risk” reasoning described in *Gertz*.

<sup>434</sup> *See* Part II. The diversity of views presented elsewhere is illustrative. *See, e.g.*, Stern *supra* note 203 (admiring the Restatement position, with a strong presumptive group size limit of twenty-five); Bromme, *supra* note 209 (suggesting five guiding social factors that exclude group size entirely); King, *supra* note 196 (recommending that courts view the group size an absolute bar at twenty-five persons).



evaluates defamatory material about a group involves a process more complex than current methods envision. In the context of group defamation, the “of and concerning” element depends upon more than whether the statement was about the plaintiff.<sup>436</sup> The determination involves measuring the strengths and weaknesses of an inference, or series of inferences, that the reader must make connecting plaintiff to the derogatory imputation.<sup>437</sup> The strength of these connections determines whether the material causes the reader to pass harmful judgement upon the plaintiff.

The reader makes her inferences under the influence of an array of variables, making the analysis resistant to simplification. Such variables may include considerations as nebulous as social context, semantics, and how the individual perceived the statement in question. Thus, group defamation doctrine already requires<sup>438</sup> that the court enter into analysis akin to factfinder’s evaluation of third-party perceptions.<sup>439</sup> For these reasons, it is not unreasonable

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<sup>435</sup> Meaning the third party that receives the defamatory material. The material need only be understood to mean the plaintiff by one person outside of the defendant and plaintiff. *See supra* note 172 and accompanying text.

<sup>436</sup> If all statements “of” or “about” the plaintiff qualified for a claim, the group defamation rule would seldom prevent litigation. The statement must “concern” the plaintiff, “concern” being defined as “[r]elate to; [be] connect[ed] with; [be of] interest or importan[ce] to; affect.” *Concern*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2017). This, as well as the theories behind the group defamation rule, suggests that the statement must have some deeper connection with the plaintiff. *See supra* Part II.

<sup>437</sup> *See supra*, Part II.

<sup>438</sup> For example, the intensity of suspicion test asks judges to determine whether the defamation names all members of a group, explicitly or by implication, as well as to make judgments about subjective aspects of the group, such as definiteness and prominence within the community. *See supra* Section II.C.

<sup>439</sup> The third party means receiver of the defamatory communication.

The distinction between ‘law’ and ‘fact’ has proved obscure wherever it is employed. For instance, the common law used to require that a plaintiff’s complaint in a civil action only state the ‘facts’ of his case, not any ‘legal conclusions.’ Unfortunately, no one has ever been able to tell whether the allegation that ‘on November 9, the defendant negligently ran over the plaintiff with his car at the intersection of State Street and Chestnut Street’ is a statement of fact or a legal conclusion. In fact, the distinction between law and fact is just the legal version of the philosophical distinction between ‘empirical’ and ‘analytical’ statements, a distinction on whose existence philosophers have been unable to agree to this day . . . .

to extend the scope of the group defamation Test beyond characteristics of the group and the fraction of group members implicated, as described below.<sup>440</sup>

After determining the appropriate standards of fault in part one of the Test,<sup>441</sup> the second phase considers how a statement about a group moves from perception to individual harm. The proposed Test relies on a balancing of the elements described in the Intensity of Suspicion test,<sup>442</sup> with the addition of a fourth element considering biases. To satisfy the novel element of the Test, the defamation must be both believable and severe, overcoming resistance to prejudice against the individual. To score the new Test, most of the original elements described in the Intensity of Suspicion test must favor the plaintiff.<sup>443</sup> If the analysis is equivocal,<sup>444</sup> the Test's novel fourth element decides the matter.

### 1. Believability of the Defamatory Material

When considering a defamatory expression about a group, the reader or listener first decides whether to believe the statement at all. The defamer presents purported facts about a group, which may or may not be true as to its members. If the material is unbelievable entirely, then the defamatory harm to reputation is significantly attenuated, even if the statement could be interpreted as about the person.<sup>445</sup> Part of this determination normally occurs elsewhere: Defamation law prohibits claims for statements of

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LEO KATZ, *BAD ACTS AND GUILTY MINDS: CONUNDRUMS OF CRIMINAL LAW* 276–93 (Univ. of Chi. Press, 1987).

<sup>440</sup> See *supra* Section III.B.

<sup>441</sup> See *supra* Section III.A; see generally *supra* Section I.B.

<sup>442</sup> The flexible criteria of the Intensity of Suspicion test are sufficiently compatible with the Restatement, excluding the presumptive twenty-five-person limit. See *supra* Section II.D.

<sup>443</sup> See *supra* Section II.C.

<sup>444</sup> Because the original intensity of suspicion elements are not independent and require a degree of judicial discretion, such a result can be expected. See *supra* Section II.D.

<sup>445</sup> This concept is critical to group defamation theory. See *supra* Section II. Reputational harm entails a shift in a reader's perception so as to lower the defamed person's social or professional standing. Whether or not the statement is believable does not affect emotional distress caused by the defamation, an effect which the author of this Note believes is not a priority in cases of group defamation. See *supra* Section I.A. Individuals are well protected from emotional harm because of the nature of the group and the group itself. See *supra* Section II.D.

opinion, insults, etc., because these statements do not assert provable facts.<sup>446</sup> The listener is expected to view such expression with a degree of incredulity, and such statements are rejected as a matter of law.<sup>447</sup>

In group context, the Test benefits from incorporating an estimate of how likely the statement is to be believed by a reasonable third party.<sup>448</sup> This is akin to determination of whether the statement is presented as a matter of fact or a matter of opinion, in that context and form are both relevant.<sup>449</sup> The evaluation considers facts about the circumstances and the statement itself, to aid in the prediction of whether the defamatory material actually reaches or concerns the plaintiff. This component of the Test ensures that the reputational harm is real in the face of the protective insulation the plaintiff receives by virtue of being an unnamed group member, especially where the Test's other elements may be equivocal.

The perceived likelihood of belief can be expressed as a fraction or percentage of the likelihood a consumer would believe the statement. If it is more likely than not that a reasonable person would believe the statement, the Test's believability element is satisfied. The determination considers several aspects of the situation including source trustworthiness, the plausibility of what has been asserted, and the propensity for confirmation bias.

#### a) Source Trustworthiness

Source trustworthiness weighs existing sentiment towards the conveyor of the statement. Source credibility theory<sup>450</sup> provides

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<sup>446</sup> “Common-law tradition has combined with constitutional principles to clothe the use of epithets, insults, name-calling, and hyperbole with virtually impenetrable legal armor, at least insofar as a resulting defamation suit is concerned.” See SACK, *supra* note 30, § 2.4:7; *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50, 52 (1988).

<sup>447</sup> See *supra* notes 122, 353.

<sup>448</sup> This would be the “believability element” of the Test. The reasonable third party is used interchangeably with the consumer, reader, or recipient of the defamatory expression. See SACK, *supra* note 30, § 2.43 (explaining the legal nuances of defamatory recipients).

<sup>449</sup> See *supra* note 446.

<sup>450</sup> See David K. Berlo James B. Lemert & Robert J. Mertz, *Dimensions for Evaluating the Acceptability of Message Sources*, 33 PUB. OPINION Q. 4, 563–76 (1969); Carl I.

insight into making the determination for media defendants.<sup>451</sup> Specifically, media credibility refers to the perceived believability of media content, beyond any proof of its contentions.<sup>452</sup> Empirical studies have validated scales for rating the credibility of media outlets,<sup>453</sup> demonstrating that the source of information reliably affects the degree to which outlets are trusted. For non-media defendants, a parallel process would consider the speaker's perceived authority on the matter, as well as her prejudices, ambitions, and experience.<sup>454</sup> For relatively unknown defendants, the Test would simply consider the content and context of the statement, described below.<sup>455</sup>

#### b) Plausibility of the Statement

The plausibility sub-component evaluates whether a consumer perceives the defamation as likely to be true, regardless of the source. Such a determination requires an examination of the statement as well as the circumstances of its creation. Statements made following an investigation, supported by witness accounts, or corroborated by facts and observations are more likely to be perceived as true.<sup>456</sup> Statements containing obvious signs of bias,

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Hovland & Walter Weiss, *The Influence of Source Credibility on Communication Effectiveness*, 15 PUB. OPINION Q. 4, 635 (1951).

<sup>451</sup> Source credibility theory draws on themes of persuasion dating to Aristotle, who divined three persuasive audience appeals: logos, pathos, and ethos. Hovland & Weiss, *supra* note 450, at 635. Ethos, meaning character, is linked to credibility as it is presented to inspire trust in the audience. Kate Ronald, *A Reexamination of Personal and Public Discourse in Classical Rhetoric*, 9 RHETORIC REV. 36, 39 (1990).

<sup>452</sup> Mark D. West, *Validating a Scale for the Measurement of Credibility: A Covariance Structure Modeling Approach*, 71 JOURNALISM Q. 159 (1994).

<sup>453</sup> See Cecilie Graziano & Kristin McGrath, *Measuring the Concept of Credibility*, 63 JOURNALISM Q. 451, 451–62 (1986) (describing a scale for rating media credibility); see also Philip Meyer, *Defining and Measuring Credibility of Newspapers: Developing an Index*, 65 JOURNALISM Q. 567, 567–74 (1988) (testing and validating the metrics developed by Graziano and McGrath).

<sup>454</sup> For example, a person's status as an insider or subject matter expert tends to bolster their credibility in the consumer's eyes.

<sup>455</sup> An "unknown" defendant, for purposes of the Test, is simply one without a reputation for trustworthiness or otherwise.

<sup>456</sup> This phenomenon is driven by evidence presented by the defamation to the consumer of the defamation. Evidence is defined as "the means from which an inference may logically be drawn as to the existence of a fact . . . the demonstration of a fact . . . ." *Evidence*, BLACK'S LAW DICTIONARY (10th ed. 2017).

made thoughtlessly, or based on speculative reasoning evidence a lower likelihood of perceived truth.<sup>457</sup>

c) Confirmation Bias<sup>458</sup>

The Test's analysis speaks to the reader's ability and willingness to make the necessary, harmful inferences about the individual from what she perceives about a group. Importantly, these inferences must overcome the third party's unwillingness to be prejudiced against the individual based on group characterizations.<sup>459</sup> The group defamation problem hinges on a determination that a third party undertakes under uncertainty. Most or many consumers of a statement would give even a known group member *some* degree of the benefit of the doubt, or at a minimum hesitate to prejudice a member based on statements concerning anonymous fellow group members. Nevertheless, aspects of the defamation and circumstances could overcome such resistance, resulting in defamatory harm to the individual. If a high degree of suspicion already surrounds the group, the reader is more likely to accept the defamation as true.<sup>460</sup> The Test considers aspects of the group, the defamation, and the social circumstances to make the determination.<sup>461</sup>

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<sup>457</sup> This assertion stems from the fact that such statements suggest a lack of evidence. See *supra* note 456. Where statements drift closer to speculation, as the *Elias* court found with regard to Erdely's statements in the Podcast, the likelihood of defamatory impact is reduced. See *Elias II*, 872 F.3d 97, 110 (2d Cir. 2017).

<sup>458</sup> See generally SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* (1993). Confirmation bias is the tendency to interpret information in a way that confirms one's preexisting beliefs or hypotheses. *Id.* As Benjamin Cardozo once explained, "We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own." *Id.*

<sup>459</sup> See *infra* Section III.B.3.

<sup>460</sup> See Kathleen Nalty, *Strategies for Confronting Unconscious Bias*, 45 *Colo. Law.* 45, 45–46 (2016); see also Barbara O'Brien, *Prime Suspect: An Examination of Factors That Aggravate and Counteract Confirmation Bias in Criminal Investigations*, 15 *PSYCHOL. PUB. POL'Y & L.* 315, 324–25 (2009) (discussing the results of a psychological study on the impact of confirmation bias during investigations).

<sup>461</sup> Questions of whether, and to what extent, the defendant's statement harmed the plaintiff are questions for the jury, but the Test provides a flexible framework based on existing standards for resolving the "of and concerning" element. See SMOLLA, *supra* note 40, § 9:56 (2d ed. 2017) ("[T]he question of whether a plaintiff's damages were caused by the defamatory statement is for the jury to decide . . ." (quoting *Cockram v. Genesco, Inc.*, 680 F.3d 1046, 1051 (8th Cir. 2012))).

## 2. Severity of the Defamatory Material

The gravity and individual reach of the defamatory allegations effect actual reader disdain of individuals within the group. The distinction made by existing slander “per se” categories presents evidence for such an effect: certain statements require lower evidentiary burdens at trial because they are presumed to be damaging or defamatory.<sup>462</sup> When emotion provoking statements are made about a group, an individual who believes them would more likely entertain a hostile opinion of an individual associated with the group.<sup>463</sup> The severity element of the Test is satisfied whenever the defamation satisfies any of four of the original slander “per se” categories.

## 3. Overcoming Resistance to Bias and the Effect of Negative Statements on Believability

The Test’s final step determines whether the believability and severity of the defamation overcome the inferential leaps a reader must make. This process accounts for the effect of emotion-inducing statements on belief bias. Belief bias is the tendency to forgo independent reasoning and believe a false conclusion consistent with one’s beliefs, that is, conclusions that are believable.<sup>464</sup> To ensure that the defamation is sufficiently damaging, the defamation must qualify as so under the four “per se” categories,<sup>465</sup> which are often emotion provoking. Yet, cognitive studies show that a person’s susceptibility to belief bias decreases as the reader is presented with statements evoking strong emotion—people jump to conclusions less easily when presented

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<sup>462</sup> See *supra* notes 155–63; see also SACK, *supra* note 30, § 2.8.

<sup>463</sup> Emotion strongly influences memory. Experiments demonstrate that taboo words and the colors they were associated with were more easily and robustly remembered. Donald G. Mackay et al., *Relations Between Emotion, Memory, and Attention: Evidence from Taboo Stroop, Lexical Decision, and Immediate Memory Tasks*, 32 *MEMORY & COGNITION* 474 (2004). See also Note, *Group Vilification Reconsidered*, 89 *YALE L.J.* 308, 312 (1979) (discussing the inability of prejudiced persons to make rational decisions about individuals).

<sup>464</sup> See ROBERT J. STERNBERG & JACQUELINE P. LEIGHTON, *THE NATURE OF REASONING* 300 (2004).

<sup>465</sup> See *supra* note 161 and accompanying text.

with salacious facts.<sup>466</sup> Thus, to satisfy the second part of the Test, the extent that the defamation is believable must rise to meet increasing reader skepticism when presented with negatively charged defamatory material.<sup>467</sup>

### C. Application to Rolling Stone

To begin, determine whether to apply the Test's analysis. The Article and Podcast identify Elias and Fowler indirectly, but individually to a sufficient extent<sup>468</sup> placing them outside of the scope of group defamation.<sup>469</sup> Unlike his fellow plaintiffs, the allegations in the Complaint regarding Hadford never successfully demonstrate that the Article's readers could or did identify him directly.<sup>470</sup> Given such, for Hadford to recover he must succeed on a group defamation theory, making application of the Test appropriate.

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<sup>466</sup> See Vinod Goel & Oshin Vartanian, *Negative Emotions Can Attenuate the Influence of Beliefs on Logical Reasoning*, 25 COGNITION AND EMOTION 121 *passim* (2011). Whether such an effect is apparent in real life defamation remains to be seen.

<sup>467</sup> It is important to note that the defamation must provoke emotion in the consumer of the defamation, and not in the defamed party for this effect to occur. For example, most professional criticism about a third party does not invoke powerful emotion, resulting in a reduced resistance to prejudicial bias formation based on the defamation. Professional criticism of one personally, especially if untrue, provokes an emotional response, such an effect is unimportant to the analysis.

<sup>468</sup> All three plaintiffs contended that they faced a public that was easily able to identify them as the subjects of the Article. Complaint at 45–52, *Elias I*, 192 F. Supp. 3d 383 (S.D.N.Y. 2016) (No. 15-5953). To satisfy the of and concerning element, the Complaint alleges that all three were members of the Phi Kappa Psi fraternity. *Id.* at 45–47. Elias and Fowler had “proudly listed” Phi Kappa Psi on their social media, while Hadford had not. *Id.* at 51–52. Elias was tied to the article by virtue of his room, Fowler by his participation as rush chair, and Hadford by riding a bicycle on campus after graduating and wearing fraternity branded clothing. *Elias II*, 872 F.3d 97, 102 (2d Cir. 2017). While each plaintiff alleges to have been contacted by journalists doing research online, only Fowler and Elias were confronted or questioned in person, by persons whose statements suggested their potential involvement in the rapes. *Elias II*, 872 F.3d 97, 105, 107 (2d Cir. 2017). Hadford only alleges general inquiries via “message boards and forums, constant texts, emails, and questioning from peers, and soliciting from reporters.” *Id.* at 107.

<sup>469</sup> See *Elias II*, 872 F.3d at 105, 107–10.

<sup>470</sup> *Id.* at 107. “The facts alleged with regard to Hadford are ‘merely consistent with . . . defendant’s liability,’ and are thus insufficient to survive Defendants’ motion to dismiss.” *Id.* (citing *Asheroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (internal citations omitted).

The first part of the Test examines whether the defamation of Hadford's group necessitates elevated restrictions on recovery.<sup>471</sup> The group does not consist of public officials, and members were not involved in government.<sup>472</sup> Whether PKP acted as a public group presents a more complex question.<sup>473</sup> Hadford joined PKP voluntarily and the group possesses the resources to defend itself, satisfying two criteria of the Test's first part.<sup>474</sup> Finally the group appears sufficiently prominent within the University of Virginia community.<sup>475</sup> Hadford and PKP satisfy the Test's definition of a powerful group whose individual members would be subject to restricted recovery.<sup>476</sup>

Applying the Intensity of Suspicion components of the Test to Hadford's circumstances, the second part of the Test reaches an ambiguous result when considering the Intensity of Suspicion elements. The group and individual characteristic element is fairly straight forward.<sup>477</sup> PKP is definite in number and composition. Because approximately thirty percent of students participate in Greek life at the University of Virginia, PKP is likely well-known on campus.<sup>478</sup> Since Hadford lived in the fraternity house for more

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<sup>471</sup> See *supra* Section III.A.

<sup>472</sup> See *supra* Section III.A.1.

<sup>473</sup> See *supra* Section III.A.2.

<sup>474</sup> *Id.*

<sup>475</sup> See *infra* note 478 and accompanying text.

<sup>476</sup> See *supra* Section III.A.2. In practice, the impact of an elevated standard in Hadford's case is unclear aside from the prohibition of the recovery of unproven damages. In New York, *Chapadeau* dictates that even private plaintiffs must establish "by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties" whenever "the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition." *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199 (N.Y. 1975). Sack has noted that this burden approaches that of the "actual malice" standard elaborated by the Supreme Court. See SACK, *supra* note 30, § 6:4.

<sup>477</sup> The dissent in *Elias II* contends otherwise. *Elias II*, 872 F.3d 97, 112 (2d Cir. 2017); see *supra* Section II.E.

<sup>478</sup> In terms of group prominence, approximately thirty-five percent of students participate in Greek life at the University of Virginia. See *Brochure for Fraternity and Sorority Life at UVA*, UNIV. OF VA, 16, <http://fsl.virginia.edu/frequently-asked-questions> [<https://perma.cc/XP7K-V7HP>] (last visited Oct. 24, 2018). Based on current enrollment statistics, approximately 4,800 undergraduate students participate in Greek life. See *id.*



than a year after graduating, during which time he rode his bike on campus and wore fraternity-branded clothing,<sup>479</sup> his identification by some of the community also seems likely.

The analysis becomes more challenging with the remaining two Intensity of Suspicion elements. The language of the Article and Podcast contains ambiguity for purposes of the “fraction implicated” aspect. The majority in *Elias* read the text to mean that the Article suggested *all* members were implicated, while the district court and dissent disagree.<sup>480</sup> To read the Article as requiring rape for the initiation of all members, or that the Article sufficiently imputes knowledge of the crime to every participant requires significant inferences.<sup>481</sup> Group size alone does not itself appear to be prohibitive given the other social aspects of the fraternity, such as the close connection between members. However, larger group size might lead a reasonable reader to question whether the Article truly meant that *every* member was a rapist or complicit in the activity.<sup>482</sup> Within a group of fifty-three or even eighty persons,<sup>483</sup> one could imagine how at least some individuals did not participate or have knowledge. Considering these factors, whether the Article permits a reader conclude that the article concerned an anonymous group member remains uncertain.

Because of ambiguity in the result of the Intensity of Suspicion analysis, the Test’s second part considering bias and perception comes into play.<sup>484</sup> The first step evaluates the likelihood that a reader considers the source as reliable. *Rolling Stone* magazine famously produces entertaining literary<sup>485</sup> and sensational

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<sup>479</sup> *Elias II*, 872 F.3d at 102, 107.

<sup>480</sup> *Id.* at 104, 112.

<sup>481</sup> For example, while the Article clearly implies that some PKP members may have been required to commit rape for initiation, it is not a foregone conclusion that all members were required to do so. *See id.* at 112 (Loheir, J., dissenting).

<sup>482</sup> Indeed, a reader could “also plausibly conclude that, even if all members of Phi Kappa Psi did not commit gang rape, they all knew that their fraternity brothers had.” *Id.* at 109.

<sup>483</sup> *See id.* at 102; *see also Elias I*, 192 F. Supp. 3d 383, 394 (S.D.N.Y. 2016).

<sup>484</sup> *See supra* Section III.B.

<sup>485</sup> *See, e.g.,* FEAR AND LOATHING IN LAS VEGAS (Universal Pictures 1998). Hunter S. Thompson’s story was originally released in *Rolling Stone* and later achieved commercial success as a film, but likely said little about the objectivity of journalism at *Rolling Stone*.

investigative stories,<sup>486</sup> in addition to its coverage of music and culture. As far as reputation for authoritativeness, the magazine seems to lie somewhere in between a “paper of the record” and a “supermarket tabloid.”<sup>487</sup> It follows that a reasonable reader would rely on the Article for its truth because of *Rolling Stone’s* credibility as a source.

The next step also supports a finding that a reader would rely on the information presented: the story unfolded as an investigative expose, backed by sources as well as corroborating facts.<sup>488</sup> The Article contained well-articulated, plausible allegations with individual reach rather than generalizations, as the portrayal contained first-hand accounts of the rape.<sup>489</sup> The defamatory statement itself appears plausible, specific, and grounded in fact to a reasonable reader.

The third aspect of the believability component considers readers’ existing biases.<sup>490</sup> Several large studies<sup>491</sup> and high-profile

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*Id.* In fact, Thompson, and the protagonist in his story, prided themselves on embracing journalistic subjectivity. *Id.*; see also Brian J. Bowe, *A Brain Full of Contraband: The Islamic Gonzo Writing of Michael Muhammad Knight*, 4 LITERARY JOURNALISM STUD. 91, 93–94 (2012) (providing a succinct definition of “gonzo journalism” employed by Thompson at *Rolling Stone* and the protagonist in *Fear and Loathing in Las Vegas*).

<sup>486</sup> See, e.g., Michael Hastings, *The Runaway General: The Profile That Brought Down McChrystal*, ROLLING STONE (June 22, 2010), <https://www.rollingstone.com/politics/news/the-runaway-general-20100622> [<https://perma.cc/4HAF-24ZT>]. Publication of this article ignited a scandal that ended in the firing of General McChrystal.

<sup>487</sup> Even following revelations about the Article, media review sites generally deem *Rolling Stone* an organization that presents a high degree of factual reporting, considering it “generally trustworthy for information.” *Rolling Stone*, MEDIA BIAS/FACT CHECK.COM, <https://mediabiasfactcheck.com/rolling-stone/> [<https://perma.cc/WB5U-BV7T>] (last visited Oct. 24, 2018). Northwestern Michigan College Library lists *Rolling Stone* on its “credible sources cheat sheet.” *ENG 111: English Composition: Credible Sources Cheat Sheet*, NORTHWESTERN MICH. C., <https://nmc.libguides.com/ENG111/credible> [<https://perma.cc/M83D-J97K>] (last visited Oct. 24, 2018).

<sup>488</sup> See *Elias II*, 872 F.3d at 102–03.

<sup>489</sup> *Id.*

<sup>490</sup> See *supra* Section III.B.1.c.

<sup>491</sup> CHRISTOPHER P. KREBS ET AL., NAT’L INST. OF JUSTICE, THE CAMPUS SEXUAL ASSAULT (CSA) STUDY (2007); BONNIE S. FISHER ET AL., BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION OF COLLEGE WOMEN (2001). The results from the CSA Study popularized the often-cited statistic that that one in five women has been the victim of sexual assault at some time in college. P. KREBS ET AL., *supra*, at xii–xiii.

cases<sup>492</sup> at the time of publication elevated awareness of sexual misconduct on college campuses. Prominence of the issue in the public discussion at the time of publication supports the likelihood that confirmation bias aggravated the defamatory effect.<sup>493</sup> Overall, the believability aspect of the Test's second part<sup>494</sup> supports recovery for group members.

After considering the believability of the defamation, the Test evaluates whether the defamation meets the severity requirement.<sup>495</sup> That persons committed gang rape on a college campus meets even the laxest definition of a grave accusation.<sup>496</sup> Taken together, the egregious allegations and convincing nature of the Article suggest that a reasonable reader would have strong impetus to form a negative opinion of individual fraternity members.

The final aspect of the Test's analysis weighs whether the defamation and circumstances convincingly overcome resistance to prejudicial bias formation.<sup>497</sup> The salacious and emotion provoking nature of the Article presents an obstacle, as readers hesitate to reach even believable conclusions under such circumstances.<sup>498</sup> Nevertheless, the inferential gaps discovered in the Test's analysis appear surmountable by the Article's convincing presentation of heinous behavior. As such, the defamation would likely result in a consumer with a well formed and powerfully negative opinion of all members of the organization, strong enough to result in harm to anonymous individuals. The second part of the Test concludes that Hadford may recover on a group defamation theory, while the first

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<sup>492</sup> See, e.g., Andrea Pino, *Why Filing an Office for Civil Rights Complaint Against UNC is Bigger Than Me*, HUFFINGTON POST (Jan. 19, 2013, 12:39 PM), [https://www.huffingtonpost.com/andrea-pino/unc-sexual-assault-\\_b\\_2497326.html](https://www.huffingtonpost.com/andrea-pino/unc-sexual-assault-_b_2497326.html) [https://perma.cc/M5HU-PVRM].

<sup>493</sup> Importantly, just two years before publication of the Article, a woman published an article describing gang rape at PKP. See *supra* note 12.

<sup>494</sup> See *supra* Section III.B.1.

<sup>495</sup> See *supra* Section III.B.2.

<sup>496</sup> The Article's accusation satisfies three of the four slander *per-se* categories because it concerns criminal activity and sexual impropriety, and it would injure with respect to trade, business, profession, or office. See *supra* notes 155–61, and accompanying text.

<sup>497</sup> See *supra* Section III.A.3.

<sup>498</sup> *Id.*

requires the demonstration of “actual malice,” and “actual harm” prior to recovery of any unproven damages.

*D. Observations and Criticism*

The Test creates a standard with many benefits.<sup>499</sup> The prevention of public officials from recovering on a theory of group defamation denies the use of suits to silence speech concerning entities with officially sanctioned power.<sup>500</sup> Elevated standards for unnamed, private individual members would grant publishers and individuals freedom to explore important issues concerning powerful groups with a larger margin of error.<sup>501</sup> Finally, the Test facilitates the adoption of a more flexible, permissive framework for determining whether unnamed plaintiffs may recover following defamations of their group.<sup>502</sup>

The Test provides a novel and flexible approach to group defamation problems, but also raises several important concerns. The Test applies a plaintiff friendly avenue to recovery under specific circumstances, where defamation doctrine traditionally restricts claims. Because of the emphasis on defamatory credibility, reputable publishers would theoretically face an increased burden to fact check stories. In addition, the bias checking element may slow discussion of matters important to public concern – for example, a report on corruption about an organization known or suspected to be corrupt by the public runs an elevated risk of liability if the allegations turn out to be untrue.

Nevertheless, the test does not run counter to the spirit of free discussion and may actually enhance the quality of public discourse. For example, many of the *Rolling Stone*'s critics contend that the Article did terrible damage to the cause of underreported sexual assault on campus, because the scandal lends credence to skeptics dismissive of the need to for increased sensitivity. Constitutional protections, particularly when applied to

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<sup>499</sup> These benefits come at the expense of a complex test, as well as the high probability that the test will at some point deny financial recovery to persons genuinely injured by false statements merely because they were members of a group involved in a controversy.

<sup>500</sup> *See supra* Section III.A.1.

<sup>501</sup> *See supra* Section III.A.2.

<sup>502</sup> *See supra* Section III.B.

the group as described above,<sup>503</sup> shield journalism and writings about powerful groups,<sup>504</sup> further narrowing the possibility of an adverse effect on public discourse.

Because the Test potentially harms plaintiffs who associate with powerful groups, the Test also raises concerns for the freedom of association, another liberty promised by the First Amendment.<sup>505</sup> However, the Test merely restricts recovery rather than imposing an outright bar. In addition, the Test's connection to a citizen's associations is remote: the threat of restricted recovery is unlikely to change a person's decision to join or dissociate with a group.<sup>506</sup>

#### CONCLUSION

Group defamation presents a complex problem requiring careful balancing of constitutional interests and a plaintiff's right to recover for injury from false statements. This Note evaluates current methods for determining whether statements about groups satisfy the "of and concerning" element of the tort, found neither approach completely satisfactory while integrating aspects of each into a proposed Test. As part of the analysis, this Note proposes applying elevated constitutional standards to group defamation plaintiffs, if and when the group assumed characteristics of a powerful individual or entity. The novel Test allows a flexible analysis which protects sensitive public discourse, while permitting recovery where defamatory statements reach group members indirectly.

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<sup>503</sup> See *supra* Section III.A.

<sup>504</sup> See *supra* Section III.B.

<sup>505</sup> U.S. CONST. amend. I, § 1.

<sup>506</sup> Cf. *Baird v. State Bar of Arizona*, 401 U.S. 1, 2–4, 8 (1971) (prohibiting state inquiries into an individual's views or associations for the sole purpose of withholding a right or benefit). Note that the Test does not cause the state to inquire about a citizen's associations; under the group defamation rule, a plaintiff seeks a benefit or right by *virtue* of being a group member, a fact he or she volunteers to the state. Nor is the Test's sole purpose to withhold a right—the goal is to balance the rights of plaintiffs and defendants.